



THE CONCEPT OF PUNISHMENT AND THEORIES OF PUNISHMENT

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ABSTRACT

Crime is a negative phenomenon in the country. It is an illegal act that violates state law and is strongly condemned by society. Crime is defined as actions or omissions that are illegal under the law and punished by imprisonment or fine. The basic goal of a sentence is to dissuade the offender from committing the offense and to deter others from committing the offense. Punishment is the imposition of a deliberate hardship on someone as a result of his or her transgression. It is intentional because it is purposefully planned, and it is a burden because it contains a sense of sorrow. The purpose of this research paper is to assess various punishment philosophies. To do so, I will first describe the theories of punishment, which are the deterrent theory of punishment, the retributive theory of punishment, and the reformative theory of punishment; and then critically evaluate each of these theories of punishment.

INTRODUCTION

Modern penology recognize that punishment is not much effective under retributive or deterrence theory. It moves towards reformations or rehabilitation. The major thrust of this theory is to rehabilitations the inmates so that they may be transformed into law-abiding citizens. The advocates of this theory justify imprisonment not solely for the purpose of isolating criminals and eliminating them from the society, but to bring about a change in their mental attitude through effective measure of reformations during the lives of their life and to afford them a chance to make a fresh start and lead an honest life. This ensures fundamental human dignity, a most cherished constitutional and human right.¹ The present penitentiary strategies primary focus on punitive and retributive forms of punishment is ill suited in safeguarding human dignity. In this light various jurist, sociologist and law makers have been advocating correctional programmes in prison system. It is now widely accepted. To rehabilitate and reintegrate the offenders. Indian government took many initiatives for the progress of rehabilitative theory, but much change has not been witnessed at grass root level.

¹M.D. A. Lloyd's, Introduction to Jurisprudence, 282 (17 th ed., 2001).



In India various Committee have been constituted to investigate the issues of rehabilitations and reintegration's of offenders, some of these are Indian jail reforms Committee, 1919-1920, All India jail committee 1957, Mullah committee 1980, Justice V.R, Krishna Iyer Committee 1987.²

The Purposes of Punishment

Punishment is the basic goal of criminal law. Society strives to hold offenders accountable for their individual wrongdoings, protect society, and influence future behaviour through the implementation of criminal law. Criminal punishment attempts to strike a balance between these opposing principles: on the one hand, the concept of reformation - the offender should be reformed and rehabilitated. On the other hand, society has a legal obligation to safeguard the public. These two objectives are continually at opposition.³

Deterrence, incapacity, rehabilitation, restitution, and revenge have historically been presented as five rationales for criminal punishments. Taken together, these concepts illustrate the tension of criminal sanctions: reducing recidivism and keeping society secure but also genuinely reintegrating the offender.

Deterrence

Deterrence tries to deter future crime by terrifying the defendant or the general population. Specific and universal deterrence are the two types of deterrence. Individual deterrence applies to a defendant. When the government punishes an individual offender, he or she is less likely to commit another crime out of fear of receiving a similar or worse punishment in the future. General deterrence, on the other hand, is applicable to the general population. When the public learns of an individual defendant's sentencing, the public is presumably less inclined to commit a crime due to the defendant's punishment. The objective of the sentence in general deterrence is not necessarily to punish the individual perpetrator, but rather to make the defendant an "example" to dissuade others from committing a similar conduct. When the public hears, for example, that an individual defendant received a life sentence for murder, it is hoped that this knowledge installs a great fear of criminal prosecution and discourages others from committing murder.⁴

²J.MJ. Sethna, *Society and the Criminal*. 195 (5 th ed. 1989).

³W. Friedman, *Law in a Changing Society*, 225 (2008, 2 nd ed.).

⁴Jeremy Bentham, *the Theory of Legislation*, 167. (1995).



INCAPACITATION

Incapacitation also known as isolation prevents future crime by isolating the offender from society. The realization by society that some offenders cannot be deterred or rehabilitated is known as incapacitation. The basis for incapacitation is an acknowledgement that the offender will not harm other members of the community while jailed. Incapacitation might take the form of incarceration, house arrest, or the death penalty. Because capital punishment the death penalty is the ultimate form of incapacity, it is regarded as the most serious punishment attainable under criminal law.⁵

Rehabilitation

Rehabilitation seeks to prevent future crime by reforming a defendant's behaviour. Examples of rehabilitation can include educational and vocational programs, treatment centre placement, and counselling. The court frequently combines rehabilitation with incarceration or with probation or parole. Offenders must participate in rehabilitative programs in combination with probation, and in addition to, or instead of, incarceration. Therapeutic approach is an example of a criminal sanction that primarily focuses on rehabilitation. Therapeutic approach can operate as an alternative to traditional incarceration and effectively lower recidivism.

