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THE THEORY OF CRIMES IN THE LIGHT OF RETRIBUTIVE THEORY AND SOCIOLOGICAL THEORY OF CRIMES CONCERNING VIOLATION OF HUMAN RIGHTS OF CHILDREN

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Abstract

The word “Criminology” was originated in the year 1890. *Criminology is a branch of criminal science that treats crimes and their prevention and punishment*¹. Criminology is concerned with conduct of human behaviour that are prohibited by society. It is, therefore, a socio-legal study that seeks to discover the causes of criminality and the remedies. The school of criminology, as explained by Prof.Sutherland is the theory dealing with causation of crime and measures to curb it. Each school focuses on different aspects to delve into the causation of crime and remedies. In an endeavour to search for an explanation for crime, several theories have been propounded. Many factors ranging from heredity to economics, have been emphasized. Criminological Theories are an integral part of the subject matter of criminology. Theory “*is a term used to describe facts on which right of action is claimed to exist*”². Therefore, a theory is presented as possibly true, but that is not known to be true. The article underlying the exemptions provided in IPC throws light that the rationale of the exemption is to a significant extent, that a child becomes recidivist due to sociological factors and not because of their deliberate intent. The focus is on different theories of sociological school vis-à-vis retributive theory. Finally, after analysis, it concludes on the note that reformation theory is best for children in the light of sociological school.

Keywords: *Criminology, Theory, Recidivist, Sociological Factors, Retributive*

¹ HENRY CAMPBELL, BLACK LAW’S DICTIONARY, 4th Ed.-29, 1968.

² Supra.

Introduction

Laws, theories are made with the aim to make society a more civilised place. In a society people of different age reside and among them the most vulnerable class, is a child. A child is a priceless asset of any society and plays an inevitable role in building a developed nation. The future of a country depends on how its children are being brought up to become the future torchbearers. However, some children have to borne the brunt of poor socio-economic environment and later on going off track from the mainstream society. The Indian Penal Code, 1860 Section 82 entails that children below seven years of age are exempted from any kind of criminal liability. The article discusses about that whether punishing individuals because they have acted wrongly address the underlying causes and social conditions that have led to criminality in the first place, and that whether punishment needs to incorporate a more rehabilitative approach and secondly is reformatory theory better than retributive within all age groups!

Chapterization

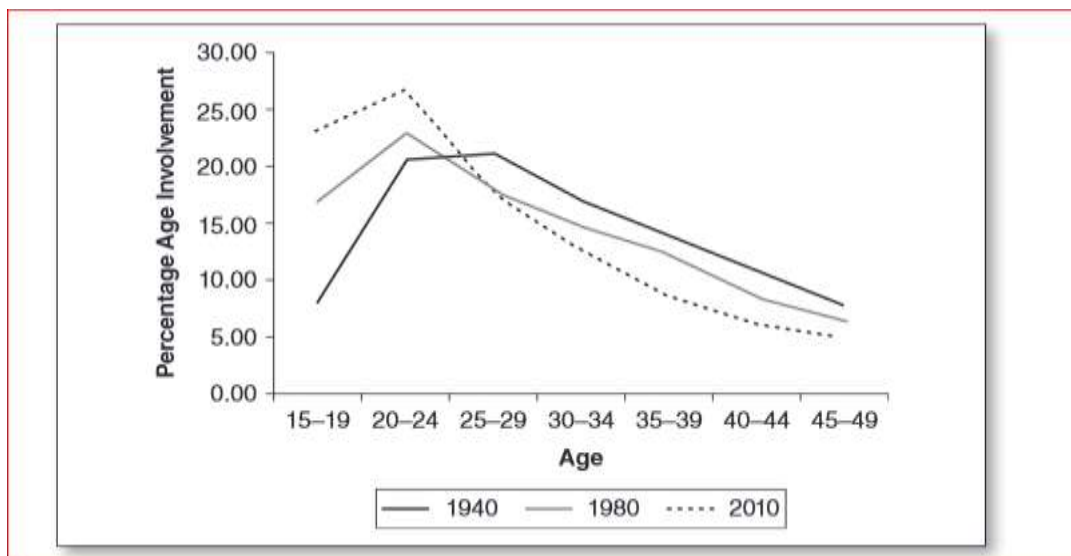
First section deals with retribution theory. Followed by sociological theory, including strain and labelling theory. The subsequent parts are related to human rights, Juvenile Justice Act. At the end recent approach by highlighting the current judgments and finally conclusion.

