

• Unit – IV
Theories of Punishment

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- **Introduction –**
- Administration of Justice is the primary functions of the State, is generally divided into administration of Civil Justice & Administration of Criminal Justice.
- The main purpose of Administration of criminal Justice is to punish the wrongdoer.
- It is the State which punishes the Criminals.
- From the ancient times, a number of theories have been given concerning the purpose of punishment.

- **Meaning of Punishment -**
- Punishment is a process by which the state inflicts some pain to the persons or property of person who is found guilty of Crime.
- **Jeremy Bentham –**
- ‘Punishment is evil in the form of remedy which operates by fear’.
- **Johan Finnish -**
- ‘Delinquent behavior of a person needs to be taught lesson not with melody but with iron hand’.

WHAT IS PUNISHMENT

- The immediate consequence that follows a criminal act is known as punishment
- Punishment involves all or few or any one of the following:
 - Suffering
 - Loss
 - Pain
 - Penalty
 - Image tarnish



- **Object of Punishment -**
- The Object of Punishment is to protect society from mischievous & undesirable elements by deterring potential offenders, by preventing the actual offenders from committing further offenses & by reforming & turning them into law abiding citizens.

WHY PUNISHMENT?



Past – To ensure crime is not repeated



Present – To create fear



Future – To prevent crime

- **Features of Punishment -**

- 1) It involves the deprivation of certain normally recognized rights, or other measures considered unpleasant.
- 2) It is the consequence of an offence.
- 3) It is applied against the author of the offence.
- 4) It is applied by an organ of the system that made the act an offence.

- **Theories of Punishment -**
- Punishing criminals is a primary function of the State. In the past, there were no strict rules for punishment and the quantum and extent of punishment largely depends on the King or the ruler.
- However, modern punishments are based on the nature of offence & are largely brought by the British & Western countries.
- Penologists have formulated several theories that deal with punishments.

- The Modern Theories of Punishment are -
 - 1) Deterrent Theory
 - 2) Retributive Theory
 - 3) Protective or Preventive Theory
 - 4) Reformatory Theory
 - 5) Expiation Theory
 - 6) Expiration/Compensation Theory

- **I) Deterrent Theory -**

- 'To deter' means, " **to abstain from action/ doing** ".
- Deterrent means, "infliction of severe punishments with a view to prevent the offender from committing the crime again."
- A/c to this theory, the object of punishment is not to only prevent the wrongdoer from doing a wrong a second time, but also **to make him an example to others who have criminal tendencies.**

- **Salmond –**
- Deterrent aspects of criminal justice to be the most important for control of crime.
- A Judge once said : "*I don't punish you for stealing the sheep but so that sheep may not be stolen.*"
- The aim of punishment is **not revenge but terror.**
- **Austin –**
- People follow the law because of fear of punishment.

- **Manu-**
- “Penalty keeps –
 - the people under control,
 - protects them,
 - remains awake when people are asleep,
 - so the wise have regarded punishment is **a source of righteousness**”.
- **Supporters** - Plato, Locke, Fichte

- **Paton –**
- The deterrent theory emphasizes the necessity of protecting society, by so treating the prisoners that others **will be deterred from breaking law.**
- This theory was the basis of punishment **in England in the Medieval Period.**
- Sever & Inhuman punishments were order of the day & inflicted even for minor offenses like pick pocketing & stealing etc. The culprits were subjected to the sever punishment of death by stoning & whipping.

- **Indian Position –**
- Mahabharata & Ramayana period
- In India during the **Mughal period**, the penalty of a death sentence or mutilation of the limbs was imposed even for the petty offenses of forgery & stealing etc.
- The Supreme Court accepted this theory in recent times due to increment in murders, dowry deaths, rapes etc.
- Even today in most of the Muslim countries , Such as Pakistan, Iraq, Iran, Saudi Arabia, the deterrent theory is the basis of Penal Jurisprudence.

