

A STUDY OF REHABILITATIVE PENOLOGY AS AN ALTERNATIVE THEORY OF PUNISHMENT

Namita Wabi*

"There is a logical contradiction at the heart of the idea [imprisonment] which is that you are taking people away from society, away from the law-abiding world, and away from all the influences of people who keep the norm, and putting them in a place where they will only be mixing with people who have broken the norm and then expecting that some good will come out of it. I think the evidence accumulated over many years is that you create a lawless society."

Vivien Stern, *The Prison: Does it serve them Right?*

Throughout human history, few social problems have occupied as much public attention as that of crime. The dynamics of criminality have eluded our understanding since times immemorial; yet, time and again, criminologists have come up with new explanations as to why crime occurs so as to devise laws to prevent it. In order to prevent the commission of crime in society, penologists have come up with different theories of punishment, all of which believe that crime is evil and therefore must be punished.² The justifications for punishment and the aims that these theories seek to achieve may be different, but all of them agree that the logical fallout of the commission of a crime is punishment.³ The introduction of reform measures in correctional programmes in Western society in the latter part of the nineteenth century was largely the result of a desire for the humane treatment of offenders.⁴ Conventional penological understanding sees the post-World War II period as the epoch of rehabilitation when "evangelical reform" and "paternalism" were substituted by a more technical form of social engineering.⁵ The offender was no longer regarded as an evil person, but was viewed as having been socially determined to take deviant roles, and that he or she was, therefore, in need of treatment to reform or rehabilitate him or her into a socially adequate individual. The retributive slogan, "Let the punishment fit the crime" was displaced by a new principle, "Let the treatment fit the needs of the offender."⁶ Thus, the focus was now on the individual rather than the crime alone, so that it was possible that different punishments could be given to different individuals guilty of the same offence. The change in this period can be attributed to the change in the political flavour of the period. Thus, while the Victorian period, in accordance with the political climate and its potential for control through discipline and obedience, focussed primarily on incarceration and the prison, various alternatives to imprisonment like probation, detention in institutions for the mentally ill, reformatory prisons, borstal homes, etc. were set up in the twentieth century in most of the Western world.⁷ These new correctional programmes focussed prima-

* III Year, B.A., LL.B.(Hons) Student, National Law School of India University.

¹ Rani Dhavan Shankardass, *Conclusion: The Punishment of Crime or the Crime of Punishment, in PUNISHMENT AND THE PRISON: INDIAN AND INTERNATIONAL PERSPECTIVES* 445 (Rani Dhavan Shankardass ed., Sage Publications, 2000).

² The deterrence, the retribution, and the incapacitation theories all aim at the prevention of crime through the imposition of punitive measures.

³ See *infra* text accompanying notes 9-22.

⁴ Shankardass, *supra* note 1, at 458.

⁵ *Id.*

⁶ James Robison and Gerald Smith, *The Effectiveness of Correctional Programmes, in SENTENCING* 118 (Hyman Gross and Andrew Von Hirsch eds., OUP, 1981).

⁷ Shankardass, *supra* note 1, at 458-459.

rily on the offender, and were targeted at preventing recidivism⁸ amongst offenders. This paper seeks to examine whether the rehabilitative theory is conceptually competent; at the same time, it also determines whether the dominant theoretical understanding of this theory is, in fact, the appropriate understanding. Finally, it presents a viewpoint on the appropriate understanding of the rehabilitative theory.

The Need for Rehabilitative Penology

In order to realize the ideal of achieving a crime-free society, different theories of punishment have been evolved. However, the fact that the crime rate in most countries of the world today is on the rise implies failure at either a theoretical or a practical level or both. The aim of this section is to examine the justification for the emergence of the rehabilitation theory. Three main theories of punishment existed before the evolution of the rehabilitative theory. The kind of penal system that is followed today is based on a combination of these theories.

Deterrence

This theory is based on the rationalistic perspective in which human behaviour is seen as a function of individually perceived costs and benefits of alternative choices or actions.⁹ Therefore, this theory assumes that potential offenders exercise rational judgment in deciding whether to offend or not, and that they are, therefore, predictably sensitive to the actual range of variation of certainty and severity of the punishment at the time that they take the decision to offend.¹⁰ The theory believes that the punishment of a crime must be sufficient to deter both the specific offender and the society in general from the commission of the crime.¹¹ Deterrence is thus seen to operate at two levels; as general deterrence, in order to deter potential offenders in the society at large from committing the offences, and specific deterrence, in order to deter the convicted offenders from recidivism. Punishment on the ground of deterrence has often been challenged on the ground of being unjust based on the argument that if an example is made of a person to induce others to avoid criminal actions, then he suffers not for what he has done, but on account of the tendency of others to do likewise. This criticism seems to be based on Kant's moral principle that man should always be treated as an end in himself and not a means for some other end.¹² Johannes Andenaes, however, meets this criticism by stating that societies often treat people in ways designed to meet the ends of society at the expense of the individual concerned. He gives examples of military conscription, quarantine regulations, confinement of dangerous mentally ill patients, and detention of enemy citizens in wartime, to illustrate this point.¹³ The rising crime rate in most societies shows that punishment has not really been able to deter crime. The deterrence theory also fails on the ground that crimes of passion and desperation are not the result of rational judgments of

⁸ *Black's Law Dictionary* defines "recidivism" as a tendency to relapse into a criminal activity or behaviour. See *Black's Law Dictionary*, (Henry Campbell Black ed., 6th ed., Florida: West Publishing Company, 1990).

