

Punishment: The Indian Jurisprudence

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Abstract

The sole object of punishment ought to be not merely the prevention but also the reformation of the offenders. Punishment must be awarded in order to achieve any or as nearly as possible of the core objectives, namely, to serve as deterrent, to be preventive, to be reformatory, to be retributive and to be expiatory. The public dislikes a criminal and this dislike is expressed in the form of punishment. Each society has its own way of social control, for which it frames certain laws and also mentions the sanctions with them. These sanctions are nothing but the punishments. 'The first thing to mention in relation to the definition of punishment is the ineffectiveness of definitional barriers aimed to show that one or other of the proposed justifications of punishments are either logically included or logically excluded by definition.' Punishment is the suffering in person or property inflicted by the society on the offender who is adjudged as guilty of a crime under the law. The administration of punishment involves the intention to produce some kind of pain, which may be partly physical and partly mental, varying from case to case depending upon the circumstances and personality of the offender. In this study, the authors have talked about various kinds of theories of punishment based on which the offenders are punished. They have also discussed the merits and demerits of different theories and deduced a conclusion based on that. Punishment is good since it is corrective, deterrent, and necessary for public welfare.

Keywords: Deterrence, Expiatory, Preventive, Punishment, Reformatory, Retributive

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INTRODUCTION

Crime is eternal – as eternal as society. The word crime owes its genesis to the Greek expression *Krimos*, which is synonymous with the Sanskrit word *Karma*, which means social order. Thus, crime is applied to those acts that go against the social order and are worthy of serious condemnation. Crime is a legal concept and has the sanction of law. Both crime and criminal are looked upon with greatest hatred by the society; still the study and research of this branch of law has always been one of the most attractive branches of jurisprudence since the early years of human civilization.

According to Durkheim:

“There is no society that is not confronted with the problem of criminality”. [1] Law reflects the public opinion of the time and the concept of crime has always been dependent on public opinion; more than any other branch of law, criminal law is the mirror of public opinion.

According to Terence Morris, “Crime is what a society says is crime by establishing that an act is a violation of criminal law. Without law there can be no crime at all; however, there may be moral indignation which results in law being enacted [2]”. Criminal law is a body of rules and statutes that define conduct prohibited by the government because it threatens and harms public safety and welfare and that establishes punishment to be imposed for the commission of such acts [3]. Demands for change in law or an enactment of new law comes from many sections of public, sometimes resulting in social and political movements and agitations to bring about reforms in criminal law. One of the examples is the movement to abolish criminal law in the country.

Law is a command enjoining a course of conduct to be observed by all the members of the society and is backed by a sanction. The command may be sovereign or the command of a political superior to political inferiors, or

the command of a legally constituted body or the legislation, duly enacted by a legally constituted legislature and addressed to the members of the society in general. Law is determined by a political process; it accords with what most people recognize as minimum standard. Not only the enforcement of laws but the definition of behavior as criminal is part of the political process. The rejection of the law by offenders is a form of social protest of which they may be dimly aware [4].

Thus, law prescribes certain standards of conduct to be observed by the people of the society. These standards have the approval of society in general. Any deviation from the standards of the behavior fixed by the society is punished. Therefore, such conduct as does not accord with the prescribed standard is a crime.

Crime is said to be an act which is both forbidden by law and is against the moral sentiments of the society. Murder, robbery, cheating, etc., are the acts which people in civilized societies do not approve and, therefore, they are termed crimes. Thus, for an act to be a crime it must be done in violation of law and at the same time it should be opposed to the moral sentiments of the society. Moral values vary from country to country, from time to time, and from place to place in the same country. This is evident from the fact that the same act is not termed as crime in different countries. For example, adultery is a crime under Indian Penal Code, 1860, whereas it is not so in some of the continental countries like South Korea. Polygamy is punishable under Hindu Law whereas there is no such law for Christians or Mohammedans; they are governed by their own personal laws. A Muslim may have as many as four wives at a time. Christians are of course restrained under their personal laws to practice polygamy. Russell has rightly observed that, "To define crime is a task which has not been satisfactorily accomplished by any writer. In fact, criminal offences are basically the creation of the criminal policy adopted from time to time by those sections of the community who are powerful to safeguard their own safety and comfort by causing sovereign power in the state to repress conduct

which they feel may endanger their position [5]".

