
RETRIBUTION, REHABILITATION AND RESTORATION - WORKING TOWARDS THE GOALS OF CRIMINAL JUSTICE

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ABSTRACT

The notions of criminal justice and punishment as we know them today are a product of the evolution of societal attitudes towards crime and criminals. Sentencing for crimes stems from five primary considerations: retribution, rehabilitation, incapacitation, deterrence and restoration of the social order. This paper analyses the two models used by countries in punishing offenders - the models of retributive justice and restorative justice. These models help States justify the practice of incarceration through morality and rationality, and prescribe rules to meet the aforementioned goals.

Retributive justice as a model emphasises the guilt of the offender and seeks to punish them in a manner proportionate to the crime committed. Restorative justice aims to bring all actors affected by the offence (victim, offender, and community) together to repair the harms caused by the offence, restore the victim and the community, and reintegrate the offender into society.

This article compares and contrasts the retributive and restorative justice models that are currently in place in India and Norway, respectively. The factors that serve as a touchstone against which both models are compared, include involvement and compensation of the victims, impact on the offenders, and rates of recidivism. These factors are determined through the goals of deterrence, incapacitation, rehabilitation, retribution and restoration as laid down in the theories of crime and punishment expounded by prominent philosophers such as Kant, Bentham and Beccaria. Norway, which uses the restorative model, has achieved lower recidivism rates in contrast to countries such as India, which follow the retributive system and face high recidivism rates. This article hypothesises that the restorative model of justice is more successful due to its goal of reintegration with the least torment to the condemned offender, compared to the retributive model which has a strictly punitive goal.

Introduction - The Justification and Goals of Punishment

The fear of acts which disrupt the social order inspires the imposition of punishment by those who have the power to compel persons to abide by the desired standards of conduct.¹ Punishment is defined in Black's Law Dictionary as any pain, penalty, suffering or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him or for his omission of a duty enjoined by law.² There is a requirement that the activity or behaviour sought to be curbed be declared a legal wrong in order to justify the imposition of penalties or punishments by public authorities in their capacity as functionaries of the State.

The theories of punishment can be applied only with an understanding of the term punishment, which constitutes five elements- first, an infliction of a certain degree of suffering or unpleasantness upon a person; second, the purpose of infliction of a punishment is for a particular offence or violation of the law; third it must be an act or omission committed by the offender; fourth it must be the direct act that can be attributed to a specific individual or organisation and not an act of God; fifth, punishment must be imposed by a specific authority, which derives its power from the law or rules against which the offence was committed.³

The foundation of criminal justice, therefore, rests on the assumption that an intentional violation of a legal norm creates a need for the atonement or expiation of the act by the offender, and such a rule can exclusively be implemented by the State and its agencies.⁴ The State's monopoly over the imposition of punishment is further demonstrated by the restriction of criminal justice to the confines and limitations of legal norms, with law enforcement authorities and mechanisms being compelled to conform to the procedure established by law, and any transgressions being viewed as offences as well.

Additionally, it can be stated that the legal order that prescribes punishment as a sanction does not recognise the interest of the private individual who was the actual victim of the crime as a decisive factor in the sentencing process.⁵ The true victim of a crime is thus seen to be society

¹ Joel Myer, Reflections on Some Theories of Punishment, *The Journal of Criminal Law, Criminology, and Police Science*, Dec., 1968, Vol. 59, No. 4, pp. 595-599

² Black's Law Dictionary, 2nd edn.

³ Antony Flew, *The Justification of Punishment*, *Philosophy*, Oct., 1954, Vol. 29, No. 111, 291, pp.293,294

⁴ Egon Bittner and Anthony M. Platt, *The Meaning of Punishment*, *Issues in Criminology*, Spring 1966, Vol. 2, No. 1, TREATMENT AND PUNISHMENT (Spring 1966), pp. 79-99

⁵ Kelsen, Hans, *General Theory of Law and the State*, (1949), pg.206

at large, and not the individual against whom the crime was committed. The the violation of a person's private sphere, for the purposes of determining the nature and degree of punishment, is merely incidental and holds little persuasive value in the eyes of the State.

The goals of punishment centre involve retribution, deterrence, incapacitation, restoration and rehabilitation, in order to ultimately restore the social equilibrium.⁶ In order to achieve these varied goals, punishment operates to injunct persons from committing crime, and while all forms of punishment involve to a certain extent the deprivation of freedom, the manner in which imprisonment is enforced by authorities varies according to the underlying philosophy of theory of punishment.⁷

Theories of Punishment

There are multiple theories of punishment that play a crucial role in determining the type and extent of sentencing that is imposed on the offender, and they can be categorised into the following; retributive theory, deterrent theory, preventative theory, incapacitation theory, compensatory theory, reformatory theory, and the utilitarian theory.

