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CHAPTER I

INTRODUCTION

I. INEVITABLE AND UNIVERSAL PHENOMENON OF CRIME

Crime is a social and economic phenomenon and is as old as human civilization. It has been with us in varying degrees since time immemorial. Crime is eternal – as eternal as society. Everywhere some human beings have fallen outside the pattern of permitted conduct. It is best to face the fact that crime cannot be abolished except in a nonexistent utopia. Weakness, anger, greed, jealousy, some form of human aberration – has come to the surface everywhere and human sanctions have vainly beaten against the irrational, the misguided impulsive and ill conditioned.

The inevitability and universality of the phenomenon of crime has been described by Emile Durkheim in the following words:¹

There is no society that is not confronted with the problem of criminality. Its form changes, the acts thus characterized are not the same everywhere, but everywhere and always, there have been men who have behaved in such a way as to draw upon themselves penal repression. No doubt it is possible that crime itself will have abnormal forms, as for example, when its rate is unusually high. This excess is indeed undoubtedly morbid in nature. What is normal, simply, is the existence of criminality, provided that it attains and does not exceed, for each social type, a certain level. To classify crime among the phenomena of normal sociology is not to say merely that it is inevitable, although regrettable, phenomenon, due to incorrigible wickedness of

Crime then, is essentially relative and interdependent. It has no inherent quality or property attached to it as such. It varies with the laws. The conditions that evoke it are equally variant. The microbe of crime seems to flourish as much in the culture medium of poverty as of prosperity, and also in all parts of our planet. Man also has learnt to split the atom, transplant hearts, cause artificial rain and even step on the moon, but in extreme contrast has failed in his attempts to solve the riddle of his own behavior.

Speaking in London, Sir, Jeon Radzinowic, Director of the Institute of Criminology Cambridge, Observed:

“No national characteristics, on political regime, no system of social welfare or criminal law, of police or justice, of punishment or treatment has made any country exempt from crime in the modern world and scarcely any can claim to have saved off its relentless increase”

The concept of crime has always been dependent on public opinion. More than any other branch of law, criminal law is the mirror of public opinion. In order to know the nature and content of crime, we must know what is law, because these concept of crime and law are closely related with each other. The law prescribed certain standards of conduct to be observed by people in society. These standard have the approval of the society in general. Any deviations from the standards of behavior fixed by the society is punished. Therefore, such conduct as does not accord with the prescribed standard in loosely known as crime.

II. DEFINITION OF CRIME

To define crime is a task which has so far not been satisfactorily accomplished by any writer. Infact criminal offences are basically the creation of the criminal policy

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2 Quoted from Mahmood Bih Muhammal’s Article “Planning and Research for Crime Preventions”. Social Defence Journal XII number 47 Jan. 1966 at 107.
adopted from time to time by those sections of the community who are powerful or astute enough to safeguard their own security and comfort by causing sovereign power in the state to repress conduct which they feel may endanger their position.

Crime is a legal concept and has a sanction of law. It is also known as a living concept. The "changing concept" of crime is dependent upon social evolution of the human being all over the world. It appears in different lights in different countries at different times. What is a crime in one country, may not be a crime to another what is a crime at one time, may not be a crime at another and vice versa. The law is forever changing adding new crimes to the catalogues and modifying altering and repealing former one.

According to Oxford English Dictionary Crime is defined as "an act punishable by law as forbidden by statute or injurious to the public welfare.

Cress and Jones define crime as a legal wrong the remedy for which is punishment of the offender at the instance of the state.

According to Bentham, "offences are whatever the legislature has prohibited for good or bad reasons. If the question relates to a theoretical research for the discovery of the best possible laws according to the principles of utility, we give the name of offence to every act which we think ought to be prohibited by reasons of some evil which it produces or tends to produce".

Halsbury defines crime as an unlawful act which is an offence against the public and the perpetrator of that act is liable to legal punishment.

Stephen has defined crime as an act which is both forbidden by law and revolting to the moral sentiments of the society.

Blackstone in his "commentaries on the laws of England" has defined crime as an act committed or omitted in violation of a public law either forbidding or commanding it. 

"Crime is a set of circumstances for which the law permits imposition of a criminal penalty. Thus crime is not a natural phenomena but a legal one; whatever
makes define as crime is crime. Crime is not intrinsic, that is one can not identify characteristic other than the law matter's that from which it is possible to distinguish criminal from non criminal circumstances.\(^5\)

Crime is further defined on the constitutional plank that “criminal law and criminal procedure are the integral part of the constitution. Concepts of cruel and unusual punishment, equal protection, and due process of law also impose mere general limitations upon which the legislature can make criminal law. By and large the constitution operates negatively, controlling the legislature rather than positively making something a crime.\(^6\)

Court decisions also formulate the definition of crime in numerous ways. The decision of the State's courts constitute important acts of further definition of statutory crimes, whether in interpreting the language of the statutes or its applying a general form of words to varying combination of facts.

*According to Paton*, “the normal marks of a crime are that the state has power to control the procedure, to remit the penalty or to inflict the punishment”.

Thus we find that it is very difficult to suggest a definition of crime suitable to all countries for all the time. Therefore, it would be easier to know a crime through its attributes. The three attributes of crime are: first it is a harm brought about by some anti social act of a human being which the sovereign desires to prevent; secondly, the preventive measures taken by the sovereign are in the form of a threat of sanction or punishment; and thirdly, the legal proceedings wherein the guilt or otherwise of the accused is determined are a special kind of proceedings governed by special rules of evidence.

### III CRIME AND PUNISHMENT IN ANCIENT INDIA

Historically the concept of Crime seems to have always been changing with the variation in social condition during the evolutionary stages of human society. With the charging conditions, the nature of crime and punishment has been

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\(^6\) Ibid at page 304.
undergoing change. In order to have adequate idea of the history of crime and punishment, it is imperative to divide the Indian History into various periods like Vedic period, Pre-Buddhist period, Epic period, Classical period, Medieval period, Maratha period, Modern period & Post Independence period.

- **VEDIC PERIOD:** it is the time in which four Vedas, the most ancient scriptures of Hindu were flourished. The idea of crime and punishment can be inferred from the description of social and political life given in Vedas. The crimes in Vedic period were few in number. The chief crimes were theft, dacoity, burgalary etc. Social crime was rare phenomenon in that time. The rule of law and justice prevailed in Vedic period. The administration of justice prevailed in Vedic period. The administration of justice was directly in the hands of the king, he used to consult his expert advisors and give due weightage to their opinion. The punishment was not harsh.

- **PRE-BUDDHIST PERIOD:**- In this period i.e. before 600 BC the number of crime has grown. The main types of crime were theft dacoity and kidnap for ransom. Law and justice were given, king used to perform the function of chief justice. The varying punishments were awarded for different categories of crimes. For serious crimes, the punishment were grave. The Death sentence was awarded for rape. The chief types of punishments in this age were exile, flogging fine, imprisonment and serving of limbs and branding of face.

- **EPIC PERIOD : BASED ON DHARMSHAASTRA**

  The legal system of this period was based on Dharamshastra and is clearly elaborated in Manu Smrit. At that time crime principally meant an evil act done with a certain amount of daring. The criminal was said to be a person who without minding the physical or the spiritual effects of his acts was prompted by the sheer spirit of violence and openly engaged himself in causing suffering to others by his acts such as theft hurt, adultery etc. According to Manu smriti, an official found guilty of graft was exited out of the country and all his property and belongings was to be attached. In

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7 Veermitrodaya Vijavaharadhyaya, ibid, p. 498.
8 Narad ibid.
delivering judgement, the judge must not only consider the crime and the situation of crime but the nature and character of criminal was also considered and given due weightage.

- **CLASSICAL PERIOD:** The period, prior to the coming of Mughals to India is classical period. In this period, there was a well organized penal system in India. The crime was very rare in this period. In this age king used to investigate into the crimes. The punishment for all types of crime was fine. Anyone found guilty of the murder of Kshatriya, was fined 1000 cows.

