CHAPTER III

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Punishment has been known and called as 'Trivargarupa', the symbol of Dharma, Artha and Kama.¹ The King (State) vested with powers to punish a person found guilty of an offence has been praised by Dharmashtras as a great gift to mankind. Without it there would be chaos, torments of fear, insecurity to life and property. It is only the fear of punishment that governs all created beings; it protects them. It is due to punishment that an individual behaves properly and is kept within limits. However, it is impressed that the power to impose penalty must be exercised judiciously; punishment properly imposed keeps the people happy but the want of which leads to destruction of an orderly society.

The principle is that the King alone could impose penalty and that he was bound to impose penalty whenever the commission of an offence was brought to his knowledge. The King had been under the duty to punish offenders, this power of the King was his prerogative. No person other than the King could impose this penalty. If he did so, that would have been unlawful and made such person liable to be punished by the King. Punishment, infact, imposes a three fold restraint on criminal tendency. In other

¹ M.B. Shanti 15, 5-6
राज्य के भाग्य के दर्शन के भांग पाप न विविधि ।
अर्थ के भाग्य के दर्शन के भांग पाप न विविधि ।
कर्म के भाग्य के दर्शन के भांग पाप न विविधि ।
भूत राज्य के दर्शन के मधु कंठे पुन: सिद्धतम ॥
words the people hesitate to commit offences for the following three reasons:

(i) for fear of being punished by the King;
(ii) for fear of being punished by Yam; and
(iii) for fear of adverse public opinion.

Kautilya has defined 'dandaniti' as intimately connected with the administration of the State. Definite guidelines for the imposition of penalties were laid down. In 'Shanti Parva' of the Mahabharata, Rajdharma (duties of the King) has been discussed in several verses. The object of imposing penalty other than death was to make the guilty person realise (the crime he had committed) reform himself and live thereafter as a law abiding citizen. The belief of the time was that by suffering a penalty from the King the offender got himself purged and became pure.²

In ancient literature, several classifications of punishment were made such as fie, using harsh words, giving corporal punishment or even death sentence. But the King was bound to know the nature of the offence committed, the place time, strength, deed and wealth in respect of which it was committed. Sir Henry Maine has observed that;

"all theories of subject of punishment have more or less broken down, and we are at sea as to first principles". ³

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2. See, Manu 8 318 : राजुभि: कुलदातः कुशा पापान मानवः I
   निमित्तः स्वर्गेयविषयः सन्तः स्वकृतिविवधायः II

It is so indeed because we find that the makers of our criminal law have failed to lay down a definite theory about the basis and nature of punishment. Holtzen Droff has observed that, "no uniform, generally recognised, and universal theory of punishment for all ages and for all people exists." However, it is attempted had to critically review all the purposes and formulating penalties which have been stressed and emphasised from age to age and country to country.

Much confusion has been caused by various writers who have put forward different theories of punishment. This is because those who have advocated their various "theories", or attempted to counter opposite "theories", have generally not argued on common grounds. They have been arguing as though they were all trying to answer the same question (why do we punish?), whereas in reality they have failed to appreciate that there are several quite distinct questions that need answers such as: What is the purpose of punishment? What is the justification of a punishment? To whom may punishment be applied? How severely may an offender be punished? Until one has agreed upon the question it is difficult to have a meaningful discussion as to the answer.

Nevertheless in the interests of clarity of exposition it is necessary to state here the various competing theories of punishment. We will then be in a position to return to the series of distinct questions posed and to answer each in turn. The makers

of our criminal law have failed to lay down a definite theory about the basis and nature of punishment. Again and again I have heard men of juristic distinction express the same opinion. Moreover, on the basis of past experience and judicial pronouncements an attempt to analyse briefly the purpose and utility of the sentence vis-a-vis resocialization of the offenders has been made here. The following five constitute the purpose of punishment:

1. Retribution:

Prior to having detailed discussion over the principle of retribution it is necessary to understand the different connotations in which this word retribution has been used. It generally indicates one of the following implications: vengeance, denunciation, reprobation, atonement, expiation or to desert. Each of these has been discussed here separately in detail.

Retribution means retaliation. The retributive purpose of punishment is based on revenge. It aims at restoring the social balance disturbed by the offender. Under this principle the offender should receive as much pain and suffering as inflicted by him on his victim to assuage the angry sentiments of the victim and the community. Sir James Stephen observes that criminal law
stands to the passion of revenge in the same relation as marriage to the sexual appetite. 5 Russel in describing its working among the Pima Indians says that the vengeance operated to prevent homicide. 6

Salmond is also of the opinion that 'conception of retributive justice still retains a prominent place in popular thought. It flourishes also in the writings of the theologians and of those imbute with theological modes of thought, and even among the philosophers it does not lack advocates. Kant, for example, expresses the opinion that punishment cannot rightly be inflicted for the sake of any benefit to be derived from it either by criminal himself or by society and that the sole and sufficient reason as well as justification of it lies in the fact that evil has been done by him who suffers it. 7

It is also argued that the justifying reason for having a system of criminal law, a system of commands plus threats, is that the system minimizes anti-social conduct and the justifying reason for punishing some one, is that he has broken the law and thus incurred the penalty. 8 The ultimate justification for any punishment is the protection of innocent members of society from the depredations of dangerous persons. 9

7. Salmond: Jurisprudence, 10th edn. p. 118.
Stephen, suggests that the infliction of punishment is justified by hatred and hating the criminal is morally right. Dr. Gour, is of the opinion that both personal and public sentiments demand that the person, who has made the other person suffer unjustly, should himself be made to suffer.10

According to the retributivist, 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 evil for evil but the righting of a wrong. It implies the imposition of a just (but no more than a just) penalty and automatically rules out excessive punishment, and therefore, capital punishment.

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. Punishment is not compensation like the "blood money" of Islamic law. It is not lex talionis of retributive genre. To be strictly compensatory or retributive, the same type of cruel killing must be imposed on the killer. But, 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.

It is difficult to appreciate how retaliatory motivation can ever be countenanced as a justificatory reason. The reason

is wholly inadequate since it does not justify punishment by its results, it merely satisfies the passion, for revenge masquerading as righteousness. The retribution involved in the theory—"Tooth for tooth" and "an eye for eye" has no place in the scheme of civilized jurisprudence and we cannot turn a deaf ear to the petitioner's claim for justice.

According to Salmond, the retributive theory, gratifies the instinct of revenge or retaliation which exists not only in the individual wronged, but also in the society at large. He has further observed:

"... the emotion of retributive indignation, but in its selfregarding and sympathetic forms, is even yet the main spring of the criminal law.... It is to the fact that administration of justice owes a great part of its strength and effectiveness...."

