

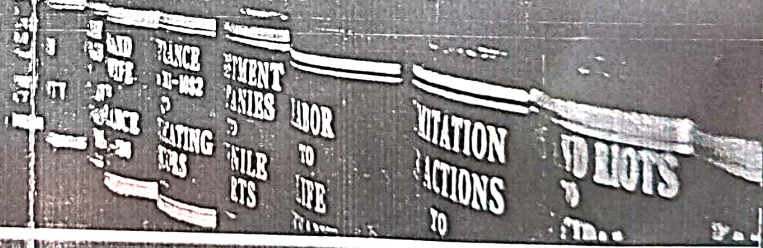
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# EMERGING ISSUES IN CRIMINAL JURISPRUDENCE

AUGUST 2018



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## Adequacy of Punishment in the Light of Changing Crime Scenario

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Dr. Tharanath \*\*

### Introduction

Law is a set of rules to control the human behaviour. For every life to exist peacefully on earth law is required. Indeed to enforce law punishment is to be awarded. India being a welfare State, it is the duty of a state to ensure a safe and crime free society. Thus concept of punishment evolved as a weapon to protect the society against the criminal activities. Today crime rate is accelerating every minute irrespective of punishment awarded. Men often comes in conflict with fellow men and tends to commit crimes. Commission of crime is not new phenomena, what is new is sophisticated methods used by the criminals to commit offence. The much more concern is brutality in committing the offence. Today crimes are committed to fulfil their greed and lust. Which is witnessed in newly emerged crimes like sexual harassment against children, cyber crimes, terrorism, organised crimes and economic offences. However, in our criminal justice system, the highest punishment awarded is death penalty. Capital punishment is awarded believing it to be deterrent. In fact death penalty is not solution to all problems. Even after awarding capital punishment, heinous crimes are on rise. This is evident in infamous cases like Nirbhaya, Arushi murder and Swamy Shradannanda case etc. Therefore the question naturally arises as to whether punishment has any impact in the control of crime? Whether punishment has any deterring effect on the criminals? Sentencing policy followed today are inadequate, ineffective and have no deterrent effect at all.

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Conventional punishment enumerated in section 53 of Indian Penal Code has become obsolete. Therefore, in this paper an attempt has been made to analyse the need for adequate punishment in the light of changing crime scenario.

### Definition of punishment

Punishment may be defined as the sanction imposed on an accused by a court of law for the violation of rules and regulations of society according to norms and established procedures of law.<sup>1</sup>

Punishment is a means of social control. H.L.A Hart with Mr. Bean & Professor Flew have defined punishment in terms of five elements:

1. It must involve pain or other consequence normally considered unpleasant.
2. It must be for an offence against legal rules.
3. It must intentionally administered by human beings other than the offender.
4. It must be an actual or supposed offender for his offence.
5. It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.<sup>2</sup>

### Types of Punishment

Section 53 of the Indian Penal Code enumerates the types of punishment that can be awarded by Indian Courts.

**Section 53:** The punishments to which offenders are liable under the provision of this code are-

First - Death;

Secondly - Imprisonment for life;

Thirdly- [Repealed by Act XVII of 1949]

Fourthly-Imprisonment, which is of two descriptions, namely:

- (1) Rigorous, that is, with hard labour; (2) Simple.

<sup>1</sup> Professor K D Gaur, Criminal law Cases & Materials, 8<sup>th</sup> ed, 2015, Lexis Nexis, at p 111

<sup>2</sup> Tanu Priya, Reformatory Theory of Punishment, available at [www.lawctopus.com](http://www.lawctopus.com) last visited on 19-04-2018

Fifthly - Forfeiture of property;

