



THEORIES OF PUNISHMENT IN THE ETHICS OF PHILOSOPHY

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Abstract

Theories of Punishment are a controversial and frequently debated topic. It is needless to mention that satisfactory justification and practical application of theories of punishment is one of the most important and complex problems in ethics. But till nowadays this problem remains unresolved although efforts have been going on to have a generally accepted solution to this problem. So it is a time that we must prepare ourselves for the change by changing and improving the understanding of morals value systems in general and the nature of human mind and society in context of the crime, criminal, penalty e.g., to take first step towards an acceptable perspective on these important issues and to take the further steps towards the beginning of a new human civilization. Punishment can be used as a method of reducing the incidence of criminal behavior either by deterring the potential offenders or by preventing them from repeating the offence or by reforming them into law-abiding citizens. Theories of punishment, contain generally policies regarding theories of punishment namely: Retributive (It makes criminals suffer for what they have done wrong), Deterrent (The aim of punishment is to stop people from committing crimes), and Reformative (The object of punishment should be the reform of the offender). The subject has been discussed by a number of philosophers- A. Macdonald, Michel Foucault, I. Ehrlich, Friedrich Nietzsche, I. Kant, A. Posner Richard, C. D. Broad, T. Hobbes, R.M. Bohm, H.L. A. Hart, Hugo Adam Bedu, Jeremy Bentham and many others.

Keyword: *Crime, punishment, deterrent theory, retributive theory, reformative theory*



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Introduction

The kinds of punishment given are surely influenced by the kind of society one lives in. Though during ancient period of history punishment was more severe as fear was taken as the prime instrument in preventing crime. But with change in time and development of human mind the punishment theories have become more tolerant to these criminals. If a society has laws, it must also have punishments for those who break the laws. In the UK, when someone is found guilty of a crime, a judge or magistrate makes a judgment on what their punishment should be. The main aim of punishment is to try to make sure that everyone obeys the law. However, there are different theories about what is the most effective form of punishment and what it should do.

Thus it becomes very important on behalf of the society to punish the offenders. Each society has its own way of social control for which it frames certain laws and also mentions the sanctions with them. These sanctions are nothing but the punishment. The concept of punishment and its practical application and justification during the past half century have shown a marked deviance from efforts to reform and rehabilitate offenders. Our practice of punishment seems to require justification. The three justifications for punishment currently used in our society today are retribution, deterrence and reformation.

Significance of the study

At first, I would like to say that for all human beings it is necessary to know, what is our role or responsibility in this world? Because the criminal engages in the criminal activity himself and thus has to bear the responsibility of his/her own action. But then what does the word responsibility mean in the context of today's world. An equally important is the discussion of our responsibilities in this context. After understanding, what is our responsibility, what is a moral action and the ethical standards of judgment, we can focus our attention to the criminal action. To understand criminal action we need to understand the nature of crime and then we can understand the rationality of punishment. Then only we will be in a position to deal with problem of capital punishment.

All human societies are formed due to the primal human emotion; we do not want to be alone. And whenever two or more persons come together they form certain rules and the collective form of these rules becomes the moral code of a society. These codes are to be upheld and thus we need a formal institution to watch over the society. Breaking of the code becomes a challenge to the institution and reinforcing it whenever there is a move for destabilizing the social order. Such actions have to be restricted and thus we need the law. And as soon as we define the first law, we have defined the first crime and the first criminal.

So, we have to ask ourselves the question that do we really need to punish. Also moralist have a same question to answer when they are asked whether it is right to punish offenders, and if so to what degree the punishment is justified. In ethics we can see that some thinkers doubt the rational foundation of punishment. Many people would say that a natural “sense of justice” demands that punishment should be limited to a fitting amount for the wrong done. Some would go further and say that the same sense of justice demands that evil-doing should be punished. Few moralists accept the view that the adding of pain, which is itself intrinsically bad, to the evil of wrong doing will lessen the total amount of evil in the universe.

Capital punishments in particular where no theory seems to provide a satisfactory justification. Nowadays criminal sociologists and criminal anthropologists believe that punishment should be a natural force to improve the moral of criminal as well as the society, so that the criminal can again come back to the society, and be a part of it. But criminal deserves punishment for cold blooded and well planned crime. Criminal are a danger to a lot of other human beings and refuse to improve their ways as well. Thus we need to reconsider the fact that whether all criminal can be rehabilitated or not. But here we have to consider the nature and seriousness of the offense, age, sex health, socio-economic condition of the offender, extenuating conditions concerning the crime and the criminal and if there was any provocation involved before we can pass the judgement about punishing somebody.

