EFFEMINATE PENOLOGY: A JURISPRUDENTIAL EXEGESIS

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Abstract

Criminology is an intricate ensemble of all the elements of justice delivery system. The law merely establishes the distinction between right and wrong on social and moral credentials but one of the social credential, which has been ignored throughout, is the gender specific delinquencies and penal system. A non-delinquent society is a contemplation, in scarcity of an effective penology, as much as an effective penology is, if it is not well-schematized with an objective singular tantum. All the penal treatments are in-considerate of the gender role, women delinquencies and a need of an effeminate penology. If a theory is propounded to distinguish and recognize a new league of penology namely; 'effeminate' penology, the requirement of the law to perceive it, is inevitable. The social construction of crime has changed over time; feudal and religious influences changed and affected the criminological theories to evolve. The idea of equality of punishment is actually difficult to implement in many situations. Equal penalty for men and women cannot be condemned on the grounds of the concept of equal treatment. A welfare state avoiding barbaric punishments to avoid unnecessary fear of law in the society while upholding the faith of society in judicial system, if can be accomplished, an effeminate penology can also be formulized and implemented effectively. As Lord Denning observed, "Ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the community of a crime", effeminate penology based on emphatic and categoric denunciation can be a therapeutic way to deal with women delinquencies.

Keywords: Criminology, Criminal Jurisprudence, Criminology and Penology, Theories of Punishment

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Criminology is an intricate ensemble of elements like; Etiology of crime, Social and legal sanctions and penology. The law merely establishes the distinction between right and wrong on social and moral credentials; it's the constituents of penology, that provides for the methodology, not only for purging the criminals but also to deter crime.

A non-delinquent society is a contemplation, in scarcity of an effective penology, as much as an effective penology is, if it is not well-schematized with an objective singular tantum. Penology, from Latin poena for punishment, comprises penitentiary science concerned with the processes devised and adopted for the punishment, repression, and prevention of crime, and the treatment of prisoners. Penology is the branch of knowledge that deals with the prevention and punishment of crime and within the penal system. In the words of Casare Beccaria, "No man ever freely sacrificed a portion of his personal liberty merely in behalf of the common good. That chimera exists only in romances. If it were possible, every one of us would prefer that the compacts binding others did not bind us; every man tends to make himself the center of his own world". Others philosophers like Antony Flew[1], Stanley Benn[2] and HLA Hart[3] conceptualized punishment as an unpleasant corollary for an offense against legal rules which is administered by the society and inflicted by a legal authority. It has a certain expressive function: punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority itself or of those 'in whose name' the punishment is inflicted[4].

The opinions were always diverse onto the pragmatics of the punishment based on two schools of law namely; Utilitarianism and retributivism. Whilst utilitarianism is based on consequentialism and aims to justify a punitive act, practice or institution by referring to its likely consequences. and looks toward the future rather than backward toward the crime. Retributivist theories of punishment are based on "*lex talionis*" and punish the criminals in proportion to their crime thereby restoring a proper balance by asserting an eye for an eye. For the consequentialist, retributivism is not an idea of punishment but a brutal revenge as no punishment can be legitimated without knowing that it will bring forth good effects.

[1] Antony Flew, 'The Justification of Punishment' [1954]. Philosophy, 29, 293-294

[2] S I Benn, 'An Approach to the Problems of Punishment' [1958] Philosophy 127, 325

[3] HLA Hart, *Punishment and Responsibility* (1st, Clarendon Press, Oxford 1968) 5

[4] Joel Feinberg, *Doing & Deserving; Essays in the Theory of Responsibility* (1st, Princeton University Press, Princeton 1970) 98

According to David Lyon the punishments must inherit the substance from the aretaic theory[5] and how their sanctions by the justice delivery system are imposed by a sovereign.

A sovereign inflicts sanctions by venerating it through law that propounds embargoes and acquiescence along with the handling of the guilty. Abidingness of law, if not executed can transform a civic society into a pandemonium, rendering the execution and punitive measures for non-execution imperative to establish rule of law in the society. Law without penology would be a toothless tiger roaring loud in seclusion. Upholding law with elimination of the crime is indispensable to create a happy society as per the Benthamian reverie.

Benthamian utilitarianism is based on hedonistic conception of man and how an instantaneous, tenacious and severe punishment would deter him from crime. The deterrence is dual in objective as to inculcate a sense of fear in criminals and deterrence in the minds of seeking criminals, while on the other hand for retributivists, the concept of punishment is to satisfy the righteous indignation, with which a healthy community treats a transgression as such as it is an end in itself.[6] According to Kant the retributive theory inflicts the punitive measures based on deservedness and any utility of punishment for him or for his fellow citizens is to be considered later on.

Effeminate Penology: A Genderized Perception of Punishment

Women are different: anatomically, psychologically and anthropo-sociologically, so are the women delinquencies, making gender-neutral penology for gender-specific delinquencies unfair and violative of the basic mandate of equality amongst equals. The question here is; do we need different theories of punishment for women based on women delinquencies or a mere introspection and scrutiny of the rationale behind the concept of punishment would suffice? The answer lies in the jurisprudential amplification of gender delinquency and social and judicial responses to them.

Women Delinquency:

The feminist criminology is just nearly two decades old concept wherein firstly Heidensohn [7] and later, Klein and Smart explicitly talked about the feminist perspectives through their critiques of extant theoretical and empirical work on the female offender. Whereas Klein focused on

[5]Aretaic theory is a normative ethical theory which emphasizes virtues of mind and character. Virtue ethicists advocate social and rational activities that express the human excellences and virtue and condemn the contrary by inflicting ethically appropriate punishment.

