CHAPTER 4
CRIME AND THEORIES OF PUNISHMENT

4.1 CRIME

In ordinary language, the term crime denotes an unlawful act punishable by the state. The term crime does not, in modern criminal law, have any simple and universally accepted definition, though statutory definitions have been provided for certain purposes. The most popular view is that crime is a category created by law (i.e., something is a crime if applicable law says that it is). One proposed definition is that a crime, also called an offence or a criminal offence, is an act harmful not only to some individual, but also to the community or the state (a public wrong). Such acts are forbidden and punishable by law. The idea that acts like murder, rape, and theft are prohibited exists all over the world. What precisely is a criminal offence is defined by criminal law of each country. While many have a catalogue of crimes called the criminal code, in some common law countries no such comprehensive statute exists. The state (government) has the power to severely restrict one's liberty for committing a crime. Therefore, in modern societies, a criminal procedure must be adhered to during the investigation and trial. Only if found guilty, the offender may be sentenced to punishment such as community sentence, imprisonment, life imprisonment or, in some jurisdictions, even death. To be classified as a crime, the act of doing something bad (actus reus) must be usually accompanied by the intention to do something bad (mens rea), with certain exceptions (strict liability). While every crime violates the law, not every violation of the law counts as a crime. Breaches of private law (torts and breaches of contract) are not automatically punished by the state, but can be enforced through civil procedure.

4.1.1 CLASSIFICATION AND CATEGORISATION

The following classes of offences are used, or have been used, as legal terms of art:

- Offence against the person
- Violent offence
- Sexual offence
- Offence against property

3. For example, by the Visiting Forces Act 1952
4. For example, by section 31(1) of the Criminal Justice Act 1991, and by the Criminal Justice Act 2003
Researchers and commentators have classified crimes into the following categories, in addition to those above:

- Forgery, personation and cheating
- Firearms and offensive weapons
- Offences against the State/offences against the Crown and Government’s political offences
- Harmful or dangerous drugs
- Offences against religion and public worship
- Offences against public justice offences against the administration of public justice
- Public order offence
- Commerce, financial markets and insolvency
- Offences against public morals and public policy
- Motor vehicle offences
- Conspiracy, incitement and attempt to commit crime
- Inchoate offence
- Juvenile delinquency

4.1.2 CATEGORISATION BY PENALTY

One can categorise crimes depending on the related punishment, with sentencing tariffs prescribed in line with the perceived seriousness of the offence. Thus fines and noncustodial sentences may address the crimes seen as least serious, with lengthy imprisonment or (in some jurisdictions) capital punishment reserved for the most serious.

4.1.3 COMMON LAW

Under the common law of England, crimes were classified as treason, felony or misdemeanour, with treason sometimes being included with the felonies. This system was based on the perceived seriousness of the offence. It is still used in the

---

5 E.g. Archbold Criminal Pleading, Evidence and Practice, 1999, chapter 22
6 E.g. Archbold Criminal Pleading, Evidence and Practice, 1999, chapter 24
7 E.g. Archbold Criminal Pleading, Evidence and Practice, 1999, chapter 25
8 E.g. Card, Cross and Jones: Criminal Law, 12th ed, 1992, chapter 17
9 E.g. Archbold Criminal Pleading, Evidence and Practice, 1999, chapter 26
10 E.g. Archbold Criminal Pleading, Evidence and Practice, 1999, chapter 27
11 E.g. Archbold Criminal Pleading, Evidence and Practice, 1999, chapter 28
12 E.g. Card, Cross and Jones: Criminal Law, 12th ed, 1992, chapter 16
13 E.g. Archbold Criminal Pleading, Evidence and Practice, 1999, chapter 29
14 E.g. Archbold Criminal Pleading, Evidence and Practice, 1999, chapter 30
15 E.g. Archbold Criminal Pleading, Evidence and Practice, 1999, chapter 31
16 E.g. Archbold Criminal Pleading, Evidence and Practice, 1999, chapter 32
17 E.g. Archbold Criminal Pleading, Evidence and Practice, 1999, chapter 33
United States but the distinction between felony and misdemeanor is abolished in England and Wales and Northern Ireland.

4.1.4 CLASSIFICATION BY MODE OF TRIAL

The following classes of offence are based on mode of trial:
- Indictable-only offence
- Indictable offence
- Hybrid offence, aka either-way offence in England and Wales
- Summary offence, aka infraction in the US

4.1.5 CLASSIFICATION BY ORIGIN

In common law countries, crimes may be categorised into common law offences and statutory offences. In the US, Australia and Canada (in particular), they are divided into federal crimes and under state crimes.

4.1.6 OTHER CLASSIFICATIONS

- Arrestable offence

4.1.7 U.S CLASSIFICATION

In the United States since 1930, the FBI has tabulated Uniform Crime Reports (UCR) annually from crime data submitted by law enforcement agencies across the United States. Officials compile this data at the city, county, and state levels into the UCR. They classify violations of laws based on common law as Part I (index) crimes in UCR data. These are further categorised as violent or property crimes. Part I violent crimes include murder and criminal homicide (voluntary manslaughter), forcible rape, aggravated assault, and robbery; while Part I property crimes include burglary, arson, larceny/theft, and motor-vehicle theft. All other crimes count come under Part II. For convenience, such lists usually include infractions although, in the U.S., they may come into the sphere not of the criminal law, but rather of the civil law. Compare tortfeasance. Booking arrests require detention for a time-frame ranging 1 to 24 hours.

4.1.8 DEFINITION

a) ENGLAND AND WALES

Whether a given act or omission constitutes a crime does not depend on the nature of that act or omission. It depends on the nature of the legal consequences that may follow it.\(^\text{18}\) An act or omission is a crime if it is capable of being followed by

\(^{18}\) Seaman v Burley [1896] 2 QB, per Lord Esher MR at 346.
what are called criminal proceedings. 19, 20

1871, and applied21 for the purposes of section 10 of the Prevention of Crime Act 190 The expression "crime" means, in England and Ireland, any felony or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanour under the fifty-eighth section of the Larceny Act, 1861.

