CHAPTER - VII

ALTERNATE SENTENCING, ALTERNATIVES TO IMPRISONMENT AND REHABILITATIVE SENTENCING:
TOWARDS RESTORATIVE JUSTICE

“There is a wide range of choice and flexible treatment which must be available with the Judge if he is to fulfil his tryst with curing the criminal in a hospital setting. Maybe in an appropriate case actual hospital treatment may have to be prescribed as part of the sentence. In another case, liberal parole may have to be suggested and, yet in a third category, engaging in certain types of occupation or even going through meditational drills or other courses may be part of the sentencing prescription. The perspective having changed, the legal strategies and judicial resources, in their variety, also have to change. Rule of thumb sentences of rigorous imprisonment or other are too insensitive to the highly delicate and subtle operation expected of a sentencing Judge.”1

Justice V.R. Krishna Iyer

7.1 Introduction

The purpose of all laws is to maximize the net happiness of society.2 Therefore, punishment should only be administered if it results in an overall benefit to society.3 Only when punishment leads to more aggregate pleasure than aggregate pain is punishment justified.4 Punishment for a past offense is [only] justified by the future benefits it provides.5 Punishment should “modify the behavior of the individual who is being punished, hopefully in such a way as to make him a more socially desirable person.”6

Nobody is born a criminal; it is the circumstances, societal constraints, inherited environment and at times accidents, which makes him a criminal. The ultimate aim of every sentencing policy shall thus be restorative justice. Not only the retributive requirements of the state which prosecutes, but also the needs of the victims and offenders be balanced to attain complete justice. This process is taken care of by a mechanism known as restorative justice. Indian jurisprudence is full of restorative justice system, though the enforcement of it was feeble at times. This chapter shall discuss the methods of restorative justice adopted in India and problems

4 Ibid
surrounding them.

7.2 Conceptualizing ‘Restorative Justice’ And ‘Alternate Sentencing’, Alternatives to Imprisonment and Rehabilitative Sentencing

Restorative justice\(^7\) is a way of responding to criminal behaviours by striking a balance between the needs of the community, the victims and the offenders. Restorative justice is an approach to problem solving which involves the victim, the offender, their social networks, justice agencies and the community. Restorative justice programmes are rested on the primary belief that criminal behaviour not only violates the law, but also injures victims and the community. Any efforts to address the consequences of criminal behaviour, therefore, should involve the offender as well as injured parties, while also providing help and support that the victim and offender require.\(^8\)

Restorative justice programmes which are based on several underlying assumptions\(^9\) can be successfully initiated: (a) at the police level (pre-charge); (b) prosecution level (post-charge but usually before a trial), (c) at the court level (either at the pretrial or sentencing stages); and, (d) corrections (as an alternative to incarceration, as part of or in addition to, a non-custodial sentence, during incarceration, or upon release from prison.)\(^10\)

The conventional criminal justice system focuses upon three questions: (1) what laws have been broken? (2) Who has done it? (3) What does he deserve? From a restorative justice perspective, however, an entirely different set of questions are asked: (1) Who has been hurt?; (2) What are their needs?; and (3) Whose obligation are these?\(^11\)

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\(^9\) Restorative justice programmes are based on several underlying assumptions that (a) the response to crime should repair as much as possible the harm suffered by the victim; (b) offenders should be brought to understand that their behaviour is not acceptable and that it had some real consequences for the victim and community; (c) offenders can and should accept responsibility for their action; (d) victims should have an opportunity to express their needs and to participate in determining the best way for the offender to make reparation, and (e) the community has a responsibility to contribute to this process. See United Nations Office On Drugs And Crime, Handbook on Restorative Justice Programmes, (New York: United Nations, 2006) p 8


The principle of restorative justice is in practice in most of the states in different form and content. One of the first to articulate restorative justice theory was Howard Zehr, who distinguishes the response to crime between retributive approach and restorative approach. The United Nations also adopted the basic principle on restorative justice which defined the term “restorative justice” as “a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implication for the future.”

There are three core models of restorative justice namely (1) Victim-Offender Mediation, (2) Family Group Conferencing and (3) Sentencing circles. Though India does not follow the three models in stricto senso, a combination of the three.

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13 Howard Zehr was considered as grandfather of restorative justice. See Daniel W. Van Ness & Karen Heeckersh, Strong, Restoring Justice, (Ellen S. Boyne: Anderson Publg. Co.,1997), p 26
15 United Nation ECOSOC experts committee adopts restorative justice basic principle in 2002
16 This definition of UN ECOSOC expert committee is based on Tony Marshall of Restorative Justice Consortium proposed in the year 1996. See Dennis Sullivan & Larry Tifft, Handbook of Restorative Justice,(USA: Routledge International Handbooks, 2006), p 23
17 Sunanda Dey and B.N. Chattoraj summarise Victim-Offender Mediation as “Victim-Offender Mediation, also called Victim-Offender Dialogue, is a face-to-face meeting, in the presence of a trained mediator, between the victim of a crime and the person who committed that crime. The practice is also called Victim-Offender Conferencing, Victim-Offender Reconciliation, or Restorative Justice Dialogue. In some practices, the victim and the offender are joined by family and community members or others. During the mediation, they may choose to create a mutually agreeable plan to repair any damages that occurred as a result of the crime. The idea of bringing them together is based on age-old values of justice, accountability, and restoration. This model is most often employed in cases involving property crimes or minor assaults, Victim Offender Mediation programs are frequently found in juvenile courts, law enforcement agencies, probation and corrections departments, and victims’ assistance programs. The first “Victim Offender Reconciliation Program” was started in Kitchener, Ontario, Canada in 1976 conducted by members of the Mennonite church, as well as a local judge and a probation officer; the first VORP in the United States was started in Elkhart, Indiana in 1978. In 1990, there were approximately 150 such programs; in 2000, there are more than 1200 programs world-wide.” See Sunanda Dey and B.N. Chattoraj, “Restorative Justice In India: Prospects And Constraints” The Indian Journal of Criminology & Criminalistics,Vol. XXIX Issue no 1, 2008, p 23
18 Sunanda Dey and B.N. Chattoraj Ibid, p 23, summarise Family Group Conferencing as “Family Group Conferencing (FGC) has a much wider circle of participants than VOM. In addition to the primary victim and offender, participants may include people connected to the victim, the offender’s family members, and others connected to the offender. FGC is often the most appropriate system for juvenile cases, due to the important role of the family in a juvenile offender’s life.”
19 Sunanda Dey and B.N. Chattoraj Ibid, p 23 summarise “Sentencing Circle or Circle Sentencing aims to recognize the needs of victims, secure the participation of the community, and identify the rehabilitative needs of the offender. Unlike many other restorative initiatives, it is part of and replaces sentencing in the formal justice system. It engages the community and the formal justice system as partners and to a lesser extent victims and offenders in the resolution of criminal justice-based disputes. The process is as well suited for adults as for young offenders and is sufficiently flexible to be adapted to other situations, including child welfare disputes. Circle sentencing has many of the attributes of family group conferencing, as developed in Australia and New Zealand. Though, it is not a panacea and its use should be restricted to motivated offenders who have the support of their community.”
models can be found ‘indigenized models’ such as compounding of offences, mutual disposition, power to withdraw complaints, satisfaction with fine etc.

Alternative Sentencing, on the other hand, is a policy which is based on the premise that the offenders can be reformed, reclaimed, re-assimilated and rehabilitated in the social milieu. Every criminal sanction need not push the person behind the bar. The ill effects of imprisonment are well known and tersely documented. The sentencing policy, therefore, should provide for alternatives to imprisonment and alternate policy which focuses on reclaiming rather than branding and banishing. The introduction of alternative sanctions in Indian sentencing policy, therefore, has been one of the most important developments in sentencing policy in the last few decades. In order to de-congest prisons, the alternatives to imprisonment such as ‘Probation’ and ‘Parole’ ‘Community Service’, ‘forfeiture of property’, ‘payment of compensation to victims’, ‘public censure’ etc have been introduced in India.

Alternative sentencing has received international recognition and has been widely in practice though forms and formats differ from one jurisdiction to another. In India, alternatives to imprisonment are available at all the three stages: pre-trial stage; sentencing stage; and post sentencing stage which are discussed below.

7.3 Alternatives To Sentencing I – Pre-Trial Process

Alternatives to sentencing at pre trial stage can, as of now, is available as two options. Offences of trivial nature can be compounded without the concurrence of the

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20 In A Convict Prisoner In The Central Prison v. State of Kerala 1993 Cri.L.J 3242, Kerala High Court observes,

“[w]ith imprisonment, a radical transformation comes over a prisoner, which can be described as prisonisation. He loses his identity. He is known by a number. He loses personal possessions. He has no personal relationships. Psychological problems result from loss of freedom, status, possessions, dignity and autonomy of personal life.”

21 In this context, the United Nations Standard Minimum Rules For Non Custodial Measures (Referred as The Tokyo Rules) 1990; United Nations Minimum Rules For The Administration Of Juvenile Justice(Referred here as Beijing Rules), 1985, and Declaration Of Basic Principles Of Justice For Victims Of Crime And Abuse Of Power 1985, are the basic international legal Instruments constituting the legal regime for alternative sentencing at international plane as a model for variety of jurisdiction to follow.

22 Pre trial alternatives include, interalia, bails, time-limit for detention, plea bargaining, free legal aid, compounding of offences, decriminalization of offences, diversion, administrative fines/ non penal fines, juvenile justice administration etc.

23 Sentencing stage alternatives include, fines, admonitions, conditional discharges, compensation, probation, community based services etc.

24 Post sentencing stage include, parole, pardon, remission of sentences, temporary release mechanisms, open prisons, rehabilitative measures etc.
whereas offences of bit serious nature can be compounded with the concurrence of the court. Offences of heinous nature or against public interest are kept outside the process of compounding. Even prior to compounding, the facility of withdrawal of complaint or FIR is provided by the Cr.PC. However, once the charge Sheet is filed or trial has commenced or cognizance has been taken of, or high court has refused to quash FIR, compounding seems to be more appropriate. If sentences carry fixed term of imprisonment and are non compoundable, plea bargaining can be invoked as alternative to sentencing in pre-trial process. The next part of the discussion deals with compounding and statutory plea bargaining.

7.4 Alternatives To Sentencing II– During -Trial Process

In the given sentencing policy in India, three alternatives are available at the sentencing stage namely admonition, probation and customized community sentences. There is a ‘either or’ interplay between admonition under Criminal Procedure Code, 1973 and Probation of Offenders Act, 1958. Where the later Act is applicable, the former is ruled out.

7.4.1. Release on admonition

Section 360 of Cr.PC classifies offenders into two categories namely; person who has committed offences punishable with less than seven years and such person is first time offender. Secondly offences committed are punishable with less than two years who may or may not be first offenders. For the former, the court may instead of passing any sentence at once, release the offenders on probation. For the second category, court may release such accused on admonition, unless of course in both the categories the court is firmly convinced that the exercise of such powers is not warranted for.

Section 360 is inapplicable where Probation of Offenders Act, 1958 is applicable. Section 360 is almost overruled in view of all states adopting Probation of Offenders

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25 See Code of Criminal Procedure, 1973, Section 320 (1)
26 Ibid section 320 (2)
27 Ibid section 257
28 Ibid section 321
29 Ibid section 482
30 Ibid Chapter XXIA
31 Ibid Section 361
32 Ibid Section 360
Act, 1958. In fact Probation of Offenders Act, 1958 confers wider benefits than section 360 of CrPC.\textsuperscript{34} A detailed discussion on admonition and release would follow in subsequent discussion.

7.4.2 Release on probation

Probation is a community-based sanction imposed by a court in lieu of imprisonment. In many jurisdictions, probation is treated as an alternative to a formal (i.e., custodial) sentence; in others, it is treated as a sentence in its own right. It always includes a defined period of conditional release in the community, sometimes preceded by a short jail stay.\textsuperscript{35} The probation of offenders Act, 1958 is “a milestone in the progress of the modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of criminal law is more to reform the individual offender than to punish him.”\textsuperscript{36} The object of the Act is to “prevent the turning of youthful offenders into criminals by their association with hardened criminals of mature age within the walls of a prison. The method adopted is to attempt their possible reformation instead of inflicting on them the normal punishment for their crime.”\textsuperscript{37} The Act classifies the offenders into two categories (i) offenders under 21 years of age and (ii) others aged 21 and above. Section 6 deals with offenders aged below 21 years. The court is prohibited from sentencing young offenders at once to imprisonment unless it is satisfied that it is not desirable to release him after admonition under Section 3 or on probation of good conduct under Section 4 of the Act. It is pertinent to note that Section 4 applies to offenders of all ages. It is a general provision.

\textsuperscript{34} In Upendra Nath Chaudhary v. High Court of Judicature At Patna 2007 Cri.L.J 2913 Justice Aftab Alam brings the difference as under

“Section 360 of the Code relates only to persons not under 21 years of age convicted for an offence punishable with fine only or with imprisonment for a term of seven years or less, to any person under 21 years of age or any woman convicted of an offence not punishable with sentence of death or imprisonment for life. The scope of Section 4 of the Probation Act is much wider. It applies to any person found guilty of having committed an offence not punishable with death or imprisonment for life. Section 360 of the Code does not provide for any role for Probation Officers in assisting the Courts in relation to supervision and other matters while the Probation Act does make such a provision. While Section 12 of the Probation Act states that the person found guilty of an offence and dealt with under Section 3 or 4 of the Probation Act shall not suffer disqualification, if any, attached to conviction of an offence under any law, the Code does not contain parallel provision”

\textsuperscript{36} Per Subba Rao, J. in Rattan Lal v. State of Punjab [1964] 7 S.C.R. 676

\textsuperscript{37} See also Isher Das v. State of Punjab 1972 AIR 1295
7.4.3 Customized community sentences

Community service is not legislatively incorporated alternatives to punishment, though juvenile justice Act 2015 speaks of it in limited way for limited cases. The benefits of community service are limited, thus to juveniles. The benefit may be extendable to first time offenders under probation of offenders Act, 1958. The probation Act does not specially mentions about community service. It provides for conditions subject to which offenders may be released. Courts have, however, made use of this “condition clause” to read community service into it. There is no comprehensive sentencing policy in this respect. The usage of this method is either limited institutionally, as far example, High Courts have frequently made use of this, or territorially, as far example, lowers courts in Delhi have been reported to have made use of it often. A critically discussion would fallow in next titles.

