

CRITICAL ANALYSIS OF THEORIES OF PUNISHMENT*

Mere denunciation of crime is not enough; it must be pushed to its logic end that crime does not pay by punishing the offenders. Punishment means, “It is the redress that the commonwealth takes against an offending member”¹ Punishment is some sort of social censure and not necessarily involving physical pain. H Kelson in his General Theory of Law and State described “sanction is socially organized consists in a deprivation of possession- life, freedom, or property”² According to Jeremy Bentham punishment is evil in the form of remedy which operates by fear.³ Johan Finnis has said that delinquent behavior of a person needs to be taught lesson not with melody but with iron hand. “There is the need of almost every member of society to be taught what the requirement of the law—the common path for pursuing the common good—actually is: and {relatively!} Vivid drama of the apprehension, trial, and punishment of those who depart from that stipulated common way”⁴

Various reasons justify punishment but criminal law as sanctions has one important object, is to eradicate the self-help and private sanctions.⁵ Once society realizes that there is need of sanction, it must be applied collectively, officially, legally and publicly.⁶ Different authors have offered various theories of punishment but those can be broadly classified as non-utilitarian and utilitarian.⁷ What distinguishes these theories is their focus and goals: utilitarian theories are forward looking concerned with the future consequence of punishment; non-utilitarian theories are backward looking, interested in the past acts and mental states; and mixed theories are both forward and backward looking.

Punishment is awarded to reduce crimes and used as means to an end, is the claim of the utilitarian. George Hegel and Immanuel Kant criticized and rejected the utility theory, presented the contrast retributive theory of punishment, which is of non-utilitarian on the premises that punishment is not means to an end but end in itself. This tug of war between the George Hegel and Immanuel Kant on one side and Jeremy Bentham on the other side is carried even by 20th century scholars. In 1949, Lord Denning appearing before the Royal Commission on ‘Capital Punishment’ expressed the following view:

“The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizen for them. It is a mistake to consider the object of punishment as being deterrent or reformatory or preventive and nothing else ... The ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime: and from this point of view, there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all namely the death penalty.”⁸

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¹ Sethna, M.J. *Society and the Criminal*, (3rd Ed) Bombay: (N.M Tripathi Pvt Ltd. 1971) p.236.

² Freeman, M.D.A.Lloyd's *Introduction to Jurisprudence*, (17th Ed.), (London: Sweet & Maxwell Ltd. 2001). P..282.

³ Jeremy Bentham, *The Theory of Legislation*, (Bombay: N.M. Tripathi Private Ltd ,1995). p.167.

⁴ Johan Finnis, *Natural Law and Natural Rights*, Oxford: Clarendon Press, [2001] p.262.

⁵ Macklin Fleming. *Of Crimes and Rights*. (New York: W.W.Norton & Company. Inc. 1978). p.102.

⁶ *Ibid* at 103.

⁷ <http://www.legalsutra.org/utilitarian-and-Kantian-concept-of-punishment>. Accessed on 21/12/2010.

⁸ Friedman, W., *Law in a Changing Society*, (2nd Ed.) (Delhi: Universal Law Publishing Co. Pvt. Ltd. 2008).p.225.

Scholar of Criminal law Professor Glanville Williams of Cambridge University, applauds the utilitarian opinion that punishment is either preventive or deterrent.⁹ Both schools agree punishment is essential but disagree in respect of its purpose. Utility doctrine has further classified punishment as Preventive (Restraint), satisfactory (compensatory), reformatory (Therapeutic or corrective), and deterrent.¹⁰

Retributive theory of punishment

Vengeance theory- It is a concept of primitive society which consists of injury inflicted by way of retaliation by victim of crime on actor of crime, which requires the existence of victim as well as a wrong doer. Its idea is severity of punishment where victim of crime inflicts the retaliatory harm that expunges the crime. Modern legal system has given up the vengeance theory because of its heinous, barbaric and uncivilized nature of punishment.

Retributive theory

Retributive theory is based on rights, desert and justice.¹¹ The guilty deserve to be punished, and no moral consideration relevant to punishment outweighs the offender's criminal desert is the philosophy of retributive theory.¹² Retributive theory replaces private punishment by instituting punishment on the structure of law and state in organized manner. Unlike vengeance theory, retributist focuses on the wrong doer not on the victim of wrong which makes difference between the '*lex talionis*' and '*jus talionis*'. Immanuel Kant who discussed the concept of punishment in the first half of *The Metaphysics of Morals*, for him just actions are deduced from the concept of morals and punishment should satisfy the rationality of moral and justice. Guilt is a sufficient condition for justifying punishment. It is worth to quote his famous lines.

“Even if a civil society were to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decides to separate and disperse themselves around the world), the last murder remaining in the prison must be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of justice.”¹³

For Kant, human being is free man, and enjoys rights in the legal system based on the dignity of humanity. When any person interferes with the others right, he forfeits and gives up his own right and submits him to others interference in his life as legitimate. Kant calls it as 'moral authorization'-*Befugnis* to interference.¹⁴ Violator of Criminal Law has derived benefit because other persons have obeyed Criminal Law; therefore, he owes

⁹Glanville Williams., *Textbook of Criminal Law*. (2nd Ed.), (Bombay: N.M. Tripathi Private Ltd. 1983). p.126.

