

“A Quest for Ideal Punishment”

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INTRODUCTION

A society in order to earn the title of being “civilized” must have a basic order within its boundaries, what this means is that the people forming part of the society must always have this basic assurance that the other person shall not employ any form of aggression against him and if such a forbidden incident occurs, there is a system in place for victim’s due restoration along with proper punishment to the perpetrators. If such basic assurance is not there then this conversation enters a void. Similarly, a partial application won’t do as if the victim is not provided due restoration or the perpetrators are left free to commit another indecent act then such a society can safely be titled as a criminalized society and not a civilized one.

It is in the basic nature of a human being to seek justice, the feeling and desire for retribution, unless spiritually or circumstantially removed, is within our animal nature. It is foolish for one to discredit it, as these dangerous tendencies often find expression in unspeakable ways. In an order-less society, humans are left free to settle their score in ways they find justified. But in a civilized society, there is a proper mechanism for providing adequate punishment to the uncivilized elements that are unfortunately a part.

The measure of adequateness of punishment is relative in its application so it is not possible to narrow it down to a concrete formula. It differs from situation to situation, place to place, and person to person with an infinite focus on person to person. What one may find justified could be totally unjustified for the other.

Different countries have different perceptions as to how criminals must be punished. Some societies believe in the principle of ‘eye for an eye’ where the preparatory is pushed into the same or similar situation as the victim was put into by him, while others employ various means to avoid crime rather than avenging it. Some believe in setting an example for the future by inflicting in excess of what was justified. While others believe in the reformation of criminals by educating them into the ways of a civilised society.

In any case, with a change in time and advancement of human personality, the punishment hypotheses have turned out to be increasingly tolerant to these hoodlums. Exposing the stringent theories of punishment the advanced society is found in relaxing its hold on the lawbreakers. The present situation additionally witnesses the restriction of the death penalty

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as harsh, however, it was a noteworthy type of rebuffing the lawbreakers prior. The law says that it doesn't generally rebuff the individual however punishes the blameworthy personality. The dread of acts that upset social balance has roused the burden of punishment by the individuals who have the ability to establish and uphold the ideal gauges of conduct. Punishment has created from the curse of agony in retribution to the utilization of science to restore so that there is an impressive divergence between what has verifiably been called punishment and the present strategies for constraining congruity and managing criminals. But the fundamental question still remains unanswered that what would be an ideal system of punishment, whether it is one of the four above-mentioned or is a system that has a mixture of all four or something totally out of the box is required.

DEFINITION OF PUNISHMENT

In his book entitled "Criminal Behavior", **Walter C. Reckless** portrays punishment as "the redress that the commonwealth takes against an offending member."³

H.L.A Hart with Mr. Bean and **Professor Flew** have defined "punishment" in terms of five elements:

- It must involve pain or other consequence normally considered unpleasant.
- It must be for an offense against legal rules.
- It must be intentionally administered by human beings other than the offender.
- It must be an actual or supposed offender for his offense.
- It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.

Punishment, as per the lexicon, includes the curse of agony or relinquishment, it is the infliction of punitive action, reprimand or censure by the legal arm of the State. Be that as it may, if the sole reason for punishment is to make physical agony the transgressor, it serves little need. Notwithstanding, if punishment is, for example, causes the wrongdoer to understand the gravity of the offense committed by him, and to apologize and make amends for it. An individual is said to be "rebuffed" when some torment is inflicted on him. This may go from capital punishment to a token fine.

³ Walter C. Reckless, Criminal Behaviour, https://study.sagepub.com/system/files/Reckless%2C_Walter_C._-_Containment_Theory.pdf, Visited on 21 July,2019.

THEORIES OF PUNISHMENT

There are basically four fundamental theories of punishment. Each one of them has a distinct and justifiable approach as to what is an ideal punishment that can bring a society one step closer to Utopia. The authors have made an attempt to explain all four with a flavor of their own understanding of the matter at hand.