Sixthly - Fine.<sup>3</sup>

### Purpose of Punishment

The very purpose of law is to administer justice. Without institutionalised law enforcement man tends to redress his wrongs by his own hand. A more civilised substitute for such primitive practice is provided by the modern states system of administration of justice.<sup>4</sup> When it comes to administration of criminal justice the main purpose of it seems to be punishment. We can look at punishment from two different aspects. We can regard it as a method of protecting society by reducing the occurrence of criminal behaviour or else we consider it as an end in itself.<sup>5</sup> The purpose of criminal justice system is punishment and the purpose of punishment is to prevent the crime, deter and reform the criminals in order to make the society crime free. According to Ralf Waldo Emerson "Crime and punishment grow out of one stem. Punishment is a fruit that unsuspected ripens within the flower of pleasure which concealed it".<sup>6</sup> Great penologist Mr. Beccaria in his book "Crime and Punishment" published in 1764, which is considered as the foundation stone of doctrine of punishment, has stated that the purpose of punishment is to make sure that the guilty does not repeat the crime and that others are deterred by the punishment of the guilty from committing crime.<sup>7</sup> Emphasizing the purpose of criminal justice system, the Hon'ble Supreme Court held that, the purpose of criminal justice system is to award punishment. It is a method of protecting society by reducing the occurrence of criminal behaviour. It also act as a deterrent. Where the punishment is disabling or preventive, its aim is to prevent a repetition of the

<sup>1</sup> Ratanlal and Dhirajlal, The Indian Penal Code, 34<sup>th</sup> edition, reprint 2016, Lexis Nexis, Haryana, at p 86

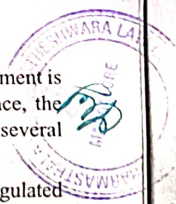
<sup>2</sup> Salmond on Jurisprudence, 12<sup>th</sup> edition by P.J. Fitzgerald, Indian economy reprint 2002, Universal Law Publishing Co. Pvt. Ltd., Delhi, at p 89

<sup>3</sup> Ibid at p 94

<sup>4</sup> Bibha Tripathi, "Correlation between crime and punishment?", CrLJ Jan 2007, pp 1-2 at p 1

<sup>5</sup> Ray Kumar Gupta, "Necessity of awarding punishment having deterrent effect?" CrLJ Jan 2002, pp 253-254 at p 253





offence by rendering the offender incapable of its commission.<sup>8</sup> Yet in another case, Supreme Court held that punishment in criminal case is both punitive and reformative. The purpose is that the person found guilty of committing the offence is made to realise his fault and is deterred from repeating such acts in future. The reformative aspect is meant to enable the person concerned to relent and repent for his action and make himself acceptable to the society as a useful social being. In determining the question of proper punishment in a criminal case, the court has to weigh the degree of culpability of the accused, its effect on others and the desirability of showing any leniency in the matter of punishment in the case. An act of balancing is what is needed in such a case; a balance between the interest of the individual and the concern of the society; weighing the one against the other. Within the parameters of the law an attempt has to be made to afford an opportunity to the individual to reform himself and lead the life of a normal, useful member of society and make his contribution in that regard.<sup>9</sup>

**Crime and Punishment**

Every criminal trial ends with either conviction or acquittal. In case of acquittal the accused is set free to his liberty. Whereas in case of conviction punishment is awarded. However in Indian Penal Code there is no fixed period of punishment, it prescribes only the maximum and minimum limit of punishment. Thus giving the court a wide discretionary power to fix the amount of punishment. It is not an easy task, as the exercise of discretionary power rests on a variety of factors such as deterrence, preventive, retribution and enhanced punishment to those categorized as "habitual offender", and also pacifying the feelings of the injured and preventing them in "private vengeance" taking law in to their hands. Judges have to balance the "conflicting" interests in choosing the appropriate sentence such as

measure of punishment.<sup>10</sup> The appropriate measure of punishment is determined by factors such as the motive to commit offence, the gravity of the offence and character of the offender among several other things.

