Subject:**Criminology**

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Paper : **Penology and Sentencing**

Module : **Retributive and Deterrent Theories of Punishment**

**Component - I (A)- Personal Details**

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**Component - I (B)- Description of Module**

| Items | Description of Module |
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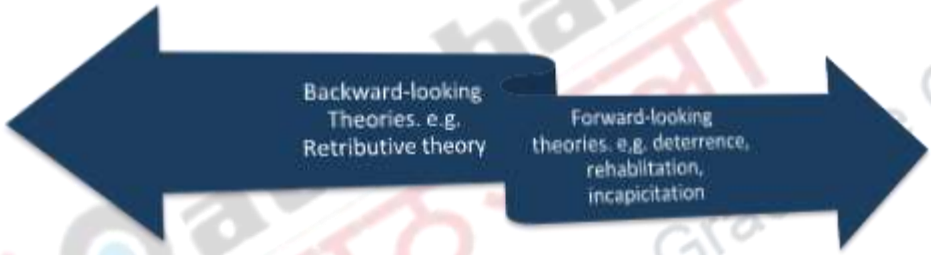
| Subject Name | Criminology |
| Paper Name | Penology and Sentencing |
| Module Name | Retributive and Deterrent Theories of Punishment |
| Module Id | Criminology/Penology & Sentencing/06 |
| Objectives | Learning Outcome:<br>• To understand the basics of the retributive theory<br>• To explore meaning of *lextalionis*<br>• To understand what is deterrent theory<br>• To explore the concept and content of *Just Deserts*<br>• To appreciate the relevance of the theories |
| Prerequisites | General understanding of the principles of criminal law. |
| Key words | Retributive, Deterrent, *lextalionis*, *just deserts*, Kant, Beccaria, Hegel |

## I. INTRODUCTION

Some of the fundamental questions about punishment continue to occupy the minds of philosophers and legal scholars who have, over the years in their effort to resolve these questions, led to the development of different theories of punishment. Broadly speaking, these theories can be categorised as *backward-looking* and *forward-looking*. Whereas retributive theory falls within the backward-looking category, "on the other side of the spectrum are those who, drawing upon Cesare Beccaria and Jeremy Bentham, offer utilitarian justifications for criminal punishment – *deterrence*, rehabilitation, incapacitation"[1], and they are thus supportive of theories that fall in the second category. The present write-up focuses upon two theories: *Retributive theory* and *Deterrence theory*.




## II. RETRIBUTIVE THEORY

"Retribution" is a word with a long history in moral philosophy where its connotations are desert, proportionality, justice and rational inquiry. [2] According to Sutherland, "At least, since the formulation of Hammurabi's code (in about 1875 B.C.) of 'an eye for eye and a tooth for tooth', it has been urged by leaders and accepted by the general public that criminal deserves to suffer. The suffering imposed by the state in its corporate capacity is considered the *political counterpart of individual revenge*."[3] It is argued by those supportive of retributive theory that "unless the criminal gets the punishment he deserves, one or both of

[1] Mike C. Materni, "Criminal Punishment and the Pursuit of Justice", 2 *Br. J. Am. Leg. Studies* 264-265 (2013)
[2] Gerome Hall, *Perennial Problems of Criminal Law* 16(1973)
[3] Edwin Sutherland and Donald Cressey, *Principles of Criminology*,287( Bombay, Times of India Press, 1965). Emphasis added. Chinnappa Reddy, J is of the view that "The Biblical injunction 'an eye for an eye and a tooth for a tooth' is often quoted as if it was a command to do retributive justice. It was not. Jewish history shows that it was meant to be merciful and set limits to harsh punishments which were imposed earlier including the death penalty for blasphemy, Sabbath breaking, adultery, false prophecy, cursing, striking a parent, etc. And, as one abolitionist reminds us, who, one may ask, remembers the voice of the other Jew: "Whoever shall smite on the right cheek, turn to him the other also?" *Bishnu Deo Shaw* v. *State of W.B.*, (1979) 3 SCC 714 at 717.

the following effects will be produced: the victim will seek revenge, which may mean lynch-law if his friends co-operate with him; or the victim will refuse to make complaint or offer testimony and the state will be handicapped in dealings with criminals."[4]


Historically, the principle of *lextalionis*, that is, an eye for an eye and a tooth for a tooth, entered the western thought through Mosaic Legal Tradition, and was applicable to both intentional and unintentional injuries. It served two main purposes: *an endorsement of measured retaliation* and *an attempt to do equity between the offender and the victim*.[5] However, the principle of *lextalionis* "came to be used as justification for the cruellest and most disproportionate of punishment, particularly in the Middle Ages" as Norton observes outlining the main reasons:[6]

> While retaliation was measured by this rule (*lextalionis*), it was early perceived that it would not necessarily be equal to the offense. One qualification added to the apparent certainty of the rule was founded upon the difference in social station between the parties--the eye of a serf did not seem to equal the eye of a lord. Also, there are no equivalent reactions to theft, blasphemy, slander, rape, or the many forms of fraudulent crimes.

