



FACULTY OF JURIDICAL SCIENCES

COURSE: BALLB

Semester-X

SUBJECT: PENOLOGY AND VICTIMLOGY

SUBJECT CODE: BAL-1001

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Lecture-8



Theories of punishment – a thorough study

Introduction

Punishment. A term which is inherent to criminal justice. It is only because of the term punishment, that certain acts are classified as ‘crimes’. Down the lane of the history of the society, we have seen that without punishments, it would have sometimes been impossible to tame the barbaric, as well as primitive tendencies of the public. It was the weapon named ‘punishment’, that the rulers used against their subjects in order to maintain a fear in the minds of the public regarding the capacities and powers of their rulers. Punishments sometimes were also given as an insult to someone else. However, the most common punishment from which all of us are familiar is the scolding or mild beating that we get from our parents. In that case, what are the theories of punishment actually in case of serious crimes? How did they develop? What are the pros and cons of the various ways of punishing people? Do the Hindu scriptures too depict any form of the punishments mentioned hereinafter? Through this paper, we will try to answer all such questions and understand how far are the various Theories of Punishment applicable in the present era. The theories of punishment are as follows:

- RETRIBUTIVE THEORY.
- DETERRENT THEORY.
- PREVENTIVE THEORY.
- REFORMATIVE THEORY.

Let us have a look at each one of them in detail.

Retributive Theory of punishment

The Retributive Theory of Punishment, or the 'Theory of Vengeance', as many people in the society would perceive it as, is the most basic, yet inconsiderate theory of inflicting a penal sentence over a perpetrator. It is based on a very small doctrine, namely the doctrine of *Lex talionis*, which if translated, means 'an eye for an eye'. Now, if looked at from the perspective of very serious and heinous offences, like the Delhi gang rape case, people may feel that it is better to inflict such retributive punishments, so as to ensure that a deterrent is set across the society, in order to prevent such crimes in the near future.

However, we forget to understand sometimes that always having a retributive approach will render the society one with a primitive system of justice, where the Kings or the Judges were considered to be the supreme beings and were provided with the stature of God Himself (hence the address *My Lord*) and thus, collapse the very concepts of the representatives being 'servants'. Before we move on to a deeper understanding of the Retributive Theory, we need to understand two very important doctrines. Let us have a look at them both.

Doctrine of Societal Personification and the Doctrine of Correctional Vengeance:

- Doctrine of Societal Personification can be stated as-

'When a member of the society is subjected to a very heinous crime, as a result of which, the whole society, as if it were a natural person, considers the offence to be inflicted upon itself, comes to the defence of that person either by way of demanding justice or by conducting the same on its own, the society is said to be personified.'

A very self-explanatory doctrine. To be put simply, it means that the society, whenever a heinous crime of an extreme form is committed, assumes the form of a natural person and behaves in a collective manner so as to get justice.

Eg: The country-wide protests for the Delhi gang rape case, the current Hathras rape case, etc.

- Doctrine of Correctional Vengeance maybe stated as-

‘When the society, in a fit to get justice, demands the concerned authorities to inflict vengeful (as painful as the original act, or even more) punishments upon the victim for creating a deterrent, it is said to exhibit correctional vengeance.’

The above definition, too, is quite self-explanatory in its nature. Now that we have understood these two doctrines, we have a basic idea about what really is retributivism or retributive justice. Let us now have a closer look upon the same.

Understanding Retributive Theory of Punishment:

‘The concept of retributive justice has been used in a variety of ways, but it is best understood as that form of justice committed to the following three principles:

1. that those who commit certain kinds of wrongful acts, paradigmatically serious crimes, morally deserve to suffer a proportionate punishment;
2. that it is intrinsically morally good—good without reference to any other goods that might arise—if some legitimate punisher gives them the punishment they deserve; and
3. that it is morally impermissible intentionally to punish the innocent or to inflict disproportionately large punishments on wrongdoers.’

The above three principles clarify the needs for retributive justice even further. We may understand retributive justice in this manner. The place where both Criminal Law as well as Moral Law meet, is the place where mostly the retributive punishments are generated.