[6] Sir Walter Moberly

[7] Heidensohn (1968: 17 l), in a "pre-feminist" paper, bemoaned the state of knowledge about female deviance and called for a "crash programme of research which telescopes decades of comparable studies of males."

economic and social explanation of women delinquencies Smart's perspective was based on radical feminism[8]. The path for the notion of a new feminist criminology and penology was just being paved when Simon and Adler[9] conjoined women delinquencies with women liberalization, generating a social panic and derailed the efforts but yet left a tremendous and unparalleled interest of jurists and sociologists in women delinquencies and its treatment. Simon's research documents, the basic inequities between male and female correctional facilities and treatments. By attributing these differences to male chivalry toward women, she takes a liberal feminist approach to the problem of gender and justice, an approach that heavily influenced later works in this area. Adler's work, while more impressionistic than Simon's, attempted to explain differences in crime rates between white and black females. Although her interpretations gave rise to more systematic examinations of intra-gender race differences in crime that are highly critical of her interpretations and methods, the issues she raised are of primary importance to most feminist criminologists today.[10]

Female delinquencies were criminologically linked to a "quasi-theory," of the liberation-crime relationship[11] and sometimes with economic marginalization[12]. The opinions about etiology varied but the trends of increasing female delinquencies were acknowledged widely and new female delinquents were identified by Simon and Adler. These conclusions did not differ substantially; they dramatically illustrated the marginality of feminist criminology and penology.

Delinquency, in general evolved as the subject matter of penology which, unlike other fields of law, primarily emerged out of the ideas of the dynamics of social engineering as per the rulers' caprices and not as the reflection of social modulations, instances are numerous like; Mughal monarchs, who ordered a huge number of criminals to be crushed by elephants as

[8] Klein (1973), a Marxist-feminist, highlighted the lack of economic and other social explanations for women delinquencies. Smart (1976), while being inclined more towards a radical feminist perspective, focused on the connections amongst the sexist theory, patriarchy, and sexism in practice, specifically identifying the relationship between stereotypical assumptions about the causes of women delinquencies and how female offenders are controlled and treated.

[9] Simon's Women and Crime and F. Adler's Sisters in Crime (1975)

[10] Sally S. Simpson; Feminist Theory, Crime, And Justice, Criminology, Volume 27, Number 4, 1989, P. 610.

[11] A research focus on gender alone does not qualify one as a feminist just as a focus on class does not make one a marxist. Rather, as part of their endeavor, feminist criminologists must seriously consider the nature of gender relations and the peculiar brand of oppression that patriarchal relations bring (Leonard, 1982).

[12] Datesman and Scarpitti, 1980; Gora, 1982; Mukherjee and Fitzgerald, 198 1; Steffensmeier, 1978, 1981; Steffensmeier and Cobb, 1981

punishment only for his amusement[13] to Adolf Hitler, who articulated the idea known as Nazi ideology and interpreted German social Darwinism in late 19th century to believe that human beings could be classified collectively as "races," each race, bearing distinctive characteristics that had been passed on genetically since the first appearance of humans in prehistoric times. The Nazis, follower of Hitler also adopted the social Darwinist take on Darwinian evolutionary theory regarding the "survival of the fittest." For the Nazis, assimilation of a member of one race into another culture or ethnic group was impossible because the original inherited traits could not change: they could only degenerate through so-called race-mixing. It was Hitler's fanatical perception of social Darwinism and an austere idea of the superiority of the "pure" German race, which he called "Aryan," or the need for "Lebensraum," or living space, for that race to expand, that resulted into holocaust.

The penology based on such individual bias or fantasy created a legal system which was founded upon virtues and ideologies and upholding them against all others like; Guru Tegh Bahadur was beheaded, under imperial warrant, in broad daylight, in the middle of a public square, the most prominent public place in India, called Chandni Chowk, of Delhi, on the charge that he was a stumbling block preventing the spread of Islam in the Indian subcontinent, based on pro-muslim and anti-Hindu ideology of Mughal emperor Aurangzib. The Sikhs and Hindus perceived his death as a martyrdom involving the "larger issues of human rights and freedom of conscience"[14] but one person's ideology ruled the whole civic system including the punishment and its justifiability. The intrinsic characteristic of such virtue based penal system never seek out for the social affirmation of righteousness and was an ardent cause of evolution of genderized delinquency.

The theory of the Divine Rights of the King and Papal Supremacy based on obedience not liberty was perceptibly the reason, wherein minor nonconforming deviation was muffled ruthlessly by naming it delinquency so that patriarchy could prevail[15].

The gender based patriarchy gradually pigeon-holed a distinct women-like behavior with superfluous submissiveness and

[13] The French traveller François Bernier, who witnessed such executions during the reign of emperor Jahangir, recorded his dismay at the pleasure that the emperor derived from this cruel punishment. Nor was crushing the only method used by the Mughals' execution elephants; in the Mughal sultanate of Delhi, elephants were trained to slice prisoners to pieces "with pointed blades fitted to their tusks".

[14] Pashaura Singh; The Spiritual Roots of Restorative Justice, Edited by; Michael L. Hadley, Sunny Press, P.206.

