CHAPTER-II

THE GENESIS AND DEVELOPMENT OF PUNISHMENT SYSTEM IN INDIA
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2.1. Introduction

Man passed on from an unsocial individual to a social being. The factors responsible for promoting man for this change were fear and reciprocity. A man became more and more social, the limitations on his actions increased. Whenever man acted in an unrestrained manner or in non-social manner, he came in conflict with others and it is in order to do away with conflicts that some sort of rule and regulations came into being. But then, to enforce them, the existence of some sort of an authority became essential. There was no criminal law in uncivilized society. Every man was liable to be attacked in his person or property at any time by any one. The person attacked either succumbed or overpowered his opponent. As time advanced, the injured person agreed to accept compensation, instead of killing his adversary. Subsequently, a sliding scale came into existence for satisfying ordinary offences. Such a system gave birth to archaic criminal law. For a long time, the application of these principles remained with the parties themselves, but gradually this function came to be performed by the State.

Different societies, through ages evolved and applied various forms of punishments of which death, imprisonment for life, banishment, mutilation; branding, pillory, flogging, forfeiture, fine and confiscation of property have been well recognized. With the rise of humanitarianism in penal philosophy, fines, forfeiture and confiscation of property, imprisonment for life and imprisonment have remained the common forms of punishment inflicted for almost all offences.
in many parts of the world. Capital punishment is inflicted only for a very limited number of offences and that too in the rarest-of-rare cases. Thus, imprisonment as a form of punishment gained prominence in India, almost all the offences under Indian Penal Code and most of the offences under special and local laws are punished with imprisonment.

Imprisonment is less than 200 years old. The first great revolution in handling criminals was the replacement of corporal punishment by institutionalization, which took place in the late 18th century. The second has to see the replacement of prisons by a flexible programme of reformative treatment based on reason and science. Attempts to justify the institution of criminal punishment take different routes. There are different theories to support the justification and development of punishments. But their ideology is different to each other. The nineteenth century witnessed the introduction of English Law in India. In 1833 Lord Macaulay persuaded the House of Commons that the ideal moment had come for codification of Indian Laws. Thus the Indian Penal Code as first codified law came into existence. In this Code offences were defined and punishments were prescribed. After Independence Indian parliament enacted several penal laws basing on the necessity from time to time.

2.2. Ancient Indian Jurisprudence

Jurisprudence is the philosophy of law. In other words, it seeks to explain what law is about in the most general way. Law is a set of rules which govern society. There are other systems like religion, morality, so on and so forth which also prescribe rules of social conduct.
When man was in the hunting stage, which was before the beginning of agriculture, he was mainly living in forests and survived by eating animal flesh, fruits, nuts, etc. At that stage man was living in tribal society, and his life was controlled by customary rules. There was no private property at that stage of social development, because the forests had not been cut for doing agriculture. Hunting was done collectively by the males of the tribe, and the animal which was killed in the hunt was eaten collectively. It was only when forests were cut and agriculture started that private property came into existence. Once man claimed that a certain plot of land belonged exclusively to him, another claimed another plot of land, etc. In order to safeguard this property the law of crime had to be created, whose main purpose is to protect property. Thus the basic law is the Criminal Law.

The Hindu Law originated from the Vedas. The Hindu law really emanated from books called the Smritis such as Manusmriti, Yajnavalkya Smriti and the Smritis of Vishnu, Narad, Parashar Apastamba, Vashisht, Gautam. There were books written by certain Sanskrit scholars in ancient times who had specialized in law. Later, commentaries called Nibandhas or Tikas were written on these Smritis. The commentary of Vigneshwar who wrote a commentary called Mitakshara on the Yajnavalkya Smriti, the commentary of Jimutvahan who wrote a book called the Dayabhaga,¹ Nanda Pandit² Commentaries were then written on these commentaries, e.g. Viramitrodaya which is a commentary on the Mitakshara which founded the Banaras School of Mitakshara. All law are originally customary laws, and there was no statutory law in ancient India.

