

A Reformative approach towards Indian Criminal Justice

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Abstract: This paper makes an attempt to highlight a reformative approach towards Indian Criminal Justice. India is a versatile state with a plenitude of religions, abundances of languages and the ever changing taste and ideas of the denizens. That plethora of ideas and taste may result into conflicts between the masses and further these conflicts can result into crime like situations. Law and crime are contemporary. They both go side by side. Just as the pesticides are used to treat the pest in the same way the law is used to treat the crime. Crime is not a new thing. It existed since the inception of the mankind. The only difference between then and now is the tentacles of crime that has now spread like a hell fire and making the law a weedy subject.

KEY WORDS: Crime, Justice, Law, punishment.

I. INTRODUCTION

Law, say the gardeners, is the sun,
Law is the one
All gardeners obey
To-morrow, yesterday, to-day.

Yet law-abiding scholars write:
Law is neither wrong nor right,
Law is only crimes
Punished by places and by times,
Law is the clothes men wear
Anytime, anywhere,
Law is Good morning and Good night.

Others say, Law is our Fate;
Others say, Law is our State;
Others say, others say
Law is no more,
Law has gone away.

The beautiful lines summed up by the W.H Auden explicitly show the relationship of law and society from the different viewpoints. Law is vast term and cannot be defined with a specific meaning and definition. Till now our lawyers and researchers wasn't able to give a specific

definition of “reasonableness in law”, I am not pointing towards their inefficiency but the sole reason for that is it can’t be given any specific meaning. If the reasonableness is not defined then put aside the thing that anyone can define the law with any specific meaning. Law is like an Air, present everywhere but can’t be seen or felt. Just as the Air adapts itself to every environment, similarly law shrinks and extends itself with every facts and circumstances. From a barren land to evergreen Sundarbans, from the needle in our house to bridges of the nation, from the water tank in our home to Oceans, everything is being controlled by the law. It can’t be seen, it can’t be felt but still each and everything we saw is governed by the law. Law doesn’t only control the materialistic things, it also control our lifestyle, our way of thinking, how we have to dress, how we have to drive, where to spend, how to spend, what to eat, where to sleep and recently law has engulfed our epiglottis also by putting a control on “What To Speak”.

II. Law and Crime: An ancient approach

Even though the law is controlling every sphere of our life but still it has some loopholes that makes space for the crime. Law and crimes has great relationship. The primary objective of the earlier law was to stop and put a check on the criminal activities going in the day to day life. The oldest law that is still surviving is the Law of Ur Nammu dating 2095 BC, few noted laws dating back are Code of Hammurabi, code of Urukagina. The intention behind making these laws was to make the fear in person’s mind so that he will think before making any criminal attempt and to make a strict check on these activities. The laws are arranged in casuistic form of IF (crime) THEN (punishment)—a pattern followed in nearly all later codes. For the oldest extant law-code known to history, it is considered remarkably advanced, because it institutes fines of monetary compensation for bodily damage, as opposed to the later *lex talionis* (‘eye for an eye’) principle of Babylonian law; however, murder, robbery, adultery and rape were capital offenses.¹

Later on the differentiation was made on civil and criminal acts. The cases of cheatings and contract related frauds started to increase and a law was required which is much more squidgy than the criminal law and also focuses on the monetary aspects and a less serious punishments. As it is correctly said that necessity is the mother of invention, the same necessities to change the law was required as the advancement of society begins. Later more codified and strict law came. The trace of that can be discovered from the invasion of the William the Conqueror, a norman, who invaded the England and make the jury system there

so as to solve the dispute both criminal and civil. Under the jury system, a royal minister or justice, who was usually a clergyman, would go out into the country to determine the wealth of the manorial estates for the purpose of taxation. The minister summoned a group of twelve free men together and asked them to testify under oath about the value of each estate. This assembly of free men was called a jury. Eventually the jury also became the body responsible for finding facts and issuing verdicts in civil and criminal cases. While the Continental nations continued to follow the inquisitorial method of justice, the English gradually developed an adversarial system. Under the adversarial process the parties to a dispute argued their cases in front of a judge and a jury of their peers. During the early centuries of the jury system the judge and jury were actively involved in looking for evidence. The jury could even ask questions of the parties and witnesses in a trial. Gradually, however, the judge and jury became more independent and left trial strategy and the location of evidence to the parties and their lawyers. The judge took on the role of an umpire who decided questions of law. The jury became primarily responsible for deciding factual questions. In the twelfth century Henry II expanded the use of the jury to identify and indict persons suspected of committing criminal acts. The king required these “grand juries,” which were comprised of several members of the community, to report every case of robbery, murder, and arson that had occurred since their last meeting with the circuit justice.ⁱⁱ

