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# REFORMATIVE APPROACH OF SENTENCING IN NEPAL: CRITICAL STUDY OF THEORY, LEGAL FRAMEWORK AND PRAXIS

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## ABSTRACT

*The article explores the idea of deterrence theory within the context of criminal justice systems. It focusses about how crime is a natural part of society and how rules and penalties are put in place to keep things in order. The article examines the history, philosophy, and rationale of deterrence theory, highlighting its goal of deterring crime by generating a fear of punishment in the public and potential offenders. It does this by drawing on qualitative and doctrinal research approaches. By examining philosophy, statutes and court rulings (case laws) in Nepal, it demonstrates how the deterrence theory affects sentence guidelines and the judgment of judges. Furthermore, the paper explores the human rights viewpoint on punishment and talks about how deterrence theory is used in Nepali law. To illustrate how courts understand and use deterrence theory in sentencing, case studies from Nepal and India are given. The article emphasizes on the judiciary's responsibility in striking a balance between deterrence and other justice-related considerations. In a nutshell, the rationale of this paper is to provide insightful information about the philosophy and use of punishment in criminal justice systems with specific reference to Nepal.*

***Key Words:*** Crime, Deterrence, Punishment, Justice, Offense.

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## INTRODUCTION

Crime is natural, normal and inevitable phenomenon and product of collective life either in primitive or modern society. 'The idea of a society free from crime is a myth. In reality, there cannot exist a society without the issue of crime and criminals.[1] According to sociologist *Emile Durkheim*, there is no society that is not confronted with the problem of criminality.[2] Crime is anti-social act which is against social order and which results social injury. *Edwin H. Sutherland* opines, crime as a symptom of social disorganization. *Paul Tappan* has defined, "crime is an intentional act or omission in violation of criminal law committed without defense or justification and sanctioned by the state for punishment as a felony or a misdemeanour".[3] Crimes are committed by the members of society so, it is concerned with the conduct and behavior of individuals who form the society.

Human beings and crime are inseparable. Society itself started to maintain and ensure well-being of the members and started maintaining normality in the society by defining and adjusting what is right and what is wrong. For this the society is obliged to enforce the law. By this reason the state came into existence and state started to prohibit specific human conduct/acts which harm others. The human conducts which are prohibited by law are known as crime and law prescribe definite punishment those who commits crimes.[4] Crimes depend on how society defines them. In modern era, society defines crime through criminal law and criminal law changes with the change in social perception, economic development and standard of living.

Law transforms the social disapprobation into defined 'offence'. Such legally prohibited act i.e. 'offence' is subjected to 'just and fair' judicial investigation, duly evidenced and established is reckoned as 'crime'.

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1 N.V. PARANJAPE, CRIMINOLOGY & PENOLOGY (INCLUDING VICTIMOLOGY), 3 (18th ed., Central Law Publications, Allahabad, 2021).

2 SYED MOHAMMAD AFZAL QADRI, AHMAD SIDDIQUE'S CRIMINOLOGY, PENOLOGY & VICTIMOLOGY 3 (7th ed., Eastern Book Company, Lucknow, 2022).

3 RAM AHUJA, CRIMINOLOGY 19 (Rawat Publication, New Delhi, 2023).

4 S.R. MYNENI, PENOLOGY & VICTIMOLOGY 7 (1st ed. reprint, Allahabad Law Agency, Faridabad, 2022).

Every proved offence requires prescribing appropriate punishment. We punish the offender as we perceive the crime. 'Penology broadly explains the justification, characteristics and effectiveness of punishment in its various forms'.[5] So, penal policy changes along with the perception of criminality'.[6] 'A crime is an act deemed by law to be harmful to society in general, even though its immediate victim is an individual'.[7] Crime is the disease of society results physical, mental and social harm to others, i.e., victim(s) and the surrounded community. Punishment controls possible crimes by deterring potential offenders, by preventing the actual offenders from committing further offences. 'The concept of punishment as being the only possible form of reparation for serious human rights violations, as a means of satisfying victims, or even as the victims' right, is a significant challenge to the traditional understanding of criminal law'.[8]

Criminology includes within its scope *the process of making of laws, of breaking laws and of reacting towards breaking of laws*.[9] The last component 'of reacting towards breaking of laws' is related to the reaction of crime by imposing appropriate punishment to the law breakers. Punishment is a consequence of an offense. In modern period, state reacts and respond with crime through criminal law with awarding appropriate punishment. 'The criminal law is about the control of behaviours by the state, backed up by the sanction of punishment'.[10] The chief function of the state is administration of justice and administration of justice is based on prescribing appropriate punishment to the law breakers and criminals. 'Reaction to crime have been different at different stages of human civilization and even at a given time they have been given different in various societies.[11] The implementation of punishment is guided

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[5] Supra Note No. no. 1, p. 305.