  In **Kautilya period**, penal system was rigorous and penalties were very harsh. The king was the supreme judge. Death penalty could be given for murder, assault and battery. An attempt to loot a government treasury was visited by being burnt alive. For minor crime, punishment was however light like fine & imprisonment etc.

  In **Ashoka & Harsha period**, king was the highest legal luminary. Imprisonment was the most common form of punishment Harsh punishment was only for crimes like rape bestiality and sex crime etc.

- **MIDDLE AGES: MUGHAL REGIME**

  In this regime, Mughals kings were staunch religionists. Some of the Mughal kings were lovers of justice. The penal system was base don Islamic codes, as inscribed in the Holy Koran. Hindu did not get full fair and impartial justice at that time.

  During this regime i.e. **after Tughlaks**, there was complete justice and it was fair and free from prejudice. The penal system was rigorous and punishment were harsh. Death Sentence was the most common form of punishment.

  In the regime of **Akbar**, legal system and penal system were well organized. Hindus case were decided according to Hindu custom and Muslim cases were according to Muslim tenets.9

9 Ram Nath Sharma, Criminology And Penology 1993, p.
• **MARATHA AGE**: In this age justice was pure and based on fair play. The canon of Maratha justice was based on social custom & traditions. Peshwa used to perform function of judge. In this age there was no penalty of death. The person who committed rape was considered to be slave. Magic was also considered undesirable activity. Theft and dacoity attracted the punishing of physical pain.¹⁰

• **BRITISH ERA**: The British ruled India for more than 200 years. Their penal system was a reflection of their policies which mainly were in perpetuating their rule. The Indian Penal code was codified by Lord Macaulay. He declared in it a number of popular practices and customs as unlawful eg. custom of sati etc. William Benntick made a well organized and systematic penal system. Towards this end, he established civil and criminal courts in all big towns of India. He ordered discontinuance of the use of third degree methods to produce confession by police and abolished flogging as a form of punishment lord Benntick launched a vigorous campaign against these cut throats and succeeded in uprooting them and putting an end to thuggee. On the whole British legal system was praise worthy.

• **POST INDEPENDENCE PERIOD**: After independence our legal penal system has undergone many changes to suit the new needs and fulfils the aspiration of independent system. Now there is Indian Penal code in India, in which all distinction based upon sex, caste, creed, religion, rank & status are considered, in consequence, for the purpose of justice. Law is blind to all these distinction and all are equal before law. There is equal punishment for all for the same crime. The approach and manner of the new IPC is unique, original and refreshing. Rarely, do law courts prescribed maximum punishment. Inversely lenient view is taken and benefit of doubt is given to the criminal. The prison have been reformed. The experiments of open prisons have been made.

Recent development in the field of penology are marked with rationalization of punishment and emphasis on clinical methods of treatment

¹⁰ Ibid
to the offenders and their rehabilitation through adequate after care measures

In sum, the ultimate aim of penal justice is to protect and promote the welfare of the state, society and the individual.

IV THEORIES OF PUNISHMENT

Punishing the offender is a primary function of all civil states. However during the last two hundred years, the practice of punishment and public opinion concerning it have been profoundly modified due to the rapidly changing social values and sentiments of the people. The crucial problem today is whether a criminal is to be regarded by society as a nuisance to be abated or an enemy to be crushed or patient to be treated or a refractory child to be disciplined? Or should he be regarded as none of these things but simply be punished to show to other that anti-social conduct does not finally pay.

Punishment is the suffering in person or property inflicted by the society on the offender who is adjudged guilty of crime under the law. According to some it is the retribution due for the violation of the rules of the society which are made for its preservation and peace and the infraction of which is made punishable. The administration of punishment involves the intention to produce some kind of pain which may be partly physical and partly mental. The amount of pain actually experienced by the offender will vary from case to case depending upon the circumstances and the personality of the offender. But it is indisputable that some pain in some form is always felt in punishment.

Punishment is a means of social control. HLA Hart and Mr. Bean are professor flow has defined “punishment” in terms of five elements

i) It must involve pain or other consequence normally considered unpleasant.

ii) It must be for an offence against legal rule.

iii) it must be an actual or supposed offender for his offence.

iv) It must be intentionally administered by human beings other than the offender.

v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

It is therefore, evident that the object of criminal justice is to protect the society against criminals by punishing them under the existing penal law. Thus punishment can be used as a method of reducing the incidence of criminal behaviour either by deterring the potential offenders or by incapacitating and preventing them from repeating the offence or by reforming them into law abiding citizens. It is this principle which underlies the doctrines concerning the desirability and objectives of punishment. Theories of punishment therefore contain generally policies regarding handling of crime and criminals. There are four generally accepted theories of punishment, namely deterrent, retributive, punitive and reformative. It must, however, be noted that these theories are not mutually exclusive and each of them plays an important role in dealing with potential offender.

THEORY OF RETRIBUTION

Retribution is probably the oldest and most ancient justification for punishment. “You hurt me and I will hurt you” is its literal meaning. One of the most convincing statement of the retribution theory was given by Immanuel Kant in the 18th Century as follows\(^\text{12}\)

\[\ldots\text{ Punishment can never be administered merely as means for promoting another good, either with regard to the criminal himself to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. For one man ought never to be dealt with merely as a means subservient to the purpose of another, not be mixed up with the subjects of Real Rights (i.e. goods or property) Against such treatment his inborn personality has a right to protect him even}\]

although he may be condemned to loose his civil personality. He must first be found guilty and punishable, before there can be any thought of drawing from his punishment any benefit for himself or his fellow citizens.”

Emphasizing the supremacy of legal Justice Kant observed:

The law concerning punishment is a categorical imperative and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishing or by reducing the amount of it in keeping with the pharsatic motto: It is better that one man should die; than that the whole people should perish. If legal justice perishes, then it is no longer worthwhile for men to remain alive on this earth”.13

In modern times retribution is used in more than one sense. In the first sense the idea is that of satisfaction by the state of the wronged individual’s desire to be avenged, in the second, it is that of the states marking its disapproval of the breaking of its laws by a punishment proportionate to the gravity of the offence. In modern penological thought retribution is not so much considered in the sense of vengeance but in the sense of reprobation. The report of the Royal commission on capital punishment emphasise that punishment must not be greater than the offence deserve. Retribution is also used by some people in the sense of expiation or atonement. According to them the offender must suffer some evil not in order to satisfy an aggrieved individual is desire for revenge, nor as mark of public disapproval of his conduct but for his own sake so that he may come to realize the justice of his punishment.

It must be stated that the theory of retribution has its origin in the crude animal instinct of individual or group to retaliate when hurt. The modern view, however,

13 Ibid page 100.
does not favour this contention because it is neither wise nor desirable on the contrary it is generally condemned as vindictive approach to the offender.

The revenge theory has been criticized by Sheldon Clueck who says that it is natural that we hate criminal, but to base a policy of social protection upon the hatred of those who commit such act is both uneconomical and unjust.\footnote{41 HLR 543 Insanity and Criminal law, pp. 13-14.}

\textbf{Dr. H. S. Gour} agreeing with plato observes that both personal and public sentiments demand that the person who has made others to suffer unjustly should himself be made to suffer.\footnote{H S Gour, Penal law of India (4th Ed) p. 331.}

Retributive theory considers punishment as an end in itself although the modern trend of penologists is to regard punishment, as a means to an end and not an end in itself. Some forms of the retributive theory emphasise that punishment should be inflicted not merely in order to attain certain ends, but solely because the prisoner has committed a crime.\footnote{Paton, Jurisprudence (3rd ed.) p. 321.}

The main defect of this theory as that it does not regard punishment as a measure of social security and welfare but consider punishment as an end in itself. It neglects the utilitarian aspect of punishment.

