

## ‘Community Service Sentence’ as an alternative mode of punishment in India- Analysis of the potential and feasibility

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### ABSTRACT

The Criminal Justice System is gradually shifting towards including *reformatory and rehabilitative* notions rather than being strictly *deterrent and preventive*. There are various modes of punishment prescribed under the penal law of India<sup>1</sup> and need has been felt to incorporate the alternative sanctions within the penal law so as to enable the Courts to exercise wide powers in sentencing the offenders and enforcing different sanctions as per the circumstances and factors of the case. The research studies one of such alternate sanction called ‘community service sentence’. *It is an order of the Court under which an offender is required to perform unpaid work of benefit to the community under the supervision of the Probation Officer, who shall also provide rehabilitative counselling and appropriate guidance to the offender.* The Juvenile Justice (Care and Protection of Children) Act, 2000 provides for it but the general penal law of India i.e. the Indian Penal Code 1860 does not provide for ‘community service sentence’ as a mode of punishment. However, the Courts in India have been awarding such punishments to the persons convicted. Therefore, it is imperative to question by what jurisdiction the Courts in India (all levels –trial, High Courts and the Apex Court) have been awarding such punishments. The research aims to study the concept of ‘community service sentence’ as an alternate mode of punishment in India along with the *jurisdictional constraints* of the courts in India and attempts to analyse the effectiveness of this mode of punishment under Indian law.

**Key Words-** *reformatory, community servicesentence, jurisdictional constraints, alternate mode of punishment, sentencing.*

### 1. INTRODUCTION

*“The mood and temper of the public in regard to the treatment of crimes and criminals is one of the most unflinching tests of the civilization of any country.”*

- Sir Winston Churchill addressing the House of Commons<sup>2</sup>

There are various forms of punishments prescribed under the penal law of India and need has been felt to incorporate the alternative sanctions within the penal law so as to enable the Courts to exercise wide powers in sentencing the offenders and enforcing different sanctions as per the circumstances and factors of the case. The research makes a study of one of such alternate sanction called ‘community service sentence’. The objective of the research has been to analyse the concept of ‘community service sentences as an alternate mode of punishments’ and further analysing the effectiveness of such a mode of punishment under Indian law. The research makes this study in the backdrop of Indian scenario and tries to analyse its need and efficacy in Indian conditions. The paper introduces the concept of ‘community service sentences’ by defining its meaning and understanding its concept. The research further describes the concept of ‘alternatives to incarceration’ or ‘alternatives to imprisonment’ and mentions various reasons why the need for alternatives to incarcerations is felt and also makes the analysis of such factors and reasons in Indian scenario. It also reflects on the changes in the approach of criminal law in India and mentions how the Courts have expressed such a change in the approach of criminal law. The research mentions the efforts in India for bringing this mode of punishment into effect by reflecting how the law commission of India, government constituted committees, the legislative bodies of the states and the Union and the judiciary (including both the higher and the lower judiciary) have dealt with the concept of ‘community

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service'. It also analyses that whether it is needed to incorporate such a mode of punishment into the general penal of the country through a legislative intervention. The research further concludes by highlight certain jurisdictional issues which must be addressed through a legislative measure in the form of an enactment, amendment etc.

## **2. COMMUNITY SERVICE- MEANING AND CONCEPT**

Community service is a form of sentence and the research therefore tries to highlight it as an 'alternate to incarceration'. It is an order of the Court under which an offender is required to perform unpaid work of benefit to the community under the supervision of the Probation Officer, who shall also provide rehabilitative counselling and appropriate guidance to the offender.<sup>3</sup> Community service orders are directed to place the offender in the society where he/she belongs and make an attempt to reform him/her at the same time make them contribute something for the betterment of the same community to which they have harmed. It is defined as a non-custodial punishment awarded by the Court after conviction where the offender is required to render unpaid service to the benefit of the community<sup>4</sup>. Such a sentence provides for dealing with the offenders who would otherwise end up in prisons even for minor offences/non-violent offences/offences for which imprisonment would not be feasible/offences for which alternate sanctions would meet the ends of justice. Therefore, in whichever jurisdictions it is preferred, the grave offences and heinous offences have been excluded from its application. Kenneth D. Miller defines it to be a form of symbolic restitution where the participant give of himself and his time for the betterment of the community.<sup>5</sup>

