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Transfiguration and Specious: The Many Inconsistencies in the Application of the Reformatory Theory in India

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With the advent of the pronouncement of the Bacchan Singh judgment, which had in-depth dealt with the existing deliberations around the Reformatory Theory, the principles of Reformation have been widely discussed and thereby applied. On the other hand, it is pertinent to note that even with the existence of principles of Reformation, the Courts have widely given heinous punishments which closed the doors of Reformation for those wrongdoers. The paper attempts and decipheres if the application of the philosophy of Reformatory Theory is consistent with its application in the Indian Contemporary context. The paper ultimately concludes that there exists a void lacuna in the philosophy and the application of Reformatory Theory in the Indian Contemporary context, with the existence of various contravening judgments.

Keywords: *retributive theory, reformatory theory, punishment, philosophy, discrepancy.*

INTRODUCTION

The paradigm of punishment has existed in our society for a very long time now. Even though there were different societies with different traditions, cultures, and practices, most of them used

to punish individuals who did not obey certain implicit and explicit rules of that society¹, may that breach of rules be morally, philosophically, or politically incorrect acts. The consequence of anything is germane and very closely related to that thing. Similar is the case with Crime and Punishment, the relationship between crime and punishment is intrinsically linked. While on one hand it is intrinsically linked on the other it is extremely complex and with the change in the interpretation of crime and the intensity of wrong that crime brings along, the punishment also changes. It is safe to say that with the changing society, the definition and therefore the interpretation of crime is likely to change.

The definitions and interpretations include brainstorming and analysing questions like, what society considers to be wrong since a crime is wrong against society. This may impinge upon what is morally and ethically incorrect from the perspective of the society and therefore leads to a change in belief of appropriate punishment. The definition and interpretation are also likely to change concerning the context and the fields in which they are interpreted, including criminology, sociology, political science, and criminal law. From a moral philosophy perspective, philosophy is given a holistic and thereby broad interpretation.²

The nature of crime can be construed to be such that requires integration and lifting of knowledge from different and varied subjects, which further allows the examination of crime and punishment on different strata. Thereby, it is safe to say that punishment from a penological perspective can be said to be a disciplinary measure, aiming to exhort people to abide by cultural and societal norms. As stated earlier that the definitions and interpretations of crime and punishment in society, vary with the change in the context in which it is applied. The context then is contingent upon social, political, economic, and cultural developments. This constant influx and change in the socio-cultural context to which it is applied create an imperative need to find new solutions that solve the newly arising problems. This continuous change creates an imperative door to the room of contestation, contentions, and disagreements, which may relate

¹ 'Philosophy and Phenomenological Research' (1967) 28(2) International Phenomenological Society
<<https://www.jstor.org/stable/i336910>> accessed 12 December 2022

² Lina Kudriavcevaite, *The Concept of Punishment in the Socio-Cultural Context, From Theoretical Justification to Penal Abolitionism* (Grin Verlag 2018)

to the intensity of punishment, time duration, the crime for which it is being given, and various other plethoras of deliberations. Since crime and punishment are somewhere related and inclined towards being morally, socially, culturally, and politically correct, these new solutions are thereby expected to fit the bill.

PENOLOGY

Penology is germane to the penal policies of the context in which it is being deliberated and certain facets of punishment. Since there exists an intrinsic relationship with the causing of the crime, the penal policies formed thereby rely on the philosophy and the thought process behind causing those crimes. This can be gauged by the classic example of what happened in the 18th century when the concept of ‘free will’ evolved and started being accepted. When this started to happen certain other contravening ideas such as that that a person is born criminal started getting eliminated.