In fact, although people may classify punishments into seven different types, but in reality, every punishment, indeed, is retributive in nature. It is very interesting to see that the damages claimed under Torts, or the remedies sort for environmental violations, maybe compensatory, but at their hearts, are retributive in nature. Then why aren't they labelled as retributive, instead? Well, the answer to the question is simple. Retributive punishments are somewhat vengeful in their nature (an eye for an eye). They may not be vengeful always, but maybe merely morally vengeful. When we say this, it means that although the punishment is not literally the thing that was originally done by the perpetrator, it still acts as a vengeance by virtue of its seriousness.

E.g: If a person rapes someone, capital punishment maybe given as a retributive measure. If we literally give the person back what he did, i.e., sex, then it would be pleasurable rather than torturing for him. Now that we have understood briefly that how exactly the retributive punishment works, let us now move on to understand the ways in which Retributive Theory is displayed in the Hindu texts and scriptures.

Retributive Theory and the Hindu Scriptures:

The Hindu scriptures, particularly the *Ramayana*, *Mahabharata* and the *Durga Saptashati*, are primarily based on Retributive Theories but also, depict the ways in which one should proceed while applying them.

Ramayana- In the *Ramayana* the whole story began from retribution itself. *Lakshmana* cut the nose of *Raavan's* sister, because of which he kidnapped *Sita*. In order to rescue her and also to avenge her kidnapping, *Ram* went to kill *Raavan*. But, the major difference between the

application of the retributive punishment between the two was that *Raavan* did not even give *Ram* a chance to repent for his younger brother's act, but, *Ram* gave several chances to *Raavan* to correct his act.

Mahabharata– *Mahabharata*, once again, is a very good example of how retributive punishment should be inflicted. The *Pandavas* had not started-off with the war right away. They had sent *Shri Krishna* as their messenger of peace a number of times to the *Kauravas*, but, they did not give in. *Mahabharata*, especially *Shrimad Bhagvad Geeta*, talks about the time when the retributive mode should be used. As we all know that *Arjun* was about to leave the battlefield as he was too scared to go against his own relatives, it was *Krishna* who said that 'when all other paths close down, only then war is to be resorted to. Because if then the person refuses to fight, then it will inflict gross injustice upon the society at-large.'

Durga Saptashati– In this too, Goddess *Durga* warns the various demons, i.e. *Mahishasur* and *Shumbh-Nishumbh*, repeatedly, before starting a killer spree upon them.

Now, let us move on to see some important case laws regarding this theory of punishment.

Case Laws:

1. *Nirbhaya* Judgement– This case is indeed the first and foremost case to be mentioned, while talking about retributive justice in India. In this Judgement, the Supreme Court sentenced four out of six felons involved in the extremely heinous Delhi gang rape case to death, much to the delight of the society, as they had committed an extremely gruesome, as well as morally unimaginable crime.
2. *Anwar Ahmad v/s. State of Uttar Pradesh and Anr.*– In this case, the convicted had already undergone a six month imprisonment term, before being officially convicted by the Court. The Court held that since the convict had been convicted and also, the

required 'blemish' had also been imposed upon him, it was not necessary to sentence him again in the name of 'retributive punishment', as it would inflict a very big loss upon the family as well.

3. Sri Ashim Dutta Alias Nilu vs State of West Bengal– In this case, it was observed that both deterrent and retributive punishment aim at prevention of the recurrences of the offences by others passing exemplary punishment for a particular offence. But the civilization and the societies are progressing rapidly. There is advancement of science and technology. The literate people and the experts in different branches of knowledge started thinking in a different way. Eye for an eye, and tooth for a tooth are no more considered as the correct approach towards the criminals. Such principle may perpetuate the rule of the Jungle but cannot ensure the rule of law.

Pros and Cons:

Pros-

1. Acts as a strong deterrent.
2. Helps in giving moral justice to the victim.
3. Instils the feeling of trust within the society, towards the judiciary.

Cons-

1. Sometimes, may become disproportionate with the seriousness of the crime.
2. Society develops feelings of vengeance and destructive tendencies follow.
3. The State may become autocratic in its functioning, using the punishment to torment people.