

The concept of imprisonment and human rights criminology essay



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The terms “ prison” and “ imprisonment” are used interchangeably in a way that the existence of the first term is a mandatory precondition for the existence of the latter one, or vice-versa. In other words in criminal justices process, the first term” prison” refers to the place where in the latter term’ “ imprisonment” is to be taken place; and imprisonment indicates the limitation of inmates’ liberty.

However, different terms are used by different countries and legal systems to explain terms ‘ prisoner’, ‘ prison’ and ‘ imprisonment’. For example in the US different states use different terminologies like ‘ inmate’ and ‘ prisoner’; ‘ correction’ and ‘ imprisonment’ interchangeably.[1]

Of course some legal systems use ‘ detention’ instead of ‘ imprisonment’ and ‘ detainee’ instead of ‘ prisoner’.[2]Hence, these above discussed facts show that there is no uniformity in the use of terms in the criminal justice system of different states. However, after the establishment of the United Nations organization (UN) and the regional organizations states are adopting uniform usage of terms through the ratification of binding and normative treaties and standards.

In order to avoid ambiguity during the writing and reading this research paper, the writer will use the term ‘ prison’ to mean a place where ‘ individuals deprived of personal liberty as a result of conviction for an offence serve their conviction’[3]emphasis added. Likewise, the term ‘ prisoner’ will be used to refer to an ‘ individual deprived of personal liberty as a result of conviction for an offence’.[4]Finally, the term imprisonment will be used to mean deprivation of liberty as a result of conviction.[5]However,

readers should be aware that the term inmate to mean prisoner may be used in some parts of this research paper.

Evolution

Indeed, crimes as a source of social evil emerged from the biblical times; however with the change of socio-economic situations its nature and techniques also changed; in line with this, the modes of control and punishment used by the state changed.[6]Therefore, prisons as we know today are result of recent developments compared to the age of commission of crimes. From these facts one can understand that before the coming of the contemporary prison system there were other modes of punishment against wrongdoers. To borrow the words of Thorsten Sellin;

[s]ociety's offenders have been dealt with in many ways. Until recent times, historically speaking, punishment was harsh; criminals were exiled, enslaved, tortured, mutilated, and executed. The use of imprisonment as a method of treating the offender is relatively new, dating back no further than the last quarter of the 18th century. Of course, jails, lockups, and places of detention of various kinds have been in existence for hundreds of years. But it was only 200 years ago that they were used for anything other than places of detention for offenders awaiting a harsher kind of punishment.[7]

During the Roman Empire, prisons were used to detain offenders pending trial or execution and to punish defiant servants.[8]Hence, it was not used to imprison convicted individuals like the practice today. The English prison was used for the same purpose with Roman ones in the 9th and 11th centuries. However, unlike the contemporary situation, all costs incurred during the

stay of a prisoner in the prison, including salaries for sheriffs, would be covered by the prisoner himself.[9]To rectify the rising of petty offences in Europe, prison labor was introduced in correction centers in the sixteenth century.[10]This new system was aimed at rehabilitating prisoners so that they can serve the society after release. Latter on transporting prisoners from Europe to colonies, which was aimed at engaging them in the farm lands in America and Australia was introduced.[11]This system ended together with the end of colonialism in the Northern America and Australia.

In America the concept of prison is related with the Quakers, a protestant religious sect, who were highly concerned about the cruelty and harshness of the then system.[12]As a result of their concern about the redemption of the souls of the criminals they came up with the idea of the penitentiary, a place of separation where criminals could think upon their evil deeds and repent'. [13]Though it is debating, there is a view that prisons as a means of social institutions emerged in Pennsylvania in the last part of the eighteenth century.[14]In general the need to reform young offenders, the detention of those politically in disfavored and banishment constituted to the 19th century prisons.