Significance of Study

The association between crime and age group is a major discussion, as the theories of criminology relies on this data. According to reports, the majority of crime is committed by young adults and teenagers. For example, 45% of those arrested in U.S.A were in the age gap of 15- 25 years old in the year 1990³.

³ Thomas B.Marvell, Carlisle E. Moddy, 7, *Age Structure and crime rates: The conflicting Evidence*, JOURNAL OF QUANTITATIVE CRIMINOLOGY (1991).

Figure 1: Age Distribution of Homicide Offenders Across Three Historical Periods, United States



Source: Jeffery T. Ulmer, Darrell Steffensmeier, *The Age and Crime Relationship*, Sage Publication.

The above graph depicts that irrespective of the year, the maximum crime is committed by the people in the age group below 25.

Therefore, it is an attempt to venture the analysis of crimes committed by people coming under the age group below 25 years and the possible theory of punishment suitable to bring them back on mainstream.

Retribution Theory

Retribution theory is based on two principles, desert and proportionality. According to the retributivists, the punishment has to be proportional to the crime committed. Retributivism is backward-looking. Retributivists do not punish a criminal for the act they might do in future, but only punish for the crimes one has committed and to the extent a person *deserves*. The principle on which this theory lies is we are doing injustice if we are not punishing as what they deserve⁴ to be punished. The punishment meted out should remove the unfair advantage.

Retribution theorists asserts that individuals are rational beings, capable of making informed decisions, and therefore rule breaking is a thoughtful decision. It has also been suggested that

⁴ THOM BROOKS, *PUNISHMENT* 20 (1st, Taylor & Francis, 2012).

punishing individuals because they have acted wrongly does not address the social conditions and that punishment needs to incorporate a more rehabilitative approach⁵.

Sociological Theory

This theory assumes that criminals are product of society. The result of societal factors is so immense that the people embrace criminality or keep away from it. Prof. Sutherland according to his studies, drew the following conclusions:

1. Criminal behaviour is learnt and not genetic.

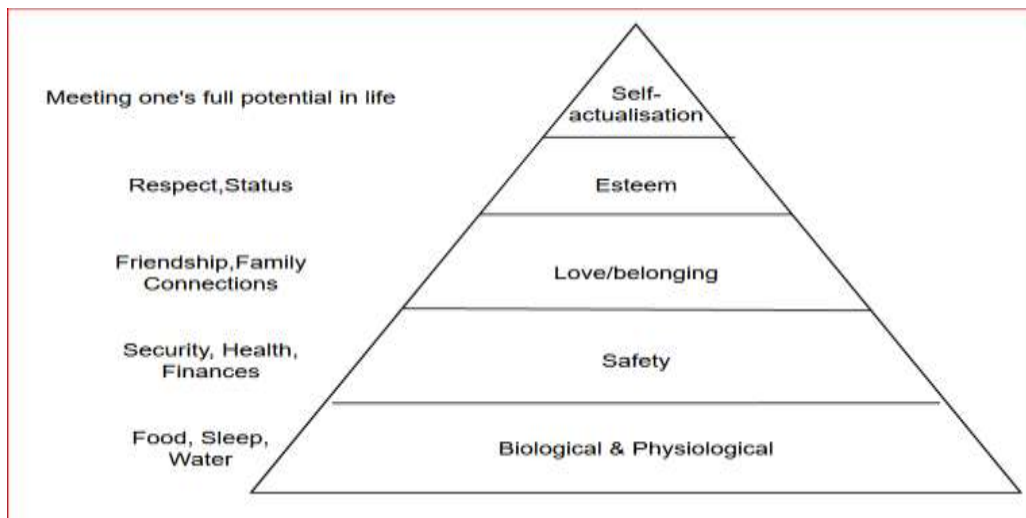
Ambition + resources = Results in fulfilment of ambition, that gives lot of prestige