4.1.9 OTHER DEFINITIONS

Legislatures can pass laws (called mala prohibita) that define crimes against social norms. These laws vary from time to time and from place to place: note variations in gambling laws, for example, and the prohibition or encouragement of duelling in history. Other crimes, called mala in se, count as outlawed in almost all societies, (murder, theft and rape, for example). English criminal law and the related criminal law of Commonwealth countries can define offences that the court salone have developed over the years, without any actual legislation: common law offences. The courts used the concept of malum in se to develop various common law offences. 22

4.1.10 ETYMOLOGY

The word crime is derived from the Latin root cernō, meaning "I decide, I give judgment". Originally the Latin word crīmen meant "charge" or "cry of distress. 23 The Ancient Greek word krima (κρίμα), from which the Latin cognate derives, typically referred to an intellectual mistake or an offense against the community, rather than a private or moral wrong. 24 In 13th century English crime meant "sinfulness", according to etymonline.com. It was probably brought to Englandas Old French crimne (12th century form of Modern French crime), from Latin crimen (in the genitive case: criminis). In Latin, crimen could have signified any one of the following: "charge, indictment, accusation; crime, fault, offense". The word may derive from the Latin cernere – "to decide, to sift" (see crisis, mapped on Kairos and Chronos). But Ernest

20 Chapter 1 of "Smith and Hogan's Criminal Law" (13th Ed by Ormerod) discusses the various proposed definitions of "crime" in more detail.
23 English Language (http://www. amazon. com/
Klein (citing Karl Brugmann) rejects this and suggests *cri-men, which originally would have meant "cry of distress". Thomas G. Tucker suggests a root in "cry" words and refers to English plaint, plaintiff, and so on.

The meaning "offense punishable by law" dates from the late 14th century. The Latin word is glossed in Old English by facen, also "deceit, fraud, treachery", [cf. fake]. Crime wave is first attested in 1893 in American English. Definition England and Wales Whether a given act or omission constitutes a crime does not depend on the nature of that act or omission. It depends on the nature of the legal consequences that may follow it. An act or omission is a crime if it is capable of being followed by what are called criminal proceedings.

a) HISTORY

The following definition of "crime" was provided by the Prevention of Crimes Act 1871, and applied[12] for the purposes of section 10 of the Prevention of Crime Act 1908: The expression "crime" means, in England and Ireland, any felony or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanour under the fifty-eighth section of the Larceny Act, 1861.

4.1.11 CAUSES AND CORRELATES OF CRIME

Many different causes and correlates of crime have been proposed with varying degree of empirical support. They include socioeconomic, psychological, biological, and behavioral factors. Controversial topics include media violence research and effects of gun politics.

4.1.12 CRIMES IN INTERNATIONAL LAW

Crimes defined by treaty as crimes against international law include:

- Crimes against peace
- Crimes of apartheid
- Forced disappearance
- Genocide
- Piracy

25 Seaman v Burley [1896] 2 QB, per Lord Esher MR at 346
27 Chapter 1 of "Smith and Hogan's Criminal Law" (13th Ed by Ormerod) discusses the various proposed definitions of "crime" in more detail.
Sexual slavery
Slavery
Waging a war of aggression
War crimes
Money Laundry

From the point of view of State-centric law, extraordinary procedures (usually international courts) may prosecute such crimes. Note the role of the International Criminal Court at The Hague in the Netherlands.

4.1.13 RELIGION AND CRIME

Different religious traditions may promote distinct norms of behaviour, and these in turn may clash or harmonise with the perceived interests of a state. Socially accepted or imposed religious morality has influenced secular jurisdictions on issues that may otherwise concern only an individual's conscience. Activities sometimes criminalized on religious grounds include (for example) alcohol consumption (prohibition), abortion and stem-cell research. In various historical and present-day societies, institutionalized religions have established systems of earthly justice that punish crimes against the divine will and against specific devotional, organizational and other rules under specific codes, such as Roman Catholic canon law.

4.1.14 ADMINISTRATION OF JUSTICE

The following five topics are discussed in this Chapter.
1. Definition and necessity of Administration of Justice
2. The origin of Administration of Justice
3. The purpose of Criminal Justice: Theories of Punishment
4. Kinds of Punishment
5. Primary and Sanctioning rights.
All these topics are discussed below with necessary details.

4.1.15 DEFINITION AND NECESSITY OF ADMINISTRATION OF JUSTICE

Administration of justice is the maintenance of right within a political community by means of the physical force of the State. It is the modern and civilized substitute for the primitive practice of private violence and violent self-help. Without a system of administration of justice, man tends to redress his wrongs by his own hand, which is certainly not at all desirable.
Its necessity 'A herd of wolves is quieter and more at one than so many men, Unless they all had one reason in them or have one power over them." (Taylor), Unfortunately, It is true that human beings, who act in the welter of conflicting interests, do not have one reason in them. Therefore, one power over them becomes necessary. As Hobbs printed out, unless man is under "a common power to keep them ali in awe," it is impossible for men to live together, except in the most primitive forms of society, where life would be "solitary, poor, nasty, brutish and short.'

The element of force is always present and operative in every society, even when a society is very orderly and its members appear to be obedient. Man, by nature, is a fighting animal, and force alone is the controlling factor. A society, in which the power of the State is never made use of, might prevail temporarily in some places, but eventually, the force of the State, which is partly or wholly talent, triumphs.

There are some optimistic thinkers who believe that the force of the State is just a temporary phase in the development of human society, and that it is sufficient for the State to declare, based on public opinion, the rights and duties of its subjects. Indeed, the constraint of public opinion is an indispensable and a highly valuable support to enforcement of legal system, because a system based entirely on coercion would bring about instability.

4.1.16 THE INDIAN PENAL CODE

But public opinion is no substitute for legal sanctions. Such a system would be inherently defective. Public opinion may be effective in the case of people who have a civilized conscience, but in the case of determine evil-doers, the effect of public opinion would be most inoperative. Public opinion can hardly influence the unjust and the turbulent members of society. The influence of public censure is least felt by those who need the most. Besides, the evil-doers might be influenced by another kind of public opinion, instead of being amenable to the influence of the opinion of the world at large, they might be amenable to the influence of the opinion of a small gang of evil-doers. Thus, for instance, honour among thieves finds its sanction and support in the professional opinion of gangs of thieves. In such circumstances, public opinion, instead of becoming a restraint on anti-social activity, might even encourage and promote it.

