CHAPTER ONE

CRIMES, PUNISHMENTS AND SET OFF

1. CRIME CONTROL AND QUANTUM OF PUNISHMENT.

2. BENTHAM'S RULES OF PUNISHMENT AND SET OFF.

3. SCHOOLS OF CRIMINOLOGY AND DOCTRINE OF SET OFF.

4. THEORIES OF PUNISHMENT AND SET OFF.

5. COMPARATIVE CRIMINAL THOUGHT.

6. SET OFF & ADMINISTRATIVE CONVENIENCE.
1. CRIME CONTROL AND QUANTUM OF PUNISHMENT.

1.1 The world today is in the grip of massive and seemingly irreversible crime progression. Therefore people all over the world are worried as to how to save the society from crime and criminals. The problem is more alarming because crime-statistics hardly present a true picture and accumulating crimes. Quite a large number of crimes go undetected and many more go unregistered or unreported.

Administration of justice is one of the essential functions of the state. Law and order within the state is maintained by the administration; and the ordinary citizens get the feel of the existence and importance of the state, only through the efficacy of administration of justice and maintenance of law and order.

1.2 Concept of crime is essentially concerned with the social order. Sociological studies have revealed that man's interests are best protected within the community rather than in isolation. Everyone owes certain duties to his fellow men and at the same time has certain rights and privileges which he expects others to ensure for him. This sense of mutual respect and trust for the rights of others regulates the conduct of the members in a society.
1.3 Although most people believe in 'live and let live' policy, yet there are a few who for some reason or the other (causations of crime) deviate from this normal behavioural pattern and themselves become anti-social elements. This obviously imposes an obligation on the state to maintain normalcy in society. This important task of protecting and giving security to the law abiding citizens and punishing the law breakers, vests with the state which performs its functions through the instrumentality of law, by clearly defining the crimes and the punishments and the administrative as well as the judicial processes.

2.1 Administration of justice is a barometre of the march of civilisation; and it has passed through various stages to reach the present concept and form. In the primitive society when a wrong was done against an individual he had to resort to self-help and it was based on private vengeance. Upon that logic, he was helped by his relatives and kinsmen. Later, when individuals got organised themselves in the form of society, certain rights were recognised by the society as belonging to every individual. If a wrong was done against an individual then it was abhorred by the society and the society made efforts to provide remedy to the individual wronged. The private vengeance still remained the motive and the effective measure but it was regulated by certain rules and
often took the form of combat. The right, wrong and punishment were decided by the physical strength of the parties. The party who could prove to be stronger was considered to be on the right. Duels (though no longer recognised by law) are reminiscent of the same practice.

2.2 In some ancient societies the natural objects (fire, water, air etc.) were considered as gods and as such they were approached for justice in an ordeal. For example, if a person against whom there was any allegation could walk through the fire and could come out unhurt, he was considered to be innocent.

Gradually, the society conceived of a political sovereign; and the state came into being for the protection of the citizens, and for its own protection it became necessary for the state to maintain law and order. This is the beginning of administration of justice in the modern sense of the term.

3.1 State defines the rights and duties of its citizens. It protects the right and enforces the duties. If any violation of the rights of an individual is done by another individual then the latter is to redress it or he be punished. The state appoints magistrates and officers or justice to adjudicate the rights and duties and to secure their protection and
enforcement. In this way, the courts come into existence and a well organized legal order sets in, in which the judiciary enjoys highest esteem and primacy being charged with the function of administration of justice.

3.2 Law today is wholly statutory. No act is unlawful unless at the time of its commission there exists a valid written law (statute or ordinance) which defines such an act as an offence and sets a penalty for its commission or omission. Substantive law defines the rights, duties, and liabilities of the parties involved in a crime and also defines the essential elements of specific crimes. Adjective law deals with the procedures of adjudication or trial from the stage of commission & cognizance of an offence to the stage of conviction and execution of sentence.

3.3 When a convicted criminal is punished today, he is punished by the state in the name of its people. Crimes are regarded as public wrongs; and in criminal law the state becomes the victim. The real injury to the real victim of a crime is formally covered with this fiction. The state prosecute, the state adjudicates, and the state determines the possible penalties. The result, some authors (Egon Bittner and Anthony Platt) suggest, is that punishment has become "an abstract measure of justice" in the sense that
the penalty for a crime is not assessed in terms of the real harm experienced by its immediate victims.\footnote{1}

4.1 Many things shape the public policy, whether a crime or a civil wrong or anything to be termed illegal or unlawful. Not least among these influences are the attitudes, beliefs, ideas, and assumptions (about crime) of those in positions of political power and influence. These attitudes and beliefs constitute the ideological under-pinnings of public policy and shape the stand to be taken on specific issues. As Walter Miller\footnote{2} has observed, "Ideology is the permanent hidden agenda of criminal justice". The same ideology is not of course, shared by everyone; nor does a particular ideology necessarily retain its influence over time. Policies change as time passes. We can also expect that the policies created, adopted and implemented at any particular time will not possibly meet with the approval of all who have an opinion on crime.

4.2 Those, whose views and propositions about criminal matters are most likely to be articulated into policy, are persons in occupation dealing directly with crimes and criminals.

\footnotesize{\begin{itemize}
\item\footnote{1}{Barlow Hugh D; Introduction to Criminology, 5th edition. page 421.}
\item\footnote{2}{Walter B., Miller, "Ideology and Criminal Justice Policy some Current issues, Journal of Criminal Law and Criminology" 64 (1973) Page - 142.}
\end{itemize}}
They are legislators, government-executives, judges, police officials, lawyers, prison officials, and other authorities and officials whose work routinely brings them in contact with law, crimes, and criminals. Also included are Psychologists, Psychiatrists, Criminologists, Sociologists, Academic Lawyers, Economists and persons with acknowledged expertise in the study of criminality and law. There is a close connection between crime and politics (or government) because the whole criminal law, the courts, the police and prisons are all governmental functionaries and instruments of crime repression.3

4.3 According to Pecker the ideology underlying the crime control model emphasizes upon repression of conduct defined as criminal to be the most important function of the criminal process.4

The failure of law enforcement machinery to bring criminal conduct under right control is viewed as leading to the breakdown of public order and then to the disappearance of an important condition of human freedom. If the laws go unenforced which is to say, if it is perceived that there is high percentage of failure to apprehend and convict the criminal in the criminal process a general disregard for legal

3. Francies A. Albn, The crimes of politics, 1974, page- 4
control tends to develop. The law-abiding citizen then becomes the victim of all sorts of unjustifiable invasions on his interests. His security of person and property gets sharply diminished, and therefore his liberty to function as a member of society also gets diminished. The claim ultimately is that the criminal process be a positive guarantor of social freedom. 

4.4 So the function of crime control agency is to pay the most attention to the capacity of the criminal justice system to apprehend, prosecute, convict, and dispose of a high proportion of criminal offenders. With its emphasis on a high rate of apprehension and conviction, and given limited resources, the crime control model places a premium on speed and finality. 'Speed' is enhanced when cases can be processed informally and when procedure is uniform or standardized. 'Finality' is secured when the occasions for challenge are minimized. It also demands that those who work in criminal justice assume that those apprehended are in fact guilty. This places heavy emphasis on the guilty of administrative fact finding and the co-ordination of agency tasks and role responsibilities.

5. Ibid --- Page 158
7. Ibid --- page - 488
Success is gauged by how expeditiously nonoffenders are screened out of the process and offenders are passed through to final disposition.

5.1 The dictionary meaning of "Punishment" is, that which is inflicted as a penalty. Chambers Twentieth Century Dictionary gives the meaning of "Punishment" as an act of method of 'Punishing', penalty imposed for an offence and 'punishing' is defined as causing, suffering or retribution.

Among the several meanings of the word "sentence" given in Law Lexicon by P.R. Aiyar, the following is worth noticing.

"Sentence as the term is used in criminal law, is the appropriate word to denote the action of the court before which the trial is had declaring the consequences to the convict of the fact thus ascertained."

"Sentence" is defined in Criminal Appeal Act, 1907, (7 Edn. 7, C-23). Sec 21 as amended by Criminal Justice Act, 1967 (C-80) Sch. 4, Para - 8. It includes any order of the court made on conviction, it does not include a sentence of imprisonment for failure to surrender to bail.

---

8. Ibid --- Page - 489
5.2 Chapter III of Indian penal code deals with punishment. This chapter on punishment is really a chapter on adjective law, though it is naturally connected intimately with the substantive law enacted in the code, in which, accordingly, it finds a place. But all the same, it is a chapter relating to procedure, and its provisions have, therefore, to be read with the Criminal Procedure Code which largely affects those provisions.

Indian Penal Code, 1860, contemplates five descriptions of punishments (Section 53):

1) Death, 2) Imprisonment for life, 3) Regorous imprisonment and simple imprisonment, 4) Forfeiture of property, 5) Fine.

Indian Penal Code does not inhere any concept of set off. In right proportion of set off was to be introduced, it should have been introduced into I.P.C. and not Cr.P.C., because set off affects the punishment, its description, its duration.

5.3 What is remarkable of Indian Penal Code is that it provides ample discretion to the judge while awarding punishment. It provides only the limits to the maximum term of imprisonment and maximum fine to be imposed, and the trial judge enjoys discretion to award punishment taking into various factors.


14. In the case of certain heinous offences the code provides a limit to the minimum sentence too, viz,

1) Where at the time of committing robbery or dacoity the offender uses any deadly weapon or causes grievous hurt to any person (Section 397)

2) Where at the time of attempting to commit robbery or dacoity the offender is armed with a deadly weapon (Section 398)

3) Section 304-8, Dowry death.
6.1 The whole dialogue on set off evolves on a conceptual base, that a person is presumed to be innocent until and unless he is proved to be guilty by a court of law. It is pertinent to examine the doctrine of set off in the light of the above mentioned descriptions of punishments enumerated in section 53 of I.P.C.

6.2 Section 428 of the Code of Criminal Procedure, 1973, defines set off as, "where an accused person has on conviction been sentenced to imprisonment for a term (not being imprisonment in default of payment of fine)\(^{15}\) the period of detention, if any, undergone by him during the investigation, inquiry of trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder if any, of the term of imprisonment imposed on him".

\(^{15}\) Inserted by Section 31 of Act. 45 of 1978.

To the above offence the minimum punishment is 7 years. In all other cases the code fixes no minimum sentence. The maximum punishment for single offence is 14 years and the lowest punishment for one offence is 24 hours. The trying judge is given discretion to inflict proper punishment taking into account all aspects, viz, circumstances and gravity of the crime, rehabilitation of the criminal, as well as theories of punishment.
6.3 This is a new provision introduced through the Code of Criminal Procedure, 1973 to take effect from 1.4.1974. A contradiction arises between section 53 I.P.C. and section 428 Cr.P.C., at this stage, which needs to be appreciated. Section 53 clause 4 I.P.C. mentions only two kinds of imprisonments: simple and rigorous. Sec. 53 I.P.C. does not mention about pre-conviction detention period in jail. It only means by 'sentence' an award of punishment upon conviction. Pre-conviction detention period in jail is not covered by any clause of section 53 I.P.C. (It was not even contemplated). While the pre-conviction period is treated as only simple detention to ensure the presence of the accused in trial or for preventive purposes, it is no imprisonment at all. And, preconviction detention in jail cannot be treated to be a punishment as it does not come under either description of imprisonment.

6.4 It is a most serious concern of administration of justice that when an U.T.P. is awarded rigorous imprisonment, his pre-conviction period is set off from the term of imprisonment awarded. This is a clear miscarriage of justice, because rigorous imprisonment is accompanied by hard labour; while the accused in pre-conviction detention period is simply detained without prescription of labour and without having to wear jail clothes and with a good many privilege to which convicts are not entitled.
6.5 There may be a good logic to provide for application of set off only in those cases where the sentence is limited to simple imprisonments (even if psychologically a pre-conviction detention and a post-conviction simple imprisonment may be quite apart from each other. This could offer a good compromise between section 428 Cr.P.C. and section 53 I.P.C. whereas there appears no logic to equate a pre-conviction detention (not undergone as punishment, and not being itself rigorous) with post-conviction rigorous imprisonment.

7.1 The cutting edge of the judicial process is the crucial strategy of the criminal law in achieving social defence and rehabilitation of the delinquent. So Courts have to consider the totality of factors having bearing on the offence and the offender and then fix a punishment which will promote effectively the punitive objective of the law—deterrence and rehabilitation of the offender (ultimately reduction of crime). But set off does not conform to this thought.

7.2 The purpose of crime control therefore, can be said: to prevent activity perilious to society, to prevent the offender from committing criminal offences and to reform him; to exercise educational influence on other people in order to deter them from committing criminal offences; to influence development of social morals and social discipline among citizens etc.

17. Sirohi J.P.S., Criminology and Criminal Administration) 1988) p. 82
7.3 A judge is called upon to decide the quantum of punishment 'not considering the provision of set off'. That is the judicial irony, because provision of set off without any discretion with the judge effects inversely upon the habitual and professional criminals.

7.4 Where a good system of prison discipline exists; where the criminal without being subjected to any cruel severities is strictly restrained, regularly employed in labour not of an attractive kind and deprived of every indulgence not necessary to his health, there a single year's confinement will generally prove as efficacious as a confinement for two years in a goal where the superintendence is defective and slack, where the work exacted is light and meaningless and where the convicts find more of amenities than what would be normally available in their socio-economic conditions. As the intensity of the punishment is increased, its length may safely be diminished. But the sine qua non for this system of punishment is that there must exist a just and human condition of living in the jails.

Intense punishment and strict discipline for a shorter period would train the convicts in such a style of living that when they come out of the prison they would find living in society with hard labour and discipline, a good pleasure.
8.1 Punishing the offenders is a primary function of all civil states. The drama of wrong doing and its retribution has indeed been an unending fascination for human mind. In fact it has been the theme of much of the world's greatest literature since ages. 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 people. 

8.2 The crucial problem to-day is whether a criminal is to be regarded by society as a nuisance to be abated or an enemy to be crushed or a patient to be treated or a refractory child to be disciplined? Or should be regarded as none of these things, but simply be punished to show to others that anti-social conduct does not finally pay?

8.3 The reasons for punishment by society are bound up with several ancient conceptions, attitudes, and values, as well as with more recent justifications and motives. In any particular society or era the justifications of punishments are pretty well stereotyped in the thinking and sentiments of the people. For the most part there is a firm belief in the efficacy and rightness of punishment, although in modern times the value of punishment has been subjected to considerable challenge and criticism.

19. Ibid --- p. 117
8.4 The existing theories of punishment, some of them ancient and some of them recent in origin may be listed as follows: - Retribution, Deterrent, Expiatory, Reformative, Preventive and Desert. The common man usually justifies the use of punishment mainly in terms of retribution and atonement which are undoubtedly the oldest justifications; Persons who are more sophisticated usually justify punishment in terms of deterrence and protection and consequential prevention of crime. The reformers express a faith in the use of punishment as a means of reformation. Latest in point of time is the desert theory which believes in alienation of the criminal from the society for limited period as a correctional measure.

8.5 Punishment can be considered in its two different aspects. Firstly, as being an institutionalised imposition for some definite end; and secondly, as being an end in itself. In the first category the end may be (a) deterrence for the potential offender, (b) prevention of repetition of further offences by the actual wrong-doer and (c) reformation of the wrongdoer. Three theories of punishment emanate therefrom, viz. (1) Deterrent, (2) Preventive, and (3) Reformative. Considered as an end in itself punishment becomes merely a retribution to the wrongdoer, for the offence committed by him, with no aim behind the infliction. The fourth theory of punishment, the Retributive theory, emanates therefrom.

Each theory of punishment has its claims for observance. Rather, a sound policy of punishment has to take into account all their relative merits while framing a law for crime and for punishment.

Punishment is the sanction imposed on a person for the infringement of the rules of society. Punishment is generally inflicted on a person or on property of an accused according to law. Punishment aims to protect society from mischievous elements, by deterring potential offenders and preventing actual offenders, to eradicate evils and to reform criminals to become law abiding citizens.22

8.6 Hindu jurisprudence views punishment as a perfection of justice. In the words of Manu, "Punishment governs all mankind, Punishment alone preserves them. Punishment wakes while their guards are asleep; the wise consider the punishment (danda) as the perfection of justice".23

This object is achieved partly by inflicting pain in order to deter criminals and others from indulging in crime and partly by reforming criminals. It is also asserted that respect for law grows largely out of opposition to those who violate the law. The amount of punishment, however, is not uniform in all cases. It varies according to the nature of the offence, intention, age and mental condition of the accused person and the circumstances in which the offence is committed.

23. (Institutes of Hindu law, (Translated by Houghton G.C)1825 Ch. 7 para 18 P. 189) Source Gaur K.D, Criminal Law; Page-334, Para-5.
Punishment is the mode by which the state enforces its laws forbidding the doing of something, or omission of doing something. Punishment may take different forms. It may be a mere reprimand, it may be a fine, it may be whipping, it may be imprisonment—simple or rigorous, it may even extend to death. But whatever the form, punishment is always co-related to a law of the state. Unless such a law exists, there is no question of any act or omission being made "Punishable".

