

Unit- 3, Applied Ethics (B A Prog. Sem. 2, Ethics, DSC 2)

Theories of Punishment

(Dear students, its just a general introduction, after this, please consult readings,
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Punishment is a negative award imposed on culprits by the state for their wrongdoings. It means inflicting penalty or harm on a criminal for violating the rules of law or state. The main objective of punishment is to do justice to the victim, and to prevent crime by penalizing the criminal. It is a mechanism to preserve peace, harmony and social order in society by causing pain to a criminal through a legal procedure. Most philosophers, thinkers and jurists endorse the practice of punishment. For example, Aristotle observes punishment as a 'negative reward' to the offender for his/her own misdeeds. Hegel opines – 'Punishment is the demand of criminal as his reward.'

The nature and quantum of punishment differ from one crime to another, depending on the gravity of the crime.

Regarding the nature of punishment the main problem that moral philosophers encounter is that, what should be the purpose of punishment?

To address this problem, three main theories have been offered –

- 1. Retributive theory of punishment** – Generally it is called the theory of 'Tit for tat'. According to this theory, if a person has inflicted some harm on another, then the injustice involved in this act should be rectified by causing harm to that person. It endorses that people ought to get what they deserve. This is also the theory of justice that accepts capital punishment as a severe form of justice for heinous crimes. This theory believes that people should be paid back for their wrong doings. In a crude way this theory can be expressed as 'an eye for an eye, and a tooth for a tooth'.

Supporters- Plato, Aristotle, Kant, Hegel

(Some writers links this theory with deontological ethics. A criminal deserve punishment, irrespective of consequence.)

- 2. Theory of Deterrent or Preventive theory of punishment-** According to this theory the purpose of punishing a culprit is to prevent or deter or discourage other people from committing the crime. Its aim is to project punishment as an example to other potential criminals so that they would not commit the same offense. It was aptly stated by a judge in the following way-

"You are to be punished, not because you have stolen a sheep, but in order that others may not steal sheep."

This is interpreted as a utilitarian theory of punishment as it focuses on the outcome. That is (**utility** of) punishing someone causes greatest happiness of the greatest number. This theory upholds capital punishment for the most dreadful criminal, so that society would never face them again.

Supporters- Bentham, J S Mill,

- 3. Reformatory theory** - According to this theory the purpose of punishment should not be harmed or caused pain to criminals rather to reform them. It holds that when a criminal is made to suffer on account of the wrong done by him, he realizes his mistakes and learn to behave better in the future. That is, reformatory punishment brings about fundamental changes in the personality, attitude and behaviour of the culprit. Reform of the offender is closely related to his rehabilitation. The supporters of this theory believe that crime is like a disease and we can cure it by treating the person who does a crime rather than inflicting him. In other words, this theory does not favour inflicting severe pain on the criminal but treats him like a patient admitted to a hospital. According to them awarding harsh punishment to a criminal will enhance the gravity of the problem rather than easing it. This principal can be well expressed in following Gandhian dictum-

“An eye for an eye will make the whole world blind.”

Supporters - Mahatma Gandhi, Vinoba Bhave, Kiran Bedi (during her posting in Tihar Jail.)

For reformatory theorists, punishment is not imposed as a means for the benefit of others. Rather, it is given to reform or educate the offender himself. Here the crime committed by the criminal is an end and not a means as in the deterrent theory. These thinkers do not endorse capital punishment.

(Dear students, for criticism and other details on the topic of capital punishment please consult reading. Please feel free, if you have any question or clarification to ask.)

CHAPTER 16

Theories of Punishment

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Theories of punishment are defining views on action needed to 'give justice' in a way that ensures harmony in human society and to human lives. The proverbial 'scales of justice' as measure for balance is a symbol commonly associated with fair play in order to judge the actions of a 'wrongdoer' in a society where human interactions are being constantly evaluated. There is, however, no general or universal rule of justice that is accepted by all societies and communities. When we ask questions such as, what is good for an individual?, or what is good for a society?, it could raise some ethical dilemmas that need to be addressed for, there can be different views as response on what is the most ethical way of dealing with crime and what are the ways in which individuals can be punished, with particular reference to either the individual or to the society as a whole. Individuals as 'moral beings' are also part of society that is a larger whole. In deciding whether consideration should be given first to the individual moral being or to the society to which she or he belongs, there can be a conflict of interest or moral benefit. For instance utilitarianism would look to the larger social moral benefit- of the greatest number, while deontology would attend to the individual's moral status and the act itself under moral consideration. Both statuses are equally important but different theories of justice and the theories of punishment usually emphasise one or the other, even though the larger and more complex end of both may be seen as same or similar.