\textbf{APPLICATION OF RETRIBUTIVE THEORY ON DEATH PENALTY}

The denunciatory theory was put forward as an agreement in favour of death penalty by lord Denning before the \textbf{Royal commission} on capital punishment. He observed:

The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizen for them. It is a mistake to consider the object of punishment as being deterrent, or reformative, or preventive and nothing else. The ultimate justification of any punishment is not that it is a deterrent, but that it is the
emphatic denunciation by the community of a crime; and from this point of view, there are some murders which in the present state of public opinion demand the most emphatic denunciation of all, namely, the death penalty.17

The Royal Commission seemed to agree with Lord Denning's view about this justification of death penalty when it observed:

It is reasonable to suppose that the deterrent force of capital punishment operates not only by affecting the conscious thoughts of individuals tempted to commit murder, but also by building up in the community, over a long period of time, a deco feeling of peculiar abhorrence for the crime of murder.

A number of reasons are advanced to highlight the importance of retribution, as the object of various punishments including the death penalty. It is explained that the suffering imposed by the State in its corporate capacity is the political counterpart of individual revenge.18 A warning is sounded that if the state does not punish the offender with the punishment which he deserve, the angry victim and his friends and relatives would seek individual revenge by taking law into their own hands or would refuse to cooperate with the state in bringing the offender to justice.

Thus the retributive object of death penalty provides a vindication of the criminal law which is necessary to make law more than a request. Punishment through retribution also helps to unify the society against the crime and the criminal. It may be reasoned that the public support for law can remain vital only as long as the society can express its disapproval of the criminal by making him suffer for this criminal activities. Otherwise, the society would feel frustrated and its obedience of law would appear meaningless. In this way, retribution provides an opportunity for the society to stand against the enemy of its accepted values and thus serves an important purpose of achieving greater social solidarity.

18 This has been advanced in no. of cases like state of UP Vs. Iflikar Khan AIR 1973 SC 563. and Jagmohan singh Vs. State of U.P. AIR 1973 SC 863.
Further the fact remain that revenge is sweet even to the modern man *Reckless* stresses this by saying:

However, the demand for punitive retribution still lurks in the minds of individuals, although, it takes the form of a rationalization of sentiments – something that ought to be done or action that justly and rightly needs to be taken and this rationalization or sentiments is carried forward as a social concept to justify the punitive action on the part of the state.

The law commission in its 35th Report has also stated that even in the modern times the society feels a sense of disapprobation, whenever a serious crime is committed and stressed the need to take notice of this feeling. It observed:

The fact remain, however, that whenever there is a serious crime, the society feels a sense of disapprobation. That this feeling prevails in the public is a fact of which notice is to be taken. The law does not encourage it or exploit is for any undesirable – ends. Rather by reserving the death penalty for murder, and these visiting the gravest crime with the gravest punishment the law helps the element of retribution merge into the element of deterrence.¹⁹

Thus the law commission regarded retribution and deterrence as two convergent goals which ultimately merge into one. It is also pointed out that if the society does not express the adherence of the offence of murder by appropriate sentence, there is a danger that the individuals may take the law into their own hands.

The retributive object of death penalty has also been a subject of criticism. The critics assert that it is opposed to the philosophy of religion piety and humanity. It is said that revenge is a very barbaric and primitive instinct which is outdated with intellectual renaissance and progress. Further, it is pointed out that as a crime can not be replied by crime, murder can not be replied by cold blooded murder by the state. The retributive theory of punishment requires that same punishment must be meted out for the same criminal act irrespective of the individual character of the criminals.

It is argued that this is not consistent with the modern philosophy which emphasizes individualized sentencing.\(^{20}\)

However, most of the criticism will not have any weight if it is not considered in the sense of revenge or vengeance. The law commission of India has also considered retribution in this refined sense. In its 35\(^{th}\) report on capital punishment, the law commission took into consideration the retributive purpose served by the death penalty in justifying its retention. Although, the commission concluded that deterrence was the principal object of death penalty, it did not completely rule out the relevance of the retributive object. However, the commission made it very clear that retribution should not be understood in the sense of 'an eye for an eye', it must be interpreted in the sense of reprobation.

Further, the objection that the retribution object of death penalty considers punishment as an end in itself and disregards the utilitarian aspect of punishment also does not seem to hold much weight.

The German philosopher Immanuel Kant approved the retributive justification not forcefully and expressed his opposition to the utilitarian justification in the following words:

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\text{Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime, for a human being can never be manipulated merely as a means to the purposes of someone else and can never be confused with the law of things.}
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Therefore, it is difficult to resolve the question whether or not retribution should from part of modern penal philosophy. However, one thing is clear that despite the growing tendency to regard punishments as a means to an end and not an end in itself, retribution still has an important place in the popular thought. The public

\(^{20}\) Salmond takes such a view, see Fitzgerald, PJ Salmond on Jurisprudence, Bombay MM Tripathi Pvt. Ltd. 1966, pp. 98-9.
has been supporting retribution as an important bases of all punishments including the death penalty.

**JUDICIAL PERCEPTION**

The judiciary in India has accepted retribution as one of the main objects of death penalty. In regard to this purpose of death penalty, *Justice Sarkaria in Bachan Singh*\(^{21}\) case observed:

Even retribution in the sense of society's reprobation for the worst of crimes, i.e. murder is not an altogether outmoded concept. This view is held by many distinguished sociologists jurist and judges.

He referred to a number of authorities for the view that retribution was still a socially acceptable function of punishment. For eg. Justice Stweart in *Furman Vs. State of Georgia* observed that retribution was a constitutionally permissible ingredient in the imposition of punishment. The instinct for retribution was part of the value of man and channeling that instinct in the administration of criminal Justice served an important purpose in promoting the stability of a society. He said:

> When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve', then they are sown the seeds of anarchy of self help vigilant justice and lynch law.

*Justice Sarkaria* referred to the reports of the British royal commission and the Indian law commission on capital punishment where retribution had been upheld as one of the penal purposes of death penalty. On the basis of the reports of these commission, he concluded that retribution and deterrence were two convergent goals which ultimately merged into one.

Further Justice Sarkaria added that it was a common phenomenon in all the civilized countries that when some shocking murders were committed, there was a general outcry from the public for the infliction of the ultimate penalty on the criminal. He illustrated this by citing a recent case where the refusal of the jury to impose death sentence on a person (a police man) convicted for heinous and cold murder.

\(^{21}\) AIR 1980 SC 898.
blooded assassinations of Mayer and Supervising Officer of San Francisco was reacted sharply by the public. In this connection, Justice Sakaria observed:

Opposition to capital punishment has (to use the words of Raspberry) much more appeal when the discussion is merely academic than when community in confronted with a crime, or a series of crimes, so gross so heinous, so cold blooded that anything short of death seems inadequate response.22

Thus, Justice Sarkaria showed that retribution in the sense of reprobation for the most terrible crimes was not a totally outmoded concept. It was still acceptable to a large section of people throughout the world.23

Justice AP Sen has also said that retribution is one of the valid purposes of punishments. In his minority opinion in Rajendra Prasad Vs. State of UP24, he quoted eminent legal philosophers who had emphasized the retributive purpose of punishment. He said that the most powerful statement in support of this theory was given by Immanuel Kant. He has said that:

Even if a civilized society resolves to dissolve itself with the consent of all its members – as might be supposed in the case of people inhabiting an island resolve to separate and scatter itself throughout the world – the last murderer lying in the prison ought to be executed before the resolution is carried out. This ought to be done in order that everyone may realize the desert of his deeds.25

Justice Sen also pointed out that this policy of retribution was justified out that this policy of retribution was justified and sustained by ethical philosophy from Plato to Thomas Acquinas and from Kant to T.H. Green and his 164 disciple.

23 Ibid 925.
24 AIR 1979 SC 916.
25 Immauel Kant, Philosophy of law, year, page.
Although the main thesis of Justice Sen was that death penalty was desirable as a measure of social necessity and as a means of deterring potential offenders, but he did not rule out retribution in view of the public demand for it. He asserted:

It may be argued that murder for instance, as the one crime which is quite irrevocable, is justly met by one punishment which is equally irrevocable, a unique form of punishment for a unique form of crime. To reduce its punishment to something or the same order as other punishments is to weaken the abhorrence which it should express and diffuse.