[4] *Id*. at 288.
[5] Jerry E. Norton, "The Punishment Debate" 44 *Chi.-Kent L. Rev*. 83,84 (1967)
[6] *Ibid*.

Moreover, there were many such "inner contradictions" that were inherent in the principle of *lextalionis*and retributivism that led to criticisms and debates as to the philosophical justness of the principle. For instance, Beccaria rejected the retributive theory and the principle of *lextalionis.* The prime objective of punishment in Beccaria's day was *retribution* or *revenge*.[7] He expressed his rejection thus:[8]

> The purpose of punishment … is none other than to prevent the criminal from doing fresh harm to fellow citizens and to deter others from doing the same. Therefore, punishments and the method of inflicting them must be chosen such that, in keeping with proportionality, they will make the most efficacious and lasting impression on the minds of men with the least torment to the body of the condemned.

However, those supportive of retributive theory argue that "the principle of *lextalionis* need not be applied in its *exactitudeor in literal sense*. Any literal application of the principle has been rejected, in categorical term, by Kant himself…. The retributive idea implores for some kind of proportionality between crime and punishment and it disregards all punishments which are disproportionate in every sense." [9] Retributive theory and the principle of *lextalionis*found support in the writings of Hegel and Kant, two philosophers who have made rich contribution to the understanding of retributive theory. According to Kant, *lextalionis*"is the only principle which in regulating a public court, as distinguished from mere private judgment, can definitely assign both the quality and the quantity of a just penalty."[10]

**Immanuel Kant**

Kant described right to impose criminal punishment as "the right of the sovereign as the supreme power to inflict pain upon a subject on account of a crime committed by him"[11]. Kant, who believed penal law to be *categorical imperative,* said that punishment must in all

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[7]*Supra* note 1 at 270
[8]*Ibid*.
[9] Amit Bindal, "Rethinking the Theoretical Foundations of Retributive Theory of Punishment" 51 *Journal of the Indian Law Institute* 3 (2009) at 313.
[10] Immanuel Kant, *The Philosophy of Law. An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* 196 (trans. W. Hastie, The Lawbook Exchange, 2002)
[11]*Ibid*.

cases be imposed only because the individual on whom it is inflicted has committed a Crime.[12] According to Kant, *just punishment* is *retribution*; retribution is justified because the criminal law is a moral imperative the violation of which demands retribution.[13] For instance, according to Kant, if a person has committed murder, he must die, the reason being "there is no substitute that will satisfy the requirement of legal justice. There is no *sameness* of kind between death and remaining alive even under the most miserable conditions, and consequently there is no equality between the crime and retribution unless the criminal is judicially condemned and put to death."[14] However, Kant did maintain that "the death of the criminal must be kept entirely free of any maltreatment that would make an abomination of humanity residing in the person suffering it."[15] It is rightly observed that:[16]

