



CAPITAL PUNISHMENT IN INDIA: AN OVERVIEW

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ABSTRACT

This study explores the administration and impact of the death penalty in India, with a comparative lens on its counterparts in the Arab nations and the United States. The research delves into the legal frameworks, frequency of executions, judicial safeguards, socio-political influences, and public perception surrounding capital punishment in these regions. In India, the death penalty is reserved for the "rarest of rare" cases, yet inconsistencies in its application raise concerns about arbitrariness and judicial discretion. The Arab nations, particularly countries like Saudi Arabia and Iran, exhibit a more frequent and often opaque use of capital punishment, driven by both civil and Sharia-based legal systems. Conversely, the United States presents a federal-state dichotomy where the use of the death penalty varies significantly, reflecting political ideologies, racial disparities, and evolving constitutional debates. By analyzing these three jurisdictions, this comparative study evaluates the ethical, legal, and human rights dimensions of capital punishment, ultimately questioning, efficacy and legitimacy in contemporary justice systems.

1. INTRODUCTION

Capital Punishment in India has a cheered history. In this Chapter the researcher would peep into the concept of punishment and its different theories, religious sanctions, legislative development and present day crusade to deal with capital punishment.

Social interest in a civilized society lies in a peaceful and secure atmosphere, which is governed by rule of law. A man possesses free choice to follow either good or evil. If he chooses evil, he is responsible for his choice thereby inviting appropriate punishment. To impose just punishment is necessary as society cannot be denied the right of self-preservation in a secured way. To dream for peaceful and orderly society, the inherent evils developed in individuals need to be eliminated for safety and comfort of others. It is indeed a melancholy commentary upon a civilized society for having failed to make a crime free living. A crusade to conquer evil disturbing the moral fibre of society, for preservation of justice, righteousness, human life and to create a decent, humane society, the punishment being a perennial process has travelled in diverse directions leading towards the present day legal vessel where human life is more sacred than the time immemorial. What was punishment for a minor crime in yesteryears is today punishment for a major crime. Capital punishment is the highest punishment for any crime.

Despite there being varied punishments for varied crimes from generation to generation, crime is prevalent in every society. The efficacy of punishment has been justified in every society with only exception that the harsh punishments have been more or less eliminated from the Code and evil is treated in charity in most of the crimes. Even though not *in toto*, the barbarity breeds barbarity seems to have been understood and the human flight seems to be ruling the day where sentencing is viewed as a process of re-educating a criminal thereby rehabilitating him to return him in the society as a responsible citizen. The holistic view of sentencing has yet to eliminate the severity in crimes which are bestial and treacherous tragedies deserving terrible condemnation and are so shocking to the human conscience that infliction of severe punishment becomes irresistible. The harshness and the human flight could not change the colour of crimes.

1.2 EFFICACY OF PUNISHMENT

Life is always sweet and death is always cruel. A man is accountable for his acts and a penalty is the sanction that supports accountability. The punishment is a dynamic process in a given society so as to know about its objectives. The question arises as to the efficacy of the 'Punishment' from past to present generation.

Questions arise - Is 'punishment' in its varied forms an artificial danger for the society? - Is it meant for creation of effective deterrence or re-education of the convict so as to make him a responsible person of the society? Is it a mean of repairing the wounds made upon collective sentiments? And/Or, Is it a decree of vengeance in favour of State necessary for maintaining the law and order?

Ideally, a Criminal Law is a command, usually a prohibition, against anti-social conduct; that is to say, against conduct which will interfere with the order and smooth and satisfactory running of the society, and any such explanation of the law demonstrates the necessity that there should be such laws, otherwise chaos would come again. It is of the nature of such a law that practically everybody is ordered to obey it.¹

What, then, is to happen if an individual disobeys the law? And the first answer to this surely must be that something must be done to demonstrate that the law is a law, and not a mere request, or pious opinion of what conduct is appropriate. Law is not a law, at any rate in modern times, without a sanction. This we may call punishment. Punishment is required to vindicate the law.²

Crime is a dynamic concept and its denotative meaning changes with the growth of society both from the point of view of direction and dimension. What is not crime today maybe 'crime' tomorrow, or what is a crime of insignificant gravity today may be of high gravity tomorrow. Naturally, the prescription of punishment also changes accordingly.³

1.3 PUNISHMENT - ITS OBJECT & PURPOSE OF PUNISHMENT

The purpose of punishment is to extinguish the rising flame of criminal tendency in a human being. By inflicting a just punishment, a civilized society usually tries to re-educate the criminal so as to make him a responsible member of the society. While the battle rages loud and long, as a perennial process, the generations have never given up recovering a worst criminal out of criminal vices by varied means of punishment for protection of the mankind. Since punishment is one of the main concerns of this study, it is important to have a brief survey of the concept of 'punishment'. A precise survey of the developments explaining the concept of punishment is succinctly explained in following passages.