1. Deterrent Theory

United States Senator, Ms. Martha Elizabeth McSally once said that “The whole idea of deterrence is to convince your enemy that you are willing and able to make it so painful for them to continue on a threatening or bellicose course that they change their behavior.”⁴

The Deterrent theory has its roots in the idea that an ideal punishment is one that sets an example for the future. The advocates of this theory dictate that convicts should be punished with the most rigorous punishment possible so that potential candidates tremble at the very thought of committing crimes. They believe that if punishment is severe and without undue delay, a clear-eyed individual will conclude that the transaction might end up being a total loss and will be deterred from engaging in an uncivilized act.

So this theory has a dual purpose, firstly to prevent recidivism and secondly to keep others from getting their hands dirty.

The infamous criminologist Charles Tittle conducted research in 1969 and declared that the certainty of imprisonment deters crime but that severity can only help the cause when certainty of punishment is reasonably guaranteed.

But protestors of this theory state that hardened offenders often grow a sense of familiarity with severe punishments and deterrence in those cases fails in its application. Similarly, it fails where crimes are committed in situations where their intelligence is hijacked by their emotions such in heat of the moment, etc.

But in rebuttal to the above statement, we can say that it depends on the severity of punishment for example if criminals start losing two fingers per theft then even a hardened criminal won't think that I am still left with four.

2. Reformatory Theory

Justice V. R. Krishna Iyer beautifully exclaimed that "Every saint has a past, every sinner has a future."⁵

On the thrust of the above words lie the reformatory theory of punishment. The theory believes that it is never too late for a criminal, even the most hardened criminals can undergo a change of heart. This theory seeks to illuminate the good side of a convict in

⁴ Ms. Martha Elizabeth McSally, <https://www.goodreads.com/quotes/tag/deterrence>, Visited on 21 July,2019.

⁵ Justice V. R. Krishna Iyer, <https://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=d4648720-96bb-4fab-8eca-32b16ce2dae1&txtsearch=Subject:%20Criminal>, Visited on 21 July,2019.

such a way that it starts dominating the corrupt side. The advocates of this theory see punishment as a means of imparting education to a convict. “A Crime is committed either because the intensity of the motive is overpowering a sane mind or restraint imposed by one’s character is too weak”, relying on this belief the supporters of this theory intends to use prisons as reformative homes for total transformation of criminals so as to make them fit to live in a civilized society.

The reformists see punishment as medicine to cure an illness they call crime, they believe prisons should be made more like comfortable dwelling houses, but in a third world country like India where almost half of the population is below the poverty line this idea is utopian as if made a reality citizens will strive to get a comfortable life (in prison).

Human rights activists keep this theory in very high regard, they are totally against using punishment as a means of revenge or deterrence but believe in social inclusion and transformation.

In criticism of the theory, penologists are of the view that the substance of this theory is fueled by human sentiments rather than a lust for justice and there are cases where after looking at the criminal one can conclude that it is a gone case and no reformative system howsoever brilliant in its practice can break the convict’s current personality.

3. Preventive Theory

“A good doctor cures the disease, but a great doctor cures the cause.”

— Amit Kalantri, Wealth of Words⁶

The Preventive theory of punishment finds its basis in the fact that prevention is better than cure. It is better to exterminate the threat before it becomes a living reality. This theory believes in striking at the root of crime that is, it's very cause. In extreme situations, the cause is considered to the criminals committing the crime and solutions offered are of removing them permanently from society either through capital punishment or by social exclusion through various means.

The expression ‘prevention of crime’ is a matter where advocates of this theory have different opinions. Some are absolute extreme as depicted above while some see imprisonment as a means of keeping the offenders cut off from society.

The theory contains certain elements of both deterrence and reformation, but only with the goal of prevention of crime as fear of harsh punishment may force many to drop the thought and reformation purifies one inside out. An example of preventive punishment can be canceling of driving license.

Mr. **Denis Parsons Burkitt**⁷ better explained the idea behind this theory that

“Western doctors are like poor plumbers. They treat a splashing tube by cleaning up the water. These plumbers are extremely apt at drying up the water, constantly

⁶ Amit Khatri, Wealth of Words, <https://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=d4648720-96bb-4fab-8eca-32b16ce2dae1&txtsearch=Subject:%20Criminal>, Visited on 22 July,2019.