¹ Which is not a commentary on any particular Smriti but is a digest of several Smritis.
² Whose commentary Dattak Mimansa deals specifically with the Law of Adoption.
The Manusmriti is not a systematic work. One can find one dealing with religion, the next dealing with law, the third dealing with morality, like that everything is jumbled up. On the other hand, the Yajnavalkya Smriti is divided into three chapters. The first chapter is called Achara which deals with religion and morality, the second chapter is called Vyavahara, which deals with law, and the third chapter is called Prayaschit which deals with penance.

Thus one can find that in the Yajnavalkya Smriti, law is clearly separated from religion and morality. The Yajnavalkya Smriti was a great advance over the Manusmriti because in it there is a clear separation of law from religion and morality. One can compare this separation made by the positivist jurists Bentham and Austin, who separated law from religion and morality. The Yajnavalkya Smriti was written later than the Manusmriti and it shows a great advance over the latter. Apart from that, the Yajnavalkya Smriti is more concise and systematic. It has only about 1000 slokas, whereas the Manusmriti has about 3000.

The germ of criminal jurisprudence came into existence in India at the time of Manu. He gave a comprehensive code which contains not only the ordinances relating to law, but is a complete digest of the then prevailing religion, philosophy and customs practiced by the people.¹ Manu has recognized assault, battery, theft, robbery, false evidence, slander, libel, criminal breach of trust, adultery, gambling and homicide, as crimes. These are the principal offences against the person and property which occupy a prominent place in the Indian Penal Code.

¹ Manu Institute, Ch. VIII, on Judicature and on Law, private and criminal, vv.44.380.
The king either used to dispense justice himself with the help of councilors or appoint judges and assessors for the administration of justice. These precepts are excellent. However, the substantive criminal jurisprudence of Manu is not free from bias. According to him, the gravity of the offence varies with the caste and creed of the criminal and so does the sentence. The protection given to Brahmins was paramount and they were placed above all.¹

During this period there was no clear distinction between private and public wrongs. Murders and other homicides were regarded as private wrongs. The right to claim compensation was the rule of the day. A distinction was, however, drawn between casual offenders and hardened criminal.² Again, he made provisions for exemption from criminal liability, where the act was done without any criminal intention, or by mistake of fact, or by consent, or was the result of accident, much on the lines as provided in Chapter IV of the Indian Penal Code. The right of private defense was fully developed.

2.2.1. Origin of Hindu Jurisprudence

It should be a matter of pride and satisfaction to a Hindu to know that his ancestors had also scaled great heights not only in literature, philosophy and religion but had also advanced in the domains of law. Hindu jurisprudence is essentially mixed with religion. The belief in the transmigration of souls was that one reaps the fruits of one’s own acts in all their lives till they are rescued by perfect spirituality are the underlying principles which give tone to the whole

1 Manu Institute, Ch. VIII, on Judicature and on Law, private and criminal, vv.44.380.
system. Punishment can thus be avoided in the life but there is no escape from them in the next birth.

In view of the above it can be definitely said that the Hindus believe that Hindu law has originated from Divine. The primary source is the Vedas from which Smritis and Samhitas have developed into various codes which are all considered sacred. Law is believed to be the voice of the deity, and its ultimate objective is not merely general happiness but spiritual welfare.

2.2.2. Theories of the Origin of Criminal Law

In order to understand the criminal law of today, it is necessary to know how criminal law in civilized world has developed. As stated by Sir Hari Singh Gour: stated that "In the rude age when society was simple, crimes were few. The use of violence against one's person or the abduction of one's females were probably the two earliest known crimes. The one led to sanguinary conflicts unrecorded by history, the other led to the battle of Troy. And as society progressed and the futility of such conflicts became more and more united on peaceful pursuit, there grew up by degrees the sense of responsibility which checked indiscriminate revenge giving birth to sanction and punishment. And as society begot human sympathy, the idea that the criminal was the concern of the State and not of an individual became more vivid and easily stereotyped. It was then that the criminal began to be accorded a trial, and the unbridled ferocity of the accused was transferred to the arbitrate of the comitia."¹ Law of England resembled that of Rome in the circumstance that it has been adopted in many countries other than that of its origin.

