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CRITICAL ANALYSIS OF THEORIES OF PUNISHMENT

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INTRODUCTION:

We live in society where there are different types of people, some are good, and some are bad same as the coin has two aspects, talking about the bad people or the people with some evil intention or motive, they are the people who pose a danger towards the society in many ways. one of the most common aspects that comes up is that these people end up committing crime or any mischievous activity which directly or indirectly harms the people of the society or causes discomfort in their wellbeing.

There are two basic types of wrongs, one which is civil in nature and the second which is criminal in nature. For the ones that are civil in nature, there is a term called compensation which is awarded to the victim, but in the case of criminal wrong, it requires punishment.

According to Westermarch, punishment is restricted to "such suffering as is inflicted upon the offender in a definite way by, or in the name of the society of which he is a permanent or temporary member."³ "Dr. Walter Reckless, in considering the meaning of punishment, says it is the redress that the commonwealth takes against an offending member."¹ ' Punishment's dictionary meaning is "pain inflicted by authority on a person for a crime."²

For centuries the punishment intent levied by the authorized state institutions has been the subject of debate among philosophers, lawyers, and policymakers. Various methods or ends of retribution were proposed, some varying only in small degrees, some contrasting strongly with each other.

After coming across the meaning of punishment, we should also understand the concept behind punishment.

The basic concept of giving punishment is to teach the wrongdoer a lesson and also to set an example before society that the system is intolerant of any wrong and crime and also punishing creates a sense of fear in the people with ill intention.

There are many methods and different ways of punishment, and observing them, we can conclude that methods and ways of punishment have changed and evolved in the meantime, as it was different in ancient times and now it has a completely different outlook.

¹ Jhargava's Standard Illustrated Dictionary of English language, p.680.

² *Ibid*

The methods and different ways of punishment drive us to theories of punishment which we will be studying a very detailed manner.

There are basically four widely accepted theories of punishment:-

- 1) Retributive
- 2) Deterrent
- 3) Reformative
- 4) Preventive

Now after this, these theories are further divided into two schools of thought, i.e.

a) Classical School

b) Positive School.

After looking at the different theories of punishment, we also will come across the fact there are different kinds of punishment that will be discussed further in the research paper in detail which will also include kinds of punishment in ancient and modern days, followed with a conclusion.

CHAPTER 1-

Meaning of punishment: -

To understand the basic concept of the punishment we first need to understand why exactly is punishment needed. Why there arises a need to punish somebody?

We live in society where there are different types of people, some are good and some are bad same as the coin has two aspects, talking about the bad people or the people with some evil intention or motive, they are the people who pose a danger towards the society in many ways. one of the most common aspect that comes up is that these people end committing crime or any mischievous activity which directly or indirectly harms the people of the society or causes discomfort in their wellbeing.

Going by the dictionary, punishment includes the putting up of forfeiture or pain, the causation of a retribution, penalty or punishment by the judicial branch of the Law. The main purpose that punishment focuses is to put the wrong doer in pain so that it might set an example for the society and also sometimes benefit the victim but the aspect is a very small purpose that is served.

In the book titled "Criminal Behaviour", the description of punishment as per Walter Reckless is "the redress that the commonwealth takes against an offending member."³ Westermarck, defines

³ Reckless, W. C. (1940). Criminal behaviour.

punishment as “Such suffering as is inflicted upon the offender in a definite way by, or in the name of the society of which he is permanent or temporary member.”

“**Punishment** is the imposition of an undesirable or unpleasant outcome upon a group or individual, meted out by an authority”⁴ In situations ranging from child discipline to criminal law as a reaction and deterrence to a certain behaviour or activity that is considered undesirable or unreasonable.

Concept behind punishment: -

There are basic two types of wrongs one which is civil in nature and the second which is criminal in nature. For the ones which are civil in nature there is a term called compensation which is awarded to the victim, but in the case of criminal wrong it requires punishment, **Now let us understand what exactly is punishment before we proceed forward: -**

The simple meaning of ‘punishment’ is the infliction of some kind of pain or loss upon a person for a misdeed⁵. Punishment is the means of social control. H. L. A. Hart with Mr.

Bean and Prof Flew has defined punishment in terms of five elements.

- (1) It must involve pain or other consequences normally considered unpleasant.
- (2) It must be for an offence against legal rules
- (3) It must be to an actual or supposed offender for his offence.
- (4) It must be intentional, administered by human beings other than the offender.
- (5) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.⁶

The basic concept to punish an offender is to put out the message to the public at large that the system and the society is intolerant towards such persons and activities and any like minded person who is looking forward to commit such an act will be treated in the same way. This somewhere creates fear in the minds of such offenders and future offenders and therefore it brings down the crime rate in the state and country. Giving punishment can be termed as a preventive measure in terms of crime and controlling it.

⁴ Edwards, Jonathan (1824). "The salvation of all men strictly examined:

⁵ The New Encyclopedia Britannica, vol. 9 (Micropedia), p, 800.

⁶ j. P.S, Siroho, Criminology and Criminal Administration”, 4th edition,(1992), p. 96.

³ J. M.J, Sethna, society and the Criminal, 5 edition,(1992), p. 192.

CHAPTER 2

The way of punishment and the kind of punishment has varied from generation to generation and country to country depending upon the mindset of the people and the kind of offence which has been committed.

There are many ways and varying means of punishment and we can infer that in the process, ways and forms of punishment have adapted and developed, since it was new in ancient times and today it has a totally different viewpoint.

The methods and different ways of punishment drives us to theories of punishment which we will be studying a very detailed manner.

There are basically four widely accepted theories of punishment: -

THE DETELRRENT THEORY OF PUNISHMENT

Punishment is basically deterrent because its basic agenda is to set and example about the intolerance against crime and teach the wrong doers a lesson and put out a clear message to the future offenders.

"According to this philosophy, the purpose of punishment is to illustrate that crime is never lucrative for the criminal in the final analysis, and, as Locke noted, to make crime" an non-profitable bargain for the criminal. Society as a whole will learn that violence is an costly way for the victim to achieve an end by making it an unhealthy-bargain.

The concept behind deterrent punishment, by inflicting an exemplary sentence on the offender, would be that of crime prevention. In this, the State tries to generate terror in its members, thereby preventing them through the psychology of terror from committing crime. The harsh realities of penal punishment cause fear and a message to the criminal and others..

According to the exponents of this philosophy, punishment is supposed to deter similar crimes from being perpetrated by the individual involved and others. In favour of their claim, the advocates of the continuation of capital punishment depend on this principle. They claim that, by its very existence, capital punishment will not have a reforming value nor be a retributive requirement. Its only value is by means of deterrence, if at all.

“In a case decided by the Supreme Court, *Phul Singh Vs State of Haryana*⁷, a young philanderer aged 22, overpowered by excess sex stress, raped a twenty-four year old girl next door in broad day-light. The Sessions Court convicted him to four years’ rigorous imprisonment, and the High Court confirmed the sentence in appeal. When the matter went in appeal to the Supreme Court, the sentence was reduced

⁷ 1980 Cri. L. J. 8

to two years' rigorous imprisonment, as the accused was not an habitual offender, and had no vicious antecedents. The Supreme Court observed: The incriminating company of lifers and others for long may be counter-productive, and in this perspective, we blend deterrence with correction, and reduce the sentence to rigorous imprisonment for two years,"⁸

THE PREVENTIVE THEORY OF PUNISHMENT

Where the principle of deterrent seeks to put an end to the crime by causing fear of punishment in the mind of the potential perpetrator of the crime, the principle of avoidance aims to stop the crime by, for example, disabling the perpetrator by inflicting the death penalty on the perpetrator or, as the case might be, imprisoning him in gaol or suspending his driving licence.

