

## HOW DO LAWMAKERS DECIDE PUNISHMENTS FOR DIFFERENT CRIMES?

*Smith John Colaco*

### ABSTRACT

*The article is about the basis and reasoning on which the lawmakers of the country determine punishment for a certain crime. This topic is especially important because punishing people is done with the hope that such incidents will not take place in the future, and it can make the people feel safe. The article talks about the current situation in India and what kinds of punishments are being used in different acts. It talks about the sentencing policy in the country and asks the question about the arbitrary nature about the term of imprisonment for crimes that are not remotely similar in nature and seriousness. The article also has a brief discussion on why punishment is necessary to keep society in order and discussed various theories of punishments and gives examples about their application around the world. In the end a proposed solution is put forward to tackle this problem and it goes in detail about the fact that, there is more to punishments than just increasing or decreasing the time of imprisonment.*

## INTRODUCTION

The question about how Lawmakers decide punishments for different crimes, is about a detailed look behind the reasoning of a lawmaker when he concludes that a certain crime deserves a certain punishment. Often it is seen that a person is either given a very lenient sentencing for a grave crime while there are many cases that a person is imprisoned for a longer period than necessary with respect to the crime, he/she is proven guilty of. In the words of Justice Jasti Chelameswar, a former judge in Supreme Court of India, “*Justice should not only be done but it should also appear to have been done*”. A big component of this is not only punishing the guilty but also the fact that the punishment is in proportion of the crime committed. Hence it is important to know the psychological, social, and legal aspect behind the construction of an act or law that defines a certain punishment for a certain crime. There have been many instances, when the government of India have amendment an act and included harsher punishment, it mostly means that the lawmakers believe that harsher punishments will instill a sense of safety in the public while also instilling a sense of fear in a perpetrator. This is mostly the result of public outcry over a certain event like the Nirbhaya gangrape case or to curb an evil that is plaguing the society like the existence of black money. But what is the basic structure behind the decision or process behind introducing a certain number of years as imprisonment for a crime. That is a matter that no one talks about. As the late advocate Nani Palkhivala once said, “*Punishments that are too harsh are seldom implemented and punishments that are too lenient are seldom implemented as well and no one cares about such punishments*”. There are also instances where a person committing a grave crime is given a punishment that is too lenient according to the nature of the crime committed and a person who has committed a crime which is not too grave in nature is given a punishment that’s too harsh. In both the cases Justice is not done and the idea that, the punishment will instill a sense of safety and the idea of rehabilitation through realization due to the punishment conferred also fails. Hence it is very important that, appropriate crimes have appropriate punishments. It is in public interest that crimes have appropriate punishment so that it discourages the criminal elements in the society.

## CURRENT SITUATION IN INDIA

As the current situation stands, there is no sentencing policy in India. The way punishments are decided in India is completely arbitrary. That was made clear by the supreme court of India in the case of *State Of Punjab vs Prem Sagar & Ors* on 13 May, 2008<sup>1</sup>. The court held that, **“In our judicial system, we have not been able to develop legal principles as regards sentencing. The superior courts except making observations about the purport and object for which punishment is imposed upon an offender, had not issued any guidelines. Other developed countries have done so. At some quarters, serious concerns have been expressed in this behalf. Some Committees as for example Madhava Menon Committee and Malimath Committee have advocated introduction of sentencing guidelines”**<sup>2</sup>. There is an enormous amount of inconsistency in the process of punishing criminals who have committed the same crime. There is also a huge scope due to which two offenders who have committed the exact same crime can be punished in different ways. For example, in The Information Technology Act, 2000<sup>3</sup> according to section 65 tampering with computer source will have the punishment of imprisonment up to 3 years and section 66A states that sending offensive text will have the punishment of imprisonment up to 3 years and the same is said for violation of privacy and stated in 66E. These are 3 different crimes altogether having the same sentences. The only similarity in them is that they are digital crimes, but the problem is not limited to different crimes in one act. Another example is that in Section 50 of Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015<sup>4</sup>, the punishment for failure to furnish in return of income is imprisonment up to 7 years, while in section 325 of the INDIAN PENAL CODE<sup>5</sup>, the punishment for causing grievous hurt is also imprisonment up to 7 years. It basically implies, that the act of not furnishing one's returns as a crime is equivalent to causing grievous hurt to someone. These crimes are not in any way related to each other and yet they have the same type of sentencing.

