



A Comprehensive Study of Theories of Punishment in The Indian Context

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Article History	Abstract
Received: 06 June 2023 Revised: 05 Sept 2023 Accepted: 16 Dec 2023	<p><i>Crime is an act deemed by law to be harmful for society as a whole though its immediate victim may be an individual. Sutherland and Cressey have mentioned two essential ideas while defining the concept of punishment. Firstly, it is inflicted by the group in its corporate capacity upon one who is regarded as a member of the same group. War is not punishment for in war the action is directed against foreigners. Secondly, it involves pain or suffering produced by design and justified by some value that the suffering is assumed to have. Punishing is primarily the responsibility of the Civil State. Due to change in social values, cultures and beliefs, the types of punishments offered need to be modified and altered. A criminal can be treated as a nuisance or a rival or a patient or a rebellious child. Reformatory theory of punishment got rooted with the passage of time and inclines towards individualised treatment of criminals. This might aid in better reintegration and erase the penal stigma. This theory believes that punishment is not an end in itself but only a means, the end being rehabilitation of the offender in society. New agencies like parole and probation are excellent measures to retrieve offenders to society as rehabilitated persons. This research paper elaborates on the evolution of different theories of punishment in India with a special focus on the measures adopted under the reformatory theory of punishment. It also analyses the effect of general substitution of reformation for deterrence, on the Indian offenders. There is a need to address if a reformatory approach can be adopted for all types of offenders.</i></p>
CC License CC-BY-NC-SA 4.0	Keywords: <i>Crime, Punishment, Theories of Punishment, Reformatory Theory</i>

1. Introduction

Crime is an outcome of a diseased mind and it demands appropriate treatment. Salmond defines 'crime' as an act deemed to be harmful for the society as a whole though its immediate victim may be an individual.¹ Therefore, such criminal acts are to be punished by the State. Every State has a pre-established criminal justice system which consists of police, judiciary and the correctional system. The basic aim of criminal justice system is to protect the society by punishing the criminals and maintaining amity, order and security. Since time immemorial, punishments have been awarded for various criminal acts. Punishments are a part of the administration of justice. As a custom or tradition, State authorities / correctional institutes are executing the punishments imposed on the offenders. But the question is 'Are the offenders really reformed by way of punishments? Which theory of punishments helps to control social cohesion?'

According to Salmond, the administration of justice implies the maintenance of right within a political community by means of the physical force. It is a modern and civilized substitute for the primitive practice of private vengeance and violent self-help.²

Punishment can help in reducing the criminal behaviour either by deterring the offenders or incapacitating and preventing them from repeating the offence or by reforming them into law-abiding citizens. As time evolved, numerous theories of punishment developed and were advocated by their followers. Each State belongs to a different school of thought and hence, follows either of it. Theories of punishment are policies that govern and regulate the handling of crime and criminals. There are

generally 4 accepted theories of punishment: Deterrent, retributive, preventive and reformative. Each theory is praised and criticized by people due to which the end goals of punishments are diverse.

One should not ignore the fact that every criminal is a human being and has human rights. Human rights are rights which are inherent to all human beings irrespective of their sex, race, religion, nationality, language etc. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, their right to work and education etc.

The Basic Principles for the treatment of prisoner's states that "all prisoners shall be treated with respect due to their inherent dignity and value as a human being." They all shall have a right to participate in various cultural and educational programs, if they so desire. Punishment may take different forms but care must be taken that criminal is reformed, socially reintegrated in the society and is no longer a burden on State resources.

Supreme Court in *Ankush Maruti Shinde v. State of Maharashtra*³ reiterated that, "in perpetuating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. Imposing a sentence without considering its effect on the social order may actually go in vain.

Meaning and definition of punishment:

Punishment is a means of Social Control. H.L.A Hart with Mr. Bean and Professor Flew have defined "Punishment" in terms of five elements:

- a) It must involve pain or other consequence normally considered unpleasant.
- b) It must be for an offense against legal rules.
- c) It must be intentionally administered by human beings other than the offender.
- d) It must be an actual or supposed offender for his offense.
- e) It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.

