Theory of Deterrence : A Justification for Capital Punishment

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Abstract

To come to Criminal Law in a spirit of criticism is to find a subject full of paradoxes. There are some signs of new approaches to the study and teaching of criminal law but these lie mainly in the area of philosophical reflection on fundamental aspects of criminal doctrine and the justification of punishment. Theories of punishment are useful to the extent that, they help to understand and explain reality.

This article is a humble attempt to trace the original doctrine underlying the ***theory of deterrence*** *and the extent of its applicability in the* ***sentencing policy*** *followed by the present Indian courts with emphasis to death penalty. Assessing the* ***deterrent effect of the death penalty*** *is much more than a question of interest to social science research.*

A debate over capital punishment would show that, normative considerations and deterrence is not the only issue relevant but there are other considerations to be looked into such as whether capital punishment can be administered in a non-discriminatory and consistent fashion.

Keywords : *Theory of deterrence, Death Penalty, Sentencing policy, Sentencing guidelines, Violation of constitutional rights.*

> *"When the code of laws is once fixed, it should be observed in the literal sense, and nothing more is left to the judge than to determine whether an action be or be not conformable to the written law"* ***Cesare Beccari***

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Introduction

Death Penalty has been a punishment in practice which the States have claimed to be structured by certain definite aims and values. The theories and philosophies underlying punishment must therefore be accessed not merely as they appear as it is but as they are realized in specific practices[1]. Since state punishment is an exercise of state power, theories of punishment generally entail or rely upon some broader political theory of the state. In this research paper the researcher attempts to specifically analyze whether death penalty as a punishment so provided can be evaluated in terms of consequent affairs, such as deterrence and crime rates.Lately, countries have attempted to make a study on the effect of deterrence on capital punishment. The studies conducted in this regard are not conclusive to lay down an emphatic rule that the theory of deterrence has not effect on capital punishment. To put it in other words, it has become needful to analyze the principles underlying the ***'Theory of Deterrence'*** and its applicability in the present day criminal justice system with special reference to capital punishment.

Deterrence: Concept and Principles

In the 18th century Cesare Beccaria in Italy and Jeremy Benthamin England, both utilitarian and social philosophers were concerned with legal and penal reform rather than with formulating an explanation of criminal behavior. They promoted reforms which many of the leading intellectuals of the day were advocating. Their theories had an affinity towards deterrence doctrine in criminology. Thus Deterrence and Utilitarianism has been in discussion since eighteenth century and deterrence has been one of the most researched as well as criticized doctrine in criminology. Interestingly, Bentham used deterrence not as an objective to be achieved, but as the currency to determine whether the cost is satisfactorily compensated for by creating a fear that punishment will undoubtedly be inflicted upon other offenders – a phenomenon which he termed as 'the apparent value of punishment'[2].

Ronald L Akers in one of his articles[3] has quoted Gibbs and states the definition of deterrence as 'in a legal context, the term deterrence 'refers to any instance in which an individual contemplates a criminal act but

refrains entirely from or curtails the commission of such an act because he or she perceives some risk of legal punishment and fears the consequence'[4].

The deterrence model is assumed to be drawn from the classical school of criminology in which man was seen as fundamentally hedonistic and therefore could be deterred from the crime only by *swift, sure and severe* punishment. This means that theory of deterrence is not a tool in itself for achieving crime prevention in a society.[5] The effectiveness of such a theory in prevention of crime is reflected through the introduction of new laws along with their associated threats of punishment and enforcement. This to a larger extent depends on the steps taken by the State in confirming the sanctions which are already prescribed through the laws. Moreover, it is understood that changes in the certainty and severity of punishment for violations of particular existing laws also depends on the social and moral contexts into which they are introduced[6]. Criminal deterrence has been divided into basically two categories based on its purpose - a) Prevention and b) Deterrence which is further divided into two namely a) general deterrence and b) special deterrence.

As already submitted, firstly this research paper will be focusing on the essence of the deterrent dimension of the theory and analyzing whether the theory still stands good and effective in communicating to the public the deliberate threat of harm and thereby discourage anti- social conduct across the society. Secondly, it is understood that when the deterrence doctrine is expanded to include other variables other than actual risk of legal sanctions,it is no longer distinctively deterrence theory. It becomes something else and deterrence loses its characteristics[7].