Oppenheimer, observes that whatever be the merits and demerits of vengeance or retribution, as the purpose of punishment, one may agree with Bentham, that "there can be no doubt that revenge is sweet, even to modern man... the pleasure of vengeance call to my mind sermonis riddle... It is sweet coming out of terrible, it is the honey dripping from the lions mouth".\(^\text{12}\)

No doubt, various arguments have been raised for the justification of the retributive theory. But, Prof. Kenny, strikes a note of caution in the following words:

"...to elevate the moral standard of the less orderly classes of the community is undoubtedly one of the functions of the Criminal Law, but it is a function which must be discharged slowly and cautiously. The law would be only stultifying itself, if when public opinion is not ripe, it converts offences, which are lightly regarded by the community into crimes requiring grave penalties."  

(a) Vengeance:

Vengeance is the revengeful attitude of the victim towards the offender. The criminal, indeed, proceeds upon the principle that it is morally right to hate criminals. Lee observes the act which is today described as a crime by then looked upon as a private wrong. The wronged party not the state or that which stood for the state, brought suit. ¹⁴ Punishment cannot rightly be inflicted for the sake of any benefit to be derived from it either by the criminal himself or by society and that the sole and sufficient reason and justification of it lies in the fact that evil has been done by him who suffers it. It highly desirable that criminals should be hated and the punishment inflicted upon them should be so contrived as to give an expression to that hatred. Stephen observed:

"...The infliction of punishment by law gives definite expression and a solemnratification and justification to the hatred which is excited by the commission of the offence, and which constitutes the moral and popular as distinguished from the conscientious sanction of that part of morality which is also sanctioned by the criminal law. The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals,

¹⁴ Lee: Historical Jurisprudence, p.375.
punishments which express it... I am also of opinion that this close alliance between criminal law and moral senti-
ment is in all ways healthy and advantageous to the commu-
nity. I think it highly desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing any gratifying healthy natural sentiment can justify and encourage it".

This desire for vengeance supposedly operates at two levels. First, it is asserted that punishment satisfies the victim's (or his relatives and friends) desire for vengeance and the state is merely exacting vengeance on their behalf to prevent private reta-
liation.

Secondly, it is asserted, that quite apart from any societal response on behalf of the victim, there is a public need for ven-
geance. It is argued that there is an instinctive demand which is active in every human being to retaliate just as an animal strikes back with hate at those who attack it. This reaction is not only understandable but also desirable as a socially acceptable outlet for our aggressions.

Thus, it has been suggested that punishment based on ven-
geance "represents the break down of human intelligence as well as good-will. It shows perhaps the ugliest phase of our human nature."

(b) Denunciation or Reprobation:

The word "denunciation" connotes... The denunciatory purpose has been argued in favour of death penalty. Indeed, the punishment inflicted on the accused should adequately reflect the revulsion felt by the great majority of citizens. The ultimate justification of any penalty is not that it is deterrent but that it is the emphatic denunciation by the community of a crime.

Death penalty, in fact, is necessary not because the preservation of society requires it but because society demands it. It is an expression of the community's hatred, fear, or contempt for the convict which alone characterises physical hardship as punishment.

The denunciatory purpose is a remnant of a primitive society which had no respect for the dignity of man and the worth of the human person and seeks to assuage its injured conscience by taking revenge on the wrong doer.

The mode and temper of the public with regard to the treatment of crime and the criminal is one of the most unfailing tests of civilization of any country. Now the manner in which a society treats offender affords the surest index of its cultural growth, socio-economic, socio-political and socio-legal development.

The Royal Commission on capital punishment observed:

"Whilst everyone agrees that crimes must be punished, there is profound disagreement as to the form which punishment should take. Many are inclined to test the efficacy of punishment, solely by its value as a deterrent, but this is too narrow a view. Punishment is the way in which society expresses its denunciation of wrongdoing; and in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else. If that were so, we should not send to prison a man who was guilty of motor manslaughter, but only disqualify him from driving; but would public opinion be content with this? The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not... some cases are so outrageous that irrespective of the value of the death penalty as a deterrent, the great bulk of the community consider that the only fitting penalty is death".18

The implication of this statement is that the death penalty is necessary not because the preservation of society requires it but because society demands it. Despite its high moral tone and phrase, the denunciatory theory is nothing but an echo of what Stephen said in rather strong language: "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite".19 The denunciatory theory is a remnant of a primitive society which has no respect for the dignity of man and the worth of the human person and seeks to assuage its injured conscience by taking revenge on the wrong doer.

18. Idem
The denunciatory theory is as inadequate as the retributive theory since it does not justify punishment by its results. As Prof. Hert point out the idea that we may punish offenders not to prevent harm of suffering or even the repetition of the offence but simply as a means of emphatically expressing our condemnation, is uncomfortably close to the human sacrifice as an expression of righteousness.

**Denunciation As a Justification for Capital Punishment:**

The denunciation theory does not justify punishment by its results. Imposition of punishment is not with the object for preventing the offender from committing further offences or repetition of the offence but simply as a means of emphatically expressing the condemnation. Revenge, in fact, is an elementary passion of a brute and betrays lack of culture and refinement.

Infliction of punishment as a denunciation reveals anguish of the society against the offender. Since the murder is one among the gravest offences against the society, capital punishment is only the fit penalty for the commission of such offences. The denunciation theory of punishment justifies the capital sentence as an expression of the moral indignation of the society against the criminal.

The denunciatory theory was put forward as an argument in favour of death penalty by Lord Denning before the Royal Commission:
"The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the object of punishment as being deterrent or reformative or preventive and nothing else. The ultimate justification of any punishment is not that it is deterrent but that it is the emphatic denunciation by the community of a crime, and from this point of view there one some murders which in the present state of opinion demand the most emphatic denunciation of all, namely, the death penalty." 20

From the following observation of the Commission it seemed to be agreed with the view of Lord Denning about the justification submitted for the death sentence. The Commission observed:

"... the law cannot ignore the public demand for retribution which heinous crimes undoubtedly provoke, it would be generally agreed that through reform of the Criminal Law ought, sometimes to give a bad to public opinion it is dangerouse to more too far in advance of it". 21

Thus, a society which is truly cultured, a society which is reared on a spiritual foundation like the Indian society, can never harbour a feeling of revenge against a wrong doer. On the contrary, it would try to reclaim the wrong doer and find the treasure that is in his heart.

