

# THEORIES OF PUNISHMENT WITH SPECIAL REFERENCE TO CAPITAL PUNISHMENT

**Ranjana Tiwari**

Research Scholar,  
Himalayan Garhwal University.

**Dr Rakesh Kumar**

Himalayan Garhwal University.

## Introduction

Punishment is a social custom and institutions are established to award punishment after following criminal justice process, which insists that the offender must be guilty and the institution must have the authority to punish. In this article an attempt is made to discuss various theories of punishment and their efficacy and effectiveness in the light of modern penology.

### **Nature of Punishment:**

The primary operation of punishment consists simply in announcing certain standards of behaviour and attaching penalties for deviation, making it less eligible, and then leaving individuals to choose. This is a method of social control which maximizes individual freedom within the coercive frame work of the law in a number of different ways<sup>1</sup>

The first moral duty of the community or of the State on its behalf is to reassert the broken moral laws against the offender who has broken it. For this reason, it must affirm his guilt and deal with him in accordance with it.<sup>2</sup> To forgive may be right: to condone is always wrong. A criminal act must not be condoned. It must be punished.<sup>4</sup> Government prohibits taking life, liberty or property of others and specifies the punishments, threatens those who break the law. The intended effect of all legal threats obviously is to deter people from doing what the law prohibits. The threats must be carried out. Otherwise, the threats are reduced to bluffs, and become incredible and therefore ineffective. Thus, all states punish people whom they identify as criminals.

How a punishment should be is still a question to be answered. Neo-Kantians proposed the concept of proportionality. "Punishment must fit the crime", when we say that the aim of punishment is to prevent crime. We must accept that man avoids criminal behaviour if that behaviour elicits swift, severe and certain punishment<sup>3</sup>. Many studies by many sociologists and criminologists such as Gibbs, Chirico and Waldo and Title suggest that the severity and certainty of punishment are additive factors. But, evidence suggests that the severity and certainty of punishment are inversely related. Jeffrey states that severity of punishment can be gained only by sacrificing certainty and that "increasing the penalties for crime has had negative effect of making the punishment less certain."<sup>7</sup>

John Bright throughout his life argued that certainty of punishment was more important than severity of punishment in preventing the development of crimes. William C. Bailey, Assistant Professor of Sociology, The Cleveland State University and Ronald W. Smith, Assistant Professor of Sociology, University of Nevada conducted extensive research in finding whether the severity and certainty of punishment really deter the criminals. They concluded that the severity and certainty are not substantially inversely related for the index crimes nor are changes in their level.

Another facet of the punishment is that it cannot be benign to the criminal. But for the society punishment is and should be a benign process. So punishment is necessarily adverse to the interests of the criminal, but to the society it is not necessary. The first duty of the state is to dissociate itself from the acts of its own member. To do this it must act, not only upon but against the member....While acting so, it must exhibit no antagonism in its will against the will of the offending members. This is necessary for the preservation of its own character, on which the character of its citizens largely depend."

<sup>1</sup> Hart, H.L.A: Punishment and Responsibility: 23 (1968).

<sup>2</sup> Earnest Van Den Haag and John P. Conrod: The Death Penalty: A Debate: 21 (1983).

<sup>3</sup> Jeremy Bentham: Principles of Penal Laws: 200 (1843).

All punishments properly imply moral accountability. Community wants the punishment to reach the criminal's mind as well as his body; it wants him to suffer remorse for his evil deed: to realize that he had against him right as well as might. Unless, the community believes these conditions are attained it is unsatisfied and the object of punishment is not fully realized<sup>4</sup>.

