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# PUNISHMENT AND IT'S THEORIES

Authored By- Ankit Kumar Singh

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## INTRODUCTION

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From the start, the degree of punishment for a specific crime could never be interpreted by the decision givers. There were always conflicts regarding what and to what extent punishment can be given for a crime committed. The initial stage of punishment was based on the common theory i.e. “*an eye for an eye*”. The learned men believed that justice can only be achieved if the degree of punishment is same as the degree of the pain caused. With changing times, the concept of punishment evolved into something different. The period after this believed that the wrongdoer should go through some inhumanly treatments and if the god finds the wrongdoer worthy enough to be saved, the god will himself come to the rescue of the person. With the advent of British era, the thinking of the people changed and strict laws regarding different types of crimes came into existence. Immediately after this, the concept of reformation was introduced in India. Reformation in the most basic sense means the act of making a change in a person’s behavior by introducing certain positive traits and making him see the better picture of his future. Soon after this the never-ending debate of Punishment vs Reformation started between different scholars and academicians. The questions like “Will the people stay safe if these offenders are welcomed again in the society” , “What kind of danger will they bring with them”, “ Can they ever be trusted” etc. haven’t been answered till date. Scholars and academicians have given different views on the idea of reformation. Some of them have supported this practice by stating that reformation in offenders develops guilt of the crime committed and helps them to cope up with their after prison life. Despite all the criticism of this practice, many scholars were of the view that reformation not only changes the view of the offenders but also helps them to co-exist with the other beings of the society. The process of reformation as stated by scholars is an important aspect of punishment. They believed in the idea of people learning from their parents. For example – A parent with strong beliefs and a strong character is likely to exhibit the same qualities to his child, which is likely to pick the same beliefs as that of his parent. In the same way, when the offenders are shown kindness and are taught to differentiate between right and wrong, they will exhibit the same behavior in the

society they will live in. The basic idea behind this type of practice was attacking the root of the problem instead of removing out the problem from a particular situation. Scholars who supported reformation wanted to study about the behaviors of the offenders and what motivates them to commit an offence. They always believed that reformation was the only way that could change the fate of the prison population and reducing the number of crimes.

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## Punishment And Its Theories

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Dr Walter Reckless defined punishment as “ *The redress that the common wealth takes against an offending member*”. H.L.A Hart, Mr. Bean and Prof. Flew<sup>1</sup> provided the world with 5 elements of punishment: (a) It must be an unpleasant experience with some kind of pain (b) It is given because an offence has been committed against the existing rules of society (c) The intention to commit a crime is important (d) the punishment should be imposed by a legal authority with the power to impose that punishment ( e) it must be an actual or supposed offender

The word Punishment is commonly described as imposition of either a sentence or a penalty in relation to a wrong committed by the person. The Punishment imposed is according to the degree of the crime committed and the punishment is prescribed by the strict set of laws decided by the government. However, these laws did not exist before. The concept of punishment is taken from the *Code of Hammurabi*<sup>2</sup> and it is strictly based on the principle of *lex talionis*. The principle states that the punishment should resemble the type of crime committed. With changing times, the punishment given was according to the power of god. People believed that the offender will be saved by god if he is worthy to be saved. After this time came the British era, which introduced some positive reforms into the society. The topic of punishment has been into various debates from a long period of time. Many academicians and scholars have given different views and theories in relation to concept of punishment. Till date, there are 4 theories accepted worldwide which are : (a) Deterrent ( b) Preventive (c) Retributive (d) Reformative.

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<sup>1</sup>The Limits of Criminal Law: A Comparative Analysis of Approaches to Legal Theorizing, By Carl Constantin Lauterwein

<sup>2</sup>Sverdlik, Steven, "Punishment and Reform" (2012). Philosophy Research. 1.  
[https://scholar.smu.edu/hum\\_sci\\_philosophy\\_research/1](https://scholar.smu.edu/hum_sci_philosophy_research/)

- *Deterrent*

In common words, deterrent means “to detest or discourage”. The basic principle behind this mode of punishment was to stop offenders from committing a crime. The working of theory was through creating fear in minds of people by imposing a kind of punishment for a certain offence which will lead the offender to think twice before committing a certain crime. It was based on the fact that by setting an example, it becomes easy to discipline people in the society. Scholars like Salmon believed that this theory is important for reducing the crime in the society and by giving a warning crime rates can be reduced. However, critics of this theory were of the view that imposing hard punishments to set out an example to others will not work, as the criminals or offenders commit a crime because they are not scared of the law or the aftermath of the crime committed.