To understand the above mentioned statements quoted, it is necessary that we analyze the assumptions underlying deterrence. The principle in the deterrent theory reflects three assumptions- ***Severity, Certainty and Celerity***. These being the objective of deterrence, any punishment falling within this theory must be swift and certain apart from being severe. At this juncture it is pertinent to quote Cesare Beccaria when he said[8]

...the more immediately after commission of the crime a punishment is inflicted, the more just and useful it will be. It will be more just, because it spares the criminal, the cruel and superfluous torment of uncertainty...the degree of the

punishment, and the consequences of a crime, or to be so contrived as to have the greatest possible effect on others, with the least possible pain to the delinquent. If there by any society in which this is not a fundamental principle, it is unlawful society.

A relationship is also drawn between certainty and severity. Taking up the third assumption of **certainty** – it refers to the probability of apprehension and punishment for a crime. It is more effective in deterring crime than severity of punishment. Both Beccaria and Bentham saw a connection between certainty and severity of punishment[9]. The consensus is that certainty of punishment is more important than severity of punishment in deterring crime. As quoted by Kevin C Kennedy in his article[10]"Severity only has a deterrent impact when the certainty level is high enough to make severity salient"[11].Thus a punishment prescribed in a legal system has to accommodate all these assumptions to come to the rational decisions regarding crimes and criminals. If it becomes capricious and uncertain, the system cannot guarantee sufficient ground for deterring offenders and thereby becomes ineffective in controlling crime.[12] In order to prevent crime, therefore, criminal law must provide reasonable penalties which are applied in a reasonable fashion to encourage citizens to obey rather than violate the law.[13] It is also pertinent to note that, these penalties need to be not only reasonable but also be enforced swiftly. If the punishment for a crime is severe, certain and swift the citizens will rationally calculate that, more is to be lost than gained from crime and will be deterred from violating law[14].But all this depends on the sanction regime that are legally available in the system and how that authority is administered which will determine the certainty, severity and celerity of sanctioning options available for a punishment of a specific type of crime.[15] The success of a crime prevention policy in general is evaluated based on (i) its capability in making citizens not even consider breaching the rules of law, or abiding by them out of habit, (ii) the degree to which it can avert habitual offending from emerging, and (iii) the degree to which the policy can make those who consider acting in breach of the law choose not to do so[16].

But now the application of the principles of this theory in the strict sense as propounded by its founding fathers has lost its importance and has paved much way for other criminological theories and concepts like

reformation, incapacitation, community sentencing etc. Most of the empirical studies conducted have been to conclude whether the theory of deterrence has lost its power to deter. But it is felt that in the light of the other alternate punishments as mentioned above and their fast growing influence on the existing criminal justice system and the sentencing policy followed by the judges most of the principles underlying deterrence in its spirit and substance are losing its applicability. It is pertinent to note that when the various assumptions of the doctrine have not been applied appropriately, it is incorrect to conclude that the principles have no effect on any of the punishments prescribed. At this juncture it is also important to point out the various conclusions put forth by eminent scholars about the role played by deterrence in making comply with the law and the gaps found in various empirical researches conducted to conclude the effectiveness of deterrence on the society. Many a times the researchers have been faced with a question of how far the principle underlying the theory of deterrence is backed by empirical research. Though the various research findings do not give a complete positive answer, it is understood that, the reason for it is due to the research gap and the fact that, some deterrence researches have been methodologically weak. Hence, it can be concluded that, the various assumptions underlying the theory of deterrence are not false, rather they have not been convincingly tested or tested at all. One of the most controversial areas where the importance of the theory and its effect is discussed is when it comes to capital punishment[17].

Effect of Deterrence on Capital Punishment

To discuss this sub topic here, reliance has been placed mainly on the studies conducted by the National Research Council on 'Deterrence and Death Penalty'[18]and the studies conducted by scholars like Eric Reitan[19] and Daniel S. Nagin[20]. Keeping in view these studies, a comparative analysis is also drawn on the findings of the 262nd Law Commission Report[21] submitted by the Law Commission of India which has also referred to the NRC for concluding its findings. These studies have generally debated whether deterrence is but one of many considerations relevant to deciding whether the death penalty is good public policy. The study conducted by the National Research Centre kept in mind the larger interest of the U.S. society at large but the committee has been mindful of the importance of reaching as broad

an audience as possible.