7.5 Alternatives to Imprisonment (Sentencing) Iii– Post- Trial Process

Post trial, many alternatives are available to imprisonment. These alternatives are in fact not alternatives to sentencing, but are alternatives to imprisonment which has a direct bearing on the sentencing. Parole, pardon, remission short sentencing schemes, etc have a huge impact on judicial sentencing. The execution of original sentence passed by the judiciary undergoes drastic and dramatic changes if any of the alternatives are exercised. Life imprisonment which is taken to be life in jail till death may turn out to be imprisonment of 8 or 9 years by the application of remission and short sentencing rules. The rationale behind such ‘executive tempering’ is to infuse mercy where the need be. Treatment of criminal in a just manner is read as fundamental right and therefore sentencing policy post judicial sentencing has to

38 For detailed discussion see Chapter VI: Clemency, Concessionary and Short Sentencing: Executive Interference in Judicial Process; Two Sides of the Same Coin or Tug of War Between?
39 The observation of Supreme Court in Mohd Giasuddin v. State of Andhra Pradesh (AIR 1977 SC 1926) is pertinent is here, which runs as
“Progressive criminologists across the world will agree that the Gandhian diagnosis of offenders as patients and his conception of prisons as hospitals……is the key to the pathology of delinquency and the therapeutic role of punishment.”
40 In Charles Sobraj v. Superintendent Central Jail, Tihar, New Delhi (AIR 1978 SC 1514), the Supreme Court observed
“Imprisonment does not spell farewell to fundamental rights laid down under part III of the constitution. Prisoners’ retain all rights enjoyed by free citizens except those lost necessarily as an incident of confinement. Therefore, it is a court’s “continuing duty and authority to ensure that the judicial warrant which deprives a person of his life or liberty is not exceeded, subverted or stultified.”
answer the constitutional test too.\textsuperscript{41} However, the sentencing policy in respect of post trial alternatives is to a greater extent uncertain and different from state to state. Prison reforms fall under State list of the seventh schedule\textsuperscript{42} and therefore states are left to frame their own rules in the absence of uniform jail manuals by the Centre.\textsuperscript{43} The policies of the state in respect of post sentencing are increasingly in question, given the disparity and inconsistency inherent in the exercise of such powers. The chapter on clemency and short sentencing would in detail unfold these predicaments with possible solutions.\textsuperscript{44}

Temporary Release Mechanisms like parole\textsuperscript{45} and furlough\textsuperscript{46} and Open

\textsuperscript{41} In Charles Sobraj v. Superintendent Central Jail, Tihar, New Delhi (AIR 1978 SC 1514), the Supreme Court observed

\begin{quote}
“Judicial policing of prison practices is implied in the sentencing power, thus the ‘hands off’ theory is rebuffed and the Court must intervene when the constitutional rights and statutory prescriptions are transgressed to the injury of the prisoner.”
\end{quote}

Further the court observed

\begin{quote}
“Whenever fundamental rights are flouted or legislative protection ignored, to any prisoner’s prejudice, this Court’s writ will run, breaking through stone walls and iron bars, to right the wrong and restore the rule of law.” “The criminal judiciary has thus a duty to guardian their sentences and visit prisons when necessary.”
\end{quote}

In Sunil Batra v. Delhi Administration & Ors AIR 1978 SC 1675, the Supreme Court held

\begin{quote}
“court has a distinctive duty to reform prison practices and to inject constitutional consciousness into the system.”
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In Sunil Batra (Ii) v. Delhi Administration (AIR 1980 SC 1579) the Supreme Court observed

\begin{quote}
“No iron curtain can be drawn between the prisoner and the constitution,” and that “The court has a continuing responsibility to ensure that the constitutional purpose of the deprivation is not defeated by prison administration.”
\end{quote}

\textsuperscript{42} ‘Prisons’ is a State subject under Entry-4 (Prison Reformatories, Borstal Institutions and other institutions of like nature) in the State List (List-II) of the Seventh Schedule to the Constitution of India. Therefore, the management and administration of Prisons falls in the domain of the State Governments. The Prisons are governed by, interalia, The Prisons Act, 1894 and the Prison Manuals/ Rules/ Regulations framed by the respective State Governments from time to time.

\textsuperscript{43} The central government has recently adopted a Model Jail Manual 2016 which prescribes uniformity among states in all most all respects of jail policy including remission, premature release, and jail discipline. States are now to modify their jail manuals on the lines of this 2016 manual. For the disparity in remission and premature release and tentative solutions see chapter no

\textsuperscript{44} See Chapter VI: Clemency, Concessionary And Short Sentencing: Executive Interference in Judicial Process; Two Sides of the Same Coin or Tug of War Between?, for detailed discussion.

\textsuperscript{45} Parole is granted for certain emergency and the release on parole is a discretionary right. However, release on furlough is a substantial right and accrues to a prisoner on compliance with certain requirements. The idea of granting furlough to a prisoner is that the prisoner should have an opportunity to come out and mix with the society and the prisoner should not be continuously kept in jail for a considerable long period.

\textsuperscript{46} Furlough/Leave differ from state to state. To take the example of Maharashtra, MAHARASHTRA PRISON MANUAL, 1979 provides for Furlough/Leave as under.

The period of furlough shall not exceed two weeks at a time. However, the period of two weeks may be initially extended up to three weeks in case prisoners desire to spend the furlough outside the State of Bombay. (Ch. XXXVII, Rule 2, 3(1) & (2)). Habitual prisoners and prisoners convicted of offences under Sections 392- 402 of the IPC are not allowed to seek furlough. (Ch. XXXVII, Rule 4). Every prisoner desirous of release on furlough shall be required to give a personal bond of the required amount. (Ch. XXXVII, Rule 7) A prisoner may be released for such period on parole as the competent authority in its discretion may order, in case of serious illness or death of any member of the prisoner’s family or of the closest relations or for any other sufficient cause. (Ch. XXXVII, Rule 19) The period spent on parole shall not count as remission of the sentence. (Ch. XXXVII, Rule 20) A prisoner may be granted parole either on his own application made by his relatives, friends or legal advisers. (Ch. XXXVII, Rule 21) before claiming Furlough/Leave, at least 1 year of actual imprisonment should have been suffered of the punishment is between 1 – 5 years, 2 years of actual imprisonment in case of 5 years and above and in case of More than 5 years but not life Imprisonment a convict may be released on furlough every year instead of every 2 years during the last 5 years of the unexpired period of sentence. In case of Life imprisonment, convict may be released on furlough every year instead of every 2 years after completing 7 years of actual imprisonment.
Prisons open colonies have been institutionalised to infuse limited and controlled independence and sense of rehabilitation in the convicts. These methods are intended to ease the imprisoned life of the convicts. These mechanisms have limited impact on the judicial sentences and are thus outside the scope of this study and therefore been safely omitted from further references.

7.6 Compounding of Offences

Though all compromises shall not be encouraged in the criminal legal system, law treats certain offences with less impunity and allows the victim and offenders to come together and mutually solve their grievances which can alternatively be done by legal system at any time. The ultimate purpose of law cannot be always to push all criminals behind the bar, provide the remedy of incarceration of offenders to victims, and send unnecessary message of zero tolerance policy of state towards all crimes. The purpose of criminal law, rather, is to strike a balance between the loss of victims, liberty of offenders and safety and security of the society. This purpose of criminal justice leads towards restorative justice. One of the pre sentencing methods of restorative justice is to encourage compounding of offences.

Compounding, in the context of criminal law, means forbearance from the prosecution as a result of an amicable settlement between the parties. The

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47 In order to save the lifer and long-term prisoners from the ill effects of confining continuously in closed prisons Open Prisons have been established. The prisoners who respond to programme, based on trust, responsibility are selected for being sent to these open institutions. Once at the open prison camp, these prisoners construct their own dwellings, where they live with their families, who are encouraged to join them. Their children attend local schools. Prisoners cultivate the camp’s land, do public works, conduct independent businesses, or work for outside employers. They self-govern their camp community through an elected council of village elders, with the handful of camp officials focusing on facilitating employment and other matters, rather than on security. The prisoners receive remission credited against their sentences, and having completed them, are then released. This model is being replicated by other states in India as well as attracting regional interest. See Khushal I. Vibhute, *Open Peno-correctional Institutions in India: A Review of Fifty Five Years*, (Max Planck Institute for Foreign and International Criminal Law, 2006) “Jailhouse Rocks” in The Telegraph, September 5, 2004, Calcutta; “A Village in a Village” in the Deccan Herald, March 28, 2004, Bangalore.

48 In Maharashtra for example, Open colonies have been established towards their final rehabilitation. The prisoners are allowed to stay with their families in these colonies. They earn their own living. There is on open colony at present located at Atapdi District Sangli.

49 In Sunil Batra v. Delhi Administration & Ors (AIR 1978 SC 1675), the Supreme Court observed “Rehabilitation is a necessary component of incarceration and this philosophy is often forgotten when justifying harsh treatment of prisoners. Consequently, the disciplinary need of keeping apart a prisoner must not involve inclusion of harsh elements of punishment. The Court opined that “liberal paroles, open jails, frequency of familial meetings, location of convicts in jails nearest to their homes tend to release stress, relieve distress and insure security better than flagellation and fetters.”
compounding scheme relieves the courts of the burden of accumulated cases. For the compounding of the offences punishable under the Indian Penal Code, a complete scheme is provided under Section 320 of the Code of Criminal Procedure, 1973.\(^5\)

Crimes essentially are of two types in terms of their impact and cognizance. Crimes of less impact and personal in nature are considered to be compoundable offences. Crimes which have indefinite impact on the society which challenge the very orderly existence of societal discipline, on the other hand are classified as cognizable offences. Offences like hurt, theft, wrongful confinements cheating, adultery, breach of trust etc are offences of personal nature which can be personally handled without invoking the entire machinery of legal system. Compromise of win win situation are encouraged where both parties sit together and bargain for loss and liberty respectively. Compounding of an offence thus signifies

“that the person against whom the offence has been committed has received some gratification, not necessarily of a pecuniary character, to act as an inducement of his desiring to abstain from a prosecution”.\(^5\)

The victim may have received compensation from the offender or the attitude of the parties towards each other may have changed for good. The victim is prepared to condone the offensive conduct of the accused who became chastened and repentant. Criminal law needs to be attuned to take note of such situations and provide a remedy to terminate the criminal proceedings in respect of certain types of offences. That is the rationale behind compounding of offences. Incidentally, the compounding scheme relieves the courts of the burden of accumulated cases. The listing of offences compoundable is something unique to the Indian Criminal Law. The State’s prosecuting agency is not involved in the process of compounding.\(^5\) Which offences should or should not be made compoundable is always an enigma for the law-makers.\(^5\)


\(^5\) *Ibid*, at p 6

\(^5\) Broadly speaking, the offences which affect the security of the State or having a serious impact on the society at large ought not to be permitted to be compounded. So also, crimes of grave nature shall not be the subject-matter of compounding. The policy of law on compoundability of offences is complex and no straightjacket formula is available to reach the decision. A holistic and not an isolated approach is called for in identifying the compoundable and non-compoundable offences.
Section 320 of Cr.P.C deals exclusively with the compoundability of offences under IPC. No offence other than that specified in this section can be compounded. Section 320 consists of three things namely, what offences can be compounded, by whom and weather with or without the permission of the court. The offence can only be compounded by the persons specified in Col.3 of the Table concerned and such person is the person directly aggrieved in the sense that she/he is the victim of the crime. As a result of composition of the offence under Section 320, the accused will stand acquitted of the offence of which he/she is charged and the Court loses its jurisdiction to proceed with the case. Unlike in some of the provisions of special laws, no one on behalf of the State is empowered to compound the offences. However, the public prosecutor may withdraw from prosecution with the consent of the Court, as provided for in Section 321 of CrPC.

Sub-section (3) of Section 320 lays down the rule that in respect of compoundable offences specified in the Section, the abetment or an attempt to commit the offence is also compoundable. So also the composition can be applied to the accused who is liable for the offence constructively by virtue of Section 34 or Section 149 of IPC. Then the composition of offence can be permitted by the High Court or a Sessions Court exercising revisional powers. Sub-section (5) provides that the composition can be allowed only with the leave of the Committal Court or Appellate Court during the pendency of committal or appellate proceedings.

7.6.1 Relationship between compounding of offences and quashing of FIR under inherent jurisdictions

Where the offences could not be compounded but the sentimental requirements of the case warranted the compromise, the courts have started quashing

54 In Ramgopal v. State of M.P 2010 (7) SCALE 711 the court observed that

“...There are several offences under the IPC that are currently non-compoundable. These include offences punishable under Section 498-A, Section 326, etc. of the IPC. Some of such offences can be made compoundable by introducing a suitable amendment in the statute. We are of the opinion that the Law Commission of India could examine whether a suitable proposal can be sent to the Union Government in this regard. Any such step would not only relieve the courts of the burden of deciding cases in which the aggrieved parties have themselves arrived at a settlement, but may also encourage the process of reconciliation between them. We, accordingly, request the Law Commission and the Government of India to examine all these aspects and take such steps as may be considered feasible”.