⁹ William Bowers and Glenn Pierce, *Deterrence or Brutalisation: What Is the Effect of Executions?*, CRIME AND SOCIETY-3: CRIMINAL JUSTICE 57 (George Bridges *et al.* eds., Sage Publications, 1996).

¹⁰ *Id.* By way of illustration, it may be stated that while crimes like murder involve a greater severity of punishment, the certainty of punishment may be greater in such offences such as traffic violations, which do not entail severe punishment.

¹¹ *Black's Law Dictionary*, *supra* note 8.

¹² See Bitner and Platt 2 *The Meaning of Punishment*, in ISSUES IN CRIMINOLOGY 79, 93 (1996).

¹³ Johannes Andenaes, *The Morality of Deterrence*, in SENTENCING 190 (Hyman Gross and Andrew Von Hirsch eds., Oxford University Press, 1981)

action by the offender. Therefore, despite the certainty and severity of punishment in this regard, there is no real deterrence of the offender.¹⁴

Retribution

This theory, also called "*just or commensurate deserts*"¹⁵, is based on the premise that while a person who violates the rules of a system continues to retain its benefits, the renunciation of burdens, *i.e.*, the duty to exercise self-restraint, confers upon him/her an unfair advantage. To place the individual at par with others in society, this advantage must somehow be erased. Therefore, for this inappropriate conduct, the sanctioning authority is entitled to choose a response that expresses moral disapproval, *viz.*, punishment. In other words, the sanction ought not only to deprive the offender of the advantage obtained by his/her disregard of the rules, but ought also to do it in a manner that ascribes blame.¹⁶ The theory believes that general deterrence does not really work, and that there must be specific retribution according to the nature of the offence. Therefore, the punishment for the offence must be proportionate to its degree of seriousness. The main failure of the retribution theory is that it does not aim at the prevention of crime, but only seeks to inflict punishment on the individual criminal in line with the old adage, "*an eye for an eye, a tooth for a tooth.*" Thus, the theory in no way seeks to achieve the ideal of a crime-free society. It sees punishment not as a means to an end, but as an end in itself.

Incapacitation

This theory is based on the idea that the only way to reduce crimes in society is to deny the offender the opportunity or ability to commit crimes. This involves removing the offender from society, and thus physically preventing the offender from committing crimes in that society.¹⁷ Incapacitation can be both selective and collective.¹⁸ Selective incapacitation involves individually based sentences, *i.e.*, sentencing decisions are individualized to vary with differences in predictions of the individual's propensity to commit crimes. Selective incapacitation permits different sentences for the same offence, in order to accommodate differences in crime control potential among offenders convicted of the same crime.¹⁹ Thus, the circumstances surrounding the commission of the crime will be relevant considerations to be taken into account while determining the propensity for recidivism, which in turn will determine the sentence to be imposed. Collective incapacitation, on the other hand, refers to aggregate-based sentencing policies. Individuals are sentenced solely on the basis of their offence and prior criminal record. Aggregate policies do not invoke any predictions about the expected future behaviour of a particular individual.²⁰ The incapacitation theory suffers from a static conception of society. Removing criminals from society does

¹⁴ Appropriate illustrations of such crimes are those for which the defence of grave and sudden provocation is generally taken. For instance, in the case of *K. M. Nanavati v. State of Bombay* (AIR 1961 SC 112), the accused in his defence for the crime of murder stated that he had killed the deceased who had been having illicit relations with his wife, because the deceased had used insulting words against her upon on being requested to marry her; this resulted in a fit of anger, which led to the killing of the deceased by the accused. In such a case, the commission of the crime was a result of the temporary loss of control by the accused over himself. Such crimes that are not committed on the basis of any rational decision on the part of the accused cannot be prevented based on the deterrence theory.

¹⁵ Andrew von Hirsch, *Desert*, in SENTENCING 147 (Hyman Gross and Andrew Von Hirsch eds., Oxford University Press, 1981).

¹⁶ *Id.*

¹⁷ Alfred Blumstein et al., *Incapacitation*, in SENTENCING 96 (Hyman Gross and Andrew Von Hirsch eds., OUP, 1981)

¹⁸ Jacqueline Cohen, *Incapacitation as a Strategy for Crime Control: Possibilities and Pitfalls*, in SENTENCING 85 (Hyman Gross and Andrew Von Hirsch eds., Oxford University Press, 1981).

¹⁹ *Id.*

²⁰ *Id.*

not eradicate crime. Crimes will continue to be committed in society despite the incapacitation of these particular individuals; even the particular offender who has been incapacitated may resort to crime after release. Moreover, both the retribution and incapacitation theories have the common flaw that they act upon the individual criminal alone and not at potential offenders in society in general. The rehabilitative theory evolved in Western society as a result of a change in attitude towards the offender and crime. With the emergence of the behavioural and sociological sciences in the nineteenth century, as also the emergence of different theories of crime like the Conflict²¹ and Marxist²² schools, it was felt that the utilitarian view of crime,²³ was too simplistic an explanation of why crime occurred and that, therefore, penal systems based on this theory of crime were bound to fail in the prevention of crime. As discussed in the next section, there are two distinct strands of thought in the rehabilitative theory, but both of these agree that the decision to commit a crime is not a rational decision, and that it is a result of factors that the criminal cannot control. The theory suggests that the only way to prevent crime in society is to eradicate the influence of those factors that compel an individual to commit crime. For this reason, criminals need to be integrated into society, rather than punished.

