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Punishment: Philosophy and law

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Punishment has always been a very important issue in every society as it has always been used to punish the offenders and serve justice to the victim and society. With the evolution of society, the concept of punishment has gone through several changes. The concept of punishment has changed from mere punishing to reforming the offender, thus it becomes essential to have a look at the laws, policies, and reforms that are taking place around us. Punishment no longer constrains itself to the traditional norms and monotonous ways of punishing and is looking forward to reforms with the introduction of reformation of the offender. This article aims at analyzing the different theories and types of punishment and in order to do so, the article maps different provisions, the theories associated, types and tries to build an argumentative construct to achieve a realistic inference. The main focus of the article will be punishments along with some contemporary examples and relevant Jurisprudence behind it. It concludes that there are immense possibilities of bringing reforms in the punishment which will result in the overall development of individuals and nations at large benefiting society.

Keywords: *punishment, law, philosophy.*

INTRODUCTION

The Indian judicial system is based on two quotes or shlokas from the Indian scriptures: *Satyameva Jayate*, from Mundaka Upanishads meaning 'Truth only triumphs', and *Yato Dharmas Tato Jayah* from Mahabharata meaning 'where there is dharma, there will be victory'.

Indian society was 'duty-oriented', focusing more on the duty an individual has in connection with his/her family, community, society, nation because he was perceived as a part of nature, therefore the law was not perceived as a necessity. With the transition in the nature of the individual from duty-oriented to rights-oriented, differences seem to emerge. With the rise in individualism, society also witnessed an increase in crimes. Crime is witnessed to be a common feature in every society. There are certain acts that are considered a crime in one society and may be acceptable in some other societies. This difference lies in several factors which accompany a society such as political, religious, cultural, and economic ideas and ideologies. In similar terms, the punishment attached to a crime is also found to be different in terms of severity in different societies.

The punishment can be found to be much more severe and barbarous in primitive societies than what is observed in the modern, symbolizing the strength of the ruler and suppression which is utilized to prevent the commission of a similar offence in the days to come. History also witnessed the punishment in the form of mutilation, torture, burning, and many others are now perceived as inhumane and abandoned in modern societies. There might be differences in the nature of punishment inflicted, but the objective remains the same, that is to take revenge on the criminal. With the advancement of society, the codes and customs of punishment have been codified and systematized. Code of Hammurabi, the Babylonian legal Code, is regarded as the oldest by western authors. While in India, Dharmashastra is found to lay down the rules of social order and also punishments.

OBJECT AND DIMENSION

Punishment is inflicted on the wrongdoer with the primary objective of punishing the offender in order to serve justice to the victim, providing comfort and relief. At the same time, it provides relief to the society at large seeing that justice is served as punishment is a social reaction to a crime. It is used as means against undesirable, nefarious, and notorious activities and behavior of such individuals and organizations who disturb the public peace and harmony in the society. Punishment is attributed as a preventive measure that is used for the prevention of crime again by the criminal and at the same time, it also deters other potential

offenders in the future from committing the crime. Apart from preventive measures, it is also a deterrent in nature and sanctioned according to the severity of the crime. Punishment also serves as a mechanism for the protection of society from criminals, thereby keeping the structure of society intact.

Punishment is inflicted meaning it is voluntarily imposed on the individual who has wronged someone by committing harm, which affects the victim as well as society at large. It is a privation and coercive in nature, which is authorized by the state. Punishment is perceived as something unpleasant, inflicting an ill upon the offender. It is backed by the authority of the state in response to an act in violation of the law of the state. The extent of punishment is dependent on the harm done, his motives, and temptation.

THEORIES OF PUNISHMENT

Administration of justice is one of the fundamental functions of a State. It can further be divided into two branches of administration which are Civil and Criminal Justice. The main purpose behind this Criminal Justice Administration is to inflict a penalty on the offender for his/her misdeeds. It is the responsibility of the State to punish a criminal. It is observed that since primitive times in all civilized states multifarious theories have been developed with the changing patterns leading to modern societies, regarding the aim of punishment/penalisation in order to reinforce the values which were earlier breached through the commission of an offence. From traditional to modern, the theories of Punishment can be broadly divided into five categories.