Thus, the extreme punishment, the death warrant, means that the perpetrator can be stopped from repeating the heinous crime once and for all. In the past, maiming, by dismembering the offending portion of the body, was considered a successful way of stopping the wrong-doer from committing the same offence in the future. Thus, the hand of a robber will be chopped off, or a sexual one.

Mithu V State of Punjab "The society has progressed time to time and the right to life has been considered as one with dignity and the theories of punishment in majority number of nations across the world believing combination of reformative and preventive rather than a cluster of countries which believe in deterrent theory of punishment

The preventive mode of punishment functions in three forms in the final review, i.e.

- A) by inspiring with fear of punishment all potential wrong-doers;
- (b) by preventing the wrong-doer from committing any crime immediately; and by preventing the wrong-doer from committing any crime immediately;
- C) by reforming the perpetrator for a process of reform and re-education so that no crime can be committed again."⁹

In this respect, the following quotation from Rule 58 of the International Standard Minimum Rules is illuminative.

THE REFORMATIVE THEORY OF PUNISHMENT

According to the reformative theory killing and imprisonment can alone not solve the problem, suppose if an offender in prison for about 10 years and when he comes out he will not have any source of livelihood and will be forced to commit a crime yet again in order to survive so therefore the

⁸ *ibid*

⁹ AIR 1983 SC 473.

authorities need to take care for the reformation of the offenders as when they are again exposed to the society they don't pose a threat and can lead their life without any difficulty.

Narotam Singh v. State of Punjab “ reformatory approach to punishment should be the object of criminal law, in order to promote rehabilitation without offending community conscience and to serve social justice”¹⁰

The exponents of the philosophy of change claim that a term in gaol for a wrong-doer should help to educate them again and to reshape their image in a different mould. While discipline can be serious, they agree it can never be degrading. To the adherents of this philosophy, remnants of the past and enemies of reformation are execution, solitary confinement and maiming. The ultimate purpose of the reformists, however, is to attempt to bring about a shift in the offender's personality and character, in order to make him a productive part of society.

In order to be turned into law-abiding residents, if inmates are to be sent to gaol, the reformists argue that gaols ought to be transformed into good, suburban houses. This argument, however, is constrained in its execution.

“Lamenting on the conditions prevailing in jails in India, Justice Krishna Iyer opens his judgment *in Rakesh Kaushik Vs Superintendent, Central Jail* with the following poignant question:”¹¹

“Is a prison term in Tihar Jail a post-graduate course in crime ?”¹²

“In *Sunil Batra V. Delhi Administration*, the Supreme Court regarded a simple letter from a co-prisoner as sufficient to invoke proceedings by way of habeas corpus. The judgment deals at length with the shocking conditions prevailing in Indian prisons and suggests a series of prison reforms. Lamenting on the atrocities prevailing in Delhi's Tihar Jail, Justice Krishna Iyer, in the course of his learned judgment, observes as follows.”¹³

While reformation is an essential aspect of punishment, the sole end of itself cannot be defined. It must not be ignored, but it must not be permitted to take undue importance at the same time. The odds of long-term improvement are better in the case of juvenile criminals and first criminals than in the case of regular offenders. Again, some offences are more prone to reform treatment than others, such as sexual assaults. In comparison, in educated and orderly environments, reform therapy is more likely to succeed than in chaotic or underdeveloped communities.

¹⁰ AIR 1978 SC 1542.

¹¹ 1980 Supp. SCC. 183.

¹² *ibid*

¹³ 1980 3 SCC 488.

THE RETRIBUTIVE THEORY OF PUNISHMENT

It was found that when studying the past of the administration of justice, vengeance by the state was a substitute for private retribution. The retributive rage of the public at large is whipped up by some violence or wrongdoing in all safe societies. Retribution simply ensures that the wrongdoer pays for his misconduct.

Whereas other philosophies interpret punishment to be a way to some other end, the philosophy of revenge views it as an end in itself. It deems it entirely legitimate that bad should be restored to bad, and that the way in which a man interacts with others should be dealt with. The rule of natural justice is deemed to be a life against a life.

The desires and impulses that lay at the root of these feelings are still present in human nature, while the mechanism of private retribution has been suppressed. Therefore, as per this theory, it is not possible to deny the moral satisfaction that society obtains from punishment.

It is also disappointing that the fact that two wrongs do not always make a right is ignored by this philosophy. It also appears to disregard the theory that if revenge is the spirit of justice, abuse is a part of life in gaol.

“State of Gujarat & Another V Hon’ble HC of Gujarat”

“The retributive theory of punishment has waned into a relic or primitivity because civilized society has realised that the retribution cannot solve the problem of escalating criminal offences. Crime is now considered to be a problem of social hygiene. That modern diagnosis by criminologists is now causing a sea change to the whole approach towards crime and punishment. The emphasis involved in punishment has now been transported from retribution to cure and reform so that the original man, who was mentally healthy, can be recreated from the ailing criminal”¹⁴

The attitude of penologists towards punishment has also undergone a profound shift in the shifting pattern of culture. From classical to constructive, they changed their point of view. Although opinions on the treatment of criminals have varied, varying from ancient traditions to recent modernization , four kinds of opinions can be easily described as predominant. Modern penologists like to call them Punishment Myths,

¹⁴ (1998) 7 SCC 392.

CHAPTER 3

“TYPES OF PUNISHMENT”¹⁵

“The following seven kinds of punishment are discussed below, namely, -

- (1) Capital punishment
- (2) Deportation
- (3) Corporal punishment
- (4) Imprisonment
- (5) Solitary confinement
- (6) Indeterminate sentence
- (7) Fine.”¹⁶

DEPORTATION

In contrast with the death penalty, the evacuation sentence is a technique for barring hopeless or harsh guilty parties. In India, it used to be called transportation. This could barely be an answer for the emergency. On the off chance that a man is perilous in one society and on the off chance that he is sans given access another general public, he is probably going to be similarly hazardous there, as well. Notwithstanding such a state degradingly affecting the personality of the detainees, regardless of whether another province or settlement were to be framed for the ejection of such detainees, the issue of making such a settlement may trigger various challenges.

A long time ago in England, this form of punishment was abolished and has been abolished in India also.

CORPORAL PUNISHMENT

Beating is fundamental for tweak, lashing (or whipping) and torment. It was a typical strategy for discipline in the old and archaic ages. In antiquated Iran and notable India, whipping was normally utilized, even in the hours of the Mughal Rulers and the Marathas.

¹⁵ Gujarat Police journal, volume-7 No.3 April-June-1989.

¹⁶ *Ibid.*

Elsewhere, too, whipping was one of the most common forms of punishment right up until the Middle Ages.

It was also a very serious method of discipline, and as a result of the cuts from the lashes, many inmates bled to death. Public whipping was also very popular, and we read, in history, of occasions where the whipping continued mercilessly even after the prisoner had fainted.

Prevention is the fundamental object of such a punishment. A long time subsequently, it was found that in addition to the fact that this is somewhat punishment brutal, yet additionally counterproductive. The individual who is presented to this type of punishment may turn out to be more withdrawn than he was previously. While one of the techniques for punishment at first remembered for the Penal Code was whipping, it was revoked in 1955.