According to Justice Sen, punishment protected life effectively if it produced in the potential murders a horrified recoil from the crime of murder along with the fear of the consequences of its commission. He also added that the Penalty which the convicted murder deserved was not simply death but death in disgrace and death of disgrace. Therefore, death penalty consisted of not merely a threat of death but also of infamy and shame. Any theory which did not take notice of this characteristics was certainly defective. Justice Sen also made it clear that person who committed on extremely brutal crime which shocked the public conscience, forfeited his right to life. He warned:

The humanistic approach should not obscure our sense of realities. When a man commits a crime against the society by committing a diabolical, cold blooded, preplanned murder, of an innocent person the brutality of which shocks the conscience of the court, he must face the consequences of his act. Such a person forfeits his right to life.

Similarly, Justice Palekar highlighted the significance of the retributive object of death penalty in Jagmohan Singh, the counsel for the appellant referred to several studies made in the west to show the in effectiveness of capital punishment either as a deterrent or as appropriate retribution to assail the constitutional validity of death sentence for murder.

27 Ibid 953.
28 AIR 1973 SC 947.
Justice Palekar rejected this arguments and observed that there were 'equally numerous studies made in the west by those who wanted to retain capital punishment and the controversy had not ended as yet. He pointed out that the studies showing the ineffectiveness of deterrent and retributive purpose of death penalty suffered from a grave defect. They considered all murders as stereotypes, the result of sudden passion or the like. But this was not the truth. Although a large number of murder were of this kind but some of them were undoubting diabolical in conception and cruel in execution. There were some other cases where the victim was a person of high standing in the country. In such cases, the society was liable to be rocked to its very foundation. He stressed that in such cases, death penalty needed to be imposed not only by way of deterrence but also to may the emphatic disapproval of the society. He said:

Such murders can not be simply whisked away by finding alibis in the social mal adjustment of the murderer. Prevalence of such crime speaks in the opinion of many for the inevibility of death penalty not only be way of deterrence but as a token of emphatic disapproval by the society.\(^29\)

In *Kehar Singh Vs. State Delhi Admn*\(^30\) the then Prime Minister of India was brutally assassinated by her own security guards. This ghastly crime was disapproved by the whole world and the judiciary had no two views about awarding the death sentence to the assassins. The Supreme Court unanimously held that assassins had thrown to the winds, all values and ideals in life arid had exhibited a betrayal of the worst order. They deserved the grave penalty of death for this most foul and senseless assassination.

In *Triveniben Vs. State of Gujrat* also the court dealt with the contention that death penalty serves no penological purpose. In his concurring opinion, justice Jagannath Shetty has said that there are various philosophical ideologies about the purposes of punishment out of which deterrence and retribution are prominent. To

\(^{29}\) The appeal against death sentence in this case was heard by a Bench consisting of justice Gr Oza Justice R. C. Roy.
\(^{30}\) AIR 1989 SC 1335.
him retribution should not be confused with revenge as is often done. There are distinct differences between the two and retribution embodies the concept have an offender should receive what he rightfully deserves.

Also while refusing to commit the death sentences in the popular Joshi Abhyankar Massacre case, the Court observed:

‘Having regard to the magnitude, the gruesome nature of the offence and the manner of perpetrating them, this case in all the facts and circumstances must be regarded as falling with the rarest category and the extreme penalty of death is clearly called for. Any leniency shown in the matter of sentence would not only be misplaced but will certainly give rise to foster, private revenge among the people leading to destabilization of the society’.

Thus, a number of judges have taken the stand that retributive purpose is served by death penalty. They regard retribution, not in its literal sense ‘revenge’ but in its liberal sense of the society’s reprobation for the most terrible crimes.

However, certain Judges have extreme contrary views. For eg. Justice Bhagwati in his dissenting opinion in Bachan Singh case stated that denunciatory or retributive theory of punishment which claimed to justify punishment, as the expression of the moral indignation of the society against the wrong doer, was in truth an attempt to legitimize the feeling of revenge entertained by the society against him. He also said that in spite of the claim of the retributionists that retribution was now used as reprobation and not revenge, the fact remained that death penalty was considered necessary not because the preservation of the society demanded it, but because the society wished to avenge itself for the wrong done to it. He was of the opinion that reprobation was merely a sophisticated phrase for revenge and the high moral tone of this phrase did not change its real nature31

31 Justice Bhagwati supported has opinion regarding the retribution object of death penalty with the observation of some legal philosophers, politicians etc. who had rejected retribution as a proper goal of punishment.
According to Justice Bhagwati, in a civilized society like our own, retaliation could have no place and to take human life even with the sanction of law and under the cover of judicial authorization amounted to ‘retributive barbarity’, ‘travesty of dignity’ and ‘violation of divinity of man’.

Similarly justice Krishna Iyer has also critised the retributive purpose of death penalty. In Ediga Anamma he said:

A legal policy of life or death can not be left for adhoc mood or individual predilection and so we have sought to objectly to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and – accepting the trend against the extreme and irrevocable penalty of putting out life.

In Rajendra Prasad Case also, Justice Krishna Iyer treated the retributive theory of punishment as futile. He said that the retributive theory of justice ought to be discarded as it did not take notice of the significant developments in criminological and humanitarian movements. He pointed out that with the variation in the concept of social justice, the awareness against the taking of human life had grown. Reformation of the criminal was now the main goal of all punitive measures. Moreover, our constitution was committed to respect the dignity and divinity in every individuals. These value should permeate our penal laws. Therefore, he observed that there was a need for amending the penal laws to incorporate the penological changes.

According to him, retributive theory had its day and was no longer valid.

Similarly Justice O. Chinnape Reddy has also regarded the retributive object of death penalty as a relic of the past. In Bishnu Deo Show Vs. State of W.B. he rejected the retributive theory of justice as out moded in the present era of enlightenment. To him, this theory of justice was inadequate as it did not attempt to justify punishment by any beneficial results either to the society or the person.

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33 sss
34 AIR 1929 SC 964.
punished. He took the view that death penalty was not justified by this theory because this theory did not mean returning of evil for evil but the righting of a wrong. It implied the imposition of a just and not excessive punishment.

Chief Justice Chandrachud has also condemned the retributive goal of punishment. In *Mithu Vs. State of Punjab*, while holding Section 303 of the Indian Penal Code as unconstitutional, he observed that this provision was enacted when retributive and deterrent theories of justice held the field. The reformatory theory of punishment attracted the attention of the criminologist later in the day. In *Deena Vs. Union of India*, he observed that retribution involved in the theory of 'an eye for an eye' had no place in the scheme of civilized jurisprudence.

Punishment may be looked at from two different aspects. It can be regarded as a method of protecting society by reducing the occurrence of criminal behavior or it can be considered as an end in itself. In modern times it is the former aspect which is being emphasized because social welfare is considered to be of paramount importance. Ethical approach to crime which is the main basis of retributive theory is gradually losing ground in modern times.

**DETERRENT THEORY**

Deterrence is usually defined as the preventive effect upon potential offenders in the form of threatened punishment. The principle of deterrence is of ancient origin and has been prominent throughout history in crime system of punishment. It is assumed that as in day to day life the infliction of pain or its apprehension keeps people away from certain prescribed behaviour, the same purpose in served by punishment in relation to conduct for bidden by law. Obviously it will be a difficult task, almost next to impossible, to establish in a clear cut 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 deterrent in scarce and of limited applicability.

35 AIR 1979 SC 964.
The purpose of the punishment is to deter the criminal from committing crime in future and to set an example that others also who will commit crime will be punished like wise. By punishing the wrong doer will be like an example for those who will violate the law will incur the risk of punishment.