The philosophy that a person is a free individual who has the decision-making and thereby action taking power in his own hands started to evolve. This concept of ‘free will’ fostered the conceptions of the free ability to think, act on own intelligence, and make choices as per the circumstances.³ With this change in the conception, the entire criminal justice system started to incline towards treating criminals as per the action of that free-willed individual in that specific circumstance. With that change, the criminal justice system of the country started being tilted towards emphasizing more on the *reformatiove* aspect of punishment. The reformatiove paradigm is majorly succeeded by post-care policies that include the rehabilitation of prisoners. This aims to rehabilitate individuals to be able to understand the nature of their acts and that the performance of their actions does not align with the norms of society. Post rehabilitation, that individual is expected to peacefully reintegrate into society and to live as an individual who understands the repercussions of his/her act and thereby complies with the laws and norms of

³ Fred Holbert & N Prabha Unnithan, ‘Free Will, Determinism, and Criminality: The Self-Perception of Prison Inmates’ (1990) 18 Journal of Criminal Justice

that society. Thereby, it is safe to say that penology at least to an extent is at a decent pace attempting to engage with the intricacies of the contemporary world.

THEORIES OF PUNISHMENT

As discussed earlier, change in society necessitates a change in the way a wrongdoer is treated. Moreover, the existence of a multitude of crimes and their intensities has led to the evolution of various theories of punishments. While there may exist a multitude of theories of punishment, they essentially stand on a few philosophies of punishment. These broadly include 5 theories of punishment:

Deterrence Theory - As the term itself implies, this theory aims at deterring criminals from committing crimes. This theory of punishment evolved around the 1550s - 1850s, by famous philosophical thinkers like Thomas Hobbes, Cesare Beccaria, and Jeremy Bentham. This deterrence aims to achieve multi-fold objectives:

- **Specific effect** - The particular criminal who had committed a grave crime, is deterred from committing the offence since he is faced with a severe punishment.
- **General effect** - A general precedent is set for the general public, to not commit that particular crime, doing so would lead to the wrongdoer being prosecuted and thereby required to undergo such a severe punishment.

Incapacitation Theory - Incapacitation is yet another grievous form of punishment which by the very term means, 'preventing the offence by punishment, to create an apprehension in the minds of others to not commit that act'. It also includes incapacitating therefore creating a physical inability in the wrongdoer to ensure his/her disability to perform that act ever again. These may even extend to capital punishment and thereby remove sufficiently dangerous people from society who are supposedly believed to not have the right to live in society post the committal of that grave crime. This theory originated and further evolved around the 18th and 19th centuries, wherein the criminals were often transported to other nations including Australia and America for punishing the criminal.

Retributive Theory - The retributive theory of punishment is also called, the 'Theory of Vengeance'. This theory of punishment is centred around the doctrine of *Lex talionis*, which simply translated to 'an eye for an eye'.⁴ The retributive theory of punishment is centred on three major principles:

- Those who commit grave offences must be subjected to proportionate punishment;
- It is morally good to subject the person to that a similar threshold which he/she has committed;
- It is morally impermissible to punish someone with a heinous punishment, which has a completely higher threshold concerning the committed crime.

Preventive Theory - Preventive theory of punishment aims to prevent the punishment by disabling the wrongdoers. This theory operates on the philosophy that by the way of:

- Creating apprehension for that punishment and keeping the severity of the punishment high;
- Physically or otherwise disabling the criminal from committing the crime;
- Reforming and rehabilitating the wrongdoer;

It believes by the way of this wrongdoer-centric approach, crime can be prevented from being committed.

Reformative Theory - Unlike others, the reformative theory of punishment is centred on reforming the criminal through certain rehabilitation means and thereby transforming him/her into a peaceful law abiding citizen, till the time he is integrated back into society. This theory revolves around the adage, *Hate the sin and not the sinner*. It is also backed by the psychological and philosophical reasoning of an individual's actions are not solely that of the individual's, but rather to an extent implication of how he/she has been brought up, the environment, the treatment, education, and various other factors. It is safe to say that the thought of a person is

⁴ Rustam Singh Thakur, 'An Eye for an Eye will Turn the Whole World Blind - In Special Context to Reformative Theory of Punishment' (2012) SSRN E-Journal <<https://dx.doi.org/10.2139/ssrn.1955438>> accessed 15 December 2022

influenced by his/her genes, upbringing, and the environment the person is exposed to, thereby Reformation must act as a medicine to cure the disease which in turn would be an asset for society.