The Rehabilitative Ideal

The rehabilitative ideal²⁴ is a complex of ideas that defies an exact definition. However, the essential points can be identified. It is believed that human behaviour is the product of antecedent causes that can be identified as part of the physical universe.²⁵ Knowledge of the antecedents of human behaviour makes it possible to devise an approach for the scientific control of such behaviour.²⁶ Finally, it is assumed that the measures employed to help the convicted offender should serve a therapeutic function; and that such measures should be designed to effect changes in the behaviour of the convicted person in the interests of his or her own happiness, health, and satisfaction, and in the interests of the society.²⁷ Before examining what the rehabilitative theory prescribes, it is essential to consider two important debates – one focuses on the nature of rehabilitative penology, and the other addresses the question of whether it is necessary to rehabilitate those who violate societal norms.

²¹ The Conflict theory of crime states that crime is a result of conflict between different sections of society. Thus, political offenders, in their quest for power, commit crimes of a political nature such as sabotage, rebellion, unlawful assembly, etc. Also, the mass massacres during the Partition riots accompanied with acts of arson, looting, and rape can be located in the communal hatred between the Hindu and Muslim communities. Similarly, crimes may be committed based on deep-rooted caste divides or as part of a worker-offensive against the management given the impact of the use of capital intensive techniques in the process of rapid industrialization. See V.N. PARANJPE, *CRIMINOLOGY AND PENOLOGY* 38-39 (8th ed., Allahabad: Central Law Publishers, 1994).

²² The Marxist school regards crime in society as arising from the oppression of the *proletariat* by the *bourgeoisie*. See *id.* at 43-44.

²³ The utilitarian view is based on the premise that crime was committed based on a rational calculation of the costs and benefits arising out of it. See ANDREW ALTMAN, *ARGUING ABOUT LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* (2002) at 445-446.

²⁴ The phrase was first used by Francis Allen. He described the changes in the criminal justice system in the early twentieth century, *viz.*, the institutions of the juvenile courts, and systems of parole and probation along with the contribution of the science of psychiatry to the theory of human behaviour as being accompanied by a revolution in public conceptions of the nature of crime and the criminal, and in public attitudes towards the proper treatment of the convicted offender. He states that despite the presence of contradictions and paradoxes in the developments of thought, institutional behaviour, and public attitudes, it was possible to detect one common element in much of this thought and activity, which he characterized as the rehabilitative ideal. Francis A. Allen, *Legal Values and the Rehabilitative Ideal*, in *SENTENCING* 110 (Hyman Gross and Andrew Von Hirsch eds., OUP, 1981).

²⁵ For instance, poverty may compel a hungry man to steal a loaf of bread.

²⁶ Knowledge of this fact would lead the authorities to ensure that nobody is so destitute that he or she has to steal in order to satisfy basic human wants.

²⁷ Allen, *supra* note 24.

Rehabilitation v. Punishment or Rehabilitation as a Part of Punishment

The term "punishment" as defined in *Webster's Dictionary* means "any ill suffered in consequence of wrongdoing"²⁸. The legal definition of punishment as given in *Black's Law Dictionary* is "any fine, penalty or confinement inflicted upon a person by authority of law and the judgment or sentence of a court, for some crime or offence committed or for any omission of a duty enjoined by law."²⁹ Sir Walter Moberly suggests that punishment presupposes that what is inflicted is an ill, which is something unpleasant, that it is a sequel to some act, which is disapproved by authority, and that there is some correspondence between the punishment and the deed that evoked it. He also states that punishment is inflicted, that it is imposed by somebody's voluntary act, and that punishment is inflicted upon the criminal, or upon someone who is supposed to be answerable.³⁰ On the other hand, the term rehabilitation has been defined in *Webster's Dictionary* as, "to make one capable of becoming a useful member of society again"³¹ It has been defined in the *Black's Law Dictionary* as "restoration of an individual to its greatest potential, whether physically, mentally, socially or vocationally"³² Rehabilitation has been defined as the result of any planned intervention that reduces an offender's further criminal activity, whether that reduction is mediated by personality, behaviour, abilities, attitudes, values, or other factors.³³ The argument in favour of considering rehabilitation as a part of punishment is that it is something that is imposed on the individual by the state, and in that sense, entails suffering for the individual. Although the attempt may be finally to reform the criminal, the fact that this is done on the basis of what the authorities think is wrong with the individual signifies a deprivation of liberty in both physical terms as well as in the matter of choice. This argument has been stated by Raffaele Garofalo, a noted Italian criminologist belonging to the Positive School of criminology as:

*"The mere deprivation of liberty, however benign the administration of the place of confinement, is undeniably punishment. Measures that subject individuals to the substantial and involuntary deprivation of their liberty contain an inescapable punitive element, and this reality is not altered by the fact that the motivations that prompt incarceration are to provide therapy or otherwise contribute to the person's well-being or reform. No matter how humane the intentions of the officials providing reformatory treatment, it will be accompanied by some compulsion and carry elements of stigma and rebuke."*³⁴

The second argument for the notion that rehabilitation is a part of punishment stems from the practical application of correctional techniques in reform institutions. The therapeutic treatment used in reformatory institutions is often cruel and inhuman, especially techniques used by the "correction" school of rehabilitative penology; for e.g., electrotherapy, injection of drugs, and surgery.³⁵ This is

²⁸ *The New International Webster's Comprehensive Dictionary of the English Language* (Florida: Trident Press International, 1998) at 1023.