- **Case - Paniben V. State of Gujrat, (1992)**
- The Supreme Court said “It would be a travesty if sympathy is shown for crimes like bride burning is committed & the court upheld the conviction of the mother in law for murder by bride burning of daughter - in - law.
- **Nirbhaya Case** – Justice to the daughters of India

- **Criticism -**
- It has proved ineffective in checking crimes.
- Excessive harshness of punishment tends to defeat its own purpose by arousing the sympathy of the public towards those who are given cruel & inhuman punishment.
- Hardened criminals are not afraid of punishment.
- Punishment loses its horror once the criminal is punished.
- When a person is dying of Hunger, he will not be bothered on death punishment.

- **Oscar Wilde –**
- Every saint has a past & every sinner has a future
- Valmiki/ Angulimala

- **II) Retributive Theory -**
- 'Retributive' means , “**punitive or payback or make a return to.**”
- In Primitive society punishment was mainly retributive. The person wronged was allowed to have revenge against the wrongdoer.
- The Principle of '**an eye for an eye', 'tooth for tooth', a nail for nail, limb for limb** was the basis of criminal administration.

- **Justice Holmes** –
- It is commonly known that the early forms of legal procedure were grounded in vengeance.
- **Salmond** –
- The retributive purpose of punishment consist in avenging the wrong done by the criminal to society.
- **Supporters** – Emmanuel Kant, Plato, Hegel etc.

- The idea behind this theory is **to make the offender realize the suffering / pain.**
- The criminal deserve to suffer. The suffering imposed by the State in its corporate capacity is considered the political counterpart of individual revenge.
- Unless the criminal receives the punishment he deserves, one or both of the following effects will result, namely,
 - I)** The victim will seek individual revenge, which may mean lynching (killing or punishing violently),
 - II)** The victim will refuse to make a complaint or offer testimony & State will therefore be handicapped in dealing with criminals .

- **Justification of this Theory -**
- Acts as a strong deterrent.
- Helps in giving moral justice to the victim.
- Instills the feeling of trust within the society, towards the judiciary.
- Severity, certainty and celerity of punishment.

- **Indian Position –**
- Hindu scriptures like **Ramayana, Mahabharata & Durga Saptashati** had references about this type of punishments.
- In modern days also this theory finds reference in the Administration of Justice in India.
- The modern criminology discards retribution in the sense of vengeance, but in the sense of reprobation, it must always be an essential element in any form of punishment.

- **Case – Jagmohan Singh V. State of U.P. (1972)**
- The Supreme Court observed that, the death penalty serves two purposes –
 - I) It satisfies the stint of retribution
 - II) It works as a deterrent to like-minded criminals.
- **Nirbhaya Case –**
- Demands of society for capital punishment to offenders.

- **Criticism –**
- **Salmond –**
- **Retribution is not remedy but aggravates the offence.**
- Punishment *per se* is not a remedy for the mischief committed by the offender. It merely aggravates the mischief.
- Punishment in itself evil & can be justified only on the ground that it yields better result.
- Revenge is wild justice. Retribution is only a subsidiary purpose served by punishment.

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

- **Mahatma Gandhi –**
- “An eye for an eye makes the whole world blind”.

- **III) Preventive Theory -**
- Preventive theory is also known as 'theory of disablement.'
- **Foundation** – “Prevention is better than cure”
- Proposition - punishment is based on “not to avenge crime but to prevent it”.
- The aim of this theory is to disable the criminal.
- Offenders are disabled from repeating the crime by awarding punishments, such as death, exile or forfeiture of an office.

- **Imprisonment** is the best mode of punishment because it serves as an effective deterrent as also a useful preventive measure.
- **Supporters** –
- Utilitarian's such as Bentham, Mill and Austin of England supported the preventive theory of punishment due to its humanizing nature.

