

## CONCEPT AND PHILOSOPHY OF SENTENCING

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### ABSTRACT

*Justice Cardozo, “a judge even when he is free is still not wholly free, he is not to innovate at pleasure; he is not a knight, errant roaming at will in pursuit of his own ideal of beauty and goodness; he is to draw inspiration from consecrated principles. Where a judge’s values and those prevailing in society clash, the judge must in theory, give way to the objective right”.<sup>1</sup>*

Justice Cardozo correctly sums up the fact that even though a Judge has immense discretion when it comes to sentencing; he cannot exercise such discretion according to his own whims and fancies. He should be guided by some specific principles so that the ends of justice can be met. Sentencing is that stage of the criminal justice system where the actual punishment of the convict is decided by the judge. Ultimately, it is through sentencing that the amount of condemnation a society has towards a criminal is reflected. It must be remembered that the choice of sentence cannot be reduced to mechanical application of some legal rules because the facts of the individual cases are different. There cannot be any stair jacket formula. But there does exist some legal principles which are to be kept in mind while sentencing. Through the views of various criminal law philosophers, these principles have taken a shape and form. In this paper, the author has dealt with the concept and philosophy of sentencing in general. Through the views of various criminal law philosophers, the object, purpose and rationale behind sentencing has been narrated. Also, there is an existing link between the philosophy of sentencing and that of punishment. The author has pointed out the link and shown how it has strengthened the purpose of sentencing.

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<sup>1</sup> Shiv Mohan Singh V. State, 1977 AIR (SC) 949

## CONCEPT OF SENTENCING

Sentencing is defined as the judicial determination of a legal sanction to be imposed on a person guilty of an offence.<sup>2</sup> A criminal Sentence refers to the formal legal consequences related to the conviction. Sentencing is that stage of criminal justice system where the actual punishment of the convict is decided by the judge. It follows the stage of conviction and the pronouncement of penalty imposed on the convict. This is the ultimate goal of any justice delivery system.<sup>3</sup> This stage reflects the amount of condemnation the society has for a particular crime. It is the most public face of criminal justice process.

According to Andrew Ashworth the passing of a sentence is the most public phase of criminal justice system and when the court passes a sentence, it authorizes the use of State coercion against a person for committing an offence. This sanction may take the form of deprivation, restriction or positive obligation.<sup>4</sup> Ashworth furthermore added that while sentencing, the Judge should keep in mind the following principles. These are: to ignore an offender's previous records and sentence the offender on the basis of the current offence; to give certain discount to the first offenders or young offenders, to give more severe sentences with each new offence. A smart sentencing is such where the primary purpose of sentencing is to reduce the crime. Within the limits imposed by law, proportionality and resources prioritized by risk levels, depositions must be based on what is more likely to reduce criminal behaviour. A sentence must be proportionate to the degree of the offence and the responsibility of the offender. A sentence should be enhanced or reduced on the basis of aggravating or mitigating circumstances relating to the offender or the offence. The judge should look into the fact as to whether any bias, prejudice based on race, caste, nation, ethnicity, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor etc is involved in the case. This will be included under aggravating circumstances. Also, whether the offender abused a position of trust and authority, or whether the offender was a terrorist or that he

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<sup>2</sup> Esq., L. C. (2014). THE LAW AND POLICY IN CRIMINAL JUSTICE SYSTEM AND SENTENCING. International Journal of Asian Social Science , 886-897.

<sup>3</sup> Niruphama, R. (2007). Need For Sentencing Policy In India: Spheres Of Justice, Second Critical Studies Conference (Paper Presentation). NALSAR, Calcutta Research Group.

<sup>4</sup> Andrew Ashworth, 4. E. (2005). Sentencing and Criminal Justice. New York: Cambridge University Press.

committed the crime at the direction or association of a criminal organization etc shall be deemed to be aggravating circumstances.<sup>5</sup>

The central question asked by the philosophers of sentencing and punishment is that what is the justification behind sentencing or punishment? To answer this question, the role of the State, it's relationship with the citizens and the role of criminal law must be looked into. It must be understood that punishments involve impositions that are unwelcome by the persons who are punished. Punishment deprives people of certain things like liberty, money, time etc<sup>6</sup>. These are valuable to all persons.