²⁹ *Black's Law Dictionary*, (Henry Campbell Black ed., 6th ed., Florida: West Publishing Company, 1990) at 1247.

³⁰ Sir Walter Moberly, *cited from*, Robison and Smith, *supra* note 20, at 119.

³¹ Allen, *supra* note 24, at 1062.

³² *Black's Law Dictionary*, *supra* note 29, at 1290.

³³ Lee Sechrest et al., *The Rehabilitation of Criminal Offenders: Problems and Prospect*, in SENTENCING 128 (Hyman Gross and Andrew Von Hirsch eds, Oxford University Press, 1981).

³⁴ UNTO TAHTINEN, NON-VIOLENT THEORIES OF PUNISHMENT: INDIAN AND WESTERN 108 (1983). Compulsion is evident from the fact that the individual offender will be subject to the dictates of the authorities with respect to measures intended to correct his behaviour. Stigma necessarily follows from the characterization of the individual as diseased and in need of medical treatment, as also from his incarceration, which may promote the idea that he is a danger or threat to society.

³⁵ As per studies conducted by Marunson, *cited from*, Robison and Smith, *supra* note 6, at 118.

because these techniques may often be used in the mistaken belief that they are for the benefit of the individual offender, when they may actually have the reverse effect. In such cases, more suffering is inflicted on the person, as compared to incarceration in a prison where the person is made to do hard labour. But the misuse of a measure does not in any way determine its efficacy³⁶, *i.e.*, the mere possibility that the authorities may either negligently or deliberately misuse these techniques does not imply that these techniques themselves are incapable of reforming the offender if properly applied. The first argument is quite significant and, to a considerable extent, convincing. The concept of individual liberty is one of the most fundamental tenets of modern democratic society.³⁷ The ideal of liberty is enshrined in Articles 19³⁸ and 21³⁹ of the Constitution of India as a part of the fundamental rights chapter. It is admitted that the rehabilitative theory as it is understood presently does require the curtailment of physical liberty, as well as the curtailment of the choice of an individual. However, as will be discussed later, it is possible to have a rehabilitative model where the attempt is not made by the authorities to correct or reform the offender, but where the state machinery merely facilitates the individual in the development of his or her own potential to the fullest degree, and in the process enables the individual to become a responsible member of society.

The distinction between rehabilitation and punishment can be stated to be on the following grounds. Punishment involves inflicting some kind of unpleasant suffering on the individual. Rehabilitation involves the creation of a healthy and pleasant environment for the offender to become a useful member of society. Curtailment of physical liberty, *per se*, does not amount to punishment. Preventive detention under Article 22 of the Constitution necessarily implies curtailment of physical liberty, but cannot be regarded as punishment, because the offence for which the punishment may have been prescribed has not yet been committed.⁴⁰ Punishment involves imposition of certain norms by the authorities. On the other hand, rehabilitation involves a process in which the criminal learns to become a self-reliant and responsible member of society. This process is not imposed upon the offender; the offender is provided with an environment in which he or she can develop skills that enable him or her to positively and constructively interact with other members of the society and also contribute to the well being of society. This is different from mere incarceration inasmuch as it involves the provision of such facilities as meditation, education, recreation, and inculcation of social values that contribute to make the individual a responsible member of society. Thus understood, rehabilitation is not a part of punishment. It is, in fact, a unique method of preventing crime, not by coercion or threat, but by enabling the offender to overcome the reasons that compelled the commission of the crime.

Reforming those who Violate Societal Norms

Another argument against rehabilitation comes from those who still believe in the retribution theory.⁴¹ They raise the fundamental question: why should society spend its resources to help one who has violated society's norms? Their argument is that the provision of various kinds of skills, counselling and training to offenders, as per the rehabilitation theory, amounts to an undeserved reward to those

³⁶ All laws are subject to misuse by authorities. However, that does not mean that there should not be any laws at all.

³⁷ This can be seen from the constitutions of most democratic societies, which make an express stipulation for this.

³⁸ Article 19(1)(d) guarantees to all citizens the right to freedom of movement throughout the territory of India.

³⁹ Article 21 provides that no person shall be deprived of his life and liberty without the authority of law.

⁴⁰ Section 151 of the Code of Criminal Procedure, 1973, confers power upon the police to arrest a person so as to prevent the commission of a cognisable offence.

