

Mapping Penal Approach & Trend under Indian Jurisprudence

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Abstract - Justice remains an esoteric concept inspite of the significant advancements in legal literature and theory. Right Punitive approach is the fundamental & most conspicuous way to convince a society that Justice has been delivered to safeguard their faith in constitution and legal regime. Once retribution has been achieved, the convict becomes a delinquent child of the State in need of correction and reformation. The following paper, through various landmark judgments, explores how the Indian Judiciary has sought solution to this basic problem of law and if there exists any common principle of penology which echoes in the spirit of Indian Jurisprudence.

Keywords: Penology, Criminology, Supreme Court, Retributive Theory, Preventive Theory, Deterrent Theory, Reformatory Theory, Rehabilitative theory, Capital punishment, Life Imprisonment.

I. INTRODUCTION

On August 25, 2001, Devinder Pal Singh Bhullar was sentenced to death by a trial court for the bombings in New Delhi on September 11, 1993 which killed nine people and injured 20. Following this, lodged in Tihar jail, he made several attempts to take his own life. News reports described him as a depressive and schizophrenic. In 2014, the Honorable Supreme Court commuted his death sentence to life imprisonment. The luminary Chief Justice Sivasubramanian explained, "Mental illness, schizophrenia & insanity are grounds for commuting the death penalty."

This is but only one example of Indian Judiciary and its approach to Penology. Law is laden with multiple, numerous and often confusing theories on penology. More debilitating is the act of deciding what punishment befits the crime committed by the guilty. Multiple factors must be taken into consideration as a punishment should not only seem to provide justice to the victim, his family, and public at large but also be deter other criminals on the street. At the same time, the punishment should allow ample scope to the criminal for another shot at living a better life i.e., in the spirit of humanity, every human being must be provided with avenues to become a part of the main stream society. These avenues must necessarily provide "rehabilitation" to the offender. In other terms, it must correct the "wrongs" in him and make them right to potentially decrease the chances of recurrence of any criminal act by him.

However, a fundamental aspect of every form of punishment and criminal justice itself, is to register on the criminal's psyche the gravity of his act which has brought pain to his fellow human beings, for no form of pain is justified enough to be inflicted on anybody. Thus, the criminal must feel the guilt and confess responsibility for his act; otherwise no reformation or rehabilitation can take place. Thus, confessions to crime, Plea bargaining, Admissions of Guilt etc. often invite legal pardon or commutation of punishment.

With reference to situation at home (India), Prison population statistics show as of 31 December 2014, there are 1387 functioning jails in India having a total capacity to house 3,56,561 prisoners. As of the same date, there were 4,18,536 inmates in jails across in India. According to a pan world survey by BBC UK, almost 3, 32,112 are convicted and serving sentence in jail in India. This is 30 people per 1,00,000 population. This is a huge number and poses a contentious issue of criminal justice.

II. FUNDAMENTALS BEHIND PHILOSOPHY OF PUNISHMENT

HLA Hart, in his pioneering work 'Punishment & Responsibility: Essays in Philosophy of Law (1968)' provides that a punishment should pass through following litmus test:

- It must involve pain or other consequences normally considered unpleasant
- It must be for an offence against legal rules
- It must be of an actual or supposed offender for his offence
- It must be intentionally administered by human beings other than the offender
- It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

These principles illustrate the importance of a unified and recognized institution of justice which is sacramental in image. The "legal system" consists of citizens protected by the legal regime and laws or regulations. It is this principle which underlines the doctrines concerning the desirability and objectives of punishment. Theories of punishment, therefore, contain generally policies regarding handling of crimes and criminals.

Penalising an individual who is proven to be guilty beyond doubt involves strapping him of his constitutional rights of liberty, right to elect government of his choice, have a lifestyle of his choice etc. Therefore, the classic philosophy of law makes sure that punishment is justified beyond argument by following crucial principles of legality, namely:

- *Nulla poena sine lege* - No penalty without a statutory provision or legal rules.