(c) Atonement or Expiation:

Atonement or expiation, says Rupert cross, may be regarded as a third sense in which the word "retribution" is used. The offender must undergo some evil, not in order to satisfy the aggrieved individual's desire for revenge, not in order as a

20. Supra Note 17.
21. Idem
mark of the public's disapproval of his conduct but for his own shake so that he may come to realise the justice of his punish-
ment. 22

Salmond observes that to suffer punishment is to pay a debt due to the law that has been violated. Guilt plus punishment is innocence. 23 For Lilley, the wrong doer by committing a crime has incurred a debt. Justice requires that the debt be paid, that the wrong be expiated. 24 However, Saleilles speaks of puni-
ishment as a "religious ceremony". It is solemnised by formalities, sanctioned by law and ritual imposing one caremony for the verdict and another for its execution. 25

This is regarded as a species of retribution in that the offender is "paying his debt" owed to society, and in so doing, becomes reconciled with that society. The focus is on the past crime; the attempt is to wipe the slate clean. However, unlike other retributive theories the emphasis here can be on the offen-
der's perspective. It is thought that he wants to expiate his sins; he needs, and perhaps even has a right to, punishment so that he can be cleansed and have his reputation restored. These ideas stem largely from the religious influences on our culture, but some would argue that there is a deeper psychological explanation underlying an offender's need for expiation. From the time we

24. Litten : Right and Wrong, p.218.
are children we are conditioned to expect punishment when we have done wrong. Guilt is a state of tension which gives rise to a need for the removal of this tension. We are conditioned to expect this relief though punishment. The most famous illustration of this form of punishment comes from Dostoyevsky's Crime and Punishment in which Raskolnikov, after committing a brutal murder, becomes obsessed with feelings of guilt and eventually gives himself up as the only means of coming to terms with himself and achieving peace of mind. Some of these ideas are illustrated by the following case. The defendant was to be punished so that he could expiate his sins, and thereafter become an accepted member of society again.26

According to this view the offender must be made to work off his guilt; he must be purified through suffering: "The essence of the expiatory view is that in suffering his punishment, the offender has purged his guilt, has 'paid for' his crime, and that his account with society is therefore clear.27

Expiation or Atonement as a Justification for Capital Punishment:

When punishment is exacted visibly or publicly in the spirit of appeasing the community or catering to the multitude, the element of expiation is certainly present. Puritive action against the culprit gives the community a sense of its moral superiority,

an assurance that virtue is regarded after all. It allows society to rally round its moral values and vitalize its sense of solidarity. Hostile action against offenders brings about cohesiveness in society when malefactors are made to expiate especially, before the multitude, society goes on a moral orgy, the recovery from which restores social equilibrium.\footnote{28}

Justification of punishment in expiation theory is based purely on economics i.e. from a Utilitarian point of view in terms of social profit and loss.

(d) Desert:

For a criminal becoming innocent if he has committed any crime, he deserves punishment to be awarded.\footnote{29} Punishment purifies the offender. It has been our old maxim that a sinner could always get himself purged of the sin by undergoing punishment and it gave him an opportunity to reform himself and give a fresh lease to his life.\footnote{30}

The word 'desert' is also used for 'deserve' as its conguate. The word 'deserve' is widely used for rewards awards, prizes and grades as well as punishments. The word 'desert' is somewhat less emotionally loaded.\footnote{31}

In everyday thinking about punishment, the idea of desert figures prominently. Ask the person on the street why a wrong-

\footnote{28. Iyer, Krishna, op.cit.,p.124.}
\footnote{29. Salmond, op.cit.,p.119.}
\footnote{30. See Supra Chap.III note 2.}
\footnote{31. Clarkson & Keating, op.cit.,p.7.}
doer should be punished, and he is likely to say that he 'deserves' it. Yet the literature of penology seldom mentions the word. Instead, there is usually listed—along with the three traditional utilitarian aims of deterrence, incapacitation, and rehabilitation—a fourth aim of retribution. We do not find 'retribution' a helpful term. It has no regular use except in relation to punishment, so that one is precluded from learning about the concept from the words use in other contexts. It also seems some what narrow. The Oxford English Dictionary, for example, defines retribution as 'recompense for, or requital of evil done; return of evil': this suggests a particular view of why punishment is deserved, namely, that the offender should somehow be 'paid back' for his wrong. Yet there are other explanations of deserved punishment which do not rely on this notion of requital-of-evil. Finally, the word is, perhaps through historical accident, burdened with pejorative associations.32

Over the last decade "theories" of punishment such as deterrence and rehabilitation have come under increasing attack both by academics and lawmakers. The view that has fast gained ascendency is that we punish criminals primarily because they deserve it. To gain such a wide acceptance it has been necessary for proponents of this view to shun psychological notions of retribution concerning revenge, and to rest their case on the more acceptable philosophical ideas of Kant that a man deserves to be punished

32. Idem
if he has broken the law. In this way we are according a man respect as an autonomous and responsible human being who has chosen to commit a crime. A man who commits a crime breaks the social contract between all members of society that is necessary for peaceful co-existence. Only through punishment can the defendant's advantage be eliminated and social equilibrium restored.

The theory has been criticised on many grounds. First, the retribution as a concept of punishment implies equation of severity of punishment with the gravity of consequences. Howard Jones has rightly pointed out that when we really administer a penal system, so that the amount of pain suffered is graduated in relation to any criterion whether of guilt or otherwise, suffering is essentially subjective. Any two offenders may differ widely in their sensitivity, to various types of punishment. As a result social opprobrium may be more painful to one than the other. Secondly, this theory does not hold good for those who turn to be offenders not on their own, but due to the socio-economic or political reasons. The third and more fundamental objection has been advanced by philosophers, from Socrates to Hobhouse, that infliction of evil upon anyone can never in itself be good. Lastly, the punishment based on retribution, results in a chain of causation of crime, and from it emerges the gang of criminals.

In the rule of retaliation the injured man or his group finds satisfaction in revenge. Criminologists are of the opinion that this is most ancient and pre-mature approach to punishment which was based on instinctive human reactions. The retributive theory has no place in the modern scientific penology.

It is believed that revenge is 'personal' and cannot be regarded as the basis of punishment in any civilized society. Further there is no hope for resocialization of the offenders under this theory.

(2) Deterrent:

The deterrent purpose of punishment is usually intended to deter the offender from repeating the crime and to make an example to deter others from committing the crime for which the offender is convicted. If intending criminals are to be deterred by the threat of punishment, it is naturally essential to the efficency, to the threat that they should be made to realise that it will be carried out if the offence is committed. The deterrent principle differs from the preventive principle not in essence but on its emphasis, the latter preventing the individual culprit from repeating the offence, and the former preventing crimes in general from their occurrence in society. The deterrent, infact, aims at

instilling in the offender a fear of the punishment by inspiring in him a healthy respect for the law and integrity of the society as a whole. In this sense deterrence is sometimes said to be individual.

The threat of gallows is an argument against committing murder or other capital offence which the meanest intelligence can grasp. Since the will to live is a fundamental instinct and death is traditionally the 'King of terror', (therefore) the theory is based on the hypothesis, that the prospective criminals will be deterred from committing the crime, when those accused of the crime are punished adequately. This theory was the basis of the punishment in the medieval ages and consequently death or corporal punishments therefore were inflicted even for the minor offences.

The deterrent theories seek to discourage crime. In the case of individual or specific deterrence it is hoped that the experience of punishment will be so unpleasant that the offender will not reoffend. The task of the sentence is therefore to look to the future and select the sentence which is likely to have most impact on the individual. In the case of some offenders, no punishment at all may be necessary- the risk of the convicted person reoffending may be minimal. In other cases the required sentence may be so severe as to be inhumane.

