

PUNISHMENT AS A SOCIAL AND MORAL AGENCY

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Abstract. Law is one of the important pillars of the state. To administer justice, punishment is needed. There are various theories of punishment which are retributive, deterrent, and reformative. Punishment is a recognized function of all the states. With the passage of time the systems of punishment have met with different types of changes and modifications. There is a lot of criticism from the side of different NGOs and organizations of human rights, but the institution of punishment always remained a recognized one. To administer justice is an essential function of the state and it is the duty of the state to provide a peaceful environment to its people. Thus, philosophy behind the concept of punishment is not only to provide justice to the aggrieved but besides this to maintain security and safety in the society, to punish a criminal is not only to give torture to him or to humiliate, but there is a higher objective to be achieved and that is to establish a peaceful society. We can find a synthesis of three kinds of punishment in the Qur'ān. The purpose of the Qur'ānic concept of punishment is to establish a peaceful society. For this purpose sometimes punishment is ordained and sometimes forgiveness is desirable.

The problem of punishment is linked on one side with the question of morality and on the other side with the question of law. Every civilized society has a system of law. To punish the criminal is a recognized function of all states. In other words, existence of law entails punishment. Punishment to a criminal by

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the state and punishment to children by their parents and teachers is not the same. The institution of punishment is naturally knitted in the whole structure of social life. The importance of punishment in education can hardly be denied. It is not only necessary to straighten the children in homes or in educational institutions; it is also a necessary part of the healthy growth and survival of the society.

Punishment means infliction of suffering on wrongdoers. First thing in this definition is that punishment is limited only to wrongdoers. The story of wrongdoing and its retribution is as old as civilization itself. System of punishment has changed and tailored with the passage of time but it always remained the part of social system. The use of rod and other slight punishments in educational institutions are criticized and condemned by the psychologists and social reformers. Death penalty is abolished in many countries. The offenders could not be kept in prisons without going through legal process by the courts. However, today the criticism on punishment is more active than before.

Any attempt to answer this criticism leads us to bump into the problems of philosophy, psychology, theology, ethics and sociology. There are many questions to be answered. For example, should the wrongdoer be treated as an annoyance to be abated, a trouble maker to be disciplined, or should he be punished in such an exemplary way, by which it could be brought home to other members of society that wrongdoer wouldn't be spared. In other words society is always in the need of law and its implementation.

In olden days, principle of punishment was 'blood' for 'blood' and it was held very brutally and indiscriminately. The retributive theory is perhaps the oldest one. With the advent of psychology and other inter human relationship disciplines, the ways and methods of punishment have undergone some modification. Similarly the other theories of punishment took birth under the circumstances which justified their emergence.

The suffering of pain by the person who is punished is considered a bad thing in itself. To exercise this bad thing needs to be justified. To ask whether punishment can be justified, may

be to ask if it has some purpose? Or whether it is the best way to achieve the purpose? It is too hard to separate the definition from justification. Punishment is a value laden word. Somehow or the other the question of punishment becomes the question of morality and of law as well. In the long run this question simply becomes the question of social order.

To answer all these questions three main views could be distinguished.

- (i) It is always good to punish the wrongdoer (retributive theory).
- (ii) Sometimes it is right and sometimes it is wrong (deterrent theory).
- (iii) It is never right (reformative theory).

Retribution is in fact an application of a general rule of “tit for tat”. By doing an offence the wrongdoer challenges the law of the state and in return he has to face the consequences in the form of punishment. In this view punishment is solely related with the breaches of law. The other important point in this regard is that how severely the offender should be punished?

Kant is of the view that retribution is the sole consideration in fixing the amount and kinds of punishment. He says:

“Punishment can never serve nearly as a means to further another good either for the offender himself or for society. But must always be inflicted simply and solely because he has committed a crime. The law of punishment is Categorical imperative.”¹

Kant is of the opinion that from the moral point of view, punishment is retributive. In discussing the problem he went so far as to say that:

“If the world were about to come to an end, it was therefore evident that to one would benefit from the punishment of prisoners who have been sentenced to death, those be executed nevertheless, in the interest of righting the balance of justice.”²

The retributive theory claims that offence is a necessary element for punishment. If there is no crime, there would be no punishment. The offender should be treated as an end in himself not as a means. There is no other question of reformation of the criminal or for the good of society. Hegel says 'hence a man is a moral being so it is his right to be punished'. In punishment the offender is honored as a rational being, since punishment is looked on as his right. This is that it is recognition of a criminal as a rational and moral being.

"The wrongdoer whereby he has transgressed law of right has incurred a debt. Justice requires that the debt be paid, that the wrongdoer be expiated. This first object of punishment to make satisfaction to outraged law."³

Compensation is the suffering for an offence and punishment is a form of compensation. To suffer a punishment is just like to pay a debt, which is due to law which has been violated. Guilt plus punishment is equal to innocence. The penalty of wrongdoing is a debt to be paid. When punishment has been endured, it does mean that the debt is paid.

