

Theories of Punishment – A Philosophical Aspect

Shikha Mishra
Assistant Professor

Abstract: *There are various theories trying to avail the purpose of punishment. These theories create different shades and effects in the criminal jurisprudence. The aim of inflicting punishment is to curtail the crime. It seems that to do crime is a human vice because of which it would be impossible to eradicate this suffering completely from the society. But it is necessary in the welfare of the society and for the survival of them that it can be curtailed to the lowest level. With this aim the application of these theories has been changing with the ages and governments but the object behind the policy of inflicting punishment was never changed. The object of punishment is diminishing the crime for remaining secure the society. Though each theory keeps separate effect on offender/convicts. With the passage of time different types of punishment were imposed upon convicts/accused as corporal (flogging, mutilation, branding, stocks and pillories), transportation, capital punishment, imprisonment, and monetary. Some of those were being barbaric abolished with the time. Today, convicts are detained not only in prisons but there are also the others approved detention centers as female reformation homes, mental asylum, juvenile care homes, and remand homes running by governments.*

Introduction: The punishment is inflicted upon an offender who has committed a wrong. It deters not only the person who has committed a wrong but also others from committing a same crime. It must be for any legal wrong. Punishment must involve pain and its' consequences must be unpleasant. It must be inflicted by the authority which has been constituted by legal system. H. Kelson in his General Theory of "Law and State" described "sanction is socially organized consists in a deprivation of possession- life, freedom, or property". According to *Jeremy Bentham*, 'punishment is evil in the form of remedy which operates by fear' *Johan Finnish* has said that 'delinquent behavior of a person needs to be taught lesson not with melody but with iron hand'. Today to give punishment is the responsibility of the State. But in the early ages of civilization the victim or the society was free to punish criminal according to its' own choice.

Reactions to crime have been different at different stages of human civilization. Attitude towards

criminal has always been colored by extreme type of emotions displayed by society. As a result of changing attitude three types of reactions are there. The first is traditional reaction, of a universal nature which can be termed as traditional approach. It regards the criminal as a basically bad and dangerous sort of person and the object under this approach is to inflict punishment on the offender in order to protect society. The second approach is, of relatively recent origin, considers the criminal as a victim of circumstances and a product of various factor within the criminal and society. This approach regards the criminal as a sick person requiring treatment. Finally there is a preventive approach, which seeks to eliminate those conditions which are responsible for crime causation. These approaches are not mutually exclusive. Not only do they overlap to each other but sometimes may coexist as part of overall system in the society. These various aspects of approaches gave different shades to theories.

Theories of Punishment: According to *Taylor*, "a herd of wolves is quieter and more at one than so many men, unless they all had one reason in them, or having one power on them."¹ Every society sets certain norms for itself and if anybody deviates from such specified norms then he will be punished by the society. The punishments which can be imposed behind them some theories work which are known as retributive, deterrent, expiatory, preventive & reformative.

Retributive theory of punishment: Retributive theory is based on rights, desert and justice. The guilty deserve to be punished, and no moral consideration relevant to punishment outweighs the offender's criminal desert is the philosophy of retributive theory. According to *Hegel*, punishment 'annuls' the crime. It aims at restoring the social balance disturbed by the offender. The offender should receive as much pain and sufferings as inflicted by him on his victim. Teeth for teeth, eye for eye are the basic principle of this theory. By providing punishment the feelings of victims were satisfied. Retributive theory replaces private punishment by institutionalizing punishment on the structure of law and state in organized manner. Retributive punishment is neither cruel nor barbaric but civilized because inflicted punishment is proportionate to the crime that is just. Retributive is

impartial and neutral. By inflicting proportionate punishment to the crime, it considers the interest of wrongdoer and society equal. Reformatory theory gives more weight to interest of criminal and deterrent theory priority would be social interest than criminal.