⁴¹ As per studies conducted by Martinson, *cited from, supra* note 6, at 148-149.

who are guilty of breaking the law. An adequate response to the above argument may be stated as follows. Every offender does not violate society's norms on his or her own volition. Society often has a major role to play in the creation of the circumstances that compel a person to offend. This is especially true of crimes arising out of poverty, unemployment, etc. Thus, the rehabilitation theory cannot be dismissed outright for all categories of offenders. Even in the case of those offenders who commit crimes out of their own volition, the rehabilitative theory, as it is understood here, may succeed in making them responsible members of the society so as to contribute to a decline in the recidivism rate in society. The second and more important reason has to deal with achieving the ideal of a crime-free society. The flaws in the theories of deterrence, retribution, and incapacitation make it imperative to seek newer punitive alternatives in achieving the above ideal.

The Two Schools of Thought in Rehabilitative Penology

There are broadly two strands of thought in the rehabilitative theory – one regards criminals as mentally ill individuals who need treatment for their reformation; the other regards criminals as victims of their social circumstances who need various kinds of measures for the development of their social skills in order to adapt themselves to their social environment.⁴²

Crime as a Mental Illness – The Correction Theory

The notion of rehabilitating offenders was initially intended as constituting their positive orientation to society.⁴³ The growth of rehabilitation, however, was paralleled by the development of behavioural sciences and, therefore, in the earlier stages of its inception, the rehabilitative ideal became virtually synonymous with the medical model of corrections. This school of thought believes that crime is a psychological illness that can be cured by treatment in the medical sense. Treatment implies a programme of presumably beneficial action prescribed for and administered to one who seeks it, its purpose being relieving the patient of his or her illness. Even though the process may be painful or disagreeable, these qualities are incidental, not purposive. Effective treatment for the convicted offender would involve motivating or stimulating or arousing in the cornered individual the wish, hope, and intention to change his or her methods of dealing with the realities of life.⁴⁴ In this therapeutic attitude towards the criminal, each person is studied with respect to his or her particular needs, basic assets, interests, and special difficulties, and, thereafter, a single psychiatric technique or a combination of several techniques is used to treat him or her. The various psychiatric techniques used are psychoanalysis, electroshock therapy, psychotherapy, occupational and industrial therapy, family group therapy, milieu therapy, the use of music and art and horticultural activities, as well as drug therapy.⁴⁵ This strand of the theory is flawed in its basic assumption that crime is a mental or psychological illness. This explanation may be true of offences committed by persons suffering from some sort of psychological or mental illness, but is inherently incapable of explaining other crimes that are committed by sane individuals in society. By talking of crime as some sort of abnormal or human behaviour, it completely overlooks the fact that crimes are committed due to various reasons. The practical application of this theory would actually constitute punishment, because the correctional techniques used often inflict great suffering on the offender. For instance, techniques like electroshock therapy and several types of drug therapy often produce great physical and mental suffering.

⁴² KARL MENNINGER, *THE CRIME OF PUNISHMENT* 254-256 (1968).

⁴³ *Id.* at 124.

⁴⁴ *Id.* at 254-256

⁴⁵ *Id.* at 258.

Crime as a Result of Social Maladjustment – The Integration Theory

This strand of the rehabilitative theory is based on the assumption that the cause of the crime is the poor adaptation of the offender to the community.⁴⁶ Consequently, this theory looks beyond the individual in isolation and, in fact, focusses on the social background of the individual in order to re-integrate the offender into society. The integration may involve several non-violent alternatives to enforced correction: community mediation and imparting various kinds of skills like education and vocational training, which may enable the individual to become a useful member of the society.⁴⁷ This school of thought seems to represent a better application of the rehabilitative ideal, in that it is able to explain a greater majority of crimes committed in society, especially crimes that arise out of poverty or other social injustices like discrimination on the basis of race, caste, or ethnicity. The theory may be said to be especially applicable to juvenile delinquents who have suffered from a bad social environment.⁴⁸ However, even this school of thought leaves unexplained crimes that are a result of acts of desperation or passion, or ones that are committed after a rational calculation of the benefits of committing the crime and the costs of certainty of punishment.

A flaw common to both the strands of thought is that they have a paternalistic attitude towards the offender. The state claims to know the exact nature of the problem with the offender that compelled him or her to commit the crime. However, crimes are not a result of a single factor. Since the treatment is a result of imposition from above, it often assume shades of punishment. These schools of thought prescribe therapy and the imparting of vocational education and other skills to the offender. Although the object behind such an approach may be laudable, the truth is that this often has little impact on the recidivist tendencies of the offender. This is because often the skills imparted have no bearing on the reasons that an offender commits a crime. Consider the case of a white-collar criminal. It is not always the result of a psychological illness, unless greed is considered an illness; at the same time, the crime committed was not because of any social maladjustment in society. In such a case, the techniques applied by the two theories will fail in preventing the offender from recidivating.

Parole and Probation

Two techniques often employed in prisons, as alternatives to punishment, are parole and probation.⁴⁹ Though not exactly falling within the rehabilitative theory, since they are alternatives to punishment, it would help to determine their importance in crime prevention. Parole is the conditional release from prison after completion of part of the sentence of the convicted offender, which entitles the parolee to serve the remainder of the term outside the confines of the institution, if he or she satisfactorily complies with all the terms and conditions of the parole order.⁵⁰ Probation, on the other hand, refers to the sentence imposed for the commission of crime whereby a convicted criminal offender is released into the community under the supervision of a probation officer, *in lieu* of incarceration. The probation is

⁴⁶ As per studies conducted by Martinson, *cited from*, Robison and Smith, *supra* note 6, at 111.

