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July 2007

## Role of Theories of Punishment in the Policy of Sentencing

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## **ROLE OF THEORIES OF PUNISHMENT IN THE POLILCY OF SENTENCING**

Dr. A. Krishna Kumari<sup>?</sup>

In this article it is proposed to analyze various theories of punishment. Austin considered sanction as an essential ingredient of law. It is only through sanction that obedience to law can be secured. Sanction is nothing but inflicting pain or injury upon the wrong doer. This in a way can be called punishment. The immediate consequence of a criminal act is punishment. The term punishment is defined as, "pain, suffering, loss, confinement or other penalty inflicted on a person for an offence by the authority to which the offender is subjected to." [1] Punishment is a social custom and institutions are established to award punishment after following criminal justice process, which insists that the offender must be guilty and the institution must have the authority to punish. In this article an attempt is made to discuss the policy of sentencing vis-à-vis various theories of punishment and their efficacy and effectiveness in the light of modern penology.

### **NATURE OF PUNISHMENT:**

The primary operation of punishment consists simply in announcing certain standards of behavior and attaching penalties for deviation, making it less eligible, and then leaving individuals to choose. This is a method of social control, which maximizes individual freedom within the coercive framework of the law in a number of different ways... [2]

The first moral duty of the community or of the State on its behalf is to reassert the broken moral laws against the offender who has broken it. For this reason, it must affirm his guilt and deal with him in accordance with it. [3] To forgive may be right: to condone is always wrong. A criminal act must not be condoned. It must be punished. [4]

Government prohibits taking life, liberty or property of others and specifies the punishments, threatens those who break the law. The intended effect of all legal threats obviously is to deter people from doing what the law prohibits. The threats must be carried out. Otherwise, the threats are reduced to bluffs, and become incredible and

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therefore ineffective. [5] Thus, all states punish people whom they identify as criminals. How a punishment should be is still a question to be answered. Neo-Kantians proposed the concept of proportionality. When we say that the aim of the punishment is to prevent crime, then the "Punishment must fit the crime". We must accept that man avoids criminal behavior if that behavior elicits swift, severe and certain punishment. [6] Many studies by many sociologists and criminologists such as Gibbs, Chiricos and Waldo and Tittle suggest that the severity and certainty of punishment are additive factors.

But, evidence suggests that the severity and certainty of punishment are inversely related. Jeffrey states that severity of punishment can be gained only by sacrificing certainty and that "increasing the penalties for crime has had negative effect of making the punishment less certain." [7]

John Bright throughout his life argued that certainty of punishment was more important than severity of punishment in preventing the development of crimes. [8] William C. Bailey, Assistant Professor of Sociology, The Cleveland State University and Ronald W. Smith, Assistant Professor of Sociology, University of Nevada conducted extensive research in finding whether the severity and certainty of punishment really deter the criminals. They concluded that the severity and certainty are not substantially inversely related for the index crimes nor are changes in their level. [9]

Another facet of the punishment is that it cannot be benign to the criminal. But for the society punishment is and should be a benign process. So punishment is necessarily adverse to the interests of the criminal, but to the society it is not necessary. The first duty of the state is to dissociate itself from the acts of its own member. To do this it must act, not only upon but also against the member.... [10] While acting so, it must exhibit no antagonism in its will against the will of the offending members. This is necessary for the preservation of its own character, on which the character of its citizens largely depends. [11]

All punishments properly imply moral accountability. Community wants the punishment to reach the criminal's mind as well as his body; it wants him to suffer

remorse for his evil deed: to realize that he had against him right as well as might. Unless, the community believes these conditions are attained it is unsatisfied and the object of punishment is not fully realized. [12]

#### PURPOSE OF PUNISHMENT:

In primitive times, crimes were mainly attributed to the influence of evil spirits, and the major purpose of punishment was to placate the gods. [13] Later, in the evolution of punishment more stress was laid on social revenge, because crime was considered a willful act of a free moral agent. Society, outraged at an act of voluntary perversity, indignantly retaliated. Thus, we started punishing primarily for vengeance or to deter or in the interest of just balances of accounts between "deliberate" evildoers on the one hand and an injured and enraged society on the other. [14]

According to Gouldner, members of the society identify themselves with the victim. Hence, human have the urge to punish the offender. Take rape as an illustration. Since, the victims of rape are females, we might hypothesize that women would express greater punitive ness towards the rapist than men, and that degrees of hostility would correspond to real or imaginary exposure to rape. Thus, young girls might express more punitive ness towards rapists than homely women. Among males, we can predict those with more reason to identify with the victims would express that greater punitive ness. Thus, males having sisters or daughters in the late teens or early twenties might express more punitive ness towards rapists than males lacking vulnerable hostages to fortune. [15] This notion in a broader perspective is well expressed by Sir James F.Stephen. According to him the purpose of punishment is to gratify the desire for vengeance by making the criminal pay with his body. To quote him "The criminal law stands to passion of revenge in much the same relation as marriage to the sexual appetite." [16] Punishment gratifies the feeling of pleasure experienced by individuals at the thought that the criminal has been brought to justice. That desire ought to be satisfied by inflicting punishment in order to avoid the danger of private vengeance. It is plain that however futile it may be, social revenge is the only honest, straightforward and

logical justification for punishing the criminals. [17] To carry out this purpose we need an authority. A criminal has a right to be punished. Because he is treated as a moral agent - a person who chooses between right and wrong- he is capable of choice.

In the words of Jeremy Taylor "A herd of wolves is quieter and more at one than many men, unless all have one reason in them or have one power over them." Hobbes says, "Without a common power to keep them all in awe, it is not possible for individuals to live in society. Without it justice is unchecked and triumphant and the life of the people is solitary, poor, nasty, brutish and short." [18]

According to Jackson Toby punishing the criminals is necessary a) for preventing crime b) for sustaining the morale of conformists and c) for rehabilitation of offenders.

#### A. PUNISHMENT AS A MEANS OF CRIME PREVENTION:

Those who have violated the moral norms of the society cannot commit crimes because their self determined concept would not permit them to do so. Only unsocial zed (and therefore amoral) individual fit the model of classical criminology and is deterred from expressing deviant impulses by a nice calculation of pleasures and punishments. [19] Other things being equal, the anticipation of punishment would seem to have more deterrent value for inadequately socialized members of the group. According to Durkheim minute gradation in punishment would not be necessary if punishments were simply a means of deterring the potential offender. Even though punishment is uncertain, especially under contemporary urban conditions the possibility of punishment keeps some conformists law-abiding.

#### B. PUNISHMENT AS A MEANS OF SUSTAINING THE MORALE OF CONFORMIST:

Durkheim talks about punishment as a means of repairing "the wounds made upon collective sentiments". [20] According to him, the punishment of offenders promotes the solidarity of conformists. When the conformist sees others defy rules without untoward consequences, he needs some reassurance that his sacrifices (being a law abiding citizen) were made in 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. He feels his sacrifices are not worthwhile. He unconsciously wishes to violate the rules.

### C. PUNISHMENT AS MEANS OF REFORMING THE OFFENDER:

Now, the trend is towards treatment of the offenders. Criminologists all over the world profess that criminals are as good or rather as bad as patients, and they need to be treated, not punished. It would be an error to suppose that the criminal invariably experiences punishment as painful whereas the psycho-pathological offender always experiences treatment as pleasant. On this assumption, punishment may be a necessary preliminary to a rehabilitation program in as much the same way that shock treatment makes certain types of psychotics accessible to psychotherapy. Those offenders who regard punishment as a deserved deprivation resulting from their own misbehavior are qualitatively different from offenders who regard punishment as a misfortune bearing no relationship to morality. The former accepts punishment as legitimate and the other bows before the superior force, because he has no option.