One of the major issues, the National Research Council as well as the latest Law Commission in India, among others that looked into were in the light of the research and other available data and evidence whether it could be concluded *that capital punishment has the magnitude to effect homicidal rates.*

The 262nd Law Commission Report suggested that death penalty does not serve the penological goal of deterrence any more than life imprisonment[22]. Among other authorities they have also relied on the National Research Council Report submitted in the year 1978 which based on their research concluded that *"available studies provide no useful evidence on the deterrent effect of capital punishment."* But the very same council in the year 2012 submitted another report which concluded thus:

Research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates....Consequently, claims that research demonstrates that capital punishment decreases or increases the homicide rate by a specified amount or has no effect on the homicide rate should not influence policy judgement about capital punishment[23]

The 262nd Law Commission Report also went a step forward to analyse the need for retaining capital punishment for serious offences like '***terrorism***'. It was suggested that "since terrorist crimes are very different from ordinary crimes in terms of the motives applicable... deterrence assumptions need a re-look to retain the death penalty for terrorism related crimes".[24] The very fact that it is suggested that Capital punishment needs to be retained for any one or two offences itself contradicts the very conclusion that the punishment has lost its deterrent value. Now assuming *arguendo* that the punishment has to be retained for offence in the interest of public security, despite its non-deterrent value, such a policy will definitely encourage debates over the punishment being applied arbitrarily only on a particular category of offenders and not others. Moreover, the retention of such punishment for the offence like terrorism ***does not in any way deter other potential rebels, but in fact make the executed person a martyr, whose death would inspire, and not deter potential offenders***.[25]

Having been said so, it becomes necessary to discuss the concept of deterrence and peruse the extent of its applicability in the current Indian criminal justice system when dealing with capital punishment. To start with the words of the Victorian English judge Sir James Fitzjames Stephen:

"the plain truth is that, statistics are no guide at all... the question as to the effect of capital punishment on crime must always be referred not to statistics, but the general principles of human nature"[26].

Thus the punishment of death is therefore, a war of a whole nation against a citizen whose destruction they consider as necessary or useful to the general good[27].Furthermore, in all nations where death is used as a punishment ... it becomes necessary that for men to be witnesses of the laws, criminal should often be put to death.

Indian Judiciary on the effect of Deterrence

It has been inaccepted among many research scholars that there are many shortcomings in the empirical study conducted but nevertheless it is concluded that the legal threat of punishment, by and large, does help prevent crime[28]. The Indian judiciary has also always been of the opinion that, acts of extreme brutality, revolting and gruesome which shakes the judicial conscience should be imposed with maximum punishment under the law as a measure of social necessity which work as a deterrent to other potential offenders[29].

According to W. Friedman, the purpose of the penal law is to express a formal social condemnation of forbidden conduct, buttressed by sanctions calculated to prevent it. Implicit in this formulation are three questions, to which different societies give very different answers: First, what kind of conduct is 'forbidden"? Second, what kind of 'formal social condemnation' is considered appropriate to prevent such conduct? Third, what kinds of sanctions are considered as best calculated to prevent officially outlawed conduct?[30] To quote the honourable Supreme Court in the case of *State of Madhya Pradesh* v. *Sheikh Shahid*[31]where it was observed:

Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, for e.g. where it relates to offences against women, dacoity,

kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic a view merely on account of lapse of time in respect of such offences will be result-wise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.[32]

In *State of Madhya Pradesh* v. *MunnaChoubey* and others [33]the honourable Supreme Court observed that :

The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law...The contagion lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence.[34]

Therefore, if the legal system of a State takes towards showing undue sympathy in imposing inadequate sentence it is felt that such a system would do more harm to the criminal justice system thereby undermining the confidence of the general public in the efficacy of law. It therefore becomes the responsibility of every sentencing court to execute their duty having regard to the nature of the offence and the manner in which it was committed.[35] Further in *JashubhaBharatsinhaGohil* v. *State of Gujarat*[36], the court held that, in the matter of death sentence the object should be to protect the society and to deter the criminal in achieving the avowed object to law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be[37].