Punishment is the suffering in person or property inflicted on the offender under the sanction of law. It is the retribution due for violation of the rules of society which are made for its preservation and peace and the infraction of which is a crime. The India Penal Code measures the gravity of the violation by the seriousness of the crime and its general effect upon public tranquility. The measure of guilt therefore determines the measure of punishment. And it is, therefore, essential that punishment must fit the crime. So punishment varies according to the nature of the offence, intention, age and mental condition of the accused and the circumstances in which the offence is committed.

Principles of punishment require that first offenders or youthful offenders should invariably be treated leniently and in applying provisions of law like the First Offenders Probation Act or section 360 of Code of Criminal Procedure the court is expected to apply the provisions liberally.

24. Dr. Gour Hari Singh; Penal Law of India 1983, page 393
But where a man has shown from his past conduct that he intends to adopt a criminal career, the following considerations need be borne in mind:

1. It is necessary to pass a sentence upon him which will make him realise that a life of crime becomes increasingly hard and does not pay. (2) The sentence should serve as a warning to others who may be thinking of adopting a criminal career. (3) Public must be protected against people who show that they are going to ignore the rules framed for the protection of the society. 25

8.9 Cases illustrative of principles of punishment fall broadly into two classes:

1. Those in which the courts have favoured the passing of lenient sentences and the observance of moderation; 26 and
2. Those to which the courts have encouraged the passing of heavy or deterrent sentences. 27

27. Mohammad Hanif Vs. Emperor AIR 1942 Bom-215, Emperor Vs. Maiku AIR 1930 All 279, Om Prakash Vs. State AIR 1956 All 163, Dulla Vs. State, AIR 1958 All 198;
9.1 Introduction of section 428 Cr.P.C. was not eccentuated with these considerations or principles. The Law Commission reported and the Joint Committee of Parliament while recommending its introduction appended a statement of Object and Reason to section 428 Cr.P.C. that, "In many cases accused persons are kept in prison for very long period as undertrial prisoners and in some, cases the sentence of imprisonment ultimately awarded is a fraction of the period spent in Jail as undertrial prisoner. Indeed, there may even be cases where such a person is acquitted. No doubt sometimes courts do take into account the period of detention undergone as undertrial prisoner when passing sentence and occasionally the sentence of imprisonment is restricted to the period already undergone. But this is not always the case, so that in many cases the accused person is to suffer jail life for a period out of all proportion to the gravity of the offence or even to the punishment provided in the statute. The committee has also noted that a large number of persons in the overcrowded jails of to-day are undertrial prisoners. The new clause seeks to remedy this unsatisfactory state of affairs."

9.2 The object of enacting section 428 Cr.P.C. was to relieve the anguish of prolonged detention of undertrial prisoners and to avoid over-crowding in jails.²⁸ Section

²⁸. Subramaniam v. Officer Commanding, 1977 Mad. L.J.(Cr.) 138
428 Cr.P.C. has been introduced chiefly to dispense with slow motion justice and dilatory investigation and long-drawn proceedings. It simply aims at setting off or crediting the period of pre-conviction detention of the accused of a case towards the sentence ultimately awarded to him upon conviction in that very case.

29. Lalrinfela v. State of Mizoram, 1982 Cr.L.J. 1793 (Gauhati)
1.1 Bentham, in his "The Theory of Legislation" has propounded five Rules in respect of proportion between crime and punishment. His concern of course is the society, not the individual. He was a positivist, thus his propositions do not visualize an abstraction or prior and do not get saddled with consideration of justness or unjustness. It would be quite appropriate to examine the doctrine of set-off with the rules propounded by Bentham.

1.2 Rule 1. The evil of the punishment must be made to exceed the advantage of the offence.

To prevent an offence, it is necessary that the repressive motive should be stronger than the seductive motive. The punishment must be more an object of dread than the offence is an object of desire. An insufficient punishment is a greater evil than an excess of rigour, for an insufficient punishment is an evil wholly thrown away.

1.3 A syllogism of set off as per Section 428 of the Cr.P.C., would be represented thus.

1. An accused is detained in custody pending trial
2. He is found guilty, 3. The judge awarded him a punishment shorter than or equal to the period he was detained under trial, 4. The Court sets him at liberty upon application of

set off. 5. He is released on the date of judgement. 6. He has not suffered imprisonment even for a day after the date of judgement. 7. Even if he would have been acquitted, he would have been released on that date of judgement.

1.4 For illustration, in G.R. case No. 964/89 tried by Session Judge, Sambalpur, the offence charged was 394 I.P.C., i.e. Robbery, sentence prescribed is life imprisonment or rigorous imprisonment for 10 years and fine. But the accused was awarded imprisonment for 17 months for the offence of Robbery whereas his preconviction detention period is 17 months and 12 days. After application of section 428 Cr.P.C. 1973, there was no remainder of imprisonment to be served. So he was released on that very date of judgement.

1.5 Would a man of reasonable understanding and common sense be satisfied with this punishment? People look to the period of imprisonment only after the date of judgement. They do not understand how substantive provision of penal laws get compromised with procedural adjustments. Be it remembered, as Bentham said, the evil of the punishment must be made to exceed the advantage of the offence. But Sec. 428 Cr.P.C. could prompt a judge to think that an offence under section 394 I.P.C. could be satiated with an S.I. for 17 months, whereas the law provided even life imprisonment. An U.T.P. serves a simple imprisonment in detention form, he is not to have rigorous labour as required upon a conviction. Thus by application of set off, the first rule propounded by Bentham, is frustrated.
The evil produced by the crime becomes far greater than the penalty imposed; and the criminal law loses efficacy and proportion and is consequentially taken lightly. Also, set off does not satisfy the victim at all; rather it provokes him for Vengeance.

1.6 Application of set off defeats the very purpose of punishment as it makes punishment inadequate and enaffective in offences of serious nature. No good results come out from set off either to the public who are left expose to like offences, or to the offender, whom it makes no better.

It is comparable to an operation by a physician, who in order to spare a sickman a degree of pain, leaves the cure unfinished. It is no enlightened humanity.

1.7 The whole criminal justice system would turn meaningless if set off is applied mandatorily in every grivious crime, more particularly because often the Magistrate matches the pre-conviction detention with period of sentence. After a long struggled successful proceeding which ends with the conviction of the accused the judgement finally comes to mean that, instead of detering others as well as the same offenders not to commit again such crime, the offender is given the benefit of 'set off' and a liberal court holds the period of preconviction detention to be sufficient a sentence.
1.8 Whatever logic might be set up for 'set off' this principle fails to answer as to how well the state compensates a detention ending in an acquittal. Rather this principle puts conviction and acquittal in disproportionate appreciation. Let us imagine a hypothetical situation. An accused in a case was bailed out and another accuse was not granted bail. In the judgement the magistrate convicts the accused and applies set off and releases him. The magistrate equally convicts the bailed accused. Now the bailed accused will be sent to jail to serve the sentence. Preconviction period in jail cannot have any comparable element of rigorous imprisonment (punishment). Thus set off cannot be the true measure of punishment in cases of grievous crimes. The punishment (with set off) cannot exceed the advantage of the offence, because the real punishment to be served by the accused is for less than the notional punishment, sometimes it even amounts to nil punishment. Hence, set off does not conform to Bentham's first rule regarding punishment.

2.1 Second Rule: - The more deficient in certainty a punishment is the severe it should be.

No man engages himself in a career of crime, except in the hope of impunity. If punishment consisted merely in taking back from the guilty the fruits of his offence,

32. Ibid — page. 201
and if that punishment was inevitable, no offence would ever be committed; for which man is so foolish as to run the risk of committing an offence with certainty of nothing but the shame of an unsuccessful attempt. In all cases of offence there is a calculation of the chances for and against; and it is necessary to give a much greater weight to the punishment in order to counter-balance the chances of impugnity.\textsuperscript{33}

2.2 Professional criminals and recidivists know the liberalities of trial procedure and the weakness of the administration of criminal justice. They know that if they are arrested of a charge of a nonbailable offence they may be detained in jail, and while they are in jail their preconviction period is counted as punishment. They also know that at least 80\% cases end in acquittal; so even if they are convicted.

They would be given benefit of set off which is a mandatory provision of criminal procedure. (In fact this provision has the effect of a substantive law though apparently it has been placed in the code of criminal procedure). So they calculate that they would have to

\textsuperscript{33} Ibid --- Page- 201
undergo rigorous imprisonment for a short term or no term at all even if they are convicted. As a result they once again engage themselves in crimes soon after they are set at liberty after conviction or acquittal. Punishment qualified with set off thus becomes inadequate and inefficacious.

2.3 As marshalled in chapter four, the data show that in large number of cases in lower judiciary the punishment is within one year and often the punishment awarded is just the matching period of setoff. These types of punishment have no deterrence effect on the accused nor do they serve the purpose of punishment or reduce the crime rate or crime recurrence. Because the criminals know that application of set off is certain (if they are detained in jail as U.T.Ps.) and that the judges have no discretion (even if the judges know the accused to be professional criminals or recidivists), the criminals even develop a kind of indifference to punishment and thus to the existence of administration of criminal justice.

2.4 The proper function of criminal justice system is that punishment must be certain and it needs no argument to propose that preconviction detention can not simply be declared to be a punishment. It is only
post-conviction imprisonment which may be logically called punishment. Thus the provision of set off does not conform to Bentham's second rule regarding punishment.

3.1 Third Rule: Where two offences are in conjunction the greater offence ought to be subjected to severer punishment; in order that the delinquent may have a motive to stop at the lesser.

If application of set off is made discretionary in the hands of the judges or if application of set off is limited to certain earmarked offences then crimes may get restricted to only those cases where set off is applicable. For example, if set off is made applicable upto offences of grivous hurt and not to attempt to murder, crimes may get restricted to the lesser offences. Set off on the other hand, does not admit of discretion with the judges. Code of Criminal Procedure also does not specify a classification of offences making set off inapplicable to cases of more grave nature.

3.2 In fact, in China, by providing more severe punishments for more grave offences, it was observed that crime rate in respect of grave offences got appreciably reduced. 34

34. Reid Sue Titus; Crime and criminology (1985) page-84.
3.3 Thus the provision of set off does not conform to Bentham's Third Rule regarding punishment.

4.1 Fourth Rule: The greater an offence is the greater is the justification for hazard a severe punishment with a view to preventing recurrence of the offence.

4.2 Severe offences deserve severer punishment without benefit of set off (even though the accused might have been detained for a considerable length of time in jail) might serve the purpose of criminal law, more. Once set off is applied the rigour of punishment is reduced which in turn fails to act as an preventive to recurrence of crimes. Thus the provision of set off does not conform to Bentham's Fourth Rule regarding punishment.

5.1 Fifth Rule: The same punishment for the same offence ought not to be inflicted upon all delinquents. It is necessary to pay some regard to the circumstances which affect sensibility.

5.2 This rule is never satisfied by set off. Rather, due to an inclination on the part of the judge to say that period of preconviction detention suffices a crime, set off acts in the negative direction. Gravity of the offence, considering the circumstances of the crime and the criminal and its effect on the society, is often
lost sight of the present research has revealed that judges have held both of 7 months as well as 7 years of pre-conviction detention to be just punishment in offences of same nature and same gravity. Thus, provision of set off does not conform to Bentham's Fifth Rule for punishment.

6.1 Though Bentham was a supporter of deterrent aspect of punishment, yet he also attached importance to the reformation of the offender. It is a great merit in a punishment to contribute to the reformation of the offender, not only through fear of being punished again, but by a change in his character and habits. This end may be attained by studying the motive which produced the offence, and by applying a punishment which tends to diminish that motive.35 A house of correction, to fulfil this object, ought to admit a separation of the delinquents, in order that different means of treatment may be adopted to the diversity of their moral condition.

6.2 In the present research however, the responses from advocates, judicial officers, Public persons and Jail Officers evinced that set off has some reformatory effect only for the first offenders, for the minors, old persons and women. Set off also has reformatory affect in cases of less serious offences.36

35, Bentham Jeremy, the Theory of Legislation 1986, p.209
36, Ibid --- page - 209
7.1 As per Bentham, the catalogue of punishment is the same with that of the offences. The same evil by authority of the law, and by violation of law, will constitute a punishment and an offence respectively. The nature of the evil is the same; but offence spreads alarm, & punishment re-establishes security. 37

But set off does not exert that severity in cases of serious offences and professional criminals what a just and reasonable punishment can normally do.

7.2 Offence is the enemy of all; punishment is the common protector. Offence, for the advantage of a single person, produces a universal evil, punishment, by the suffering of an individual, produces a general good. Suspend punishment, the world becomes a scene of robbery and society is dissolved. Re-establish it, and the passions grow calm, order is restored, and the weakness of each individual is sustained by the protection of the public force. 38

7.3 This argument for punishment presents a suitable analogy that application of set off to a far extent particularly in respect of grave offences and in respect of hardened criminals amounts to partial erosion of severity of punishment, weakening the very legal protection for the society against the crimes and the criminals.

37. Ibid --- page - 210
38. Ibid --- page - 210
As it appears, section 428 C.P.C. providing for set off, views punishment from the angle of an individual who is detained prior to conviction; and it fails to view the whole scene from the angle of the society at large. Law is to afford protection to the society. Society cannot be ignored, so also theories of punishment cannot be ignored. Section 428 C.P.C. which equalizes the two unequals i.e. pre-conviction detention and post-conviction imprisonment, does serve no purpose to an accused but liberalises the rigours of punishment at the cost of the society.
3. SCHOOLS OF CRIMINOLOGY AND DOCTRINE OF SET OFF

1.1 PRE-CLASSICAL CONCEPT: Theology, metaphysics and mysticism pre-dominated the concept of crime and punishment till the pre-medieval period. The criminal was not the concern of the law giver. Incidences associated with a crime or the criminal were not taken into account. Still worse was that there were no well regulated criminal law. It varied according to the fiat of the king or the judge. Alongside the evolution of modern state, the criminals and not the crime, gradually became the focal point of criminal law. Sociological studies bestowed a serious concern about treating the criminal as a social disease. This paved the way for juristic thinking on criminology in modern sense.

1.2 That way, the formal development of criminology as a distinct discipline is very recent. Despite its recent recognition as a distinct discipline, the ideas of thinkers who might be called early criminologists can be traced historically. Most of them were lawyers, doctors, philosophers or sociologists. They were reforms of the Criminal Law and not interested in creating a science of criminal behaviour. Nevertheless their contribution to criminology are immense.\(^{39}\)

\(^{39}\) Reid Sue Tituas: Crime and Criminology, 4th Ed. 1985, page - 71
Ideas and philosophies do not exist within the vacuum of a human mind, and so they must be understood in the light of the social context in which they appear.40

2.1 CLASSICAL SCHOOLS: The Classical writers were rebelling against a very arbitrary and corrupt system of law, in which the judges held absolute and almost tyrannical power over those who came before them.41 Law was applied unequally; corruption was rampant; confessions were obtained by means of torture; and capital punishment was prescribed for good many offences.

2.2 The protagonist of the classical school was Cesare Beccaria. He published only one major book,42 and his treatise was not entirely original, for many of the ideas were merely syntheses of ideas already expressed by others. But it was widely received "because it constituted the first successful attempt to present a consistent and logically constructed penological system, a system to be substituted for the confusing, uncertain, abusive and inhuman practices inherent in the criminal law and penal system of his world."43 The work was also widely accepted because many people in Europe were ready to hear and implement the kinds of changes Beccaria proposed.

40. Supra Note 2. page - 71
41. Supra Note 2. page - 71
42. On Crimes and punishment trans. Henry Paolucci (Indianapolis Bobbs-Merrill (1963) PP IX XXXIII.
43. Elicott Monochese "Cesare Beccaria", in Herman Maannheim, ed; pioners in criminogy (Mouttclair N.J. Patterson Smith, 1973)p.48
The underlying philosophy of Beccaria's position was that of free will. He maintained that behaviour is purposive and is based on hedonism, the pleasure-pain principle; human beings choose those actions that will give pleasures and avoid those that will bring pain. Therefore punishment should be assigned to each crime in a degree that will result in more pain than pleasure for those who commit the forbidden acts. That is, the punishment should fit the crime.

But application of set off in cases of grievous nature, and in respect of professional criminals and recidivists, makes the punishment easy and simple in comparison to post-conviction imprisonment in jail. Doctrine of set off is just opposite of the views as given by Beccaria that punishment should be assigned to each crime to a degree that will result in more pain than pleasure for those who commit the forbidden acts.

2.3 Hedonistic view of conduct implies that the laws must be clearly written and be not open to interpretation by the judges. Only the legislature

44. Supra Note. 2, page - 72
can specify punishment. The law must apply equally to all citizens; no defences to criminal acts are permitted. The issue in court is whether a person committed the act; if so, the particular penalty prescribed by law for that act should be imposed. Judges are more instruments of the law, allowed only to determine innocence or guilt and thereafter to prescribe the sentence of punishment. Under this system, the law is rigid, structured and impartial.\footnote{Supra Note. 2, page - 72}

The major weaknesses of Beccaria's ideas on crimes and punishment were the rigidity of his concepts and the lack of provisions for justifiable criminal acts. These faults were discerned by the neo-classical schools. (Provision of set off is a benefit which applies rigidly to all criminals and in all crimes, irrespective of the fact that whether the criminals is a first offender or casual offender, or a habitual criminal or a recidivist.)