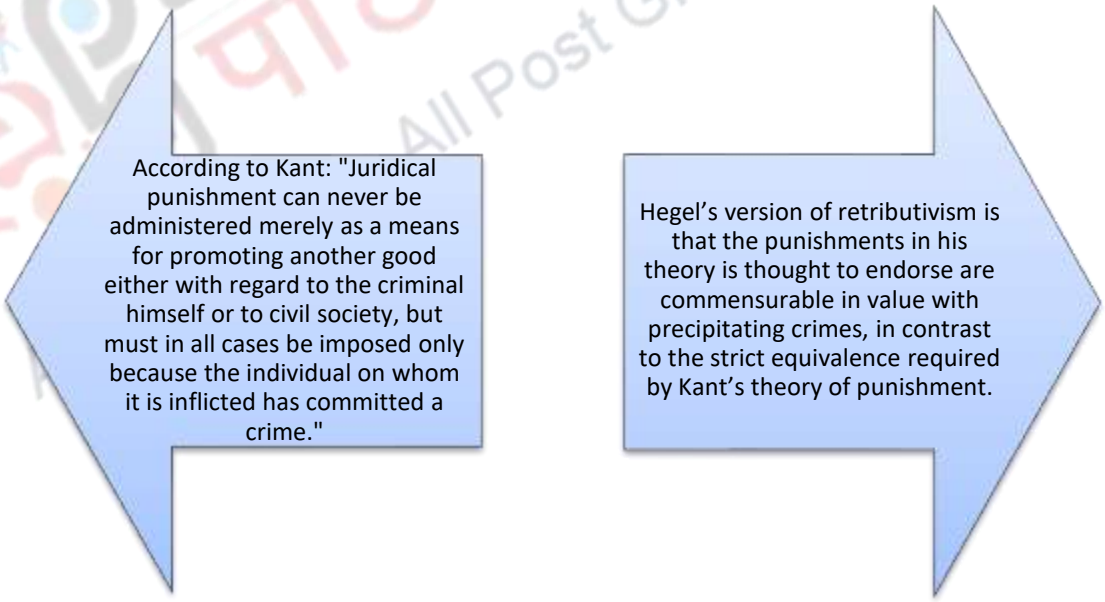
> Kant did not develop a theory of punishment of his own in any systematic fashion. He makes it plain that he prefers a retributive account-one that would make the person's punishment depend on his own deserts rather than on the penalty's societal benefits….Some passages give the initial impression of a starkly retributive theory of punishment, where only the offender's demerit, and no social utility, can be considered for any purpose. A closer look, however, suggests this is not necessarily so.

Kant in his famous and oft-quoted observation said: "Juridical punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but *must in all cases be imposed only because the individual on whom it is inflicted has committed a crime*. For one man ought never to be dealt with merely as a means subservient to the purpose of another ... Against such treatment his inborn personality has a right to protect him, even though he may be condemned to lose his civil personality. *He must first be found guilty and punishable before there can be any thought of*

[12] *Id* at 195.
[13] *Supra* note 1 at 272.
[14] Immanuel Kant, " Retributivist Theory" in Edward Allen Kent, *Law and Philosphy*,288 (New York, Meredith Corporation, 1970)
[15] *Ibid*.
[16] Andrew von Hirsch, "Proportionality in the Philosophy of Punishment", 16 *Crime and Justice* 55, 59 (1992)

*drawing from his punishment any benefit for himself or his fellow-citizens*."[17] In an another observation, he asserts:[18]

> But what is the mode and measure of punishment which public justice takes as its principle and standard? It is just the principle of equality, by which the pointer of the scale of justice is made to incline no more to the one side than the other. It may be rendered by saying that the undeserved evil which any one commits on another, is to be regarded as perpetrated on himself. Hence it may be said: "If you slander another, you slander yourself; if you steal from another, you steal from yourself; if you strike another, you strike yourself; if you kill another, you kill yourself." This is the Right of Retaliation (*jus talionis*); and properly understood, it is the only principle which in regulating a public court, as distinguished from mere private judgment, can definitely assign both the quality and the quantity of a just penalty. All other standards are wavering and uncertain; and on account of other considerations involved in them, they contain no principle conformable to the sentence of pure and strict justice.




**Georg Wilhelm Friedrich Hegel**

[17] Edmund L. Pincoffs, *The Rationale of Legal Punishment*,2-3 (New York: Humanities Press, 1966)
[18] *Id*. at 3.

Hegel agrees with the Kantian thesis that punishment equals retribution. However, unlike Kant, he gives a metaphysical justification for retribution. According to Hegel, a crime is an infringement of rights; this infringement is erased by the infringement, caused by the infliction of punishment, of the rights of the criminal, and in particular of his right to freedom.[19] Hegel's version of retributivism *vis-à-vis* Kantian version may be seen thus:[20]

> The general attraction of Hegel's version of retributivism is that the punishments in his theory is thought to endorse are commensurable in value with precipitating crimes, in contrast to the strict equivalence required by Kant's theory of punishment. As a result, Hegel's theory is praised both for being more acceptable to modern readers than Kant's so-called 'pure retributivism', as well as for being an 'emphatically anti-utilitarian' theory.