Some Chinese jurists believe that civil law is necessary for restraining Man acting wrongfully or in a depraved manner. HSU Tze has observed: "Man, who is by
nature wicked, needs teaching and discipline in order to be right; the ancient rulers understood the viciousness of man and therefore, created morals, laws and institutions, in order that human instincts may be disciplined and transformed." The Taoists and the Confucians, on the other hand, preached that Man commences life with a virtuous nature; yet law is necessary for preventing man from doing wrongful acts which he may commit by reason of a deviation from the right path.

Therefore, the administration of justice with the sanction of the physical force of the State is unavoidable, and admits of no substitute. In fact, a society in which the power of the State is never called into actual exercise marks, not the disappearance of governmental control, but its final triumph and supremacy.

4.1.17 THE ORIGIN OF ADMINISTRATION OF JUSTICE

As has already been pointed out, the administration of justice is the modern and civilized substitute for the primitive practice of private vengeance and violent self-help. The progress from primitive times to modern days has been through various Stages, The development can be divided into the following three stages:

a) THE FIRST STAGE – In the early days of mankind, a person redressed his wrongs and avenged himself upon his enemies by his own hand, supported by the hands of his friends and kinsmen, where necessary. At this stage every man carried his life in his own hands. He was liable, at any moment to be attacked, and could only resist by overpowering his opponent. In those days, every man was constituted a judge in his own cause, and Might was the sole measure of Right. There was no guarantee, at this stage, that a crime would certainly be punished, and if met with punishment, that the punishment would be in proportion to the crime. Very often, one crime led to another, and the consequent crime would not confine itself to the criminal, but along with him, his family and even his tribe, would be the victims of the retaliation. Thus, it would lead to group conflicts and tribal conflicts. Blood-feuds became very common.

4.1.18 ADMINISTRATION OF JUSTICE

At some stage, when blood-feud proved to be disastrous, primitive society provided for payment of some money, or its equivalent, as a compensation to the victim of the crime, or to the relatives of the victim, as the case may be. The advantage of this system of compensation was readily seen, and it developed until a
regular sliding scale was fixed. Even in the case of murder, the vengeance of the relatives could be bought off by paying "blood money", which varied according to the importance of the victim.

a) THE SECOND STAGE – The second stage in the history of administration of justice begins with the rise of the political State. However, these infant States were not powerful enough to regulate crime and to inflict punishment on the criminal. The law of "private vengeance" and "violent self-help" continued to prevail. The function of the State was just regulate private vengeance and violent self-help. At this stage, the State prescribed certain rules for regulation of private vengeance. All that the State could ensure was that the act of revenge or retaliation was not disproportionately severe. The State, at this stage, enforced the concept of "a tooth for a tooth", "an eye for an eye" and "a life for a life", What the State made sure was that a life was not taken for a tooth, nor a life for an eye. This was definitely a stage in the advancement of criminal justice. In the days of the Saxons, for instance, vengeance was not totally absent,- it was merely restricted and regulated. It was thought proper that every man should have a right to do with his own hands, what is today done by the machinery of the State. As royal justice grew in strength, the law began to speak for itself, and what followed was the modern theory of establishing an exclusive system to administer justice by the State.

b) THE THIRD STAGE. – In the first and second stages, there was hardly any difference between criminal justice and civil justice. With the growth of the State's power, the State began to act as a judge, to assess liability and to impose penalty. It was no longer a regulator of private vengeance; it substituted public enquiry and punishment for private vengeance. The civil law and administration of civil justice helped the wronged, and became a substitute for the system of violent self-help of the primitive days. Thus, it will be seen that modern administration of justice is a natural corollary to the growth in power of the political State.

4.1.19 DIFFERENCE BETWEEN CIVIL AND CRIMINAL JUSTICE

The administration of justice is civil as well as criminal. The social equilibrium of Society is maintained through the machinery of criminal justice (as for instance, imprisonment and fine), whereas the enforcement of civil rights and liberties
is done through the weapon of civil remedies (as for instance, damages, specific performance, injunction, restitution of conjugal rights, divorce etc.)

There has been considerable difference of opinion amongst jurists regarding the difference between civil justice and criminal justice.

1. Some writers are of the opinion that the object of civil proceedings is to enforce rights, while the object of criminal proceedings is to punish wrongs. In other words, whereas civil liability is mainly remedial, criminal liability is, on the whole, penal. There is an element of truth in this view. Certainly, punishment features more in criminal proceedings than in civil proceedings, but punishment is not always present in criminal proceedings, nor always absent in civil proceedings. For example, a juvenile offender may be just warned, and not punished in a criminal proceeding, whereas, in an action for torts. Heavy damages may be awarded by way of a punishment. Likewise, when a many disobeys an injunction of the Court, he can be punished with imprisonment in civil proceedings (as for instance, for contempt of court). Therefore, this distinction cannot be accepted in to.

2. Secondly, in a criminal case, the accused person is on trial for the offence, and the question is whether such a person is guilty or not. In a civil case, on the other hand, the Court frames issues as to whether the civil rights of a person are violated, and if so, whether he is entitled to any relief. Thus, whilst a criminal proceeding determines the guilt or the innocence of a person, a civil proceeding determines the rights and liabilities of the parties to the suit.

3. The third distinction, made by some writers is that crimes are more harmful in their consequence than civil wrongs, it is said that crimes injure the public at large, whereas civil wrongs injure private individuals. According to Salmond, the distinction between crimes and civil wrongs is that crimes are public wrongs, whereas civil wrongs are private wrongs. Thus, Salmond maintains that a crime is an act deemed by law to be harmful to society in general, even though its immediate victim is an individual. He gives the example of murder, which injures primarily the victim and his family, but falls in the category of a public wrong (crime) as it shows a blatant disregard for human life. This distinction between civil justice and criminal justice cannot always be maintained, because some acts may be considered both as crimes and also as
civil wrongs. Thus, defamation is both a tort (civil wrong) as well as a crime. Further, it is not always true that crimes are more harmful than civil wrongs. For example, the negligence of a contractor (which is a civil wrong) which results in widespread loss of life and property may entail more harmful consequences than, say a simple assault or a petty theft (which are crimes).

4. The fourth distinction is that in a crime, the State constitutes itself a party to the proceedings, whereas in civil proceedings, private individuals are the litigants before the Court. This distinction is also not always maintainable, as there are some crimes where private individuals can be parties, and some civil wrongs where the State is the litigant.