*Halsbury's Laws of England*⁴ defines the aims of punishment as follows:

"The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims. The retributive element is intended to show public revulsion to the offence and to punish the offender for his wrong conduct. The concept of justice as an aim of punishment means both that the punishment should fit the offence and also that like offences should receive similar punishments. An increasingly important aspect of punishment is deterrence and sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law. The importance of reformation of the offender is shown by the growing emphasis laid upon it by much modern legislation, but judicial opinion towards this particular aim is varied and rehabilitation will not usually be accorded precedence over deterrence. The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary consideration when sentences are being decided."

Sir Henry Sumner Maine, the English legal historian, observed that punishment evolved from social necessity. The concept of punishment as a form of expiation or atonement reaches far back into human nature as well as into human history. The notion that the threat of punishment by the State will restrain the potential criminal is one of the most accepted justifications for it. The idea has a philosophical basis in the utilitarians' concept of the rational man acting upon a deliberate calculation of possible losses and gains. If men choose rationally among possible future courses of action then surely the likelihood of a criminal course of action could be decreased by attaching to it a quick, certain and commensurate penalty.

Like every other institution, says Sir Henry Sumner Maine, which has accompanied the human race down the current of its history, the punishment of death is a necessity of society in certain stages of the civilizing process. There is a time when the attempt to dispense with it baulks both of the two great instincts which lie at the root of all penal law. Without it, the community neither feels that it is sufficiently revenged on the criminal, nor thinks that the example of his punishment is adequate to deter others from imitating him. The incompetence of the Roman Tribunals to pass sentence of death led distinctly and directly to those frightful Revolutionary intervals, known as the Proscriptions, during which all law was formally suspended simply because party violence could not find any other avenue to the vengeance for which it was thirsting. No cause contributed so powerfully to the decay of political capacity in the Roman people as this periodical abeyance of the laws; and, when it had once been resorted to, we need not hesitate to assert that the ruin of Roman liberty became merely a question of time. If the practice of the Tribunals had afforded an adequate vent for popular passion, the form of judicial procedure would no doubt have been as flagrantly perverted as with us in the reigns of the later Stuarts, but national character would not have suffered as deeply as it did, nor would the stability of Roman institutions have been as seriously enfeebled.⁵

¹ CODDINGTON, F.J.O, *Problems of Punishment*, THEORIES OF PUNISHMENT, STANLEY E. GRUPP (ed), 333-336 (LONDON INDIANA UNIVERSITY PRESS 1971)

² Id., p. 337

³ MITRA, N.L., *A New Question on Penal Law*, CRIMINAL LAW & CRIMINOLOGY, K.D. GAUR 72 (2002 DEEP & DEEP PUBLICATIONS PVT. LTD.)

⁴ HALSBURY'S LAWS OF ENGLAND, Vol.11, 288 para 482 (4th ed. Butterworth 1974)

⁵ MAINE, SIR HENRY SUMNER, *The Early History of Delict and Crime* in ANCIENT LAW – ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS, 305-323 (LONDON, OXFORD UNIVERSITY PRESS, 1959)

Punishment, whatever shape it may assume, is an evil. The supreme importance visible in punishment is that it prevents offences. The rationale of punishment enunciated by Jeremy Bentham has been presented by John Bowring⁶ as follows:

“Pain and pleasure are the great springs of human action. When a man perceives or supposes pain to be the consequence of an act, he is acted upon in such a manner as tends, with a certain force, to withdraw him, as it were, from the commission of that act. If the apparent magnitude, or rather value of that pain be greater than the apparent magnitude or value of the pleasure or good he expects to be consequence of the act, he will be absolutely prevented from performing it. The mischief which would have ensued from the act, if performed, will also by that means be prevented.

... Punishment has three objects: incapacitation, reformation, and intimidation. If the crime he has committed is of a kind calculated to inspire great alarm, as manifesting a very mischievous disposition, it becomes necessary to take from him the power of committing it again. But if the crime, being less dangerous, only justifies for the delinquent to return to society, it is proper that the punishment should possess qualities calculated to reform or to intimidate him.”

