CHAPTER - IV

INTERNATIONAL HUMAN RIGHT NORMS
AND THE SYSTEM OF PUNISHMENTS

This research work is also related to the human right and the punishments. The primary object of human rights law is to humanize the system by which the laws of a state are administered in regard to various matters, and the object of criminal jurisprudence is to indict the persons violating the law of the land. Earlier, the means that could be employed to punish the wrong-doers depended upon the kind of precepts the state had adopted in regard to its subjects. In such a system the wrongdoers enjoyed only such of the safeguards which they could avail of as a subject, as a citizen, or a national of the state. But today the human rights law aims at treating the individual as a member of human family and strives hard to protect his dignity and honour rising over and above the limited safeguards of the ordinary laws. The human rights law can help an individual in whichever situation he might be. In the new system that is envisaged by the human rights law the individual is to be considered keeping in view the principles of equality, fairness and reasonableness in regard to everything applicable to him in matters of criminal justice. The message of human rights law to the nations all over the world is to modify their penal laws and introduce human element in the functioning of the penal institutions. The system obtaining in India at present shows the efforts which the authorities of our country including the Legislature, the Executive and the Judiciary have been making to absorb the principles of human rights law and mould the system of criminal justice.

This chapter is devoted to a discussion of the fundamentals of human rights and Administration of Criminal Justice. Since these two matters are of crucial importance and since they are inseparable themes of this research work, a beginning is made herein with the basics of these two themes treating them in one and the same chapter. The first section in this Chapter is devoted however to the concept of human rights and the second section to the application of human rights law to the system of punishments.

While Section A of this Chapter is devoted to the national and international perspectives on human rights discussing therein the origin and development of the concept of human rights; Section B is devoted to discussing the question how human rights are applicable to the system of Punishments.
The System of punishments has many facets starting with the principles on which the system is based. The institutional set up, the different methods relating to the administration of the system of punishment fall within the purview of the system of punishment. The discussion in Section B of the chapter covers such of the important aspects of the system of punishments to which the human rights law is applicable.

SECTION A – THE NATIONAL & INTERNATIONAL PERSPECTIVES ON HUMAN RIGHTS

I. Meaning of human rights

Initially, the meaning of human rights was confined to narrow bounds of mere freedom from arbitrary government; human rights were described as those minimal rights which every individual must have against the state or the public authorities by virtue of his being a member of human family irrespective of any other consideration.

However, soon it became evident that the threats to liberty, equality and Justice did not emanate from the state alone but even from other sources such as the private family life. The concept of human rights today not only acts as a negative restriction on the state, but as a positive obligation of the state for creating an environment of dignified life. Thus, the human rights today have gradually acquired much more comprehensive and wider meaning, and have become a prominent parameter of a society based on law and Justice.

Though the concept of human rights is as old as the ancient doctrine of “natural rights” founded on natural law, the expression “human rights” is of recent origin, emerging from the situations of post Second World War, through international charters and conventions.

In England, the case for natural law, superior to manmade laws, was argued by Blackstone in the 17th Century.

II. International Perspective of human rights The humanitarian concept of protection and care of the people, particularly the under-privileged is an important issue of international concern and had been well established in the thinking of eminent scholars and jurists. However a difficulty had been experienced to express this concern in terms of legal principles and norms. law required a certain degree of precision to spell out the rights and standards of treatment to be also in conformity with the sovereign rights of the states.
In the context of human rights it is considered that it is a matter which the states are obliged to adhere. The various international instruments such as the declaration on human rights of 1948, the U.N. Convention of Refugees of 1951 and the declaration of Territorial Asylum of 1967 have tried to spell out some kind of rights for the persons who were persecuted. The important convention in this reserved the united nation in declaration 1984 was adopted by U.N. The same came into force in June, 1987. The Convention inter-alia makes it obligatory for the signatory state to take effective legislative, judicial, administrative and other measures to prevent the commission or attempts to commit the torture in its territory and to make all such acts or attempts offensive under the Criminal law.

The concept of human rights gained importance after the Second World War when political and civil rights of the people were completely suppressed, and development in material resources gave rise to economic and social rights. In developed countries political and civil rights are considered as human rights but in developing countries Cultural, Social and Economical rights are considered as human rights. The human rights, thus, are classified into political and civil on the one hand and social, cultural and economic rights on the other; these rights under the first group are more in the style of injunctions against the government from encroaching upon the freedom of an individual. The rights under the second group are in the nature of demands on the state authorities to provide conditions in which the individual may be able to exercise the rights under the first group.

In the initial stages, the international human rights organizations were founded for achieving the same goal; such as the London based Anti-Slavery Society for human rights (1938), the international committee for Red Cross, the French League for human rights (1898) then there were certain nongovernmental organizations (N.G.O.’s) such as People’s union for civil Liberties (P U C L) (1974), the Peoples union for Democratic rights (P U D R) in 1976 and Center For Democracy (CFD).