⁴⁷ *Id*

⁴⁸ For a study of the factors that lead to juvenile crimes, see RICHARD LAWRENCE, SCHOOL CRIME AND JUVENILE JUSTICE 36-47 (1998).

⁴⁹ The systems of parole and probation have been in practice in India for quite some time, but they have always progressed in a haphazard manner without a clear-cut idea as to their ultimate goal. At the same time, while probation requires supervision over the probationers by the probation officers, this task is now entrusted to the Central Welfare Boards. For conditions that have to be satisfied for the grant of parole and probation and judicial trends regarding grant of parole, see PARANJAPÉ, *supra* note 21, at 284-288.

⁵⁰ Bowers and Pierce, *supra* note 9.

subject to the fulfillment of certain specified standards of conduct as stipulated by the public authority. The objective of this process is to give a chance to the offender to improve; its purpose is to reform and rehabilitate the offender. In determining whether the defendant is entitled to a sentence of probation, the court looks to such matters as the nature and circumstances of the offence, the history and characteristics of the defendant and the need for the sentence imposed.⁵¹ Various studies have been carried out in order to determine to what extent parole and probation are successful in preventing recidivism. A review of various projects by R.F. Sparks carried out in the United States of America⁵² reveals that the re-conviction rates of offenders placed on probation were markedly lower than those of groups sent to penal institutions under supervision.⁵³ Sparks concludes that a substantial proportion of offenders placed on probation succeed, even though they receive nominal treatment and supervision.⁵⁴ This may be because, unlike incarceration in prisons, probation allows an individual to interact meaningfully with other members of society and pursue occupations, thus enabling him or her to become a responsible member of society. Therefore, in view of the cost-effectiveness of probation and the social stigma attached to being put in prison, probation is a better way to prevent recidivism. The effects of parole have not been as encouraging as probation, as revealed in a number of studies conducted by Daniel Glaser and Vincent O' Leary, who collected data on post-parole violation rates based on the age of the parolees and the types of offences committed in a number of districts in the United States.⁵⁵ Generally, recidivism rates were found to be high for juvenile offenders. The highest recidivism rates were found for crimes such as burglary and forgery.⁵⁶ Thus, it is possible to conclude that probation is a better method for preventing recidivism as compared to parole. However, it is submitted that this may not work for all categories of offenders. An important limitation of these techniques, as is evident from the studies, is that only the low risk offenders are allowed to go out of prison on parole or probation. This implies that the success of the parole and probation stems more from the fact that the offenders are already less prone to recidivate.

⁵¹ *Id.* For instance, the fact that the offender is the sole bread-earner in the family and is a first time offender may be relevant considerations in the mind of the judge in granting a sentence of probation.

⁵² The Mueller study in California (1958-1965), the Provo Project in Utah (1963-64), the Silverlake experiment in Los Angeles (1966), the Essexfields Project in New Jersey (1967) and the Community Treatment Project in Sacramento and Stockton, California (1964) cited from R.F. Sparks, *The Effectiveness of Probation: A Review*, in CRIME AND JUSTICE-3: THE CRIMINAL IN CONFINEMENT 211-216 (Leon Radzinowicz and Marvin E. Wolfgang eds., London: Basic Book Publishers, 1971).

⁵³ The results of this study are confirmed by two more studies conducted by Ralph W. England and Scarpitti & Stephenson. In the first study, a random sample of 500 ex-probationers in Pennsylvania District was studied to determine the rates of recidivism. Since 10 offenders died in the course of the study, the sample was limited to 490 probationers. Using the criterion of convictions, a post-probation recidivism rate of 17.7 % was found. 73.1% of these convictions were for minor offences involving mainly, gambling, theft, and disorderly conduct. In the second study, probation programmes designed for juvenile delinquents were found to be effective in that the recidivism rates of those who successfully completed the programme were found to be only 15%. See Ralph W. England, *Post Probation Recidivism*, *ibid.* at 218-222 and Frank R. Scarpitti and Richard M. Stephenson, *Results of Probation*, in CRIME AND JUSTICE-3: THE CRIMINAL IN CONFINEMENT 231-241 (Leon Radzinowicz and Marvin E. Wolfgang eds., London: Basic Book Publishers, 1971).

⁵⁴ *Supra*, note 52.

⁵⁵ Daniel Glaser and Vincent O' Leary, *The Results of Parole*, in CRIME AND JUSTICE-3: THE CRIMINAL IN CONFINEMENT 245-259 (Leon Radzinowicz and Marvin E. Wolfgang eds., London: Basic Book Publishers, 1971).

