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Community Service: An Alternative form of Punishment

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Author
Ajeet Kumar
Research Scholar
Faculty of Law
University of Allahabad
Prayagraj, Uttar Pradesh, INDIA

Abstract

Over the period of time and in the name of reforms many alternatives have been introduced for custodial sentences in our Criminal justice system like– use of open prisons, parole, probation, rehabilitation centers etc., but Community sentence has not been given much importance. The punishment by way of community service is a new concept relating to reformatory theory. The study showed that ‘Community service’ punishment is the most significant change in alternative punishment, and it is distinguished from other types of alternatives in that it enhances the contribution of community in the field of criminal justice, and keeps the convicted person in touch with the outside world so that they do not lose their work. The Law Commission, in its 156th report have suggested that the IPC, 1860 should include the additional type of punishment in addition to or instead of imprisonment they are community service, order for payment of compensation, public

censure or disqualification from holding office. The only statutory provision available in India was section 18 (1)(c) of the J.J Act of 2015 which provides that the juvenile offenders can be awarded community service if the J.J. Board deems it fit. The objective of this article is to analyse the prevalent theories of punishment, in India in relation to newly introduced community service sentencing and to review the existing legal and institutional framework on community service. Moreover, the significance of the study is to provide background information on community service as a penal reform in India with special reference to the Reports of Law Commission of India on IPC, 1860 and the provisions of newly introduced BNS, 2023

Key Words

Punishment, Reformatory Theory, Alternative Punishment, Community Service, BNS.

“The only difference between the saint and the sinner is that every saint has a past and every sinner has a future”
-Oscar Wilde

Theories of Punishment

According to Manu, ‘danda’ is the essential characteristic of law. He argued that punishment makes the society under control and it is an instrument of public justice. There are mainly two purpose of punishment. *Firstly*, to prevent the offender from committing the offence again and *Secondly*, to deter other people from committing the same. There are following theories of punishment;

- 1. Deterrent Theory:** The main object of this theory is to make commission of an offence an ill-bargain for the wrong-doer and deter others from committing the same. This punishment theory was based upon the notion of fear and the main motto of this theory was to create terror in society. This theory got support from jurists like Salmond, Manu, Plato and Bentham. According to Salmond, “.the main purpose of law of crime is to make the wrong-doer an illustration, and to warn all same minded with him”¹. This theory was opposed by Justice Holmes and Kenny. Justice Holmes opposes this theory on the ground that it is immoral because it has no standard measure to decide quantum of punishment, except the subjective opinions of the judges².
- 2. Retributive Theory:** The revenge was the focal aim of this theory i.e. “*tit for tat*”. The theory says that an evil should be returned for an evil, without having any regard to consequences. This theory is based on the principle of natural justice which can be expressed by the famous maxim, “*an eye for an eye, and a tooth for a tooth*” and also based on idea of revenge i.e. “*You hurt me and I will hurt you*”. It is proper and right, without regard to ultimate results that an evil ought to be returned for an evil. Salmond criticized this theory on the ground that retribution in itself is not a remedy for the mischief of the offence³.
- 3. Preventive Theory:** This theory takes foundation from the notion that “*prevention is better than cure*”. The development of prison system is essentially the result of this theory. G. W. Paton advised that this theory seeks to prevent the convict person from committing any further crime by making him disable to do so. This theory, however, does not lay any stress on the motive of the wrong-doer but looks for taking away his physical strength to commit the wrong. This theory was criticised by the jurist Emanuel Kant on the basis, that the theory treats man a thing and not as a person, as a means and not as an end⁴.
- 4. Expiatory Theory:** The underlying philosophy of expiatory theory is that to bear punishment is nothing but to pay debt due to the law that has been infringed. Kohler was the supporter of this theory. He said that this theory is a purification not of the individual alone but of a humanity as a whole. However, it was criticized by Paton on the basis of moral doctrines and acclaimed that this theory is beyond the limits of modern law and jurisprudence⁵.
- 5. Reformatory Theory:** Now, the time has come where the focus has been shifted from punishment to the correctional methods because criminals are not born, they are made. If we take “*an eye for an eye*” than the society will become blind. The term ‘*Reformation*’ can be defined as “the effort to restore a man in our society as better and wiser man and also a good citizen”. This theory has gained support from jurists like Plato and Kautilya. In support of this theory Plato said that a wrong-doer should be sent to jail and a sick should be sent to the hospital. Our Judicial system also supports this theory. This theory is generally used in cases of Juvenile offenders and first offenders. However, this theory was criticized by Oppenheim on the basis that if the criminal is treated as an object of pity than the punishment might become a mere work of charity⁶. It is submitted that no theory is complete in itself. Undoubtedly, the reformatory theory must be admired but at the very same time deterrent theory and preventive theory should not be completely over-looked⁷.