Retributive is based on the Roman doctrine of *Poenam solum tenet actor et non alios* means punishment belongs to the guilty, and not others. It punishes voluntary acts and excludes involuntary acts based on less blame worthy acts like, act of insane person or immature person. Once criminal pays his debt to the society in the form of punishment, his sin is expiated and admitted back to mainstream of society again. Retribution connects the offender to correct values; it sends values to the wrongdoer that what he did was wrong. This kind of philosophy is missing in the deterrent punishment. Retributists have failed to elaborate any guidelines or principles for proportionate punishment that makes difficult task for judges to measure punishment for crimes. Object of punishment is not only punishing the criminal but to prevent the crime in future also. In modern society the idea of revenge in the punishment is rejected and the modern concept is 'hate the sin and not the sinner'. Modern criminology states that it is important to protect the interest of a criminal in a same way as one has to defend social interest.

Reformatory theory of punishment: The object of punishment has been considerably under the process of changes from the last centuries because of the Welfare State concept. Let us give human touch to Criminal Law and reduce the brutalities of punishment is today's philosophy of law. This theory states that the object of punishment should be reformatory. The offender should be reformed. The prisons should be converted into reform homes. Reformist looks at sanction as instrument of rehabilitation and tries to mould the behavior of criminal on the premises that criminal is not born but made by the environment of society. The motives behind the offences must be examined there should be made a way so that offender could back to main stream. Therefore, it is the responsibility of society to reform him by adopting certain suitable methods. The increasing understanding of the social and psychological causes of crime has led to growing emphasis on reformation rather than deterrence. Less frequent use of imprisonment, abandonment of short sentences and attempt to use prison as training rather than a pure punishment, and greater employment of probation, parole and suspended sentences are evidence of reformatory trend.

This approach rejects the deterrence and retributive elements of punishments and impeccably advocates reformatory approach on simple idea that, 'we must cure our criminal, not kill them'. The reformatory theory is reaction to the deterrent theory, which has failed to take into consideration of the welfare of criminal. The real objection to reformation is simply that it does not work. High hopes of reformatory theory never materialized and met with repeated failure. Reformation requires combination of too many disciplines and their attempt has failed to deliver goods yet hunt is on for right combination to make theory fruitful. Researchers have concluded that no known or effective methods for reformation of convicted criminal had been demonstrated "we know nothing about deterrent or reformatory effects of any mode or variety of treatment"

There are number objections against reformatory theory. Some offenders are so corrupt, base and mean persons that they cannot be set right even by all possible human agencies. The reformatory theory will fail for such offenders. The Supreme Court in *Narotam Singh v. State of Punjab*² has rightly said that reformatory approach to punishment should be the object of criminal law, in order to promote rehabilitation without offending community conscience and to serve social justice. However, in *M.H. Hoskot v. State of Maharashtra*³ The Supreme Court cautioned the judiciary for showing more leniency to offenders based on reformatory theory that would amount to injustice to the society. The offences like serious economic offences and other offences, the balance has to be maintained between the security of society and rights of offenders. In *Sunil Batra (II) V. Delhi Administration*⁴ learned judge, observes as follows. "The rule of law meets with its Waterloo when the State's minions become law-breakers, and so the Court as a sentinel of justice and the voice of the Constitution, runs down the violators with its writ, and serves compliance with human rights even behind iron bars and by prison wardens."

Deterrent theory of punishment: According to this theory the object of punishment is to deter the offender from repeating the same course of conduct so that the persons and property of others may not be harmed.⁵ The act that takes away the power of committing injury is called incapacitation, is in the form of remedy operated by the fear should be the object of punishment which is called deterrent theory. *Bentham* went to the extent of depriving the criminal's power of doing injury by awarding death sentences. *Bentham* treats the committed offences as an act of past, that should be used as opportunity of punishing the offenders in such a way that the

future offences could be prevented *Glanville Williams* says, deterrence is the only ultimate object of punishment. "Punishment (sanction) is before all things deterrent, and the chief end of the law of crime is to make the evildoer an example and warning to all that are like minded with him." This kind of threat is commonly described as 'specific' or 'individual' deterrence.

