

**INDIAN PENAL CODE AND PUNISHMENT
THEORIES**

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Punishment Theories*, 2 (2) LIU & 13 2021**Abstract***“Punishment is not for revenge, but to lessen crime and
reform the criminal”*

-Elizabeth Fry

Fundamental right of a citizen is a top priority of the State. From ancient times, it is the responsibility of the state to guard sole individual in order to reduce crime rates. As an individual it is a total violation of the fundamental right to punish the sole individual with extreme punishment. Therefore, punishment theories were introduced in the ancient times in order to reduce the severe punishment but another aim behind the severe punishment also known as sanction in order to reduce crime rates. In layman language, Punishment means “pain, suffering, loss or confinement” same as the victim suffered. The basic motive behind this paper is to critically evaluate different kinds of theories under the Indian Penal Code. In order to make this paper simple and understandable, the author will break this paper into 5 sects i.e., a) to define crime and different kinds of punishment, b) types of punishment theories with their merits and de-merits’ c) comparative study between punishment theories d) it’s applicability in present era and e) conclusion.

1. Introduction

¹⁸ Shaswata Dutta, Theories of Punishment- A Socio Legal View.

https://www.legalserviceindia.com/articles/pun_theo.htm.

Punishment is an imposition of the undesirable or unpleasant outcomes of a group or an individual. This term is inherent to “criminal justice”. Under the sanction of law, it is the modus operandi to stop the criminal from doing any offences against any person and furthermore, to prevent further crimes. In a society, we see different classes and sects of people. This society is divided into three classes: rich, middle and poor, and different religions. Therefore, there are two sects of people in this society: a) who abide by the laws and b) who openly disregard the law. Down to the lane of history, we have seen that without punishment there is no justice to victims. As the world is getting in reshape, additionally the crime rates are also increasing rapidly. Initially, when the crime is committed, it does not affect the victim or his/her family, it completely affects the large mass of civilization. It is the compliance of the state to defend the people by making stringent laws. Crimes were happening from the ancient period but as the mindset of humans is changing and developing, therefore theories of punishment should also get stringent. Debunking the stringent theories of punishment in the modern world is like losing the hold on criminals¹⁸. According to Manu, “Punishment governs all mankind, punishment alone preserves them, and punishment wakes while their guards are asleep the wise consider the punishment as the perfection of justice”¹⁹.

The definition and sections of punishment have been well-defined from section.53 to 75 under IPC. The prime objective of the Indian Penal Code is to provide security to Indian Citizens and protect the citizens of India by their laws. It is the main criminal code in India. There are many offences made under this law and for the various offences, punishment is also mentioned underneath. In the Indian Penal Code, Punishments have been defined from sec.53 to 75. Brief description of Punishment is defined u/s 53 of the IPC; it is fundamentally defined the nature of punishment that judge

¹⁹ Dr. Ravulapati Madhavai, Theories of Punishment, MCRHRDI.

<https://www.mcrhrdi.gov.in/89fc/week2/L%20-%20Theories%20of%20Punishment.pdf>.

can impose on the accused when the accusation against the accused has been proved beyond doubt²⁰.

Since from a long period of time, the punishment is based on theories whose object ranged from a deterrent, reformatory, preventive, and retributive, whichever theory is used, the main objective is to provide justice and security to citizens²¹. Particularly, as a result, the crime rate is increasing rapidly; therefore, it becomes necessary to punish the offenders. As the punishment generally punishes the guilty minds it has become important on the part of the researcher is that, "What is a crime", to be true: no one can answer this question in particular line because different philosophers have a different meaning. Therefore, to understand the topic, the researcher breaks this paper into three segments: Theories of Punishment, Scope of theories in present and future and in last comparative study between the theories.

2. Crime & Punishment: The Conceptualization

The proposition of crime is very wide and broad. In practical language, not a single person can define the expression "crime" as it is difficult to define this expression in a single statement. Different scholars define this term in various words, many attempts were made to define "crime" in a single statement, but they were unsuccessful to describe "crime" because of today's notions that keeps changing every day. The rate of crime is escalating, so are the methods of crime. According to Blackstone, he expresses crime in two ways: In the first place, he defines crime as: "An act committed or omitted in violation of public law"²². The main objective behind establishing the notion of criminal law is to protect the society and to make India a secular where all the individual lives freely without any fear, though India made a lot of improvement in quite few years for instance:

²⁰ KI VIBHUTE, PSA Pillai's Criminal Law, 310(14th ed. LexisNexis 2021).