¹ Gour H.S., the Penal Law of British India, 1936, 57 Madras Law Journal 60.
There are four theories, which are explaining the origin of criminal law, they are civil wrong, moral wrong, social wrong and group conflict theory. The 'civil wrong theory' regards criminal law as originating in torts, or wrongs to individuals. The 'social wrong theory' postulates that the criminal law originated in the rational process of unified society. The 'moral wrong theory' says that the criminal law originated from the crystallization of morals, traditions and the like. Customs after persisting for a time achieved an ethical foundation. The 'group conflict theory' holds that criminal law developed in the conflict of rival groups in the society in order to protect each other's interests. Thus, the powerful group in the society forces the State through the criminal law to prohibit the conduct which they feel may endanger to their position.

2.2.3. Brief History of Crimes

The history of crime is as old as the human civilization. Every society and country has its own notions of crime. Crime is inevitable in every society, because there is always some violation or other of a prescribed code of conduct for every society.

The period of Indian history from the seventh century before Christ to 320 A.D. is an age of imperial unity as well as of laws and philosophy. Crime is a perennial and universal problem of all societies. The concept of crime is rooted in man's rudimentary attempts to distinguish between right and wrong in his interaction with fellow humans.

The basic problem in criminology concern is the definition of crime. The dictionary definition is an act punishable by law, as being forbidden by statute is inadequate since it covers the entire range of serious offences, minor
transgressions of law, petty violations and some aspects of deviant and non-conformist behavior. On the other hand, the dictionary of behavioral sciences which defines crime as a major transgression of law which is punishable is equally ambivalent. The Indian Penal Code does not define crime per se, but contents itself with defining an offence as a thing “made punishable by the code.

Originally crimes were not defined officially and involved no official action but were private matters. Individuals who were wronged would seek retribution against the wrong doer or his family. The concept of personal justice is clearly visible in all early laws, including the code of Hammurabi from 1900 B.C., the Roman table of laws from 450 B.C., the Mosaic code, law in early Greek society as revealed in Illiad and the Odyssey, and the laws of Tacitus prevalent among the German people. The legal definition of the sociologist Paul Tappan will serve as reference point.

Crime is an intentional act or omission in violation of criminal law committed without defense or justification, and sanctioned by the state as a jealousy or misdemeanor.

2.2.4. Court procedure in Ancient India

A court was a place where justice was judicially administered. Courts were called Dharmddhikarana, Dharmasthana and Dharmasana. The law-court was compared to the human body in which the king was the head, the chief judge was the mouth, the assessors were the arms. More accurately, the functions of

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1 Venugopal Rao, s, Dyics of Crime, Indian Institute of Public Administration, New Delhi, 1981.
2 Ibid p.149.
3 Manu, VIII, 1823; of Sukra, IV, 5.44&46.
4 Narada, 1.34
the limbs are parts of a law court, which were ten in number. In olden days Judiciary had the highest regard and supreme position. Even the king could not disregard the recognized system without incurring sin condemnation and in some cases without penalty.¹

The Dharmasastra contains only of few provisions which may be said to relate to judicial organization or to adjective law. The earliest of them whose extant text is considered to be reasonably authentic and reliable lays down the duty of the king to administer justice, punish the guilty and protect his subjects. There are few simple directions and a references to justice being administered according to the Vedas, Upaveda, Dharmasastras and Puranas.

According to S. Varadachariar the Sutra and the Smrti period are spoken of together as the Dharmasastra age.² The period of Dharmasutra start with Gauthama and ends with Vasista in between 500 BC to 300 BC. The names of prominent saints and the respective period are mentioned in the following table who are authors of different Dharma Sastras.