¹⁰ Jeremy Bentham., *op. cit.*, p. 167

¹¹ Amit Bindal, “Rethinking Theoretical Foundation of Retributive Theory of Punishment”, 51 *JILI* (2009). p.310.

¹² <http://plato.stanford.edu/archives/spr2010/entries/punishment>. Accessed on 28-12-2010.

¹³ Murphy, J.G. *Retribution, Justice and Therapy; Essays in Philosophy of Law*, (Holland: D Reidel Pub, Co, 1979),p.82.

¹⁴ Amit Bindal, *op. cit.*, p..323.

debt to society in the form of punishment, which is condition for his re-entry into the community.¹⁵ This analysis takes closer to another principle of expiation. The penalty of wrong doing is a debt, which offender owes to his victim. When punishment has been endured, the debt is paid, the liability is extinguished. Doctrine of just desert based on principle that criminal having committed crime in the past deserved to be punished. The worlds 'deserved' puts limitation on the power of inflicting harm and makes it just or fair that exhibit the humanitarian aspect of the theory, which is the base for wider acceptability in society. Retributive is no exception to the principle. Every theory has demerits. Weakness of retribution is focusing more on criminal, his guilt, suffering and his feelings likely to glorify them. Total rejection of claim of victim of crime, potential victims and potential criminals undermines the nature of Criminal Law. This theory focuses on what had happened but does not on what has to be done in future for prevention of crimes because some time punishment ought to be considered as means to end. Kant categorically rejected punishment as means to end because it amounts use of man for others, which is against the principle of human dignity. Retributist fails to take notice of Criminal law's future direction.

Retribution is not cruel because it treats a criminal with dignity.¹⁶ It gives him chance to expiate his crime by suffering. The doctrine of desert, fairness, and proportionality reject cruel, barbaric, and uncivilized punishment of vengeance theory. Retributive theory puts substantial limitation on punishment. When the law and State inflicts harm on the wrong doer in fair manner, how retributive theory is called reflection of vengeance theory. Law condemns the act of criminal by awarding punishment, if incidentally that satisfy the vengeance of victim of crime, the retributive theory cannot be criticized for that because they never claimed it. Hegel has rightly objected by saying retributive is nothing but concept of vengeance is superficial.¹⁷ The following are the merits and demerits of the retributive theory.

Merits

1. The theory is very simple. Punishment is an end in itself but Utility theory is means to an end. Therefore, utilitarian theories are evaluated on parameters of success and failure. This question does not arise in retributive theory.
2. Retributive punishment is neither cruel nor barbaric but civilized because inflicted punishment is proportionate to the crime that is just. Utility theory recommends more punishment than the profit of crime.
3. Retributive is impartial and neutral. By inflicting proportionate punishment to the crime, it considers the interest of wrongdoer and society equal. Reformatory theory gives more weight to interest of criminal and deterrent theory priority would be social interest than criminal.
4. Retributive is based on the Roman doctrine of *Poena sous tenere debet actors et non alios* means punishment belongs to the guilty, and not others. It punishes voluntary acts and excludes involuntary acts based on less blame worthy acts like, act of insane person or immature person. Utilitarian demands punishment for every kind wrongful act either intended or unintended. So innocents are likely to be punished which is harsh.
5. Retributist always treat the human being with dignity and honor by saying that the punishment is an end in itself not means to an end. However utilitarian treat the

¹⁵ Murphy, J.G., *op. cit.*, pp.83-84

¹⁶ Harris, J.W. *Legal Philosophies*, (2nd Ed.) (London: Butterworth's. 1997). p.60

¹⁷ *Supra* note at 14 at 336

person either as a commodity or animal because his punishment used as means to teach lessons to others to prevent crimes, which degrades the human value.

6. Hallmark of retributive theory lies in its nature of mercy. Once criminal pays his debt to the society in the form of punishment, his sin is expiated and admitted back to mainstream of society again. This kind of philosophy is missing in the deterrent punishment.

Demerits:

1. Retributist have failed to elaborate any guidelines or principles for proportionate punishment that makes difficult task for judges to measure punishment for crimes.
2. Object of punishment is not only punishing the criminal but to prevent the crime in future also. Punishment is means to an end not an end itself.
3. Kant philosophy of murder warrants death sentences as not acceptable to the Modern civilized society.