See also Diwaker Singh v. State of Bihar Crl. appeal No. 433 of 2004 Dated 18th August 2010

55 Supra note 51 at p 9

56 Ibid
the FIR under their inherent jurisdictions. The Supreme Court in *Shiji @ Pappu v. Radhika* held that simply because an offence is not compoundable under Section 320 CrPC is by itself no reason for the High Court to refuse exercise of its power under Section 482 to quash the prosecution. In *Gian Singh v. State of Punjab and another*, the court observed:

“[T]he power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. … However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim’s family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of legitimacy relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put [the] accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal.

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58 2010 (12) SCALE 588

59 (2012) 10 SCC 303
proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding.”

If the offences against women and children and the IPC offences falling under the categories, like, murder, attempt to murder, offence against unsound mind, rape, bribe, fabrication of documents, false evidence, robbery, dacoity, abduction, kidnapping, minor girl rape, idol theft, preventing a public servant from discharging of his/her duty, outrage of woman modesty, counterfeiting currency notes or bank notes, etc., are allowed to be compounded, it will surely have serious repercussion on the society. Similarly, any compromise between the victim and the offender in relation to the offences clubbed with Special Enactment, like Arms Act 1950, the Prevention of Corruption Act 1988 or the offences committed by Public Servants while working in that capacity, etc., cannot provide for any basis for quashing criminal proceedings involving such offences. As held by the Apex Court, insofar the offences arising out of matrimonial dispute, relating to dowry or the family disputes where the wrong is basically private or personal in nature, are concerned, the possibility of conviction is remote and bleak, in case the parties resolve their entire disputes amicably among themselves. There cannot be any compromise in respect of the heinous and serious offences of mental depravity and in that case, the Court should be very slow in accepting the compromise. If the compromise is entertained mechanically by the Court, the accused will have the upper hand. The jurisdiction of this Court may not be allowed to be exploited by the accused, who can well afford to wait for a logical conclusion. The antecedents of the accused have also to be taken into consideration before accepting the memo of compromise and the accused, by means of compromise, cannot try to escape from the clutches of law.

7.6.2 Where compounding is impresmissible- reduction of sentence as alternative

Where the law does not permit the compounding of offences yet the courts feel that maximum leniency needs to be given, the courts as via media have started reducing the sentence already undergone by the accused in selected cases of course!\(^\text{60}\)

In Jalaluddin v. State of U.P.,\(^\text{61}\) the accused was convicted for the offence


\(^{61}\) (2002) 9 SCC 561
under section 326 of the IPC and sentenced to undergo rigorous imprisonment for 18 months. Dealing with an application for compounding of offence under section 320 of the Code, 1973 the Supreme Court said

“ It has been stated that the complainant and the appellant are close relations and have compromised the dispute outside the Court. It is prayed that the offence may be permitted to be compounded. The offence under section 326 IPC is not compoundable and it cannot be compounded. The application for compounding is, therefore, rejected.”

However the sentence was reduced to the period already undergone.

In *Y. Suresh Babu v. State of Andhra Pradesh*[^62] compounding of a non compoundable offence under Section 326 of the IPC was allowed as a special case. The Supreme Court, however, took care to term the case as a special one and directed that the case should not be treated as a precedent.

The Supreme Court in *Mahesh Chand v. State of Rajasthan*,[^63] a case under Section 307 of the Penal Code which is not compoundable, again allowed composition by directing the trial court to accord permission to compound. This was done in the facts and circumstances of that case.

However, both above judgments were held to be judgement *per incuriam* as the two cases did not consider section 320(9) of Code, 1973 and as such are not be treated as Precedent.[^64]

### 7.7 Mutual Disposition – Sui Generis Plea Bargaining

No criminal jurisprudence would ever expect that every breach of law shall compulsorily result in incarceration leaving the life of convict and sufferers devastated. Remedy for wrong lies in the amends, that is to say, in the restoration and rehabilitation. A happy win-win situation is possible in criminal wrongs also. Thus, compounding of offences and Plea bargaining are the methods through which this happy balance is struck. Plea bargaining essentially is a compromise - a compromise between three parties, namely, accused, victim, and prosecutor and other people. Plea bargaining is a form of alternative sentencing or alternatives in the sentencing. According to the gradation of crimes some crimes are compoundable with or without

[^62]: (1987) 2 JT (SC) 361
[^63]: A.I.R 1988 S.C 2111
permission of the court, whereas many other are not. There are few offences where minimum sentencing is provided. All that legislature wants to communicate from such classification is that certain offences are socially so shunned that any kind of leniency would not be tolerated. This however, does not mean that the offender who has recognized his fault and candidly ready to accept his guilt be shown the highest point of law! Accused who are ready to amend and suffer for his crime by cooperating with the prosecution should be dealt with differently in the sentencing policy. Taking care of this particular situation, judicial systems have recognized Plea bargaining of different degrees and nature. Plea bargaining is based on the premise of “Nolo Contendere” contendere = (I do not wish to contend). Precisely, object of plea bargaining is to conclude a criminal case without a trial as a result of negotiation between prosecution and defence usually in exchange for a more lenient punishment.

Broadly in the system of pre-trial negotiations where the accused pleads guilty in return, he can fructify concessional treatment from the prosecution.

**7.7.1 Process of plea bargaining and sentencing**

Plea bargaining was initially frowned upon by the court though subsequently it was legalized in legislative form. ‘Plea of guilty’ is in vogue in India but not ‘plea

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65 Hon’ble Mr. Justice B. N. Mahapatra, Judge, Orissa High Court in his address at judicial academy quoted the example as under

“The Mogul Emperor Jahangir had put a bell at the top of his palace tied with a rope. The person aggrieved would pull that rope and the Emperor Jahangir would appear for hearing complaint then and there and decide the case according to law prevailing at that time. Once a complaint was made before the Emperor Jahangir that Prince had misbehaved with the wife of the complainant and as per law in existence at the relevant time was “tit for tat”. Therefore, the punishment to be awarded was that the complainant had to misbehave with the wife of the Prince. At that stage, Begam Noorjahan intervened and pleaded for plea bargaining and the complainant was compensated in shape of money.”


68 Ibid

bargaining’ until it was officially incorporated.⁷⁰ ‘Plea bargaining’ as such has not been subscribed by the Indian legal system though it was recommended so.⁷¹

A consideration of Chapter XXI-A dealing with plea bargaining will show that certain procedure prescribed for plea bargaining under Sections 265-A to 265-L of Cr.P.C are to be complied with to make it a valid plea bargaining. As per Section 265-A, the plea bargaining shall be available to the accused charged of any offence other than offences punishable with death or imprisonment or for life or of an imprisonment for a term exceeding seven years. Section 265-B contemplates an application for plea bargaining to be filed by the accused which shall contain a brief description of the case relating to which such application is filed, including the offence to which the case relates and shall be accompanied by an affidavit sworn by the accused stating therein that he has voluntarily preferred, after understanding the nature and extent of the punishment provided under the law for the offence, the plea bargaining in his case and that he has not previously been convicted by a court in a case in which he had been charged with the same offence. Sub-clause 4(a) is to the effect that if the court is satisfied with the voluntary nature of the application, then it shall provide time for working out a mutually satisfactory disposition of the case which may include giving to the victim by the accused compensation and other expenses. Section 265-C prescribes the procedure to be followed by the court in working out a mutually satisfactory disposition. Section 265-D deals with the preparation of the report by the court as to the arrival of a mutually satisfactory disposition or failure of the same.

⁷⁰ In State of Gujarat v Natwar Harchandji Thakor 2005 Cri.L.J 2957, the Ahmadabad High Court, brought out the distinction between the two as under

“…But the ‘plea bargaining’ and the raising of “plea of guilty”, both things should not have been treated, as the same and common. There it appears to be mixed up. Nobody can dispute that “plea bargaining” is not permissible, but at the same time, it cannot be overlooked that raising of “plea of guilty”, at the appropriate stage, provided in the statutory procedure for the accused and to show the special and adequate reasons for the discretionary exercise of powers by the trial Court in awarding sentences cannot be admixed or should not be treated the same and similar. Whether, “plea of guilty” really on facts is “plea bargaining” or not is a matter of proof. Every “plea of guilty”, which is a part of statutory process in criminal trial, cannot be said to be a “plea bargaining” ipso facto. It is a matter requiring evaluation of factual profile of each accused in criminal trial before reaching a specific conclusion of it being only a “plea bargaining” and not a plea of guilty simpliciter. It must be based upon facts and proof not on fanciful or surmises without necessary factual supporting profile for that.”

Section 265-E prescribes the procedure to be followed in disposing of the cases when a satisfactory disposition of the case is worked out. Section 265-F deals with the pronouncement of judgment in terms of such mutually satisfactory disposition. Section 265-G says that no appeal shall lie against such judgment. Section 265-H deals with the powers of the court in plea bargaining. Section 265-I makes Section 428 applicable to the sentence awarded on plea bargaining. Section 265-J contains a non obstante clause that the provisions of the chapter shall have effect notwithstanding anything inconsistent therewith contained in any other provisions of the Code and nothing in such other provisions shall be construed to contain the meaning of any provision of chapter XXI-A. Section 265-K says that the statements or facts stated by the accused in an application for plea bargaining shall not be used for any other purpose except for the purpose of the chapter. Section 265-L makes the chapter not applicable in case of any juvenile or child as defined in section 2(k) of Juvenile Justice (Care and Protection of Children) Act, 2000.

7.7.2 When can plea bargain be invoked?

Plea bargaining or mutual disposition can be invoked subject to following conditions

1. Offences must be punishable with less than seven years imprisonment

2. Offences affecting socio-economic condition of the country cannot be mutually disposed of

3. Offences committed against woman or child below 14 years of age cannot be mutually disposed of

4. Provisions as to plea-bargaining shall not apply to any juvenile or child as defined in Sub-clause (k) of Section 2 of the Juvenile Justice (Care and Protection of Children) Act, 2000.

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72 See section 265A. (1) of code of criminal Procedure, 1973
74 Ibid
75 265L. Non-application of the Chapter- Nothing in this Chapter shall apply to any Juvenile or Child as defined in sub-clause (k) of section 2 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000)
5. The accused should not have been convicted earlier for the same offence.76

7.7.3 Process of working out mutually satisfactory disposition

The process of working out mutually satisfactory disposition would start once the (a) the report has been forwarded by the officer in charge of the police station under section 173 alleging that an offence appears to have been committed by him77 or (b) a Magistrate has taken cognizance of an offence on complaint78 and trial is pending before a court. The accused has to make voluntary application with affidavit.79 After receiving such application the court shall issue notice to the Public Prosecutor or the complaint of the case, as the case may be, and to the accused to appear on the date fixed for the case.80 The court shall examine the accused in camera, where the other party in the case shall not be present, to satisfy that the accused has filed the application voluntarily.81 The court has two options before it in respect of such application.

(a) If the Court is satisfied that the application has been filed by the accused voluntarily, it shall provide time to the Public Prosecutor or the complainant of the case, as the case may be, and the accused to work out a mutually satisfactory disposition of the case which may include giving to the victim by the accused the compensation and other expenses during the case and thereafter fix the date for further hearing of the case.

(b) The Court finds that the application has been filed involuntarily by the accused or he has previously been convicted by a Court in a case in which he had been charged with the same offence, it shall proceed further in accordance with the provisions of the Code.

76 section 265-B (4) (b) of Code of Criminal Procedure, 1973
77 Ibid Section 265 A (a)
78 Ibid Section 265 A (b)
79 Ibid Section 265 B provides as under
80 Ibid Section 265B (3)
81 Ibid Section 265B (4)
7.7.4 Guidelines for mutually satisfactory disposition

Section 265C provides that in working out a mutually satisfactory disposition the court shall follow the following procedure, namely:-

(a) in a case instituted on a police report, the Court shall issue notice to the Public Prosecutor, the police officer who has investigated the case, the accused and the victim of the case to participate in the meeting to work out a satisfactory disposition of the case:

(b) in a case instituted otherwise than on police report, the Court shall issue notice to the accused and the victim to participate in a meeting to work out a satisfactory disposition if the case:

It shall be the duty of the Court to ensure, throughout such process of working out a satisfactory disposition, that it is completed voluntarily by the parties participating in the meeting. It shall also be the duty of the court to ensure that if the victim of the case or the accused, as the case may be, so desires; he may participate in such meeting with his pleader engaged in the case. Whether the mutually satisfactory disposition is successful or otherwise, such report shall be submitted before the Court.\(^{82}\) Where a satisfactory disposition of the case has been successfully worked out the Court shall dispose of the case in the following manner, namely:-

(a) the Court shall award the compensation to the victim in accordance with the disposition under section 265D and hear the parties on the quantum of the punishment, releasing of the accused on probation of good conduct or after admonition under section 360 or for dealing with the accused under the provisions of the Probation of Offenders Act, 1958 or other law for the time being in force and follow the procedure specified in the succeeding clauses for imposing the punishment on the accused:

(b) after hearing the parties under clause (a), if the Court is of the view that section 360 or the provisions of the Probation of Offenders Act,

\(^{82}\) *Ibid* Section 265D provides as

"265D. Report of the mutually satisfactory disposition to be submitted before the Court—Where in a meeting under section 265C, a satisfactory disposition of the case has been worked out, the Court shall prepare a report to such disposition which shall be signed by the presiding officer of the Court and all other persons who participated in the meeting and if no such disposition has been worked out, the Court shall record such observation and proceed further in accordance with the provisions of this Code from the stage the application under sub-section (1) of section 265B has been filed in such case."
1958 or any other law for the time being in force are attracted in the case of the accused, it may release the accused on probation or provide the benefit of any such law, as the case may be:

(c) after hearing the parties under clause (b), if the Court finds that minimum punishment has been provided under the law for the offence committed by the accused, it may sentence the accused to half of such minimum punishment;

(d) in case after hearing the parties under clause (b), the Court finds that the offence, committed by the accused is not covered under clause (b) or clause (c), then at may sentenced the accused to one-fourth of the punishment provided or extendable, as the case may be, for such offence.