To conclude the discussion on retributive theory, it can be said, quoting Jeffrie Murphy that "The retributivist seeks, not primarily for the socially useful punishment, but for the *just* punishment, the punishment that the criminal (given his wrongdoing) deserves or merits, the punishment that the society has a right to inflict and the criminal a right to demand."[21] Retributivism justifies punishment in terms not of its contingently beneficial effects but of its intrinsic justice as a response to crime; the justificatory relationship holds between present punishment and past crime, *not between present punishment and future effects*.[22]

***Jus Deserts***

In recent times, the discourse of penal philosophy in criminal law seems to be undergoing a paradigm shift. Doctrine of proportionality has gained much acceptance *vis-à-vis* utilitarian tradition and Kantian retributive tradition.[23] If we try to decipher the factors that have led to its growing acceptance, one factor that prominently emerges is the "notion of justice" that the

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[19] *Supra* note 1 at 273.

[20] Thom Brooks, "Is Hegel a Retributivist?", available at Academia.edu (last accessed on 28.06.2016)

[21] Jeffrie G. Murphy, "Retributivism and the State's Interest in Punishment", in Nomos XXVII: *Criminal Justice* 156, 158-59 (J. Pennock & J. Chapman eds. 1985)

[22] R. A. Duff, *Punishment, Communication, and Community*, 19-20 (Oxford: Oxford University Press, 2001) Emphasis added.

[23] "The great formulator of penal utilitarianism was Jeremy Bentham, writing two centuries ago. His contemporary and critic, Immanuel Kant, supported retributive sanctions. Two centuries later, in the 1950s, H. L. A. Hart attempted a synthesis of utilitarian and desert-based approaches." Andrew von Hirsch, " Proportionality in the Philosophy of Punishment", 16 *Crime and Justice* 55 (1992)

principle seems to serve. To put it otherwise, it adds, many argue, an element of "fairness" to punishment(s) meted out. Doctrine of proportionality has, however, been beset with few scathing questions, namely, "What does the principle of proportionality require? Does the principle yield only broad outer bounds of punishment? If so, it is rather easily satisfied, by avoiding extremes of severity or leniency. Could the principle yield definite quanta of punishments-and if so, how could those quanta possibly be ascertained?"[24] As regard the juristic and judicial writings on the issue, we come across ample literature that helps us understand both the *content* and *contour* of the principle of *jus desert*.

In *Lehna* v. *State of Haryana*[25] , the Supreme Court observed, "The principle of proportion between crime and punishment is a principle of *just desert* that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that the punishment not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without [fault]."[26]

Justice Chinnappa Reddy in the celebrated case *Bishnu Deo Shaw* v. *State of W.B.*[27] observed "The retributive theory is incongruous in an era of enlightenment. It is inadequate as a theory since it does not attempt to justify punishment by any beneficial results either to the society or to the persons punished."[28] Justice Krishna Iyer also expressed his disapproval of the retributive theory in *Rajendra Prasad* case.[29] He said: "Punishment …. is not *lextalionis* of retributive genre. To be strictly … retributive, the same type of cruel killing must be imposed on the killer. Secondly, can the hanging of the murderer bring the murdered back to life? "The dull cold ear of death cannot hear the cries or see the tears of the dying convict."[30]In *Ram Narain* vs. *State of Uttar Pradesh*[31] the Supreme Court observed that "the broad object

[24]*Id*. at 75.
[25] (2002) 3 SCC 76
[26]*Id*. at 87.
[27](1979) 3 SCC 714
[28]*Id*. at 717.
[29]*Rajendra Prasad* v. *State of U.P.*, (1979) 3 SCC 646.
[30]*Id*. at 674.
[31] (1973) 2 SCC 86, para. 8(emphasis added)

of punishment of an accused found guilty in progressive civilized societies is to impress on the guilty party that commission of crimes does not pay and that it is both against his individual interest and also against the larger interest of the society to which he belongs. The sentence to be appropriate should, therefore, be *neither too harsh nor too lenient*....” In *Babl*uv. *State of Rajasthan*[32] reiterated that “As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just deserts, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is *punishment without guilt*.”[33]