In many cases we find that punishment has failed to achieve the object aimed at because many criminals appear before the Magistrates repeatedly. If punishment really serves as a deterrent then severe punishment is justified because it would create greater fear but we find that even more severe punishments have failed to eliminate crimes. This theory does not prescribe any measure of punishment which will serve as effective deterrence. Therefore, Holmes criticizes this theory of being immoral in as much as the measure of punishment.36

It is true that punishment has some deterrent effect on many people, but there are some other aspect also, which can not probably be asserted with the same amount of confidence. In many cases offences are committed under the heat of passion or extreme excitement, or provocation, where the offender loses his mental balance and commits the offence without applying his mind to the consequences. In these cases the punishment hardly works as a deterrent. In the case where offender is once punished, the punishment to a certain extent, loses its rigour for him and once an offender undergoes imprisonment, he is no longer afraid of it to the same degree as he was before he served his first term. Thus the punishment has little deterrent effect upon the offender who has suffered the penalty.

SCOPE OF DETERRENT THEORY IN CAPITAL PUNISHMENT

This theory aims at checking the crimes by deterring the criminal behavior with the fear of consequences. From this it follows that the grave crimes would be deterred by severe punishments. Death penalty is regarded as an effective deterrent punishment for the grave crimes like murder, treason etc. The reasons for this is that basically all human being dread death and nothing is more dear them life for them. Death sentence is taken to act as maximum deterrent for potential criminal. The basic

36 Holmes, Common law, pp. 42-43.
argument about the deterrent value of death penalty has been well stated by Sir James Fitzgames Stephen in the following words:

No other punishment deter men so effectually from committing crimes as the punishment of death. This is one of those propositions which it 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 one to which resort has always been made when there was an absolute necessity for producing some result.... No one goes to certain inevitable death except by compulsion. Put the matter the other way, whether there is any a criminal who, when sentenced to death and brought out to die, would refuse the offer of commutation of his sentence for the severest secondary punishment? Surely not. Why is this? It can only be because ‘No body wants to give up his life’. In any secondary punishment, however, terrible, there is hope; but death is death; its terrors can not be described more forcibly.

Thus death penalty has a greater deterrent value as compared to all other punishments including life imprisonment. Deterrent purpose of death penalty is strongly highlighted for the retention of this penalty.

The deterrent effect of death penalty has been criticized on various grounds. It is contended that this object of the extreme penalty rules out individual deterrent. It has no deterrent effect on the criminal who is executed. This aspect of death penalty is scorned as a sentimental approach of those who pretend to reform other by making the criminal an object of example and warning. It is said that the death sentence does not deter any person from committing the crimes for which it is the punishment. The professional and hardened criminal do not speculate on the punishment but concentrate only on how to avoid detection. Similarly, those committing crimes in the heat of passion without premeditation do not think of the consequences and are hardly deterred by death penalty. Further it is pointed out that whatsoever little deterrent effect death penalty possesses is reduced by the infrequency of its
application due to difficulties of detection, apprehension and conviction and by the exercise of the power of reprieve after conviction. To illustrate the failure of death penalty, reference is made to the empirical and statistical studies made in some countries which shows that there is no rise in the incidence of murder in the event of abolition of death penalty.

However, these arguments assailing the deterrent effect of death penalty do not hold much weight and can be replied back with equally forceful argument that death penalty rules out individual deterrence, it may be pointed out that the well-established principle behind this theory of punishment is to protect the society rather than reform him or prevent him from committing crime. The law commission of India has also pointed out in its 35th Report that the Chief object not only of death penalty, but of all punishments in deterrent or what has been called 'general prevention. The philosophy of deterrent object of death penalty can be summed up in the words of an 18th century Judge who told the defendant that 'you are not to be hanged because you have stolen a sheep but in order that others may not steal a ship This still holds ground. All punishments including death penalty are awarded for the security and protection of the society, so that every individual, so far as it is possible, may live in peace.

In answer to those who contend that it is immoral to punish a person as means to deter others, it is pointed out that criminal, is not punished merely as means. The social good which involves his own individual good, is taken into account while awarding punishment. The decision whether the criminal should receive a punishment, and if so the highest punishment is an empirical one, based on the fact: In coming to that decision, alongwith the social good, individual criminal's good is also considered and his past history possibility of reform etc. are weighed against the other circumstances. The criminal whose offence has been proved us sentenced to death only if that is inevitable and there is no other way of avoiding serious danger to the lives of numerous citizens and maintaining the well being of the society. In India, the discretionary nature of death penalty and its use in exceptional cases ensure this.

Death penalty is necessary to deter the hardened and professional murderers. Abolition of death penalty would remove any fear which these offenders have in thei
minds. Further, the argument that death penalty has no deterrent effect on criminals acting in the heat of the moment without premeditation, is based on lack of appreciation of the legal position. For many such murders committed in the heat of the moment under emotional or psychological stress, death penalty is either not possible or is not awarded. Grave and sudden provocation and killing in the heat of passion are treated as culpable homicides if falling within exception one and four of Section 300 of the Penal code. The maximum penalty permissible in these cases is life imprisonment. Even otherwise, the judiciary is vested with the discretion toward the lesser sentence in the presence of some extenuating circumstances. Moreover death sentence is an exceptional punishment according to Section 354(3) of code of Criminal Procedure, 1973.

The statistical studies undertaken in other countries showing no rise in the incidence of murder in the event of abolition of death penalty, cannot be used in India to assail the deterrent effect to this penalty. There are a number of reasons for this. Firstly, no such study has been carried out in India. Secondly, the analysis in these studies are based on inadequate data. Thirdly, in the countries where death penalty has been abolished the figure of homicide was very low, four in a million or even less than that, whereas in India, it is as high as twenty five. Fourthly, various countries which had abolished death penalty have restored it for a number of reasons. Lastly, the need for the deterrent control provided by death penalty is greater in India in view of the social and political factors and the crime rate prevalent here. An eminent public man who had held high offices and had rich and various experience of criminal law, in his reply to the Law Commission of India, strongly advocated the effectiveness of the deterrent effect of death penalty. Its observation deserves to be quoted here:

The deterrent effect of the well known and universally dreaded sentence of hanging is not to be measured by statistics of cases. The wicked and reckless thought of angry and greedy man to do away with a human obstruction in his way do not take active shape because of the universally known law that killing means hanging of the offender. Many a murderer ends only with the thought of it. These do not come to be numbered. If this death sentence is abolished hundreds of angry and foolish minds
would take the chance of 15 years in jail much more readily than they do now. An
the motives for such crime are increasing these days, and jail life has lost most of i:
terror.

Thus, the crux of the matter is that the number of those who are found guilt
of capital offences lead the opponents of death penalty to contend that it has failed ε
a deterrent, but they overlook the fact that it is impossible to find out as to in ho
many cases it actually deterred the potential offenders. This is so because suc
persons do not commit the crime nor do they report to the authorities that they hav
been deterred by this extreme penalty. Therefore, merely because it is difficult t
number the successes of the deterrent effect of death penalty, it should not be taken t
be ineffective as a deterrent. Death penalty certainly has a unique deterrent effe
which no other form of punishment can have, leave alone life imprisonment.

The deterrent effect of death penalty has also been recognized and approve
by various commissions and committees which have studied this extreme penalty. Ti
British Royal Commission expressed the view that prima facie, the death penalty
likely to have a stronger effect as a deterrent to normal human begins than any oth<
form of punishment. It also added that there was some evidence to prove this, Roy;
commission explained that the deterrent force of capital punishment operated not on
by affecting the, conscious thought of individuals tempered to commit murder, bi
also by building up in the community, over a long period of time, deep feeling o
peculiar abhorrence for the crime of murder.

**Canadian Committee** on capital punishment also reached a simil
conclusion. After a careful consideration of the statistics presented by experts ar
after noting the evidence received from Law Enforcement Officers, it strong
advocated the deterrent effect of death penalty. It stated that death penalty d
exercise a deterrent effect, which would not result from any other from i
punishment. It was necessary to retain this stern penalty as a continuing restrai
against the use of violence by professional criminals.