### **Purpose of Punishment:**

In primitive times, crimes were mainly attributed to the influence of evil spirits, and the major purpose of punishment was to placate the gods.<sup>13</sup> Later, in the evolution of punishment more stress was laid on social revenge, because crime was considered a wilful act of a free moral agent. Society, outraged at an act of voluntary perversity, indignantly retaliated. Thus, we started punishing primarily for vengeance or to deter or in the interest of a just balances of accounts between "deliberate" evil doer on the one hand and an injured and enraged society on the other<sup>5</sup>

According to Gouldner, members of the society identify themselves with the victim. Hence, the urge to punish the offender. Take rape as an illustration. Since, the victims of rape are females, we might hypothesise that women would express greater punitiveness towards the rapist than men, and that degrees of hostility would correspond to real or imaginary exposure to rape. Thus, young girls might express more punitiveness towards rapists than homely women. Among males, we can predict that greater punitiveness would be expressed by those with more reason to identify with the victims. Thus, males having sisters or daughters in the late teens or early twenties might express more punitiveness towards rapists than males lacking vulnerable hostages to fortune.<sup>13</sup> This notion in a broader perspective is well expressed by Sir James F. Stephen.

According to him the purpose of punishment is to gratify the desire for vengeance by making the criminal pay with his body. To quote him "The criminal law stands to passion of revenge in much the same relation as marriage to the sexual appetite<sup>6</sup>." Punishment gratifies the feeling of pleasure experienced by individuals at the thought that the criminal has been brought to justice. That desire ought to be satisfied by inflicting punishment in order to avoid the danger of private vengeance. It is plain that however futile it may be, social revenge is the only honest, straight forward and logical justification for punishing the criminals.<sup>17</sup> To carry out this purpose we need an authority. A criminal has a right to be punished. Because he is treated as a moral agent - a person who chooses between right and wrong- he is capable of choice.

### **Theories of Punishment:**

There are four theories of punishment, namely, retributive theory, deterrent theory, preventive theory and reformatory theory. Of all the four theories retributive theory is the first and foremost. A child who falls down, kicks the floor inadvertently. Generally, it is believed to be a form of taking revenge and would not serve any penal purpose. Deterrent theory by punishing the offenders deters the wrongdoer specially and deters the general public also by punishing him and refrains them from committing an act which is an offence. Preventive theory incapacitates an offender from repeating the crime, while reformatory theory serves the purpose of rehabilitation of the offender. Modern penologists do not believe in purposeless punishment. They believe that a criminal is a patient and he be treated with humanity. All these four theories have their own merits and demerits. They are discussed at length in this chapter.

### **Retributive Theories:**

Retribution is probably the oldest and most ancient justification for punishment, according to which a wrong is made right by an offender's receiving his just deserts. It involves a "get even" spirit, atleast since the formulation (in about 1875 B.C.) of the Code of Hammurabi ("an eye for an eye and a tooth for a tooth"), it has been urged by leaders and accepted by the general public that the criminal deserves to suffer<sup>7</sup>. Among the ancient Jews even animals which killed human beings were regarded as contaminated and were got rid of for the good from the community. Many authorities have attempted to base the forms of human punishment on instinctive reactions, which might variously be called wrath, anger, resentment or revenge. Both

<sup>4</sup> Walter Moberley: The Ethics of Punishment: 287 (1968).

<sup>5</sup> Donald R. Taft & Ralph W. England : Criminology: 21 (1956).

<sup>6</sup> James F. Stephen: A History of the Criminal Law of England: 81-82 (1883).

<sup>7</sup> Edwin Surtherland and Donald R. Cressey: Criminology: 335 (1974).

theologists and philosophers advocated the theory of retributive justice. Some have even sought to demonstrate the existence of rudimentary punishment in the animal kingdom, in the effort to validate the instinctive basis of punitive action. But, it is hazardous to seek equivalent of human punishment in animal behaviour.