[6] MADHAV PRASAD ACHARYA & GANESH BAHADUR BHATTRAI, CRIMINOLOGY PENOLOGY 11 (2nd ed., Bhrikuti Academic Publications, Kathmandu, 2022).

[7] P.J. FITZGERALD, SALMOND ON JURISPRUDENCE 92 (12th ed., Sweet and Maxwell, South Asian edition, India, 2016).

[8] Elena Maculan & Alicia Gil Gil, *The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts*, 40 (1) OXFORD JOURNAL OF LEGAL STUDIES 134 (January 2020), (Nov. 4, 2020, 09:08 AM) *https://academic.oup.com/ojls/article/40/1/132/5716712.*

[9] EDWIN H. SUTHERLAND & DONALD R. CRESSEY, CRIMINOLOGY 3 (10th ed. J.B. Lippincott Company, America, 1978).

[10] JONATHAN HERRING, CRIMINAL LAW 30 (4th ed., Palgrave Macmillan).

[11] *Supra Note No.* no. 2, p. 245.

by a number of theories of punishment. The quantum of punishment used to be based on the theories of punishment.

There are certain ends which legal punishment seems to effect, or to aid in effecting, and these may be regarded as theories/principles which, so far, regulate its use. The end may be conceived as deterrent, in the sense in which we shall use that term, to deter others from committing the crime for which the criminal is seen by society to suffer. Or it may be reformatory, to improve the morals of the sufferer. Or it may be preventive, in the sense of placing the criminal in such a position as to render it impossible for him/her to repeat their offence, perhaps for a long time, perhaps forever. Or it may be vindictive, to execute vengeance against him/her. Or it may be to satisfy some claim of abstract justice which society conceives itself to possess, and, of course, is not admitted to be the outcome of vindictive animosity[12.] The justifications for punishment are deterrence, prevention, retribution, or rehabilitation. Punishment always runs with crime and punishment is awarded to reduce crimes and maintain peace in society. It is a commonly accepted concept that theories of punishment represent the basis of legitimating for the state's criminal punishment procedures. To respond such criminal acts, different philosophies of punishment have been used to revenge and/or to deter the offender, or to reform them.

Early modes of punishment were by at large deterrent in nature. Traditionally, punishments are imposed on the criminals with the objective to deter them to recur the same wrong doing and transform them into law-abiding citizens. The fear of punishment has been one of the most fundamental method of controlling crime since human civilization and history. *Glanville Williams* says, 'deterrence is the only ultimate object of punishment'.[13] 'In deterrent treatment of the criminal the emphasis is placed upon the relation of the criminal to his/her acts, and the fact that

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[12] W.A. Wall & W.A. Watt, *Deterrent Punishment*, 8 (2) INTERNATIONAL JOURNAL OF ETHICS 157 (The University of Chicago Press, 1898), (Aug. 30, 2023, 07:05 AM), *http://www.jstor.com/stable/2375260*.

[13] Khushboo Garg, *Study of the Theories of Punishment & their Justification* (Sep. 30, 2023, 08:17 AM) *https://legalreadings.com/theories-of-punishment-and-their-justification/*.

society is to be protected from the recurrence of similar acts'[14]. It has been believed throughout the ages that, fear of punishment can reduce minimize or eliminate undesirable behavior. This idea has always been popular in criminology, penology and entire mechanism of administration of justice.

Nepali legal system, within its National Penal Code (Muluki Aparad Samhita), 2074 (2017) and other specific legislations recognizes deterrence approach to deter to an offender as an objective of punishment and a principal goal of criminal justice system. This article intends to examine interplay of deterrence theory of punishment and relevant Nepali legal principles and provisions of criminal justice in light of legal framework, standards and principles recognized in criminal jurisprudence. To this end, this paper seeks to analyse and assert what deterrence theory of punishment is about and examines its rationales and Nepali legal contexts of punishing offenders.