Ambition – resources = Dissatisfaction → “deviance” (Alternative Route)

We humans want to reach higher echelons, and when this cannot be fulfilled the deviance, as an alternative method of achieving goal can be observed. In Maslow's theory, which is a psychological theory can be here related. The theory depicts in a pyramidal structure the wants of humans and it's increasing nature. First, people achieve their basic needs, then slowly goes on scaling pyramid with finally reaching self-fulfilment needs. Self-fulfilment need is fulfilled when meet all their life's desire. By comparing the Maslow's theory and sociological theory it can be deduced that it is when a person fulfils all their basic needs that they achieve self-fulfilment, highlighting that it takes efforts and time in finally reaching top most of the pyramid. If in situation a person couldn't reach up they might go off-track. As, Maslow believed that people have a desire to be self-actualized.

⁵ Supra.

Figure 2: Maslow's theory



The criminality is also learned from “multiple-factor” approach. Multiple factor approach emphasizes that when factors cumulatively result in influencing a person to commit unlawful acts, example Mobility: It is due to rapid growth in urbanisation that led to increase in movement through the ease in travel facilities, that people come across strangers, and gives rise to new opportunities to commit crime, culture conflict: The impact of old values, new values may create culture conflicts, family background.

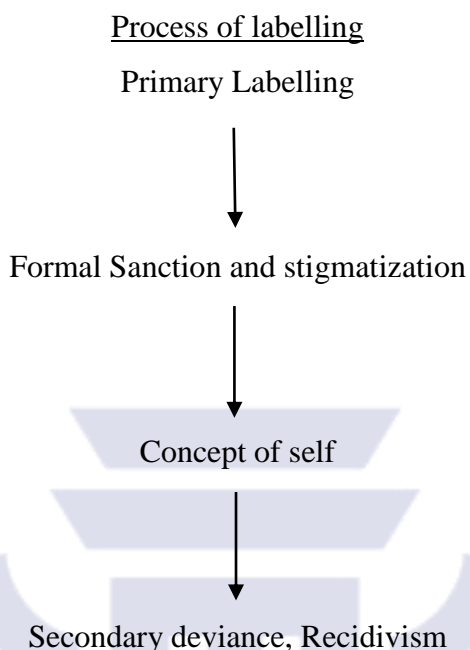
Strain Theory

Robert k. Merton argues that deviance results from society itself and not from pathology. Aspiration and opportunity disjunction create strain theory of deviance. He states that there are institutionalised means and cultural defined goals. Institutionalised means are the ways of attaining success, it is institutionalised because the ways are accepted everywhere. Cultural defined goals are the success. It adds that if success is given undue importance it paves ways of achieving through any means and normlessness arises. Therefore, as the strain theory suggests that there lies a disjunction between aspiration and opportunity and that leads to deviance, and failure leads to being labelled as not successful people. This culminates into deviant behaviour, and the person wants easily earned success to get recognition in society.

Prof. Becker discussed two types of deviance:

Primary deviance: First act of deviance. It is sometimes normalised also.

Secondary Deviance: When the individual accepts the label and this results in occurrence of criminal behaviour frequently.



Therefore, if prior to secondary deviance there is a scope of rehabilitation then that can be taken help from.

Prof. Lemert a sociologist from university of California, studied the coastal areas of Canada, to search for an answer, why the specific area has chronic problem of stammering. He suggested that the problem arised because of given undue importance to ceremonial speech-making. Failure to speak well was considered as humiliation. Children with the slightest speech problem used to be so conscious of their parents' expectation to perform well in front of masses that it resulted in children becoming over anxious about their own abilities. It was this anxiety leading to chronic stuttering.

Prof. Lemert concluded by this analogy that it was the social pressure to speak well that had the implication of developing problems related to stuttering. In this example, chronic stuttering (secondary deviance) is a response to parents' reaction to initial minor speech defects (primary deviance)⁶.

⁶ Karl Thompson, *Labelling Theory of Crime*, REVISE SOCIOLOGY, November 17, 2021. <https://revisesociology.com/2016/08/20/labelling-theory-crime-deviance/>

American sociologist Howard S. Becker asserts in the light of the labeling theory that, “*Deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an offender*”⁷.