2.4 Jeremy Bentham was contemporary of Beccaria. He was adorned as the greatest legal philosopher and reformer the world has everseen. He propounded the theory that, "Let the punishment fit the crimes". He believed
that people act rationally. We choose certain acts because they bring pleasure; likewise, we avoid acts that result in pain. Our choice is a rational one. Therefore, if we perceive that an act will bring pain that is, if the punishment for the crime is sufficiently severe we will choose to avoid that the act because engaging in it would result in pain that would outweigh any pleasure we might derive in committing the crime.

Bentham titled his philosophy of social control as that of utilitarianism. "An act is not to be judged by an irrational system of absolutes but by a supposedly verifiable principle .... (which is ) ' the greatest happiness for the greatest number' or simply 'the greatest Happiness'. Despite his belief in utilitarianism and the free will of individuals, Bentham also hinted at the theory of learned behaviour as the explanation of criminal behaviour. He deserves considerable credit ..... for his adherence to a theory of social (i.e. Pleasure pursuit) causation of crime rather than a concept of biological or climatic or other non-social causation".

(In present day context, when both extensity and intensity of crimes are increasing in algebrical proportions through out the world, the provision of set off, a beneficial provision in criminal law is totally uncalled for in criminal jurisprudence

46. Reid Sue Titus : Crime and Criminology ;4th Ed. 1985 p. 73
47. Gilbert Geis, "Jermy Bentham" in mannehin Pioneers p.57
It gives pleasure to criminals instead of giving them pain as they deserve for the wrongful act.)

3.1 NEO-CLASSICAL SCHOOL: The neo-classical school of criminology flourished during the nineteenth century. It had the same basis as the classical school, a belief in free will. But the neo-classical criminologist, who were mainly British, began complaining about the need for individualised reaction to offenders, as they believed that the classical approach was far too harsh and, in reality unjust.48

One of the shocking aspects of these harsh penal codes was that they did not provide for the separate treatment of children who committed crimes. One of the changes effected during neo-classical period was that children under seven years of age were excepted from the law on the basis that they could not understand the difference between right and wrong. Mentally retarded persons were also excepted from criminal liability. Indeed, any situation or circumstances that made it impossible to exercise free will was seen as a sufficient reason to exempt the person from criminal liability. As such the validity of mitigating circumstances; whether they be physical, environmental, or mental, was recognized by the neo-classicists.49

49. Reid Sue Titus; Crime and Criminology; 4th Edn. 1985, Pag. - 74
3.2 Although the neo-classical school was not a scientific school of criminology, unlike the classical school, it did begin to deal with the problem of causation. By making exceptions to the law, varied causations were implied, and the doctrine of free will could no longer stand alone as an explanation for criminal behaviour. Even today, much modern law is still based on the neo-classical philosophy of free will mitigated by certain exceptions.50

3.3 The influence of the classical school upon the Scandinavian criminal thought deserves mention here. Thinking about criminal sentencing has undergone a remarkable transformation in Scandinavia during the last decade. There has been a movement away from positivist sentencing ideology, that is, away from indeterminacy of sentence; and from rehabilitation and prediction of future criminality as the basis for sentencing. There has been growing support for a 'neo-classical' sentencing rationale, that would emphasize penalties proportionate to the gravity.

50. Ibid., P. 74
of the criminal conduct. This movement has had its
greatest impact in Finland, where, 'neoclassicism'
has come to be official policy. Article 6 of the
Finnish criminal code as amended in 1976, declares
that sentences should be in 'just proportion' to the
harmfulness of the criminal conduct and the culpability
of the offender.\(^{51}\)

The Neo-classical were the first in point of time to
bring out a distinction between the first offenders
and the recidivists. They supported individualisation
of offender and treatment methods which required the
punishment to suit the psychopathic circumstances of
the accused. Thus although the 'Act' or the 'Crime'
still remained the sole determining factor for adjudging
criminality without any regard to the intent yet the
neo-classical school focussed at least some attention
on mental causation indirectly.\(^{52}\)

(But provision of set off without any discretion with
the court did not make a distinction between the first
offenders and the recidivists, professional or habitual
offenders.)

\(^{51}\) Andrew Von Hirsch; "Neo-classical" proportinality,
and the Rationale for punishment; Thoughts on the
scandinavia Debate", Crime of Delinquency, January 1983,
p. 52.

\(^{52}\) Prof. Paranjape N.V., Criminology and Penology;
7th Ed. 1991, P. 22
3.4 Although neo-classists recommended lenient treatment for "irresponsible" or mentally depraved criminals on account of their incapacity to resist criminal tendency, but they unanimously believed that all criminals, whether responsible, or irresponsible, must be kept away from the society.53

3.5 New-classists adopted subjective approach to criminology and concentrated their attention on the conditions under which an individual commits a crime.

The above discussion makes it clear that main contribution of the neo-classical school of criminology lies in the fact that it came out with certain concessions in the 'free will' theory of classical school and suggested that an individual might commit criminal acts due to certain extenuating circumstances which should be duly taken into consideration at the time of awarding punishment. Thus, besides the criminal act as such, the personality of the criminal as a whole, namely, his antecedents, motives,

53. Ibid --- Page, 22.
previous life history and general character, etc. should not be lost sight at the time of assessing his guilt.\(^{54}\) (In case of provision of set off, it is equally applied to both 'responsible and irresponsible' offenders.)

4.1 POSITIVE SCHOOL:– In nineteenth century French doctors opined that neither 'free will' nor his inmate depravity which actuated him to commit crime is the cause, rather the cause of criminality lies in anthropological features of the criminal.

Some phrenologists (the external studies of brain, Viz. size of skull) also tried to demonstrate the organic functioning of brain and enthusiastically established a correlation between criminality and the structure and functioning of brain. This led to the emergence of the positive school of criminology. Cesare Lembroso, Raffacìc Garofalo and Eurico Ferri were three main exponents of positive school of criminology.

The positive school of criminology was composed of several Italians whose approaches differed to some extent but they all agreed that the emphasis in the study of crime should be on the scientific treatment of the criminal, not on the penalties to be imposed on the criminal once he or she was convicted.

\(^{54}\) It may be noted that the origin of jury system in criminal jurisprudence is essentially an out come of the reaction of neo-classical approach towards the treatment of offenders.
4.2 The classical school, defining crime in legal terms, emphasized the concept of free will and the proposition that punishment gauged to fit the crime would be deterrent to crime. The positivists rejected the harsh legalism of the classical school and substituted the doctrine of determinism for that of free will. They focused on the constitutional, not the legal, aspect of crime, and they emphasized a philosophy individualized, scientific treatment of criminals, based on the findings of the physical and social sciences.55

As Stephen Schafer said, "their emergence (in the late eighteenth century) symbolized clearly that the era of faith was over and the scientific age had begun." 56

Lombroso adopted an objective and empirical approach to the study of criminal through his anthropological experiments. After an intensive study of physical characteristics of his patients, and later on of criminals, he came to a definite conclusion that criminals were physically inferior in the standard of growth and therefore developed a tendency for inferior acts. He further generalized that criminals are less sensitive to pain and therefore they have little regard for the sufferings of others.57 Thus through his biological and anthropological researches on criminals Lombroso justified the involvement of Darwin's theory of biological determinism in criminal behaviour. He classified criminals into three

55. Reid Sue Titus; Crime and Criminology; 4th Ed. 1985, P.74
56. Schafer, Theories in Criminology. P. 123.
57. Taff "Criminology" (4th Edn.) Page. 64
main categories. (1) The atavists or hereditary criminals whom he also termed as born criminals Environment had no relevance whatsoever to the crimes committed by them. He therefore considered these criminals as incorrigibles, i.e. beyond reformation. (2) The second category of criminals consisted of insane criminals who resorted to criminality on account of certain mental disorder of insanity. (3) The third category of criminals were those of criminoids who were physically criminal type and had a tendency to commit crime to overcome their inferiority to meet the needs of survival.

Lombroso laid consistent emphasis over the individual personality of the criminal in the incidence of crime. This view gained favour in subsequent years and modern criminological measures are devised to attain the aim of individualization in the treatment of criminals. It has been rightly commented that sociologists emphasize on the external factors, psychologists on the internal factors, while Lombroso held that both had a common denominator the "individual".

Provision of set off does not take into consideration individual personality at the time of sentencing. It refuses to appreciate in sociological incidences and psychological frame of the offender at the time of commission of a crime.

58. Supra Note. 20, page 23.
59. Sirohi J.P.S., Criminology and Criminal Administration 1988, PP.37
4.4 Ferri was an exponent of positive school. The major contribution of Ferri to the field of criminology is his "Law of Criminal Saturation". This theory presupposes that crime is the synthetic product of three main factors. Viz. (1) Physical or Geographical; (2) Anthropological, and (3) Psychological or Social. Thus Ferri emphasised that criminal behaviour is an outcome of a variety of factors having their combined effect on the individual. Therefore the basic purpose of crime prevention programme should be to remove conditions making for crime. Ferri worked out a five-fold classification of criminals namely, (1) Born Criminals; (2) Occasional Criminals; (3) Passionate Criminals; (4) Insane Criminals; and (5) Habitual Criminals.

He suggested an intensive programme of crime prevention and recommended a series of measures for treatment of offenders. He asserted that punishment was one of the possible methods of reforming the criminals. He favoured indeterminate sentence keeping in view the chances of inmate's readjustment in the community. In his 'Penal Project' Ferri denied moral responsibility and rejected the concept of punishment for retribution and moral culpability. (Provision of set off has no objective to reforming a criminal; nor has it a concern over sentencing. It simply aims at easing over crowdedness in jails, and it seeks to compensate undertrial detention).
4.5 Raffacle Garofalo was the other main exponent of positive school of criminology. He stressed the need for a closer study of the circumstances and living condition of criminals. In his opinion a criminal is a creature of his own environment. He emphasised that lack of pity generates crimes against person while lack of probity leads to crimes against property. As to classification of criminals he rejected Ferri's classification and put them into four main categories: (1) "Endemic Criminals" or murderers (2) Violent criminals who are effected by environmental influences, such as prejudices of honour, politics and religion; (3) Criminals lacking in sentiment of probity, (4) Lascivious or lustful criminals who commit crimes against chastity.

4.6 Inspite of the considerable differences among the views of its leaders it is possible to sum up the essential features of the positive school. Although it came into being largely in opposition to the classical school, it is in fact the first coherent system of criminological thought ever constructed. The classical school as represented by such great figures as Beccaria, Romilly, Feuerbach (and with many reservations, Bentham) was mainly interested in the reform of criminal law, of criminal procedure and of the system of

60. Mannheim Hermann; Comparative criminology, Volume 1, Fourth Impression 1973 P.221.
penalties. It was opposed to the arbitrary and cruel character of the contemporary administration of criminal justice to the law-making powers of the judiciary, to torture, capital punishment and transportation. It favoured equality before the law, trial by jury, fixed penalties and an objective equation between crime and punishment. With the study of the individual offender it was but little concerned, and it did hardly anything to provide the scientific tools for such study; even the very idea of it was premature at the time. The statistician sociologists in mid-nineteenth century tried to create a scientific criminology for the study of crime as a mass phenomenon. The classical school attempted to construct an equation between the individual criminal and his treatment.

The positivists emancipated criminology from the overtones of theology and metaphysics. This implied a complete divorce of science and law from morals and the priority of science. The repudiation of free will and moral responsibility, as the idea of guilt had to be replaced by the of dangerousness (pericolosita) and its subjective elements, (teribilta). Therefore the individual criminal had to be studied by means of scientific quantitative observation of facts, and the effect of treatment by way of experimentation.

61. Ibid ---- page. 222.
4.7 Before the advent of the classical school, legal nature of the crime was comparatively unimportant. Ferri (classical school) advocated reduced punishment. The positive school wanted to reduce crime by effective treatment of the offender in accordance with his needs.\

In the fields of penology and criminal law, it means the following, (i) That the moralizing concept of punishment had to be replaced by a morally neutral system of measures of security of the society and of reform and rehabilitation of the accused. Such measures might in individual cases, be much more severe than the old fashioned penalties of the classical schools as the limiting principle of the just equation between crime and punishment was no longer valid. (ii) That, in particular, the system of penalties fixed by the court had to be replaced by indeterminate sentences, the length of which was to be decided in the course of their application in accordance with needs of treatment; (iii) That if the idea of replacing the concept of guilt by that of dangerousness is to be taken seriously, measures of security and reform should be applied not only to those who have already committed crime, but also preventively to those whose dangerous state (etat dangereux) makes it likely that they will do so in future.

(pre-delinguents). This—one of the most controversial points in the positive programme—would imply the abandonment of the fundamental principle of the criminal law; no punishment without crime, which would be justified however, in the eyes of the positivists because of the sharp distinction which they made between the moralizing idea of punishment and morally neutral measures of security and reform. In doing so they initiated the long and drawn out legislative struggle between the compromising double track system, which tried to keep penalties and measures of security and reforms side by side.  

4.8 Both classical and positive school propounded theory to solve the problem of their time. But what is the need of to-day? The crime is increasing in a alarming rate in every part of the world. The need today is treatment of offender with more severe punishment notwithstanding due support for their reformation. Now-a-days the view of classical school is again reviving that is "Punishment according to crime".

5.1 Set off attacks at the root of the object of punishment. It neither reduces the crime, nor punishes the wrongdoer. It does not reform the wrongdoer too. Justness or otherwise of the punishment its or intensity is never the concern of set off. Thus for administrative

63. Ibid ---- Page. 223
convenience the philosophical thinking about crime is rendered meaningless by the doctrine of set off.

Ordinarily bail is refused on the ground that the accused is charged with serious crime or his release on bail may create trouble to witnesses. But when the same accused is convicted, the whole period of his pre-conviction detention is being counted as punishment, thus reducing the term of imprisonment and releasing the accused prematurely. Positive school propagated that punishment should fit the criminal and that the object of punishment is treatment of the offender. In fact, when a court awards punishment it considers, inter alia the age of the offender, seriousness of the offence, circumstances of the offence, motive of commission of the offence, casual or habitual or professional nature of the criminal, sex, criminal background of the offender and the chances of repetition of crime. Universal application of set off dilutes all these judicial exercises and waters down the very object of punishment and of administration of criminal justice.

5.2 Provision of set off is not a pain to offender, rather than it is pleasure to them. It is not fear of punishment to them rather it is blessing to the U.T.Ps. or a bonus to the U.T.Ps., if they are per chance proved to be guilty.
Thus set off indirectly leads to commission of more crimes specially by habitual criminals, professional offenders and recidivists. It has neither individual deterrence nor general deterrence upon like minded offenders.

The provision of set off is introduced to support administrative convenience (to compensate delay and to reduce overcrowdedness of jail).\textsuperscript{64} Pre-conviction detention period is given benefit of provision of set off mandatorily and remaining post-conviction period in jail (if there is any remainder after set off) is provided with good time laws, parole, probation, remission etc.

\textsuperscript{64} Whereas the Annual Administrative Report of jail Department of Orissa from the year 1986 upto 1990, show that only 5% of U.T.Ps. population were convicted and 95% were acquitted of charges. It means that set off only applied to 5% and that overcrowdedness of jails could be reduced by only 5% which is as good as nothing. Set off leaves 95% of U.T. Ps. without any legal provision to compensate their loss, due to detention in jail. (of overcrowdedness or long protracted delay the mischief is solved by 5% where the crying mischief by 95% remaining unsolved).
While fixing up punishment or its relaxation, the Legislature or the Government has to take into account its impact upon the society. Punishment is not a random when it is a social logic. Any penal provision, including reational measures, have to be testified on the touchstone of established theories of punishment, namely: (i) Retributive Theory; (ii) Deterrent Theory; (iii) Reformative Theory; (iv) Preventive Theory; (v) Decline of Reformation Theory; (vi) Just Desert/Justice Model; (vii) Economic Theory.

1.1 RETRIBUTIVE THEORY AND SET OFF: The writings of the classical and positive schools illustrate the basic philosophies behind punishment viz. retribution or revenge, deterrence of the individual and of others, and reform or rehabilitation. Historically, victims (or their families) were permitted to take measures to "get even" with criminals. This practice is referred to as revenge, retaliation, or retribution. But the terms are not synonymous. Revenge, or retaliation, more accurately reflects the practice of earlier days when victims could, within the law, inflict upon their attackers, the same or similar kind of offences as that suffered by the crime victim.

