

The Erosion of Retributism in Penalization of Imprisonment and Its Alternatives

Punishment does not fit into the framework of criminal law or criminology alone, but rather into a general scheme, that is, within the framework of the social policy of a given state; this is why public opinion has sought a convincing reason for accepting this strict manifestation of reaction. Punitiveness is the most obvious manifestation of this reason. The basis of the philosophy of the punitivists is that they consider the root of punishment in the inherent characteristics of the criminal act and do not pay attention to the consequences resulting from it. The mere fact that someone has committed a crime is enough to punish him and one should not seek to find a deterrent or corrective effect and the like from punishment. Historical studies of criminal law indicate that the most common punishments have been for individual and social psychological reasons in the form of punishment of the criminal's physical integrity. This seemingly obvious idea has complex components and principles that can only be fully realized by applying it precisely in the criminal law. By examining the theoretical foundations of the punitive philosophers, it is observed that in the tradition of this school, there are four intellectual foundations of spiritual refinement, moral obligation, fulfillment of religion, and abolition of crime; but how can these foundations be applied in criminal policymaking? Suppose: For a crime such as: assault and causing disturbance to children or women, the subject of Article 619 of the Islamic Penal Code, the punishment is determined to be imprisonment for two to six months and up to 74 lashes. On the one hand, the victims of this crime, in order to protect their security, want the court to deal decisively with the criminals; on the other hand, the legislator, in accordance with Article 40 of the same law, by utilizing the institutions of immunity from punishment, gives the judge the authority to: postpone the issuance of the verdict in case of circumstances; In this case, how does the criminal receive the punishment for his actions? This is where retributive justice comes into conflict with institutions of mitigation and impunity. The conflict between these two criteria may have consequences such as confusion of judges when issuing verdicts, citizens' reluctance to report crimes and increasing the number of crimes, feelings of insecurity and personal revenge, and not only does it not achieve the goal of reducing crime, but it also paves the way for an increase in new crimes; therefore, it is important to recognize these inconsistencies and eliminate them in the context of punishment. Accordingly, the article is divided into two parts: first, in the first part, it introduces and explains the teachings of retributivism, and in the second part, it examines why and in what cases in Iranian criminal law, punishments that deprive freedom deviate from the logic of retributivism, and how the consequences of this deviation and the solution to eliminate it in punishment are possible.

Based on the above studies, attention to retributionism, as a punitive emotion, is used as a reliable justification for punishment. This metaphor serves as a rational justification for the community's intuitive perception of crime and the appropriate response to it; thus, punishment is justifiable because it expresses the citizens' feeling of hatred for the crime and the desire to take revenge and inflict violence on the offender. A logical connection must always be established between the justification of punishment and the community's intuitive understanding of crime and punishment. Healthy and common minds are consistently a reliable source for expressing citizens' understanding of the mission of criminal responses and the understanding of these minds can never be ignored in criminal policymaking. Accordingly, some retributionists have engaged in the moral reproduction of the concept of retributionism. In this process, the justification of the suffering resulting from punishment becomes important and its unpleasantness is always taken into account. For this reason, all types of punishments, including custodial punishments and even their alternatives, should have the ability to incorporate the principles of spiritual purification, moral obligation, fulfillment of religion, and the abolition of crime, which are the main components of punishment; however, in current policy-making, due to the influence of criminological theories, a set of goals have been mixed together in a single punishment, and the teachings of pure retributivism have been erased from the goals of punishment in an eroding process. For example, in retributivism, what is important is the amount of damage that has been done to the psyche of the criminal and has made it impure, and the damage to the victim is not of much importance. The consequences of this thinking, in the practical field

of legislation, should lead to the reduction and elimination of pardonable crimes in punishments such as imprisonment, while, in the depths of Iranian criminal laws, there are numerous cases of pardonable crimes, examples of which can be seen in the punishment of the crime of theft, subject to Article 661 of the Penal Code approved in 1375, and the punishment of the crime of leaking information to government officials, subject to Article 506 of the same law. Also, crimes without a specific victim, such as environmental crimes or suicide, are punishable according to the logic of this approach. On the other hand, if the spiritual purification of the offender is achieved by means other than punishment, the retributive goals have been achieved, and whenever the wrongdoer truly feels remorse for the mistake he has committed and embarks on the path of spiritual development, there is no longer any justification for punishment; This is despite the fact that, according to Article 115 of the Islamic Penal Code approved in 2013, repentance is a reason for the remission of punishment in Ta'zir crimes only up to the sixth, seventh, and eighth degree, and is not effective in Ta'zir crimes of higher degrees. It was also examined: According to the teachings of the abolition of crime in the retributive philosophy, punishment is imposed to negate the crime; now, if the criminal committed the crime under environmental pressures, his behavior can no longer be considered an initial negation; rather, it must be assumed to be an action that itself occurred in order to eliminate the negation of another; therefore, it can be said: the imposition of punishment in crimes that occur as a result of pressures resulting from parental addiction, illiteracy, poverty, social discrimination, and provocative behaviors of the victim is not convincing. In alternative punishments to imprisonment, as discussed, the requirement to convert imprisonment into its alternatives is not consistent with the unpleasantness and merit of the punishment. In this case, at least, it is necessary to establish the repentance of the offender and completely eliminate the effects of the crime; especially if the plaintiff demands compensation and punishment, the court's requirement to issue a sentence of alternative punishment to imprisonment is contrary to the retributive doctrines. In order to resolve the existing challenges, it seems that: the legislative branch should separate the types of imprisonment in the text of the Penal Code in accordance with the goals intended for it and allocate each type of imprisonment to the crime committed in accordance with it; for example: in crimes where the offender is obliged to take action to remove the damage from the victim, the title of the punishment should be changed to corrective imprisonment, or in the case of drug users or beggars, corrective imprisonment should be foreseen. Also, in the case of crimes that are of higher severity, such as: drug distribution, or kidnapping or armed robbery, the perpetrator should be sentenced to imprisonment, because this title reflects the goals of punishment and punishment for the perpetrators and gives society a sense of security that it expects from punishment. In addition, the legislator can use these types of imprisonment together in order to achieve different goals; for example, in the case of a crime that is punishable by 5 years of imprisonment, the way the law is written can be changed to 2 years of imprisonment and 3 years of correctional imprisonment. Obviously, the conditions of these imprisonments should be implemented differently in terms of the architecture of the prison building, the right to use open space, the obligation to participate in educational workshops, the prisoners' meal list, the amount and method of visiting companions, negotiation sessions between the offender and the victim, and the use of parole institutions, etc.