

Punishments in India and its Relationship with the Theory of Pain and Pleasure

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Abstract

Punishment is the most important part of criminal justice system in all the countries of the world since ancient time. For the maintenance of peace, harmony and justice in the society, States have always strive hard to control wrongs or crimes through its penal policy. Inflicting punishment upon the wrong doer has always prevailed in the human society since the Vedic period. This paper deals with the concept of punishment in India along with different kinds of punishments prevalent under Indian Penal Code, 1860. The Article provides a retrospective reading of the Indian penal tradition, highlighting the succession of criminal law over the centuries. It elaborates the theory of pain and pleasure laid down by some eminent law reformers and tries to connect and highlight a relationship between the theory of pain and pleasure with the penal system in India. It also highlights the objective and purpose of inflicting punishment upon a wrong doer in a society.

The author in this article has attempted to bring out in detail all the above aspects in order to understand the importance of punishment in today's world so as to introspect and rethink Indian punishment system.

Keywords: Punishment, Jeremy Bentham, Pain and Pleasure theory

“Every punishment which does not arise from absolute necessity is tyrannical”- Montesquieu

INTRODUCTION

Salmond defines Crime as “an act deemed by law to be harmful for society as a whole although its immediate victim may be an individual.” Those who commit such act are punished by the State. The study of punishments in relation to the crime and the management of prisons is known as Penology. Penology is a science which primarily deals with the principles, kinds and methods of giving punishment. It guides the government on framing penal policy for different crimes. It also aims at maintaining social peace, harmony, security and punishes the criminals in a rational manner. Thus, study of ‘punishment’ is an important branch of criminal law.

WHAT IS PUNISHMENT?

There is no prescribed definition of punishment but we can say that legal punishment involves imposition of deprivations of freedom or privacy or other goods to which the person otherwise has a right, or the imposition of special burdens because the person has been found guilty of some criminal violation, typically involving harm to the innocent. Punishments inflicted to the offenders are basically of two types, positive and negative punishments.

As per Black's Law Dictionary, 'Any pain, penalty, suffering, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offence committed by him, or for his omission of a duty enjoined by law.'

HISTORICAL PERSPECTIVE OF PUNISHMENTS

In ancient period, the popular modes of punishment were exile, banishment, declaring outlaw, flogging, mutilation, branding, stoning, pillory, banishment, etc. However, during the medieval period, human civilization was predominated by the religious bodies especially in the western countries. Punishments were mixed with religious notions of cleansing of the soul for the reformation of the criminal. With the passage of time, different forms of punishments of inhuman nature became outdated and as per the neo-penologists, punishments were inflicted upon a wrong doer in proportion to the gravity of the offence.

Vedic Period

In the ancient period, the King played a prominent role in punishing his subjects for committing any wrongful act as his duty was to maintain public order and the only way for the King to maintain the order was by inflicting punishment upon the wrong doer. Manu recommends that the King considered the circumstances of the crime and of the offender's ability to bear a specific penalty. Dharmashastra stated that as 'punishment' is a powerful tool of maintaining law and order in the human society, it can not be delivered by the king arbitrarily without the advice of the brahmins who were learned in Ved, Purana and Shastras. However, the King had the power to pass ultimate decision in each case. In the case of sins, brahmins were in-charge of delivering the penance, but often a sin constituted a crime. According to Manu, men who were punished by the King would proceed to heaven like those who performed a good deed in their lives. There is much debate though on the way penance and punishment worked together.

In his digest, the Mānava-Dharmaśāstra, Manu cited four types of punishments namely, Vak Danda - admonition, Dhikdanda - censure, Dhanadanda - fine (penalty), and Badhadanda - physical punishments. Vak danda was considered the least severe type of punishment as compared to Dhikdanda, Dhanadanda, and Badhadanda respectively. Manu also stated that the punishments may be given according to the nature of crime committed and in appropriate situation, different types of punishments may be given to the wrong doer, to serve as a just punishment. Later authors added two more types of punishment to Manu's four category of punishments namely, confiscation of property and public humiliation.

Hindu and Muslim religion

Apart from the king, there were two other locations of law, the brahmins and the community leaders and corporate groups. During 17th and 18th centuries, a network of brahmins dealt with disagreements related to the Brahmin community. In most cases, these councils had some relationship with the king, but yet were still able to remain autonomous as well. Instead of dealing with disagreements that were already underway, the brahmins dealt with the questions relating to the law itself. A learned Brahmin was said to have knowledge about the Dharmashastra and therefore they represented the living translation of Dharmashastra principles into real world legal matters.

There is notable difference between the punishments administered in ancient India as compared with the modern times in hindu societies. In ancient India, if a criminal was to confess to a crime, he would receive half of the prescribed punishment; however in modern India, confessing does not mitigate one's punishment. In ancient India, one's caste would affect the punishment that he would receive. In modern

India, caste does not play a role, which furthers the idea of equality among men. Modern law in India dictates that only laws that have been conceived and that are written down may be punished. As per the ancient Indian law, a person could be prosecuted if a Sishta, Brahmin who had studied the Veda declared the act to be a crime. One other punishment that could be incurred in ancient India was the confiscation of a Sudra's wife if he had an affair with a woman of a higher caste, which would be inconceivable in modern India.