The first documentary use of the expression ‘human rights’ is to be found in the Charter of the united nations, which was adopted after the Second World War, at San Francisco, on June 25th, 1945. The Preamble of this charter, which was drawn up to prevent a recurrence of the distinction and suffering caused by the Second World War, by setting up an international organization called the united nations, declared that the united nations shall have for its objects the duty to reaffirm faith in fundamental human rights and art. I thereafter stated that one of the purposes of the united nations shall be “to achieve international cooperation in promoting and encouraging respect for human rights”. The U.N. Charter, however was not a binding instrument and merely stated the ideal which was to be later developed by different agencies and organs.
Sources of international law of human rights

(a) international Treaties

In 1966, the (ICCPR) and the international covenant on economic, social and cultural rights (ICESCR) were taken up by the united nations, declaring the articles contained in the UDHR obligatory on all signatories and parties to this treaty, Thus human-rights law emerged.

After the human rights law emerged as a distinct branch numerous other sets of legislation have been discussed and debated globally. These sets are recognized as HR instruments. Some of the most significant, referred to (with ICCPR and ICESCR) as "the seven core treaties", i.e., Convention on the Elimination of All Forms of Racial Discrimination, 1966; Convention on the Elimination of All forms of discrimination against women;1979, Convention against Torture (CAT), 1984, Convention on the rights of the Child (CRC) 1989; Convention on the rights of Persons with Disabilities (CRPD) 2006, Convention on the rights of all migrant workers and members of their families (ICRMW) 1990.

(b) Customary international law

In addition to protection by international treaties, customary international law may protect some human rights, such as the prohibition of torture, genocide and slavery and the principle of non-discrimination.

(c) international humanitarian law

The Geneva Conventions which form part of the international law of War are relevant to the treatment of the sick, the wounded, the injured and the dead persons; it is relevant to the treatment of the aliens, the civilians and others during the time of war. They are based upon the principles of human rights law and have been contributing to the development of humanitarian law.

International Conventions are the Treaties or agreements arrived at by sovereign states after due deliberations at the conferences called for the purpose of adopting them in the form of law. Conventions are known by different names, such as, declarations, covenants, and Protocols etc. On the subject of human rights also there are international conventions, such as, universal declaration of human rights, 1948, the international covenant on economic, social and
cultural rights, 1966, the international covenant on civil and political rights, 1966, the Optional Protocol to the covenants.

A treaty is an instrument governed by international law and once it enters into force; the parties thereto have legally binding obligations distinct from those arising under the national law of any party. Obviously, the great majority of treaties will be made between states, but there are many examples of other international persons such as international organizations entering into treaty arrangements either with states or with each other.

While the concept of human rights received recognition by the benign action of the United Nations and they became a prominent feature of international law, their further progress, promotion and development took place by virtue of the legal instruments which contained the necessary mandate for the task. The following are the instruments which have been responsible for contributing to the development of the human rights law under the United Nations.

(d) United Nations Charter

United Nations Charter is a set of rules for protecting dignity of human beings all over the world residing in various nations developed and developing. UN charter professes and advises all nations democracies and monarchies to observe equality between men and women, and equality between races between men and women having distinct skin colors. UN charter also condemns discrimination based on religion and language. Respecting human dignity and observing equality between sexes and between races are the key issues of the focus of UN charter.

Section B - The Nature of human rights

(i) The Concept of Legal right

A ‘legal right’ is the genus of which human rights are the species. Conceptually, a legal right is nothing but a beneficial socio-political gratuitous endowment for people of various colours and hues and economic statuses recognized by law. The underlying idea of a legal right is that being in need of various things for their survival human beings have their interests in various things at various times. The thing which can secure the satisfaction of their needs is something which is regarded as the subject matter of ‘interest’. What can secure the satisfaction of the interest of a person may be a thing which is his own or a thing which is not his own. The relation of a person to
the thing which can satisfy his need and the thing for which he is in need of a certain object is a relation of fact, and when it receives the protection of law it is called a ‘legal right’.

An interest of a man in certain things may be recognized and protected by social forces like morality, ethics, culture, religion etc. Depending upon the institution or agency which protects the interests of the person the interest is given the name of a right, such as, the moral right, the ethical right, the religious right etc. But when the interest of a person is protected by rules of law, the ‘interest’ assumes the form of a ‘legal right’. In other words, the interest of a person in a thing becomes his legal right when the ‘law’ recognizes his interest and takes the responsibility of preventing the deprivation or infringement of his interest by others.

As a result, the concern shown by different branches of law in different matters the concept of ‘legal right’ has flourished in the realm of legal thought in different forms. If the interest of a person in a certain thing is recognized and protected by the rules of the fundamental law of the country, such as the constitution, the rights are known after the source from which they arise, such as the Fundamental rights law because they arise from the basic law, i.e., the constitution of the country, or the constitutional rights because they arise from the constitution of the country.

(ii) The Concept of human rights

human rights are understood by each of us as inseparable basic endowments to which a person is by birth entitled just because he or she is born human. human rights are conceived as universal since they are applicable to each of us irrespective of the country of our birth and the place we live in. These rights exist as natural rights and also as legal rights, in both national and international law.

human rights were first defined as a result of European scholars attempting to form a "secularized version of Judeo-Christian ethics". Although ideas of rights and liberty have existed in some form for much of human history, the rights then conceived were to some extent rights but were not as wide and sensitive as they are in today’s modern world. In ancient time human rights did not exist at all, in medieval times only a glimpse of was seen in the sermons of saintly people. The Medieval saints saw human rights as benevolent king’s kindness. In today’s world the buzz word or mantra is “all human beings have right to flourish and grow economically and culturally” Professor Alistair McIntyre, Senior Research Fellow at Aristotelian Studies of Ethics and Politics (CASEP) London, argues there is no word for "right" in any language before 1400A.D.. Medieval charters of liberty such as the English Magna Carta were not charters of human rights; rather they were the crude foundations of human rights and constituted a form of limited political
and legal agreement to address specific political circumstances, in the case of Magna Carta later being recognised in the course of early modern debates about rights.