All these theories present varying understandings of the notion of punishment, the justification for the same, and the ultimate goal sought to be achieved by punishing a person for violating a legal norm. An understanding of these theories and the manner in which they seek to impose punishment upon offenders is crucial to analyse the incarceration system and its effectiveness in reducing crime, protecting public health and safety, and maintaining the social order. These theories are either implemented in isolation or in combination, while sentencing convicted offenders.

A general understanding of the rehabilitative goal would yield the knowledge that the primary goal of rehabilitative sentencing would be to treat the prisoner of any socially deviant behaviour patterns and tendencies, and train them to become productive members of society that uphold law and order.⁸ Conversely in the context of retribution and deterrence, the crimes determine the type of punishment and the personality of the offender determines the extent of the same.⁹

⁶ <https://slate.com/human-interest/2013/05/why-does-norway-have-a-21-year-maximum-prison-sentence.html>

⁷ Joel Meyer, Reflections on Some Theories of Punishment, *The Journal of Criminal Law, Criminology, and Police Science*, Dec., 1968, Vol. 59, No. 4, pp. 595

⁸ *ibid*

⁹ *Supra* note 7

Retributive Theory

The retributive theory of punishment centres around the need to restore societal equilibrium through the expression of a sentiment of hostility, in order to retaliate against the offender. In primitive and feudal societies, retribution was an individual responsibility with vigilante justice being an accepted form to settle any differences. However, the advancement of society caused the emergence of the welfare state, where the responsibility to protect citizens from any harm or suffering fell to the sovereign and their agents by virtue of the social contract theory. The State perceives a crime committed against one individual as a crime committed against society as a whole, and thus, executes a punishment by attributing the need for retribution to the entire community.¹⁰

The retributive theory of punishment is supported by three considerations. Firstly, a person may be punished only if they have committed a wrong, secondly, the punishment must be equivalent to the immorality of the crime committed, and thirdly the justification for punishment of persons is that the retaliatory suffering placed on the wrongdoer is morally valid.¹¹ These three considerations are termed, respectively, the principle of responsibility, the principle of proportionality, and the principle of just requital.¹²

A sentence is prescribed under this theory, therefore, with a focus on inflicting a punishment on the offender.

Deterrent Theory

The philosophy of deterrence is the application of utilitarianism to criminal justice. The concept of rational choice is based on economic utilitarianism, which operates under the assumption that all human actions are based on rational decisions taken in one's best interest.

According to the deterrence theory, a rational human being would recognize that the consequences to be incurred upon being punished for a crime would outweigh the benefit that

¹⁰ See, Privette, *Theories of Punishment*, 29 U.K.C.L. REV. 76 (1958).

¹¹ See, Hart, *Punishment and Responsibility* (New York: Oxford, 1968).

¹² Hugo Adam Bedau, *Retribution and the Theory of Punishment*, *The Journal of Philosophy*, Nov., 1978, Vol. 75, No. 11, 601, 603

one would derive out of committing the crime, thus defeating one's self interest and thus erasing the motivation and desire to commit a crime.¹³

The main goal of the deterrence approach is to convince potential criminal offenders that the risk of being punished and the subsequent harm that would be suffered is significantly greater than any benefit that would be incurred by the commission of a crime. It involves the usage of punishment as an example to demonstrate to future offenders the consequences of their actions, and to instil a fear of legal penalties as the sole preventive mechanism.¹⁴

However, it must be noted that the deterrence theory is not always effective. It fails in instances where individuals do not fear getting caught due to factors such as inefficient mechanisms to detect crimes and corruption in law enforcement, all leading to low conviction rates, even if the prescribed punishment is severe. Furthermore, crimes of passion, impulsive acts and accidents cannot be prevented by a criminal justice system operating solely on the theory of deterrence.

Rehabilitative Theory

Rehabilitation is punishment based on the psychology and sociology of crime. The goal of rehabilitation is to return the offender to society neither embittered nor resolved to get even for his degradation and suffering, but possessing a new set of values and morals and a desire to contribute to society.¹⁵

Rehabilitation is motivated by a belief in the worth and dignity of every person, and a societal willingness to expend their time and energy to reclaim the criminal for his own good, and not just to prevent him from committing another offence that would harm society.