The Court shall deliver its judgment in terms of section 265E in the open Court and the same shall be signed by the presiding officer of the Court.\textsuperscript{83} The judgment delivered thus by the court shall be final and no appeal (except the special leave petition under article 136 and writ petition under article 226 and 227 of the Constitution) shall lie in any Court against such judgment. The accused enjoys two specific benefits under this mutual disposition. Firstly the period of detention undergone by the accused against the sentence of imprisonment imposed under this Chapter shall be set off.\textsuperscript{84} Secondly the statements or facts stated by an accused in an application for plea bargaining filed under section 265B shall not be used for any other purpose except for the purpose of this Chapter.\textsuperscript{85}

\begin{footnotesize}
83 \textit{Ibid} Section 265F  
84 \textit{Ibid} Section 265I provides:

\textquote{"265I. Period of detention undergone by the accused to be set off against the sentence of imprisonment- The provisions of section 428 shall apply, for setting off the period of detention undergone by the accused against the sentence of imprisonment imposed under this Chapter, in the same manner as they apply in respect of the imprisonment under other provisions of this Code."} 

\textit{Ibid} Section 428 also provides:

"Period of detention undergone by the accused to be set off against the sentence of imprisonment.

Where an accused person has, on conviction, been sentenced to imprisonment for a term, not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him.

Provided that in cases referred to in section 433A, such period of detention shall be set off against the period of fourteen years referred to in that section." 

85 \textit{Ibid} Section 265K
\end{footnotesize}
7.7.5 Minimum sentencing and plea bargaining

The success rate of plea bargaining are high when a definite minimum sentence is provided for a particular offence and no compounding is allowed. When the offence is petty or punishable with fine, compounding of offence is the best possible solution. When the offence is compounded nothing goes on record and the accused does not incur any disqualifications or disabilities even though the same mutual disposition is worked out as is done under sui generis Indian plea bargaining. Further, no punishment is incurred in compounding whereas plea bargaining subjects the accused to minimum one fourth of punishment. If the accused is first time offender and below 21 years, plea bargaining would not be of much help since section 6 of the probation of offenders Act, 1958 is automatically invoked. Similarly section 4 of the same Act also confers certain similar benefits. However, if the offence carries mandatory minimum sentence below 7 years and the accused has undergone custody, the mutual disposition works wonder for he would get double benefits. Assume for example that the offence is punishable with 5 years and the accused has been under-trial prisoners for 6 months. If mutual disposition is worked out, he may incur two and half years imprisonment out of which six months under-trial duration would be subtracted. Thus two years imprisonment which may be much lesser actually when remissions are added would provide great opportunity to the accused to resettle whereas the victim would have compensation for his rehabilitation and have the convict punished too. It’s like eat the cake and have it too. Where no minimum punishment is provided the Indian plea bargaining may inversely work. To illustrate, if the offence is punishable with three years punishment, the language employed Section.265-E (d) CrPC provides that “… may sentence the accused to one–fourth of the punishment provided or extendable … for such offence”. Consequentially the court has to invariably sentence the offender to nine months of imprisonment and cannot impose lesser sentence. The prosecutor cannot seek and the court cannot impose less than one-fourth of the sentence on the offender in such circumstances. If the same offender is processed through contest mechanism the court is empowered to sentence him even for as low as one day imprisonment. It is therefore invariably suggested that mutual disposition as said above is better suited where minimum mandatory sentence are provided.
7.7.6 Difference between plea barraging and mutual disposition

There is sharp contrast between mutual disposition in India and proper plea bargaining in USA. Firstly in USA all crimes are subject matter of plea bargaining whereas in India only crimes punishable with less than seven years are subject matter of mutual disposition. Secondly in USA parties can bargain for any sentence whereas in India parties are not free to mutually dispose the matter for any sentence. Two limitations are imposed namely, only judges have the authority to seal the disposition and where minimum mandatory punishment is provided, judges cannot accept disposition below half of the minimum punishment.

7.8 Community Service

Community service\(^\text{86}\) is also referred as community correction which is defined as a non-incarcerative sanction in which offenders serve all or a portion of their sentence in the community.\(^\text{87}\) Community service is premised upon the belief that offenders and also victims of crime have rights deserving of protection. Apart from that, human beings are capable of change and that is one of the reasons why a commitment to the reintegration of the offender into the community is very essential.\(^\text{88}\) Community service orders benefit the offender greatly, as well as society and the correctional system itself.\(^\text{89}\) Community service orders are increasingly popular with judges who find that they can be more flexible and humane in punishing offenders unlikely to commit another crime.\(^\text{90}\) Whether the work itself is useful or not, this kind of sentencing is certainly helpful to the criminal justice system in a time of budget deficits and overcrowded prisons. Community service is practical as well as

\(^{86}\) According to Martin Wasik

“Community sentence is one of the available sentencing options, appropriate in cases where the offender has committed an offence of an intermediate degree of seriousness. The judges impose the order in a view that the nature of the offence is not such as to require custody, but it does require something more than the mild penalty of a bind over or a discharge.”

See Martin Wasik, Emmins on Sentencing 4\(^{th}\) ed., (UK : Blackstone Press, 2001)

\(^{87}\) Leanne Fifital Alarid, Community – Based Corrections, 9\(^{th}\) ed., (USA : Wadsworth Cengage Learning, 2013)


\(^{90}\) Blog sentencing law and policy “Is community service really a punishment? Should it be ordered more?” available at http://sentencing.typepad.com/sentencing_law_and_policy/2010/09/is-community-service-really-a-punishment-should-it-be-ordered-more.html
humane. It saves court time because few of these cases go to trial. In juvenile justice circles, the term has been associated with “restorative justice” that focuses on righting a wrong and changing a negative behavior into a positive one. In this context, community service is seen as having both compensatory and rehabilitative aspects in which the service is seen as not only righting a wrong but also strengthening the connection between the juvenile and his community, and potentially reducing recidivism.

Community service in India is not codified unlike western jurisdictions. Western jurisdictions like USA, England Australia have community service in their statute book mandating judges to exercise the same as alternative to imprisonment. In India, however, no law provides for community service except juvenile justice and probation jurisprudence. Though judges in India have experimented Community services of different types- some usual some out of the box- the trend is not uniform and not even approved unquestionably.

7.8.1 Community service and Indian courts: some even and uneven practices

In recent times, there are few noteworthy cases on alternative sentencing decided by Hon’ble courts of India. In R.K. Anand v. Registrar, the Hon’ble Supreme court has held a Senior Advocate guilty of contempt of court. The court in this case awarded a unique and novel punishment. While considering the age of the accused, physical health of his wife etc. the court sentenced him to one year pro-bono professional services to be rendered to poor accused who on account of lack of resources could not engage lawyer along with a grant of a sum of Rs 21,00,000/- to be paid to the Bar council of India, to be used for developing the infrastructure of the college situated at a mufassil place attended by under privileged and deprived section of the society.

In Nitin Sharma v. State and others, the court has restored to alternative sentencing in the form of community service to an accused against whom allegations

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91 Ibid
93 Prof. (Dr.) M.K. Vyas “Alternative Sentencing: A Felt necessity of the 21st century Criminal Justice System” available at
94 (2013) 1 SCC 218
95 Cri.MC.2906/2010
under section 154 IPC (assault or criminal force to woman with intent to outrage her modesty) were leveled. In *Ashgar Ali Khan and others v. state*, the Hon’ble court directed the accused who siphoned of funds of his father, in addition to render social services in the old age home run by NGO ‘Help Age India’ for one year considering the overall circumstances.

Metropolitan Magistrate Tarun Kumar Sehrawat ordered a legislator named in a case of trespassing to organise a cleanliness drive and also spread awareness about family planning and AIDS. The Metropolitan Magistrate Gautam Mannan ordered a boy, accused of causing a road accident by jumping traffic light and driving without a licence, to attend a traffic school for 10 days. The Delhi High Court asked the two businessmen to perform community service with a voluntary organisation for a year as punishment for firing three shots at their friend for fun. Justice Sanjay Kishan Kaul, while quashing a first information report (FIR) against the two businessmen, asked Delhi Police not to return their gun for a year.

In a recent case, a Delhi Court directed the Delhi Traffic Police to provide road safety training to a 26-year-old engineer who had been booked for drunken driving. Pronouncing the verdict, the court stated that as an alternative to the custodial sentence, the man should undergo four hours of training each day for at least 15 days and help the traffic police sensitise other offenders against traffic violations.

Similarly, the driver of a BMW car and his friends were taken to court for beating up a rickshaw puller. The district court released them on probation but imposed a condition that they would help the rickshaw puller’s children in their education, apart from a compensation of Rs 10,000 to the victim. Some legal experts lauded the good intention of the judge, while others considered the fine “too little” and the punishment “too lenient”.

For sexually harassing a woman in a bus the magistrate ordered the accused to write a 25-page essay on eve-teasing and harassment. He was further asked to make

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96 WP(cri) No.911/2010
97 Available at http://twocircles.net/2008mar11/court_orders_two_businessmen_do_community_service.html#.WDewD9V97IU
98 Ibid
99 Ibid
100 Ibid
500 copies of the essay and distribute them outside schools and colleges. Similarly, a magistrate sentenced a group of lawless bikers to do community service at a gurudwara in Delhi. In yet another incidence a youngster involved in a case of road rage was asked by the lower court to manage traffic at a busy intersection.

In another instance the Delhi High Court directed a perfume manufacturer to supply room freshener to a school for blind children in order to get an FIR filed against him quashed. He was charged with molesting his former woman employee. The court passed the order after the businessman tendered a written apology. It also imposed a fine of Rs 2 lakh on him and directed him to deposit the amount in favour of the Delhi High Court Lawyers Library and the Delhi Police Welfare Society.

In July 2013, two men sentenced to five and 10 days imprisonment for drunken driving were given a chance by Delhi court to reform themselves by doing community service at the government hospitals St. Stephens’s hospital and Hegdewar hospital.

In April 2012, six people, accused of causing injury to their neighbor over financial matters were asked by the Delhi HC to carry out community service at a temple for two weeks.

A magistrate, in an order passed in October, had convicted Kishan Solanki for causing hurt to his neighbour in a 13-year-old case. Solanki, who ran a fair price shop in Rajouri Garden area, was released for one year on probation for good conduct after he furnished the requisite bonds. The magistrate also directed him to serve at DDU Hospital for two days every week for two hours during the period of probation. The hospital’s medical superintendent could utilise the probationers services to look after admitted patients and to keep the general wards clean. However the court recently set aside a judgment ordering a convict to perform community services at DDU Hospital, holding that there was no legal provision sanctioning such punishments.

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102 Ibid
103 Ibid
104 Ibid
105 Ibid
106 Ibid
107 Ibid
108 Ibid


109 Ibid
1010 Ibid
In Sanjeev Nanda,\textsuperscript{109} the court ordered that the accused to pay an amount of Rs 50 lakhs to the Union of India within six months, which will be utilised for providing compensation to the victims of motor accidents and further ordered the accused to do community service for two years. On default, he had to undergo simple imprisonment for two years.

In Nidhi Kaim v. State of Madhya Pradesh & Ors Etc.\textsuperscript{110} the Supreme Court going out of the box in mass copying case. In this case students were involved in malpractices in their entrance exams on the basis of which they joined study of medicine. Some even completed their studies whereas some were prosecuting their studies and were nearly finishing it. When prosecuted for the mass copying, Justice Chelameswar held

“I would prefer to permit the appellants to complete their study of medicine and become trained doctors to serve the nation. But at the same time there is a compelling national interest that dishonest people cannot be made to believe that “time heals everything” and the society would condone every misdeed if only they can manage to get away with their wrong doing for a considerably long period… Society must receive some compensation from the wrongdoers. Compensation need not be monetary and in the instant case it should not be. In my view, it would serve the larger public interests, by making the appellants serve the nation for a period of five years as and when they become qualified doctors… without any regular salary and attendant benefits of service under the State, nor any claim for absorption into the service of the State subject of course to the payment of some allowance (either in cash or kind) for their survival. I would prefer them serving the Indian Armed Forces subject to such conditions and disciplines to which the armed forces normally subject their regular medical corps. I would prefer that the appellants be handed over the certificates of their medical degrees only after they complete the abovementioned five years. The abovementioned exercise would require the ascertainment of the views of Ministry of Defence, Government of India, and passing of further appropriate orders by this Court thereafter. In view of the disagreement of views in this regard, I am not proposing such an exercise.”