It is often said that every time a crime is committed the theory of deterrence is weakened; it is an argument that has some force when applied to the re-offender. One can argue that his reconviction reveals the failure of the previous sentence. Under this theory it is the threat of punishment that deters people from committing crimes. At the Legislative Level, the Parliament lays down penalties to threaten those who might contemplate crime. At the sentencing level, offenders are punished in order that others will be discouraged from committing crimes; this punishment is treated as an example of what will happen if others engage in similar activities.

There are two aspects of this theory. Firstly, punishment "at the normal rote" must be imposed in most cases to keep the threat of punishment alive. But secondly, when a specific type of crime is on the increase or has attracted much publicity, excessively severe penalties (known as "exemplary sentences") may be imposed to try and prevent that particular crime. The theory of general deterrence rests upon one crucial assumption—that people are deterred from committing crime by the threat of punishment. Is this assumption justifiable? It is assumed that as in everyday life the infliction of pain or its apprehension keeps people away from certain prescribed behaviour, the same purpose is served by punishment in relation to conduct forbidden.

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by law. It has been suggested that the so called deterrent approach is a veiled form of the retributive spirit. There seems to be no answer to the question as to whether punishment really deters the offender in future or other members in the community. Obviously, it will be a difficult task, almost next to impossible, to establish in a clearcut manner as to who has been deterred, and on what occasions, by the apprehension of infliction of punishment. As a result, the statistical evidence for the effectiveness (or the lack of it) of deterrents is scarce and of limited applicability.

The efficacy of deterrent aspect of punishment can be pointed out with reference to the Islamic law of crimes as applied in Saudi Arabia, the only country where the system with all its severity is being applied even now. Muslim law of crimes, like other laws of medieval ages, is very severe in its application to offenders. For instance, mutilation of limb is possible as punishment in a case of theft. It is reported that crimes are almost unknown in Saudi Arabia and it is a common sight in towns where people leave their shops open and unattended even while they are away from them for some time. It may be pointed out, however, that several other factors might be operating for creating such a situation, like economic security and religions injunctions. Further, it may be observed that deterrence is not the only purpose of criminal law but it has also to maintain some other values as well. The draftsman of the Indian Penal Code gave due impor-

39. SIDDIQUE AHMAD: Criminology problem & perspectives, pp.48-49.
tance to the deterrent theory of the punishment and even now the concept of deterrence receives a prime consideration in the sentencing process.

In Dulla Vs. The State, the court emphasised that the twin objects of the punishment, are to prevent a person from repeating the crime and prevent others from committing it.

In Khana Saday Singh Vs. State, the court laid down that of all the important objectives of punishment, the deterrent object is an important one. Again, in Yadu Ram alias Anand Sagar Vs. State of Jammu & Kashmir, the High Court enhanced the sentence of seven years to that of ten years, and observed: in fact, such persons did not deserve any sympathy or consideration from the court, on any ground whatsoever, and the sentence imposed on such persons should be so deterrent as to serve a living example for others to prevent them from being a grave menace to society. Similarly, the court in a number of judgments, either refused to reduce the sentence or enhanced it, on the ground that the offence committed by the accused was a serious one and thus deserved a deterrent sentence.

No doubt, there is a wide acceptance of deterrence doctrine for preventing the commission of crimes. But the criminologists argue that this theory is not based on human conduct. It is a

40. AIR 1958 All 198.
41. AIR 1960 All 190.
42. 1972 Cr.L.J. 1464. In this case accused was convicted under section 376, Indian Penal Code.
punishment not to suit the criminal, but the crime. Justice Holmes, rightly observes, that what we have is better than a blind guess to show that the criminal law in its present form does more good than harm.

The deterrent theory of punishment is criticised on many grounds. First deterrent penalty has never achieved its end. Secondly, the severity in punishment does not necessarily reduce the crime rate. As in U.S.A. the statistical research has shown that the rate of murder in the states, where death penalty for committing murder has been abolished, has not increased. Eysenck, 43 observes that one may flog people for certain type of offences, but instead of deterrence it seems to have the opposite effect. Although, the punishment is severe, the rate of recidivism is greater, than it would have been without flogging. Thus the deterrent punishment tends in the direction of cruelty without fruitful results.

Thirdly, there is a sense of resentment about the deterrent dose of punishment, which the recipient considers to be unjust.

Many prisoners seem to have a smouldering sense of injustice, which often perpetuates their anti-social tendencies. It has generally been observed that deterrent sentence often hardens a prisoner. A prisoner with the long term imprisonment or any other deterrent sentence, emerges like a hero in the prison commu-

nity and commands respect from those who have been convicted and sentenced for minor offences. Moreover, the violation of the prison rules and even prison riots, are often the outcome of the prisoner's resentment against deterrent sentence or prison hardships.

Moreover, the prisoner's who were sentenced for long terms of imprisonment showed a sort of resentment against the society and were hostile towards the criminal justice system. Lastly, the fear inspired by most terrifying punishments, is blinded by long familiarity with it. Beccaria, in this regard points out:

"... the more cruel punishments become the more human, minds harden, adjusting themselves, like fluids, to the level objects around them, and the ever living force of the passions brings it about that, after a hundred years of cruel punishments, the wheel frightens men just as much as at first did the punishment of prison..."44

Further, severe punishment for trivial offences, makes the people unwilling to cooperate in carrying out the punishment. The deterrent punishment also levels no hope for the correction and resocialization of the offenders.

Deterrence as a justification for Capital Punishment:

The primary object of all forms punishment including death penalty is deterrent. Here the question arises, whether capital punishment is the most desirable and effective means for deterring

the criminal from committing the offence. Is the capital punishment essential to decrease the number of murders? The answer to such questions can be well found in Stephen's\textsuperscript{45} statement:

"No other punishment deters men so effectually from committing crimes as the punishment of death. This is one of those propositions which is difficult to prove simply because they are in themselves more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction. The threat of instant death is the one to which resort has always been made when there was an absolute necessity for producing some result. Those who argue that the punishment of death does not terrify may be challenged to answer this single question. Suppose a pistol were levelled at the head of a man proposing to commit murder and suppose he knew that the death of his victim would immediately be followed by his own, does anyone suppose that the murder would be committed?"