"There seems to be a feeling too, that one who commits a crime. Owes a "debt" that he must pay, and that so long as that debt remains unpaid, there is an imbalance in the community or in the universe, a kind of state of being — injustice — that can be rectified only with the punishment of the wrongdoers."⁴

"The most thorough going retributivists maintain that the punishment of crime is right in itself — that the guilty should suffer, and that justice, or the moral order, requires the institution of punishment."⁵

Question of justice is the main question in Plato's thought. In order to maintain justice he supports retributive theory of punishment.

"If justice is good and the health of the soul as injustice is its disease and shame, chastisement is their remedy. If a man is happy when he lives in order, then when he is out of it, it is of importance to him to enter it again and

he enters it through chastisement. Every culprit demands expiation: the culprit is ugly, it is contrary to justice and order, the expiation is beautiful because all that is just is beautiful and to suffer for justice is beautiful.”⁶

The retributive theory may be defined as a view that punishment is of value not mainly or primarily because of any good consequences it may produce but as an end-in-itself.

This seems inhuman and irrational because it enjoins the infliction of pain or deprivation only for the sake of pain. If we say that anything is end in itself, then it does not require any justification in terms of appreciation or resemblance with other goods. Its intrinsic value could be judged on any ground including intuition or divine revelation but intuition is not a satisfactorily accepted source for all people. When we say that criminal should be punished, this demand for justice reaffirms the punishment. If any theory which justifies punishment is taken for the good consequences to be achieved, one thing should be remembered that punishment is only for a past offence. The question to be dealt here is that the criminal should be punished justly or he should be morally improved? In both cases punishment is not enough. There are certain difficulties in determining the degrees of moral badness attached to any crime and to notice that how much suffering that particular penalty will bring to a person. If we would be able to determine all this, how can we determine a pain for a given degree of moral badness?

“Punishment is punishment,” wrote F. H. Bradley, “only when it is deserved.” Punishment for any other reason is “crying injustice”.⁷

Man is responsible for his action. This is a simple principle, which provides the basis for the justification of punishment. Man is free to choose between good and bad, right and wrong due to the moral sense given to him. The intension of a person remains personal but when it turns into an action, it becomes of social importance. Punishment in Islam is to promote moral values for the welfare of society. The system of punishment in Islam is designed to attain certain objective. The objective of punishment

in Islamic social system is a higher one, it is to establish a secured and peaceful society.

Since the committing of an offence is a breach of a law, and the Qur'ān has set a system of punishment. The Qur'ān describes punishment in this way:

“Now as for the man who steals and the woman who steals, cut off the hand of either of them in requital for what they have wrought, as a deterrent ordained by God.” (5:38)

The deterrent aspect of punishment is perhaps the most important one. Each punishment somehow or the other has the deterrence. The main purpose of the law of crime is to make the wrongdoers an example and warning to others. The objective of punishment is not only to prevent the criminal from doing crime for the next time, but also make him an example for other people who have such kind of intentions. The aim behind the deterrent punishment is to secure society rather than individual.

“The deterrent theory was the bases of punishment in England in medieval times and continued to be so till the beginning of the 19th century. The result was that severe and inhuman punishments were inflicted even for minor offences in England. In India also, the penalty of death or mutilation of limbs was imposed even for petty offences.”⁸

The justification of the punishment is only as a means to an end and its main purpose is to prevent society from future offences. The sense of punishment is always to deter the offender and the other members of the society. In other words the objective of punishment is not only to straighten the wrongdoer but the betterment of society in the long run. By giving punishment to wrongdoer, there would be two fold psychological effects, on one side, to the offender and on the other side to the society. There is another side of the picture. The offender sometimes has some deep rooted psychological problems which force him to do a particular action. Instead of getting afraid the offender may

become more aggressive and want to take revenge. Suicide killing may be one of the examples.

Reformation only works there, where one can determine that the offender is a psychological patient at any level and some kind of psychological treatment can do good to reform the person, who has done an offence. Punishment sometimes cures a person who has nasty tendencies. The main objective of punishment is always deterrence. If the state is in a position to reform the criminal, must do it, but to protect the innocent is more important than to improve the guilty. Discouraging the crimes is necessary than to reforming and rehabilitating the criminals. Reformatory theory wishes to give as little pain as possible and tends to improve much. On the other hand, A. C. Ewing is of the view that reformation of criminals should be sought at any costs. He holds that if the retributive punishment is chosen in spite of its bad consequences to individual or society, it would be a crime by it self.

“Retributive justice may be a very good thing, but the saving of the souls is a much better thing, and to seek to achieve the first at all costs, even where it will probably involve the sacrifice of the second, seems to me not amoral duty but positively, and in a serious degree, wrong.”⁹

There is a great hue and cry over the death penalty from the side of psychologists, sociologists and different NGOs of human rights. They claim that death penalty should be stopped because it is inhuman. The plea they take that by giving death penalty we are committing another offence that we kill a man. A. C. Ewing is of the view:

“Nowhere else is it right deliberately to inflict evil as such. Yet here we are asked to inflict pain for pain’s sake. It seems strange that a kind of action which under ordinary conditions is regarded as the very extreme of moral depravity should become a virtue in the case of punishment.”¹⁰

Here arises another question that by giving any kind of punishment can we minimize the rate of crimes?