The difference between criminal justice and civil justice cannot be considered in terms of the natural acts or the physical consequences of the act. The distinction lies in the differences in the legal consequences. Civil proceedings, if successful, result in a judgment for damages, or a judgment for payment of a debt or penalty, or in an injunction, or a decree for restitution or specific performance, or in an order for the delivery of possession of land, or any other form of relief known distinctively as civil. On the other hand, criminal proceedings, if successful, result in one or a number of punishments, ranging from hanging to fine, or in binding over to keep the peace, or release upon probation, or any other outcome known to belong distinctively to criminal law. In other words, civil justice is administered according to one set of forms, in one set of courts, and criminal justice according to another set of forms. In a different set of courts.

Though, broadly speaking, criminal justice attempts at punishment and civil justice attempts at remedy, yet to be accurate, the distinction is more in the nature of the form of the proceedings than in intrinsic nature of the acts.

4.2 THE PURPOSE OF CRIMINAL JUSTICE: THEORIES OF PUNISHMENT

4.2.1 PUNISHMENT

Punishment, according to the dictionary, involves the infliction of pain or forfeiture, it is the infliction of a penalty, chastisement or castigation by the judicial arm of the State. But if the sole purpose of punishment is to cause physical pain to the wrong-doer, it serves little purpose. However, if punishment is such as makes the

---

28 THE INDIAN PENAL CODE (ACT XLV OF 1860)
offender realize the gravity of the offence committed by him, and to repent and atone for it (thus neutralizing the effect of his wrongful act), it may be said to have achieved its desired effect.

A person is said to be "punished" when some pain or detriment is inflicted on him. This may range from the death penalty to a token fine.

Thus, punishment involves the infliction of pain or forfeiture; it is a judicial visitation with a penalty, chastisement or castigation. In this book entitled "Criminal Behaviour", Walier Reckless describes punishment as "the redress that the commonwealth takes against an offending member." In the words of Westermarck, punishment is "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."

**The objects of punishment,** - The needs of criminal justice are considered to be five, namely:

A. Deterrent  
B. Preventive  
C. Reformative  
D. Retributive  
E. Compensation.

**4.2.2 THE DETERRRENT THEORY OF PUNISHMENT**

Punishment is primarily deterrent when its object is to show the futility of crime, and thereby teach a lesson to others. Deterrence acts on the motives of the offenders, whether actual or potential.

Offences are committed, in most cases, as a result of a conflict between the so-called interests of the wrong-doer and those of society at large. The object of punishment, according to this theory, is to show that, in the final analysis, crime is never profitable to the offender, and as Locke observed, to make crime "an ill-bargain to the offender." By making it an ill-bargain to the offender, the world at large would learn that crime is a costly way of achieving an end.

The idea behind deterrent punishment is that of preventing crime, by the infliction of an exemplary sentence on the offender. By this, the State seeks to create fear in its members, and thus deter them from committing crime through fear psychology. The rigour of penal discipline is made a terror and a warning to the
According to the exponents of this theory, punishment is meant to prevent the person concerned and other persons from committing, similar offences. The advocates for the retention of capital punishment rely on this theory in support of their contention. They argue that capital punishment, by its very nature, cannot have either a reformative value or be a retributive necessity. Its only value, if at all, is by way of deterrence.

However, the theory of deterrent punishment fails to achieve its goal. A hardened criminal becomes accustomed to the severity of the punishment, and deterrence does not always prevent him from committing a crime. On the other hand, it also fails to affect an ordinary criminal, as very often, a crime is committed in a moment of excitement. If the crime is pre-mediated, the offender commits the crime, knowing fully well, the consequences arising from his act and performs the act because he cannot help but do it.

In a case decided by the Supreme Court, Phul Singh Vs State of Haryana, (1980 Cri. L. J. 8), a young philanderer aged 22, overpowered by excess sex stress, raped a twenty-four year old girl next door in broad daylight. The Sessions Court convicted him to four years' rigorous imprisonment, and the High Court confirmed the sentence in appeal. When the matter went in appeal to the Supreme Court, the sentence was reduced to two years' rigorous imprisonment, as the accused was not an habitual offender, and had no vicious antecedents. The Supreme Court observed: "The incriminating company of lifers and others for long may be counter-productive, and in this perspective, we blend deterrence with correction, and reduce the sentence to rigorous imprisonment for two years,"

4.2.3 THE PREVENTIVE THEORY OF PUNISHMENT

If the deterrent theory tries to put an end to the crime by causing fear of the punishment in the mind of the possible crime-doer, the preventive theory aims at preventing crime by disabling the criminal, for example, by inflicting the death penalty on the criminal, or by confining him in prison, or by suspending his driving license, as the case may be.

Thus, the extreme penalty, the death sentence, ensures that, once and for all, the offender will be prevented from repeating the heinous act. In the past, maiming was considered an effective method of preventing the wrong-doer from committing
the same crime in the future, by dismembering the offending part of the body. Thus, a thief's hand would be cut off, or a sexual off.

In the ultimate analysis, the preventive mode of punishment works in three ways, viz-

a) by inspiring all prospective wrong-doers with the fear of punishment;
b) by disabling the wrong-doer from immediately committing any crime; and
c) by transforming the offender, by a process of reformation and reeducation, so that he would not commit crime again.

In this connection, the following extract from Rule 58 of the International Standard Minimum Rules is illuminative:

"The purpose and justification of a sentence of imprisonment or a similar measure derivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society, the offender is not only willing, but also able, to lead a law–abiding and self-supporting life."

4.2.4 THE RELATION BETWEEN DETERRENT AND PREVENTIVE THEORIES OF PUNISHMENT.

An important difference between the deterrent and the preventive theories of punishment deserves to be carefully noted. The deterrent theory aims at giving a warning to society at large that crime does not pay, whereas the preventive theory aims at disabling the criminal from doing further harm.

As mentioned above, the purpose of the deterrent theory is to set a lesson unto others and show that crime does not pay. This theory of punishment seeks to show to the offender, and the rest of the world, that ultimately punishment will be inflicted on the criminal, and therefore, crimes are to be shunned. But under the preventive theory of punishment, the main object of the punishment is to disable the wrong-doer himself from repeating the crime. This theory does not act so much on the motive of the wrong-doer, but it disables his physical power to commit the offence.