The deterrent effect of the death penalty is emphasised by Stephen even further:

"In any secondary punishment, however terrible, there is hope; but death; its terrors cannot be described more forcibly. Be bold enough and pitiless enough, and human nature will give way. Few things, indeed, hardly even great virtues, will bear up against the threat of death enforced without shrinking by irresistible power. If this is the case where the object is to over come the strongest passion of the human mind, such for instance as patriotism and religion, is it to be supposed that mere vice will fail to be affected by it? If the fear of death will make men desert their country and deny their God, is it to be supposed that it will have no influence at all on the mind of a man who is plotting murder? It would require the strongest evidence to prove a proposition so improbable; but if it were proved, it would prove too much. It would

\textsuperscript{45} Stephen, Capital Punishment in Fraser's Magazine Vol. XIX June 1864, p.753.
prove that legal punishment does not deter at all, for it can hardly be contended that of the two, the fear of penal servitude or imprisonment is more terrible than the fear of death.

Stephen in this connection has further observed:

"Does the death penalty for first degree murder really serve as a deterrent to potential murderer? All human beings fear the loss of their lives, even those, who may be suffering from major mental disturbances. The instinct of self preservation is fundamental and the threat of death apprehended as such must have a powerful determining influence on the voluntary direction of human activity. No one will knowingly drink poison or cost himself over a precipice unless he is so deranged that he cannot evaluate the consequences of what he is doing or unless he studiously chooses the alternative of death to continued existence in what he judges to be an intolerable situation. The claim that the death penalty itself decreed for the commission of a major crime, will not exercise a deterring influence on the great majority of potential criminals, contradicts one of the fundamental facts of human psychology."

Capital punishment, as a deterrent, in general seeks to control future events in "three ways":

(a) to stop the offender from offending again (particular deterrence);

(b) to deter other potential offenders (general deterrence); and

(c) to protect the society from the persistent offender (protection).

Whether death penalty works as a deterrent for homicides several learned professors and commissions have conducted deep studies. Prof. Ehrilien and Prof. Thorsten Sellin, Akman,

46. Idem
Taylor are on top in conducting such studies. Prof. Sellin has found that the states which abolished death penalty have lower homicides than those which have retained it, "There is no evidence that the abolition of the death penalty generally causes an increase in criminal homicides or that its re-introduction is followed by a decline. 48

Prof. Isaiah Ehrilren on the basis of data collected found that the capital punishment does not show any positive indication regarding the value of capital sentence as a deterrent. Statistical findings fail to show death penalty as any deterrent measure. 49 Ehrlich's later studies show that punishment in general and execution in particular has a deterrent effect on the potential murderers. He now finds that previous studies, which concluded as having no significant co-relationship between capital punishment and the crime of murder, made only simple co-relations between the legal status of the death penalty and the murder rate across states. They also failed to consider systematically such aspects of law enforcement activity as probability of apprehension, conditional probability of conviction and actual enforcement of the death penalty. 50

The English views:

Regarding the deterrent effect of the capital sentence of

48. Streatfield Committee Report, ChrC, 1289, p.79, para 271.
Source: 35th Report, pp.100-01.
50. Gupta, Subhash C., op.cit., pp.57
the Royal Commission (1949-53) can be concluded from the following passage:

"It is impossible to arrive confidently at a firm conclusion about the deterrent effect of the death penalty. A penal policy in relation to murder may not be based on exaggerated estimates of the uniquely deterrent force of the death penalty".51

In the United Kingdom the murder rate has been constant from 1930 to 1960 in spite of altering period of severity and virtual defects abolition before the enactment of homicide Act, 1957.

The department of Economic and Social Affairs of the United Nations conducted a survey in 1962 on Capital Punishment in various countries of the world. The Report remarked that "the deterrent effect of the death penalty is, to say the least, not demonstrated".52

The commission further observes that all information available appears to confirm that partial abolition, that is removal of certain crimes from the list of capital crimes, has in fact, never been followed by a notable rise in the incidence of the crime no longer punishable with death.53

The Report further holds that the same general observation can usually be made regarding the total abolition of the death

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53. Ibid, see, para 197.
penalty as per data provided by U.S.A., Federal Republic of Germany, Finland, Sweden, Netherlands, Denmark and Belgium.

In India studies conducted in the State of Andhra Pradesh from 1935 to 1970 reveal that the data so collected do not justify the conclusion that the death penalty has been a deterrent. Chinnappa Reddy, J, refers to the most reasonable conclusion that there is no positive indication that the death penalty has been a deterrent, in other words, the efficiency of the death penalty as a deterrent is improved.54

The Law Commission of India on Capital Punishment submitted in its Report that as regards the deterrent effect of the Capital Punishment there is a mixed reaction of people in India. Some are of the opinion that capital punishment does act as a deterrent, others are of the view that it has failed to act as a deterrent.

The Law Commission asserts that the first and foremost amongst the arguments for taking the view that capital punishment does act as a deterrent is that "Basically every human being dreads death". It suggests that death penalty has, therefore, a greater deterrent affect than any other punishment. In cases where an offender has a homicidal tendency or habitually commits grave offences or has a vicious or savage nature or is a potential danger to the society or a terrorist who repeatedly commits murders without remorse, or a Kanpatimar, who finds interest in

taking lives of innocent persons or the like, I think it is very essential to deter such persons by capital punishment.

Following are some of the important points on the basis of which the Law Commission of India concluded that death penalty acts as a deterrent:

(a) Basically, every human being dreads death.
(b) Death, as a penalty, stands on a totally different level from imprisonment for life or any other punishment. The difference is one of quality, and not merely of degree.
(c) Those who are specifically qualified to express an opinion on the subject including particularly the majority of replies received from the State Government, Judges, Members of Parliament and Legislatures and Members of the Bar and Police officers are definitely of the view that the deterrent object of capital punishment is achieved in a fair measure in India.
(d) As to the conduct of prisoners released from jail (after undergoing imprisonment for life), it would be difficult to come to a conclusion, without studies extending over a long period of years.
(e) Whether any other punishment can possess all the advantages of capital punishment is a matter of doubt.
(f) Statistics of other countries are inconclusive on the subject. If they are not regarded as proving the deterrent effect, they cannot be regarded as conclusively disproving it.55

Justice Bhagwati in his minority judgement in Bachan Singh Vs. State of Punjab,56 vehemently criticised the approaches of the Law Commission that death penalty acts as a deterrent. He observed:

"So far as the first argument set out in clauses(a) is concerned, I have already shown that the circumstances that every human being dreads death can not lead to the inference that death penalty acts as a deterrent. The statement made