## DATA AND METHODS

The method of this research paper is qualitative and doctrinal. In this article the authors have used secondary information from various literature. Presentation and discussions are furthered on the basis of the international norms, standards and principles recognized in criminal jurisprudence. Through the content analysis method, the collected information and literatures are descriptively examined and analytically explained. Both print and online secondary sources such as authentic books, journals, archives, previous studies and research etc. are used as source of data collection. Other required information is obtained from relevant international human rights instruments and Nepali statutory framework.

## RESULTS AND DISCUSSION

Based on the collected information and data from various literatures, human rights instruments, international norms, standards, Nepali

[14] Albert Levitt, *Some Societal Aspects of the Criminal Law*, 13 (1) JOURNAL OF THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY 96 (Northwestern University Pritzker School of Law, May 1922), (Nov. 4, 2020, 09:08 AM), *https://www.jstor.org/stable/1133866.*

statutory framework and practices the researchers discover as well as presents following results and discussion:

## Concept, Jurisprudential Philosophy and Justification of Deterrence Theory of Punishment

'In punishment the criminal's own act is seen returning on himself. The punishment of the criminal is just, because it expresses his/her own will as a rational being; for in his act is involved a universal element which by the act is set up as law'[15]. 'The rigour of penal discipline acts as a sufficient warning to offenders as also others'.[16] Punishment can protect society by deterring potential offenders.[17] 'Sanction/Punishment is an essential component of law. Punishment is the proper immediate consequence of the criminal act, a stage in the criminal justice system'.[18] Punishment supports the law for its effective implementation. Punishment is intended to prevent the commission of crimes, to compel or discourage offenders to repent and change. Ancient Hindu jurist *Manu* summarized the object of punishment as "punishment governs all mankind; punishment alone preserves them; punishment wakes while their guards are asleep; the wise considers the punishment (Danda) as the perfection of justice."[19] 'Punishment gives a potential offender a reason not to commit the crime'.[20] People do not involve and commit crime because of the punishment associated with the crime.

Punishing the offender is the obligation of the state and a victim right and satisfaction. Criminal justice system as a part of state is a duty bearer to respect, protect and fulfil human rights of the right-holders, victims of crimes as well as suspects, accused and convicted offenders. Jurisprudentially, 'state punishment can no longer be perceived as an

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[15] *Supra* No. 12, pp. 158-159.

[16] Supra Note No. 1, p. 307.

[17] *Supra* Note No. 7, 94.

[18] Ranjana Tiwari & Rakesh Kumar, *Theories of Punishment with special reference to Capital Punishment*, 7 (10) Journal of Emerging Technology and Innovative Research 2337 (2020), (Apr. 1, 2024, 09:08 AM), *JETIR2010302.pdf.*

[19] Barathi Kumar, CRIME AND THEORIES OF PUNISHMENT, (Apr. 1, 2024, 09:08 AM), https://www.academia.edu/29112789/CRIME_AND_THEORIES_OF_PUNISHMENT.

[20] Hsin-Wen Lee, *Taking Deterrence Seriously: The Wide-Scope Deterrence Theory of Punishment*, 36(1) CRIMINAL JUSTICE ETHICS 11, (2017), DOI: 10.1080/0731129X.2017.1298879, (Sep. 30, 2023, 10:00 AM), *https://www.researchgate.net/publication/316255906.*

imaginary act; rather, it is the outcome of the will of the democratic legislator'[21]. 'Punishment makes the victim feel better. The beneficial effects of punishment are usually said to include the recognition that the victim has suffered an unjust act and that what has occurred is neither a mere accident, the product of bad luck, nor the consequence of one's own errors. The punishment of the offender also offers the symbolic assurance that it will not recur, thereby protecting the victims' sense of safety or self-confidence and preventing them from feeling guilty'[22].

The word "deter" in the context of deterrent theory of punishment denotes to refraining from engaging in any wrongdoing and commission of crime. According to *Black's Law Dictionary*, "deterrent punishment intended to deter the offender and others from committing crimes and to make an example of the offender so that like-minded people are warned of the consequences of crime"[23]. The objective of this theory is to "deter" criminals from attempting new crimes or repeating same crime in the future. As a result, it says that the goal is to prevent crime by creating fear and instilling terror; by punishing the offender, one sets an example for others or the entire society. Its aims to create fear to the human beings and thus deter them from committing crime through fear psychology. 'The criminal would not repeat the wrongful act and others would be deterred by fear of similar punishment'[24]. 'The two main assumption of the deterrence theory: (1) potential offenders are rational agents capable of taking into consideration the likely consequences of their actions; and (2) punishment is intended to give potential offenders a reason not to commit a crime'.[25] 'Punishment according to this theory, should be so drastic as to strike terror into the hearts of people who may be criminally disposed'.[26] Therefore, deterring crime by creating a fear and to set or establish an example for the individuals or the entire society by punishing the criminal is the major justification of this theory.