4.2.5 THE REFORMATIVE THEORY OF PUNISHMENT

According to the reformative theory, a crime is committed as a result of the conflict Between the character and the motive of the criminal. One may commit a crime either because the temptation of the motive is stronger or because the restraint
imposed by character is weaker. The deterrent theory, by showing that crime never pays, seeks to act on the motive of the person, while the reformative theory aims at strengthening the character of the main, so that he may not become an easy victim to his own temptation. This theory would consider punishment to be curative or to perform the function of a medicine. According to this theory, crime is like a disease. This theory maintains that "you cannot cure by killing".

The exponents of the reformative theory believe that a wrong-doers stay in prison should serve to re-educate him and to re-shape his personality in a new mould. They believe that though punishment may be severe, it should never be degrading. To the followers of this theory, execution, solitary confinement and maiming are relics of the past and enemies of reformation. Thus, the ultimate aim of the reformists is to try to bring about a change in the personality and character of the offender, so as to make him a useful member of society.

The reformists argue that if criminals are to be sent to prison in order to be transformed into law-abiding citizens, prisons must be turned into comfortable, dwelling houses. This argument is, however, limited in its application, and it must be remembered that in a country like India, where millions live below the poverty line, it may even act as an encouragement to the commission of crimes.

Lamenting on the conditions prevailing in jails in India, Justice Krishna lyer opens his judgment in Rakesh Kaushik Vs Superintendent, Central Jail (1980 Supp. S.C.C. 183) with the following poignant question:

"Is a prison term in Tihar Jail a post-graduate course in crime?"

In Sunil Batra (II) V. Delhi Administration (1980 3 S.C.C. 488), the Supreme Court regarded a simple letter from a co-prisoner as sufficient to invoke proceedings by way of habeas corpus. The judgment deals at length with the shocking conditions prevailing in Indian prisons and suggests a series of prison reforms. Lamenting on the atrocities prevailing in Delhi's Tihar Jail, Justice Krishna lyer, in the course of his learned judgment, observes a follows.

"The rule of law meets with its Waterloo when the State's minions become law-breakers, and so the Court as a sentinel of justice and the voice of the Constitution, runs down the violators with its writ, and serves compliance with human rights even behind iron bars and by prison wardens."
True it is, that the reformative element had long been neglected in the past. However, the present tendency to lay heavy stress on this aspect seems to be only a reaction against the older tendency to neglect it altogether, and has therefore, the danger of leaning to the other extreme. Whereas reformation is an important element of punishment, it cannot be made, the sole end in itself. It must not be overlooked, but at the same time, it must not be allowed to assume undue importance. In the case of young offenders and first offenders, the chances of long-lasting reformation are greater than in the case of habitual offenders. Again, some crimes, such as sexual offences, are more amenable to reformative treatment than others. Further, reformative treatment is more likely to succeed in educated and orderly societies than in turbulent or under-developed communities.

4.2.6 THE RELATION BETWEEN THE DETERRENT THEORY AND THE REFORMATIVE THEORY

Though the deterrent and the reformative theories coincide to some extent, there is also some element of conflict between the two. The deterrent theory would impose the punishment of imprisonment, fine, or even whipping and death-penalty, but according to the formative theory, all modes of punishment other than imprisonment are barbaric. Imprisonment and probation are the only instruments available for the purpose of a purely reformative system.

The next question to be answered, in view of this conflict between the deterrent and reformative theories of punishment, is whether it is possible to have a penal system having the reformative element as the sole standard of punishment. Salmond, in his treatise on Jurisprudence, points out that there are in the world, men who are incurably bad. With them, crime is not so much of a bad habit as an ineradicable instinct. The reformative theory might be quite helpless in the case of such persons. Therefore, according to him, the perfect system of criminal justice is based neither the reformative, nor the deterrent principle exclusively, but is the result of a compromise between them. In this compromise, it is the deterrent principle which wields the predominant influence.

Salmond further adds that the present-day acceptance of the reformative theory is, in a large measure, a reaction to the conservative approach to the question of punishment. The extreme inclination towards the reformative theory may be as dangerous as the complete acceptance of the old code of punishment. It is true that in
the olden days, too much attention was paid to the crime, and very little to the criminal. It is also true that criminals are not generally ordinary human beings. They are often mentally diseased abnormal human beings; but, if all murderers are considered as innocent and given a lenient treatment, is it not possible that even ordinary sane people might be tempted to commit that crime, in view of the lenient attitude of law towards crime? Thus, in course of time, this theory would crumble down. The theory may be effective in the case of very young and the completely insane offenders, but in other cases, some deterrent element in the punishment must be present.

4.2.7 THE RETRIBUTIVE THEORY OF PUNISHMENT

While discussing the history of the administration of justice, it was seen that punishment by the State is a substitute for private vengeance. In all healthy communities, any crime or injustice stirs up the retributive indignation of the people at large. Retribution basically means that the wrongdoer pays for his wrongdoing, since a person who is wronged would like to avenge himself, the State considers it necessary to inflict some pain or injury on the wrongdoer in order to otherwise prevent private vengeance.

Whereas other theories regard punishment as a means to some other end the retributive theory looks on it as an end in itself. It regards it as perfectly legitimate that evil should be returned for evil, and that a man should be dealt with the manner in which he deals with others. An eye for an eye and a tooth for a tooth is deemed to be the rule of natural justice.

Though the system of private revenge has been suppressed, the instincts and emotions that lay at the root of these feelings are yet present in human nature. Therefore, according to this theory, the moral satisfaction that society obtain from punishment cannot be ignored. On the other hand, if the criminal is treated very leniently, or even in the midst of luxury, as the reformatory theory would have it. (and as actually happens in some prisons of the world, which are equipped with air-conditioning, private toilets, TV sets etc.), the spirit of vengeance would not be satisfied, and it might find its way through private vengeance. Therefore, punishment, instead of preventing a crime, might indirectly promote it.

Unfortunately, the retributive theory ignores the causes of the crime, and it does not strike at the removal of the causes. A mere moral indignation can hardly
prevent crime. It is quite possible that the criminal is as much a victim of circumstances as the victim himself might have been.

It is also unfortunate that this theory overlooks the fact that two wrongs do not really make a right. The theory also seems to ignore that if vengeance is the spirit of punishment, violence will be a way of prison life.