This form of punishment owes its origin to the reformatory approach of criminal law<sup>6</sup>. Conceptually, community service as a reformatory measure is quite alike to that of Probation<sup>7</sup>. Both are sentences which are generally brought into effect post-conviction or post determination of guilt (through trial or the plea of guilt). Both act as alternatives to incarceration and both suggest that instead of sending the accused behind the four walls, an opportunity be afforded to the person convicted to get reformed and rehabilitated as a member of the society. Both the sentences try not to interfere with the normal social life of the convict and enable him/her to lead normal social life while undergoing the sentence. Both the sentences are generally believed to be appropriate for the non-violent or less grave offences and heinous offences are generally excluded from being awarded these forms of sentences. The difference lies in the method of enforcement only since under probation, the convict is only supervised to abide by the conditions of the probation and under community service, along with maintaining the good conduct, the convict has to undertake the specified work for the specified number of hours as directed through the order. The order aims to be both punitive and rehabilitative There is no logical reasoning why a particular sentence cannot be punitive, reparative and rehabilitative in equal measure; however, there are concerns whether community service addresses all the approaches with equal force.<sup>8</sup> Community service sentences are operational in number of jurisdictions, namely, England, Russia, Canada and USA.

## **3. ALTERNATIVES TO IMPRISONMENT – MEANING AND NEED**

'Alternatives to incarceration' means any punishment other than imprisonment awarded to the convict for an offence. All the offences cannot be punished or addressed through same kind of treatment to offenders (incarceration since it is the conventional punishment) and therefore different kinds and gravity of offences demand various alternative sanctions which address both the crime and the criminal. These alternatives are in various forms such as the probation orders, halfway houses, house arrest, fines and restitution, public shaming, community service orders etc. Such alternatives are advocated for the numerous benefits they offer over the conventional modes of imprisonment. In a nutshell, such alternatives provide

courts with more sentencing options, save the taxpayer's money in maintaining the prisons, strengthens the family, prevents recidivism, protects first time and young offenders from accompanying with the hardened criminals, help restore the offender to the mainstream society.<sup>9</sup> Following are the reasons why 'alternatives to incarcerations' such as community service be opted in Indian scenario.

#### **The Failure of Incarceration as a method of Reform-**

The traditional method of incarceration is unsuitable for all kinds of offenders in all cases and therefore alternatives to incarceration must be devised. It has been observed by the criminologists and penologists across the globe that incarceration is unsuitable for all kinds of offenders and it does a little to reform the offender rather worsens the scope for reform by bringing him/her in association with the hardened criminals and leaving only bleak hopes for re-assimilation with the society to which one originally belonged. In context of Indian prisons, Prof. M P Singh mentions that '*Indian prisons are characteristically associated with loss of various civil and fundamental rights; spiritually dehumanizing and physically brutalizing prison milieu, status degradation and deculturization, sexual perversions and secondary criminalization which make the reformation of a convict a false promise.*'<sup>10</sup> Violence, criminalising effects of a prison, overcrowding, sexual abuse, corruption and extortion, health problems, drug abuse, mental illness of prisoners etc. are some of the shortcomings witnessed in the system of incarceration.

#### **Crisis of Jail Administration in India-**

It is observed that incarceration has not been able to meet its objectives.<sup>11</sup> The crisis in the Jail Administration, which is a peculiar lacuna in Indian scenario, is also a major factor for the pursuit of alternatives to incarceration. The overcrowded prisons leading to congestion leads to further problems. Most of the prisoners lingering in jails are not dangerous to the society since they are not serious offenders and such short-term imprisonment awarded to them is disadvantageous to all i.e. the offender, the society and the jail administration as well.<sup>12</sup>

#### **Economic Dimensions-**

It does not require much of intelligence to find out that for the duration spent by a person in the prison, due to his joblessness, his family and dependants suffer a lot and this becomes tragic in cases where the convict is the sole bread-earner of the family.