²¹ Sagar Shelke & Jyoti Dharam, *Theories of Punishment: Changing trends in Penology*, 8 IJEAT 1299,1300 (2019).

²² KD Gaur, Criminal Law – Cases and Materials, 40(9th ed. LexisNexis 2019).

²³ The Indian Penal Code,1860, §494 .

polygamy²³, dowry²⁴, abortion, adultery²⁵ and untouchability was not a crime few years back but now, it is prohibited. In simple language or in simple terms we can define crime as an act that is baneful to society and an act which is violating the laws.

2.1 Essential Elements of Crime

The most constituent element to commit a crime is a wrongful act and wrongful intention. In a legal language, these terms are defined in a legal maxim as "actus reus" and "mens rea"²⁶. The principle is exemplified in the maxim known as "*actus non facit reum nisi mens sit rea*" means "to commit an act which is illegal in nature, the act which is committed it must be done with a guilty mind"²⁷. To constitute a crime these elements is vital. In a layman language, "*Actus Reus*" means physical conduct of actions committed by the person, to commit a crime there should be a guilty act and suits for damages because without a guilty act and damages there will be no intention to commit a crime, whereas, "*Mens Rea*" is particularly defined as Intention, that the person should have an intention to commit a crime. The commission of crime involves four stages: a) Intention b)Preparation c)Attempt and d) Accomplishment.

2.2 Punishment underneath the Indian Penal Code:

When a citizen commits an offence then he is being punished under the Indian penal code. Under, the IPC the notion "punishment" is demarcated under sec.2 and 3 of this act. Under the referred act, punishment is defined under two types: a) Offences committed within India²⁸ and b) Offences committed beyond but which by law may be tried within,

²⁴ *Ibid*, §304B.

²⁵ See, *Supra*, n(4),§497.

²⁶ See, *Supra*, n(2).

²⁷ Kousini Gupta, Actus Non Facit Reum Nisi Mens Sit Rea, ITJ (June 26,2019). [Actus Non Facit Reum Nisi Mens Sit Rea - Legal Maxim - Law Times Journal](#).

²⁸ See, *Supra*, n(2), §2.

India²⁹. In the Indian Penal Code, 1860, sec.53 specifically deals with different kinds of punishment. The Indian Penal Code prescribes six types of punishment:

- a) *Death Punishment or Capital Punishment*: Under this punishment, the accused is hanged till death.
- b) *Imprisonment for life*: In this type of punishment, the accused remain in prison until the further orders or until he is alive or until pardoned.
- c) *Imprisonment*:
 - c.1) *Rigorous*: In this type of punishment, the accused have to do hard labour such as agriculture, carpentry, drawing water etc. This punishment is dealt u/s 194³⁰ and 449³¹ of the act.
 - c.2) *Simple*: As, the above punishment deals under the hard labour while this punishment deals under simple punishment without any hard labour.
- d) *Forfeiture of property*: This punishment means seizing another property. It is an offence u/s. 126³² and 127. The property forfeited may be immovable and movable.
- e) *Fine*: The court may impose fine as punishment or as an alternative of punishment. If, a person misses the mark to give fine, the court may order for imprisonment.
- f) *Solitary Confinement*: This term means to keep the accused isolated and away from the world. In a case of *Charles v. Superintendent*³³, the SC held that, the solitary confinement punishment is very harsh and isolated punishment for the prisoners from the society. Therefore, it should be punished with fair procedure and only in exceptional cases.

3. Theories of Punishment and its applicability in Indian Penal Code:

²⁹ See, supra n(2), §3.

³⁰ See, *Supra*, n (4), §194, this section deals with fabricating the false evidence which may result into capital offence.

³¹ §.449 of IPC deals under the house – trespass with an evil intention in order to commit an act which result into death.

³² §.126 of IPC deals with committing an attack on the territories of Power at peace with the Government of India.

