



THEORIES OF PUNISHMENT

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Abstract-- Crime and punishment are always related to each other. The basic purpose of punishment is to maintain peace and order in society. Historically and till today the forms of punishment finds its relevance with the theories of punishment. These theories of punishment are important as these have guided us to decide what kind of punishments be inflicted in what kind of offences. The aim of this paper is to briefly discuss the theories of punishment and to criticise them. This paper also discusses the role and impact of these theories in Indian Criminal Judicial system.

Keywords: *Punishment, Judicial and society*

INTRODUCTION

Ever since the communities, clans or tribe came into existence the need was felt to keep a control over society for the peaceful survival of everyone. Every person has set of rights given by the power over or state over them and for the protection of those rights administration of justice is required. When we read different schools jurisprudence we can conclude that every school has one thing in common i.e. the people and the political power over them it means that one rules and other part is to be ruled. However, the kind and form of this power varies from one community to another. And this control of state or authority over individuals for protecting rights of individuals is exercised with administration of justice. Administration of justice is the maintenance of right within a political community by means of the physical force of the State. It is the modern and civilized substitute for the primitive practice of private violence and violent self-help. Without a system of administration of justice, man tends to redress his wrongs by his own hand, which is certainly not at all desirable¹. Take a look to the Austin's Definition of Law, "Law is command of the sovereign which is backed by sanctions". Here command is the rules to be followed by the individuals and sanctions reflects the punished to be imposed over them in case of non-fulfillment of those commands. Similarly, Bentham gave the concept of Utilitarian individualism and supported theory of pleasure and pain². Since then till now we are studying the relation between law and society. And for orderly running of society relation between crime and punishment is important. We have two forms of administration of justice. First one is Civil. Here when civil rights are violated of any individual, civil remedies are opted like fine, penalty, restitution and the compensation. While for the crimes there are punishments.

BACKGROUND OF FORMS OF PUNISHMENTS

The object of punishment has been very well summarised by Manu, the great Hindu law giver, in following words: punishment governs all mankind; punishment alone preserves them, punishment wakes while their guards are asleep; the wise considers the punishment (danda) as perfection of justice³. History suggests the punishments of different forms for different offences out of which some are followed today

¹ Crimes and theories of punishment available at http://shodhganga.inflibnet.ac.in/bitstream/10603/45012/9/09_chapter%204.pdf

² Book on Jurisprudence by Dr. B.N.Mani tripathi

³ Theories of Punishment by Aviral Umrao, research associate updated on February 7, 2014 available at <http://lex-warrier.in/2014/02/theories-punishment-overview/>



also while others are abolished. But in is always to be kept in mind that punishment inflicted should be directly related to the offence committed. Punishments of different times are given and suggested by the theories of punishment. These theories are till now the part of penal system of any country. The Indian Criminal Judicial System also includes theories of punishment and punishments for different types of the offences are categorically included and mentioned under Indian Penal Code, 1860.

THEORIES OF PUNISHMENTS

The types of Punishments to be inflicted are backed by the different theories. These can be briefly explained as follows.

- **Retributive Theory:** The most classic form of retributivism is derived in Code of Hammurabi's lex talionis, which stands for 'an eye for an eye and a tooth for a tooth'. Most retributivists believe that a guilty person should suffer pain. Herbert Hart defined retributivism as 'the application of the pains of punishment to an offender who is morally guilty'⁴. Retributive justice is a theory of justice that considers punishment, if proportionate, to be the best response to crime. When an offender breaks the law, s/he thereby forfeits or suspends her/his right to something of equal value, and justice requires that this forfeit be enacted⁵. This theory supports that for any crime committed by the individual then same act is to be done with him. This theory is also called by the name of revenge Theory. For example if someone commits murder then revenge is taken from the offender in the same manner.

Criticism: This theory is not followed nowadays as it defeats the basic purpose of punishment and also the principle of natural justice. Taking a revenge of crime done by one will not create any effect over the society. One fact cannot be ignored is that before infliction of punishment it is to be observed that under which circumstances the crime has been committed by the offender. Moreover it is not justified to give same punishment to all the offender committing same offences as no two cases have same set of facts and circumstances. Another point of criticism is that one chance should be given to all to reform him. It is not like this that once an offender is always an offender. Sometimes pardoning or reprimanding can do big things that a punishment cannot.