Restitution

The goal of restitution places the emphasizes repairing the harm caused to the victim. Restitution is meant to make the victim or community whole. Restitution can include court orders obligating the criminal defendant to pay the victim for any harm suffered. In this vein, restitution may resemble a civil damages award. Restitution can be for physical injuries, loss of property or money, and rarely, emotional distress in the form of future counselling costs. It can also be a financial reimbursement to cover some of the costs of the criminal prosecution and punishment.⁶

Retribution

The theory of retribution seeks to prevent future crime by demanding a sanction against the defendant regardless of its rehabilitative impact. When victims or society discover that the

⁵ Ahmad Siddique's, *Criminology and Penology*, 128 (2009,6 th ed.).

⁶Prof. N.V. Paranjape, *Criminology and Administration of Criminal Justice* 98 (5 th ed.2005).



defendant has been adequately punished for a crime, they may achieve a certain satisfaction that our criminal justice system is working effectively. Retributive theories seek to enhance society's overall faith in the criminal justice system by eliminating the desire for personal avengement . Retribution seeks to ensure offenders receive a punishment comparable to the seriousness of the underlying crime.⁷

Theory of Punishment

Retributive theory

This philosophy is based around the concept of retribution which reflects the maxim, "an eye for an eye and a tooth for a mouth." Retribution is the earliest and most common reason for retaliation. "You harmed me, and I harmed you" is the basic sense. In ancient days, when another individual was wounded, it was deemed the responsibility of the victim to seek revenge on the other person. The basic premise of this philosophy is that the perpetrator will undergo as much misery and distress as he has caused on his victim and thereby recover the collective order disrupted by the crimes. In other terms, it connotes that incarceration is an indication of the anger that culture has towards the convicted offender. The criminal deserves the "ex talionis" suffering Retaliation fulfils a divine task by punishing the perpetrator, preserves the societal order that is disrupted by the crime, and the remorse by the criminal is washed away by misery. It implies that bad can be switched around into bad without any thought of effect.⁸

Deterrent Theory of Punishment

Classical philosophers such as Thomas Hobbes (1588-1678), Cesare Beccaria (1738-1794), and Jeremy Bentham (1748-1832) advanced the deterrent idea of punishment. 'Discouraging' is the dictionary definition of deterrent. Deterrence in criminology is defined as the preventive effect that real or threatened punishment of criminals has on potential offenders.

⁷ Ibid

⁸ P.J Fitzgerald, Salmond on Jurisprudence, 94 (12 th ed. 1966).



The objective of imposing this form of punishment on offenders is to dissuade them from committing a crime in their initial place.⁹

Deterrence works on the actual or anticipated impulses of offenders. The deterrent idea also aims to create fear in the minds of others by providing enough penalties and exemplary punishment to offenders, so keeping them away from criminal activity. The state sentences the perpetrator to an exemplary punishment. Thus, punishments under this approach serve as an adequate deterrent to both offenders and others. The notion is also based on the belief that if the criminal is not punished, the crime will spread rapidly, generating a sense of vengeance in others who would not hesitate to perpetrate a crime.¹⁰

Bentham views the committed crimes as a past deed that should be utilized to punish the offenders in such a way that subsequent violations can be avoided. According to this idea, the goal of punishment is to demonstrate that, in the end, crime is never lucrative to the criminal, and, as Locke observed, to make crime "an ill-bargain to the offender." By making it an unfavourable bargain for the perpetrator, the rest of the world would learn that crime is a costly way to achieve a goal. Similarly, the State uses fear psychology to create terror in its citizens and thereby dissuade them from committing crimes.

According to John Ball, the following elements influence the deterrent effect of a particular sort of punishment.

1. The social structure and value system in concern;
2. The citizens in question;
3. The type of law upheld;
4. The nature and severity of the specified penalty;
5. The certainty of fear and punishment;

⁹Monica David, *Legal Theory Jurisprudence*, 141 (4 th ed.)

¹⁰ Ibid



6. The individual's understanding of the law and the specified punishment, as well as his assessment of the circumstance in light of these variables.¹¹

Sutherland classified deterrence into two types:

1. Deterrence in General
2. Particular Deterrence.

The general people is subject to deterrence. It is the use of punishment to deter others who may be inclined to commit an infraction from doing so. Those who witness an offender's punishment will have a profound fear of criminal prosecution. People want pleasure and avoid pain; therefore, if the punishment is believed to be too unpleasant, people will avoid unlawful action that could result in that punishment. General deterrence assumes that punishing persons convicted of crimes will set an example to potential violators who, being 'rational' beings, will not violate the law in order to escape such hardship.