The law commission of India studied the deterrent object of death penalty
its 35th report. After an extensive research, it concluded that deterrence was tl
strongest justification of death penalty. Even if all other object were to be kept asi
the deterrent object would by itself, furnish a rational basis for its retention. Regarding the deterrent effect of death penalty, the law commission observed: In our view, capital punishment does act as a deterrent.

JUDICIAL PERCEPTIONS

The Supreme Court has recognized and accepted the deterrent value of death of death penalty. In cases where the murder has been committed in cold blood and with utter disregard for human life, the Judges have clearly inflicted the extreme penalty of death by way of deterrence. This trend has been followed consistently over the years.

In *Jagmohan Singh* Justice D G Palekar took due notice of the fact that for certain types of murders death penalty alone is considered adequate deterrent. He observed:

In the context of our criminal law which punishes murder, one cannot ignore the fact that life imprisonment work out in most cases to a dozen years of punishment, and it may be seriously questioned whether that sole alternative will be an adequate substitute for the death penalty.

Justice V. R. Krishna Iyer in *Ediga Annama* expressed the view that deterrence through threat of death may still be a promising strategy in some fruitful areas of murderous crime. He observed:

The weapons and the manner of their use, the horrendous features of the crime and the hapless and helpless state of victim steel the heart of law for the sterner sentence. Similarly he refused the leave to appeal to the appellant in *Paras Ram Vs. State of Punjab*. In this case, the appellant was a fanatic devotee of the Goddess and used to hold satsang at which ‘Bhajans’ were sang in praise of the

37 AIR 1973 SC 947.
38 AIR 1974 SC 799
Goddess'. Appellant ceremonially beheaded his four year old son at the crescendo of the morning Bhajan one day. He was sentenced to death for this crime Justice Iyer, speaking for himself and Justice Sarkaria, refused to grant special leave and summarily dismissed the petition. Stressing the need for deterrent punishment, he observed:

Secular India, speaking through the court, must administer shock therapy to such anti social "piety", when the manifestation is in terms of inhuman and criminal violence. When the disease is social, deterrence through court sentence must, perforce, operate through the undivided culprit coming up before court. Social justice has many facets and Judges have a sensitive, secular and civilizing role in suppressing grievous injustice to humanist values by inflicting condign punishment on dangerous deviants.

However, in Rajendra Prasad case\textsuperscript{39} he modified his earlier view. He said that the crime persisted inspite of this penalty and there was no moral defence for the application of this penalty even in the name of deterrence. But he favoured limited use of death penalty in cases where the offender was a social gangrene and nothing less than his elimination could serve the penological purpose. Thus he favoured death penalty in a limited class of cases, for instance, train dacoity and robbery, bandits, economic offenders, white collar criminals and a hardened murderer beyond rehabilitation. The extreme penalty could be invoked only in the exceptional cases. He also said that the retributive theory was in longer good and reformation and deterrence alone could justify the penal deprivation of liberty.

In the same case, Justice A P Sen\textsuperscript{40}, strongly highlighted the deterrent effect of death penalty in his dissenting opinion. He quoted the views of eminent scholars and jurists to stress the deterrent aspect of all punishments particularly death penalty. Emphasising this justification of this extreme penalty Justice Sen pointed out that

\textsuperscript{39} AIR 1979 SC 1384.
\textsuperscript{40} Ibid 1396.
Beccaria, who asserted that all capital punishment was wrong in itself, claimed that it was justified in two cases one of them being that execution was the only way to deter others from committing a crime.

He pointed out that deterrence was generally held to be the most important of all the purposes of punishment and since people fear death more than anything else, death penalty was the most effective deterrent. He considered retribution and deterrent as convergent ends. According to him, by reserving death penalty for murder, the criminal law stigmatized the gravest crime, gravest punishment so that the element of retribution merged into that of deterrence.

In Asharfilal Vs. State of UP*1 confirming the death sentence, Justice sen observed:

It is the duty of the court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment. The only punishment which the appellant deserves for having committed the reprehensible and gruesome murders of two innocent girls to wreak their personal vengeance they had with regard to property with their mother Smt. Bulakan is nothing but death. As a measure of social necessity and also as a means of deterring other potential offenders the sentence of death on the two appellants Ashrfi Lal and Babu is confirmed.

Justice Sarkaria has also accepted the deterrent effect of death penalty. In Bachan Singh he asserted this by saying

....in most of the countries in the world, including India, a very large segment of the population including notable penologists, judges, jurists legislators and other enlightened people still believe that death penalty for murder and certain other capital offences does serves as a deterrent, and a greater deterrent than life imprisonment.

*1 AIR 1987, SC 1721.
In support of this statement, Justice Sarkaria set out the opinion of some of these distinguished person. He also referred to the 35th report of the law commission wherein deterrent effects of death penalty had been upheld after careful examination. Justice Sarkaria pointed out that most of the countries in the grip of an ever rising tide of violent crimes. The statistics furnished by the respondents evidenced that this was true in respect of India also. In such a situation, many expressed the fear that if the last of the remaining horrifying deterrent of death was abolished, nothing would be left to frighten the anti social hoodlums.

Similarly in *Mahesh Vs. State of MP* the court upheld the death sentence imposed on the appellant (father and son) who axed person and three members of this family and a neighbour. Justice Khalid, speaking for the court, observed:

To give the lesser punishment for the appellants would be to render the juticing system of this country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative Jargon.

The court has also emphasized the need of inflicting the deterrent punishment of death in dowry death and bride burning cases.

In *Kailash Kaur Vs. State of Punjab* Justice V. Balakrishna observed:

This is yet another unfortunate instance of gruesome murder of a young wife by the barbaric process of pouring Kerosene oil over the body and setting her on fire as the culmination of a long process of physical and mental harassment for extraction of more dowry. Whenever such cases come before the court and the offence is brought home to the accused beyond reasonable doubt, it is the duty of the court to deal with it in most severe and strict manner and award the maximum penalty prescribed by the law in order that it may operate as a deterrent to other persons from committing such crimes.
Thus, the deterrent effect of death penalty seems to be one of the most important justifications in favour of the retention of death penalty. The analysis of the cases shows that many Judges believe in the deterrent effect of death sentence. However some judge have also rejected this object death penalty as futile or in effective.

Justice O.Chinnappa Reddy, for instance, does not believe the deterrent effect of death penalty. In *Bishnu Deo Shaw*\(^44\) he stated that the question was not whether the death penalty had deterrent effect on potential murderers but whether it deterred more effectively than other penalties. He believed that death penalty had no special deterrent effect either in the cases of premeditated murders or in cases of unpromeditated murders. According to him:

Where the murder is unpromeditated any thought of possibility of punishment is blurred by emotion and the penalty of death can no more deter than any other penalty. Where murder is promeditated the offender disregards the risk of punishment because he thinks there is no chance of detection, what weighs with him is the uncertainty of detection and consequent punishment rather than the nature of punishment.

Justice Reddy conceded that no systematic study of the problem whether death penalty was a greater deterrent than life imprisonment had been undertaken in India. However, he concluded that the efficacy of death penalty as a deterrent remained unproved.

Similar view has been echoed by Justice Bhagwati in his minority opinion in *Bachan Singh*\(^45\). He said that the belief that death penalty was a greater deterrent than life imprisonment and that its abolition would increase the incidence of capital crimes was wholly unjustified, irrational and unsubstantiated by any factual data or empirical research. In this connection, he observed:

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\(^44\) AIR 1979 SC 964.

\(^45\) AIR 1980 SC 898.
The argument that the rate of homicide will increase if death penalty is removed from the statute book has always been advanced by the established order out of fear psychosis, because the established order has always been apprehensive that if there is any change and death penalty is abolished, its existence would be imperiled. This argument has in my opinion no validity because, beyond a superstitious belief for which there is no foundation in fact and which is based solely on unreason and fear, there is nothing at all to show that death penalty has any additionally deterrent effect not possessed by life sentence.