Human Rights

Human rights are basic rights. They are universal, applicable to every person irrespective of age, that is from the time a person is born to burial. Manifold reasons, like transformation of the family structure, globalization, mass migration, etc all have strong impacts on children. Because they are still developing, children are especially vulnerable. The effects of disease, and poverty threaten the future of children⁸.

The Universal Declaration of Human Rights (UDHR), 1948, it defines human rights as “rights derived from the inherent dignity of the human person”. Some of the features of human rights are:

- I. Human Rights are universal– The term universal means all people irrespective where they live in the world are entitled to them. The universality can also be found to be stated under Article 1 of Universal Declaration of Human Rights (UDHR), “All human beings are born free and equal in dignity and rights”.
- II. Human Rights are indivisible – It signifies human rights are civil, political, economic, social or cultural in nature, and are all inherent to the dignity of every human person.
- III. Human Rights are interdependent – It highlights the nature of human rights being dependent on other requirements. An example can be right to education dependence on right to health, if a person is uneducated, unemployed the survival and existence also becomes a challenge, and maintenance of proper health is difficult.
- IV. Human rights are not absolute - Like all rights, they cannot be exercised in unfettered manner. They may be restricted in the interest of public peace, security.
- V. Human Rights are dynamic – It means the ambit of human rights cannot be curtailed or be limited, it’s scope always need to be expanded, in tune with changes of time.

International human rights law has made it clear that the best interests of the child are paramount.

⁷ HOWARD BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE, (New York free Press, 1963).

⁸ UNICEF, <https://www.unicef.org/child-rights-convention/child-rights-why-they-matter>

The General Comment 10 to the United Nations Convention on the Rights of the Child stresses on the need to provide special considerations applicable to juveniles with respect to State's justice system. For example, children must be subjected to criminal procedures in conformity and taking into consideration their age, children who are convicted of criminal offenses must be separated from adults.

In *C. Johnson v. Jamaica*⁹, it was held by human rights committee that children who commit criminal offenses under the age of 18, may not be sentenced to the death penalty.

In *Assenov v. Bulgaria*¹⁰, the European Court of Human Rights ruled that it is important for the authorities to consider the tender age and in ensuring that child criminal suspects are brought to trial within a reasonable time.

In *S.C. v. the United Kingdom*¹¹, the European Court of Human Rights held special tribunals or criminal procedures may be necessary on account of the minor's intellectual age, or of the nature of the penalty he faced.

The Inter-American Court has found violations of the rights of the child if State fails to provide due process, and humane treatment to arrested minors¹² (*Bulacio v. Argentina*).

*Juvenile Re-education Institute v. Paraguay*¹³, the Court also found that the State is responsible for establishing a specific system which must include certain characteristics such as the possibility of dealing with children without resorting to judicial proceedings, and assessing the psychological well-being of the child.

Juvenile Justice Act, 2006

The Act is based on rehabilitation and reform of the Juvenile Justice (Care and Protection of Children) Act, 2015. The Act provides that children in conflict with law need care and basic needs by providing proper development, in the best interest of children and for their rehabilitation.

⁹ (592/1994), ICCPR, A/54/40 vol. II (20 October 1998).

¹⁰ 90/1997/874/1086, Judgment of 28 October 1998.

¹¹ No. 60958/00, Judgment of 30 September 2003.

¹² Judgment of Sept. 18, 2003, (Ser. C) No. 100 (2008)

¹³ Judgment of September 2, 2012, (Ser. C) No. 112.

Recent Judgments

*Roshan Lal v. State of Himachal Pradesh*¹⁴ - In this case it was stated that among various grounds on which parole is provided, is that prisoner should be entitled to maintain their family ties. This is the reason that time should be given to maintain their social contact. There are many theories of criminology - deterrence, retribution, reformation. When reformation is recognised, it provides justification for giving short periods of leave, on parole underlying humanistic approach towards those languishing in jails. Those who leave prison and not having link with network of support, without employment prospects, and without resources, stand a significantly higher chance of failure. When offenders go back to criminal activity upon release, they often do so because they lack hope of merging into society as accepted citizens. Every human being in a civilized society deserves it be treated with dignity, and it being the crux of protection of human rights. However, it must be noted that while granted parole, public interest has also to be considered like those of habitual offenders.