4.2.8 RETRIBUTION AS EXPIATION

There is yet another interpretation of the retributive theory, which considers punishment as a form of expiation. To suffer punishment is to pay a debt due to the law that has been violated. As per this formula, guilt plus punishment is equal to innocence. According to this view of the retributive theory, the penalty is a debt which the offender owes to his victim, and when the punishment has been endured, the debt is paid, and the legal bond forged by the crime is dissolved.

Therefore, the object of true punishment must be to substitute justice for injustice, to compel the wrong-doer to restore to the injured person that which is his own, and by such restoration and repentance, the spirit of vengeance of the victim is to be satisfied.

4.2.9 THE COMPENSATION THEORY OF PUNISHMENT

According to this theory, the object of punishment must not be merely to prevent further crimes, but also to compensate the victim of the crime. This theory further believes that the main-spring of criminality is great and if the offender is made to return the ill-gotten benefits of the crime, the spring of criminality would be dried up.

Though there is considerable truth in this theory, it must be pointed out that this theory tends to over-simplify the motives of a crime. The motive of a crime is not always economic. Offences against the state, against justice, against-religion, against marriage, and even against persons, may not always be actuated by economic motives. There may be other complicated motives involved. In such cases, the theory of compensation may be neither workable nor effective. Quite often, even in the case of offences actuated by such motives, the economic condition of the offender may be such that compensation may not be available. Therefore, this theory can at best, play a subordinate role in the framing of a Penal Code.
By way of conclusion, it may be said that the administration of criminal justice cannot have any of the above purposes as the single or sole standard of punishment. A perfect penal code must be a judicious combination of these various purposes of punishment.

No theory of punishment is a complete answer by itself. All the above theories of punishment are not mutually exclusive.

If the retributive theory is meant pure vengeance, it cannot be accepted. However, it does not mean that. In its true sense, it involves the working of Nemesis. The real idea behind retribution is to make the offender realize-by a process of reformative detention-the heinousness of his crime, thus preventing him and deterring others at the same time.

As observed by justice Krishna Iyer in Rakesh Kaushik Vs Superintendent, Central Jail (referred to above),-

"The fundamental fact of prison reforms-comes from our constitutional recognition that every prisoner is a person, and such person hold the human potential which, if unfolded, makes a robber a Valmiki, and a sinner a saint."

As stated in a British Government's White Paper entitled "People in Prison,"- 

"A society that believes in the worth of individual beings can have the quality of its belief judged, at least in part, by the quality of its prison and probation services and of the resources made available to them." In the words of Dr. Sethna, the theories of retribution, reformation, determent and prevention go hand-in-hand, and exist for the preservation of the moral order, the protection of society and the rehabilitation of the offender himself.

4.3 KINDS OF PUNISHMENT

The following seven kinds of punishment are discussed below, namely,-

(1) Capital punishment
(2) Deportation
(3) Corporal punishment
(4) Imprisonment
(5) Solitary confinement
(6) Indeterminate sentence
(7) Fine.
4.3.1 CAPITAL PUNISHMENT

In the history of punishments, capital punishment has always occupied a very important place. In ancient times, and even in the middle ages, sentencing offenders to death was a very common kind of punishment. Even what might be considered as minor offences in modern criminal law, attracted the death penalty in those days. In England, there was a time when there were as many as 200 felonies for which the punishment was death. Even the offence of theft of property worth more than two shillings would attract the penalty of death. Till the middle of the seventeenth century in England, even the penalty for the offence of forgery was death.

Then there arose a movement in the 18th century, which raised its voice of protest against the inhuman of punishment. Bentham can be considered as the spearhead of this movement. He analysed the causes of crime, and showed how punishment would serve its purpose. According to him, punishment itself was an evil, but a necessary evil. No punishment was to be inflicted unless it brought greater good.

The object of capital punishment is said to be two-fold. By putting the offender to death, it may instill fear in the minds of others and teach them a lesson. Secondly, if the offender is an incorrigible one, by putting him to death, it prevents the repetition of the crime by that person on a permanent basis. But it is evident that this punishment is not based on the reformative object of punishment, in the sense that it is a step of despair.

There have been many arguments for and against this kind of punishment. In a case before the Supreme Court, the accused killed his ailing wife, as he could not provide the money for her operation. He also killed his two children, as there would be no one to care for them after the mother. However, the crime was committed out of poverty, and not for just, vengeance or gain. In the circumstances, the Supreme Court held that life imprisonment, and not capital punishment, was the appropriate sentence (State of U.P. V. M.K. Anthony, A.I.R. 1985 S.C. 48).

In Bachan Singh V. State of Punjab (1980 2 S.C.C. 684), the Supreme Court was faced with the question whether the death penalty imposable for some offences under the Indian Penal Code is constitutionally valid. By a four-to-one majority verdict, the Supreme Court ruled that the death penalty is constitutionally valid, and does not constitute an "unreasonable, cruel or unusual punishment." The majority pointed out that the death penalty is to be imposed only for "special reasons" and only
in the rarest of rare cases. However, such provisions cannot be said to be violative of Articles 14, 19 and 21 of the Constitution. It was also observed that the fact that India had accepted the International Covenant of Civil and Political Rights does not affect the constitutional validity of the death sentence. The voice of dissent came from justice Bhagwati, who delivered a separate verdict to the effect that section 302 of the Code is void, in so far as it provides for imposition of a death penalty (for murder) as an alternative to life imprisonment.

The Supreme Court has taken a stern view of recent "dowry deaths" and "wife-burning tragedies", and has refused to commute sentences imposed on such "murders" by lower Courts. The following observations of the Supreme Court in Vasant Pawar V. State of Maharashtra (1980 Supp. S.C.C. 194) are interesting:

"Wife-burning tragedies are becoming too frequent for the country to be complacent…Law must rise to the challenge of shocking criminology, especially when helpless women are the victims, and the crime is committed in the secrecy of the husband's home."

A reference may be made to yet another decision of the Supreme Court in a wife-burning tragedy which took place in Delhi (State V. Laxman Kumar & others), a detailed discussion whereof appears in the Appendix (at the end of the book).

a) Arguments against Capital Punishment

(i) Those who denounce this kind of punishment argue that capital punishment has not served its deterrent object at all. For example, in certain States of the United States of America, where the death penalty has been abolished, there are fewer serious crimes than in other States, where capital punishment is still retained. If capital punishment has the deterrent effect which it is supposed to have, crimes in the former States ought to have increased, and crimes in the latter States ought to have decreased. Therefore, it is argued that the statistics do not prove the deterrent effect of capital punishment.