## III. DETERRENT THEORY

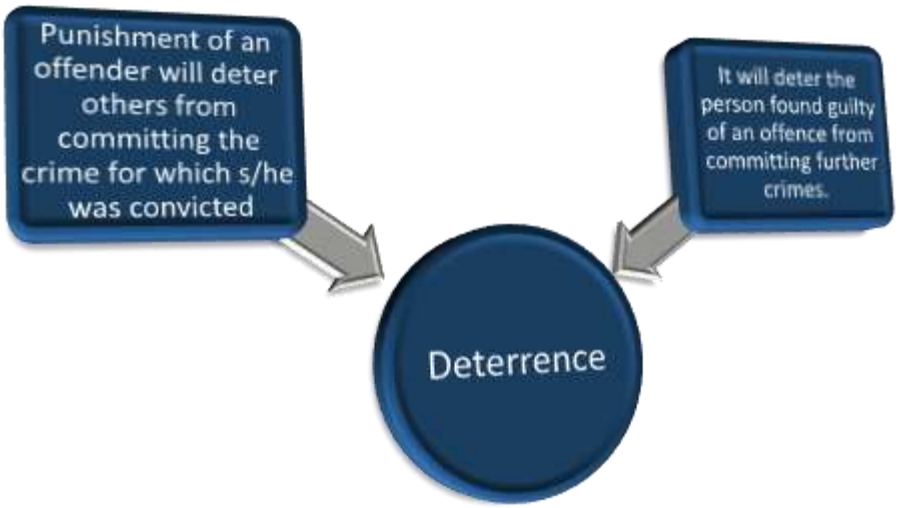
According to this theory, the purpose behind punishment should be to deter the prospective criminals. An offender is punished to be set as an example so that prospective offenders may see the consequences that they may have to face. In other words, “Deterrence is the use of punishment to prevent the offender from repeating his offense and to demonstrate to other potential offenders what will happen to them if they follow the wrongdoer’s example.”[34] It is notable that the *deterrence* is used in two senses: *first*, punishment of an offender will deter others from committing the crime for which s/he was convicted; *second*, it will deter the person found guilty of an offence from committing further crimes.[35]

[32] (2006) 13 SCC 116

[33] *Id*. at 121. Emphasis added. Also see, *State of UP* v. *Satish*, (2005) 3 SCC 114, paras. 28-30. See for detailed analysis, KNC Pillai, “The Quagmire of Confusion in Sentencing”, (2013) 3 SCC J-1

[34] Joel Meyer, “Reflections on Some Theories of Punishment”, 59 *J. Crim. L. Criminology & Police* Sci. 595, 596(1968)

[35] R C Nigam, *Law of Crimes in India*, Vol. I, 229-230 (New Delhi, Asia Publishing House,1965)




Burnett, J said to a prisoner: "Thou art to be hanged not for having stolen a horse, but in order that other horses may not be stolen."[36] Beccaria famously said:[37]

> The purpose of punishment … is none other than to prevent the criminal from doing fresh harm to fellow citizens and to deter others from doing the same. Therefore, punishments and the method of inflicting them must be chosen such that, in keeping with proportionality, they will make the most efficacious and lasting impression on the minds of men *with the least torment to the body of the condemned.*

According to Norton, "The purpose of punishment being something other than total retaliation, Beccaria concerned himself with the limits and consistency of punishment. The amount of punishment, he felt, should be defined by the legislature, and the courts left without discretion. Further, the legislature should determine this according to two factors: the destructiveness of the crime to public safety and happiness, and the inherent inducements present in the crime."[38]

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[36] *Ibid.*
[37] Cesare Beccaria, *OnCrimes and Punishments and Other Writings* 26 (Richard Bellamy ed., Richard Davies, Virginia Cox and Richard Bellamy trans., Cambridge Univ. Press, 1995).
[38] Jerry E. Norton, "The Punishment Debate" 44 *Chi.-Kent L. Rev.* 85 (1967)

Be that as it may, the deterrent theory has been criticised for many reasons, one of the prominent one can be described thus:[39]

> A very potent and tangible example of the failure of punishment as a deterrent to crime is the fact that in countries where capital punishment has been abolished, there has not been an increase in crimes meriting such punishment, nor have many of these abolitionist states re-enacted that practice, and also the fact that so large an amount of recidivism is in existence everywhere. And if capital punishment has failed to act as a deterrent, what punishment will?

