

THEORIES OF PUNISHMENT: DETERRENT AND REFORMATIVE THEORY

The immediate consequence that follows a criminal act is known as punishment. Thus, punishment is defined as suffering, loss, pain, or any penalty that is inflicted on a person for a crime. Whenever there is an offence, the offender is punished. The punishments in a country depend and are influenced by the kind of people living in that country. The punishments are backed up with reasoning or justification and the theories of punishment are justification for it.

There are four theories of Punishment, which are as follows;

1. Deterrent Theory
2. Retributive theory
3. Preventive theory
4. Reformative theory

Deterrent theory

According to this theory, punishment is the end, that is there is no other way to prevent the offender from doing acts and further providing injury to the society, also prevents others from committing a similar offence. Capital punishment fulfils all the purposes of this theory. This theory implies that punishment awarded is to stop the people from committing an offence.

Retributive theory

This theory centres on the wrongdoing itself as the explanation behind monumental discipline. As per the retributive theory, an offender should pay for the offence committed or it can be said that the response to an offence should be in proportion to the act committed by an offender. This theory gives importance to moral satisfaction which is obtained from the punishment.

Preventive theory

The preventive theory is established for the prevention from the repetition of wrongdoing by stopping the guilty party through measures, for example, detainment, relinquishment, passing



discipline, and suspension of the permit. In their view, it is the sureness of law and its seriousness, which affects guilty parties. The advancement of the establishment of jail is a result of the preventive theory of punishment.

Reformative theory

As per the reformative theory, the goal of discipline should be transformed by the wrongdoer. This isn't disciplined for all intents and purposes but instead a rehabilitative procedure. In this way, this procedure helps in making a criminal a productive member of society however much as could reasonably be expected. Besides, it makes the resident a significant resident and an upstanding straight man.

This article mainly focuses upon the status of deterrent theory and capital punishment and application of Reformative theory on juvenile offenders

Deterrent theory and capital Punishment

The Deterrent theory was founded by Bentham. An act that takes away the ability to do or committing an offence is known as *incapacitation*, the deterrent theory is in the form of a remedy operated by the fear, it should be the objective of the punishment. According to Bentham, an offence which is already been committed is the act of past and this should be used as an opportunity to punish the offender in such a way that the future offences can be prevented. As in people will get to know and then they will pull themselves back from not doing such things. Deterrence is applied to send a message to society. As the higher number of offenders are caught and punished, the credibility of sanction increases. What the deterrent theory tries to communicate is that crime doesn't pay, honesty is the best policy.

It is temporary relief as far as the offender in the prison when imprisonment is provided in the deterrent factor. When the offender is in the prison the motive of crime and reasoning behind why he does such act, can't be destructed by the factor of fear. Ironical results can be produced from sanctions like pain. The most effective and useful deterrent punishment is a death sentence. When

imprisonment is a death sentenced to an offender not only has the deterrent value but also has reformative value. Criticism against this theory is, that it had failed to reduce the crime. Basically, according to this theory, only that kind of punishment should be awarded that can create deterrence and capital punishment satisfies the purpose of creating deterrence.

Capital punishment is also known as the death penalty, execution of an offender sentenced to death after conviction by a court of law for a criminal offence. There has been a steady decrease in the number of offences for which the penalty is death. At present-day death penalty has been reserved only for some offences, but in a country like Norway, Sweden, Denmark, Holland, Finland, Belgium, Cantons of Switzerland, and some of the states of American Union, the death penalty has been altogether abolished. In India, the courts are handing out capital punishment for murders involving sexual offences, like in the case of the Delhi gang-rape case “*the Nirbhaya case.*”

The death penalty has a greater deterrent influence on potential criminals than any other kind of punishment. The death penalty is one of the most effective preventive punishments as the most dangerous human being of society is permanently eliminated from society.

In the case of *Bachan Singh v State of Punjab*¹, the Supreme Court held by the majority of 4:1 that the provision of death sentence is an alternative punishment for the murder under section 302 of the Indian Penal Code, 1860 is not unreasonable and is in the public interest. But in some cases, justice Bhagwati has given dissenting opinion. He pointed toward the international trend for the abolishment of capital punishment. Right to life and personal liberty for all person as guaranteed under Article 21 of the Indian Constitution, the article states that,

“no person shall be deprived of his life or personal liberty except according to the procedure established by law”.

It has been lawfully construed to mean that there is a procedure or method, which is just fair and valid and reasonable, and then the state by framing a law can deprive a person of his life. While the union has consistently maintained and kept the death penalty in the statute books to act as a deterrent, and for those who are a threat to society, the Supreme Court has affirmed the constitutional validity of capital punishment in “rarest of rare” cases.