According to Sutherland and Cressey, the concept of punishment must have the spirit of following ideas: -

- a) It is inflicted by the group in its corporate capacity upon one who is regarded as a member of the same group. War is not punishment for in war the action is directed against foreigners.
- b) It involves pain or suffering produced by design and justified by some value that the suffering is assumed to have.⁴

Punishment is the infliction of some kind of pain or loss upon a person for a misdeed (i.e., the transgression of a law or command). It is a weapon used by the rulers against their subjects in order to maintain fear in the minds of the public. Punishment may take forms ranging from capital punishment, flogging, forced labour, and mutilation of the body to imprisonment and fines.⁵

Hugo Grotius, a Dutch lawyer was of the opinion that punishment can be exempted in certain cases like poverty, necessity etc. To uphold justice, we must have the self-control to tolerate our own suffering rather than endanger the innocent.⁶

Sir Walter Moberly accepted this definition of punishment and suggested that punishment is a sequel to an ill act, which is disapproved by the society at large. Punishments are outcome of unpleasant or indecent behaviours. It is the function and duty of every civilised State to punish the criminal and protect the citizens.⁷

Certain justifications or aims for punishments are: Deterrence, Incapacitation, Restoration and Rehabilitation. Deterrence means to create fear in the mind and discourage wrong behaviour. It demands severe punishments wherein the pain inflicted weighs more than the benefit or pleasure derived from the commission of the offence. Incapacitation has the effect of confining the person and physically incapacitating him from committing a crime. This is more suitable for dangerous criminals. Punishment in the form of restoration is suitable for minor offences where fine and compensation is imposed. Another justification for imposing punishment is to reform the offender by changing his attitude and making him a socially acceptable person.⁸

Theories of punishment:

"What is the end/ ultimate aim of punishment?" is an issue raised by modern penologists. With the evolution and changing ideologies in society, the traditional approach towards punishments has

changed. Only imprisonment as punishment to offenders is insufficient. They form a part of our human resource and ultimately, grow to be a burden on the State resources. Therefore, reforming and reintegrating has been the main focus of the modern penologists and criminologists. Innovative measures need to be adopted for proper utilisation of this human resource (criminals). However, each justification for punishment is criticized and praised by penologists. No unanimous opinion as to one aim of punishment is accepted. But, a transition in attitude from suffering to be inflicted on a person to treatment of offenders is seen.⁹

Deterrent theory

Traditional modes of punishment were deterrent in nature. This theory presupposes infliction of severe penalties. Jeremy Bentham, the founder of this theory expressed that punishment is an evil but necessary to create fear in the minds of offender and a warning to similar minded persons. It will help in maintaining peace and order in the society. This theory is practically ineffective in India. This can be revealed from the fact that many hardened criminals return back to prison immediately after release. Their preference is jail and not a free life in the society. Even first-time offenders are observed to commit crimes on the spur of the moment, without prior intention or awareness of the punishment inflicted. Therefore, the very object underlying the deterrent theory is defeated and quashed. Reformation theory, on the other hand, is a forward-looking theory which focuses on rehabilitation of offender, during the period of punishment and not on the wrong done, which is an irreversible past.¹⁰

Retributive theory

This theory is based on the principle 'Tit for Tat'. It advocates evil should be returned for evil.¹¹ It supports and encourages an attitude of revenge i.e. punishment is an expression of society's strong disapproval for offender's criminal act. Supporting the theory of retribution Emanuel Kant observed:

"Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being ought never to be manipulated merely as a means to the purposes of someone else."

As the society believes that good should always be rewarded and wrong should always be punished, vengeance is a justification that comes naturally because punishment is seen as an aim in itself.¹²

Hegel opposed the theory of retribution and observed that it is the manifestation of revenge for an injury. To quote him, he said,

"You hurt me so I will hurt you. Indeed, that is the literal meaning of retribution. And if I cannot hurt you myself, I demand that you should be hurt by others. The desire to make the offender suffer, not because it is needed so that the guilt is purged, not also because suffering might deter him from future crime, but simply because it is felt that he deserves to suffer, is the essence of retribution."¹³

Preventive theory

This theory, too, seeks to avoid crime rather than avenge it. According to this notion, the objective is to keep the criminal out of society. With this point of view, the criminal is given the death penalty, life in prison, or both. While the deterrent and preventive theories may have the same ideology, the preventive theory emphasizes more on the punishment of the offender and his disablement, in turn preventing that offender from acting in the same way again, whereas the deterrent theory of punishment focuses on the offender as an example for himself as well as the rest of the society, in turn leading other people to deterrence.¹⁴