Immanuel Kant, the German philosopher sounds pessimistic when he says: "Judicial punishment can never serve merely as a means to further another good, whether for the offender himself or for society, but must always be inflicted on him for the sole reason that he has committed a crime." [21] The object of punishment must be to substitute justice for injustice. According to Paranjape, the principle which underlies the doctrine concerning the desirability and objectiveness of punishment is to reduce the incidence of criminal behavior either by deterring the potential offenders or by incapacitating and preventing them from repeating the offence or by reforming them into law abiding citizens. [22] All said and done we do not yet generally punish or treat in the sense that scientific criminology would imply, namely, in order to change antisocial attitudes into social attitudes. [23]

## THEORIES OF PUNISHMENT:

There are four theories of punishment, namely, retributive theory, deterrent theory, preventive theory and reformatory theory. Of all the four theories retributive theory is the first and foremost. A child, who falls down, kicks the floor inadvertently. Generally, it is believed to be a form of taking revenge and would not serve any penal purpose. Deterrent theory by punishing the offenders deters the wrongdoer specially and deters the general public also by punishing him and refrains them from committing an act, which is an offence. Preventive theory incapacitates an offender from repeating the crime, while reformatory theory serves the purpose of rehabilitation of the offender. Modern penologists do not believe in purposeless punishment. They believe that a criminal is a patient and he be treated with humanity. All these four theories have their own merits and demerits.

## RETRIBUTIVE THEORY:

Retribution is probably the oldest and most ancient justification for punishment, according to which a wrong is made right by an offender's receiving his just deserts. It involves a "get even" spirit, at least since the formulation (in about 1875 B.C.) Of the Code of Hammurabi ("an eye for an eye and a tooth for a tooth"), it has been urged by leaders and accepted by the general public that the criminal deserves to suffer. [24] Among the ancient Jews even animals which killed human beings were regarded as contaminated and were got rid of for the good from the community. [25] Many authorities have attempted to base the forms of human punishment on instinctive reactions, which might variously be called wrath, anger, resentment or revenge. Both theologians and philosophers advocated the theory of retributive justice. Some have even sought to demonstrate the existence of rudimentary punishment in the animal kingdom, in the effort to validate the instinctive basis of punitive action. But, it is hazardous to seek equivalent of human punishment in animal behavior. But, we often observe, the reaction to crime on the injured party and the public are often indignant and wrathful and fairly spontaneous. In American society a particularly offensive crime such as rape, kidnapping, cold-blooded murder calls out a wave of popular indignation and resentment. Even in the Indian Society we often hear of pick-pickers who are caught red handed and are beaten

black and blue. Injuries and wrongs frequently incite a spontaneous instinctive wrath and anger. Immanuel Kant notices that punishment inflicted neither benefits the criminal nor the society, but the sole and sufficient reason for inflicting punishment is the evil doer facing the evil: he did the evil, he suffered the evil. Bentham referring to the concept of vengeance wrote, "The pleasure of vengeance calls in my mind sermon's riddle.... It is sweet carrying out of terrible, it is the honey dropping from the lion's mouth." [26]

In the evolution of punishment more stress was laid on social revenge. Society is outraged at an act of voluntary perversity and indignantly retaliated. It is plain that, however, futile it may be, social revenge is the only honest, straightforward and logical justification for punishing the criminals.

Retribution theory intends that a man deserves punishment because he has acted wrongfully. What retribution has insisted upon is that no man can be punished unless he has broken the laws. To be more precise, retributionists consider that the offender-

- i) Performed an action of a certain culpability;
- ii) That the penalty will give satisfaction equivalent to the grievance caused by his action;
- iii) That similar ones have been and will be imposed on similar offenders;
- iv) That he was responsible for his action and performed it with knowledge of possible consequences according to a penalty system and,
- v) That unlike non-offenders, he has gained satisfaction on the commission of an offence. As it stands it is worth consideration as a sufficient argument for punishing a man. [27]

Retaliation fulfils a religious mission of punishing the offender it reestablishes the social harmony affected by the offence and offender's guilt is washed away through suffering. [28] Even if a civil society were to dissolve itself by common agreement of all its members, the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the blood guilt thereof will not be fixed to insist on carrying out the punishment, for if they fail to do that, they may be regarded as accomplices in this public violation of legal justice. [29]

Plato observed that "it could never be really to harm anyone, however he may have harmed us." To quote Prof. Sidwick, "It seems still to be widely held that justice requires pain to be inflicted on a man who had done wrong, even if no benefit results even to him or to others from the pain. Personally, I am so far from holding this view that I have an instinctive and strong moral aversion to it: and I hesitate to attribute it to common sense, since I think that it is gradually passing away from the moral consciousness of educated persons in the most advanced communities." [30]

In Greek civilization, Protagoras protested emphatically against atrocious retaliation as the basis of theory of punishment. He proclaimed humanitarian correctional approach to be adopted. The abolition of the concept of physical torture and public punishment in the modern society is an indication that goes against this theory. According to him the theory of deterrence is proper theory of punishment.

Plato adumbrates, "Justice is the good and health of the soul as injustice is its shame and chastisement is the remedy for the disease. Every culpa (guilt) requires expiation; the culpa is ugly and contrary to justice and social order. The expiation is beautiful; to suffer for justice is beautiful." According to Plato he who punishes rightly punishes justly. Just is noble, nobility is good, and therefore either pleasurable or useful. Plato continues, "Since punishment does not give pleasure, it must be useful." If punishment were not useful, then as Plato says, it would not be just: and therefore everything that is useless in punishment should be avoided.

However, the demand for punitive reaction still lurks in the minds of individuals. Only aspect is that we want some justification or rationalization or sentiment for taking revenge. Even the oldest reformer could not dare to completely breakaway from the tradition based upon retribution. [31]

At the outset, no penal reformer or legislator can afford to disregard popular notions of good or ill desert, even if he himself believes them to be quite illusory. Even in advanced societies the punishment of crime, if it is to be genuinely preventive, must carry popular sentiment with it and to do so, it must appeal to the popular sense of justice. Today's

society inspire of the boasted civilization expects revenge. But, in the heart of hearts it feels that State agencies should look after the matter. That is why Stephen observed: "The criminal law stands to the passion of revenge in much the same relation as marriage to sexual appetite." [32] The sentence of law is to the moral sentiment of the public in relation to any offence is what a seal is to hot wax. [33]

#### RETRIBUTIVE POLICY IN SENTENCING FOR CAPITAL OFFENCES

There are two aspects in this theory. In the first aspect conformists say "lex talionis" is right. A killer deserves to be killed. They do not want to offer any other explanation except that the criminal should die, because he killed another. The demand for retribution has a shady origin. It springs from the crude animal impulse of individual or group to retaliate, when hurt by hurting the hurter. In itself such resentment is neither wise nor good and, in its extreme forms, it is generally condemned as vindictive. Also it often has morbid accompaniments, such as the impulse, which leads boys to run to see a pig being killed. This is due to a blend of anger and alarm, which furiously demands outlet and will not be denied. [34] Another aspect of retributive theory also supports the doctrine of "an eye for an eye and a tooth for a tooth", but in a subtle way, which sounds philosophical. The retentionists of Capital Punishment needless to say support both aspects and the abolitionists of Capital Punishment oppose both. For the first aspect an answer is being given directly and for the second aspect the answer is in the same philosophical tone. The stalwarts who are engaged in this scholarly battle are Earnest Van Den Haag for receptionists and John P. Conrod for the abolitionists.