After brief discussion on different kinds of punishment we come to the conclusion that punishment appears a fundamental ingredient of a moral society. Islamic view of punishment is a synthesis of all kinds of philosophical theories of punishment. It has the capacity to exercise all kinds of punishment namely retributive, deterrent and reformative. The objective of Islamic concept of punishment is a big one and it deals within a large perspective.

The Qur'ān wants to establish a peaceful society for human beings. The main stress is on the social side rather than the commands about worship and the main concern is to help the man in setting up a social system which is lawful. We find three types of punishment in the Qur'ān. In The retributive theory of punishment man is taken as end in itself while The Qur'ān also insists on that in the case of murder, only murderer should be punished but the spirit behind is not only to kill the man and get rid of one culprit but here man is used as a means to get the big purpose. And that is the betterment of society that is the reformation of other members. For this reason it is said in the Qur'ān that:

“There is life for you in the law of retaliation O men of Understanding, that you may enjoy security.” (2:179)

We find two kinds of commands in the Qur'ān:

1. Moral Commands
2. Castigatory Commands

Breaking of moral injunction could not be brought under the heading of social crime. On the other hand Castigatory commands are those laws that breaking of these becomes a social crime. There are many dos and don'ts which could not be brought under social laws. This division of the Qur'ānic injunction is to understand the difference between strong and slight orders for punishment. The whole teachings of the Qur'ānic injunctions aim at to inculcate morality and to set up a good society.

There are two kinds of orders in the Qur'ān. First there are orders in which punishment is prescribed. Second are those in which to fix punishment is the duty of the state. This matter is of great importance that which injunctions we should include in castigatory laws, who will decide the quality of pain to the wrongdoer. It is quiet clear that no single person would be able to answer this question. It is the state who will look into the matter and will determine and fix punishment. The principle of movement works here. These laws could be changed and amended with the changing circumstances. The explanation and modification could be done with the passage of time. Islam is not a static religion .It keeps flexibility in it, which works when needed. The concept of *Ijtihad* in Islamic Jurisprudence works under this principle.

This is a dire need of the time that an atmosphere of such kind should be set in which each individual feels that his basic rights are safe and protected. The creation of such atmosphere is necessarily would be the result of Qur'ānic Social System.

There are certain other factors which can destroy the peace of society. Some people are psychologically not sound. Apparently they look like sane people but sometimes they behave in such a way that peace of society is disturbed. These people should be handled other way. The punishment works in two ways. First, to improve their psychological behaviour and deterrence for those who have intentions of doing crime. Second, the compensation of the loss for the person who is inflicted .The inflicted person is complainant not only against the offender, but against the state as well. If the recovery of the loss is not made by the offender, it is the responsibility of the state to provide the compensation to the plaintiff. It is the duty of the state to provide security and protection to its citizens. If it fails to exercise its power to fulfill its duty, how it could be the protector. Keeping in view the larger purpose it should be the responsibility of the state and social system to keep peace in society and make such arrangements that no one could destroy the peace of society.

Some one may ask about the Qur'ānic concept of forgiveness. The Qur'ān is very much vigilant in administrating

peace in society. It teaches if there could be any kind of scope to straighten the individual, he could be forgiven.

“But [remember] that an attempt at requiting evil may, too, become an evil; hence, who ever pardons [his foe] and makes peace, his reward rests with God — for, verily, He does not love evil doers.” (42:40, 41)

The Qur’ān calls for providing a security and safety in the prevailing social system in the Islamic state. For this purpose certain principles are maintained. *Qisas* is first principle in this regard.

The Qur’ān says,

“And there is life for you in retaliation men of understanding that ye may ward off (evil). (2:179)

The Qur’ān clarifies that no offence should be remained unchecked. The main stress is on a flawless and secured system of social living. In order to achieve this goal sometimes punishment is ordained and sometimes forgiveness is desirable.

We can call the second principle the principle of justice.

“O Ye who believe, Retaliation is prescribed for you in the matter of murder; the free man for the freeman and the slave for the slave, and the female for the female.” (2:178)

Justice means that the punishment should be according to the offence. Punishment is a need of society. The wrongdoer should not be treated only as a patient; he is a criminal and should be treated as criminal.

“The punishment is a recompense for the crime. It is undesirable to treat a criminal lightly who threatens the security of society with danger.”¹¹

After this discussion we come to know the conclusion that the Qur’ān aims at to establish such kind of social system in which each and every individual can live peacefully. Islam wants to protect society from the dangers of criminals. The purpose behind giving somebody punishment is not only to give torture or

to humiliate but to achieve some higher objective which is an important part of Islamic social system. It is the right of society to secure and safe its members. The Philosophy behind punishment is that no crime should be left unchecked. This is a simple rule that not let the evil to prosper and the criminals should be countered with iron hands to gain the purpose of making a society peaceful and worth living.

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