Criminal law prohibits actions such as murder, rape, assault and theft. Offenders are punished with deprivation of freedom and property, i.e., through imprisonment or even with the loss of life. What justifies such punishment? It is the attempt of the theories of punishment to state the conditions which justify punishment. In Western ethical discourse the three common theories of punishment are retribution, deterrence, and reform and these extend from three central theories of justice, namely, retributive, utilitarian and distributive.

Retributive justice and utilitarian justice are more relevant as the basis of the theories of punishment than distributive justice since the latter deals more with the economic conditions of society such as distribution of welfare and opportunities and less with the topic under discussion.¹ This paper focuses mainly on retributive and utilitarian theories of punishment.

Retributive punishment extends from the retributive theory of justice associated with deontology and is based on the 'fairness' principle of 'just deserts'. It is understood to be a 'backward looking' theory in its consideration of the wrong act itself, not looking forward towards consequences of either the crime or the punishment. The consequentialist utilitarian standpoint, on the other hand, includes two distinct theories of punishment, namely, 'deterrence' from future crime and 'reform' of the wrong doer. These are known as 'forward looking' theories of punishment as they are concerned with the consequences of punishment to society and to the wrongdoer respectively. These theories do not completely justify punishment but contribute towards forms of law keeping and conceptions of justice that are widely accepted on ethical grounds.

RETRIBUTION, 'DESERT' AND PROPORTIONALITY

The retributive theory of punishment, historically, is a component of justice based on the notion of 'just deserts' that goes back to Plato, Aristotle and Kant as well as the Biblical tradition and other religions. It holds that people ought to get what they deserve. This is also the theory of justice that accepts capital punishment as a severe form of justice for very serious crimes. The idea that people should be paid back for their wrong doings appeals to people's sentiments. So much so that even though Christ said to turn the other cheek if someone slaps you, Christian justice generally believes in retribution. Well-known ethical thinkers too, among them Immanuel Kant, advocate the principle of 'desert'. Kant says in the *Critique of Practical Reason*:

...When someone who delights in annoying and vexing peace-loving folk receives at least a right good beating, it is certainly an ill, but everyone approves of it and considers it as good in itself, even if nothing further results from it.²

It must be acknowledged that there are many expressions of retributive punishment but perhaps the most influential and best known defence of retributive punishment even today is the one that Kant propounds in his *Metaphysical Elements of Justice*. In fact, Kantian retribution provides the basis for two cardinal principles, 'just deserts' and 'proportionality,' upon which retributive punishment is founded. Briefly, the 'principle of just desert' states

that people deserve to be treated in the same way as they have voluntarily treated others. The 'principle of proportionality,' especially in application to criminal justice, consists of the core argument that punishment should be proportionate to the crime.

The principle of 'just desert' when taken as a rationale for retributive punishment leads to the question of *why* we should treat people as they deserve. When examined, at least three or four understandable reasons for treating people as they deserve can be identified. First, acknowledging deserts grants people the power to *determine their own fates*. That is, 'desert' means that *all* people ought to be treated as they deserve. Since our well being depends on not only ourselves but also the way others treat us, in accepting a system of desert we may be able to ensure to a large extent, that we receive good or acceptable behavior towards ourselves by first treating others well. We can thus determine our own well being by treating others well. Second, acknowledging desert gives people control over how others will treat them. That is, individuals in society will themselves be *entitled to good treatment by earning it*. Without this control, people would be unable to affect how others treat them, and, could resort to the unethical or irresponsible behaviour of coercion or charity for any decent treatment they might receive. Since desert means treating people as they deserve, we can expect to be treated well by 'entitlement' of first behaving well ourselves or as we deserve rather than resorting to undue force or charity. If our own behaviour is faulty we would lose the entitlement of being treated well. Third, morality includes how we *choose to treat other people* in our varied interactions with them. That is, there is personal choice and responsibility implied in this view in terms of how we decide to treat others. Moreover, if *reciprocity* could not be expected, the morality of treating other people well would be less important for both individuals and society. Thus it is held that only the guilty should be punished, because innocent people have not done anything to deserve punishment.