"Crime is an act committed or omitted in violation of public law, forbidding or commanding it." – Sir William Blackstone [6].

Later on, he improved the definition, "Crime is a violation of the public rights and duties, done to the whole community considered as a whole community." Further this definition was edited by Serjeant Stephen, who said, "A crime is a violation of rights considered in reference to the evil tendency of such violation as regards the community at large."

As defined by Kenny, "Crimes are wrongs where sanction is punitive, and it is no way remissible by any private person but remissible by Crown alone, if remissible at all."

Penal laws are ancient; they have been there since time immemorial; they are found in Manusmriti, Arthshashtra, and Yajñavalkya.

Disobedience of all law is not crime, for an act done in breach of law of contract, personal law or civil law may not be a crime unless such breach is by some law declared as criminal in nature. To common man crimes are those acts that people in society "consider worthy of serious condemnation."

Crime is not absolute like sin that can be defined and have an existence beyond the limits of what men may say and do.

PUNISHMENT: VARIOUS THEORIES

The mood and temper of the public with regard to the treatment of crime and criminal is one of the unfailing tests of the civilization of any country. A calm dispassionate recognition of the rights of the accused and even of the convicted – criminal against the state, a constant heart searching by all charged with the duty of punishment. A desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment; tireless efforts towards the discovery of curative and regenerative process; unfailing faith that there

is a treasure, if you can only find it, in the heart of every man; these are the symbols which in the treatment of crime and criminal, mark and measure the stored-up strength of a nation, and are sign and proof of the living virtue in it.

Philosophy of punishment is marvelously summarized by Manu as:
Punishment governs all mankind;
Punishment alone preserves them from all sides;
Punishment wakes while the guards are asleep;
The wise consider the punishment as the perfection of justice [7].

Punishment according to West Mark is limited to “such suffering as is inflicted upon the offender in a definite way, by or in the name of the society of which he is a permanent or temporary member [8]”. Punishment is a sanction imposed on an accused for the infringement of the established rules and norms of the society. According to Bentham, “Punishment is an empirical question or desire and of an infliction of sufficient pain to provide an effective Deterrent [9]”. This is an instrument of public justice. If a murderer is prosecuted, is brought before the court, his case heard, punishment awarded by the court and finally executed by the state, then it becomes punishment in legal sense. It will not become a punishment in law, if a father beats his son for committing a theft. The origin of punishment is believed to flow from vengeance, to fear of the offended gods or from the conflict of interests of different groups, whatever maybe the exact origin, one thing is certain that both crime and punishment are the product of society, it is rightly said that, “society prepares the crime and the criminal commits it.” The efficacy or otherwise of the punishment is influenced by what the people of the particular society feel about it. In some, punishment is for the transgression of rules and it is inflicted by legally authorized persons. Various theories are advocated to explain the purpose of punishment, namely:

1. Retributive theory
2. Deterrent theory
3. Preventive theory
4. Expiatory theory
5. Reformatory theory

Expiatory is one peculiar to Hindu jurisprudence alone. No society or system of law follows entirely one theory, rather a combination of all are followed by most legal systems including India.

