



DISCIPLINE AND PUNISHMENT: A STUDY FROM A JURISPRUDENTIAL PERSPECTIVE

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Abstract-- "All punishment is mischief, all punishment in itself is evil"- Jeremy Bentham¹

The concept of discipline and punishment is interrelated in the sense that since time immemorial, punishments of all sorts have been inflicted on human beings by the authorities with respect to the mistakes and crimes they had committed. This was with regard to discipline them and as a result even the harsher punishments were meted out without anyone to challenge them. Beginning with the works of Cesare Beccaria, Jeremy Bentham etc. who advanced their theories in this field, Michael Foucault's masterpiece 'Discipline and Punish' highlights the brutal ways of punishment including the massive torture of the body of the wrong-doers. Not only that, he was the pioneer behind giving the structure of panopticon as advanced by Bentham, whereby the wrong-doers were kept in a confined space and were under continuous surveillance which worked as a disciplinary mechanism. Moreover, relating the idea of this same panopticon to the modern day institutions such as the juvenile correctional homes, shopping malls, schools etc., one can see the similarities in the functioning of the age old panopticon to these institutions where the element of continuous vigilance by the authorities is present.

Keywords: Discipline, Punishment, Crime, Panopticon, Wrong-doers, Modern day institutions

INTRODUCTION

From a broader perspective, the practice of imposing punishments on the citizens is attributed to the state which is considered to be the sovereign power. It is defined as "the pain or deprivation intentionally inflicted on a person by an authority for an offence".² As such, the noticeable elements which can be established are the imposing of some pain or deprivation on an individual intentionally by someone in power for committing an offence against any rule. We generally tend to take the practice of punishment to be a given aspect of social life but it is also important to understand the ways or purposes for which punishments are awarded to some and not others.

Given punishment theory's large descriptive component, it is necessary to distinguish between the two disciplines where on one hand jurisprudence is focused exclusively on explaining the validity of legal norms but on the other hand, the descriptive questions with which punishment theory is concerned ordinarily do not include the questions of legal validity.³ The practice of punishment can be said to exist in the society from the day the very concept of 'society' came into existence where there was a need to punish the wrong doers for their mistakes. This also meant that for a long period of time the ways in which the people were punished remained unchallenged. Passages from the Bible show how the right to punish by the authorities were obeyed by without questioning as it was believed that the authority imposed God's will and so its actions had to be good and right.

PERSPECTIVES ON PUNISHMENT

Some notable works on punishment were carried by reformists such as Cesare Beccaria and Jeremy Bentham. They disbelieved the divine justice held to be the common belief at that time and instead adopted a secular perspective in order to find out the justification of such punishments. Questions were posed now regarding where this right to punish came from and if it served any purpose. The conclusion of these early reformists was that punishment indeed can be justified, because it can promote compliance with common rules and thereby uphold social peace and order.⁴ Also, they deduced that punishments meted out was itself an evil.

¹ Jeremy Bentham, "An Introduction to the Principles of Morals and Legislation", Jonathan Bennet, 2010-2015

² Goran Duus-Otterstrom, "Punishment and Personal Responsibility", Department of Political Science, Goteborg University, 2007, pp.55

³ Kyron Huigens, "The Jurisprudence of Punishment", William & Mary Law Review, Volume 48, Issue 5, Article 12, 2007, pp.3

⁴ Goran Duus-Otterstrom, "Punishment and Personal Responsibility", Department of Political Science, Goteborg University, 2007, pp.17



Cesare Beccaria, one of the classicists to have worked on punishment composed his famous works of all times 'On Crime and Punishments' whereby he held that all punishment not deriving from absolute necessity was tyrannical.⁵ He understood authority comparing it to an individual's consent in forming a social contract and postulated that the individuals would adhere to whatever punishment is imposed upon them by the concerned authorities as it would result in happiness for all by complying with some set rules. But it is possible only if punishment served its goals and it is moderately administered to provide an effective justification. Otherwise, it would be despotic and the contracting parties might not abide by it. The idea of punishment as a prima facie evil was advanced by Jeremy Bentham in his work 'The Principles of Morals and Legislations'. Developing his theory of punishment from a utilitarian perspective, he believed that the concept of punishment was itself evil in nature and can be justified if and only if it produced some balancing good. Another theory of punishment was that of retributivism which is associated with the writings of Immanuel Kant and Hegel. It is defined as the theory which stated that punishment is justified if it can be proved that it is morally deserved. Adopting a backward-looking approach to punishment, it holds that in order for a punishment to be justified, it must give the rule breaker what he or she deserved in virtue of his/her actions.⁶ In ordinary punishment theory, a judgement of legal punishment is just or valid, only if it imposes morally deserved punishment.⁷ In this regard, we can also look at John Finnis's description of criminal fault. He said "sanctions are punishment because they are required in reason to avoid injustice, to maintain a rational order of proportionate equality, or fairness, as between all members of the society".⁸ His concern was therefore legal punishment in particular and not the general punishment.