- **Justice Holmes –**
- Prevention would accordingly seem to be the chief & only universal purpose of punishment. The law threaten certain pains if you do certain things, intending thereby to give you a new motive for not doing them. If you persist in doing them, it has to inflict the pains in order that its threats may continue to be believed.
- **Paton-**
- The Preventive theory concentrates on the prisoner & seeks to prevent him from offending again in the future. The death penalty & exile serve the same purpose.

- **Ways / Principles of Punishment by Preventive Theory –**
- By creating the fear of punishment.
- By disabling the criminal permanently or temporarily from committing any other crime.
- By way of reformation or making them a sober citizen of the society.

- **Indian Position –**
- This theory holds good ground and is applicable in India.
- **Case – D.K.Basu V. State of West Bengal, AIR 1997 SC710**
- The Supreme Court highlighted the purpose of preventive detainment & observed that security of the state individuals can be preventively detail.

- **Criticism -**
- Preventative Punishment has the undesirable effect of hardening first offenders, or juvenile offenders, by imprisoning them in the association of Harden Criminals.
- Attempting only to prevent the crimes but not to change the thinking of criminals.

- “Prevention is better than Cure”

- **IV) Reformatory Theory -**
- According to Reformatory theory, the object of punishment is the **reformation of criminals**.
- It seeks to bring about a change in the attitude of offender so as to rehabilitate him as a law abiding member of the society.
- Even if an offender commits a crime under certain circumstances, he does not cease to be a human being. The circumstances under which he committed the crime may not occur again.
- **Supporters** – JSM, Bentham, etc.

- Crime is a **mental disease**, caused by different anti-social elements. Therefore the mental cure of criminals rather than awarding punishment will serve the purpose.
- If the criminals are **educated & trained**, they will be competent to behave well in the society.
- The object of the punishment should be **to reform the offender**.

- The criminal must be educated & taught some art or craft or industry during his term of imprisonment, so that they may be able to lead a good life & become a responsible & respectable citizen after release.
- The character & age of the offender, early breeding, family background, education & environment, the circumstances under which he committed the crime, the motive which prompted him or her indulge in criminal activities, etc. so that the Judge could award punishment that could serve the ends of justice.

- **Indian Position –**
- This theory is applicable in India in the process of administration of justice.
- **Case – Sunil Batra V. Delhi Administration**
- The Supreme Court observed that fair treatment will enhance their personality rather than to affect or regulate their life.
- **Justice Krishna Iyer** in the case of Mohd. Giasuddin v. State of A.P..
- **“Every saint has a past and every sinner has a future”.**

- **Criticism –**
- If Criminals are sent to prison to be transformed into good citizens, a prison will no longer be a 'prison' but a dwelling house i.e. casual place & causes increase in crime.
- This theory may be successful in case of young offenders.
- Poor nation can't bear the cost of better framework, infrastructure, training tools, offices in jail, etc. It requires gigantic ventures.

- Transformation of hardened criminals or recidivists, habitual offenders, incurably corrupt persons, terrorist, crime syndicates, contract killers, hired criminals etc. may not always work.
- Transformation may be a complete disappointment in cases of untalented, uninformed and evidently hopeless lawbreakers.
- It ignores the cases of survivors of violations.

- **Mahatma Gandhi –**
- **“Hate the Sin and not the Sinner”.**

- **V) Expiatory Theory -**
- Expiatory theory of Punishment is based on **morality**.
- A/c to this theory, **repentance/ expiation/self realisation by offender itself is a punishment**.
- If the offender expiates or repents, he must be forgiven.
- It was prevalent in ancient Indian criminal law.
- Expiations were performed by way of uttering mantras, fasting or even burning oneself to death.
- **Manusmriti** – Prayaschita
- Supporters – Hagel, Kohler, etc.

- **Criticism –**
- This is based on morals only and obsolete now.
- Not the exact method of reparation of crime.
- Not useful in cases of recidivists, harden criminals, rapists etc.

- **VI) Theory of Compensation -**
- A/c to this theory, the object of punishment must not be merely to prevent further crimes but also to compensate the victim of Crime.
- Concept of blood money –
- If one causes the death or injury of another person accidentally or intentionally, he or she has to pay blood money or diya.
- Prevalent in Dubai/ UAE etc.