---

65. Reid Sue Titus; Crime and Criminology, 1985, p.76
66. The practice is often traced back to the Bible as well as to the code of Hammurabi and is referred to as the 'eye for an eye', 'tooth for a tooth' doctrine source, Reid Sue Titus; Crimes and Criminology 1985, p.77.
1.2 The classical thinkers did not, however, accept this extreme philosophy of punishment. They rejected punishments that were too harsh and believed that the criminal law should not be used as vengeance against the criminal. The punishment should "fit the Crime". Beccaria, for example, insisted that the state had no right to impose a punishment greater than was necessary. "The right of the state to impose punishment is therefore limited to the minimum restriction of freedom adequate to this end". Individuals have given to the state only "that portion of his liberty necessary to preserve the rest". But in all other matters individuals should suffer no other consequences beyond the natural results of their acts. Any law or punishment in excess of this limit is an abuse of power, not justice, and no unjust punishment may be tolerated, however useful it seems.

1.3 It is a mistake to believe, as many people apparently do, that retribution is synonymous with revenge. Retributivists are quick to point out that their conception of legal punishment emphasizes the principles of justice and due process, not the subjective passions of punishers seeking vengeance. The principle of justice at the

67. Reid Sue Titus; Crime and Criminology 1985, p.77
68. Ibid ---- p.77
70. Barlow Hugh D; Introduction to Criminology; Second Edn. p.422.
heart of retribution is that punishment is deserved when morally responsible persons are guilty of willfully violating the moral order as articulated in the laws of the society in which they claim membership. For its part society has the moral right, and the duty to punish the guilty. It has the right to punish because the integrity of its moral order has been violated, it has the duty to punish because, not to do so negates the very idea of crime and renders moral responsibility meaningless.\(^71\)

All of this does not mean that penalties will necessarily be severe.

1.4 Retributivists see only one possible basis for justification of specific penalties for specific crimes. A specific penalty is justified when the guilty person has received a punishment reflecting the gravity of his offence. The two issues of guilt and making the punishment fit the crime provide the grounds for arguing that any particular legal punishment is a "just desert."\(^72\)

1.5 Provision of set off enshrined in Section 428 of the Code of Criminal Procedure 1973, neither advances the retributive object of punishment nor supports it. On the contrary application of set off to habitual offenders, \(^{71}\) Ibid ---- p. 422

\(^{72}\) Barlow Hugh D; Introduction to Criminology; Second Edition, p. 422.
professional criminals, recidivists, in case of heinous and grievous offences simply waters down the gravity of offences. Set off makes no distinction between pre-conviction detention (judicial custody) with the post-conviction rigorous imprisonment. Set off equalizes the detention in judicial custody (when he gets the treatment expected to be meted out to innocent persons) with the post conviction imprisonment (when his guilt has been judicially established).

Stensibly very often set off exhibits no difference between acquittal and conviction. Very often two accused might have been detained in jail at the inquiry, trial and investigation stages, and on the date of judgement, one accused is acquitted of charge and released and another accused is convicted of charge but is released simultaneously because he has been awarded a term of rigorous imprisonment equal to or less than the length of time he had spent as an under trial prisoner. Set off cannot serve the retributive object of punishment.

1.6 Jack Gibbs, in his important contribution to the literature on criminal punishment, identifies ten different ways punishment can prevent crimes. Out of ten, one is

73. Analysis of data on chapter IV revealed that 42% of accused were convicted and released on the date of judgement even if they were awarded rigorous imprisonment.

that certain forms of punishment incapacitate potential offenders by removing or diminishing the opportunities to commit crimes. Incapacitation is absolute when an offender is executed. In Gibb's view, changes in penal policy since 1800 have brought about a decline in the incapacitating value of legal punishment; initially executions declined in favour of imprisonment, and more recently imprisonment declined in favour of fines and probation.\textsuperscript{75} Gibbs asserts that where there exists a demand that the guilty be punished. Not to do so would encourage private vengeance, the extreme form of which is armed vigilantism. Even in societies with "law", the certainty and severity of punishment could become so negligible that the citizens would seek personal retribution; and what the injured party would take to be justifiable vengeance could be criminal assault, criminal homicide, robbery, extortion, kidnapping, or theft. So no imagination is required to see that retribution "outside law" generates crimes. Hence, retribution through legal punishments may prevent crimes.\textsuperscript{76}

1.7 Provision of set off is a blessing and benefit to the undertrial prisoners. They also know that if they are convicted then set off must be applied to them. In case

\textsuperscript{75} Ibid ---- P. 59
\textsuperscript{76} Ibid ---- P. 83
of probation, parole and remission, it depends upon court's discretion or executive discretion as the case may be; which undoubtedly exercises certain control or vigilance over their criminal behavior. Provision of set off pleasure the U.T. Ps., and hurts the feelings of the injured or victim and when the victim feels that accused was not properly punished by the criminal justice system he seeks personal retribution.

The real injury to the real victim of a crime is formally ignored. The state prosecutes by its executive branch and adjudicates by its judicial branch and determines the possible penalties. Thus punishment becomes an abstract measure of justice in the sense that the penalty for a crime is not assessed in terms of the real harm experienced by its immediate victims.

2.1 DETERRENT THEORY AND SET OFF: Originally the prime object of punishment was deterrence. Provision of severe penalties could deter a potential offender from committing crime. It is the fulfilment of one's vengeance that underlies every criminal act. The deterrent theory seeks to create a fear psychosis in the mind of others by providing adequate penalty and exemplary punishment to offenders. Strict sanctions of penal discipline act as a sufficient warning to the offender as also to others.
Deterrence is observed in almost every criminal justice system as an effective mode of punishment.

Provision of set off on the other hand does not create any kind of fear in the mind of criminal or of others, contrarily, it gives relief to offenders from the rigors of punishment. There are two types of deterrence, individual and general. Individual deterrence refers to the effect of punishment in preventing a particular individual from committing additional crimes.

2.2 In the past, this form of deterrence often took the form of incapacitation, making it impossible for a particular offender to commit again the crime for which he or she had been convicted. For example; the hands of the thief would be amputated, rapists would be castrated, prostitutes would be disfigured in ways that would repel potential customers; and so on. The second type of general deterrence is based on the assumption that punishing individuals who are convicted of crimes will set an example to potential violators who being "rational" beings and wishing to avoid such pain, will not violate the law. One can discern the influence of the classical thinkers, with their emphasis on free will and rational

77. Reid Sue Titus; Crime and Criminology; 1985, P.77
choice. People seek pleasure and avoid pain; thus, if the punishment is perceived as too painful, people will avoid the criminal activity that might result in that punishment.

2.3 On contrast provision of set off neither has any individual deterrence nor has any general deterrence upon the public. Rather, it gives individual benefit to the U.T.Ps (if convicted). At the same time it make known to all criminals that set off is a mandatory provision and it applies to all U.T.Ps. if convicted of charges. To count U.T. period as punishment already undergone as term of imprisonment in case of conviction dilutes the quality of individual deterrence as well as of general deterrence. The provision of set off lessens the punishment period of offender and thus attacks the very principle of deterrent theory of punishment.

2.4 The early utilitarians, especially Beccaria and his English counterpart Jeremy Bentham, believed that punishment could be made to deter individuals from committing crime. Like Beccaria, Bentham believed that punishment was justifiable if it prevented crime. The important remaining question is how? The answer they believed was fairly obvious: since people seek pleasure and avoid pain they will tend to avoid those things

that bring pain, especially if the pain outweighs the actual or anticipated pleasures associated with them. Accordingly, punishment can prevent crime by its threat of pain, simply out, people are scared away from crime by fear of punishment. 79

2.5 Punishment is being justified on the basis of deterrence. The assumption is that if society failed to bring culprits to justice and to punish them for their misdeeds, crime would be encouraged and consequently, rampant. Punishment is therefore supposed to hold crime in check, to have a deterring effect on criminal behaviour. In modern countries, deterrence is probably the most accepted and verbalized of all the justifications for punishment. It is a much more intellectualized justification for punishment than either retribution or expiation, which are tinged with strong emotional reactions. 80 Beccaria contended vigorously that the intent of punishment should not be to torture the criminal or to undo the crime (expiation) but "to prevent others from committing a like offense". 81

79. Barlow Hugh D; Introduction To Criminology; Second Ed. P.424.
80. Reckless Walter C; The Crime Problem, P. 503
He insisted also that "a punishment to be just, should have only that degree of severity which is sufficient to deter others".82

'Many communities that pride themselves an efficient law enforcement and swift certain criminal justice may actually discourage professional crime organized crime, and commercialized lawlessness by reducing the chances of their continuing uncaught and unsentenced on the other hand. Communities with inefficient law enforcement and flatering criminal justice may encourage these kinds of crime'.83

2.6 The various aspects of punishment considered relevant interests of the Beccaria and Bentham made a significant contribution to the development of ideas about a deterrence when they focused attention on three properties of punishment. They recognized that criminal penalties can be more or less certain, more or less severe and more or less swift in their imposition, though a little vague on the matter. Bentham, and Beccaria must be understood as saying that the deterrence impact of punishment will be greater the more certain, severe and swift the penalties.84

82. Ibid ---- page. 504
83. Ibid ---- page. 504
84. Supra, Note. 16, P. 456.
Punishment to be deterrent must be certain; whereas juxtaposit to it, set off is an advantage, but it is certain. There is certainty that if an offender is detained as an U.T.P. then on conviction his under trial period shall be counted as term of imprisonment.

2.7 Punishment should be severe whereas set off relaxes a punishment. 'Belief in the effectiveness of capital punishment as a diterrent led the government of the Peoples Republic of China to announce in 1982 that corrupt government and communist party officials would be executed. According to the party newspaper People's Daily, "It is necessary to kill one to warn a hundred. the seriousness of a few economic offence has reached such an extent that the death penalty may have to be employed to beat down the offender arrogance and to educate and save others.85

'The current wave of executions began in August of 1983, with reports of thousands of people being executed for the crimes of murder, rape, arson, robbery as well as gangsterism and even less violent crimes. Some of those executed were driven through the streets,

accompanied by placards proclaiming to the masses the crimes for which the offenders would be executed.'

'The list of capital crimes in China expanded in 1983, and now included are gang leaders, organizers of prostitution, and embezzlers. Furthermore, there is no longer a requirement that capital sentences have to be reviewed by the Supreme People's Court. In cases of violent crimes, execution may be carried out swiftly after the sentence is imposed by a lower court. The processes of arrest, indictment, trial, sentence, is imposed by lower court. The process of arrest, indictment, trial, sentence, and execution may take place in four days. In China, the usual method of execution is a single shot in the back of the head. 86

'In the spring of 1984, the Chinese claimed that as a result of increased executions (estimated by some to be as high as ten thousand since August of 1983), the crime rate had dropped 42 percent.' 87

(That is, within 2 years 10,000 criminals were executed. In the name of Social Security or reduction of crimes rates, such a practice of executors is an affront and shame to Human Rights and human values. Deterrent Theory

87. National News Broadcast, Spring 1984. (Source; Reid Sue Titus; Crime and Criminology; 4th Edn. 1985; P.84
of punishment can never be utilized to extinct the human race or to make the right to life subject to whims and idiosyncrasy of persons in the government.)

2.8 Application of set off to offenders is not a pain to offender, rather it turns to be a pleasure to the offender. It reduces the term of imprisonment awarded by the court. As Bentham said, the evil of the punishment must be made to exceed the advantage of the offence; whereas provision of set off is an advantage to the offender.

3.1 PREVENTIVE THEORY AND SET OFF:— Punishment at least temporarily prevents the criminal either through incarceration or through constant monitoring of his or her activity from committing further crimes.  

The emphasis today is almost always on punishment as a means of preventing crime, or in some way reducing it. In the late eighteenth and early nineteenth centuries the English utilitarians, under the leadership of Jeremy Bentham, systematically developed a justification of legal punishment based on its preventive consequences. Imprisonment is rationalized as a crime deterrent, a threat to the freedom of would be criminals.

88. Crime and Punishment Changing Attitudes in America; P. 78.
89. Barlow Hugh D; Introduction to Criminology; p. 456
90. John and Erua Perry; Face to Face; P. 298.
3.2 The preventive theory of punishment presupposes that need for punishment of crime arises simply out of social necessities. In punishing a criminal the society protects itself against anti-social acts which threaten social order in general or persons or property of its members. The preventive philosophy of punishment is based on the proposition that crime is not to be avenged but to be prevented. Punishing a criminal comes after commission of a crime, but as Fichte has rightly observed, the end of all penal laws is that an offence should not be committed because of a legal provision for punishment therefor; viz; when a land owner puts up a notice 'Trespassers will be prosecuted', he does not want an actual trespasser and to have the trouble and expense of setting the law in motion against him. He hopes that the threat will render any such action unnecessary, his aim is not to punish trespass but to prevent it. If trespass still takes place, he undertakes prosecution.

3.3 While the object of preventive theory is to prevent the crime, the object of set off on the contrary is to reduce the jail population and compensate the delay; while the purpose of the preventive theory is to protect the society from criminal, the object of set off is to reduce the length of imprisonment of offender and release them earlier without having any control on them after
such release on set off.

3.4 The real object of the penal law is to make the threat generally known rather than putting it occasionally into execution. This indeed makes the preventive theory realistic and humane. It is effective for discouraging anti-social conduct.

3.5 Again the supporters of preventive philosophy recognise imprisonment as the best mode of punishment because it serves as an effective deterrent as well as useful preventive measure. It presupposes some kind of physical restraint on the offenders. Contrarily earlier release of prisoners (U.T.Ps.) from jail (in many cases on the date of judgement) due to application of set off does not serve the purpose of preventive theory of punishment. Premature release of prisoner is a cause of increase in the rate of crimes specially by habituals, professional criminals, recidivists.

4.1 REFORMATIVE THEORY OR REHABILITATION THEORY AND SET OFF: Retribution and deterrence were the philosophy of the classical and neo-classical schools, with their emphasis on 'let the punishment fit the crime'. The positive school, on the other hand,
emphasized the importance of the 'punishment fitting the criminal'. It was the individual criminal, not the crime, that was the focal point in the positive thinking. This school emphasized that if we were to prevent crime, changes must be made in the social environment. They favoured indeterminate sentences tailored to meet the needs of individual criminals.

4.2 They also set the stage for further developing the philosophy of rehabilitating the offender, a philosophy that dominated criminal justice system until recently. The philosophy of rehabilitation none the less continued and even gained momentum in the current century. The concept of rehabilitation has become the 'modern' philosophy of incarceration. It is described as the "rehabilitative ideal", characterized by the juvenile court, probation, parole and the indeterminate sentence.\(^1\) The ideal was based on the premise that human behaviour is the result of antecedent causes that may be known by objective analysis and that permit scientific control of human behaviour. The assumption was therefore, that the offender should be treated not punished.\(^2\)

\(^1\) Francis Allen, "criminal justice, legal values and the rehabilitative ideal", journal of criminal law, criminology and police science 50 (September, October, 1959). P.P. 226-232.

\(^2\) Reid sue titus; crime and criminology: fourth Edi. 1985, p. 78
4.3 The backbone of the philosophy of rehabilitation was the indeterminate sentence. (In India of course there is no such indeterminate sentence philosophy). The court at the time of sentencing could not give an offender a definite term, as a judge could not possibly predict in advance how much time would be needed for the treatment and rehabilitation of that offender. Consequently, in most jurisdiction the legislature prescribes minimum and maximum terms for the each offence. In its present form, the indeterminate sentence means that a person would be sentenced to prison for a term ranging 'from one day to the whole life'. Treatment personnels or correctional officials would then evaluate the person, recommend and implement treatment and decide when that individual had been rehabilitated and could safely be released back into society. The punishment was fitted to the criminal, not to the crime. Inshort the basic philosophy was that society should incarcerate people until they were "cured" or rehabilitated.93

5.1 THE DECLINE OF THE REHABILITATIVE IDEAL:— The philosophy of rehabilitation was based on a belief that we could indeed predict when offenders had been rehabilitated and were therefore ready for release. But prediction is not that accurate in social sciences, although individuals trained in the behavioral sciences would be in a better position to make that decision after working with an offender (more than would a judge be able to comprehend at the time of sentencing). But, it is alleged that treatment has not been very effective in prisons. Perhaps an even greater problem has been the administrative abuse of the power of release. Another criticism of the indeterminate sentence was that it caused feelings of frustration and even hostility toward the criminal justice system. Offenders never knew when their release would be. The indeterminate sentence is referred as the "never knowing system" and it created psychological problem for them (for offenders).

5.2 The increasing dissatisfaction with the rehabilitative ideal and the concern about the extent of crimes especially violent crimes, led many Americans to

favour a "get tough" policy in sentencing, demanding even more severe sentences than are actually imposed. The argument is that treatment did not work; so let us try incarceration for longer periods of time. "Lock 'em up and throw away the key" crudely put; that increasing in the rallying cry is an America fed up with violent crime."  

5.3 Provision of set off simply reduce the term of imprisonment, without taking into account of whether the offender is cured or properly rehabilitated and thus misses the reformation or rehabilitation object of punishment.

Study has revealed that the provision of set off has very little reformatory quality upon the first offenders and those who are charged with simple nature of crimes, but detained in prison for reasons not due to gravity of the crimes. Even if it is agreed that set off reforms the first offenders, it is not that effective a measure and there exist already provisions of probation of offenders Act. Reduction of jail population could also


97. Time, September 13, 1982, P.38 (Source: Reid Sue Titus ; Crimes andCriminology 4th edi. 1985, P-80
be done by awarding punishment in terms of fine instead of imprisonment. Again in simple nature of cases the court should not detain them in jail as U.T.P., even in cases where the offender is unable to fulfil conditions in respect of surities for bail. The lower courts in India do not evince judicial activism in criminal cases.

