

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary
Peer Reviewed

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THE CRITICAL EVALUATION OF THE DIFFERENT THEORIES OF PUNISHMENT.

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Abstract

Punishment is the suffering in person or property inflicted by the society on the offender who is adjudged guilty of crime under the law. Punishment is something which involves some kind of pain which either be partly physical or partly mental. The main aim of this paper is to critically evaluate on the different theories of punishment such as Deterrent theory, Retributive theory, Preventive theory, Expiatory and Reformatory theory of punishment. Each theory has different perspective and each theory has distinct in nature. In practical world only reformatory theory exist, and most of the countries relies on reformatory theory of punishment among all different forms of theories of punishment.

Methodology

To fulfill this objective, the researcher adopted is a doctrinal form and the author has referred to the secondary sources in doing the analyzation.

Keywords

Retributive, Deterrent, Expiatory, Preventive, Reformatory, Utilitarian, Compensatory, Incapacitation, Incarceration, Rehabilitate

Introduction

Punishment is the infliction of pain or loss of life, freedom, rights or property, imposed on an individual without his consent and against his will. Punishment means suffering for some offence, it is the suffering in person or property inflicted upon the offender under the sanction of law.

In general, punishment is something given to an offender for the act which he had done wrong doing and is not acceptable under the law.

According to Bentham – Punishment is an empirical question of desire and of the infliction of sufficient pain to provide an effective deterrent¹.

According to Hobbes – Punishment is for the transgression of rules; and it is inflicted by legally authorized person. Punishment is an evil inflicted by public authority on a person who has broken the law, with the purpose of ensuring obedience to the law and maintaining social order².

According to Hall – Punishment is a coercive deprivation intimately applied to an offender because of his voluntary commission of a harm forbidden by penal law and implying his moral culpability³.

Punishment is synonymous with penalty. The punishment or penalty is fixed by the law defining the criminal act to ‘punish’ means to impose a penalty upon an offender or wrongdoer, to afflict him with pain or loss or suffering for a crime on fault, to inflict a penalty for an offence upon the offender for commission of crime.

Example – ‘A’ commits theft in house of B, A is liable for the punishment as he commits crime of theft which is an offence under law and a punishment should be inflicted upon the offender ‘A’.

(1) Retributive theory of punishment.

Plato was a supporter of this theory. According to him, “If justice is the good and the health of the soul as injustice is its disease and shame. Chastisement is their remedy⁴.”

The origin of this theory lies in the ancient notion of vengeance against the wrong doer. As per this theory, A ‘tooth for a tooth’ or an ‘eye for an eye’ or an ‘evil for evil’. This notion is based on that the evil should be returned for evil. If an evil has been done it can be negated only by doing an evil to the wrongdoer.

It is basically of reattribute the unjust act, holding that the punishment should be proportionate to the crime committed. The punishment is given to the person as a retribution towards his crime. It is simply the theory of private vengeance. According to Salmond, revenge is the right

¹ Bentham J. – An introduction to the principles of morals and legislation

² Thomas Hobbes, Leviathan (1651)

³ Jerome Hall, Reflections on some theories of punishment (1967)

⁴ Plato’s Republic (444 d-e)

of the injured person, it means the wrongdoer should be dealt the same as he had committed to the others.

Hegel also supports this theory by simply adding 'it is the reward of the crime'. According to Mackenzie – 'It is the theory which is most satisfactory of all the theories of punishment'.

This is because not any of the theories like deterrent nor reformative theories of punishment will do any good at large, if the criminal does not understand that the punishment is the consequence of his wrongdoing and he will be treated with the same offence, he had committed. Retributive theory's origin lies since the primitive era where retribution applies to the animals as well, where people use to cut the limb or chopped the ear of an animal in order to retribute the acts.

According to Dr. Evinger – The retributive theory of punishment involves two main conception. First it is an end in itself that the guilty should suffer pain through the punishment. Secondly the offence has not been committed in future furtherance by inflicting punishment upon the wrongdoer.