Before the implementation of Indian Penal Code, Mohammedan criminal law was applicable to both Hindus and Muslims. The following are the various type of punishments prescribed under the Mohammedan Law.

1. Qisas - Where the victim or his relatives were allowed to inflict similar pain or injury to the offender;
2. Diya - Where the offender could be exempted from punishment by paying money to the victim or legal heir of the victim;
3. Hadd - Where some fixed punishments were prescribed for certain specific crimes. In such specific crimes, the Judge did not have a say;
4. Tazeer - Where the Judge has complete discretion to award punishment to the offender;
5. Siyasat - Where the King could in public interest award punishment to the offender.

OBJECTIVE OF INFLICTING PUNISHMENT

“The purpose of punishment is to make crime an ill-bargain for the offender.” - Beccaria

Punishment connotes society's disapprobation for a particular human conduct and penal sanctions act as a threat to the aggressor to refrain from committing such forbidden acts of violence.

There were two main purposes of punishment in hindu society. Incapacitation was the first purpose and was used to ensure that an offender would not be able to commit the same crime again. For example, the hands of a thief would be cut off. Deterrence was the second purpose of punishment. Criminals were punished to set an example to the public, in hope of preventing future offenses.

One reason for punishment is to prevent or discourage commission of crimes or unlawful behavior, through deterrence. It can prevent people from committing a crime or from re-offending. According to the Mahabharata, people only engage in their lawful activities for fear of punishment by the king, in the afterlife, or from others. An important way to deter potential criminals from committing a crime was through the example of offenders who were suffering due to infliction of punishment. Manu recommended the king to place prisons near a high road where the suffering and agony of the offenders could be seen clearly by the people of society to portray imprisonment to be deterrent and preventive.

The ultimate object of punishment is to protect society from the law-breakers.

Mr. Justice Krishna Iyer observed, “Sub-culture that leads to anti-social behavior has to be countered not by undue cruelty but by re-culturalisation.”

The Supreme Court in **Ankush Maruti Shinde v/s State of Maharashtra (AIR 2009 SC 2609)** reiterated that, “in perpetuating the sentencing system, law should adopt a corrective machinery or the deterrence based on factual matrix. Imposing a sentence without considering its effect on social order may be in reality a futile exercise...It is therefore, the duty of every court to avoid proper sentence having regard to the nature of the offence and the manner in which it was perpetuated or committed.”

PUNISHMENTS UNDER INDIAN PENAL CODE, 1860

The Indian Penal Code, 1860 describes six kind of punishments. In the year 1949, 'Penal Servitude' was removed from the Code as the third punishment. Lord Macaulay at the time of drafting the Indian Penal Code may have been guided by the theories of pain and pleasure because in India the nature and gravity of the offence decides the magnitude of punishment to the offender.

At present there are five kinds of punishment under the Indian Penal Code, 1860. They are -

1. Death Penalty

The punishment of death may be imposed on waging or attempting to wage war or abetting the waging of war against the Government of India, Abetment of mutiny actually committed, Giving or fabricating false evidence upon which an innocent person suffers death, Murder, Punishment for murder by a life-convict, Attempt to murder by a person under sentence of imprisonment for life, if hurt is caused, Dacoity with murder, Abetment of suicide of a child, an insane or intoxicated person. The Courts have a high range of discretionary powers in passing death sentences. The death punishment is also called as 'Capital Punishment'. It is the most severe form of punishment imposed on an offender. This punishment occupies topmost position among the grades of punishments. This punishment can be imposed in extreme cases and rarely that too in extremely grave crimes. The offenses for which death penalty is prescribed under IPC, 1860 are Ss. 121, 132, 194, 302, 305, 307, 364A, 396. For other offenses under IPC, punishments other than death penalty are prescribed.

2. Imprisonment for Life

Before 1955, the words 'transportation for life' was used in place of 'imprisonment for life'. The Code of Criminal Procedure Amendment Act, 1955 substituted the words 'imprisonment for life' in place of 'transportation for life'. Imprisonment for life mandates that the offender shall remain in the prison for the rest of his, till his death.

3. Imprisonment

The third kind of punishment is 'Imprisonment'. It is of two descriptions, viz.—

- (i) Rigorous, i.e., with hard labour - In rigorous imprisonment, the convicted person is put to do hard labour such as digging earth, cutting stones, agriculture, grinding corn, drawing water, carpentry, etc.
- (ii) Simple, where the offender is incarcerated in the jail where he undergoes only imprisonment without any labour.

Solitary Confinement

A harsh and hardened convict may be confined in a separate cell to correct his conduct. He is put separately without intercourse with other prisoners. All connections are severed with other world.