RETRIBUTIVE THEORY

Retributive is probably the oldest and the most ancient justification for punishment. The origin of this theory lies in the primitive notion of vengeance against the wrongdoer. This satisfies the feeling of revenge. The literal meaning of this punishment is “you hurt me and I will hurt you.” An eye for an eye and a tooth for a tooth is the motto of this theory. This theory believes in the concept of getting even. The theory proceeds on ethical grounds; moral culpability of the culprit is the focal point of attention. This theory was nurtured more prominently in the olden days when the injured person was given a right to take revenge on the person trying to cause injury. Cant says that justification of punishment lies in the fact that evil has been done by him who suffers it. In modern times, retribution is used in more than one sense. In the first sense, the idea is that of satisfaction by the state of the wrong individuals desire to be avenged, second it is that of the state marking its disapproval of the breaking of its laws by a punishment proportionate to the gravity of the offence. In modern penological thought, retribution is not so much considered in the sense of vengeance but in the sense of reprobation. This intends that a man deserves punishment because he has acted wrongfully. Retribution is used by some people in terms of expiation or atonement. According to them, the offender must suffer some evil so that he may come to realize the justice of his punishment. This theory was criticized by Sheldon Glueck, who says that it is natural that he hates criminals but to base a policy of social protection upon the hatred of those who commit such acts is both uneconomical and unjust [10]. Contrary to this, Stephen justified punishment on the ground of hatred and said hating a criminal is morally right. In his opinion, “Criminal law stands to the passion of revenge in much same relation as marriage to sexual appetite.” According to Aschenffenburg, a man happens to be a criminal due to circumstances, “chances and

causes” and, therefore, “he needs to be disciplined”. And once he suffers the penalty he is lost forever, and the state is deprived of a useful perhaps a necessary member [11]. It is rightly suggested by Bentham that revenge is sweet even to a modern man.

The main defect of this theory is that it does not regard punishment as a measure of social security and welfare but considers punishment as an end in itself. It neglects the utilitarian aspect of punishment. Retribution is in itself not a remedy for the mischief of the offence but an aggravation of it. Retributive theory is gradually losing its ground in modern society. It is observed that the *Lex Talionis*, an eye for an eye and a tooth for a tooth, cannot be a justification for punishment in modern society.

The principle of an eye for an eye, a tooth for a tooth, nail for a nail, and limb for a limb was the basis of criminal administration [12].

This theory is considered to have a link with the retributive theory. This theory propounds that punishment should be to adjust the suffering to the sin. The offender by suffering pays the debt demanded by justice and owed to authority inflicting the suffering, and so becomes reconciled once more with that authority. The punishment should be in proportion to the quantum of wrong, and after the wrongdoer undergoes the punishment it is presumed that he gets purified and thus he once again becomes an accepted member of society. Salmond observes [13]:

“Akin to the idea of retribution is that of expiation. On this view, crime is done away with, cancelled, blotted out or expiated by the suffering of its appointed penalty. To suffer punishment is equal to innocence. Revenge is the right of the injured person. The penalty of wrongdoing is a debt which the offender owes to his victim, and when the punishment has been endured the debt is paid, the liability is extinguished, innocence is substituted for guilt, and the *vinculum juris* forged by crime is dissolved. The object of true redress is to restore the position demanded by the rule of right, to substitute justice for injustice, to compel the wrongdoer to restore the injured person that which is his own. A like purpose is

assigned to punishment, so long as it is imperfectly differentiated from that of retributive vengeance, which is in some way reparation for wrongdoing. The fact that in the expiatory theory satisfaction is conceived as due rather to the outraged majesty of the law than to the victim of the offence, merely marks a further stage in the refinement and purification of the primitive conception.

EXPIATORY THEORY

This theory is also known as theory of penance. According to this theory punishment is necessary for the purification of the offender. It is a kind of expiation for the misdeeds of the person. In modern times, it is accepted in a modified form and is considered to be a part of the retributive theory. Suffering must be equal to the guilt if it were to wipe it out. It is difficult to work out this theory successfully as it is difficult to weigh the guilt in fine scale of suffering. The external conduct of the wrongdoer which led to the commission of the crime cannot be measured. The fact that in the expiation theory satisfaction is conceived as due rather to the outraged majesty of the law than to the victim of the offence merely marks a further stage in the refinement of the primitive conception [14].