Objective of the Study

In the case of death penalty, the analysis with the problem of death penalty and its relation with crime and its practical application and justification is not new. This analysis has been done by different thinkers in different periods. But till today the problem of practical application of capital punishment continues to persist and is considered as one of the major problems that in the ethics of punishment in the discipline of philosophy seek to resolve. We have different theories on this problem such as reformatory, deterrent and retributive theory. The amount of damage inflicted on the society by the offender must be accounted for (Retributive theory), punishment for sake of moral redemption (Reformatory theory), punishment as deterrent or preventive measure against crime and criminals (Preventive or Deterrent theory). But we can say relatively the retributive theory is perhaps the most satisfactory of the three as it has the other two theories hidden inside it, yet this theory is not absolutely perfect and lacks universal acceptability as there are further difficulties created by this theory. In all these respects, the issue of punishment in general and capital punishment in particular where no theory seems to provide a satisfactory justification. Thus in this thesis

effort will be made to discuss this theory in its details, to get proper understanding of the issues involved and proper interpretation of the major concepts is necessary for resolution of the problems. Attempt will be made to resolve some of the research is the make the theory more acceptable than it is now.

Data and Methodology of the Study

Here I will consult both primary and secondary source of books and journals. And also different articles down loaded from Internet. Original articles and books by leading thinkers on the respective theories will be relied upon. Some secondary sources will be consulted if required when primary sources are not available during research.

So, during my study I will follow the following methods to fulfill the objectives of the study. And also to collect the necessary data.

1. Study of the existing books.
2. Primary and secondary source of books and journals.
3. Internet surfing.
4. Interview of eminent professor of scholars of Philosophy.
5. Visiting the different libraries.

The method adopted for this research work will be analytic method which involves analysis and interpretation of concepts.

Deterrent or Preventive Theory

J. Bentham, as the founder of this theory, states:

"General prevention ought to be the chief end of punishment as its real justification. If we could consider an offence, which has been, committed as an isolated fact, the like of which would never recur, punishment would be useless. It would only be only adding one evil to another. But when we consider that an unpunished crime leaves the path of crime open, not only to the same delinquent but also to all those who may have the same motives and opportunities for entering upon it, we perceive that punishment inflicted on the individual becomes a source of security for all. That punishment which considered in itself appeared base and repugnant to all generous sentiments is elevated to the first rank of benefits when it is regarded not as an act of wrath or vengeance against a guilty or unfortunate individual who has given way to mischievous inclinations, but as an indispensable sacrifice to the common safety."

Bentham's theory was based on a hedonistic conception of man and that man as such would be deterred from crime if punishment were applied swiftly, certainly, and severely. But being aware that punishment is an evil, he says,

If the evil of punishment exceeds the evil of the offence, the punishment will be unprofitable; he will have purchased exemption from one evil at the expense of another.

The basic idea of deterrence is to deter both offenders and others from committing a similar offence. But also in Bentham's theory was the idea that punishment would also provide an opportunity for reform.

This theory holds that social harmony is best served by minimizing the possibility of future harm and likelihood of future transgressions. This rationale is outcome focused in that it seeks some particular future purpose by administering the punishment. This is utilitarianist approach, like Bentham argued that,

“General prevention ought to be the chief end of punishment, as it is its real justification.”

Deterrent theory is one of the best known of utilitarian justifications. It works in the premises where the criminal, like any other citizen, is a rational actor. It works by changing the costs and the benefits of the situation so that the criminal activity becomes an unattractive option. Bentham stated:

“ If the apparent magnitude, or rather value of [the] pain be greater than the apparent magnitude or value of the pleasure or good he expects to be the consequence of the act, he will be absolutely prevented from performing it. ”

Those who support this theory will even support greater punishment for a smaller mischief; they also support capital punishment. To make the punishment exemplary they often go for capital punishment to achieve a grander effect. It depends on the fear to act as a moral stimulant and thus smaller punishments will not suffice.