Retribution is to restore an objective order rather than to satisfy a subjective craving for revenge. [35] This definition given by Prof. Earnest Van Den Haag was challenged by many a scholar of criminology. The major term in retributive doctrine is "just desert" which suggests that criminals should not be punished capriciously. Yet, the retributionists fail to stipulate who is to determine the just desert for a particular type of crime. [36]

The argument of retributionists is that the criminal should die, because he has committed a terrible crime, and only his death will satisfy the public and keep it from taking the law into its own hands. [37] According to the retributionists, society has the right and the duty

to vindicate the wrong done to it and it must impose a punishment, which fits the crime. It does not mean returning of an evil for evil but the righting of wrong. It implies the imposition of a just punishment. [38] Prof. Haag argues that retribution is imposing specific punishments on people who "deserve" feeling and feelings just are. He does not accept retributions as a theory. It is a feeling. It cannot be proved right. But things may be right even if they cannot be proved scientifically to be true. It is certain at any rate, that the law must to some extent gratify the retributionist's sentiment, the desire to see crime punished, even if it were useless to do so. If the law did not punish the criminals who harm others, the victims would want to do so. The desire to see crime punished is felt by non - criminals. If criminals could break the law with impunity, the self-restraint of non - criminals would have been in vain. The punishment of the criminals is needed to justify the restraint of the non - criminals. It is psychologically restorative: it returns the advantage to those who play by the legal rules.

Retributionism although it may tell us why we do punish does not tell us why we should punish. Sir James Stephen gives the answer: some men, probably, abstain from murder because they fear that if they commit murder they would be hanged. Hundreds of thousands abstain from it because they regard it with horror. One great reason why they regard it with horror is that murderers are hanged. [39] Retributionists insist that it is unjust and immoral not to punish the offenders. Punishment is good in itself whether it is useful or not is not the criterion in imposing the penalty.

"We are reluctant to admit how large a part underlying sense of its retributive justice has played in public approval of Capital Punishment. We feel it is unenlightened and reactionary..."No penal administration or legislator can afford to disregard popular notions of good or ill desert even if he himself believes them to be quite illusory. [40] Perhaps, this is one reason why we are still maintaining death penalty in our Legal books.

Lord Denning before the Royal Commission expressed almost a similar view. "The punishment of death should reflect adequately, the revulsion felt for the gravest crimes by the great majority of the citizens." [41]

It is a question to be contemplated whether sheer retribution is a worthy motive for action by the political society. "I am revolted by the idea of retribution through officially imposed death just as I am revolted by the idea of poisoning for money; in neither case in the end, as I am able to prove another person that, that person ought also to be revolted by either of these ideas or by both of them." [42] To demand an Eye for an eye without reference to the context of crime, to the motive which prompted it or the consequences in which it is used is as absurd as the early English Law which suggested that if a man has caused the death of another by falling out of tree upon him, the avenger of blood must himself climb a tree and fall upon the culprit. [43]

But, our retributive justice is less naive. That is why; it only requires a counter stroke of the same moral order and magnitude as the offence. The offender's own aggressive act is not simply reenacted upon him, but something, which deemed to be the crime's equivalent in value and significance. Just retribution consists not in simple but in proportionate retaliation, that is, in receiving in return for a wrongful act not the same thing but its equivalent. [44]

Rapists cannot be raped; robbers cannot be robbed; burglars cannot be burglarized. The state cannot retaliate against these criminals by treating them as they treated their victims. It is nevertheless possible for the state to kill, as it must when a man or woman stands convicted for murder. Only because murder, the crime of crimes, is punishable by death it is regarded with proper horror. Any less response would trivialize the death of an innocent victim. [45] The answer for this challenge is found in his opponent's answer. The "Lex talionis" cannot be literally applied. The severity of the punishment should be proportionate to the seriousness of the crime, though its form may differ from the form of the crime, since we cannot steal from burglars, rape rapists or defraud those who commit fraud. Still, for some crimes we can do something of the kind. It is in the nature of retributive view to try. Thus, we may fine those whose crimes are pecuniary and execute the murderer. [46]

If the business of the criminal justice system is to punish the guilty, because, and only because, they deserve it, jurists and legislators need not be concerned with problematic

consequences of punishment. The retributive theory is not utilitarian. Its goal is "doing justice" rather than prevention of crime. [47] The fundamental shortcoming of the retributive doctrine is not that it seeks to justify a legal punishment as an end itself; rather the doctrine offers no solution to the specific problem that haunts the criminal justice system. Putting the criticism more bluntly, the retributive doctrine is attractive because it is little more than an empty formula. That characterization is not a tacit belittlement of the perennial efforts of retributionists to justify legal punishments. Nonetheless, the justification of legal punishments in general is not a justification of the death penalty, let alone a penal policy. [48] Yet, some of the justices are willing to entertain a distinctly different argument that retribution is a sufficient justification for legal executions. [49]

It is surprising to note that the retributive doctrine is currently receiving support from numerous scholars. [50] "Retributive justice does not require the death penalty to maintain its credibility." Conrod's statement is supported by the following argument. In the legal battle for the prosecution and defence the crime sinks into a sort of oblivion. All the while, the chief aim of retributive justice, the repudiation of the wrong done by the criminal, is suppressed in the excitement of the game and its aftermath. At the end, the men are put to death. A life in prison is severe punishment. Manhood and vigor ebb, and years after murder has been forgotten there may remain a living body sunk in senility. The years in prison cells contribute to apathy, but surely apathy is not the response that is appropriate to retributive justice, nor is the defiance implicit in the notion of paying a debt to society by suffering death in return for having caused the death of another. The response that the criminal should seek and that the state should encourage is atonement. For atonement for a wrong done to another is the foundation of the reconciliation and that should conclude the long process of retributive justice. The essential element in... retributive punishment is... the assertion of the good will of the community against his evil will, whereby in one act it condemns the evil will and reminds him that the good will of the community is also his own: or at least that his duty and welfare consist in making it so...[51] Execution of the most contemptible murderer conflicts with the true functions of retributive justice - the reputations of the evil done and prospective

reconciliation of the criminal with the community he wronged. When punishment lapses into mere retaliation, the criminal's total criminality is affirmed; there can be no reason to expect reconciliation. When the retaliation takes the form of execution, the community makes it clear that it expects neither atonement nor reconciliation. The unreconciled criminal was our enemy: once he is executed he is still unreconciled - a dead enemy.

The scales of punishment that should compose the structure of retributive justice do not require retaliation. Only retaliatory justices practised in ancient Greece and Rome can justify Capital Punishment. (Retributive thought has gone far from the Twelve Tables of Republican Rome.) For retributive justice, long imprisonment, sometimes life imprisonment, is the response that fits the continuity of punishments to which modern society is now committed. The death penalty is an anachronism of which society must purge itself so that the process of retributive justice may contribute to order and solidarity rather than to the inflammation of hostility. A truly retributive system of justice needs no executions. On the contrary, justice is disfigured by the barbarous actions that are committed in its name.

The retributive theory is incongruous in an era of enlightenment. The Prime Minister of Canada, Mr. Pierre Trudeau, addressing the Canadian Parliament, pleading abolition of death penalty, posed a question: "Are we as a society so lacking in respect of ourselves, so lacking for human betterment, so socially bankrupt that we are ready to accept state vengeance as our penal policy?" [52] The Florida special commission on Capital Punishment recommended retention of the death penalty on other grounds, but rejected, "vengeance or retaliation" as justification for the official taking of life. [53]

The retribution involved in the theory - "Tooth for a tooth and an eye for an eye" has no place in the scheme of civilized jurisprudence.

