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An Analysis on the Rationale of Criminal Sanctions

RITESH DAS¹

ABSTRACT

Since the time immemorial, the society has recognized the notion of 'sanction' & punished the offenders, while attempting to defend this tradition on moral and rational grounds and to explain the correlation between sanction and justice. Conventionally, the "deontological theories," "utilitarian theories," or a blend of both had been brought up to defend the imposition of sanction upon the offenders.

This article aims to weigh the victims' interests before imposing the punishment, with the social aims and thereby, opting for a flexible method to prosecute and/or punish the wrongdoers. This article aims to propose a broader notion of victim-oriented justice by outlining the victim-oriented theories of sanctions, being regarded as the ultimate justice. Further, it aims to propose the concept of a blended system of both traditional sanction theory and restitution. This practice will serve as the best possible method to ensure the fundamental aim of the maintaining the social order and will also align to the actual essence of the jurisprudence of punishments.

I. INTRODUCTION

The literal meaning of the term '*sanction*' is a threatened penalty imposed for the disobedience of any law. It has been derived from Roman law. Throughout recent years, the notion of criminal penalties is commonly witnessed as an integral weapon for grappling with vehement violence throughout the transitional justice. This notion has been supported by multiple phenomenons, like giving significance to victims in criminal policy. The establishment of international criminal laws aligning to the phrase of "*fight against impunity*" and the recognition of the notions of human rights are the significant contributor in this regard.²The evolution and progress of criminal sanctions laid down the interpretation of "*right to justice as a right to the punishment of criminals.*"³ The principle of imposing deterrent or retributive

¹ Author is a student at Symbiosis Law School, Hyderabad, India.

² M. Cherif Bassiouni, *The Pursuit Of International Criminal Justice: A World Study On Conflicts, Victimization, And Post-Conflict Justice*, (Intersentia Publishers, 2010)

³ Ezequiel Malarino, *Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies*, 12 INT'L CRIM. L. R. 665 (2012)

sanction as the sole plausible remedy for egregious infringements of civil rights or committing crime, as a method of appealing the victim, poses a significant barrier to the traditional understanding of criminal laws. It destroys the essence of criminal law, “*regarded as a means for societal control, devised to safeguard legal interests for societal harmony.*”⁴ This concept simply allude towards removing the non-exculpatory defences and mitigating factors, which accounts the efficacy of criminal law irrespective of the offender's offence.⁵ It destroys the notion of criminal law by rendering it as “*officium puniendi (obligation of the state) rather than jus puniendi*” (*right of the state*)⁶. Aligning with the words of *Bentham*, “*All punishment is a mischief. If it ought at all to be imposed it ought only to be imposed in so far as it promises to exclude some greater evil*”,⁷ it should only be imposed to serve justice to the victim and to eradicate social evils rather than being a mere obligation.

This concept of criminal sanction as a state obligation fades the rights of the victims against the repressive apparatus of the state. The dilemma is whether criminal law would ultimately accomplish its objectives if criminal sanctions are viewed as the obligation of the State and the right of the accused. This aspect needs to be assessed from the frame of widest transitional justice. The demand for the retributive justice can diminish the spectacle of the other desires in picture. It may escalate the ultimate exasperation of the goals of transitional justice comprising of *reconciliation, restoration of the societal framework etc.* The fact of varying needs of the victim, apart from the imposition of punitive sanctions is masked by the notion, jurisprudence, and purposes of criminal sanctions.

II. DISCUSSION

The term *sanction* has been well-defined by *John Finnis* as “*punishment because they are required in reason to avoid injustice, to maintain a rational order of proportionate equality, or fairness, as between all members of the society.*”⁸ The main question here is whether the victim of injustice wants the imposition of criminal sanction, as mentioned in the framework of the criminal justice system, on the offender as the final reward of his suffering. Aligning with *locke*'s notions of punishment, there must be 2 grounds for sanctions: protection for society and restitution. Rather than completely upholding the retributive theory *Locke* has acknowledged restitution as a key element. *Hobbes* also supported the theory of restitution. According to him, the punishment must benefit the victim or the society, it's just not be imposed

⁴ M. Cherif, *supra note 2*.