55. 35th Law Commission Report, paras 334-70.
56. Infra Chap.IV Note 11."
in clause(b) is perfectly correct and I agree with the Law Commission that death as a penalty stands on a totally different level from life imprisonment and the difference between them is one of quality and not merely of degree, but I fail to see how from this circumstances an inference can necessarily follow that death penalty has a unique deterrent effect. Clause(c) sets out those who are specially qualified to express an opinion on the subject have in their replies to the questionnaire stated their definite view that the deterrent effect of capital punishment is achieved in a fair measure in India. It may be that a large number of persons who send replies to the questionnaire issued by the Law Commission might have expressed the view that death penalty does act as a deterrent in our country, but mere expression of opinion in reply to the questionnaire, unsupported by reasons, cannot have any evidentiary value. There are quite a number of people in this country who still nurture the superstitions and irrational belief, ingrained in their minds by a century old practice of imposition of capital punishment and fostered, though not consciously, by the instinct for retribution, that death penalty alone can act as an effective deterrent against the crime of murder. I have already demonstrated how this belief entertained by lawyers, judges, legislators and police officers is a myth and it has no basis in logic or reason. In fact, the statistical research to which I have referred completely falsifies this belief. Then, there are the arguments in clauses(d) and (e) but these arguments even according to the Law Commission itself are inconclusive and it is difficult to see how they can be relied upon to support the thesis that capital punishment acts as a deterrent. The Law Commission states in clause(f) that statistics of other countries are inconclusive on the subject. I do not agree. I have already dealt with this argument and shown that the statistical studies carried out by various jurists and criminologists clearly disclose that there is no evidence at all to suggest that death penalty acts as a deterrent. But even if we accept the preposition that the statistical studies are inconclusive and they cannot be regarded as proving that death penalty has no deterrent effect, it is clear that at the same time they also do not establish that death penalty has a uniquely deterrent effect and in this situation, the burden of establishing that death penalty has an additional deterrent effect which life sentence does not have and therefore serves a penological purpose being on the State, it must be held that the State has failed to discharge the burden which rests upon it and death penalty must, therefore, be held to be arbitrary and unreasonable."

Fear of death is always and everywhere by far the strongest possible deterrent. Any exception to this rule, he believes, is
negligible. In support of his conviction that the prospects of imprisonment for life is a far weaker deterrent, the fact is sometimes adduced that nearly all men condemned to death did their utmost to secure a reprieve. But in his eyes this conviction is self evident and so really requires no support.\(^57\)

(3) Incapacitation:

Incapacitation indeed means to restrain an offender personally from repeating a criminal act. Incapacitation as a purpose of penal policy requires a decision on the part of the sentence that the defendant is a persistent danger or nuisance to the society and that the most suitable course of action is "coldstorage"—formerly the death penalty, severance of limbs, and now long term incarceration in prison or hospital. Much before independence deportation to penal colonies like the Andman and Nikobar in India was also one of the other modes of execution of sentence for incapacitation purpose. We are to protect society by preventing the re-emergence of the offender, for as long a period as is deemed necessary or acceptable in view of the severity of the defendant's present offence.

The problem of the persistent offender is thus sought to be answered in many ways: in terms of the protection of society when there seems no other avenue of approach; in terms of a higher degree of blameworthiness, or even, possible, that the

\(^57\) Mokerly, Sir Walter: The Ethics of Punishment, p.291.  
\(^58\) David, M. op.cit., p.146-51.
longer sentence may at last have a deterrent effect upon the defendant. This latter justification seems particularly wistful given the well known deleterious effects on criminality of long-term imprisonment. But are the other justifications any better? Is it enough in justification of longer periods of imprisonment than that normally given for the defendant's present offence? And how convincing is the argument that the persistent offender is more blame worthy? Is not supposed to have "paid the price" and redressed the balance for previous offences? Even if one tentatively concludes that justification can be found for very severe punishment of persistent offenders, points of difficulty do remain.

First, should the longer sentences given to persistent offenders be without any limitation whatsoever? And secondly, should longer sentences of imprisonment be available to deal with all kinds of persistent offenders or only to some?

In both these respects the English experience is illuminating. The Criminal Justice Act of 1948 introduced preventive detention; the sentence was expressly intended to be for the protection of society. By virtue of section 21(2), if conditions as to age and previous convictions were satisfied, a court could impose a sentence of preventive detention of not less than five but not more than fourteen years (imprisonment). It was envisaged that this measure would be used against dangerous offenders, but it was widely employed against minor, inadequate recidivists
instead. In 1967 preventive detention was replaced by the extended sentence; this, too, is couched in terms of protecting society and is subject to a ceiling.\textsuperscript{59}

It has also tended to suffer the same fate in the degree of abuse that has taken place. Nevertheless cases do arise in which the need for some kind of protective sentence in sharply focussed.

It is within the context of dangerous offenders that most debates about persistent offenders have taken place, and it is submitted that this (with the possible extension to the professional criminal) is where the debate properly belongs. The inadequate recidivist of petty crimes ought not to be brought within the framework of protective sentencing.

Furthermore, this principle of a ceiling, or of proportionality, should apply to other types of persistent offenders. Even though they qualify for longer periods of imprisonment, their present offence must play a large part in determining the length of their sentence. Protective sentencing cannot be without limit; it can not ignore the dictates of just deserts of justice.

So, according to this view of punishment there can be cases where society needs protection; it is thus permissible to incarcerate dangerous offenders who pose a threat to society far longer

\textsuperscript{59} Criminal Justice Act, 1967, Sections 37-38; Powers of the Criminal Court Act, 1973, Section 528; Subject to fulfilling certain conditions, an extended sentence may exceed the maximum term authorised for the offence; it may not, however, exceed five years if the normal maximum is less than five years and ten years if the normal maximum is less than ten years.
than non-dangerous offenders committing the same offence.

(4) **Reformation and Rehabilitation**:

Reformative purpose is, in fact, not a punishment but only a rehabilitative process. The main object of this theory has been, as far as possible, to mould a criminal into a better citizen by means of moral and ethical training. This is founded on the supposition that a crime is not the result of the Original Sin in a criminal as much as it is a product of its environment and lack of opportunity and training. 60

To punish with the aim of reforming or rehabilitating the offender has constituted one of the most ambitious developments in penal theory. One aims to secure conformity, not through fear, but through some inner positive motivation on the part of the individual. The process has been described as "improving the offender's... character so that he is less often inclined to commit offences again even when he can do so without fear of penalty. The source of change in motivation or improvement in behaviour has been variously described but it remains one of the ambiguities of the concept of reforms Wortley observes:

"... No system of punishment is likely to be useful that regards a criminal as a being of different species from his fellowmen, and which does not treat him and his personality with dignity and consideration, that his nature demands..." 61

This theory is of recent origin and is generated by scientific and socialistic thought. With the growth of criminology and penology, the retributive and deterrent theories of punishment have declined and given way to the reformatory theory and resocialization of offenders. According to the reformatory theory, the wrong-doer is not only a criminal to be punished but a patient to be treated. Therefore curative forms of punishment have to be applied to reform the character of the wrongdoer and develop his better qualities so that he will desire to do what is right, instead of fearing to do what is wrong.

The most powerful opposition to the retributive and deterrent theories came from the positivist school. It takes the offender into consideration and insists that the treatment may be related to the offender, according to his own psychological and sociological needs. The approach asserts that the deterrent value does not lie in the severity of punishment, but in the educative, moralizing function of law.