Here one can say that man is treated as a thing or a means but not the end in him. Here the main object is not to bring a greater good for the criminal, or redemption. Here criminal is a tool to be used for the sake of betterment of others. This is the ultimate subversion of humanity. To use a person, any person for whatever purpose, against his/her will is wrong. Thus all rational beings must be treated as ends not means.

But disagreement is possible on the above issue by saying that the judges, while handing out punishment for lesser offenses do not treat human beings as means. But capital punishments are of a different issue. Lillie believes that the punishment improves the moral character of the criminal himself. Because generally a person refrains from committing the same crime once punished for it. But smaller punishments do not act as effective deterrents, so the supporters of this theory always support greater punishments.

A further argument against the preventive theory is that the concept of exemplary punishment is the weak point of this theory. Here handing severe punishment for lesser offenses goes against normal ethics. Justice depends on balance, equilibrium. So this sort of punishment becomes unjust.

Again the exemplary nature of this theory will also support punishing an innocent person instead of the real criminal. Lillie decides this to be the biggest pitfall of this theory. Here there is no difference between a criminal and an innocent person.

“The real weakness of deterrent theory is that, if the only purpose of punishment is to deter people from the wrong-doing, it does not matter whether the person punished is himself innocent or guilty.”

Lastly, one can say that the fear of punishment cannot change a person from the inside. The criminal desire still remains within humans and it can resurface at any given time if presented with the proper opportunity.

Retributive Theory:

As Kant argues in a famous passage:

“Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else... He must first of all be found to be deserving of punishment before any consideration is given of the utility of this punishment for himself or his fellow citizens. ”

Kant argues that retribution is not just a necessary condition for punishment but also a sufficient one. Punishment is an end in itself. Retribution could also be said to be the 'natural' justification, in the sense that man thinks it quite natural and just that a bad person ought to be punished and a good person rewarded.

The retributive view has a long history. It is found in *lex talionis* of early Roman law, the “eye for the eye” precept in the old testament (and a virtually identical precept in Koran), and many early codes. The concept of punishment as retaliation or revenge is similar to retributive concept in treating punishment as a recompense paid by the criminal. But retribution comes from criminals wrong but retaliation focuses on the impulse of the victim As Mackenzie says –

“The aim of punishment is to allow a man’s deed to return on his head i.e., to make it apparent that the evil consequences of his act are not merely evils to others, but evils in which he is himself involved.”

The amount of damage the criminal causes by his/her actions, the same amount of loss he/she should suffer. This forms the retributive basis of punishment for breaking social and moral laws. This demands a tooth for a tooth and an eye for an eye.

Lillie says that the common reaction of every animal, human or otherwise is to hit back at the offender. But from ancient times we have seen that we do more damage while retaliating than the damage was done to us.

“If Cain shall be avenged seven-fold, truly Lamech seventy and seven-fold.”

But later it settled down to a system of equal retribution. The theory has two forms –

The rigoristic form that the nature of punishment should be decided based on the nature and amount. If the offense is severe, so should be the punishment. There is no scope to judge extenuating circumstances or the mental state of the offender. Only the offense is taken into account. A murderer should always be murdered. This was the case in primitive societies.

According to mollified form this theory the extenuating conditions are taken into account. Was there a provocation, what is the age, gender, health of the offender; these all questions are carefully considered here. Here according nature and importance of the offense and the above conditions judgment is delivered. Some argue against this theory saying that it anti-humanitarian and anti Christian. It is the fulfillment of one’s vengeful desires.

Mackenzie argues with the above oppositions by reminding us that the retribution is not delivered by a single individual, but a judicial system bound by certain rules and should be devoid of malevolence towards the criminal to serve a just punishment.

Hegel supported retributive theory saying that punishment is a kind of reward to the offender, and Aristotle calls it the ‘negative reward’. Good and bad both deeds are rewarded in a sense. In the Biblical context” The wage of sin is death”.

The main theme of retributive theory is that we need punishment of offenders to uphold the social and moral values. The rules for the society, created by us for sake of betterment, should not be violated, as it makes us take a step backward to barbaric times.

“If the laws are necessary condition of our life in organized societies, then there must be some penalty for disobeying them.”