[15] John Neville Figgis; **The Divine Right of Kings: The Holy Roman Empire and The Papacy, P. 51.**

associated delinquency in case of disobedience. The genderisation of the behavior genderized the delinquencies for examples; Polygamy is conventional, polyandry is delinquent[16], Hudood law[17], the Hindu men have the right to bigamy under specific circumstances mentioned in Codes of Usages and Customs of Gentile Hindus of Goa (if the wife fails to deliver a child by the age of 25, or if she fails to deliver a male child by the age of 30)[18]. For other communities, the law prohibits bigamy etc. establishing discriminatory women delinquencies. The preeminence of men and delinquencies reckoned on petty disobedience displayed by women gorged prisons and brutal public execution of women delinquents in late 18th and 19th century. In 20th century the legal reformation and judicial activism against gender-bias and promulgation of equality on the basis of aretaic theory, fetched a gender neutral punitive mechanism, ignoring the concepts of gender specific delinquencies and other gender based considerations while deriving effective penology again and subdued the attempts of socio-legal non-discrimination.

Women incarcerations: Concerns and issues

There are 700, 000 women and girls held in penal institutions throughout the world either pre-trial detainees /remand prisoners or having been convicted and sentenced. Female prisoners generally constitute (in about 80% of penal systems) two percent to nine percent of total prison population. The number of women and girls has increased by 50% percent since the year 2000 when the total was estimated as 460,000[19]. The figures so enormously depict the existence of the female gender generating a well categorized personage subject matter entailing the attention of the justice delivery system to treat them distinctly; however, the contemplations about the dependents on a woman and other incidental but annexed factors are yet to be brought into the picture.

The figures indicate that the number of women incarcerations are enormous and

[16] In Pakistan there is *currently* a wife-beating bill proposed by the Council of Islamic Ideology, stating that a man should be able to 'lightly beat' his wife as a form of discipline. The draft details that a husband should be entitled to 'lightly' beat his wife if she does one of the following: defies his commands, does not dress up as per her husband's desires, refuses intercourse or does not take a bath after intercourse/ menstrual periods.

[17] An entire body of law has been enacted - largely during the regime of General Muhammad Zia-ul-Haq - that seeks to establish what is perceived by the supporters of these laws as an "Islamic" system of justice in the country. These laws have come under increasing scrutiny and debate both within Pakistan and internationally especially with regard to their impact on civil liberties, human rights and equal treatment men and women.

[18] Vivek Jain and Shraddha Gupta (2014-05-15). "Uniform and civil". *The Statesman*

[19] Roy Wamsley: World Female Imprisonment List, 3rd Edition, Women and Girls in Penal Institution (Including Pre-Trial Detainees And Remand Prisoners), Prepared By World Prison Brief, Institute Of Criminal Policy Research, July, 2015. P. 2.

increasing rapidly demonstrating the need of concretization of effeminate penology, curtailing precisely to women delinquents and specific riposte to their gender-specific needs and a dignified redemption in the society.

Penology still has primordial characteristics although the status of women, gender-specific delinquencies and pro-women laws have witnessed a paradigm shift. Society has seen the whole formalistic alteration from the joint family based society to a society dominated by nuclear family system. In eighteenth century, when a mother was imprisoned, there were people to take care of her children because of the prominent joint family structure. The education of children was not a priority. It was easy to manage few women prisoners, with low standards of personal hygiene standards and their improvement was not a concern. With the increase of women prisoners, improved hygiene standards, augmented value of education, women sharing or independently bearing the financial burdens of the family and no alternate caretaker for children, women, when imprisoned, carried along, the burden of their children's upbringing and education, besides their own wellbeing. This, in no scenario, could equate the condition of male prisoners as for them they carry only financial burden of their families on their shoulder but their absence no way prejudice the mental wellbeing of the children and other issues are also underplaying in the matter of a male prisoner. Female anatomy also demands more hygiene standards and hygiene products for which our penal system is not well equipped or considerate. Pregnant women, if treated equally as other prisoners, penalty, cannot be justified.

Significant progress is being made to improve the outcomes of pregnancy, childbirth and post-natal care of mother and child in many countries[20], still, the estimated 24000–60000 women who are pregnant and incarcerated worldwide often lack access to antenatal care at the same level as that available in their communities[21]. Despite clear international standards that mandate equivalent care for people in prison, pregnant women in these settings face significant barriers to adequate antenatal care. The needs of pregnant women are often overlooked in prisons designed to house men – who comprise most of the world's prison population of over 10.1 million people. As the World Health Organization's Member States consider the

[20]Hogan MC, Foreman KJ, Naghavi M, Ahn SY, Wang M, Makela SM, et al. Maternal mortality for 181 countries, 1980–2008: a systematic analysis of progress towards Millennium Development Goal 5. Lancet. 2010 May 8;375(9726):1609–23. http:// dx. doi. org/ 10.1016/S0140-6736(10)60518-1 pmid: 20382417

[21] Walmsley R. World female imprisonment list. Colchester: International Centre for Prison Studies; 2012. Available from: http:// www. prisonstudies. org/ sites/ default/files /resources/ downloads/ wfil_2nd _edition.pdf [cited 2015 July 2].

post-2015 agenda for maternal health, this vulnerable and hidden cohort of women should not be forgotten.[22]

As the prison institutions have large structures, they dedicate funds to maintaining security and health care providers tend to be marginalized, without the adequate antenatal care in prisons leaving behind the pregnant women, in settings without access to toilets or water for washing or bathing and restricted sleeping hours are mostly spent on hard surfaces without a mattress or pillow[23]. The unfriendly insensitive staff and shackles and other restraints create significant discomfort and stress for women throughout pregnancy and labour[24]. Most prisons lack dedicated obstetricians or gynecologists and without proper physical examination and reproductive history, women who need referral are either not identified or referred causing diseases like AIDS, HIV Positivity or STDs that affect maternal health, infections, hepatitis, mental illness and fetus deformities. Consequently, pregnant women in prison often need coordinated antenatal, medical and behavioral health services[25].