Expiation, however, is no easier to justify morally than retribution. To compel the wrongdoer to compensate or make restitution to his victim seems reasonable, but the suggestion that we should compel him make restitution in the obstruct to no actual person suffers not only from a mysticism that should have no place in law and politics but also from the fatal objection that there is no moral right for mere men to enforce this sort of obstruct or payment.”

DETERRENT THEORY

Deterrence according to Sir John Salmond is, “Punishment is before all things deterrent and chief end of the law of crime is to make the civil doer as example and of warning to all who are of like-minded with him [15].” Oppenheimer observes that deterrence as an aim of punishment, though has lost much of its former importance, it cannot be said to be entirely eliminated from the policy of the modern court of criminal jurisdiction. Bentham also agrees that general prevention

ought to be the chief object of punishment and its real justification. According to this theory the objective of punishment is not only to prevent the wrong doer from doing a wrong a second time, but also to make him an example to other persons who have criminal tendencies. The deterrent theory was the basis of punishment in England in the medieval period; severe punishments were inflicted even for minor offences. For instance, for the ordinary crime of stealing, the culprit was subjected to the severe punishment of death by stoning and whipping. In India, the penalty of death sentence or mutilation of the limbs was imposed even for the petty offences of forgery, stealing, etc., during the Mughal period. Even today, in most Muslim countries like Pakistan, Iran, Iraq and Saudi Arabia, this theory is the basis of penal jurisprudence. The chief purpose of the punishment is the protection and maintenance of individual interest in the society by deterring the evil minded people. The notion that punishment reduces crime is based on hedonistic assumption that people regulate their behavior by calculation of pleasure and pain. Thus, emotion of a man plays an important role. He is aware that if he ever commits an offence, he will be sternly dealt with, and this feeling is generated in the mind of all by including a potential criminal. Obviously, more serious the offence, sterner is the penalty.

In many cases we find that punishment has failed to accomplish the objective aimed at because many criminals appear before the magistrates regularly. Holmes criticizes this theory of being immoral and in as much as the measure of punishment is based on the subjective opinion of the law gives [16]. In many cases, offences are committed under the heat of passion or extreme excitement, or provocation, where the offender loses his mental balance and commits the offence without applying his mind to the consequences. In such cases, the punishment hardly works as a deterrent. Secondly, when the offender is once punished, the punishment, to a certain extent, loses its rigor for him and once an offender undergoes imprisonment, he is no longer afraid of it to the same degree as he was before he served the first term. Thus, the punishment has little deterrent effect upon the offender who has suffered the penalty.

The preventive theory works on the principle of, "Prevention is better than cure." Another object of punishment is prevention or disablement. The preventive theory concentrates on the prisoner and seeks to prevent them from offending again in the future. The death penalty and exile serve the same purpose of disabling the offender. The fear of punishment prevents the lawbreaker from violating the law. All similar secondary purposes of preventive disablement are served by forfeiture of office, suspension of driving license, and the old penalty of exile. In modern times, the disabling aspect has been emphasized by statutes conferring upon judge's power to sentence habitual offenders to preventive terms of imprisonment in the form of enhanced imprisonment. The purpose of punishment is the compelling of person to seize or refrain from committing crime, by forcing or persuading to them to conform to the established goals of conduct, designed for the protection of government, of life, of property, of other rights, privileges, and immunities guaranteed by law [17]. Salmond too appears to have emphasized the preventive purpose of punishment, when he says that we hang murderers not merely that it may put a fear into the hearts of others but for the same reason for which we kill snakes, namely, because it is better for us that they should be out of the world than in it. The protection of society demands at least a measure of disablement to restrain incorrigible offenders and harden criminals, also from further wrongful activities and that is why disablement consists, primarily in physical restraint.

Punishment has to be before all things deterrent, for the chief end of the law of the crime is to make the evil doer an example and a warning to all that the like-minded with him [18]. The courts need to properly operate the sentencing system and impose such sentence for a proved offence, which may serve as a deterrent for the commission of like offence by others [19].