In the case of sexual harassment by and of teenagers, the Bombay High Court in Bhavesh Keshav Mhatre and ors v. State of Maharashtra and ors\textsuperscript{111} ordered that

“The petitioners are in the age group of 19 to 22 years. The respondent[s] have stated that considering the young ages of the petitioners, they should not be dragged to the criminal Court. … The petitioners have shown remorse by depositing a sum of Rs.50,000/each. The petitioners have offered to do social service by undertaking to do the cleaning work in Ward No.1, Kulgaon, Badlapur on every Sunday in the month of November 2016. … Considering the peculiar facts it cannot be said the offence alleged is against the society at large. Considering the respective ages of the petitioners and the remorse

\textsuperscript{109} State v. Sanjeev Nanda (2012) 8 SCC 450
\textsuperscript{110} (2016), https://indiankanoon.org/doc/152246364/
\textsuperscript{111} In The High Court of Judicature at Bombay Criminal Appellate Jurisdiction Writ Petition No.3534 of 2016 Decided On October 25, 2016, https://indiankanoon.org/doc/24753548/
shown by them... we accept the undertakings of the petitioners. The Badlapur Municipal Council shall assign appropriate work of cleaning to the petitioners for a period of two hours on every Sunday in the month of November 2016”

7.8.2 Towards codified Community Service

Although community service is now being ordered by some of the courts as a condition for release on probation of good conduct, there are instances of such orders being set aside by the appellate courts on the ground that there was no legislative sanction for it.112

Of late attempts are, however, being made in India to codify community service as a part of penal sanctions. Andhra Pradesh has become the first state in India to introduce community service as a punishment for those serving up to six months in jails for minor offences.113 Gujarat amended the Bombay Prohibition Act, 1949 in 2009 to include community service as a punishment.114

The proposed Motor Vehicles Amendment Bill 2016 intends to incorporate the Community Service as punishment for causing motor accidents. the “Community Service” is defined as unpaid work as a punishment for an offence committed under this Act.115

The Draft Model Rules, 2016 under The Juvenile Justice (Care And Protection Of Children) Act, 2015 has tried to define the scope of community service in the context of child in conflict with law as under

(v) ‘community service” means service rendered to the society by children in conflict with law in lieu of or in addition to other judicial remedies and penalties, which is not dangerous, degrading and dehumanizing and with due protection of the identity of the child, Guidelines for community service may be notified by the State Government from time to time, Community service may include:

a) cleaning a park;

b) serving the elderly;

c) helping out at a local hospital or nursing home; and

114 Supra note 112
(d) serving disabled children.
(e) serving as traffic wardens or volunteers

Law commissions and Malimath Committee have also recommended for introduction of community service as alternative sanction for certain offences. Law commissions and Malimath Committee have also recommended for introduction of community service as alternative sanction for certain offences.\textsuperscript{[116]} IPC was also proposed to be changed to introduce community service under IPC.\textsuperscript{[117]} However, law commission of India once rejected this idea as impracticable to work.\textsuperscript{[118]} There is a sea change in present times and the perceptions of law commission of India at that point of time. Therefore, community service needs to be generalized for all conceivable offences in the line it is provided to the child in conflict with law.

7.9 Accidental Offenders And Sentencing Policy: Benefits Of Probation Act

7.9.1 Sentencing Policy for Accused below 21 Years

Offenders who are not covered under the JJ Act, 2015 and who are below 21 years are covered by the Probation of Offenders Act, 1958. The law does not assume absolute criminality when the offences are committed by the person below 21 years. If the purpose of the punishment is reformation and desistence from criminality, incarceration at the young age of 21 years is detrimental to reformatory purposes. Therefore section 6 of the Act, lays down an injunction not to impose a sentence of

\textsuperscript{[116]} See Committee on Reforms of Criminal Justice System, 2003, p178 where the Committee “suggests that community service may be prescribed as an alternative to default sentence.”

\textsuperscript{[117]} Clause 27 of the Bill provides for insertion of a new section 74A exclusively to deal with punishment of community service and is in the following terms:

"74A. (1) where any person not under eighteen years of age is convicted of an offence punishable with imprisonment of either description for a term not exceeding three years or with fine, or with both, the court may, instead of punishing him as aforesaid or dealing with him in any other manner make an order (hereinafter in this section referred to as the Community Service Order) requiring him to perform, without any remuneration, whether in cash or in kind, such work and for such number of hours and subject to such terms and conditions, as may be specified in the said Order:
Provided that the number of hours for which any such person shall be required to perform work under a Community Service Order shall be not less than forty hours and not more than one thousand hours:
Provided further that the court shall not make a Community Service Order in respect of any such person, unless--
(a) such person consents in writing to perform the work required of him under such Order:
(b) the court is satisfied that such person is a suitable person to perform the work required of him and that for the purpose of enabling him to do such and such work under proper supervision, arrangements have been made by the State Government or any local authority in the area in which such person is required to perform such work.
(2) Every Community Service Order made under sub-section (1) shall specify the nature of the work to be performed by such person which shall be of general benefit to the community….”

\textsuperscript{[118]} See Law Commission of India, 42\textsuperscript{nd} Report on “Indian Penal Code” 1971
imprisonment on a person who is under twenty-one years of age and is found guilty of having committed an offence punishable with imprisonment other than that for life, unless for reasons to be recorded by it, it is satisfied that it would not be desirable to deal with him under Section 3 or Section 4 of the said Act.\textsuperscript{119} Section 6 reads

“6. Restrictions on imprisonment of offenders under twenty-one years of age.—
(1) When any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under section 3 or section 4, and if the court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so.
(2) For the purpose of satisfying itself whether it would not be desirable to deal under section 3 or section 4 with an offender referred to in sub-section (1) the court shall call for a report from the probation officer and consider the report, if any, and any other information available to it relating to the character and physical and mental condition of the offender.”

The object of section 6 is to ensure that juvenile offenders are not sent to jail for offences which are not so serious as to warrant imprisonment for life, with a view to prevent them from contamination due to contact with hardened criminals of the jail.\textsuperscript{120} The provision of Section 6 of the Act is mandatory. If the case is one in which the provisions of the Probation of Offenders Act can be invoked and it is shown that the age of the accused is below 21 years, the Court has no other option but to apply the provisions of Section 6 of the Probation of Offenders Act. The Court, can refuse to invoke the provisions of Section 4 only if it is satisfied that having regard to the circumstances of the case including the nature of the offence and character of the offender it would not be desirable to deal with under Section 3 or 4 of the Probation of Offenders Act.

Section 6 contemplates that an offence punishable with imprisonment, not being imprisonment for life, must invariably be allowed to be released on admonition or probation unless there are reasons to be recorded having regard to the nature of offence and the character of offender.\textsuperscript{121} In case of an offender under the age of 21 years on the date of commission of the offence, the Court is expected ordinarily to give benefit of Section 6 of the Act. While deciding whether the offender should be granted the benefit, it is necessary for the Court to keep in view three relevant aspects

\textsuperscript{119} See Mohamad Aziz Mohamed Nasir v. State of Maharashtra 1976 AIR 730, 1976 SCR (3) 663
\textsuperscript{120} Daulat Ram v. State of Haryana, AIR 1972 SC 2434
\textsuperscript{121} Mafaldina Fernandes v. State AIR 1968 Goa 103
viz., nature of the offence, character of the offender and the attendant and surrounding circumstances as revealed in the report of the Probation Officer.

### 7.9.2 Sentencing policy for first time petty offences

The object underlying the infliction of punishment is to make the offender suffer either in person or in purse or in both so that he may not follow errant way in future and at the same time to make other understand that they will be dealt with similarly if they commit any offence against the society. This being recognized not to meet the case of a person having the first lapse in his life from the path of rectitude - Section 3 is introduced. 122 u/s 3 a person who has first lapse in life need not be sentenced to punishment. Section 3 reads

"3. Power of court to release certain offenders after admonition.—When any person is found guilty of having committed an offence punishable under section 379 or section 380 or section 381 or section 404 or section 420 of the Indian Penal Code, (45 of 1860) or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code, or any other law, and no previous conviction is proved against him and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence, and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4 release him after due admonition. Explanation.—For the purposes of this section, previous conviction against a person shall include any previous order made against him under this section or section"

This section is intended to be used to prevent young persons from committing to jail where they may turn hardened with association with hardened criminals. Term imprisonment often has opposite effect to that which was expected. Given a chance persons may make good citizens. The offenses contemplated by this section are certain petty offences, with offenders having no previous conviction. 123 The provisions relating to admonition cover all offences under IPC as well as other laws punishable with not more than two years imprisonment or with fine. 124

The exercise of this discretion does need a considerable sense of responsibility in the magistrate. Should he make a bad use of this discretion, far from reforming an offender, he will be a cause of corruption of many. 125

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123 Ibid p 57
124 Ibid p 58
125 Ibid p 57
7.9.3 Sentencing policy and benefits of probation in deserving cases

Section 4 of the Act empowers the Court to release an offender found guilty of having committed an offence not punishable with death or imprisonment for life, on probation of good conduct instead of sentencing him to any punishment. It reads

“4. Power of court to release certain offenders on probation of good conduct.—
(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, 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: Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.
(2) Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.
(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order, impose such conditions as it deems necessary for the due supervision of the offender.
(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.
(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned.”

In order to apply the provisions of Section 4 (1), the following requisite conditions must be satisfied: (1) the offence found to have been committed by the offender must not be one punishable with death or imprisonment for life. In other words, only in cases where a person is found guilty of an offence punishable with any sentence other than death or imprisonment for life, the Court-can apply these
provisions. The Court must opine that it is expedient to release him on probation of good conduct instead of sentencing him to any punishment. (3) The offender or his surety must have a fixed place of abode or regular occupation in a place situate within the jurisdiction of the Court. The factors which are material and relevant for the Court to form its opinion about the expediency of releasing the offender on probation of good conduct are

(i) the circumstances of the case,  
(ii) the nature of the offence and  
(iii) the character of the offender.

The Court shall consider the report of the concerned Probation Officer before passing an order. If the aforesaid requisite conditions are satisfied the Court may

(i) direct the release of the offender on his executing a personal bond, with or without sureties

(ii) take undertaking from the offender to appear and receive sentence when called upon during such period not exceeding three years and in the meantime to keep the peace and be of good behaviour.

It is Manifest from plain reading of sub-section (1) of section 4 of the Act that it makes no distinction between persons of the age of more than 21 years and those of the age of less than 21 years. On the contrary, the said sub-section is applicable to persons of all ages subject to certain conditions which have been specified therein. Once those conditions are fulfilled and the, other formalities which are mentioned in section 4 are complied with, power is given to the court to release the accused on probation of good conduct.

The release of probationer on bond with or without sureties on probation of good conduct is, in nature, a preventive measure which seeks to save the offender.

126 State of Gujarat v. A. Chauhan AIR 1983 SC 359
127 For exposition of law on this point see Dalbir Singh v. State of Haryana AIR 2000 SC 1677
128 Section 7 Report of probation officer to be confidential.
   “The report of a probation officer referred to in sub-section (2) of section 4 or sub-section (2) of section 6 shall be treated as confidential:
   Provided that the court may, if it so thinks fit, communicate the substance thereof to the offender and may give him an opportunity of producing such evidence as may be relevant to the matter stated in the report.”
129 The Public Prosecutor v. Nalam Suryanarayana Murthy 1973 Cri.L.J 1238
130 Ishar Das v. State of Punjab 1972 AIR 1295
131 See section 5 of the Probation of Offenders Act. 1958
from the evil effects of institutional incarceration and affords him an opportunity of reformation within the community itself. It is a discretionary remedy rather than a mandatory one.\textsuperscript{132}

In the interest of offender and public, variations in conditions of probation can be made by the courts provided such application is made by the probation officer and due opportunity of being heard is given to the offender and sureties.\textsuperscript{133}

Where the offender has failed to observe any of the conditions of the bond, the court may issue a warrant for his arrest or may, if it thinks fit, issue a summons to him and his sureties, to attend before it and sentence him for the original offence or where the failure is for the first time impose upon him a penalty not exceeding fifty rupees.\textsuperscript{134}

Section 12 of the Act provides for Removal of disqualification attaching to conviction. It runs as:

Notwithstanding anything contained in any other law, a person found guilty of an offence and dealt with under the provisions of section 3 or section 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law: Provided that nothing in this section shall apply to a person who, after his release under section 4 is subsequently sentenced for the original offence.

The provision of section 4, however, should not be mistaken as undue leniency not should it be applied leniently in undeserving cases\textsuperscript{135} where the offender has committed a reprehensible offence of rape on his neighbour’s wife,\textsuperscript{136} gold smuggling\textsuperscript{137} guilty of abducting a teenage girl and forced her to sexual submission,\textsuperscript{138} nefarious trade affecting the morals of society particularly of the young.\textsuperscript{139}

\textbf{7.10 Sentencing Policy and Juvenile Justice: Restoration and Rehabilitation}

To what extent is the criminal to be punished? Crime in the abstract cannot be punished. Therefore, the answer must be - to the extent of the criminal’s responsibility. It is by this standard that we gauge the responsibility of children or the

\begin{enumerate}
\setcounter{enumi}{\textsuperscript{133}Dasappa v. State of Mysore AIR 1965 Mys 224}
\setcounter{enumi}{\textsuperscript{134}Ibid Section 9}
\setcounter{enumi}{\textsuperscript{135}Section 4 would not be extended to the abominable culprit who was found guilty of abducting a teenage girl and forced her to sexual submission with commercial motive. See Smt. Devki v. State of Haryana AIR 1979 SC 1948}
\setcounter{enumi}{\textsuperscript{136}Phul Singh v. State of Haryana AIR 1980 SC 249}
\setcounter{enumi}{\textsuperscript{137}State of Maharashtra v. Natverlal AIR 1980 SC 593}
\setcounter{enumi}{\textsuperscript{138}Smt. Devki v. State of Haryana AIR 1979 SC 1948}
\setcounter{enumi}{\textsuperscript{139}Uttam Singh v. The State (Delhi Administration) 1974 AIR 1230}
\end{enumerate}
Democracies worldwide have carved out a separate sentencing policy for the children to which India is no exception. Since from the 1986 when the first Juvenile Justice Act came on the statute book, new changes are being read into this jurisprudence till date. The Juvenile Justice jurisprudence was thoroughly revised in 2015 providing for a shift in the sentencing policy as under.

7.10.1 Background of JJ Act 2015

Increased ratio of juvenile crimes particularly heinous crimes have alarmed the nation and government. After the Delhi Gang rape episode, numbers of criminal reforms were initiated by virtue of which, comprehensive sentencing policy has been initiated. Apart from the Criminal Law Amendment Act, 2013, a bill was introduced to amend existing law bring comprehensive law in place of old law to address the perceived threat of juvenile crimes and overcome implementation hurdles that had occurred during implementation of old laws. Thus came the Juvenile Justice (Care and Protection of Children) Act, 2015. The 2015 Act has been labeled as misconceived steps in hurry taken contrary to international commitment.