#### **Burden on the Exchequer-**

Prison is a costly institution to be managed for the governments and a prison sentence costs much to the public exchequer and especially for a country like India, it is difficult to maintain prisons, which are facilitative of reformation considering the population of offenders flooding in these institutions. On the other hand, community service appears to be a better alternate even as per the per capita cost of offender. In USA, it has been analysed that it is ten to thirteen times more to maintain an offender in an institution than to supervise him in the community.<sup>13</sup> Similar appears to be a case with India since as per the rough estimates the cost involved in probation is one fourth to the total cost involved in prison.<sup>14</sup> Probation programs appear much more economical to imprisonment<sup>15</sup> and especially considering the vast advantages it has in terms of rehabilitation of the offenders, it appears as much more viable option than that of imprisonment, especially for a developing country like India. The advantages of probation are immense and has led a noted American penologist Sanford Bates to say "*probation may be regarded as an investment in humanity....it encourages rather than embitters. It builds up rather than degrades. It is an investment in the community protection.*"<sup>16</sup> The merits highlighted in context of probation apply to the community service orders also.

**'Stigma' and other related factors-**

It becomes very difficult for a convict to re-assimilate with the society as the normal being because due to social stigmatization, attaining social acceptance as a normal being becomes difficult. It is observed that the biggest problem a prisoner faces is the 're-entry crisis' i.e. the situation he/ she encounters on his release from prison. Further, lack of economic means due to unemployment worsen the situation which often compel the person to resort to unlawful means which further create the vicious cycle for the offender and opens up the scope of recidivism. In case of alternatives such as community service orders and probation, the offender does not lose his job or the potential to earn, there are fair chances that offender would not turn into a recidivist. Further, the duration of incarceration of the offender greatly affects the lives of the friends, family and relatives especially the family members since they are emotionally doomed and therefore community service sentences/ probation sentences have a great potential from saving the family of the offender from receiving the emotional setback, which impedes their lives also.

**Women Offenders**

Any person who encounters the criminal justice system is at disadvantage but the women and children are the most impacted groups of society. The mothers, when incarcerated, are most worried for their children and the lives of their children is greatly affected in the absence of the mother.

**Change in the Approach of Criminal Law in India-**

The orientation of criminal law which was mainly oriented towards the punitive and preventive approach has been tilting towards reformative and restorative approach and this is reflected from the efforts made by the legislature as well as the interpretations offered by the judiciary in administration of criminal justice. Appropriate sentencing mechanism to facilitate reformation and rehabilitation of the offender is a significant step in this regard.

In *Santa Singh v. State of Punjab*<sup>17</sup>, Justice P. N. Bhagwati, while dealing with section 235 of the CrPC, 1973 makes a mention that no such analogous provision existed in the old criminal procedure code<sup>18</sup> but the presence of such a provision in the new code<sup>19</sup> reflects that how seriously the question of sentencing is considered by the legislature. It is also mentioned that there was no separate stage for being heard in regard to sentence as per the old code. He tries to describe this in following words:<sup>20</sup>

*Moreover, it was realised that sentencing is an important stage in the process of administration of criminal justice as important as the adjudication of guilt and it should not be consigned to a subsidiary position as if it were a matter of not much consequence. It should be a matter of some anxiety to the court to impose an appropriate punishment on the criminal and sentencing should, therefore, receive serious attention of the court.*

It is held that "Sentencing an accused is a sensitive exercise of discretion and not mechanical prescription acting on hunch."<sup>21</sup> There has been a clear indication by the judiciary that sentencing must incorporate creative sanctions taking into account the holistic approach creating a win-win situation for the offender, the victim and the community at large and these observations have paved way for the alternatives to incarceration.

#### 4. CONCLUSION

There is a great scope of exhausting the 'constructive' potential of the offenders, who remain behind the bars for years in the fear of their 'destructive' potentials towards the society. In order to find an appropriate alternative to imprisonment as to tackle the rigours of overcrowding of prisons and prevent the huge expenditure incurred in maintaining the prison institutions, 'community service' can fill this vacuum. To attune with the reformatory approach of criminal law, community service is a good alternative to provide an opportunity of reform to the offender and it could be used in large number of offences leaving apart few offences. For the community at large also, this can prove to be a good alternative where a number of works (charitable, educational, awareness programs and many more) could be done through the offenders who instead of being a burden on the community by being put in jails would give back something constructive to the society and community at large. This has proved constructive in countries such as USA, UK etc. and in case of India, there is a huge potential of extracting the potential of these offenders for various works. They can serve in schools, NGOs, Old age homes, orphanages and a number of places. It depends on how such sentence is designed and supervised so as to make the offenders perform tasks in the interest of society at large and also making them realise about the offence they have committed offering them a chance to reform internally.