The concept of human rights received recognition at the international level after the World War II when the causes of the War were analysed and it was noted that one of the reasons for the War to have broken out was the violation of the rights of individuals because they belonged to certain other religion, race or culture. Nations denied protection to the individuals because of religious differences.

The institutions which had taken upon themselves the task of protecting international peace and security had considered human rights to be an essential element of peaceful existence. Hence the commission which was set up for developing the idea of human rights had come up with the universal declaration of human rights, just a few years after the establishment of the United Nations. In a very short time the concept of human rights became a fundamental issue in international peace within the domain of international law and international relations.

On the advice of the United Nations the Member states of the United Nations took the step of promoting and protecting the concept of human rights. They established Regional organizations for the purpose of adopting the norms at the state level. Consequently, we found the legal instruments adopted at the regional level and then emerged the institutions for the enforcement of the rights enshrined in those instruments. This is how the concept of Regional organizations and Regional courts developed in America, Europe and Africa.

(iii) Classification of human rights

human rights can be classified, spelt out and organized in a number of ways. At an international level the most common categorization of human rights has been to split them into two groups 1) civil and political rights, and 2) economic, social and cultural rights.

civil and political rights are embodied in articles from 3 to 21 of the Universal Declaration of human rights (UDHR) and in the International Covenant on civil and political rights (ICCPR). Economic, social and cultural rights are enshrined in articles from 22 to 28 of the Universal Declaration of human rights (UDHR) and in the International Covenant on economic, social and cultural rights (ICESCR).

The UDHR regrouped human rights separately as
1) economic, and cultural rights and
2) social and political rights

The regrouping is done simply due to separate hue some rights have. The rights which belonged to economic betterment and social improvement and cultural advancement were grouped together as economic social and cultural rights. Other rights which are related to rights as a citizen, rights of franchise, election, voting were grouped as civil and political rights.

The human rights take root and grow only when other cogent conditions like democracy and international brotherhood, rule of law exist. Civil and political rights can grow when nation has democratic values and rule of law. Economic and socio-cultural rights are higher generation rights and take off only when a nation and political leaders think about well being of people as their agenda.

Some scholars think the civil and political rights and the economic social and cultural rights are not heirarchically placed but they are interdependent. Because without civil and political rights like citizenship, right to vote the citizens cannot assert their economic, social and cultural rights. Similarly, without employment and incomes generating from a growing economic activity, the public cannot think of asserting of civil or political rights. The inseparability and mutuality of all human rights has been confirmed by the 1993 Vienna declaration and timetable of its implementation.

(iv) Three Generations of human rights

One more classification, offered by Czech-French worldwide Official and University Professor Karel Vasak, is that there are three generations of human rights:

First-Generation civil and supporting rights (right to life and political participation),

Second-Generation financial, social and educational rights (right to subsistence) and

Third-Generation harmony human rights (right to peace, right to clean environment).

(a) Universal declaration of human rights, 1948: The first concrete step by way of formulating the rules on various human rights was taken by the United Nations general assembly in December 1948, by adopting the universal declaration of human rights. It was intended to be followed by an international Bill of rights which could be legally binding on the covenanting parties. United nations general assembly category declares various right as a human rights.

The prime aim and object of these declaration is who achieve for all people and all country
in the world, that every individual person and every organ of society keeping in the mind is
declaration shall achieve by education and teaching to the masses for the promotion of
these rights and freedoms and by resorting to developmental methods, national as well as
international protect their universal effective reorganization and obeying and observing
among the people of and member of united nation them self on one side and among the
people of tertiary under there jurisdiction on the other.

The UDHR was framed by members of the human rights commission, with former First
Lady Eleanor Roosevelt (widow of American President F.D.Roosevelt) as Chairperson, she
started debate on a proposed international Bill of rights in 1947. The members of the
commission declined on the form of such a bill of rights, and raised doubt whether, it should
be concretized and be implemented. Instead The commission advanced to frame the
UDHR and attached treaties ties. Circumstances pushed UDHR since the set it quickly
became the priority.

The united nations appeals member countries to promote a horde of human, civil,
economic and social rights, asserting these rights as part of the "bedrock of liberty equity
peace in the world." The declaration was the first international legal effort to limit the high
handedness of governments of nations and to tell them about where their power to
discipline the public ends and their duties towards citizens begin in the context of the
model of rights-duty mutuality.

The universal declaration of human rights, 1948 contains 29 articles and declares that “all in
the world are eligible to all the liberties and endowments set forth in this declaration without
differences such as, race, colour, sex, language, religion, political or other opinion, National or
social origin, property, birth or other status.”