Bentham in his celebrated treatise *Principles of Penal Law* discussed *Measure of Punishment* to establish a proportion between crimes and punishments. He observed thus:

“Punishments may be too small or too great; and there are reasons for not making them too small, as well as for not making them too great. The terms *minimum and maximum* may serve to mark the two extremes of this question, which require equal attention.

With a view of marking out the limits of punishment on the side of the first of these extremes, we may lay it down as a rule— That the value of the punishment must not be less, in any case, than what is insufficient to outweigh that of the profit of the offence. By the profit of the crime, must be understood not only pecuniary profit, which has operated as a motive to the commission of the crime.

The profit of the crime is the force which urges a man to delinquency: the pain of the punishment is the force employed to restrain him from it. If the first of these forces be the greater, the crime will be committed; if the second, the crime will not be committed. If, then, a man, having reaped the profit of a crime, and undergone the punishment, finds the former more than equivalent to the latter, he will go on offending for ever; there is nothing to restrain him. If those, also, who behold him, reckon that the balance of gain is in favour of the delinquent, the punishment will be useless for the purposes of example.

If it be determined to preserve the punishment of death, in consideration of the effects it produces *in terrorem*, it ought to be confined to offences which in the highest degree shock the public feeling – for murders, accompanied with circumstances of aggravation, and particularly when their effect may be the destruction of numbers; and in these cases, expedients, by which it may be made to assume the most tragic appearance, may be safely resorted to, in the greatest extent possible, without having recourse to complicated torments.”

Bentham also examined the issue of minimum and maximum of punishment. He observed thus:

“The minimum of punishment is more clearly marked than its maximum. What is *too little* is more clearly observed than what is *too much*. What is not sufficient is easily seen, but it is not possible so exactly to distinguish an excess. An approximation only can be attained. The irregularities in the force of temptations, compel the legislator to increase his punishments till they are not merely sufficient to restrain the ordinary desires of men; but also the violence of their desires when unusually excited.

The greatest danger lies in an error on the minimum side, because in this case the punishment is inefficacious; but this error is least likely to occur, a slight degree of attention sufficing for its escape; and when it does exist, it is at the same time clear and manifest, and easy to be remedied. An error on the maximum side, on the contrary, is that to which legislators and men in general are naturally inclined: antipathy, or a want of compassion for individuals who are represented as dangerous and vile, pushes them onward to an undue severity. It is on this side, therefore, that we should take the most preparations, as on this side there has been shown the greatest disposition to err.”

Bentham also examined capital punishment. According to him, the most remarkable feature in the punishment of death, and that which it possesses in the greatest perfection, is the taking from the offender the power of doing further injury: whatever is apprehended, either from the force or cunning of the criminal, at once vanishes away; society is in a prompt and complete manner delivered from all alarm. According to him:

“Death is the absence of all pleasures indeed, but at the same time of all pains.

If it be determined to preserve the punishment of death, in consideration of the effects it produces *in terrorem*, it ought to be confined to offences which in the highest degree shock the public feeling – for murders, accompanied with circumstances of aggravation, and particularly when their effect may be the destruction of numbers; and in these cases, expedients, by which it may be made to assume the most tragic appearance, may be safely resorted to, in the greatest extent possible, without having recourse to complicated torments.”

Punishment, says Ted Honderich⁷, is imposed on an offender, someone who is found to have broken a rule, to have done something prohibited. A judge cannot find someone to have broken the law, in this sense, if he is convinced that he has not done so. Nor can he find him to have broken the law if he does not investigate the matter in certain ways.

The magnitude of punishment is of importance. Punishment is an expression of society's disapproval of the act and the degree of approval is expressed by the magnitude of punishment. A serious crime must be answered with a severe punishment, a minor misdemeanour with a lenient reaction.⁸

⁶ BENTHAM, *Principles of Penal Law*, THE WORKS OF JEREMY BENTHAM, Vol.1, 383-390, JOHN BOWRING (ed.)

⁷ HONDERICH TED, PUNISHMENT – ITS SUPPOSED JUSTIFICATIONS, 1, 2 (1st ed., Hutchinson & Co. (Publisher) Ltd., London, 1969)

⁸ J ANDENAES, JOHS, *General Prevention – Illusion or Reality?* THEORIES OF PUNISHMENT, GRUPP, STANLEY E

The concept of punishment is explained by Hans Von Henting⁹ as follows:

“Punishment means the establishment of artificial danger. Punishment is organized hurt, an impairment of life organized in the form of laws, which society consciously uses to train humanity to avoid certain possible courses of action potentially injurious or hostile to itself. Punishment is imitation of precedents which in real life are hourly repeated: here lurks the injurious agent, and there, guarded by man’s living senses, wait the motor functions, and over both mechanisms is their great co-ordinator, the Brain. With sound co-operation the stimulus which cannot be overcome or surmounted will be avoided, circumvented, or rendered harmless by flight. Punishment can only be tuned to the moral pitch of the average man in an average position of life. It must fail whenever these assumed conditions are in any way altered. Far from being a difficult problem, punishment would be a mere arithmetical exercise if sensitiveness were always normal and healthy.”

