PHILOSOPHY OF PUNISHMENT

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INTRODUCTION

In the past half century, the practical application & justification of punishment has glided away from efforts to reform & rehabilitate offenders in favour of retribution & detention. In the ancient times, there were numerous laws & every state had its own unique system of administration of justice & modes of punishment. In the current society, most of the laws are just an enhancement or an improvement to the social customs of the society. Naturally, the focus of the early statutes was punishment & crime. Today, treatment of criminals is a scientific, psychiatric & as well as a legal question.

RESEARCH METHODOLOGY

This paper uses the non-empirical tool of research. The reason for choosing this method of research is the availability of research. The most of the material that has been used in the project is from books, articles & online resources & this method of research is an apt tool for the project. The research involves an analytical approach to reasoning as the project involves a critical & analytical review of the philosophies of punishment.

RESEARCH OBJECTIVES

The primary objective of this project is to analyse the punishment system in India. The primary focus of this project is the following:

1. Reexamining the Retributive Theory of Punishment
2. The problems & perspectives of sentencing process
3. Is there a need for a rehabilitative theory of punishment & the Malimath Committee report
4. The classical & positive school of philosophy of punishment

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LITERATURE REVIEW

For the purpose of the project, the researcher has reviewed various books & articles. The researcher has taken various online portals such as SCC Online, Jstor, Indian Law Institute, & West Law. However, the purpose of the project, the primary focus is given to the material available on Indian Law Institute & Jstor.


Lakshminath, A., Criminal Justice in India: Primitivism to Post-Modernism, Indian Law Institute, New Delhi, Journal of Indian Law Institute- Volume 48 (2006); Page No. 26-56


In most of the ways, the paper by Amit Bindal is of exceptional importance for legal philosophers, criminologists & penologists. His paper not only does attempt to remove persistent misunderstanding concerning ‘justifications’ for determination of guilt & punishment in retributive theory. He analyses acclaims as a major event in thinking about retributive theory. In the other words, the importance of Amit Bindals’ analysis highlights the fact that retribution not to be understood as an aim of punishment.

In the paper by Kameswari G & Rao Nageshwar, they discuss about the sentencing process in India. Initially, they try to define punishment according to various philosophers around the world & glorifies the in Indian Criminal Law perspective. They discuss the capital punishment & the judiciaries approach of uniformity in the punishment process. They analysed the no uniformity approach by various case laws in imposing a penalty. The judiciary neither is consistent nor thorough scientific analysis of the behaviour problems of individual offenders.
REEXAMINING THE RETRIBUTIVE THEORY OF PUNISHMENT

The legal theory of punishment is based on the foundational structure on the substratum of revenge, as an explanation to punish is formulated by Immanuel Kant & is styled as the retributive theory of punishment. This theory firmly asserts that it is the criminal guilt, which is the genuine basis of punishment, irrespective of the social effectiveness of such punishment. Kant states that the theory is based on the ‘justice model’, where guilt is a necessary condition for the legitimate infliction of punishment. The fundamental & heart foundational elements of the theory are right, justice & desert. This monograph endeavours to compact with all the three aspects, but is necessary for us to elaborate & extricate the labyrinthine complexity, which has slithered in the legal theory about retributive theory. It is significant to inspect some of such unsupported & off the cuff observations made by some authors, which can be described as ‘folklore jurisprudence’ about the retributive theory of punishment.

The important aspect of folklore remains that it is marked by ‘lack of proof’ or ‘any research’ but merely passed on by ‘word of mouth’ which, at best gives it the hue of gossip or guesswork. For an instance of such folklore jurisprudence, an Indian criminologist describes the ‘retributive theory’ in the following terms: In primitive societies, the punishment was mainly retributive… According to this theory, evil should be returned for evil without any regard to consequence. The theory is based on the rule of natural justice which is expressed by the maxim “an eye for an eye & a tooth for a tooth”. The theory, therefore, emphasises that the pain to be inflicted on the offender by way of punishment must outweigh the pleasure derived by him from his criminal act.

This theory that has been explained is actually in a pre-classical notion of vengeful retribution. Even the most superficial reading of Kant would make it clear that the maxim of “eye for eye & tooth for tooth” has been rejected by him for literal application as both impossible as well as implausible. The author has later on described this obsolete rule of jus talionis (return like for like) as a rule of natural justice in the book which is not correct.

Retributive Theory has been equated to private justice, thereby constructing a meaning or concept entirely contrary to the ordinary meaning explained, even by Kant himself & understood generally by retributivists. This theory is actually an expression of an idea to be

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institutionalised within a legal system thus private justice necessarily falls out of even its worst distorted meaning of retributive theory. The critique is not restricted to one author in particular, rather, to the misunderstandings of legal theorists when they speak or write about retributive punishment. This issue is not confined not only to the authors of criminal law only but reflected in the writings of various judges as well. For instance, as a learned judge as V R Krishna Iyer in, The Dialectics & Dynamics of Human Rights in India relying on Salmond's wisdom dismisses the retributive theory as a relic of some long-gone period. In this context, it shall be noted that equating retributivism with ‘punitive brutality’, a form of punishment which is disproportionate & cruel or pre-classical notion of punishment, is entirely misleading. The human race has bid goodbye to retributive punishment is to articulate something which is factually untrue. H.L.A. Hart has emphatically initiated retribution to be an essential component of discipline to punish. Hart argues that accountability can merely be fixed found upon retributive principles.

