

REDRESSIVE THEORY OF PUNISHMENT

Democracy : Law and Justice

Law & Society

Punishment is not an isolated phenomenon. It is intimately related to the socio-political modes and aspirations of a society. Law is the key-lever which maintains and sustains the equilibrium of social relations of all sorts. The legal system is, in turn, an outcome of the human urges that determine inter-personal social relations. It is, therefore, keyed to a definite social purpose. It is institutional and instrumental. It is institutional, because it aims at maintaining the solidarity of a society. It is instrumental, because it provides for the society and its individual members to live upto their cherished desires and values. But there is nothing ultimate or intrinsic about it. Since the equilibrium of social relations is in a continuous process of change, for many reasons, so has the legal system of a society to remain in personal adjustment to respond to it properly.

Punishment is the operational mechanics of a legal system. It is its weaponry. Punishment figures at the centre in Hindu-polity also. Lord Manu has extolled it as "son of Lord"....."Punishment alone governs all created beings and keeps the world in order"¹ Kautilya upholds it as the "sceptre on which the well being and progress depends."²

The conformists and non-conformists; centrifugal and the centripetal forces are always co-present in a society. Law attempts to maintain the balance between these rival forces without being detrimental to progress. Whenever, the disruptive forces, at individual or group level, tend to vitiate the social equilibrium, law takes cognisance of the situation and restores order by punishing the lawlessness. Thus punishment consists in inflicting suffering, in any shape or form, upon those who take liberties with the law of land. Since society is an ever-changing, equilibrium of its relations, its law and modes of punishment also remain in a state of adjustment with it.

There are different systems of societies. An authoritarian society is different from a democratic society, a theocratic

society differs from a secular society and so on. Every society has its own value system and its supporting legal-system. The tone and character of the legal-system of a society reflects the status and the role on individual as a citizen plays in that system. If the individual is free to realise himself, as in a democratic frame-work then, the laws and the modes of punishment will, and should, be different from those where an individual is just an instrument of the "social will" or the "rulers-will". It matters whether an individual constitutes part of 'a people' or of 'a subject'. Liberty is the differentia of 'a people', servitude characterisea 'a subject'. Self-rule is the *sine quanon* of a democratic society and serfdom the hall-mark of an authoritarian social order.

An individual therefore, occupies different positions from society to society. Unlike an authoritarian set-up, a democratic society should never liken to rob its individual citizen at least of his personality even on committing an offence to law. His individuality should remain intact. He must be treated as an end-in-himself growing and fulfilling like every other individual in society. The institution of punishment should therefore, differ from society to society.

It is very well known that no one is a born criminal nor is any one a criminal by choice. One becomes a criminal, more often than not, under compulsion. And, what one becomes is the by-product of bio-social factors. Faulty social environment, very often, produces criminal tensions in the minds of otherwise law-abiding citizens. We can not and we do not, set right the social order, but we hold the individual responsible for a crime in its entirety and punish him without going into the causes that prompted him to go that criminal way. However, the occasion of a crime is different from it's cause. The cause of a crime lay deeper in the body of social milieu, work from underneath and are of lasting nature. The occasion is rather ephemeral and accidental.

What moral right does anyone have to possess more than one's needs so long as a single person in his society does not possess just enough for his need? Anyhow, law can not afford to be objective in its import and application and vitalize social equities. If some people live below poverty-line and others live at wasteful luxury standard, what is basically wrong? No law can make it

right. We possess more than our need and punish anyone who takes away a portion of it for his bare needs. The socio-economic mat should be reset so as to provide for every individual an honourable means of livelihood.

Equality preconditions social or natural justice. Socio-economic equality, relative if not absolute, prefaces political freedom and civil liberties. Justice should not be a privilege nor should law be a privilege nor should law be a weapon in the hands of the affluent and the frugal section of a society to protect and preserve its privileged position. Disparity breeds disparity everywhere. If the application of law has to be objective then, it must take man as man and every man as one and no one more than one.