While discussing the development and future of punishment, Hans Von Henting observed thus:

“The magical and religious foundations which we have excavated from under the visible walls of punishment do not only give an explanation of the form and contents of many means of punishment, but they, above all, help us to understand the tremendous tenacity with which capital, corporal and many derogatory punishments defend themselves in our emotional life against any rationalization.

The road of progress in penal law is curiously zigzag. The need for punishment surges up in strange rhythms, sinks and suddenly returns in new disguises of a return to mysticism.”

According to Robert G. Caldwell and William Nardini¹⁰ punishment is the penalty imposed by the State upon a person adjudged guilty of crime. It has these two essential elements: (1) public condemnation of antisocial behaviour, and (2) the imposition of unpleasant consequences by political authority. The infliction of punishment, therefore, always involves the intention to produce some kind of pain, which is justified in terms of its assumed values.

Jackson Toby in his celebrated article *Is Punishment Necessary*¹¹ noted that most of the textbook writers have found the trend in modern countries toward humanizing punishment and toward the reduction of brutalities. They point to the decreased use of capital punishment, the introduction of amenities into the modern prison by enlightened penology, and the increasing emphasis on nonpunitive and individualized methods of dealing with offenders, e.g., probation, parole, psychotherapy. The punishment is a vestigial carry-over of a barbaric past and will disappear as humanitarianism and rationality spread. Let us examine this inference in terms of the motives underlying punishment and the necessities of social control.

Jackson further discussed punishment as a means of sustaining the morale of conformists and referred to Emile Durkheim’s philosophy as follows:

“**Durkheim considered punishment indispensable as a means of containing the demoralizing consequences of the crimes that could not be prevented.** Punishment was not for Durkheim mere vindictiveness. Without punishment Durkheim anticipated the demoralization of “upright people” in the face of defiance of the collective conscience. He believed that unpunished deviance tends to demoralize the conformist and therefore he talked about punishment as a means of repairing “the wounds made upon collective sentiments.” Durkheim was not entirely clear; he expressed his ideas in metaphorical language. Nonetheless, we can identify the hypothesis that the punishment of offenders promotes the solidarity of conformists.

Durkheim anticipated psychoanalytic thinking as the following reformation of his argument shows: One who resists the temptation to do what the group prohibits, to drive his car at 80 miles per hour, to beat up an enemy, to take what he wants without paying for it, would like to feel that these self-imposed abnegations have some meaning. When he sees others defy rules without untoward consequences, he needs some reassurance that his sacrifices were made in a good cause. **If “the good die young and the wicked flourish as the green bay tree,” the moral scruples which enable conformists to restrain their own deviant inclinations lack social validation.** The social significance of punishing offenders is that deviance is thereby defined as unsuccessful in the eyes of conformists, thus making the inhibition or repression of their own deviant impulses seems worthwhile. Righteous indignation is collectively sanctioned reaction formation. The law-abiding person who unconsciously resents restraining his desire to steal and murder has an opportunity by identifying with the police and the courts, to affect the precarious balance within his own personality between internal controls and the temptation to deviate.”

On the same point Beccaria in his historic work *On Crimes and Punishments*¹² denounced retributive basis of punishment:

“The aim of punishment can only be to prevent the criminal committing new crimes against his countrymen, and to keep others from doing likewise.

(ed), 138 (LONDON INDIANA UNIVERSITY PRESS 1971)

⁹ HENTING HANS VON, PUNISHMENT – ITS ORIGIN, PURPOSE AND PSYCHOLOGY, 2 (1st ed., WILLIAM HODGE AND COMPANY LTD., LONDON 1937)

¹⁰ CALDWELL, ROBERTS G. & NARDINI, WILLIAM, *Criminal Courts and Procedure*, FOUNDATIONS OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, 229 (1st ed. BOBBS-MERRILL EDUCATIONAL PUBLISHING, INDIANAPOLIS 1977)

¹¹ TOBY, JACKSON, *Is Punishment Necessary*, THEORIES OF PUNISHMENT, GRUPP, STANLEY E (ED), 102-106 (LONDON INDIANA UNIVERSITY PRESS 1971)

¹² BECCARIA, CESARE, *On Crimes and Punishments*, THEORIES OF PUNISHMENT, GRUPP, STANLEY E (ed), 119 (LONDON INDIANA UNIVERSITY PRESS 1971)

Punishments, therefore, and the method of inflicting them, should be chosen in due proportion to the crime so as to make the most efficacious and lasting impression on the minds of men, and the least painful impressions on the body of the criminal.