Justice Hansaria in a case relating to dowry death expressed similar concerns as to the deterrent effect of death sentence. He observed: "We have given considered thought to the question and we have not been able to place the case in that category which could be regarded as the "rarest of the rare" type. The increasing number of dowry deaths would bear this. To halt the rising graph, we, at one point, thought to maintain the sentence; but we entertain doubt about the deterrent effect of a death penalty. We, therefore, resist ourselves from upholding the death sentence, much though we would have desired annihilation of a despicable character like the appellant before us."[40]

Justice Holmes was also very critical of the theory when he said: "the theory was immoral; inasmuch as it gives no measure of punishment except lawgivers' subjective opinion."[41] Despite such criticism, deterrence as an aim of punishment has not been eliminated from the policies of modern government, though it has lost much its former importance.[42] Supreme Court in *State of Karnataka* v. *SharanappaBasanagoudaAregoudar*[43] pertinently observed:[44]

> The sentence imposed by the courts should have deterrent effect on potential wrongdoers and it should *commensurate with the seriousness of the offence*. Of course, the courts are given discretion in the matter of sentence to take stock of

[39] Fanny Cohen, "Punishment or Treatment", 54 *S. African L.J.* 310, 314 (1937)
[40] *Ravindra TrimbakChouthmal* v. *State of Maharashtra*, (1996) 4 SCC 148 at 151
[41] Holmes, *Common Law*, 42-43(1963)
[42] A Laxminath, " Criminal Justice in India: Primitivism to Post-Modernism",. 48*JILI* 1 (2006)
[43] (2002) 3 SCC 738 : 2002 SCC (Cri) 704
[44] *Id*. at 741. Emphasis added.

the wide and varying range of facts that might be relevant for fixing the quantum of sentence, but the discretion shall be exercised with due regard to larger interest of the society and it is needless to add that passing of sentence on the offender is probably the most public face of the criminal justice system.

The courts have time and again reminded of the need to have punishments having deterrent effect, especially in certain specific categories of offences. For instance, in a case relating to section 364-A, the Supreme Court observed that in cases relating to kidnapping for ransom, "crime …called for deterrent punishment irrespective of the fact that kidnapping had not resulted in death of the victim. Considering the alarming rise in cases of kidnapping young children for ransom, the legislature in its wisdom provided for stringent sentence."[45] The Court further added that "whoever kidnaps or abducts young children for ransom, no leniency be shown in awarding sentence, on the other hand, it must be dealt with in the harshest possible manner and an obligation rests on the courts as well."[46] Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence.[47]

**Social dimension of deterrence theory**

According to deterrence theory, people are punished with a view to conveying a "message" to others in the society that "It is wrong to behave in certain ways, and if a person behaves in one of those ways and fails to obey the law, society will punish him or her accordingly. The expression of society's disapprobation is punishment."[48] The conveying the message, it is believed, "creates conscious and unconscious inhibitions against committing crime".[49] In the long run, it leads to a situation where one observes a "habitual obedience" at large to the laws that proscribe certain acts by way of meting out punishments. However, it has been argued by many that it debatable how far punishment acts as deterrence among the people in any given

[45] *Akram Khan* v. *State of W.B.*, (2012) 1 SCC 406 at 413
[46] *Ibid*.
[47] *State of Karnataka* v. *Krishnappa*, 2000 SCC (Cri) 755 at 83.
[48] Kevin C. Kennedy, "A Critical Appraisal of Criminal Deterrence Theory", 88 *Dick. L. Rev*. 1, 3 (1983-1984).
[49] Andenaes, General Prevention: Illusion or Reality?, 43 *J. Crim. L.. Criminology & Police* Sci. 176, 179 (1952)

society. For instance, in *Shashi Nayar* v. *Union of India*[50], one of the arguments put forth challenging death penalty on the ground of being violative of article 21 of the constitution of India was that "capital punishment does not serve any social purpose, and in the absence of any study, the barbaric penalty of death should not be awarded to any person as it has no deterrent effect". It has been argued that ever-growing number of cases, despite stringent penal provisions, is indicative of the failure of deterrence theory.[51] In short, it may be said that:[52]

> Deterrence theory is immoral because it treats individuals as means rather than as ends. Additionally, the theory relies on mass obedience. This reliance is contrary to the historical flow of civilization and democracy, which has been moving away from strong central governments, coercive force and tyranny. Deterrence theory's reliance on mass obedience, therefore, is a serious political threat to the citizenry of any free nation in which deterrence theorists influence the decision making process.