The role of the state is to punish criminals. Therefore, from the ancient times the state has formed several theories that deals with punishment. The main theories are as follows:

1. Retributive Theory.
2. Deterrent Theory.
3. Incapacitation Theory.
4. Protective or Preventive Theory.
5. Reformatory Theory.
6. Compensatory Theory.
7. Utilitarian Theory.

3.1 Retributive Theory:

This theory is one of the oldest theories from the ancient times. This theory was prevailed during the times of private retribution like blood for blood, tooth for tooth, eye for eye. This theory is also known as “Backward looking approach”, in layman language, this means that accused or a criminal should agonize just same as the victim. In most of theories, the main intention behind this theory is to curb or reduce the rates of crime³⁴.

This theory fortified rights of criminal because after committing a crime, the criminal forfeited his/her rights i.e., right to live. In this theory, the punishment is not more and not less, in fact, retributive theory provide punishment in equal amount of crime that criminal has committed. Not any other punishment philosophy gives so much standing to both actus reus and mens rea, while this theory both elements play an important role under this theory³⁵. Retributivists do not concern about themselves with the consequences but they concern only with the desert (desert refers to some demerit which has caused the accused to commit a crime³⁶) which has

³³ *Charles Sobraj v. The Suptd., Central Jail, Tihar*, 1978 AIR 1514.

³⁴ See, supra n (4).

³⁵ Jon’ F. Meyer, Retributive justice. <https://www.britannica.com/topic/retributive-justice>.

³⁶ Abhishek Mohanty, *Retributive Theory of Punishment: A Critical analysis*, LAWCTOPUS (January 15, 2015),

occurred. This theory provide punishment to offender rather than of social welfare and security. This theory believes that, justice should be provided to victim and victim's family.

In the landmark judgment *Bachan Singh v. State of Punjab*³⁷, where this case was "rare of rarest" held by SC also in this case, the SC stipulated that the retributive theory of punishment is a sense of society's denounce is not an out-of-date context in case of heinous crime³⁸, considering the point of view of Lord Justice Denning it was further stating that punishment as an expression should adequately reflect what society feels, hence the crimes with a contemptable punishment should deserve because the society insists on adequate punishment, it does not matter if the punishment is deterrent or not, it would be a mistake to consider the objects of punishment as preventive, deterrent, or reformative³⁹.

In *Nirbhaya Judgment*, the most serious offence which was held in New Delhi, for the first type in the modern India in this case retributive theory was mentioned in this case. In this judgment, the SC sentenced four out of six fellows involved in the extremely heinous rape crime⁴⁰ which latter on lead to death, much to the delight of the society, as they have committed an extremely gruesome, as well as morally unimaginable crime.

3.2.2 Criticism of Retributive Theory:

This theory did not outline the guidelines or principles which makes it moral than legal⁴¹. It only focuses on the punishing the crimes which is both immoral and illegal. Although most of crimes is serious in nature like theft, rape, murder, etc but there are crimes like traffic offences and jaywalking which is illegal in nature, in these types of offences, the state cannot directly punish the offender, there has to set certain guidelines for some minor offences. The second criticism is that: after facing such a heinous⁴²

<https://www.lawctopus.com/academike/retributive-theory-of-punishment-a-critical-analysis/>.

³⁷ *Bachan Singh v. State of Punjab*, AIR 1980 SC 898.

³⁸ *The Retributive Theory of Punishment: A Brief*, LJ (November 25,2019). <https://lawtimesjournal.in/the-retributive-theory-of-punishment-a-brief/>.

³⁹ *Ibid.*

punishment for not so big crime, the society will develop feeling of vengeance and destructive tendencies⁴³. The third and last criticism is related to state where they have absolute power and ruling, under which people do not have their own rights and own powers.

3.2 Deterrent Theory

"Deter" means to abstain a person from committing a serious offence or wrongful act. Among the five philosophy theories, deterrent theory is the theory which deals with dreadful consequences i.e., inflicting actions in order to curb or remove the crime in the today's era. The main aim behind this theory is to stop committing crime or same crime in future and to make the country free from crime. But in reality, this theory is not applicable because crime rates are increasing rapidly and also there is no punishment for same crime which is known as "Double jeopardy". As per the criminologist Sutherland, he categorised this theory in two sects:

- a) General Deterrence and
- b) Specific Deterrence

3.2.1 General Deterrence:

In above we all know the meaning of "Deterrence" to discourage or to abstain. General Deterrence means to stop public from entering into legal activities by providing them consequence after the offence.