The retributive theory propagates human being feelings that justice is most essential for sustaining legal order in society. This is what reflected by the Indian society in Ruchika and Jessay cases. In Ruchika's case, the trial court pronounced six months sentences for retired DGP of Haryana S.P. Rathore for molesting a girl of 13 years , Ruchika, who later committed suicide. Judgment of trial court shocked the Indian civil society and condemned it with one voice that forced the prosecution to file appeal in the High court that enhanced the sentence to 18 months. In Jessica Lal murder case where Manu Sharma and others murdered her in an open bar, trial court acquitted all the accused on ground that there was no evidence. People were shocked, stunned and criticized the judgment of the court. Delhi High Court by considering the outrages and stunning remarks of people conducted the proceedings on daily basis and passed sentences of life imprisonment on the accused, which is confirmed by Supreme Court on appeal.¹⁸Two cases clearly send message that people's hunger for justice, if not honoured, the society will not honour Criminal Law. Hart has put the same logic in different words,

“Sanctions are therefore required not as the normal motive for obedience, but as guarantee that those who would voluntarily obey shall not be scarified to those who would not. To obey without this, would be to risk going to wall.¹⁹

Retributive theory based on the doctrine of Roman law, *nulla poens sine leges* and *nulla peona sine crimen* which means no punishment outside the law, and no punishment except for crime.²⁰Undue sympathy to impose inadequate punishment would do more harm to the justice system that undermines the public confidence in the efficacy of the law.²¹Sentencing process should be stern where it should be, and tempered with mercy where it warrants to be, otherwise departure from Just desert principle results into injustice.²²Any attempt to down play the importance of retributive as vengeance concept is unfair. Retributive upholds and preserves the greater social values. Failure to satisfy the public sense of justice may lead to loss of respect for authority and human beings likely to take justice into their own hand that would be reverting the clock back to primitive society.

¹⁸ http://en.wikipedis.org/wiki/Murder-of-Jessica_lal. Visited on 25-12-2010.

¹⁹ Hart,H.I.A. *The Concept of Law*, (2nd Ed.),(New York: Oxford University Press, 2001) .p. 198.

²⁰ <http://plato.stanford.edu/archives/spr2010/entries/punishment>. Visited on 28-12-2010.

²¹ *Shivaji Shankar v. State of Marashatra*, AIR 2009 SC 56.

²² *State of Punjab v. Rakesh Kumar*, AIR 2009 SC 391.

Utility theory of punishment

Utilitarian believes the punishment is means to an end and seeks to punish the offenders to discourage or deter future wrongdoing. Great jurist Jeremy Bentham who was instrumental behind the utility theory said,

“The principal end of punishment is to prevent like offences. What is past is but one act: the future is infinite. The offence already committed concerns only a single individual; similar offences may affect all. In many cases it is impossible to redress the evil that is done; but it is always possible to take away the will to repeat it; for however great may be the advantage of the offence, the evil of the punishment may be always made to out-weight it.”²³

Reduction or prevention of crime has to be ultimate object of punishment that has to look forward not backward as presented by retributist. These theories can be categorized as, Reformatory, (corrective or therapy) Deterrent, preventive and compensatory.

Reformatory theory of punishment

The object of punishment has been considerably under the process of changes from the last centuries because of the Welfare State concept. Let us give human touch to Criminal Law and reduce the brutalities of punishment is today's philosophy of law.²⁴ Reformist looks at sanction as instrument of rehabilitation and tries to mould the behavior of criminal on the premises that criminal is not born but made by the environment of society. Therefore, it is the responsibility of society to reform him by adopting certain suitable methods. The increasing understanding of the social and psychological causes of crime has led to growing emphasis on reformation rather than deterrence. Less frequent use of imprisonment, abandonment of short sentences and attempt to use prison as training rather than a pure punishment, and greater employment of probation, parole and suspended sentences are evidence of reformatory trend.²⁵

This approach rejects the deterrence and retributive elements of punishments and impeccably advocates reformatory approach on simple idea that, 'we must cure our criminal, not kill them'.²⁶ The reformatory theory is reaction to the deterrent theory, which has failed to take into consideration of the welfare of criminal. The real objection to reformation is simply that it does not work.²⁷ High hopes of reformatory theory never materialized and met with repeated failure. Reformation requires combination of too many disciplines and their attempt has failed to deliver goods yet hunt is on for right combination to make theory fruitful.²⁸ Researchers have concluded that no known or effective methods for reformation of convicted criminal had been demonstrated "we know nothing about deterrent or reformatory effects of any mode or variety of treatment".²⁹ There are number objections against reformatory theory.

²³ *Supra* note 3 at 118

²⁴ Sutherland Edwin H and Cressey Donald, *Principles of Criminology*, {12th Ed}, (Bombay: The Times of India Press, 1985). pp.317-320

²⁵ Salmond, *Jurisprudence*, Fitzgerald, P.J.(Ed.) (12th Ed.), (Delhi: Universal Law Publishing Co Pvt, 2008). p.95

²⁶ *Ibid.*

²⁷ Arnold loeway, *Criminal law*, (New York: St, Paul Minn, West Publishing Co, 1975). p.3

²⁸ Macklin Fleming, *op. cit.*, p. 109

²⁹ Jerome Michael and Mortimer Adler, *Crime, Law and Social Science*, (New York: Harcourt Brace, 1933).p.49

1. Reformatory theory expects better infrastructure and facilities in prison, proper co-ordination between different discipline and persistent effort on their part to mould criminal. It requires huge investments which poor country cannot afford it.
2. Millions of innocent people who have high regards for law are finding difficult to get basic amenities postulates ethical justification for providing better facilities inside prison.³⁰
3. Moreover, the rationality of the theory is more towards incentives for the commission of crime rather than prevention.³¹
4. Reformation can work out on those people who can be reformed, there are people who cannot be reformed like hardcore criminal, highly educated and professional criminals.³²
5. This theory neglects potential offenders and persons who have committed crime but not within the arms of law. Further, it overlooks the claims of victims of crimes.³³
6. Corrupt social environmental is responsible for crime but not individual responsibility, is the philosophy of reformatory which is hard to digest.