Punishment

Punishment should also have a different dimension and temper in a democratic society. An individual should not be punished as a means to any end beyond himself, but for himself only. Preventive theory of punishment subordinates individual to society. This theory is acceptable to the extent it prevents the criminal or the wrong-doer from repeating the wrong and not that others are to be prevented from going that way. This would be undemocratic. Retributive theory plays upon the hoax of the 'offended majesty of law'. Reformatory theory is a soft-spoken idiom for reform of the criminal.

Retributive theory claims punishment to be the wage of wrong. It is acceptable to that extent. But it is also asserted, at the same time, that a wrong is an offence to law, law is sovereign and that its offended majesty is to be restored. Punishment restores the offended majesty of law. This sounds more a sophist than a norm of public administration. Fundamental moral law can claim to be sovereign, that too is not free from controversy. The law of a state is just instrumental. It is neither supreme nor sovereign. It is neither universal nor ultimate nor intrinsic. So where is its majesty? Further, it is just a form. For just form should we flog the individual and be just? The individual is the content, the flesh and blood of law. Law is not to preserve itself, but to preserve the individual in a system and for a purpose. Retributive theory takes law in a dehydrated sense. There is nothing very sacred about law.

As such, what is sacred is the individual and the system in which his life and purpose seek fulfilment. Law assists the process of fulfilment. The authoritarian rulers may provide majestic awe and status to law in order to crucify the individual at the altar of their vested interests. But in a democratic social order it is neither natural justice nor social justice. In short, it is no justice at all. Law in order to do justice must promote equities in social relations.

Reformatory theory sounds otherworldly. Reform of what? Of the criminal. But crime does not originate with the individual alone. It originates from the cross-section of individual-cum-social relations. You can not weed out crime or reform the criminal without purging the society of its disparity-ridden modes of living. Disparities breed despair and generate crime. An individual is just the germ-carrier. Destroy the germ and its source, otherwise no reform of any sort is possible.

Disparity of any sort impairs fraternal order. It undermines community-spirit and generates inferiority and superiority complexes among the high and the low, the rich and the poor. It is admitted that disparities can not be totally weeded out because individual differences are nature-born and thus eventually generate differences in the society. No legislation can make men equal who are born unequal. Differences do survive. But in a fraternal social order, just as in a family, innate differences of the members do not make them superior and inferior. They remain equal in spite of differences. Privileged section of society should not become a legacy distinct and elated order. This sparks of conflict and animosity in social relations.

Crime and Justice

Justice, as it obtains today, is therefore far removed from life and its norms. It may be consistent or rational, but life is not merely rational. Life transcends reason. Consistency or rationality is not the touchstone of life and its ways.

There are three parties in an act of crime : the aggrieved, the offender, and the state. For one reason or the other, the state punishes the offender, no matter on retributory grounds or for preventive purposes, etc. It is good so far as it goes, but what

about the aggrieved? The damage done to him is not at all repaired by punishing the criminal. What is justice for him? Our entire thought on punishment has been crime or criminal-centred. No theory of punishment has taken the aggrieved into consideration. Retributive theory holds that punishment is merited by the wrong: preventive theory justifies it to check crime and the reformatory theory advocates it to reform the criminal; none of these theories carries justice to the wronged. Whether society gains or the offended majesty of law is restored or the criminal becomes a whit better, are all one-way.

Justice

Law is above all a duty of the state towards the aggrieved in a democratic set-up. It does not deal with the whole problem squarely in this way. It is not all-comprehensive. The legal system is thus incomplete and unwholesome. Justice ought to be positive in approach and consequences. It should not carry out only the spirit of revenge. Further, it is no justice and least of all social justice to send a criminal to jail and feed him at the cost of the citizens. The criminal becomes an economic burden on the society. It is imperative in a democratic social order that each one, law-abiding citizen or a criminal, should pay for one's deeds or misdeeds. It is unjust that the law abiding, peace-loving section of a society, directly or indirectly, should stand the cost of jails, etc. Why should anyone be a liability upon anybody else? In view of the principle of equality, it is in order that crime ought to pay for its licentiousness. The criminal should be made to work extra so as (i) to repair the wrong done by him to the aggrieved and (ii) also to meet the cost of his stay in jails and the staff employed there to take care of him, etc. Criminals must learn that crime cannot be an easy-go. They should know its cost. Each crime ought to be priced. But it does not mean that commit the crime and pay-off its price. Price means labour, not cash, work and not money. It has to be a suffering in all cases.