Reformation or correction is defined as "the effort to restore a man to society as a better man and good citizen". There can be no doubt in the fact, that crime rate can be controlled, if the offenders are treated as fellow human beings and are dealt in accordance with the modern correctional philosophy,

which aims at re-socialization of the offenders. For example, in the model prison, Lucknow a majority of prisoners who were brought within the purview of the reformatory theory, showed their tendency toward reformation. Some of them were even transferred to the "Agricultural farm" of the Model Prison where they enjoyed more freedom and availed other privileges. 64

Similarly, the prisoners of the Central Jail Srinagar, who were imparted University education were in a position to lead a law abiding life. One of them was appointed on a responsible post in Jammu and Kashmir Jail Department. 65 According to this theory, if a criminal is morally regenerated, his criminal tendencies become extinct or at any rate dormant. That is why Oppenheimer, 66 calls punishment, "a physical measure adopted to excite in the soul of the guilty true repentence, respect for justice, sympathy for their fellow creatures and love of mankind. Reformation or correction, is aimed at moral improvement, sharpening of intellect and developing the sense of honesty. It was in this sense that this theory was adopted by the philosophers from Plato down to our age.

Victor Hugo's remarks "to open a school is to... close a prison" implies that if a person of doubtful character is given a training and education in such a manner as to make him competent to earn his livelihood honestly, he would not commit crime, and

hence 'opening a school' would mean 'closing a prison'.

According to the reformative theory, the society can be protected from the offenders, only when they are encouraged to abstain from the criminal behaviour by providing them with the social, educational or vocational training, which is necessary to enable them to conform to the social pattern, from which their delinquency is a departure. For this purpose, various correctional treatment methods are employed for the reformation of the offenders in almost all the civilized countries of the world. However, the value of reformation or correction, to a greater extent depends on the spirit behind the present "Mills of Justice" and of course, same time correction of prisoners is also influenced by the sentencing patterns.

Justice Krishna Iyer, 67 in respect of the punishment and correctional substitutes observed:

"My thesis is that punishment which inflicts injury cannot improve, that prisoners are persons and must be posited with human rights, that social defence which legitimates the penal law, is promoted by therapeutic attention to inner man, not by sadistic drills based on body conscious fear. The progressive manifestation of the divinity in men is the recognition of the dignity and worth of the human person and this creative process is the healing hope of decriminalization... not stone walls nor iron bars nor other subtle barbarities. This knows how of humanization alone can dissolve the dilemma". The Supreme Court in Modi Ram and Others Vs. The State of Madhya-Pradesh, 68 observed that keeping in view the broad object of punishment of criminals by court, in all progressive civilized societies, true dictates of justice demand that the

68. AIR 1972 SC 2438.
attending relevant circumstances should be taken into account for determining the proper, and just sentence. The sentence should bring home to the guilty party, the consciousness that the offence committed by him, was against his own interest, as also against the interest of society, of which he happens to be a member.

The Court in Parveen Kumar Gupta Vs. State of Madhya-Pradesh, stressed that the purpose of punishment is protection of the society, by deterring potential offenders from committing further offence, and by reforming and turning them into law abiding citizens.

Reformative Purpose a Justification for Death Penalty:

The civilized goal of criminal justice is reformation of the criminal whereas death penalty is the violation of this goal for those who suffer it. The death penalty naturally cannot serve the reformatory purpose because it extinguishes the life and puts an end to any possibility of reformation of the offender. However, the answer of protagonist of death penalty to this argument is that though there may be a few murderers whom it may be possible to reform and rehabilitate but there are others who are incorrigibles who cannot be reformed and rehabilitated. Why should the death penalty be not awarded to them? Justice Bhagwati in Bachan Singh Vs. State of Punjab, observed that even in their cases, I am afraid, the argument cannot be sustained. There is no way of accurately predicting or knowing with any

69. 1974 Cr.L.J. 57.
70. Infra Chap.IV Note 11.
degree of moral certainty that a murderer will not be reformed or incapable of reformation. All we know is that there have been many successes even with the most vicious of cases.

Jean of Valjean of Les Misérables was reformed by kindness and magnanimity of the Bishop, Balurki, great decoit and sinner of his time, was reformed and became the author of one of the world's greatest epic. Notorious dacoits of Chambal were reformed and transformed by the saintliness of Vinoba Bhave and Jai Prakash Narayan, the great social reformers. There are thousands of such examples which explained how the most heinous criminals were turned into good citizens. Swami Ram Krishna Param Hansa once said "every soul is potentially divine" there is Brahman in every living being.71

The purpose of reformation necessarily involves that the offender is not to be executed but has to be restored as a normal human being. Imprisonment in place of death penalty has disproved the saying that murders do not change their nature. The data on recidivism collected in the Nineteen Seventees72 showed that of the 98.80 per cent of offenders, who were now 3.31 per cent were arrested once in the past, 0.48 per cent twice, and among these only 0.41 per cent or a little more had been arrested on the charge of murder. From this data it is obvious that the recidivism in the cases of murder has been reported to be less

71. Idem
than one percent. This should be taken as a sufficient proof to abolish capital punishment. Moreover, recidivism cannot be solely attributed to the individual's failure. The society, the situation, and the correctional system is no less responsible.\textsuperscript{73}

The reformatory theory too, has been criticised on many grounds.\textsuperscript{74} It is argued that there is a danger of carrying the theory too far. It poses certain problems. First, it is not easy to determine before hand, how an offender will behave, when he is released. Secondly, for how long can the individual liberties of the wrong-doer, be curtailed by rigid fixation of the term of imprisonment? Thirdly, is punishment to be waived when a person commits a serious crime under extraordinary psychological stress but with no danger of recurrence? Fourthly, this aspect of punishment does not provide an outlet for the gratification of that emotion of retributive indignation, which in all healthy communities is stirred up by injustice. Fifthly, it encourages the habitual type of offenders. Lastly, in a law abiding community some prominence may safely be given to the reformatory method, which in a turbulent society, such as criminal tribes of India, may be fateful to the public welfare.

But, while applying the theory of reformatory punishment and introducing model prisons in the zeal of penal reform, we

\textsuperscript{73} Gupta, Subhash C., op.cit., p.
\textsuperscript{74} David, M., op.cit., pp.149-51.
must not make punishment too cheap. For instance, the prisons should not be made comfortable hotels, which the offender may visit time and again, without any fear of hardship or hardwork or without any shame.

Prof. Sethna, here observes:

"... Reformation should not be like a galloping horse heading for a fall, it should be bridled up by the reins of deterrence and mixed with the idea of retribution..."