For example – In earlier times, the punishment for small offences like stealing was death or being pushed into fire. Although this created a fear but did not in any way stop the criminals from committing that offence. Deterrence theory further got divided into :- (a) Individual deterrence and (b) General deterrence.

Individual deterrence is focused on one individual. This type of deterrence deals with stopping one individual to commit a certain crime. For example – cutting the hands of the thief to prevent him committing a further crime.

General Deterrence was based on the principle that punishing an individual who has committed the crime will set out an example to all those people who are likely to commit offence in the future.

- *Preventive*

This theory is based on the principle of preventing a crime instead of giving strict punishment against the crime. It is based on the concept of removing the offender from the society. This theory prohibits the offender from committing an offence. This theory has been criticized on various points. One of the most important criticism this theory has faced is, the practice of removing the offender has led to more crimes. The offender is put into jail with the already existing criminals which lead him to committing more crimes. Like in the case of Child offenders, the practice of putting them in jail with the already existing offenders have directly put them under the influence of habitual offenders. The preventive theory suggests imprisonment is the best form of punishment and this is the only way when reoccurrence of a

crime can be avoided. However, critics have given a different view and suggested an alternative to preventive theory is needed.

- ***Retributive theory***

Retributive theory is the oldest theory. It is simply based on the fact that the degree of punishment should be equal or similar to the amount of the pain caused while the offence was committed. The gravity of the punishment should be the same as the gravity of the crime. This theory is complete opposite of Deterrent theory. This theory focused on personal justice. Supporters of this theory suggests that mere removing them or seeing the end goal is not important, the pain caused should be felt by the offender as well. For example: If a murder has happened in a society, the appropriate punishment for that murdered would be to get murdered by the victim's family. The supporters believed in the act of vengeance. They believed that appropriate punishment is only limited to the hurt caused by the offender. It was thought that this type of punishment could bring out guilt and shame which the other theories cannot. They also believed that merely detention and imprisonment is not enough, as even the victim will not be satisfied with the punishment and will look for alternate ways to get justice on his own. The whole concept was based on individual revenge and did not take society as a whole into consideration. With the evolution of people's minds, this theory was not considered wise and people were made to see the never ending circle which this type of practice brought.

- ***Reformative theory***

With the changing times, developments were seen in the field of criminology as well. There were some scholars in the society who believed that any crime committed by an offender is a product of his environment. They specifically believed that if their social, psychological, and physical backgrounds are studied thoroughly, crime can be prevented to a certain extent. This theory believes a criminal can be reformed, the offender can be made into a just human being, if the root of the problem of him/her becoming a criminal is solved. Reformative theory suggested that even if an offender commits a crime because of certain problems, they are still human and should be treated as per one. Throwing them or imprisoning them won't make a difference instead will increase the prison burden. The ultimate goal of prisons should be to reform and to rehabilitate the prisoner instead of keeping them locked away for prevention of crimes.<sup>3</sup>

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<sup>3</sup> The Limits of Criminal Law: A Comparative Analysis of Approaches to Legal Theorizing, By Carl Constantin Lauterwein

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## Reformation And Need For Reformation

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Black's Law Dictionary defines reformation as "*The act of bringing back a criminal to such a sense of justice, so that he may live in a society without any detriment to it*"

Reformation in most basic sense means the act of reforming i.e. changing the ideologies and beliefs of a criminal in order to bring him back into the society as a reformed individual. The topic of reformation has been in a never ending debate since it was introduced. From discussing the pros of introducing reformation in different parts of the world to discussing the cons of reformation, the scholars have always kept reformation under strict scrutiny. Some scholars believed that if an offender has killed some other person, taking his life is not justified. There are ample reasons which have led to offender acting in such a way and committing a particular crime. They believed that all aspects of an offender's life should be studied before sentencing him to a punishment for any of the crimes committed by him. Merely sentencing him to imprisonment will take him out of the problematic situation but the problem will still exist. They also emphasized on the fact that constitution of every country provides every living person some basic set of rights which are not only limited to non-offenders. It was initially believed that punishment is mainly given to offenders to reform their ideas about the society. The scholars believed that prisons are only providing a preventive measure to avoid a crime but in no way are solving the root cause of the problem of the offenders. The Honorable Courts have given their view in 2 different cases on the topic of reformation vs punishment.