For a punishment to be efficacious, it is enough that the disadvantage of the punishment should exceed the advantage anticipated from the crime; in which excess should be calculate the certainty of punishment and the loss of the expected benefit. Everything beyond this, accordingly, is superfluous, and therefore tyrannical.”

The author further formed questionnaire as to what are to be the proper punishments for crimes:

“Is the death-penalty really useful and necessary for security and good order of

society? Are torture and torments just, and do they attain the end for which laws are instituted? What is the best way to prevent crimes? Are the same punishments equally effective for all times? What influence have they on customary behaviour? These problems deserve to be analyzed with that geometric precision which the mist of sophisms, seductive eloquence, and timorous doubt cannot withstand.”

Beccaria noted that the scale of punishments should be relative to the state of the nation itself. Very strong and sensible impressions are demanded the callous spirits of a people that has just emerged from the savage state. A lightning bolt is necessary to stop a ferocious lion that turns upon the shot of a rifle. But to the extent that spirits are softened in the social state, sensibility increases and, as it increases, the force of punishment must diminish if the relation between object and sensory impression is to be kept constant. The weight of punishment and the consequence of a crime should be that which is most efficacious for others, and which inflicts the least possible hardship upon the person who suffers it; one cannot call legitimate any society which does not maintain, as an infallible principle, that men have wished to subject themselves only to the least possible evils.

Beccaria discussed the issue of the certainty of punishment and noted thus:

“The certainty of a punishment, even if it be moderate, will always make a stronger impression than the fear of another which is more terrible but combined with the hope of impunity; even the least evils, when they are certain, always terrify men’s minds, and hope, that heavenly gift which is often our sole recompense for everything, tends to keep the thought of greater evils remote from us, especially when its strength is increased by the idea of impunity which avarice and weakness only too often afford.”

Speaking on the treatment of crime and criminal, in the House of Commons on July 25, 1919 as Home Secretary, Winston Churchill said¹³:

“The mood and temper of the public in regard to the treatment of crime and

criminals is one of the most unflinching tests of the civilization of any country. A calm, dispassionate recognition of the rights of the accused, and even of the convicted criminal, against the State – a constant heart searching by all charged with the duty of punishment – a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment; tireless efforts toward the discovery of curative and regenerative processes; unflinching faith that there is a treasure, if you can find it, in the heart of every man. These are the symbols, which, in the treatment of crime and criminal, mark and measure the stored-up strength of a nation, and are sign and proof of the living virtue in it.

Churchill pleaded for balance in society’s responses to crime – first, balance between the urge to punish and the recognition that the reclamation of offenders is in the societal interest and, second, balance between resort to the law’s authority to protect society and the respect for civil rights that is the cornerstone of a democracy. Can a nation’s people and their agents of criminal justice strike this balance in spite of the passions fuelled by crime? Whether or not the people have this regard toward criminals tells us much about their humanitarian regard for one another – the hallmark of social virtue.”

Justice V. R. Krishna Iyer in his celebrated article *Capital Punishment & Human Rights*¹⁴ wrote, “Let us, with humility and confidence and in all conscience, strive to lead kindly light amidst the encircling gloom. Taking a human life even with subtle rites and sanction of the law is retributive barbarity and violent futility, travesty of dignity and violation of divinity”. He discussed as to what is the existential approach to punishment? To this theory, he referred to the condensed statements of Jean Paul Sartre and Albert Camus, which are as under:

“... Punishment is an artificial means of maintaining man’s bondage to an inauthentic restriction of absolute freedom and self-projection. If there is no nature, nothing is unnatural. If every man is unique, there is no consensus, if there is no consensus, there is no law, and hence nothing illegal. Since nothing is unnatural or illegal, man’s only punishment lies in the fact that his existence is shared by others.