Kautilya lays down that the awarding of punishment must be regulated by a consideration of motive and nature of offence, time and place, strength, age, conduct (or duties), learning and monetary position of the offender, and by the fact, whether offence is repeated. This means judges always considered the relevant circumstances before deciding actual punishment.<sup>11</sup> Manu, Yajnavalkya and Brihaspati state that there were four methods of punishment, namely, by gentle admonition, by severe reproof, by fine and corporeal punishment and declare that these punishment may be inflicted separately or together according to the nature of offence.<sup>12</sup>

One of the primitive objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime.<sup>13</sup> Each case is decided in the light of its own facts and circumstances.

In primitive societies when the concept of law and order was not yet known, the common mode of settling disputes was through personal vengeance such as blood feuds and reparation. In those days, 'punishment was reflective reaction to injury'. Obviously, it was based on retribution and vengeance. The result was exploitation of the weaker by the stronger, which led to chaos and undue domination of mighty persons in the society. There was no any external agency such as state, law, police, court, etc., to regulate the conduct of individuals in primitive societies and self-help was the only recourse to settle the disputes.<sup>14</sup> The powers vested in the King (State) to punish

<sup>8</sup> LalithaJalan v. Bombay Gas Co. Ltd.,(2003) 6 SCC 107 para 17 available at <http://www.sconline.com/members/search/Result2014.aspx> last visited on 10 march 2018

<sup>9</sup> Karamjit Singh v. State (Delhi Admn.)AIR 2000 SC 3467,para 7 available at <http://www.sconline.com/members/search/Result2014.aspx> last visited on 10 march 2018

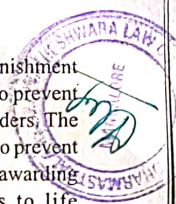
<sup>10</sup> Prof. (Dr.) MukundSarda, Courts and sentencing principles : A study, Criminal Law Journal 2015, pp 33 - 37 at p 33

<sup>11</sup> V.D. Kulshreshtha's, revised by Gandhi, Landmrks in Indian Legal and constitutional history, Eastern Book Company, Lucknow, p 14

<sup>12</sup> Ibid

<sup>13</sup> G. Kabardhi, "Adequate Punishment- Conscience of the Society", Cri LJ 2013, pp 174-176 at 174

<sup>14</sup> N V Paranjape, Crime ft punishment trends and reflections, LexisNexis, at p 230



a person found guilty of an offence has been praised by the Dharmashastras as a great gift given to mankind. The reason given in this behalf is that without the creation of kingship and without the conferment of power on the king to punish the criminals, there would have been chaos and human beings would have always been tormented by fear, insecurity to life and property and consequential misery<sup>15</sup>. Nevertheless today we have welfare state which take care of welfare of its citizens. We have legislature to enact laws, executive to enforce law and judiciary to interpret as well as to uphold justice. Occurrence of any criminal offence is considered as offence against the state. The state will take the responsibility of punishing the guilty person.

**Theories of punishment**

Law to be powerful, its deviation should be punished. The following are the four theories of punishment.

● **Retributive theory of punishment**

“Eye for eye and tooth for tooth” is the maxim on which this theory is based. It was practised in ancient times where people believed in taking revenge by themselves. For instance if someone is murdered the victim family would found the murderer and murdered him. This was the most inhuman act practised in those days where there was no systematic method for awarding punishment. Today this theory has no relevance. We have developed a criminal justice system where state will take the responsibility of punishing the criminals. Every offence is considered as offence against state.

● **Preventive and deterrent theory of punishment**

As the name itself suggest this theory aims at preventing the criminals from committing the crime and deter the prospective wrong doers. Both of these theory go hand in hand. Salmond and Holmes are the main supporters of preventive theory of punishment. This theory is based upon “prevention is better than cure”. The 18<sup>th</sup> century utilitarian,

William Poley describes that “the proper end of punishment is prevention of crimes.” Preventive theory seeks to prevent the recurrence of crime by incapacitating the offenders. The principle of this theory is ‘not to avenge crimes but to prevent it.’<sup>16</sup> Preventive punishment today can be found by awarding imprisonment which varies from one months to life imprisonment.