The term "specific deterrence" is used to describe what the government does to a defendant in order to deter them from committing another crime. When a defendant is punished by the government, they are, in theory, deterred from committing another crime because they fear that they will be punished in a similar or worse way. In the past, this type of punishment was known as "incompetence." For example, a thief would have his hand amputated. A rapist would have his penis removed. A prostitute would have her face disfigured in order to discourage potential customers.¹²

The Beccaria-Bentham theorem states that the rate of committing a crime is inversely related to the degree of celerity, the degree of certainty, and the degree of severity of punishment for the crime. Using these two variables as a starting point, proponents of the model of criminal deterrence based on utility maximization argue that, as the likelihood of conviction increases or the degree of punishment decreases, the number of crimes decreases. The consensus view is that the degree of certainty is more important in deterring crime than the degree of

¹¹J.P.S Sirohi, *Criminology and Criminal Administration*, 96 (5 th ed. 1989).

¹²Shamubrata Mukherjee, *Jeremy Bentham*, 379. (1999. 1 st ed.).



punishment. Statistics support the idea that certainty of punishment deterrence's crime more than the level of punishment. However, some sociologists argue that no punishment is effective unless it is perceived as severe.¹³

While certainty and severity are essential for deterrence, they are not sufficient on their own. To be effective, a threat needs to be credible and effective. To be credible, the offender needs to believe that they can be apprehended and punished by the system. Personal experiences and police presence seem to have the greatest effect on the perception of credibility. The more law enforcement there are, the more likely someone is to be apprehended and the more likely they are to believe the threat. The more credible the threat, the more likely the person to be apprehended. To be effective, the punisher needs to communicate a reasonable justification for the punishment. The more rational the punishment, the more effective it will be.

Reformative Theory

Reformative theory of punishment is as old as Plato. "The soul of criminal justice, "is the art of recovering from the soul of a man stained by crime." This must be done by the sentence and the treatment in the prison. This constructive aim of the punishment is at the heart of the penal policy. "Crime must be regarded as a disease, and treated as such," says the Reformative theory. "We should treat crime as a disease," says Victor Hugo. "Evil will be treated with gentleness, not anger. Change will be easy and beautiful." Aristotle considered punishment a form of medicine. But some medicines create new diseases and are called "iatrogenic." Gandhi said it best, "Hate the sin not the sinner." That's how criminal justice should work." Gandhi said, "The prisoners in the jail should be treated like the patient in a hospital," "That should help them to restore their mental health."¹⁴

This view is supported by progressive criminologists who describe it as the 'correct remedy' and 'key' to the problem of delinquency not only to reform the delinquent but also to solve many complex social problems by saving them for society as a whole. Eminent Judge V.R. Iyers notes its importance: 'When the entire sentence is considered, and the consequences of

¹³ Ibid

¹⁴ Elemer Hubert, Johnson, Crime Correction and Society, 251 (4 th ed. 1978.).



imprisonment are more visible, the use of cruel and self-destructive punishments is less likely. It is time for the Indian criminologist to look to Indian Yoga as the scientific cure for criminal behaviour rather than relying on the blind jail term of the Penal Code.’ Perhaps this is why western researchers look to Indian Yoga to normalize the individual as well as the group. Gandhian diagnosis plays a crucial role in understanding the pathology of crime and the therapeutic nature of punishment. Krishna Iyer explains the essence of the ‘corrective philosophy’ within criminology: ‘Every saint has a past, and every sinner a future’. It is the law’s job to remind both.¹⁵

The transition to reformism began as a rebellion. It was a rebellion against both the harshness of prison life and the loss of morality and spirituality. For centuries, the reformers’ twin goals were to build clean prisons and to use religious and moral appeals to persuade prisoners to cease being sinful. The theory is grounded in religion, which teaches that each person in a community has worth and honour, and on the principle that society wants to locate the bad person who did the bad thing for the good of society, rather than to stop him from doing the bad thing again. This requires a constructive program, with the right facilities and staff, to re-educate and reorganize the criminal’s attitude by giving motivation, support, ideas, and patterns of conviction. Rehabilitation is an individualistic program; delinquents are seen as being able to use and control their actions. By examining the offender’s background, friends, environment and mental capacity, proper treatment would lead the criminal back into a productive life. The critics of the hypothesis focus on the fact that seasoned offenders don’t respond positively to the reformist program.¹⁶

This philosophy of redemption was based on the idea that no one was raised as a criminal, so that anyone can change. The idea was that any crime was the result of psychological, environmental or economic forces forcing an otherwise law-abiding and successful individual to behave in a way that could be changed through discipline, employment and other means of recovery. This was especially true for young criminals. The Welfare State was the goal of retribution, the goal of which was to witness the cycle of improvement from the last century. Add human interest to criminal law and that the brutality of retribution is law today.