III. Law and Crime : Medieval View

The law of king was prevailed, no supremacy than the king. The supreme power vests with the king and whatever the kings says was the absolute decision, nobody was allowed to criticize the stand taken by the king or the ruler. Magna Carta was the rebel against the kingship law. Magna Carta is a charter agreed by King John of England at Runnymede on 15 June 1215. It was drafted to make peace between the unpopular King and a group of rebel barons, it promised the protection of church rights, protection for the barons from illegal imprisonment, access to swift justice, and limitations on feudal payments to the Crown, to be implemented through a council of 25 baronsⁱⁱⁱ. The Magna Carta implied that there was a law higher than that of the king's will and that the nobility had a legal right to force the king to abide by the law of the nation. The minimal concept of fundamental right was also enshrined in the Article 39 of the charter which states that, the state cannot take away an individual's property or freedom without a fair and impartial hearing. In other words it can be said that Magna Carta was the first law to give the foundation concept of freedom and liberty and constitutional mechanism of government working.

Doesn't matter how much advancement is there in society and law, the basic laws of criminal law never changed. From Ur Nammu to Magna Carta, the basic of criminal punishment was somehow same. The principle was *lex talionis* which means eye for eye, tooth for tooth, limb for limb was the penalty for assault. A sort of symbolic retaliation was the punishment for the offender, seen in cutting off the hand that struck a father or stole a trust; in cutting off the breast of a wet nurse who switched the child entrusted to her for another; in the loss of the tongue that denied father or mother, in the loss of the eye that pried into forbidden secrets. The loss of the surgeon's hand that caused loss of life or limb, or the brander's hand that obliterated a slave's identification mark, are very similar. The slave who struck a freeman or denied his master lost an ear, the organ of hearing and symbol of obedience. A person who brought another into danger of death by false accusation was punished by death. A perjurer was punished by the same penalty the perjurer sought to bring upon another.^{iv}The death penalty was freely rendered for theft and other crimes in this section of the Code.

IV. Law and Crime: Modern scenario

Criminal Law of India is a replica of colonial times. It is hostile to the poor and the weaker sections of society. The law still serves and protects the needs of the haves and ignores the have-nots. Such biasness has resulted in rich people escaping law and the jail is more often full of the unprivileged class of society. When we think about prisons the image that comes to our mind is that of hard core criminals who were imprisoned for committing crimes. But in actual fact 64.7% of prisoners in Indian jails are undertrials who may or may not be punished. Thousands of them, arrested on suspicion of committing petty crimes, languish in jails for a much longer period than the maximum punishment under the law for the crime which they have committed. The presence of higher number of undertrials in the prison results in their over-crowding, which in turn causes many socio economic problems in the society.^v

The prison system as it operates today in our country is a legacy of the British rule. It was an ingenious creation of the colonial rulers Over our indigenous penal system with the prime motive of making imprisonment "a terror to wrong doers". Nevertheless it was a great leap in the history of our penal reforms as it facilitated the abolition of our old fashion system of barbarous punishments and substitution of imprisonment as the chief form of punishment for crimes.

In 1784 the British Parliament empowered the East India Company to rule India and since then some attempts were made to introduce reforms in the administration of Law and Justice.

At that time there were 143 civil jails, 75 criminal jails and 68 mixed jails.^{vi} In fact these jails were an extension Mughal rule which were managed by the personnel of the East India Company in their efforts to maintain peace and establish their trade.

