CRIMINAL JUSTICE IN INDIA: PRIMITIVISM TO POST-MODERNISM

*A. Lakshminath**

I Criminal justice in ancient India[1]

"Punishment should be inflicted on those who violate any rule of conduct. If any offender goes unpunished, the guilt falls upon the King and the priest who are enjoined to practice some penances."[2]

There were numerous laws in the ancient times, and each state had its own unique system of administration of justice and modes of punishments. Many of these laws were just an enhancement or an improvement upon existing social customs in the society. Crime and punishment naturally were the focus of these early statutes. Emperor Hammurabi evolved a code of laws to govern Babylon, and this was one of the earliest recorded legal codes. When it comes to the aspect of punishment, the code is simple but precise—an eye for an eye,[3] and a tooth for a tooth.[4] An unduly heavy emphasis was placed on the death penalty[5] and mutilation of body parts as a means of punishment. The ancient Egyptians and Greeks too practiced barbaric forms of punishment such as amputation of body parts, stoning to death, burning alive, etc. The reaction of these early legal systems to crime was a knee jerk one. The state took it upon itself to satisfy the blood lust and the vengeance of the victim's relatives and friends by punishing the offender in a swift and brutal manner. With the gradual evolution in systems of administration of justice during the Greek and Roman era, the theories of crime and punishment, though still at an incipient stage, began to make their presence felt. While Plato advocated retributive justice, his disciple Aristotle sought to mitigate the harshness of the punishments imposed and sought a more rational approach. In Rome, Seneca sought

* Dean and Registrar, NALSAR University of Law, Hyderabad.

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2. *Vasishta*, XIX, 40-43.

3. *Code of Hammurabi,* Law 196.

4. *Id.,* Law 200.

5. Approximately 37 specific offences were punishable by death according to the Code.

to develop his own theory of punishment that was primarily grounded in the concept of mercy. These issues shall be dealt with in detail in subsequent parts.

It would be worthwhile to explore the ancient Indian legal system at this juncture. The Hindu political, legal and economic thought is included in the *Mahabharata, Dharmashstras* (of which *Manu-Smriti* is the most important), *Niti-shastras* or the science of state-craft (of which the *Shukranitisara,* is the most elaborate), and *Arthashashtras* (of which Kautilya's *Arthashashtra* is the most popular version that is easily the most recognised and frequently refereed work to this day). The concept of *dharma* governed Hindu life since the *vedic* times, and every one from the king down to the commoner was expected to follow it. The king had to ensure that all his laws were in conformity with the *dharma* and it was said, "Hunger, sleep, fear, and sex are common to all animals, human and sub-human. It is the additional attribute of *dharma* that differentiates man from the beast."[6] The great statesman Kautilya left his imprint on this nation's thought with his work, the *Arthashashtra*, a treatise on economic, political and legal administration, in the 4th century before Christ.[7]

In an age when vast swathe of Europe was still emerging from the primitive age, and the 'civilized' Roman Empire rapidly disintegrating, Kautilya's *Arthashashtra* provides a valuable insight into the legal system in ancient India. The *Arthashashtra* gives directions as to the treatment of petitioners in courts, behaviour of the judges, methods of identifying witnesses indulging in falsehood,[8] and punishment of offenders. Kautilya constantly rejects the rule of thumb, advocating instead a judgment based on the specifics of a particular situation and punishments to an appropriate scale.[9] There was an intimate relationship between the sin and sinner, and the kings (and judges) were expected to decide upon the nature of the punishment after seeing if the offending party showed any repentance for having committed the crime. It was not uncommon for sentences to be commuted by the king when the offender acknowledged

6. Sundeep Waslekar, *Dharma Rajya*, 42 (1998).

7. The *Arthashashtra* consists of 15 chapters, 380 *shlokas* and 4968 *sutras* and deals with a wide variety of subjects like administration, law and order, taxation, revenue, foreign policy, defence, war.

8. For instance, a person charging an innocent man with theft or any other crime was to be punished as though he had committed the said crime himself.

9. Different kinds of punishments were inflicted based upon all the relevant facts and circumstances involved in the commission of the offence. The judge was expected to look at the social status of the offender and victim, the antecedents of the offender, the families involved, the occasion, place and time of the offence, and all other mitigating or extenuating factors wherever found to be so present.

his mistake and it was felt that he could be rehabilitated in society. Thus, the concept of separation of the crime from the criminal was wholly in tune with the Hindu philosophy and appears to have been prevalent in ancient times. Having fully considered the time and the place (of the offence), the strength and knowledge (of the offender), the king had to justly inflict that punishment on men who acted unjustly.[10] The death penalty was not used very often, except in serious cases. Minors (in those days, any one under the age of 15 was not punished) were sent to reformatory homes.[11]

The award of punishment was governed by considerations of status of the accused. Rank played a very important role in determining the nature and punishments for most offences, especially those relating to defamation and assault. What is thus most revealing is that punishment varied according to a person's caste or position in the social order and the penalty for a crime was increasingly severe the higher the *varna* of the victim. In ancient times, caste violations were often the crimes that attracted the severest of punishments for these were issues closest to the peoples' hearts. It is striking to note the fact that crimes such as theft of cattle and destruction of property did not meet with barbaric executions, as was the case in the 'enlightened' western world. There was, therefore, a highly developed concept of monetary fines that were frequently imposed as an alternative to physical punishments.[12]

Another interesting feature was that punishments in the form of fines were imposed for 'doing mischief' to trees and plants, *i.e.* degrading the environment.[13] Wherever possible, the accused was given the chance to return stolen property or its monetary equivalent to the victim.[14] Besides, the judges were expected to punish first time offenders lightly. Chapter XII of the *Arthashashtra* also makes mention of the fact that judges could be punished for wrongly punishing offenders in a court of

10. Frederic B. Underwood, "Aspects of Justice in Ancient India" 5 *Journal of Chinese Philosophy* 271 (1978).

11. Bansi Pandit, "Some Philosophical Aspects of Hindu Political, Legal and Economic Thought," *archived on* www.ikashmir.org/hindudharma/books.html

12. Kautilya's *Arthashashtra* mentions an exhaustive list of offences and the fines charged for committing them. The amount varied based upon the gravity of the offence, the person who was affected, and the nature of the accused.

13. In fact, if any harm was done to the trees and plants located at places of pilgrimage or in the forests of the king, double fines were imposed upon the offenders.

14. There are chapters in the *Arthashashtra* that deal with a whole variety of crimes and punishments. For example, chapter IX deals with penal measures to protect people at large from government servants. An analogy can be drawn with the same relationship in the modern world *viz.* through the Indian Penal Code. Another portion of the *Arthashashtra* (chapter X) deals with alternative fines in lieu of mutilation of limbs.

law.[15] This was a unique system of accountability that successfully regulated the judicial decision making process, making it quite immune from corruption and bias. Today, a similar system is unthinkable, especially given the fact that in a country like ours, even the slightest criticism of the judges invites criminal sanctions against the critic by way of contempt of court laws. The system of laws and punishment for violation of the same was an integral component of the ancient Hindu philosophy and was not an external irritant forcefully imposed upon, and barely tolerated by the society—as was the case with the advent of the British and their legal system.

Post-modernism seeks to demolish the myth that the law speaks with one voice for all regardless of history, economics and social reality. The objective and neutral figure of justice has been revealed to be a myth, a dangerous anachronism that crushes, not the serpent of inequity and chaos, but the flower of human experience, beneath her feet. In rejecting totalizing narratives, and in embracing contextual narratives, recent critical challenges to the approaches to legal interpretation, from race and feminist theory and sentencing policy in particular, proceed in postmodernist fashion.[16]

Law seeks to create a just society that is founded on certain basic norms and entitlements that allow for the greatest development of all members of society, without any regard to their position in said society, that have been created on the basis of economic status, religious identity, communal labels or gender, to take a few examples. All jurisprudence may be essentially boiled down to the fundamental question, what may be legitimately demanded by any group from the rest of society, which can be enforced through a formalized and ordered system.