In support of this view, Justice Bhagwati relied heavily on the studies carried out in other countries to show that there was no relation between the homicide rate and the presence or absence of death penalty. He did not agree with the view of the majority that a large segment of population including notable judges, jurists, penologists and legislators believed that death penalty had a greater deterrent effect their life imprisonment. He said that this was not the factual position. Only a few judges, jurists penologists and legislators believed in the deterrent force of death penalty and could not be said to fem a large segment of population.

**PREVENTIVE THEORY**

Preventive philosophy of punishment is based on the proposition not to avenge crime but to prevent it. It presupposes that need for punishment of crime arises simply out of social necessities. In punishing a criminal, the community protects itself against anti social acts which endanger social order in general or person or property of its members. The preventive object of criminal justice is stressed by punishing preliminary crimes like abetment, conspiracy and attempt etc. Salmond too appears to have emphasized the preventive purpose of punishment, when he says that we hang murderers not merely that it may put into the hearts of others like them the fear of a like fate, but for the same reason for which we kill snakes, namely, because it is better for us that they should be out of the world than in it. The real object of the
penal law, therefore is to make the threat generally known rather than putting at occasionally into execution. This indeed makes the preventive theory realistic and humane.

In England utilitarians like Bentham supported preventive theory because of its humanizing influence on criminal law. They asserted that it is the certainty of law and not its severity which has a real effect on offenders.

In modern times, some other measures of prevention are also applied, such as forfeiture of office, suspension and cancellation of licenses for dealing in goods or driving etc. Apart from them some other preventive measures are also adopted in our country against those who threaten to commit offences or who are otherwise dangerous to the society.

Prevention as a purpose of punishment does not seem to be very convincing and does not work very successfully in checking crime. Person committing crime under extraordinary psychological stress seldom repeat the crime. To punish a man who commits a crime under such a pressure would be meaningless.

Death penalty is the most effective mode of disabling or preventing the offender. It prevents the repetition of crime by the offender by eliminating him. But because of the grave nature of this penalty, it is confined only to certain grave offences like murder and treason etc. These offences are regarded as most dangerous for the society. Therefore, death penalty is considered to be the most appropriate punishment for such offence. It is considered to be the most effective preventive measures.

However, the preventive object of death penalty is also not spared from criticism. It is said that this theory aims only at the prevention of crime and takes no note of the criminal. It prefers to disable the wrongdoer from committing any more crimes, but ignores one of the basic objects of the criminal law i.e. to reform the criminal. It is also said that prevention as a purpose of death penalty is not very convincing and does not work very successfully in checking and crimes. It is pointed out that most of the murders are committed without premeditation and under some
psychological or emotional stress. There is no need to prevent such offenders by death penalty because even otherwise they do not repeat this crime.

This criticism does not seem to be very convincing. Death penalty is the most effective preventive measures. The Law Commission of India in its 35th report has regarded ‘elimination of the offender’ as one of the objects of death penalty. I regarded this to be a special form of particular prevention seeking total and permanent elimination of the offender. It observed:

Even after all the arguments advanced to support the abolition of capital punishment are taken into account, these does remain a residuum of cases where it is absolutely impossible to enlist any sympathy on the side of the criminal or to postulate any mental abnormality on his part, or to assert that the deterrent effect is counter balanced by any external factors i.e. factors other than the will and determination of criminal. As Stephen said, there are in the world, a considerable number of extremely wicked people, disposed, when opportunity offers to get what they want by force or fraud, with complete indifference to the interests of others, and in ways which are inconsistent with the existence of civilized society. Such person, I think, ought in extreme cases to be destroyed.

JUDICIAL PERCEPTION

Preventive purpose of death penalty was upheld by Justice Sarkaria in Bachan Singh46. He was of the opinion that incapacitation of the offender as purpose of death penalty was in fact another aspect of its deterrent effect. In this connection he relied upon the following observation of Sheldon L. Messinger and Egon Bittner:

46 AIR 1980 SC 898.
There is an additional point worth stressing. Even if punishment by execution or imprisonment does not have any deterrent effect, surely it must exert some incomparative effect on punished offender by reducing or eliminating the possibility of recidivism on their part.

Justice Sarkaria also stated that some penologists justify death penalty (and life imprisonment) on the isolation or ‘elimination’ theory of crime and punishment. In support of this, he quoted Vernon Rich who said:

The isolation theory of crime and punishment is that the criminal law is a device for identifying persons dangerous to society who are then punished by being isolated from society as a whole, so that they cannot commit other anti social acts. The isolation theory is used to justify the death penalty and long term imprisonment. Obviously, this theory is effective in preventing criminal acts by those executed or permanently incarcerated.

In his minority opinion in Rajendra Prasad47, Justice Sen also approved the preventive purpose of death penalty. He said that the death sentence is imposed simply to eliminate one who is held to have become irretrievably, a liability or a menace to the society.

However, in Bishnu Deo Show48, Justice O. Chinnappa Reddy rejected the preventive theory as unimportant where the choice is between death and life imprisonment.

EXPIATORY THEORY

"Expiation" is a form of punishment, no doubt but it is, in a sense widely different also. Primarily punishment is imposed from without and is therefore

47 AIR 1973 SC 916.
48 AIR 1979 SC 964.
involuntary whereas expiration is undertaken as a result of inspiration from within and is a voluntary process.

According to this theory, punishment is necessary for the purification of the offender. It is a kind of expiation or penance for the misdeeds of a person. Fr. observe that

Punishment should be in order to “adjust the suffering to the sin”\(^\text{49}\), some maintain that the offender becomes purified either by beating or by scourging.\(^\text{50}\) While others say that it is the purification not of the individual alone but of the humanity as a whole.\(^\text{51}\)

*Salmond* too appears to support this theory when he agrees that punishment blots out crime.\(^\text{52}\) To suffer punishment is to pay a debt due to the law that has been violated, maintain Salmond.

But it is difficult to work out this theory because it is difficult to ascertain a equivalent of guilt in terms of suffering. It is impossible to weight the guilt in the fine scale of suffering. The second difficulty with regard to this theory is the suffering can not be standardized even though it were possible to judge crime according to moral scale no equivalent of punishment would be prepared in terms of suffering. The effect of the same punishment may vary upon two different accused. To one it may amount to torture while to other it may be like a child’s play. Thus the above theory is not sound because it is out of men’s capacity to work it out.

According to this theory guilt plus punishment is equal to innocence. The first object of punishment is to make satisfaction to outraged law. The penalty of wrongdoing is a debt which the offender owes to his victim, and when the punishment has been endured the debt is paid, the liability is extinguished, innocence is substituted for guilt.\(^\text{53}\)

\(^{49}\) Block way A New way with Crime p. 15.
\(^{50}\) Oppenheimer, Rationale of Punishment p. 188.
\(^{51}\) Ibid 189.
\(^{52}\) Salmond, Jurisprudence (10th ed) pp. 112.
\(^{53}\) Salmond Jurisprudence 12th Ed. Pp. 99-100
REFORMATIVE THEORY

Modern penology recognises that punishment is no longer regarded as retributive or deterrent, but is regarded as reformation or rehabilitative. Individualised treatment became the cardinal principle for reformation of offender. Reformation is defined as "the effort to restore a man to society as a better and wiser man and a good citizen. According to reformationists, a criminal is to be studied, like a patient in his entire socio-economic milieu, and nor in isolation, to understand causative factors leading to criminalising and then attempt be made to reform or treat and rehabilitate the offender.

By reformation of the criminal in meant his moral regeneration, and developing the sense of honesty. A person who commits a crime and suffers punishment for that comes back to the society and lives in along with his other fellow beings. Therefore punishment must aim at making a man worthy of king in the society. The advocates of reformatory theory aim at the rehabilitation of the offender in the society. According to them a man is not a born criminal, one commits crime because he suffers from some disease so criminal is a patient and deserves treatment for crime. It treats punishment not an end in itself but as a means to an end that end is the correction or rehabilitation of the offender.