The foremost theory is the retributive theory, which can be regarded as one of the most ancient practices of punishment. Justice Holmes observed that "it is commonly known that the early forms of legal procedure were grounded in vengeance." The word 'Retributive' means punitive or payback resulting in vengeance. Its objective is to give punishment in the same manner in which the injury is inflicted. It can be said that it is based on the principle of 'an eye for an eye', 'a tooth for a tooth', 'a nail for a nail'. Immanuel Kant, a staunch supporter of this theory, in its justification, remarked that "evil should be returned with evil". The theory advocates for such

penal provisions which will ensure that the offender suffers the same amount of pain as was inflicted by him/her which will in turn help to restore the social balance that was distorted by the offender. The victim suffering a wrong at the hands of the offender was allowed to exact revenge against him. As per Sir John Salmond, "the retributive purpose of penalisation consists in avenging the wrong done by the criminal to society. The thought behind this theory is to create the wrongdoer to notice the suffering/pain."

Deterrent theory of punishment is based on instilling fear in the minds of prospective offenders. The term 'to deter' can be understood to mean, "abstaining from actions/deeds ". Further, the word deterrent means, "infliction of severe punishments with an objective to stop the wrongdoer from committing the crime again." The theory advocates that the article of punishment is solely not to forestall the wrongdoer from continuing any wrongdoing, however conjointly to create him as a precedent for others who share similar prospective offender. The objective of the law is to adequately punish the offender to restore the social balance and at the same time to detour the potential offenders and people with criminal tendencies. An honorable justice once observed that "I do not penalize you for stealing the sheep but so that the sheep may not be stolen." The purpose of penalisation isn't vengeance however terror for the commission of offences. According to Paton, "The deterrent theory stresses the need of protective society, by therefore treating the prisoners, so that others are deterred from breaking the law."

The next theory advocated is the preventive theory which is also called the '*theory of disablement*' by disabling the criminal to prevent him from committing another crime. For instance, a person guilty of murder is punished with imprisonment for life or the death penalty in order to prevent him from committing a similar crime again. This theory is based on the proposition, "not to avenge crime but to prevent it", with the aim to disable the offender. The preventive theory of punishment received support from utilitarians, such as Bentham, Austin, Stuart Mill as it had a humanizing ascendancy on criminal law. With the increasing popularity of the preventive theory, the institutions of prison or jail gathered momentum. By confining the criminal in prison, he is prevented from the commission of any other offence.

Imprisonment of the offender is regarded as the topmost mode of punishment as it acts as an imperative preventive measure.

With the change in time, several developments have been made in the field of criminal justice which has brought a progressive change with a new approach to the concept of punishment. According to the reformatory theory, the purpose of punishment is to rehabilitate the criminals. It sought to bring in a change in the perspective of an offender in order to reshape his thoughts and help him mend to become a law-abiding member of society. The theory is focused on making improvements in the offender by way of reforming him through correctional schools or organizations. In the case of *Mohamad Giasuddin v State of Andhra Pradesh*¹, it was observed that reformation should be the dominant objective of punishment and during incarceration, every effort should be made to recreate the good man out of the convicted prisoner. Justice V.R. Krishna Aiyer advocating reformatory punishment observed that "every sinner has a future". The object of the punishment should be to rehabilitate the offender. The criminal must be educated and trained with some kind of skills during his term of imprisonment so that he/she can lead a good life once released from confinement.

The expiatory theory of Punishment has its basis on morals. It is also known as the '*theory of penance*'. It observes that punishment is essential to ensure the purification of the offender so that he could realize his own guilt. Manu observed that "Men who are guilty of a crime when condemned by the king become pure and go to heaven in the same way as good and virtuous men go". According to this theory, repentance or expiation by the offender itself serves as a punishment. The criminal/offender should be pardoned if he expatriates or repents. This theory was prevailing in the ancient Indian criminal law done by way of chanting mantras, fasting, and other forms.

¹ *Giasuddin v State of Andhra Pradesh* 1977, AIR 1926 SCR 153

TYPES OF PUNISHMENT

Indian Penal Code under its Section 53 stipulates five types of punishments which are Death, Imprisonment for life which can be divided into two kinds namely- rigorous (with hard labour) and simple, Forfeiture of property, and lastly fine.