Criminal Law theorists believe that sentence serves two purposes: They serve the goal of deterring crime in future by both the convict and other potent criminals who may commit the same crime and secondly, they serve the purpose of retribution. For the purpose of retribution penalty is inflicted on the criminal.<sup>7</sup> In the public's eye, sentencing is done to determine whether justice has been given or not, to both the victim and the defendant. The underlying rationale of any criminal justice delivery system can be determined by looking at the kind of punishment given for various crimes. The primary objective of criminal sentencing is defined as: punishment, rehabilitation, deterrence & incapacitation.<sup>8</sup>

It must be understood that the Theories of punishment is linked with sentencing in an intrinsic manner. The justifications behind criminal sanctions have influenced sentencing policies over a long period of time. For example: Deterrence helps to reduce future crimes. It makes crime costly. Incapacitation removes the offender from the society. While, the rehabilitative model assumes that crime is determined by social forces and it is not merely the decisions of criminals. The just desert model or retribution model asserts that punishment should be proportional to the gravity of the offences. The minor crimes receive lenient punishments and serious crimes

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<sup>5</sup> Andrew Ashworth and Julian Roberts, 5. e. (2012). Sentencing: Theory, Principle, and Practice. UK: Oxford University Press.

<sup>6</sup> Bagaric, M. (2000). Consistency and Fairness in Sentencing. Berkeley Journal of Criminal Law, Volume 2 Issue 1 , 1-26.

<sup>7</sup> Merriam Webster, since 1828. (n.d.). Retrieved January 14, 2017, from <https://www.merriam-webster.com/dictionary/retribution>

<sup>8</sup> Storm, L. M. (n.d.). The Purposes of Punishment. Retrieved January 17, 2017, from [http://catalog.flatworldknowledge.com/bookhub/reader/4373?e=storm\\_1.0-ch01\\_s05](http://catalog.flatworldknowledge.com/bookhub/reader/4373?e=storm_1.0-ch01_s05)

receive harsher punishments. From this model, the theory of proportionality in sentencing came up.<sup>9</sup>

There are authors who believe that the idea of penal system should be harsh because the aim of the penal system is to deliver punishment or pain. Such punishment is to be inflicted as an answer to the harm the criminal has done to the victim. There is an under pinned retribution behind this philosophy.<sup>10</sup> Also, it must be known to the criminal as well as others that the behaviour which he had resorted to will not be tolerated. There is an under pinned deterrence behind this philosophy.<sup>11</sup> A second outlook towards penal system and sentencing philosophy is making good or repairing the damaged lives. Thus, penal system should not only site punishment; but there must be provisions relating to education, health and related services that improve the chances of an individual to resort to good and useful life when he returns back to the society. Another view behind the jurisprudence of sentencing is referred as “doing the necessary minimum.”<sup>12</sup> The idea behind this philosophy is that the penal system must be used as a social control agency of last resort and those within it must be treated with dignity and respect. Protection of human rights must be there. Under this view, offenders are considered as citizens who are paying their dues to the society in proportion to the harm that they have caused. Thus, the public principles behind penal policy can be divided into: Doing Harm, Making Good and Doing the necessary minimum. Again, there are certain philosophies backing each of these principles. The philosophy for doing harm is inherent in retribution, deterrence and incapacitation. The philosophy for making good is inherent in rehabilitation and repatriation. While, the philosophy behind doing the necessary minimum is inherent in desert theory or proportionality. Now, what sentence would meet the ends of justice depends on the facts and

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<sup>9</sup> Materni, M. C. (2013). Criminal Punishment and the Pursuit of Justice . 2 Br. J. Am. Leg. Studies , 264-300.

<sup>10</sup> Bura, R. (n.d.). Notes on Retributive Theory of Punishment. Retrieved December 25th, 2016, from <http://www.preservearticles.com/2012050131633/notes-on-retributive-theory-of-punishment.html>

<sup>11</sup> Punishment, Stanford Encyclopedia of Philosophy. (n.d.). Retrieved December 12th, 2016, from <https://plato.stanford.edu/entries/punishment/>

<sup>12</sup> Loader, P. I. (n.d.). The Principles and Limits of the Penal System, Centre for Criminology, University of Oxford, Commission on English Prisons Today, Pg-7 to 11, . Retrieved November 20th, 2016, from <http://howardleague.org/wp-content/uploads/2016/04/The-Principles-and-Limits-of-the-Penal-S>

circumstances of each case and the court must keep in mind the gravity of the crime, the motive for the crime, the nature of the offence and all other attendant circumstances.<sup>13</sup>

As mentioned above, the principle of proportionality in sentencing a crime doer is well articulated in criminal jurisprudence.<sup>14</sup> As a matter of fact, the proportion between crime and punishment bears the most significant influence in determining the sentencing of the offender. While sentencing a convict; the courts play the function of providing the link between criminal law and penal system by relating offences with the punishments given to a particular offender. Here, the judges must not forget that the most important aim of sentencing is appropriate sentences. Also, there must be a minimum consistency in sentencing.