Function of imprisonment

From the historical point of view imprisonment has had different objectives at different times. As mentioned above, prisons used to serve as a place where detainees awaiting trial or execution stay. In this case its purpose is aimed at keeping the individuals until conviction or execution.

It is widely known that the purpose of imprisonment is firmly related with the objective of criminal punishment. Accordingly, the best way to discuss about the function of imprisonment would be to look in light of the objectives of criminal law. However, looking at the historical point of view on the treatment of prisoners is of worth.

Typically, inmates in ancient times were put to death or used as slave labor force, but, in most of these cases, a period of incarceration or detention was preceded. When they were not otherwise engaged in labor they were held in remote and hostile surroundings, making escape virtually impossible and these drastic sanctions and inhuman treatments continued until the coming of 18th c Enlightenment.[15]

The 17th c colonial jails and earlier various confinement and detention facilities hardly resembled the institutions that the term prison implies today. That is because such places were solely for the purpose of detention and confinement with no pretence of rehabilitation or reformation and such places were called penal institutions or penitentiaries.[16]

However, following the coming of 18thc Enlightenment, prison officials began to develop the ideas of reformation and rehabilitation programs to their inmates. For instance, during the 1800s; New York prison officials developed two major systems of prison organization.[17]The first system was introduced in 1821 and under this system; prisoners stayed in solitary confinement at night and worked together during the day and it emphasized silence. That is to mean prisoners could not speak to, or even look at, one another because prison officials hoped that this silence and isolation would

cause inmates to think about their crimes and reform. However this system failed without fully achieving its purpose partly because the rigid rules and isolation drove inmates insane.

The 2nd system, however, was different both in methods of admission and treatment. It was opened in 1876 as a model person for offenders between the ages of 16 and 30 and this system made use of flexible sentences and allowed inmates to earn early release for good behavior and, moreover, it offered physical exercise, military training and an educational program which generally used education as a means of rehabilitation.[18]But the institution did not fully achieve its high expectations, largely because it judged inmates on their prison behavior and conduct instead of on their actual fitness for release.

Further improvement and modification have been made in the 1900s. For instance, in the 1930s prison officials began to develop rehabilitation programs based on the background, personality, and physical condition of the individual inmate and this approach made rehabilitating and reforming programs more meaningful.[19]This is indication of well-developing system that laid the foundation for cotemporary rehabilitation and correction systems.

But despite such efforts attempts to rehabilitate and reform inmates could not bring the desired results largely because of poorly trained staffs, lack of funds, and ill-defined goals. An extension of these rehabilitating and reforming process further strengthened and enlarged in 1960s and many

people in the field of corrections felt that inmates could be helped better outside prison.

As a result, community correctional facilities and halfway houses were established in 1960s and inmates lived in these facilities just before release and received counseling to help them adjust their life outside prison.

[20]Following the emergence of rehabilitation and reformation programs, modifications of the various prison terminologies became feasible. As mentioned above, in the past, prisons were called penitentiaries or penal intuitions.

Now days, however, the popular name is correctional institutions or correctional facilities. Similarly a modification is made from the term ' guard' to correctional officers and these modifications in nomenclature emerged with the professionalism of the field of corrections during recent decades and the desire to modify the harsh images eluted by the terms ' prison' and ' guard'.

In the past and still now, there has been a lively debate regarding the purposes for establishment of prisons and sending inmates in to these institutions. Some commentators argue that prisons are established only to imprison convicted criminals.[21]That is to say their purpose is to punish convicted law-breakers using imprisonment as a means of retribution. Indeed as Edward Kaufman said, retributive purpose of imprisonment is necessary for the society, however it is considered as " barbaric" now days.[22]He further mentioned that;

[1]imprisonment for retribution may drive a delinquent further along the road of crime through forcing association with criminal elements and increasing rage toward and alienation from society. Permitting brutal retribution may stimulate brutal responses not only in the individual but in society as a whole, as in riot control and war.[23]

Based on the above stated reasonable pitfalls, it is fair to suggest that retribution as a purpose should be supported by rehabilitation to halt further wrongdoings in the community.