(b) international covenants of 1966: The universal declaration was merely a statement of
ideals, which was not of the nature of a legally binding covenant and had no machinery for
its enforcement that deficiency was sought to be removed by the united nations general
assembly by adopting in December, 1966, two covenants for the observance of human
rights.

i) The covenant on civil and political rights and

ii) The covenant oneconomic, social and cultural rights. While the former formulated legally
enforceable rights of their individual, the latter were addressed to the states to
implement them by legislation.
The covenants came into force in December, 1976 after the requisite number of member-states (35) had ratified the same; many other states ratified the covenants subsequently numbering 69 at the end of 1981. These covenants are, therefore, legally binding on the ratified states. The effect of such ratification is that the ratifying state is obliged to adopt legislative measures to implement the covenants to ensure the rights proclaimed in the covenants so that, though the covenant itself is not part of the domestic law of the ratifying state, the rights embodied in the relevant legislation are enforceable through domestic codes.

(C) international Bill of rights

International covenant on civil and political rights (ICCPR) and the international covenant on economic, social and cultural rights (ICESCR) are the legal treaties that enshrine the rights outlined in the universal declaration of human rights. Together, and along with the first and second optional protocols of the ICCPR they constitute the international bill of rights.

(D) Basic Principles of human rights

The fundamental principal of human right organization protect civil, political, social, economic, cultural right, but it doesn’t express different kind of right in issue, there are fundamental doctrines are always they part and parcel of human right standards and implementations these doctrine includes universalization human right shall in form and be provided and afforded to each and every person, without reservation and discrimination. The whole outline of the area of the human rights is that people are entitled to these rights simply by virtue of being human.

Indivisibility: human rights are indivisible (cannot be enjoyed in parts) and though the human rights classified into various classes are interdependent. At international level human rights are classified into mainly two groups’ i.e. political and civil right and social economical and cultural rights. Without social economical and cultural rights. Individually these rights are no use, political and civil right can only be enjoying in its total spirits if there is social, economical, cultural right, without social, economical, cultural rights and political and civil right are of no use and vice versa. For example – if a government violets rights such as the right to life and personal liberty. The people in general have right to participate in Process and adjudication and flight of steps as to how and at what level decisions are made regarding protection of their rights. This right of participation includes the right to supply inputs at the time of decision making by the forums about rights. To ensure effectiveness protection of human rights, governments must engage in the participation of civil society on these issues.
Accountability: governments must create mechanisms of accountability for the enforcement of rights. Human rights commissions are not accountable to any authority. Human rights law is considered as domestic law, in fact it is a global issue. There must actually be effective measures put in place so that the government can be held accountable if those rights standards are not met. United nations officer must supervise HR in each member country and give report to united nations.

Transparency

Meaning of transparency is right to know or right to information government has to formulate number policies and schemes which would naturally will affect the human rights of the people. If it is given a right to know Why this policy formulated by the government, people will judge to whom the importance is to be given either to the human rights or to the policies or scheme framed by the government, transparency will help to formulate the general opinion or conscience of the people and it also public institution such as hospitals and schools which are needed to protect human right are managed and run.

NON-Discrimination

Human right must be guaranteed without discrimination of any kind this discrimination includes not only purposeful. Segregation in cases of incrimination arrest and detention, but also protection from policies and practices which may cause exclusion of certain communities and groups from government doles, benefits and concessions leading to discriminatory effect.

E. National Perspective of human rights

The concept of human rights in India has a long history. During the ancient age the concept formed part of the broader idea of Dharma, according to which all people were equal and even the King was subject to law. During the later period a variety of factors gave rise to the concept of human rights in India. The Social reform movement and National movement led by individual social reformers, social interest groups and subsequently political parties played considerable role in shaping the notion of human rights. Western liberal teachings, racial equality, and growing repressive character of the colonial government and the interests of the socially aspiring groups such as middle class and aristocracy are some of the factors which influenced the evolution of human rights.

The Indian people, particularly the oppressed carried several movements as part of their assertion for dignity and freedom. The Indian people, particularly the oppressed, carried several movements as part of their assertion for dignity and freedom. Of all the assertions and encounters
between subjugation and liberation, anti-colonial struggle popularly known as freedom movement occupies a place of pride in Indian history.

After Independence of the country the time came for drafting the constitution, an advisory committee with Sardar Patel as its Chairman was set up to deal with the provisions of Fundamental rights and its allied subjects, on January 14th, 1947. The sub-committee on the Fundamental rights started its work initially with ten members, with the task of defining the Fundamental rights and preparing a list of the rights and classifying the rights into justifiable and non-justifiable rights with a view to devise effective protection for the rights defined therein.

The justifiable rights have taken the shape of Fundamental rights and have been put in part III of the constitution, and the non-justifiable rights have taken the shape of Directive Principles of state Policy and are contained in Part IV of the constitution.

(a) Equality before law: article 14 of the constitution of India says, “the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

article 7 of the universal declaration of human rights stated for full equality. There shall not be any discrimination on account of race, cast, gender or even economic status.

(b) Freedom of speech, assembly, association etc: article 19(1) of the constitution guarantees to the citizens, the following rights:
 a) freedom of speech
 b) assemble
 c) associations;
 d) movement
 e) residence

However, the constitution permits reasonable restrictions to be imposed by the state by law on certain grounds.

(c) Protection in respect of conviction for offences:

Fundamental rights guaranteed to citizens vide article 20(1) states, 'No person shall be convicted of any offence except for violation of law in force at the time of the commission of the act
charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence”

universal declaration of human rights in its article 1(2) uses more or less the same technology. It says, that breach of existing law alone should invite the wrath of police. Quantum of punishment after the commission of offence cannot be enhanced and people cannot be punished doubly for single offence.