Reformative theory

Krishna Iyer, J. was the person who advocated strongly for orienting reformative treatment of prisoners. In all his judgments he tried to incorporate reformative values into the prison administration. The concept of crime was also redefined by the judges of his time. It was observed that:¹⁵

Crime is a pathological aberration that the criminal can ordinarily be redeemed that the state has to rehabilitates rather than avenge. The sub-culture that leads to anti-social behavior has to be countered not by undue cruelty but by re-culturisation. Therefore, the focus of interest in penology is the individual and the goal is salvaging him for society. The infliction of harsh and savage punishment is thus a relic of past and regressive times.

The above judgment conveys the right influence of international human rights doctrine over the Indian judiciary. The Court in the Giasuddin emphasized on the Gandhian approach of treating offenders as patients and therapeutic role of punishment. The Supreme Court after considering all the circumstances

of the appellant directed that the sentence should be reduced to 18 months. The court also directed, a guarded parole releases every 3 months for at least a week punctuating the total prison term and assignment of suitable mental cum-manual work and payment of wages in jail. The appellant was ordered to pay a fine of Rs. 1200/- to be made over to the victim of deception under Section 357 of the Criminal Procedure Code. Krishna Iyer, J. delivering the judgment also pointed out that the judge must use a wide range of powers in reformatting the criminal before him. Thus, the concept of reformation was planted even out of the four walls of prison by this judgment.

He further stated that "Society must strongly condemn crime through punishment, but brutal deterrence is fiendish folly and is a kind of crime by punishment. It frightens, never refines; it wounds never heals." Every authority must be instrumental in the goal of reformation through prison treatment. The human right to be safe in prisons as mandated by international human rights law is being incorporated into Indian law by judicial initiatives.¹⁶

The international legal framework on the protection of the human rights of prisoners, through the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter, the Torture Convention) forbids suffering and cruel, inhuman, or degrading treatment or punishment, without exception or derogation. Article 10 of the ICCPR reads as "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." It also mandates that "prisoner reformation and social reintegration" be an "essential goal" of incarceration.

Numerous further international texts inflate on the human rights of those incarcerated, offering guidance on how countries might meet their international legal commitments. The United Nations Standard Minimum Guidelines for the Treatment of Prisoners (known as the Standard Minimum Rules) were approved by the United Nations Economic and Social Council in 1957. Although the Standard Minimum Rules are not a treaty, they do serve as an authoritative reference to enforceable treaty standards.¹⁷

Today, reform and the rehabilitation of the offender play an increasingly important part in the purpose of punishment. The sentence of the court is gradually beginning to reflect, not so much the indignation and anger of society (though this still happens frequently enough), but an attempt at diagnosis so that the punishment may be made to fit the criminal as well as the crime. The overriding aim here is the protection of society by serious and sustained attempts to prevent further relapses into crime. But coupled with this aim, there is another: the personal rehabilitation of the offender for its own sake. This is based on the unwavering conviction that every person matters, no matter how ill, how impoverished, or how bad they are.

Concern for society's weaker members has already paid off. In social services, which provide some protection for the poor and elderly; in medicine, where so many people are now cured who previously would have died or been disabled for life; and now in penal reform, where new methods of treatment are succeeding in turning anti-social people back into useful and effective members of society.

Prison labour:

Human rights concerns are present in prison labour as well. Depending on the sentence and type of imprisonment, a prisoner's level of labour varies. Prison labour, however, must be viewed as a tool for reformation rather than as a form of punishment. The Indian judicial system always uses it as a tool to carry out the court's orders for strict imprisonment. Accommodating the prisoners for the most apt job was well identified in the early periods itself. Following this doctrine Krishna Iyer, J. in a leading case law directed the prison authorities to engage a convict in agriculture as he traditionally belongs to that sector of the society.¹⁸ The Court further concluded the objective of prison labour as:¹⁹

An adequate wage should be offered to inmates who are forced to labour so that the curative effect on their minds is fully felt. Furthermore, from the perspective of society, it will be beneficial to properly utilise the services of inmates in some meaningful activity, whether as farmers, artisans, or even in creative work, as it will lessen the tension on the public resources.