The virus of new law has also been unsuccessfully challenged before the Supreme Court.

141 Cf Parliament of India Department related parliamentary standing committee on human resource development two hundred sixty fourth report The Juvenile Justice (Care and Protection of Children) Bill, 2014, p 16 where it observes that

“[a] lot of misinformation about the juvenile crimes was being spread through media which required relooking. Research has shown that adolescence was a specific stage of development where the brain is not fully developed and matured, therefore, the adolescents were more prone to reckless behaviour. A lot of children who end up offending were also the children in need of care and protection requiring extra attention. The whole philosophy of juvenile jurisprudence centred around the quality of restoration, rehabilitation and reform and not around incarceration into jails and throwing children with adults into a system where they would get further brutalized. About the NCRB data, the representative opined that juvenile crimes account for only 1.2 per cent and that this percentage had remained constant over 2012 and 2013. Even most cases of rape were either love or elopement cases where girl's parents subsequently charged the boy with rape”

142 See The long title of the Juvenile Justice (Care and Protection of Children) Act, 2015
143 For the development of juvenile delinquency law and controversies surrounding it in the context of violation of international norms, see Ved Kumar, “The Juvenile Justice Act 2015- Critical Understanding”, Journal of Indian Law Institute, Vol. 58 No.1,2016, Pp 83 to 103
144 See “Plea filed in Supreme Court against new juvenile law” The Indian Express, January 31, 2016.
Even prior to the enactment of this law, the erstwhile Act was unsuccessfully challenged as unconstitutional on the basis of unreasonable classification in Salil Bali v. Union of India (2013) 7 SCC 705 and Subramanian Swami v. Raju Through Juvenile Justice Board (2013) 10 SCC 465
Though a new classification of juveniles between 16 and 18 has been created for heinous crimes, the basic fabric of rehabilitation and reintegration principles based upon which the jurisprudence of juvenile justice has been developed worldwide has been kept intact with necessary facelift in this new law.

7.10.2 Juvenility- reclassification

The criminal liability in India is based on maturity to understand the consequences of crimes. Children below 7 years are considered to be *doli incapex* and no question of criminal liability therefore arises. Children above seven years but below 12 years are prima facie believed to be innocent and therefore their criminal liability is subject to strict proof. However, children above 12 years may be imputed with full criminal liability under the criminal laws. However, in recent years for the purpose of care, protection, welfare, training and education, and rehabilitation of neglected and delinquent children, social legislation such as JJ Act, 1986 as recast in 2015 are enacted to provide different mechanism to deal with delinquent children.

Juvenile Justice (Care and Protection of Children) Act, 2015, defines “juvenile” as “a child below the age of eighteen years”, child as “a person who has not completed eighteen years of age” and child in conflict with law “means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence”

Thus, eighteen years has been retained as benchmark of juvenile jurisprudence in line with international norms and repealed enactment. The new catch however is the new entrant in the cap of sixteen to eighteen years. In other words, though eighteen years is the benchmark for differential treatment, if the child

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145 See section 82 of Indian Penal Code, 1860
146 Ibid section 83
148 (35) “juvenile” means a child below the age of eighteen years.
149 (12) “child” means a person who has not completed eighteen years of age.
150 Section 2 (13) Juvenile Justice (Care and Protection of Children) Act, 2015
152 See Juvenile Justice (Care and Protection of Children) Act, 2000. *See also* Juvenile Justice Act, 1986
is below eighteen years but above sixteen years and committed heinous crime, such child may be treated as adult on the recommendations of the child board. All punishments except death and life imprisonment without parole may be imposed on such child. Though simultaneous rehabilitative measures may also be invoked, the substantive sentence needs to be served by such child in cases of heinous offences. Thus for practical purposes juveniles are of two types juvenile below eighteen years who has committed offences other than heinous offences and juveniles below eighteen but above sixteen who has committed heinous offences. Section 5 (1) provides that a person who was juvenile at the time of commission of offence shall continue to be treated as child even if he turns adult during the process of inquiry. Same treatment is to be followed even in respect of person, who has completed eighteen years of age, and is apprehended for committing an offence when he was below the age of eighteen years.

153 Cf Parliament of India Department related parliamentary standing committee on human resource development two hundred sixty fourth report The Juvenile Justice (Care and Protection of Children) Bill, 2014, p 30 where it observes that “3.21 From the above, the Committee can only conclude that the existing juvenile system [JJ Act 2000] is not only reformative and rehabilitative in nature but also recognises the fact that 16-18 years is an extremely sensitive and critical age requiring greater protection. Hence, there is no need to subject them to different or adult judicial system as it will go against Articles 14 and 15(3) of the Constitution. 3.23 Clause 21 of the Bill, which allows the Children’s Court to transfer a child in conflict with law on attaining 21 years of age from a place of safety to jail is also violative of not only Article 20(1) but also of established principle of juvenile justice which prohibits co-mingling of a child offender with hardened criminals. It was forcefully contended by the stakeholders that why should treatment of a child become harsher on crossing a particular age. When our system does not allow a child below 18 to drive, vote, enter into contracts, engage a lawyer, sue and take legal action, marry or own property why that child be allowed to go to adult criminal justice system. The Committee also notes that introducing children into the criminal justice system amounts to violation of Article 21 (Protection of life and personal liberty) as the procedures contained therein are not commensurate with the requirements of children. The juvenile justice system has child appropriate procedures keeping in mind the best interest of the child. 3.24 Furthermore, there were provisions in the Act of 2000 itself i.e Section 16 to deal with children between 16-18 who have committed serious crime which were within the juvenile system and there was no need to push those children into adult criminal system, a move which could be described as retributive only.”

154 Section 5 provides that “where an inquiry has been initiated in respect of any child under this Act, and during the course of such inquiry, the child completes the age of eighteen years, then, notwithstanding anything contained in this Act or in any other law for the time being in force, the inquiry may be continued by the Board and orders may be passed in respect of such person as if such person had continued to be a child.”

155 Section 6 (1) provides that “any person, who has completed eighteen years of age, and is apprehended for committing an offence when he was below the age of eighteen years, then, such person shall, subject to the provisions of this section, be treated as a child during the process of inquiry.”
7.10.3 Classification of offences- A new entrant

Under the new law, three offences are labeled to base the liability of the juveniles, namely: petty offences, serious offences and heinous offences. Section 2 (45) defines “petty offences” to include the offences for which the maximum punishment under the Indian Penal Code or any other law for the time being in force is *imprisonment up to three years*.

Section 2 (54) defines “serious offences” to include the offences for which the punishment under the Indian Penal Code or any other law for the time being in force, is *imprisonment between three to seven years*;

Section 2 (33) defines “heinous offences” as the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is *imprisonment for seven years or more*.

7.10.4 Principles governing sentencing

Section 3 of the new Act mandates that the Central Government, the State Governments, the Board, and other agencies, as the case may be, while implementing the provisions of this Act shall be guided by the following fundamental principles, namely: 

(i) Principle of presumption of innocence

(ii) Principle of dignity and worth

(iii) Principle of participation

(iv) Principle of best interest

(v) Principle of family responsibility

(vi) Principle of safety

(vii) Positive measures

(viii) Principle of non-stigmatising semantics

(ix) Principle of non-waiver of rights

(x) Principle of equality and non-discrimination

(xi) Principle of right to privacy and

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156 Any child shall be presumed to be an innocent of any *mala fide* or criminal intent up to the age of eighteen years.

157 All human beings shall be treated with equal dignity and rights.

158 Every child shall have a right to be heard and to participate in all processes and decisions affecting his interest and the child’s views shall be taken into consideration with due regard to the age and maturity of the child.

159 All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.

160 The primary responsibility of care, nurture and protection of the child shall be that of the biological family or adoptive or foster parents, as the case may be.

161 All measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system, and thereafter.

162 All resources are to be mobilised including those of family and community, for promoting the well-being, facilitating development of identity and providing an inclusive and enabling environment, to reduce vulnerabilities of children and the need for intervention under this Act.

163 Adversarial or accusatory words are not to be used in the processes pertaining to a child.

164 No waiver of any of the right of the child is permissible or valid, whether sought by the child or person acting on behalf of the child, or a Board or a Committee and any non-exercise of a fundamental right shall not amount to waiver.

165 There shall be no discrimination against a child on any grounds including sex, caste, ethnicity, place of birth, disability and equality of access, opportunity and treatment shall be provided to every child.
confidentiality166 (xii) Principle of institutionalisation as a measure of last resort167 (xiii) Principle of repatriation and restoration168 (xiv) Principle of fresh start169 (xv) Principle of diversion170 and (xvi) Principles of natural justice171

The entire focus of all these stated principles is to create child friendly172 environment in the trial which shall be in the best interest of the child.173

7.10.5 Juvenile Justice Board- a crucial forum

The entire responsibility of juvenile justice falls on the Juvenile Justice Board (JJB). Right from the Body before which apprehended child is to be produced to the role of what sentences to be passed is decided by this Board. Child friendly environment at the time of trial or enquire shall be ensured by this Board. Section 14 clearly spells out the role of JJB as under:

_Inquiry by Board regarding child in conflict with law_

“14. (1) Where a child alleged to be in conflict with law is produced before Board, the Board shall hold an inquiry in accordance with the provisions of this Act and may pass such orders in relation to such child as it deems fit under sections 17 and 18 of this Act.
(2) The inquiry under this section shall be completed within a period of four months from the date of first production of the child before the Board, unless the period is extended, for a maximum period of two more months by the Board, having regard to the circumstances of the case and after recording the reasons in writing for such extension.
(3) A preliminary assessment in case of heinous offences under section 15 shall be disposed of by the Board within a period of three months from the date of first production of the child before the Board.
(4) If inquiry by the Board under sub-section (2) for petty offences remains inconclusive even after the extended period, the proceedings shall stand terminated:

Provided that for serious or heinous offences, in case the Board requires further extension of time for completion of inquiry, the same shall be granted by the Chief Judicial Magistrate or, as the case may be, the Chief

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166 Every child shall have a right to protection of his privacy and confidentiality, by all means and throughout the judicial process.
167 A child shall be placed in institutional care as a step of last resort after making a reasonable inquiry.
168 Every child in the juvenile justice system shall have the right to be re-united with his family at the earliest and to be restored to the same socio-economic and cultural status that he was in, before coming under the purview of this Act, unless such restoration and repatriation is not in his best interest.
169 All past records of any child under the Juvenile Justice system should be erased except in special circumstances.
170 Measures for dealing with children in conflict with law without resorting to judicial proceedings shall be promoted unless it is in the best interest of the child or the society as a whole.
171 Basic procedural standards of fairness shall be adhered to, including the right to a fair hearing, rule against bias and the right to review, by all persons or bodies, acting in a judicial capacity under this Act.
172 Section 2 (15) “child friendly” means any behaviour, conduct, practice, process, attitude, environment or treatment that is humane, considerate and in the best interest of the child.
173 Section 2 (9) “best interest of child” means the basis for any decision taken regarding the child, to ensure fulfillment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development.
(5) The Board shall take the following steps to ensure fair and speedy inquiry, namely:

(a) at the time of initiating the inquiry, the Board shall satisfy itself that the child in conflict with law has not been subjected to any ill-treatment by the police or by any other person, including a lawyer or probation officer and take corrective steps in case of such ill-treatment;

(b) in all cases under the Act, the proceedings shall be conducted in simple manner as possible and care shall be taken to ensure that the child, against whom the proceedings have been instituted, is given child-friendly atmosphere during the proceedings;

(c) every child brought before the Board shall be given the opportunity of being heard and participate in the inquiry;

(d) cases of petty offences, shall be disposed of by the Board through summary proceedings, as per the procedure prescribed under the Code of Criminal Procedure, 1973;

(e) inquiry of serious offences shall be disposed of by the Board, by following the procedure, for trial in summons cases under the Code of Criminal Procedure, 1973;

(f) inquiry of heinous offences,—

(i) for child below the age of sixteen years as on the date of commission of an offence shall be disposed of by the Board under clause (e);

(ii) for child above the age of sixteen years as on the date of commission of an offence shall be dealt with in the manner prescribed under section 15.”