(d) Life and liberty: According to article 21 of the Indian constitution, “Nobody’s life and personal liberty can be taken away except by procedure established by law.” The same aspect has been covered by the human rights declaration in its articles 3 and 9. According to article 3, ‘everyone has the right to survive on the earth and guard his own person’. article 9 states; ‘No one can be arrested, detained and exiled arbitrarily .

The universal declaration of human rights in its article 4 provides, “No one on this earth shall be master and hold another human being as slave.Buying another human being as slave and the slaving in any form as business of buying and selling human shall not be allowed and shall remain banned .”

(e) Right to constitutional remedies: Just enumerating rights of various kinds is not enough for justice and equity to prevail. There must be easy and clear procedure to move even the highest court. article 32(1) of constitution of India proclaims that all the citizens or any single citizen of India has the right to move the supreme court by procedure laid down for the enforcement of rights conferred upon the citizens by the constitution is guaranteed.

The declaration of human rights in its articles 8 very clearly in unambiguous language proclaims that each and every citizen of a nation has the natural right to justice from the courts in his country for suppression of the basic rights guaranteed to him or her by the constitution of his her nation or by international law or international treaty.

SECTION C – HUMAN RIGHTS APPLICABLE TO THE SYSTEM OF PUNISHMENTS

(a) Human rights law applicable to the making of The punitive law for the states

In the year 1966 the united nations adopted the international covenant on civil and political rights considering that as per the elements announced by the Charter of the united nations,
inseparable rights all people get by the fact of birth as human beings and those rights recognized by the society and the nation with status and prestige of a human being called as dignity are the bases of freedom equity and tranquility in the world. The united nations recognized that these rights as emerging from the prestige and status a human person gets upon his birth anywhere in the entire world. The united nations also recognizes that, as per the universal declaration of human rights, The objective that all may enjoy civil and political liberty and may be freed from fear of oppression and freed from the state of want. The states Parties to this covenant have responsibility to fulfill them.

The following provisions of the international covenant on civil and political rights are relevant to the authority of the states with regard to the exercise of their legislative power as to the question of making Criminal law for their country.

article 2:

1. Each member nation signatory to the present covenant guarantees to uphold and to ensure to its citizens and residents within its territorial jurisdiction and subject to its jurisdiction the rights recognized in the present covenant, without distinguishing or differentiating in any way such as genetic composition, colour of skin, gender, language, socio-, political, or religious opinion, wealth or birth status.

2. In conditions where laws already have been enacted and other measures already taken by each member nation to the present covenant such member nations must also undertake to take steps, for making easy constitutional procedure and provisions needed to implement the rights recognized in the present covenant.

The above provisions urge upon the states to maintain the principle of equality to respect and to ensure to all individuals a fair liberty, equality and freedom or other opinion to give effect to the rights recognized in the present covenant. The implication of this provision is that while taking the necessary steps in accordance with its constitutional process a state has to adopt only such laws or other measures as may be able to give effect to the rights recognized in the present covenant.

The covenant further calls upon the state to avoid discrimination between man and woman. article 3 provides that the states Parties to the present covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present covenant.

The covenant further provides that the states shall not make any law which may derogate from any of the fundamental rights, recognized by the state Party or impose restrictions upon the
exercise of rights on the pretext that the present covenant does not recognize such rights that it recognizes them to a lesser extent.

i) The Doctrines of Nullum crime Sine Lege, Nullum Poena Sine Lege:

The doctrine of Nullum crime Sine Lege has the meaning that nothing is a crime unless the law has declared it to be so. The doctrine of Nullum Poena Sine Lege has the meaning that no punishment shall be inflicted without there being a legal norm to that effect.

According to the first doctrine something not provided for the law constitutes neither a crime nor a wrongdoing. This doctrine requires that every criminal act should be expressly defined by law. According to the second doctrine the punishment to be awarded to a guilty person must be in the form of legal norm previously laid down by the legislature for the particular wrong.

The international instruments of human rights have given due recognition to these doctrines and urged upon the state to observe the standards represented by these doctrines in the System of Criminal Justice. The international convention states that no one is to be criminalized for a law enacted after the act of commission or omission. It also says that penalty for an act of omission or commission of an act cannot enhanced by any future law made after commission or omission of the act held as crime.

article 15 of the international covenant on civil and political rights, 1966 also says that people can be held guilty for offences already codified and carried by statute books. No future laws can hold someone guilty for past acts of commission or omission.

ii) The Rule against ex postfacto law as embodied in human rights law:

The right against ex-post-facto law has been recognized at international level under the two international covenants viz., the international treaties.

The meaning of doctrines of Nullum crimen Sine Lege, Nullum Poena Sine Lege: and meaning of ex post facto enacted law is one and the same. These doctrines and maxims have been incorporated in three different prime legislations viz.