These arguments apart, 'just desert' or retribution might be acceptable from the egalitarian point of view upheld by distributive justice, if it brings in greater distributed social benefits, i.e., by altering things in the direction of greater equality rather than inequality. For instance, reward for a hardworking person rather than a lazy worker may make up for the deliberate efforts by the former, since the lazy person getting equal benefits is not fair.

Some key issues in the context of equality and fairness that have been brought up in more recent ethical discourse, after Kant, include the views of noted thinker John Rawls on the issue of 'natural endowment'. As elaborated

in his book *A Theory of Justice*, the question of 'natural endowments' is taken care of by considering the principle of 'entitlement'. Rawls says:

Perhaps some will think that the person with greater natural endowments deserves those assets and the superior character that made their development possible. Because he is more worthy in this sense, he deserves the greater advantages that he could achieve with them. This view, however, is surely incorrect. It seems to be one of the fixed points of our considered judgements, any more than one deserves one's initial starting place in society.³

Importantly, the question of 'natural endowments' is taken care of by considering the principle of 'entitlement' in 'Rawlsian deontology'. Though Rawls refers to "our considered judgements," ethically significant is the underlying argument that native endowments are not deserved. This is consistent with the general retributive punishment standpoint. That is, one does not deserve better only because one is naturally more talented. Thus, in this context, what is emphasised is that people only deserve things because of their past actions. The view that people deserve things because of their superior native endowments is no longer well regarded in ethics today.

The second foundation for retributive punishment is 'proportionality'. Although proportionality is often difficult to measure in the practice of punishment, its importance in determining retributive punishment remains. Kant justifies proportionality in *Metaphysical Elements of Justice* by clearly supporting the principle of *lex talionis*, which means that the punishment should be the same as the crime. However, ethicists today reject this in favour of a more acceptable notion of proportionality, by and in itself. The golden rule tells us to do unto others what we would have others do unto us, relevantly interpreted, it means an implicit affirmation of equality such that underlies the justice of *lex talionis*. However, there *cannot* really be an exact returning of the same act as punishment, as it may turn out to be unfair or immoral. For instance we cannot punish rapists with rape or torturers with torture. Proportionality means suitable serious or mild punishment for serious or mild crimes respectively, but not the same act in return. Punishment is to be dispensed essentially focussing on the degree of immorality of the crime itself.

Retributivism, then, incorporates four essential principles of punishment in the most natural way possible. (1) Only the guilty should be punished, because innocent people have not done anything to deserve punishment. (2) People who committed the same crime should receive the same punishment, because

what one deserves depends only on what one has done. (3) The principle of desert requires proportionate responses because what people deserve depends on how well, or how badly, they have behaved. Thus retributivists usually support capital punishment in principle going by the severity of the crime (even though they might have reasons for opposing it in practice). For the retributivist then a murderer charged with 'a crime against humanity' deserves a very severe response, even capital punishment, whereas a thief deserves a more moderate response. (4) Finally, a retributivist system of punishment, where what people deserve depends only on their voluntary behaviour, would have to accept 'excuses' for when that behaviour is not voluntary.⁴ Thus by demonstrating that one was coerced, one can get off from being punished within this system.

Significantly, the difference between 'retribution' and 'revenge' is often not recognised in society and they are often spoken of synonymously. When revenge is especially interpreted to be a demand for primitive vengeance, heated debates often follow. However, it ought to be noted that retribution as punishment does not really advocate vengeance as the latter is not an ethical idea at all. Revenge usually means retaliation by the victim directly or by someone on his or her behalf (whether deserved or not) which results in the infliction of suffering. It is possible that this infliction is undertaken without regarding the quality or severity of the retaliatory act. In contrast retribution as punishment is dispensed in a court of law; it is a third party judgement; it is based on the principle of 'fairness'; and it is proportional to maximum 'equality'.