It is a highly individualistic process that is resource intensive. It requires a constructive program with adequate facilities and well-trained personnel for reforming the criminals' attitudes and rehabilitating them to become productive members of society.¹⁶ Motivation, stimulation and ideas to reform one's conduct must be provided.

¹³ Ronald L. Akers, Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken, *The Journal of Criminal Law and Criminology*, Autumn, 1990, Vol. 81, No. 3. 653, 654.

¹⁴ Gibbs, Punishment and Deterrence: Theory, Research and Penal Policy, in *LAW AND THE SOCIAL SCIENCES* 319, 325-26 (L. Lipson & S. Wheeler eds. 1986)

¹⁵ *Supra* note 7 at 597

¹⁶ Leopold, What is Wrong With the Prison System, 45 *NEB. L. REV.*36 (1966).

The rehabilitative theory of punishment evolves from the behavioural approach to crime and criminology, wherein it is understood that a crime is committed as a result of forces outside the control of the offender, and this inquires into the personality, behaviour and socio-economic background of the criminal so that the underlying factors promoting criminal tendencies can be assessed and thus resolved by formulating methods of control suited to such personality and behaviour.¹⁷

Reintegrative Theory

The reintegrative theory essentially posits that criminal behaviour represents a breach or absence of community, and the purpose of punishment is to help restore community at that breach or establish community where it is absent.¹⁸

Therefore, punishment not only reintegrates those criminals who were once members of the community but have been alienated from the community by virtue of their crime; but also integrates those criminals who were never members of the community in the first place.¹⁹ The reintegrative theory of punishment therefore has two main goals; first, it must wipe out the stigma of crime, and secondly, it must compel a higher devotion to the public good in the criminal.²⁰

Retribution and Rehabilitation - A Comparison

The retributive and rehabilitative approaches are vastly opposite approaches to criminal justice. In order to establish a fair comparison between the two approaches, the following factors need to be taken into consideration: involvement of victims, impact on the convicted offender, the rates of recidivism, economic efficiency, and the responsibility of the state.

Retribution and deterrence constitute a legalistic approach to the prevention and punishment of crime, which advocates for the suffering of the criminal, as it believes that all criminal acts are a result of one's free will and desire to commit a crime. Conversely, the rehabilitative theory takes on the behaviouristic approach, which believes that a person would only have the urge to

¹⁷ RUBIN, *The Law of Criminal Corrections* (19

¹⁸ Eric Reitan, *Punishment and Community: The Reintegrative Theory of Punishment*, *Canadian Journal of Philosophy*, Mar., 1996, Vol. 26, No. 1, 57,76

¹⁹ *ibid*

²⁰ Simone Weil, 'The Needs of the Soul 'in *The Need for Roots* (New York: G.P. Putnam's Sons 1952), 21

commit a crime due to extraneous circumstances beyond their control, such as poverty, socialisation into a criminal society, and so on.

In both these methods there is an angle of punitive treatment that is meted out to the offender by the State, but while punishment is the final goal of the retributive approach to sentencing, it is merely a component of the rehabilitative approach whose final goal is to treat and reform the criminal into a productive, law abiding member of society.

Retributive justice has been described broadly as a system that addresses the punishment of offenders, and the reaffirmation of societal values and norms. It aims to make the offender suffer for their wrongs. Retributive justice aims at punitive outcomes such as the imposition of a fine, imprisonment, or even in some cases, the death penalty, and torture.

In contrast, the rehabilitative or restorative process aims to include the victims of crimes to determine the most appropriate manner to repair the harms caused by the offense.²¹ The focus of rehabilitative justice is to restore all the stakeholders involved in the process; the victim, the criminal, and society at large.

This process allows for the condemning of the bad act without condemning the actor himself, which provides an avenue for rehabilitating the offender and restoring them as a law-abiding member of the community.²² For the victims, rehabilitative justice seeks to provide material and psychological aid, with the goal of restoring them to the state they were in before the offense was committed.²³ On the community level, the goal of restorative justice is to repair any harm that may have been caused to the community or society at large, as well as ease the transition process and rebuild the offender's connection with society so as to help reintegrate them after their sentence has been served and they have been sufficiently rehabilitated.²⁴

Rehabilitative justice enables prisoners to understand the impact of crime on victims, and to take responsibility for their actions.²⁵ This is done by various methods such as victim-offender mediation, conferencing and peacemaking. Additionally, under the system of rehabilitative

²¹ Dena M. Gromet, Tyler G. Okimoto, Michael Wenzel and John M. Darley, A Victim-Centered Approach to Justice? Victim Satisfaction Effects on Third-Party Punishments, *Law and Human Behavior*, October 2012, Vol. 36, No. 5, 375

²² Marshall, T. F. (1999). *Restorative justice: An Overview*. [A report by the Home Office Research Development and Statistics Directorate]. London, U. K.: Home Office.