<table>
<thead>
<tr>
<th>Sl.No.</th>
<th>Name of the Saint</th>
<th>Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Manu</td>
<td>200 B.C -100 A.D</td>
</tr>
<tr>
<td>2</td>
<td>Vishnu</td>
<td>100 A.D – 300A.D</td>
</tr>
<tr>
<td>3</td>
<td>Yagnavalakya</td>
<td>100 A.D – 300 A.D</td>
</tr>
<tr>
<td>4</td>
<td>Narada</td>
<td>100 A.D. – 400A.D</td>
</tr>
<tr>
<td>5</td>
<td>Bruhaspathi</td>
<td>300 A.D – 500 A.D</td>
</tr>
<tr>
<td>6.</td>
<td>Katyana</td>
<td>400 A.D. – 600 A.D</td>
</tr>
</tbody>
</table>

Table No: 1, Showing different saints and their respective

¹ Manu-VIII.

² The Hindu Judicial System. The Lucknow University, 1946,p.2.
2.2.4.1. The contribution of Manu to criminal law

Manu spoken of as the father of mankind. He was a Vedic poet prays that one may not be led away from the ancestral path of Manu. It was only natural that the Smriti should devote considerable space and attention to the duties of a king, not like Kautilya, with a view to increase the king's wealth and power by any means, but to show how a righteous king should conduct himself.

The germs of criminal jurisprudence came into existence in India from the time of Manu. In the category of crimes Manu has recognized assault, theft, robbery, false evidence, slander, criminal breach of trust, cheating, adultery and rape. The king protected his subjects and the subjects in return owned him allegiance and paid him revenue. The king administered justice himself, and, if busy, the matter was entrusted to a judge. If a criminal was fined, the fine went to the king's treasury and was not given as compensation to the injured party.

2.2.5 Ancient Mohammedan Criminal Law

The criminal law of Northern and Southern India was the Mohammedan law introduced by the Moghul conquerors whose power culminated under Akbar in the second half of the sixteenth century. The most authoritative written exposition of the version of this system in India was the Hedaya or guide, which expresses the views of Aboo Huneefah and his disciples Aboo Yousuf and Imam Mohammed who were regarded by the Sooni sect as the principal commentators on the Koran. The Mohammedan criminal law classified all offences as incurring one of these classes of punishments namely 1) Kisas, or retaliation including

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1 Rgveda.VIII.30.3
diyut – the porice of blood; 2) Hud, specific penalties; and 3) Tazeer, or discretionary punishment.

The Mohammedan criminal law as stated in the Hedaya presents a curious mixture of great vagueness and extreme technicality. The Mohammedan criminal law was open to all objections. It was occasionally cruel. Thus, for instance, immoral intercourse between a woman and a married man was in all cases punishable by death.

Many of the reforms introduced into English criminal law by the legislation of Sir Robert Peel, when the government of India was transferred from the company to the Crown. From the time of the conquest of India by the Muslims, the victors imposed their own criminal law. The primary basis of the Mohammedan criminal law was the Quoran which was believed to be of Divine origin. But the laws of the Quoran were found inadequate. It was only eighty or ninety verses of the Koran which "lay down something like a general rule on matters which might come before a civil or criminal court of justice. Even these are very largely open to the observation that the sanction put in the foreground is the religious one."\(^1\) Indeed, there were very few passages which distinctly prescribed a duty to punish offenders against the rule in question. It is true that the prophet himself as a true ruler exercised criminal jurisdiction over his subjects and summarily sentenced the offenders to temporal punishments. For such instance where the Prophet summarily sentenced a murderer to the punishment of death\(^2\) and to supply the needs of a large and civilized community in this regard

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\(^1\) Sir William Muri, 'Life of Mahomed,' at p. 281.

\(^2\) R K Wilson, An Introduction to the study of Anglo Mohammedan Law P. 16(1894),
introduced the Sunna, or rules of conduct, deduced from the oral precepts, actions, and decisions of the Prophet.

In Western jurisprudence, the real notion of crime percolated from the Roman law. In modern times, crimes have multiplied in an extraordinary degree. It has revolutionized the concept of criminal law. Various statutes have been enacted imposing different kinds of duties, liabilities, and restrictions, on individuals.