Various courts across India have been awarding community service sentences to the convicts. Yet, it is unclear what jurisdiction the courts prefer in awarding such sentences. Frequent award of this sentence without justifying about jurisdiction raises several questions over the sentencing policy followed by the Courts. The change in the approach of criminal justice system and the realization of the courts that 'alternatives to incarceration' be sought is a welcome step but it brings with it multiple issues of its own, which may not be ignored. For which kind of offences community service could be awarded, what are the activities/sectors where the convicts could perform community service as a punishment and, whether supportive administrative infrastructure is available to supervise such sentences are all pertinent questions, which could only be answered through a legislative measure. Could the 'community service sentences' be read into the punishment of 'fine' under IPC<sup>22</sup>, Could the high courts derive jurisdiction under *section 482* of the Code of Criminal Procedure, 1973, Could courts award community service sentences in compoundable cases, Could the courts derive jurisdiction under *section 360* of the code of criminal procedure and; Could the Apex Court award a punishment not prescribed under the penal code in exercise of its jurisdiction under Article 142 in order to do 'complete justice', are some of the lingering questions which could be put to rest through a legislative intervention. In light of previously mentioned, it is suggested to have a legislative intervention for bringing 'community service sentences' as alternate form of punishment in India.

#### References

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- 2 Quoted in A. Lakshminath, "Criminal Justice in India: Primitivism to Post-Modernism" 48:1 *Journal of Indian Law Institute* 26 (2006).
- 3 L. Jayasree, "Community Service: An Alternative to Imprisonment" 111 *Criminal Law Journal*, 314 (2005).
- 4 Andhra Pradesh Community Service of Offenders Bill, 2010.
- 5 James L. Hurd and Kenneth D. Miller, "Community Service: What, Why, and How" 45 *Federal Probation* 39 (1981).

- 6 The “Declaration of Principles of Crime and Punishment” of the Cincinnati, Ohio meeting of the First Congress in 1880, it was observed that the supreme aim of present discipline is the reformation of criminal, not infliction of indigent suffering.”
- 7 Probation, in the criminal justice system, can simply be understood as ‘the conditional release of an offender on the promise of good behaviour’. It is an opportunity afforded to a person found guilty to reform himself/herself so as to assimilate him as a member of the community on the promise made by him/her about his/her good behaviour and conduct. In India, the Probation of Offenders Act, 1958 provides for probation.
- 8 David C. Perrier and F. Steven Pink, “Community Service: All Things to All People” 49 *Federal Probation* 32 (1985).
- 9 Available at- <http://famm.org/wp-content/uploads/2013/08/FS-Alternatives-in-a-Nutshell-7.8.pdf>, (Last accessed- April 24, 2016).
- 10 Mahendra P. Singh, *Crime and Redemption of Criminals Probation of Offenders*, 25 (Deep & Deep Publications, New Delhi 1987).
- 11 *Supra* note 10
- 12 *Id.*
- 13 S.C. Raina, *Probation- Philosophy, Law and Practice*, 9 (Regency Publications, New Delhi 1996).
- 14 *Id.*
- 15 *Supra* note 10
- 16 *Supra* note 13 at 8
- 17 AIR 1976 SC 2386, 1977 SCR (1) 229.
- 18 The Code of Criminal Procedure, 1898
- 19 The Code of Criminal Procedure, 1973 (Act 2 of 1974).
- 20 The Court also stated that: “There is in many of the countries, intensive study of the sociology of crime and that has shifted the focus from the crime to the criminal, leading to a widening of the objectives of sentencing and, simultaneously, of the range of sentencing procedures. Today, more than ever before, sentencing is becoming a delicate task, requiring an inter-disciplinary approach and calling for skills and talents vary much different from those ordinarily expected of lawyers.”
- 21 *Ved Prakash v. State of Haryana* AIR 1981 SC 634
- 22 In case of minor offences where the Court can impose fine, can community service in the form of unpaid work in addition to minimal fine be awarded to the convicts?