The object of this punishment is to reform the hardened and habitual offender and in order to experience him with loneliness. However, there are certain restrictions in imposing solitary confinement. This type of punishment was prevalent in earlier society and has found support in ancient penology of India and was considered very effective as expiatory measure. But this punishment does not find a place in the modern penal system of India. However, S.73 to 75 of Indian Penal Code, 1860 deal with the legality of this type of punishment.

4. Forfeiture of Property

'Forfeiture' means divesting a person of a specific property without compensation, as a consequence of some default or act forbidden by law. The courts may order for forfeiture of property of the accused in certain occasions.

5. Fine

The courts may impose fine as punishment. It may be given with or without imprisonment. The Indian Penal Code prescribes the punishment of fine for several offenses, petty and serious in nature. Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable may be unlimited, but it shall not be excessive. In every case where an offence is punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case where an offence is punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.

Today in India, one or more of the above five type of punishment/s are given to an offender who commits a crime under any criminal law in force in India. The criminal justice system in the present scenario recognizes and focuses predominantly on the above mentioned types of punishments which are humane and serves the purpose for maintenance of peace and justice in the society. All other type of punishments are outdated and ineffective in the 21st century.

JEREMY BENTHAM ON 'PUNISHMENT AND PAIN AND PLEASURE THEORY'

"Punishment must be fair and reasonable to curb the menace of crime" – Jeremy Bentham

Jeremy Bentham who was an eminent English law reformer was influenced by Beccaria's work on 'Crimes and Punishment'. He used Baccaria's catalytic thinking in his work and commented that the penal policy must be in conformity with the principle of hedonism which relates to the **Utilitarian Doctrine of Pain and Pleasure**. It means that the pleasure or gain derived by committing a crime must not outweigh the pain which is inflicted through punishment for committing the crime. If so, the punishment is bound to lose significance.

In England, Utilitarians like Jeremy Bentham, Stuart Mill and Austin supported the preventive theory of punishment due to its humanizing influence on criminal law. According to Bentham, wrong doers act constituted two parts, which he divided into primary mischief and secondary mischief. Primary mischief relates to the pain suffered by the victim/s directly; secondary mischief includes the whole society which is affected or injured indirectly by the act of the wrong doer. Bentham analysed the concept of 'pain' which was the outcome of the crime and the punishment prescribed on the basis of the suffering caused to the victim, witnesses, society, whether directly or indirectly.

Bentham's ambition was to create a complete and a comprehensive law well known as a 'pannomion' system. He not only proposed many legal and social reforms but also expounded an underlying moral principle on which they should be based. This philosophy of utilitarianism lays down the axiom, "**it is the greatest happiness of the greatest number that is the measure of right and wrong**". Bentham claimed to have borrowed this concept from the writings of Joseph Priestley, although the closest that Priestley in

fact came to expressing it was in the form "the good and happiness of the members, that is the majority of the members of any state, is the great standard by which everything relating to that state must finally be determined".

Bentham claimed that pleasure and pain can be rated according to their value or dimension which constitutes intensity, duration, certainty of pleasure or pain. He was concerned with maxima and minima of pleasures and pains. According to him, punishment must signify terror to the evil or wrong doers and a terrible warning to all others who may be tempted to imitate the wrong doers. Bentham stated, "General prevention ought to be the chief end of punishment... An unpunished crime leaves the path of crime open, not only to the same delinquent but also to all those who may have some motives and opportunities for entering upon it... We perceive that punishment inflicted on the individual becomes a source of security to all ..."

Utilitarians view punishment as a mean to achieve certain ends with the aid of criminal law. The Principle of utility is based on the idea of 'pleasure and pain'. According to Bentham, pleasure and pain relates to the man's action which may be rendered as right or wrong; principle of morality is the principle which is used to test the actions of man. Punishment must serve as an instrument for reducing crimes either by deterring the offender and others from doing similar acts in future or it should prevent the commission of offenses by incapacitating the offenders. Utilitarians accept punishment only for achieving good consequences but there may be disagreement as to nature of good consequences. Three issues must be considered in a given situation. Whether the punishment would be useless, needless, and involving more evil than what it purports to be solved. Bentham supported corporal punishment and imprisonments based on the seriousness of the case; he denounced infliction of capital punishment due to its detrimental qualities.

CONCLUSION

Punishment is an integral part of any criminal administration system. Without administering it, justice cannot be given to people. It should always serve as a measure of social defense.

Punishment to be effective must follow the combination of all the theories of punishment namely, deterrent, preventive, retributive, compensatory and reformative, so that it prevents a future wrong besides bringing a change in the attitude of the offender through reformative measures during the period of incarceration. Therefore, punishment may not be an act of violence, of one or of many, against a private member of the society. It should be public, immediate and necessary, the least possible in the case given, proportioned to the crime and determined by the laws. Only then punishments will be focused as a 'necessary evil' required to maintain equilibrium in the society.

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