JEREMY BENTHAM AND PUNISHMENT

Most discussions of punishment begin by assuming two matters- a) the punishment is morally justified and b) that punishment should be controlled and monopolised by the state.⁹

Jeremy Bentham, one of the most famous English moral philosophers and legal reformers provided in his penal writings a considerable, comprehensive and sophisticated justification for the infliction of legal punishment. Being a utilitarian theorist, he believed that human beings are governed by the two sovereign masters of 'pain' and 'pleasure' where the goal was to maximise pleasure and minimise pain. In that way, the concept of 'good' and 'bad' are measured by what is pleasurable and painful. Therefore, according to him, the object of legislation should be to secure the greatest happiness of the greatest number of people which also meant that the pain that the punishment caused should be in proportion to the happiness that it secured. Also, the idea of panopticon prison is credited to Bentham where ideas of surveillance, control and regimentation are said to find a place. His works on punishment which to an extent was also influenced by Beccaria can be found in "An Introduction to the Principles of Morals and Legislation."

To throw some reflections on Bentham's theory of punishment, his utilitarian perspective identified the sources of motivation as the key to understanding what was involved in the encouragement of law-abiding behaviour.¹⁰ He also talked about four different sources of pain and pleasure namely, physical, political, moral and religious sanctions. He accordingly defined punishment as a particular category of pain, produced not just as the result of some individual action, but of an action that could be labelled as 'offence'. In Bentham's words, the idea of punishment presupposed the idea of offence: punishment as such not being inflicted but in consideration of offence.¹¹ Talking about the distribution of pain from the political or legal sanction which formed a central component in his theory of punishment, he basically tried to attack the common law or judge made law and suggested reforms. He held that only a utilitarian system of positive law would be better suited in responding to

⁵Ibid

⁶Ibid at pp. 20

⁷Kyron Huigens, "The Jurisprudence of Punishment", William & Mary Law Review, Volume 48, Issue 5, Article 12, 2007, pp.11

⁸Ibid at pp. 12

⁹Brian Bix, "Jurisprudence: Theory and Context", 6th edition, Sweet and Maxwell, 2014, pp.123

¹⁰Tony Draper, "An Introduction to Jeremy Bentham's Theory of Punishment", Journal of Bentham Studies, UCL Bentham Project, Vol. 5, 2002, pp.5-7

¹¹Ibid at pp. 8



the complexities of offending behaviours. To find out if an act was 'wrong' and can be classified as an 'offence', he suggested a test which sought to identify the experience of pain suffered by some assignable or unassignable individual or individuals.¹² Identifying the two mischief of any act, he divided them into firstly the 'primary mischief' which related to the pain sustained by an assignable individual or individuals and 'secondary mischief' which extended to the whole wider society and affected the other unknown unassignable individuals.¹³ It could be thus said that Bentham's analysis was more concerned with recognising the action of pain, unhappiness or fear and defining their operation in specific directions, than it was in calculating the precise quantities of pain being created.¹⁴ Another most important component in his theory of punishment was the principle of 'proportionality' where he laid down specific rules for better proportioning the punishments to offences. Bentham's utilitarian perspective can be considered as a type of consequentialism whereby the consequences to be considered in the evaluation are the pleasure and pain of individuals which are then summed up and that option is chosen which maximises the sum of pleasure and pain for everyone, also keeping in consideration the future consequences of the punishment. For him, pain and henceforth punishment was always a social negative until and unless it promised a greater pleasure in future.

Regarding the forms of punishment that he preferred, one thing was common which was concerned with punishment providing a variable quantity of pain against the offence. He demarcated eleven properties of punishment subsequently which stressed on this quantification. He was the mastermind behind creating the 'panopticon' imprisonment which became the dominant mode of punishment in the later part of the century. The effective surveillance system in place ensured that the inmates followed the routine and accordingly their behaviour was rewarded when it was found to be in compliance. The psychological impact that this surveillance setup created in the minds of the prisoners didn't leave them with any other choice but to conform. Therefore, the 'pain' here became self-generated where an individual faced anxiety that his/her crime would be seen. Hence, the individual engaged in self-policing and technically governed his own behaviour.