In ancient times, the offender was prevented from crime again by disabling him permanently. For example, the punishment for theft was cutting the hand of the offender. The

most effective kind of punishment is the death penalty. It is awarded only in serious cases and their repetition, as it is most dangerous for the society. Therefore, death penalty is considered to be the appropriate punishment for such offences.

PREVENTIVE THEORY

Prevention as a purpose of punishment does not seem to be very convincing and does not work very successfully in checking crimes. Persons committing crimes under extraordinary psychological stress seldom repeat the crime. To punish a man who commits a crime under such a pressure would be meaningless. On the other hand, punishment has a demoralizing effect upon him and after suffering the sentence; he becomes fearless and shameless and may possibly turn into a professional. Every man enjoys his own reputation and is conscious enough to protect it. Once he chances to commit a crime and is punished, he finds that his social reputation has been affected and this makes him feel to repeat the crime because no more he considers himself to be respected by the society.

The reformatory aspect is meant to enable the person to relent and repent for his action and make himself acceptable in the society. Theory of reformation through punishment is grounded on sublime philosophy that every man is born good, but circumstances transform him into a criminal. The aphorism that if “every saint has a past every sinner has a future” is a tested philosophy concerning human life. Victor Hugo states, “To open a school is to close a prison.” This theory follows this dictum. It believes in educating the offenders in such a way as to make them better citizens of tomorrow. It treats a criminal mind as a diseased mind which requires careful diagnosis and proper attention to cure him. Reformation seeks to bring about a change in the character of the offender. It believes in causes of crime to be explored more vigorously in a personalized manner, and then a personalized treatment is recommended. Justice VR Krishna Iyer, while sentencing in the case of *Mohammad Giasuddin v. State of Andhra Pradesh* [20], has taken pains to

ornately fresco the reformatory profile of the principles and observed in the case that reformation should be the dominant objective of a punishment and during incarceration every effort should be made to recreate the good man out of the convicted prisoner. An assurance to him that his hard labor would eventually snowball into a handsome saving for his own rehabilitation would help him to get stripped of the moroseness and desperation in his mind while toiling with the rigors of hard labor during the period of his jail life. Thus, reformation and rehabilitation of a prisoner are of great public policy. Hence, they serve a public purpose [21]. Punishment is also to reform such wrongdoers not to commit such offences in future [22].

Based on this theory, the former President Dr. APJ Abdul Kalam, wanted to abolish death penalty. However, this theory admits only the types of punishments which are educative and discipline the criminal and not those which inflict pain on the offender. In modern times, reformatory measures are adopted in cases of juvenile offenders.

Critics of this theory maintain that if a punishment is to be a punishment, it must be unpleasant. We cannot put remorse, readymade into a criminal mind but we can stimulate it by giving him a pain akin to that of remorse, making him feel the indignation of impartial observance. The criminal is looked upon as an object of pity, and punishment becomes the work of charity.

CONCLUSION

The objective of any concession given to an offender should be to convince him that normal and free life is better than life in jail. In the case of *Narottam Singh vs. State of Punjab* [23], the Supreme Court has rightly said that reformatory approach to punishment should be the objective of criminal law in order to promote rehabilitation without offending community conscience and to secure social justice. In case of *MH Hoskot vs. State of Maharashtra* [24], the Supreme Court has held that the court should not confuse the correctional approach with prison treatment and nominal punishment verging on

decriminalization for serious social and economic offences.

A perfect system of criminal justice could never be based on a single theory of punishment. Every theory has its own merits and every effort should be made to extract the good points of each. For instance, the reformatory aspect must be given its proper place. The offender is not only a criminal to be punished but also a patient to be treated. Punishment should be proportionate to the gravity of crime. A first offender should be treated leniently; special treatment should be given to juveniles; and special courts should be set up for the trial of children. The criminal should be able to secure his release by showing improvement in his conduct.

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Cite this Article

Shreya Sinha, Anupama Soumya.
Punishment: The Indian Jurisprudence.
National Journal of Criminal Law. 2018;
1(2): 5–11p.