3.2.2 Specific Deterrence:

The logic behind specific deterrence theory is to maintain the fear of repetition of punishment. For example, if a little boy touches the light with the plug on, he will feel slight shock, next time he will first switch off the plug before touching the

⁴⁰ Ranuak Chaturvedi, *Theories of Punishment: a thorough study* (November 19,2020). https://blog.ipleaders.in/theories-of-punishment-a-thorough-study/#Retributive_Theory_of_punishment.

⁴¹ See, supra n (21).

⁴² See, supra n (19).

⁴³ *Ibid.*

light. Hence, the logic behind this theory is very simple, that Pain must be inflicted to get results.

3.2.3 Criticism of Deterrent Theory

The main criticism of deterrent theory is that this theory thinks that Human beings are rationale actors, this theory contemplates that after punishing to human beings for their crime, they do not commit any further crime but they don't know the human mind, severe punishment never change the mind of human beings. Take an example of Nirbhaya rape case, though the court give the punishment to the accused after 7 years but after the capital punishment, another rape case happened which was "Hathras Rape Case", this shows the criticism of Deterrent Theory. In the case of Phul Singh v. State of Haryana⁴⁴, the SC observed, "the impeaching company of convicts and others for long may be counterproductive and in perspective, we intermingling deterrence with correction and diminish the sentence to rigorous imprisonment for two years"⁴⁵.

3.3) Incapacitation Theory.

The term "Incapacitation" means to restrict an individual's freedom that they have normally in the society.

The purpose of this theory is to stop committing crime in future. The word "Incapacitation" means to "prevent the offence by punishing, so that future generation will be in fear to commit a crime"⁴⁶. This will happen by removing that person permanently or by another method. The method that applied in India is "Capital Punishment" which means "hanged till death" and "life imprisonment". The main objective behind the Incapacitation theory is to reduce the crime rates. The origin of this theory was originated in Britain in the year 18th and 19th century. According to the

study conducted by University of California, it has been confirmed that after incorporation of this theory, the crime rates was reduced by 20%⁴⁷. Compare to other theories like retributive, compensatory theory etc, they laid down stringent application to put them behind which may result into increase of population in prisons. From the very commencement of this theory, the main objective behind this theory is to primary remove the offenders from the society.

3.4) Protective or Preventive theory:

The term "Preventive" itself says a lot of things, in modest term it means "to stop committing any crime again and again" and this theory is also known as "Protective" means to "protect the society from the offenders". According to the scholars, such as Bentham, Austin and Mill, they braced preventive theory of punishment due to humanizing nature⁴⁸. The viewpoint behind this theory is to serves as an effective deterrent and also a successful preventive theory depends on the factors of promptness⁴⁹. According to Paton, "the preventive theory concentrates on the prisoner and seeks to prevent him from offending again in future. The death penalty and exile serve the same purpose"⁵⁰.

Prime objective of this theory is to prevent prospective crimes by disabling criminals. The primary method is to transforming the criminals by permanently or temporary disabling them. The punishment for small offences is only prison for few years or compensation which is temporary disabling them and to permanent disabling them is a life time imprisonment or capital punishment or to chop off the modes for permanently disabling the crimes. To, derivate the offenders is the ultimate remedy and the principle for this theory⁵¹.

3.4.1) Criticism of Preventive theory:

⁴⁴ Aphul Singh v. State of Haryana, 1980.Cri. L.J.8.

⁴⁵ See, supra n (14), at 1299.

⁴⁶ See, supra n (19).

⁴⁷ See, supra n(23).

⁴⁸ Ibid.

⁴⁹ See, supra n (19).

⁵⁰ <https://ccsuniversity.ac.in/bridge-library/pdf/LLM-II-SEM-JURISPRUDENCE-II-L-2002-Lecture-on-Theories-of-punishment.pdf>.