There are a number of jurists who have given their views on sentencing and punishment and it includes writers from the field of philosophy, jurisprudence and criminology. There are a number of views on sentencing and punishment from where the aim, objective and rationale behind sentencing can be deduced. However, little consensus is reached regarding what theory should predominate.

The prominent philosophy behind sentencing during the 19<sup>th</sup> century and the initial half of 20<sup>th</sup> century was retribution and deterrence.<sup>15</sup> During the 18<sup>th</sup> century, *Beccaria* prevailed.<sup>16</sup> *Beccaria* specifically said that the judges in criminal cases do not possess the right to interpret the law. The sovereign or the representative of the society is the lawful interpreter in such case. He added that in every criminal case, a judge must reason syllogistically. The legislators must remember that there must be a fixed proportion between crimes and punishment. He said that the crimes of first degree should be assigned the punishment of the last and any action which does not come into the scaling will not be considered as a crime. He furthermore added that crimes are to be measured by the degree of injury done to the society. While some scholars

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<sup>13</sup> *Ibid*

<sup>14</sup> Law Commission of India, R. N. (n.d.). Retrieved January 2nd, 2017, from [lawcommissionofindia.nic.in/reports/Report264.pdf](http://lawcommissionofindia.nic.in/reports/Report264.pdf)

<sup>15</sup> Daly, K. (n.d.). Part-3, Griffith University, Aims of the Criminal Justice System. Retrieved January 12th, 2017, from [https://www.griffith.edu.au/\\_\\_data/assets/pdf\\_file/0010/300988/Chapter-17,-Aims-of-Criminal-Justice-updated-22-April-11-for-webposting.pdf](https://www.griffith.edu.au/__data/assets/pdf_file/0010/300988/Chapter-17,-Aims-of-Criminal-Justice-updated-22-April-11-for-webposting.pdf)

<sup>16</sup> (n.d.). Retrieved August 23, 2016, from An essay on Crimes and Punishment by Cesare Beccaria: <http://www.thefederalistpapers.org/wp-content/uploads/2013/01/Cesare-Beccaria-On-Crimes-and-Punishment.pdf>

have estimated crime by the dignity of the person offended. The consequences on the society have not been focused upon.<sup>17</sup>

Again, *Beccaria's* ideas were challenged by the rehabilitative ideal with an emphasis upon individualization of penalties to fit the needs of the offender and reform him. These days, the principle of proportionality has gained ample importance in the field of sentencing. Traditionally, penal philosophy was based upon Utilitarianism. Later on proportionality concerns and Retributivism came in.<sup>18</sup> Many philosophical writers have focused on penal deserts too. Desert model abide by the principle of proportionality but permit little deviations to other fields also. Recent criminal jurisprudence laid stress on just deserts, limiting retributivism and selective incapacitation.

A more detailed discussion on the views of different Jurists regarding sentencing would help us understand the object and purpose of Sentencing. It would also throw some light on how the process of sentencing has developed through the ages.

## **OBJECT AND PURPOSE OF SENTENCING**

The philosophical tradition of sentencing and punishment usually centered around Bentham's Utilitarianism, Kant's Retributivism and H.L.A Hart's synthesis of Utilitarianism and Retributive ideas (1959).<sup>19</sup>

*Jeremy Bentham:* According to Bentham, social measures are to be judged according to the degree of promotion of aggregate satisfaction. The satisfaction and dissatisfaction, the pain and pleasure in the course of action is to be given importance. According to him, punishment brings harm or dissatisfaction on those who are punished and thus it can be justified only to the extent that it produces in aggregate, other benefits or satisfaction to a greater degree. Net social

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<sup>17</sup> Monachesi, E. (1956). Pioneers in Criminology IX--Cesare Beccaria. *Journal of Criminal Law and Criminology*, Volume 46, Issue 4 , 439-449.

<sup>18</sup> Bagaric, M. (2000). Consistency and Fairness in Sentencing. *Berkeley Journal of Criminal Law*, Volume 2 Issue 1 , 1-26.