Female vulnerabilities aggravate during incarceration resulting in sexual assault and other human rights abuses in prison settings. Women are forced into coercive sexual relationships to receive basic survival amenities and care, which cause physical and psychological trauma harming women and contributes to distrust of whatever care is available, especially when health staff are seen to be enemies not allies. The missing or tainted data and incorrect information leads to vague policies and haywire implementations.

Women constitute a vulnerable group in prisons, due to their gender. Although there are considerable variations in their situation in different countries, the reasons for and intensity of their vulnerability and corresponding needs, a number of factors are common to most.

These include[26]:

[22]Molly Skerker, Nathaniel Dickey, Dana Schonberg, Ross MacDonald & Homer Venters; Improving antenatal care in risons, Published online: 31 August 2015. In Bulletin of the World Health Organization 2015;93:739-740. oi: http:// dx. doi. org/ 10.2471 /BLT. 14.151282

[23] van den Bergh BJ, Gatherer A, Fraser A, Moller L. Imprisonment and women's health: concerns about gender sensitivity, human rights and public health. Bull World Health Organ. 2011 Sep 1;89(9):689–94. http:// dx. doi. org/10.2471/BLT.10.082842 pmid: 21897490

[24] The shackling of incarcerated pregnant women: a human rights violation committed regularly in the United States. Chicago: International Human Rights Clinic, University of Chicago Law School; 2013. Available from: https:// ihrclinic.uchicago. edu/ sites/ihrclinic. uchicago. edu/ files/ uploads/ Report %20-% 20Shackling% 20of% 20Pregnant% 20Prisoners% 20in%20the%20US. pdf [cited 2014 Dec 2].

[25] Foot note 4

[26] Handbook on Women and Imprisonment, 2nd Edition with Reference to the United Nations Rules for Treatment of Women Prisoner and Non-Custodial Measures for Women Offenders (The Bangkok Rules), Criminal Justice Handbook Series, P. 7

- The challenges they face in accessing justice on an equal basis with men in many countries;
- Their disproportionate victimization from sexual or physical abuse prior to imprisonment;
- A high level of mental health-care needs, often as a result of domestic violence and sexual abuse;
- Their high level of drug or alcohol dependency;
- The extreme distress imprisonment causes to women, which may lead to mental health problems or exacerbate existing mental disabilities;
- Sexual abuse and violence against women in prison;
- The high likelihood of having caring responsibilities for their children, families and others;
- Gender-specific health-care needs that cannot adequately be met;
- Post-release stigmatization, victimization and abandonment by their families

Effeminate penology

Gender confounds the anticipated relationship between objective of punishment, sanction, risks of deviation and criminality. Women are deviating and criminality cannot be diversified on the basis of gender, yet a purposeful penology in order to be efficient has to be genderised.

Envisaging the variants of deterrence and retribution, the effeminate penology must come up with a punitive concept, after taking all the women-specific stakes in consideration. Punishment for deterrence is extension of the principle of utility while retribution is revenge by inflicting a punishment based on deservedness i.e. 'a criminal deserves to be punish as a revenge of the wrong that he perpetrated'. Righteousness as asserted by the Positive School merges with deservedness somewhere in the corridors of sentencing policy in almost all justice delivery systems but as far as women are concern the treatment they deserve as guilty, if same to that of a man, can never be pronounced as befitting or righteous.

It is jurisprudentially evident that the penology and theories of punishment evolved with the changes that society witnessed with time and then reflected that change in its legal comprehension. But jurists at large, turned blind to the changing status and role of women in the society. Penology was always promulgated as a gender-neutral concept and never ever there was a need felt or raised by patriarchal society to genderize the concept of treatment on gender-specific grounds.

Both of the primary punitive theories viz. utilitarianism and retributivism implicate a treatment for judicially proclaimed delinquent. The quantum and type of punishment inflicted is prescribed by the penal law provisions of the State and are generally based on deservedness. Deservedness is a concept that has both Benthamian and retributivist explanation to it.

A feminist penology can be derived on the basis of same theories but only on the foundation of realization of the fact that man and woman are plenteously different making them entitle to different treatments. A 'women-wise' penal strategy should be devised to right some of the wrongs presently suffered by women in the criminal justice system.

To establish the validity of the effeminate theory of punishment, two main questions are needed to be answered; when are we justified in punishing? What are the limits of just punishment? Those who advocates the effeminate penology must answer these in context of women delinquents.

Justified Punishment for Women Delinquents: A Utilitarian Exegesis

Beccaria advocated the protection of the liberties of those who adhered to the law; he emphasized the need to establish certainty and celerity of punishment for those who transgressed the law; and he sought to revive respect for the law by advocating a new mildness in the apportioning of punishment for those who broke the law[27]. These humane and liberal principles were rapidly adopted by reform-minded men and women across Europe[28]; and in England also, they were received with enthusiasm and admiration, although it has been argued that many men of status and wealth regarded Beccaria's criticisms as more appropriate to continental penal systems than to Britain's[29]. For Bentham, Beccaria's work was exceptionally influential, and he used the penal principles reflected in On Crimes and Punishment to connect his own justifications for legal punishment firmly to a utilitarian base.

Bentham while laying down the principle of Utility said,

"….that principle which approves or disapproves of every action whatsoever

[27] See 'Introduction', in C. Beccaria, On Crimes and Punishments: Translated from the Italian in the Author's Original Order, trans. D. Young, Indianapolis, 1986.

[28] On the positive reception given to Beccaria see 'Cesare Beccaria: The Influence of Dei Delitti e delle Pene', Radzinowicz, English Criminal Law, p. 277-80.