2.2.6. Origin of systematic judicial system in India

The East India Company which was incorporated by Queen Elizabeth through a charter in 1600 entered into India to do business and spread to entire India. The Charter gave the Company exclusive right of trading to all parts of Asia, Africa and America, beyond the Cape of Good Hope, eastward to the Straits of Magellan. It also gave the Company power to make laws. In 1609, James I renewed the Charter, and in 1661 Charles II gave similar powers while renewing it. The Charter of 1668 transferred Bombay to the East India Company, and directed that proceedings in Court should be like unto those that were established in England.

In 1683, Charles II granted a further Charter for establishing a Court of Judicature at such places as the Company might decide. In 1687, another Charter was granted by which a Mayer and Corporation were established at Fort St. George, Madras in order to settle small disputes. In these Courts the powers exercised by the authorities were very arbitrary. Strange charge was framed and strange punishments were inflicted.
In 1726, the Court of Directors made a representation to the Crown for proper administration of justice in India in civil and criminal matters. Thereupon, Mayors' Courts were established for proper administration of justice. Company's mercantile servants who possessed very little legal knowledge and the law that was administered by them was utterly unsuited to the social conditions of either the Hindus or the Mohammedans. In 1753, another Charter was passed under which Mayors were not empowered to try suits between Indians. English law was no more applicable to Indians, and they were left to be governed by their own laws and customs.

The Englishmen realized the importance of having a sound judicial system in the territories falling under their sway. They, therefore, started on the task of evolving a judicial system practically from the very outset of their administrative career. The administrative responsibility devolved on them first with respect to the three Presidency Towns which were founded by them to facilitate their trade and commerce. To begin with, an elementary judicial system was improvised there. The major breakthrough in this situation occurred, after nearly more than 150 years of the British administration, when the Supreme Court was established at Calcutta in 1774.

2.3. Origin of punishments

There is a proverb to say that Punishment governs all mankind; punishment alone preserves them; punishment awakes while their guards are asleep; the wise considers the punishment as the perfection of justice.¹

¹ Translated by Haughton, G.C. 1835)Ch 7, para 18 p. 189.
Laws are the conditions under which men, naturally independent and united themselves in society. Weary of living in a continual state of war, and of enjoying a liberty which became of little value, from the uncertainty of its duration, they sacrificed one part of it, to enjoy the rest in peace and security. The sum of all these portions of the liberty of each individual constituted the sovereignty of a nation and was deposited in the hands of the sovereign, as the lawful administrator. But it was not sufficient only to establish this deposit; it was also necessary to defend it from the usurpation of each individual, who will always endeavor to take away from the mass, not only his own portion, but to encroach on that of others. Some motives which strike the senses were necessary to prevent the despotism of each individual from plunging society into its former chaos. Such motives are the punishments established, against the infractors of the laws. This is inflicted as penalty for wrong doing.

From the earliest times, punishment of offenders was a private matter. Punishment was based on the principle of lex talionis. The victim or a member of the victim's family would retaliate against the offending party as a remedy for personal wrongs. In many instances, personal revenge was not only a right but also a responsibility. Family members were often obliged to avenge the harm to themselves or their kin. This primitive system of vengeance, which was accepted and encouraged, was passed from generation to generation. Each tribe, family, or society sought to preserve its own existence without the benefit of a written code. Even though this ancient system of retaliation can hardly be referred to as law, it influenced the development of early legal systems, especially the English common law that served as a source for American criminal law.

1 The Law of Retaliation
Code and the Code of Hammurabi are the earliest written criminal codes. They set down laws prohibiting specific behaviors. These codes continued the harsh translations of lex talionis but further specified the concept of "equality of revenge". The severity of the retaliation must be equal to the severity of the offense, and the punishment or amount of retaliation must fit the crime. The moral condemnation and stigmatizing effect of criminal penalties is related to one of the traditional purposes and limitations of criminal punishment.

2.3.1. Theories which support the Punishment

There are several theories to support the use of punishment to maintain order in the society. Such theories can be divided into two general philosophies: 1) utilitarian and 2) retributive. The utilitarian theory of punishment seeks to punish offenders to discourage, or "deter" future offences. The retributive theory seeks to punish offenders because they deserve to be punished. Under the utilitarian philosophy, laws should be used to maximize the happiness of society crime and punishment are inconsistent with happiness, they should be kept to a minimum understand that a crime-free society does not exist, but they endeavor to inflict only as much as is required to prevent future crimes.