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[21] *Supra* Note No. 8, p. 137.
[22] *Ibid*.
[23] BLACK'S LAW DICTIONARY, (10th ed.) p.1429.
[24] Julian P. Alexander, *The Philosophy of Punishment*, 13 (2) JOURNAL OF THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY 238 (Northwestern University Pritzker School of Law, 1922), (Jan. 1, 2024, 07:05 AM), *https://www.jstor.org/stable/1133492*.
[25] *Supra* Note No. 20, 4.
[26] S.R. MYNENI, JURISPRUDENCE (LEGAL THEORY) 130 (Asia Law House, Hyderabad, 2012).

Simply, deterrence means the omission of a criminal act because of the fear of sanctions or punishment. While not the entire premise, deterrence is certainly an important foundation of the criminal justice system. It is reasonable to argue that a belief or expectation that sanction threats can deter crime is at the very heart of the criminal justice system[27]. Accordance with this theory, if someone commits a crime and is severely punished, it may result in the people of the society becoming aware of the severe punishments for certain kinds of crimes, and as a result of this fear in the people of the society, the people may refrain from committing any crimes or wrongdoing. Punishment is primarily deterrent to teach a lesson to others. 'The criminal would not repeat the wrongful act and others would be deterred by fear of similar punishment'[28]. 'Deterrence theories are based on the idea that fear of a threatened punishment may dissuade a person from committing a crime. Legal theorists customarily distinguish between specific deterrence, which is the effect of a punishment on the person being punished, and general deterrence, which refers to the effect of a punishment on everyone else'[29].

'In ancient time in many jurisdictions, punishments were executed publicly and the idea was that the imposition of punishment could frighten others from committing the same act'[30]. 'The deterrence of other potential wrong-doers by demonstrating to them the futility and painful consequences of anti-social conduct'[31]. At that times, the severe punishment and the execution of the sentence before the public were meant to serve this end. The deterrent theory of punishment is utilitarian in nature. An eighteenth-century judge, while awarding death sentence to a person guilty

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[27] Raymond Paternoster, *How much do we really know about Criminal Deterrence*, 100 (3) JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 766 (Northwestern University, School of Law, U.S.A, 2010).

[28] *Supra* Note No. 24, p. 238.

[29] Martha Grace Duncan, Positive Images of Prison and Theories of Punishment, ROMANTIC OUT LAWS, BELOVED PRISONS, THE UNCONSCIOUS MEANINGS OF CRIME AND PUNISHMENT 48 (NYU Press, 1996), (Sep. 9, 2020, 01:16 PM), *https://www.jstor.org/stable/j.ctt9qg6p4.10*.

[30] Farhad Malekian, *Principles of Islamic International Criminal law a Comparative Search*, Brill, 400, (Jan. 2, 2024, 07:28 AM), *https://www.jstor.org/stable/10.1163/j.ctt1w8h3dt.38.*

[31] John Lisle, *The Justification of Punishment*, 25(3) INTERNATIONAL JOURNAL OF ETHIC 357 (The University of Chicago Press, 1915), (Sep. 1, 2022, 09:35 AM), *http://www.jstor.com/stable/2376823*.

of stealing a sheep observed: ***'You are to be hanged not because you have stolen a sheep but in order that other may not steal sheep'.***[32] This the notion of this statement of judge is that, the offender is punished not only because s/he has done a wrongful act, but also in order to ensure the such type of crime may not be committed in future. This statement is relevant till this modern time in the realm of modern penology.