But, we often observe, the reaction to crime on the injured party and the public are often indignant and wrathful and fairly spontaneous. In American society a particularly offensive crime such as rape, kidnapping, cold-blooded murder calls out a wave of popular indignation and resentment. Even in the Indian Society we often hear of pick-pockets who are caught red handed and are beaten black and blue. Injuries and wrongs frequently incite a spontaneous instinctive wrath and anger. Immanuel Kant notices that punishment inflicted neither benefits the criminal nor the society, but the sole and sufficient reason for inflicting punishment is the evil doer facing the evil: "he did the evil, he suffered the evil. Bentham referring to the concept of vengeance wrote, "The pleasure of vengeance calls in my mind sermon's riddle....It is sweet carrying out of terrible, it is the honey dropping from the lion's mouth."<sup>8</sup>

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### **Deterrent Theories:**

Retributive theory is based on the assumption that punishment is for the sake of punishment. It is suggested that evil should be returned for evil without any regard to consequences.<sup>54</sup> Beginning with the Age of Reason in the eighteenth century, the aim of the criminal law has gradually changed from punishment for its own sake to punishment as a means of improving social behaviour.<sup>33</sup> Punishment is designed not to take revenge but to terrorise the future offenders. An exemplary punishment should be given to the criminal so that others may learn a lesson from him. According to Manu 'Penalty keeps the people under control, penalty protects them, penalty remains awake when people are asleep, so the wise have regarded punishment as a so difficult to find a man who by nature sticks to the path of virtue.' An eighteenth century judge, while awarding death sentence to a person guilty of stealing a sheep observed: "You are to be hanged not because you have stolen a sheep but in order that other may not steal sheep."

### **Preventive Theories:**

This theory was meant to restrain an offender personally from repeating a criminal act by incapacitating him, by such punishments such as imprisonment, death or exile.<sup>110</sup> In ancient times this form of punishment had a bearing on the nature of the crime and member of the body most responsible for commission of such an offence thereof used to be incapacitated. For example the hands of a thief have a major role in an offence of theft. Chopping the hands of the thief would hence incapacitate him from repeating theft.<sup>111</sup> The punishment for perjury was cutting one's tongue. Capital Punishment and exile served the purpose of incapacitating an offender, whatever may be the crime. This does not act much on the motive of the offender, but disable his physical power to repeat the offence. However, now the criminal justice system does not turn to barbaric punishments such as mutilation and exile, though death penalty is in the statute books of many countries.

The notion that punishment is necessary to protect the society from criminal had been growing in importance. Punishment is for social defence and solidarity. In such a background prisons came handy to serve the dual purpose of protecting the society and punishing the criminal. The incarceration of the culprit has the result of severing him from the society and eventually preventing him from laying his hands again on similar crime or other crimes atleast temporarily for the period of incarceration. This is

attended with the smug belief that the isolation and some sort of rigorous labour which will give a feeling of degradation and self remorse. It may help in eradication of any future motive in his mind.

Prisons not only serve the purpose of severing the culprit from the society, it further deprives him of his personal liberty, which one values most after one's own life. Thus, incarceration serves three purposes: protection of the society, incapacitating the offender without turning to barbaric mutilations, and punishing the offender by deprivation of liberty. Thus prisonisation of criminals was considered to be the best method of prevention of crime.

Sutherland, as well as Bames and Teeters, the modern criminologists observed preventive theory from a different angle. First realising the necessity of removing the social and economic forces that induce attitudes leading to delinquency and crime, and secondly, focussing attention on the individual who shows potentialities for anti-social behaviour either because of biological and psychological handicaps or lack of social or economic opportunities for attaining a desirable integration<sup>9</sup>.

The first goal, which aims at creating such social and economical conditions in the society which

<sup>8</sup> Heinrich Oppenheimer: The Rationale of Punishment: 29 (1913).

<sup>9</sup> Chaturvedi & Chaturvedi: Theory and Law of Capital Punishment: 16 (1989).

prevent the offender to commit a crime, is very difficult to achieve. Removing social and economic forces that induce attitudes leading to delinquency and crime is the aim of social reformers, social workers and above all politicians. Nobody could do it till date - not even Marxists and nobody can do it in the near future.