DISCIPLINE AND PUNISH- AN ANALYSIS

The path breaking work of Michel Foucault '*Discipline and Punish*' which mainly revolved around surveillance, punishment and disciplinary society was basically a history of the modern panel system. Now, a penal system or a penal regime connoted to the established formal practices and rules which the state employed with respect to law-breaking. So, punishment and the reasons for inflicting it takes centre stage in such a regime along with the situations when not to punish.¹⁵ In this work therefore, he tried to analyse punishment as it operated in the social context and examined how the changing power relations had a role in punishment. He also tracked down the history of punishment, way back from the pre-eighteenth century to the birth of 'panopticon' in the subsequent stages. The other themes which form a part of this work are the concepts of knowledge and body which allows him to explore and look beyond a simple interpretation of discipline.

Initially, Foucault begins by giving the readers a picture of the way punishment was awarded before the eighteenth century whereby public execution and corporal punishment formed the most important punishments which were ceremonial and targeted at the prisoner's body. For e.g. expressions such as "flesh torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand...burnt with sulphur and on those places where the flesh would be torn away, molten lead, boiling oil, burning resin, wax and sulphur melted together were to be poured..."¹⁶ revealed the intensity of the punishment which was so brutal in nature that there was no scope for morality and it was merely the revengeful attitude of the sovereign. Also, public execution which was an important component in this ritual of punishment, re-established the authority and power of the sovereign master.

¹²Tony Draper, "An Introduction to Jeremy Bentham's Theory of Punishment", Journal of Bentham Studies, UCL Bentham Project, Vol. 5, 2002, pp.10

¹³Ibid

¹⁴Ibid

¹⁵Goran Duus-Otterstrom, "Punishment and Personal Responsibility", Department of Political Science, Goteborg University, 2007

¹⁶ Michel Foucault, "Discipline and Punish (The Birth of the Prison)", Second Vintage Books edition, May, 1995



Next, the 18th century saw the calls for reform in the way punishments were awarded. But Foucault mentions that this calls for reform were not advanced keeping in view the welfare of the prisoners but rather to make power operate more efficiently. Now, the role of judges was directed in correcting or curing a condemned individual through non-fatal means such as imprisonment. Instead of depriving one of life, liberty was the thing that was taken away.¹⁷ Though torture disappeared at this stage, methods in which the prisoners were executed differed compared to the earlier times such as executions were carried out quickly etc. Foucault's emphasis on torture and execution can also be said to be indicating the power struggles at that time. All crimes were thought to be personal attacks on the sovereign and so the sovereign wanted to keep intact its honour by awarding punishment through a remarkable execution. In this way, terror was instilled within other people who would think twice before going against the sovereign. However, this notion concerning torture and execution changed around the 19th century with the declining importance of the monarchy. So, no longer was punishment seen to be restoring the honour of the sovereign but the intention was now to transform the criminal through a series of disciplinary mechanisms adopted by the state. A final aspect of modern punishment was that a long duration in prison was believed to be the most effective method of reforming criminals.¹⁸ In this way only, throughout his work, Foucault demonstrated how power has shifted from the monarch to the bureaucratic society.

PANOPTICON- IS IT A METAPHOR OR AN INSTRUMENT OF SURVEILLANCE?

The panopticon was a metaphor for the new society which was used by Foucault to showcase the relationship between the systems of social control and those people in a disciplinary situation and to effectively portray the power-knowledge concept. He also compared the panoptic society to the most extreme form of surveillance. This is the heart of Foucault's work where for him, it represented the way in which discipline and punishment worked in modern society. He was influenced by Bentham when he discussed the structure and the functioning of the panopticon model which could be considered as a permanent cage for the modern society and affected every member of the society.

While defining the principle that the panopticon worked upon, he said that at the periphery there was an annular building and at the centre a tower was present.¹⁹ Now, this tower was pierced with wide windows that opened onto the inner side of the ring. The peripheric building was divided into cells, each of which extended the whole width of the building. They had two windows, one on the inside corresponding to the windows of the tower and the other, on the outside, which allowed the light to cross the cell from one end to the other.²⁰ Next, a supervisor was placed in the central tower and in each of the cells, a madman, patient, a condemned man, a worker or a schoolboy was to be put who would become the object of observation from the tower above. In other words, Foucault mentions that the panoptic mechanism basically reversed the mode in which a dungeon functioned. So, from three of its functions i.e. to enclose, to deprive of light and to hide, the panoptic model just retained the first function and eliminated the other two. Instead, full lighting was used along with a constant supervisor to monitor their activities and so visibility was a trick. The practice of surveillance was so meticulous and well organized that nothing would escape the 'gaze' which was also seen as a perfect exercise of power. The ability of the panopticon which allowed the prisoners to be monitored secretly by the guards also reflect the self-disciplinary mechanism adopted by the prisoners themselves. It was because the mere knowledge that someone was constantly keeping an eye on them meant that the prisoners needed to regulate their behaviours for the fear of being caught by the authorities and even though he/she was not sure if someone was actually watching them all the time, they thought it better to not take the risk of breaking any rule. Hence, the major effect of the panopticon was to induce in the inmate a state of conscious and permanent visibility that ensured the automatic functioning of power.²¹ It was a kind of scientific laboratory which could be used to conduct experiments, alter behaviour and to train or correct behaviours. For ensuring correct behaviours, disciplinary mechanisms such as