SOLITARY CONFINEMENT

Solitary confinement is a form of slavery that is exacerbated. The sociable nature of man is thoroughly abused by this kind of retribution, and it seeks to cause him misery by denying him the culture of his fellow beings.

This kind of retribution is inhuman and perverse, many criminologists have thought. It is probable that this could turn a man of good mental health into a lunatic. If used in excess, it can cause irreversible damage on the perpetrator, while if used in measure, this type of punishment can be successful in restricted circumstances. Yet if such constraints are exceeded, it is likely to be overly inhumane.

A. Kinds of Punishment in Ancient Times

Over the centuries, numerous ways of punishment have evolved and been introduced in various cultures. Any of the defining characteristics of the penal philosophy around the world before comparatively modern times is torture, sadistic ways of administering death sentences, and all kinds of cruelties in gaols. During ancient times, the following types of discipline existed.

a. Flogging

“The dictionary meaning of flog is to bear very hard with a stick or a WHIP as a punishment”¹⁷ Flogging practice is banned in virtually the whole world, but it nevertheless prevails in most East countries even today.

“In India, this mode of punishment was recognized under the Whipping Act 1864, which was repealed and replaced by similar Act in 1909 and finally abolished in 1955”.¹⁸

Penological investigations have found that whipping has hardly been successful as a form of punishment. But the derived effect on prisoners charged with serious offences does not appear to have any effect.

b. Mutilation

In early times, mutilation was another type of corporal punishment generally used. Mutilation is “to separate a limb or organ, to maim to make imperfect.”¹⁹ During the Hindu era, it was understood that this form of punishment was in use in ancient India. Either or both hands of the man who committed robbery were cut off, and his genitals were cut off if he indulged in sexual crime. In fact, the method has also been used in England, Denmark, and several other European countries.

Certainly, amputation/mutilation was worse than capital punishment. Yet we find the offender's amputation more painful than death as we sink deep. The potential offender may forget the pangs of an offender burnt to death over the lapse of time, but an offender imprisoned by surviving amputation and living in society and living a miserable life forever keeps the memories of the pain and suffering fresh in the minds of the offenders. A more shudder is caused by his grotesque look. Therefore, there is more barrier to amputation/mutilation than even capital punishment.

However, because of its barbaric existence, the method is totally abandoned in modern times. These punishments are thought to be due to an inevitable propensity to engage in people's brutality.

¹⁷ "Cambridge Dictionary of American English South Asian Edition (2003), p. 328.

¹⁸ N. V. Pranjape, Criminology and Penology, 9th ed., p.16.

¹⁹ Bhargava's Standard Illustrated Dictionary of English Language, p. .534.

c. **Branding**

“As a mode of punishment, branding of prisoners was commonly used in oriental and classical societies. Roman, England, American penal law supported this mode of punishment and criminals were branded with appropriate marks on the forehead so they could be identified and subjected to public ridicule.”²⁰

Branding was exercised as a means of revenge in India under Mughal rule. With the rise of humanism, this method of corporal punishment is now fully annulled in the field of penology.

d. **Stoning**

It is also known that the stoning of prisoners to death was performed during the mediaeval period. In certain Islamic nations, such as Pakistan, Saudi Arabia, etc., this mode of punishing the criminal is still in practise. This form of penalty is normally punished by the perpetrators involved in sex offences. In a shallow trench dug in the earth, the convicted individual is forced to stand and people surround him on the other side and throw stone on them before they die due to pelting. Due to the deterrence effect, violence against women , in particular, are under curb in these nations.

e. **Pillory**

This method of punishment was often referred to as literary punishment, although infliction was more frequently used than in poetry. In fact, this method of punishment continued until the 19th century. With his hands and head bound in an iron cage, the convict was forced to stand so that they did not move their limbs. The Pillory is a wooden structure with hollow space for placing a criminal's head and hands. The most agonising influence on him was the limitation on the criminal's bodily actions, and it was hoped that the deterrent involved in this method on discipline would certainly put the perpetrator to book. Before the middle of the twentieth century, A traditional method of pillory execution in much of the world has been to hang condemned prisoners to death in public.

²⁰ N . V. Paranjape, Criminology and Penology, p. 16.

B. Kinds of Punishment under current laws

The method of punishment set out in Section 53 of the Indian Penal Code is prescribed under the current system in India.

(a) Fines

Fines have been increasingly preferred by both the law and the legal authority as an extra or substitute means of penalty. In particular, they are most applicable for crimes relating to slavery, the recruitment of people not allowed by statute and the infringement of laws relating to the manufacturing and sale of goods. In regards to property offences, such as embezzlement, bribery, stealing, violations of lottery and gaming laws and lesser offences, such as loitering and disorderly behaviour, they are very often levied.

“In the Indian Penal Code, the provision for fines, as punishment, was justified by its framers thus, fine is the most common punishment in every part of the world and it is a punishment at the advantages of which are so great and obvious that we propose to authorize the courts to inflict it in every case. Imprisonment, transportation, banishment, solitude and compelled labour are not equally disagreeable to all men. With fine the case is different. In imposing a fine, it is always necessary to have regard to the pecuniary circumstances of the offender, as to the character and magnitude of the offence. The mulct, which is ruinous to the labourer, is easily borne by the tradesman and is absolutely unfelt by a rich zamindar.”²¹

The quantity of the fine and the expense and enforcement of its payment is the real problem involved in the financial penalty situation.

(b) Imprisonment

Originally, detention was a method of imprisonment of people on prosecution.

The key aims of detention are:

- (i) “Disabling the offender, being danger to society, by locking him up.
- (ii) Preventing prospective offenders by the threat of long term lock up.
- (iii) Reforming the offender under healthy and transforming conditions.

So we can say that the goal of imprisonment is not only punitive but restorative to make an offender a non-offender. Rehabilitation is a prized purpose of prison hospitalization”.²² The sentence for prison deprivation requires an enlightened rehabilitative process for social justice and social defence. Imprisonment, with new disciplinary methods implemented in prison

²¹ S. M. A. Qadri, Ahmad Siddique Criminology, 5th ed., (2005), pp. 130-131.

²² . M. J., Sethna, Society and the Criminal, 5th ed., p. 238.

systems, is It is now one of the world's most accepted ways of punishment; it serves as a effective means of reforming the prisoner and protecting society from anti-social powers at the same time. It thus represents, at one and the same time, the dual function of preventive and reformatory justice.

Rajendra Prasad v. State of U.P. “Justice Krishna Iyer held that giving discretion to the judges to make choice between death sentence and life imprisonment on special reasons under section 354(3) CrPC would be violative of Article 14 which condemns arbitrariness”²³

c. Imprisonment for Life

“Imprisonment for life has been authorized as a form of punishment. There are in all 52 sections in Indian Penal Code, 1860”²⁴. Imprisonment for life has got all the authorization as a form of punishment. There are sections in the IPC that provide for life imprisonment. It is different from that of normal imprisonment as it is for life. There are two types of life imprisonment, the first being rigorous and the second being simple.

“The imprisonment for life must be read in the context of section 45 of the Indian Penal Code. Under that provision, the word 'life' denotes the life of a human being unless the contrary appears from the context. Thus, imprisonment for life would ordinarily mean imprisonment for the full or complete span of life. A sentence for transportation of life must prima-facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life.”²⁵

d. Capital Punishment

The term capital means head, and in Latin, the etymology originates from Caput. Crimes that may lead to the punishment of capital are known as capital crimes or capital crimes. “The term capital originates from Latin capitalis, literally 'regarding the head'. Hence, a capital crime was originally one punished by the serving of the head. The natural meaning of the word 'sentence', therefore, would show that disqualification of suspension of the driving license, which is a consequence upon the conclusion of the guilt and order passed on conviction, should amount to sentence.”²⁶ “Prosecutors and sentencing judges alike try to deal with individuals on an

²³ AIR 1979 SC 947.