***In the case of State of MP vs G. Singh***,<sup>4</sup> the Supreme Court stated that the law established in the society regulates the interest of the society and it is also responsible for protecting the security of the people living in the society. The judges in this case also stated that this can only be achieved if the criminal justice system is working properly. With the changing times, the law also has to evolve, the old laws cannot exist for the crimes happening today. The fault in the system of law would only lead to disturbance in the social order Therefore, the law should be able to meet challenges as per the present times. It also stated that the punishment given to an individual should be as per the factual matrix. The punishment should be strict enough where the facts and circumstances demands the punishment should be strict. And if the situation demands that the person should be given a less stricter punishment, then the law should be able to judge accordingly. The judges also stated that undue sympathy will only deter the basics of the judiciary i.e. providing justice to everybody. The intensity of the crime,

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<sup>4</sup> 2003 Supp(3) SCR 618

against whom the crime is committed, the intention behind the crime etc everything should be considered by the judiciary.

Similarly in the *case of T.K Gopal vs State of Karnataka*<sup>5</sup>, The supreme Court differentiated between the 3 approaches towards the crime. It stated that the first approach i.e. punitive approach talks about inflicting punishment on the offender. The second approach ie. Therapeutic approach which talks understanding the reasons of the offender for committing the crime. The third approach i.e. Preventive approach talked about the imprisonment in order to avoid a crime. The court in this case stated that therapeutic approach is an effective method of punishment as it not only punishes the criminal, but it also helps to reform the criminal and helps him to realize his guilt. The court stated that no matter the degree of crime, the offender is a human being and is entitled to all the basic human rights, human dignity and human sympathy.

The need for reformation has been constantly in question since the increase in prison population worldwide. Reformation not only provides the prisoners with a hope for their future but is also focused on improving the faults in the criminal justice system.

- **Reducing the prison population**

Reformation works towards reducing the prison population. The offenders who are reformed are at a lower chance of becoming habitual offenders. These offenders are provided with employment opportunities and are given basic education which helps them to choose a different path in their lives, ultimately reducing the prison population.

- **Reducing prison violence**

Giving reformation to the inmates of the prison changes the attitude of the prisoners. The process of reformation is not only teaching them skills or educating them but also providing them with moral values of society. This in turn helps reducing prison violence in prisons.

- **Reducing recidivism**

The reformation process also teaches skills so that offender does not resort to criminal practices for his survival. For example : Teaching an offender machine repairs so that once he is released, he can look for job in the same field and make a living out of that. Most cases of crime are due to shortage of money even for basic food and clothing, providing them with

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<sup>5</sup> Criminal Appeal No. 443 of 2000 (Arising from S.L.P. (Crl.) No. 3220 of 1999)

skills and education helps them expanding their basic job opportunities.

Providing reformation provides countless benefits to the prisoners as well as the society they will live after their reformation.

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## Reformation And Punishment Under The Criminal Justice System Under India And Usa

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### INDIA

If we look at the time Mughals era, we can see that idea behind giving punishment was not reformation but to deter the offender from committing the crime. The concept of reformation was foreign to the people, they only believed in punishing the person accused and knowing the reasons for committing such act was immaterial. The punishments which were common during those times were : - branding, death penalty, whipping, flogging etc. Prisons were considered to be the places where torture took place with the offenders.

With the onset of British, prison reforms came to be known in India. Various ideas were presented in order to improve the conditions of the prisons which lacked even the basic amenities. Revolutionary changes were introduced which changed the course of punishment in India. Around the year 1836, jail enquiry committees<sup>6</sup> pointed out the insanitary conditions of the prisons. They elaborated this by saying, that most of the deaths in prisons were happening because of the inhumane living conditions in Indian prisons. Due to reports of enquiry committee , Prisons Act 1894 was enacted. It not only regulated the prisons but provided better accommodation of prisoners and also abolished whipping as punishment. Dr. WC reckless, who was a member of technical experts in United Nations on crime prevention of treatment of offenders gave some recommendation to reform the Indian Prisons in the year 1951: -

- Each State should have a home department which should include correctional measures
- Probation and Parole should be followed more
- Manuals which keep records of the jails should be revised accordingly.