## DETERRENT THEORY:

Retributive theory is based on the assumption that punishment is for the sake of punishment. It is suggested that evil should be returned for evil without any regard to consequences. [54] Beginning with the Age of Reason in the eighteenth century, the aim of the criminal law has gradually changed from punishment for its own sake to punishment as a means of improving social behavior. [55] Punishment is designed not to take revenge but to terrorize the future offenders. An exemplary punishment should be given to the criminal so that others may learn a lesson from him. According to Manu "Penalty keeps the people under control, penalty protects them, penalty remains awake when people are asleep, so the wise have regarded punishment as a source of righteousness." He continues, "People are in check by punishment, for it is difficult to find a man who by nature sticks to the path of virtue." [56] An eighteenth century judge, while awarding death sentence to a person guilty of stealing a sheep observed: "You are to be hanged not because you have stolen a sheep but in order that other may not steal sheep. [57]

Noted criminologist Sutherland divided this theory into two categories:

1. General Deterrence and
2. Specific Deterrence.

## GENERAL DETERRENCE:

Punishment is designed to deter future crime by making an example of each defendant, thus frightening citizens so much that they will not do what the defendant did.

## SPECIFIC DETERRENCE:

Beyond serving the above-mentioned purpose, punishment is designed to educate and therefore to reform the criminals subjected to it. It is also maintained that punishment reforms criminals and that it does it by creating fear of repetition of the punishment. [58]

## GENERAL DETERRENCE:

The basic argument for general deterrence is that inflicting suffering upon those convicted of crime serves to terrorize others, and the punishment has great value for that reason, even if some individuals are not deterred. When Ohio's Attorney General William J. Brown made a claim though dramatically that "The mandatory type penalty structure deters crimes of intent. The criminal when he commits a crime should know that the judge does not have any discretion. The guy who used a gun should know That he will be put in jail forever. That is the only way to solve the crime problem, he," he not only reflected the mind of his own but of the law enforcement officers world wide, with few exceptions. [59] If prevention of crime is the chief object of law, terror alone can achieve this goal, opined Lord Chief Justice Ellenborough. Many criticize this theory of deterrence. The deterrence principle is mechanistic, holding that varieties of crimes and varieties of punishments are to be finely balanced that each punishment imposed on a criminal will have a significant impact on citizens at large, as well as directly on the criminal. In this view, the calculus of deterrence is the basis of criminal law; lawmakers and others need only do their sums carefully in order to ensure that appropriate amounts of pain are inflicted on wrong doers, thus convincing bystanders, that the cost of committing a crime outweighs the benefits.

Besides this, the principle of general deterrence is stated in economic terms, such as "pay the price of crime" and "pay his debt to the society". Thus, the economic hypothesis seems to be based on the hedonistic assumption that people regulate their behavior by calculations of pleasure and pain. This is a misplaced faith. It supposedly follows that if the pain element is increased by severe punishments, people will turn from crime to righteousness. [60] Believing this lawmakers and public laid their faith in the cruelty and severity of the punishment. But, extreme and indiscriminate severity is worse than ineffectiveness. It defeats its own end by outraging public opinion and rousing sympathy with the criminal. Where ordinary people do not regard an offence with horror, they will not co-operate in subjecting the offender to a horrid fate, witnesses will not give evidence, juries will not convict, and, even after conviction, the advisers of the Crown

will hesitate to allow the law to take its own course. [61] Giving severe punishment is like bending the bow till it snaps back.

All said and done, the parameters of deterrent theory - certainty and severity - are psychological variables. They vary depending upon various factors present in an individual and society as well. When general deterrence was regarded as the principle purpose of punishment, penalties were made as public and brutal as possible. Anyhow, if protection is the sole purpose of any punishment, the truth is that the busiest hangman can do little to protect society in comparison with an efficient police force. Inspire of such arguments from criminologists against the deterrence theory whenever a community experiences a significant increase in its crime rate - however that rate may be produced - a demand for an increase in certainty and severity of penalties arises, based on the assumption that if more criminals are punished more severely, other persons will be effectively deterred from similar crimes. [62] But, it is proved that it is to pay with a "certain evil" for a "very uncertain good".

#### SPECIFIC DETERRENCE:

It is also maintained that punishment reforms criminals and that it does this by creating fear of repetition of the punishment. The belief is that hurting criminals changes them into non-criminals. When a boy touches a hot stove, he is painfully burnt, and in that way learns to avoid hot stoves. The philosophy of specific deterrence is very simple. Pain must be inflicted to get results. All over the world many parents believe in this philosophy and practises it upon their children. Law enforcement authorities practised the same upon criminals.

Recently, thousands of experiments in human learning have been run in the effort to determine the relative values of rewards and punishments in human learning and performance, and these studies are considered pertinent to policies for the reformation of criminals. But, the effects of punishment, even in these experimental situations, cannot be stated as a simple proposition. A mild punishment may promote learning, but a more severe punishment may cause terror and panic, which interferes with the whole learning

process. More over, the social situations in which punishments for crime are inflicted involve variables, which are lacking in punishments administered in experimental laboratories. [63]

A century ago most of the teachers' time was in almost all the schools was devoted to the maintenance of order and infliction of punishment. The behavior of school children in modern schools, in which corporal punishment is seldom inflicted is much better than in schools of a century ago when corporal punishment was extremely frequent. [64]

The deterrent effect of the threat of penal treatment in relation to non-criminals and its deterrent or corrective effect upon criminals is modified by many factors, such as: the psychological make-up of the culprit: his previous history: the attitudes of those who administer punishment: certainty and severity: the psychology of the community that is concerned, etc., All these and more work together to determine the effect of punishment upon a given individual. The effect of punishment is a human nature problem and like human nature it admits of no easy analysis. [65]

#### DETERRENCE POLICY IN CAPITAL OFFENCES

The belief that the death penalty is the supreme deterrent to murder is hardy perennial and deeply planted in the human mind and nourished by emotions. [66] It presumes that life is regarded by man as a precious possession, which he wishes to preserve eagerly, perhaps, than any other of his attributes. [67] Death was - must be - was bound to be - could not help being - a great deterrent than any other form of punishment, and therefore, its abolition was bound to result in a large increase in whatever the crime in question was. [68] Most people will not commit a crime if they know that they may be executed as a result: this is an outgrowth of man's instinct for self-preservation. [69]

No other punishment deters men so effectually from committing crimes as the punishment of death argued Stephen. [70] Was there ever a criminal who, when sentenced to death and brought to die, would refuse the offer of a commutation of his sentence for the severest secondary punishment?" Many shared Stephen's belief. Lord Jowitt said that death penalty's potency as a deterrent reduces the number of murders.