Report of Law Commission

The effective administration of criminal law is indispensable for the proper functioning of constitutional democracy. Criminal law serves as a safeguard from deliberate and blameworthy actions perpetrated by individuals or collectives. Additionally, it delineates various preventative measures, and proclaims, “*prevention is better than cure.*” However, it is imperative to reassess our perspectives on offence and punishment thereof, remaining attuned to rapid developments. Earlier the objectives of punishment was to achieve retribution i.e. taking of “*an eye for an eye*”, or ‘*a tooth for a tooth*’, aiming to shield society from the transgressions of dangerous individuals. Thus, if one person deprives another of an eye, retribution demands the loss of their own eye as vengeance. However, this form of punishment may not garner widespread societal approval given

our current social background and understanding of human psychology.

The 42nd Law Commission Report considered several questions and asked whether any changes, if any, are required in the Penal Code? But commission did not suggested any change in respect of the types of punishments. It, however, recommended certain minor changes only in some sections like section 64 to 69, 71 and 75 of the Penal Code, 1860⁸.

In 1978, an amendment bill was introduced in the parliament i.e. “Indian Penal code (Amendment) bill of 1978” for considering certain other types of punishments, including community service, are suggested to be included in section 53 of the Penal Code of 1860 but we witnessed number of workshops held across the nation highlighted that the sentence of community service is neither practicable to give an effect to nor it may not amount to a punishment. Clause 27 of this Bill provides for inserting a new section in the Code i.e. Section 74.A to exclusively deals with punishment of ‘community service’ in India.

The proposed Section 74A suggests that if a person not under the age of eighteen is found guilty of an offense punishable by imprisonment for a period not exceeding the term of three years or with fine, or both, the court can opt to issue an order of Community Service. This order mandates the individual to perform unpaid work, as specified in the order, instead of imposing the usual punishment or any other action. The ‘hours of work’ required in Community Service must be between forty and one thousand hours. Additionally, the court cannot issue a order of Community Service unless the person subject to it consents in writing to perform the required work and the court is convinced of their suitability for the task. Moreover, proper supervision arrangements by the local authority or, the state Government must be in place for the person carrying out the specified work. Every order of ‘Community Service’ shall specify the nature of work required to be performed by the said person and that shall be of general benefit to society at large. If the court, which issued a sentence of Community Service, determines at any point that an individual subject to the order has failed, without reasonable cause or excuse, to adhere to any specified terms and conditions, or Considering circumstances subsequent to the order’s issuance, it is expedient and necessary in the interest of justice, the court may order for modification or revocation of sentence of community service and may handle the said convicted person as they would have been for the offense in question. If a court issues multiple sentence of Community Service against an individual convicted of multiple offenses in the same trial, it has the authority to specify that the ‘hours of work’ required under one Community Service can be served concurrently, with or in addition to, the hours of work mandated under any other Community Service Orders issued during the same trial. However, this directive is subject to the condition that the total number of hours of work assigned to the individual under all or any of the Community Service Orders does not surpass one thousand hours⁹.

In numerous judgments, the Apex Court has emphasized that, if practicable, the reformatory method must be tried in lieu of deterrent punishment when imposing a penalty on a convicted person. Therefore, the Law Commission, in its 156th report have given suggestions and recommendations that The Penal Code should include the following additional type of punishment in addition to or instead of imprisonment:

1. community service;
2. disqualification from. holding office;
3. order for paying compensation;
4. public censure;

In respect of community service some judges have also suggested, that the punishment proposed should not apply to economic and social offenses. The sentence of community service should be made applicable only to serious cases, and the victim ought to be compensated by the trial court itself. The maximum amount of compensation should be fixed. However, some judges and academicians are of the view that ‘community service’ may not be relevant or applicable to Indian conditions and that court’s must have the discretion to determine the appropriate amount of compensation for victims of crimes. The court will consider this when determining damages in any civil suit arising from the same cause of action, and it will give both the accused and the victim an opportunity to be heard¹⁰.