II Sentencing process - General principles

Sentencing process

The purpose and general justification of the criminal law is to protect society, by maintaining social order, by methods of social control that maximize individual freedom within the coercive framework of law. Penal codes give due notice of the offences, and inform the citizens of

15. The judge was liable to be punished himself by the first amercement if he did not enquire into the necessary facts and circumstances surrounding a crime, unnecessarily delayed in disposing of the cases, postponed worked with spite, helped witnesses by prompting them, was corrupt, resumed cases that had already been settled, etc.

16. Joel F.Handler, The Presidential Address, 1992 "Postmodernism, Protest, and the New Social Movements"*26 L & Soc'y Rev* 697 (1992).

how they are expected to behave and call their attention to the rule that any infringement deemed contrary to the general interest is followed by punishment. Punishment, therefore, is an expression of society's disapproval of the act, and the magnitude of punishment reflects the extent of the indiscretion. The humanizing of penal law in the past, however, has led to a marked lowering of the general level of punishment. Nevertheless, punishment remains, as the counterpart of crime and criminal law stands to the passion of revenge in much the same relation as marriage to sexual appetite. Though the last British colonialist left the country decades ago, the criminal laws framed by them in the mid and late 19th centuries flourish nonetheless.

The Indian Penal Code (IPC) of 1860 and the Code of Criminal Procedure (Cr PC), 1973 form the basis of the Indian criminal justice system. As the name indicates, the Cr PC is procedural while the IPC is substantive in nature. The IPC measures the gravity of violation by the seriousness of the crime and its general effect upon the public tranquility, whatever is the object of theory of punishment. The measure of guilt is, therefore, the measure of punishment. The law indicates the gravity of the act by the maximum penalty provided for its punishment and the courts will have to consider how far the crime committed falls short of the maximum punishment and what, if any, are the extenuating circumstances justifying the adoption of a lower punishment, than the maximum provided.[17] The IPC gives much leeway to the courts to give punishments. A sentence should reflect the seriousness of the offence and the sentence should suit the personality of the offender. The higher judiciary in particular has been exercising their power to modulate the sentences on the basis of the fact situation or on the basis of the circumstances that prompted the offender to commit the crime. Sections 53 to 75 of IPC lay down the general provisions relating to punishments.[18]

Statute law like the IPC and other local and special laws lay down the terms under which a criminal court may pass sentence after conviction. The role of legislation in Indian sentencing law is thus essentially one of providing powers and laying down the outer limits of their use. While drafting the IPC, Lord Macaulay in his own wisdom, preferred the gradation or the fixation of maximum sentence in a number of offences, so that the judge while scrutinizing particular facts and circumstances in a given case would be in a position to award 'appropriate sentence' to the guilty person. It would seem to indicate that the policy of the law generally is to fix a maximum penalty, which is intended

17. V.V. Raghavan, *Law of Crimes* 94 (1986).

18. S. 53 enumerates several types of punishments that can be imposed on a convicted criminal *viz.*, death, imprisonment, forfeiture of property and fine.

only for the extreme cases.[19] The determination of appropriate punishment in a particular case has always been left to the court for the weighty reason that no two cases would ever be alike, and the circumstances under which the offence was committed and the moral turpitude attaching to it would be matters within the special knowledge.[20]

General principles

Punishment is an expression of social values as well as an instrumental means to a clinical penological end. An onerous duty of sentencing is cast upon the judges who are carrying out this duty under the IPC. The task of a judge in sentencing becomes more onerous and difficult, since the modern penology regards crime and criminal as equally important for awarding an appropriate punishment. Thus, a duty is cast on the judge to see that the sentence shall consist of element of reformation of the criminal also along with the elements of deterrence, prevention and retribution. The sentencing judge has to ensure that the sentence is sufficiently severe enough to deter the criminal and like minded persons; satisfies the sentiments of the victims of the crime that the wrong doer is adequately punished; impresses upon the criminal and change his mental make-up and reform him and restore him to the society as a good citizen; and also adequately compensate the victims of the crime, leaving an impression with them that the law will take care of them and undo the misery caused to them by a criminal by the commission of the crime to the extent possible.

Thus, the judge has to balance all these conflicting interests and choose the right and appropriate sentence, for it to be meaningful. He has to consider not only the crime committed and punishment prescribed under law for its commission, but also various other mitigating and aggravating factors. The law indicates the gravity of the act by the maximum penalty provided for its punishment and the courts will have to consider how far the crime committed falls short of maximum punishment and whether there are any extenuating circumstances justifying the adoption of a lower punishment than the maximum provided.

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19. While taking a similar stand Chief Justice Napier of South Australia in *Webb* v. *O. Sullivan* (1952 SASR 65 at 66) observed; "The courts should endeavor to make the punishment fit the crime, and the circumstances of the offender as nearly as may be. Our first concern is the protection of the public, but, subject to that, the court should lean towards mercy. We ought not to award the maximum, which the offence will warrant, but rather the minimum, which is consistent with a due regard for the public interest."

20. See, *14th Report of Law Commission of India* at 838.

There is no hard and fast rule that can be laid down to determine the right measure of punishment. A day's imprisonment to an honourable man may have more deterrent effect than a life imprisonment awarded to a hardened criminal. Thus, to determine right measure of sentence, the gravity of offence, the position and status of the offender, the previous character and the existence of aggravating and extenuating circumstances have to be considered by the court. Thus, it is always desirable to prescribe maximum punishments leaving the imposition of desirable sentence within the maximum prescribed to the discretion of the court, which will always know what is the most appropriate sentence that ought to be handed down to the accused.

Provision of a minimum sentencing period: Is it really necessary?

The present day sentencing scenario unveils, quite conspicuously, the relentless efforts of the legislature, to interfere with the sentencing discretion of the courts, particularly, by introducing minimum mandatory sentences.[21] The sentencing judges are left with no discretion, except to award the mandatory sentence that induces them to indulge in a mechanical sentencing process. The introduction of minimum sentence in the ambit of penological jurisprudence is relatively of much recent origin. Of late, there is an increasing tendency shown by the legislature towards prescribing a minimum sentence. This tendency appears to be not only confined to socio-economic offences but also to other traditional offences.[22] The principal reason for the shift in the policy appears to be that courts seldom award sentences which would have a deterrent effect, particularly in certain types of offences that are necessarily to be dealt with sternly in the interests of society. If, a minimum sentence were to be prescribed for certain offences or classes of offences, the award of the really needed deterrent punishment would be assured in these cases.

The problem really arises when there are statutes that prescribe a minimum, instead of a maximum sentencing period. Numerous complications arise, most of which may not be apparent at the first instance. In case of heinous crimes, the penal statutes prescribe minimum sentences and in such a case, the court is bound to impose the minimum sentence. In case where the statute prescribes mandatory minimum

21. The difference between minimum sentence and minimum mandatory sentence is — in the case of former a limited discretion if recognized. In the latter, of course, it is purely non-discretionary. As a matter of fact this kind of shift in the treatment is nothing new.

22. For instance, see s..4 of the Dowry Prohibition Act. 1961 (substituted by Act 63 of 1984) and also s. 376 (2) of the Indian Penal Code (Substituted by Act 43 of 1983). In fact in the entire body of the IPC there are some sections, which prescribed a minimum sentence like ss.121, 297 and 398 etc.

sentence, the court is left with no discretion except to impose the minimum sentence prescribed. To illustrate the same, under section 302 of IPC[23] the maximum sentence prescribed is the death penalty, and the minimum sentence is imprisonment for life. In such cases, the court has no discretion to impose any other punishment less than the imprisonment for life. Similarly section 397 of the IPC prescribes that the offence shall be punishable with imprisonment, which shall not be less than seven years, and section 398 IPC[24] prescribes the imprisonment that shall not be less than seven years. Thus, when the court found an offender guilty for committing the offence punishable under any of these sections and convicts him, the sentence imposed shall be the minimum mandatory sentence of seven years.

Instead of the current approach it would be far more preferable for maximum sentences to be provided for all these offences. This gives the adjudicating authority the maximum freedom to impose sentences based upon the gravity of the crime and the personality of the accused person. At the sentencing stage of the trial a judge has a fairly good idea of what kind of punishment the guilty person *really* deserves, but with minimum punishment periods provided for, the judge invariably feels constrained by the restrictive provisions of the law and is left with nothing more to decide than the guilt or innocence of the accused person.

Deterrent sentencing or soft sentencing?

