

PUNISHMENTS IN ANCIENT, MEDIEVAL AND MODERN/NEW INDIA

Punishment in Ancient India

In Pre-Buddhist India, administration of justice was one of the primary functions of the state. Justice was administered with due deliberation. Punishment was awarded with careful measure in proportion to the nature of offence. But in the whole, the judicial arrangements were not quite sound. Theft and robbery were very common. Methods of torture were employed with a view to eliciting confessions. Some of the punishments were meaningless, but a desirable factor going with punishment was that of compensation of the aggrieved party so as to bring him to status quo.

Trial by ordeal does not, in Pre-Buddhist period, appear to be a prevalent system, though there appears to have been the ordeal by fire by which a woman could prove her chastity. For offences generally, the state did not support the system of trials of ordeal. Drunkenness, was punished with heavy fines. Slander was punished with a fine of eight Kahapanas. Adultery in woman was punished very heavily; even death or mutilation was imposed.

The main types of punishment were: fines, whipping, imprisonment, mutilation, confiscation and banishment. Thieves and robbers were whipped very severely. And executions were terrible.

In ancient India, during the Epic Age, there were the Dharma Shastras (law books) and Dharma-pathakas (law professors). Manu was, shown by Brehaspati, the greatest lawgiver of ancient India, and his Manava Dharma Sutra is the most important law book in ancient India. The Dharma Sutras emanated from Vedic Schools, and, therefore, on the whole, the law books at first represented certain schools of Brahmanica teaching. The law books of Vishnu and Yajnavalkya who were the exponents of Yajurveda Schools, And the works of this class lose all connection with any one school and become universally authoritative. Later legal works were Dharma Nibandhas, of the eleventh century and later, and the learned commentaries like the Mitakshara. The Manava Dharma Castra was followed by the work of Vishnu in the third century, A.D., and the law code of Yajnavalkya in the 4th century and the Code of Narada in the 5th century.

The Sutras showed that the judge originally was the king. The thief or the criminal was brought before the king for being dealt with. Theft, especially, theft of cattle, and robbery is regarded, in the Vedas, as the chief crimes. According to Brehaspati, there were different kinds of theft. He treats theft as a form of violence. Violence according to him is of four kinds- homicides, theft, assault on other's wife, and injury (either assault or abuse). Thieves are also classified into different kinds, viz., „open thieves“ and concealed thieves“; and according to their skill and methods they are further classified. Trials were by ordeal. Manu recognised only two types of ordeals. Later writers introduced additional types. Ordeal by oath was given effect to. A farmer could swear by his cattle. One could swear and say, that a thing was truly as he deposed and if his house then was burnt up within a week, it could mean that he had perjured himself.

The two earliest ordeals recognised by Manu are fire and water. Then elaborate trials with the use of the balance, etc., till eventually there were nine formal ordeals. Those nine ordeals were:

1. by fire
2. by water
3. by balance
4. the sacred libation
5. Ploughshare
6. the ordeal by dharma
7. by grains of rice
8. by hot gold piece, and
9. by poi on

The heated gold is reserved for cases of theft; the ploughshare for those accused of theft of cattle. Originally ordeal by fire meant walking through fire; and ordeal by water meant that the accused was through into water, and if he was not drowned he was held innocent. In the ordeal by fire one had to carry a hot iron ball, and if he remained unburned he was held innocent. The ordeal by balance lay in weighing the accused twice. If he weighted more the second time, then he was found guilty because the weight of since went against him. And the

ordeal by Dharma and Adharma lay in painting pictures of Justice (Right) and Injustice (Wrong) upon two leaves (one picture painted white and other black). The leaves were then, unobserved the accused, rolled in balls of earth and set in a jar. The accused was then asked to draw one of these balls. If he drew Dharma he was held innocent; if he drew Adharma he was found guilty and punished.

For murder, the offender had to render compensation to the relatives of the deceased or to the King or to both. Later this compensation was made in favour of the priests; a hundred cows have to be handed over. In the Sutra period, compensation was treated as a „royal right“. In the time of Manu, compensation was regarded as a penance; hence it was renderable in favour of the priests. Treason was punishable with death. Punishing a person by making him an outcast (thereby causing him loss of social rights) was also resorted to, especially in the case of the priests.