Coming to deterrent theory of punishment Salmond says that “punishment is before all things deterrent, and the chief end or law of crime is to make the evil-doer an example and a warning to all that are like minded with him.” This theory says that by punishment the wrong-doer is made an example. It creates an awe not only in the mind of the offender alone, but in the minds of others also and deters them from committing crimes. In this way it checks crimes.<sup>17</sup> Written in the 4<sup>th</sup> century BC by Kautilya, minister of the king Chandragupta Maurya, the “Arthashastra” is a treatise on the act of ruling and one of the main Indian book ever written. It recommends cutting of the right hand for pickpocketing or theft, cutting of the nose for theft, cutting of the nose and ears for abetting in theft and adultery. There were also different forms of death, death with torture for murder in a quarrel, death with impaling for theft by royal animals, death by burning hands and skin for treason.<sup>18</sup> Death penalty in India is based on this deterrent theory, were it is awarded in the rarest of rare case. Death sentence is executed only by hanging the accused no other modes is permissible.

● **Reformatory theory of punishment**

The main aim of this theory is to reform the wrong-doer so that he become a law abiding citizen. The supporters of reformatory theory maintain that crime is a kind of disease and the criminal should be treated well so that he may be

<sup>15</sup> Justice M. Rama Jois, Legal and Constitutional history of India, reprint 2017, Universal law publishing co. Pvt.Ltd., New Delhi, at p 324

<sup>16</sup> Dr. S.R. Myneni, Foundations of political obligation, New era law publications, Faridabad, 6<sup>th</sup> edition 2015, reprint 2016, at p 456

<sup>17</sup> Ibid at p 454

<sup>18</sup> Punishment & torture in Ancient India, available at <https://travelreport.wordpress.com>

able to recover from this disease.<sup>19</sup> The reformatory theory takes into account the factor which compels the criminal crime- his family, education, culture, socio-economic background etc. This theory concentrates not on crime but on the criminal.<sup>20</sup> Nobody is born criminal. There are several social and economic factors which would have forced them to become anti-social element. And not everyone is habitual offenders. Some offences are committed out of provocation and without mens rea. In such circumstances a chance should be given to the wrong doer to reform himself so that he will not repeat that in future. In India Juvenile Justice (care and protection) Act 2015 is glaring example of reformatory justice.

#### Changing crime scenario

Basically punishment is considered as end result of criminal justice system. Once the sentence is awarded justice is seemed to be done, no matter what quantum of punishment is awarded. It is needless to say that it is not so. The main object of criminal justice system is not only to punish the offender but also to see that he is punished adequate enough to prevent himself from committing the crime again and deter potential offenders. Every day we hear and read about various crime happening around us. Over the years we can see that there is paradigm shift in the pattern of crime. After Nirbhaya, Kathua and Unnao case many inhuman incidents have come to light. Recently in Ghazipur a 17 year old student was alleged sodomised by five men, who also inserted an iron rod in his rectum.<sup>21</sup> Yet in another case a 65 year old man was arrested on the charges of raping his own four year old granddaughter and killing her in Bastar.<sup>22</sup> In another shocking case inhuman act is committed against 11 year old girl who was found raped and murdered with 86 injuries.<sup>23</sup> These incidents are very few

<sup>19</sup> R.C. Agarwal, Political Theory, S.Chand & Co. Pvt. Ltd, Reprint 2014, at p 208

<sup>20</sup> Supra note 16 at p 459

<sup>21</sup> Available at <https://www.indiatimes.com/news/india/17-year-old-boy-gangraped-by-5-men-in-ghazipur-iron-rod-inserted-into-private-part-347593.html>

<sup>22</sup> Available at <https://www.indiatimes.com/city/raipur/chattisgarh-grandfather-rapes-kills-4-year-old-in-bastar/articleshow/6464270.cms>

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to mention. More and more heinous offences are reported every day. With such barbaric acts of criminals innocent children undergo physical and mental trauma. Addressing this issue, government passed the ordinance on April 21, 2018 which introduces capital punishment for those convicted of raping a girl under 12 years of age.<sup>24</sup> But the question is whether this going to have any deterrent effect on potential offenders? is speculation which needs to be clarified.