Handing down lenient sentences to guilty individuals has been a problem facing the courts and the criminal justice system for a very long time. While the tide is slowly turning against the concept of deterrent punishment, there is as yet no consensus as to whether soft sentencing is a boon or bane. In America, there is an extremely powerful and influential lobby that believes in harsher sentencing policy, since they feel that criminals are getting away too lightly. A minimum requirement in a rational system is that there should be some degree of correspondence between the crime committed and crime for which the defendant is convicted.

It is no doubt true that inadequate sentences can do harm to the system. Law must meet the challenges that criminalization offers for, after all, misconceived liberalism cannot be countenanced. There is a constant interplay between the rights of the victims and that of the accused. When it comes to soft sentencing, the focus is undoubtedly on the victim and the victim's family. Suddenly, the old ghosts of retribution and private vengeance surface at times when the state is perceived as

23. Punishment for murder

24. Attempt to commit robbery or dacoity armed with deadly weapons.

being too lenient, and unable to properly punish its criminals. In cases that relate to anti-national activities, the adoption of a policy of soft sentencing would be disastrous. In such instances perhaps the deterrent method would be a better alternative.

III Philosophical foundations of punishment

Man endowed with conscience, generally follows certain dos and don'ts. Yet, the fact remains that man is primarily an animal. When the bestial element overpowers his conscience, he inevitably does an act resulting in damage to his fellow beings. If such elements were to be left unchecked, organized society would turn chaotic with the passage of time. Hence to reduce, if not totally eliminate, the menace of such elements in society, the concept of punishment seems to have been evolved. One of the major questions with which the penologists are engaged today is whether the traditional forms of punishment should remain the primary weapon in restraining criminal behaviour or should it be replaced or supplemented by much more flexible measure of reformative, curative and protective nature. The coercive strategies employed by the criminal law administration have always relied on the punishments, which, throughout history consistently included deprivation of liberty. In the civilized society governed by rule of law, no punishment can be inflicted on an individual unless it serves some social purpose.

Despite the best efforts of jurists like H.L.A Hart,[25] the concept of 'punishment' (in much the same way as that of a 'crime') remains hard to define with a degree of accuracy. The object of punishment differs depending upon the theory it is based on. The Supreme Court of India has however, in *Ram Narayan's* case,[26] stated the object as:

> The broad object of punishment of an accused found guilty in progressive civilized societies is to impress on the guilty party that commission of crimes does not pay and that it is both against his individual interest and also against the larger interest of the society to which he belongs.

The major theories can be briefly elucidated upon as under:

Retributive theory

The basis of this theory is 'an eye for an eye and a tooth for a tooth' which is drawn from Hammurabi's Code. Plato in his *Republic* has

25. H.L.A Hart has talked about it in terms of 'pain'- which may be in the form of imprisonment, or fine, or forfeiture of property or some such other restriction or detriment, imposed by society as a mark of its disapproval of the act of the individual punished.

26. *Ram Narayan* v. *State of U.P.,* (1973) 2 SCC 86 (91).

favoured the system of retribution or revenge and accordingly "the doer must suffer." Thus there is an analogy that summer is the due retribution for the imbalance of winter and that mere springtime would not be able to set the imbalance right.[27] Many theologists and philosophers of the ancient times genuinely thought that they were merely preventing society from descending into chaos by instituting retributive systems of punishment.[28] The punishments were often entirely disproportionate to the crime committed. For instance, stealing a sack of grains met with amputation of the offender's hands, if he was lucky, and death, if he were not. It has thus been said that:[29]

> Retribution is nothing more than philosophically dressed-up revenge, the irrational, emotional, and unjustifiably barbaric assuaging of hurt feelings and harm by inflicting hurt on their perpetrator.
>
> Another major fault of the retributive theory is that it is oriented in the past, i.e. it treats punishment purely as a backward-looking response to an offence, and thus offers no account as to how punishments can be forward-looking or productive in any way. Retributive justice has therefore rightly been described as primitive and savage justice that has no place in civilized society.

Expiatory theory

The idea of punishment according to the exponents of this theory is that suffering and pain of punishment should be equal in proportion to the enormity of the crime. This theory also assumes that punishment is to pay a debt due to the law that has been violated. It was said that guilt in addition to punishment is innocence.[30] Jurists of ancient India also subscribed to this theory. In the *Mahabharata* it has been observed by Sathyavan, "if in the presence of a priest and others they give themselves up to him for desire of protection and swear saying 'Oh Brahmana, we shall never again commit sin' they should be discharged without any punishment – this is the command of the creator himself." P.N. Sen[31] remarked that the statement has behind it the whole philosophy of expiation by penance known as '*karma vipak'*, which was one of the accepted methods of rehabilitating the offender. This concept is highly idealistic and is difficult to put into action for it requires infinite understanding and a virtue that is super-human for those who attempt to

27. Martha Nussbaum, *Sex and Social Justice* 161 (1999).
28. Not to mention Kant, Hegel etc.
29. James Penner *Criminology* 540.
30. Glanville Williams (Ed.), *Salmond on Jurisprudence* 119 (1947).
31. *Tagore Law Lectures* 95 (1929).

impose such punishment for the simple reason that it envisages individualization of punishment, whereby the punishment should be equivalent to guilt.

Deterrent theory

The key to this theory is that fear plays a paramount part in every human being's life. The deterrent effect works in two directions. First to instil fear in the mind of the offender and secondly to warn others on the consequences that could befall them if they committed the crime. The first purpose was not always served since the offender could become a more hardened criminal, for he looked upon society as his enemy. Holmes suggested that "the theory was immoral; inasmuch as it gives no measure of punishment except the lawgiver's subjective opinion… it is said to conflict with the sense of justice… that the members of such communities have equal rights to life, liberty and persons' security."[32] The basis of the deterrent theory has been most aptly summed up by Barnet J who told a protesting prisoner, "Thou art to be hanged not for having stolen the horse, but in order that other horses may not be stolen."[33] It is, however, submitted that deterrence as an aim of punishment has not been entirely eliminated from the policy of modern government, though it has lost much of its former importance. A deterrent sentence may be justifiable only when the offence is the result of deliberation and preplanning, and is committed for the sake of personal gain at the expense of the innocent and is a menace to the safety, health or moral well being of the community or is difficult to detect or trace. In rare circumstances such as anti-national conspiracies, communal violence, etc., harsh punishment may act as the only effective deterrent. The fact is that not only has the idea of deterrence not been vindicated by experience, but from the stand point of exact justice, it is doubted whether the criminal should be punished in excess of his just deserts merely for the benefit of a potential criminal who, in the absence of such extra punishment, might commit crime. This makes every punished criminal a martyr.

Reformative theory

The reformative theory has been defined as an effort to restore a man to society as a better and wiser man and a good citizen.[34] Victor Hugo's statement, "to open a school is to close a prison", contains a

32. Holmes,*Common Law* 42-43 (1963).
33. Cited by B.S. Sinha in *A Text Book of Jurisprudence* 94 (1977).
34. *Prison Commissions Report* 23 (1912).

great truth. If persons of doubtful character are given training or education in such a manner as to enable them to earn their livelihood by honest means then they would not need to adopt criminal methods for their subsistence. Turner puts forward the logic of Carrit who said "reformative theories forget that if punishment is to be punishment it must be unpleasant while the cause of reformative education is only accidentally unpleasant. We cannot put remorse ready-made into a criminals' mind, but we can stimulate it by giving him a pain akin to that of remorse, making him feel the indignation of impartial observers."[35] Death penalty, according to this theory, has got no meaning for death would segregate the criminal forever and will not cure him. Oppenheim criticized the reformative theory claiming it removes punishment of its sting. The criminal is looked upon as an object of pity, not of hatred, and punishment becomes the work of charity.[36] The trend, in recent times is towards inflicting punishments on a person depending upon his status in society, the psychological reasons which prompted him to commit the offence and the nature of the individual himself—first offender or habitual offender. Despite its limitations, the reformative theory is here to stay.