Lord Brentford, who was Home Secretary (for the British Government) from 1924-1929, offered the same proof. In all his five years tenure of office he had only known one case in which the condemned man had been content to be hanged: in all other the man and his family strove their utmost to save him from the gallows. That to his mind was conclusive evidence of the value of the death penalty as a deterrent. [71] Given the choice between life in prison and execution ninety-nine percent of all prisoners under sentence of death prefer life in prison.... it follows that the threat of death penalty is likely to deter more than the threat of life in prison. [72]

Lord Wright thought, "Deterrence could obviously not to be proved by evidence. It was a conclusion that must be drawn from the general impression one gains from experience, from looking around the world, from seeing how things are done and how people feel. [73] Lord Simon had no doubt that Capital Punishment prevented more murders to an extent that no other punishment could. It was not a matter of statistics but of the judgment and common sense. [74] Lord Bridgeman based his belief in the deterrent force of the penalty. "... More on what I think is my knowledge of human nature than anything else." [75]

Bishop of Truro on the value of the death penalty as a deterrent felt that his own feelings were a surer guide than any statistics from other countries and he was sure that the death penalty would be a great deterrent to him if he were to be contemplating murder. [76] Surely, a murderer, for whom a possible death penalty had to be proved no deterrent, would be considered abnormal were he not to make every effort to escape death after being discovered and sentenced to die. [77] Earnest Van Den Haag supports death penalty as a deterrent from another point of view. "... If rehabilitation and the protection of society from unrehabilitated offenders were the only purpose of legal punishment the death penalty could be abolished: it cannot attain the first end and is not needed for the second. No case for the death penalty can be made out unless "doing justice" or "detering other" are among the penal aims." [78] When the threatened punishment is so light that the advantage of violating rules tends to exceed the disadvantages of being punished; greater the threatened penalty, the more it deters; the threat of fifty lashes

deters more than the threat of five; \$ 1000 fine deters more than \$ 10 fine; ten years in prison deters more than one year in prison. The threat of life in prison deters more than any other terms of imprisonment. The threat of death may deter still more. It is a mistake to regard the death penalty as though it were of the same kind as other penalties.... death differs significantly in kind, from any other penalty. Life in prison is still life, however unpleasant it may be. In contrast, the death penalty does not just threaten to make life unpleasant - it threatens to take away the life altogether.

The death penalty is the only possible deterrent. In cases of acute substantial attempts to overthrow the government, prospective rebels would altogether disregard the threat of any prison sentence. They would not be deterred, because they believe that the swift victory of the revolution will invalidate a prison sentence and turn it into advantage. Execution would be the only deterrent, because unlike prison sentence, victorious rebels cannot revoke it. The same reasoning applies to deterring spies or traitors in wartime. Finally, men who, by virtue of past acts are already serving or are threatened by a life sentence could be deterred from further offenses only by the threat of death penalty. [79] If the life imprisonment is substituted for the death penalty, a man who has committed a crime for which he may be sentenced to life imprisonment would be likely to commit other serious crimes, because, he would also know he was already subject to the maximum penalty. [80]

Prof. Ehrlich published an article in 1975 in which he wrote that Capital Punishment is more effective deterrent than life imprisonment. During 1935-1969 he employed number of assumptions and concluded each execution deterred seven or eight murders. In contrast to this proposition Friedman and Passes and Taylor have claimed that instead of each execution being associated with seven or eight fewer murders, each execution associated with fourteen more murders. Ehrlich criticizes this argument as an attempt to prove that executions generate murders. However, neither of them could successfully prove their propositions. [81] Royal Commission on Capital Punishment observed that "Prima facie (i.e. common sense tell us) the penalty of death is likely to have stronger effect as a deterrent to normal human beings than any other form of punishment, and there is some

evidence (though no convincing statistical evidence) that this is in fact so. But, this effect does not operate universally or uniformly, and there are many offenders on whom it is limited and may often be negligible. It is accordingly important to view this question in a just perspective and not to base a penal

Policy in relation to murder on exaggerated estimates of the uniquely deterrent force of the death penalty. [82]

Before arriving at this conclusion, the commission had noted "Capital Punishment has obviously failed as a deterrent when a murder is committed. We can number its failures. But, we cannot number its successes. No one can ever know how many people have refrained from murder because of the fear of being hanged. For that we have to rely on indirect and inconclusive evidence." [83] If we keep in mind that the issue is not the deterrent force of punishment but the claim that the death penalty is a more "efficacious deterrent of crime" than any other punishment, it is obvious that all the dogmatic assertions quoted above are simply personal opinions unsupported by any scientific evidence and based on intuition and common sense, which are untrustworthy guides. Common sense once upon a time told us that the earth was flat. [84]

"Common sense is the wisdom of the common man. It rises up from the general experience of ordinary people. It does not depend on specialized education, on the acquisition and manipulation of data, or on the subtleties of the logician. Common sense has nothing to do with the reason for committing a criminal act, and probably almost nothing to do with the reason for abstaining after serious consideration of committing a crime." [85]

Sir Romily expressed the same view long back. Death penalty deters offenders - might be so in theory, it would not happen in practice: the chief deterrent to crime was not severity of punishment but certainty of conviction. [86]

If those who profess deterrence as an effectual threat are correct the following hypotheses should hold good:

1. Death Penalty jurisdictions should have a lower annual rate of criminal homicide than abolition jurisdictions.
2. Jurisdictions, which abolished the death penalty, should show increased annual rate of criminal homicide after abolition.
3. Jurisdictions, which reintroduced the death penalty, should show a decreased annual rate of criminal homicide after reintroduction.
4. Given two contiguous jurisdictions differing chiefly in that one has the death penalty and the other does not, the latter should show a higher annual rate of criminal homicide.
5. 5. Police officers on duty should suffer a higher annual rate of criminal assault and homicide in abolition jurisdiction than in death penalty jurisdiction.
6. Prisoners and prison personnel should suffer a higher annual rate of criminal assault and homicide from life term prisoners in abolition jurisdiction than in death penalty jurisdiction. [87]

Thorsten Sellin after a serious and thorough study of the entire subject in United States on behalf of American Law Institute concluded "Anyone who carefully observes the data is bound to arrive at the conclusion that the death penalty as we use it, exercises, no influence on the extent of fluctuating rate of capital crime. It failed as a deterrent." [88] Many a scholar shared his point of view. [89]

Sellin's findings have been cited as superior to Ehrlich's because of the existence of several significant factors in his study. His work has also found support and acceptance in judicial quarters. Panel of research on "Deterrent and Incapacitative Effects" which was commissioned by the National Academy of Sciences to review "deterrence research" concluded that available results of analysis on Capital Punishment provided no useful evidence on the deterrent effect of Capital Punishment for policy purposes. [90] Ehrlich himself all along maintained that proof for his conclusion is not possible. [91]

British and Canadian papers as well as the works undertaken by the European Council, the Committee for the Prevention of Crime created by the United Nations and The European Parliament Studies concluded "violent crime follows a curve that is a

function of social and economic conditions and the evolution of the moral values of society at a given moment. It is unaffected by existence or absence of Capital Punishment. In other words the death penalty does not reduce nor does its abolition increase it." [92] Knorr observes that when human lives are at stake, it does not seem reasonable to weigh lives against such questionable statistics as that of Ehrlich's. [93]

The repudiation of death penalty is tilted now based on statistics. On theoretical grounds also it is strongly contested. "Whether death is the penalty or not good men and women abhor violence.... particularly when it is homicidal." In America the number of murders is less than 0.1% of its total population. Conrod finds no reason to believe that the remaining 99.9% are refrained from killing only by the threat of the hangman. [94] This reasoning that Capital Punishment is an effectual deterrence assumes that potential criminals are rational men. They want to maximize gains and minimize losses. The rational criminal man if he exists at all, seldom commits murder, and when he does, his crime is usually impossible for the police to detect. [95] Criminals are not economists, and when they kill they do not take into account the risk of such behavior, but kill out of infuriated frustration. [96] Further this theory preserves the idea that law can have no deterrent effect upon a potential criminal, if he is unaware of its existence. [97]

There is no evidence to support that abolition of death sentence would lead to an increase in crime. In Goa and Travancore in India, where Capital Punishment was not in force for many years, the evidence amply established the fact that absence of the death penalty did not increase crime. In the twenty-two countries that have completely abolished it, there has been no increase in the rates of homicide. [98]

