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Evolution of the Process of Punishment in India

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ABSTRACT

Punishment, which in Austin's words is sanction, has been a part of the Indian legal system since a very long time. To be precise, it existed in the times when law was not codified in India. The basic cause for existence, prevalence and evolution of the process of punishment was maintain an order in the society. As a matter of fact, in ancient times, when rules were made by different kings, it was observed that enforcement is not possible without authority. This Article tries to trace the origin of punishment in India, an attempt has also been made to show how the process has constantly evolved and the principles have changed.

I. INTRODUCTION

Man was initially an unsocial being but the time, circumstances and requirements turned man into a social animal. This development led to limitation or restraint of actions as a result of which any unsocial and unrestrained act led to conflict. To settle down these conflicts, rules came into existence but without authority, enforcement was not possible and hence, there was a requirement of authority to enforce the rules.

In the uncivilised world, there was no existence of any rule or criminal law. The only universal rule or law that governed everything was "survival of the fittest". In consonance to the then existing universal law, the victim or the person aggrieved either succumbed to the injuries or over-powered the opponent and the stronger one was the winner. With the birth of the Archaic Criminal law, the person aggrieved or the victim agreed to take compensation. The applicability of this law remained upon and within the parties for long but gradually, the State started taking charge and performing these functions.

As society advanced and inefficacy or vanity of sanguinary conflicts became more and more amalgamated on peaceful pursuits, there grew up multitudinously the sense of responsibility which checked indiscriminate and haphazard revenge giving birth to sanction and punishment and as society fostered human sympathy, the idea that the criminal or the wrong-doer was the concern of the State and not the aggrieved individual only as a result of which, criminals began to be accorded trial and their unbridled and unquenched ferocity was transferred to the arbitrate

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of the chosen authority who exercised the judicial, legislative and electoral powers.²

“punishment governs all mankind, punishment alone preserves them, punishment awakes while their guards are asleep, wise consider punishment as perfection of justice.”³

II. BIRTH OF THE PROCESS OF PUNISHMENT IN INDIA

In India, during the hunting age, man lived in forests and survived on flesh, fruits etc. and the life in the then existing tribal society was governed by customary rules. The Manu laid the germ of criminal jurisprudence in India. It gave a comprehensive code existing of ordinances relating to law and order. It was a digest of the religion, philosophy, customs and practices followed by people. Both law and social creation of the body in India are anchored or deeply embedded in specific religious ideologies and ritual systems that constitute the ultimate legitimizing force for established social order.⁴

III. PUNISHMENT IN THE ANCIENT INDIA

Punishment has been talked about in the ancient legal literature of *Dharmashastra* in which, the technical term used for punishment is *danda*. The term *danda* has been used in the context of criminology and suppression of crimes. The ancient Indian criminology talks about two concepts i.e. *danda* and *prayashchita*. The difference between these two is that in the latter one, the sinner himself acknowledges that he has committed a wrong or performed an act which stands in conflict with morality and the then existing rules, whereas in case of *danda* it is not necessary for the wrong-doer to confess or voluntarily acknowledge his guilt. Accordingly, the judgement that was based on *prayashchita* was known as judgement based on *dharma* and the judgment concluded through evidence was known as a judgment based on *vyavahara*.⁵

In the ancient times, it was the responsibility of the king to punish the law breakers, he was one empowered to do so. It was the responsibility of the king to maintain law and order in his kingdom and punishment was the only way of social control he had in order to protect the law-abiders. According to the ancient literature of *Manu*, the king was the protector and the holder of punishment, and the term used for that was *Danda Chhatra Dhari*.

(A) Forms of punishment in the ancient India

If we look at the forms of punishment that prevailed in the ancient India, it can clearly be

² Gour H.S., The Penal Law of British India 1936, 57 Madras Law Journal 60

³ Translated by Houghton, G.C. 1835, Chapter 7, para 18, p. 189

⁴ Patrick Olivelle, The Journal of Hindu Studies, Volume 4, Issue 1, May 2011, p. 23-41, <https://doi.org/10.1093/jhs/hir011>

⁵ Ibid.

inferred that they were based on the retributive and deterrence theory of punishment only as the punishment used to be very cruel, torturous and barbaric in nature. Since this was the only way of social control, the kind used to keep a check on the number of crimes committed in his kingdom with the help of the then prevailing penal system. Some of the punishment that were prevalent in the ancient times are enlisted below:

a) Capital Punishment: It is considered to be one of the most extreme forms of punishment. In the ancient times, capital punishment i.e. death penalty was executed for small-small crimes. The factor of proportionality in deciding punishment was absent. Through the ages, there has been different methods of execution of capital punishment, such as stoning, pillory, construction into a wall, throwing under an elephant's leg etc. All these methods of execution are very barbaric and were designed to give a very painful death to the convict.

b) Corporeal punishment: It was a punishment where some sort of physical injury or pain was inflicted to the convict in order to deter him and others from doing such offences. Various methods of corporeal punishment are mutilation, branding, flogging, bilboes, imprisonment. Etc. from amongst all these punishment, imprisonment gained the most popularity in India.