The criminal always remains a human offender, and as human he is always free to learn new values and new adaptations. **The imposition of punishment is justified only by its ability to re-educate an offender and thereby to return him to society as an integral human being.**

Law intends to allow for the maximum exercise of freedom. Punishment intends to restore to the offender his mitigated freedom and to the offender a correct appreciation of his existential situation as a being-in-the-world with other freedoms. Punishment, then, is justified not by deterrence or prevention but by re-education. Punishment thus seeks to safeguard and maintain rather than to minimize the criminal’s freedom. (Crime and Justice, Vol.II Edited by Radziszowicz and Wolfang, pp 116, 117)”

A judicial journey to the penological beginning reveals that social defence is the objective. The triple purposes of sentencing are retribution, draped sometimes as a public denunciation, deterrence, another scary variant, with a Pavlovian touch, and, in our era of human rights, rehabilitation, founded on man’s essential divinity and ultimate retrievability by raising the level of consciousness of the criminal and society. We may avoid, for the nonce, theories like “society prepares the crime, the criminal commits it”; or that

¹³ JOHNSON, ELMER H., CRIME, CORRECTION AND SOCIETY, 561 (4th ed., THE DORSEY PRESS, ILLINOIS)

¹⁴ IYER, V. R. KRISHNA, *Capital Punishment & Human Rights*, MINORITIES, CIVIL LIBERTIES AND CRIMINAL JUSTICE, 110 (PEOPLE’S PUBLISHING HOUSE 1980)

“crime is the product of social excess” or that “poverty is the mother of crime”¹⁵.

Crime is not a personal disease; it cannot be equated to personal disease; it is, however, a social disease. Looked at from the point of view of society, crime is a disease of an integral part of that society. And it is a virus from which society must seek protection. .. The prime function of punishment must clearly be the protection of that society.¹⁶ The Courts must reflect a public abhorrence of crime and that justice demands that some attempt be made to impose punishment fitting to the crime.¹⁷

Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive.¹⁸

Punishment is the sanction imposed on the offender for the infringement of law committed by him. Once a person is tried for commission of an offence and found guilty by a competent court, it becomes duty of the Court to impose on him such sentence as is prescribed by law. Penal laws, by and large, adhere to the doctrine of proportionality in prescribing sentences according to culpability of criminal conduct. Judges in principle agree that sentence ought always to commensurate with the crime. In practice, however, sentences are determined on other relevant and germane considerations. Any liberal attitude of imposition of meagre sentence or too sympathetic view may be counterproductive in the long run and against social interest which needs to be cared for, protected and strengthened by string of deterrence inbuilt in the sentencing system.¹⁹

1.4 THEORIES OF PUNISHMENT

Punishment is a dynamic process which requires due consideration to achieve penal objectives. It is necessary to be clear and sure of our fundamentals vis-à-vis the theory of punishment. The traditional trinity of theories is retribution, deterrence and reformation/rehabilitation and sometimes a blended brew of all the three. These theories point out the objectives of punishment and rationale for sustaining the sentencing system.

The general policy which the courts have followed with regard to sentencing is that the punishment must be appropriate and proportional to the gravity of the offence committed. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime.²⁰

What is done to the criminal is a very accurate index to the quality of any civilization.²¹ A given punishment theory stands as a model which is used as a point of reference for generating and evaluating punishment procedures.²²

Jurisprudence, says Justice V. Krishna Iyer²³, often reflects the values of the age and people and so changes from time to time. Criminal justice, likewise, responds to the ethos of a community although certain universal norms are being woven by the civilised march of mankind. Indeed, the modern trend of criminal justice is a blend with human rights, so much so no country, in its jurisprudence, is an island and the new world legal order directs the broad course of criminal law even in its penal dimension. The unconscious impact of the changes in the normative nuances in criminal sentences as reverence for human life and considerations of compassion and rehabilitation received larger liberalism is best witnessed in judicial attitudes.

Sentencing policy is a way to guide judicial discretion in accomplishing particular sentencing. Generally, two criteria, that is, the seriousness of the crime and the criminal history of the accused, are used to prescribe punishment. By introducing more uniformity and consistency into the sentencing process, the objective of the policy, is to make it easier to predict sentencing outcomes. Sentencing policies are needed to address concerns in relation to unfettered judicial discretion and lack of uniform and equal treatment of similarly situated convicts. The principle of proportionality, as followed in various judgments of this Court, prescribes that, the punishments should reflect the gravity of the offence and also the criminal background of the convict. Thus, the graver the offence and the longer the criminal record, the more severe is the punishment to be awarded. By laying emphasis on individualised justice, and shaping the result of the crime to the circumstances of the offender and the needs of the victim and community, restorative justice eschews uniformity of sentencing. Undue sympathy to impose inadequate sentence would do more harm to the public system than undermine the public confidence in the efficacy of law and society could not long endure under serious threats. Ultimately, it becomes the duty of the courts to award proper sentence, having regard to the nature of the offence and the manner in which it was executed or committed, etc. The courts should impose a punishment befitting the crime so that the courts are able to accurately reflect public abhorrence of the crime. It is the nature and gravity of the crime, and not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. Imposition of sentence without considering its effect on social order in many cases may be in reality, a futile exercise.²⁴