Punishment may be regarded as one of the institutions of society and in this context; sentencing is an institution for the expression of social values as well as instrumental means to a clinical penological end[38]. When men started living independent and united in a society they decided to

sacrifice one part of their liberty to enjoy the rest in peace and security, thereby constituting sovereignty who becomes the lawful administrator and in whose hands the liberty was deposited.At this juncture, it becomes pertinent to quote Beccaria when he said that, *it was necessary to defend the liberty so deposited from the usurpation of each individual.* He states that, some motives therefore became necessary to prevent each individual from encroaching into the liberties of others. Such motives are the punishments established which he felt were necessary and sufficient to counter balance the effects of the passions of the individual which oppose the general good. These punishments are of various kinds which are incorporated in the criminal jurisprudence. On one hand it has to respond towards 'dark night' of social cry for retribution against an act done in most diabolic and brutal manner and of a magnitude where the conscience of the society is revolted; on the other hand it has to respect and value the 'new moon' of 'personhood' and the right of a human being in its residual human essence'[39].Hence, while deciding the kind of punishment to be applied in each case it is important that the principle of proportionality has to be applied depending on the crime that is committed.. Since, death penalty, is often termed as the most brutal amongst all possible kinds of punishment, it must face the same test. Therefore, it becomes necessary that, the punishment should fit the crime and not the individual thereby demanding the law to strictly apply the penalty called for a particular crime which is not varied by the characteristics or circumstances of the offender.

In many countries where capital punishment is retained, whether or not death penalty is imposed for a capital offence is left to the discretion of the court and it is the judge who decides whether capital punishment is to be granted or not. As in the United States, after the decision of the Supreme Court in the case of *Ring*v. *Arizona*[40] it has been established that, the jury must first find the fact that, beyond a reasonable doubt when deciding whether a convict is eligible for death penalty. This does not exclude the judge from making the ultimate sentencing decision but, only requires that the jury should determine the facts for granting this punishment beyond reasonable doubt. This is not the uniform principle followed all over United States. In some states, only the judges decide the sentencing and in some other states, the judge gets the power to override a jury decision. But in

most other states, jury decides whether capital punishment is or not imposed.However, it may be noted that, in all these states there exists some mechanisms that aim to ensure that the punishment is not imposed arbitrarily and discriminatorily.

The sentencing policy for capital punishment in India has been no different from other countries. Since the landmark judgment of *Bachan Singh* v. *State of Punjab*[41], the policy followed in death penalty cases has been the 'rarest of rare' doctrine. To the court this doctrine meant a case which was so serious that it shocked the conscience of the society collectively.One of the basic principle underlying classical criminology is that, the legislators enact laws that clearly define what is unlawful, prescribe punishment for law violation sufficient enough to offset the gain from crime, and thereby deter criminal acts by citizens. Judges should do no more than determine guilt or innocence and should use no discretion to alter penalties provided for by law[42]. Having said so, emphasis may be given to the fact that in the modern era, application of this principle may not be possible due to the cry for the need of other alternate reformative punishments. But as long as death penalty remains as a punishment in the books of criminal law, it is necessary that the judges need to be properly guided so that the discretion enjoyed by them is not discriminatory and arbitrary. In the recent past an analysis of the Indian cases shall reflect the fact that one of the most important issues brooding the judicial system is to identify and crystallize a proper sentencing policy- especially where capital punishment has to be granted.

In a majority of offences, the I.P.C and other penal laws provide punishment of imprisonment of varying terms. The law normally prescribes maximum punishment to be awarded in respect of an offence and except in a very few cases, it does not prescribe the minimum term of imprisonment. The penal policy is to give wide discretion to the court in awarding the appropriate sentence after considering the various factors which are aggravating and mitigating[43].In most of the countries around the world, the principal sources of sentencing law are legislation and judicial decisions. But in the Indian Criminal Justice Administration, each judge exercises his discretion according to his own judgement and there is no guidance in this regard in order to select the most appropriate sentence in each case. There is

therefore no uniformity. But that punishment must be proportionate to the offence is recognized as a fundamental principle of Criminal Jurisprudence around the world. In *Weems* v. *United States*[44],the petitioner had been convicted for falsifying a public document and sentenced to 15 years of what was described as '*cadena temporal'*, a form of imprisonment that included hard labour in chains and permanent civil disabilities. The U.S Supreme Court, however, declared the sentence to be cruel not only in terms of length of imprisonment but also in terms of shackles and restrictions that were imposed by it. That punishment for crime should be graduated and proportionate to the offence, is a precept of justice, declared by the court. It is also important to quote the principles laid down by the court in *Vikram Singh's*[45] case. The Honorable Supreme Court made a thorough study on the principle of proportionality laid down by various jurisdictions around the world and summed up that:

a) Punishments must be proportionate to the nature and gravity of the offense for which the same are prescribed.

b) Prescribing punishments is the function of the legislature and not the courts.

c) Courts, however, have the jurisdiction to interfere when the punishment prescribed is so outrageously disproportionate to the offence or so inhuman or brutal that the same cannot be accepted by any standard of decency.

d) In dealing with questions of proportionality of sentences, capital punishment is considered to be different in kind and degree from sentence of imprisonment. The result is that while there are several instances when capital punishment has been considered to be disproportionate to the offence committed, there are very few and rare cases of sentences of imprisonment being held disproportionate[46].