Law enforcement exists both to apprehend wrongdoers and to convince would-be wrongdoers that there is a risk of apprehension and punishment if they commit a crime. Laws that provide a host of different sanctions for the commission of criminal offenses (fines, probation, imprisonment) serve notice that criminal statutes contain a credible threat that—it is hoped—will inhibit those who have been punished from committing additional crimes (specific deterrence) and those who have not yet offended from committing crimes at all (general deterrence)[33]. There are two types of deterrence i.e. general deterrence and specific deterrence:

- **General Deterrence:** General deterrence means creating fear to public at large who don't have a personal experience of punishment but they have a knowledge of punishment experienced by a defendant. 'General deterrence is the idea that every person punished by the law serves as an example to others contemplating the same unlawful act.'[34] General deterrence measures include the existence of laws, police, courts, penalties and prisons. These institutions serve as signposts or guidelines to distinguish between acceptable and unacceptable behavior. The objective is to create a general social climate environment that reduces the likelihood of intentional transgression of acceptable behavior for fear of detection and the possible punitive consequences. So, for example, we all drive our cars on the same side of the road and generally observe other road rules.
- **Specific Deterrence:** Specific deterrence is the idea that the individuals punished by the law will not commit their crimes again because they

[32] *Supra* Note No. 2, p.252.
[33] *Supra* Note No. 27, p. 766.
[34] Section 2.5: Theories of Punishment, Criminal Justice (Apr. 2, 2024, 07:40 AM), *https://www.coursesidekick.com/.*

learned a lesson.'[35] Specific deterrence means an individual offender who is punished for his/her offence won't commit that offence again in the fear of punishment s/he already gone through.

A deterrence theory of punishment holds that the institution of criminal punishment is morally justified because it serves to deter crime. Because the fear of external sanction is an important incentive in crime deterrence, the deterrence theory is often associated with the idea of severe, disproportionate punishment. 'The deterrent method of treatment is designed to prevent the recurrence of the criminal act on the part of the criminal and also on the part of other members of society who might feel the impulsion to act as the criminal did'[36]. 'Deterrence, as a means of social protection'[37] which helps in maintaining social control in the society. Hence, deterrence is the practice of discouraging or restraining someone from committing crimes. It involves an effort to stop or prevent crime by threat or fear of punishment.

A deterrence theory of punishment holds that the institution of criminal punishment is morally justified because it serves to deter crime. Because the fear of external sanction is an important incentive in crime deterrence, the deterrence theory is often associated with the idea of severe, disproportionate punishment. 'One of the most fundamental and ancient notions in crime prevention is the idea and philosophy of deterrence'.[38] The role of the law maker and law-making institutions during this period was to design sentencing laws with deterrence as the primary goal. Most of our ancient laws and even the modern existing laws and penal system are not untouched and isolated from the philosophy of deterrence theory of punishment. Deterrence punishment is admitted and applied through the punishment of imprisonment, fine, or even whipping and death-penalty, of deterrency from the practical point of view. 'The only possible justification for physical punishment is its value as a deterrent; thus the fear of punishment is of far greater practical value than the punishment itself'[39].

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[35] *Ibid.*
[36] *Supra* Note No. 14, p. 94.
[37] *Supra* Note No. 31, p. 356.
[38] Understanding deterrence, (Apr. 3, 2024, 07:40 AM), https://www.aic.gov.au/.
[39] *Supra* Note No., 24, p. 242.

The deterrence theory, traces its origins back to the Greek philosopher *Plato*. However, it was Jeremy Bentham, who, within his general and well-worked comprehensive moral theory called utilitarianism, established a link with the nuanced theory of deterrence[40]. So, this theory was developed by *Jeremy Bentham*. The other main exponents of this theory are Plato, Locke, Bentham, Sophists, Fischte etc. '*Plato* justified punishment solely upon the grounds that the criminal was thereby through a severe chastening made better and the example of his extreme punishment acted as a deterrent to others. He had before him the unwise theories of the ancient Greeks, who conceived that exact justice demanded a punishment literally "in kind." Thus, one who committed arson was burned to death and he that killed with a stone was likewise stoned to death'[41]. *Beccaria* the propounder of the classical school of criminology who argued that justification of punishment must be to deter potential criminals and not merely to punish the offender.[42]

Deterrence theory in its classical form holds that crime is deterred by the threat of punishment. The classical statement can be found in Beccaria (1809/1963), Bentham (1843) and, indeed, earlier. Threat of punishment involves (1) severity of punishment and (2) the probability of punishment.[43] Intellectual history of deterrence theory in the work of Cesare Beccaria and Jeremy Bentham, two Enlightenment philosophers who created the conceptual foundation for deterrence. Interest in deterrence theory and the deterrent effect of legal sanctions was not rekindled until the mid-1960s.[44] Becarria was an enlightenment thinker who was repulsed by the cruelty and barbarism of the legal codes under the ancient regimes throughout Europe. These codes allowed such practices as secret accusations, torture, convictions without trial, and a host of not only cruel but disparate punishments.[45]

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[40] A. Lakshminath, *Criminal Justice in India: Primitivism to Post-Modernism*, 48 (1) JOURNAL OF THE INDIAN LAW INSTITUTE 42 (Indian Law Institute, 2006), (Dec. 8, 2023, 07:40 AM), *http://www.jstor.com/stable/43952016*.