⁵ Michael Clerk, *The Sanctions of the Criminal Law*, 97 OXFORD J.25 (1997)

⁶ Alex Tuckness, *Retribution and Restitution in Locke's Theory of Punishment*, 72 THE J.POL.720 (2010)

⁷ Jeremy Bentham, *An Introduction to The Principles of Morals And Legislation* (Oxford: Clarendon Press, 1907)

⁸ John Finnis, *Natural Law and Natural Right* (2nd Ed, Oxford University Press, 2011)

for the sake of giving a punishment. They emphasise more on achieving a future good rather than focusing on past wrongs and hence he condemned the imposition of punishments on the basis of severity of crime. So it is quite debatable whether the imposition of punishment service as an ultimatum of justice to the victim although these punishment theories are evolved over a period of time and their efficacy has been proven in various cases but still there are certain instances that are beyond the ambit of sanctions calling for broader interpretation of the term 'justice of the victims'. Let us outline some of the victim-oriented theories which are confined to the ambit of sanctions.

III. VICTIM-ORIENTED THEORIES OF SANCTIONS

(i) Crime calls for justice by the way of sanctions

This retribution theory of punishment align to the Kant's notion of criminal sanction—*“the notion of punishment as an imperative, or obligation (of society, of the state), as well as the frequent appeal to justice as a foundation, the demand for talionic punishment—irrespective of political and criminal considerations, and of the possible absence of preventive needs—and the requirement of the full execution of the sentence imposed.”*⁹ In this context, the theories which advocate the responsibility of the state to inflict punishment and the right of the victims to punishment have been identified as retributionists.

But it should be remembered that both sects vary greatly. The classical retribution philosophy centres on the perpetrator and his or her deserving punishment, therefore revolving around the past action. Alternatively, the victim-oriented philosophy emphasizes the present scenario of the victims and their contentment and relief. According to the critics, the idea of retribution is evil and its justification is irrational as one evil can't overshadow or balance another.

(ii) Sanction – The right of the victim engendered as the repercussion of the crime

Many scholars defend the right of the victim to persecute the perpetrator by opting the principle of vengeance.¹⁰ It is contended that abstaining from private justice and handing over to the state, the domination on punishment implies that the state has an obligation to exert it. This statement entails reinforcing a sort of *“natural right of self-protection and punishment,”* whose existence is questionable in nature.¹¹ More than a century after unification, State sanctions can no further be seen as an abstract action by the victim; rather, it is the product of the will of the

⁹ Elena, *Supra note 3*.

¹⁰ “Adil A Haque, *Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law*, 9 BUFFALO CRIM. L. R. 273 (2005)

¹¹ Michael, *supra note 4*

democratic lawmaker. The key concern is that the evidence from past development and with respect to the present context, from retaliation to punishment does not justify why and for what one is punished. The above claim calls for investigation of the purposes of the ancient imposition of vengeance, for ascertaining whether this would aid in revealing the actual purposes of punishment in the contemporary period.

(iii) Sanction- A tool for rendering relief to the victim

Some scholars have stated that the punishment is meant to provide the victim with relief because it ensures the victim to feel ‘better.’¹² The punishment of the perpetrator often gives a tacit assurance regarding its non-recurrence, thus shielding the victim's sense of safety. Finally, it communicates social sympathies and empathy and fosters the consequent reintegration of the victim.

In fact, based on a number of situations, the implications of the offence – and the court prosecution – vary with every victim. In comparison, many of the desirable outcomes due to sanctions by those who endorse these ideas can be accomplished by ways other than the infliction of evil.¹³ Additionally, if someone is showing sympathy or solidarity towards a person, their actions must be addressed towards that particular person rather than someone else. Punishment or the infliction of an evil, goes away from solidarity and cannot be justified by the above statement. In addition, this concept remains accompanied with additional problems: if the only object of punishment is to give relief to the victim, then the viciousness must only be constructed depending on the ‘needs of the victim’ which vary for each particular victim. And if such concept is applied, then the principles of ‘Legal Certainty and equality’ will be violated. At end, it cannot be claimed that the right to punishment is exclusively based on its potential beneficial outcomes for victims.