²⁴ Indian Penal Code, 1860.

²⁵ Indian Penal Code, 1860, Section 45 reads as under: The word "life" denotes the life of a human being, unless the contrary appears from the context.

²⁶ Mohammad Shabir Maulamaiya v. State of Maharashtra, 1977 Mah.LJ 338 at p. 341.

individual basis, without regard to social status. The act of pronouncing a judicial sentence on a defendant the sentence so pronounced.”²⁷

Then, in the 18th century, a revolution emerged, raising the voice of indignation against the punishment of human beings. The spearhead of this campaign may be assumed to be Bentham. He investigated the roots of crime and demonstrated how the function can be fulfilled by punishment. Punishment itself, according to him, it was evil, but a required/necessary evil. Unless it yielded greater benefit, there was no justice to be inflicted.

The object of capital punishment is said to be two-fold. In others' eyes, it will still be terror to teach them a lesson by bringing the perpetrator to death. Secondly, if the perpetrator is an incorrigible one, it avoids the replication of the offense by the person on a permanent basis by putting him to death. But it is clear that this penalty is not based on the reformatory purpose of the penalty, in the sense that it is a move in desperation.

A stern view of previous "dowry killings" and "wife-burning tragedies" has been taken by the Supreme Court and it has declined to commute penalties levied by lower courts on such "murders." The following observations of the Supreme Court in *Vasant Pawar V. State of Maharashtra*²⁸ are interesting:

“Wife-burning tragedies are becoming too frequent for the country to be complacent...Law must rise to the challenge of shocking criminology, especially when helpless women are the victims, and the crime is committed in the secrecy of the husband's home.”²⁹

In *Bachan Singh V. State of Punjab*³⁰ In a four-to-one plurality decision, the Supreme Court found that the death penalty is legally valid and does not represent a "unreasonable, inhuman or unusual punishment." The Supreme Court ruled that “the death penalty is constitutionally valid and does not represent an unreasonable, inhuman or unusual punishment.”³¹ However, it cannot be assumed that certain clauses are violative of Articles 14, 19 and 21 of the Constitution.

²⁷ The American Heritage Dictionary of the English Language, Third Edition, p. 1644.

²⁸ (2005) 5 SCC 281.

²⁹ *ibid*

³⁰ (1980) 2 SCC 684.

³¹ *ibid*

CHAPTER – 4

Arguments against Capital Punishment

- (i) The ones who deny this form of punishment say that by death penalty deterrent nature has not been served at all. For instance, in the states where capital punishment has been abolished, there are fewer violent offenses than in any other state. For example, U.S.A., as per the nature of it being a deterrent, the number of crimes in the mentioned stated should have increased.
- (ii) Capital punishment might occur, but there are many more factors involved not just the crime, the circumstances of the offender, the mindset of the offender, and also the unnatural condition that might have forced him to commit the certain act. For any heinous crime life sentence is more than enough to teach him a lesson.

Arguments in favor of Capital Punishment

- (i) On the contrary, some people who support capital punishment argue that there are quite a number of offenders who cannot be corrected, the ones who do it with their will, they are a great danger to society, and there is no justifies reason why the society should have such elements so it's better to eliminate such risks before it eliminates you.
- (ii) Another point put forward in support of the death penalty is that if a murderer is not penalized by death, other relatives of the deceased are very likely to be killed in the murder., and therefore a chain of murders could be created. As long as human feelings are high, it is claimed that capital punishment is a required kind of punishment, as long as the forces of revenge prevail. In the end, we can say that though capital punishment has a purpose, it is not straightforwardly needed in each and every condition. In today's time, when we are surrounded by the facts of human rights, it is not justified to take someone's life but also, there is a constant need to eliminate the threat, so yes, capital punishment should be there, but in way too extreme cases which straight down needs to put a message of intolerance against crime.

CHAPTER 5

CONCLUSION-

One of the unfailing measures of every country's culture is the attitude and temper of the people surrounding the prosecution of crimes and offenders. While addressing the House of Commons, Sir Winston Churchill stated. "The justification of punishment possesses one of the most difficult jurisprudential issues. There are different theories of punishment prevalent in various ages and different justifications are offered among different countries according to variations in culture and civilizations."³² When the penalty is too severe, it is inhuman to subject the accused to useless suffering; on the other hand, "is it not cruel still to leave the innocent to suffer? When the result of such punishment is too mild to be efficient"³³ In order to be deterrent but not so severe to be brutal, discipline must be severe enough. Likewise, "punishment should be moderate enough to be human but cannot be too moderate to ineffective"³⁴.

For any judicial framework that makes the sentence less harsh and any lack of certainty makes punishment more serious, the certainty of punishment is most significant. Severe punishment calls for higher proof of guilt standards. The arrest rate, which is not a good sign of criminal justice, would definitely be lower. The guarantee of punishment depends strongly on the integrity of legislation and good procedural procedures. Judicial justice must reconcile the two essential basic concepts of criminal justice between "Justice deferred is justice withheld" and "Hurried justice is buried justice". The findings of the Malimath committee further describe the existence of the criminal justice system prevailing in India.

Each penalty principle has its own merits and demerits. Therefore, if it depended on any one principle of deterrence, criminal justice would not be safe. Criminal Procedure, "the court has to record reasons for awarding death sentences that means life sentence is rule and death sentence is exception"³⁵.

"Punishment like rigorous or simple, forfeiture of property and fine are appropriate to use as the tool of reformative punishment. The Supreme Court in *Narotam Sing v. State of Punjab* has rightly said that reformative approach to punishment should be the object of criminal law, in order to promote rehabilitation without offending community conscience and to serve social justice"³⁶.

³² 5 Lakshminath, A. "Criminal Justice in India: Primitivism to post-Modernism" 48, JILI, (2006).p.53.

³³ Jeremy Bentham, op. cit., p .213.

³⁴ Supra note 74 at 169.

³⁵ THE COD. OF CRIM. PROC., Sec. 354(3).

³⁶ 1978 SC 1542.

“However, in *M.H. Hoskot v. State of Maharashtra*, Supreme Court cautioned the judiciary for showing more leniency to offenders based on reformatory theory that would amount to injustice to the society. The offences like serious economic offences and other offences, the balance has to be maintained between the security of society and rights of offenders.”³⁷

“In *Dr Jacob George v. State of Kerala*, the Supreme Court held that the object of punishment should be deterrent, reformatory, preventive, retributive and compensatory. Preferring one theory to other is not sound policy of punishment. Each theory of punishment should be used independently or combined according to the merit of the case. Human beings neither are angels capable of doing only good nor are they demons determined to destroy each other even at the cost of self-destruction.”³⁸

Criminals are very much a part of society, and they must be reformed and corrected and made sober by society. Society needs to think from the victim's point of view as well. When the claimant asserts that, in the interest of change and correction, the State is unable to prosecute the criminals, they will take the law into their own hands, they will attempt and prosecute their criminals themselves, and it will lead to anarchy.

³⁷ AIR 1978 SC 1548.

³⁸ (1994) 3 SCC 430.