[41] *Supra* Note No. 24, p. 238.

[42] *Supra* Note No. 1, p. 305.

[43] Andy B. Anderson *et. al., Models of Deterrence Theory*, 12 SOCIAL SCIENCE RESEARCH 236 (1983) (Dec. 18, 2023, 09:40 AM), *https://www.sciencedirect.com/sdfe/pdf/download/eid/1-s2.0-0049089X83900145/first-page-pdf*.

[44] *Supra* Note No. 27, p. 765.

[45] Ibid, p. 768.

The deterrent theory is related to the sociological school of jurisprudence which creates a relationship between the society and law. It suggests that law is a social phenomenon that has a direct or indirect relationship to society. The primary aim of the deterrence theory is to establish an example for the individuals in the society by creating a fear of punishment. The concept of deterrent theory can be simplifying to the research of philosophers such like Thomas Hobbes (1588-1678), Cesare Beccaria (1738-1794), Jeremy Bentham (1748-1832). These social contract thinkers provided the foundation of modern deterrence in criminology.[46]

*Justice* ***Oliver Wendell*** *Holmes* suggested that "the theory was immoral; inasmuch as it gives no measure of punishment except the lawgiver's subjective opinion... it is said to conflict with the sense of justice... that the members of such communities have equal rights to life, liberty and person's security.[47] Having some criticisms deterrent theory is important which aims to control the crime rate in the society.

## LEGAL FRAMEWORK AND PRAXIS ON DETERRENCE THEORY OF PUNISHMENT

For deterrence approach punishment is based on creating 'fear which plays a paramount part in every human being's life. The deterrent effect works in two directions. First to instill fear in the mind of the offender and secondly to warn others on the consequences that could befall them if they committed the crime'[48.] The deterrence approach of punishment is also recognized in various international human rights instruments. The Rome Statute of the International Criminal Court in its preamble expresses grave crimes threaten the peace, security and well-being of the world, affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation. It sets the duty

[46] Deterrent Theory of punishment, (Apr. 3, 2024, 07:40 AM), *https://www.iilsindia.com/study-material/76288_1633318832.pdf.*

[47] *Supra* Note No. 40, p. 36.

[48] *Ibid.*

of every State to exercise its criminal jurisdiction over those responsible for international crimes… resolved to guarantee lasting respect for and the enforcement of international justice.[49]

**India**

In the landmark decision of "State of Karnataka v. Sharanappa Basanagouda Aregoudar"[50], the Supreme Court of India reinforced the principle that the legal consequences faced by offenders should serve as a warning to deter potential lawbreakers and must be proportional to the severity of the offense committed. This judgment is in line with the principle of utilitarianism in punishment, which posits that inducing fear of punishment can lead to a reduction in criminal activities.

Similarly, in "State of Madhya Pradesh v. Munna Choubey & Anr"[51], the Court focused on the broader societal ramifications of criminal acts, stressing the importance of ensuring that penalties not only penalize but also act to discourage future crimes with significant societal impacts. The Court pointed out the risk of diminishing the value of deterrence in sentencing, especially when dealing with offenses that have a profound societal impact, indicating that failure to adequately consider the deterrent effect of sentences could negatively affect societal well-being.

The "Nirbhaya Rape Case"[52] serves as a pivotal example in debates concerning the deterrent effect of punishment. Despite the Indian Supreme Court imposing the death penalty on the perpetrators to act as a cautionary measure, critics argue that such punitive actions have not significantly curtailed violence against women, prompting a reevaluation of the deterrent theory's effectiveness in real-world scenarios.

This scenario, along with others, showcases the Supreme Court's intricate engagement with the concept of deterrence. The court navigates the delicate balance between the theoretical need for punishments to deter future crimes and the practical challenges in achieving such deterrence.