After reading suggestions, the commission have recommended in its report that while awarding the sentence of 'community service', other relevant factors such as the age of the convict, namely that he should not be. less than eighteen years, the nature and the time or duration of the work, and remuneration, if any, payable to the convict, be considered.

Before passing of the BNS, 2023 perhaps the J.J. Act, 2015 was the only legislation dealing with Community Service in India. Section 18 of the J.J. Act of 2015 deals with the powers of Juvenile Justice Board to give orders in respect of child, found to be in conflict with law. It says that where the Juvenile Justice Board have satisfaction on inquiry made by him, that a child, irrespective of age, has committed a offence of petty nature, or a child below the age of sixteen years has committed an offence of heinous nature, or a child above the age. of sixteen years has committed any heinous offence and that the Board has, after making preliminary assessment under Section 15. of the same Act, disposed of the matter then, the J.J. Board may make an order to child to perform such 'community service' as ordered, under the guidance and supervision of an organisation or group of person, or specified person identified by the J.J. Board¹¹.

Community Service under BNS, 2023

The standing committee has put forth several considerations regarding community service and acknowledges the introduction of 'Community Service' under clause 4(f) of the Bhartiya Nyaya Sanhita, 2023 as a commendable effort and a rehabilitative approach toward addressing delinquency. This initiative has garnered appreciation from all stakeholders, as it is anticipated to alleviate the strain on prison infrastructure by reducing inmate populations and enhance prison management nationwide. However, the precise definition and scope of 'community service' remain unspecified. The committee observes that 'community service' entails the performance of unpaid work by offenders in place of incarceration. Consequently, they recommends that the term and nature of 'community service' be explicitly defined. Furthermore, it suggests that upon incorporating the definition of 'Community Service' into the proposed legislation, provision must be made for the appointment of an individual responsible for supervising such punitive measures.

The BNS, 2023¹² introduced in the Lok Sabha to replace the existing penal code IPC, 1860¹³. The legislation suggests an exhaustive overhaul of the justice delivery system in India. The objects and reasons for introduction of the Bill says that the Penal Code (IPC), enacted in the year 1860, is still continuing in the nation having several amendments made therein from time to time and that time and again Government considered it necessary and expedient to revisit and review the existing criminal laws to strengthen law & order and to make the existing laws relevant to the contemporary situation and provide speedy justice to common man. The existing penal laws, stemming from colonial era have no longer represented the present day situation of Indian society and have often been subject to criticism for being outdated and not in tune with present needs. The proposed BNS, 2023¹⁴ seeks to make certain changes in the nature of the law towards providing justice rather than punishing and it would be a step forward to remove traces of the then colonial mind-set. This Sanhita has enhanced the punishment for most of the offences that were in earlier Penal Code.

For the first time, 'Community Service' as a new form of punishment has been introduced in Section 4 of the Bharatiya Nyaya Sanhita (BNS), 2023. This new form of punishment was recommended by the several reports of Law commission but never introduced. Now, this Sanhita has provided community services for six types of petty offences. However, the term 'community service' is neither explained nor defined in the Sanhita. Section 4. of the sanhita deals with the punishments to which offenders are liable. It has now included community service as a form of punishment. Now, there are six forms of punishment in India.¹⁵

Section 8 of the sanhita deals with amount of fine and liability in default of payment of fine. Sub-section (4) of section 8 stipulates that the imprisonment imposed by the court due to non-payment of a fine or failure to fulfill community service obligations may be of any kind applicable to the offense for which the offender was convicted. Sub-section (5) of section 8 specifies that if the offense carries a penalty of a fine or community

service, any imprisonment ordered by the court for non-payment of the fine or non-completion of community service shall be simple, and the term for which the Court may direct the offender to be imprisoned, in default of payment of fine, or in default of community service, shall not exceed:

- (a) two months, if the fine amount is up to Rs. 5000;
- (b) four months, if the fine amount is up to Rs. 10,000; and
- (c) one year, in any other circumstance.