The votaries of the retributive theory have failed to unmask or refute these baseless & unsubstantiated prejudices, something which can be done merely by reading the original texts of Hegel & Kant- the pioneer exponents of this theory. Thus, the ‘folklore jurisprudence’ of this theory needs to be deconstructed & can only be done exposing of these kinds of prejudices. Therefore, there is a need to expose & debunk the false notions which are associated with the concept of the theory. Retributive theory is based on rights, justice & desert. The basic question that arises which the theory asks is whether the state has the right to punish & what confers such right to the state?

THE STATE’S RIGHT TO PUNISH

The problem of how to reconcile between the use of the state coercion & individual autonomy is to be answered at the outset. The retributivists, from the very inception, maintain that criminal guilt is the only justification to use or inflict state punishment to an individual. This is because of the act of defiance, the individuals & relinquishes his right to autonomy, thereby, making herself vulnerable to state punishment. This kind of a problem,

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3 2000, Page 331-332
cannot be formulated intelligibility from a utilitarian perspective. Therefore, the writings influenced by the utilitarian outlook fail to grabble with the fundamental question: What gives anyone the right to inflict punishment on any person? In an attempt to defend retributive outlook on rights & justice in detail, retributive perspective is rooted in values of rights & justice & not at all considerations of utility.

INSTITUTIONALISATION OF REVENGE

The retributive theory is based on the primitive notion of revenge is one of the objections & is said to have been the relic of our barbarous & uncivilised past & is no more useful, much less acceptable. This criticism is misunderstood can be responded as gross & misunderstanding the retributive theory which is based on the glorification of revenge or gratification obtained from any sadistic pleasure attained by the infliction of revenge. The argument from the retributivists is that the revenge needs to be the basis of punishment in order to satisfy the victim & not to let her take recourse to private justice. Thus, the institutionalization of the instinct of retribution so as to expiate the possibility of private revenge or justice dragged to the streets.

This idea has inspired many minds that anyone who injures another must also equally receive an injury of similar nature. The important point which emerges is that in order to attain the core values of ‘justice’ is revenge, so as to negative its peripheral & unacceptable parts of retribution one needs, not suppression or extinction, but regulation & limitation. This can be done by institutionalising it as an acceptable theory of punishment. It needs to be accepted at the outset is the existence of the retributive theory as one of the important theories which are of some importance in any discussion on punishment. The Marxist critiques tendered for the theories based on ‘Justice Model’ & can be applied to retributive theory as well. It must be understood that this theory should not be rejected without being considered as a theory at all.

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6 Emphasis of proportional punishment rather than on equal punishment is the retributive theory.
7 Friedrich Nietzsche, On the Geneology of Morals (1996) Essay 1 Section 10
THE SENTENCING PROCESS – PERSPECTIVES & ITS PROBLEMS

Punishment can be defined as the suffering in a person or property inflicted on the offender under the sanction of law is punishment. The prime purpose of any punishment is deterrence of crime & the measure of punishment consequently varies from time to time according to the prevalence of a particular form of crime & circumstances. Punishment is itself an evil & be justified only by its effect in deterring the offender from committing the offence in future & deterring other by his example from the commission of it. Punishment, when imposed, shall be stern enough to deter but not too stern to be brutal. Similarly, the punishment should be reasonable enough to be human but not too reasonable to be ineffective. It has to be intended to transform the offender & retrieve him as the law abiding citizen for his good & for the good of the whole society. A punishment would defeat its own object if it is not consistent in punishing moderate or is excess.

The term sentencing can be called as any consequence, which flows from conviction. The purpose of the sentencing is that the accused must realise that he had committed an act which is an act which is harmful to the society in which he/she forms an integral part of the future. This sentencing is the cutting edge of the judicial process, which is the decisive tactic of criminal law, for accomplishing social defence & delinquent rehabilitation.

The punishments that offenders are liable under the provisions of the Indian Penal Code, 1860 are imprisonment for a term which may be simple or rigorous, imprisonment for life, forfeiture of property, fine & death. Most offences in Indian Penal Code are defined with sufficient clarity & the maximum punishment that can be imposed on a person is fixed in most of the cases. In the case of offences of grave nature⁸, the minimum punishment that has to be inflicted has also been specified with a qualification that less than minimum can be imposed when the judge feels it is warranted but has to record special reasons for doing so.⁹

In relation to the capital punishment, there are several sections in which death sentence could be imposed, but that sentence is nowhere mandatory¹⁰ under the Indian Penal Code, 1860. In those

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⁸ Section 304B, 376, 397 & 398 Indian Penal Code, 1860
⁹ Section 376 of Indian Penal Code, 1860.
¹⁰ Under Section 303 of Indian Penal Code, 1860 death sentence was made mandatory but was later held to be unconstitutional by the Supreme Court in Mithu v. State of Punjab., AIR 1980 SC 893
cases where the maximum punishment is the death penalty, wide discretion is given to the judge to prescribe the appropriate punishment. The punishment that can be imposed for an offence is imprisonment for life & is always rigorous. If it is imprisonment for a term, it might be rigorous or simple. The sections that prescribe imprisonment as a punishment in most of the cases state that imprisonment of either description may be imposed.