²³ Braithwaite, J. (1989). *Crime, Shame, and Reintegration*. Cambridge, U. K.: Cambridge University Press.

²⁴ Bazemore, G. (1998). Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration. *American Behavioural Sciences*, 41, 768-813.

²⁵ Johnstone, Gerry. "Restorative justice in prisons: Methods, approaches and effectiveness." (2014).

justice, the victim and the convict are provided assistance as needed to reintegrate into the community, with mental health professionals, social workers and peers forming support groups to mitigate any difficulties in reintegration.²⁶

The model of rehabilitative justice is unique as it involves the entire community in an effort to determine how the offender can directly rectify the harm caused to society by their actions. It operates on the principle that the criminal justice system can repair the harm done to both, the victim and the community by utilising methods such as negotiation, mediation, community service and compensation.²⁷

However, rehabilitative justice is a resource and capital intensive endeavour, and requires countries to overcome considerable challenges in order to sustainably and meaningfully implement the same, such as low funding, societal attitudes towards crime and criminals, overcrowded and understaffed prisons, hostile prison authorities, and a general lack of access to mental health services and other rehabilitative tools that uniquely cater to the needs of victims and offenders.

Conversely, under the retributive system, prisons execute punishments by imposing suffering or withdrawing benefits from the offender.²⁸ These punishments deprives these offenders of the freedom of movement and association, and impinges on their privacy.²⁹ However, it is the easiest model to implement and maintain due to the low requirement of resources and funding, and the lack of involvement of multiple stakeholders in the process.

Currently, most countries around the world follow a primarily legalistic approach with a criminal justice system aimed at retribution and deterrence through punishment. However, incarceration is on the rise, and a majority of offenders will recidivate upon release from prison.³⁰ Restorative procedures through the behaviouristic approach that target rehabilitation

²⁶ <https://www.waldenu.edu/online-bachelors-programs/bs-in-criminal-justice/resource/the-role-of-restorative-justice-in-a-criminal-justice-system>

²⁷ Shenk, Alyssa H. "Victim-offender mediation: The road to repairing hate crime injustice." *Ohio St. J. Disp. Resol.* 17 (2001): 185

²⁸ Walen, Alec, "Retributive Justice", *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), Edward N. Zalta (ed.)

²⁹ Lippke, Richard L. "Retribution and Incarceration." *Public Affairs Quarterly* 17, no. 1 (2003): 29-48.

³⁰ Gibbons, J. J., & Katzenbach, N. D. B. (2006). *Confronting Confinement*. The Commission on Safety and Abuse in America's Prisons. Accessed at http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf

as the goal of sentencing, are more likely to elicit greater victim and community satisfaction than conventional retributive sentencing.³¹

It has been studied that victim satisfaction has a significant impact on societal and community level perceptions of the offender. This is due to a number of reasons, such as the inference that the presence of victim satisfaction is due to the expression of remorse and reformation by the offender.³²

Tihar Jail and Halden Prison - Comparative Analysis

In order to compare the functioning and efficacy of these two differing approaches to criminal justice, one can look to Norway's Halden prison, and India's Tihar Jail.

The treatment of offenders by prison authorities is the most important component in the reformation of a criminal; it determines whether they will go on to become a productive and law abiding member of society, or contribute to recidivism by continuing to engage in criminal activity. Thus it stands as the primary focus of comparison between Halden Prison and Tihar Jail.

The Halden Prison in Norway operates on the morality principle, and believes that the progression of a sentence should ultimately be aimed at reentering the community.³³ Prison is not seen as the final goal to punish prisoners, but prisoners are merely seen as members of society that are temporarily removed.³⁴

Various aspects of the prison including its architecture and interiors, opportunities for education and skill development and friendly interactions between guards and inmates contribute to a sense of normality and foster positivity among the inmates. Prison officials believe that the more isolated and confined a prison is, the harder it is for a convict to successfully reintegrate into society and enjoy freedom in a healthy manner. Prison officials in

³¹ Latimer, J., Dowden, C., & Muise, D. (2005). The effectiveness of restorative justice processes: A meta-analysis. *The Prison journal*, 85, 127 - 144.