Nevertheless, it would be unfair to dismiss the noble concept of reformation as a total failure. All are familiar with the instances in which unskilled, uneducated and apparently incorrigible criminals have developed skills in prison, which have transformed them into highly useful persons.

Deterrent theory of punishment

The act that takes away the power of committing injury is called incapacitation, is in the form of remedy operated by the fear should be the object of punishment which is called deterrent theory. Bentham went to the extent of depriving the criminal's power of doing injury by awarding death sentences.³⁴ Bentham treats the committed offences as an act of past, that should be used as opportunity of punishing the offenders in such a way that the future offences could be prevented.³⁵ Glanville Williams says deterrence is the only ultimate object of punishment. "Punishment (sanction) is before all things deterrent, and the chief end of the law of crime is to make the evildoer an example and warning to all that are like minded with him."³⁶ This kind of threat is commonly described as 'specific' or 'individual' deterrence.

Specific deterrence works in two ways. First, an offender would be put in prison to prevent him from committing another crime for specific period. Second, this incapacitation is designed to be so unpleasant that it will discourage the other offender from repeating his criminal behavior. When individual deterrence is used as means to send message across society is called 'general' or 'community' deterrence. The higher percentage of criminal being caught and punished would enhance the credibility of sanctions. Crime does not pay and honesty is the best policy. That is the message

³⁰ Macklin Fleming, *op. cit.*, p.130

³¹ Salmond, *op. cit.*, p. 94

³² *Ibid* at .97

³³ *Ibid* at .94

³⁴ Jeremy Bentham, *op. cit.*, p. 209

³⁵ *Ibid* at 167

³⁶ *Supra* note 30 at 114

deterrent theory tries to communicate to society. Once deterrent as painful sanction is accepted, it would oppose better facilities in prison as suggested by the reformist.

Utility of deterrent theory

Imprisonment as deterrent factor may provide temporary relief as long as criminal is inside the prison because motive of crime cannot be destructed by fear factor. Sanction as pain some time produces ironical results. It is thought that punishment would deter offenders, in reality it hardens the criminals because once criminals accustomed with punishment, deterrence loses its strength on such criminals.³⁷ Under these circumstances, reliance on rehabilitation and prison reformation would give better result. The most effective deterrent punishment is death sentences, where as imprisonment has not only deterrent value but reformative also. The strongest criticism against deterrent is that it has failed to reduce crimes. Should it be given up? The conclusions are based on the percentage of crime rate which are available. The tragedy of deterrent theory is that number of criminals it has failed to deter measures its efficacy but not by number it has in fact deterred.³⁸ The classic illustration from earlier times is the number of pickpockets went up when people gathered to watch public hanging of pickpocketers. It is difficult to collect the data of persons who have deterred. The success of Deterrent theory can be measured by taking into consideration of data when there is breakdown of law and order. Just consider the number of crimes committed aftermath Indira Gandhi assassination. Same thing happened in Gujarat when the Godhra incidence took communal shape which led to break down of law and order. Therefore, the question in case of pickpocketers is not how many pickpockets exist in spite of the penalty against them, but how many more would have been there without such penalty. Glanville Williams holds the same view by saying that how much worse off we should be if we had no social provision for punishing evildoers.³⁹

Abolition of Death Sentence

Powerful argument for the abolition of death penalty is based on the Report of the Royal Commission on Capital Punishment. “[T]here is no clear evidence ... that the abolition of capital punishment has led to an increase in the rate, or that its reintroduction has led to a fall.”⁴⁰ In pursuance of this report, the British government abolished death sentences by passing The Murder (Abolition of Death Penalty) Act 1965. Statistics show that death sentence has not produced the desired result. If it really does deter, then there ought to be a lesser number of homicide in places where the penalty is retained than where it has been abolished.⁴¹ In India, crime rate is high in spite of having death sentences where as European countries abolition of death sentences has not resulted into reduction of crime. The Indian Law Commission cites the following reasons for the retention of death sentences.⁴²

1. Capital punishment acts as deterrent. “Do we want more of Murders in our country or do we want less of them?”
2. Danger criminals need to be eliminated to protect the society.