Just deserts theory

The issue concerning moral justification of punishment all along has engaged the attention of both philosophers and penological theorists.[37] The classical debate pertaining to theories of punishment has in a sense been revived largely due to two factors, namely, sliding public confidence on reformation and growing disenchantment with utilitarianism and also epitomization of undeterrability, which has hardly been considered as a subject of investigation.[38] In fact, these developments have given an impetus to the evolution of new thinking in the ambit of sentencing aims. Of late, many penological thinkers have started advocating just deserts as the viable alternative sentencing aim. To deserve is the cognate of the expression 'desert'. Kant's explanation of deserved punishment in the form of fair dealing among free individuals

35. *Canadian Bar Review* 91(1943).

36. Oppenheim, *Rationale of Punishment* 245 (1975).

37. For details see, H.B. Acton (Ed.) *The Philosophy of Punishment: A Collection of Papers* (1969).

38. See Nigel Walker, *Sentencing, Theory, Law and Practice* (1985). In this regard Andrew von Hirsch opines, "the deterrability of different criminal behaviours varies with the kind of people typically involved; the strengths of their motives for crime; available non-criminal alternatives", see also Andrew von Hirsch, *Doing Justice: The Choice of Punishments* 42(1976).

mirrors the essence of this theory. According to him, "to realize their own freedom members of society have the reciprocal obligation to limit their behaviour so as not to interfere with the freedom of others. When someone infringes other's rights, he gains an unfair advantage over all others in the society – since he has failed to constrain his own behaviour from other person's forbearance from interfering with his rights. The punishment by imposing a counterbalancing disadvantage on the violator restores the equilibrium after having undergone the punishment, the violator ceases to be at advantage over his non-violating fellows."[39]

When compared to utilitarian and reformative theories, this is the only theory which connects punishment with deserts, and so with the justice, for only as a punishment is deserved or undeserved can it be just or unjust. Naturally, the process of ascertaining deserved sentence takes within its fold independent and individualized factors in the form of both aggravating and mitigating in order to quantify, so to say, the blameworthiness on the part of the offender.[40] Therefore, according to just deserts both aggravating and mitigating circumstances which throw light on (a) the culpability of the offender and (b) seriousness of the offence would be taken into consideration for the purpose of identifying commensurate deserts.

The basis on which one is expected to decide the quantum of punishment is crucial to understanding this theory. The supporters of just deserts offer a two dimensional principle, namely, ordinal and cardinal proportionality. This is a complicated explanation that has not fully convinced detractors of the viability of the just deserts system. According to proponents of just deserts, ordinal proportionality relates to comparative punishments, and its requirements are reasonably specific. Persons convicted of crimes of comparable gravity should receive punishments of comparable severity (save under mitigating or aggravating circumstances altering the harmfulness of the conduct or the culpability of the actor). Persons convicted of crimes of differing gravity should receive punishments correspondingly graded in their degree of severity. These requirements of ordinal proportionality are not mere limits, and they are infringed when persons found guilty of equally reprehensible conduct receive unequal sanctions on crime preventive grounds. However, these rules do not provide substantial guidance to the decision makers just how much punishment is appropriate to various crimes. In fact this failure has been assailed as the fundamental weakness of this theory. Though just deserts can be justified in terms of justice and morality, to

39. Ted Hondereich, *Punishment: The Supposed Justifications* 88-91 (1989).

40. For details see Andrew Ashworth, *Sentencing and Criminal Justice* 66 (1992) Also see Andrew Ashworth, "Criminal Justice and Deserved Sentences" *Cri LR* 340-55 (1989).

put it in practice one has to face an uphill task. However, it is necessary to realize that the process of anchoring penalty scale depends upon sociological, economical, political and ethical factors mirrored in a particular society. Yet, the initiatives of Sweden[41] and Canada[42] reveal positive signs where the principle of just deserts is being experimented. It is thus not too early for us in India to take a serious look at the pros and cons of this method and to examine the feasibility of adapting the same to our local environment.

The concept of restorative justice

"Restorative justice" is a relatively recent phenomenon that has been growing in popularity with policy makers and academics alike. As with many innovative policies, the concept of restorative justice is still in the process of being defined. Restorative justice contains elements pleasing to both liberals and conservatives, making for strange bedfellows. Conservatives like it because it pays attention to victims (indeed, the concept was born out of the right-wing victims' rights movement in the western world) and liberals like it because it doesn't seem as punitive as jail. Probably because of its broad-based appeal, the growth of restorative justice programs manifested as Victim Offender Reconciliation Programs (VORPs) or, more commonly, Victim Offender Mediation (VOMs), in the United States of America and western Europe in particular, has been rapid since their inception in the mid-1970s. Essentially, VOMs are meetings between victims, offenders, and mediators (although in some versions others might also be present, such as family members, friends, community members, and the like). The outcome of the meetings also vary, but the usual stated goals are to provide a forum for "clearing the air" and asking questions, agreeing on a restitution contract for the offender, and also giving the offender the opportunity to apologize to his victim. The meetings are optional for both parties, and may either be diversionary (meaning they replace prosecution) or an adjunct to sentencing/probation.[43] Flexibility is the key, since all of the parties who are present are deeply involved in deciding how to respond to the crime.

41. Andrew von Hirsch, *Doing Justice: The Choice of Punishments* 282-83(1976). Also see Norval Morris, *Punishment, Desert and Rehabilitation,* (1976). In this the author claims desert as limiting principle while distinguishing it from defining principle.

42. *Id*. at 288.

43. Mark S. Umbreit, Robert B. Coates and Ann Warner Roberts, "The Impact of Victim-Offender Mediation: A Cross-National Perspective" 17 *Mediation Q* 215 at 216-17 (2000).

During a typical VOM, a victim gets to describe how much he/she lost materially as a consequence of crime. But the victim also gets to specify the emotional and psychological harms she suffered, often, these are status harms, or the sense of having been humiliated or violated. Representative community members, if present, also get to specify the losses they suffered (such as diminished social activity because of fears, or an assault on community values). Offenders' own participation gives them the opportunity, at least, to ameliorate the harm they caused, with less damage to themselves, their families, and their communities than traditional jail sentences typically inflict. Because it recognizes an array of criminal harms, restorative justice also enables and demands an equally diverse assortment of responses and actions designed to address them. It allows for creative, precisely tailored, and therefore more deeply satisfying resolutions to criminal offending. Restorative justice is about healing (restoration) rather than hurting. In short, restorative justice is harm-oriented.[44]

Citizens seem unwilling to route serious cases (such as those involving physical harm) into restorative justice programs. This is probably because the public regards these programs as lacking in punitive punch. They believe that justice necessitates inflicting harm on offenders in a way that fits the crimes they have committed. Since restorative justice programs are perceived (often rightly) as diversions from the more severe sanctions offered by the criminal justice system, citizens balk at using them for offences that require the heavy guns of prison to fully condemn. Why are they willing to use restorative justice procedures at all, even for more minor offences? It is not because restorative justice procedures are not retributive at all. In fact, they are: victims get to "face down" their offenders, inflicting a measure of humiliation on them that responds to the humiliation they themselves felt as victims.[45] But while being faced down by your victim may be humiliating, it still isn't very severe. Restorative justice as popularly conceived is capable of inflicting adequate harm (in the form of condemnation) on minor offenders; but it just isn't strong enough for more serious ones.

Critics feel that the major drawback of the restorative justice practice is that disparate treatment exists, for the outcome of any process would

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44. *Ibid*.

45. Victims have a direct hand in deciding how the harms they suffered will be addressed; a position that gives them power over the offender. But interestingly, to the extent that the harms he or she suffered were psychic, emotional, or losses in status, the very ability to meet the offender face-to-face may go some way toward healing the victim's wounds. Here, dialogue and redress merge into one. This has been shown by numerous case studies conducted in Europe and in the United States of America.

depend upon the personalities of the victim and the offender. After all, it has been argued, why should one offender receive a particular type of response because his victim is magnanimous, whereas another could receive a much harsher treatment because his victim is hard-hearted. It has also been stated that by following the restorative approach to justice, criminal justice is made civil justice, because of the fact that it effectively abolishes not only the punitive response, but also the very criminality of the offences with which it deals. Nevertheless, many jurists feel that the need of the hour is to have elements of the restorative method of punishment introduced into criminal justice systems worldwide. Courts should be given the right to make compensation orders, victim-offender mediation schemes, *etc*. In restorative justice philosophy, there cannot be a neat distinction between minor offences and more serious ones, with the former being treated as civil matters whereas the latter are treated as crimes simply because the possibility of restorative justice in these cases simply does not exist. However, the Truth and Reconciliation Commission in post-apartheid South Africa for instance, is seen as a model of restorative justice practice, which more or less overturned traditional stereotypes when it dealt with the heinous offences committed during the apartheid era.