- *Iusacceptum*: If no punishment is recognized or prescribed by statutory or common law, the court cannot impose the Punishment.
- *Iuspraevium*: If punishment is increased, it must not be applied to the detriment of the accused who committed a crime before the punishment was increased.
- *Iuscertum*: Legislature should not express itself vaguely when prescribing punishment.
- *Iusstrictum*: If prescribed punishment is ambiguous, court must interpret provision strictly.

III. ELABORATION & APPLICATION OF PENAL THEORIES BY INDIAN JURISPRUDENCE

Apart from contributions of ancient legal philosophers and modern jurists, Indian jurisprudence has tremendously benefitted and heavily influenced by the Apex Court decisions. These can be viewed and interpreted selectively to better understand the various problems faced in application and determination of an "ideal" punishment.

In a succinct manner, the Supreme Court in **T.K. Gopal v State of Karnataka**, observed: *"In the matter of punishment for offence committed by a person, there are many approaches to the problem. On the commission of the crime, three types of reactions may generate. The traditional reaction of universal nature is known as punitive approach. The other approach is the therapeutic approach; the third is the preventive approach. Under the punitive approach, the rationalization of punishment is based on retributive and utilitarian theories. Deterrent theory which is also part of the punitive approach proceeds on the basis that the punishment should act as a deterrent not only to the offender but also to others in the community."*

RETRIBUTIVE THEORY OF PUNISHMENT:

As recent as 2004, the Supreme court in **Union of India v. Kuldeep Singh**, reiterated the central position occupied by Retributive theory of punishment: "criminal law adheres to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences."

DETERRENT & PREVENTIVE THEORY OF PUNISHMENT:

N. K. Dutta, in his book 'Origin and Development of Criminal Justice in India', (1990) provides a pearl of legal wisdom. The author quotes The Gautama, who recommended four factors to take into consideration for inflicting the punishment against a crime i.e.

- the status of the offender,
- his bodily strength (that is power of endurance),
- and the nature of the offence and
- whether it has been repeated.

This ancient idea illustrates the classic Deterrent approach to Punishment. However, Deterrence is not always successful as a hardened criminal is used to the severity of the punishment, and deterrence does not always prevent him from committing a crime. On the other hand, it also fails to affect an ordinary criminal, as very often, a crime is committed in a moment of excitement. If the crime is pre-mediated, the offender commits the crime, knowing well, the consequences arising from his act and performs the act because he cannot help but do it.

On the other hand, the Preventive mode of Punishment works in the following ways:

- a) "by inspiring all prospective wrong-doers with the fear of punishment;
- b) by disabling the wrong-doer from immediately committing any crime; and
- c) by transforming the offender, by a process of reformation and reeducation, so that he would not commit crime again.

The UN Standard Minimum Rules for the Treatment of Prisoners provides the following in Rule 58: *"The purpose and justification of a sentence of imprisonment or a similar measure derivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society, the offender is not only willing, but also able, to lead a law-abiding and self-supporting life."*

Both preventive and Deterrent theory of Punishment are crucial for maintaining order and necessary fear in the public. The objective is to control, rather than reform.

In **Bachan Singh V. State of Punjab**, the Supreme Court was faced with the question whether the death penalty imposed for some offences under the Indian Penal Code is constitutionally valid by a four-to-one majority verdict, the Supreme Court ruled that the death penalty is constitutionally valid, and does not constitute an "unreasonable, cruel or unusual punishment." The majority pointed out that the death penalty is to be imposed only for "special reasons" and only in the rarest of rare cases. However, such provisions cannot be said to be violative of Articles 14, 19 and 21 of the Constitution. It was also observed that the fact that India had accepted the International Covenant of Civil and Political Rights does not affect the constitutional validity of the death sentence. The voice of dissent came from justice Bhagwati, who delivered a separate verdict to the effect that section 302 of the Code is void, in so far as it provides for imposition of a death penalty (for murder) as an alternative to life imprisonment.