Assuming that offenders are deterred by death penalty there is another category of criminals who commit murders as a result of psychopathic compulsion who are relatively immune to the deterrent effect of death penalty. "... No person in our society is in a normal state of mind, when he commits murder. A high percentage are not only emotionally scarred and twisted but are actually psychotic" [99]. Gerald Gardiner supports the observations of Glueck. [100] It is interesting to note the Indian experience in this context. "In....majority of cases murder is unpremeditated and is the result of some

uncontrollable passion, cupidity, lust, revenge, jealousy, anger, fear, pity, despair, self-righteousness, political fanaticism and duty. The deterrent effect of Capital Punishment certainly cannot function when murders, are committed in such psychological state of mind." [101]

Former Supreme Court Judge of India, Krishna Iyer holds the opinion that there are generally three kinds of murderers - those who kill on impulse and therefore do not consider the noose before committing the murder, those who are hardened criminals and are again unconcerned with their eventual punishment and lastly, those who kill because of belief and justification in what they are doing. In all the three cases the eventuality of a death penalty does not deter the killer. If at all there is any other deterrent effect, it lies in the certainty of such punishment and not in its severity. [102]

Almost the same view is expressed by noted criminologists Barnes and Teeters: "nor can the death penalty be supposed to act as an effective deterrent in the case of the professional gunman. He realizes that his chances of being apprehended for his crime are relatively slight: that the probability of his conviction after arrest is not more than fifty percent; that he runs a fair chance of being released on a technicality in appeal, even if he is convicted; and finally, if he is sentenced to death, he is likely to have this sentence commuted to life imprisonment may ultimately be pardoned and restored to a life of freedom. Probably the death penalty does not have deterrent effect on those who commit murder to settle a deep-seated grudge. Because, any fear would be outweighed by the strong pressure to commit murder and the consciousness of large probability of escaping in application."

"The death penalty even if applied invariably to every apprehended and convicted murderer without any subsequent intervention of commutation or pardon, would not even seriously deter many of those whose personality types would respond to the operation of deterrent influence." [103] "...For murderers who act in passion the threat of death has little or no deterrent effect. It should be borne in mind that the large majority of murders are committed without premeditation many of them by good citizens who

have committed no previous offence, in circumstances which preclude any consideration of the consequences. The relatively small number of planned murders is committed by men who believe that they will never be found out." [104] Professor Conrod makes reference to poverty stricken, ill experienced robbers who lack planning and in panic cause the death of the victim. Capital Punishment does not affect their behavior. [105]

Not only the theory of deterrence has been subject to intense criticism, but also the use of Capital Punishment has been critically questioned as to its desirability in a society espousing the goal of rehabilitation and not retribution.

Life is generally regarded as man's most valued and even sacred possession, and the protection of life by avoidance of doing deliberate harm to others or to ourselves is taught to us from childhood in many ways by many means. When inspired by this general social aversion to murder, killing occurs it means that the perpetrators have either not been properly taught to respect human life or that they find themselves in a situation where hatred, desire, anger, greed, necessity, or other mores of a group to which the offender belongs, acquire such dominance that all else is ignored or forgotten, including the possible punishment. [106]

Even if it is assumed that the potential fear of death can deter a crime, this in itself may not be necessary and sufficient reason for the use of death penalty. None else than the ardent retentionist of death penalty Professor Van Den Haag makes this comment. [107] "If deterrence does not work, the implication is that the execution of a person becomes a means to influencing the behavior of another. Is such coercive mechanism, which sacrifices human life just? Is a process which aims at attempting to solve a problem by creating fear reasonable?" [108]

"Discounting war and revolutions, all but very few people, even most murderers, consider the taking of life as a terrible moral wrong. It is this feeling that ultimately is the great deterrent"

Anyhow," the deterrence hypothesis may have no real basis in fact. Therefore attempts to justify the use of Capital Punishment by relying on this theory must be carefully examined, and evaluated, since the consequences of accepting such a justification as legitimate is literally a matter of life or death." [109]

#### PREVENTIVE THEORY:

This theory was meant to restrain an offender personally from repeating a criminal act by incapacitating him, by such punishments such as imprisonment, death or exile. [110] In ancient times this form of punishment had a bearing on the nature of the crime and member of the body most responsible for commission of such an offence thereof used to be incapacitated. For example the hands of a thief have a major role in an offence of theft. Chopping the hands of the thief would hence incapacitate him from repeating theft. [111] The punishment for perjury was cutting one's tongue. Capital Punishment and exile served the purpose of incapacitating an offender whatever may be the crime. This does not act much on the motive of the offender, but disable his physical power to repeat the offence. However, now the criminal justice system does not turn to barbaric punishments such as mutilation and exile, though death penalty is in the statute books of many countries.

The notion that punishment is necessary to protect the society from criminal had been growing in importance. Punishment is for social defence and solidarity. In such a background prisons came handy to serve the dual purpose of protecting the society and punishing the criminal. The incarceration of the culprit has the result of severing him from the society and eventually preventing him from laying his hands again on similar crime or other crimes at least temporarily for the period of incarceration. This is attended with the smug belief that the isolation and some sort of rigorous labor which will give a feeling of degradation and self-remorse. It may help in eradication of any future motive in his mind.

Prisons not only serve the purpose of severing the culprit from the society, it further deprives him of his personal liberty, which one values most after one's own life. Thus,

incarceration serves three purposes: protection of the society, incapacitating the offender without turning to barbaric mutilations, and punishing the offender by deprivation of liberty. Thus pressurization of criminals was considered to be the best method of prevention of crime.

Sutherland, as well as Barnes and Teeters, the modern criminologists observed preventive theory from a different angle. First realizing the necessity of removing the social and economic forces that induce attitudes leading to delinquency and crime, and secondly, focusing attention on the individual who shows potentialities for anti-social behavior either because of biological and psychological handicaps or lack of social or economic opportunities for attaining a desirable integration. [112]

The first goal, which aims at creating such social and economical conditions in the society, which prevent the offender to commit a crime, is very difficult to achieve. Removing social and economic forces that induce attitudes leading to delinquency and crime is the aim of social reformers, social workers and above all politicians. Nobody could do it till date - not even Marxists and nobody can do it in the near future.

Though Marxists hold that crime generates from economic inequalities that is not the only fertile ground for criminality. The behavior of man is unpredictable. Criminality depends on various other factors, psychological and personal also, which is nothing to do with economics. At any rate, removing such social and economic forces, which generate crime, is ruled out.

Then remains the second goal focusing the attention on the individual. That is what precisely the modern criminologists advocate. As Krishna Ayer J. stated the attention should be on criminal and not on the crime. [113]

#### PREVENTIVE POLIOCY IN CAPITAL OFFENCES

The preventive theory, which is known as Incapacitative theory, also is a good weapon in the armour of retentionists. Their argument is not to keep the offender behind the bars, though that amounts to incapacitation. They argue murderers are hanged not merely to

deter people from meeting similar end but to eliminate such offenders, lest they repeat their crime. In case of life imprisonment the chances of parole, remission, pardon, commutation etc., are available. Retentionists do not want any of such privileges to be available for a killer. Killing the killer is the best method of prevention, according to them.

This theory is a two edged weapon, used for the argument of abolitionists also. They advocate that life imprisonment serves the purpose of prevention of crime. Incapacitating the prisoner behind the bars throughout his life is the best method of prevention. Professor Conrod argues that wife killers, who commit murders at the spur of the moment, once in the prison are docile, guilty and the survivors of an irreversible tragedy. They never repeat their crime. [114]

#### PREVENTIVE POLICY VIS-À-VIS DEATH PENALTY AND FINANCIAL FACTOR:

Retentionists of Capital Punishment continue their argument by stating that though life imprisonment is also a preventive measure death penalty is cheaper than that. [115] Maintaining a killer for twenty years at the cost of public exchequer is not proper.