Others insist that their main purpose is to deter offenders from committing further crimes after they are released and to deter those potential law-breakers from committing crime in the future.[24]That is to mean the purpose of these institutions is to prevent convicted offenders from relapsing in to crime after their release by taking lessons from their first incarceration and the existence of prisons as penal institutions will make potential law-breakers to be refrained from committing crimes as well. However, there is an idea that sending someone to prison might not deter him/her from committing crime inside the prison compound.[25]The same problem can be deducted from the third objective of imprisonment 'incapacitation' which is aimed at halting possible commission of crime by the individual prisoner by putting him in prison. Therefore, the deterrence and incapacitation objectives of imprisonment lonely cannot realize the aimed purpose of deterring or incapacitating unless it is supported by other mechanisms like rehabilitation.

Still others advocate that inmates are sent to correctional institutions to be reformed or rehabilitated.[26] That is to say during their stay in the institutions they will come to realize and learn the wrongfulness and hazardous effects of committing crime and will further learn skills which will help them to be a law abiding and productive citizens when they are released. In practical terms, the purposes for the establishment of prisons could be interpreted as a combination of the above reasons and, therefore, they are established for more than custody and control.

Now days, the concept of rehabilitation is being claimed as a right based on different international and regional treaties and standards. This is aimed at striking the balance between the two seemingly contradicting duties of prison centers ' humane treatment of prisoners' and ' its punitive nature to maintaining peace and security'.

The International Covenant on Civil and Political Rights (ICCPR), under its article 10 deals on human treatment of prisoners. It further states that '[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'.[27] As per this provision, states parties have the obligation to employ rehabilitation as a main purpose of imprisonment in their criminal justice system. The United Nations Standard Minimum Rules (UNSMR), which interprets the rights of prisoners under the International bill of rights, states that;

[t]he purpose and justification of a sentence of imprisonment or a similar measure derivative of liberty is ultimately to protect society against crime.

This end can only be achieved if the period of imprisonment is used to

ensure that upon his return to society, the offender is not only willing but able to lead a law-abiding and self-supporting life.[28]

In a similar way of expression, under its general comment No. 21, the ICCPR human rights committee has stated that ' no penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner.'[29] Similar way of expression is used in different regional treaties and standards.[30]

Generally, the above discussed arguments together with the binding and normative international and regional treaties tell us that rehabilitation is the main purpose of imprisonment in today's criminal justice system.

Accordingly, it imposes obligation against states in general and prison centers in particular to use rehabilitation tools for their prisoners. But, this does not mean the other purposes of imprisonment will be totally disregarded they will rather use them side by side.

Prisoners' rights: Do Prisoners have a right?

Some people believe that inmates should have no rights for the reason that any rights that they once had were forfeited, while they were incarcerated as part of the price they had to pay for their crimes.[31] Of course, rights namely human rights and freedoms are not absolute and, thus, they may be subject to limitations so as to protect the rights of others and the interests of the society. On the other hand, the preamble of the Universal Declaration of Human Rights (UDHR), dictates that, ' All persons are born free and equal in dignity and rights'. However, equal enjoyment of rights might not be practicable due to various grounds where imprisonment is one among these.

The above stated arguments and other factors pose the question ' do prisoners have rights once imprisoned?'

Researches show that, many people are of the opinion that imprisonment results in forfeiture of rights of prisoners in general.[32] Sometimes this assertion is confirmed by court decisions. In the famous *Price v Johnston*[33] case the US Supreme Court declared that " lawful incarceration brings about the necessary withdrawal or limitation of privileges and rights". Indeed history tells us that prisoners were facing the worst punishments in prisons because it is believed that they forfeit their rights. But what about human rights, which follow human beings where ever they go? Are prison center unreachable for human rights? Is it an exception to the universal application of human rights?

