

B: THEORIES OF PUNISHMENT

1. RETRIBUTION

The theory of retribution is often traced back to Emmanuel Kant's concept of free will.¹ According to Kant, ethical behaviour consists in choices that are moral in the order of priority.² As such, offenders 'should be punished only because and to the extent that they deserve it'.³ This theory is, thus, fault-based. It focuses 'on the necessity of punishing those who have violated societal norms, irrespective of the possible future benefits of prosecution, on the basis that the offender[s] deserve punishment for what they have done'.⁴ Essentially, criminal liability is important either because 'the offender deserves punishment or because punishment makes society safer, whether through deterrence, rehabilitation, or incapacitation'.⁵ This meaning should be distinguished from the common definition that equates the concept of retribution with revenge.

2 DETERRENCE: GENERAL AND SPECIFIC DETERRENCE

This is the preventive effect that actual or threatened punishment has on an offender or potential offender in a given society. It is an ancient theory. John Salmond believes that punishment must be deterrent. The main aim of criminal law should be to make the wrongdoer an example and warning to all who are like-minded.

There is a close connection between deterrence and retributive forms of punishment. Retributive punishment is believed to have some deterrent value. Deterrence is meant to reduce crime and for this reason some penologists argue that the harsher or more horrid the punishment the more effective the deterrence.

Cesare Beccaria the Italian criminologist argued against the severity of punishment saying that punishment was not to provide a social revenge on the criminal and it was not the severity but the certainty and expedition in punishment that secured the best results for deterrence.

Deterrence is at two distinct levels – individual and general

Individual deterrence: The idea is that the offender should be given such an unpleasant time that through the fear of a repetition of punishment he will never repeat his conduct. There are limiting factors however.

¹ Immanuel Kant Ground work of the metaphysic of morals (1785 reprinted in 1964) 89; Immanuel Kant, The philosophy of law (1796 reprinted in 1887) 198.

² Ibid.

³ SP Garvey 'Punishment as atonement' (1999) 46 UCLAL Review 1801,1835-36.

⁴ Cryer et al. 'An introduction to international criminal law and procedure' (n 64 above) 24.

⁵ A Gruber 'A distributive theory of criminal law' (2010) 52(1) William and Mary Law Review 4.

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General deterrence: The aim of punishment is thought of as the discouragement of like-minded persons from committing offence by the threat of punishment and the example of the punishment of the offender.

This theory is illustrated in the case of *R vs Atma Singh s/o Sharda Singh 1943 E.A.C.A 69*. The appellant an elderly Sikh man appealed against conviction and sentence on the charge of causing grievous bodily harm to his wife. The brief facts were that the appellant's wife had been enticed by another man, upon which she left their matrimonial home in Mombasa, to live with her new man in Nairobi. The appellant followed her there and managed to take her back to Mombasa, and thereupon cut off her nose and ears. He was tried and sentenced to 7 years imprisonment with hard labour. On appeal the sentence was affirmed. Describing the assault as barbaric and therefore one that needed punishment that would lead to deterrence, the judges further stated that for purposes of deterrence a lesser sentence would be misunderstood.

3. INCAPACITATION/ DISABLEMENT/PREVENTION

This theory is connected to the deterrence theory. It is founded on the assumption that the isolation or incapacitation of an offender renders him incapable of committing crime and rids society of evil. Incarceration or imprisonment of offenders isolates them from the rest of society and from the circumstances that led him to crime. The death penalty also disables by permanently incapacitating the offender. Its main avenue for operation is the prison and related institutions.

The application is best illustrated in the case of *Ndurugo s/o Karuga vs Republic 1950 EACA 50* where the accused was charged with the offence of stealing one cow. He was sentenced to 10 years imprisonment with hard labor. He appealed against both conviction and sentence. The conviction was upheld but sentence was reduced to 5 years. In the opinion of the appeal judges, the accused if let loose would commit more serious offences as he had 21 previous convictions. The sentence was thus intended to disable or incapacitate him to ensure security to the community's property.

The theory has several weaknesses;

- a) It merely postpones crime
- b) It is based on the prison system with all its weaknesses
- c) It presupposes that no crime occurs in prison
- d) It encourages longer and unnecessary punishment

4. REHABILITATION/REFORMATION/ RESTORATION

There are two aspects to the reformatory approach;

- a) that reform can come through the punishment itself, the pain of punishment is therefore expected to have reformatory merits on its own. Sir Rupert Cross remarks that this view is unfashionable and that nothing can be said about it beyond observing that solitary confinement is an example from former times, the theory being that suffering the loss of liberty in solitude would induce remorse, repentance and reform.

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- b) The idea of reform as concomitant to punishment. This is the prevailing theory for sentences such as probation where reform is at the forefront to the extent that probation in many quarters is not viewed as punishment at all, but merely as a measure of rehabilitation.

Rehabilitation and reformation are one the major objectives of punishment and very fashionable amongst penal reformers. It finds basis on the notion that offenders are social misfits or persons who are socially maladjusted. Punishment is therefore seen as a means of re-socializing such persons with the aim of making them useful members of society. The problem with reformation is that it is a long and expensive process which is not guaranteed to produce the desired effect or result.

Arguments in favour of reformation include:

- a) reforming the criminal provides the state with opportunity to control crime in future;
- b) the reformation process is also deterrent and thus an effective condemnation of crime
- c) it creates resources for the state for training the offender – prison etc
- d) it enables the criminal to stay within society – probation , parole, discharge etc provide s the best opportunity for re-socialization of the offender

Weaknesses evident in the theory are:

- a) Reformation, in most cases, is supposed to occur in prison or jail. The prison environment is not conducive to reformation as it mixes the theories or objectives of retribution and deterrence with reformation. The prison atmosphere generally fosters hatred and bitterness yet the same is expected to be a correctional institution.
- b) To achieve the objective of reformation prisoners are put to all kinds of programs – carpentry, tailoring, hairdressing, gardening, pig keeping etc. These programs however, do not help reform the offender as there does not necessarily exist a causal connection between lack of skills and criminality. It is only a small class of offenders who lack skills and it does not necessarily follow that they engage in crime due to lack of skills.
- c) Reformation is an expensive process. It demands heavy infrastructure. In Kenya reformation is directed towards probation, parole, conditional and unconditional discharge, bonds to keep the peace, community service orders. The success of these programs demands financial as well as human resources and facilities for training.

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