Advocates of abolition counter this argument by observing that execution is not actually cheaper because the trials of death penalty cases are ordinarily much longer than trials of other cases, which would cost more. The expenditure for death houses (such as gas chamber and electrocution) and the close custody, which must be maintained for the condemned man, is not less. However, considering the fact that executions could be purchased for less money than life imprisonment is not fair, humane and just. Indeed if financial implication were the only issue, and if citizens could be killed cheaply, then it would follow that we should kill insane and mentally retarded persons, as well as criminals whose institutional maintenance would cost more than their executions.

Conrod further continues his argument on behalf of the abolitionists. "This cost is not inherent in the penalty, but imposed by judges. It is not cheaper to keep a criminal confined, because most of the time he will appeal just as much causing as many costs as a convict under death sentence. Being alive and having nothing better to do, he will spend

his time in prison conceiving of ever-new habeas corpus petitions, which being unlimited, in effect cannot be rejected as res judicata. The cost is higher." However, he accepts that it is not a decisive factor. [116]

Moreover, now days, the treatment and training programmes in prisons have been considerably improved in tune with the modern trends in correctional jurisprudence. There is ample opportunity for a prisoner to learn a trade in prison in accordance with his aptitude and interest and earn remunerations during his incarceration. He cannot only learn but be able to pay for his maintenance in the prison, contribute towards the support of his dependants and if necessary, make payments to the relatives of the victims of his crime. The idea that hanging is less expensive is not correct. [117]

It is the lifer who becomes a man, leaving gradually his preoccupation with self as the routine of prison life removes the stress of programmed death. Some of them achieve a sort of goodness, as though atonement for atrocities committed in the past can be achieved in the calm monotony that is possible for lifers. [118]

Prevention of crime can be achieved by segregating offenders. Not much longer can we hang them and feel that we have done all that is necessary. [119] We must punish no more than we must. The death penalty is needless in an age when maximum-security prisons are available.

#### REFORMATIVE THEORY:

Retribution and deterrence are the philosophies of the classical and neo-classical schools, with their emphasis on "let the punishment fit the crime". The positive school on the other hand, emphasizes the importance of the "punishment fitting the criminal". It is the individual criminal, not the crime that is the focal point in the positive thinking. Reformatory theory emerged of such positive thinking. According to this theory the object of punishment should be the reformation of the offender. This is not virtually a punishment, but a mere rehabilitative process. It aims at making the criminal as far as possible a better citizen by means of moral and ethical training that is teaching him to go straight as an upright man and meaningful citizen. This is founded on the surmise that a

crime is not the result of an original sin in a criminal but is much more a product of its environment, his lack of opportunity and training. [120]

Until the present century, almost all attempts to change criminals were mass methods designed to modify the criminal in some mechanical manner.

The classical theory suggested that reformation would occur if enough pain were inflicted on the offender. A second method designed to change criminals was meditation, generally enforced by isolation: for some it may work, but generally this procedure has not been effective. Third method was moralizing by sermons in the name of God, mother, country etc., Fourth method was asking the offender to sign a pledge or in some other way make resolutions to live a law abiding life. Fifth method of reformation was mechanical habituation, produced by various punitive regimes including hard and dreary work in the prison and rigid prison discipline.

These five methods were examples of the effort to change the criminal in the past. Although they have been carried over to the present, they reveal the importance of knowing more about human behavior than was known in the last century. [121]

The present century researches in the field of criminal science brought about a radical change; the new approach focused greater attention on the individual who committed crime rather than the crime itself. The five methods explained above were also meant for reformation of the offender. But, the difference between last century approach and present century approach is that in the last century reformation was taken up on the mass level, and in the present century every individual is treated separately and attended to individually. The present day reformists advocate that sympathetic, tactful and loving treatment of the offender would bring a revolutionary change in them. They want to punish criminals "as little as possible" and improve them as much as possible. [122] The advocates of this theory emphasize on rehabilitation of the convicts in peno-correctional institutions, so that they are transformed into good citizens. [123]

In furtherance of this theory, Borstal Schools had been set up. Probation of Offenders Acts was enacted throughout the world. Parole Boards came into existence. Indeterminate sentences, furlough, suspension of sentence - are all the bye-products of this theory. The reformatory theory stretched further in 20th century and "Open Air Institutions" emerged as a novel idea for reforming the criminals without inflicting any pain. The open prisons, which accommodate primarily the life convicts, most of them being murderers, prove that no man is a born criminal. Salmond criticizes this theory by observing that if criminals are to be sent to prison to be transformed into good citizens by physical, intellectual and moral training, prisons must be turned into comfortable dwelling places. However, he observes that reformatory element must not be overlooked but neither must it be allowed to assume undue prominence. [124]

It is submitted that modern prisons must transform into reformatories with a program of work, education, and religious services with the purpose of rehabilitating the offenders and preparing him for adjusting himself into a law-abiding citizen.

#### REFORMATIVE THEORY AND CAPITAL PUNISHMENT:

The global winds are blowing in favour of reformatory and rehabilitative process of punishment, as a result of progressive changes in the penological field. The concept of retribution is outdated. The object of punishment is neither to torture the criminal nor to undo his crime. The purpose of punishment is to deter others and reform the criminal. The punishment should be such, which makes strong impression on the minds of others with least suffering to the criminal. As a result of pathological studies in the field of criminology and penology, it has been proved that there is no direct connection or relation between crime and punishment. On the other hand there is no substantial proof of the fact that the ratio of crime increases because of soft or civilized punishment. [125] The civilized goal of the criminal justice is the reformation of the criminal and death penalty means abandonment of this goal for those who suffer it. [126]

Prof. Conrod observes this aspect from a totally different angle. According to him, it is the lifer who becomes a man. Condemned prisoners cannot think of others. They seldom express regrets for their killing. They could only think of themselves and their scheduled

deaths. [127] But, some of the lifers achieve a sort of goodness, as though atonement for the atrocities committed in the past can be achieved in the calm monotony that is possible for life prisoners. [128] Obviously, death penalty cannot serve the reformatory goal, because it extinguishes life and puts an end to any possibility of reformation. It defeats the reformatory end of punishment.

A sentence that provides for unpaid public services or monetary compensation to the victim's family or personal services to them when monetary compensation is not feasible serve the purpose of punishment better than simply taking away the life of the offender. In fact, this we find in Sukraniti, according to which this bad practice of Capital Punishment violates the Vedic injunction and should be replaced by imprisonment for life, if necessary, and a natural criminal should be transported to an Island, or fettered and made to repair the public roads. [129]

Conrod further observes "I have seen many murderers who have chosen service to others - as best as they could with limited opportunities - as their way of expiating guilt for an offence - a guilt with which they must live for the rest of their lives." The most famous such case is that of Nathaniel Leopold, convicted for a crime of the utmost atrocity, who dedicated himself to the education of criminals and to research leading to their better understanding. Less gifted murderers have chosen to make their lives as useful as possible to others - to fellow prisoners, to a large society when they can. The case of Pan ham Singh is a very good example to illustrate this. Pancham Singh Chauhan was a dreaded bandit, who headed a 60 - member gang of hardcore dacoits in the notorious Chambal Valley. The police so desperately wanted him that they announced a hefty reward of Rs.1.30 lakhs to anyone who gave them information, which might eventually lead to his arrest. Some of the offences he had committed were murders, kidnappings and dacoities.

When the police turned the heat on him Pancham Singh and his band of bandits finally surrendered to them. Though they surrendered, the Court, which tried their offences sentenced them to death in view of the gravity of their offences. But for the late Jayaprakash Narain, Pancham Singh and his gang would have been dead by now. The

Government reduced their death sentence to life imprisonment. But, they were released after eight years, in prison obviously for their good behavior.