In cases of grievous crimes, habitual offenders, recidivists & professional criminals the application of set off neither reforms them nor cures them. On the contrary such criminals do not fear the punishment and get encouraged to committing more crimes. The present study (in chapter III) would reveal that application of set off to habitual offenders, recidivists and professional criminals in henious and serious crimes, could not reform them; rather, in many cases, application of set off encouraged them to commit more crimes. These criminals very well know that, there is very little chance of conviction (between 5% to 20%) and even if convicted then their pre-conviction detention period would be taken as term of imprisonment already undergone and thus would reduce the length of imprisonment upon conviction.

This is mainly due to mandatory provision of set off. If there were provisions for judicial discretion, then set off could have been applied judiciously
avoiding its short-comings. Indian Penal Code provides ample discretion to the judge while awarding punishment. It provides only the limits to the maximum term of imprisonment and maximum fine to be imposed and the trial judge enjoys discretion to award punishment taking into various factors. But juxtaposition to this, set off does not leave any scope for discretion for its non application.

6.1 JUST DESERT THEORY AND SET OFF: The trend toward harsher punishment, including greater use of the death penalty is "justified" today on basis of twin philosophies of justice and of deterrence (i) harsh punishment is what the criminal deserves, and (ii) by imposing harsh penalties on "deserving" individuals, they and others will be deterred from committing crimes. These two philosophies have virtually replaced the former emphasis on rehabilitation as a means for punishment by incarceration "Let the Punishment fit the crime" has been heared once again, with the background of Beccaria and classical school of thought ringing in the ears of those who follow cycles in history. This time, however, the philosophy of retribution carries a different name. The theory of 'Just deserts' or 'justice' but the underlying philosophy or retribution remains.

98. Section 397, 398 and section 304-B(Dowry Death) of I.P.C. provides a limit of the minimum sentence too.

6.2 The concept of retribution was severally criticized in much of the scholarly social science literature as well as in judicial opinion in the first two thirds of this century. It was recognized in 1972 by the U.S. Supreme Court as an appropriate reason for the use of capital punishment. In 1976 the court again discussed retribution as a justification for capital punishment. 'The Court noted that the instinct for retribution is a part of human nature and that if the courts do not handle these situation, private individuals might take the law into their own hands'.

6.3 At least four different notions have been said to underlie the punishment of offenders. Three of these concern reduction of crime in the future; rehabilitation, incapacitation, and general deterrence. "The fourth desert concerns the blame worthness of the offenders' post criminal conduct. Which of these should be given primacy when selecting penalties has long been a matter of debate. During most part of this century, rehabilitation and incapacitation (and to a lesser degree deterrence) were favoured notions of penalogists".

100. Furman Vs. Georgia, 408, U.S. 238 (1972)

Now there is renewed interest in desert. 'Given the continuing dispute over aims, why is it necessary to make a choice and why not, instead, pursue all four purposes at once. Unfortunately for such a strategy, the aims are in potential conflict. The best treatment may be a poor deterrent; the best deterrent may be undeservingly severe. One must choose which of the aims should have priority'.

6.4 It is the fundamental requirement of justice in punishing the convicted, that the severity of the punishment be commensurate with the seriousness of the Offender's criminal conduct. This is called the principle of 'commensurate deserts'.

Retribution as a justification for punishment not only has been in recent cases on the issue of capital punishment, but in addition to it constitutes the framework for what is today called the 'justice model' of punishment and sentencing.

6.5 Andrew von-Hirsch represented the position of the report of the committee for the study of Incarceration in his book 'Doing Justice; The choice of Punishment'.

102. Andrew Von Hirsch; The question of Parole Retention Reform or Abolition? 1978; PP. 13-14
103. Ibid ---- page. 14
Indicating their basic mistrust of the power of the state the committee members rejected rehabilitation and the indeterminate sentence and turned to deterrence and 'just desert' as reasons for punishment. David Fogel, is the chief protagonist of this just desert of Justice Model Theory of Punishment.

Just Deserts denote the idea that an individual who commits a crime deserves to suffer for it. Also it may be called retribution. Justice Model is a philosophy holding that justice is achieved when offenders receive punishments based on what is deserved by their offences, as written in the law; the crime determines the punishment. In sentencing, this model presumes that prison should be used only as a last resort. Flat time sentence are set for each offence; parole is abolished, and early release can be achieved only through good time credit.

In the justice model, the emphasis is shifted away from the processor (the public, the administration, and others) to the 'consumer' of the criminal justice system. It is a shift from what Fogel calls, the 'Imperial' or 'Official Perspective' to the 'Consumer Perspective' or 'Justice Perspective'. Justice for the

104. Reid Sue Titus; Crime and Criminology. 4th Ed. 1985, P. 82.
105. David Fogel; We are the Living Proof; The Justice Model for correction (Uincinati Ohio W.H.Anderson 1975) PP, 183-184.
106. Reid Sue Titus; Crime and Criminology 4th Edn.1985, P.623
offender must not stop with the process of sentencing but continue throughout the correctional process. 'The justice perspective demands accountability from all processors, even the pure of heart. Properly understood, the justice perspective is not so much concerned with administration of justice as it is with the justice of administration.\textsuperscript{107}

6.6 Sentencing would be shaped, though not rigidly determined, by sentencing guidelines that take into account not only the gravity of the offence and prior conviction record of the accused, but also the full criminal history, including the juvenile record and the involvement, if any, of the accused with drug abuse. The enter bonds of judicial discretion would be shaped by society, judgement as to what constitutes a just and fair penalty for a given offense. Within those bounds sentencing would be designed to reduce crime by giving longer sentence to high rate offenders (even when convicted of a less serious offense) and shorter sentences to low-rate offenders (even if the offences in question are somewhat more serious)\textsuperscript{108}.

It is possible to spot dangerous criminals more accurately and sentence these criminals to a longer term.\textsuperscript{109}

\begin{flushright}
\textsuperscript{107} David Fogal; We are the Living Proof; The Justice Model for corrections. 1975, page, 192.
\textsuperscript{108} James Wilson; Thinking about crime, rev. Ed. P-256
\textsuperscript{109} Andrew on Hirisch, past or future crimes (Deservedness and Dangerousness in the sentencing of criminals); 1986; p- 17
\end{flushright}
6.7 The influence of the classical school can be seen in this recent return to a theory of 'just deserts' or retribution. Bentham and Beccaria argued that the punishment 'should fit the crime'. The 'just and human' approach is to punish the criminal for what he or she has done, not to follow the treatment rehabilitative or so-called humanitarian, approach.

6.8 Set off does not serve even the new theory of 'just desert' or 'justice model' of punishment. It neither gives justice to the victim of a crime nor gives protection to the society in general. When the criminal deserves the punishment for his wrongful act then in such case the application of set off is not called for and even the exponents of the just desert theory wanted that parole should be limited or abolished.

If the court wanted that in given case the offender must undergo a specific term of imprisonment, than in such case the doctrine of set off violates the principal of justice. When a criminal deserves a severer punishment then in such case set off acts contrary to such principle.
In just desert model the crime determines the punishment. But under the provision of set off, the pre-conviction detention period is counted as punishment already undergone as term of imprisonment. The principle of just desert contemplates selecting the offenders basing on their criminal history and favouring a longer term of imprisonment for those who had previous criminal records. Provision of set off on the other hand, does not take into account such conditions. A flat arithmetical equality vitiates the concept of criminal justice.

7.1 ECONOMIC THEORY AND SET OFF: Economists believe that people are rational and that they look for ways to improve their conditions of living. In matters of criminal activity this means a person weighs the profit by a crime against the cost of detention and conviction. A person commits an offense if the expected utility to him exceeds the utility he could get by using his time and other resources at other activities. Some persons become 'criminal' therefore, not because their basic motivation differs from that of other persons, but because their benefits and costs differ.110

The criminal behaviour is thus explained by a cost benefit analysis, just as economists use this to

explain other kinds of behaviour. Some people may make an inaccurate judgement on a cost benefit basis, but the explanation remains. They decide whether to abide by the law or to engage in illegal behaviour on the basis of their own mental calculations of the costs and benefits of each. Deterrence comes into play in their theory, that adjustments in the incentives and disincentives can alter the behaviour. Thus if we increase the 'cost' of crime, the 'demand' or incidence, will decrease; but if we decrease the 'cost' of crime and increase the 'benefits', the 'demands' or prevalence of crime will increase.

7.2 Once again one sees the influence of the classical thinkers. Becarria and his followers believed that people were rational and operated on a pleasure-pain principle, they engaged in behaviour that brought pleasure and avoided behaviour that brought pain. To 'control' their behaviour, all we need to do is adjust the costs and benefits make the punishment just a little greater than the pleasure of committing the crime and the rational person will not commit the crime.

Now-a-days every thing or material is tested on the ground of mandatory value. Now it is the age of material comfort. Thus if state increases the cost of crime, the 'demand' or incidence will decrease, but if the state decreases the cost of crime and increases the benefit the demand, or prevalence of crime will increase.

7.3 Ordinarily it is this economic aspect which weighs heavily on the mind of the poor undertrial prisoners; and they fail to engage lawyers to defend themselves. Applied this calculus, even professionals and recidivists weigh the balance sheet of profit and loss arising out of a crime; and often they prefer to be 'not failed out' because in that situation they will be defended by State Defence for which they needs not pay. If they are acquitted, definitely, the cost of crime for them is less than the profit out of the crime. If they are convicted too they get the benefit of set off mandatorily. Thus the provision of set off decrease, the cost of the crime even with respect to professional criminals and recidivists; and economically they feel better of, which in turn economically propel them to commit crime than not to commit crime. Probability
of arrest, detention and conviction i.e. level of sanctions reduces the 'supply & offences'. Severe punishments or sanctions deter a person from risking commission of offences. Of course 'deterrence' and 'risking' are not always equally proportionate in case of all persons. The ratio depends upon the attitude of persons towards taking risks. Those who like to take risks will be more often deterred by increases in the probability of conviction; whereas those who do not like to take risks will be more deterred by increases in the level of the penalty.

7.4 Application of set off to criminals gives benefit to the accused because the term of imprisonment is reduced. So they do not mind to take up a career of a criminal. Both the expected certainty of conviction and severity of punishment are found to deter criminal activity. One percent increase in certainty of conviction exerts a greater effect than a similar increase in severity of punishment. Certainty of punishment is found to have a greater effect for relatively minor offenders and severity for persistent offenders.112

Economist stress on poverty and unemployment as causes of crime; but set off does not serve the purpose of economist theory. Detention as an under trial prisoner is only a detention in judicial custody with food, drink and roof and with other facilities like recreation, medical treatment in case of illness. This sort of detention even is accepted as a boon by some criminals. If punished the whole under trial period is set off. However if they are required to learn for themselves in prison while awaiting trial then they may become more responsible; and this consideration may of course reduce their temptation for committing crime after release or acquitted.

Today as it appears, there is no punishment at all. Undertrial period is given the benefit of set off mandatorily upon conviction and the remaining period is also shortened with good time laws, parole, probation, remission etc.

7.5 One thing must be remembered, rate of conviction in the whole country is very very low. Added to it, is good time laws i.e. provision of parole, probation and remission. From economists stand point set off serves no purpose. It is all the more important to
appreciate doctrine of set off against this back drop of the nation now torn by criminalty, militancy and insurgen_cies. The worst has come in form of criminalization of politics and politicalization of crimes.

8.1 CONCLUSION:- Analytically viewed, provision of set off is a substantive law in a procedural code. Strangely a period of detention not as a punishment is to be viewed as a period of punishment upon conviction. While application of set off turns the period of detention into punishment already undergone, it serves not a single object of punishment. It only purports to serve administrative purpose in reducing prison population, but that too negligibly.

It is a wrong legislative policy in criminal law, that instead of solving administrative problem like, delay in trial and overcrowdedness of jail, administratively, set off wrongly interfere with the most important field of penology, that is 'Judicial discretion' on punishment. Application of set off to criminals does not advance or pursue any theory of punishment. No school of criminology
did or would propagate or approve a scheme like set off. Neither classical school nor positive school of criminology and penalogy did even contemplate a scheme of set off. Also it does not satisfy the desert theory or justice model theory of punishment.

8.2. Application of set off attacks the very object and the very philosophy of punishment; rather it supplants recurrence of crimes and dilutes the society's attitude towards crimes and criminals; and in the process weakens the whole system of administration of criminal justice, and crimes tend to become permisive.

Sociologists emphasise on external factors in the causation of crimes. Set off fails to prevent or influence the external social factors that tend to cause crimes.

Psychologists emphasise on the internal factors. Set off rather adversely or inversely affects internal factors responsible for psychological make-up for causation of crimes.
Economists stress on poverty and unemployment as causes of crime, but provision of set off does not serve the purpose of economic theory. Set off never controls the widespread white collar crimes in society.

Provision of set off does not serve the purpose and object of preventive detention in the cases of serious offences and hardened criminals. Upon conviction such serious crimes and criminals deserve proportionate punishment but set off reduces the term of sentence which threatens the very root of the social defence.

8.3 The foregoing analysis converges on a proposition that doctrine of set off as a mandatory provision in cases of offences and criminals of all types is totally uncalled for in the realm of criminal justice.
5. COMPARATIVE CRIMINAL THOUGHT

1.1 UNITED STATES OF AMERICA :- United States of America also faces the problem of overcrowdedness in jails and prisons (the term 'Jail' is usually used for detention of under trial prisoners and for convicts sentenced upto one year imprisonment, whereas the term 'prison' is used in respect of those jails where convicts for imprisonment beyond one year are housed.).

1.2 Unlike India, in America the doctrine of 'set off' is not a mandatory provision. It is purely a discretionary power with the court. It is of course very seldom used on strong judicial grounds to be recorded in the judgement itself. Ordinarily ofcourse a convictional imprisonment runs from the date of judgement without reckoning any preconviction detention.

Courts in America do take into consideration the period of pre-conviction detention while sentencing, but they may order or may not order for any deduction of the time already spent in jail from the sentence imposed. The courts may impose a sentence of probation rather than incarceration. However they 'may sentence to'
'the time served in pretrial detention', which would result in the defendant's full discharge from custody.\textsuperscript{113}

1.3 Jail time is generally used as punishment only for those convicted of misdemeanors and petty offences. Judges may allow time spent in jail while awaiting trial and sentencing to be counted toward the eventual sentence. If less than a year is left for a felony offender he, will usually serve out his time in jail.\textsuperscript{114}

This discretionary power gives the trial judge a wide discretion that this benefit should be allowed only in selected cases. If the case is a serious one, or is a felony offence, generally the courts choose not to count the period of pre-conviction detention in jail at the time of sentencing. The courts generally take jail time as punishment only for those convicted of misdemeanors and petty offences. The courts do not ordinarily apply set off in respect of recidivist, habitual criminals or professional criminals and in cases of grievous or heinous crimes.


1.4 However, there is considerable variation in the degree to which the fact or length of pretrial detention is considered by the court while sentencing convicted defendants who are incarcerated or given probation without regard to their period of pre-conviction detention and are exposed to an unfair double standard of justice that punishes them twice. Endorsing the provision in the model penal Code, the President Crime Commission recommended that detainees who are subsequently convicted and sentenced to jail or prison should be given full credit for all time spent in pretrial detention. Detainees who are subsequently acquitted might be reimbursed on a per diem rate.\textsuperscript{115} This recommendation of course has not yet been adopted.

2.1 UNITED KINGDOM: In United Kingdom the courts sometimes do consider pre-conviction detention period while sentencing an accused. Set off thus has an acceptance in United Kingdom, but it is strictly guided by judicial conscience (a term higher than judicial discretion). Set off is not a mandatory rule in United Kingdom, it is rarely used. Such judgements are sensitive and become sensational.\textsuperscript{116}

\textsuperscript{115} Robin D. Geralad; Introduction to the Criminal Justice System, 2nd edition, 1984, P.230

\textsuperscript{116} Indian Express Dt. 15 Oct. 1992 (Husband burning case) Kiranjit Ahluwailia.
2.2 In an interesting recent article, William Landes\textsuperscript{117} suggest that the Criminal Justice system should pay people who are kept in jail before trial if they are adjudged to be innocent. This way, the innocent could be partially compensated for what amounts to punishment, and yet society can keep arrested individuals locked up while they await trial if the judge has good reason to suspect that they may dangerous.\textsuperscript{118}

Most sentences are longer in the United States than in most other countries. Few convicts are sent to prison for more than five years in any Western European countries. One inevitable result of long sentences is that by increasing the average stay in prison, they add to the size of prison population.\textsuperscript{119} But reduction of the average length of sentences has been opposed in the United Kingdom. Fears have been expressed that public safety would be endangered by subversion of the protective function of the prison.

\textsuperscript{117} W.M. Landes; The Bail System ... an Economic approach J.Leg, Stud. Vol. 2 No. 1 January-1973.