Attention ought to be paid to two ideas here. First, that a retributivist system of punishment would have to accept excuses, especially if the excuse is accepted as a way of demonstrating that the offender was coerced and his behaviour was not voluntary. Second, since life is considered sacred and death is the final extinction of life, capital punishment is a matter of controversy and emotion in most societies. And so the issue of capital punishment is not as straight forward and is mixed with other elements – amounting to retributivists accepting this punishment in principle, but having reasons for opposing it in practice.

A related but distinct ethical issue is one of pardon or 'mercy' by the law. Interestingly, statistics vary in different communities and societies with regard to the efficacy of death penalty for the deterrence of crime; it is mostly reported that this penalty is not a very effective deterrent. The debate thus remains open about whether mercy as opposed to the death penalty is an ethically better option. It could be argued from the retributivist point of

view that in exceptional cases of crimes against humanity it would actually be unethical to forgive the offender. To have mercy on the grounds of either circumstances or any kind of compassion would not take into account the issues of graveness and proportionality. There is also the utilitarian view that if mercy (in terms of confinement) is granted to the guilty criminal instead of capital punishment, then it would mean the deprivation of state support to other more deserving and innocent people. To this could be added that the sanctity of human life, upheld by the right to life, could be lost if a proven 'crime against humanity', for example that committed by a psychopath beyond any known medical treatment or by a terrorist who wilfully kills innocents causing large scale social injury and loss, is shown mercy.

The limitation of the retributive theory is that it cannot sufficiently justify why the guilty should be punished at all if good consequences are not produced by punishment, and this is particularly pointed out by utilitarianism. Moreover, since the retributive theory does not take into account conditions before and after the crime but only the crime itself, it is often seen as failing to address the amount of suffering that can at times accompany both the wrong act and the offender in terms of the circumstances as well as the consequences of crime. It then seems to add to the suffering that already exists.

UTILITARIANISM, DETERRENCE AND REFORM

Utilitarianism as propounded by Jeremy Bentham, was famously developed by John Stuart Mill in his book *Utilitarianism* where he states the principle of utility: actions are right if they promote happiness and wrong when they produce the reverse. It also believes that pleasure and happiness are good and that pain or suffering is bad or evil in itself. Mill states in *Utilitarianism*:

I have, throughout, treated the idea of a *right* residing in the injured person and violation by the injury, not as a separate element in the composition of the idea and sentiment, but as one of the forms in which the other two elements clothe themselves. These elements are a hurt to some assignable person or persons, on the one hand, and a demand for punishment on the other. An examination of our own mind I think will show that these two things include all that we mean when we speak of violation of a right. When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law or by that of education and opinion.⁵

In this, the right to be protected by society on part of the offender would mean protection from undue injury, or violation of human dignity. It also means

that the victim has the right to be protected by society against violation of dignity and injury. Thus, that doesn't mean that there should be no punishment as such but only that reform or rehabilitation is preferred by utilitarianism, to forms of physical or corporal punishment as pain in itself or suffering as such is considered an evil.

The purpose of *deterrence* is mainly to treat punishment as an example to other potential criminals so that they would not commit the same crime or offence. A distinction can be made here between *general deterrence*, which is the psychological effect the punishment of the offender can have on others, and *specific deterrence*, which is the persuasive effect the suffering through punishment has on the offender such that persuades him or her not to commit the crime again. Ethicists at times object to this form of punishment because according to it the criminal or offender is treated merely as a means to other people's good. But this is not always the case as deterrence accepts capital punishment for serious crime where the suffering is most for the offender herself or himself. The main weakness of the utilitarian theory, however, remains that it cannot explain why punishment should be restricted to the guilty and not be extended to the innocent under appropriate situations, if deterrence is the aim of punishment. For, if the only aim of punishment is to deter people from committing crime, especially the same kind of crime, then it does not matter whether the person punished is really innocent or guilty.