<sup>19</sup> 3 Justifications of the Practice: Utilitarian and Retributive. (n.d.). Retrieved January 5th, 2017, from 3 Justifications of the Practice: Utilitarian and Retributive - UC Press E-Book Collection, 1982-2004: <http://publishing.cdlib.org/ucpressebooks/view?docId=ft4q2nb3dn&chunk.id=d0e2384&brand=ucpress>

benefits and general deterrent effects are to be taken into account. Bentham focused on the standard of right and wrong on one hand and the chain of causes and effects on the other hand. He talked about hedonism in two forms i.e. psychological hedonism and ethical hedonism. Psychological hedonism states that all motives of actions are grounded in the apprehension of pain and pleasure and ethical hedonism holds that pleasure is the only good and actions are right in so far as they tend to produce pleasure or avoid pain. Both civil law and penal law are connected to Bentham's legal theory. The primary purpose of civil law is economic security and national prosperity. It draws powerful support from the protection afforded persons, property and expectations by the threat of punishment. Similarly, Utilitarian penal law is framed in terms of the principal objective of deterrence.<sup>20</sup> On the basis of the aforesaid, Bentham has coined certain rules of sentencing and punishment viz:

Firstly, when two offences come in competition, the punishment for greater offence must be sufficient to induce a man to prefer the less. Also, the higher punishments must ordinarily be reserved for more harmful acts.<sup>21</sup> Secondly, the preventive benefits of punishment must be weighed against the pains of those punished (restraining principle). Once an appropriate punishment is set by the judge, it should then be adjusted to reflect the degree of sensibility of the individual offender and he gave 32 circumstances influencing sensibility viz: health, bodily imperfection, pecuniary circumstances, age etc.<sup>22</sup> Finally, general deterrence should be the purpose behind sentencing and punishment and hence the calculation of the sentence and the reasons behind it must be spelt out to the public. Bentham gave the concept of a fictitious tribunal named Public Opinion Tribunal. He said that the most important function of this tribunal is the dissemination of information. Furthermore he added that it would require an unshackled press to ensure widespread publicity and the freedom to criticize unimpeded by censorship or gagging orders.<sup>23</sup>

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<sup>20</sup> Bagaric, M. (2001). *Punishment and Sentencing: A Rational Approach*. US: Cavendish, 2001.

<sup>21</sup> Bentham, J. (2014, December 17). *Principles of Penal Law*. Retrieved November 7th, 2016, from eBooks@Adelaide: [https://ebooks.adelaide.edu.au/b/bentham/jeremy/principles\\_of\\_penal\\_law/complete.html](https://ebooks.adelaide.edu.au/b/bentham/jeremy/principles_of_penal_law/complete.html)

<sup>22</sup> Hirsch, A. v. (1992). *Proportionality in the Philosophy of Punishment*. *Crime and Justice*, Vol. 16, , 55-98.

<sup>23</sup> Posner, R. A. (n.d.). *bentham's influence on the law and economics movement*. Retrieved January 5th, 2017, from [clp.oxfordjournals.org/content/51/1/425.full.pdf](http://clp.oxfordjournals.org/content/51/1/425.full.pdf)

*Kant*: According to Kant, each person must be treated as a value in him or herself and not merely as one among many whose benefits and sufferings may be aggregated for common good. Kant was against the concept of penal utilitarianism where persons are merely treated as a means. According to Kant, while sentencing it must be remembered that an actor is punished in order to induce others to desist from crimes and the severity of the punishment depends upon its degree of preventive impact. Kant propagated Retributivism. According to him, rather than taking society's penal benefits into account, one must be punished on his own deserts. Retributive idea of punishment is grounded in justice and sanctions based purely on utility may treat the punished persons unjustly.<sup>24</sup> Kant gave certain philosophies behind sentencing as follows:

Firstly, the right to punish is the right of a ruler which he has against a subject to inflict pain upon him because of his having committed a crime. Also, juridical punishment cannot be administered as a means for promoting another good either with regard to the criminal himself or the civil society.<sup>25</sup> Secondly, individual autonomy and rationality should be given importance. They have the capacity to make choices and take responsibilities for their actions and to act on the basis of reason and principles rather than passions and these principles should be reflected in specific punishment and sentencing.<sup>26</sup> Thus, in a situation where criminal sanction has already been decided and the question is of its allotment among convicted offenders, sentencing must be done in such a manner that everyone realizes the desert of the misdeed. Finally, the right to retaliation must regulate a public court as distinguished from mere private judgment. Sentences must be given on the basis of pure and strict justice and both qualitative and quantitative matching should be considered in terms of amount of pain and type of punishment.<sup>27</sup>

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<sup>24</sup> Hastie, t. b. (n.d.). *The Metaphysics of Morals* (Part II, "The Science of Right"). Retrieved August 23, 2016, from <https://www.marxists.org/reference/subject/ethics/kant/morals/ch04.htm>

<sup>25</sup> Susan Easton, C. P. (2016). *Sentencing and Punishment: The Quest for Justice*, 4th Edition. UK: Oxford University Press.