Abolition of capital punishment has been a recent experiment in England and the immediate results are indeed encouraging. The experiment is worth a trial in India also. Subsequent to its abolition in England, in July 1983, a private member's Bill was introduced in the House of Commons for restoring the death penalty in England after fourteen years of its abolition. However, the Bill was defeated, with 233 votes in favour and 368 votes cast against the proposal.
(ii) Capital punishment may be preventive, but at what cost, and under what circumstances? Crimes are very often committed, not by persons who are normal human beings, or under normal circumstances, it is not even certain that a murder would repeat the murder again. He might have committed this heinous crime under extraordinary circumstances. If the State were to kill that man, it could, at best, have only the dubious satisfaction of having prevented a crime which probably would never have been committed. But it must be noted that, in such a case, in its anxiety to prevent a crime, the State itself has committed the greatest crime of taking away the life of a man. As Professor Henting put it"…I see in capital punishment a means of punishment whose advantages can be obtained by other means, and whose disadvantages cannot be prevented in any other way than by abolishing it".

(iii) Professor Henting draws our attention to another salient defect of the capital punishment: No thinking person can claim that our law of evidence and the law of procedure are foolproof, and always lead us inevitably to the truth. It is possible that there are judicial errors, and in such a case, capital punishment, once it is awarded and the person executed, cannot be revoked. Thus, there have been cases where after execution of an alleged murderer, the true murderer is caught. But can the mischief be remedied? It is argued that it is, therefore, better to save nine murderers from capital punishment than to inflict it on one who may be, in fact, innocent.

It is, therefore, argued that this form of extreme punishment is neither effective nor just, and should be abolished.

b) Arguments in favour of Capital Punishment

(i) On the other hand, those who advocate capital punishment argue that there are some offenders who are not only incorrigible, but who are immensely dangerous to society, and there is no reason why society should be burdened with maintaining such people. If you cannot cure, and If this incorrigible element is harmful to human society, why not remove it altogether?

(ii) Another argument pressed in favour of capital punishment is that it must be remembered that punishment by the State is a substitute for private
revenge. If a murderer is not punished with death, it is quite possible that other relatives of the victim might murder the murderer, and thus a chain of murders might set in. So long as human emotions are powerful, so long as the powers of vengeance prevail, it is argued, capital punishment is a necessary kind of punishment.

In conclusion, it may be said that though capital punishment serves some purpose, in the present context of our respect for human dignity and the possibility of reforming the character of the offenders, an experiment of abolishing capital punishment would be a very worthy attempt.

c) EFFECTIVE OF DELAY IN EXECUTING A DEATH SENTENCE:

Very often, there is a considerable delay in executing a death sentence awarded to a convict. This delay may be attributed to the procedural delays involved in Courts, and often by mercy Petitions of the relatives in a bid to save the life of the convict.

In a rather surprising decision (delivered in February, 1983), Justice O. Chinnappa Reddy and Justice R.B. Mishra of the Supreme Court held that if there is a delay of more than two years in executing a death sentence, the appropriate relief is to vacate the death sentence and commute it to life imprisonment. The Court held that any delay exceeding two years in the execution of a sentence should be considered sufficient to entitle the person to invoke Article 21 of the Constitution, and demand the quashing of the death sentence, the cause of delay, in such cases, being immaterial. (T.V. Vatheeswaran V. State of Tamil Nadu, 1983 Cri. L.J. 481).

The decision in T.V. Vatheeswaran's case (above) was, however, overruled by a three-member Bench of the Supreme Court (consisting of Chief Justice Chandrachud, Justice Tulzapurkar and Justice Varadrajan) only a month later (in March 1983), when the Court held that two-year delay in Executing the death sentence does not, by itself, give a right to the offender to have it converted into a sentence of life imprisonment. No doubt, prolonged delay is an important consideration in such cases, but no hard and fast rule should be laid down to give a right to the murderer to have his death sentence quashed. As observed by the Court, very often, four or five elapse between the sentence of death imposed by the Sessions Court and rejection to the final appeal by the Supreme Court. To this may be added the time taken by the President or the Governor to consider mercy petitions. Therefore, the
Court observed, if such a hard and fast rule is laid down, it will become an object of ridicule, by permitting a person to resort to frivolous proceedings in order to delay the sentence by two years or more. (Sher Singh and Others V. State of Punjab, 1983 Cr. L.J. 803).

In Sher Singh's case (above), the Supreme Court also reiterated that the death sentence is constitutionally valid and permissible within the constraints prescribed by the Supreme Court (viz., that it should be imposed only in the rarest of rare cases).

Following the later decision of the Supreme Court, a Full Bench of the Madras High Court has also held that delay in execution of a death sentence is no ground in itself for modification of such sentence to one of life imprisonment, the circumstances causing the delay being immaterial. (K.G. Pillai V. Government of India, A.I.R. 1986 Mad. 204).

4.3.2 DEPORTATION

Next to capital punishment, a method of elimination of incorrigible or dangerous offenders is the punishment of deportation. In India, it used to be called transportation. This could hardly be a solution to the problem. If a man is dangerous in one society and if he is let loose in another society, he is likely to be equally dangerous there also. Even if a separate colony or settlement were to be created for deportation of such offenders, the problem of maintaining such a settlement might create a number of difficulties, in addition to such a colony having a degrading influence on the character of the offenders.

This kind of punishment was abolished in England a long time ago, and it has also now been abolished in India.

4.3.3 CORPORAL PUNISHMENT

Corporal punishment includes modulation, flogging (or whipping) and torture. This was a very common kind of punishment in the ancient and the medieval times. In ancient Iran and ancient India, and even in times of the Mughal Rulers and the Marathas, whipping was commonly resorted to. Elsewhere also, right upto the Middle Ages, whipping was one of the commonest form of punishment. It was also very severe form of punishment, and many prisoners bled to death as a result of the wounds received by the lashes. Whipping in public was also quite common, and we read, in history, of cases where the whipping continued mercilessly even after the prisoner had fainted.
The main object of this kind of punishment is deterrence. It has been long ago realized that this kind of punishment is not only inhuman, but also ineffective. The person who undergoes this kind of punishment may become more antisocial than he was before. The criminal tendencies in him might be hardened and reforming him might become impossible. Though whipping was one of the kinds of punishment originally provided in the Penal Code, it was abolished in 1955. However, flogging has recently been reintroduced as a form of punishment in Pakistan.