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[49] The Rome Statute of the International Criminal Court, (Sep. 30, 2023, 07:40 AM), *https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf.*

[50] *State of Karnataka vs. Sharanappa Basanagouda Aregoudar, (2002), 3 SCC 214, (India).*

[51] *State of Madhya Pradesh vs. Munna Choubey & Anr., (2005), 9 SCC 631, (India).*

[52] *Mukesh & Anr vs. State for NCT of Delhi & Ors., (2017). 6 SCC 1, (India).*

This approach highlights the judiciary's continuous efforts to ensure that sentencing aligns with the wider objectives of societal welfare, crime prevention, and the pursuit of justice.

**Nepal's Legal Provision and Praxis**

Historically, Nepal legal provision was influenced by the deterrence theory. The concept of the harsh punishment for the "pancha-aprad" in the Kirat, Licchavi and Malla regime with subsequent depictions in the Muluki Ain, 1910 reveals the existence of the deterrent theory in Nepalese legal gene. This approach of punishment has also influence in the present Nepali legal system and statutory provisions, which is given below, inter-alia.

***The National Penal Code, 2074 (2017)***

The categorization of the offense based on the "degree of imprisonment"[53], arrangement of "factors aggravating the gravity of the offense"[54], "imprisonment for life until death"[55], "computation of life imprisonment as 25 years"[56], "additional punishment for offender of heinous crime and recidivist"[57], "imprisonment for offender who is unable to pay fine"[58] reflects the tendency of deterrent theory of punishment. However, deterrent theory is not fully accepted by the code. The provision of act of "child"[59], "unsound mind"[60], "private defense"[61] and "trifling act"[62] not to be offense has been anti-thesis for the deterrent theory. Furthermore, "mitigating factor of offense"[63], "community service in lieu of imprisonment"[64] and "plea bargaining"[65] shows the reformative approach of punishment.

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[53] Section 3(f)(g) of *The National Penal Code, 2074 B.S. (2017 A.D.).*
[54] Section 8 of *The National Penal Code, 2074 B.S. (2017 A.D.).*
[55] Section 41 of *The National Penal Code, 2074 B.S. (2017 A.D.).*
[56] Section 42 of *The National Penal Code, 2074 B.S. (2017 A.D.).*
[57] Section 44 of *The National Penal Code, 2074 B.S. (2017 A.D.).*
[58] Section 46 of *The National Penal Code, 2074 B.S. (2017 A.D.).*
[59] Section 13 of *The National Penal Code, 2074 B.S. (2017 A.D.).*
[60] Section 14 of *The National Penal Code, 2074 B.S. (2017 A.D.).*
[61] Section 24 of *The National Penal Code, 2074 B.S. (2017 A.D.).*
[62] Section 27 of *The National Penal Code, 2074 B.S. (2017 A.D.).*
[63] Section 38 of *The National Penal Code, 2074 B.S. (2017 A.D.).*
[64] Section 40 (1) (g) of *The National Penal Code, 2074 B.S. (2017 A.D.).*
[65] Section 47 (1) (g) of *The National Penal Code, 2074 B.S. (2017 A.D.).*

***The Criminal Offences (Sentencing and Execution) Code, 2074 (2017)***

Criminal Offences (Sentencing and Execution) Code, 2017 (2074) has set out legislative framework of criminal punishments and provision of deterrence approach of punishment. In Section 13 there is provision of "Purposes of Sentencing to be taken into account which sets purpose of sentence as "deterring the offender or other persons from committing the offence."[66] Furthermore, the grounds for determining the sentence shall be the "gravity of the offence and the degree of culpability of the offender"[67,] "offence aggravating factors"[68] and "offender's previous activities."[69] In determining a sentence, the code has prescribed the following deterrent approach:[70]

| Types of offenders | Sentence |
|---|---|
| Offender who commits a heinous or grave offence. | Sentence of imprisonment |
| Recidivist offender<br>Offender who is dangerous to the society or the community | Sentence that is double the sentence imposable for the last offense<br>Sentence of imprisonment |
| Offender who is a holder of a public authority | Additional one and half of the sentence |

Furthermore, "the restriction to use the community service for the offender being sentenced more than 6 months imprisonment"[71] and "prescription of the negative lists for the application of suspension of sentences"[72] denotes the vitality of deterrent approach for creating the just, peaceful and safe society.