⁵⁶ *Id.*

A Benefit Analysis

There have not been sufficient studies conducted on rehabilitative penology for us to conclude with certainty that it is a failure. While studies by Martinson (1974)⁵⁷, Brody and Greenberg and Sechrest, White and Brown (1979)⁵⁸ have led to the conclusion that rehabilitative programmes involving educational and vocational programmes, psychotherapy, group counselling and milieu therapy hardly signify an appreciable reduction of recidivism rates, there also exist studies that dispute the above findings; for instance, one such study concludes that, "*Criminal sanctions with components of rehabilitative techniques appear to work better than criminal sanctions not involving rehabilitative techniques.*"⁵⁹ Furthermore, these studies are reflective of Western conditions, which may not be applicable in the Indian scenario. Moreover, these studies were based on a random sample of offenders. It is possible that rehabilitation may work for a particular class of offenders and not for others. Therefore, the reliability of these studies for policy formulation is doubtful. It is important to conduct studies based on samples of particular categories of offenders like juvenile offenders or those guilty of committing crimes of poverty. The results of these studies may also imply that the way rehabilitation programmes are being implemented may not be the appropriate method to achieve the aims of rehabilitation. Moreover, the correctional programmes that were reviewed by these studies were based on the two dominant strands of thought as discussed earlier – that crime is an illness or that it arises as a result of social maladjustment. However, as has been discussed, both these strands of thought are flawed in their application of rehabilitation techniques and the need, therefore, is to evolve a new theory of rehabilitative penology, the practical application of which may contribute to a reduction in recidivism rates, in particular, and crime prevention, in general, in society.

Case Study of Tihar Jail: The Indian Perspective

This section undertakes an examination of the application of the rehabilitative theory in the Tihar Jail. The reasons for including this study of Tihar in this paper flow primarily from the fact that this is the only available Indian study where an effort was made to apply rehabilitative techniques in reforming the offenders. In 1993, when Kiran Bedi took up the post of Inspector General (Prisons), the four prisons of the Tihar Jail Complex housed over 7,200 prisoners with a sanctioned capacity of 2,273. Among them, only 900 were convicted while the rest were undertrials, or on remand waiting for their trials in various courts. There were about 300 women, about 50 children below the age of four years, around 1,200 adolescents in the age group of 18-21, and about 125 foreigners of 35 nationalities who were incarcerated mostly under the Narcotic Drugs and Psychotropic Substances Act, 1986.⁶⁰ The inmates were found to be living in poor conditions. They had insufficient and unwholesome food; there was an acute shortage of potable water even for drinking, bathing, and washing; there was also an acute short-

⁵⁷ See Robison and Smith, *supra* note 6, at 113-123.

⁵⁸ *Id.* at 133.

⁵⁹ ANDREWS, ZINGER et al., *Does Correctional Treatment Work*, in SENTENCING 138 (Hyman Gross and Andrew Von Hirsch eds., Oxford University Press, 1981).

⁶⁰ KIRAN BEDI, *ITS ALWAYS POSSIBLE: TRANSFORMING ONE OF THE LARGEST PRISONS IN THE WORLD* 13 (1998).

age of space. The sanitary facilities were very poor, and almost non-existent. The prisoners had to clean the toilets themselves – the toilets were the source of a number of diseases. Medical facilities were poor and were supported by a grossly inadequate and incompetent team of doctors. Most of the inmates came from underprivileged backgrounds, and brought with them a plethora of medical problems. Apart from common ailments resulting from obvious causes such as malnutrition, unhealthy lifestyles and cramped living conditions, they suffered from avoidable maladies caused by flourishing alcoholism, heavy smoking, and drug abuse.⁶¹ The most deplorable aspect of the prison administration, however, was that all kinds of offenders were placed together – this led to widespread exploitation of the weak by the strong, both in terms of physical and financial capacities.⁶² Furthermore, the prison atmosphere, with its undercurrents of violence, tension, and bitterness made an adverse psychological impact on the children who were staying with their mothers. The claustrophobic conditions drastically curtailed their natural instincts.⁶³ The adolescent prisoners in the Jail had committed a wide range of offences like murder, kidnapping, drug peddling, theft, and rape, but a substantial number of them were guilty of only minor offences like ticketless travel. However, there was no differentiation of the criminals on the basis of the offences committed, probably because they were mostly undertrials. Most of them were uneducated. Almost 80% of the adolescents were slum dwellers and about 30% were drug abusers.⁶⁴ The measures for reform that Bedi introduced were not in any way extraordinary but unique in that they infused the spirit of self-reliance and responsibility in the inmates. The inmates were involved in most aspects of the prison administration through the *Panchayat* system. In recognition of the fact that the prisoners had all the time, energy, and skill that constituted the foundation of a vibrant society, *Panchayats* were formed in every ward with the intention to encourage the prisoners to voluntarily take part in organizing various educational, cultural, and sports activities, to maintain discipline;⁶⁵ a Legal *Panchayat* was formed in order to provide legal assistance to the inmates.⁶⁶ Apart from the individual ward *Panchayats*, a *Mahapanchayat*, i.e., a collective assembly of all the *Panchayats* was formed, whose basic functions were to coordinate the relevant activities, to streamline the reform process, to reach a consensus on acceptable methods of functioning, to offer further suggestions for the improvement of reformative activities, and to move ahead to the clearly defined goals.⁶⁷ These *panchayats* led to several beneficial developments. First, the prisoners' feeling of isolation and worthlessness was eliminated, as they could now participate in their own correctional programmes. Secondly, the *Panchayat* system created a positive equation between the staff and the inmates.⁶⁸ Though Bedi does not furnish any statistics

⁶¹ *Id.* at 12-45.