Criticism: This theory has been criticized by various jurists and philosophers such as Salmond, Asquith, Paton, Sheldon Glueck etc. This theory has been criticized on the basis that it ignores the main purpose of punishment i.e., to reform the criminal. Reformation is not possible to be successful by returning the evil to the wrong – doer. It is regarded by all as a relic of barbarism. It is considered as a cruel form of punishment where a single chance had not been given to the wrongdoer.

In Modern time, retribution is not considered in the sense of vengeance but in the sense of Reprobation.

Sheldon Glueck says that it is natural to hate criminals but to base a policy for social protection upon the hatred of those who commit act is both uneconomical and unjust. On its contrary Stephen justified punishment on the ground of hatred that hating the criminal is morally right. In his opinion, criminal law stands to the passion of revenge in much the same as marriage to the sexual appetite.

Aschenffenburg laid down that a man happen to be a criminal because of its circumstances, "chance and causes or may be his undesired wants and therefore he needs to be disciplined".

Plato observes that both personal and public sentiments and demand that the person who has made others to suffer unjustly should himself be made to suffer.

Prof. J.D. Mabbott rejected the traditional retributive theory and presents his own theory of retribution. He treats punishment as a purely legal matter and a person should be punished if has broken a law.

He rejects the traditional retributive theories on the following grounds –

- (1) Punishment implies that someone is legally authorized to impose it upon offenders;
- (2) No more than do the reformative and deterrent theories can, the traditional retributive ones account for the serious objections to retroactive penal legislation.
- (3) None of the other theories can account for punishment imposed by an official who disapproves the law which he is enforcing. The fact that rule was violated makes punishment proper.
- (4) His theory escapes the retributionist's difficulty of measuring moral wrong and equating punishment with it.

The main defect of this theory is that it does not regard punishment as a measure of social security and welfare but considers punishment as an end in itself. It neglects the utilitarian aspect of punishment.

Case Laws:

1. Nirbhaya Judgement – This case is indeed the first and foremost case to be mentioned, while talking about retributive justice in India. In this Judgement, the Supreme Court sentenced four out of six felons involved in the extremely heinous Delhi gang rape case to death, much to the delight of the society, as they had committed an extremely gruesome, as well as morally unimaginable crime⁵.
2. Anwar Ahmad v. State of Uttar Pradesh and Anr.- In this case, the convicted had already undergone a six month imprisonment term, before being officially convicted by the Court. The Court held that since the convict had been convicted and also, the required 'blemish' had also been imposed upon him, it was not necessary to sentence him again in the name of 'retributive punishment', as it would inflict a very big loss upon the family as well⁶.

(2) Deterrent theory of punishment

The purpose of the punishment is to deter the criminal from committing crime in future and to set an example that others also who will commit crime will be punished likewise. By punishing the wrong – doer an example is set that those who will violate the law will incur the risk of punishment. The idea is that punishment will thus curb the criminal activities of the prospective offenders. In olden times severe punishments and public executions were held mainly with the

⁵ Mukesh and Anr. V. State of NCT of Delhi and Ors 2017 6 SCC 1

⁶ Anwar Ahmad and Ors. V. State of UP and Anr 2022

object to deter others and to set an example that violation of law will be punished. Punishment serves as a deterrence in two ways. It creates fear in the mind of the wrong – doer and deters him from committing crime in future and it also deters other prospective criminals from committing crime. The chief purpose of punishment is the protection and maintenance of individuals interest in the society by deterring the evil minded persons.

This theory says that by punishment, the wrong – doer is made an example. It creates an awe not only in the mind of the offender, but in the minds of others also and deters them from committing crimes. In this way it checks crimes. According to the exponents of the theory of deterrent punishment, punishment is meant to prevent other persons from committing similar offences. The advocates for the retention of capital punishment rely on this theory in support of their contention.

According to this theory it is to set terror into the hearts of people who may be criminally disposed the main supporters of this theory are Bentham, Plato, sophists, fischte, locke, the aim of this theory is to prevent other persons from committing similar offences.

Criticism – The main criticism is laid down by Holmes. He says this theory is immoral as it gives no measure of punishment except the law givers, this theory is also criticized on the ground of its severity as the severity of punishment do not curtail the number of crimes.