IV. REFORMATIVE & REHABILITATIVE THEORY OF PUNISHMENT

In contrast to above mentioned theories, exponents of the reformatory theory believe that a wrong-doer stay in prison should serve to re-educate him and to re-shape his personality in a new mould. They believe that though punishment may be severe, it should never be degrading. To the followers of this theory, execution, solitary confinement and maiming are relics of the past and enemies of reformation. Thus, the ultimate aim of the reformists is to try to bring about a change in the personality and character of the offender, so as to make him a useful member of society. The reformists argue that if criminals are to be sent to prison in order to be transformed into law-abiding citizens, prisons must be turned into comfortable, dwelling houses. This argument is, however, limited in its application, and it must be remembered that in a country like India, where millions live below the poverty

line, it may even act as an encouragement to the commission of crimes.

Justice Krishna Iyer in **Rakesh Kaushik Vs Superintendent, Central Jail** mused: "Is a prison term in Tihar Jail a post-graduate course in crime?" the Supreme Court very prudently pointed out in the landmark judgment of **Sunil Batra v. Delhi Administration** that the undue leaning towards the concept of reformation through prison sentence is a stretch of imagination in some sense and unduly pressed upon by the modern legal penology. No doubt it is crucial in penology; it is not the sole end in itself. The Honourable Supreme Court with its observations paved the way for balancing all Purposes of Punishment with each other to determine the right punitive approach under Indian jurisprudence.

It must be noted that In the case of young offenders and first offenders, the chances of long-lasting reformation are greater than in the case of habitual offenders. Again, some crimes, such as sexual offences, are more amenable to reformatory treatment than others. Further, reformatory treatment is more likely to succeed in educated and orderly societies than in turbulent or under-developed communities. Parole and probation are common tools of reformatory form of punishment.

Rehabilitation under Indian criminal justice system is two-fold: For Victims, and secondly, for the Convict. In **Hari Shankar v Sukhbir Singh** the Supreme Court directed the trial courts to exercise the power of awarding compensation to the victims of the crime U/S 357(3) of the Cr.P.C liberally, so as to meet the ends of justice in a better way. The court observed: "Section 357(3) is an important provision and empowers the court to award compensation to victims while passing judgment of conviction. It may be noted that the power to award compensation is not ancillary to other sentences, but is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to the crime as well as reconciling the victim with the offender. It is, to some extent, a constructive approach to the crime. The court may enforce the order by imposing sentence in default".

In **State of Punjab v Ajaib Singh** the Supreme Court went a step further in granting a huge compensation to the victim even after acquittal of the accused as during the pendency of the trial the accused had offered to pay a sum of Rs 5 Lakhs to avoid litigation.

In **D.K. Basu v State of W.B** the Supreme Court observed: "It is now a well accepted proposition in most of the jurisdiction, that the monetary and pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by a public servant. However it can be said that in the assessment of the compensation the emphasis is to be on the compensatory and not the punitive element".

In **Mangilal v State of M.P** the Supreme Court dealt with the scope of Section 357(3) of Cr.P.C in detail. The Court observed: "The power of the court to award compensation to the victims U/S 357 is not ancillary to other sentences but is in addition thereto. Section 357(1) deals with a situation when a court imposes a fine or a sentence (including sentence of death) of which fine also forms a part. It confers discretion on the court to order as to how the whole or any part of fine recovered is to be applied. If no fine is imposed, section 357(1) has no application. The basic difference between sub-section (1) and (3) of Section 357 is that in the former case, the imposition of fine is the basic and essential requirement; while in the latter even the absence thereof empowers the court to direct payment of compensation. Such power is available to be exercised by an appellate court or by the High Court or Court of Sessions when exercising revisional powers".

Usually fines are prescribed as punishments for petty offences as an alternative to imprisonment. This alternative course of imposition of fine has the potential for rehabilitation of both the victim and the offender. As far as the victim is concerned, the amount of fine imposed can be utilized for his rehabilitation and survival. It can further be used for indemnifying the victim for the loss and damage done to him by the offender. The money award can be calculated only to make good the financial loss. It is not an award for the sufferings already undergone, which are incapable of calculation in terms of money. In the case of **R.D. Upadhyay v State of A.P.**, Supreme Court observed, "Money compensation is awarded so that something tangible may be procured to replace something of the like nature, which has been destroyed or lost. Money award cannot, however, renew a physical frame that has been battered and shattered due to callous attitude of others".