7.10.6 Trial of petty offences and serious offences

Section 2 (45) defines “petty offences” to include the offences for which the maximum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment up to three years; Section 14 (d) requires that cases of petty offences, shall be disposed of by the Board through summary proceedings, as per the procedure prescribed under the Code of Criminal Procedure, 1973;

Section (54) defines “serious offences” to include the offences for which the punishment under the Indian Penal Code or any other law for the time being in force, is imprisonment between three to seven years. Section 14 (e) mandates that the inquiry of serious offences shall be disposed of by the Board, by following the procedure, for trial in summons cases under the Code of Criminal Procedure, 1973;

Section 14 (2) requires that “the inquiry under this section shall be completed within a period of four months from the date of first production of the child before the Board, unless the period is extended, for a maximum period of two more months by the Board, having regard to the circumstances of the case and after recording the reasons in writing for such extension.” Section 14 (4) supplements that “[i]f inquiry
by the Board under sub-section (2) for petty offences remains inconclusive even after the extended period, *the proceedings shall stand terminated*”

7.10.7 Sentencing petty and serious offences

Though different trials are contemplated for ‘petty’ and ‘serious’ offences no separate sentencing policy is provided. Offenders of petty offence, or a serious offence, or a child below the age of sixteen years who has committed a heinous offence are treated in single stroke by section 18 which essential crafts the need based punishments mostly in the form of admonition, group counseling, probations of different degrees and exceptionally with institutional detentions. Section 18 reads:

“18. (1) Where a Board is satisfied on inquiry that a child irrespective of age has committed a petty offence, or a serious offence, or a child below the age of sixteen years has committed a heinous offence, then, notwithstanding anything contrary contained in any other law for the time being in force, and based on the nature of offence, specific need for supervision or intervention, circumstances as brought out in the social investigation report and past conduct of the child, the Board may, if it so thinks fit,—

(a) allow the child to go home after advice or admonition by following appropriate inquiry and counselling to such child and to his parents or the guardian;

(b) direct the child to participate in group counselling and similar activities;

(c) order the child to perform community service under the supervision of an organisation or institution, or a specified person, persons or group of persons identified by the Board;

(d) order the child or parents or the guardian of the child to pay fine:

Provided that, in case the child is working, it may be ensured that the provisions of any labour law for the time being in force are not violated;

(e) direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or fit person, on such parent, guardian or fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and child’s well-being for any period not exceeding three years;

(f) direct the child to be released on probation of good conduct and placed under the care and supervision of any fit facility for ensuring the good behaviour and child’s well-being for any period not exceeding three years;

(g) direct the child to be sent to a special home,174 for such period, not exceeding three years, as it thinks fit, for providing reformatory services including education, skill development, counselling, behaviour modification therapy, and psychiatric support during the period of stay in the special home:

Provided that if the conduct and behaviour of the child has been such that, it would not be in the child’s interest, or in the interest of other children housed in a special home, the Board may send such child to

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174 Section 2 (56) “special home” means an institution established by a State Government or by a voluntary or non-governmental organisation, registered under section 48, for housing and providing rehabilitative services to children in conflict with law, who are found, through inquiry, to have committed an offence and are sent to such institution by an order of the Board.
the place of safety.\footnote{Section 2 (46) provides “place of safety” as “any place or institution, not being a police lockup or jail, established separately or attached to an observation home or a special home, as the case may be, the person in-charge of which is willing to receive and take care of the children alleged or found to be in conflict with law, by an order of the Board or the Children’s Court, both during inquiry and ongoing rehabilitation after having been found guilty for a period and purpose as specified in the order.”}

(2) If an order is passed under clauses (a) to (g) of sub-section (1), the Board may, in addition pass orders to—

(i) attend school; or
(ii) attend a vocational training centre; or
(iii) attend a therapeutic centre; or
(iv) prohibit the child from visiting, frequenting or appearing at a specified place; or
(v) undergo a de-addiction programme.

(3) Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children’s Court having jurisdiction to try such offences.”

Section 24 provides that shall not suffer disqualification, if any, attached to a conviction of an offence under such law except for heinous crimes. It also imposes duty on the board to direct the registry to destroy the relevant records once the purpose is served. Section 24 reads

“24. (1) Notwithstanding anything contained in any other law for the time being in force, a child who has committed an offence and has been dealt with under the provisions of this Act shall not suffer disqualification, if any, attached to a conviction of an offence under such law:

Provided that in case of a child who has completed or is above the age of sixteen years and is found to be in conflict with law by the Children’s Court under clause (i) of sub-section (1) of section 19, the provisions of sub-section (1) shall not apply.

(2) The Board shall make an order directing the Police, or by the Children’s court to its own registry that the relevant records of such conviction shall be destroyed after the expiry of the period of appeal or, as the case may be, a reasonable period as may be prescribed:

Provided that in case of a heinous offence where the child is found to be in conflict with law under clause (i) of sub-section (1) of section 19, the relevant records of conviction of such child shall be retained by the Children’s Court.”

7.10.8 Sentencing heinous crimes

Section 2 (33) defines “heinous offences” as the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years or more. To deal with heinous offence, a new and altogether different procedure is contemplated u/s 15 as under

“15. (1) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of
the offence and the circumstances in which he allegedly committed the
offence, and may pass an order in accordance with the provisions of sub
section (3) of section 18:

Provided that for such an assessment, the Board may take the
assistance of experienced psychologists or psycho-social workers or other
experts.

Explanation.—For the purposes of this section, it is clarified that preliminary
assessment is not a trial, but is to assess the capacity of such child to commit
and understand the consequences of the alleged offence.

(2) Where the Board is satisfied on preliminary assessment that the matter
should be disposed of by the Board, then the Board shall follow the
procedure, as far as may be, for trial in summons case under the Code of
Criminal Procedure, 1973:

Provided that the order of the Board to dispose of the matter shall be
appealable under sub-section (2) of section 101:
Provided further that the assessment under this section shall be completed
within the period specified in section 14.

Section 17 (3) provides that “[w]here the Board after preliminary assess-
ment under section 15 pass an order that there is a need for trial of the said child as an adult,
then the Board may order transfer of the trial of the case to the Children’s Court
having jurisdiction to try such offences.” Section 19 provides for the detailed powers
of and the procedure to be followed by the Children’s Court. Section 19 runs as:

Powers of Children’s Court

“19. (1) After the receipt of preliminary assessment from the Board under
section 15, the Children’s Court may decide that—

(i) there is a need for trial of the child as an adult as per the
provisions of the Code of Criminal Procedure, 1973 and pass
appropriate orders after trial subject to the provisions of this section
and section 21, considering the special needs of the child, the tenets
of fair trial and maintaining a child friendly atmosphere;
(ii) there is no need for trial of the child as an adult and may conduct
an inquiry as a Board and pass appropriate orders in accordance with
the provisions of section 18.

(2) The Children’s Court shall ensure that the final order, with regard to a
child in conflict with law, shall include an individual care plan for the
rehabilitation of child, including follow up by the probation officer or the
District Child Protection Unit or a social worker.

(3) The Children’s Court shall ensure that the child who is found to be in
conflict with law is sent to a place of safety till he attains the age of twenty-
one years and thereafter, the person shall be transferred to a jail:

Provided that the reformative services including educational services,
skill development, alternative therapy such as counselling, behaviour
modification therapy, and psychiatric support shall be provided to the child
during the period of his stay in the place of safety.

(4) The Children’s Court shall ensure that there is a periodic follow up report
every year by the probation officer or the District Child Protection Unit or a
social worker, as required, to evaluate the progress of the child in the place of
safety and to ensure that there is no ill-treatment to the child in any form.

(5) The reports under sub-section (4) shall be forwarded to the Children’s
Court for record and follow up, as may be required.”
The eventuality of Child attaining twenty-one years of age but yet to complete prescribed term of stay in place of safety is taken care of by section 20 which runs as under:

“20. (1) When the child in conflict with the law attains the age of twenty-one years and is yet to complete the term of stay, the Children’s Court shall provide for a follow up by the probation officer or the District Child Protection Unit or a social worker or by itself, as required, to evaluate if such child has undergone reformative changes and if the child can be a contributing member of the society and for this purpose the progress records of the child under sub-section (4) of section 19, along with evaluation of relevant experts are to be taken into consideration.

(2) After the completion of the procedure specified under sub-section (1), the Children’s Court may—

(i) decide to release the child on such conditions as it deems fit which includes appointment of a monitoring authority for the remainder of the prescribed term of stay;

(ii) decide that the child shall complete the remainder of his term in a jail:

Provided that each State Government shall maintain a list of monitoring authorities and monitoring procedures as may be prescribed.”

7.10.9 Special protection for child in conflict with law

Following special protections have been provided to child in conflict with law.

1. No child in conflict with law shall be sentenced to death or for life imprisonment without the possibility of release.\(^\text{176}\)

2. No proceeding shall be instituted and no order shall be passed against any child under Chapter VIII of the said Code of criminal procedure, 1973\(^\text{177}\)

3. There shall be no joint proceedings of a child alleged to be in conflict with law, with a person who is not a child.\(^\text{178}\)

\(^{176}\) Section 21 reads

“No child in conflict with law shall be sentenced to death or for life imprisonment without the possibility of release, for any such offence, either under the provisions of this Act or under the provisions of the Indian Penal Code or any other law for the time being in force.”

\(^{177}\) Section 22 reads

“Notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1973, or any preventive detention law for the time being in force, no proceeding shall be instituted and no order shall be passed against any child under Chapter VIII of the said Code.”

\(^{178}\) Section 23 reads

“(1) Notwithstanding anything contained in section 223 of the Code of Criminal Procedure, 1973 or in any other law for the time being in force, there shall be no joint proceedings of a child alleged to be in conflict with law, with a person who is not a child.

(2) If during the inquiry by the Board or by the Children’s Court, the person alleged to be in conflict with law is found that he is not a child, such person shall not be tried along with a child.”
4. The child shall not suffer disqualification, if any, attached to a conviction of an offence under such law unless the child is above the age of sixteen years and is convicted for heinous crime with jail term. The relevant records of such conviction shall be destroyed after the expiry of the period of appeal or, as the case may be, a reasonable period of time.\textsuperscript{179}

7.10.10 Rehabilitation and Social Re-Integration

The long title of Act speaks in no uncertain words the purpose of the law as

“[a]n Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, herein under and for matters connected therewith or incidental thereto.”

Consistent with long title section 39 provides for process of rehabilitation and social integration of children as under

“39. The process of rehabilitation and social integration of children under this Act shall be undertaken, based on the individual care plan of the child, preferably through family based care such as by restoration to family or guardian with or without supervision or sponsorship, or adoption or foster care:

Provided that all efforts shall be made to keep siblings placed in institutional or non institutional care, together, unless it is in their best interest not to be kept together.

(2) For children in conflict with law the process of rehabilitation and social integration shall be undertaken in the observation homes, if the child is not released on bail or in special homes\textsuperscript{180} or place of safety\textsuperscript{181} or fit facility or with a

\textsuperscript{179} Section 24 reads

“(1) Notwithstanding anything contained in any other law for the time being in force, a child who has committed an offence and has been dealt with under the provisions of this Act shall not suffer disqualification, if any, attached to a conviction of an offence under such law:

Provided that in case of a child who has completed or is above the age of sixteen years and is found to be in conflict with law by the Children’s Court under clause (i) of sub-section (1) of section 19, the provisions of sub-section (1) shall not apply.

(2) The Board shall make an order directing the Police, or by the Children’s court to its own registry that the relevant records of such conviction shall be destroyed after the expiry of the period of appeal or, as the case may be, a reasonable period as may be prescribed:

Provided that in case of a heinous offence where the child is found to be in conflict with law under clause (i) of sub-section (1) of section 19, the relevant records of conviction of such child shall be retained by the Children’s Court.”

\textsuperscript{180} Section 48 reads

(1) The State Government may establish and maintain either by itself or through voluntary or non-governmental organisations, special homes, which shall be registered as such, in the manner as may be prescribed, in every district or a group of districts, as may be required for rehabilitation of those children in conflict with law who are found to have committed an offence and who are placed there by an order of the Juvenile Justice Board made under section 18.

\textsuperscript{181} Section 49 reads

(1) The State Government shall set up atleast one place of safety in a State registered under section 41, so as to place a person above the age of eighteen years or child in conflict with law, who is between the age of sixteen to eighteen years and is accused of or convicted for committing a heinous offence.
fit person, if placed there by the order of the Board.

(3) The children in need of care and protection who are not placed in families for any reason may be placed in an institution registered for such children under this Act or with a fit person or a fit facility, on a temporary or long-term basis, and the process of rehabilitation and social integration shall be undertaken wherever the child is so placed.

(4) The Children in need of care and protection who are leaving institutional care or children in conflict with law leaving special homes or place of safety on attaining eighteen years of age, may be provided financial support as specified in section 46, to help them to re-integrate into the mainstream of the society.”

7.10.11 Special role of probation officer

Probation officer plays a significant role in rehabilitation and re-integration of the delinquents. Right from the apprehension of a child to disposal of cases, various roles are contemplated by the Act for probation officer. Where a child alleged to be in conflict with law is apprehended, the probation officer must be informed for preparation and submission within two weeks to the Board, a social investigation report containing information regarding the antecedents and family background of the child and other material circumstances likely to be of assistance to the Board for making the inquiry. Where a child is released on bail, the probation officer or the Child Welfare Officer shall be informed by the Board.

Section 12 requires that the apprehended or detained child alleged to be in conflict with law shall be released on bail or placed under the supervision of a probation officer. Once the child is produced before the Board, probation officer

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182 Section 52 reads

(1) “The Board or the Committee shall, after due verification of credentials, recognize any person fit to temporarily receive a child for care, protection and treatment of such child for a specified period and in the manner as may be prescribed.”

183 Section 2 (28) “fit person” means any person, prepared to own the responsibility of a child, for a specific purpose, and such person is identified after inquiry made in this behalf and recognised as fit for the said purpose, by the Committee or, as the case may be, the Board, to receive and take care of the child;

184 Section 51 reads

(1) The Board or the Committee shall recognise a facility being run by a Governmental organisation or a voluntary or non-governmental organisation registered under any law for the time being in force to be fit to temporarily take the responsibility of a child for a specific purpose after due inquiry regarding the suitability of the facility and the organisation to take care of the child in such manner as may be prescribed

185 Section 2 (48) defines “Probation officer” to mean “an officer appointed by the State Government as a probation officer under the Probation of Offenders Act, 1958 or the Legal-cum- Probation Officer appointed by the State Government under District Child Protection Unit.”

186 Section 13(1)

187 Section 13(2)

188 Section 12 reads

(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person
has to undertake a social investigation into the case and submit a social investigation report within a period of fifteen days.\(^{189}\) Section 8\((h)\) requires that while disposing of the matter and passing a final order such order includes an individual care plan for the child’s rehabilitation, including follow up by the Probation Officer or the District Child Protection Unit or a member of a non-governmental organization, as may be required.