¹⁵ *Maru Ram v. Union of India*, (1981) 1 SCC 107, para 42

¹⁶ MORRIS, NORVAL & BUCKLE, DONALD, *The Humanitarian Theory of Punishment*, THEORIES OF PUNISHMENT, GRUPP, STANLEY E (ed), 309-311 (LONDON INDIANA UNIVERSITY PRESS 1971)

¹⁷ *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684

¹⁸ *Gopal Singh v. State of Uttarakhand*, (2013) 7 SCC 545 at 552

¹⁹ *State of M.P. v. Babulal*, (2008) 1 SCC 234, at 241

²⁰ *Jameel v. State of U.P.*, (2010) 12 SCC 532 at 535

²¹ Winston Churchill

²² GRUPP, STANLEY E. (ed), *Introduction*, THEORIES OF PUNISHMENT STANLEY, 5 (LONDON, INDIANA UNIVERSITY PRESS, 1971)

²³ IYER, V.R. KRISHNA, *Liberty – A Non-Negotiable Value*, THE DIALECTICS & DYNAMICS OF HUMAN RIGHTS IN INDIA (YESTERDAY, TODAY AND TOMORROW), TAGORE LAW LECTURES, 332 (EASTERN LAW HOUSE 1999)

²⁴ *State of U.P. v. Sanjay Kumar*, (2012) 8 SCC 537

According to Sir John Salmond²⁵, the ends of criminal justice are four in number, and in respect of the purposes so served by it, punishment may be distinguished as (1) Deterrent, (2) Preventive, (3) Reformative, and (4) Retributive. Of these aspects the first is the essential and all-important one, the others being merely accessory.

Various authors have opined different theories of punishments differently, which read thus:

2.1.1 DETERRENT THEORY

Deterrence is a valid punitive component of sentencing. Deterrence is the primary purpose of the State's sanction. The objective of this theory is to deal with the offender in such a manner as to serve notice on potential offenders so as to deter them from committing crimes. People are believed to refrain from committing crime because of their fear for punishment. Application of swift, certain and severe punishment deters an offender from breaking the law again and such a punishment becomes an example to others in desisting from indulging in crimes.

Deterrence is the use of punishment to prevent others from committing crimes. The offender is punished so that he will be held up as an example of what happens to those who violate the law. The fact that crime continues to exist does not mean that punishment is not efficacious as a deterrent, since there is no way to determine how much crime there would be if criminals were not punished. Some persons abstain from murder because they fear the penalty, but many others do so because they regard murder with horror.²⁶ While discussing the mental classification of punishment, Sir John Salmond²⁷ dealt with deterrent theory as follows:

“Punishment is before all things deterrent, and the chief end of the law of crime is to make the evildoer an example and a warning to all that are like-minded with him.”

While discussing the mental classification of punishment, Hans Von Henting dealt with deterrent theory as follows²⁸:

“The effects of selection which penal law obtains by intimidation are not essentially more efficacious. As a psychological attempt to exercise compulsion, intimidation works in two directions.

An association between the action threatened with punishment and the painful consequences of the action can only be established in the mind and emotional life of the punished person as a result of simple infliction of pain.

It would be important to find out whether it is just the severity of the threatened punishment which affects human prudence and whether the fact that a deep gulf lies between threat and execution, does not make the severity of the threat illusory for many people who are sure of themselves, their strength and cleverness, or also who are unconscious of their stupidity.”

Deterrence was undoubtedly the major goal of punishment in recent times, and still is in many cases, and in many Courts, particularly with respect to adults. Deterrence is intended to operate by fear. The idea is that the sentence imposed shall be so unpleasant – so terrible, if the word be understood without exaggeration – that the offender will hereafter be afraid to repeat similar offences, and that others will be afraid to imitate his crime. If this were all, the more savage the sentence the better – as our ancestors apparently thought.²⁹

Lord Justice Denning appearing before the British Royal Commission on Capital Punishment stated his views on deterrent aspect of punishment as follows:

“Many are inclined to test the efficacy of punishment solely by its value as a deterrent: but this is too narrow a view.