With the development of technology conventional crimes are taking new dimension and sophisticated crimes like terrorism, white collar crimes, organised crimes, socio economic offences, cybercrimes, drug trafficking, prostitution, women and child trafficking are increasing. In respect of white collar crimes, the special court in New Delhi which convicted and awarded two-year jail sentence to former Coal Secretary H C Gupta and two senior government officials K S Kropcha and K C Samaria, said white-collar crimes were more dangerous to the society than ordinary crimes for the damage they inflicted on public morale. The Court also observed that "it is also true that to find criminality in such acts committed by white-collar criminals is often a difficult task primarily because they are committed after much deliberation and planning undertaken by well-trained minds having a higher status in the society."<sup>25</sup> Another case in which Abdul Karim Telgi who was mastermind behind biggest stamp paper scam was convicted. Telgi printed counterfeit stamp papers and distributed them all over India. He managed to accomplish it with paramount sophistication and planning. The whole scam was of around Rs.600 billion. Yet in another case Madhya Pradesh High Court in its order passed on 27.06.2017 has directed the trial court to impose minimum sentence specified in the statute in offences of grave socio-economic crime where a person for his or her benefit sell adulterated items that has adverse effect on human health and also said that grave socio-economic crimes should not be lightly taken up.<sup>26</sup> Likewise cyber

<sup>21</sup> Available at <https://thelogicalindian.com/news/surat-rape-murder-sold-35000>

<sup>24</sup> Available at <http://www.prsindia.org/billtrack/the-criminal-law-amendment-ordinance-2018-5232>

<sup>25</sup> Available at <https://m.economicstimes.com/news/politics-and-nation/to-detect-criminality-in-white-collar-crimes-is-tough-court/articleshow/58823762.cms> dated May 24<sup>th</sup> 2017 taken madhya pradesh hc / dated June 29, 2017

<sup>26</sup> Available at <http://www.livelaw.in/grave-socio-economic-crimes-not-lightly-taken-madhyapradesh-hc/dated-june-29-2017>

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crime is also creating big menace nowadays were adults and children fall prey of pornography. These offences are bound to increase in near future leaving the society most vulnerable. The conventional punishment enumerated under Section 53 of IPC would be inadequate to meet this new challenges. It is suggested to add 7 new forms of punishment to existing ones in section 53, IPC with a view to deter particular criminals. Such punishment will have more psychological, social and moral impact on the criminals and will go long way in curbing crimes. The proposed punishments are compensation to victims of crime, extermment, public censure, community service and disqualification from holding public office.<sup>27</sup> However few punishments like compensation to victim and disqualification from holding public office are already prevailing but not effective in control of crime. Nevertheless Justice Malimath committee in its report recommended that a committee should be appointed to review the Indian Penal Code and suggest creation of new kinds of offences, prescribing new forms of punishment and reviewing the existing offences and punishments.<sup>28</sup>

**Conclusion :** Ensuring a safe and crime free society is the avowed object of the criminal justice system and this can be achieved by imposing an appropriate punishment. The criminal justice system should adhere to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal activities. However, the practice of punishing the wrong-doer with same degree of brutality with which he committed the offence is unknown to the civilised country like India. Nevertheless, in this changing crime scenario, showing unnecessary sympathy to the wrong-doer tends to cause more harm to the society and cause serious miscarriage of justice. Liberal attitude of state would send wrong message to the society. Toady appropriate changes should be brought in the present penal code which should incorporate provision for proportionality of punishment for the offence committed. This will in fact deter potential offender. There is a need to re-examine and reframe the sentencing policy to meet 21<sup>st</sup> century challenge, were crimes knows no limit. Therefore, in the changing crime scenario adequate punishment and stringent punishment is need of the hour.

<sup>27</sup> Supra note 1at p 325

<sup>28</sup> Dr. Justice V S Malimath Report available at <http://mba.gov.in>