[29] Douglas Hay suggests that 'the rhetoric of Whiggism denied that arbitrary measures existed and claimed that the criminal law was already fixed and determinate'. See 'Property, Authority and the Criminal Law', Albion's Fatal Tree, Crime and Society in Eighteenth-Century England , ed. D. Hay, P. Linebaugh, C. Winslow, J. Rule, E.P. Thompson, London, 1975, p. 58.

according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness".[30]

When Bentham speaks of happiness of the party whose interest is in question he is referring to the sum total of all the individuals' interest thereby promoting happiness. In 'An Introduction to the Principles of Morals and Legislation, IPML', Bentham directed this analysis against a host of ethical propositions he sought to eliminate as competing alternatives to the utility principle, such as "moral sense", "common sense", "law of reason", "natural justice", and "natural equity". All are dismissed on the grounds that they are merely empty phrases that express nothing beyond the sentiment of the person who advocates them. Not representing verifiable reality, such phrases could not be considered useful. Indeed, they were surely pernicious, serving as a "pretense, and aliment, to despotism; if not … in practice, a despotism however in disposition"[31]. By comparison, "utility" was a principle rooted in the empirical and verifiable facts of the felt experience of pains and pleasures.

Deterrence theory of punishment is based on the Benthamian principle of utility, bequests, maximum happiness of society through laws and believes that as the crime and punishment are inconsistent with happiness, they should be kept to a minimum.

Building on Bentham's science of legislation, Austin imported its leading ideas into his own jurisprudence, none more so than Bentham's distinction between the law as it *is* and the law as it *ought to be*, an idea that stands at the foundation of the doctrine of legal positivism[32] .

For the punitive mechanism, the Positive School rejected the doctrine of punishment befitting the crime and emphasized on the protection of society against the criminal with the punishment, befitting or righteous for the criminal. Although it appears more theoretical than practical that a criminal would be receiving individualized treatment according to his own psychological and sociological needs but ultimately, it's the criminal, not the crime, who bears the sentence or punishment given and for this reason it is crucial to segregate the criminal from the sentence and explore the righteousness of the treatment. For the women delinquents the righteousness has to be based on the gender specific parameters as

[30] H.L.A. Hart, 'Bentham and Beccaria', Essays on Bentham: Studies in Jurisprudence and Political Theory, Oxford, 1982.

[31] Jeremy Bentham; An Introduction to the Principles of Morals and Legislation, IPML, (1970, 28n).

[32] *Lectures on Jurisprudence or The Philosophy of Positive Law* (1863)

penology does not dwell into the intricacies of the crime and culpabilities or their trials but anticipate a legally found guilty person and an expedient strategy of its treatment. Owing the justification of punishment as promulgated by Beccaria and Bentham, which is to bring the happiness to the society and is more or less same, not an individualistic happiness but happiness as per the societal norms is the core of Positivism, conferring an element of non-perpetuity with its transience character.

Now the question remains that to what extent does the penal jurisprudence describe Utilitarianism? or why the extents are extended further in case of women? Till the time criminal justice system gains sanity why the effeminate penology can't settle on a compassionate treatment on the ground on moral and humanitarian grounds? A pregnant woman, if given same treatment as of any male offender will not bring happiness to the society neither would it work in the favour of eradication of crime. The fetus or and an expecting mother in prison, getting regular treatment are antithetical to the rules of deservedness and righteousness which demand equitable treatment for all.

Effeminate penology advocates for differential treatment on basis of a different sex. The first step is to recognize the need of effeminate penology and then derive rules once gathering legal sanctions for them. Expecting women can be house poisoned for the gestational period only to be shifted to a normal prison post-natal. Prisons with proper crèche with trained and sensitive staff can ensure that the new born is taken care properly and mother has an access to the child. Education of the child of imprisoned females with no other family members is the responsibility of the State.

Women bear different vulnerabilities even as an offender and if not, extermination they need to be counteracted. Effeminate penology derives its ancestry from the overbearing role of moral philosophy and nurtures by separating and highlighting the features of punishment theory that are descriptive and more concerned with legality. It's morally unjust to punish two human beings who anatomically, psychologically and socially alienate to each other. The requirement is to fetch justification, description and legality to this moral concept of effeminate penology as any punishment, whether legal or divine, needs justification. Bentham conveys the extent of punishment as;

"If the evil of punishment exceeds the evil of the offence, the punishment will be unprofitable; he will have purchased exemption from one evil at the expense of another".

As suggested by Bentham all the punishments aim, as of anything else, to produce pleasure and prevent pain at a large scale and this principle of utility has penetrated from time to time into laws, along with its occasional alliance with the principle of sympathy and antipathy. When this concept of pain and pleasure merge with law it is called its sanction and sanction is what any principle requires to attain legality. Even when in 19th century in England legal positivism was being asserted by Thomas Hobbes and then by Jeremy Bentham it correlated law with sovereignty and utility. Bentham denounced natural law as 'nothing but a phase' and Blockstonian natural rights as 'non-sense' and eulogized the concept of utility as the principle, based on human advantages, pleasures and satisfactions with an emphasis on reform and social welfare as the prime duties of the welfare state. Bentham's analysis of law was fictional with the focus on the reforms to achieve greatest possible happiness for greatest number of people. Bentham's scheme for prison reform, the celebrated "Panopticon" was corroboration of his thought. Principle of natural justice and equity also demand equal treatment for "the equals". The gender based inequalities like pregnancy, mental well being of the young child and female vulnerabilities make women a distinct class making the demand of effeminate penology justified and in terms with the principles of natural justice as well.