A few criminologists have suggested that whipping should be reintroduced as a punishment in India. They have argued that imprisonment, by itself, does not have the same deterrent value as whipping, which would instill a graver fear in the mind of the prospective offender. However, there seems to be very little merit in going back to an almost barbaric form of punishment. Not even in cases of brutal offences can whipping be justified, for by whipping a man whom society may call a brute, society will only transform him either into an enemy of a coward. Whipping produces only the rougher kind of criminal, the more maladjusted human being, the braver desperado, -or else a broken-down man. As Dr. Barnes once observed, "In never know a convict benefited by flagellation. The beaten may become a more desperate character."

4.3.4 IMPRISONMENT

Imprisonment, if properly used, may serve all the three important objects of the punishment. It may be a deterrent, because it makes an example of the offender to others. It may be preventive, because it disables the offender, at least for some time, from repeating the offence, and it might, if properly used, give opportunities for reforming the character of the offender.

4.3.5 SOLITARY CONFINEMENT

Solitary confinement is an aggravated kind of imprisonment. This kind of punishment exploits fully the sociable nature of man, and by denying him the society of his fellow beings, it seeks to inflict pain on him.

It has been felt by many criminologists that this kind of punishment is inhuman and perverse. It is possible that this might turn a man of sound mental health into a lunatic. If used in excess, it may inflict permanent harm on the offender, though in limited cases, if used in proportion, this kind of punishment may be useful. But if those limits are surpassed, it is likely to be unnecessarily cruel.
Ss. 73 and 74 of the I.P.C. lay down the limits beyond which solitary confinement cannot be imposed under the Indian law. Thus, the total period of solitary confinement cannot exceed three months in any case; nor can it exceed fourteen days at a time, with intervals of fourteen days in between (or seven days at a time with seven days intervals in between, in case the substantive sentence exceeds three months' imprisonment).

4.3.6 INDETERMINATE SENTENCE

Another kind of imprisonment, which may serve the reformative purpose to a greater extent, and which is to-day extensively used in the United States, is the method of awarding an indeterminate sentence. In this case, the accused is not sentenced to imprisonment for any fixed period. The period is left in determinate at the time of the award, and when the accused shows improvement, the sentence may be terminated. This kind of sentence serves the reformative purpose to a considerable extent, as even in prison, the offender has a very strong motive to reform himself.

4.3.7 FINE

Some criminologists are of the opinion that the punishment of fine, in addition to serving its deterrent object, also serves three more purposes. Firstly, it may help to support the prisoners; secondly, it might provide expenses for the prosecution of the prisoners, and thirdly, it may be used for compensating the aggrieved party.

This kind of punishment may be very useful in cases of criminals who are not hardened. But care must be taken to see that heavy and excessive fines, which would almost result in forfeiture of the property of the offender, should not be inflicted. Moreover, facilities for collecting fines must be created in such a way that levying of fine does not inevitably drive the offender to the prison on account of his inability to pay the fine.

4.3.8 PRIMARY AND SANCTIONING RIGHTS

Civil proceedings are enforced with the object of enforcing a person's rights. These rights may be classified into primary and sanctioning rights.

A primary right is a right arising out of a contract as a jus in rem. A sanctioning right is one which arises out of the violation of another right. If X enters into a valid contract, his right to have the contract performed is a primary right, and if the contract is broken, his right to damages for the loss caused to him by the breach of
contract is a sanctioning right. The right not to be assaulted is primary. But the right to obtain pecuniary compensation from a person who has assaulted another is a sanctioning right.

A primary right may be enforced by specific enforcement, and a sanctioning right is enforced by sanctioning enforcement. Specific enforcement lies in either (a) specific performance, e.g. by ordering delivery of an article not available in the open market, or (b) specific restitution, e.g. restoring a person to his status quo.

Sanctioning rights are: (1) the right to be compensated (by damages) by the wrong-doer, or (2) the right to exact the imposition of pecuniary penalty on the wrong-doer by penal action. The first is divided into two types: (a) Restitution and (b) Penal redress. Restitution lies in restoring the plaintiff to his original position, while penal redress involves restitution of all benefits which the offender derives for his wrongful act, in addition to a full redress for the plaintiff's loss.

Another method of enforcement, which is extra judicial, may be enforced by specific or sanctional rights. It is specific when the right is specific when the right is maintained and the status quo restored. It is sanctional in the case of distress damage feasant, as for instance, in the case of stray animals.

4.3.9 THE PRIMARY & SECONDARY FUNCTIONS OF THE COURT OF LAW

The primary function of a Court of law is the administration of justice, viz., the application by the State of the sanction of physical force to the rules of justice. But there are four secondary functions which the Court performs. These secondary functions are:

a) PETITION OF RIGHT

In England, proceedings against the Crown can be taken only by a petition of right in a Court of law, which will determine the rights of the parties. This is not administration of justice, strictly and properly so called, for the essential element of coercive force is lacking. The State, being the judge of its own cause, cannot exercise constraint against itself.

b) DECLARATION OF RIGHT

A suitor may seek the assistance of a Court of Justice, not by way of obtaining redress, but by way of having it declared that he has or has not a certain right. The
Court of justice, after hearing the parties, either makes or refuses to make the necessary declaratory order. Such suits are known as declaratory suits.

c) ADMINISTRATION

Courts of Justice sometimes undertake the management and distribution of property, e.g. administration of a trust, liquidation of a company etc.

d) TITLES OF RIGHT

These are all those cases in which judicial decrees are employed as the means of creating, transferring and extinguishing right, e.g. an adjudication of bankruptcy, a grant of probate, letters of administration etc.

The above are secondary functions of law as pointed out by Salmond. Dr. Sethna takes a different view. According to him, "functions such as those of declaration of rights, for example, interpretation of documents and trusts, wills, and advising persons such as trustees, executors, and administrators, and the deciding of titles of rights, for example, creating, assigning and extinguishing rights, are not secondary, but are truly, and should be regarded really, as the primary and ordinary functions of law Courts."