⁵¹ See, supra n(4).

The main criticism of this theory, that is harshen on juvenile or first offenders where the imprisonment is punishment, by putting them in the association of harden criminals.

3.5) Reformative Theory:

Reformative theory is like priests. The idea behind this theory is that no one is born to be criminals, the human mind set depends on an individual who is educated and one who is illiterate. The main purpose of this theory is that there should be no harsh punishment on criminals, in fact they should treat criminals like diseased persons. The purpose of this theory is to reform the offender by eliminating his motive for the crime and to give him second chance to live his life. Therefore, basically theory is a rehabilitative process. This process helps in making the offender person a good citizen as much as possible.

3.5.1) Criticism of Reformative Theory:

In a layman language, people always used to say that, after committing a crime or offence, that person may or may not commit a crime. This theory is totally a dicey situation, it totally depends upon an individual how he thinks and lives. Another criticism is that, if a criminal is sent to prison to transformed into a good citizen, a prison will no longer be a prison but it will convert into a dwelling house.

3.6) Compensatory Theory:

Compensatory theory is another word for compensation. A victim of the crime is one who agonized many losses because of some illegal act or lapse of the accused. The prime objective of the law is to protect the victim and punish the criminals. In this theory, the victims of the crimes can be compensated on mainly two grounds:

- a) An accused who has caused a grievance to a citizen or a group of citizens or where an accused

destructured the property must be compensated for the loss.

- b) The second ground is where the State has failed to provide protection and safety to the victim or victim's family.

In the landmark case of *DK Basu v. State of West Bengal*⁵², the Apex court held that a victim who is under the custodial right has every fundamental right to receive compensation as her Right to Life which is under Article 21 of the Indian Constitution, has been breached by the officer of the State⁵³.

3.7) Utilitarian Theory of Punishment:

The theory of Utilitarian seeks to punish offenders to discourage or “deter” future from wrongdoing⁵⁴. Under the Utilitarian philosophy, laws should maximize the happiness of society. Because crime and punishment are inconsistent with happiness, they should be kept to a minimum. This theory understands that a society with a crime free does not exist. The hypothesis of “Utilitarian” is consequentialist in nature.

4) Applicability of Punishment Theory in Present Era.

In a present era, many judgments take place on the basis of Punishment theory. The most basic theory which is in consideration is “Retributive theory”, “Preventive theory” and “Compensation theory”. In the landmark judgment and most heinous crime i.e., Nirbhaya case, the Supreme Court stated that this case is a retributive theory and Preventive theory, because the crime was heinous and the punishment should be permanent so that, this type of crime won't happen again. But after receiving the permanent punishment to the offenders, the rate of rape keeps on increasing, after Nirbhaya case another rape case happened i.e., Hathras rape case. It is easy and well described written in the punishment theories but somewhere, applicability of punishment theories is lacking something. In reformative theory, it stipulates that

⁵² *DK Basu v. State of West Bengal*, AIR 1997 SC 610.

⁵³ *See, supra* n (25).

⁵⁴ <https://law.jrank.org/pages/9576/Punishment-THEORIES-PUNISHMENT.html>.

crime rate increase because in India people are not educated, well in practical life and thinking, though this must be reason but also it depends on individual's thinking and society, in ancient as well in present, in small towns, gender discrimination is still not over and from the starting the position of men is higher than women, therefore they don't have any enough humanity left.

In some of theories, it is rightly said that the crime rate will be down when the punishment to accused is same as suffering to the victim and in another theory, it is rightly given that, to the accused the punishment should be divided into two categories: temporary and permanent. Therefore, in a present era the applicability of punishment theories still take place but some of the theories are simple to applicable but somewhere in real life it is hard and does not change anything.

5. Concluding my views.

Criminology defines different theories of crime, from time-to-time theories get changed and developed. No theory is sufficient to curb down the rate of crime that is happening on daily basis. In this predicament, the victim gets ignored which should be primary as the offence committed to him/her. These are important principles which should be understand, punishment theories are just a theories and philosophy given by many scholars in order to curb down the crime rates. The criminal justice in a modern time is more simplify and therefore it is kind a way that is molding into two or more theories to meet the end of justice.

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