Deterrence theory versus retributivism

The debate between those who justify punishment on the basis that the evil of treating criminals harshly is outweighed by the good it does by deterring people from committing crimes, and those who claim that punishment is the appropriate moral response to criminal acts because the perpetrators deserve to be punished, is the traditional clash of viewpoints that colours all other discussions of the subject. Both these theories however share a certain commonality, *viz.* both these theories defend punishment as morally just, and secondly, both the theories share the view that the severity of the punishment inflicted upon the offender should be in proportion to the seriousness of the crime that he has been found guilty of committing. However, the differences are many, and fundamental at that. The retributivists advocate the notion of deserts, arguing for the infliction of bodily harm, imprisonment or death simply based upon the notion that the person deserves the said treatment. It has been said therefore that the theory of retribution is nothing more than "philosophically dressed-up revenge, the irrational, emotional, and unjustifiably barbaric assuaging of hurt feelings and harm by inflicting hurt upon their perpetrator."[46]

46. James Penner, *Punishment* 540.

Deterrence theory is one element of a generally 'consequentialist' approach to moral issues.[47] A consequentialist approach to punishment is broader than a deterrence approach because punishment, or more broadly, dealing with offenders, can be an occasion for the realization of more consequences than simply deterring people from committing crimes. This is because it takes into account the rehabilitation of the offender, his incapacitation, (preventing him from committing further crimes), or the reparation of the victim (by, for example, requiring the offender to repair the damage the crime caused)- all of which are possible goals which a comprehensive consequentialist approach to dealing with offenders may incorporate.

The deterrence theory, as mentioned earlier, traces its origins back to the Greek philosopher Plato. However, it was Jeremy Bentham, who, within his general and well-worked comprehensive moral theory called utilitarianism, established a link with the nuanced theory of deterrence. Nevertheless, the cost-benefit analysis to punishment has not been thought acceptable to a theory of punishment. This feature has been said to be the deterrence theory's greatest strength as well as its greatest weakness.[48] It can be said to be a strength because it has a sensible yet imminently compelling rationale *i.e.* we punish in order to keep the levels of crime to a reasonable minimum. On the other hand, it is considered a weakness because it revolves around the utilitarian 'felicific' calculus in the sense that the duty or right to punish an offender is contingent on how much good the punishment will do. Therefore, we do not punish because it is a response to an offence; on the other hand, we punish so that it would act as a deterrence. However, the deterrence theory is not always on a sound footing because of the fact that the punishment more often than not does not have the intended 'deterrent' effect upon would-be offenders.[49]

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47. Consequentialists, utilitarians being a prime example, hold that the moral rightness of actions turns on their consequences, in particular how such actions affect the lives of persons. The value or the lack of it of different consequences can be measured in a variety of ways, for instance Bentham's calculus method that was prescribed to measuring the action in terms of pleasure or pain brought about by it.

48. *Supra* note 46 at 541.

49. The best example of this could be the death sentences meted out to eleven defendants at Nuremberg for crimes against humanity. Now, several decades down the line, the answer to the question as to whether this has deterred other people from committing similar monstrous acts of barbarism is obviously a resounding 'No.' The execution of Kaltenbrunner, Eichmann, Goering and the like clearly has not prevented or 'deterred' a new breed of mass murderers like Pol Pot and Idi Amin, amongst others from committing crimes against humanity in wanton disregard of established international norms.

IV Polemics of "Aversion Theory"

Since many questions are now being raised as to the efficacy and the need for a system of punishments, schools of thought have emerged that try to explain the reason for the failure of theories of punishment. The "aversion theory" is one of the most significant of these new approaches. In relationships with each other as persons, or as parents to children, one may if his imperatives are ignored find it necessary to use other means to ensure that his commands, requests, *etc.*, are met; so society, likewise, may find it necessary through its established institutions to express its denunciations by some means other than the verbal. But these nonverbal denunciations must speak to man's reason. Pain or privation in that form of denunciation known as 'punishment' meets this requirement. Punishment, or its threat, provides the child with a reason for not behaving in certain ways: it equally provides the individual member of society with a reason for not behaving in certain ways. It does not mean that as a result of punishment the individual develops an aversion to what is forbidden. His aversion is rather to the unpleasantness (*i.e.* punishment) that may follow his indulgence in what is forbidden.

Aversion theory is no doubt controversial and is not very strong in theoretical foundation because of the difference of opinion that has developed relating to the usage of the hedonistic calculus. In aversion therapy the aim is through treatment to alter certain patterns of behaviour. The method is to associate, taking account of the law of temporal sequence, something unpleasant with the behaviour which one desires to change. In dealing with offenders one would link situations that evokes the unwanted behaviour with something unpleasant. The means used may vary from case to case, *e.g.* electric shocks, drugs or a combination of both associated with the behaviour (habits) which one wishes to eliminate. The result is that generally the unwanted behaviour becomes so closely associated with what is unpleasant that it practically becomes identical and as a result, proponents of the theory hope, it is avoided.

This theory may lead some critics to conclude that it is simply founded upon the hedonistic calculus.[50] Although Eysenck regards a theory of behaviour based on the hedonistic calculus as inadequate, his own theory, when one examines it, is not divorced from hedonism, from rewards and punishment.[50*a*] And it is from behavarioul psychology that behaviour or aversion therapy has developed. So, in the eyes of critics

50. According to the hedonistic calculus, man is so constituted by nature that he will try to avoid what is unpleasant and seek out what is pleasant. Punishment is unpleasant; therefore people will behave in such a way (by not committing crimes) as to avoid this unpleasantness.

50*a*. J. Eysenck, *Fact and Fiction in Psychology* 258 (1965).

such as W.A Miller, Eysenck's objection to conventional punishment really amounts to the objection that it is not scientific enough; because punishment is not a very scientific form of aversion therapy. And if it is held that punishment can only be justified if it 'works' (*i.e.* is fully effective in putting a stop to undesirable behaviour) then one ought seriously to consider replacing it by aversion therapy. Aversion therapy would then be the method of treating offenders and its threat a warning to potential offenders.[51] Its threat, of course, may be no more effective than the threat of conventional punishment (due to the operation of the law of temporal sequence) but its application should be more effective.

What is known as the *plene esse* view of punishment on the other hand certainly makes use of the hedonistic calculus.[52] It is opposed to the view that society is entitled to break a man. Such a right would be a denial of the right of the individual to live his life to the full. So although one may make use of the calculus but may reject the view that man by nature must always act according to it. Man may, on occasions ignore it, because they believe that what they are doing is right, and believe this so much that they are prepared to take the consequences. The consequences of aversion therapy may simply be the breaking of such individuals.

A distinction is made between punishment and torture. In the view of jurists like Miller, this should prompt us to hold that we must also distinguish between punishment and aversion therapy *i.e.* reject the view that aversion therapy is just a more scientific form of punishment. Benn and Peters in their listed criteria of punishment have included the proposal that the unpleasantness involved in punishment must be an essential part of what is intended, and not merely incidental.[53] There remain those who are convinced that differences exist between punishment and aversion therapy. In distinguishing between punishment and aversion therapy one may say that the implanting of an aversion (in the sense of a loathing, a dislike) is not an essential part of what is intended in punishment. The function of punishment is not to implant aversions - although that may sometimes incidentally happen - but rather to educate. It is because of this that Miller claims that punishment is akin to prescriptive language.

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51. W.A. Miller, "A Theory of Punishment," extracted from an article by the author *available on* www.royalinstituteofphilosophy.org/index/articles.htm

52. It allows that men do generally seek pleasure and avoid what is painful; and it allows society to make use of this fact in order to influence the behaviour of its members. But it does not regard men as automatic, incapable of resisting the sensory dominance of pleasure and pain.