Excepting cases of treason, differential treatment existed. The social condition of the victim of the offence was also considered while considering the question of punishment. Slaves, however, were punished with undue severity. When a warrior defamed a priest, he was fined one hundred panas; if a non-warrior (of the people -caste) did so, the penalty was one hundred and fifty panas; but for the slave there was corporal punishment for defamation of a priest. Adultery was, in legal theory, punishable by death, but in practice, male offenders were fined, and female offenders were liable to have their hair cut off and treated with contempt; but a slave guilty of adultery with a high-caste lady could be slain. If a Vaisya man committed adultery with a high-caste lady, his property could be forfeited.

Punishment in Medieval India:

In the Mughal period, the judges thought it fit and best to follow Koranic precepts; Punishment was discretionary with the officer who tried the case, and might assume any form. In the reign of Akbar, instructions were issued to the provincial governor asking him “to pursue what the witnesses deposed by manifold inquiries, by study of physiognomy and the exercise of foresight.” Superior executive officers had the authority to try criminal cases. Shayesta Khan, during his administration of Bengal, held open durbar daily for administering of justice and redressing of wrongs. The Kazi attended the hearing of cases by the trying

officers and assisted them to arrive at decisions according to the precepts of Koran. Where the Koran was silent on a point in issue in a case, the trying officer applied his own discretion in arriving at decision. There was a right to appeal to the Emperor. The criminal law of the Mughal period was originated in precepts of the Holy Koran; and the professed idea in punishing the wrongdoer was that, of teaching him righteousness.

The highest Court in Mughal India was that of the Emperor himself. The Emperor was the fountain of justice. Akbar was noted for devoting several hours in the day hearing cases of appeals, Shall Jahan had his court every Wednesday in the Diwani-I-khas; and Aurangazeb in his private chamber administered justice.

The Maratha system of administration of justice was simple and suited to the needs of the time.' The law was not codified, but was based on old customs and treatises like Mitakshara and the Code of Manu. Ordeals and oaths were allowed in determining the guilt or innocence of the accused. The Judiciary and the Executive were not separate. The Pesbwas personally also went out on tour every year for trial of cases and punishment of offenders. Capital Punishment seems to have been unknown in the days of Shahu Chhatrapati and Balaji Baji Rao. For murder, the penalties were fine, confiscation of property and imprisonment. Punishment was meant for being used as a corrective only. Fines were imposed according to the financial capacity of the offender; payment by instalments was also allowed. The offender was not needlessly sent to jail for non-payment of fine. Witchcraft was punished with fine, imprisonment and ex- communication. For adultery, the punishment for female offenders was slavery and penal servitude; but such persons were released if some relation stood surety for their future good behaviour. Sometimes mutilation was ordered in place of slavery. For the male offender the punishment generally was fine, and sometimes imprisonment. The condition of the slaves was, in spite of 'hard labour they were put to, relatively well. Penalties for forcible marriage were confiscation of property and ex-communication. Sometimes the offender was let off with a fine. But robbers and thieves were mutilated.

Punishment in Modern or New Penology

With new criminological developments, particularly in the field of penology, it has been generally accepted that punishment must be in proportion to the gravity of the offence. It has been further suggested that reformation of criminal rather than his expulsion from society is more purposeful for his rehabilitation. With this aim in view, the modern penologists have focused their attention on individualization of offender through treatment methods. Today, old barbarous methods of punishment such as mutilation, branding, hanging, burning, stoning, flogging, amputation, starving the criminal to death or subjecting him to pillory or poetic punishment, etc. are completely abandoned.

Pillory was a method of corporal punishment under which the offender was subjected to public ridicule by exposing him to punishment in public places. Different poetic punishments were provided for different crimes. For example, cutting off hands for theft, taking off tongue for the offence of perjury, emasculation for rape, shaving off the head of a woman in case she committed a sex-crime or whipping her in public street and similar other modes were common forms of poetic punishment during the middle ages. Modern penologists have substituted new forms of penal sanctions for the old methods of sentencing.

The present modes of punishment commonly include imposition of monetary fines, segregation of the offender temporarily or permanently through imprisonment or externment or compensation by way of damages from the wrong-doer in case of civil injury. The credit for introducing these penological changes goes to eminent Criminologist, like Beccaria, Garofalo, Ferri, Trade, Bentham, and others who formulated sound principles of punishment and made all out efforts to ensure rehabilitation of offenders so as to make them useful member of society once again. Garofalo strongly recommended „transportation“ or „banishment“ of certain types of offenders who had to be segregated from society. Modern penal systems, however, limit the punishment of transportation within the country itself. Of late, open jails, parole or probation are being intensively used for long-timers so that they can earn their livelihood while in the institution.