*Harjinder Singh v. State of Himachal Pradesh*¹⁵ – Defining who are hardened criminal, it was said that for these people committing crime has become a way of life and exhibit tendency to re-commit the offence. For an individual who has committed a serious offence for which they are convicted, but it is also found that it is the only crime he has committed, then they are not to be treated as hardened criminal. The signs of reformation if is observed then mere nature of the offence committed by him should not be a factor to deny parole outrightly. However, stricter standards in mind while judging their cases on the parameters of habitual offenders.

Conclusion

From section 11 of the Indian Contract Act, 1872, it becomes clear that a person will be competent to contract if he has attained the age of majority. From section 10 and section 11 of the Indian Contract Act, it is vivid that an individual by reason of infancy, is incompetent to enter into contract, under the Indian Contract Act. Consequently, a minor's agreement is void ab initio and cannot be enforced by either of the party to the contract. In *Mohri Bibi v. Dharmodas Ghose*¹⁶ (1903) - The court held that unless the parties have competence under section 10, no agreement is a contract. According to Section 30 of the Indian Partnership Act, 1932, a minor cannot be a

¹⁴ 2021 Indlaw HP 110.

¹⁵ 2021 Indlaw HP 117.

¹⁶ (1903) 30 Cal 539.

partner but can get the benefits of partnership. In a 2021 case law, *Priya Roche D/o Ronald Roche v G. R. Shet S/o Late K. R. K. Shet and others*¹⁷, though the main issue did not deal with minor entering into a contract. However, in the case law it was mentioned that a minor entering into a contract is void ab initio. According to *T.Sivakumar v. Inspector of Police Trivullar*¹⁸ – The child marriage is voidable. According to Prohibition of Child Marriage Act, 2006 (Hereinafter, PCMA) being a special legislation for the purpose of preventing the evil practise of child marriage. According to Section 3, PCMA a child marriage is a voidable marriage. These all, precedents highlight the inclination in favour of minors, as they being incapable of ascertaining the practices which can be detrimental to them. The question that gives us a food for thought is can't this inclination towards protection of minors, be reflected in theories of criminology. An American writer, Mr. August Drahms, in his book "The Criminals", was the first to provide a lucid classification of classification of criminals¹⁹. Giving a glance to the Journal he points out that if a person who is a habitual offender and post thirty years of age, must be brought to books, not with the expectation of reformation. Adding to it, it has also been emphasised that it is usually observed that offenders post thirty years, have been guilty of serious offences. Therefore, they must be given strict punishments. Imprisonment effects relationships and weakens social bonding, since the maintenance of such bonding is based on long-term relationships. When a member of a family is imprisoned, the disruption of the family structure affects relationships.

Finally, in the case of *Jitendra Jatav v. State of UP*²⁰ – The High court relied on Halsbury's Laws of England²¹, for taking reference to the object of punishment. In it, it was stated the object of punishment encompass retribution, deterrence, reformation. The concept of justice as an aim of punishment means both that the punishment should fit the offence and also that offences should receive similar punishments. Every theory of crime has it's own significance and is an integral part of criminal justice system. The facts and circumstances are relevant to ascertain which principles to be incorporated. For example, Deterrence and sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law.

¹⁷ Appeal No.554 OF 2019.

¹⁸ AIR 2012 Mad 62.

¹⁹ Charles A. Ellwood, Classification of Criminals, 1, JOURNAL OF CRIMINAL AND CRIMINOLOGY, 536-548 (1911).

²⁰ 2021 Indlaw ALL 1.

²¹ HALSBURY LAW OF ENGLAND, 482 (4th Edition: Vol.II, 2013).

Finally, it can be concluded that all theories of criminology have their role to play. However, sociological theory, labelling theory serves the purpose for answering the question why children acts as a habitual criminal and the theory which is suitable for awarding children punishment, is reformatory theory.