In *Mahesh* v. *State of U.P*[47], it was observed that "proportion between crime and punishment is a goal respected in principle and in spite of errant notions; it remains a strong influence in the determination of sentences. The practice of punishing all serious crime with equal severity is now unknown in civilized society, but such a radical departure from the principle of proportionality has disappeared from law only in recent times. Quite

apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequence"[48].

At this juncture the notable case of *SwamyShardhananda* v. *State of Karnataka*[49] needs a special mention. This case stands as a typical example of where the court was reluctant in confirming the death sentence of the accused and exercised its discretion in determining the sentencing policy of granting life imprisonment even though it felt that the crime committed by the accused was very grave and highly depraved. The Apex Court observed:

The inability of Criminal Justice System to deal with all major crimes equally effective and the want of uniformity in the sentencing process by the court lead to a marked imbalance in the end results. On the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this court and on the other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the court in giving punishments or worse the offender is allowed to slip away unpunished on account of deficiencies in the Criminal Justice System. Thus the overall larger picture gets asymmetric and lop-sided and presents a poor reflection of the system of criminal administration of justice. This situation is matter of concern for this court and needs to be remedied[50].

The concern of the judiciary that is mentioned by the Hon'ble Supreme Court in *Shradannanda's Case* make it apt to quote Cesare Beccaria when it was mentioned that ...

the Authority of making penal laws can only reside with the legislator...judges in criminal cases have no right to interpret the penal laws, because they are not legislators...if the judge be obliged by the imperfection of the laws, or chooses to make any other or more syllogisms, it will be an introduction to uncertainty...We see the same crimes punished in a different manner at different times in the same tribunals, the consequence of not having consulted the constant and invariable voice of the laws, but the erring instability of arbitrary interpretation.

Keeping in mind the various judgments passed by the Supreme

Court and the concerns raised by the various authorities, it is felt that disparity and discrimination in sentencing is a major issue brooding over the present criminal justice system. In other words, ***Variance*** in the sentences in a particular crime stand as the point of controversy over the existence of capital punishment in the criminal jurisprudence. Thomas S. Ulen in his article[51] has made a mention about this matter. He argues that aspect of variance in a convict shall vary to such an extent that justice could be provided only by the sentencing judge who will be able to determine the punishment which they would decide based on their experiences. Thus , to him greater the variance in the sanction in a given crime, the greater the uncertainty facing any potential criminal and the increased uncertainty might play havoc with the deterring effect of criminal sanctions. It is felt that even among the judges following a sentencing policy in India; the variance is seen in the pretext of *'mitigating and aggravating circumstances'*. Also the test of 'rarest of rare' has given way to further tests called ***The Crime Test, the Criminal Test and the Rarest of Rare Test'***. [52]It is humbly felt that more the variance in the sentencing policy, more is the disparity and arbitrariness that will prevail in the sentencing policy.

The Law Commission of India on Death Penalty, 2015[53] observed that,

> ...the death penalty operates in the system that is highly fragile, open to manipulation and mistake, and evidently fallible. However objective the system becomes, since it is staffed by humans, and thus limited by human capacities and tendencies, the possibility of error always remains open, as has been acknowledged by the world over, including the most highly resourced legal system[54].