\textsuperscript{118} Wright Buston; Criminal Justice and Social Sciences 1978, page 298.

\textsuperscript{119} Johnson Elmer Hubert; Crime, Correction and Society Introduction to Criminology 1978 p. 323.
3.1 JAPAN, 1950-75: In recent years, Japan has attracted considerable attention as a result of a sharp decline in the level of recorded crimes. Over the same period, prison population has got substantially reduced. The physical capacity of the prison system and the number of personnel remained stable from 1950 up to 1975. There was a period of steady decline. The Japanese prison population rate in 1975 was half as it obtained in England and almost one fifth as it obtained in United States. The rate of decline of sentenced and unsentenced (U.T.P) prisoners over the period was similar, with unsentenced prisoners remaining about seventeen percent of the total.

3.2 An official statement on crime in Japan cities four explanatory factors as to why Japan has differed from other industrial nations with respect to its relatively lower level of recorded crimes. These factors are as follows; First, the existence of informal social controls strengthened by a homogeneity of culture, ethnic origin and language; Second, a fair and efficient criminal justice process which receives general public support and whose goals shared with non-criminal justice agencies; Third, the efficient
control of weapons and drugs; Fourth, the relative affluence of Japanese citizens and the relatively equitable distribution of wealth across all social groups.120

3.3 The police in Japan enjoys unusually high clear up rates. In 1979 the overall clear up rate for non-traffic penal code offences was 59%. The clearing rate of robbery was 88%, for rape 89%, and for theft 55%. All criminal cases investigated by the police are referred to the public prosecutor, who exercises discretion as to whether or not to take the case to court in the light of personnel circumstances or consideration with regards to the offence. Prosecutorial discretion to dismiss minor offences dates from 1885 and was formally authorized in the 1922 Code of Criminal Procedure. In 1973, 43% of adults found by public prosecutors to have committed non-traffic penal code offences were granted suspension of prosecution. The rate of prosecutorial suspension varies considerably between offences. For example in 1978, 64% of embezzlement cases were suspended; compared with 9% of robberies. An official Japanese statement refer to prosecutorial dismissals as contributing significantly to the speedy dispositic of vast number of criminal cases and a consequent

120. Supra; note 1, P.133
reduction of criminal court dockets... prompt recognition can be given to expressions of contrition even in relatively serious cases without exacting the price of a criminal conviction; restitution and expression of apology to victims can be required without a necessity for extended criminal proceedings.¹²¹

Courts in Japan are able to exercise broad discretion in sentencing practice. Of particular importance are powers to suspend prison sentences. Suspension of imprisonment varies by offence; powers to fine were much expanded; and in 1978 fines accounted for about 85% of all penal code sentences. Defaulting is quite unusual and such persons in 1978 made up less than two in thousands of the total prison population. Defaults accounted for about one in a thousand of persons fined.¹²²

3.4 Probation supervision arises with respect to some sentences of imprisonment which have been suspended. The court has discretion regarding cases where no previous suspended sentences has been made, but must order probation supervision where a second suspended sentence is imposed. In 1978 some 8,500 persons were placed under probation supervision.¹²³

¹²¹ Supra; note 1, p.133
¹²² Supra; note 1, p.134
¹²³ Supra; 1 note, page - 134
3.5 In 1975 the decline in Japan's prison population came to an end, and between 1975 and 1978 prison population increased by 9%. This growth was due largely to an increase of 11% in the number of sentenced prisoners entering the prisons system over this period. The important factor to be mentioned in Japanese administration of criminal justice in that, the undertrial prison population was always less than convicted prisoners population.

Prison population in Japan stood thus during 1950-75:

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>Rate per 1,00,000 inhabitants</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950</td>
<td>1,03,170</td>
<td>123</td>
</tr>
<tr>
<td>1955</td>
<td>81,868</td>
<td>91</td>
</tr>
<tr>
<td>1960</td>
<td>78,521</td>
<td>83</td>
</tr>
<tr>
<td>1965</td>
<td>63,515</td>
<td>84</td>
</tr>
<tr>
<td>1970</td>
<td>49,209</td>
<td>47</td>
</tr>
<tr>
<td>1975</td>
<td>45,690</td>
<td>40</td>
</tr>
</tbody>
</table>

In 1950 there were about 123 prisoners per one lakh population. This got reduced to about 40 prisoners by 1975. It exhibits a constant decline.

124. Supra 1 page 136,
Source cross national study, Supra-1, P.134
Length of prison sentences in Japan in 1976 stood thus:

<table>
<thead>
<tr>
<th>Number sentenced</th>
<th>Percent Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>less than one year</td>
<td>15,309</td>
</tr>
<tr>
<td>Over than one year to three year</td>
<td>10,731</td>
</tr>
<tr>
<td>Over three years to five years</td>
<td>1,815</td>
</tr>
<tr>
<td>Over five years to ten years</td>
<td>654</td>
</tr>
<tr>
<td>Over ten years</td>
<td>108</td>
</tr>
<tr>
<td>Life Sentence</td>
<td>30</td>
</tr>
<tr>
<td>Total</td>
<td>28,647</td>
</tr>
</tbody>
</table>

(Source Cross national study)\(^{125}\)

This statistics show that there is constantly a declining curve from higher terms to lower terms of imprisonment.

4.1 NETHERLANDS (1950-75) Between 1950 and 1975 the prison population in the Netherlands receded from over 6,500 to under 2,500. In terms of the rate per 1,00,000 inhabitants, the reduction was from 66 to 17. The United National International

---

\(^{125}\) Supra 1; page 134.
survey of prison population prepared for the Fifth
and the Treatment of Offenders held in 1975,
reported no other western country with a rate under 30,126
per one lakh population. The reductionist policy,
which has been successfully pursued in the Netherlands,
has attracted extensive international attention. The
dramatic drop in the Netherlands prison population,
unlike the situation in Japan, over the same period,
was accompanied by an increase in reported crimes.
The reduction in prison population is associated
with the relative mildness of Dutch criminal justice,
typified by measures which filter offenders out of
the criminal justice process.

Prison Population in the Netherlands during 1950–75127
stood thus:

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>Rate per 1,00,000 inhabitants</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950</td>
<td>6,730</td>
<td>66</td>
</tr>
<tr>
<td>1955</td>
<td>4,075</td>
<td>38</td>
</tr>
<tr>
<td>1960</td>
<td>3,449</td>
<td>30</td>
</tr>
<tr>
<td>1965</td>
<td>3,105</td>
<td>25</td>
</tr>
<tr>
<td>1970</td>
<td>2,433</td>
<td>19</td>
</tr>
<tr>
<td>1975</td>
<td>2,356</td>
<td>17</td>
</tr>
</tbody>
</table>

126. Supra 1, page 137
127. Supra 1, page 137
The decline in the Dutch prison population at least since 1955 for which more complete data are available, has been almost entirely with respect to sentenced prisoners. The number of remand prisoners in custody fluctuated over this period, with remand prisoners increasing as a proportion of the total prison population from 36% in 1955 to 46% in 1975 and rising further to 60% by 1980. The proportion of remand prisoners in the Netherlands is very much higher than in most other national prison systems. In most other European countries the remand population constitutes about one fifth of the total.

Remand and sentenced prison population in Netherlands during 1955-80 stood thus:

<table>
<thead>
<tr>
<th>Year</th>
<th>Remand</th>
<th>Sentenced</th>
<th>Total</th>
<th>Remand prisoners percentage total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1955</td>
<td>1,479</td>
<td>2,596</td>
<td>4,075</td>
<td>36</td>
</tr>
<tr>
<td>1960</td>
<td>1,510</td>
<td>1,939</td>
<td>3,449</td>
<td>43</td>
</tr>
<tr>
<td>1965</td>
<td>1,460</td>
<td>1,645</td>
<td>3,105</td>
<td>47</td>
</tr>
<tr>
<td>1970</td>
<td>1,350</td>
<td>1,083</td>
<td>2,435</td>
<td>55</td>
</tr>
<tr>
<td>1975</td>
<td>1,094</td>
<td>1,262</td>
<td>2,356</td>
<td>46</td>
</tr>
<tr>
<td>1980</td>
<td>1,921</td>
<td>1,282</td>
<td>3,203</td>
<td>60</td>
</tr>
</tbody>
</table>

Source-Cross National Study

128. Supra 1, N.P. 138
Time spent in custody on remand in Netherlands stood thus:

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Remands in Custody</th>
<th>Upto 42 Days</th>
<th>43-103 Days</th>
<th>103-192 Days</th>
<th>192 Days</th>
</tr>
</thead>
<tbody>
<tr>
<td>1970</td>
<td>6,761</td>
<td>24</td>
<td>46</td>
<td>26</td>
<td>NIL</td>
</tr>
<tr>
<td>1974</td>
<td>6,452</td>
<td>34</td>
<td>41</td>
<td>20</td>
<td>NIL</td>
</tr>
<tr>
<td>1979</td>
<td>7,164</td>
<td>38</td>
<td>36</td>
<td>20</td>
<td>6</td>
</tr>
</tbody>
</table>

Average length of stay on remand remained throughout the 1970s at about 70 days. Average time in custody on remand is very much longer than time in custody after sentence. In 1977 the average time in custody for all prisoners, remand and sentenced, was 41 days, and Data Steenhuis reports that the average number of days for remand prisoners was about 70 days calculating the balance for sentenced prisoners shows an average length of stay for sentenced prisoners of 33 days, less than half the average time spent in custody by unconvicted prisoners.

4.2 Since at least 1960 there has been an increasing tendency by public prosecutors to dismiss cases rather than to proceed with prosecution through the courts. In 1960, of all prosecutorial dismissals and guilt findings combined, 30 percent were dismissed by prosecutors compared with 44 percent in 1975. The upward trend in dismissal of cases by public prosecutors is also evident with respect to certain more serious offences.
The discretion exercised by public prosecutors in the Netherlands plays a crucial part in determining both the volume and composition of cases dealt with by the courts.

Despite the decline in clear up rates and the increase in prosecutorial dismissals, the total number of persons found guilty by the courts between 1950 and 1975 increased by 54 percent.

4.3 The main sentencing alternatives to custody in the Netherlands are suspended sentences and fines. Suspended sentencing powers were introduced in 1915 and were extended in 1929. Most forms of judicial sentence including fines, can be suspended. Sentences can be fully or partially suspended, and since the mid 1950, courts have preferred the partially suspended sentence over fully suspended sentences.

4.4 However the courts impose a sentence more or less equal to the length of the term spent in pre-trial detention. That is the courts in Netherlands do apply the principle of set off sparingly, though not mechanically under a mandatory provision.
4.5 The fine is by far the most frequently used penal sanction in Netherlands. Courts were empowered to impose fines on a wide scale as alternatives to custody in 1925. Between 1950 and 1975 fines were used increasingly by the courts rising from 58% of all sentences in 1950 to 65% in 1975. Between 1975 and 1979 the use of fines increased to 72%.

4.6 Probation in the Netherlands are non-governmental, Protestant, Catholic and non-religion organisation are charged with this function. In fact probation supervision as a court sentence has declined since 1965. It was used in 2% of cases in 1965. In 1975 it was used in only 1% cases.

4.7 Adopting Prison Waiting list is a special device in Netherlands. A customary aspect of continental criminal procedure is to delay the start of a prison sentence where the offender was not remanded in custody up to the time of sentence. In the Netherlands this procedure has been developed and manipulated by the prison system so as to reduce pressure of numbers on prison capacity. Following figures would illustrate the Prison waiting list (1965-75):

<table>
<thead>
<tr>
<th>Year</th>
<th>Total immediate imprisonment</th>
<th>Waiting list</th>
<th>Total percent waiting list</th>
</tr>
</thead>
<tbody>
<tr>
<td>1965</td>
<td>11,872</td>
<td>7,934</td>
<td>67</td>
</tr>
<tr>
<td>1970</td>
<td>12,954</td>
<td>9,261</td>
<td>71</td>
</tr>
<tr>
<td>1975</td>
<td>14,316</td>
<td>10,627</td>
<td>74</td>
</tr>
</tbody>
</table>
The call up process has the consequence of locating the pressure point outside rather than inside the prison system.
6. **SET OFF & ADMINISTRATIVE CONVENIENCE**

1.1 The institution of prison symbolises a system of punishment and also a sort of supporting institution to house the under trials and suspects during the period of enquiry, investigation and trial. Since there cannot be a society without crime and criminals, the institution of prison is indispensable for every country.

1.2 The history of prisons in India and elsewhere clearly reflects upon the changes in society's reaction to crime from time to time. The system of imprisonment represents a curious combination of different objectives of punishments. Thus prison may serve to deter the offender or it may be used as a method of retribution or vengeance by making the life of the offender miserable and difficult. The isolated life in prison and incapacity of inmates to repeat crime while in prison, fulfils the preventive purpose of punishment. Thus it helps in keeping crimes under control by elimination of criminals from the society. Again, prison may as well serve as an institution for the reformation and rehabilitation of offenders. It follows that whatever be the object of punishment the prison serves to keep offenders under custody and control.

1.3 In the preceding decade, there were 76 Central Prisons, 250 District Prisons, 822 Sub-jails, 20 special Jails and 27 Open Jails in India. The sanctioned inmate capacities of these institutions were 79,544 (Central Jails), 63,654 (Districts Jails), 26,057 (Sub-jails) 6,640 (Special Jails) & 4,626 (Open Jails).

The total number of persons languishing in jails all over the country as on December 31, 1980, were 1,59,692. Of these 1,55,619 were men and 4073 were women. Out of this 1,59,692 inmates 92,276 i.e. 60% were undertrials prisoners.

1.4 The committee On Jails Reforms appointed by the Government of India on July 25, 1980, in its report, described the condition of jail, thus, "insufficient accommodation; indiscriminate huddling of offenders; unhygienic conditions, Sub-standard food; insufficient water supply. Use of drugs and narcotics by inmates, atrocities on children and women, maltreatment of prisoners and corruption.... half baked or over-burnt rotis, maggots and worms in cooked food, untertial prisoners in loin cloth and open basket system latrines still in use...."
The committee after its extensive visits to prisons in India observed, "In some of the states prison barracks are so overcrowded that inmates have to sleep in shifts. Under such conditions, custody and security of the inmates becomes the primary and probably the only consideration of the staff, and even care and welfare is neglected".

1.5 The committee further condemned the "Mass Approach" towards prisoners and their problems as also the lack of proper classification of the inmate population. In this context the committee observed, "It is our opinion that this confusion", is a major hurdle in the development of proper correctional treatment in the prisons in this country", and "The committee was shocked to find that all categories of inmates were huddled together in most of the prisons. Even women, children, Young offenders and adults were not effectively segregated. There is no proper classification of prisoners and diversification of institutions to facilitate treatment of prisoners according to their need. It appears that the concept of scientific classification of offenders is not still clear to prison personnel".

1.6 A century ago, the prisons Act 1894, in Section 27, did prescribe a scheme for separation of prisoners. The Act is still in force; and the scheme runs, thus;

130. The committee on Jail reforms.
1. Female prisoners shall be so separated as to prevent their seeing, conversing or holding any intercourse with male prisoners;

2. Male prisoners under 18 years of age shall be separated from male prisoners above that age;

3. Among male prisoners under 18 years of age, those who have arrived at the age of puberty shall be separated from those who have not attained puberty;

4. Convicts shall be kept apart from unconvicted prisoners; and

5. Civil prisoners shall be kept apart from criminal prisoners.

One of the most important points to be taken into consideration, for an effective prison system, is proper segregation of prisoners.

Segregation, however, has not been possible in Indian prisons owing to several reason like over crowding, sudden influx of prisoners, insufficient buildings, large percentage of short-termers, insufficient facilities for segregation and homeogeneous grouping, shortage of personnel and funds. In fact most of the states are not even clear about this.

aspect of prison administration; some are ignorant, others confused.

Diversification of institutions is closely linked with scientific classification of prisoners. The All India Jail Manual Committee (1957-59) in its report has defined diversifications thus, "a net work of institutions where inmates can be segregated on the basis of sex, age, criminal record, legal reason for their detention, length of their sentence, recidivism), physical or mental health; requirements of security needs of training and treatment etc...."

Proper segregation would require a detailed analysis of each prison on the basis of inmate population; available accommodation possibility of gradation in consonance with security measures, architectural designs of gaols, existing personnel resources, requirement of personnel for development of correctional training treatment programmes etc.

1.7 Other problem of poor living conditions in prisons can be identified on several fronts indicated by the committee on Jail Reforms. It covers a wide range of maladministration, from Dietary mismanagement to sanitary vagary.

The Committee observed "...... The persistent stench prevailing in the living enclosures of almost any jail
in India is indicative of inadequate and inappropriate system of lavatories. Over flowing drains, open
severages, crustng walls, water loggings, basket-type dry latrines, parched floors, insufficient overhead
water tanks and lack of wire net shutters are a common sight in our jails. A natural corollary to such inhygienic conditions is the breeding of pests and vermin resulting in infections and communicable diseases, thus adversely affecting the health of prisoners."