Death Penalty or Capital Punishment is the gravest form of punishment. It is even scrapped by more than half of the countries in the world. A death sentence or capital punishment may be awarded only in the 'rarest of rare cases. In the landmark judgment of *Machhi Singh v the State of Punjab*,² it was observed that the death penalty can be awarded only in the 'rarest of rare cases. The court explained the concept of rarest of rare in this case and held that "when the collective conscience of the community is shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty can be awarded. The death penalty is not a rule but an exception".³ Garofalo, a criminologist who was a staunch supporter of the death penalty advocated it as the most efficient way of eradicating criminals. Indian Penal Code prescribes the death penalty for certain offenses which are of grave nature. For instance, Waging, attempting, or abetting war, against the Government of India which is mentioned under Section 121. Some other such provisions are section 132, Section 194, murder under Section 302, abetment to suicide under Section 305, kidnapping for ransom (Section 364 A), dacoity with murder (Section 369).

The next important punishment is imprisonment for life which in general terms refers to a confinement sentence that runs throughout the remaining period of a convict's natural life. In the landmark judgment of *K.M. Nanavati v the State of Maharashtra*,⁴ the court observed that "imprisonment for life means rigorous imprisonment for life and not simple imprisonment." Imprisonment stands to be divided into two types- Rigorous and Simple. Rigorous

² *Machhi Singh v State of Punjab* 1983, AIR 957 SCR 413

³ K. Venkataramanan, 'Death penalty comes with the jurisprudence of outrage' (*The Hindu*, 13 May 2017) <<https://www.thehindu.com/opinion/lead/the-jurisprudence-of-outrage/article18440436.ece>> accessed 27 December 2021

⁴ *K. M. Nanavati v State of Maharashtra* 1962, AIR 605 SCR 567

Imprisonment includes hard labor such as grinding of corn, digging of earth, drawing of water and cutting of wood, etc. In deciding whether the imprisonment should be rigorous or simple, Section 60 of I.P.C plays a pivotal role, it is in the discretion of the competent Court to decide, whether the imprisonment shall be fully rigorous, or wholly simple or that any part of such imprisonment shall be rigorous and the rest simple. Some of the provisions of the Indian Penal Code directing rigorous imprisonment as a form of punishment are Section 194, Section 449. Another aspect of rigorous imprisonment is Solitary Confinement which can be understood as retaining a prisoner thoroughly, secluded from any form of external contact. An unharmonious and habitual offender may be confined in a separate cell to correct his conduct. It can be awarded only in the case of rigorous imprisonment. It can be imposed by subject to certain limitations such as the term of solitary confinement should not exceed three months of total imprisonment, it cannot be inflicted where legal confinement is not part of the punishment directed. As per Section 74 of I.P.C, the term of solitary confinement cannot exceed more than fourteen days at a time and it cannot be imposed consecutively but at an interval period of time. Simple imprisonment is imposed in the case of small or trivial offences which are not of serious nature such as wrongful restraint, defamation, etc. In simple imprisonment, the offender is not subjected to any hard manual during the term of imprisonment. Some offences which are punishable with simple imprisonment under the Indian Penal Code are denying to take oath under Section 178, defamation under Section 500, misconduct by a drunk person, under Section 510, and many others.

Another form of punishment under the Indian Penal Code is 'forfeiture of property' meaning withdrawing of the rights of the property of the offender permanently by the State. Forfeiture always occurs after the seizure, and seizure does not necessarily lead to forfeiture. Forfeiture of property is now widely eradicated except in certain types of offences. Under the Indian Penal Code property can be forfeited under Section 125, 126, 127, IPC. The Courts in the form of punishment can also impose a fine/penalty as an alternative for imprisonment and it can also be added as an addition to the imprisonment. The Indian Penal Code, 1860 provides for a fine along with imprisonment in respect of a majority of offences. In case of default, the convict may be subjected to imprisonment.

CONCLUSION

The concept of punishment is old as the beginning of civilization. With the change in time and circumstances, the concept of punishment has also undergone several changes. Historically, the punishment was concerned with inflicting pain and torture to punish the offender. But with the change in time, punishment in modern times is more focused on the rehabilitation of the offender in order to streamline him/her into society. Some of the components of the theories of punishment mentioned above can be compounded. It is imperative today that more focus is made on rehabilitation when it is attainable and deterrence when it is a necessity. Restoration in addition to retribution is suggested. The ancient along with modern elements can be combined to balance against one another, helping to decrease the commission of a crime while inflicting no more punishment than what is deserved. Therefore, a reformative approach to punishment must be the primary purpose of the law as well as the state. To streamline such changes it is imperative that changes should be made in the legal provisions of the state and at the same time, the state should also provide the concerned authorities with infrastructure to support the offenders in order to rehabilitate them by providing them with essential skills for their survival.