<sup>26</sup> *Ibid*

<sup>27</sup> Corlett on Kant, Hegel, and Retribution-Cambridge University Press. (2001, October). Retrieved August 7th, 2016, from <https://www.cambridge.org/core/journals/philosophy/article/div-classtitlecorlett-on-kant-hegel-and-retributiondiv/6919BE324690F55FCDE7D5E86B015BB6>

According to Kant, different types of crimes may be difficult to match with appropriate punishments but death for murder or castration for rape may be clearer. He said that a murderer must be executed and a person committing bestiality must be expelled from the civil society. No other sentence can satisfy the demand of justice.<sup>28</sup>

*Hegel:* Hegel too had same notions like Kant. The Utilitarian notion of drawing up a balance sheet while deciding on moral choice was absurd according to him. According to Hegel, absurd right must be there in order to ensure freedom and right must be restored by doing away with the crime. He argued that deterrence and reformation must be looked into while deciding on the mode of punishment but his main focal point was that those who deserve punishment must receive appropriate punishment. The concept and measure of punishment must be derived from his own act. According to Hegel, punishment consists of the criminal's own rights. He furthermore added that by punishing a criminal he is acknowledged as a rational individual and the criminal gives his consent to punish him by his very act. Hegel accepts that death penalty must be given in case of murders; but at the same time in case of other types of crimes it is a difficult task to find equivalent punishment.<sup>29</sup>

*H.L.A Hart:* In 1968, after the Second World War, Hart's Prolegomenon to the principles of punishment was published. In this publication, he wrote an essay in response to the works of Barbara Wootton who focused on treatment-oriented scheme in sentencing.<sup>30</sup> Hart's theory however rested in crime prevention in which liability would be limited to offenders. Hart focused on constraining the amount of sanction on the basis of proportionality. Hart proposed limits on the distribution of penalties so long as it can be justified independently. He proposed a justification for retributive limit on the substantive criminal law. His arguments rested in the notions of choice and he was of the view that in a free society, citizens should have full

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<sup>28</sup> Potter, N. T. (2002). Kant and Capital Punishment Today. *The Journal of Value Inquiry* 36 , 267-282.

<sup>29</sup> Easton, S. (2016). *Sentencing and Punishment: The Quest for Justice*, 4th Edition. UK: Oxford University Press,.

<sup>30</sup> Hart, H. (n.d.). *Prolegomenon to the Principles of Punishment* - My Illinois State. Retrieved January 7th, 2017, from [my.ilstu.edu/~jkshapi/Hart\\_Prolegomenon.pdf](http://my.ilstu.edu/~jkshapi/Hart_Prolegomenon.pdf)

opportunity to avoid impositions of criminal law.<sup>31</sup> This they can do by abiding the law. His views on sentencing policy are listed below:

Firstly, the principle of proportionality should be the constraint to retribution. It is necessary to differentiate when penalties should be adjusted from those which are deemed to be proportionate to the gravity of crime. Adjustment should be the concern for any relevant sentencing objective. The principle of proportionality cannot be based on a fair opportunity to avoid criminal law's impositions. This is because of the fact that the persons who have broken the law have voluntarily exposed themselves to the consequences of criminal liability. Thus, he advocated proportionality and said that disproportionate sanctions possess a risk of withering away of criminal justice system.<sup>32</sup> Hart said that punishment must involve pain or other consequence normally considered unpleasant. It must be for an offence against legal rules.<sup>33</sup> It must be intentionally administered by human beings other than the offender. It must be an actual or supposed offender for his offence. It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.<sup>34</sup> Secondly, Hart believed in a mixed theory of punishment and sentencing. He believed that a theory of punishment cannot be absolutely utilitarian or retributive, rather a compromise is necessary.<sup>35</sup> He believed in retribution in distribution, a notion of justice which says who all should be punished and to what extent. According to him, the court must impose a sentence which emerges as a compromise between competing factors i.e. mitigating and aggravating.<sup>36</sup> Finally, Hart believed that aggravating factors increase the severity of punishment while the effect of mitigating factors is to reduce the harshness or severity. He gave certain mitigating and aggravating factors while talking about the proportionality of criminal sentencing. Remorse,

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<sup>31</sup> H.L.A Hart. (Feb, 1958), ). Positivism and Separation of Law and Morals,. Harvard Law Review, Vol 71 , pg-593 to 629.