In Shanti B.K. vs. H.M.G. case,[73] the court ruled that cruelty and torture, nature and gravity of crime, past record of the offender, the magnitude of suffering suffered by the victim shall be fundamental basis

[66] Section 13 (a) of *The Criminal Offences (Sentencing and Execution) Code, 2074B.S. (2017 A.D.).*
[67] Section 15 (a) of *The Criminal Offences (Sentencing and Execution) Code, 2074B.S. (2017 A.D.).*
[68] Section 15 (c) of *The Criminal Offences (Sentencing and Execution) Code, 2074B.S. (2017 A.D.).*
[69] Section 15 (d) of *The Criminal Offences (Sentencing and Execution) Code, 2074B.S. (2017 A.D.).*
[70] Section 15 (2) of *The Criminal Offences (Sentencing and Execution) Code, 2074B.S. (2017 A.D.).*
[71] Section 22 (1) of *The Criminal Offences (Sentencing and Execution) Code, 2074B.S. (2017 A.D.).*
[72] Section 24 (3) of *The Criminal Offences (Sentencing and Execution) Code, 2074B.S. (2017 A.D.).*
[73] *Shanti B.K. vs. H.M.G., NKP 2061,* Vol. 6, D.N. 7399.

in determining the sentence. Furthermore, in the case N.G. vs. Kari Sada Mushar et.al,[74] the court propounded that basis and reason must be given while refraining from the maximum sentence imposed by the law. Inferentially, the case has supported the deterrent approach through implicit acceptance that maximum punishment is general rule and minimum punishment is exceptional rule. The same spirit is directly adhered by the case NG v. Govinda Karki[75] through proclamation that using of Chapter on Court Procedure, no 188 to reduce the sentence is the exceptional rule. Moreover, the case NG v. Sher Bhadur Basnet[76] sets the purpose of punishment as to penalize the guilty, deter others from committing such offenses, and to inspire the guilty to pursue a path of reform by realizing their crime under the subjugation of the law. The case further propounded that while exercising judicial authority, it is imperative not to take the fundamental principles of punishment lightly.

## CONCLUSION

Deterrence theory of punishment based on criminal punishment is required or appropriate to discourage crime through deterrence i.e. the fear or threat of fear of punishment. 'The main purpose goal of deterrence punishment is to inflict deterrent effect on the criminal themselves from repeating the crime and on others so that they don't commit the crime fearing the consequence i.e. the punishment'.[77] Deterrence punishment harass the offender for preventing the offender from possible commission of new crimes. Not only to prevent the wrongdoer from doing a wrong, but also to make him an example for others, calculated to curb criminal tendency in others. Despite the critique viewing the deterrent treatment of the as destructive, deprivitive or punitive'[78,] its importance in modern criminal justice system cannot be denied.

To sum up, deterrence theory continues to be a fundamental component of criminal justice systems across the globe. This hypothesis,

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[74] *N.G. vs. Kari Sada Mushar et.al, NKP 2063,* Vol.8, D.N. 7752.
[75] *N.G. vs. Govinda Karki, NKP 2065,* Vol. 11, D.N. 8039.
[76] *N.G. vs. Sher Bhadur Basnet NKP 2071,* Vol.3, D.N. 9136.
[77] Sagar Shelke & Jyoti Dharm, *Theories of Punishment: Changing Trends in Penology* 8 INTERNATIONAL JOURNAL OF ENGINEERING AND ADVANCED TECHNOLOGY 1299 (2019), (Sep. 30, 2023, 06:40 AM),*10.35940/ijeat.F1225.0986S319.*
[78] *Supra* Note No. 14, p. 95.

which is based on the notion that people may refrain from committing crimes out of dread of punishment, has impacted both nations' legal systems, sentencing guidelines, and court rulings. This article has clarified the idea, jurisprudential philosophy, and practical application of deterrence theory within the Nepal using qualitative and doctrinal research. It has shown how deterrence is prioritized as a primary goal of sentencing in legal provisions like those found in the National Penal Code and the Criminal Offences (Sentencing and Execution) Code in Nepal.

Deterrence theory does have supporters, but its applicability in real-world situations is still up for discussion and investigation. Critics contend that the effectiveness of punishment is called into doubt due to its disproportionate effects and its limited ability to solve underlying societal conditions that contribute to crime. Notwithstanding these obstacles, the idea of deterrence continues to be relevant in the debate surrounding modern criminal justice since it is consistently emphasized in legislative frameworks and court rulings. As we move forward, politicians, legal professionals, and academics must critically assess how deterrence theory affects social well-being, human rights, and the pursuit of justice. By doing this, supplier and consumer of justice can work to ensure that punishment and crime prevention be more equal, efficient, and rights-based approach.

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