1.8 The plight of women, children and young offenders in jails is especially a matter of great concern. The Borstal Schools Act and Reformatory Act were enacted with the intention of redeeming young offenders in the age group of 18 to 23 years from crime and treat and train them in these institutions, specially established for the purpose. But the problem remains as acute as ever. The infrastructure detailed under the Act has not been created. Nor has the provisions Act been implemented. In the result, young offenders freely mix with adult criminals who are confined in the same prisons.

Medical services in Indian Prison, are not only most unsatisfactory where they exist, but are in fact conspicuous by their absence.

Another problem is that lunatics criminals and non-criminal psychiatric treatment is offered in
very few cases as most jails do not have the facilities. In several prisons lunatics have stayed in prison "for more than 20 years without their trial having begun". In many jails hardened and dangerous criminals spies, smugglers, infiltrators or murderer are a constant source of trouble, causing serious disciplinary and security problems.

1.9 To sum up in the words of the Committee on Jail Reforms..... "Our prison system....... is grouping into a blind alley, not quite knowing how to achieve its desired objectives. The system has run totally out of tune. The conditions in prison have been deteriorating and have reached a point of crisis one of the main reasons for this general deterioration is the lack of national commitment..... The centre has played only an advisory role occasionally setting up a recommendatory body to go into the question of prison reforms. The states and Union Territories have always treated Prison Department as non-productive, non-developmental and .... have given it a very low priority in their development plans. On the plea of financial stringencies, the department has been made to stagnate and even deteriorate for decades.... Even the basic tenets of human dignity have been ignored.
Major deficiencies, sometimes leading to explosive situations in the prison system have been brought to the notice of the Central Government. On all such occasions, the Government of India have generally been caught unawares on important issues.

2.1 The object of enacting section 428 of the Code of Criminal Procedure, 1973, was to relieve the anguish of prolonged detention of under trials and to avoid over-crowding in jails. The Joint Select committee expressed itself in respect of this provision thus; The Committee has noted the distressing fact that in many cases accused persons are kept in prison for very long period as under trial prisoners and in some cases the sentence of imprisonment ultimately awarded is a fraction of the period spent in jail as under-trial prisoner. The Committee has also noted that a large number of persons in the overcrowded jails of to-day are under trial prisoners. The new clause seeks to remedy this unsatisfactory state of affairs. The new clause provides for the setting off the period of detention as on under trial prisoner against the sentence of imprisonment imposed to him.
2.2 Thus the purpose of section 428 of the Code of Criminal Procedure, 1973, was to relieve the anguish of prolonged detention of under trials and to avoid overcrowding in jails. The wholesome provision of set off has been introduced, to dispense with slow motion justice and long distance investigation. It provides for setting off or crediting the period of pre-conviction detention of the accused of a case towards the sentence ultimately awarded to him after his conviction is that very case. The period of pre-conviction detention includes the period of detention of an offender during investigation, enquiry and trial. A convict thus will be liable to undergo imprisonment only for the remainder period only after deducting the pre-conviction detention from the term of imprisonment awarded. If after such set off, there is no remainder, the accused has to be released forthwith.

2.3 The logic mooted is simple. By granting set off only credit is given to the convict in the calculation of the term of imprisonment awarded to him for the period he was in detention. It does not in any manner after the sentence of the judgement entering conviction and awarding sentence. They remain the same even after
set off. The period of detention must be in the same case; the computation of the period must terminate on the date of conviction. The section lays down the rights and liabilities of an accused in each individual case. It does not permit the accused to claim set off for the period of detention in another case.

2.4 The irony is also simple, but drastic. The provision of set off is available to those who had preconviction detention and have been found guilty. The law is unkindly silent to those who had pre-conviction detention but have been found not-guilty. Persons of this category, though held honourably innocent, receive no compensation or rehabilitation at state cost. They simply suffer a jeopardy; and law creates an inequality. It might appear that they suffer an emotion that unjustness and unfairness has been written on their forehead compared with persons who have been convicted and have been given the benefit of set off. This might prima facie appear to be violative of equality clause and thus unconstitutional. One pathetic aspect of administration of criminal justice system in India has been that large number of under-trial prisoners languish in jails. The statistics of last few years show that at any given point of time,
the percentage of undertrial prisoners has often exceeded that of convicts. In 1960, these were 2,93,398 under trials as against 4,12,198 convicts. In 1970 the number of undertrials increased to 9,38,598 as against 4,40,059 convicts. Between 1960 and 1970 the number of under trials admission rose by 58% while convicts admission increased only by 7%

Table No. 1 Would indicate co-relation of inmates (Convicts=undertrials) between 1975 and 1981

<table>
<thead>
<tr>
<th>DATE</th>
<th>TOTAL INMATES</th>
<th>CONVICTS</th>
<th>UNDERTRIALS</th>
<th>RATIO OF CONVICTS TO UNDERTRIALS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.1.1975</td>
<td>2,20,146</td>
<td>93,374</td>
<td>1,26,772</td>
<td>100 : 136</td>
</tr>
<tr>
<td>1.1.1976</td>
<td>1,84,169</td>
<td>83,086</td>
<td>1,01,083</td>
<td>100 : 122</td>
</tr>
<tr>
<td>31.12.1977</td>
<td>2,11,963</td>
<td>98,186</td>
<td>1,13,777</td>
<td>100 : 116</td>
</tr>
<tr>
<td>31.12.1978</td>
<td>1,85,655</td>
<td>66,319</td>
<td>1,19,336</td>
<td>100 : 180</td>
</tr>
<tr>
<td>31.12.1979</td>
<td>1,57,824</td>
<td>62,023</td>
<td>95,801</td>
<td>100 : 154</td>
</tr>
<tr>
<td>30.6.1981</td>
<td>1,41,761</td>
<td>54,617</td>
<td>87,144</td>
<td>100 : 160</td>
</tr>
</tbody>
</table>

The figures between 1975-77 ofcourse do not include preventive detentions.

Table No. 1 indicates that the undertrial prisoners constitute about 60% of the jail population.
2.5 Through the provision of set off has been applied to U.T.P. since 1974, the object has not been achieved. Because the problem of distant investigation and long drawn trial lie with the police and the court. And, the whole situation worsens because of the present bail system which is antipoor.

2.6 These undertrial prisoners consisted principally of two categories; one representing those who where denied bail by the courts on accounts of their involvement in serious offences and the other consisting of those who could not furnish bail for one reason or the other. These undertrial prisoners were he, rded together in jails where the problem of overcrowding had reached unmanageable proportions and they were living in shocking horrible conditions.133

The position, indeed was so deplorable in the states of U.P., Bihar and Tamil Nadu, that many of these undertrial prisoners were languishing in jails for years, without even their trial having commenced. The fate of such U.T.Ps., in the state of Bihar was brought to the public notice by K.K.Rustomji, a member of the National Police Commission who wrote a number of tour notes, some of these notes described that some

132. Source ; KUMKUM CHADHA; The Indian Jail, 1983, P.93
people were waiting trial in prison for as long as ten years, whereas, the offences for which they were held carried half or even briefer terms of sentence. Many others were in prison without having even been charged with an offence, investigation against them were pending for well over two years. Some prisoners had committed no offence at all; they were persons placed in "protective custody" by the police because they were either victims of crime, or witnesses needing protection. This group also included destitute women and children. Rustomji identified about 18 concrete, cases of such under trials by name. Though the object of set off is to reduce the overcrowdness of jail and to compensate delay it only achieves its object so the persons, who are convicted and left the large majority (more then 80%) with no compensation relief.

A second coincidence, was that a lawyer, Mrs. Kapila Hingorani, was so shocked by the depiction of the horror of the situation as to move the Supreme Court for a writ of habeas-corpus.

The third incidence was that the first bench which heard the case was led by Justice Bhagwati of the Supreme Court of India; who fortunately continued leading the hearing in all subsequent occasions.
This three coincidences have brought promise of new and basic changes in criminal justice as well as the Constitution. They have also ushered in a basic revision of some aspects of the day-to-day administration of criminal justice system. And more concretely, they have brought unexpected relief to undertrials who were in jails for no other tangible reason then that of their poverty. The court examined the matter in great depth and gave various directions which have come to be known as Hussainara Khatoon decisions. (But, be it remembered that these coincidences or cases had occurred after 1973 and thus could not be posed to supply logic to introducing provision of set off in 1973).

2.7 The case of Hussainara Khatoon Vs. State of Bihar AIR 1979 S.C. 1360 is a significant landmark in the history of personal liberty of undertrials. It brought to the notice of the Supreme Court that thousands of undertrials in Bihar had spent long years in jails, in some cases as many as ten years, awaiting trial of offences carrying lesser punishment (Can application of set off to these undertrials prisoners solve the problem of overcrowdedness of jail and compensate the delay. They have been detained in jail for a period more than the maximum punishment for the
offences charged against them. Who is responsible for these state of affairs? Application of set off to these U.T.Ps., if convicted cannot solve the overcrowdedness of jail; nor can it compensate the delay. Bhagwati J. moved by the undertrials' misery delivered a verdict on poverty and justice, reflecting creativity and concern for the poor. Although injustice involved in Hussainara case was colossal the Constitution of Indian unlike American Constitution and the Criminal Procedure Code neither guarantee a right to speedy trial, nor created a bail system sensitive to the problems of the poor. They do not prescribe the maximum period for which an U.T.P. can be detained in jail without trial. Even they failed to provide specifically that the undertrial imprisonment should not exceed the maximum period of imprisonment prescribed for an offence.

The Seventy-eight Report of the Law Commission of India stated that on January, 1, 1975; out of 2,20,146 prisoners, 1,26,772 i.e. 57.6% were undertrials. It was further stated that 90.9% of the prisoners in the Ambala Central Jail and 88.7% of the prisoners in the New Delhi Central Jail were U.T.Ps. which also included cases where the U.T.Ps
were charged with bailable offences only.

It was disclosed by State of Bihar in this case, that duration of imprisonment of the undertrials without trial ranged from a few months to ten years. These were cases in which such imprisonment exceeded the maximum imprisonment prescribed for the respective offences. No information was made available as to how many of them were produced and how many times before the magistrates under section 167 of the Code of Criminal Procedure, 1973.

2.8 Bhagwati, J., tried to identify the shortcomings in the administration of criminal justice responsible for this tragic state of affairs. He found that an unsatisfactory bail system and delays in courts had frustrated the prayers of U.T.Ps., for justice, and in most cases it was due to their poverty.

He observed; (A.I.R. 1979, S.C. at page 1362) "It is necessary therefore that the law as enacted by the legislature and as administered by the courts radically change its approach to pre-trial detention and ensure reasonable, just and fair procedure which has a creative connotation after Menna Gandhi's case.

Bhagwati J., with Kaushal J. Concurring, tried to make the bail system more compassionate to the poor in more ways than one. He also read in Article 21 the right to speedy trial. So if the right to speedy trial is violated due to the carelessness of the government
machinery, then Government should pay monetary compensation to the U.T.P. Law should fix the responsibility on government functionary any in case of delay in trial of U.T.Ps.¹

In Hussainara Case II, Bhagwati J. with Sen.J. concurring (A.I.R. 1979 S.C. 104) held that detention of persons covered by the section 468 contravened Article 21 and hence they should be released forthwith.

Bhagwati J. held that remanding women victims of offences to protective custody violated Art 21 and directed the government to set up welfare-and-rescue homes to take care of the destitute women and children.

In Hussainara Case III, Bhagwati J. with Desai J. concurring (A.I.R. 1979, S.C. 1369) reprimanded the respondent state for keeping the undertrials in jails for period longer than the period of imprisonment prescribed for offences they were charged with. He found that undertrials charged with bailable offences were still in jails, presumably because they were too poor to furnish bail and to engage a lawyer. He further found that some magistrates insisted on monetary bails. Such unfortunate situation cried aloud for introduction of an adequate and comprehensive legal aid service programme.
He regarded it as an essential ingredient of reasonable, fair and just procedure that a prisoner who is to seek his liberation through the court's process should have legal services made available to him at state cost.

He observed, "the state cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The state is under a constitutional mandate to ensure speedy trial; and whatever is necessary for this purpose is to be done by the state". He ordered the release of these persons forthwith as their continuous detentions was unconstitutional.

In Hussainara Khatoon Case IV Bhagwati J. with Chinnappa Reddy and Sen J.J. Concurring (A.I.R.1979, S.C. 1377) elaborated the theme of right to legal aid after reprimanding the respondent for keeping undertrials in jail for periods longer than the maximum period of imprisonment for offences they were charged with and for keeping lunatics and persons of unsound mind in jail. He described legal aid as "an absolute imperative", "equal justice in action" and "delivery system of social justice". If an accused, confronted with loss of liberty and too poor to engage a lawyer was not provided with free legal services by the state, "the trial itself may run the risk of being vitiated as controvening Art 21 (at P.1381)."
(But the right to legal aid came at the state of hearing and the U.T.P. upto that stage have to wait.). The real problem lies with the delay at the investigation stage, even though section 167 Cr.P.C. requires investigation to be completed within six months. Bhagwati J. expressed the court's amazement and horror at the leisurely and utmost lethargic manner in which investigation into offences seems to be carried on. He underlined the need to overhaul and streamline the investigative machinery so that the judicial process may be set in motion without any unnecessary delay.

In Hussainara case V, Bhagwati J. with Chinnappa Reddy J. Concurring, (A.I.R. 1979, S.C. 1819), ordered the release of undertrials charged with multiple offences and languishing in jail for the maximum term for which they could be sentenced on conviction even if the sentences awarded to them were consecutive and not concurrent with regard to undertrials, charged with multiple offences and languishing in jail for periods exceeding the maximum term. He ordered such U.T.P.s. to be released on bail on executing a personal bond of Rs. 50/- without any surety and without verification of financial solvency. (Justice Bhagwati could pronounce such ruling perhaps because of the existence of Sec. 428 Cr.P.C. However, even in its absence, a judge would have been wholly just in pronouncing like rulings in respect of U.T.P.s., who have so outshed the jail period beyond the maximum term of imprisonment.
upon conviction).

The provision of set off is applicable only to those U.T.P.s. who are convicted and sentenced to undergo a term of imprisonment. Obviously, set off cannot apply to U.T.P.s. who are acquitted of charges. Thus provision of set off can only reduce the population of convicted prisoner in jail.

There could be three modes to reduce U.T.P. population in Jails, viz., (1) by releasing them on liberal bails, (2) by speedy investigation and trial, (3) by encouraging plea of guilt. Population of convict prisoners in jails could be reduced in four modes, viz. (1) Probation, (2) Parole, (3) Remission, (4) Open prison. All these modes have positive bearing on the criminal justice system. It is difficult to push through the doctrine of set off as to be having a positive bearing at all on the criminal justice system. No reformation, no rehabilitation, no deterrence is served by the doctrine of set off.

3.1 SET OFF VIS-A-VIS PROBATION: The probation of offenders Act, 1958, contains elaborate provisions relating to probation of offenders upon conviction. The Act provides four different modes of dealing with youthful and other offenders in lieu of sentencing them to imprisonment subject to certain conditions.
The modes include: (1) release after admonition, (2) release on entering a bond on probation of good conduct with or without supervision, and on payment by the offender the compensation and costs to the victim if so ordered, the courts being empowered to vary the conditions of the bond and to sentence and impose a fine if he failed to observe the conditions of the bond; (3) persons under twenty-one years of age are not to be sentenced to imprisonment unless the court calls for a report from the probation officer or records reasons to the contrary in writing.

3.2 Thus it would appear that the provisions of the Probation of Offenders Act are not confined to juveniles alone, but they extend to adults as well. Provision of the Act are not only confined to offence committed under the Indian Penal Code but they extend to offences under other laws as well.

Firstly, the system of probation involves conditional suspension of punishment. An offender may be released on probation with or without the sentence being passed in his case or without passing of a sentence.

While in case of provision of set off it applies to undertrial prisoner who had any preconviction detention period in jail. The period of undertrial detention

134. The probation of offenders Act 1958, Section 3.
135. Section 4.
136. Section 6.
is set off from the term of imprisonment and in many cases the accused is released on the date of judgement after the application of set off. Both the system of probation since 1958 and the provision of set off since 1974 apply to persons convicted of offences triable under the Code of Criminal Procedure, 1973.

In case of probation the sentence is suspended or the execution of sentence is suspended; but in case of 'set off' the sentence is counted from the date of detention in the jail. Both the systems relieve the offenders to certain extent from the further imprisonment in jail. But in case of probation of Offenders Act, the court imposes certain conditions; while in case of set off the court does not impose any condition, it applies suo motto if the offender had any preconviction detention.

Secondly, the application of Probation of Offenders Act resides with judicial discretion. It is a judicial power given to the judiciary. The reason being that if the power of probation is detegated to extra judicial agencies which lack judicial techniques, it would create intricate problems as these agencies will be guided by their own value consideration. In case of provision of "set off" it is a mandatory provision
of law and the judiciary has no discretion whatsoever as to whether in given a case set off should be applied or should not be applied. Even the trial judge opined in a given case the offender is a dangerous one or habitual one or the crime is serious one which deserves a hard punishment. But unfortunately set off applies even to them. It is an legislative policy applicable mandatorily in all crimes and to all criminals upon their conviction. In case of Probation of Offender Act, judicial discretion applied judiciously to minimise the hardship and at same time to bestow care of social defence to the accused. This aspect of social defence is conspicuously absent in the provison of set off.