---

<sup>1</sup> Sinha, S., 2021. *State Of Punjab vs Prem Sagar & Ors* on 13 May, 2008. [online] Indiankanoon.org. Available at: <<https://indiankanoon.org/doc/1889684/>> [Accessed 7 December 2021].

<sup>2</sup> *ibid*

<sup>3</sup> Indiankanoon.org. 2021. *The Information Technology Act, 2000*. [online] Available at: <<https://indiankanoon.org/doc/1965344/>> [Accessed 7 December 2021].

<sup>4</sup> Incometaxindia.gov.in. (2015). *BLACK MONEY (UNDISCLOSED FOREIGN INCOME AND ASSETS) AND IMPOSITION OF TAX ACT, 2015*; [online] Available at: <https://www.incometaxindia.gov.in/pages/acts/black-money-undisclosed-income-act.aspx>.

<sup>5</sup> legislative.gov.in. (n.d.). *The Indian Penal Code/Legislative Department / Ministry of Law and Justice / GoI*. [online] Available at: <https://legislative.gov.in/actsofparliamentfromtheyear/indian-penal-code>.

There is also an unclear element in a single punishment. For example, in Section 124 A of the INDIAN PENAL CODE<sup>6</sup>, which is sedition. The act of sedition is punishable with life imprisonment while the same act is punishable with imprisonment up to 3 years. Basically, a broad spectrum of punishments for the exact same crime. The concept of having such a broad spectrum of punishment for the same crime is confusing. This basically implies that one act of sedition is worth 3 years of imprisonment while another act of sedition is worth life imprisonment. This sentencing policy where people may be punished for may be 4 years in prison while for the same offence some people are let off on probation. This is a severe case of inconsistency in the framework of setting punishments for different crimes. Due to this lack of reasoning from the legislature which makes these laws, it handicaps the judiciary as well. Another problem being minimum sentencing. The concept of minimum sentencing completely takes away discretionary powers from a judge of the judiciary.

### **WHY PUNISHMENTS ARE NECESSARY? AND DIFFERENT THEORIES FOR JUSTIFICATION OF PUNISHMENTS**

It is normally wrong to harm people but an act of punishment, which is an act of harming someone is an exception to that sentiment. For example, if someone is sent to prison, that person is harmed because his/her freedom is taken away. If a person is fined, then that person is harmed because his/her money is taken away. But harming in punishment is justified because it is done to guilty people who have committed certain wrong. Hence the harm caused to them through these punishments seem justified<sup>7</sup>.

The question is what justifies punishment. The theories of punishment are as follows:

1. Retribution Theory
2. Deterrent Theory
3. Rehabilitation Theory

---

<sup>6</sup> ibid

<sup>7</sup> www.youtube.com. (n.d.). *Why Should We Punish? Theories of Punishment*. [online] Available at: <https://www.youtube.com/watch?v=gNJ096J-ngo>.

These theories somewhat answer this question. According to the Retributive theory. The act of punishing someone is simply giving the wrongdoer what he/she deserves. This justification is referred to in Latin as “*lex talionis*”. It is based on the principle of “an eye for an eye”. The idea of this theory is that “if you harm someone, you deserve to be harmed back”. This is how the theory of retribution justifies punishing someone<sup>8</sup>. An example of this can be seen in Saudi Arabia. According to a BBC story from 2015, blogger Raif Badawi was sentenced to public humiliation after being found guilty of cybercrime and insulting Islam. He had been sentenced to 1,000 lashes over the course of a week. Saudi Arabia is considering banning “flogging” in response to international uproar.<sup>9</sup>