CRITICAL ANALYSIS OF THEORIES OF PUNISHMENT

Aditya M. Saran¹

INTRODUCTION:

We live in society where there are different types of people, some are good, and some are bad same as the coin has two aspects, talking about the bad people or the people with some evil intention or motive, they are the people who pose a danger towards the society in many ways. one of the most common aspects that comes up is that these people end up committing crime or any mischievous activity which directly or indirectly harms the people of the society or causes discomfort in their wellbeing.

There are two basic types of wrongs, one which is civil in nature and the second which is criminal in nature. For the ones that are civil in nature, there is a term called compensation which is awarded to the victim, but in the case of criminal wrong, it requires punishment.

According to Westermarch, punishment is restricted to "such suffering as is inflicted upon the offender in a definite way by, or in the name of the society of which he is a permanent or temporary member."³ "Dr. Walter Reckless, in considering the meaning of punishment, says it is the redress that the commonwealth takes against an offending member."² ' Punishment's dictionary meaning is "pain inflicted by authority on a person for a crime."³

For centuries the punishment intent levied by the authorized state institutions has been the subject of debate among philosophers, lawyers, and policymakers. Various methods or ends of retribution were proposed, some varying only in small degrees, some contrasting strongly with each other.

After coming across the meaning of punishment, we should also understand the concept behind punishment.

The basic concept of giving punishment is to teach the wrongdoer a lesson and also to set an example before society that the system is intolerant of any wrong and crime and also punishing creates a sense of fear in the people with ill intention.

There are many methods and different ways of punishment, and observing them, we can conclude that methods and ways of punishment have changed and evolved in the meantime, as it was different in ancient times and now it has a completely different outlook.

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² Jhargava's Standard Illustrated Dictionary of English language, p.680.

³ *Ibid*

The methods and different ways of punishment drive us to theories of punishment which we will be studying a very detailed manner.

There are basically four widely accepted theories of punishment:-

- 1) Retributive
- 2) Deterrent
- 3) Reformative
- 4) Preventive

Now after this, these theories are further divided into two schools of thought, i.e.

a) Classical School

b) Positive School.

After looking at the different theories of punishment, we also will come across the fact there are different kinds of punishment that will be discussed further in the research paper in detail which will also include kinds of punishment in ancient and modern days, followed with a conclusion.

CHAPTER 1-

Meaning of punishment: -

To understand the basic concept of the punishment we first need to understand why exactly is punishment needed. Why there arises a need to punish somebody?

We live in society where there are different types of people, some are good and some are bad same as the coin has two aspects, talking about the bad people or the people with some evil intention or motive, they are the people who pose a danger towards the society in many ways. one of the most common aspect that comes up is that these people end committing crime or any mischievous activity which directly or indirectly harms the people of the society or causes discomfort in their wellbeing.

Going by the dictionary, punishment includes the putting up of forfeiture or pain, the causation of a retribution, penalty or punishment by the judicial branch of the Law. The main purpose that punishment focuses is to put the wrong doer in pain so that it might set an example for the society and also sometimes benefit the victim but the aspect is a very small purpose that is served.

In the book titled "Criminal Behaviour", the description of punishment as per Walter Reckless is "the redress that the commonwealth takes against an offending member."⁴ Westermarck, defines

⁴ Reckless, W. C. (1940). Criminal behaviour.

punishment as “Such suffering as is inflicted upon the offender in a definite way by, or in the name of the society of which he is permanent or temporary member.”

“**Punishment** is the imposition of an undesirable or unpleasant outcome upon a group or individual, meted out by an authority”⁵ In situations ranging from child discipline to criminal law as a reaction and deterrence to a certain behaviour or activity that is considered undesirable or unreasonable.

Concept behind punishment: -

There are basic two types of wrongs one which is civil in nature and the second which is criminal in nature. For the ones which are civil in nature there is a term called compensation which is awarded to the victim, but in the case of criminal wrong it requires punishment, **Now let us understand what exactly is punishment before we proceed forward: -**

The simple meaning of ‘punishment’ is the infliction of some kind of pain or loss upon a person for a misdeed⁶. Punishment is the means of social control. H. L. A. Hart with Mr.

Bean and Prof Flew has defined punishment in terms of five elements.

- (1) It must involve pain or other consequences normally considered unpleasant.
- (2) It must be for an offence against legal rules
- (3) It must be to an actual or supposed offender for his offence.
- (4) It must be intentional, administered by human beings other than the offender.
- (5) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.⁷

The basic concept to punish an offender is to put out the message to the public at large that the system and the society is intolerant towards such persons and activities and any like minded person who is looking forward to commit such an act will be treated in the same way. This somewhere creates fear in the minds of such offenders and future offenders and therefore it brings down the crime rate in the state and country. Giving punishment can be termed as a preventive measure in terms of crime and controlling it.

⁵ Edwards, Jonathan (1824). "The salvation of all men strictly examined:

⁶ The New Encyclopedia Britannica, vol. 9 (Micropedia), p, 800.

⁷ j. P.S, Siroho, Criminology and Criminal Administration”, 4th edition,(1992), p. 96.

³ J. M.J, Sethna, society and the Criminal, 5 edition,(1992), p. 192.

CHAPTER 2

The way of punishment and the kind of punishment has varied from generation to generation and country to country depending upon the mindset of the people and the kind of offence which has been committed.

There are many ways and varying means of punishment and we can infer that in the process, ways and forms of punishment have adapted and developed, since it was new in ancient times and today it has a totally different viewpoint.

The methods and different ways of punishment drives us to theories of punishment which we will be studying a very detailed manner.

There are basically four widely accepted theories of punishment: -

THE DETELRRENT THEORY OF PUNISHMENT

Punishment is basically deterrent because its basic agenda is to set an example about the intolerance against crime and teach the wrong doers a lesson and put out a clear message to the future offenders.

"According to this philosophy, the purpose of punishment is to illustrate that crime is never lucrative for the criminal in the final analysis, and, as Locke noted, to make crime" an non-profitable bargain for the criminal. Society as a whole will learn that violence is an costly way for the victim to achieve an end by making it an unhealthy-bargain.

The concept behind deterrent punishment, by inflicting an exemplary sentence on the offender, would be that of crime prevention. In this, the State tries to generate terror in its members, thereby preventing them through the psychology of terror from committing crime. The harsh realities of penal punishment cause fear and a message to the criminal and others..

According to the exponents of this philosophy, punishment is supposed to deter similar crimes from being perpetrated by the individual involved and others. In favour of their claim, the advocates of the continuation of capital punishment depend on this principle. They claim that, by its very existence, capital punishment will not have a reforming value nor be a retributive requirement. Its only value is by means of deterrence, if at all.

“In a case decided by the Supreme Court, *Phul Singh Vs State of Haryana*⁸, a young philanderer aged 22, overpowered by excess sex stress, raped a twenty-four year old girl next door in broad day-light. The Sessions Court convicted him to four years’ rigorous imprisonment, and the High Court confirmed the sentence in appeal. When the matter went in appeal to the Supreme Court, the sentence was reduced to two years’ rigorous imprisonment, as the accused was not an habitual offender, and had no vicious

⁸ 1980 Cri. L. J. 8

antecedents. The Supreme Court observed: The incriminating company of lifers and others for long may be counter-productive, and in this perspective, we blend deterrence with correction, and reduce the sentence to rigorous imprisonment for two years,”⁹

THE PREVENTIVE THEORY OF PUNISHMENT

Where the principle of deterrent seeks to put an end to the crime by causing fear of punishment in the mind of the potential perpetrator of the crime, the principle of avoidance aims to stop the crime by, for example, disabling the perpetrator by inflicting the death penalty on the perpetrator or, as the case might be, imprisoning him in gaol or suspending his driving licence.