The term Community Service has not been defined under the sanhita but specifically provided for six petty offences;

1. Section 202 of the Sanhita outlines penalties for a public servant participating in trade unlawfully. It states that any individual, holding the position as a public servant and obligated by law in that capacity not to engage in trade, who does so, shall be liable for punishment in addition to, or in alternative of community service.
2. Section 209 of the Sanhita outlines penalties for Non-appearance in response to a proclamation issued under section 84 of the BNSS, 2023¹⁶. If an individual, upon receiving a summons issued under sub-section (1) of section 84 of the BNSS¹⁷, 2023, fails to appear at the designated time and place, shall be punished.
3. A new provision i.e. Section 226 has been introduced. It says that punishes for attempt to commit suicide, to compel or restrain exercise of lawful power. It says that any individual who attempts to commit suicide, intending to, compel or restrain a public servant from discharging his official duty shall be punished.
4. The term 'theft' has been defined in section 302 and Sub-section (2) of section 303 prescribes punishment for the offence of theft. It says that an individual who commits theft shall be punished with *imprisonment of either description for a term which may extend to 3 years, or with fine, or with both*. In case of subsequent conviction of any person under this section, shall be punished with *rigorous imprisonment for a term which shall not be less than 1 year but which may extend to 5 years and with fine*:
Provided that in cases of theft where the value of the stolen property is less than Rs. 5000, and a person is convicted first time offender, shall upon return of the. value of property or, restoration of the stolen property, *shall be punished with community service*.
5. Section 355 of the sanhita provides punishment for misconduct by a 'drunken person' in a public place. This section says that, a person in a state of intoxication, appears in any public place, or in any place which it is a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance. to any person, shall be punished.
6. The term defamation has been defined in Section 356, and punishable under Sub-section (2). of the same section. It says that a person who defames another person, shall be liable to punished. with community service.

Though the magistrate is empowered to award community service in the above mentioned six petty offences but an open air prison system is better suited from the point of view of the correctional measures rather than the punishment of community service.

Community Service under BNSS, 2023

It is for the first time that the term community service have been introduced under section 23 of the BNSS, 2023¹⁸. Section 23 of the sanhita deals with the senetencing power of the Court of CJM, the Court of a magistrate of a first class and second class. Its sub-section (2) and (3) empowers the Judicial Magistrate of the first class and the Court of a Judicial Magistrate of the second class to pass '*community service*' in addition to or alternative to other punishment. An explanation added to Section 23 of the sanhita defines 'community service' as a work, which the court may order to be performed, gratuitously as a form of punishment for public good.

Conclusion

The main aim and object of punishment is to make reform in the conduct of the offenders and to rehabilitate them in the society. Community service is a retributive sanction and has proven to be a good mechanism in place of custodial sentencing. The Apex Court and several High Courts in India have passed a number of verdict awarding Community Service but it seems that only poor people are doing 'community service' there because they cannot afford amount of fine. Offenders, having involvement, in community service performs works such as picking up of trashes in parks and along highways, and working in Gurudwara. The bulk of community service work is probably done for private, non-profit agencies in the community of the offenders (hospitals, nursing homes, and community centers). Community Service is a need of an hour. From an economic standpoint, it is cost effective. It will decongest prisons and it will reduce the burden on prison system. As resources get freed up, it can lead to improvement in the conditions of prisons with more attention being paid towards health of prisoners and their living standards.

References

Footnotes

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2. Paranjape, N. V. *Studies in Jurisprudence and legal theory*, 246 (7th ed., 2013).
3. *Ibid*, at 247
4. *Ibid*, at 248
5. Agrawal, Nomita *on Jurisprudence*, 84(11th ed. 2019)
6. Oppenheim: Rationale of punishment, (1975), p. 245.
7. Paranjape, N. V. *Studies in Jurisprudence and Legal Theory*, 251 (7th ed. 2013)
8. 42nd Law Commission of India Report, Indian Penal Code, 44 (1971) available at https://lawcommissionofindia.nic.in/report_fifth/ Assess on 10/02/2024.
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11. Agarwal, Mitali (2019) 'Beyond the Prison Bars: Contemplating Community Sentencing in India', 12(1) NUJS LAW REVIEW 119.
12. The Bharatiya Nyaya Sanhita (BNS), 2023
13. Indian Penal Code (IPC), 1860
14. Bharatiya Nyaya Sanhita, 2023
15. Section 4. The punishment to which offenders are liable
 - a) Death
 - b) Imprisonment for life;
 - c) Imprisonment, which is of two descriptions, namely:
 1. Rigorous, that is, with hard labour;
 2. Simple;
 - d) Forfeiture of property;
 - e) Fine;
 - f) Community Service.
16. The Bharatiya Nagarik Suraksha Sanhita, 2023
17. *Ibid*
18. The Bhartiya Nagarik Suraksha Sanhita, 2023

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