- **Deterrent Theory:** This theory says that such a punishment be inflicted that others will not repeat the specific offence. Deter = Abstain from action, Deterrent Punishment = Severe Punishment; Intended to prevent the offender from doing again committing the crime. The aim of this theory is to inflict various penalties on the offenders with a view to deterring them from committing crime. This theory also seeks to create a sense of fear in the mind of others with a view to keep them away from committing such crime. The rigor of the punishment acts as a warning to others⁶. Deterrence is the use of punishment as a threat which is considered as a means to prevent people from offending or to reduce the probability and/or level of offending. The concept of deterrence has two key assumptions: the first is that specific punishments imposed on offenders could prevent the offender from committing further crimes; the second is that fear of punishment could prevent others from committing similar crimes. Deterrence is often contrasted with

⁴ Retributive Theory of Punishment: A Critical Analysis, Updated on January 15, 2015 By hariharan By Abhishek Mohanty, WBNUJS available at <https://www.lawctopus.com/academike/retributive-theory-of-punishment-a-critical-analysis/>

⁵ CURATED COLLECTIONS OF THE MOST USEFUL FACTS, Curated by BROSHAN SCHWARMA available at <https://www.citelighter.com/philosophy/philosophy/knowledgecards/retributivist-theory-of-punishment>

⁶ Theories of Punishment available at https://www.lawnotes.in/Theories_of_Punishment



retributivism, which holds that punishment is a necessary consequence of a crime which the offender deserves and its severity should be calculated based on the gravity of the wrong done⁷.

Criticism of the Theory: This theory is not practical and thus is not followed nowadays. This theory fails to create any effect over the hardcore criminals or the repeated offenders as they are not deterred by the punishments inflicted over them. So it defeats the very purpose of this theory as when criminals are not deterred then how such punishments are going to deter general public. Thus it will not reduce the extent of crime in the society. On the other hand, it also fails to affect an ordinary criminal, as very often, a crime is committed in a moment of excitement. If the crime is pre-mediated, the offender commits the crime, knowing fully well, the consequences arising from his act and performs the act because he cannot help but do it. This method is still in use in Muslim countries⁸.

- **Expiatory Theory:** The basic principle underlining this theory is that 'To pay for the sins'. Expiation Theory says that compensation is to be awarded to the victim by the offender or the wrong-doer. It supports that the offender should not be physically punished but economically. As making compensation will not only create effect over the wrongdoer but also create an effect over the family. Thus will deter the persons in the society also to not to commit the offence as an individual is usually not concerned about the punishment to be inflicted over him. But is always more concerned and possessive about his family. No one wants his or her family to suffer for his deeds thus such a punishment will create more deterrent effect over the individuals. Except this it is also important that instead of punishing the wrongdoer stress should be given on compensation to the family as it will really help the victim's family and punishment to offender is never going to fulfill that objective. This theory supports that the extent of the compensation should be determined as per the extent of the loss suffered by the victim's family.

Criticism of the theory: The Compensation alone does not provide adequate remedy to the victim's family in case any crime has been committed by the wrongdoer. It will go for the civil offences but in case of crime the victim's families always want strict action towards the criminal and money cannot satisfy the pain suffered by victim's family. For example a wrongdoer is a rich person and he commits a rape of a female than in such a case only compensation will not solve the issue. It also defeats the very objective of the criminal judicial system in India. No doubt, Compensation can be additional remedy but not be a sole remedy in case of the crimes.

- **Reformative Theory:** This theory is based on the principle given by Mahatma Gandhi that 'Condemn the sin, not the sinner'. This theory supports the view that a criminal is not always a criminal. There might be a possibility that one has committed an offence under grave provocation or anger then in such cases he is not a hard core criminal. In such cases efforts are to be made so as to reform them instead of criminalizing them or punishing them. Moreover keeping such persons with actual hard core criminals in prisons will further reduce their chances of becoming good human beings and such company will further create bad impact over them. According to this theory, crime is like a disease. This theory maintains that "you cannot cure by killing". The exponents of the reformative theory believe that a wrong-doers stay in prison should serve to re-educate him and to re-shape his personality in a new mould. They believe that though punishment may be severe, it should never be degrading. To the followers of this theory, execution, solitary confinement and maiming are relics of the past and enemies of reformation. Thus, the ultimate aim of the reformists is to try to bring about a change in the personality and character of the

⁷ Deterrence (legal) From Wikipedia, the free encyclopedia available at [https://en.wikipedia.org/wiki/Deterrence_\(legal\)](https://en.wikipedia.org/wiki/Deterrence_(legal))

⁸ IBID



offender, so as to make him a useful member of society⁹. Not looking to criminals as inhuman this theory puts forward the changing nature of the modern society where it presently looks into the fact that all other theories have failed to put forward any such stable theory, which would prevent the occurrence of further crimes. Though it may be true that there has been a greater onset of crimes today than it was earlier, but it may also be argued that many of the criminals are also getting reformed and leading a law-abiding life all-together. Reformatory techniques are much close to the deterrent techniques¹⁰.

Criticism: This Reformatory Theory of Punishment cannot be applied to hardcore or repeated criminals. If prison will be very comfortable, it will become dwelling house for poor and unemployed¹¹.

- Preventive theory of Punishment: The basic principle and idea underlying this theory is that 'Prevention is better than cure' for example it is better to avoid those acts which can result into punishments. The preventive theory is founded on the idea of preventing repetition of crime by disabling the offender through measures such as imprisonment, forfeiture, death punishment and suspension of licence. Preventive theory was supported by utilitarian law reformers because of its humanizing influence on penal law. In their view, it is the certainty of law and its severity which has a real effect on offenders. The development of the institution of prison is essentially an outcome of the preventive theory of crime¹².