The Commission in its fifth chapter titled 'Sentencing in Capital Offences' has dealt with the fallibility of the Criminal Justice System and the death penalty. The Report also quoted instances where the Supreme Court itself has acknowledged high rate of error in the application of doctrine of 'rarest of rare'. A perusal of *Santhosh Kumar Bariyar* v. *State of Maharashtra*[55], *Shankar KisanraoKhade* v. *State of Maharashtra*[56] and *Sangeet* v. *State of Haryana*[57]will bring to light the fact that, the court has acknowledged error in sixteen cases, involving death sentences to 20 persons. Further the court in *Dhananjay Chatterjee* v. *State of West Bengal*[58] the measure of punishment

in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenseless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals[59]. Similarly the passing of the sentence of death must elicit the greatest concern and solicitude of the judge because, that is one sentence which cannot be recalled[60]. Post *Bachan Singh* capital sentencing has come into the folds of constitutional adjudication by virtue of the safe guards enumerated under Article 14 and 21 of our Constitution. However, the passage of 36 years since the decision and the change in global and constitutional landscape has made the 262nd Report of Law Commission to re-evaluate the constitutionality of death penalty. The Commission has observed that, the options of reforming the present system to remove the concern regarding arbitrariness and disparate application of the death penalty are limited. On the one hand, as *Bachan Singh*, and subsequently *Mithu* v. *State of Punjab*[61] have held, judicial discretion cannot be taken out of the sentencing process. A sentencing process without discretion may be more consistent, but will also be equally arbitrary for ignoring relevant differences between cases. In such a system sentencing is likely to be severely unfair and would definitely not remain a judicial function[62].

Hence it is felt that if there be a written law, it gives very little chance for arbitrary and capricious interpretation for the judiciary. The Malimath Committee Report stated that "sometimes the courts are unduly harsh, sometimes they are liberal... therefore, in order to bring about certain regulation and predictability in the matter of sentencing, the Committee recommends a statutory committee to lay guidelines on sentencing[63]....But Contrary to the view taken by the Malimath Committee with regard to death sentencing, the 262nd Report of the Law Commission states that India's own jurisprudence, as well as the experiences of other countries warns against standardization and categorization as a response to the arbitrariness of the death penalty[64]. The Commission also recommends one more option- the option of putting into place guidelines that are less rigid, and allow for flexibility, but nonetheless limit the scope of application of the death penalty.

Conclusion and Recommendation

This paper has tried to only analyse whether deterrence has lost its

value among the theories of punishment. On understanding the various assumptions of principles underlying the theory of deterrence, it is incorrect to say that death penalty has lost its deterrence because the principles that are being followed are not necessarily deterrent. The reasons are firstly, one of the main aspects, as already mentioned, that underlines deterrence is the assumption of 'swiftness' in granting punishment. But the Indian Criminal Administration is such that delay in execution of death sentence not caused at the instance of the offender has become one of the strong grounds for the Government to commute death penalty to life imprisonment. This shows that deterrence and its principles remain the same even today but it is the existing criminal institutions like the police and the courts that have not risen to the level of providing justice at the earliest be it either to the victim or the offender.

Secondly, going with the global thought that death penalty has to be abolished, the courts have started granting life imprisonment beyond the period of 14 years thereby denying the offenders right of remission. This matter was extremely discussed in *Muthuramalingam* v. *State*[65]. This stands as a challenge to various judicial decisions wherein the honorable courts including the Supreme Court has passed judgments stating that offender shall undergo imprisonment for life without remission. This is again an interference with the power of the legislature within who remains the right to prescribe punishments. Though life imprisonment without remission may have deterrent effect on the offender, variation and disparity in the sentencing policy will hit the second assumption of certainty underlying deterrence for sure. The failure of these principles of swiftness and certainty will directly influence the third assumption severity thereby erasing deterrence from the thread of criminal jurisprudence; not because it has failed to deter but because our institutions including the police, judiciary, prisons and to one extent our legislature has failed in bringing out sufficient changes in the system from time to time; rather they are stubborn in neither accepting nor attempting to change any situation to meet the new challenges.

The above mentioned facts remaining to be the back ground of the existing scenario, the state legislatures of Madhya Pradesh, Rajasthan and Haryana have recently enacted new laws namely 'The Penal Law (Madhya Pradesh Amendment) Bill 2017', 'The Criminal Laws (Rajasthan Amendment)

Bill, 2018' and 'The Criminal Law (Haryana Amendment) Bill, 2018',which grants death penalty as an option for rape offences against girls below 12 years. A perusal of those provisions again has again prescribed minimum and maximum punishment which will pave way for further disparity.

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[*] This research paper is based on the second chapter of the Ph.D. thesis done by the researcher.

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[59] Ibid at para 15
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[62] Firozbhai Daudbhai Agariya v. State of Gujarat, MANU/GJ/0751/2016
[63] Supra 2 at p. 171
[64] Supra 2 at p.172
[65] (2016) 8 SCC 313.