⁷ Denis Parsons Burkitt, <https://www.goodreads.com/quotes/tag/prevention>, Visited on 22 July,2019.

inventing new, expensive, and refined methods of drying up water. Somebody should teach them how to close the tap.”

4. Retributive Theory

“Though the mills of God grind slowly, yet they grind exceeding small; though with patience He stands waiting, with exactness grinds He all.”

— **Henry Wadsworth Longfellow**⁸

Retribution literally means revenge. The retributive theory can be said to be the first thought of punishment as it comes to an uninfluenced mind which has not gone into various complexities of life, morals, and ethics. This theory can be said to be the oldest on the evolutionary scale. It was considered to be ideal since time immemorial, but a lot has changed as human society progressed. But still, the basic sense of justice in a human being still cries for retribution. It believes in an eye for an eye and a tooth for a tooth. So if one commits a theft in other’s house then as a retributive punishment state will be taking an amount equal to the theft from him and if we add an element of deterrence to it, then depending on values of the society either his hands will be chopped or will be charged a 200 % interest on that amount.

Human activists see this theory as a crime against humanity, especially when it comes to physical retribution. They protest that this form of punishment dilutes the basic difference between the one engaging in the indecent act and the one punishing for the same, there is always someone who is suffering and the transaction involves humans on all ends. A state should end human suffering and not design mechanisms for the same.

RELATIONSHIP BETWEEN THEORIES OF PUNISHMENT

After considering all the theories of punishment one may find that some theories are deeply in contrast to one another while others are such that they have equanimous views in regard to certain issues but have a different explanation for supporting or protesting for the same.

If one touches the contemporary issue of capital punishment and sees it through the filter of each of the theories one may find that, the retributive theory will give a big green light to capital punishment as a means of revenge or justification against the perpetrator of heinous crimes, the deterrent theory will also welcome it with open arms even for less heinous crimes as means of striking terror in the hearts of aspiring candidates, preventive theory may or may not advocate for it as if other means of excluding anti-social elements are available, liberal supporters may not endorse it but if it is the only way of exclusion then they may give a thumbs up. But as far as reformatory theory is concerned, there is a big fat no to it, irrespective of the intensity and barbarity of the crime committed.

⁸ Henry Wadsworth Longfellow, <https://www.goodreads.com/quotes/tag/retribution>, Visited on 22 July, 2019.

Retribution and reformation are abstract enemies as there is not even an iota of common ground between them, but Retribution and Deterrence can go along as they are more like supplementary to each other, deterrence is nothing but a fearful version of retribution.

Preventive punishment as mentioned before contains elements of both deterrence and reformation but only to the extent necessary for the prevention of crime.

If we consider Deterrence and reformation, they have equanimous views until the limits of punishment are imprisonment as anything beyond imprisonment is bizarre.

IDEAL PUNISHMENT - INDIAN PERSPECTIVE

India being a quasi-federal state, the law-making powers are with the Legislature and enforcement machinery is entrusted to a separate organ, Judiciary. So in the context of the current discussion, we can say that it is the legislature that prescribes the punishment and the Judiciary that actually decides the quantum while observing the limits prescribed.

The Supreme Court of India in a plethora of judgments have discussed as to what is the ideal frame for punishing the hoodlums.

In Ravji vs State of Rajasthan⁹

In this case, the convict committed one of the most heinous crimes by killing his poor wife who was in an advanced stage of pregnancy and three minor children for no fault on their part.

The Supreme Court held that “it is the nature and the gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should respond to the society's cry for justice against the criminal. In our view, if for such heinous crime the most deterrent punishment for wanton and brutal murders is not given, the case of deterrent punishment will lose its relevance, we, therefore, do not find any justification to commute the death penalty to imprisonment for life.