<sup>32</sup> Id.

<sup>33</sup> McPherson, T. (1967). Punishment: Definition and Justification. Analysis, Volume 28 No 1 , 21-27.

<sup>34</sup> Robert Arp, B. M. (2015). The Concept of Hell. UK: Palgrave Macmillian.

<sup>35</sup> Punishment and Sentencing-A Rational Approach. (n.d.). Retrieved February 1st, 2017, from [203.153.33.250:8282/collect/1lawbook/index/assoc/HASH0178.dir/doc.pdf](http://203.153.33.250:8282/collect/1lawbook/index/assoc/HASH0178.dir/doc.pdf)

<sup>36</sup> Punishment | Internet Encyclopedia of Philosophy. (n.d.). Retrieved June 7th, 2016, from [www.iep.utm.edu/punishme/](http://www.iep.utm.edu/punishme/)

offender's past criminal history, offense type, co-operation with law enforcement officials etc are recognized as a legal mitigating factor in many sentencing regimes.<sup>37</sup>

Here it is worthy to mention that among the ancient philosophers, Hart's approach best reflects the present state of sentencing law and practice.

During the past two decades, a change is noticed towards the ancient approach of sentencing and punishment. Modern followers of Bentham like *Richard Posner* have attempted to see Bentham's Utilitarianism on economic grounds. Posner subjects punishment and sentencing under a cost benefit analysis. According to him, the criminal sanction prevents criminal behaviour but incur various expenses on administration. He quantifies the various harms incurred and prevented into costs and says that how much to punish should be decided by considerations of optimum cost reduction. However, this formula would raise certain problems to justice and in criminal sentencing; this redefinition of utility is of less help.<sup>38</sup> Modern retributive theories are given by *Herbert Morris and Jeffrie Murphy*. They focus on the fact that law is a jointly beneficial enterprise. It requires each person to desist from predatory conducts. In this manner, the person not only benefits others but is also himself benefitted by the reciprocal self-restraint by others. Thus, offenders should be made to suffer punishments. The rationale behind penalty is retrospectively focused over here.<sup>39</sup> While *R.A. Duff* focuses on censor-oriented desert theories. He says that any human actor is a moral agent and even though he has committed an offence, consideration should be given on his sense of right and wrong. Thus, the punishment for crimes and sentencing should depend on how reprehensible the conduct is, the harm the conduct does, the culpability of the actor, the arrogance of the actor etc.<sup>40</sup> This theory can be easily equated with the notions of proportionality. *Kleinig* says that it is hard to find any proportionalists who in a strict sense believe that what was done to a victim,

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<sup>37</sup> Robinson, P. H. (2012). Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good-Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment. Penn Law: Legal Scholarship Repository, Faculty Scholarship, Paper 353 , 738-825.

<sup>38</sup> Supra Note 22

<sup>39</sup> Bennett, C. (2013 Springer). Retributivist Theories - White Rose Research Online. Encyclopedia of Criminology and Criminal Justice , 4446-4456.

<sup>40</sup> Hoffman, R. (2015). A New Reading of Kant's Theory of Punishment. Publicly Accessible Penn Dissertations 1063 , pg-14.

should be done to the criminal.<sup>41</sup> He points out that it is very hard to decide as to what punishment one should inflict upon a rapist, a murderer, a dope peddler, a smuggler, a blackmailer, a fogger etc. It is hard to see how strict retaliation can be ethically sustained. While speaking about the theory of proportionality, he said that it is not possible in any direct way to decide the poles of respective scales that serve as an anchor point in sentencing.<sup>42</sup> Modern Retributivist like *Von Hirsch* was of the notion that proportionality limits unlimited punishment. Thus, in practice it will lead to less severe sentencing than that demanded by other theories.<sup>43</sup>

From the above detailed discussion, it can be noted that the theories of punishment and the policy of sentencing are inherently linked. The criminal law philosophers have time and again talked about different theories of punishment to define the object and purpose of sentencing. As we know, Punishment is the penalty or pain inflicted upon a person who does an act or omission defined under the criminal law. The ultimate goal of any criminal justice system is punishment because it contains in itself the condemnation of the society and is backed by the sanction of the State.<sup>44</sup>