In 1919 the British Government appointed a Joint Commission of officials to investigate the whole subject of jail management and to suggest improvement. The commission recommended the establishment of separate institutions like Borstal School for juvenile delinquents. The under trials were to be kept separate from the convicted and the adult convicts were to be classified as habitual and casuals.^{vii} The committee report also took serious views on transportation of convicts to Andaman Islands and recommended for the discontinuation of the practice. Solitary confinement was abolished. All convicts below 29 years of age were to be cared under adult education programmes and libraries were to be established in all Jails. Quality of food to be improved and prisoners were to be provided with two sets of clothing. The commission underlined the idea of reform of inmates as ultimate objective of imprisonment and rehabilitation of prisoners as social necessity.^{viii}

The most recent and the most humane of all theories is based on the principle of reforming the legal offenders through individual treatment. This theory aims at rehabilitating the offender to the norms of the society i.e. into law-abiding member. It is based on the humanistic principle that even if an offender commits a crime, he does not cease to be a human being. He may have committed a crime under circumstances which might never occur again. Therefore an effort should be made to reform him during the period of his incarceration.

The judge must look at the several aspects of life of the offender before granting the punishment, his past, environment, circumstances and his education must be looked into. Sometimes it is the circumstances behind the crime but not the real intention.

In *Musa Khan v. State of Maharashtra*^{ix}, the Supreme Court observed that this Act is a piece of social legislation which is meant to reform juvenile offenders with a view to prevent them from becoming hardened criminals by providing an educative and reformatory treatment to them by the government.

This theory condemns all kinds of corporal punishments. These aim at transforming the law-offenders in such a way that the inmates of the peno-correctional institutions can lead a life like a normal citizen. These prisons or correctional homes as they are termed humanly treat

the inmates and release them as soon as they feel that they are fit to mix up with the other members of the community. The reformation generally takes place either through probation or parole as measures for reforming criminals. It looks at the seclusion of the criminals from the society as an attempt to reform them and to prevent the person from social ostracism.^x

Narotam Singh v. State of Punjab,^{xi} the Supreme Court has taken the following view“
Reformative approach to punishment should be the object of criminal law, in order to promote rehabilitation without offending community conscience and to secure social justice.”

V. Statutory provisions where the essence of Reformatory approach can be found

- **Section 82 of the Indian Penal code, 1860:** This section confers immunity to the child below 7 years of age from the criminal liability but a child who is more than 7 years but below 12 years of age the immunity shall extend if he has not attained sufficient degree of maturity of understanding to judge the nature & consequences of his act.
- **Section 6 of the Probation of Offenders Act, 1958:** If a person under 21 years age if found guilty of having committed an offence punishable with imprisonment shall not be sentenced to undergo the same, Court can release him on probation of good conduct.
- **Section 27 of the Prisons Act, 1894:** It makes the provision for separate confinement of adult criminals, young offenders & female prisoners. It aims to prevent contamination of juveniles & further to safeguard exploitation by other offenders.
- **Reformatory school System:** In 1897 the Reformatory Schools Act was enacted empowering the State Government to establish Reformatory Schools. Section 399 of Cr.P.C 1898 made the provision of reformatory school for that area where the Reformatory Schools Act was not applicable. Generally these schools are meant for “Youthful Offenders”.

VI. Conclusion

It is no doubt that the law is somehow bias, but it is the ultimate source of justice. No matter what, it had played its role and is still playing it, but the thing that had to be noted is that why

it is not able to stop the crime till now or why there is no decline in percentage of criminals. The laws are strict, the society's mindset is good, the environment is safe, physiological needs are being fulfilled, then where is the lacuna? I think it is the approach towards the criminal that needs to be changed, rather being giving the deterrent penalties, and making them realise that you have committed a crime, is not the only solution. A reformative approach should be followed and steps should be taken for the transformation of the criminal into a soft hearted human.

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^v Rayess Rasool, Criminal system of India,

^{vi} JG Roy, Prisons and society, p.8

^{vii} Prisons Act, 1870, Section 30.

^{viii} Report of the Indian Jail Committee, 1919, Para, 08, 101, 102, 121, 140.

^{ix} AIR 1976 SC 2566

^x Shaswata Dutta, Theories of Punishment- A Socio-Legal View.

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