Reformative Theory:

The most recent and the most humane of all theories is based on the principle of reforming the legal offenders through individual treatment. Not looking to criminals as inhuman this theory puts forward the changing nature of the modern society where it

presently looks into the fact that all other theories have failed to put forward any such stable theory, which would prevent the occurrence of further crimes. Though it may be true that there has been a greater onset of crimes today than it was earlier, but it may also be argued that many of the criminals are also getting reformed and leading a law-abiding life all-together. Reformative techniques are much close to the deterrent techniques.

Retribution and deterrence involve a process of thinking that proceeds from the crime to the punishment. However, rehabilitation is a more complex notion involving an examination of the offense and the criminal, and a concern for the criminal's social background and punishment. Further, those in favor of rehabilitation theories acknowledge the possibility of additional problems developing during the offender's sentence or treatment that may be unconnected with the offense and which may require an offender to spend additional periods in treatment or confinement.

This theory states that moral education and rebuilding the character of the criminals should be the main object of punishment. It ensures prevention of crime as well. With a change of heart the criminal refrains from crime. And here the criminal is treated as an end rather than a means. Here punishments not to build the character of others but to build the character of the criminal himself. And as we can understand that this theory preaches against capital punishment, especially death sentences. If the criminal dies, there is none to rehabilitate. After death, no earthly force can do anything for his soul or character.

Almost all thinkers agree with reformative theory of punishment as it agrees with the humanitarian sentiments. Nowadays criminal sociologists and criminal anthropologists agree with the reformative theory and believe that punishment should be a force to improve the moral of criminal as well as the society, so that the criminal can again come back to the society, and be a part of it.

Modern sociologists sometimes identify the structure and oppression of society and the environment in general to be cause for normal people turning to crime. Some anthropologists and psychologists claim that criminal mindset is a disease or neuroses. So it is not justified to punish somebody for their crime. Again Freudian theory states that we are born with instincts that are taboos in society and the criminal tendency is inherent. So, they engage in crime because that where their instincts drive them. This is not voluntary action and so cannot be punishable.

But the above is not a proper interpretation of reformative theory. Reformative theory does not overrule the need of punishment, but it talks about the need of education, treatment, sympathy and even painful punishment for the sake of correction of character. The

reformatory theorists also recognize the fact that punishment is perhaps not the best possible route to choose in this case. Instead of physical punishment, invoking mental pain or distress may also be a form of punishment. Reformatory theorists in general stick to the latter way as being more agreeable. Solitary confinement is always more effective than physical pain. This way works better to make the criminal realize the error of his/her way. And understanding is the first step towards rehabilitation.

Although highly praised, even this theory is not free of criticism. If reformation, then no death sentences. That is why to some this theory becomes unacceptable. A cold blooded and well planned murder deserves a death penalty. And such criminals are a danger to a lot of other human beings as well. Thus we need to reconsider the fact that whether all criminals can be rehabilitated or not.

The sociological and anthropological arguments can be countered by saying that the environment is only a part and not a whole. Someone may commit crime, just out habit when there is no unfavourable environment is present. Psychologists are also wrong in trying to find psychological basis for all crimes. So one must find the true intent of the criminal.

Actually these arguments are not well suited against reformatory theory, as it does not oppose the idea of punishment.

Conclusion

The most recent and the most humane of all theories are based on the principle of reforming the legal offenders through individual treatment. Not looking to criminals as inhuman this theory puts forward the changing nature of the modern society where it presently looks into the fact that all other theories have failed to put forward any such stable theory, which would prevent the occurrence of further crime. Reform in the deterrent sense implied that through being punished the offender recognized his guilt and wished to change. This theory aims at rehabilitating the offender to the norms of the society i.e. into law-abiding member. This theory condemns all kinds of corporal punishments. Though this theory works stupendously for the correction of juveniles and first time **criminals**, but in the case of a hardened **criminal** this theory may not work with the effectiveness.

According to this theory, the aim of punishment is to educate or reform the offender himself. Punishment is inflicted on a criminal in order to reform or educate him. This theory is commonly accepted at the present time, because it is in harmony with the humanitarian sentiments of the age. This theory does not involve treating a person as a thing; a criminal is

punished for his own good- not merely for the good of others. Reformation or education of the criminal is the aim of punishment.

At this present time it might be wise to abolish death penalty completely everywhere, but we must prepare ourselves for the change by changing and improving the morals and the understanding of morals and value systems in general to take the first step towards the beginning of a new human civilization.

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