It was Beccaria who pioneered classical view of penology and raised voice against cruel and brutal punishments. He advocated equalized treatment for all criminals in the matter of punishment and reiterated that it was not the personality of offender but his antecedents,

family background and circumstances, which had to be taken into consideration while determining his guilt and punishment. This in other word meant greater emphasis on the „act“ (crime) rather than the criminal. He was equally opposed to the discretionary power of the court and argued that the function of determining appropriate punishment for different offences must be confined to the legislators and law-makers alone. The system of trial by jury is essentially an outcome of the classical thinking which treated „act“ and not the „individual“ as the object of punishment. The function of jury is to determine the question of fact, i.e, whether the crime has been committed by the offender or not, while it is for the magistracy to decide the guilt or innocence of the accused in accordance with the established principles of law. The central themes of penal policy advocated by adherents of classical school were equality of punishment for similar offences. However, the theory has fallen into disuse with the advance of knowledge through Penological researches.

As a reaction to classical view, Neo-classists voiced their criticism against equality of punishment on the ground that it did not respond well with the requirements of certain categories of criminals such as minors, idiots, mentally depraved offenders or those committing crime under extenuating circumstances. The adherents of neo-classical school therefore, suggested that punishment should be awarded in varying degrees depending on the mental condition and intent of the criminal. Thus, it was for the first time that an attempt was made to shift the emphasis from „crime“ to „criminal“. The significant contribution of this school in the field of penology lies in the fact that it emphasized the need for individualized punishment. This finally led to classification of criminals into different categories according to the genesis of their criminality. The object was to make the reformatory methods of punishment more effective. Commenting on this change, Dr. P.K.Sen rightly observed the punishment is now divested of its retaliatory characteristic and is converted into a treatment method for bringing about reformation of the Among modern penologists the names of Raffaele Garofalo and Enrico Ferri deserve a special mentions. Garofalo was an eminent criminologist of Italy who held distinguished position as a Judge, a Professor of law as also a Minister of Justice and therefore, he was deeply involved in administration of criminal justice and treatment of offenders. Out of his vast experience as a magistrate, he suggested that insane criminals should be treated leniently. In his opinion,

vengeance had only a theoretical basis for penal sanctions. Surprisingly, Garofalo was a critic of reformatory theory of punishment and believed that it had only a limited utility in cases of young or first offenders and believed that it had only a limited utility in cases of young or first offenders and it hardly served any useful purpose in case of recidivists and hardened criminals. He also rejected deterrent punishment since it failed to determine the exact quantum of punishment for a given offence under varying social circumstances. He, however, agreed with Beccaria that retention of punishment is necessary for recognition of individual rights and social co-existence.

Enrico Ferri was yet another Italian penologist who supported positive school of criminology. He asserted the punishment was necessary for the protection of society because crimes in society are inevitable. In his opinion, punishment was a social deterrent. Since society has to defend itself against aggressors, it has a right to punish the offenders. He strongly commended compensation as an effective sanction against crimes, particularly those relating to property. Ferri believed that dumping the prisoners in prison cells throughout their term of sentence served no useful purpose. It was wholly an unproductive process. He therefore, He therefore, suggested that inmates should be utilized to work on agricultural farms or construction sites and engaged as labour during working hours. This in his view was in the best interest of the inmates as well as the state. He preferred indeterminate sentence to a fixed term of institutionalized sentence and recommended clinical treatment for insane criminals.

Briefly stated, it is now well recognized that prevention of crime and protection of society are the main objects of punishment. It therefore, follows that no single theory of punishment will serve the real purpose. Commenting on this aspect of penal justice, Caldwell observed. "Punishment is an art which involves the balancing of retribution, deterrence and reformation in terms not only of the Court but also of the values in which it takes place and in the balancing of these purpose of punishments, first one and then the others receives emphasis the accompanying conditions change.

The modern Penological thinking favours rationalization of punishment by taking into consideration the various approaches in their proper perspectives and making use of them

to suit the given situation and requirement of the offender in accordance with the principle of individualization.