Thus, the Indian Penal Code, 1860 leaves the quantum of punishment to the prudence of judges, who would have the means in each case of forming an opinion as to the character of the offender & the circumstances, whether aggravating or mitigating under which, the offence has been committed. The policy of the law in giving a very wide discretion in the matter of punishment to the judges has its origin in the impossibility of laying down rigid & flexible standards. Any attempt to lay down the standards as to why in one case, there should be more punishment & in the other, less punishment would be an impossible task. On balancing the aggravating & mitigating circumstances as disclosed in each case, the judge has to judicially decide what would be an appropriate sentence. The penal philosophy of judge also plays a role to a certain extent while deciding punishment to a certain extent.¹¹ In penology & sentencing procedures, the modern trend is to accentuate the humanist principle of individualising punishment to suit the offender & his circumstances.

Punishment is institutionalised violence & it can be justified only when it is aimed at protecting the society by preventing crime. No sentence should ever appear to be vindictive. An excessive sentence defeats its own objective & tends to undermine the respect of law. On the other hand, an unconscionable lenient sentence would lead to a miscarriage of justice & undermine the people’s confidence in the efficacy of the administration of criminal justice.

THE PHILOSOPHY OF PUNISHMENT – CLASSICAL & POSITIVE SCHOOLS OF PENOLOGY

The impulse of vengeance is recognised as the major doctrine for the historical development of punishment. In primitive society, the criminal justice management was absent in the light of the

¹¹ The constitutional validity of capital punishment is generally believed that the judgments rendered by the Supreme Court Judges were influenced by the ‘abolitionists’.
brutal & retributive system of savage justice, as justice used to be achieved by the various means of the instinct of savage of self-redness & cruelties merely by retaliating to any sort of threat to life or property. (3) It can be emphasised that the vengeance was a basic building block for the historical development of criminal punishment. The primitive ancient societies resorted to the practices of self-retribution for the administration of criminal justice & created a system to curb all types of external & internal encroachments that threaten its security & stability. Practices of vengeance included a strong desire to revenge, self-dress, retaliate in a collective form against actions were considered offences in those days. Thus, retaliation itself was deemed as a moral justification for punishment & as a sort of repayment for wrongful actions during the life of primitive societies in east & west.

CONCLUSION

“The mood & temper of the public in regard to the treatment of crimes & criminals is one of the most unfailing tests of civilisation of any country.” – Sir Winston Churchill addressing the House of Lords.

One of the most jurisprudential issues is the justification of punishment. Each & every person has their own personal view on what punishment is & how is it carried out; though moral sensitivity often gets in the way of an objective analysis of the subject. According to the human nature or human predicament in punishing people seems to do something which, sometimes, it is right to do or, we must do. The justification process can be wrecked by many complexities of legal as well as moral & philosophical. We have not yet got around to accepting the true reasons behind the desire to punish, & the answer perhaps remains locked away within the deepest recesses of the human mind.

A consensus on the most appropriate theory & form of punishment too is far from settled. In modern times, the essential end of punishment is neither to torment offenders nor to undo a crime already committed. It is, rather, to prevent offenders from doing further harm to society & to prevent others from committing crimes. Thus, punishment can be looked upon as an educative process & the types of punishments selected & how they are imposed should always receive
serious consideration so as to make the greatest impact & the most enduring impression upon all the members of the society, while inflicting the least amount of pain & suffering on the body & the mind of the offender.

The Indian Judiciary today now comments great respect & trust from among all the organs of the state. The move towards a standardized sentencing policy also should not be hasty, since there are several drawbacks inherent in such an initiative. The legal fraternity members need to adequately discuss the issue of the minimum vis-à-vis maximum sentencing period in cases of certain offences & explore the possibility of doing away with the former. The criticism of soft sentencing must also be counterbalanced with the need to examine the over-zealousness on the part of some judges who punish certain offences, especially sexual crimes, in an unduly harsh manner.

Lastly, the moral argument of revenge being a detestable value in itself cannot stand universally true for all the cultures. The idea here is not to make value judgments on moral & religious traditions but to emphasise that ‘other worlds’ or narratives do exist, wherein revenge can be differently conceptualized in a varying context & the mere fact that some people are ‘not familiar’ with such notions is not sufficient to label others as ‘fools & madmen’. This theory should be taken seriously & discussed, analysed as well as criticised as any other theory.