¹⁷ SharifShawki, "Surveillance and Foucault: Examining the Validity of Foucault's Notions Concerning Surveillance through a Study of the United States and the United Kingdom", Illinois Wesleyan University, 2009, pp.10

¹⁸ Michel Foucault, "Discipline and Punish (The Birth of the Prison)", Second Vintage Books edition, May, 1995

¹⁹ Ibid

²⁰ Michel Foucault, "Discipline and Punish (The Birth of the Prison)", Second Vintage Books edition, May, 1995, pp.200

²¹ Ibid at pp.201



timetables and military drills along with exercises were used which technically were to be strictly followed by the inmates.

However, Foucault didn't only restrict this model to prisons but also extended its reach to all parts of society such as education, medical treatment, production etc. as a disciplinary mechanism. Furthermore, he aptly depicted the example of the police apparatus which transformed into a strict administrative mechanism after the 18th century. The police became conscious about minor details and things which were generally unimportant and it started to exert its own kind of political power.²² So, with the introduction of surveillance, the various institutions of the society learned to operate with its help and ultimately the sovereign lost his stronghold on power. This continuous mention of power and surveillance in Foucault's work of panopticon as a controlling mechanism though helped to reduce the torturous punishments of the earlier times where the body was directly affected by punishment, in the new form the body was still affected by punishment but indirectly. In the modern system of punishment, Foucault upheld that the body was subjected to disciplinary mechanism instead of torture. He also added that the prison can't be abolished as punishment can't be done away with any day. That is why we can ultimately say that the principle of discipline and punishment work hand-in-hand.

JUVENILE CORRECTIONAL HOMES AND PANOPTICON

The concept of juvenile correctional facilities which have been modelled to aid in the rehabilitation of youths instead of punishing them in the manner of adult prisons calls for a discussion here. Many of these facilities are extremely secure and are designed to hold serious offenders who have been processed through the system as juvenile delinquents. Other facilities serve the same function as jails, holding suspected offenders in secure institutions pending disposition of their cases.²³

If we extend the idea of panopticon in case of these juvenile homes which are highly functional in today's contemporary era as a correctional mechanism, it can be seen that the features of the panopticon mechanism such as those of the concept of an enclosed structure aimed at disciplining the inmates under the constant surveillance of an authority are visibly present. It is necessary therefore to look at this closely. Firstly, two important distinctions can be made for this juvenile correctional model which provides for two types of facilities- long term correctional facilities (consists training schools, youth ranches and forestry camps and boot camps) and short term temporary care facilities (consists jails, youth shelters, juvenile detention homes and reception centres). The second distinction is the secure (where the juvenile offenders are locked in so that they may not run away) and non-secure (requires lock-ups only at specified times during the day) correctional facilities.²⁴

Now, these juvenile homes have been operative in many legal systems whereby their primary goal is to rehabilitate the child offenders through corrections in their behaviours. They are confined to "total institutions" which means that they are held accountable for their behaviours and therefore require compulsory institutionalisation. In these homes, they undergo trainings which are disciplinary in nature and are made to "correct" their behaviours through the developmental, social and vocational skills. This type of remedial education imparted on them is to prepare them for their future reintegration into the mainstream society. The authorities keep a constant vigil on them which means that they need to adhere to certain standards of behaving in these homes. If they indulge in deviant behaviours, they are duly awarded with punishments by the same authorities who look after them.

