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Unit-4Theories of punishmen ; Retributive ,deterrent ,preventive and reformative

Theories of Punishment:

With change in the social structure the society has witnessed various punishment theories and the radical changes that they have undergone from the traditional to modern level and the crucial problems relating to them. Kenny wrote: "it cannot be said that the theories of criminal punishment current amongst our judges and legislators have assumed...."either a coherent or even a stable form. B.Malinowski believes all the legally effective institutions....are....means of cutting short an illegal or intolerable state of affairs, of restoring the equilibrium in the social life and of giving the vent to he feelings of oppression and injustice felt by the individuals. The general view that the researcher finds is that the researcher gathers is that the theories of punishment being so vague are difficult to discuss as such. In the words of Sir John Salmond, "The ends of criminal justice are four in number, and in respect to

the purposes served by the them punishment can be divided as:

1. Deterrent
2. Retributive
3. Preventive
4. Reformative

of these aspects the first is the essential and the all-important one, the others being merely accessory. Punishment before all things is deterrent, and the chief end of the law of crime is to make the evil-doer an example and a warning to all that are likeminded with him.

Deterrent Theory:

One of the primitive methods of punishments believes in the fact that if severe punishments were inflicted on the offender would deter him form repeating that crime. Those who commit a crime, it is assumed, derive a mental satisfaction or a feeling of enjoyment in the act. To neutralize this inclination of the mind, punishment inflicts equal quantum of suffering on the offender so that it is no longer attractive for him to carry out such committal of crimes. Pleasure and pain are two physical feelings or sensation that nature has provided to mankind, to enable him to do certain things or to desist from certain things, or to undo wrong things previously done by him. It is like providing both a powerful engine and an equally powerful brake in the automobile. Impelled by taste and good appetite, which are feelings of pleasure a man over-eats. Gluttony and surfeit make him obese and he starts suffering disease. This causes pain. He consults a doctor and thereafter starts dieting . Thus the person before eating in the same way would think twice and may not at all take that food. In social life punishment introduces the element of 'pain' to correct the excess action of a person carried out by the impulse (pleasure) of his mind. We all like very much to seize opportunities, but abhor when we face threats. But in reality pain, threat or challenges actually strengthens and purifies a man and so an organization.

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. "While a person goes on seeking pleasure, he also takes steps to avoid pain. This is a new system of political philosophy and ethics developed by Jerome Bentham and John Stuart Mill in the 19th century called Utilitarianism. It postulates human efforts towards "maximization of pleasure and maximum minimization of pain" as the goal." The main ethical imperative of utilitarianism is: the greatest good for the largest number of people; or the greatest number of goods for the greatest number of people" The fear of consequent punishment at the hands of law should act as a check from committing crimes by people. The law violator not merely gets punishment, but he has to undergo an obnoxious process like arrest, production before a magistrate, trial in a criminal court etc. that bring about a social stigma to him as the accused. All these infuse a sense fear and pain and one thinks twice before venturing to commit a crime, unless he is a hardcore criminal, or one who has developed a habit for committing crimes. Deterrent theory believes in giving exemplary punishment through adequate penalty." In earlier days a criminal act was considered to be due to the influence of some evil spirit on the offender for which he was unwillingly was made to do that wrong. Thus to correct that offender the society retorted to severe deterrent policies and forms of the government as this wrongful act was taken as a challenge to the God and the religion. But in spite of all these efforts there are some lacunae in this theory. This theory is unable to deter the activity of the hardcore criminals as the pain inflicted or even the penalties are ineffective. The most mockery of this theory can be seen when the criminals return to the prisons soon after their release, that is precisely because as this theory is based on certain restrictions, these criminals are not effected at all by these restrictions rather they tend to enjoy these restrictions more than they enjoy their freedom.

Retributive Theory:

...An eye for an eye would turn the whole world blind- Mahatma Gandhi The most stringent and harsh of all theories retributive theory believes to end the crime itself. This theory underlines the idea of vengeance and revenge rather than that of social welfare and security. Punishment of the offender provides some kind solace to the victim or to the family members of the victim of the crime, who has suffered out of the action of the offender and prevents reprisals from them to the offender or his family. The only reason for keeping the offender in prison under unpleasant circumstances would be the vengeful pleasure of sufferer and his family. J.M.Finnis argues in favour of retributism by mentioning it as a balance of fairness in the distribution of advantages and disadvantages by restraining his will. Retributivists believe that considerations under social protection may serve a minimal purpose of the punishment. Traditional retributism relied on punishing the intrinsic value of the offence and thus resort to very harsh methods. This theory is based on the same principle as the deterrent theory, the Utilitarian theory. To look into more precisely both these theories involve the exercise of control over the emotional instinctual forces that condition such actions. This includes our