(iv) Sanction- A tool for eliminating the harm inflicted to the victim

Many scholars claim that a criminal offence often affects the victim, which is different from the actual damage covered under the legal interests. By enforcing a penal sanction on the perpetrator, this damage will be removed. It is also argued that criminal justice fulfils the task of ending the disturbance in social life endured by victims. Moreover, it can also diminish the faith of law if no sanction has been enforced.¹⁴ These argumentations typically display the same flaws that were previously identified by theories mentioned in the above paragraph,

¹² WHITLEY KAUFMAN, *HONOR AND REVENGE: A THEORY OF PUNISHMENT* (Springer 2013)”

¹³ Alex, *supra note 6* at 727

¹⁴“George P Fletcher, *The Place of Victims in the Theory of Retribution*, Vol. 3, BUFFALO CRIM. L. R., p. 51 (1999)”

namely that there is no fair justification of the necessity for equalising the victim and the perpetrator in the evil endured. Moreover, the absence of evidence regarding infliction of evil on the perpetrator results in expressing concern to the victims' sufferings. It must be pondered upon that rather than taking reparatory initiatives, how inflicting an evil to another alleviates the suffering or the miseries of the victim.

IV. PROPOSED 'ALTERNATIVE APPROACHES'

The following are the proposed alternative approaches in light of the above arguments and theories that focus beyond vengeance -

(i) Redirection of these theories towards consequentialism

The capacity of sanctions to benefit the victims cannot be denied in my view. The implications consisted largely to illustrate the inequality they experienced and ensuring its non-repetition; further reinforcing their demand for justice, repairing their faith in the laws and community and fostering their non-desocialization. We must understand that our perception of justice, as humans, drives us to demand the wrongdoers to be punished. We must not overlook, that these thoughts correspond to the calculated reciprocity process which exists in every organism with social behaviour. Though, the sanctions do fulfil the "*needs for reciprocity*" intrinsic in the framework of social relations, this purpose is eventually instrumental. Hence, the victims' satisfaction can't be inferred and placed as an end in itself or higher to the standard preventive means, nor can it surpass the underlying rationales of criminal law i.e "*to protect legal interests and the social order.*"¹⁵

Finally, it can be said that a strategy adopted mustn't ignore the former offences by satisfying the interests in order to strengthen a lasting peace. The state via its stranglehold on violence, the state must abate "*the reasonable and lawful desires for reciprocity*" of the victims and the society accept it to certain reasonable boundaries. It must try to satisfy these desire by alternative methods and balance them against other social objectives and other victims' lawful interests for ensuring the eventual aim of maintaining social order.

(ii) Strengthening the notion of restitution

In the light of victim's right to justice, a broader notion of justice should be drawn; which shouldn't be limited to the sanctions; rather, encompassing the notion of '*restorative justice.*'

¹⁶Restorative justice involves figuring restitution for the damage incurred by the crime to the

¹⁵ Mike, *supra note 17*

¹⁶JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* (Oxford University Press 2002)

victim rather than imposing sanctions. It also seeks to overcoming of a multitude of flaws of the conventional justice system.¹⁷

Furthermore, “*restorative justice mechanisms contribute—and do so more effectively than conventional criminal justice—to the acknowledgement of responsibility by the offender, to his or her re-socialisation and to the restoration of interpersonal relations*”¹⁸. Lastly, some authors have also noted, “*restorative justice not only has an impact at the interpersonal level, but may also have broader transformative effects on institutions and community as a whole*”¹⁹. In addition, restorative justice method leads to the acknowledgment of the perpetrator's guilt, re-socialization and restoring community ties acts efficiently than traditional criminal justice frameworks. Additionally, scholars have pointed out that restorative justice will have more transforming impacts on the systems and the whole society as well. The social psychologists have also disputed the argument of ‘*criminal sanctions*’, so-called epitome of preserving the justice. It has been contended that even victims have admitted in certain scenarios that their quest for justice is satisfied via apology or restoration from the perpetrator and the acceptance of the injustice committed rather than unilaterally imposing sanctions²⁰. Moreover, the legal principles impaired by the criminality are reaffirmed by such instruments. The scenario of seeking forgiveness implies that the perpetrator recognizes these ideals and also the victims' dignity has been acknowledged and restored. It can be concluded by saying that the imposition sanctions sometimes may act as a counter-justice for the victims.

It must be noted that restorative justice isn't proposed as a substitute of the conventional criminal justice system because there are certain brutal crimes like rape, murder etc, for with the quest for sanction is justified. Moreover, the treatment of restitution, being an ultimatum, would cease to distinguish the line between ‘*Tort Law*’ and ‘*Criminal Law*’. Rather, it is proposed as a mechanism complementing the above, allowing the implementation of new aspects for humanising and favouring the realisation of the objectives of criminal justice system.