The utilitarian theory is "consequentiality" in nature. It recognizes that punishment has both the offender and society and holds that the total good produced by the punishment should equal to the total evil. In other words, punishment should not be unlimited. One illustration of punishment is the release of a prison inmate suffering from illness. If the prior is imminent, society is not served by his continued confinement because he is no longer capacity for committing crimes. Under the utilitarian philosophy, laws that specify punishment
for criminal conduct should deter future criminal conduct. Deterrence operates on a specific and a general level. General means that the punishment should prevent other people from committing criminal acts. This serves as an example to the rest of the society, and it puts others on notice that criminal behavior must be punished.

### 2.3.2. Mythological Perspective of Punishments

Garuda Purana is in the form of instructions by Vishnu to his carrier, Garuda.¹ This Purana deals with Law, astronomy, medicine, grammar, and gemstone structure and qualities. The Garuda Purana is a Vaishnava Purana. The others in this group are Vishnu Purana, Narada Purana, Bhagavathi Purana Padma Purana and Varaha Purana. The Garuda Purana has nineteen thousand Slokas. It is a medium-sized Purana. In this Purana different offences were defined and corresponding punishments were prescribed. Some important of them are mentioned below. As per this Purana the punishments are very fearful, barbarous and not fit to a civilized society.

<table>
<thead>
<tr>
<th>Garuda Purana</th>
<th>Wrong doing</th>
<th>Punishment given in Naraka</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kumbipaka</td>
<td>Destroying innocent lives for food</td>
<td>Roasting in hot oil tank by Yama kinkaras.</td>
</tr>
<tr>
<td>Thamisra</td>
<td>Stealing other's property including wife, children and belongings</td>
<td>Thrashing with Gadha.</td>
</tr>
<tr>
<td>Agnikunda</td>
<td>Snatching other's property by force, gaining undue advantage and unlawfully making best out of everything in the world.</td>
<td>Roasting in Agni Kunda in inverted position with hands and legs ties under a stick.</td>
</tr>
<tr>
<td>Krimibhojan</td>
<td>Selfish survival; eating others</td>
<td>Insects are left. intruding the body.</td>
</tr>
</tbody>
</table>

¹ The king of birds a vahana of Bhagavan Vishnu.
| Sanmali | Unchaste relationships by Kamukas | Thrashing with Gadha |

Table No:2, Showing some age old punishments.
2.3.3. Punishments as per Kowtilya Arthasastra

Kowtilya Arthasastra was written between 321 and 330 B.C. Kowtilya is realist and deals with duties, violation of which are regarded as crimes and punished by the State. Prior to Koutilya Law and religion were intermixed but he separated them as two separate parts.

Kautilya the gignatic law giver of Maurya period has made valuable contribution in the fields of maintaining law and order, prevention of crime, detection of criminal youths, arrest on suspicion, recover of stolen property, attempt to commit an offence, eliciting confiscation from suspects by questioning, interrogation or by physical torture and Post Mortem of sudden deaths.

As per him the offence has to be considered in all dimensions such as whether the offence is grave or simple, circumstances, the antecedent, the present circumstances, the time, place, consequences and social position and rank of a person. He divided imposition of fine into three categories as mentioned below:

First amercement: A fine ranging from 48 to 96 Panas\(^1\)

Middle amercement: A fine ranging from 200 to 500 Panas.

Highest amercement: A fine ranging from 500 to 1000 Panas.

Koutilya prescribed lower punishment to higher caste offenders and more severe punishments to lower caste offenders. According to him Brahmana is not to be tortured like other people even though he committed an offence. On his forehead a mark of the guilt shall be branded to exclude him from all dealings. He provided serious punishments to adultery. But there was much discrimination basing on the category of the offenders. A Kshtriya who commit adultery with an unguarded woman shall be punished with highest amercement, a Vysya doing

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\(^1\) Phanas means Golden coins
the same shall be deprived off entire his property and a Sudra shall be burnt alive. A man who commits adultery with a woman of low caste shall be exiled with a mark of headless trunk on the head or shall be degraded to the same caste. A Sudra who commits adultery with Arya woman shall be put to death, while the woman shall have her ears and nose cut off. As per Koutilya, if a judge or magistrate impose unjust fine he shall be fined either the double the amount or 8 times over the prescribed fine. If he imposes corporal punishment wrongly, he shall himself suffer corporal punishment.