The quantum of punishment is decided by the judges through the process of sentencing. This process comes after conviction and pronouncement of penalty imposed upon the convict. The object of sentencing is best understood by analyzing the theory(s) of punishment that the judge resorted to while sentencing the offender. At times a judge may be influenced by Restorative Justice and his aim may be to bring the victim back to the position where he was before the crime was committed. This can be seen in tort or economic crime cases. Again, at times a judge may be influenced by deterrence and retribution. Deterrence and Retribution are usually seen in cases of tremendous mental and physical harm where it is almost impossible to bring the victim back to position where he/she was before the crime was committed. Again, at times the aim of sentencing may be rehabilitation and reformation where the judge may resort to

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<sup>41</sup> Ryberg, J. (2004). *The Ethics of Proportionate Punishment-A Critical Investigation*. London: Kluwer Academic Publishers.

<sup>42</sup> *Ibid*

<sup>43</sup> Retributive Justice (Stanford Encyclopedia of Philosophy). (n.d.). Retrieved January 6th, 2017, from <https://plato.stanford.edu/entries/justice-retributive/>

<sup>44</sup> Materni, M. C. (2013). Criminal Punishment and the Pursuit of Justice-Harvard Law School . 2 Br. J. Am. Leg. Studies , pgs-276 to 300.

treatment of the offender because he believes that taking revenge would not serve any penal purpose.<sup>45</sup> A deeper insight into the theories of punishment will help us understand how the judges formulate their rationale while sentencing an offender.

## **PHILOSOPHY BEHIND SENTENCING AND PUNISHMENT**

The philosophies underlying sentencing and punishment may be the reflection of retribution, incapacitation, deterrence, restoration, reformation or a combination of all. The rationale behind the theory of retribution is revenge and the underlying principle behind this theory is that the criminal should get back what he has done to the victim. This Theory has its roots in the Judeo-Christian laws and Mosaic laws of Old Testament which talks about the principle of an eye for an eye and a tooth for a tooth.<sup>46</sup> Again, the theory of incapacitation and prevention is based on Reductivism where through physical incapacitation or prevention, the criminal urge to repeat the crime is reduced. It has its roots in Utilitarianism and it says that the pain inflicted through punishment should justify that the offender does not repeat the crime. The principle of incapacitation is followed in the strictest sense when a judge sentences a convict to capital punishment. Other forms of incapacitation are life imprisonment; forced labor with incarceration etc.<sup>47</sup> The rationale behind the theory of deterrence can be directly linked with Bentham's Theory of Utilitarianism. Bentham said that the human society is ruled by two sovereign masters namely: pleasure and pain and actions are approved when they promote happiness or pleasure of all. Inversely, actions are disapproved when they inflict pain. To deter a person from crime it is thus necessary to inflict pain. Deterrence may be specific as well as general. In specific deterrence, the aim is to deter the offender or potential offender from repeating or doing an offence. The aim of general deterrence is to deter all the members of the society from committing an offence.<sup>48</sup> The rationale behind the theory of restoration is to bring

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<sup>45</sup> Areti, K. K. (July, 2007). Role of Theories of Punishment in the Policy of Sentencing. Selected Works of Krishna Kumari Areti prof , pgs 1-41.

<sup>46</sup> BRADLEY, G. V. (2003). RETRIBUTION: THE CENTRAL AIM OF PUNISHMENT. Harvard Journal of Law & Public Policy, volume 27 , pg- 19 to 31.

<sup>47</sup> Leipold, A. D. (2003). Recidivism, Incapacitation, and Criminal Sentencing Policy. University of St. Thomas Law Journal, Volume 3 , pgs-536 to 558.

<sup>48</sup> BURNS, J. H. (March 2005). Happiness and Utility: Jeremy Bentham's Equation. Cambridge University Press, Utilitas Vol. 17, No. 1, , Pgs 46 to 61.

back the parties to the crime in the previous in the previous situation where they belonged before the crime was committed. Here, usually the offender helps the victim to get back to the earlier position. This is because; the offender should take the responsibility of his deed and repair the harm done to the victim. This can be done through imposing fines, offender-victim agreements, community mediation etc. It is necessary to note here that restorative justice is possible in case of tort crimes or economic crimes. Crimes which are of more severe nature are impossible to uproot through restorative justice<sup>49</sup> Last but not the least, the theory of reformation is the one where the criminal justice system aims at bringing back the criminals to the social mainstream by reforming them. It is a more individualistic approach where the crimes committed by the convicts are viewed as a mental distortion. The basic principle underlying this theory is that no one is born a criminal; it is the social environment which turns a person into a social deviator. The aim of correctional services for the inmates of a Peno-Correctional home is to reform them into better citizens.<sup>50</sup>