Thus, the extreme punishment, the death warrant, means that the perpetrator can be stopped from repeating the heinous crime once and for all. In the past, maiming, by dismembering the offending portion of the body, was considered a successful way of stopping the wrong-doer from committing the same offence in the future. Thus, the hand of a robber will be chopped off, or a sexual one.

Mithu V State of Punjab “The society has progressed time to time and the right to life has been considered as one with dignity and the theories of punishment in majority number of nations across the world believing combination of reformative and preventive rather than a cluster of countries which believe in deterrent theory of punishment

The preventive mode of punishment functions in three forms in the final review, i.e.

- A) by inspiring with fear of punishment all potential wrong-doers;
- (b) by preventing the wrong-doer from committing any crime immediately; and by preventing the wrong-doer from committing any crime immediately;
- C) by reforming the perpetrator for a process of reform and re-education so that no crime can be committed again.”¹⁰

In this respect, the following quotation from Rule 58 of the International Standard Minimum Rules is illuminative.

THE REFORMATIVE THEORY OF PUNISHMENT

According to the reformative theory killing and imprisonment can alone not solve the problem, suppose if an offender in prison for about 10 years and when he comes out he will not have any source of livelihood and will be forced to commit a crime yet again in order to survive so therefore the

⁹ *ibid*

¹⁰ AIR 1983 SC 473.

authorities need to take care for the reformation of the offenders as when they are again exposed to the society they don't pose a threat and can lead their life without any difficulty.

Narotam Singh v. State of Punjab “ reformatory approach to punishment should be the object of criminal law, in order to promote rehabilitation without offending community conscience and to serve social justice”¹¹

The exponents of the philosophy of change claim that a term in gaol for a wrong-doer should help to educate them again and to reshape their image in a different mould. While discipline can be serious, they agree it can never be degrading. To the adherents of this philosophy, remnants of the past and enemies of reformation are execution, solitary confinement and maiming. The ultimate purpose of the reformists, however, is to attempt to bring about a shift in the offender's personality and character, in order to make him a productive part of society.

In order to be turned into law-abiding residents, if inmates are to be sent to gaol, the reformists argue that gaols ought to be transformed into good, suburban houses. This argument, however, is constrained in its execution.

“Lamenting on the conditions prevailing in jails in India, Justice Krishna Iyer opens his judgment *in Rakesh Kaushik Vs Superintendent, Central Jail* with the following poignant question:”¹²

“Is a prison term in Tihar Jail a post-graduate course in crime ?”¹³

“In *Sunil Batra V. Delhi Administration*, the Supreme Court regarded a simple letter from a co-prisoner as sufficient to invoke proceedings by way of habeas corpus. The judgment deals at length with the shocking conditions prevailing in Indian prisons and suggests a series of prison reforms. Lamenting on the atrocities prevailing in Delhi's Tihar Jail, Justice Krishna Iyer, in the course of his learned judgment, observes as follows.”¹⁴

While reformation is an essential aspect of punishment, the sole end of itself cannot be defined. It must not be ignored, but it must not be permitted to take undue importance at the same time. The odds of long-term improvement are better in the case of juvenile criminals and first criminals than in the case of regular offenders. Again, some offences are more prone to reform treatment than others, such as sexual assaults. In comparison, in educated and orderly environments, reform therapy is more likely to succeed than in chaotic or underdeveloped communities.

¹¹ AIR 1978 SC 1542.

¹² 1980 Supp. SCC. 183.

¹³ *ibid*

¹⁴ 1980 3 SCC 488.

THE RETRIBUTIVE THEORY OF PUNISHMENT

It was found that when studying the past of the administration of justice, vengeance by the state was a substitute for private retribution. The retributive rage of the public at large is whipped up by some violence or wrongdoing in all safe societies. Retribution simply ensures that the wrongdoer pays for his misconduct.

Whereas other philosophies interpret punishment to be a way to some other end, the philosophy of revenge views it as an end in itself. It deems it entirely legitimate that bad should be restored to bad, and that the way in which a man interacts with others should be dealt with. The rule of natural justice is deemed to be a life against a life.

The desires and impulses that lay at the root of these feelings are still present in human nature, while the mechanism of private retribution has been suppressed. Therefore, as per this theory, it is not possible to deny the moral satisfaction that society obtains from punishment.

It is also disappointing that the fact that two wrongs do not always make a right is ignored by this philosophy. It also appears to disregard the theory that if revenge is the spirit of justice, abuse is a part of life in gaol.

“State of Gujarat & Another V Hon’ble HC of Gujarat”

“The retributive theory of punishment has waned into a relic or primitivity because civilized society has realised that the retribution cannot solve the problem of escalating criminal offences. Crime is now considered to be a problem of social hygiene. That modern diagnosis by criminologists is now causing a sea change to the whole approach towards crime and punishment. The emphasis involved in punishment has now been transported from retribution to cure and reform so that the original man, who was mentally healthy, can be recreated from the ailing criminal”¹⁵

The attitude of penologists towards punishment has also undergone a profound shift in the shifting pattern of culture. From classical to constructive, they changed their point of view. Although opinions on the treatment of criminals have varied, varying from ancient traditions to recent modernization, four kinds of opinions can be easily described as predominant. Modern penologists like to call them Punishment Myths,

¹⁵ (1998) 7 SCC 392.

CHAPTER 3

“TYPES OF PUNISHMENT”¹⁶

“The following seven kinds of punishment are discussed below, namely, -

- (1) Capital punishment
- (2) Deportation
- (3) Corporal punishment
- (4) Imprisonment
- (5) Solitary confinement
- (6) Indeterminate sentence
- (7) Fine.”¹⁷

DEPORTATION

In contrast with the death penalty, the evacuation sentence is a technique for barring hopeless or harsh guilty parties. In India, it used to be called transportation. This could barely be an answer for the emergency. On the off chance that a man is perilous in one society and on the off chance that he is sans given access another general public, he is probably going to be similarly hazardous there, as well. Notwithstanding such a state degradingly affecting the personality of the detainees, regardless of whether another province or settlement were to be framed for the ejection of such detainees, the issue of making such a settlement may trigger various challenges.

A long time ago in England, this form of punishment was abolished and has been abolished in India also.

CORPORAL PUNISHMENT

Beating is fundamental for tweak, lashing (or whipping) and torment. It was a typical strategy for discipline in the old and archaic ages. In antiquated Iran and notable India, whipping was normally utilized, even in the hours of the Mughal Rulers and the Marathas.

¹⁶ Gujarat Police journal, volume-7 No.3 April-June-1989.

¹⁷ *Ibid.*

Elsewhere, too, whipping was one of the most common forms of punishment right up until the Middle Ages.

It was also a very serious method of discipline, and as a result of the cuts from the lashes, many inmates bled to death. Public whipping was also very popular, and we read, in history, of occasions where the whipping continued mercilessly even after the prisoner had fainted.

Prevention is the fundamental object of such a punishment. A long time subsequently, it was found that in addition to the fact that this is somewhat punishment brutal, yet additionally counterproductive. The individual who is presented to this type of punishment may turn out to be more withdrawn than he was previously. While one of the techniques for punishment at first remembered for the Penal Code was whipping, it was revoked in 1955.