But this reformative approach does not apply over habitual offender because for them crime is a habit and they are beyond the reach of any reformative programme. Secondly, if the offender are kept in prison very comfortably, the prison might turn into dwelling house atleast for the poor and unemployed. Critics of this theory also maintain that if punishment is to be a punishment, it must be unpleasant, while a course of reformatory education is only accidentally unpleasant. Reformation only robs punishment of its sling. The criminal is looked upon as an object of pity, not of hatred and punishment becomes the work of charity. This theory works well in case of young offenders and some sexual offender but has no appreciable effect upon habitual, professional and hardened criminal.

54 Oppenheimer, supra, f. n. 50, p. 245.
V. CAPITAL PUNISHMENT : A BRIEF HISTORY OF OPINION AND PRACTICE

MEANING OF CAPITAL PUNISHMENT

The term "capital punishment" stands for most severe form of punishment. It is the punishment which is to be awarded for the most heinous, grievous and detestable crimes against humanity. The word 'Capital' refers to the head or top of the column. Thus capital punishment has reference to head and is also top most among the grades of punishments. It is one of the most severest type because nothing can be more painful, crueler to an individual than being deprived of the very life and existence. Meaning of the 'Capital Punishment' is the practice of deliberately putting offender to death as a measure of social policy imposed by the governing authority of the community. By common usage in jurisprudence, criminology and penology, capital sentence means a sentence of death. Mrityum Danda, Phansi or Saja-e-maut are all synonymous of death penalty.

HISTORICAL BACKGROUND OF CAPITAL PUNISHMENT IN INDIA

Capital punishment has been prevalent in India from times immemorial. Perhaps it is as old as the Hindu society itself. We find references to the penalty of death in our ancient scriptures and law books.

Dandaniti (naMuhfr) is not a recent growth in India. The fundamental basis of dandaniti is deterrence and mental rehabilitation. Danda is that by which righteousness is maintained. On proper analysis it will appear that the ruling idea is the protection of society, which correction of the individual may be a means to that end. The main object of punishment is not to inflict pain but to eradicate evil.

Infact, the Indian law givers of the olden times were well versed in the science of penology and attached great importance to penal sanctions. It was observed that even in those days that one who commits sin should be imprisoned and made to perform ignorable works for a month, 3 months, 6 months one year or for whole life

55 Encyclopedia Britannica, Vol. VIII p. 303
but should not be killed. One should not kill living beings – this is the truth of Sruti. It was enjoined that the king should carefully avoid capital punishment but restrain by detention, imprisonment and repression. The one other peculiarity of ancient India was that death was not meant for the Brahmana, but mostly for Sudra, and less frequently for the Kshatriya and Vaisya as well. Thus in the case of Adultery for the non Brahmana death penalty was prescribed and this also in various ways.\textsuperscript{56} It has even been ordained that for kidnappers the king should inflict the punishment of burning them on straw fires.\textsuperscript{57} Those who commit theft during journey were to be hanged by the neck on trees\textsuperscript{58}. Again Punishment for murder itself was death by gruesome method.\textsuperscript{59} Capital punishment was also prescribed for those who robbed the king’s treasing or preserved in doing the opposite of his commands, or conspired with his enemies.

Even in the work of Kautilya we find mention of sentence to death by various means for murder. From Kalidasa, it is gathered that murder was legally punishable by death.\textsuperscript{60} When a murder was committed by conspiracy, no one was spared from the rod of the king. Yajna Valkya prescribed special punishment for the inciter and helpers or the person who associated the actual miscreants in different ways in the crime of murder.

In Buddhist Sanskrit and late Pali tests, one finds references relating to death sentence one works states, that the king is one who rules and guides the world, the censures, fines and executes the man who transgresses his commands; ruling in righteousness, he became dear to his people.\textsuperscript{61}

In Kautilya Asthashastra, there are many rules which are regarding death penalty. If an offender in a dispute caused instantaneous death of another, he was to be given a torturous death. Killing offenders by burning their head and hands has also been prescribed for seditionists. An offender who killed his mother, father, son, brother, teacher or a person performing penance (Tapasvi) had to put to death by first

\begin{itemize}
\item\textsuperscript{56} M.S. VIII 359.
\item\textsuperscript{57} Brahshpati quoted in Dada viveka page 323
\item\textsuperscript{58} Vyasa quoted in Dada viveka page 126
\item\textsuperscript{59} Vyasa – Dinyativa tu patakam Samyak p.
\item\textsuperscript{60} Raghuvamsam IX 81.
\item\textsuperscript{61} Ghoshal VN, A History of Indian Political Ideas, p. 265.
\end{itemize}
peeling the skin of his head and then by setting fire to it.\textsuperscript{62} Death by being burnt in a fire was prescribed for him who set fire to a pasture land, field, threshing floor, house etc.\textsuperscript{63}

\textit{During Muslim times} the main system of criminal law administered was Quranic one. Its main source were the Quran. Akbar idea of justice may be gathered from his instructions to the Governor of Gujrat that he should not take away life till after the most mature deliberations.\textsuperscript{64} He was keen to lay down that capital punishment was not to be accompanied with mutilation or other cruelty; and that, except in cases of dangerous sedition, the Governor should not inflict capital punishment until the proceedings were sent to Emperor and Confirmed by him. In the time of Jahangir no sentence of death could be carried out without the confirmation of the Emperor. During Aurangzeb reign, capital punishment was almost totally unknown. He never issued orders of death during this life time. Under Muslim law, death sentence is inflicted only in following cases i.e.

(i) When the next of kin of murdered person demands the life of the murder (qisa) and compensation (diya or prince of blood).

(ii) in certain cases of immortality, the woman owner is stoned to death by the public.

(iii) On highway robbers.\textsuperscript{65}

However with the decline of Mughal Rule, the British captured political power in India. The defects of Muslim criminal law provided an opportunity for British law administration to substitute their own system of laws with necessary modifications so as to suits the needs of this country. The common methods of punishment introduced by British administrators in India included the sentence of death, deportation, transportation, solitary confinement, imprisonment and fines.

In Bengal Resolution of 1793, the nature of the instrument as signifying the intention was made unmaterial in homicide and the intention was to be gathered from

\textsuperscript{62} Kautilya Arthashastra IV 7-75-1 IV-7-76-1 & 4.
\textsuperscript{63} Kautilya Artha IV 77 Rule 1 & 3.
\textsuperscript{64} Wahid Hussain, Administration of Justice during Mughal Rule in India, p. 33.
\textsuperscript{65} Subhash C. Kashyab – Capital Punishment in India, p.
the general circumstances and the evidence. It is provided in this resolution that in cases of willful murder, judgement was to be given on the assumption that 'retaliation' had been claimed. Thus the motive, not the method should determine the sentence. Regarding the power of commutation it was observed that it was evidently fit that the Govt. should be empowered to commute the sentence of death (without consent of the offender) for any other punishment.

Thus it was left to the Britishers to give the country a systematized penal code which strictly limited the number of capital offences and laid down the procedure for criminal trials. In a sense, the Britishers were responsible for partial abolition of capital punishment.66

**CONCLUSION**

The *Modern Penologist* are opposed to retention of capital punishment on humanitarian grounds. They argue that killing of man is inhumane. That apart, if an innocent person is executed due to erroneous justice, that will do irreparable harm. Some argue that putting an offender to death virtually amounts to a cold blooded murder which serves no useful purpose. The real object of punishment being reformation and not destruction of the criminal, death sentence hardly serves any purpose. Thus enlightened view is averse to the retention of capital punishment since it is grossly unjust and against the principle of humanity.

It must, however, be pointed out that despite growing disinclination for awarding death penalty, there is a growing reluctance to abolish it. This is so because of a general feeling that threat of infliction of death penalty itself proves as an effective deterrent. Therefore ideal policy is to retain capital punishment in the statute book to be used in “rarest of the rare” cases.

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66 Subhash C. Kashyap, Ibid.