In Dhananjay Chatterjee @ Dhana vs State of West Bengal¹⁰

it has been indicated by the Supreme Court that: “*some criminals get very harsh sentences while many receive a grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished thereby encourage the criminal and in the ultimate making justice suffer by weakening the system's credibility.*

⁹ 1996 (2) SCC 175

¹⁰ [1994]1SCR37

It has also been indicated that: In imposing sentences in the absence of specific legislation, Judges must consider a variety of factors and after considering all those factors and taking an overall view of the situation, impose a sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration. The measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenseless and unprotected state of the victim. The imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminal. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of a crime and the society at large while considering the imposition of appropriate punishment.

In **Musa Khan vs State of Maharashtra**¹¹, the Supreme Court observed that this *The Probation of Offenders Act, 1958* is a piece of social legislation which is meant to reform juvenile offenders with a view to prevent them from becoming hardened criminals by providing an educative and reformatory treatment to them by the government.

In **Ramji Missar vs State of Bihar**¹², observed:

“The purpose of release of youthful offenders on probation is to stop their conversion into stubborn criminals as a result of their association with a hardened criminal of mature age. Modern Criminal Jurisprudence recognizes that no one is born criminal & that a good many crimes are the result of the socio-economic milieu. Although not much can be done for hardened criminals, yet a considerable emphasis has been laid on bringing about reform of juveniles who are not guilty of very serious offenses by preventing their association with mature criminals.”

In **Narotam Singh vs State Of Punjab And Anr.**¹³

“It was held that “the law of crimes perverts itself on occasions into the crime of law if narrow legalism overwhelms social justice. This criticism applies to the field of penology as well, and so the finer, more perceptive and sociologically relevant approach to punishment, when crime has been proved, is to take a holistic, realistic and humanistic size-up action as to promote rehabilitation without offending community conscience.”

Analysing the trend- After carefully analyze the judgments above we can say that the Supreme Court when awarding punishment has a high inclination towards reformation as the ideal thing to do. The court makes a considerable effort in each case to conclude it at

¹¹ AIR 1976 SC 2566

¹² AIR 1963 SC 1088

¹³ AIR 1978 SC 1542

reformation or in other words imprisonment as punishment but there are cases where the facts are such that it shocks the conscience of the court, where the order of imprisonment would prove to be unjust to the society and would not even minutely satisfy the retributive feeling in the hearts of the victims and their family members, capital punishment is the sole way.

The court also seeks to imbibe an element of preventive punishment such as in the cases of Musa Khan (supra) and Ramji Missar (supra) where the court considered probation only for the prevention of juveniles from turning into hardcore criminals.

CONCLUSION

Punishment is a necessary evil that will continue to function as an indispensable pillar of a civilized society. After reflecting general and societal conceptions on the issue, it is equally important to give the readers an insight into the author's own opinions and perceptions regarding the issue at hand.

Human beings are not an end of the evolutionary chain, we are constantly evolving. Evolution is not only physical in nature, our thoughts, emotions, views regarding various complexities of life are also undergoing drastic changes. If we go a hundred years back in time, we would have definitely gone for perfect retribution and deterrence as frames for ideal punishment. But, now when the exorbitant history of punishments has enriched our minds with modern conceptions such as reformation, there is much on our plate. The need of the hour is to diligently decide how much of what is required. True equilibrium in a society cannot be attained by adopting a single theory as an ideal but the need is to form a carefully blended theory which doesn't discriminate, say reformation for retribution. Each element has its own importance, as we can't survive totally on reformation, as many contemporary thinkers claim. Similarly, being totally retributive will only push us back a century. We have to break limits on the extent of punishments (intended in both positive and negative ways). For example, depending on the degree of crime, punishment should be such that it has an element of deterrence and prevention along with retribution or reformation depending on the circumstances of the case that is if the court is able to concretely form an opinion that the state of the criminal is such that based on past experiences, the system of reformation the state provides, it is possible to transform his soul and make him a boon to the society, then definitely go for reformation, but if the criminal beyond that then excuses such as case not coming in the definition of rarest of rare case should not be a bar against death penalty.

Apart from that, the authors feel a need for increasing the voltage of deterrence in the system of punishment in India, not by physically disabling the convicts as that would only increase the burden on the society, but taking measures such as depriving them of public benefits.