¹ *Bachan Singh v State of Punjab*, AIR 1980 S C 898

In *Jagmohan Singh v State of Uttar Pradesh* (1973)², followed by *Rajendra Prasad v State of Uttar Pradesh*³ (1979), and finally in *Bachan Singh v State of Punjab* (1980)⁴, the Supreme Court confirmed and protected the constitutional validity of the death penalty. When the death penalty is awarded to a convict by the law and the procedure of granting the convict the capital punishment is fair and valid and reasonable. And in the rarest of the rare case, the court has to mention the special reason for doing so (the reasoning behind it).

The International Covenant on Civil and Political Rights ('ICCPR') is one of the major documents while discussing the imposition of the death penalty in international human rights law. The ICCPR does not abolish capital punishment, but Article 6 of ICCPR contains provisions regarding the right to life and also provides important safeguards to be followed by signatories who retain the death penalty or capital punishment. The basic principle of the criminal justice system builds up on some of the principles of natural justice. Offenders consider as innocent until proved convicted. Another alternative with ICCPR, aiming at the abolition of capital punishment, is the treaty directly concerned with abolishing capital punishment, welcoming signatures from all countries in the world. In 1991 it came into force, and it has 81 states parties and 3 signatories. Also, for pushing the abolition of the death penalty in countries, the law of extradition has played an important role. Several abolitionist countries either require assurances that retentions-extraditing countries don't impose the death penalty or have included such a clause in bilateral extradition treaties.

Reformative theory and Juvenile Justice act

The purpose of punishment according to reformative theory is to reform or change the character of the wrongdoer so that he will desire to do what is right instead of fearing to do what is wrong. The advocates of the reformative theory treat an offence as a disease that requires to be cured. This theory regards crime as a social anomaly and criminal justice as a means of social education. Whenever an offence has committed the reason behind it is because of the influence of the motives upon the character. And maybe prevented either by a change of motives or by a change of

² *Jagmohan Singh v state of Uttar Pradesh*, 1973 AIR 947

³ *Rajendra Prasad v State of Uttar Pradesh*, 1979 AIR 916

⁴ *Bachan Singh v State of Punjab*, AIR 1980 S C 898

character. The pure reformatory methods involve only those kinds of punishments that are submissive to the education and discipline of the criminal. Capital punishment or death sentence in this view is accurate and we must cure our criminals not to kill them. Reformatory theory is based upon the humanistic principle, even if a person commits an offence; he does not cease to be a human being. Thus, an effort should be made to reform the offender during the punishment period.

In the early criminal justice system, there was no distinction between adults and juvenile offenders. Hence, there was no difference in punishment. Over several cases and periods, it was realized that the youngsters between certain ages should be treated differently in the matters of punishment. As they can be easily influenced or tempted by any person and thus, result in any criminal act without any intention to do it.

Illustration: A man 30-year-old, intimidate a minor to add poison in B's food. The minor added poison without any intention to commit a crime. Delinquency is an act or behaviour which is not normal. Juvenile delinquency is the participation by the minor in illegal acts. Most of the countries including India are now tackling the problem of a juvenile on the priority basis by a separate body and juvenile courts.

The Supreme Court in the case of *Musa Khan V State of Maharashtra*⁵ upheld that the objective of any social legislation is to reform the juvenile offenders and also stated that the application of the reformatory system will prevent the juvenile offenders from becoming habitual criminals.

In India, the reformatory approach relates to the Juvenile offender: the immature violators of law who do not understand the gravity of the offence. The Juvenile Justice Act, this act makes special provisions for the protection, care, development, treatment, and rehabilitation of juvenile offenders. This act assumed that the young offenders should not be tried but should be corrected and they shouldn't be punished but treated. The juvenile justice links with rehabilitation and reform of a minor. The act provides that no juvenile offender shall be sentenced to death or imprisonment. According to **Justice Bhagwati & Justice Pathak**, "Juvenile Delinquency" is, by and large, a product of social & economic maladjustment. Even if it is found these delinquents have committed offences, they cannot be allowed to be maltreated. The fundamental rights are shed when they

⁵ Masu Khan v state of Maharashtra, AIR 1976 SC 25566

enter in a jail. The law provides a blanket of protection around juveniles and isolates them from other criminal offenders because the emphasis placed by law is not incarceration but on reformation.

There are Certified Industrial Schools under the provision of the Borstal Schools Act. The English Borstal Law has been adopted in India for reforming criminals. To effectuate this type of punishment, the Probation of Offenders Act was passed in 1958. There are at present several Children Homes, Observation Homes, Borstal Institutions & Reformatories functioning throughout India where adequate educational & vocational training is imparted to young offenders. The States have also established After Care Association & Child Aid Societies for the rehabilitation of juveniles who need care & protection after their release from Homes, Borstal & Reformatories.