Criticism of the theory: This theory is not very much useful as it is relevant for those who are actually law abiding citizens and are deterred by the punishments but is not of much use in case of those persons who willfully opt for wrong ways to fulfill their goals or get involved in illegal activities. The major defect of this theory is that it uses the offender as means and not as end. This does not affect any improvement in the culprit. He is made the means of the improvement of others. No the other hand, those who have criminal tendencies can be prevented from crime by necessary preventions and the removal of conditions constituting the breeding ground of crime. To punish a man in order to convey a lesson to others is improper and inhuman. This theory is more defective than even the Retributive theory¹³.

Theories relevant in India: Indian criminal judicial system also reflects the relevance of these theories. Sentencing and quantum of punishment are the most important features. Our system reflects involvement of all these theories except the expiatory theory. Indian criminal justice system offers an example of influence of the theories of punishment on sentencing. During the British regime and the first two decades after independence with Victorian age values in the ambiance, Indian courts were more concerned with deterrent and proportionate sentences. In *Emperor vs, Maiku*¹⁴, the Allahabad High Court observed that "It is an elementary proposition in criminal jurisprudence that sentence in each case should be proportionate to the nature and gravity of the crime." Similar observation was made by the Calcutta High Court in *Emperor vs. Yar Muhammad*¹⁵ In *Mohomed Hanif vs. Emperor*¹⁶ the Bombay High Court observed regarding sentencing the offenders as follows: In the first place, it is necessary to pass a

⁹ Supra refer to footnote no. 5

¹⁰ Supra refer to footnote no. 2

¹¹ Article on ' Theories of Punishment: Definition, Criticism and Philosophy' updated on the webpage of Law and Society available at <https://www.lawsociety.guru/theories-of-punishment/>

¹² Preventive Theory Law and Legal Definition available at <https://definitions.uslegal.com/p/preventive-theory/>

¹³ 3 Important "Theories of Punishment" (Retributive, Preventive and Reformatory) Article shared by Pragati Ghosh available at <http://www.shareyouressays.com/knowledge/3-important-theories-of-punishment-retributive-preventive-and-reformatory/113055>

¹⁴ AIR 1930 All 279

¹⁵ AIR 1931 Cal 448

¹⁶ AIR 1942 Bom 215



sentence upon him which will make him realise that a life of crime becomes increasingly hard, and does not pay. In the second place, the sentence should serve as a warning to others who may be thinking of adopting a criminal career. In the third place, the public must be protected against people who show that they are going to ignore the rules framed for the protection of society. Next in series is the following of reformatory theory in many cases. Many judgments have been passed keeping in view that 'Paap se grihna karo, paapi se nahi' every chance of reformation be given to offenders. One of such cases is where the Court observed as under: If every saint has a past, every sinner has a future and it is the role of law to remind both of this. The Indian legal genius of old has made a healthy contribution to the world treasury of criminology. The drawback of our criminal process is that often they are built on the bricks of impressionist opinions and dated values, ignoring empirical studies and deeper researches¹⁷.

This is not the end the facts and circumstances of every case are different. Slowly and gradually courts came with further cases where again court believed in following the principle of deterrence in providing quantum of punishments. Like in the Rape cases the tremendous increase in number of offences relating to rape the need was felt to have harsh and stricter punishments. In case of Nirbhaya the court itself suggested that Death penalty should be only punishment for such offences. In Mahesh vs. State of Madhya Pradesh¹⁸ the Supreme Court depreciated the practice of taking a lenient view and not imposing the appropriate punishment observing that it will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. The court held that "To give a lesser punishment to the appellants would be to render the justice system of this country suspect. The common man will lose faith in the courts¹⁹. Except in sentencing the framing of laws is also done by keeping in view these theories like Preventive theory and the reformatory theory. The Indian Penal Code 1860 supports preventive theory as it is a code mentioning the amount and extent of the punishments to be imposed in case any such crime mentioned in IPC is committed by any individual. Thus it prevents the crime. Along with IPC all our laws find its place in the preventive theory. Along with this the establishment for the rehabilitation centers at state and Central Level suggest the principles of reformatory theory.

CONCLUSION

Our history suggests the importance and relevance of all these theories in different times and different places. These theories are well explained on the basis of the objectives behind them. But as every coin has two sides, these theories of punishment too have both pros and cons. These theories are also criticized from time to time. The numbers of punishments are suggested by these theories out of which some are still prevalent, while others are totally banned. Indian judicial system too reflects the involvement of all these theories. Among all the theories the expiatory theory is the only one which has lost all its relevance in the present times as compensation can be the additional remedy in criminal cases but alone it is of no use and does not fulfill the basic objective of the punishments.

¹⁷ Mohammad Ghasiuddin v. State of Andhra Pradesh (1977)3SCC287

¹⁸ (1987) 3 SCC 80

¹⁹ Paper on "Criminal Judicial System" Module 'Sentencing: Theory and Practice' available at http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/05._criminal_justice_administration/17._sentencing_theory_and_practice/et/8182_et_et.pdf