(3) Expiatory theory of punishment

This theory is linked with the theory of Retributive as it also states that it is considered to be a part of it, Hegel and Kohler are the propounders of this theory. Hegel states that punishment makes the criminals to expiate for the wrong they did. This theory is based on the morals. According to this theory punishment is necessary for the purification of the offender as it is a kind of expiation or penance for the misdeeds done by wrongdoer. Manu says “Men who are guilty of crimes, when condemned by the King become pure and go to heaven in the same way as good and virtuous men go”. Men undergo punishment so that the wrong done by them may be expiated. In view of Hindu Jurists expiation or penance washes away the sin.

That being the obvious purpose of the punishment, suffering must be equal to the guilt if it were to wipe it out. According to this theory if the offender expiates or repents for the crime, he should be forgiven – as his expiation or repentance is itself a punishment. This method of punishment was also common in ancient India where expiations were performed by way of penance which varied in form and severity.

This theory is now obsolete. The principles of morality now cannot wholly and solely come under the domain of law. At present the organisation of state, its functions, human habits,

attitudes have all developed to a great extent. According to Paton this theory is based on moral doctrines, and, therefore, is beyond the limits of modern law and jurisprudence.

According to this theory, repentance and expiration by the offender itself is a punishment. The prisoner or an offender were kept in isolation cell to repent and expiate of his crime. This theory believes that every person deserves to be forgiven when he realized his / her mistake.

(4) Preventive Theory of Punishment

The main supporters of this theory are Salmond and Holmes. Preventive theory of punishment solely relies on the basis of prevention, means to prevent crimes. The main aim of this theory is to take preventive steps in order to diminish the crime committed by wrongdoers. The main idea behind this theory is transforming the criminal by temporarily or permanently. The theory is another form of deterrent theory. Whereas in deterrent theory, the aim is to deter the society while in this is to prevent the wrongdoer from committing the crime. In order to prevent wrongdoers from committing crimes, the fear of punishment must be created in the minds of criminals, it also be reflected by disabling the criminal permanently or temporarily from committing any other crime. The another step is to make reformation or making them a good citizen of the society.

This theory focuses on the process of reformation and re-education, so that crime would not be committed again and again.

Case Laws:

1. Dr. Jacob George v. State of Kerala: In this case, the Supreme Court held that the aim of punishment should be deterrent, reformatory, preventive, retributive & Compensatory. One theory preferred over the other is not a sound policy of punishment. Each theory of punishment should be used independently or incorporated on the basis of merit of the case. It is also stated that “every saint has a past & every sinner has a fortune”. Criminals are very much a part of the society so it is a responsibility of the society also to reform & correct them and make them sober citizens of the society. Because the prevention of crime is the major goal of the society and law, both of which cannot be ignored⁷.
2. Surjit Singh v. State of Punjab: In this case, one of the accused, a policeman entered the house of the deceased with the intention to commit rape but failed to do so as the sons

⁷ 1994 SCC (3) 430; JT 1994 (3) 225

of the deceased shouted for help. Another accused suggested the policeman to kill the deceased. The accused was held liable under section 450 of the Indian Penal Code. While on the contrary, the death penalty or capital punishment is more of a temporary form of disablement⁸.

(5) Reformatory Theory of Punishment

The Reformatory theory owes its origin to the Italian school headed by Lombroso and the French writer La Gassaque. This theory is also known as corrective or rehabilitative theory. The essence of reformatory theory lies on “An eye for an eye will turn the whole world blind”- Mahatma Gandhi. According to this theory the aim of punishment should be the reformation of the criminal, it is to reform the character of the criminal so that he will desire to do what is right instead of fearing to do what is wrong. The punishment should be curative, clinical, medicinal and educative rather than inflicting of physical injury or pain upon the wrong-doer. This theory not focuses on the crime but on the reformation of criminal, his personality all other factors which led him to do wrong. It concentrates to find out the cause, the reason which compelled an individual to commit a crime and try to eradicate the criminal tendency by reforming the criminal by way of education and rehabilitation. This theory studies the psychology of the criminal or studies his behaviour patterns and reforms them through education, sessions therapies. This theory admits only such types of punishments which are educative and disciplined in nature and not of those which inflict pain on the criminal. The punishment aims at making a man worthy of living in the society. A person who commits a crime and suffers punishment for that comes back to society and lives along with his other fellow beings again. This theory treats punishment as a means to social end. A man is not born criminal, his circumstances makes him criminal, or either there might be some personality defect or psychological causes be there. In modern times this form of punishment is getting tremendous support, most of the legal systems of the world have incorporated this method of punishment.