PHILOSOPHY OF THE REFORMATIVE THEORY OF PUNISHMENT

The Reformative Theory of Punishment largely inclined towards the humanitarian aspect and protection of the human rights of the people post their committal of the crime preaches that *Crime is like a disease, and it cannot be cured by killing*. Rather curing it by treatment and medicines is the appropriate approach. The theory maintains that since crime is wrong against the public, the public must, *hate the sin and not the sinner*. It revolves around the principle of renewal of the criminal and beginning a new life for him. The rationale behind this philosophy (which the Courts many times during the pronouncement do not take into consideration, as will be discussed further) is multi-folded:

The punishment is a sanction imposed on an individual for breaching the norms of society. The intent is to protect society from the committal of crimes.⁵ Keeping in my the intent and the philosophy of the punishment it is imperative to take into account that the punishment only achieves the intent and does not exceed to achieve ancillary objects, which it might not have intended in the first place. This is majorly what the reformative theory attempts to achieve, by protecting the society from crimes by reforming the individuals living in that society through conducive means, and thereby reintegrating them back into the society so that they live as peaceful law-abiding citizens. Thereby, excessively exceeding this and since deterring individuals goes far beyond the intent of the punishment, this theory condemns all forms of corporal punishment.⁶

It is not just the individual committing the crime responsible for a crime against the society being committed, but rather the society as a whole which is responsible for the committal of the crime.

⁵ KD Gaur, *Criminal law : Cases and Materials* (3rd edn, Butterworths India) 257

⁶ *Bacchan Singh v State of Punjab* AIR (1980) SC 898

Much of our crime is merely the symptom of profound social maladjustments and injustices⁷, as there exists deep malaise within the society which develops how a person thinks and further acts. The upbringing, treatment in society, education of people, ensuring that the unprivileged are in a position to be able to survive, learn and adhere to the norms the society expects them to play a pivotal role. Punishing the criminal with a heinous punishment like corporal punishment then is merely eradicating the tip of the iceberg and is not achieving the intended task of protecting society from crime, since the iceberg would remain inherent. The idea that other theories of punishment lead to deterrence is in itself up for contestation and has been proved to not be true by various studies. Additionally, –

“Sending an individual convicted of a crime to prison isn’t a very effective way to deter crime” and “Increasing the severity of punishment does little to deter crime.”⁸ Thereby, theories like deterrence and retribution then have a crippling effect, since the intent it aims to achieve is not fulfilled and further a citizen who could be reformed into peaceful law abiding citizen who could be used as an asset is put to a futile punishment.

THE PHILOSOPHY OF RETRIBUTION NOT BEING CONSISTENT WITH ITS APPLICATION IN THE INDIAN CONTEMPORARY CONTEXT IN HEINOUS OFFENCES

The Supreme Court over the years in cases like *Shiv Mohan Singh v State (Delhi Administration)*⁹, *Asgar v State of U.P*¹⁰, *Shabnam v Union of India*¹¹ and various other cases have upheld the death penalty. It is pertinent to note even with the existence of *Reformatioe Theory*, and its upheaval in the contemporary context wherein judges pronounce judgements keeping in mind the purpose and the intent of punishment, there has been an increase of 21% in the people on death row in 2021 as compared to 2020.¹²

⁷ ‘Society’s Responsibility for Crime’ (1932) 22(5) Journal of Criminal Law and Criminology <<https://doi.org/10.2307/1134949>> accessed 15 December 2022

⁸ National Institute of Justice – Five things about Deterrence

⁹ *Shiv Mohan Singh v State (Delhi Admn)* (1977) 2 SCC 238

¹⁰ *Asgar v State of UP* (1977) 3 SCC 283

¹¹ *Shabnam v Union of India* (2015) 6 SCC 702

¹² Sonakshi Chinda, ‘Reformatioe Theory of Punishment : Analyzing the Status in India’ (2021) 4(3) IJLMH <<https://doi.org/10.1000/IJLMH.11575>> accessed 18 December 2022