The interdependence prevailing with regard to the different theories of punishment is perceivable upon an understanding of the true meaning of each theory. There can be no true retribution, unless there is true repentance. Retribution is the bringing home to the mind of the offender the realization that his bad act deserves punishment. The offender, by reformation and repentance, is given the sense of understanding that, retribution will be sought in vain. And if a person is made thoroughly to understand the heinousness or the wickedness of his act or omission, through the instrumentality of reformation, he becomes free from recidivism. He would not commit the same act or omission again. It is reformation, that can really ensure prevention. Prevention of crime can best be achieved not by elimination of the wrong-doer but by educating and reforming him. The idea of deterrence is linked with that of retribution also. It is the declaration of penalties for offences, and the punishment of offenders, that deters other persons from committing crimes. Thus the theories of retribution,

reformation, deterrence and prevention go hand in hand, and exist for preservation of the moral order, the protection of society and rehabilitation of the offender himself.

(5) **Utilitarian Motive:**

Jeremy Bentham's classical utilitarianism, whether in act or social practice, is morally desirable. It depends upon promoting human happiness better than other possible alternatives. Since punishment involves pain, it can be justified only if it accomplishes enough good consequences to outweigh this harm. The utilitarian purpose of punishment may make the balance of likely consequences central to justification without asserting, as Bentham did, that all relevant consequences are reducible to happiness and unhappiness. In modern usage, utilitarianism is often employed to refer broadly to theories that likely consequences determine the morality of action, and the same usage has been followed here.

Under the utilitarian purpose of punishment the benefits can be realised in the following circumstances:

(1) General deterrence: If people know that punishment will follow a crime, they will hesitate to commit the crime. Thus future violation of laws is reduced; unhappiness and insecurity are automatically reduced. Though the person who has already committed a crime cannot be deterred from committing that very crime yet he would not repeat his mistake. In Bentham's view
this helps to deter others. General deterrence is very much a matter of affording to the rational self of persons good reasons not to commit a crime. With a properly developed penal code, the benefits to be gained from criminal activities would be outweighed by the harm of punishment, even when those harms were counted by the probability of avoiding detection. Accordingly the greater the temptation to commit a particular crime and the smaller the chance of detection, the more severe the penalty should be. 76

For general deterrence it has some weight that seeing others punished for certain behaviour can create in people a sense of association between punishment and the act that may constraint them even when they are sure they will not get caught. People may subconsciously fear punishment even though rationally they are confident it will not occur.

(2) Norm-Re-enforcement : There is a little difference between young children and adults for having a reason of consequences for punishment. For young children it will be some time when they may be distinguish between believing (that behaviour is wrong) and fearing punishment, while adults make the distinction more plainly. The practice of punishment can thus re-enforce community norms by affecting the dictates of individual conscience. Serious criminal punishment represents societies. It is a strong condemnation of what the offender has done. It also performs a significant role

in moral education.

(3) **Individual Deterrence**: Infliction of punishment creates fear in the offender that if he repeats his crime he will be punished again. To deter an offender from repeating his actions penalty should be severe enough to outweigh in his mind the benefits of the crime. For the utilitarian, more severe punishment for such offender is warranted partly because the first penalty has shown itself ineffective from the standpoint of individual deterrence.

(4) **Incapacitation**: This also serves the utilitarian purpose of punishment that imprisonment puts the convicted criminals out of general circulation temporarily and death penalty does so permanently.

(5) **Rehabilitation**: The utilitarian purpose of punishment is to avoid pain to society and to bring happiness to it. Under rehabilitation the punishment has to reform the criminal so that he can be a happier and more useful person to the society. Simple imposition of penalty may contribute to reform by making him aware that he acted wrongly. Psychological therapies, psychosurgery and psychiatry are designed to curb his distinctive tendencies. Educational and training programmes help very much in rendering legitimate employment, a more attractive alternative to criminal endeavour. All these means create a confidence in the offender regarding selfrespect.
(6) **Vengeance**: The utilitarian in contrast to the retributivist does not suppose that wrongful acts intrinsically deserve harsh response, but he recognises that victims, their families and friends will feel frustrated if no such response is forthcoming. The utilitarian in a straightforward manner seeks to increase the happiness or reduce the unhappiness of those who want the offender punished. The utilitarian approach to punishment is compatible with philosophical determinism. The utilitarian does not start with the premise that the penalty of equal severity should go to those with equal blame.

The utilitarian most fundamental objection lies in treating the criminal as a means to satisfy social purpose rather than proving an end in himself. This objection bears on why and how, guilty offenders may be punished; but the most damaging aspect of the attack is that the utilitarianism admits the possibility of justified punishment of the innocent. The retributivist asserts that such punishment is morally wrong even when it would produce a balance of favourable consequences.  

But mixture of the utilitarian and retributive theories provide the most cogent approach to punishment. The basic reasons for having compulsory legal rules backed by sanctions are utilitarian; these reasons should dominate decisions about the sorts of behaviour to be made criminal. Moral wrong should

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77. Ibid, p. 1341.
not be subjected to legal punishment unless that is socially useful. The behaviour that is initially indifferent to social morality may also be covered by the criminal law if doing so serves social goals.

Utilitarian Justification for Capital Punishment:

Justification for capital punishment from the utilitarian viewpoint revolves around the concept that execution is always cheaper than confinement in prison for a long time. There is no reasonability for maintaining criminal at the cost of the state.

Ku. Karita Vashishtha in 1962, when a Bill regarding abolition of capital sentence was brought before the Rajya Sabha, opposed it on this very ground. She observed:

"Another thing is, we today in India, have got money for taking care of our orphans, or destitute women or, hospitals and medical facilities, we do not have enough for transportation facilities, for helping our rural areas and backward areas. We have no money even for essential things like primary education which could not be implemented in spite of the provision in the Constitution and the best intentions of the people and the Government. When we do not have money even for the good things and for the basic amenities of life what is the idea of our spending money for maintaining and prolonging the life of these criminals and pathological people? Therefore, I feel that we have no money for maintaining these people from 10 to 30 years. Therefore, I beg my honourable friend to withdraw the resolution because it is a very expensive proposal."

78. Rajya Sabha Debates, 1961, para 3816-17.
In immediate, relation to the criminal law, responsibility is associated with punishment. But in the wise of freedom protected by the criminal law, responsibility connotes a way of life to be sought, maintained and enlarged. To be a responsible person in this sense is to be a mature participant in social life, sensitive to other person's needs and potentialities as well as to one's own development. In this context, the principal purpose of the system of criminal justice is to preserve and improve the moral fabric of interpersonal relation upon which social life, freedom, and individual creativity depend. It is evident, I trust, from what was previously said about an inclusive penal policy, that those who have harmed their fellow men should be helped to participate in this value cosmos.79

The true social defence lies not in perpetuating a system of severe or lenient punishment but by making an attempt to curb and central criminogenic influence, by adopting a sound correctional policy, not particularly of the criminal, but of the society at large, by improving the general, rational and moral tone of the citizen. The certainty of punishment conceivably has more likely the strength to deter people from committing crimes than its severity. The question looms large on the propriety to punish or finish a known criminal to set an example to the hypothetically unknown prospective offender, and nobody has been able to successfully demonstrate that any one method of dealing with the offender is inferior to all other theories of punishment.80