V. CONCLUSION AND RECOMMENDATION

The notion of the absolute sanctioning of the offenders is an integral part of transitional justice in the contemporary world. It has been interpreted as a tool for rendering satisfaction to the

¹⁷ Marian Liebmann, *Restorative Justice: How It Works* (Jessica Kingsley 2007)

¹⁸ Howard Zehr, *Changing Lenses: A New Focus For Crime And Justice* (Herald Press 1990)

¹⁹ M Kay Harris, *An Expansive, Transformative View of Restorative Justice*, 7 CONTEMP. JUST. R.117 (2004)

²⁰ Michael Wenzel and Tyler Okimoto, *How Acts of Forgiveness Restore a Sense of Justice: Addressing Status/Power and Value Concerns Raised by Transgressions*, 40 EUR. J. SOC. PSYCHOL. 401(2010)

victims or upholding their rights, thereby ensuring peace and social order. With respect to the potential positive impact of criminal sanctions on victims, the study of different theories on criminal sanctions, which could provide the basis for this ideology, revealed that the sanction can rationally be justified because of its preventive effect.

Due to this justification, it is contended that *“theories attempting to justify the need of infliction of an evil on the perpetrator corresponding to the positive results for the victim, are just a shot to shield the victim’s yearning for vengeance.”*²¹

In my opinion, the notion of sanction, being a deterrent and an assurance of non-repetition as well as beneficial for the victim, can’t be ignored totally. It fulfils the demand for justice, maintain faith in the legal system and promote non-desocialization of the victim. Nonetheless, we cannot overlook that this sense of justice is built on the concept of reciprocity, aiming to preserve the person and the community. The ‘*feeling of justice*’ is the product of standardisation of a constructive developmental response (sanctions as a preventive mechanism) and therefore constrains the amount of sanction through the ‘*imposition of proportionality*’ in punishments. As mentioned earlier, this article has aimed to create blend of Restitution along with imposition of sanctions in the extreme cases .Both Locke and Hugo Grotius views are supported which insisted on compensation to the victim (Locke) as well as imposition of sanctions when there is some good in such punishment .

Thus, sanctions must not be generalized and evoked *as an end in itself*, nor should the victim’s right of justice outshine the underlying rationales of criminal law i.e *“to protect legal interests and the social order.”* The state via its stranglehold on violence, the state can abate the reasonable and lawful desires for ‘*reciprocity*’ of the victims and the society accept it to certain reasonable boundaries. *We should remember “Crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions that promote repair, reconciliation, and reassurance.”*²²

The beneficial measures in criminal justice system, involving the imposition of magnanimous sanctions depending on disbandment, confession, recognition and acceptance of the crime and restoration, undeniably encompass relinquishing the ‘*just*’ sanction, which is proportionate to the severity of the crime and the extent of guilt of the offender. However, it conforms with other objectives which are set in aligning to interest of the victims and the society, like

²¹ Cornelius Prittwitz, *The Resurrection of the Victim in Penal Theory*, 3 *BUF. CRIM. L. R.* 109 (1999)

²² HOWARD ZEHR, ‘*A RESTORATIVE LENS*’, IN *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* (Herald Press 1990)

bolstering the swiftness of the sanctions and aiding in discovering the truth, restitution and non-repetition.

- The state should try to render satisfaction to the victims by opting other measures like truth-seeking measures, official and formal apologies, public events recognizing the victim and his sorrow, memorials and other substantial reparations, weighing them with other goals and needs for the best possible approach for meeting the ultimate goal of upholding social order, by protecting the legal interests of the society.
- The emphasis of maintaining the criminal justice system as '*jus puniendi*' and the weapon of state (neither the only available weapon nor the absolute obligation) should be laid down, to accomplish the overarching goal of preserving legitimate interests and thereby maintaining peace and harmony in the society. Moreover, this encourages the enforcement of criminal law only insofar it is essential and beneficial.
- The cost of crime must be raised so that people will think twice before committing a crime. Along with compensation, the perpetrator must be made to pay the cost of his apprehension, trials and legal expenses of the other party. It will also help the victim to get adequate legal aids if the victim isn't financially strong.
- There must be verdict in 3 tiers: guilty not proven guilty not guilty under which if the offender is found guilty then he has to between chat as per the procedure of laws but on the other hand if he's not guilty then the defendant would be compensated by the respective enforcement agencies this cost of compensation is given keeping in mind the inconvenience caused to the victim. And if somehow the charges are not proven then neither party should pay each other.

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