³⁷ Salmond, *op. cit.*, p.95

³⁸ *Supra* note 27 at 8

³⁹ Glanville Williams, *op. cit.*, p. 38

⁴⁰ *Supra* note 8 at 224

⁴¹ Sethna, M.J., *op. cit.*, p.241

⁴² See, Law Commission of India’s Thirty Fifth Report on “The Capital Punishment.” pp. 53-66

3. The life of police and prison staff cannot be put into risk by not awarding death sentences to danger criminals.
4. If danger criminals are not hanged, they are likely to repeat the offence after their release.
5. Where death sentence is abolished, the crime rate is very low but that cannot be in India.
6. Public opinion is substantially in favour of capital punishment otherwise, it leads to lynching.
7. Imprisonment of criminals leads to problem of prison administration and taxpayer money has to be utilized for maintenance of criminals that is unjust.
8. Capital punishment is a painless and less cruel than life imprisonment.

There are some justifiable grounds for abolition of death sentences.

1. It is revengeful.
2. Destruction of life is not a wish of God or nature.
3. It is immoral. Society has no right to take life that is incompatible with modern morality and human rights.
4. India believes in non-violence philosophy.
5. Death sentence is unjust for the family of offender.

Irretrievable error of justice is most practical reason for its abolition.⁴³ Unlike life imprisonment, executed death sentences would not give opportunity to judiciary to correct its error of judgment. In the late 1990s, a powerful new challenge to death penalty emerged the risk of executing innocent people. Aided particularly by the availability of DNA testing, more than 116 death row prisoners have been exonerated (declared to be not guilty) and realized from prison from 1977 to 2004 in USA.⁴⁴ This information leads to the logic that some other innocent might have been executed. Abolitionist of death sentence encases on this. The main reason for earlier day's death sentences is lack of prison infrastructure. With arrival of means and facilities to confine criminals indefinitely, even for life, abolitionist started questioning ethical propriety of death sentences and right of society to take life in order to protect life.⁴⁵

Many experts have questioned whether a capital punishment has any greater deterrent value than a sentence of life in prison without parole. When criminals are sentenced for life, long sentences inside the prison without liberty, luxurious comfort, isolated from family, friends, and society that would be more ideal painful deterrence than death. Inconsistency in awarding death sentences strengths the argument of abolitionist. USA Supreme Court in *Furman v. Georgia* by highlighting these remarks and suspended death sentences in 1972. It is worth to quote Justice William Douglas Words,⁴⁶

It is the poor, the sick, the ignorant, the powerless, and the hated who are executed...[The law] leaves to the uncontrolled discretion of judges and juries the determination of whether defendants committing these crimes should die or be imprisoned...These discretionary statutes are unconstitutional.

⁴³Friedman,W., *op. cit.*, p. 225.

⁴⁴ Harry Hendrenson, *Capital Punishment*, (3rd Ed.), (New York: Facts on file, Inc, 2006).p.4.

⁴⁵ *Supra* note 5 at 189.

⁴⁶ Harry Hendrenson, *op. cit.*, p. 12.

Indian Supreme Court has laid down that death sentences would be given in 'rarest of rare cases.' Further Court held that the judges discretionary power to impose the death sentences, are well guided by the Indian Penal Code, Indian Evidence Act and Code of Criminal Procedure 1973 which do not offend Articles 14 and 21 of the Constitution.⁴⁷ Yet people's mind is not free from the fact that it is judges who decide between life and death of criminals because even in similar cases there is different findings. In *Dhanjay's* case who raped and killed a 14 year girl was given death sentence. In *State of Maharashtra v. Mansing*, the accused who had committed rape and murder of 8 year minor girl was awarded life imprisonment by Supreme Court.⁴⁸ In another similar case, the Supreme Court awarded life imprisonment.⁴⁹ Abolitionist maintains that death sentences statistics reveal that criminal justice system disproportionately singles out least advantaged members of society for execution. Those who are wealthier, more educated and more socially connected rarely, if ever, receive death penalty; in their view the message is actually conveyed that there are two standards of justice.

Certainty of punishment is much more important than the severity of punishment otherwise death sentences would not have the desired result. Factors like appeal, revision, mercy petition and delay in execution of death have diminished the deterrence of death and ultimately became Constitutional grounds for converting the death sentences to life imprisonment.⁵⁰ Another ground against death sentences is that, it is carried in private and relatively low number of execution that lessens the deterrence value of punishment. Counter argument is that, it is in fact the result of abolitionist's opposition. State tries to satisfy the opponents of death sentences. Hence, it is executing privately and rarely.

Bentham justifies death sentences in extraordinary occasions like civil wars.⁵¹ When life itself is at risk, any threat of lesser sanction and confinement is unlikely to have any great impact on the soldier tempted to save his life by deserting the battle of war field.⁵² Terrorist incidence, like 9/11 and 26/11 demand nothing shorter than death sentences.⁵³ America's 2/3rd population supported the death sentences.⁵⁴ India has not abolished death sentences even though it has signed the International Covenants on Political and Civil Rights. Proponents of death sentences believe that the law should place less value on the life of convicted murder than on victim. Indian Law Commission observed, "[A]rgument that may be valid in respect of other countries may not necessarily be valid for India. Unlike Western Countries, education, prosperity, homogeneity and viability are sadly absent in many parts of India. Punishment should bear a just proportion to the crime. Therefore, capital punishment is only punishment for those who have deliberately violated the sanctity of human life".⁵⁵ Further, it said, even if the principle of abolition is accepted the time is not yet ripe in India.⁵⁶ Law Commission concluded that State has every right to execute certain violent criminals in order to uphold

⁴⁷ *Bachan Sing v. State of Punjab*, AIR 1980 SC 898.