In the ancient times, the barbaric methods of punishment lacked, proportionality and were strictly designed for the purpose of deterrence and retribution but with advancement of time, proportionality was introduced in the penal code. The object of punishment was not restricted to retribution and deterrence only. Capital punishment is awarded in the rarest of the rare cases.

IV. PUNISHMENT IN THE MODERN INDIA

Process of punishment has evolved with civilization, they have become less harsh and cruel. Punishment now focuses more on correction rather than to punish. The Indian Penal Code was codified in 1860, during the British rule and it gave the forms of punishment to be used in the modern India. Section 53 of IPC talks about the existing forms of punishment in India, namely, death, imprisonment for life, rigorous imprisonment, simple imprisonment, forfeiture of property, and fine.⁶ With the evolution in the forms of punishment, the process of punishment and the process through which we reach the stage of pronouncing punishment also evolved and became more precise. In the modern India, it is the work of the judiciary to maintain law and order. The process of a criminal trial has been laid down in the Code of Criminal Procedure, 1973. Both the aggrieved and the accused are examined by the Court of Law, every aspect,

⁶ The Indian Penal Code, 1860, §53, (45 of 1860)

every minute detail is liked into by the court and then it arrives to the conclusion of acquittal or conviction. After conviction, comes the question of punishment, on which the court listens to the submissions of the respective lawyers and decides the punishment accordingly.

In the modern days, capital punishment is the most debated form of punishment among the penologists.⁷ Capital punishment is one of the most severe forms of punishment to be given. Under the IPC, it was awarded only in the ‘rarest of the rare cases’ and it is provided only as an alternative form of punishment and not as a mandatory one. Life imprisonment has come up as the best alternative to death sentence.

Besides the above methodology of punishment reigning in Modern India, the court may order the accused to furnish security bond for good behaviour in case of offences which are not profound or serious in nature, the provisions with respect to security bond have been laid down under Section 106 to 110 of Cr. P.C., 1973 and, though it is not a punishment but it may serve a useful purpose to restrain a person from committing a crime and to make him a law abiding citizen.⁸

From the above descriptions, we can conclude that the methodology of punishment in India has changed and developed with time. Now the punishments are less cruel and the severity of punishment depends on the nature of the crime as the object of penology and law-making has shifted to reformation and deterrence

V. CONCLUSION AND A BRIEF INSIGHT OF THEORIES OF PUNISHMENT

It is rightly said that conviction of an accused is not as difficult a part of trial as sentencing of the convict. Various theories of punishment introduced by the penologists are the Retributive Theory which basically is the rule of ‘tit for tat’ i.e. a revenge which is basically public and legally authorized; second is the Deterrent Theory which states that the purpose of punishment is to set up an example/ fear in the society; third is the Preventive Theory which is based on the principle “not to avenge crime but to prevent it”; fourth is the Reformatory theory according to which, the purpose of punishment is reformation of the offender, supporters of reformation seek to prevent crime by providing offenders with the education and treatment necessary to eliminate criminal tendencies, as well as the skills to become productive members of society.⁹ According to the supporters of the reformatory theory, criminal convicts can be reformed into good, law-abiding citizens with the help of proper, competent, educational treatment during the

⁷ *Chapter 3, Punishment of Offences Prevailing in Ancient and Modern India*, p. 10, para 1, https://shodhganga.inflibnet.ac.in/bitstream/10603/218741/7/07_chapter%203.pdf

⁸ *Id.*

⁹ Article on Criminal Law- Encarta Reference Library 2005.

period of their imprisonment.

As we see the different theories, we can infer that the modern Indian approach of social control has shifted from retribution to reformation and rehabilitation. As rightly said, “reformation and not retribution is the sentencing lodestar”.¹⁰

¹⁰ *Saradhakar Sahu v. State of Orissa*, 1985 Cr LJ 1591.