However, Supreme Court in *Maru Ram* sounded apprehensive and justified deterrent theory when it observed that:[53]

> In the present distressed and disturbed atmosphere if deterrent punishment is not resorted to, there will be complete chaos in the entire country and criminals will be let loose endangering the lives of thousands of innocent people of our country. In spite of all the resources at its commands, it will be difficult for the State to protect or guarantee the life and liberty of all the citizens, if criminals are let loose

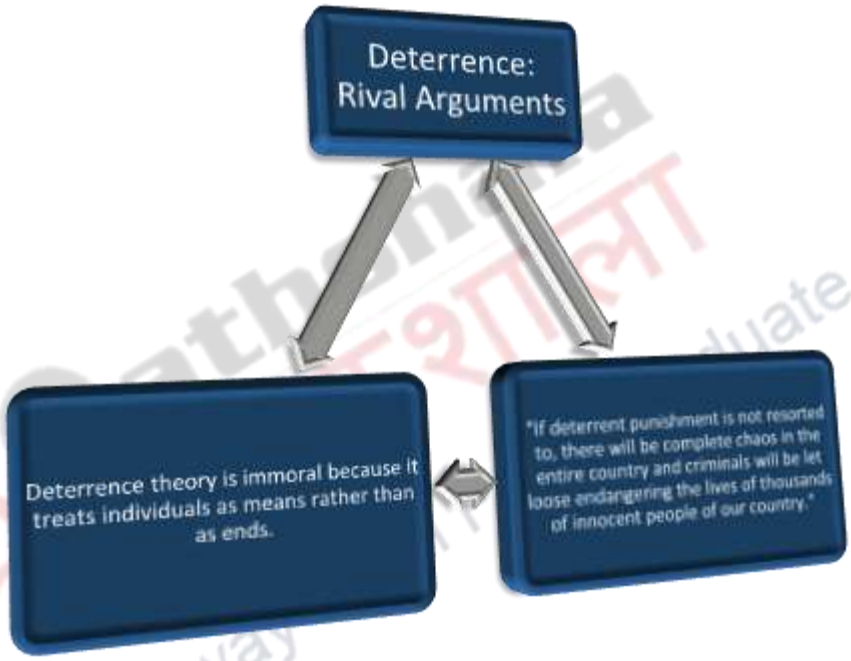
[50] AIR 1992 SC 395

[51] Studies have been done to support the assertion. "Mohan Kumaramangalam's study, referred to in Justice P.N. Bhagwati's dissenting opinion in *Bachan Singh*, has adduced evidence contradicting the positive claim that the death penalty deters murder more than life imprisonment does. The study shows that in the former state of Travancore and Cochin, a total of 962 murders were committed between 1945 and 1950 when a moratorium on the death penalty was in force, whereas a total of 967 murders were committed between 1951 and 1956 when the moratorium had been lifted. The study is particularly important because it shows that even when the death sentence was commonly employed as the main punishment for murder, it had no additional deterrent effect on the murder rate. It can, therefore, be inferred that if the heavy use of the death sentence in the pre- Bachan Singh era did not deter murder, the use of the death penalty at a fraction of its former frequency today cannot have any deterrent effect. National crime records confirm this inference." See, Yug Mohit Chaudhry, "Hanging on Theories", *Frontline* (Aug 25-Sept 07, 2012).

[52] *Supra* note 45 at 10.

[53] AIR 1980 SC 2147

and deterrent punishment is either abolished or mitigated. Secondly, while reformation of the criminal is only one side of the picture, rehabilitation of the victims and granting relief from the tortures and suffering which are caused to them as a result of the offences committed by the criminals is a factor which seems to have been completely overlooked while defending the cause of the criminals for abolishing deterrent sentences.




There are thus rival opinions as the need and efficacy of deterrent theory. It has been rightly observed that "The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims….The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary consideration when sentences are being decided."[54]

## IV. JUDICIAL APPROACH IN INDIA

[54] *Shatrughan Chauhan &Anr*. v. *Union of India* (2013),available at http://supremecourtofindia.nic.in/outtoday/wpc552013.pdf (last accessed on 28.06.2016)

A series of cases on punishment decided by the Supreme Court clearly indicate that the judicial approach in India, by and large, has been towards reformation and protection of the rights of people punished. Justice Saghir Ahmad, in *T K Gopal* v. *State of Karnataka*[55] observed that: "a criminal should be punished and the punishment prescribed must be meted out to him, *but also reforms the criminal through various processes, the most fundamental of which is that in spite of having committed a crime, maybe a heinous crime, he should be treated as a human being entitled to all the basic human rights, human dignity and human sympathy*. It was under this theory that this Court in a stream of decisions, projected the need for prison reforms, the need to acknowledge the vital fact that the prisoner, after being lodged in jail, *does not lose his fundamental rights or basic human rights and that he must be treated with compassion and sympathy*."[56]