Specific deterrence works in two ways. First, an offender would be put in prison to prevent him from committing another crime for specific period. Second, this incapacitation is designed to be so unpleasant that it will discourage the other offender from repeating his criminal behavior. When individual deterrence is used as means to send message across society is called 'general' or 'community' deterrence. The higher percentage of criminal being caught and punished would enhance the credibility of sanctions. Crime does not pay and honesty is the best policy. That is the message deterrent theory tries to communicate to society. Once deterrent as painful sanction is accepted, it would oppose better facilities in prison as suggested by the reformist.

Imprisonment as deterrent factor may provide temporary relief as long as criminal is inside the prison because motive of crime cannot be destructed by fear factor. Sanction as pain some time produces ironical results. It is thought that punishment would deter offenders, in reality it hardens the criminals because once criminals accustomed with punishment, deterrence loses its strength on such criminals. Under these circumstances, reliance on rehabilitation and prison reformation would give better result. The most effective deterrent punishment is death sentences, where as imprisonment has not only deterrent value but reformatory also. The strongest criticism against deterrent is that it has failed to reduce crimes. It is difficult to collect the data of persons who have deterred. The success of Deterrent theory can be measured by taking into consideration of data when there is breakdown of law and order.

In *State of Karnataka vs. Krishnaappa*⁶ the court held that the measure of punishment does not depend upon the social status of offender or of victim. It must depend upon the conduct of accused. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate punishment. The same view was retreated by the court in the case of *State of M.P. vs. Ghanshyam Singh*⁷ the court held that the motive for the commission of crime, the conduct of the accused, the nature and weapon used in committing crime would be taken into consideration. Undue

sympathies to impose inadequate sentence would do more harm to the justice system to decline the public confidence in the efficacy of law.

Preventive Theory: The real object of the penal law therefore, is to make the threat generally known rather than putting it occasionally into execution. This indeed makes the preventive theory realistic and gives it human touch. In England, utilitarians as *Bentham*, *Stuart Mill* and *Austin* supported preventive theory because of its humanizing influence on criminal law. The profounder of this theory held that the object of punishment is to prevent the offences. The offences can be prevented when the offender and his notorious activities are checked. The check is possible by disablement. The disablement may be of different type. To keep inside the jail is the limited form of disablement. It suggests that prisonisation is the best mode of crime prevention as it seeks to eliminate offenders from society thus disabling them from repeating crime. The death penalty is also based on this theory. This theory is another form of deterrent theory. One is to deter the offender while another is to prevent him from committing the crime.

The preventive mode of punishment works by inspiring all prospective wrong-doers with the fear of punishment, by disabling the wrong-doer from immediately committing any crime; and by transforming the offender, by a process of reformation and reeducation, so that he would not commit crime again. In this connection, the following extract from *Rule 58 of the International Standard Minimum Rules* is illuminative: "The purpose and justification of a sentence of imprisonment or a similar measure derivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society, the offender is not only willing, but also able, to lead a law-abiding and self-supporting life."⁸

Expiatory Theory: The object of this theory is "to pay for the sin committed". These days this theory has become close to Retributive. "On this view, crime is done away with, cancelled, blotted out or expiated by the sufferings of its appointed penalty. To suffer punishment is a debt due to the law that has been violated. Guilt plus punishment is equal to innocence".⁹ It is the concept behind this theory is that offender will serve the victims and their dependents to compensate the deprivation which will create the sense of repentance and cleansing of heart. This theory holds that the punishment wipes

away the sin and the offender becomes the innocent. Experimentation of this theory is too expensive in terms of public safety and security. It could not be a solution to the serious offences. It is sufficient to meet the less serious type offences. However it is regrettable to say that the theory is not applicable to any system of law. It is held impracticable because of being idealistic. Although, In *Criminal Procedure Code, 1973* this theory is also being implemented. Section 320 of the said Act describes certain crimes which can be compoundable. The accused can compromise with the victim by paying money or through apology.