According to Bentham, a Benthamite legislator must strive to attain the goals, namely: Subsistence, Abundance, Equality and Security for the citizens. The same objective must be for the punishments as well. Penology coalesced with Benthamite objectives of legislation rationalize the effeminate inference in penology. All four of the objectives are in favour of a specific standard of punishments for women; more compassionate but effective and not inflicting extra burden or pain owing to the God made difference of gender or influencing the life of the children of any female prisoner. Even where, Bentham endorses sanction as law and Austin restricts sanction to be a part of law, both describe sanction as an integral element of penology again validifying the effeminate penology, that stipulates a sanction on the ground of conceiving happiness in a society which has a female-centric family structure.

H.L.A. Hart, infers principle of punishment as a system designed to minimize the wrongdoing but while respecting freedom. A gender-neutral penology although minimizes the wrongdoing i concord of the Hart's contemplations but the after/side effects of minimization can never be neglected making effeminate penology the demand of time wherein, a special recommendation to

minimize wrongdoing after considering gender-related specific side effects are taken into consideration.

Justified Punishment for Women Delinquents: A Retributive Exegesis

For retributivism, punishment is a mean to punish the criminals in proportion to the crime committed by them, thereby, restoring a proper balance. As per Herbert Hart, retributivism is 'the application of the pains of punishment to an offender who is morally guilty'[33], while for Scanlon retributivism is based on 'moral desirability'[34].

The two interrelated modules of retributivism are desert and proportionality. The punishment has to be proportional to the crime committed. Desert refers to the demerit caused by the accused to, the victim when he committed a crime. Retributive punishment has to be proportional to the degree of desert; more the desert, more the punishment should be. Retributivism favours ending and do not dwell upon the after effects/consequences of punishment on the society. It proposes to punish a criminal for the crimes one has committed as much as he *deserves*. Various retributivists, designate punishment as a form of 'payback' for the crime[35], compensatory for the crime, justice as deserved[36]. For the retributivists punishment is a way to remove the 'unfair advantage' that the criminals attained due to the crime he committed[37]. Retributivism perceive the criminals as free-riders in the law-abiding community and hence for them the objective of the punishment must be to wipe out the unfair advantage.

Hegel in early nineteenth century saw the idea of punishment to cancel, negate or annul the offender's crime[38]. A criminal rejects entitlements or rights of the victim by committing a crime so depriving him of few of his rights by punishing him, restores the *status quo ante* crime. This view was extended by Hampton, when he vindicated the retributive punishment as, "the value of victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but also does so in a way that confirms them as equal. In this way punishment can annul the message, sent

[33] R.A.Duff and Stuart P.Green, 'Introduction: The Special Part and Its Problems' in *Defining Crimes: Essays on the Special Part of the Criminal Law* (OxfordL Oxford University Press, 2005): 1-20

[34] T. M. Scanlon, What We Owe to Each Other (Cambridge: Belknap/Harvard University Press, 1998), p. 266.

[35] John Cottingham, 'Varieties of Retribution', Philosophical Quarterly 29 [1979], pp. 238-46.

[36] Thom Brooks, *Punishment* (1st, Taylor & Francis, 2012) 20

[37] Herbert Morris, "Persons and Punishment" 1976 31-58. Published in Monis 52 [1968]: 475-501

[38] Hegel, *Philosophy of Right* (1st, Dyde, 1952) 100

by the crime, that they are not equal in value"[39].

Retributivist theory focusses on deservedness and proportionality unlike deterrence theory, they are not concerned with the cryptic budding criminality of a person to commit a crime. For punishment to be meted out, a person must be found guilty[40]. Proportionality must be derived on the basis of 'how much the victim suffered'[41]. Such proportional punishment must protect against disproportional punishments for crimes.

The idea of punishment as envisioned by scholars like Morris, Hampton and Sir. Sir James Stephen is,

"The sentence of the law is to the moral sentiment of the public in relation to any offence is, what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment".[42]

In the opinion of Hart, punishment must not seek for denunciation alone but a deserved punishment may serve as a denunciation also. According to him, we do not live in society in order to condemn, though, we may condemn in order to live[43]. Morris focused on the significance of the evil underlying offenses while Hampton focused on the immorality of the action, right or wrong.

Retributivism rests on the grounds of morality, deservedness and proportionality. All the retributivists propound punishment, that a wrong morally deserve in order to counterbalance the sufferings of victim proportionately. Now in a hypothetical situation wherein, a pregnant woman, in her last gestational trimester if steals money and is punished with monetary fine and two months imprisonment would the rhetoric of counterbalancing the suffering through retribution be justified? Does the child in the womb of the mother, deprived of pre-natal medical care and good diet, comes in the ambit of a wrongdoer, deserving the incarceration as revenge of the sufferings caused to the victim by the mother? Any legal positivist supporting retributivism cannot justify such counterbalancing, deservedness or even proportionality as per retributivism.

Consistent with his position as a legal positivist Kelson believed that retribution is also a moral concept, "In as much as retribution is possible, only in a society, it consequently always represents in some

[39] Murphy & Hampton 1988: 131

[40] Immanuel Kant, 'The Retributive Theory of Punishment' in (eds), *The Philosophy of Law* (1st, , 1887).

[41] Murray N. Rothbard, "Punishment and Proportionality," in *Assessing the Criminal: Restitution, Retribution, and the Legal Process*, R. Barnett and J. Hagel, eds. (Cambridge, Mass.: Ballinger Publishing, 1977), pp. 259–70.