The above approach of the court has to be a little bit criticized as the argument supports the use of the income of a prisoner against his expenses inside the prison. On the other side, the state should not take anything from the income of a prisoner as it can be used for the well-being of his family or according to his lawful aspirations. The old position was based on the conviction that the man who broke the law has placed himself in debt of society for which he has to compensate.²⁰ This will also work in creating earning habits and making a prisoner self-confident. The need for adequate wages by prisoners was

again raised before the Supreme Court and where the court held the application of Minimum Wages Act, will be of great use.²¹ The real message to be conveyed by prison labour was made herein as:

Reformation should be dominant objective of a punishment and during incarceration every effort should be made to re-create the good man out of convicted prisoner. An assurance to him that his hard labour would eventually snowball into handsome saving for his own rehabilitation would help him to get stripped of the moroseness and desperation in his mind while toiling with the rigorous of hard labour 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.

In this judgment, the court recommended to the State concerned to make law for setting apart a portion of wages earned by the prisoners to be paid as compensation to the deserving victims, of the offence, the commission of which entailed the sentence of imprisonment to the prisoner either directly to through a common fund to be created for this purpose or in any other feasible mode.

Penal policy in India

Penal changes in India over the last few decades have resulted in a significant shift in the public's attitude towards criminals. The traditional ideas about crime, criminals and convicts have shifted dramatically. The emphasis has now switched from deterrent to offender reform. Discriminatory and severe penalties of the past have no place in the present prison system.

The advancement of penology in the Anglo-American globe throughout the 18th and 19th centuries had considerable influence on the Indian correctional system. Significant criminal reforms have been introduced in India, particularly over the last fifty years. The sentences of transportation, mutilation, solitary confinement, whipping, or punishing offenders in public places have been completely abolished, and new reformatory techniques such as parole, probation, open-air prisons, borstals, reformatories, and so on have been adopted for the rehabilitation of offenders.²²

Practical forms of bundling the offender have shown to be extremely efficient such that they provide an inmate a "chance" to return to society as a law-abiding citizen, instilling in him a feeling of "hope" that he would be trusted by society following his release from the institution.

Modern criminologists generally agree that the primary goal of any prison system should be to rehabilitate offenders, but the value of deterrence should not be overlooked. Although reformation and rehabilitation can be employed to rehabilitate criminals in general, individuals who do not react favourably to these remedial techniques of treatment must be harshly punished. The criminal measures must be aimed at demonstrating society's aversion to crime.

Yet, it should be noted that the Indian prison system appears to be less efficient as a control mechanism since it allows many offenders to enjoy the proceeds of their unlawful conduct. Without a doubt, Indian criminal policy is founded on an individualized system, but it appears to be biased in favour of advantaged groups, notably political leaders and those in power, with the result that the deterrent impact of punishment is significantly reduced.²³

Punishment in bribery and corruption cases and big financial scams is too lenient, undermining its effectiveness as a crime control mechanism.

4. Conclusion

In order to have an effective criminal justice system, India needs to develop and customize an ideal penal policy for itself that will focus on the reformation and rehabilitation of various offenders. Undoubtedly, reformation as a resort can be adopted for certain types of offenders and certain types of offenses only, based on factual matrix. Example, first offenders and juveniles should be subject to a reformatory approach and hardened criminals should be subject to a deterrent approach.

Traditional punishments, like imprisonment, which focused on custody of the offender in the prisons must undergo a change. Prisons are no longer custodial institutions instead; they are to be seen as treatment and training centres for lawbreakers. Such centers can be set up with the help of public-private partnerships, thereby reducing the State burden.

Individualized treatments need to be designed as human nature is complex and different from one another. Such customized treatments should ultimately help to protect society as well as reform the offender.

Due to the penal stigma, offenders feel isolated even after their release. Therefore, rehabilitation and social reintegration in a real sense is not achieved. To overcome this situation, training should be accompanied by an appropriate after-release service program.

Indian penal reforms need remodeling by getting an in-depth insight into the manifestations of crime and criminals. Logical and systematic cataloging of offenders is required to achieve the ultimate means of penal justice.

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