53. S. I. Benn and R. S. Peters, *Social Principles and the Democratic State* 174 (1959).

However, faced with the problem of the persistent offender one feels the attractiveness of the argument that the positive results of the behavioural sciences should be accepted and applied. Opposition to this seems tantamount to saying that man has the right (to the irritation of his neighbours or, perhaps, even at their expense) to persist in wrongdoing. On the utilitarian view, man is governed by pleasure and pain; and the use of punishment in the interest of the good of society is recognition of this.[54] But behaviour or aversion therapy is based on the same principle. Punishment, therefore, it could be argued is but a less scientific way of regulating behaviour. Why not adopt the more scientific way - the way of aversion therapy? Thus, it is the considerate opinion of some that to give a man a series of electric shocks under controlled conditions is no more repugnant, or should be no more repugnant, to our moral sense than giving him a term in prison or fining him a sum of money for commission of an offence.

Miller states that it is a gross simplification to claim that one can so easily distinguish *reality* from *morality* in the topic under consideration. Here the distinction between matters of fact and matters of value does not hold. He also says that to say people have the right to 'misbehave' is not to say that they have the right to do what they like without opposition. Their right may be opposed (as it is when punishment is threatened or inflicted) although not denied, much as in the way, to draw a parallel, the parliamentary opposition opposes the government but in an important sense does not deny the government's right to govern.[55] Thus the claim emerges that to deny man his 'misbehaving' is to deny him his being as a man. This claim is made on the grounds that man is not just a physical object in a world of other objects. He cannot, therefore, be manipulated and controlled like other objects. And this 'cannot' is based, not on a moral sentiment, but on the nature of man. Aversion therapy is a form of manipulation and control and it cannot be denied that it may work. But to grant this is not to grant that man can be manipulated and controlled like any other object, because he is not like any other object.

Therefore, the view of punishment which jurists such as Miller argue for — a view which sees punishment related to the nature of man and society — regards it as providing a 'reason' of a certain kind for man to heed the law of his community if other reasons are not sufficiently persuasive. Yet it is also 'reason', which like others, he may reject; and this rejection could result in society re-examining its position. It may very well be society, its values and structures that require to be changed rather than the individual offender. Miller and others state that those

54. *Supra* note 51.
55. *Ibid*.

who claim that punishment does not work and advocate its replacement by aversion therapy are advised to remember the character "Raskolnikov" in Dostoyevsky's *Crime and Punishment*.[55*a*]

V Standardized sentencing policy – A judicial straitjacket?

The structure of the criminal law underlines the policy that when the legislature has defined an offence with sufficient clarity and prescribed the maximum punishment thereof, a wide discretion in the matter of punishment should be allowed to the judge. Any exhaustive enumeration of aggravating or mitigating circumstance is impossible. The impossibility of laying down standards is at the very core of the criminal law, as administered in India, which invests the judges with a very wide discretion in the matter of fixing the degree of punishment, that discretion in the matter of sentence is liable to be controlled by superior courts. Laying down of standard to the limited extent possible, as was done in the model judicial code, would not serve the purpose. The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguard for the accused.

The nature of the sentence to be imposed on an offender is influenced by three factors:

(1) The offence and its circumstances

(2) The offender and his back-ground

(3) The attitude and psychology of the judge (This factor is the most elusive and indefinite element in any sentencing policy).

The Supreme Court of India was also justified in leaving this last discretion to the judges in the matter of fixing the degree of punishment. In *Jagmohan Singh* v. *State of U.P.*,[56] it was argued that by providing death sentence or imprisonment for life in section 302 IPC the legislature has failed in its essential function of not providing the legislative standards as to in what cases the judge should sentence the accused to death and in what cases he should sentence him only to life imprisonment

55*a*. What you claim for yourself, every man has the right to claim for himself. In Dostoyevsky's *Crime and Punishment* Raskolnikov has a theory about the cause of the criminal's behaviour. The criminal is seized by a kind of disease. At first it develops gradually and only reaches its climax a short time before he commits the crime, it continues until the crime is committed and then it gradually declines and passes like any other disease. It is because of this disease that the criminal makes the mistakes that lead to his apprehension. But, for Raskolnikov, there is no question of himself suffering from the disease because what he intended was 'not a crime'.

56. (1973) 1 SCC 20.

and, therefore, is vitiated by the vice of excessive delegation. The court rejected this argument. When the same argument was once again raised, the Supreme Court, in *Bachan Singh* v. *State of Punjab*,[57] while rejecting the same, held that: "As pointed out in *Jagmohan*, such 'standardization' is well nigh impossible".

From these landmark judgments, it is clear that it is not desirable to lay down such rules or principles in the field of sentencing and only broad guidelines can be prescribed for the judicious exercise of wide discretion vested with the judges in sentencing, which, if exceeded or not properly exercised, be corrected by the higher court in appeal or revision. Thus, there is every possibility for arriving at two different kinds or terms of sentences for the same offence committed by two different offenders in different circumstances, within the maximum sentences or alternative sentences prescribed for commission of that offence.

There are several arguments that can be advanced against standardization of sentencing. Firstly, there is little agreement among penologists and jurists as to what information about the crime and criminal is relevant and what is not relevant for fixing the quantum of punishment for a person convicted of a particular offence. It may be argued that crimes are only to be measured by the injury done to society. But how is the degree of that culpability to be measured? Can any thermometer be devised to measure its degree? This is a very baffling, difficult and intricate problem.

Secondly, criminal cases do not fall into set-behaviourist patterns. Even within a single category offences there are infinite, unpredictable and unforeseeable variations. No two cases are exactly identical. There are countless permutations and combinations, which are beyond the anticipatory capacity of the human calculus. Simply in terms of blame worthiness of desert, criminal cases are different from one another in ways that legislatures cannot anticipate and limitation of language prevent the precise description of differences that can be anticipated. This is particularly true of murder. There is probably no offence that varies so widely both in character and in moral guilt as that which falls within the legal definition of murder.

Thirdly, standardization of the sentencing process, which leaves little room for judicial discretion to take account of variations in culpability within single-offence category, ceases to be judicial. It tends to sacrifice justice at the altar of blind uniformity. Indeed, there is a real danger of such mechanical standardization degenerating into a bed of procrustean cruelty.

57. (1980) 2 SCC 684.

Fourthly, standardization or sentencing discretion is a policy matter that belongs to the sphere of legislation. Recently, for instance, there were fears in the USA that the establishment of a sentencing commission would take away the powers of the American Congress. When our Parliament as a matter of sound legislative policy, did not deliberately restrict, control or standardize the sentencing discretion any further than that is encompassed by the broad contours delineated in section 354 (3) of the Cr PC, the court ought not, by over-leaping its bounds, rush to do what Parliament, in its wisdom, warily and sensibly refused to do. At this juncture, it must be stated that the Malimath Committee has made a strong case for the statutory committee to be constituted to lay down sentencing guidelines to regulate the discretion of the court in imposing sentences for various offences under the IPC and special local laws. However, it is submitted that in light of the arguments mentioned above, standardization of sentencing policy in India would lead to a great deal of discomfiture in the operation of our judicial machinery.

VI Crime and punishment – A post-modernist perspective

Pre-sentence hearing

In the original Cr PC there was no question of the judge hearing the accused before passing a sentence on him. Now, with the amendment of the Cr PC, section 235 (2) and section 248 (2) have been added.[58] This has been a consequence of the Law Commission's 48th Report advocating precisely such a change. With this new provision, it has become mandatory for the judge to hear the accused before sentencing him. Thus, the accused has the opportunity to present his view of the case and also provide some mitigating circumstances that could have the effect of reducing the sentence that the judge hands down to him. This hearing on the quantum of the sentence is a humanist principle of individualizing punishment to suit the person.[59] The court is required to consider the question of sentencing in the light of various factors such as educational background, home life, sobriety, social adjustment, emotional and mental condition, and the prospects of returning to a normal path in conformity with the law. It is heartening to note that courts have not interpreted this provision mechanically to imply that only oral submissions are permitted. The accused is now able to produce material bearing on the sentence and if this is contested by the other

58. The twin provisions make it obligatory on the part of the magistrate to hear the accused on the question of sentence in all cases except those mentioned in ss. 360 and 325, and only then pass the sentence according to the law.