[42] Sir James Stephen, *A History of the Cirmnal Law of England* (1st, MacMillan, London 1883) 81-82

[43] HLA Hart, *Punishment and Responsibility* (1st, Clarendon Press, Oxford 1968) 5

degree a moral principle"[44]. A retributivist advocating counterbalancing the wrong with proportionate punishment, if derive proportionality on the basis of the sufferings suffered by the victim, must consider the sufferings inflicted as punishment to the criminal as well and while doing so it is pertinent to consider gender-specific factors. Women delinquents suffer more during punishment due to gender specific vulnerability and the situation get even worse in the matter of pregnant women mothers of young children. In the contemporary women centric family-structure based societies, "Lex Talionis" needs a women-centric explanation. Deservedness must be interpreted in terms of be-fittingness as both the concepts are inter-related and in case of a women delinquent effect the character of each other.

The most classic form of retributivism is derived from *lex talionis*[45]. Most retributivists believe sufferings for a guilty person. Herbert Hart defined retributivism as 'the application of the pains of punishment to an offender who is morally guilty'[46]. It has been commented that retributivism is seen as making some appeal to 'moral desirability'[47].

The core-interconnected principles of retributivism are desert and proportionality. Retributive punishment has to be proportional to the degree of desert. The more the desert, the more the punishment should be. Retributivism goes backward and does not work on likelihoods or appreciation as for proportionality of punishment the extent of desertion is required so Retributivists only punish for the crimes one has committed and to the extent a person *deserves*.

If the retributivist theory is 'payback' for the crimes one has committed[48]and criminals deserve punishment, then justice demands we punish and it would be an injustice if

[44] Kelson; 1934, p.55

[45] The earliest retributivist ideal, the lex talionis (literally, "law of the same kind"), is found in numerous ancient Near Eastern law codes, including the Code of Hammurabi (c. 18th century B.C.E.) and exemplified in the Old Testament formula of an "eye for eye, tooth for tooth, hand for hand, foot for foot" (Deut. 19:21; see also Exod. 21:24, Lev. 24:23). The principle of the talionis has often been compared to vengeance, and indeed the emotional satisfaction of the victim plays a large part in retributivist accounts, especially in the symbolic similarity of the punishment to the crime. However, retributive justice is meant to place a strict limitation on the extent of requital, disrupting potential blood feuds and ensuring both proportionality and a conclusion to strife. By offering an image of justice based in rebalancing a harmony that has been upset, retribution assumes the justness of the initial status quo and punishment invites a return to that initial stage.

[46] R.A.Duff and Stuart P.Green, 'Introduction: The Special Part and Its Problems' in *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford University Press, 2005): 1-20

[47] T. M. Scanlon, What We Owe to Each Other (Cambridge: Belknap/Harvard University Press,1998), p. 266.

[48] John Cottingham, 'Varieties of Retribution', Philosophical Quarterly 29 [1979], pp. 238-46

criminals are not punished because they, then do not receive what they deserve[49].

Another school of thought of retributivists infers punishment as a way to remove the 'unfair advantage' that the criminals possess due to commission of the crime. Stolen property makes criminal rich and victim poor. The punishment meted out should remove the unlawful and unfair advantage[50].

Another view of retributivism conceives the idea of punishment to cancel, negate or annul the offender's crime[51]. However, by punishing the criminal, the *status quo ante* crime is restored. This view was taken forward by Hampton who said that by the very act of commission of crime, the criminal fails to respect the victim's value as a human being. Retributive punishment vindicates "the value of victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal."[52] In this way punishment "can annul the message, sent by the crime, that they are not equal in value"[53].

Retributivist theory focuses on punishment to only those who 'deserve' it unlike deterrence theory, where the innocents are also deterred. The idea of punishment as a form of denunciation of the criminal and his act by the society has been envisioned by scholars like Morris, Hampton and Sir. Sir James Stephen put the message in the words as, "The sentence of the law is to the moral sentiment of the public in relation to any offence is what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment."[54]

In the opinion of Hart, punishment should not be for sake of denunciation alone but a deserved punishment does serve as a denunciation. According to him, we do not live in society in order to condemn though we may condemn in order to live.[55] Morris contended that by punishing wrongdoers each citizen learns the particular significance of the evil underlying offenses and the degree of seriousness. Hampton opined that punishment is somehow representative of the pain suffered by the victim of crime and hence by inflicting punishment the wrongdoer shall understand the immorality of the action.

[49] Thom Brooks, *Punishment* (1st, Taylor & Francis, 2012) 20
[50] Herbert Morris, "Persons and Punishment" 1976 31-58. Published in Monis 52 [1968]: 475-501
[51] Hegel, *Philosophy of Right* (1st, Dyde, 1952) 100
[52] Hampton 1992: 1677
[53] Murphy & Hampton 1988: 131
[54] Sir James Stephen, *A History of the Cirmnal Law of England* (1st, MacMillan, London 1883) 81-82
[55] Supra, note 3

Retributivists are uncomfortable with mercy and pardons. Sometimes a greater good can be achieved by pardoning a criminal instead of punishing him. However, Kant famously quoted that if 'justice goes, there is no longer any value in human beings living on the earth'[56].

It must be noted that retributivist punishment cannot be meted in all cases. The weightage given to proportionality in the retributive system of justice carries with itself several advantages and disadvantages. Retributivism ignores the offender's future conduct or effects punishment can have on crime rates. However, in many cases like juveniles and women delinquents, one should take into account the effect of punishment on the accused. Hence, a lenient and reformative system of punishment should be observed in such cases.