In **Brij Lal v Prem Chand**¹ the Supreme Court in the facts and circumstances of the case substituted the sentence awarded to the accused with sentence of imprisonment for period already undergone by him and enhanced the sentence of fine from Rs 500 to Rs 20,000/. The court also directed that out of the fine amount, a sum of Rs 18,000 should be paid to the father of the deceased for bringing up deceased's minor son.

In **Dr Jacob George v State of Kerala**² the Supreme Court reduced the sentence of 4 years rigorous imprisonment imposed by the High Court to 2 months imprisonment already undergone. The court, however, enhanced the fine amount of Rs 1,000/ awarded by the high Court to Rs 1,00,000/ to be paid to deceased's minor son. The sentence was modified, as the ultimate aim was rehabilitation of victim's minor son.

The modern criminal justice system enforces itself through the might of the state. It is the state, which prosecutes the offenders and punishes them. Thus, the parties to the dispute have little say in the matter of punishment or pardon. Section 320 of Cr.P.C is an exception to this general rule of state prosecution. The section empowers the parties to the dispute to compound the offence on their own and without the permission of the court in cases of minor offences and with the permission of the court in other specified offences. The judiciary in India has recognized the need of participation of the parties to the dispute. To give it a thrust the judiciary is supporting the parties who enter into a compromise to resolve the dispute among them. The parties estimate a reasonable amount of compensation to be paid by the offender to the victim and such agreement is enforced through the process of court of law. There may be, however, cases where the offence in question may be a non-compoundable one. In such a situation the court generally reduces the sentence to the period of imprisonment already undergone by the accused.

In **Bachhu Singh v State of U.P.**, the Supreme Court held that since the incidence took place a long time back and subsequently the parties arrived at an amicable settlement, it would be a fit case for reducing the sentence to the period already undergone.

Thus, the Indian apex court has largely taken a case to case basis approach in determining the quantum of punishment while at the same time maintaining the 'WELFARE STATE' image provided for the Indian state under the Indian constitution.

¹ AIR 1989 SC 1661.

² 1994 (3) SCC 430.

V. CONCLUSION

In **State of M.P v G. Singh**, the Supreme Court observed: “*The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for the commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the arena of consideration. The undue sympathy to impose inadequate sentence would do more harm to the justice system. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc.*”

An illustrative checklist (based on experience of Indian judiciary) of crucial factors impacting approach taken for awarding punishment can be drawn up thus:

- the facts and circumstances of each case,
- the nature of the crime,
- the manner in which it was planned or committed,
- the motive for the commission of the crime,
- the conduct of the accused,
- the nature of the weapons used,
- prior criminal record of the offender,
- age of the accused,
- home life of the accused,
- emotional and mental condition of the accused,
- the prospects for rehabilitation,
- the possibility of return to normal life in the community,
- the possibility of treatment and training of the offender,
- the social impact of the crime, and
- all other attending circumstances.

According to Salmond, the perfect system of criminal justice is based neither on the reformatory, nor the deterrent principle exclusively, but is the result of a compromise between them. In this compromise, it is the deterrent principle which wields the predominant influence. Salmond further adds that the present-day acceptance of the reformatory theory is, in a large measure, a reaction to the conservative approach to the question of punishment. The extreme inclination towards the reformatory theory may be as dangerous as the complete acceptance of the old code of punishment. It is true that in the old days, too much attention was paid to the crime, and very little to the criminal. It is also true that criminals are not generally ordinary human beings. They are often mentally diseased abnormal human beings; but, if all murderers are considered as innocent and given a lenient treatment, is it not possible that even ordinary sane people might be tempted to commit that crime, in view of the lenient attitude of law towards crime? Thus, in course of time, this theory would crumble down. The theory may be effective in the case of very young and the completely insane offenders, but in other cases, some deterrent element in the punishment must be present.

Thus, the author feels that in spite of the esoteric nature of sentencing and the existential questions of justice, the Supreme Court of India has developed and set sound principles which are now building blocks of the Indian Jurisprudence and its approach to practical Penology.

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