59. *Shiv Mohan Singh* v. *Delhi Administration,* AIR 1977 SC 949.

side, then to produce evidence for the purpose of establishing the same.[60] Perhaps most importantly, the accused has the opportunity to directly address the magistrate and make an appeal for leniency. With this amendment, the earlier robotic function of dispensing with the sentences provided for in the statute books has become a thing of the past. This provision is especially helpful when the court has an option to choose between one or the other sentence. Hearing out the accused, and if needed, the public prosecutor, would enable the magistrate to arrive at the correct decision.

Alternative forms of punishment

The Indian criminal justice system desperately needs overhauling. Changes in the methods of punishment could prove a good starting point. In the west, there is the concept of "community service" which has proved to be particularly effective. In India, this is almost unknown, save for a provision (section 15) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Community service is popular in the United States of America as an alternative to traditional means of punishment such as imprisonment or fines. It would essentially involve a person serving out his sentence by assisting in the welfare of his community and contributing in making it clean, secure, and self-reliant by strengthening the bonds of co-operation between its members. The convicted person can participate in social service activities and thus become an asset to the community. In the US, many people, notably celebrities, who run into minor trouble with the law, are awarded a specified number of hours (or days/weeks) of community service. If they serve this period out, then there would be no need for throwing them into prison. The same rule can be effectively applied in India, with the scope being expanded to include not just offences under the Juvenile Justice Act.

A greater emphasis on payment of monetary fines can also be resorted to in case of non-violent crimes, instead of compulsory imprisonment. Section 357 of the Cr PC empowers the trial court, while imposing fines, to direct that the fine recovered be paid as compensation to the victim of the crime. Where the court has not imposed fine as part of the conviction, it may direct the accused to pay compensation to the victim. However, courts do not often resort to these and other provisions provided in our penal statutes. As the Malimath Committee rightly pointed out, many of the fines currently in place were prescribed more than a century ago and since the value of the rupee has gone down considerably, these

60. *Santa Singh* v. *State of Punjab*, AIR 1976 SC 2386.

fines should be suitably enhanced.[61] Another alternative is disqualifying a repeat offender from holding public offices. There is also an urgent need to frame adequate laws in order to tackle new kinds of crimes, such as economic offences. Despite all of this, one fundamental point remains unaltered - that a system of reformatory justice with an emphasis on rehabilitative aspect of punishment is desperately required in India.

Need for a rehabilitative theory of punishment

According to different schools of 'penological thought', there are four aims of punishment, namely, retribution, prevention, deterrence and reformation. Departure from such strong convictions (such as retribution) as being the sole aim of sentencing has occurred only in the recent past, with reformative or rehabilitative theory gaining momentum in many a countries. According to Friedman, "Generally speaking the increasing understanding of the social and psychological causes of the crime had led to a growing emphasis on reformation; rather than deterrence, in the older sense as the best way to protect both the individual criminal from himself and society from the incidence of crime".[62]

The votaries of reformative or rehabilitative theory aim at the process of reintegration of criminals into the mainstream of social life, thereby containing recidivism at any level. Basically the positive impact of this theory has been largely felt in the area of culpability. The central thesis of reformation rests solely on the basic premise that it is the 'social environment', which is the crucial causative factor for any crime. Accordingly, a new outlook on crime and punishment compelled the investigation into crime causation and research on the effects of different forms of punishment. According to the *Encyclopedia Britannica* the idea of rehabilitation denotes that through treatment and training the offender should be capable of returning to society and functioning as a law-abiding member of the community.[63] This concept dominated the penal philosophy way back to a century and half. It is part of the humanistic tradition, which presses for ever-more individualization, as the basic principle of justice demands treatment of the criminal not the crime. It relies upon medical and educative model, defining the criminal as, if not sick, less than evil, some how less 'responsible' than he had

61. The committee has recommended that wherever fine is prescribed as one of the punishments, suitable amendments should be made to increase the fine amount by 50 times.

62. Friedman, *Law in a Changing Society* 180(1959).

63. "Crime and Punishment" 16 *The New Encyclopedia Britannica* 808 (1991).

previously been regarded.[64] Individualization of punishment, the main thrust of which is that, the law should look to the criminal and not merely to the crime while fixing the punishment.

As a social malfunctioned, the criminal needs to be 'treated' or to be reeducated.[65] The emphasis is not to look into the past – to the offence committed – but to the future needs of the offender. Rehabilitation, therefore, promises pay off to society by reforming the offender into law-abiding, productive citizen who no longer desires to victimize the public.[66] It is also, one way of controlling crime humanly, where the emphasis lies not on the nature of the crime the perpetrator commits but on the treatment of the offender. Rehabilitation as a treatment includes psychiatric therapy, counselling, vocational training and other behaviour modification techniques. The objective of rehabilitation, therefore, is to encourage the offender to abstain from criminal behaviour in the future by providing him, for example, with social support in the form of probation, or a second chance in the form of an absolute or conditional discharge.[67] Only this method ensures a regeneration of a society into a more mature and responsible entity—not stigmatizing and locking up the deviant behind the high walls of prison. Just as how life imprisonment is seen as the rule and death penalty the exception (as opposed to the not so distant past), imprisonment in itself must be seen as an exception, with alternative methods of punishment as the rule.

The views of the Malimath Committee

The Malimath Committee[68] admits in its report that the variety of punishments that can be prescribed is limited. Therefore, there is a need to have new forms of punishment such as community service, confiscation orders, *etc*. The committee is in favour of constituting a permanent statutory committee for the purposes of prescribing sentencing guidelines and has taken inspiration from other countries with sentencing guidelines.[69] The argument of the committee is that there is no clear

64. Andrew Von Hirsch, *Doing Justice: The Choice of Punishment* XXIX (1974).

65. *Ibid.*

66. Francis T. Cullen and Karen E. Gibbert, "The Value of Rehabilitation" in John Muncic et al. *Criminal Perspective* 325 (1996).

67. Delvin, Keith, *Sentencing Offenders in Magistrate Courts* (1970).

68. *Report of the Malimath Committee on Reforms of Criminal Justice Systems in India* (2003).

69. The proposed committee is to be headed by a former judge of the Supreme Court or a retired chief justice of the high court, who has experience in criminal law matters. Assisting this individual would be members representing the police, legal profession, NGO's *etc*.

indication as to what all are the factors that should be taken into consideration in the matter of assessing the sentences to be imposed. Thus it feels a standardized system would serve the justice system better. The recommendations for increasing the value of the fines being charged on offenders, and also a system whereby the non-payment of monetary fines would not involve automatic imprisonment, but instead a stint of community service, should be implemented. All of these reforms have been suggested as part of the movement away from viewing imprisonment as being the primary method of punishment for offences. Therefore, the focus of the committee's suggestions in this area appears to be reform in the system of sentencing and punishment. While the need for prescribing new forms of punishments for new categories of offences has been mentioned, the crucial recommendation is that a thorough review of the IPC be conducted to review, reconsider and in most cases, suggest alternative modes of punishment.[70] It is hoped that the momentum for reform generated by the committee does not get lost in the crucial coming years. Of late, however, the Supreme Court of India has not been very forthright in its condemnation of the deterrent theory of punishment perhaps because it still sees some scope for its application in our criminal justice system.[71] Actually no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula, which may provide the basis for reasonable criteria to correctly assess various circumstances germane to the consideration of the gravity of the crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.[72] Judges have agonized long and hard over the merits of the various forms of punishment, and while conceding that just deserts or proportionality would be most appropriate, have never shied away from resorting to

70. Today, many of the developed nations are moving towards decriminalization of selected offences that hitherto resulted in punishments. It is about time that India began to seriously explore this option as a viable alternative to the current system, at least in respect of certain offences. There is no longer any need to prescribe prison terms for violating certain traffic rules, or for that matter, pulling the emergency chain on a train.

71. See, *State of Karnataka* v. *Sharanappa Basanagouda Aregoudar*, (2002) 3 SCC 738; *State of M.P.* v. *Ghanshyam Singh*,(2003) 8 SCC 13; *State of Karnataka* v. *Puttaraja*, (2004) 1 SCC 475; *Sushil Murmu* v. *State of Jharkhand*,(2004) 2 SCC 338; *Union of India* v. *Kuldeep Singh*,(2004) 2 SCC 590;*Surjit Singh* v. *Nahara Ram*, (2004) 6 SCC 513; *State of Uttar Pradesh* v. *Virendra Prasad*,(2004) 9 SCC 37.