⁴⁸ (2005) 3 SCC 131.

⁴⁹ *Surendra Pal Shivbalakpal v. State of Gujarat*, (2005) 3 SCC 127.

⁵⁰ *Triveniben v. State of Gujarat*, AIR 1989 SC 142.

⁵¹ *Supra* note 3 at 209.

⁵² *Supra* note 5 at 191.

⁵³ Plane hijack and attack on WTO and other various places in USA by terrorist on 11th September 2001, and Terrorist attacks on various places in Bombay on 27th November 2008

⁵⁴ Harry Hendrenson, *op. cit.*, p.15.

⁵⁵ *Supra* note 42 at p. 53-66.

⁵⁶ *Ibid.*

and preserve greater social value. Failure to satisfy the public sense of justice may lead to loss of respect to authority of law.

Preventive theory of punishment

Even utilitarian like Bentham advocated the preventive remedies which tend to prevent offences.⁵⁷ That some individual need to be restrained is hardly debatable proposition. Even staunchest advocate of the reformation theory would not contend that a convicted unreformed dangerous criminal ought to be without restraint while he is being reformed. The target of sanction as incapacitation is criminal himself and protection comes by physically separating criminal from the victim and potential victim that denies him ability and an opportunity to commit further crime.

Preventive philosophy is the best mode of punishment because it serves as effective deterrent and also useful preventive measures. The effectiveness of preventive theory much depends upon promptness and proportion factors.⁵⁸ The delay in inquires or investigation by the public authority makes sanction ineffective. The effectiveness of sanction is further scaled down as courts grants bail to accused on the ground that accused presumed to be innocent until guilt is proved. There is considerable dispute, as to who should be restrained and how long. Confinement should involve the least restraint needed to furnish reasonable protection against crime.⁵⁹ The naked truth is that protection can never be absolute. Certain amount of crime is inevitable and society must take chance against them. Effective incapacitate depends upon various factors like, criminal's history, background, and personality. In spite of all these things it is not possible to predict accurately whether or not a particular criminal will repeat crime. Incapacitation should not be disproportionate, wasteful and expensive.⁶⁰ Unless restraint is either permanent or is coupled with a meaningful rehabilitative program imprisonment will not restrain criminal conduct, but will merely postpone it.⁶¹ Incapacitation affects ability and an opportunity to commit criminal act, but has no influence on emotional and criminal intent and expectation of profit. Therefore, incapacitation is being temporary than permanent.

Compensatory theory of punishment

The criminal justice system is incomplete is the major allegation made by the victims of crime, which is in fact true. The entire focus of the criminal justice system is on the offender, to punish him or to seek his reformation and rehabilitation with all the resources and goodwill available through courts and other governmental and non-governmental agencies.⁶² The victims of crimes are, on the other hand, forgotten people in the system. President Gerald R. Ford sent the following message to the American Congress in 1975,

⁵⁷ Jeremy Bentham, *op. cit.*, p 167.

⁵⁸ Macklin Fleming, *op. cit.*, p.171.

⁵⁹ *Ibid* at 173.

⁶⁰ *Ibid* at 175.

⁶¹ *Ibid*.

⁶² Ahmad Siddique, *Criminology*, (5th Ed.), (S.M.A Qadri, Ed.), (Lucknow: Eastern Book Company, 2005).p.544.

“For too long, the law has centered its attention more on the rights of the criminal than on the victims of the crime. It is high time we reversed this trend and put the highest priority on the victims and potential victims”⁶³

Compensation to victim of crime rests primarily on two grounds. Firstly, a criminal who inflicted injury against persons or property must compensate for the loss, and second, a State that failed to protect victim must pay compensation to him. The United Nation General Assembly in 1985 adopted the declaration known as “Basic Principles of Justice for victims of Crime and Abuse of power” which is called as Magna Carta of Rights of victims.⁶⁴ Principle 9 of the declaration provides “Government should review their practices regulations and laws to consider restitution as an available sentencing option in criminal cases in addition to other criminal sanctions.” Such a duty of State towards victims is more explicitly stated under the European Convention on the Compensation of Victims of Violent Crimes.⁶⁵ Article 2 of the Convention says, “When compensation is not fully available from other sources the State shall contribute to compensate”. Such compensation is to be awarded even if the offender cannot be prosecuted or punished. Jeremy Bentham also recognized that compensatory remedies should be object of criminal justice, which he called it as satisfactory remedies.⁶⁶ Potential offender pays compensation along with ill-gotten gain that would variably kill the motive of committing crime. COMPENSATION therefore is of the essence of true deterrent, reformation and a necessary condition of retribution.