Jails

Jails become after sometime just holiday resorts enjoyable or at least cease to have penal effect for the wonted criminals. Jails

neither reform the criminals nor do these repair the damage done to the offended.

Psychologically or sociologically, isolation in jails is also not proper kind of punishment. Isolation germinates criminal-tensions and tendencies in the mind of the victim. It hardens the tough-guys who sport with the life, property and peace of others. It makes them an object of social contempt. It creates social-gap. Psychologically, it ruins the personality of a criminal.

Jails produce inferiority complex which makes it difficult for a criminal to live in the society peacefully even when he chooses to do so. It is imperialistic and capitalistic. Justice is made a tool of segregation and to create a section in the society for hatred and contempt because it satisfies ego. We must have some one to hate or to feel superior to.

Aggrieved and the Offender

Law should bring together the aggrieved and the offender by way of punishment which should be imparted in a way as to make the offender suffer the wrong done by him and at the same time benefiting the aggrieved. It may be admitted that certain wrongs cannot be repaired. A murdered man cannot be brought back to life by any legal system or suffering of any kind or quality. True, but what does the aggrieved family gain if the murderer is hanged? Social justice implies that the offender should be punished rather than be punished, but in a way as to repair the loss of the aggrieved to the extent possible. The offender should be made to serve the interests of the aggrieved party. Punishment should redress, redeem and reclaim. It should not aim to humiliate the person in the criminal, it should rather transform his anguish into humility. It should repair him rather than generate despair in the desperado. This is how punishment can do real good in a democratic society.

Work

Social justice must involve the criminal in work. Work at all costs and at all levels is a imperative norm of democratic spectrum of a society. Work reforms the criminal and repairs the damage

done to the aggrieved, The fly-wheel of social justice is work glowing with continuum. The offender and the offended are not a category apart. They are human beings. They should remain together and improve upon their interpersonal relations. Democracy is based on fraternity which does not segregate but integrates. Isolation and segregation in any shape or form are suicidal to a democracy.

Redemption can never be complete nor can it ever be earned by staying in jails or going to the gallows and so on. It condemns the criminal all the worse. Redemption can be complete only if the individual is reclaimed in the social order without any indignity.

This can be achieved only when the grievances of the wronged are redressed. The damage done to the wronged person must be to the extent possible, repaired by the criminal himself and by his sweat and toil. It is only then, that the individual can be reclaimed as an honourable citizen in the society. Unless the old scars are healed, the aggrieved can never forgive him nor can the offender even on the completion of the sentence ever feel free from his sense of guilt.

The criminal should far better it is if possible, remain in the society to suffer out the wrong done by him paying back to the sinned. He should seek redemption by earning goodwill of the aggrieved. This would be the real suffering of the wrong.

Suppose A steals B's goods worth Rs. 700/- This case is proved in the court of law. A is held guilty. Instead of sending A to jail, he should be made to serve the interests of the aggrieved worth Rs. 700/- by working under police vigilance. He should be acquitted on receiving a certificate of relief and goodwill from the aggrieved and the police. Take another case. In cases of murder and other such grave crimes, in which the family is rendered helpless, the criminal having undergone due legal process, should be made to serve the family, if found guilty till the family becomes economically and socially self-supporting. This is positive justice which will promote harmony and eradicate hatred from the parties. This will integrate the criminal in the social order once again, benefitting all the three parties, the aggrieved, the wrong doer and the state.

It may be agreed that this theory does not cover all the cases but a significant social aspect of crime, punishment and justice has been brought to light. It takes punishment broad-based and democratic. It includes other theories of punishment and adds one more vital aspect of this phenomenon to make justice comprehensive, wholesome social and democratic.

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NOTES

1. S. Radhakrishnan & Charles Moore : A Source Book of Indian Philosophy. London 1957, p. 186.
2. *Ibid*, P. : 196.