⁶² *Id.*

⁶³ *Id.* at 102.

⁶⁴ *Id.* at 116-120.

⁶⁵ *Id.* at 217.

⁶⁶ The Legal *Panchayat's* basic function was to first make the inmates aware of their legal rights, and then provide ways and means of exercising these rights. The core of the Legal *Panchayat* was voluntarily formed by those inmates who had a legal background, and who possessed analytical skills as well as the ability to draft petitions and type affidavits. This legal aid cell offered legal assistance at no cost. The *Panchayat* deputed a team of lawyers, who were also inmates, to tackle the endemic problem of inordinately delayed trials and to produce substantial evidence of such lapses before the courts. *Id.* at 224-227.

⁶⁷ *Id.* at 219.

⁶⁸ *Id.* The existence and management of these *Panchayats* can be likened to the system of local self-government that was sought to be promoted in India in continuation of the *Panchayati Raj* System from the pre-Independence era. These *Panchayats* imitated structures of democratic self-governance in society, thereby preparing the inmates through participation to be responsible members of the society.

regarding the effect of the reforms introduced on the recidivism rates of the offenders, it must be noted that an overwhelming majority of the inmates in Tihar were undertrials. Some inmates had been languishing in the Jail for periods ranging upto seven years without trial. For such people, the conditions of the Jail had a debilitating effect – this was especially true of the adolescent offenders. Moreover, their contact with recidivist offenders posed the serious threat of their initiation and involvement in a life of crime. The Bedi prison reforms ensured that they spent their time profitably by acquiring various kinds of skills. A case in point is that of Mufti Farooqui who had been detained under the Terrorist and Disruptive Activities Act, 1987. Since he had been in the legal profession, he was personally responsible for obtaining bail orders for numerous prisoners.⁶⁹ Moreover, Bedi documents that regular surveys and meetings conducted with the prisoners revealed that there was a definite change in the attitude of the inmates as important members in the prison administration.⁷⁰

The reason to include this study in the paper is that the premise on which the reforms were carried out was different from those of the traditional rehabilitative theories. The attempt was not to correct or adapt the offender to the surroundings. At the basis of the reforms initiated was the belief that it was time to move on from retributive to reconstructive justice. It was recognized that the offender had committed a crime and that this could be of his or her own volition or because of his or her circumstances. The idea was to provide the offender with a supportive environment, which could help him or her in overcoming the propensity to commit crime by bringing about a change in attitudes and values. Since the premises of this experiment were different from the traditional rehabilitative experiments, it did not suffer from their fundamental flaw – that of imposition from above. Unlike the therapy and counselling involved in those experiments, which necessarily put the offender in the position of a recipient, this experiment placed the offenders and the prison authorities on an equal level of interaction. Moreover, in the traditional experiments, the interaction was only between the prison authorities and the individual offender. The interaction at Tihar was at two levels – between the offender and the authorities and between the offenders themselves. This double interaction enabled the offenders to envisage themselves as responsible members of a society, as the large prison population constituted an excellent sample of society with people from diverse backgrounds. This prepared the inmates for society upon their release. The success of this experiment (if any, considering there are no statistics on post-release recidivism rates) has one *caveat*. This experiment, though not carried out as a part of policy, was still the result of the efforts of the authority in charge, and therefore, can be said to be a state initiative. At the same time, it is evident that the replication of this experiment would depend upon the individual actions of the authorities in charge in different prisons. The success of such an experiment can only be determined by a comparative analysis of the application of the theory in different prisons.

Conclusion

The dominant traditional understanding of rehabilitation is not the appropriate understanding. Rehabilitation means the creation of an environment in which the offender can meaningfully interact with other offenders and with the authorities in a constructive manner, thereby bringing about a change in the offender's attitudes and values, and creating in the offender a sense of responsibility and trust. This would enable the transformation into a responsible and valuable member of society. The only way to judge the efficacy of the rehabilitative ideal would be to apply it practically and observe results. In this

⁶⁹ *Id.* at 227.

⁷⁰ *Id.* at 210-233.

regard, it may be noted that the facilitation of an environment in which the inmates themselves manage prison activities also results in a substantial reduction in costs relating to prison administration.

Rehabilitative theory is most likely to work in the case of crimes that are committed as a result of socio-economic circumstances. The theory does not apply in case of crimes that are committed as acts of desperation, because those offenders are not likely to repeat the offence in any case. Moreover, in case of white-collar crimes and organized crimes, which are carried out on a rational calculation of the benefits of committing the crimes and the costs arising from arrest and punishment, the theory is only likely to work if there is a change in the value system of the offenders, which may not be achieved in the rehabilitation process. The theory is more likely to work in case of juvenile delinquents than in the case of adults because it is easier to modify the value systems of young people. Most juvenile offences can be seen to fall into the category of crimes committed as a result of socio-economic circumstances. Similarly, the theory is more likely to succeed in case of first-time offenders than in case of recidivists. This is because it would appear logical to presume that it is easier to change the values of those who have not as yet adopted a life of crime. The success of a reform institution based on this theory depends less upon the formulation of policies and guidelines, and more on the calibre and potential of the authorities in charge of the institutions. Since the nature of crimes committed in society is so diverse, it is not possible for a single theory of penology to prevent the occurrence of all types of crime.