### **Reformative Theories:**

Retribution and deterrence are the philosophies of the classical and neo-classical schools, with their emphasis on "let the punishment fit the crime". The positive school on the other hand, emphasises the importance of the "punishment fitting the criminal". It is the individual criminal, not the crime, that is the focal point in the positive thinking. Reformative theory emerged of such positive thinking. According to this theory the object of punishment should be the reformation of the offender. This is not virtually a punishment, but a mere rehabilitative process. It aims at making the criminal as far as possible a better citizen by means of moral and ethical training, that is teaching him to go straight as an upright man and meaningful citizen. This is founded on the surmise that a crime is not the result of an original sin in a criminal but is much more a product of its environment, his lack of opportunity and training.<sup>10</sup> Until the present century, almost all attempts to change criminals were mass methods designed to modify the criminal in some mechanical manner.

The classical theory suggested that reformation would occur if enough pain was inflicted on the offender. A second method designed to change criminals was meditation, generally enforced by isolation: for some it may work, but generally this procedure has not been effective. Third method was moralising by sermons in the name of God, mother, country etc., Fourth method was asking the offender to sign a pledge or in some other way make resolutions to live a law abiding life. Fifth method of reformation was mechanical habituation, produced by various punitive regimes including hard and dreary work in the prison and rigid prison discipline.

### **Future of Punishment:**

Punishment must be just. It must be directed to the good of the society. A punishment which prejudices rather than promotes the good order of society is plainly not just, no matter how guilty the offender may be, how well founded the authority which imposed the punishment may be. Punishment ought to be medicinal rather than retributive. In his disclosure to the Catholic Jurists of Italy in December 1954 Pope Pius XII stated that the limction of punishment is "the redeeming of the criminal through repentance" and thus seemed to set the reformation of the offender as the primary end of penal sanction.

There is a general belief that has persisted since the late eighteenth century that punishment must have an aim. Retributivists punish because the criminal is guilty. According to them the crime itself justifies the punishment and punishment has no other purpose than to be imposed as a legal consequence of the guilt<sup>10</sup>. Punishment is categorically imperative, the guilty criminal must be punished, but moral order demands that the punishment should be proportionate to the gravity of the offence. Utilitarians would punish because they seek to prevent crime by intimidation, incapacitation or reformation of the criminal and by presenting his fate to the general public so that the like minded may see what the consequences of a criminal act will be. However, history has shown, critics contend, that punishment \ has never reduced crime to any marked degree. To maintain that punishment is imposed in order to prevent crime is to offer an answer to the question of the aim of penal legislation. To say that punishment is imposed because the criminal has incurred guilt is to offer an answer to the question of the justification for imposing penalties<sup>11</sup>.

### **Conclusion and Suggestion:**

To conclude, punishment is the proper immediate consequence of the criminal act, a stage in the criminal justice system. It should be administered in such a way that the criminals reconciliation to the community is not impeded. Perhaps, in future, in imposing the punishments, authorities would take this point into consideration. Our probation laws, parole system, open prisons etc., aimed at this goal only.

Sanction is an essential ingredient of law. Punishment is a social custom and institutions are established to award punishment, after following criminal justice process. Governments prohibit taking life, liberty or property of others and specifies the punishments, threaten those who break the law.

Criminologists hold the view that certainty of punishment is more important than the severity. However, punishment shall prevent crime, it shall sustain the morale of confirmists and it shall reform the offender at the same time.

<sup>10</sup> Gollanz: Capital Punishment: Heart of the Matter: 22 (1955).

<sup>11</sup> Alf Ross: On Guilt, Responsibility and Punishment: 44 (1975).

Of the theories of punishment namely, retributive, deterrent, preventive and reformative, the first two theories, being the philosophies of classical and neo-classical schools advocate the retention of Capital Punishment. While the last viz., reformative theory, the product of positive school is against the death penalty. Retributionists argue that death will satisfy the public and keep them away from taking the law into their hands. Deterrent theory suggests that punishment is designed not to take revenge but to terrorise the future offenders, thus explaining the necessity of carrying out the execution of the offender. Preventive theory which is known as incapacitative theory also, is a two edged weapon used for arguments of retentionists as well as abolitionists. Reformative theory which used mass methods to reform the criminals in the last century resorted to individual treatment, in the present century.

These theories advocates that punishing the offender is as good or as bad as punishing a cancer patient. It serves no good.