(6) Compensatory Theory of Punishment

Compensation is the true essence of deterrent, reformatory and contribution of retribution. The main aim of the law of crimes is to penalize the wrongdoer or the criminal and to seek for his reformation and rehabilitation with all the resources and goodwill available through the courts

⁸ CRA-D-340-DB-2018

and other governmental organisations. It must be seen that the criminals get fair judgement for their crimes and the victims in a crime should be compensated fairly and equitably.

The compensation can be made on two grounds namely →

1. The compensation must be for the harm caused to the victim or for his property where such injury had been inflicted upon by the criminal.
2. Where the state has failed to provide safety towards its citizens, compensation must be received for the harm or loss caused by the offender or criminal.

In case *DK Basu v. State of West Bengal*, the Apex Court held that a victim who is under the custodial right, has every right to get compensated as right to life which is under article 21 of the constitution, has been breached by the officer of the state⁹.

(7) Incapacitation Theory of Punishment

Incapacitation refers to the restriction of an individual's freedoms and liberties that they would normally have in society.

The main purpose of this theory is to remove the dangerous persons from the society. The word Incapacitation means to prevent the offence by punishing the offender so that the future generation fears to commit the criminal act. Incapacitation happens either by removing the criminal from the society temporarily or permanently or by some other method which restricts him to act criminally.

The most common way of incapacitation is incorporation of the offenders. This theory of punishment rearranges the distribution of offenders in society so that the rate of crime decreases. Incapacitation is to dissuade others from the offenders in the past, so that it is not followed by the future generations.

(8) Utilitarian Theory of Punishment

The utilitarian philosophy tries to rebuff guilty parties to debilitate, or "hinder," for future bad behaviour, and as such the laws ought to be utilized to amplify the joy of society. This theory is consequentialist in nature as it perceives that discipline has ramifications for both the wrongdoer and society. A delineation of consequentialism in discipline is the arrival of a jail detainee experiencing an incapacitating sickness or in many cases approaching death.

The utilitarian laws work on discouragement implying that the punishment should to be given to keep others from committing crimes and also specify punishment for criminals, should be

⁹ 1997(1) SCC 416

an example to the society that is an obvious deterrence implying the punishment ought to keep individuals from committing crimes. Capital punishment can also have the application of utilitarian theory as it produces both positive and negative results. There have been many debates encompassing the issue and as such rivals of capital punishment pronounce that it is savage and harsh thus the administration ought to get rid of it. The activities that enhance the satisfaction of the greater section of the public, should be sought and those prevented should be evaded.

Conclusion

A punishment is an outcome of an offence. Punishments are imposed on the criminals with the objective to prevent them from committing the crimes again in society and transform them by rehabilitation and reformation. The endeavour of the different theories of punishments is to convert the law breakers into law abiders. Crime denotes an unlawful act punishable by state. In every aspect law is supreme and no one can break any law and if anyone breaks the law he or she will be liable for punishment. In order to protect society against criminal and law breakers the law holds for the punishments in different ways such as fines, penalties, imprisonment etc. Punishments are either corporeal or non-corporeal. Corporeal punishments are those punishments which are inflicted on the body such as forced labour, incarceration or death. Non-Corporeal punishments are in the form of fines, forfeitures or suspension etc. Punishment is to such which makes the criminal realize the magnitude of the offence which he had committed and to repent for them only it may be said to have achieved its desired effect. Thus punishment is a practical necessity for a system in which threats of punishment are to be taken seriously and criminals must be punished for the offences they commit.

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