Thirdly, in case of Probation of Offenders Act the court imposes certain conditions on the offenders. If he violates such conditions then he is punished for his original offence and is directed to prison to serve the sentence. Whereas incase of application of 'Set Off' when the accused had any under trial detention period, the provision of set off applies automatically if he was convicted of offence. The suspension of probationer's sentence is conditioned by his good behaviour during the period of probation and therefore it acts as a sufficient deterrent for the probationer, and serves as a punitive reaction to
crime. In other words the system of probation serves to bridge the gap between punishment and measurers of safety, that is, the moral responsibility with the social defence. Whereas in case of set off there is neither deterrent effect on offender nor it imposes any responsibility upon the offender to have a good behaviour in society. He may be released after application of set off and again he may commit a crime and again be detained in jail and convicted and again the provision of set off would apply to him. And with all logic probation of offenders applies to only the first offenders.

In case of Probation of Offenders Act the probationer has to respond positively and otherwise he will be punished for his original offence. But in case of 'set off' the accused is saddled with no responsibility so behave or to respond favourly towards good behaviour in the society.

Fourthly, the probation of Offenders Act applies selectively and even it cannot be applied in respect of all offences of whatsoever nature. It depends upon judicial discretion. Section 3 & 4 and 6 exclude certain offences from the benefit of Probation of Offender Act, while provision of 'set off' applies universally.
to all offences under I.P.C. and other special laws as well as to all categories of offenders.

Fifthly, the probationer is bound to obey the conditions of probation imposed upon him, violation of which will again entail the sentence of imprisonment. If a probationer offender responds favourably, his initial crime should be deemed to have been scrapped, but if he fails to do so, he may be brought back to court and sentenced for the original crime as also for any other crime which he might have committed. Probation is not a "let off"; it is only an opportunity for reformation.

3.3 On the other hand, object of 'set off' is not to reform the criminal but to reduce the jail population and compensate the delay caused in trial. It neither reforms nor deter criminals from living a criminal life. Many case studies have revealed that set off has encouraged crimes by habitual, professional and recidivist criminals.

The fear of punishment in case of violation of probation law has a psychological effect on the offender. It deters the probationer from law-breaking during the period of probation. Thus probation indirectly prevents an offender from adopting a revengeful attitude towards society. While in case
of set off it causes reverse effect on the mentality of the offenders. They develop carelessness or casual attitude towards law and society because set off is an unconditional benefit with no responsibility and no accountability.

3.4 Probation keeps the offenders away from the criminal world, but set off does not answer to such creative segregation from criminal world. Probation seeks to obviate the evils of institutional incarceration and this prevents the offender from contamination and pursuit of a criminal career. Probation seeks to socialise the offender as the liberty which he enjoys during the probation period enables him to attend to his domestic obligations and to contribute or support his family financially. Probation enables the offender to rehabilitate himself instilling in him a sense of self-sufficiency, self control and self confidence. Set off does not answer to these positive aspects achievable by probation.

3.5 Lastly, probation of offenders has been considered as an effective method of easing pressure on prisons. The courts are provided with an improved range of non-custodial alternative to avoid unnecessary incarceration of offenders. And rightly the probation
of Offenders Act has reduced the overcrowdedness of jail offering a reformatory quality; but set off is neither able to reduce the overcrowdedness of jail nor to reform the criminals.

4.1 SET OFF VIS-A-VIS PAROLE: One of the most important devices for reducing pressure on prison institution is the selective release of prisoner on parole. Parole has to be distinguished from probation or conditional release. In case of parole, part of the sentence is served and, it is then that the convict is released on parole on condition of good behaviour; and if he is found to have improved and has abstained from criminal conduct, he gets remission of the rest of the sentence and for sometime at least a part of the sentence.

Parole is also known as a premature release of offenders after a strict scrutiny under the rules laid down by various governments. Premature release from prison is conditional subject to his behaving in society and accepting to live under the guidance and supervision of parole officer. "Parole" means "a term to designate conditional release granted in a penal institution."\textsuperscript{137} It is available in cases of long term imprisonment. However, in India, it is seldom used. Justice Krishna Iyer has advocated for its

\textsuperscript{137} Sirohi J.P.S. Criminology and Criminal Administration, 1988, P. 243.
liberal use including in respect of cases of preventive detentions.  

4.2 Parole may be recommended as measure of reformation and rehabilitation besides its characteristics like quasi-judicial and conditional. Parole has distinct reasons, for preference over set off.

Firstly, the grant of parole is a quasi-judicial function performed by the Parole Boards (executive), whereas provision of set off is a legislative policy and is statutorily mandatory. Before allowing a prisoner to be released on parole the parole board has to ensure that the parole has a suitable home to live and a satisfactory job to do. The parole officer has also to undertake a parole-orientation programme for the prisoner and to make sure that he is well prepared to adjust himself to normal life and at the same time the conditions outside the institution are conducive to the development of his personality.  

Set off on the other hand involves no judicial or quasi-judicial function on the part of judiciary or executive. It is pure and simple mechanical application of law to all convicted U.T. Ps.

138. Babulal Das Vs, State & West Bengal Bst, s.s..
139. Sen P.K., Penology old and new (1943), p.182
Secondly, the grant of parole is also selective one. It is not granted to all prisoners. There must be disposition of good behaviour on the part of the prisoner. Conditional release on parole is in fact a reward for good behaviour in prison.

Set off on the other hand applies to all convicted U.T.Ps. of any offence and even if they had violated jail discipline.

Thirdly, a prisoner can be released on parole only after he has already served a part of his sentence in the prison or in a similar institution. Thus it essentially involves an initial committal of offender to a certain period of sentence (provided there must be disposition of good behaviour on the part of the prisoner). It is a conditional release subsequent to serving a part of the sentence. Professor Sutherland consider (parole as the liberation of an inmate from prison or a correctional institution on condition that his original penalty shall revive if those conditions of liberation are violated.\textsuperscript{140} It means if the parole violated the conditions then he has to serve his rest sentence in the prison again. Whereas in case of set-off there is no state control over character and conduct of the convicts once they are released.

\textsuperscript{140} Sutherland & Cressey; Principles of Criminology (6th Ed.) p. 575
Fourthly, grant of parole to prisoners means that they had good behaviour in prison and did not violated any prison law. If they complete parole period abiding by all conditions imposed thereto, it is deemed that they have satisfactorily undergone. The whole term of sentence (and they are released). But if they violate the conditions then they have to go back to prison and have to undergo the remainder period of imprisonment. In India by parole the offenders are given chance to rehabilitate themselves and the state helps them for their proper rehabilitation and for their adjustment in the society as law abiding citizens. During parole period the paroles are sent to various educational, vocational and industrial institutions where they are trained for a profession which may help in securing a livelihood be fitting an absolutely upright life essential in a proper social order.

It is needless to mention that provision of set off does not have any such mission of socializing the individual criminals.

Fifthly, while probation is the first stage of rehabilitation of offender, parole is the last stage of rehabilitation. Application of set off has no such aim or object to achieve neither reform nor rehabilitate.
4.3 Parole keeps the offender away from the criminal world. The fear of further punishment in case of violation of parole conditions has a psychological effect on the parolee.

But application of set off is for administrative convenience and is not concerned with the reformation or rehabilitation of the offender. Set off only reduces overcrowdedness in jail; but parole too satisfies this objective. Set off does not bother for social defence; whereas parole does not compromise with social defence.

5.1 REMISSION VIS-A-VIS SET OFF :- Under the system an inmate could earn certain reduction in respect of his term of sentence provided he behaved well inside the prison. Thus the system of good time laws (remission) was introduced to case the problem of indiscipline inside prisons and make the custody, security and control within the institution more meaningful and effective. Good time laws authorised the prison officials to cut short the period of sentence awarded to prisoners by law courts, of course in fixed proportions. This discretion to make an
allowance in the terms of sentence of the prison lies with the Prison Board or Parole Board provided however the inmate has a good record of his conduct in prison. Any misconduct on the part of inmate inside the prison may, however entail certain reduction in his good time allowance. The provisions relating to these curtailments in the terms of prisoner's sentence are contained in the Jail Manual or the Prison Act.

5.2 Set off on the other hand is not on award for good behaviour. It is not a good time law and is not a remission earned. It carries no honour or satisfaction as in the case of remission.

5.3 Under Section 59, subsection(5), of the Prison Act, 1984, state governments make rules to regulate the shortening of sentences by the granting remission. Orissa Jail Manual provides the following remissions:

I Rule: 713. Ordinary remission is (shall be) awarded on the following scale:-

a) Two days per month for thoroughly good conduct and scrupulous attention to all prison regulations;

b) Two days per month for industry and due performance of the daily task imposed.

---

141. Prison Act 1894 (Act No.9 of 1894) Section 59, claim - 5.
II Rule; 714, In lieu of the remission all and under rule 713, convict overseas shall receive six days ordinary remission per month and convict night-watch men five days per month.

III Rule; 717, Prisoners employed on prison services such as cooks and sweepers, who work on sundays and holidays, may be awarded 3 days ordinary remission per quarter in addition to any other remission earned under these rules.

VI Rule; 723, Special remission may be given to any prisoner whether entitled to ordinary remission or not other than a prisoner undergoing a sentence referred to in rule 709 for special service, as for example:

1. Assisting in detecting or preventing breaches of prison discipline or regulation; 2. Success in teaching handicrafts; 3. Special excellence in, or greatly increased outturn of, work of good quality; 4. Protecting an officer of the prison from attacks; 5. Assisting an officer of the prison in the case out-break, fire or similar emergency; 6. Economy in wearing clothes; 7. Taking interest in study.

V Rule; 724, Special remission may be awarded: - (a) by the Superintendent to an amount not exceeding thirty days in one year. (b) by the Inspector General or the provincial government to an amount not exceeding sixty days in one year.
VI Rule; 726, Fixes the maximum remission which can be awarded to a convict.

Rule 726, The total remission awarded to a prisoner under these rule shall not ordinarily exceed one fourth part of his sentences, but the Inspector General may, in exceptional and suitable cases, grant remission upto a limit of one third of the sentence.

So it is clear that if a prisoner behaves well in prison and obeys the jail's discipline he can earn a remission of one third of his sentence at the maximum.

Again under Rule 711 of a prisoner is convicted of an offence committed after admission to jail under sections 147, 148, 152, 224, 302, 304, 304-A, 306, 307, 308, 323, 324, 325, 326, 332, 333, 352, 353, or 377 of the Indian Penal Code, or of an assault committed after admission to jail on a Warder or other officer, the remission of whatever kind earned by him under these rules till the date of the said conviction may with the sanction of the Inspector General of Prisons, be cancelled.

5.4 So to earn a remission benefit, a convict has to obey jail discipline. Both remission and set off reduce population pressure on jails, but while remission has certain control over the conduct of the convicts, set off visualises no such control.
6.1 OPEN PRISON VIS-A-VIS SET OFF: The first scientific effort to modernise prison in India was made by Sir Walter Reckless, the U.N. Technical Expert who visited India in 1952 and submitted an elaborate report on prison administration in India. As a result of this, All India Jail Committee was appointed in 1956-57, which worked for three years and made useful recommendations for prison reforms. One of the recommendations of the Jail Committee was to set up Open Jails for the rehabilitation of prisoners. The emphasis under this system was on self-discipline and self-help. These open jails are characterised by the absence of materials and physical precautions against escapes, so as to promote a sense of responsibility among inmates towards the group in which they live.

6.2 Undertrials may well be allowed to remain in Open-air Camps and to work there (except where chances of absconding are high or except where there exist security reasons) and to create a feeling of self-discipline and self-help. Experience has shown that dumping the convicts in overcrowded prisons cells served no useful purpose. Another advantage of the system is that it achieves economy in expenditure on prison and this contributes to reduce the burden on state exchequer considerably.
6.3 Open prison is a challenging rehabilitational device. It inculcates responsibility and responsiveness in the inmates. However they are still prisoners; it could not be called a remission or parole or probation. But it has a distinct educative advantage and has a distinct purpose of socialization of prisoners without detriment to social security.

Set off on the other hand writes off a term of imprisonment ordered by court because the accused was not/could not be bailed out during trial. But his socialization after release becomes more difficult than socialisation on the part of a prisoner of an open prison. Open prison has a direct effect on society attitude and acceptance of a prisoner upon his release. No such idea underlie the provision of set off.

7. CONCLUSION:- In countries like United States, United Kingdom, Japan and Netherland, rate of conviction is higher than rate of acquittal; whereas in India the rate of acquittal is much higher than the rate of conviction. In the State of Orissa only 5% of undertrial prisoners were convicted and 95% were acquitted between 1986 to 1990. The peculiar ratio of conviction of U.T.Ps

necessitates a deep thinking while adopting doctrine of set off in Indian criminal justice system. Set off is never practiced or seldom practiced under strict judicial discretion in some countries. Even in United States, provision of set off has not been made mandatory inspite of the recommendation of President Crime Commission.

Without changing prison conditions and without changing conditions of labour and without adopting means to reduce jail population by liberalizing bail and means to select cases for true prosecution and lastly without changing the whole system of trial and attitude of prosecution and defence and investigation agencies where tend to unimaginably low rate of conviction, a mere mechanical adoption of mandatory provision of set off is not a suitable panacea to the evil of long-drawn trial and overcrowdedness of jail population. A lot of alternatives, such as delayed sentence, quick disposals, substitution of fine for imprisonment could well be tried besides parole, probation and open prison. A high police clear-up and dismissal of cases at prosecution level in deserving case could also be attempted. Means and instrumentalities should be devised with deep research as to how best
punishment should remain as punishment fulfilling its celebrated objectives. It is dangerous to compromise with populist measure for the sake of administrative convenience. Reduction in jail population and speedy completion of investigation and trial could be achieved by methods of liberal bail, parole, probation, even remission for good behaviour or preparation of a call up list, and like measures with prescription of maximum of time for investigation and trial, all this do not dilute rigours of punishment as does a compulsory mandatory provision of set off.
<table>
<thead>
<tr>
<th></th>
<th>PROBATION</th>
<th>REMISSION</th>
<th>PAROLE</th>
<th>OPEN AIR CAMP</th>
<th>SET OFF</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reduces Overcrowdedness</td>
<td>Reduces Jail Population</td>
<td>Reduces Jail Population</td>
<td>Reduces Jail Population</td>
<td>It aims to reduce jail population and to delay but fails to achieve it.</td>
<td></td>
</tr>
<tr>
<td>Judicial function (Discretion)</td>
<td>Executive (Administrative)function (Prison officials satisfaction)</td>
<td>Executive (Parole Board) (Quasi judicial function)</td>
<td>Executive (Quasi Judicial function)</td>
<td>Mandatory provision (No discretion)</td>
<td></td>
</tr>
<tr>
<td>Selective</td>
<td>Selective (certain precondition required to another remission benefit)</td>
<td>Selective</td>
<td>Selective</td>
<td>Equally applies to all U.T.P.s if convicted.</td>
<td></td>
</tr>
<tr>
<td>Sentence suspended or execution suspendent</td>
<td>Lessens the length of sentence if good conduct shown.</td>
<td>Allows liberty and lessens the sentence.</td>
<td>If conducted successfully then remission is granted as well as it allows liberty.</td>
<td>Sentence counted from the date of detention if convicted and sentenced lesser the length of sentence</td>
<td></td>
</tr>
<tr>
<td>PROBATION</td>
<td>REMISSION</td>
<td>PAROLE</td>
<td>OPEN AIR CAMP</td>
<td>SET OFF</td>
<td></td>
</tr>
<tr>
<td>--------------------------</td>
<td>-----------</td>
<td>-------------------------</td>
<td>--------------------------------------------</td>
<td>----------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Condition imposed of</td>
<td>Condition</td>
<td>Condition imposed of</td>
<td>Responsibility included of self-help and</td>
<td>No condition imposed no responsibility</td>
<td></td>
</tr>
<tr>
<td>good conduct in society</td>
<td>good</td>
<td>good conduct in society</td>
<td>self-discipline</td>
<td>imposed mandatorily applied.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>conduct</td>
<td>while a release at</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>in prison</td>
<td>parole</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Aim is to reform</td>
<td>Incentive</td>
<td>Aim is to reform as</td>
<td>Reformation and rehabilitation</td>
<td>No such aim, just to compensate delay and</td>
<td></td>
</tr>
<tr>
<td></td>
<td>for</td>
<td>well as to rehabilitation</td>
<td></td>
<td>reduce over crowdedness</td>
<td></td>
</tr>
<tr>
<td>First stage of</td>
<td>Middle</td>
<td>Last stage of</td>
<td>Last stage of reform towards, rehabilita-</td>
<td>No such object to achieved.</td>
<td></td>
</tr>
<tr>
<td>reform</td>
<td>state of</td>
<td>reformation and</td>
<td>tion.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>reforma-</td>
<td>toward rehabilita-</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>tion</td>
<td>tion</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>