Furthermore, if we look at the concept of reformation in India, after prison reformation came into existence, the concept of reformation. Academicians and scholars started studying the reasons for which the crime was committed. In addition to this, they started developing skills so as to motivate the offenders to change into law abiding citizens. Some of the practices which they developed to

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<sup>6</sup><http://www.legalserviceindia.com/legal/article-104-corrective-measures-in-india.html>

help the prisoners were :

- Giving education to that they can get a job
- Teaching out skills in different fields
- Social education was also given so as to help them cohabit in the society.

The concept of prisons in India is that of open prisons. Indian prisoners are given an opportunity to make a living in prison itself. They are given all the necessary tools along with the necessary skills to make money which can be given to them once they are released.

In the case of *Ramamurthy vs State of Karnataka*<sup>7</sup>, the Supreme Court held that :-

The concept of open Air prisons creates certain problems related to administration but for the good of society as well as prisoners, it is a very good development. The idea behind imprisonment is not to just detain the prisoners but to make them a good human being. This cannot happen if the society keeps on ignoring them, making it impossible to accept them in a society. They should see the prisoners as reformed citizens and not some petty criminals.

In addition to this practice of probation was introduced :- Probation in extremely basic term means that “I prove my worth”. Probation happens when the probationer lives in a society and his lifestyle is regulated by Courts. There is some authority which supervises the probationer commonly known as probation officer. This idea gave the basic foundation for Probation of Offenders Act.

The Supreme Court in the case of *Ramji Missar vs state of Bihar*,<sup>8</sup> highlighting the purpose of the Act was to mainly stop youthful offenders from turning into hardcore criminals. This can happen when young offenders are imprisoned with mature offenders which ultimately leads them getting influenced. Modern jurisprudence of Criminal states that “Nobody is born a criminal and it happens due to the factors surrounding him/her .” This was further elaborated by saying that such practices are used for offenders with less serious offences as they can be reformed without imprisonment.

The development of prisons and reformation happened because of various recommendations given by various committees some of which are as follows :-

- **Mulla Committee**

In the year 1980, a committee on Jail Reform was set up under the guardianship of Justice A.N. Mulla. The main objective of this committee was to critically analyze the laws, rules , regulations with the main aim of protecting society and rehabilitating offenders. Further to constitute an All India Service called as the Indian Prisons and Correctional Service for recruitment of Prison authorities.

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<sup>7</sup> 2003 (1) ACR 337 (SC)

Ramamurthy v. State of Karnataka

<sup>8</sup>AIR 1963 SC 1088

- **Krishna Iyer Committee**

In the year 1987, this committee mainly worked for the benefit of women. They studied the conditions of women prisoners and recommended induction of more women in police force with the idea of tacking women and child offenders.

India has come a long way since independence in terms of giving punishment and reformation and has developed with changing times.

## USA

United states have worked towards development of reformation with the main motive of reducing the prison population and punishments. Although most of the punishments were based on the theory of deterrence. A new revolution in 1700 came which changed the course of punishment and reformation. The first ever prison known as the Old Newgate Prison, <sup>9</sup>located in Connecticut was actually the first official prison in United states. If we look at the structure of this prison, it can be easily seen that prisons were used to torture. The prisoners were kept underground and were put to hard labor. An American medical doctor known as Benjamin Rush became motivating people for prison reforms. In the year 1787, a group of reformers met together for a group of prison reform group came to known as Philadelphia Society for Alleviating the Miseries of Public Prisons ( which was later named as the Pennsylvania Prison Society) which was mainly established to introduce prison reforms in India. This Society mainly contributed in the development of reforms in Walnut street jail. They introduced a wing wherein, education services, basic medical attention and gave access to work related activities.