1) constitution of India
2) international treaties
3) international convention
b. HUMAN RIGHTS LAW APPLICABLE TO ENFORCEMENT OF PUNISHMENT:

Punishment is the sanction imposed on a person for the infringement of the rules of the society. Punishment is generally inflicted on a person or on property of an accused according to law. 'Punishment involves the infliction of pain or forfeiture, the judicial visitation with a penalty, chastisement or castigation'. Punishment is some sort of social censure and not necessarily the involving or inflicts of physical pain. It is ideal if the idea behind it is to improve or reform the wrongdoer, and if it really is of such character that it does not degrade, but elevates and is really potent at leading to the desired result. Such information of the offender as leads him to realize the wrong done by him and to repent and atone for it, thus neutralizing the effect of his Wrongful Act and making him realize that a bad act will lead its doer to his own damnation and that the best thing is to abstain from wrong doing.

Dr. Walter Reckless, in considering the meaning of Punishment says, "It is the redress that the commonwealth takes against an offending Member". Punishment, according to Wester Marck, is limited to "such suffering as is inflicted upon the offender in a definite way by, or in the name of the Society of which he is permanent or temporary Member". Punishment aims to protect society from mischievous elements by deterring potential offenders and preventing actual offenders from committing further offences, to eradicate evils and to reform criminals and turn them into law-abiding citizens.

The object of punishment is to bring about reformation of the offender, to prevent him from committing crime again and to prevent other persons from committing crimes, and there is reiteration of the time worn saying. As you Sow, So shall you Reap. Through Punishment, nemesis brings home to the mind of the wrongdoer that a good act is rewarded, and a bad act meets its merited fate. The main ends of punishment, according to Jeremy Bentham, are prevention and Compensation. And Holmes J. has pointed out that prevention is the chief purpose of Punishment. Punishment cannot work through repressive methods for repression will rebound with as much vigour as it was repressed. Punishment then with the pain of detention must involve a re-educating process and not a bare tormenting process.

This object is achieved partly by inflicting pain in order to deter criminals and others from indulging in crime and partly by reforming criminals. It is also asserted that respect for law grows largely out of opposition to those who violate the law. The amount of punishment is not uniform in
all cases. It varies according to the nature of the offence, intention, age and mental condition of the accused person all the circumstances at the time of committing the offence.

(i) Theories of Punishment as embodied in human rights law

The object of protecting the society from criminal is sought to be achieved by deterrence, prevention, retribution and reformation. Of these, deterrence is usually regarded as the main function of punishment, other being merely secondary.

In fact, perfect system of criminal justice cannot be based on any singular theory of justice. It has to be a combination of all. Every theory has its own merits and every effort should be made to take the good points of all. The law should look to the criminal and not merely to the crime in fixing the punishment the suit each particular category of criminals. Different sanctions are applied to children and juvenile delinquents as opposed to adults, to mentally abnormal persons as against other individuals, to first offenders as against the recidivists. The quantum of punishment also varies from a mere admonition to capital punishment depending on the nature and gravity of the offence.

(ii) Probation:

Probation is a condition of freedom granted to the offenders by the court under the supervision and guidance of Probation Officers. It is based on the theory of Reformative Justice. Majority of the states in India, and the union Territories have introduced the system of Probation in their respective areas.

(iii) The kinds of punishment and the Philosophy of human rights

(a) The Punishment of Death:

With regard to the power of prescribing punishment in the Criminal law, the international convention of 1966 has the following rule to laid down:

article 6:

1. Each of the humanbeing has the right to live on this planet earth. This right shall be converted in to an act of legislature. No authority can take away this right without due process of law.
2. In member nations which have retained capital punishment must award capital punishment only for the most cruel diabolic devilish murders and not for murders done in routine manner by provocation and to avenge murders of somebody’s dear ones.

3. The crime of genocide committed by one or many must not in case be considered pardonable. The crime of genocide is the most condemned of all crimes.

4. Mercy and pardon should be available to persons condemned to death by the trial courts and their appeals rejected by higher courts.

5. Minors may not be sent to gallows for having committed murders and their crimes proved in court. Pregnant women should not be hanged by state even if death sentence has been given to them as finality.

6. The member nations of the covenant cannot delay the abolition of capital punishment. The UDHR, The ICCPR, the Amnesty international all have been pressing nations to abolish capital punishment.

One of the aims of punishment in society is deterrence and social control. The theory of deterrence relies on the assumptions that the potential offender will act rationally in his own interest and seek to avoid pain, and that he will both remember the past experience and anticipate the consequence of his intended future actions. For this reason penal systems from early times have frequently been characterised by the infliction of punishment often of brutal nature like the punishment of death.

Originally, almost all-legal systems of the world provided for the punishment of death. But there has arisen in recent year’s serious criticism against the infliction of death sentence. Consequently, there are two schools of thought now, one seeking to abolish the punishment of death and the other seeking to retain it. The arguments advanced by the abolitionists and the receptionists are of great academic significance. The developments at the international level have added some more significance to the controversy surrounding the punishment of death.

The united nations from its inception has been making efforts to seek the abolition of death from criminal jurisprudence. The argument advanced by the abolitionists before the united
nations is that capital punishment is not congruous with advances in spirituality and with development in philosophical epistemology. Punishment of death to any convict is antipodal, incongruous and barbaric in the 21st century; it is the duty of the international duties to push ahead reform of law, and to protect men from narrow prejudices and barbarous practices.

Article 7 of the treaty corresponding to article 5 of the universal declaration of human rights re-affirmed that no one shall be subjected to torture, to cruel, inhuman or degrading treatment or punishment.