Punishment is the way in which society expresses its denunciation of wrong-doing; and in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else ... The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is a deterrent or not.”

Fear plays an important role in deterring most persons from the commission of legally prohibited acts, although other motives are of course, also operative. Since the threat of arrest and punishment is an appeal to fear, which for most persons is probably the strongest motive, it doubtlessly has a deterrent value. It is fallacious to argue, as many do, that because the volume of crime in proportion to the population has not diminished, or is rising (if such be the case), such a condition proves that the treatment of punishment is no deterrent.³⁰ But though the threat of punishment has some deterrent value, it must be pointed out that a scientific

²⁵ SALMOND, SIR JOHN, JURISPRUDENCE, 9th ed 141 (Sweet & Maxwell 1966)

²⁶ CALDWELL, ROBERTS G. & NARDINI, WILLIAM, *Criminal Courts and Procedure*, FOUNDATIONS OF LAW ENFORCEMENT AND CRIMINAL JUSTICE 231 (1st ed., BOBBS-MERRILL EDUCATIONAL PUBLISHING, INDIANAPOLIS 1977)

²⁷ SALMOND, SIR JOHN, JURISPRUDENCE, 9th ed. 141 (Sweet & Maxwell 1966)

²⁸ HENTING, HANS VON, *Mental Classification of Punishment*, PUNISHMENT – ITS ORIGIN, PURPOSE AND PSYCHOLOGY 135-138 (1st ed., WILLIAM HODGE AND COMPANY LTD., LONDON 1937)

²⁹ CODDINGTON, F.J.O, *Problems of Punishment*, THEORIES OF PUNISHMENT, GRUPP, STANLEY E (ed), 343 (LONDON INDIANA UNIVERSITY PRESS 1971)

³⁰ GUECK, SHELDON, *Principles of a Rational Code*, THEORIES OF PUNISHMENT, GRUPP, STANLEY E (ed), 271, 276 (LONDON INDIANA UNIVERSITY PRESS 1971)

system of penal law taking the point of view of modern psychiatry would not, in any real sense, deprive society of whatever deterrent effect such threat might have. The vital element of the possibility of lifelong incarceration if the individual is shown by scientific investigation to require it, may reasonably be expected to reinforce the natural deterrent effect of the threat of punishment.

2.1.1 PREVENTIVE THEORY

Preventive Theory aims to disable or prevent a person from committing crime repeatedly by imprisonment, surveillance or execution of the criminal. According to Sir John Salmond³¹, "Punishment is, in the second place, preventive or disabling. For not only do we endeavour to deter offenders by fear, but also to disable them from repeating the offence by such penalties as imprisonment, death, exile or forfeiture of offence, as a secondary object of criminal law".

2.1.3 RETRIBUTIVE THEORY

Retribution theory is outcome of vengeance which acknowledges the principle of 'tooth for tooth and an eye for eye'. It is the pain which the offender is made to suffer because he has broken the law and which is proportioned according to the gravity of the offence. It helps to placate whatever passion for revenge the victim and his relatives and friends may have and so tends to regulate and control feelings that otherwise might be disruptive in organized society. It helps to unify society against crime and criminals.³²

According to Sir John Salmond³³:

"Retributive punishment in the only sense in which it is admissible in any rational system of administering justice, is that which serves for the satisfaction of that emotion or retributive indignation which in all healthy communities is stirred up by injustice. It gratifies the instinct of revenge or retaliation, which exists, not merely in the individual wronged, but also by way of sympathetic extension in the society at large.

It is scarcely needful to observe that, from the utilitarian point of view hitherto taken up by us, such a conception of retributive punishment is totally inadmissible. Punishment is in itself an evil, and can be justified only as the means of attaining a greater good. Retribution is in itself not a remedy for the mischief of the offence, but an aggravation of it."

³¹ SALMOND, SIR JOHN, JURISPRUDENCE, 9th ed. 141 (Sweet & Maxwell 1966)

³² CALDWELL, ROBERTS G. & NARDINI, WILLIAM, *Criminal Courts and Procedure*, FOUNDATIONS OF LAW ENFORCEMENT AND CRIMINAL JUSTICE 230 (1st ed., BOBBS-MERRILL EDUCATIONAL PUBLISHING, INDIANAPOLIS 1977)

³³ SALMOND, SIR JOHN, JURISPRUDENCE, 9th ed. 141 (Sweet & Maxwell 1966)