According to the deterrent theory, punishment is justified because it prevents people from attempting to do future wrongdoings. This theory claims that punishment is justified because it protects society, and it serves as a warning to anyone who might be thinking about committing a crime. It signals that the society will not tolerate such crimes. Simply put, punishment is justified because it has good consequences and “deters” crime<sup>10</sup>. Such phenomenon can be seen in Indian legislature where the term of imprisonment is increasing. As previously discussed, the act of not furnishing income tax and having black money will fetch a person 7 years in prison which is the same amount of years for grievously hurting someone. The lawmakers are basically trying to deter people from engaging in unlawful practices involving black money. The expected consequence of this is, that the amount of black money will reduce which technically justifies the 7 years of prison as punishment according to the deterrent theory. This theory in case of India doesn’t seem to be working as the data according to the National Crime Record Bureau suggests that in 2019 there are a total of 4,78,600 prisoners with the occupancy rate of 118.5% as compared to 2017 when there were 4,50,696 prisoners with an occupancy rate of 115.1%<sup>11</sup>. This shows that for some reason, the increase in prison terms is not deterring people from committing crime.

According to the rehabilitation theory, it is justified to punish someone because it reforms the wrongdoer. It is basically a process to reform a perpetrator and help them integrate back into society where they can be a contributing and productive member. It is believed that punishing the

---

<sup>8</sup> ibid

<sup>9</sup> Saudi Arabia to abolish flogging - supreme court. (2020). *BBC News*. [online] 24 Apr. Available at: <https://www.bbc.com/news/world-middle-east-52420307> [Accessed 8 Dec. 2021].

<sup>10</sup> Supra note 7

<sup>11</sup> <https://ncrb.gov.in/sites/default/files/Executive-Summary-2019.pdf>

wrongdoer can bring about this change<sup>12</sup>. For example, in Finland, prisoners are kept in an open prison where they learn tech skills. This is to help them get back into the society with a skill that can get them a good job and essentially motivate them to not commit crime again.<sup>13</sup>

These are essentially the reasons used to punish the wrong doer and they are not perfect by themselves but the point of them being discussed is that different crimes need different types of punishments and increasing or decreasing the years of prison sentences will not bring about the required results of a safer society as expected.

### PROPOSED SOLUTION ON SENTENCING POLICY

The first step to counter the complete arbitrary nature of sentencing is to use the reasoning of different punishment theories in the proposed act. There must be an explanation about why a particular theory is used for a certain crime and why a certain punishment is conferred upon the wrongdoer. Whether the wrong doer must be rehabilitated, if yes then why and so on with other theories. There must also be an explanation about why a particular theory is not used for deriving a punishment for a certain crime. Due to the flexible nature of the Indian constitution, if a certain type of punishment is not having the desired effect, then the punishment can be changed, and a new theory can be used. This nuanced approach of using psychology and sociology in the framing of punishments is much more reasonable than the arbitrary changing of number of years of imprisonment. Simply speaking, the legislature must be articulate about the basis and rationale behind the prescription of a certain punishment. They must include the reason for punishment, the ends they are trying to achieve and the means in terms of administration and impact due to the implementation of the certain punishment<sup>14</sup>.

While it is not the job of the legislature to be so articulate in this matter, there is a need for an institution which looks more holistically at sentencing policies both in the legislature and the judiciary and lays down certain principles, guidelines, and range of punishment. For example, they

---

<sup>12</sup> Supra note 7

<sup>13</sup> www.youtube.com. (n.d.). *Prisoners In Finland Live In Open Prisons Where They Learn Tech Skills | On The Ground*. [online] Available at: <https://www.youtube.com/watch?v=l554kV12Wuo>.

<sup>14</sup> www.youtube.com. (n.d.). *We have no idea how to punish crimes*. [online] Available at: <https://www.youtube.com/watch?v=YXFXnaTzGng&list=PLwzs5UMrYUjJtNLTPDVRx06PWlfsap5MZ&index=5> [Accessed 8 Dec. 2021].

can declare that the offences related to tax evasion are not as serious as offences against the body or make a set of offences that are less or more serious than another set of offences. They can have a tier system from 1<sup>st</sup> tier being the most lenient offences and the highest tier for the most serious offences. There must be a range of punishments for a particular set of offences which are similar in seriousness. There must be ranking, and guidelines like for example, crimes against the body must be between 5 years to life imprisonment or crimes related to tax must not have punishment that exceeds 5 years of imprisonment. Such guidelines and ranking system will be much better in determining how they should punish a particular wrongdoer and by how much<sup>15</sup>.



Journal of Multi-Disciplinary  
Legal Research

---

<sup>15</sup> ibid