As of 31st December 2021, there were 488 prisoners on death row. Additionally, there are multiple cases wherein life imprisonment is offered. It is imperative to acknowledge that life imprisonment in many of the cases might be in contravention of the philosophy of Reformation, which the Court had exclusively emphasized in the *Bacchan Singh case*. This is so because as discussed earlier, the punishment intends to protect society from crime, and then the Reformatory theory attempts at reforming and rehabilitating the wrongdoers. As also iterated in the case of *Dalbir Singh v State of Punjab*¹³, that life imprisonment strictly means imprisonment for a man's whole life, but in practicality, it amounts to incarceration for a period between 10 to 14 years. This exhorts to identify the lacunae in the criminal justice system where punishments like life imprisonment and the death penalty are given where there exist the principles of Reformatory theory. It is ironic to observe the co-existence of *Reformatory theory* and punishments like the death penalty and life imprisonment. This lacuna is problematic because the entire onus is placed on a single individual wherein the ideology, thought process, and the action an individual undertakes are contingent on a multitude of societal factors, Some of those factors include age, mental and emotional disturbance at the time of the offence, the probability that the accused would not constitute a continuing threat to society, probability of reformation, and any 'mental defect' that the accused may have at the time of the offence. It is fascinating to observe that the Courts have time and time again given the death penalty and imprisonment for a lifetime when it is widely acknowledged that there might be certain Life Experiences and Mental illnesses one might be undergoing.

Additionally, apart from societal factors there exist a multitude of genetic and biological factors into consideration, which lead to mental illness. These factors combined with the societal circumstances not in favour of the wrongdoer, in many cases forcefully exhort the wrongdoer to commit a crime. The wrongdoer in such a case might not even know the repercussions of the act. Additionally, the existence of negative life experiences among prisoners sentenced to death

¹³ *Bacchan Singh v State of Punjab* AIR (1980) SC 898

is another factor that has been in the limelight. This is major because two primary factors include adverse childhood experiences and Traumatic life events.¹⁴

All of these factors indicate the fact that a wrongdoer is not the only stakeholder in the committal of the crime, rather society as a whole is responsible for that committal. Thereby, punishing only the criminal in turn is only removing the tip of the iceberg, whereas there will be continued existence of malaise in the society which will be present even post punishing the criminal with say corporal punishment. The deeper problem with this is that to the intent of ensuring a peaceful society, the criminal justice system is punishing the criminals with barbaric punishment, which in turn is augmenting the situation in comparatively less amount.

All these factors, which are germane to the philosophy of Reformation, many times not being taken into consideration, lead to the creation of the lacunae between the philosophy and the application of the Reformatory Theory. It is pertinent to point out that even in cases of life imprisonment, which the Court in many cases does by commuting it from the death penalty, the outcome is futile since a well-abled citizen who might have committed a crime because of certain extraneous irrelevant reason and has the potential to act as an asset of the country if integrated back into the society is left helpless and hopeless in the prisons of the country, and thereby acting as a liability of the country. It is safe to say that if the government feels justified in punishing criminals with punishments like corporal punishments, it must take into account all the factors which might have led to the committal of that crime in the first place, and to an extent take the onus of ensuring that the individual is decently placed in the society in such a way that the person knows the nature and the repercussions of his/her actions.

CONCLUSION

Taking into consideration the above deliberations around the philosophy and taking into account the statistical data about the application of the philosophy, it is safe to render that there exist void lacunae in the implementation and the philosophy. The statistical data is evidence

¹⁴ Maitreyi Misra, 'DEATHWORTHY: A MENTAL HEALTH PERSPECTIVE OF THE DEATH PENALTY' (P39A, 20 October 2021) <<https://www.project39a.com/deathworthy-a-mental-health-perspective-of-the-death-penalty>> accessed 18 December 2022

that the number of criminals on death row, in turn of decreasing are rather than increasing. The standing irony then is, the co-existence of principles of the Reformatory theory of punishment and heinous punishment like life imprisonment and death sentence. This lacuna indicates a void gap in the understanding of Reformation as a theory and the way and the circumstances in which needs to be applied. This lacuna may further lead to arbitrariness in the decision-making process. Thereby it necessitates a need for further deliberations in the criminal justice system, as to reconcile the existing gap between the philosophical aspect and application of the Reformatory Theory of Punishment.