On 25th May, 1984 the Economic and Social council adopted the following safeguards regarding protection to the rights of those facing Death penalty:

1. In member nations which have not abolished the Death penalty, such punishment may be imposed only for the crimes done in most cruel, devilish manner. For lethal international crimes killing tens, hundreds and thousands of innocent humans death sentence may be retained.

2. Death sentence can be retained for crimes for which death penalty is already there on statute books.

3. Minor persons, pregnant women and insane, sick persons cannot be subjected to death penalty.

4. Capital punishment may be imposed only when the guilt of accused person charged with crime is proved in such a way that even after review and re-examination of the whole process innocence of the accused may not pop up.

5. Death sentence may only be awarded in final judgement and implemented only after rejection of two appeals and exhaustion of the opportunity of tendering mercy petition. Throughout the process fair and impartial adjudication must follow.

6. Capital punishment awardees must have the right to seek pardon or commutation to a lower sentence.

In India, Death penalty is provided by the provisions of the penal code for as many as eight offences. In addition to this Death penalty is provided for by the provisions of certain Special laws also.
As in other countries in India also two groups have emerged one of the abolitionists and the other of the retentionists. The abolitionists argued that no right is more fundamental and dear than the right to life; the penal policy of the country must reflect contemporary ideas of decency; death penalty being a barbaric form of sanction has no relevance to the present day situations. But there is at the same time another group of the retentionists who strongly argue in favour of retaining the death sentence.

In several of the cases litigated before the courts the propriety of death sentence was questioned by the Abolitionists with reference to the Doctrine of human rights adopted at the united nations level and the Fundamental rights enshrined in the constitution. But, the courts did not accept the plea. In Bachan Singh’s case, for example, the supreme court held that the provision of Death penalty as an alternative to Punishment for murder is not violate of any provision of the Indian for international covenant. It was further held that the procedure for sentencing under Sec. 354 (3) of the code of criminal procedure does not violate any Indian or constitution.

The lawcommission recommended a change in the code of criminal procedure requiring the court as in the case of Sec.367 to state the reasons for awarding the capital punishment of transportation. Accordingly, the code was amended whereby Sec.354 (3) came to read as follows:

Just as the Legislature has laid down the principles to be observed in sentencing the accused the courts also developed principles of the same magnitude.

In Ediga Anamma v state of Andhra Pradesh, the supreme court said that the murder is to the punished accordingly. Further the court said that, "the weapon of justice to be used wisely."

In Machhi Singh v state of Punjab 1983 the supreme court held that the community would sanction and expect the court to inflict death penalty when the crime is committed.

1. Manner of commission of murder;
2. Motive for commission of murder;
3. Anti-social or social abhorrent nature of crime;
4. Magnitude of the crime;
5. personality of the victim of murder.

(b)The Punishment of Imprisonment as provided in human rights law
The following provisions of the international covenant on civil and political rights, 1966 lay down the conditions when and of what type of imprisonment may be awarded by the criminal law of a state. Article 8 of the covenant says,

“1. There shall be no master-slave relationship between human beings. Buying and selling of human beings to work without wages or low wages must be banned throughout the world.

2. There shall be no custom, tradition of practice of maintaining unpaid servants.

3. (a) No citizen must be asked to do work against his her will.

(b) Paragraph 3 (a) in respect of forced labour shall not be presumed as precluded, in nations where courts award imprisonment with hard labour sometimes also written as rigorous imprisonment. Even by sanction of law on statute book to validate forced labour, the forced labour cannot become legal in terms of human rights law pressed by international treaties.

(c) The term force includes.

(i) Any work normally required of a detainee on quid pro quo basis such as conditional release from such detention. Do the work get the release early.

(ii) Work done during national emergency, crisis, disaster is not considered as forced work since it must be done to save people or to stop damage to national property.

(iii) It may not be held as forced work if work is performed as civil contract.

As in the case of Death penalty in the case of Imprisonment also the United Nations has been from the beginning considering the questions of 'alternatives to imprisonment'. The United Nations feels that incarceration of persons in prison entails their isolation from society, cutting their ties with families and friends, disrupting their employment and pursuit to a meaningful life. Prisons overcrowded with an increasing number of prisoners present a serious problem to the state authorities.

The various kinds of punishments and the conditions existing in the prison institutions in various parts of the world have been a subject-matter of discussion before the United Nations forums. Because international law lays much emphasis upon the observance of human rights in penal institutions several alternatives to imprisonment have been considered at the meetings and conferences of the United Nations.
The UN committee on treatment of offenders have come out with several alternatives to imprisonments. They have suggested that imprisonment should be reserved for really serious offender and every effort should be made to develop and extend other correctional measures.

India is one of the countries which have introduced important changes in its Criminal law with the idea of humanizing the Prison system. New legislation has been enacted to implement the idea of ‘alternatives to imprisonment’ as can be seen from the reforms introduced in the country on the following subjects:

(i) Pre-trial diversion: Criminal cases can be disposed of informally and amicably at the local level without recourse to formal criminal justice system. Village Panchayats and certain other local institutions perform the functions of a court at the village or lower level.

(ii) Alternatives to Detention: In conducting investigation into criminal cases the law enforcement officers can exercise vast powers in the matter of arresting and detaining the suspects. While it is necessary to subject the offenders to arrest and detention in order to prevent them from fleeing to other places, it has been considered necessary to invest the authorities with necessary powers to grant bail etc. to reduce the number of prisoners.