³² *Supra* note 21

³³ <https://www.kriminalomsorgen.no/informasjon-paa-engelsk.536003.no.html>

³⁴ Labutta, Emily. "The prisoner as one of us: Norwegian Wisdom for American Penal Practice." *Emory Int'l L. Rev.* 31 (2016): 329.

Halden Prison also take the approach of motivating inmates so that their sentence is as meaningful, enlightening and rehabilitating as possible.³⁵

In order to further perpetuate their belief, there is an abundance of green spaces, with Halden being set in the middle of a forest, as nature acts as a rehabilitative factor. The prison is well equipped with workshops, libraries, kitchens and recreation rooms, with each prisoner having their own cell with unbarred windows, televisions and mini fridges. There are further opportunities for prisoners to enhance their skills and take part in jobs such as carpentry, woodwork, graphic designing, or even prepare for higher education, in order to build a life after prison.

Furthermore, in order to promote healthy socialisation and encourage normalcy, guards interact and socialise with inmates, and inmates are allowed to move around without constant monitoring or surveillance.³⁶ This minimises the sense of incarceration and promotes a therapeutic rehabilitation period.

In stark opposition to the model followed by Halden Prison, Tihar Jail is understaffed, mismanaged and overcrowded, and focuses on punishing inmates with no preparation given for a life after incarceration. Basic necessities such as medical care and hygienic living conditions are denied and a sense of hostility pervades the environment with frequent abuse faced by inmates at the hands of jail authorities and other inmates as well.

The institutional failure in Tihar Jail has manifested in two broad ways, security and surveillance, in its refusal to engage prisoners and staff members in the prison reform process. Authorities studied only isolated incidences of prison violence without analysing the broad underlying causes with a mindset to reform the same.³⁷

The Ministry of Home Affairs consistently ignores the needs of prisoners, and only recommends an increase in security arrangements with no further investigation conducted as to the living and work conditions of prisoners, their access to basic necessities and treatment by prison authorities. The punitive ideology of the State is reflected in the terminology used to describe prisoners, and the reportage of prison violence with the cause of the same attributed

³⁵ Snyder, Rebecca. "The Power of Architecture: Architecture of Power." PhD diss., University of Cincinnati, 2014.

³⁶ Johnson, Craig R. "Organizational Ethics: A Practical Approach". SAGE Publications, 2018

³⁷ <https://theprint.in/opinion/prisoner-staff-violence-common-in-delhi-jails-govt-and-courts-are-unable-to-stop-it/586345/>

entirely to prisoners who are hardened criminals who commit offences daily, is wholly neglectful of the role of prison authorities in perpetuating prison violence.

Another approach that has been taken is the usage of surveillance, with multiple committees instituted over the years recommending CCTV cameras, watchtowers, electric fencing, metal detectors, dog squads and heightened perimeter walls as solutions to maintain law and order.³⁸

A three member committee headed by J. Brijesh Sethi, apart from calling for the independent monitoring and management of CCTV footage, identified the language barrier between prisoners and staff as a contributor to tensions. It further emphasised the need for training of staff members regarding the prison rules, and the need to restrain the use of force while dealing with prisoners.³⁹ However, no such policies have been implemented in line with these recommendations.

Furthermore, the impact and efficacy of the rehabilitative and retributive justice systems are visible when prisoners serve their sentences and are released once more. Norway has a 20% recidivism rate, which is the lowest in the world, due to initiatives such as victim-offender mediations, access to active labour market programs to help ex convicts find employment and social security services.

Conversely, in India, one in every five male prisoners returns to the prison system due to a lack of access to adequate schemes and support systems. Retributive justice often ignores “the victim’s need for compensation and reparation and the offender’s need for forgiveness and return to full membership in the community”.⁴⁰

Conclusion

It can thus be concluded that the rehabilitative approach as employed in Norway’s Halden Prison is far more efficient and yields results that are the best outcomes for all the stakeholders involved, i.e the victim, the offender and the society. However, it is a resource and capital intensive endeavour and requires significant funding and research. On the other hand, Tihar Jail is a prime example of the failures of the retributive approach and its consistent role in

³⁸ <https://www.mha.gov.in/MHA1/PrisonReforms/NewPDF/BestPrisonPractice08112010.pdf>

³⁹ http://delhihighcourt.nic.in/writereaddata/orderSan_Pdf/gmi/2018/110883_2018.pdf

⁴⁰ Hermann, Donald HJ. "Restorative justice and retributive justice: An opportunity for cooperation or an occasion for conflict in the search for justice." *Seattle J. Soc. Just.* 16 (2017): 71

increasing prisoner dissatisfaction due to prison violence and criminal activity despite constant surveillance.