- **Criticism –**
- The expiation theory could not be a solution in cases of murder, plunders, rapes, kidnapping, thefts, etc., serious natured offenses. If the compensation is allowed to be paid in rapes, the number of rapists will be increased.

- **Conclusion –**
- No one theory of punishment is perfect.
- Each theory of punishment has its own pros and cons.
- The elements of prevention, deterrence and reformation of offenders should be sparingly used in the penal system.
- India has all these elements in its penal system.

Forms of Punishment –

- 1) Corporal Punishment
- 2) Forfeiture of Property
- 3) Fine
- 4) Deportation
- 5) Imprisonment
- 6) Imprisonment for Life
- 7) Death Sentence

- **1) Corporal Punishment -**

- A) Flogging
- B) Mutilation
- C) Branding
- D) Stoning
- E) Chaining
- F) Pillory

- **2) Forfeiture of Property –**
- It is a form of punishment statutorily recognised under s. 53 of IPC, 1860. The relevant offences are –
- **S. 126** – Committing depredation on territories of power at peace with India.
- **S. 127** – Receiving property taken by war or depredation mentioned in S.126 above.
- **S. 169** – Public servant unlawfully buying or bidding for property, &
- **S. 263-A** – Prohibition of fictitious stamps.

- **5) Imprisonment –**
- Imprisonment may be –
 - I) Rigorous (with hard labour) or
 - II) Simple (without any labour)
- Both these types of punishment may be with or without fine.

- **I) Offences which are punishable with rigorous imprisonment –**
 - A) S. 194 of IPC – giving or fabricating false evidence &
 - B) S. 449 of IPC – house trespass in order to commit offence which is punishable with death
 - are mandatorily punishable with rigorous imprisonment without any alternative of simple imprisonment.
- Similarly, the offence of rape u/s 376 is also punishable with rigorous imprisonment only.

- **II) Offences punishable with simple imprisonment-**
- Following are such offences –
 - A) Wrongful restraint (S. 341 IPC)
 - B) Printing or selling defamatory matter (S. 500, 501 & 502 IPC)
 - C) Misconduct in a public place by a drunken person (S. 510 IPC)
 - D) Insult to modesty of a woman (S. 509 IPC)
- Maximum imprisonment in IPC is 14 years (eg. S.57)
- Minimum imprisonment is 24 hours (eg. S. 510)

- There are only 3 offences in the IPC for which the minimum sentence of imprisonment has been provided **u/s 57 IPC**. These are –

I) Use of deadly weapon causing grievous injury while committing dacoity or robbery is punishable with imprisonment of not less than 7 years **(S. 397)**

II) Being armed with any deadly weapon at the time of attempting to commit a dacoity or robbery is punishable with imprisonment of not less than 10 years **(S. 398)**

III) Rape of a girl under 12 years of age or a gang rape is punishable with rigorous imprisonment for a term which shall not be less than 10 years **(S. 376 (2) (a))**

- **Essentials of An Ideal Sentencing System –**
- 1) The punishment must be in proportion to the gravity of offence.
- 2) Elimination of inordinate delay
- 3) Elimination of unwanted sympathy to criminals.
- 4) Improvement in police & prison management & administration.

- 5) Due respect & recognition to the rights & compensatory claims of victims by courts
- 6) to refrain the projection of image of dreadful criminals by announcing rewards on their heads etc.
- 7) Retention of capital punishment to be used in rarest of rare cases.
- 8) Not allowing the rich, wealthy, powerful & influential criminals to bend the justice.

- 9) Practicing by judges the conscience of intellectual honesty & to deal with all experience & humility at their command.
- 10) Maintaining the impartiality & fairness in sentencing.
- 11) Restructuring of penal institutions.
- 12) Using the correctional, reformatory & rehabilitative measures with caution etc.