Reformative Theory as Therapeutic Approach to Law:

Reformative theory of punishment is generally most of the appreciating theory of punishment This theory believes in the concept that “*hate the crime not to criminal*” and that nobody is born as criminal it is only the consequences of those circumstances which were around of him. So situations and circumstances can be changed. It is the established fact that prevention of crime and protection of society are the main object of the society. If therefore, no single theory of punishment will the serve the real purpose.¹⁰ Justice Caldwell observed that “Punishment is an art which involves the balancing of retribution, deterrence and reformation in terms not only of the Court but also of the values in which it takes place and in balancing of these purposes of punishments, first one and then the order receives emphasis as the accompanying conditions change.”¹¹

In 1957, Government of India, appointed the All India Jail Manual Committee the Committee observed that the problems during imprisonment cannot be solved neither by making punishment more deterrent nor by making more weak and diluted. Realizing the significance of *Mahatma Gandhi's* dictum that ‘criminal should be treated as patients in hospitals and jails should hospitals admitting such patients for treatment and cure’¹² the committee wanted to transform prisons into correctional institutions. In *Pathak vs.State of A.P.*¹³ the Supreme Court held that the benefit of provision of Article 42 (the State shall make provisions securing just and equitable conditions of work and maternity relief) may be extended to prisoners and made the basis for prison reforms.

Reformation of prisoners should be the object of punishment while the individualization the Justice Krishna Iyer stated in *Mohd. Giasuddin vs. State of U.P.*¹⁴ that ‘subculture that leads to anti-social behavior has to be countered not by undue cruelty but by re-culturalisation’. Punishment should create the combined effect of deterrence, reformation and prevention. In appreciating approach prisons and reformation homes should

not be converted into earthly paradise to provide all sorts of comforts. Punishment should always serve as a measure of a social defense. *Kautilya* in his *Arthashastra* modeled his penal policy on utilitarian principle taking into consideration various social factor, traditions and customs of the people. In *Rajendra Prasad vs. State of U.P.*¹⁵ the Supreme Court held with majority “it is illegal to award capital sentence without considering the correctional possibilities inside prison.” The Apex Court in *Hiralal Mallick vs. State of U.P.*¹⁶ observed the ancient admonition of the Rigveda, “let noble thought come to us from every side.....”

In *T.K.Patnaik vs. State of Karnataka*¹⁷ the court advocated a therapeutic approach in dealing with the criminal tendencies of prisoners. It was stated that there could be several factors that lead a prisoner to commit a crime but nevertheless a prisoner is required to be treated as a human being entitled to all basic human rights, human dignity and sympathy. The Court said that therapeutic approach aims at curing the criminal tendencies which were the product of diseased psychology. Reformative theory is of positive attitude and its impact is quite sufficient on the convicts who are first offenders or juveniles or committed the offence accidentally but on the other side this theory is very much less effective on habitual offenders however in most of the cases of habitual offenders it has no effect.

Conclusion: In *Dr Jacob George v. State of Kerala*,¹⁸ the Supreme Court held that the object of punishment should be deterrent, reformative, preventive, retributive and compensatory. Preferring one theory to other is not sound policy of punishment. Each theory of punishment should be used independently or combined according to the merit of the case. Human beings neither are angels capable of doing only good nor are they demons determined to destroy each other even at the cost of self-destruction. Taking human nature as it is, complete elimination of crime from the society is not only impossible but also unimaginable. It is stated that ‘every saint has a past and every sinner has a fortune’¹⁹ Criminals are very much part of the society and society has to reform and correct them and make them sober citizens.

Society has also to look from the point of victim. Undoubtedly if the therapeutic approach were kept into focus then the jails will become the place of relaxed there should be appropriate coordination between deterrent and reformation so that further commission of crime can be checked. The prevention of crime is the goal of society and law both which should not be ignored. On the other

hand, if victim relies that the State is reluctant to punish the offenders in the name of reform and correction, they may take law in their own hands, they themselves may try to punish their offenders and that will lead to anarchy. *Bentham's* theory of penal objectives that pain of punishment of offender should be higher than the pleasure he enjoys by commission of crime. Nevertheless, this must have proportionality and uniformity too.

*INVERTIS University, Bareilly

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