72. *Dennis Councle McGoutha* v. *State of California*,402 US 183: 18 L Ed 2d 711 (1971).

exemplary punishment such as the death penalty in exceptional circumstances. This dichotomy between the forms of punishment has become the central feature of our punishment system and is reflective of the growing judicial uncertainty over the impact of their decisions (and the sentencing process) on future perpetrators of crimes as well as society as a whole.

VII Conclusion

"*The mood and temper of the public in regard to the treatment of crimes and criminals is one of the most unfailing tests of the civilisation of any country*."- Sir Winston Churchill addressing the House of Commons.

The justification of punishment poses one of the most difficult jurisprudential issues. Everybody has a view on what punishment is, and how it is to be carried out; though moral sensitivity often gets in the way of an objective analysis of the subject. Given human nature, or the human condition, or the human predicament, punishing people seems to be something which, sometimes, it is right to do, or we must do. Therefore, though it may seem *prima facie* wrong to do so, it could seem plausible if we can justify the practice in one way or the other. However, this justification process is wrecked by many complexities, both legal as well as moral and philosophical. So far, we have not yet got around to accepting the true reasons behind the desire to punish, and the answers perhaps remain locked away within the deepest recesses of the human mind.

For thousands of years, putting a person in chains or just putting an end to his life was the preferred way of dealing with the criminal elements in society. Thankfully, human evolution has resulted in legal revolutions, and we have come a long way from demanding 'an eye for an eye' to now asking for treatment of criminality, instead of the criminal. Alternative methods of punishment and sensible sentencing policies offer the only way out of the current predicament, for every just law must have a punitive force to back it up. Punishment alone does not ensure respect for the law and the objective cannot be achieved through deterrence alone. Inasmuch as an offence is promoted by a combination of elements such as character, education, family circumstances, social condition, and the like, the commission of further offences cannot be efficiently prevented except through a change in the said elements.

Sentencing is no doubt one of the controversial issues of social policy. It affects different categories of the society the convicted, the victim, the society, the state, etc. It involves moral, social, economic, political and ideological issues. Due to the involvement of all these issues it has been a challenge for the civilizations that endeavoured to

overcome the problem and bring uncontested and blameless solutions. It still continues to be a challenge to penologists and social scientists of the twenty-first century too. It provokes more conflicting interests and raises discord whenever an attempt to reform sentencing policy is undertaken. A consensus on the most appropriate theory and form of punishment too is far from settled. It can however be safely stated that in these modern times, the *essential end of punishment is neither to torment offenders nor to undo a crime already committed*. It is, rather, to prevent offenders from doing further harm to society and to prevent others from committing crimes. Punishment is thus looked upon as an educative process and the types of punishments selected and how they are imposed should always receive serious consideration so as to make the greatest impact and the most enduring impression upon all members of the society, while inflicting the least amount of pain and suffering on the body and mind of the offender.

Today the judiciary in India commands great respect and trust from amongst all the organs of the state. The move towards a standardised sentencing policy also should not be hasty, since there are several drawbacks inherent in such an initiative. Members of the legal fraternity need to adequately discuss the issue of minimum *vis-à-vis* maximum sentencing period in cases of certain offences and explore the possibility of doing away with the former. The criticism of soft sentencing must also be counterbalanced with the need to examine the over-zealousness on the part of some judges who punish certain offences, especially sex crimes, in an unduly harsh manner (in accordance with the provisions of the IPC). Sentencing which does not combine the two aspects of appropriateness for the offence and the offender, lacks completeness and is inconsistent with the philosophy of criminology or penological theories. There can be no doubt that the systems of retributive and deterrent punishments are now in the twilight zone.

It is not as if the rehabilitative theories of punishment never existed earlier. Rehabilitative methods (in its incipient form) have been used to reform offenders since ancient times. In the past, pardoning offenders and offering them a fresh chance in life was not entirely unknown. This was mostly the prerogative of the king who represented the fountainhead of justice and was thus empowered with sufficient wisdom and good sense to decide whether to impose suffering on a criminal, or whether to give him a chance to repent. However, these were sporadic attempts that implicitly acknowledged the harshness of the punishments involved, since the king's conscience was invariably pricked when he was enjoined to hand out harsh sentences to those he considered hardly deserving of the same. Later on, the all-pervasive nature of the caste system meant that certain classes in society escaped brutal retributive forms of punishment.

For instance, those belonging to the upper castes could be 'forgiven' for committing certain offences. Nevertheless, it is only with the advent of modernist and post-modernist forms of thinking that the just deserts and rehabilitative theories have begun to gain widespread acceptance and have prompted efforts at law reform.

The forces of modernism and subsequently those of post-modernism that have invaded our lives have profoundly affected the way in which we think and respond to everyday situations. The change in thinking has been especially profound in the field of law, with the impact being felt in the field of criminal jurisprudence as well. Gone are ironclad notions of law, justice and the legal system, and in its place stands a unique and informed interpretation of the law that is far more comprehensive and inclusive in its nature. This evolution of 'modern' legal thought brought about winds of change that swept through hitherto straight jacketed and conservative notions of crime, punishment, and sentencing. Modernism brought about several changes in law as well as in societal thinking but was found to be inadequate by many. A 'reaction' to the effects of modernism then began, and this 'reactionary' school of thought came to be termed as post-modernism, with its stated objective being to correct the perceived flaws brought about by the advent of the modernist philosophy.

Modernism seeks to impose a universalist, hegemonizing structure of law, within which all voices except that of the dominant group are submerged. In response to this has arisen post-modernism, which is essentially an 'inclusive' model, which seeks to guarantee articulation of all groups within society.

Postmodernism has contributed significantly in recognizing the inherent flaws within the modernist, liberal structure of rights. It is only by understanding the limitations of the liberal ideology that critique and transformation may arise. When the dominant ideology is subtle and complex in it's domination and oppression, critique of such an ideology have by necessity to be subtle and complex, in order to rend the theoretical basis of such oppression (witness Noam Chomsky's critiques of the neo-liberal movement). Perhaps this often robs postmodernism of it's mass appeal, since 'proselytizing' such a complex message to all and sundry is often impossible in the day of the sound byte and easy to digest rhetoric.

Postmodernism is essentially a 'reactive' school of jurisprudence, *i.e.* it acts only as a counter to the hegemonizing tendencies of the modernist discourse. Deconstruction of the legal edifices that modernism has built up and dissent towards the universalizing tendencies of this school are the primary characteristics of the postmodernist movement. Postmodernism does not seek to advocate an alternative vision, since acceptance of the postmodernist logic would

imply that such a 'model' would be, *prima facie,* impossible. In this regard, therefore, postmodernism cannot work without the impetus or catalyst of the modernist framework, within the 'cracks and fissures' that exist within the deep dichotomies of the framework itself. In this regard, inclusion of voices at a systemic level would throw up other problems also.

Since all formal law is essentially derived from either common or civil laws systems that originated within Europe, they were *prima facie* detrimental to the indigenous and traditional systems of law that existed within pre-colonial societies. Whole scale transplantation of colonial legal systems, led not only to their extinguishment and detriment, but also denied subjugated peoples the opportunity to evolve a jurisprudence that was unique to their spatial and historical context. By allowing for more and more 'native' voices to be heard, postmodernism seeks to correct this historical inequity and perhaps create a more humane jurisprudence across the world.

In a globalized and increasingly connected world, the postmodernist recognition of local voices is brought face to face with an increasing tendency for 'global' norms to be sought in order to create a truly international legal order. Yet postmodernism does not deny the essential unity of human experience. Although *articulations* may differ across space and time, the *basis for articulation* is common to human beings across the globe. Thus, although universal structures of law are undesirable, certain universal norms, arising out of common human experience are a reality.

Innovation is the key, absence of it only leads to stagnation and portends doom for the legal system. It is imperative, therefore, for the judiciary to respond to the peoples' needs and adopt a more reasonable and logical approach towards sentencing as well as punishment, in order to once and for all banish the ghosts of the colonial past and welcome the dawn of a new era on our ancient nation and civilization.