However, it is worth noting the fact that though these confined homes may be able to bring in a change in the behaviours of the juvenile offenders through their disciplinary mechanisms, they have been also criticised on several grounds. Firstly, sometimes the confinements can be too strict or too lenient in nature and they further prisonize the delinquents so that they become accustomed to being institutionalised, where they do little more than hone their criminal skills.²⁵ It also means that the like-minded offenders might form gangs and indulge in physical violence within the homes. Moreover, due to continuous confinements the children may suffer from psychological problems. They suffer from the 'Institutional Child Syndrome' and are victims of excessive

²²Ibid

²³Gus Martin, "Juvenile Justice: Process and Systems", Sage Publications, 2005, pp. 229

²⁴Ibid at pp.230

²⁵Ibid at pp.231



routinization and regimentation.²⁶ The most important criticism which has been raised against these homes are that of abuse, both physical and sexual abuse by the authorities themselves which is a cause of worry. The children face trauma and are victimised by the care-givers which is really shameful. Apart from this, institutionalization lowers the self-esteem of the child offenders because they are in a way labelled as 'juvenile delinquents' which make them feel segregated and isolated from the wider society. They also have low education and skills compared to their peers in the mainstream society and thus feel alienated as a whole and have no one to look up to and trust. Thus, all these issues inside the juvenile correctional homes reflect the features of the age old panopticon mechanism which worked along the same principle of disciplining the inmates within a confined space.

Suggestions for reforms regarding the juvenile correctional facilities should be made at this juncture having seen the criticisms of the same. To begin with, alternative models of correction of behaviours for the juvenile offenders should be thought of within the mainstream society as these confined institutions alienate them and are the hub of abuse by the authorities. Institutionalization bars the child offenders from leading a normal life with less opportunities for future growth. The resultant effect is the 'identity crises' of the offenders where they can't identify themselves with the mainstream children and therefore face adjustment problems at a later stage in their lives. Even in the homes, sufficient care should be taken to make it a safe and secure place for the children and the authorities should be properly trained and be efficient to deal with those children. This should be followed by strict monitoring and supervision of the homes, maintenance of detailed records of children and de-institutionalisation of children wherever possible.²⁷ Furthermore, the offenders should not be treated differently and should be encouraged to participate in the management of the institutions, provided regular counselling and should be treated with utmost care so that they don't feel isolated and alienated. But all these will be effective only when our society learns to accept these children as 'normal' children and don't label them and make them feel different. Hence, a greater awareness including campaigning, workshops and counselling should be provided to the masses to understand the sensitivity of this issue.

CONCLUSION

Analysing critically, it is quite evident that the panopticon concept is not totally absolute in practice. Jeremy Bentham along with Foucault's panoptic society and the creation of docile bodies by using the surveillance mechanism can be used to explain how the state intervenes in the private lives of individuals with the pretext of maintaining discipline.

A remarkable example in this regard is the closed-circuit television (CCTV) used as modern day form of surveillance where the principles of the earlier panopticon are found. With an objective to govern the activities of people in public places like streets, shopping malls etc., in reality the privacy of an individual is interfered with where the threat of being caught exists. The knowledge that someone behind the camera is keeping an eye makes the individuals extra conscious regarding his movements and to a certain extent restricts his choice. Foucault's work can also be useful to understand the way in which discipline and punishment works in modern society in institutions like schools, factories, hospitals etc. where element of prison functioning can be found. This is because of the fact that in these social institutions, just like in a prison set-up, the individuals are classified and are made to conform to some 'norms' along with the presence of the control mechanism. Timetables and routines are followed and most importantly, the individuals' choices are restricted in the sense that they cannot just behave the way they want and must be non-deviant. This also means that the 'good' and 'bad' would be decided by those in power and the subjects are just to adhere to the ways they are asked to. This shows how we can accurately connect the concept of panopticon to the modern institutions where individuals spend a considerable time.

Foucault who effectively showed in his work the ways in which the changing power relations affected punishment over the time also highlighted the plight of the prisoners who at one point of time in history had to face the most severe and harsh modes of punishment that was awarded by the revengeful state and thus reflected the authority's abuse of power. However, with the gradual penal reforms and looking at the context of

²⁶ Asha Bajpai, "Child Rights in India: Law, Policy and Practice", Second edition, Oxford University Press, 2006

²⁷ Ministry of Women and Child Development, "Study on Child Abuse: India 2007", Government of India, New Delhi, India



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the 21st century, it can be said that today there exists certain principles by which the prisoners are to be treated, the disregard of which otherwise would amount to human rights violation. All prisoners are to be treated with the respect due to their inherent dignity and value as human beings and the Universal Declaration of Human Rights (UDHR) ensure that the states do not violate these principles when it comes to the protection of the rights of the prisoners. Thus, the present judicial system has done away with the earlier system of brutal punishments and misuse of power and instead maintains a balance between the different players in the same system.