The above decision of the US Supreme Court is a reflection of the belief of the then society. However, after the establishment of the UN and adoption of the UDHR, SMR, ICCPR and other regional Treaties the perception that ' imprisonment forfeits rights' changed. This is because issues related to the rights of prisoners were included in all the International and Regional Human rights Treaties and Standards. Indeed the concept of regulating the rights of prisoners in the international level was raised during the League of Nations. For this reason the then Penal and Penitentiary commission has prepared rules on the treatment of prisoners which was approved by the League of Nations Assembly in 1934.[34] These rules were finally inapplicable and latter on revised by the UN secretariat and finally approved by the UN ECOSOC as Standard Minimum Rules for the Treatment of Prisoners (SMR) in 1957.

[35] These standards are now implemented through many regional and <https://assignbuster.com/the-concept-of-imprisonment-and-human-rights-criminology-essay/>

domestic legislations and standards to gain binding status. Particularly, Europe through its European prison Rules and the US the 1962 model penal code and standard correction rules of the 1973 are considered as ' Bill of Rights' for prisoners.[36]

It is after such an international effort of the UN and other regional organizations that courts began to pronounce that rights follow human beings. The same court of the US (the Supreme Court) in the *Coffin v Reichard* case decided that -“ a prisoner retains all the rights of ordinary citizen except those expressly or by necessary implication taken from him by law.”[37]This decision was a stepping stone for further realization of rights of prisoners in the US and all over the world. In strengthening the above decision of the Supreme Court, Justice Blackmun said, “ Fundamental rights follow the prisoner through the walls which incarcerate him, but always with appropriate limitations”.[38]But the main point that has to be asked is what are the limitations and how one can know what his rights are and what are not in prison. Justice Blackmun said that ‘ the court shall use a ‘ Balancing test’ of protecting the interest of the individual and restricting them for different reasons’. The UN general assembly in the adoption of the Basic Principles for the Treatment of Prisoners has declared the same and urged states parties to apply the standards and international or regional treaties where they are party to.

As mentioned above determining what rights of prisoners will be limited during their imprisonment is crucial. There are some people who argue that the rights that are limited and retained by prisoner during his imprisonment could be easily identified by the purpose of punishment intended.[39]Form <https://assignbuster.com/the-concept-of-imprisonment-and-human-rights-criminology-essay/>

this proposition we can easily understand that except for rehabilitation, most of the other purposes of imprisonment discussed above results in forfeiture of most of the rights of prisoners.

Basically, Richard L. Lippke suggested certain criticisms against those who said prisoners forfeit their rights during imprisonment. He said that, in practice it is only state officials who can impose penalties on prisoners, however if their rights are forfeited during imprisonment it is not clear why any ordinary person cannot impose same.[40]The other problem identified is the duration of forfeiture, which according to Lippke is difficult to know for the reason that;

‘[M]any criminals violate their victims’ rights only briefly, though they do them great harm in the process. If we tie the duration of forfeiture to the time it takes victims to recover, the problem is that some victims may never recover from brief, but devastating, right violations. Yet not all right violators can justly be punished indefinitely, not even all serious right-violators who do their victims permanent or irreversible damage.[41]

The third problem is related to breadth or scope of the forfeiture.

Accordingly, this poses a question ‘ Does someone who punches another person in the nose forfeit the relatively narrow right to not be punched in the nose, or the broader right to bodily autonomy?’ For him both the narrower and broader approaches are problematic since the narrower gives ‘ dubious’ ground for officers where as the broader approach authorizes forfeiture of rights which can be claimed not violated by the prisoner.[42]

Now it seems fairly clear that prisoners retain their rights except those deprived specifically by law and due to their deprivation of liberty. However, there is well known perception and practice that the retained prisoners' rights is less stringent than ordinary person's rights, therefore can be overridden for the benefit of less weighty ordinary person's rights.[43]It is not clear why a state discriminates between its citizens based on status, in this case prisoner and ' ordinary citizen' despite its prohibition in different treaties including the UDHR.