The reformatory theory works fruitfully in the cases of reformation of non-habitual offenders. But in some cases, it does not work efficiently as it worked for non-habitual offenders, because a rigid offender cannot be reformed. It is considered that criminals will repeat the same type of offence. That is why instead of trying the reformatory theory approach the offender's criminal mind should be punished. Thus, it can be said that the Reformatory theory will be more effective if it is intended to supplement normal punishment, rather than replace it altogether. The reformatory theory suggests that punishment is only justifiable if it looks to the future and not to the past. Rigid and professional offenders hardly respond positively to reformatory theory because they are incorrigible offenders with whom crime is not so much a bad habit but it is an ineradicable instinct in them. Deterrent punishment is the only alternative for such offenders.

Even on the chances that the criminal offenders are treated as patients, a few of them are incurably bad. If the jails are converted into a comfortable place, there are chances that the prison might turn into a residence for them, and surely for the poor people. The crime rate is ever-increasing even with the application/ utilization of this theory. When there is a pure application of reformatory theory, it will lead to astonishing and inadmissible results, as said by Salmond. Reformatory theory of punishment has very limited applications but in the case of a juvenile can be effective.

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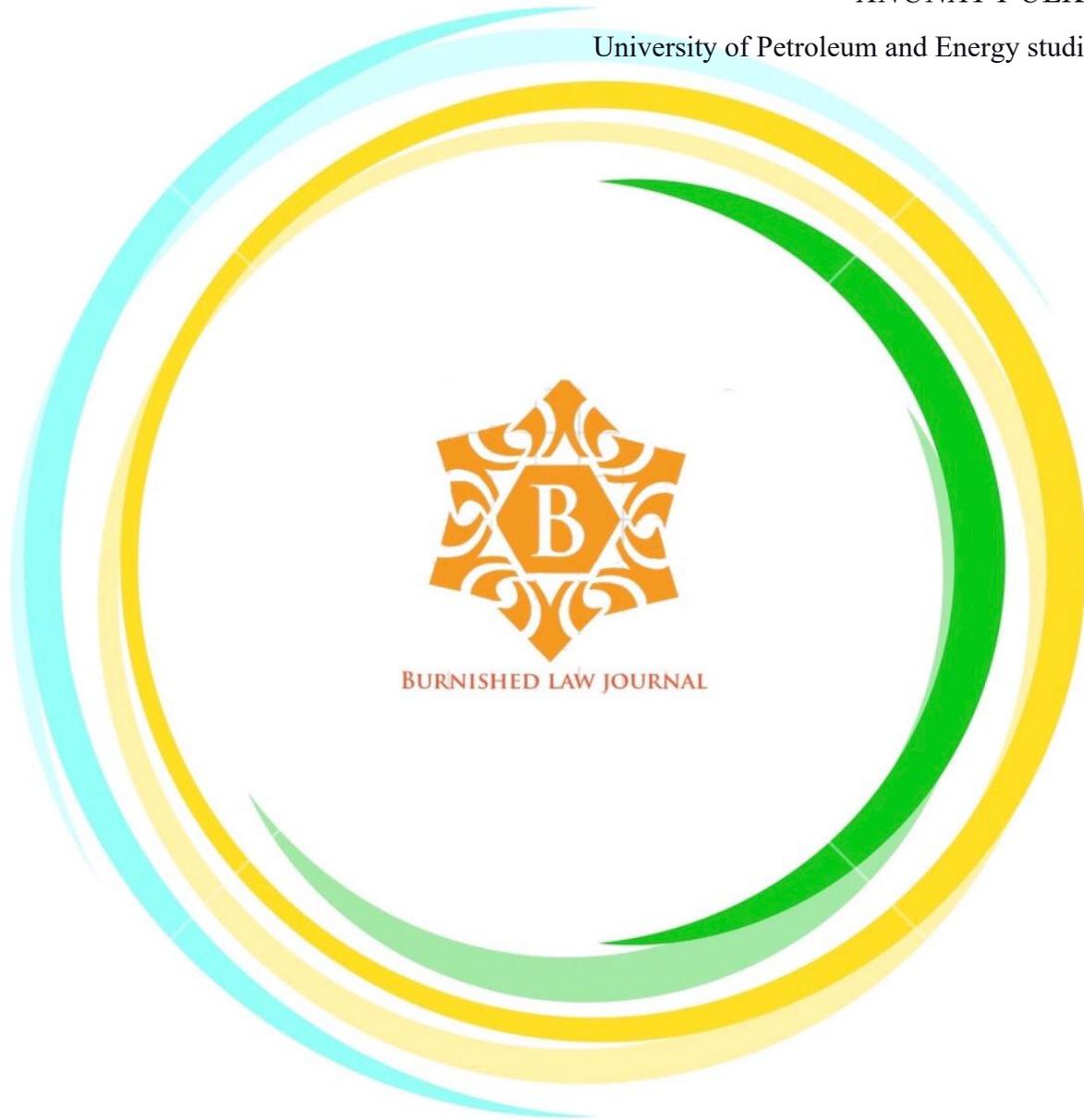
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