Furthermore, deterrent punishment for *prevention* of future crime justifies and includes incapacitation of the criminal by imprisonment or execution. In this, utilitarian punishment permits imposing pain that is excessive to the degree of pleasure derived from the committing of the crime. Clearly the moral issue involved here is that it is always wrong to inflict on the offender or criminal more suffering than he or she deserves or has enacted, and no deterrent argument can justify this.

Utilitarianism also advocates the more complex reform or rehabilitative punishment. Since utilitarianism considers pain or suffering as bad or evil in itself, the argument here is that pain inflicted upon the offender through punishment leads to greater suffering in society and less happiness or pleasure and this is in general not good. Therefore, this theory appeals for reforming the personality of the criminal so that he or she could re-enter mainstream society again with a lesser chance of the same crime being committed. This would then lead to less suffering in society as the chance of the crime's occurring has fallen or it may not occur at all. Capital punishment is clearly not acceptable at all in the reformatory theory of justice. Reform as punishment is well accepted today as it is considered to be humane.

The 'reformatory theory of justice,' which extends from utilitarianism as well as consequentialist ethics, goes beyond them in being based on the notion of 'human need'. It deals with the most basic necessary conditions for life and health. That is, 'reform' as punishment addresses the most primary form of justice in any society concerned with the basic necessary conditions for life and health. According to this view, human need includes reforming criminals, providing health care, basic life needs etc.

In the field of distributive justice Amartya Sen and Martha Nussbaum with their 'capability theory' criticise utilitarianism, libertarianism and Rawlsian deontological liberalism.⁶ Although this theory of distributive justice does not deal specifically with either criminal justice or punishment for crime, it is an important contemporary view that is concerned with human dignity and human rights that includes a perspective on criminals as members of society. The capability approach carries forward the argument of utilitarianism beyond its traditional notions to question the Rawlsian viewpoint. The capability approach sees most modern views of justice, especially the liberal ones, as being based on "commodity fetishism" that give intrinsic value to material goods and prosperity instead of the actual well-being of individuals. According to it, the earlier classic theories of 'primary goods', for instance, that of Rawls, fall short of taking account of individual *human capacities*. Sen and Nussbaum have discussed in their theory that human needs and functional capacities are *not* always universal—for instance, the social forces affecting the lives of women, minorities and the poor etc. are different or differ.

The capability approach questions earlier theories of 'primary goods', for instance that of Rawls, who had put forward the idea that 'primary goods' are both materialistic as well as universal. From this begins the debate between the concept of primary goods as materialistic (and universal) versus 'capabilities' which includes mental, social, cultural aspects as *need* of a human being. The questions raised in response to the capability approach are for instance whether or not the notion of 'human needs' is culturally relative or defined? On its part the capability approach asks whether universal standards of 'needs' possible are indeed possible. While this view argues that food, clothing shelter – are basic needs, the focus changes towards 'the quality of life argument' that attends to the development of human capability for improved quality of life, beyond the merely material. It is here pointed out that the developing human capabilities are not material only, but, constitute developing one's mind, aspirations etc. In this would be included reform, care, health and social condition of criminals and circumstances of crime. That is, the background before and after the event

of the crime is taken into account while describing the crime and also while pronouncing punishment for it.

A related view is one given by 'care ethics' but this is not quite the same as 'reform'. Since reform and rehabilitation take into account the notion of 'care' in terms of both nurture and compassion with regard to individuals in society, particularly including the *relationship* that a criminal may have with other individuals or society in general, this view would include the condition and need of the criminal/offender who is subject to care.

Reform is also sometimes misunderstood to mean that the offender should be reformed through only education, greater economic facilities or even forgiveness. However, these are really not punishments as such, even though they may be desirable if they happen to change the character of the offender to the extent that she or he never commits any crime again. Since this is rarely the case, the real significance of the reformatory theory is that institutionalised forms of punishment should be modified and re-assessed and the circumstances of the offence or crime be taken into consideration before awarding a suitable punishment. Physical pain or violence to the body is not the only form of punishment. The true pain of those punished through imprisonment is perhaps the disapproval of society. The reformatory value of this kind of suffering is its ability to make the offender recognise the moral badness or evil of her or his wrong doing.⁷

While not contradicting the above arguments, A.C. Ewing suggests the educative theory of punishment where people would recognise that the acts that they think are *excusable*, like gambling, are in reality *very wrong* and need penalties imposed by laws. There are also other contemporary theories of punishment that incorporate principles of retributive and utilitarian considerations. For instance H. L. A. Hart maintains that the aim that justifies punishment is the utilitarian goal of preventing crime but states that only those who have voluntarily broken the law may be punished and that the punishment should be proportionate to the gravity of the offence.