SOLITARY CONFINEMENT

Solitary confinement is a form of slavery that is exacerbated. The sociable nature of man is thoroughly abused by this kind of retribution, and it seeks to cause him misery by denying him the culture of his fellow beings.

This kind of retribution is inhuman and perverse, many criminologists have thought. It is probable that this could turn a man of good mental health into a lunatic. If used in excess, it can cause irreversible damage on the perpetrator, while if used in measure, this type of punishment can be successful in restricted circumstances. Yet if such constraints are exceeded, it is likely to be overly inhumane.

A. Kinds of Punishment in Ancient Times

Over the centuries, numerous ways of punishment have evolved and been introduced in various cultures. Any of the defining characteristics of the penal philosophy around the world before comparatively modern times is torture, sadistic ways of administering death sentences, and all kinds of cruelties in gaols. During ancient times, the following types of discipline existed.

a. Flogging

“The dictionary meaning of flog is to bear very hard with a stick or a WHIP as a punishment”¹⁸ Flogging practice is banned in virtually the whole world, but it nevertheless prevails in most East countries even today.

“In India, this mode of punishment was recognized under the Whipping Act 1864, which was repealed and replaced by similar Act in 1909 and finally abolished in 1955”.¹⁹

Penological investigations have found that whipping has hardly been successful as a form of punishment. But the derived effect on prisoners charged with serious offences does not appear to have any effect.

b. Mutilation

In early times, mutilation was another type of corporal punishment generally used. Mutilation is “to separate a limb or organ, to maim to make imperfect.”²⁰ During the Hindu era, it was understood that this form of punishment was in use in ancient India. Either or both hands of the man who committed robbery were cut off, and his genitals were cut off if he indulged in sexual crime. In fact, the method has also been used in England, Denmark, and several other European countries.

Certainly, amputation/mutilation was worse than capital punishment. Yet we find the offender's amputation more painful than death as we sink deep. The potential offender may forget the pangs of an offender burnt to death over the lapse of time, but an offender imprisoned by surviving amputation and living in society and living a miserable life forever keeps the memories of the pain and suffering fresh in the minds of the offenders. A more shudder is caused by his grotesque look. Therefore, there is more barrier to amputation/mutilation than even capital punishment.

However, because of its barbaric existence, the method is totally abandoned in modern times. These punishments are thought to be due to an inevitable propensity to engage in people's brutality.

¹⁸ "Cambridge Dictionary of American English South Asian Edition (2003), p. 328.

¹⁹ N. V. Pranjape, Criminology and Penology, 9th ed., p.16.

²⁰ Bhargava's Standard Illustrated Dictionary of English Language, p. .534.

c. **Branding**

“As a mode of punishment, branding of prisoners was commonly used in oriental and classical societies. Roman, England, American penal law supported this mode of punishment and criminals were branded with appropriate marks on the forehead so they could be identified and subjected to public ridicule.”²¹

Branding was exercised as a means of revenge in India under Mughal rule. With the rise of humanism, this method of corporal punishment is now fully annulled in the field of penology.

d. **Stoning**

It is also known that the stoning of prisoners to death was performed during the mediaeval period. In certain Islamic nations, such as Pakistan, Saudi Arabia, etc., this mode of punishing the criminal is still in practise. This form of penalty is normally punished by the perpetrators involved in sex offences. In a shallow trench dug in the earth, the convicted individual is forced to stand and people surround him on the other side and throw stone on them before they die due to pelting. Due to the deterrence effect, violence against women , in particular, are under curb in these nations.

e. **Pillory**

This method of punishment was often referred to as literary punishment, although infliction was more frequently used than in poetry. In fact, this method of punishment continued until the 19th century. With his hands and head bound in an iron cage, the convict was forced to stand so that they did not move their limbs. The Pillory is a wooden structure with hollow space for placing a criminal's head and hands. The most agonising influence on him was the limitation on the criminal's bodily actions, and it was hoped that the deterrent involved in this method on discipline would certainly put the perpetrator to book. Before the middle of the twentieth century, A traditional method of pillory execution in much of the world has been to hang condemned prisoners to death in public.

B. Kinds of Punishment under current laws

²¹ N . V. Paranjape, Criminology and Penology, p. 16.

The method of punishment set out in Section 53 of the Indian Penal Code is prescribed under the current system in India.

(a) Fines

Fines have been increasingly preferred by both the law and the legal authority as an extra or substitute means of penalty. In particular, they are most applicable for crimes relating to slavery, the recruitment of people not allowed by statute and the infringement of laws relating to the manufacturing and sale of goods. In regards to property offences, such as embezzlement, bribery, stealing, violations of lottery and gaming laws and lesser offences, such as loitering and disorderly behaviour, they are very often levied.

“In the Indian Penal Code, the provision for fines, as punishment, was justified by its framers thus, fine is the most common punishment in every part of the world and it is a punishment at the advantages of which are so great and obvious that we propose to authorize the courts to inflict it in every case. Imprisonment, transportation, banishment, solitude and compelled labour are not equally disagreeable to all men. With fine the case is different. In imposing a fine, it is always necessary to have regard to the pecuniary circumstances of the offender, as to the character and magnitude of the offence. The mulct, which is ruinous to the labourer, is easily borne by the tradesman and is absolutely unfelt by a rich zamindar.”²²

The quantity of the fine and the expense and enforcement of its payment is the real problem involved in the financial penalty situation.

(b) Imprisonment

Originally, detention was a method of imprisonment of people on prosecution.

The key aims of detention are:

- (i) “Disabling the offender, being danger to society, by locking him up.
- (ii) Preventing prospective offenders by the threat of long term lock up.
- (iii) Reforming the offender under healthy and transforming conditions.

So we can say that the goal of imprisonment is not only punitive but restorative to make an offender a non-offender. Rehabilitation is a prized purpose of prison hospitalization”.²³ The sentence for prison deprivation requires an enlightened rehabilitative process for social justice and social defence. Imprisonment, with new disciplinary methods implemented in prison systems, is It is now one of the world's most accepted ways of punishment; it serves as a

²² S. M. A. Qadri, Ahmad Siddique Criminology, Sth ed., (2005), pp. 130-131.

²³ . M. J., Sethna, Society and the Criminal, Sth ed., p. 238.

effective means of reforming the prisoner and protecting society from anti-social powers at the same time. It thus represents, at one and the same time, the dual function of preventive and reformatory justice.

Rajendra Prasad v. State of U.P. “Justice Krishna Iyer held that giving discretion to the judges to make choice between death sentence and life imprisonment on special reasons under section 354(3) CrPC would be violative of Article 14 which condemns arbitrariness”²⁴

c. Imprisonment for Life

“Imprisonment for life has been authorized as a form of punishment. There are in all 52 sections in Indian Penal Code, 1860”²⁵. Imprisonment for life has got all the authorization as a form of punishment. There are sections in the IPC that provide for life imprisonment. It is different from that of normal imprisonment as it is for life. There are two types of life imprisonment, the first being rigorous and the second being simple.

“The imprisonment for life must be read in the context of section 45 of the Indian Penal Code. Under that provision, the word 'life' denotes the life of a human being unless the contrary appears from the context. Thus, imprisonment for life would ordinarily mean imprisonment for the full or complete span of life. A sentence for transportation of life must prima-facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life.”²⁶

d. Capital Punishment

The term capital means head, and in Latin, the etymology originates from Caput. Crimes that may lead to the punishment of capital are known as capital crimes or capital offenses. “The term capital originates from Latin capitalis, literally 'regarding the head'. Hence, a capital crime was originally one punished by the severing of the head. The natural meaning of the word 'sentence', therefore, would show that disqualification or suspension of the driving license, which is a consequence upon the conclusion of the guilt and order passed on conviction, should amount to sentence.”²⁷ “Prosecutors and sentencing judges alike try to deal with individuals on an

²⁴ AIR 1979 SC 947.