The working of the probation officer in India had not been inspiring under erstwhile law.\(^{190}\) Therefore, Draft Model Rules, 2016 under the Juvenile Justice (Care and Protection of Children) Act, 2015 prescribes the exhaustive and detailed role and responsibility of the probation officers under Rule 54 which reads as under:

“54. Duties of a Probation Officer
(1) On receipt of information from the Police or Child Welfare Police Officer under sub-section (1) (ii) of section 13 of the Act, without waiting for any formal order from the Board, the probation officer shall inquire into the circumstances of the child as may have bearing on the inquiry by the Board and submit a social investigation report in Form 6 to the Board.
(2) The social investigation report should provide for risk assessment, including aggravating and mitigating factors highlighting the circumstances which induced vulnerability such as traffickers or abusers being in the neighbourhood, adult gangs, drug users, accessibility to weapons and drugs, exposure to age inappropriate behaviours, information and material.
(3) The probation officer shall carry out the directions given by the Board and shall have the following duties, functions and responsibilities:

(i) To conduct social investigation of the child in Form 6;
(ii) To attend the proceedings of the Board and the Children’s Court and to submit reports as and when required;
(iii) To clarify the problems of the child and deal with their difficulties in institutional life;
(iv) To participate in the orientation, monitoring, education, vocational and rehabilitation programmes;
(v) To establish co-operation and understanding between the child and the Person-in-charge;
(vi) To assist the child to develop contacts with family and also provide assistance to family members;
(vii) To participate in the pre-release programme and help the child to establish contacts which could provide emotional and social support to the child after release;
(viii) To establish linkages with probation officers in other districts and States for obtaining social investigation report, supervision and followup.
(ix) To establish linkages with voluntary workers and organizations to

\(^{189}\) Section 8\((e)\) directing the Probation Officer, or in case a Probation Officer is not available to the Child Welfare Officer or a social worker, to undertake a social investigation into the case and submit a social investigation report within a period of fifteen days from the date of first production before the Board to ascertain the circumstances in which the alleged offence was committed.

\(^{190}\) See generally Erika Rickard “Paying Lip Service To The Silenced: Juvenile Justice In India” Harvard Human Rights Journal Vol. 21, 2008, pp 155 to 166
facilitate rehabilitation and social reintegration of children and to ensure the necessary follow-up;

(x) Regular post release follow-up of the child extending help and guidance, enabling and facilitating their return to social mainstreaming;

(xi) To prepare the individual care plan and post release plan for the child;

(xii) To supervise children placed on probation as per the individual care plan;

(xiii) To make regular visits to the residence of the child under his supervision and places of employment or school attended by such child and submit periodic reports as per Form 10;

(xiv) To accompany children where ever possible, from the office of the Board to the observation home, special home, place of safety or fit facility as the case may be;

(xv) To evaluate the progress of the children in place of safety periodically and prepare the report including psycho-social and forward the same to the Children’s Court;

(xvi) To discharge the functions of a monitoring authority where so appointed by the Children’s Court as per sub-rule 16(xiii) of rule 18 of these rules;

(xvii) To maintain a diary or register to record his day to day activities such as visits made by him, social investigation reports prepared by him, follow up done by him and supervision reports prepared by him;

(xviii) To identify alternatives of community services and to establish linkages with voluntary sector for facilitating rehabilitation and social reintegration of children; and

(xix) Any other task as may be assigned.”

7.11 Sentencing Young Offenders – Mandates of New Model Jail Manual 2016

The Jail Manual 2016 prescribes the mode and method of dealing with young offenders from evil of incarceration. It mandates following non-institutional treatment for young offenders.

Non-Institutionalised Treatment

“27.05 It is necessary to save young offenders from evil of incarceration. Noncustodial treatment for young offenders should be preferred to imprisonment. Under mentioned process should be followed for young offender:

(A) When any young offender found guilty and is likely to be punished with imprisonment not exceeding one year, the court should take recourse to any of the following non-custodial measures:

1) Release on admission

2) Release on taking a bond of good conduct, with or without conditions from the young offenders and from parents/guardians/approved voluntary agencies.

3) Release on probation under the Probation of Offenders Act on any of the following conditions:

(a) Continuation of education/ vocational training/employment;

(b) Obtaining guidance from probation officer/ teacher counsellor;

(c) Getting work experience in work camps during week-ends and on holidays;
(d) Doing useful work in work centres (agricultural farms, forestry housing projects, road projects and apprenticeships in work-shops.)

(e) Young offenders released on probation shall be kept under constant supervision.

Note: suitable cases of young offenders likely to be sentenced to periods above one year of imprisonment should also, as far as possible, be processed through the above-mentioned non institutional approach. Young offenders should be sent to prison only as a last resort.

(B) (1) Young offenders involved in minor violations should not be kept in police custody. Instead, they should be kept with their families/guardians/approved/ voluntary agencies on the undertaking that they will be produced before the police ,as and when required for investigation for minimum period required for investigation.

(2) Young offenders involved in serious offences, while in police custody, should be kept separate from adult criminals and the police custody should be only for the minimum period required for investigation.

(3) The investigation of cases of young offenders must be expeditiously completed.

(4) Bail should liberally granted in cases of young offenders .

(5) When it is not possible to release a young offender on a bail, he should be kept in a reception centre /Kishoresadan/Yuvasadan during the pendency of his trial.

(6) In case it become necessary to keep young offenders in a sub-prison during investigation and trial, it should be ensured that they do not come in contact with adult criminal there.”

7.12 Rehabilitative Sentencing

Adhering to the rule book and providing possible remedy and justice is a thing of past now. Indian judicial corridors have, of late, been witness to a new kind of rehabilitative sentencing where the courts have gone to the possible extent of espousing the life of victim by providing even jobs and by providing adequate compensation disregarding the financial limits fixed by the governments for rehabilitation. Few such judgements need mention here which have opened a new era in the economics of sentencing in India.

The decision of the Delhi High Court in Brindavan Sharma v. State\(^{191}\) is a milestone in Indian criminal jurisprudence inasmuch as for the first time the Delhi High Court thought it obligatory both morally and legally to care for the victims of not only crime but also of punishment.\(^{192}\) The facts are unique - Father of three children killed the mother making them virtually orphans. Father accused showed willingness to give all the movable and immovable property to the children but the

\(^{191}\) Available at http://www.delhicourts.nic.in/Aug07/Brindavan%20Sharma%20V%20State.pdf

\(^{192}\) K.N. Chandrasekharan Pillai, “Victims of Both Crime And Punishment: Delhi High Court’s Attempt To Make Law Humane” JILI, 2007, Pp 554-555
court was not satisfied with it. It went ahead and suggested to one Vinod Dhawan, a philanthropist to pay a monthly assistance to these children (Rs. 2,100/-). Justice Mukul Mudgal took judicial notice of the absence of a scheme to make provision for such victims and asserted the need for the court’s proactive role. After noting that the philanthropist has taken care of the children and that the court is duty bound to do something it also stressed the obligation of the government “to ensure that the victims of crime such as the three children in the present case, are looked after institutionally and provided succour and support.”

_Tekan Alias Tekram v. State of Madhya Pradesh_ decided by the Hon’ble Supreme Court of India on February 11, 2016, is a unique and of its kind judgment, heralding a victorious jurisprudence for rape victims in particular, and believers of restorative and compensatory jurisprudence in general. Going out of its usual way, the Supreme Court ordered the state government to pay Rs 8000/- monthly compensation to the unfortunate blind victim of the rape for the rest of her life!

Though the court did not directly subscribe to the scheme framed by Goa state where Rs 10,000,00/- compensation is payable in respect of rapes, the fact that the scheme was highlighted in bold letters in the survey of schemes and applaud by the court here and there in the judgment itself indicates that, judiciary was judiciously underlining the scheme of Goa as a model scheme to be adopted by every state. This is precisely what the court expressed in its concluding part.

“In the typical facts before the court, in fact, the court awarded the compensation of Rs.10,00,000/- to the victims but for the inability of the victim to manage the funds, the court awarded Rs.8,000/- per month till her life time, treating the same to be an interest fetched on a fixed deposit of Rs.10,00,000/-.”

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193 Ibid
195 In the presence of above facts, and dismal compensation scheme framed by the State of Chhattisgarh, the court was seized with what compensation to be awarded and how. The court observed that

“The victim, being in a vulnerable position and who is not being taken care of by anyone and having no family to support her either emotionally or economically, we are not ordering the respondent-State to give her any lump sum amount as compensation for rehabilitation as she is not in a position to keep and manage the lump amount. From the records, it is evident that no one is taking care of her and she is living alone in her Village. Accordingly, we in the special facts of this case are directing the respondent-State to pay Rs.8,000/- per month till her life time, treating the same to be an interest fetched on a fixed deposit of Rs.10,00,000/-. By this, the State will not be required to pay any lump sum amount to the victim and this will also be in the interest of the victim.”

In *Re v. Indian Woman Says Gang-Raped*\(^{197}\) the court directed to pay Rs. 3,00,000/- to the victim who was a minor. The court asked the government to deposit 75% of the amount in a fixed deposit for a period of three years to be paid thereafter with accrued interest.

The Madras High Court in *C. Thekkamalai*\(^{198}\) enhanced the compensation from Rs.75,000/- to Rs.5,00,000 and directed that the State to consider the application of the victim for allotment of agricultural land under THADCO land purchase scheme or to allot the land of her choice at concessional rate in accordance with the scheme.

In a rare order, the Bombay High Court has asked the government to contemplate if the benefits of the rehabilitation schemes meant for rape/child abuse victims can be given with retrospective effect in certain “deserving cases”. “The state government would contemplate as to whether in deserving cases, the benefits under the Manodhairya scheme as well as Maharashtra Victim Compensation Scheme, 2014 could be provided to the victims retrospectively,” said a divisional bench in an order passed on March 23.\(^{199}\)

The predicament of acid victims in terms of sufferings and agony has been well documented.\(^{200}\) Though much jurisprudence has not been developed in respect of acid crimes since the crime and legislative and judicial responses to such crime are of recent origin and still in the formative years, *Laxmi v. Union of India*\(^{201}\) decided by the Supreme Court of India is a path breaking judgments and exemplary example of judicial sensitivity towards the acid victims. This is the case initiated a decade back\(^{202}\) in the Supreme Court the final result of which is awaited. In the same case Supreme Court ruled that

“victims shall be paid compensation of at least Rs. 3 lakhs by the concerned State Government/Union Territory as the after care and rehabilitation cost. Of this amount, a sum of Rs 1 lakh shall be paid to such victim within 15 days of

\(^{197}\) *[Re v. Indian Woman Says Gang-Raped](http://indiankanoon.org/doc/153043729/)*

\(^{198}\) *[C. Thekkamalai v. State of Tamil Nadu](http://indiankanoon.org/doc/839968/)*

\(^{199}\) Naziya Alvi Rahman, “Can benefits of rehab schemes for rape victims be given with retrospective effect: Bombay High Court asks govt” *DNA*, April 22 2016

\(^{200}\) See The Law Commission of India, 226th Report, *“The Inclusion of Acid Attacks as Specific Offences in the Indian Penal Code and a law for Compensation for Victims of Crime”* 2009

\(^{201}\) *(2014) 4 SCC 427*

\(^{202}\) Laxmi A minor who was a minor in 2005 had been attacked by three men with acid for rejecting love proposal. Her life was shattered in no times. The predicament furthered when she learnt that the existing laws are inadequate in punishment of offenders, compensation and rehabilitation of acid victims. She filed a writ petition in 2006 (WRIT PETITION (CRL.) NO (s) 129 of 2006) before the Supreme Court of India praying for various directions to centre and states. The case is pending since then with interim relief and directions for compliances.
occurrence of such incident (or being brought to the notice of the State Government/Union Territory) to facilitate immediate medical attention and expenses in this regard. The balance sum of Rs. 2 lakhs shall be paid as expeditiously as may be possible and positively within two months thereafter…”

The real judicial empathy was witnessed in Parivartan Kendra, in which the Supreme Court pronounced that three lakhs compensation is minimum and not a bar to award higher compensation than that. The court clarified its own ruling in which it fixed Rs 3 lakhs as compensation, in following words;

“12. The above mentioned direction given by this Court in Laxmi’s case … is a general mandate to the State and Union Territory and is the minimum amount which the State shall make available to each victim of acid attack. The State and Union Territory concerned can give even more amount of compensation than Rs.3,00,000/- as directed by this Court. It is pertinent to mention here that the mandate given by this Court in Laxmi’s case nowhere restricts the Court from giving more compensation to the victim of acid attack… In peculiar facts, this court can grant even more compensation to the victim than Rs. 3,00,000/-”

“19. …We are conscious of the fact that enhancement of the compensation amount will be an additional burden on the State. But prevention of such a crime is the responsibility of the State and the liability to pay the enhanced compensation will be of the State. The enhancement of the Compensation will act in two ways:–

1. It will help the victim in rehabilitation;
2. It will also make the State to implement the guidelines properly as the State will try to comply with it in its true spirit so that the crime of acid attack can be prevented in future.”

With the intervention of the Madras High Court, the State government provided a job to a victim of an acid attack, an M.Phil-degree holder, on compassionate grounds. In another case, G. Valentina of Villupuram district was in class IX when Dhansekar trespassed into her house and threw acid on her face. The Madras High Court confirmed a sentence of 10 years rigorous imprisonment against the attacker. It also directed the government to give the victim a suitable job as she possessed a M.Sc. degree and an M.Phil in microbiology. By a G.O. in April last year, the State government directed the director of medical and rural health services to give employment to the victim as a junior assistant in the Tamil Nadu ministerial service as a special case

203 Parivartan Kendra v. Union of India (2016) 3 SCC 571
204 Ibid
Thus, the loss of job, social stigma and the pain, physical injury, marriage prospects, after care and rehabilitation cost etc. were taken into consideration for awarding compensation.

7.13 Conclusion

Reformation and rehabilitation of victims and offender is at the heart of Indian sentencing policy though not in the structured form and format. Courts have shed their traditional role of neutralism and have become pro-active in dispensing customized justice. Alternatives like compounding, plea bargaining, community service etc are being increasingly used by the courts though it has not reached in its intensity. Alternative mechanism of sentencing first time offenders under probation and juvenile justice law is commendable subject to the suggestions offered in the conclusion chapter.