(c) The Punishment of Imprisonment for Breach of Contractual Obligation as provided in human rights law:

Article 11 of the international law on civil and political rights 1966 reads – punishment shall not be given to any person merely on the basis of breach of contract. The international agreement between the state parties prohibits the imprisonment merely not fulfilling their contractual obligation and merely for not discharging a decree debit, unless there be some other reason and accompanied with guilty mind apart from failure to enforce the decree. The provision of international law on kept in civil prison to the debtor’s person by the order of court. India is also a party and signatory to covenant and accordingly Indian constitution cast a duty upon the government to foster respect of international law and treaty obligations by the civilized society of the world.

Section 51 of the code of civil Procedure, 1908 enacts the rule regarding imprisonment for breach of contractual obligation, thus:
In Jolly George v. Bank of Cochin, the Bank of Cochin had started chasing Jolly George in view of the non-payment of debts which were the result of breach of contractual obligations. As proceedings were initiated against him under the provisions of C.P.C. the plea taken by was that there is no 'rule, under international law, for imprisonment of a person on account of non-performance of contractual obligations. The supreme court took the view that a rule laid down in an international covenant does not automatically become an enforceable in India. Thus, in the absence of enabling legislation incorporating the rule of international law for nothing punishing a person with imprisonment for a breach of contractual obligation, the supreme court did not like to interfere with the legal process in the instant case.

(d) Human rights law applicable to matters of Special laws:

Under the constitution, there is distribution of legislative and executive powers between the union and the states with regard to various matters including those relating to penal matters. In matters of national importance for which a uniform policy is desirable authority is entrusted to the union Legislature and matters of local concern have been assigned to the states.

While there is distribution of legislative power between the union and the states under article 246 of the constitution, the union parliament alone enjoys the authority under the provisions of Part III of the constitution to make laws of offences of the socio-economic character. A brief description of these provisions may be given as under:

(1) article 35 of the constitution confers power on the parliament to make a law prescribing punishment for acts, which are prohibited by the provisions of Part III of the constitution. This article clearly lays down that notwithstanding anything in the constitution the parliament shall have and the legislature of state shall not have the power to make laws prescribing punishment for those acts which are declared to be offences in Part III of the constitution, as soon as may be, after the commencement of the constitution shall make laws prescribing punishment for those acts.

(2) article 23 of the constitution in terms prohibits traffic in human beings and regards it as an offence punishable under the law, so the competent authority to pass a law prescribing punishment for traffic in human beings in the union parliament and not the state Legislature. article 23 is not a self-executing provision but requires legislation to implement it. The sanction to implement the provision is found in article 35 of the constitution, which empowers the parliament and not the state legislature to make a law.

(3) article 24 of the constitution prohibits employment of children below the age of 14 years in any factory or mine or engaged in any hazardous work.
(4) article 17 of the constitution abolished Untouchability. The practice of Untouchability in any form is forbidden by these provisions and is declared to be an offence punishable in accordance with law.

By exercising its powers under the constitution the union legislature has passed certain statutes and thereby created certain new offences, some of which are called the socio-economic offences. A significant feature of these offences is that the legislature has followed the policy of prescribing new kinds of punishments, the conventional punishments and the conventional theories of liability not being effective in dealing with the problem of crimes. Following are some of the important punishments provided by the penal laws of the special type:

1. Publishing the name, and place of business etc. of Companies.
2. Forfeiture of property.
3. Forfeiture of property of unlawful associations.
4. Attachment of property.
5. Punishment of fine.
6. Punishment of confiscation.

e) human rights law regarding compensation to victims of crime

The commission of held at the UN Headquarters in May 1973 evolved an international Plan of Action which covered several aspects of crime Control strategies. The committee observed that in rendering justice the Judiciary played a crucial role in the prevention and control of crime. The problem of sentencing and applying sanctions was causing concern to most countries of the world. The committee observed that more attention should be given to penalties other than imprisonment such as compensation to victims by the offender.

In November, 1985 the united nations adopted the one program of social and economic advance named as the international the declaration recommended steps to compensate the victims of crime by sumptuous monetary mitigation.

The old Criminal Procedure code (1898) in India had provided for compensation to be ordered by the court while convicting a person when the offence was one which was punishable with fine. Later on the law was amended empowering the criminal courts to order payment of compensation in all cases of conviction.
Yet another trend to be noticed is the award of compensation by the apex court and their Writ Jurisdiction. Starting with the case of RudalSah decided in 1982 the supreme court has been ordering payment of compensation by Public Authorities where the victim suffers in his Fundamental rights or ordinary rights due to the culpable negligence or culpable wrongs of the officers of state.

In NilabatiBehera v. state of Orissa the supreme court was pleased to consider the plea of Sovereign Immunity pleaded by the state and held:

It follows claim for compensation, in public law for breach of human rights and fundamental right for which the protection is already provided in constitution is an acknowledge remedy for the reservation and protection of human rights and also such a claim based on doctrine of strict liability made by availing to remedied provided by constitution for the enforcement of fundamental rights for such cases the defence of sovereign immunity is inapplicable and alike to the concept of guarantied of fundamental right there can be no question of such a defence being availed in the reclaim of constitutional law.