One of the most important cases in US which completely defied the theory of reformation or prisoners was Ruffin vs Commonwealth (1871). This case dealt with the concept of hands off doctrine. The supreme court noted that the prisoner is the slave of the state while serving his or her sentence. The hands off doctrine meant that the Supreme Court did not interfere in the matters of prison and left all the powers in the hands of prison authorities.

In the year 1870 , reformers met again and established National Prison Association (NPA) <sup>10</sup>This organization not only focused on administration of prisons but also helped in Reformation. A man by the name Zebulon Brockway who was a warden highlighted that prisons are supposed to individual reformation centers. During his time , the first ever practice of giving less punish`lent to

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<sup>9</sup> Chapter\_1\_Early\_History\_of\_Punishment\_and\_the\_Development\_of\_Prisons\_in\_the\_United\_States.pdf

<sup>10</sup>Chapter\_1\_Early\_History\_of\_Punishment\_and\_the\_Development\_of\_Prisons\_in\_the\_United\_States.pdf

first time offenders came into existence. During their time in prisons, they were monitored and if possibility of reformation seen, they were helped to go into the society as law abiding citizens. In the year 1930, Federal Bureau of Prisons( BOP) was established by Congress in the year 1930. It became an organization which looked after inmates with the help of its employees. They not only provided facilities but focused on reforming the prisoners as well.

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## Comparison As To Which System Is Better

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Analyzing both the systems of India and USA, the best prison system exists in India. Since it is based on the concept of open prisons. It not only punished but allows the prisoners to develop skills and education because of which they further can be rehabilitated in the society. On the other hand, American prisons despite being reforming the offenders did not follow the concept of open air prisons. US has two types of imprisonment centers : - Jails and prisons. Jails are for short term inmates which are usually operated by Local County or City. Prisons are for offenders who have committed serious offences and their punishment is above 1 year. Another feature is that these jails do not provide any type of rehabilitation or reformative practices. Whereas, if we look at India, the prisons allow the offenders to even take exams from inside and all types of reformative and rehabilitated practices are allowed. In American prisons and jails, medical help is not given much attention which remains the same with India. However, in terms of helping them out to flourish, Indian prisons provide the prisoners with work and even salaries are paid in order to motivate them to earn and then make a living. But, if you look at the American system, they do not provide any such facilities. Once an offender goes into jail or prison, it becomes exceedingly difficult for him to manage things out once he is released. This is solely the reason why America has the highest number of repeated offenders compares to any other country.

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## Conclusion And Suggestions

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The concept of punishment and reformation is not a new concept and has been into existence since a long time. The idea behind punishment started from the concept of retribution which dealt with the idea of giving back the same treatment a victim has faced. This meant that if an offender has committed a murder, then the victim should in return kill the offender. Although widely followed this idea was highly criticized. Scholars believed that one should start analyzing the behaviors of the offenders so as to what motivates them to commit a certain crime. This concept led to development of Reformation and completely changed the fate of prisons, prisoners and people who were just victims of circumstance. The practice of reformation not only encouraged the reformation of prisoners but also focused on making the prisons a better place. They wanted to completely abolish the name and reputation given to earlier prisons commonly called as the “torture place”. They started analyzing the behavior patterns and noticed that offenders were not given opportunity to represent themselves and the reason why they committed crimes due to absence of even basic amenities. So when they arrested the offenders, a new chance was given to learn new set of skills and education so that when the offenders go into the society, they can live a normal life like any other citizen without the fear of being labelled. This led to the birth of reformation in many countries. If we see today, a number of countries follow reformation as a part of their punishment. USA and India have the largest prisons and these countries to an extent follow reformation. Despite this, there are some circumstances where countries lack at their level. For example – In India, reformation is highly followed but after being released the stigma still exists. Giving them skills and education will not help if they are not provided jobs and means to live. This will increase the possibility of re-offenders. Furthermore, reformation should also be in the living style of prisoners. Despite such practice being in existence from so many years, there is overcrowding in prisons and it often leads to problems for the prisoners. In addition to this, mental reformation is as important as other forms of reformation. Counselling sessions should be held regularly for people in prisons and not only in India but all over the country. Once a chance is given to these prisoners, to express themselves as to what motivated them to commit a crime, they are likely to mend their ways. Even smallest of changes can help this practice to grow even further and make prisons a better place in comparison to present inhumane situation.