sense of hatred towards the criminals and a reliance on him as a butt of aggressive outbursts. Sir Walter Moberly states that the punishment is deemed to give the men their dues. "Punishment serves to express and to and to satisfy the righteous indignation which a healthy community treats as transgression. As such it is an end in itself." "The utilitarian theories are forward looking; they are concerned with the consequences of punishment rather than the wrong done, which, being in the past, cannot be altered. A retributive theory, on the other hand, sees the primary justification in the fact that an offence has been committed which deserves the punishment of the offender." 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. However 'natural' retribution might seem, it can also be seen as Bentham saw it, that is as adding one evil to another, base and repugnant, or as an act of wrath or vengeance. Therefore as we consider divine punishment we must bear in mind, as Rowell says, The doctrine of hell was framed in terms of a retributive theory of punishment the wicked receiving their just deserts, with no thought of the possible reformation of the offender. In so far as there was a deterrent element, it related to the sanction hell provided for ensuring moral conduct during a man's earthly life. Thus the it concludes that this theory closely related to that of expiation as the pain inflicted compensates for the pleasure derived by the offender. Though not in anymore contention in the modern arena but its significance cannot be totally ruled out as fear still plays an important role in the minds of various first time offenders. But the feels that the basis of this theory i.e. vengeance is not expected in a civilized society. This theory has been severely criticized by modern day penologists and is redundant in the present punishments.

Preventive Theory:

Unlike the former theories, this theory aims to prevent the crime rather than avenging it. Looking at punishments from a more humane perspective it rests on the fact that the need of a punishment for a crime arises out of mere social needs i.e. while sending the criminals to the prisons the society is in turn trying to prevent the offender from doing any other crime and thus protecting the society from any anti-social elements. Fichte in order to explain this in greater details puts forward the an illustration, An owner of the land puts a notice that 'trespassers' would be prosecuted. He does not want an actual trespasser and to have the trouble and expense of setting the law in motion against him. He hopes that the threat would render any such action unnecessary; his aim is not to punish trespass but to prevent it. But if trespass still takes place he undertakes prosecution. Thus the instrument which he devised originally consist of a general warning and not any particular convictions. Thus it must be quite clear now by the illustration that the law aims at providing general threats but not convictions at the beginning itself. Even utilitarian such as Bentham have also supported this theory as it has been able to discourage the criminals from doing a wrong and that also without performing any severity on the criminals. The present day prisons are fallout of this theory. The preventive theory can be explained in the context of imprisonment as separating the criminals from the society and thus preventing any further crime by that offender and also by putting certain restrictions on the criminal it would prevent the criminal from committing any offence in the future. Supporters of this theory may also take Capital Punishment to be a part of this theory. A serious and diligent rehabilitation program would succeed in turning a

high percentage of criminals away from a life of crime. There are, however, many reasons why rehabilitation programs are not commonly in effect in our prisons. Most politicians and a high proportion of the public do not believe in rehabilitation as a desirable goal. The idea of rehabilitation is considered mollicoddling. What they want is retribution, revenge, punishment and suffering. Thus one can easily say that preventive theory though aiming at preventing the crime to happen in the future but it still has some aspects which are questioned by the penologists as it contains in its techniques which are quite harsh in nature. The major problem with these type of theories is that they make the criminal more violent rather than changing him to a better individual. The last theory of punishment being the most humane of all looks into this aspect.

Reformative Theory:

But that is the beginning of a new story--the story of the gradual Renewal of a man, the story of his gradual regeneration, of his Passing from one world into another, of his initiation into a new Unknown life. The author of the above excerpt in this concluding paragraph underlines the basic principle of the reformative theory. It emphasizes on the renewal of the criminal and the beginning of a new life for him. 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. Reform in the deterrent sense implied that through being punished the offender recognized his guilt and wished to change. The formal and impressive condemnation by society involved in punishment was thought to be an important means of bring about that recognition. Similarly, others may be brought to awareness that crime is wrong through another's punishment and, as it were, 'reform' before they actually commit a crime. But, although this is indeed one aspect of rehabilitation, as a theory rehabilitation is more usually associated with treatment of the offender. A few think that all offenders are 'ill' and need to be 'cured' but the majority of criminologists see punishment as a means of educating the offender. This has been the ideal and therefore the most popular theory in recent years. However, there is reason to believe this theory is in decline and Lord Windlesham has noted that if public opinion affects penal policy, as he thinks it does, then there will be more interest shown in retribution in the future. 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. These aim at transforming the law-offenders in such a way that the inmates of the penitentiary institutions can lead a life like a normal citizen. These prisons or correctional homes as they are termed humanly treat the inmates and release them as soon as they feel that they are fit to mix up with the other members of the community. The reformation generally takes place either through probation or parole as measures for reforming criminals. It looks at the seclusion of the criminals from the society as an attempt to reform them and to prevent the person from social ostracism. Though this theory works stupendously for the correction of juveniles and first time criminals, but in the case of hardened criminals this theory may not work with the effectiveness. In these cases come the importance of the deterrence theories and the retributive theories. Thus each of these four theories have their own pros and cons and each being important in it, none can be ignored as such.