Pancham Singh, who afterwards became a Rajayogi in Brahma Kumari movement, spent the booty he had looted for charitable purposes. He constructed a school in Madhya Pradesh. Now, he is 66 years old and leading a peaceful life with his wife and two sons and two daughters. He is eking out his living by growing a vegetable garden in the six and half acre land allotted to him by the Government under the ex-dacoits rehabilitation scheme. [130] Krishna Iyer makes a mention of Valmiki and Aurobindo, the first being a hunter in a forest and turned the great epic writer and the second was implicated in a conspiracy to murder and in prison he became Krishna conscious and enriched global life with a boundless light. To hang a man is to deny an embodied soul the sublime honor to transform himself and humane. It is a path that they cannot follow when they must go to a scheduled death.

Some people experienced in the handling of prisoners have concluded that murderers are among the best-behaved prisoners. [131] Statistics show that most persons convicted for murder are successful parolees. Of 36 persons under life sentence who were paroled between 1943 and 1958 in New York only two were returned to prison - one for technical offence and the other for burglary. Most of these prisoners would have been executed if their sentence had not been commuted.

In a study by the Philadelphia Bar Association in 1951, of 215 persons pardoned after serving varying terms on sentence of life imprisonment for murder, it was found that only seven were later arrested and of these only one was for murder. [132] It is generally accepted that lifers who have escaped the death penalty for murder make the best prisoners and after serving a relatively long term keep out of trouble. These and many other examples clearly show that it is not possible to know before hand with any degree of certainty that a murderer is beyond reformation. [133]

It is absurd to think of punishing a person who is suffering from cancer or any other malignant disease. Indeed, it is likewise absurd to punish those who are socially ill to the degree that they commit socially disapproved acts. We must reduce so far as possible, the unhealthy social environments that generate those bad habits that emerge in criminal conduct, and set up systems of treatment that will rehabilitate reformable convicts. The problem of Capital Punishment appears to be relatively important in relation to the much broader and more fundamental series of problems that involve crime causation, criminal jurisprudence and the rehabilitation of criminals. By killing them we are depriving the offenders a chance of atoning their wrongs.

"...Every saint has a past and every sinner a future, never write off the man wearing the criminal attire but remove the dangerous degeneracy in him, restore his retarded human potential by holistic healing of his fevered, fatigued or frustrated inside and by repairing the repressive, though hidden, injustice of the social order which is vicariously guilty of the criminal behavior of many innocent convicts. Law must rise with life and jurisprudence responds to humanism. [134]

Our attitude to murder and the treatment of offenders is entirely unrealistic. It is rather - like panic response. A man kills, we cannot tolerate this, of course, and something must be done, so we kill him. The incidence of murder has not been reduced, the man is certainly no better off, and neither is the society. The response seems to be rationalized rather than reasoned...we are certainly not adopting the best approach; we have, in Freudian terms, fixated.

If we abolish Capital Punishment we shall have lost nothing; we shall not have endangered the society, and we may do some practical good, because our energies may be diverted to solving the problem by new techniques. [135] An execution is a needless tragedy, an anachronism whose survival does great harm to society without accomplishing any comparable good. Orwell's instinct was correct. An execution is both wrong and tragic. [136]..."condemned man has lost the universal human power of correcting his ways." [137]

The criminal always remains a human offender, and as a human he is always free to learn new values and new adaptations. When Chessman was executed millions across the globe felt that "the man killed on Monday by the Sovereign State of California was not the same man whom the State's Courts originally sentenced.... California sentenced a young thug; it killed a man who learned law, and probably citizenship, the hard way." [138] Then would it be right to extinguish the life of a human being merely on the basis of speculation - and it can only be a speculation and not any definitive inference - that he cannot be reformed. "There is divinity in every man and no one is beyond redemption." [139]

The imposition of punishment is justified only by its ability to reeducate an offender and thereby to return him to society as an integral human being. The evildoer cannot be done to death. Capital Punishment cannot serve the goal of reformation. Because it extinguishes the life, thus puts an end for the reformation. Krishna Iyer recalls Victor Hugo: "We shall look upon crime as a disease. Evil will be treated in charity instead of anger. The change will be simple and sublime. The cross shall displace the scaffold." [140]

The hope of reforming even the worst killer is based on experience as well as faith and to legitimize the death penalty even in the so called exceptional cases where a killer is said to be beyond reformation would be to destroy the hope by sacrificing it at the altar of superstition and irrationality. [141] Even the Royal Commission on Capital Punishment concurred with this view. "Not that murderers in general are incapable of reformation, the evidence plainly shows the contrary. Indeed, the experience of countries without Capital Punishment indicates that the prospects of reformation are at least as favorable with murderers as with those who have committed other kinds of serious crimes. The released murderers who commit further crimes of violence are rare, and those who become useful citizens are common." [142]

So long as the offender can be reformed through the rehabilitatory therapy which may be administered to him in the prison or other correctional institution and he can be reclaimed as a useful citizen and made conscious of the divinity within him by techniques such as meditation, how can there be any moral justification for liquidating him out of existence? [143]

In what does doing justice to man consist? In giving him his due. You give fish its due by allowing it in water: you give an artist his due by encouraging him to paint his best pictures: and you give a man, any man, his due by fostering his power to realize as completely as possible, his man-ness, his essential humanity: you cannot do that by killing him. [144] Lex talionis a tooth for tooth, but no more than a tooth, a life for life no more than a life, but only for a life, is the origin of judicial murder, or Capital Punishment. But, another great advance was to come: Christ came into the race of talionis and explained what was wrong with that law. You can never get a just society - by mechanical squaring of accounts; you can get only when people learn to give and to love - and once they have learned it they discover that the giving and loving is their own free development itself, as well as that of others. So you must forgive, unto seventy times seven; must love your enemies, including the enemies of the society. [145]

#### FUTURE OF THE PUNISHMENT:

Punishment must be just. It must be directed to the good of the society. A punishment which prejudices rather than promotes the good order of society is plainly not just, no matter how guilty the offender may be, how well founded the authority which imposed the punishment may be.

Punishment ought to be medicinal rather than retributive. In his disclosure to the Catholic Jurists of Italy in December 1954 Pope Pius XII stated that the function of punishment is "the redeeming of the criminal through repentance" and thus seemed to set the reformation of the offender as the primary end of penal sanction. [146]

There is a general belief that has persisted since the late eighteenth century that punishment must have an aim. Retributivists punish because the criminal is guilty.

According to them the crime itself justifies the punishment and punishment has no other purpose than to be imposed as a legal consequence of the guilt. [147]

Punishment is categorically imperative, the guilty criminal must be punished, but moral order demands that the punishment should be proportionate to the gravity of the offence. [148] Utilitarians would punish because they seek to prevent crime by intimidation, incapacitation or reformation of the criminal and by presenting his fate to the general public so that the like-minded may see what the consequences of a criminal act will be. However, history has shown, critics contend, that punishment has never reduced crime to any marked degree. To maintain that punishment is imposed in order to prevent crime is to offer an answer to the question of the aim of penal legislation. To say that punishment is imposed because the criminal has incurred guilt is to offer an answer to the question of the justification for imposing penalties. [149]

To conclude, punishment is the proper immediate consequence of the criminal act, a stage in the criminal justice system. It should be administered in such a way that the criminal's reconciliation to the community is not impeded. [150] Perhaps, in future, in imposing the punishments, authorities would take this point into consideration. Our probation laws, parole system, open prisons etc., aimed at this goal only.

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