¹⁵ Ibid.

¹⁶ Leon Radzinowicz and Reger Hood, *Criminology and the Administration of Criminal Justice*, 167 (1976, 1 st ed.).



Reformists view approval as a means of healing and seek to mould illegal behaviour on the principle that criminals are not created but generated by society's climate, so it is society's duty to improve it by following these correct methods. A growing understanding of the sociological and psychological origins of crime has led to a growing emphasis on reformation, rather than deterrence, on the less frequent use of incarceration, the abolition of limited term and the increased use of probation and parole.¹⁷

Based on this philosophy, the goal of the theory would be to rehabilitate the convict through the individualization process. It is based on the humanistic principle that while a criminal commits a crime, he is still a moral being. In conditions where he may have committed a crime that will never be repeated, an attempt is made to change him during his imprisonment. The goal of the punishment is to bring about the moral transformation of the offender. During his incarceration, he will need to learn a skill or trade so that he can return to a normal life after his release from prison. The judge will consider the offender's character and maturity, his date of birth, his education and environment, the circumstances in which the crime was committed, the reason for the crime, and many other factors before handing down a sentence that is appropriate to the circumstances. The purpose of doing so is to inform the judge of the exact nature of the circumstances.¹⁸

Modern Trend

Gandhi Ji once remarked, "Hate the sin, not the sinner." It should be utilized as a guideline for the administration of criminal justice. Understanding the illness of crime and the healing purpose of punishment requires a Gandhian diagnosis. It looks at the whole individual and assumes that he or she is healthy. Because everyone is born healthy, Indian criminal courts should follow modern principles of penology, reform, and rehabilitation.

"Every saint has a past and every sinner has a future," writes Justice Krishna Iyer, "never write off the man wearing the criminal attire but remove the dangerous degeneracy in him, restore his retarded human potential by holistic healing of his fevered, fatigued, or frustrated inside."

¹⁷ Ibid.

¹⁸ Elmer H. Johnson, *Crime Correction and Society* 329 (1978, 4 th ed.).



The Supreme Court ruled in *D.K. Basu vs. State of West Bengal*.¹⁹ Kept the custody Torture or execution in prison is regarded as a threat to the rule of law. As a result, the court has proposed a change to the rules of proof that would attribute culpability to police or jail authorities if an inmate died unexpectedly while in their custody. The Court has gone above and above in several situations to aid those who have been wronged by police.

Problem faced by Reformist philosophy

1. Reformative philosophy forecasts enhanced jail services and resources, strong cooperation among multiple departments, and an ongoing effort to shape offenders. It requires massive investments that a poor country cannot afford.

2. Millions Of fine citizens who observe the rules find it difficult to have simple provisions create legal justification for having more services within jail.

3. In fact, the theory's argument is more oriented toward crime panel incentives than deterrence.

4. Reformation will work for those who can be reformed; others, such as extreme, well-trained, and professional offenders, cannot be changed.

5. This principal ignores alleged criminals and persons who committed the violation but were not prosecuted in court. Furthermore, it disregards the perpetrators' charges of crimes.

6. A corrupt societal system is accountable for violence but not criminal culpability; it is difficult to accept a shift in ideology.

The Supreme Court held in *Dr Jacob George v/s State of Kerala* ²⁰that the penalty would be subject to deterrence, improvement, avoidance, restitution, and reimbursement. Choosing one principle above another is an illogical disciplinary method. Each penalty concept should be implemented alone or in combination depending on the circumstances. Humans are neither gods who can only do well, nor are they motivated to harm one another, even if it means destroying themselves. Given the nature of human existence, the complete absence of violence from society is not only impossible, but also unfathomable. Criminals are

¹⁹AIR 1997 SC 610

²⁰AIR 1994 SCC (3) 430.



still a significant part of society, thus they will be punished by the government and become responsible citizens. Society must constantly consider the victim's point of view.

If an individual is reliant on the State to prosecute offenders in the context of change and punishment, they will take the law into their own hands, attempting to punish their perpetrators themselves, which will lead to instability. The intensity of the offender's penalty should be greater than the enjoyment he obtains from commissioning the offence, according to Bentham's idea of disciplinary priorities. However, proportionality and uniformity must still be provided.²¹

CONCLUSION

The fundamental goal of punishing people is to keep crime out of society. To minimize crime in society, the root cause of crime must be identified and addressed, with some of the core reasons being unemployment, education, and so on.

In some horrific crimes, such as rape or murder, where punishment cannot compensate for the harm done, the victims must be compensated in a fair and timely manner. The court should consider all factors while deciding on sentencing because while a hundred accused may go free, an innocent person should not be penalized.

²¹Gallihier and James L. McCartnery, Power Crime and Criminal Law, 110 (1977).