There is no denying the fact that "award of punishment commensurate with the gravity of the offence" as Supreme Court observed in *State of M.R.* v *Bala@ Balram*[57] and such an approachis necessary "to ensure that a civilised society does not revert to the days of "eye for an eye and tooth for tooth". Not awarding a just punishment might provoke the victim or its relatives to retaliate in kind and that is what exactly is sought to be prevented by the criminal justice system we have adopted."[58] "This philosophy is woven into our statute and our jurisprudence and it is the duty of those who administer the law to bear this in mind", the Court reminded.[59] Supreme Court has on a number of occasions indicated that the punishment must fit the crime and that it is the duty of the court to impose a proper punishment depending on the degree of *criminality* and *desirability* for imposing such punishment.[60]

[55] (2000) 6 SCC 168.
[56] *Id*. at 177. (emphasis added). Also see, 42nd Report of The Law Commission of India (para 3.9).
[57] (2005)8 SCC1(*Per*Balasubramanyan, J)
[58] *Id*. at 6.
[59] *Ibid*. Long back, Krishna Iyer, J cautioned *Rajendra Prasad* v. *State of U.P*., (1979) 3 SCC 646 thus, "Judges are entitled to hold their own views, but it is the bounden duty of the court to impose a *proper punishment*, depending upon the degree of *criminality* and the *desirability* to impose such punishment as a measure of social necessity, as a means of deterring other potential offenders." *Id*. at 708, para. 195.
[60] *State of M.P*. v. *Bala*, (2005) 8 SCC 1 at 7. Also see, *Earabhadrappa* v. *State of Karnataka*, (1983) 2 SCC 330; *Rajendra Prasad* v. *State of U.P*. (1979) 3 SCC 646.

However, amid the chorus of reformative approach, there are instances where the Supreme Court has emphasised "deterrence". For example in *State of M.P*. v. *MunnaChoubey*[61], Supreme Court observed that:[62]

> Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order and public interest, cannot be lost sight of and per se require exemplary treatment. *Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result wise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.*

Be that as it may, Justice Fazal Ali in *Maru Ram*[63]raised one pertinent question that needs to be pondered upon. The question he raised was: "should the country take the risk of innocent lives being lost at the hands of criminals committing heinous crimes in the holy hope or wishful thinking that one day or the other, a criminal, however dangerous or callous he may be, will reform himself. *Valmikis* are not born everyday and to expect that our present generation, with the prevailing social and economic environment, would produce Valmikis day after day is to hope for the impossible."[64]

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[61] *State of M.P*. v. *MunnaChoubey*, (2005) 2 SCC 710. In *Bala* case, Justice G P Mathur, relying upon *MunnaChoubey* dictum, observed that: "*It is true that reformation as a theory of punishment is in fashion but under the guise of applying such theory, the courts cannot forget their duty to society and to the victim. The court has to consider the plight of the victim in a case involving rape and the social stigma that may follow the victim to the grave and which in most cases, practically ruins all prospects of a normal life for the victim.* Could a court afford to forget these aspects while imposing a punishment on the aggressor? I think not. The court has to do justice to society and to the victim on the one hand and to the offender on the other. The proper balance must be taken to have been struck by the legislature. Hence, the legislative wisdom reflected by the statute has to be respected by the court and the permitted departure therefrom made only for compelling and convincing reasons."(2005) 8 SCC 1 at 7. Emphasis added.

[62] *Id*. at 716. (emphasis added)

[63] 1981 (1) SCR 1196

[64] *Id*. para 1251.

## V. Summary:

Retributive theory and Deterrence theory are two such theories of punishment that continue to occupy public and intellectual space as regard their efficacy and relevance. Retributive theory is premised on the idea that a criminal should get the punishment s/he deserves otherwise it may lead to a situation where victim may seek revenge or s/he may well refuse to seek access to criminal justice system put in place by the state. This will in effect handicap the state to deal with criminals. However, the idea of punishment in the form of "an eye for an eye and a tooth for a tooth" remains debatable and the principle of lex talionis has invited criticisms in plenty.

As regard deterrence theory of punishment, the basic premise of this theory is that punishment should be such that it deters the criminal from committing the crime s/he has been convicted for, and more than that, the punishment so inflicted deters others from committing such crimes. One of the criticisms against deterrence theory is that it treats individuals as means rather than as ends. It however remains to be debated how far deterrence theory has been successful in achieving the purpose it is believed to serve.