Section of 357(1) of Criminal Procedure Code 1973 (CrPC) empowers court to grant amount to victim of the offence out of fine imposed as part of the sentence. Under section 357(3) of CrPC, court may nevertheless order accused person to pay a certain sum of compensation to victim where no fine is imposed as part of sentence. Compensation is payable to victim of the crime only when fine is not imposed as part of sentence which is unfair because amount of fine is meager compare to the compensation. Moreover, incurred expenses of prosecution are deducted from the fine and remaining amount is paid to victim of crime, therefore, victim gets small amount that would not amount to justice. Courts have generally restored to sentence of fine in addition to imprisonment but compensation provision is invoked seldom because power is discretionary. Further, there is injustice, when ordered payment of compensation is not complied by accused; there is no provision in law for imposing penalty for such non-compliance. On the other hand, non-payment of fine may lead to extension of period of imprisonment. The Supreme Court in *Sarwan Singh v. State of Punjab* observed that if the accused is in a position to pay the compensation to the injured, there could be no reason for the court not directing such compensation.⁶⁷

The Supreme Court in *Delhi domestic working women’s forum v. Union of India and others*,⁶⁸ made remarkable direction to the National Commission for Women to draft scheme under which victim of rape would be given compensation even though accused is not convicted. The same should be sent to Union of India for its implementation within six months. Again, Supreme Court highlighted the pathetic conditions of victim of crime

⁶³ *Ibid.*

⁶⁴ See, the UN General Assembly Resolution no 40/34 of 1985.

⁶⁵ Opened for signature at Strasbourg on 24 November 1983, and put into force on 1 February 1988.

⁶⁶ Jeremy Bentham, *op. cit.*, p 167..

⁶⁷ (1978) 3 SCC 799.

⁶⁸ (1995) 1 SCC 15.

in *State of Gujarat and another v. Hon'ble High Court of Gujarat*.⁶⁹ Justice Thomas held that Restorative and reparative theories deserves serious consideration, victim of crime or his family members should be compensated from the wages earned in prison by the perpetrator. The court suggested the State to enact a comprehensive legislation in respect of compensation payable to victim of crime. Section 357 of CrPC has not proved to be much effective. Many persons who are sentenced to long-term imprisonment do not pay compensation and instead they choose to continue in jail in default thereof. Justice Wadhwa said,

“Criminal justice would look hollow if justice is not done to the victim of the crime. A victim of crime cannot be “forgotten man” in the criminal justice system. It is he who has suffered the most. His family is ruined particularly in case of death and other bodily injuries. An honor which is lost or life which is snuffed out cannot be recompensed but then compensation will at least provide some solace”⁷⁰.

Time has come for legislator to act on these directions, enact comprehensive legislation and provide a security to victim of crime. In recent years, European and North American Nations have enacted legislations to protect the interest of crime victim.⁷¹

Law Commission of India said, “Victim is fortunate if he gets compensation or even his expenses”⁷² and observed that, “Reparation to the victim of an offence has been receiving increased attention in recent times. In part, this is due to a realization that mere punishment of the offender though it may exhaust the primary function of the criminal law, is not total fulfillment of the role of law”.⁷³ It further recommended that Indian Penal Code should be amended by inserting compensation provision. Malimath Committee on reformation of criminal justice system said “system being heavily dependent on the victim, criminal justice has been concerned with the offender and his interest almost subordinate or disregarding the interest of victim”.⁷⁴ It added that increased victim satisfaction would, in effect, enhance the efficiency of the Criminal Justice System.

Conclusion

The mood and temper of public concerning the treatment of crimes and criminals is one of the unfailing tests of the civilization of any country.—Sir Winston Churchill said while addressing the House of Commons.⁷⁵ The justification of punishment possesses one of the most difficult jurisprudential issues. There are different theories of punishment prevalent in various ages and different justifications are offered among different countries according to variations in culture and civilizations. It is cruel to expose the guilty to useless sufferings when the punishment is too severe; on the other hand, is it not cruel still to leave the innocent to suffer? When the result of such punishment is too mild to be efficient⁷⁶ punishment must be severe enough to act as deterrent but not too severe to be

⁶⁹ (1998) 7 SCC 392.

⁷⁰ (1998) 7 SCC 392 at p.399

⁷¹ UK enacted The Criminal Injuries Compensation Act, 1995, in USA, 45 States of America have compensation schemes payable to victim of crimes.