It must be remembered that a single theory of punishment cannot address the criminal justice system in a holistic manner. The principle that rules sentencing practices all over the world take into account all the theories of punishment in such a manner so as to reach a sentence where the purpose of criminal justice system is solved. Different theories of punishment defines justice in different manners but its construction depends upon how a sentencing judge rationalizes the punishment he gives. A punishment given from a Retributist view point may seem to be unjust from a Reformatory perspective and vice-versa.<sup>51</sup>

If we look into the development of criminal justice system, the classical approach was towards Utilitarianism and Retribution. During the late 18<sup>th</sup> and early 19<sup>th</sup> century, Retribution and Utilitarianism played a significant role. The works of Hegel, Kant, Bentham, Mill and Beccaria have strong influence of these theories. They tried to form a link between punishment and the

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<sup>49</sup> Daly, P. K. (n.d.). Reparation and Restoration, Prepared for Michael Tonry (ed.) Oxford Handbook of Crime and Criminal Justice. New York:. Retrieved January 19th, 2017, from [https://www.griffith.edu.au/\\_\\_data/assets/pdf\\_file/0020/220475/Reparation-and-restoration-as-of-1-Feb-2011.pdf](https://www.griffith.edu.au/__data/assets/pdf_file/0020/220475/Reparation-and-restoration-as-of-1-Feb-2011.pdf)

<sup>50</sup> Mishra, S. (2016). Theories of Punishment – A Philosophical Aspect. Imperial Journal of Interdisciplinary Research (IJIR), Vol-2, Issue-8, , pg 74 to 77.

<sup>51</sup> Piper, S. E. (2008, second edition). Sentencing and Punishment, the Quest for Justice. UK: Oxford University Press

seriousness of the offence. “Just deserts” later on served as a basis for the principle of proportionality which is a well-known sentencing principle all over the world. Utilitarianism contains in it the concepts of general deterrence, specific deterrence, incapacitation as well as rehabilitation. Utilitarianism focuses on prevention of crime by intimidation, incapacitation or reformation of the criminal. In modern sentencing practices, it is seen that Utilitarianism oppose limitless penal expansion while Retributivism bases its arguments on desert theory where punishment is expected to be proportional with the seriousness of the offence. According to the Retributivists, the crime itself justifies the punishment and the purpose of punishment and sentencing is embedded in the legal consequence of the guilt. Bentham argued that punishment is pain and thus it should be avoided. While talking about general deterrence he furthermore mentioned that sentences should be calculated in such a manner that it deters the mass from committing the offence the convict has committed. Again, while talking about specific deterrence he said that sentences should be calculated in such a manner that a fear is created in the mind of the offender and he is prevented from engaging in repeated criminality.<sup>52</sup>

During the 20<sup>th</sup> century Reformation and Rehabilitation in sentencing peeped in because the human rights perspective received much importance after the Second World War. Equal importance was given to the criminal as it was given to the crime. As a result of reformation and rehabilitation, concepts like probation, parole, admonition, open air prisons etc became prominent throughout the world. It is worthy to note here that the Theory of Rehabilitation and Reformation is basically a Utilitarian rationale for punishment and it aims at preventing future crimes by giving the offenders a chance to reform. It is argued that the civilized goal of criminal justice is reformation.<sup>53</sup>

However, it depends upon the facts and circumstances of a specific case that which theory of punishment should be given more importance. At times, a combination of all the theories may serve the need of a specific case. A sentence may combine Utilitarian principles with that of Retributive one. For example: A convict may be sentenced to rigorous imprisonment for a long span of time. Alongside, he may be given educational and cultural programs inside the prison walls which would help him to become a better human being in near future. Even if the Judges are given enough freedom to exercise judicial discretion and opt for a definite theory or a

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<sup>52</sup> Ibid

<sup>53</sup> *Supra* Note 44

combination thereof; they are expected to apply their judicial minds and be rational while serving the need of a specific case. Punishment must be just and it must be directed towards the good of the society. Sentencing must never be inappropriate or inadequate. It will question the very principle of justice.

## **CONCLUSION**

In this paper, the author has explained the concept and philosophy of sentencing in the light of the views of eminent Criminal Law scholars. The author has also shown the intrinsic link between the Theories of sentencing and that of punishment. It is important to note here that the individual Judges inter alia take the help of several theories behind sentencing and punishment so as to reach to a justification behind such sentencing.