Rights retained

Identifying rights retained is highly related with the purpose of imprisonment that we deserved to attain.

Most obviously, this involves severe curtailment of their rights to freedom of movement for some period of time. We might also have to curtail their rights to freedom of association and intrude upon their privacy, though to what extent in each case are matters that require further substantive analysis. Prisoners would fully retain other moral rights. These might include rights securing interests in political participation, freedom of speech and conscience, control over labor, subsistence, health care, visitation with family and friends, and access to culture and entertainment. Pp 134

Incapacitation

It is hard to see how more extensive restrictions on the rights of prisoners will reduce threats to the rights of others in ways that are clearly greater in

magnitude than the direct burdens such restrictions will impose on inmates.”

Pp135

Keeping prisoners locked in cells most of the time with few opportunities to exercise their autonomy or to maintain or develop social and labor skills may marginally reduce crime within prisons in the short-term. However, such an approach seems a prescription for disaster in the longer term if our aim is to reduce crime. The vast majority of prison inmates will eventually be released from prison, most sooner rather than later. 136

(If prison life is better than life outside prison (an unlikely proposition in any case), the solution might be to improve the living conditions of the least advantaged members of civil society).

“ It should be apparent that rehabilitative crime reduction considerations point us away from harsh prison regimes toward those that impose moderate or minimal deprivations on offenders. Prisoners are unlikely to become better functioning members of civil society if they are kept under conditions that deny them access to education, meaningful work, mental health treatment, and ready access to the family members and friends who care about

them.. 138

retribution

Retributive logic demands that serious offenders suffer

losses or deprivations commensurate with their crimes. In all probability,

penal confinement will always satisfy that demand. Thus, the only point of

contention among retributivists will likely be about precisely which rights

must be maintained and facilitated if prisoners are to retain the capacities

vital to moral personality. Pp 141

More intriguing is Edgardo Rotman's claim that prisoners have a moral

right to rehabilitation (Rotman 1990, 10-13). Rotman interprets this right

both

negatively, as a right not to be allowed to deteriorate in prison, and

positively,

as a right to improvement in such things as work skills and mental health

while in prison. His primary argument for this right is that deprivation of

freedom is the sine qua non of modern legal punishment. Freedom is the

highest value and its loss is what offenders appropriately suffer. The other

things (mostly bad, unfortunately) that happen to them in prison are not part

of punishment, so prisoners should be protected from them. Moreover, many offenders come from socially and economically deprived backgrounds, and this requires the state to not only prevent them from deteriorating while in prison but to actually improve their lives. Pp 143

critics

Even if we grant that freedom is the highest value in modern societies, it does not follow

that its loss, or its loss alone, is all that offenders should suffer

However, the detention or incarceration of prisoners does not mean that all the rights they have are lost as a result of such detention or incarceration. That is because certain rights like the right to respect inherent human dignity and human ways of treatment, the right to food and health care, shelter and Freedoms like freedom of thought, belief and so on are fundamental to human existence and they are inherent entitlements that come to every person as a result of being human. As a result, inmates under detention or imprisonment have such and the like fundamental human rights and freedoms and retain these rights with the exception of those that have been lost as a result of deprivation of liberty.

Following the declaration of the UDHR in 1948, states have developed considerable number of human rights instruments including the Basic Principles for the Treatment of Prisoners (BPT), Standard Minimum Rules of the Treatment of Persons (SMR) and other instruments specifically dealing

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with the rights and human treatments of prisoners at the national, regional and international level. These basic principles and minimum standard rules form part of customary international law, which means that they are binding, regardless of whether a state has ratified international treaties concerning these instruments.

Moreover, states have undertaken obligations under international and domestic legislations both to promote and protect the wide variety of human rights in general and that of prisoners in particular.