⁷² See, Law Commission of India's Forty Second Report on the “Indian Penal Code.” p. 50

⁷³ *Ibid.*

⁷⁴ Malimath Committee Report, Volume 1: Committee on Reform of Criminal Justice System, (Minster of Home Affairs, Government of India, 2003), p.82

⁷⁵ Lakshminath, A. “Criminal Justice in India: Primitivism to post-Modernism” 48, *JILI*, (2006).p.53

⁷⁶ Jeremy Bentham, *op. cit.*, p .213

brutal. Similarly, punishment should be moderate enough to be human but cannot be too moderate to ineffective.⁷⁷ Certainty of punishment is most important for any legal system that makes the punishment less severe and any deficiency in certainty makes punishment more severe. Severe punishment demands higher standard of proof of guilt. Obviously, conviction rate would be less that is not a healthy sign of criminal justice. Certainty of punishment much depends upon the simplicity of laws and good method of procedure. Criminal justice must balance between “Justice delayed is justice denied” and “Hurried justice is buried justice” which are two important basic concepts of criminal justice. The Malimath committee observations better explains the nature of criminal justice system prevailing in India,

The system devised more than a century back, has become ineffective; a large number of guilty go unpunished in a large number of cases; the system takes years to bring the guilty to justice and has ceased to deter criminals. Crime is increasing rapidly every day and types of crimes are proliferating. The citizens live in constant fear.⁷⁸

Each theory of punishment has its own merits and demerits. Therefore, criminal justice would not be healthy if it relies on any one theories of punishment. Section 53 of IPC prescribes different kind of punishment namely, death, life Imprisonment, Imprisonment of rigorous or simple, forfeiture of property, and fine but does not mention the object of punishment that depends upon the theory of punishment. Indian Penal Code, excluding exceptions prescribes the maximum punishment and leaves imposition of appropriate punishment in the hands of judiciary, which makes the IPC flexible. The capital punishment that is part of traditional deterrent theory is retained and continued in the Indian legal system. Under the new Criminal Procedure Code of 1973, the court has to record reasons for awarding death sentences that means life sentence is rule and death sentence is exception.⁷⁹ In *Rajendra Prasad v. State of U.P.*, Justice Krishna Iyer held that giving discretion to the judges to make choice between death sentence and life imprisonment on special reasons under section 354(3) CrPC would be violative of Article 14 which condemns arbitrariness.⁸⁰ Nevertheless, the Supreme Court up held the Constitutional validity of death sentences in *Bachan Sing v. State of Punjab*, by saying it does not violate the Article 21 of the Constitution because the death sentence is an alternative and would be imposed in the most heinous crimes.⁸¹

The ratio of *Bachan Sing* case is not yet over ruled that is in accordance with The International Covenant of Civil and Political Rights 1966. Convention does not talk about the abolition of death sentences but only says that it should be imposed in most heinous crimes and not arbitrarily.⁸² Indian judiciary consistently observes these two conditions by holding that death sentences should be given in rarest of rare cases. The grey area is what constitutes rarest of rare is not defined but said it is a question of fact. In series of cases, the Supreme Court tried to lay down objective principles for determining the rarest of rare case but in fact they have become subjective principles in the hands of judges who decides rarest of rare cases. Some time the courts are unduly harsh while at other times

⁷⁷ *Supra* note 74 at 169

⁷⁸ *Ibid* at .265

⁷⁹ Section 354(3) of CrPC

⁸⁰ AIR 1979 SC 947

⁸¹ AIR 1980 SC 898

⁸² Article 6 of the Covenant on Civil and Political Rights, 1966

they are liberal. Uniformity is lacking even in the case of rarest of rare cases while imposing death sentences.⁸³

The Malimath Committee has also endorsed the view of retaining the death sentences because of new kinds of crime like terrorism, organized crime and drug trafficking which have threatened the security of society.⁸⁴ More reliance on deterrent theory would be at the risk of humanitarian. Death sentences in rarest of rare cases give more scope for reformation theory. Section 360 of CrPC gives a wide power to court to adopt lenient view in respect of young offenders. Punishment like rigorous or simple, forfeiture of property and fine are appropriate to use as the tool of reformatory punishment. The Supreme Court in *Narotam Sing v. State of Punjab* has rightly said that reformatory approach to punishment should be the object of criminal law, in order to promote rehabilitation without offending community conscience and to serve social justice.⁸⁵ However, in *M.H. Hoskot v. State of Maharashtra*, Supreme Court cautioned the judiciary for showing more leniency to offenders based on reformatory theory that would amount to injustice to the society. The offences like serious economic offences and other offences, the balance has to be maintained between the security of society and rights of offenders.⁸⁶ In *Dr Jacob George v. State of Kerala*, the Supreme Court held that the object of punishment should be deterrent, reformatory, preventive, retributive and compensatory. Preferring one theory to other is not sound policy of punishment. Each theory of punishment should be used independently or combined according to the merit of the case. Human beings neither are angels capable of doing only good nor are they demons determined to destroy each other even at the cost of self-destruction. Taking human nature as it is, complete elimination of crime from the society is not only impossible but also unimaginable. Criminals are very much part of the society and society has to reform and correct them and make them sober citizens. Society has also to look from the point of victim. If victim relies that the State is reluctant to punish the offenders in the name of reform and correction, they may take law in their own hands, they themselves may try to punish their offenders and that will lead to anarchy. Bentham's theory of penal objectives that pain of punishment of offender should be higher than the pleasure he enjoys by commission of crime. Nevertheless, this must have proportionality and uniformity too.

⁸³ *Supra* note 74 at 170

⁸⁴ *Ibid*

⁸⁵ AIR 1978 SC 1542.

⁸⁶ AIR 1978 SC 1548.