Many scholars believe that the idea of proportionality should only prescribe maximum sentences possible in the cases. A modest theory of 'limiting retributivism' emphasizes on the need of punishment to be within a range of not lenient and not too severe punishment. Norval Morris viewed retributive punishments to be imprecise in their assessment.[57]Several other writers have proposed flexible retributive limits on different grounds. For example, Armstrong wrote that:

"*the right to punish offenders up to some limit, but one is not necessarily and invariably obliged to punish to the limit of justice… For a variety of reasons (like reforming the criminal) the appropriate authority may choose to punish a man less than it is entitled to, but it is never just to punish a man more than he deserves.*"[58]

Effeminate Penology: A Science for the Treatment of Women-delinquents

Comprehension of penology is a process of validifying the legal theories and it is still a matter a debate, whether a legal rule validifies a legal theory or a legal theory validifies a legal rule. To begin with the assumption goes in the favour of aretaic theory to be part of a rule of natural law theory of utilitarianism to be the origin of public executions and capital sentences and consequentialist punishment theory to be connected with legal positivism while the focus on moral principle plausibly hints to a connection between Dworkinian jurisprudence and deontological punishment theory.

Of all the social movements in the society during the past hundred years, none

[56] Robinson, *Distributive Principles of Criminal Law,* 1
[57] Norval Morris, The Future of Imprisonment (1974) 83-119
[58]Supra, note 25 K.G.Armstrong, 'The Retributivist Hits Back' [1961] Mind, New Series 33

threatens our future as free men and women more than, the attempt to ignore and suppress the feminist approach and incorporation of gender-specific factors in penology, through legal, criminal and penal system to fit the modern women delinquencies, gender-based vulnerabilities and change of the status of women in the society.

All the theories of punishment integrate at one objective i.e. establishment of rights while few adopt a path to deter the intrusions other punish the intruders. On the same route effeminate penology promotes rights but at the same time highlights the specificities which are being ignored largely by the legislators and jurists.

The multifaceted problem faced by legislators would be how to describe, label and punish women delinquencies so that:

1. everyone could know what wrongs are being punished but to the justified extent only and justifiability is gender-specific.
2. Codification of penal laws must set the pace for subsequent social changes and all imaginable types of gender specific factors like women delinquencies, gender-specific-vulnerabilities pre-incarceration and during incarceration and redemption delinquencies are to be covered (to prevent voids in the criminal law which later on are difficult to be filled by a straight-jacketed judiciary);
3. Punishment if computed with relation to the degree of moral guilt the effeminate factors can also be contemplated on the same moral grounds. Effeminate penological codes developed by a process of reasoned deduction, can also have logical structures of outstanding harmony and equilibrium which in term is difficult to be codified leaving behind a big scope of discretion and possibilities of arbitrariness.

The penology in recent time is going through metamorphosis and this new school penology, along with its counterparts in various areas of the law, focuses on the traditional concerns of the criminal law and criminology, along with the individual, and redirects it to actuarial consideration of penalty. This paradigm shift facilitates the development of a penal process that reckons on increased reliance on imprisonment merge it with the concepts of surveillance and custody, the ultimate concern has drifted away from punishing criminals to managing them after duly considering their individuality still, the consideration of gender remains abjured.

If a theory is propounded to distinguish and recognize a new league of penology namely;

'effeminate' penology, the requirement of the law to perceive it, is inevitable. The fact that a theory of punishment does not require a theory of legality is trivial. Whether the jurisprudence and the punishment theories are orthogonal or not remain unanswered but the presumed subordination of punishment theory to moral theory is not always true. The moral justification of punishment is one and not the only virtue that any punishment strives for, in order to get acceptance widely in the society and systems whereas, the standing questions that a theory of punishment addresses is the concerns about the description of criminal law.

The new school penology, along with its counterparts in various areas of the law, focuses on the traditional concerns of the criminal law and criminology, along with the individual, and redirects it to actuarial consideration of penalty. This paradigm shift facilitates the development of a penal process that reckons on increased reliance on imprisonment merge it with the concepts of surveillance and custody, the ultimate concern has drifted away from punishing criminals to managing them after duly considering their individuality still, the consideration of gender remains abjured.

The social construction of crime has changed over time; feudal and religious influences changed, and affected the criminological theories to evolve. When the Classical school developed it was in a time of major reform in penology, there were many legal reforms at the time due to the French revolution and as modernity has progressed so has the development of the judicial systems, if positivism was used as the main criminological thinking, then these systems wouldn't exist because positivism uses treatments to the criminal in order to solve crime. This could be why the classical school of criminology has been so influential and still is, because it protects various organizations set out to remove crime and it also provides a good theoretical basis on which more recent theories have been developed[59].

The idea of equality of punishment is actually difficult to implement in many situations. What can be the punishment for crimes like rape, kidnapping, forgery and so on? The state cannot exercise the same brutality since it would be demoralizing to the community and also somewhat barbaric. In today's societies, the maximum punishment that can be imposed is the death penalty which has its own critics. However, in many cases like the

[59] "The classical school of criminological." LawTeacher.net. 11 2013. All Answers Ltd. 04 2018 <https:// www. lawteacher. net/free -law-essays/criminology/the-classical-school-of-criminological.php?vref=1>.

Delhi rape case, terrorist attacks the death penalty has been imposed and not condemned by the society.[60] On the same line equal penalty for men and women cannot be condemned on the grounds of the concept of equal treatment. A welfare state avoiding barbaric punishments to avoid unnecessary fear of law in the society while upholding the faith of society in judicial system, if can be accomplished, an effeminate penology can also be formulized and implemented effectively.

As Lord Denning observed, "Ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the community of a crime"[61], effeminate penology based on emphatic and categoric denunciation can be a therapeutic way to deal with women delinquencies.

[60]Sanjoy Mazumder, 'India and the death penalty' (BBC News 2005) http:// news. bbc. co. uk/ 2 /hi/south_asia/2586611.stm accessed 16 Nov 2017

[61] H.L.Deb; An Approach to the problems of punishment, Philosophy 33, 1958.