²⁵ Indian Penal Code, 1860.

²⁶ Indian Penal Code, 1860, Section 45 reads as under: The word "life" denotes the life of a human being, unless the contrary appears from the context.

²⁷ Mohammad Shabir Maulamaiya v. State of Maharashtra, 1977 Mah.LJ 338 at p. 341.

individual basis, without regard to social status. The act of pronouncing a judicial sentence on a defendant the sentence so pronounced.”²⁸

Then, in the 18th century, a revolution emerged, raising the voice of indignation against the punishment of human beings. The spearhead of this campaign may be assumed to be Bentham. He investigated the roots of crime and demonstrated how the function can be fulfilled by punishment. Punishment itself, according to him, it was evil, but a required/necessary evil. Unless it yielded greater benefit, there was no justice to be inflicted.

The object of capital punishment is said to be two-fold. In others' eyes, it will still be terror to teach them a lesson by bringing the perpetrator to death. Secondly, if the perpetrator is an incorrigible one, it avoids the replication of the offense by the person on a permanent basis by putting him to death. But it is clear that this penalty is not based on the reformatory purpose of the penalty, in the sense that it is a move in desperation.

A stern view of previous "dowry killings" and "wife-burning tragedies" has been taken by the Supreme Court and it has declined to commute penalties levied by lower courts on such "murders." The following observations of the Supreme Court in *Vasant Pawar V. State of Maharashtra*²⁹ are interesting:

“Wife-burning tragedies are becoming too frequent for the country to be complacent...Law must rise to the challenge of shocking criminology, especially when helpless women are the victims, and the crime is committed in the secrecy of the husband's home.”³⁰

In *Bachan Singh V. State of Punjab*³¹ In a four-to-one plurality decision, the Supreme Court found that the death penalty is legally valid and does not represent a "unreasonable, inhuman or unusual punishment." The Supreme Court ruled that “the death penalty is constitutionally valid and does not represent an unreasonable, inhuman or unusual punishment.”³² However, it cannot be assumed that certain clauses are violative of Articles 14, 19 and 21 of the Constitution.

²⁸ The American Heritage Dictionary of the English Language, Third Edition, p. 1644.

²⁹ (2005) 5 SCC 281.

³⁰ *ibid*

³¹ (1980) 2 SCC 684.

³² *ibid*

CHAPTER – 4

Arguments against Capital Punishment

- (i) The ones who deny this form of punishment say that by death penalty deterrent nature has not been served at all. For instance, in the states where capital punishment has been abolished, there are fewer violent offenses than in any other state. For example, U.S.A., as per the nature of it being a deterrent, the number of crimes in the mentioned stated should have increased.
- (ii) Capital punishment might occur, but there are many more factors involved not just the crime, the circumstances of the offender, the mindset of the offender, and also the unnatural condition that might have forced him to commit the certain act. For any heinous crime life sentence is more than enough to teach him a lesson.

Arguments in favor of Capital Punishment

- (i) On the contrary, some people who support capital punishment argue that there are quite a number of offenders who cannot be corrected, the ones who do it with their will, they are a great danger to society, and there is no justifies reason why the society should have such elements so it's better to eliminate such risks before it eliminates you.
- (ii) Another point put forward in support of the death penalty is that if a murderer is not penalized by death, other relatives of the deceased are very likely to be killed in the murder., and therefore a chain of murders could be created. As long as human feelings are high, it is claimed that capital punishment is a required kind of punishment, as long as the forces of revenge prevail. In the end, we can say that though capital punishment has a purpose, it is not straightforwardly needed in each and every condition. In today's time, when we are surrounded by the facts of human rights, it is not justified to take someone's life but also, there is a constant need to eliminate the threat, so yes, capital punishment should be there, but in way too extreme cases which straight down needs to put a message of intolerance against crime.

CHAPTER 5

CONCLUSION-

One of the unfailing measures of every country's culture is the attitude and temper of the people surrounding the prosecution of crimes and offenders. While addressing the House of Commons, Sir Winston Churchill stated. "The justification of punishment possesses one of the most difficult jurisprudential issues. There are different theories of punishment prevalent in various ages and different justifications are offered among different countries according to variations in culture and civilizations."³³ When the penalty is too severe, it is inhuman to subject the accused to useless suffering; on the other hand, "is it not cruel still to leave the innocent to suffer? When the result of such punishment is too mild to be efficient"³⁴ In order to be deterrent but not so severe to be brutal, discipline must be severe enough. Likewise, "punishment should be moderate enough to be human but cannot be too moderate to ineffective"³⁵.

For any judicial framework that makes the sentence less harsh and any lack of certainty makes punishment more serious, the certainty of punishment is most significant. Severe punishment calls for higher proof of guilt standards. The arrest rate, which is not a good sign of criminal justice, would definitely be lower. The guarantee of punishment depends strongly on the integrity of legislation and good procedural procedures. Judicial justice must reconcile the two essential basic concepts of criminal justice between "Justice deferred is justice withheld" and "Hurried justice is buried justice". The findings of the Malimath committee further describe the existence of the criminal justice system prevailing in India.

Each penalty principle has its own merits and demerits. Therefore, if it depended on any one principle of deterrence, criminal justice would not be safe. Criminal Procedure, "the court has to record reasons for awarding death sentences that means life sentence is rule and death sentence is exception"³⁶.

"Punishment like rigorous or simple, forfeiture of property and fine are appropriate to use as the tool of reformative punishment. The Supreme Court in *Narotam Sing v. State of Punjab* has rightly said that reformative approach to punishment should be the object of criminal law, in order to promote rehabilitation without offending community conscience and to serve social justice"³⁷.

"However, in *M.H. Hoskot v. State of Maharashtra*, Supreme Court cautioned the judiciary for showing more leniency to offenders based on reformative theory that would amount to injustice to the

³³ 5 Lakshminath, A. "Criminal Justice in India: Primitivism to post-Modernism" 48, JILI, (2006).p.53.

³⁴ Jeremy Bentham, op. cit., p .213.

³⁵ Supra note 74 at 169.

³⁶ THE COD. OF CRIM. PROC., Sec. 354(3).

³⁷ 1978 SC 1542.

society. The offences like serious economic offences and other offences, the balance has to be maintained between the security of society and rights of offenders.”³⁸

“In *Dr Jacob George v. State of Kerala*, the Supreme Court held that the object of punishment should be deterrent, reformatory, preventive, retributive and compensatory. Preferring one theory to other is not sound policy of punishment. Each theory of punishment should be used independently or combined according to the merit of the case. Human beings neither are angels capable of doing only good nor are they demons determined to destroy each other even at the cost of self-destruction.”³⁹

Criminals are very much a part of society, and they must be reformed and corrected and made sober by society. Society needs to think from the victim's point of view as well. When the claimant asserts that, in the interest of change and correction, the State is unable to prosecute the criminals, they will take the law into their own hands, they will attempt and prosecute their criminals themselves, and it will lead to anarchy.

³⁸ AIR 1978 SC 1548.

³⁹ (1994) 3 SCC 430.