Punishment remains a topic of continued debate. Institutionalised punishment is a way the state affects the moral lives of individuals by expressing disapproval of serious wrong-doing on their part such that creates suffering and social disharmony. Each of the theories of punishment discussed above advocate different forms of depriving freedom and property to individuals for the purpose of improving the condition of human beings and society. But they show their preferences towards either individuals or society by focusing on the gravity of the crime or the consequences on offender or society respectively. Each theory as stated has weaknesses and strengths, all the while contributing to the different perspectives on justice, crime and punishment.

NOTES AND REFERENCES

1. C.L. Ten, "Crime and Punishment" in *A Companion to Ethics*, ed., Peter Singer Oxford: Basil Blackwell, 1993, 366. In this essay he points out that for criminal justice, particularly, retributive punishment and the utilitarian theory of punishment are mainly relevant. However, this essay briefly discusses other forms of justice as well to bring out other views on punishment and crime, for a more comparative understanding.
2. Immanuel Kant, *Critique of Practical Reason*, trans., Lewis White Beck Chicago: University of Chicago Press, 1949 (1788), 170.
3. John Rawls, *A Theory of Justice*, Cambridge, Mass.: Harvard University Press, 1971, 103-4. For a comparative discussion on Rawls as well as Kant analysis of punishment and desert, see also James Rachels, "Punishment and Deserts" in *Ethics in Practice*, ed., Hugh LaFollette, Oxford: Blackwell, 1997, 470-479.
4. Hugo Adam Bedau, "Capital Punishment" in *Encyclopaedia of Applied Ethics*, Volume I, San Diego, California: Academic Press, 1998.
5. John Stuart Mill, "Utilitarianism" in *Justice: A Reader*, ed., Micheal J. Sandels, New York: Oxford University Press, 2007, 41.
6. Amartya Sen and M. Nussbaum, *The Quality of Life*, Oxford: Clarendon Press, 1993. Also see Amartya Sen and B. Williams, eds., *Utilitarianism and Beyond*, Cambridge: Cambridge University Press, 1982; and Amartya Sen, *Inequality Re-Examined*, Oxford: Clarendon Press, 1992 amongst other related writings. See for discussion on Libertarianism, Capability Approach and Rawlsian Liberalism, Sirkku Hellsten, "Distributive Justice, The Theories of" in *Encyclopaedia of Applied Ethics*, Volume I San Diego, California: Academic Press, 1998, 15-828.
7. J. Murphy, ed., *Punishment and Rehabilitation* (third edition), Belmont, CA: Wadsworth Press, 1995.
8. See A. C. Ewing, "Punishment as a Moral Agency: An Attempt to Reconcile the Retributive and the Utilitarian View", *Mind*, New series, vol 36, no. 143, July, (1927). See also H. L. A. Hart, *Punishment and Responsibility*, Oxford: Clarendon Press, 1968.

FURTHER READING

- H. L. A. Hart, *Punishment and Responsibility*, Oxford: Clarendon Press, 1968.
- Hugh LaFollette ed., *Ethics in Practice*, second edition, Oxford, U.K.: Blackwell Anthologies, Blackwell Publishers, 2002. (See Louis Pojman, "Defence of Death Penalty").
- J. Murphy, ed., *Punishment and Rehabilitation* (third edition), Belmont, CA: Wadsworth Press, 1995.
- Ruth Chadwick, ed., *Encyclopaedia of Applied Ethics*, Vol I, San Diego, California: Academic Press, 1998. (Refer to Sections on 'Justice' and theories of 'Punishment', 413 f and 815f respectively.)