### 2.3.4. Historical Perspective of Punishments

Four hundred years ago corporal punishment was the accepted method of punishment and confinement was the exception. In that time rehabilitation was not viewed as the main goal of punishment. But the predominant purposes of punishment today are as they were four hundred years ago. They were retribution, deterrence, and incapacitation. In 17th and 18th century England, confinement at a means of punishment was rare, jails were mainly used to hold those who were awaiting trial or punishment. Punishments consisted of flogging, the strips, and hanging. Most of these punishments were carried out publicly, and the public nature of the punishment was its most important characteristic. At a hanging in London, the condemned would be paraded through the streets to the scaffold, local magistrates would attend, and the city's religious leaders would pray. The hanging was a public production that helped bolster the power of the monarchy and the magistrates. It was a threat of righteousness and authority, sending a warning to all that observed it. Changing perceptions led to the downfall of theoretical punishment. The lower classes who were the target
audience of this threat began to treat it more as merriment and a mockery of the law than as a grave warning. At the same time, the upper classes were slowly growing more sensitive to the cruelty of physical pain. The death penalty began to be used less frequently, corporal punishment was more often carried out privately, and the use of imprisonment grew.

In England an alternative to imprisonment or corporal punishment for felons, the most of the period in eighteenth century preferred transportation. Prisoners were sent to the United States until it gained independence, and then to Australia. By 1772, three-fifths of male convicts were being transported, while only one tenth were sent to prison. But these practices then began to change rapidly, and by 1800 two thirds of male convicts were sentenced to prison. For minor offenders, imprisonment as punishment had started much earlier, in 1557, the first English House of Corrections was established in Bridewell palace, designed to reform and train minor offenders such as prostitutes, beggars, vagrants, and debtors. It enforced a work ethic on its inhabitants in the belief that these offenders' inappropriate social behavior was due to a lack of moral discipline and job skills.

In eighteenth century America, although corporal punishment was also the chief means of punishment, more humane methods were normally used, mostly for economic reasons. Unlike the situation in Europe, American needed labor to build the growing colonies. The colonial governments wanted to kept their population alive and healthy, so the methods of corporal punishment were less severe and included public humiliation such as dunking and the stocks.
2.3.5. Western punishments in olden days

The punishments in practice in olden days of America are very barbarous. There was punishment for certain crimes, the offender's arms and legs would be broken, then woven through the spokes of the wheel. The wheel and offender would be hoisted to the top of the pole. He would be left there to starve to death in agony in full view of the public. In addition there was hanging, burning at the stake, flogging, and beheading were in practice.

In another kind of punishment, torturers the offender and pour water continuously into the mouth of a prisoner. It caused a drowning feeling and in another type the torturer cranks the wheel, slowly pulling the body until the joints separate. This was done in the name of the Church and God.¹

2.3.6. Ancient Hindu law and unequal punishment

Under the ancient Hindu kings, there was administration of civil and criminal justice which was done according to the rules of Dharma Sastras. In ancient Hindu law, law was discussed under eighteen heads covering both modern civil and criminal branches of law which fell under heads such as gifts, sales, partition, bailment, non-payment of debt, breaches of contract, disputes between partners, assault, defamation, trespass of cattle, damage to goods and bodily injuries in general. Manu's code specifically recognizes assault, defamation, theft, robbery, violence to body and adultery as crimes. Yagnavalkya and Nilakanta also recognize these crimes. Mayukha law which prevailed in Mumbai also contains punishments for assault, theft, violence and adultery. As in

¹ In The United States of America it is used to call 'water boarding'.
other ancient communities the practice of paying money compensation was also prevalent in ancient India.

A Hindu code was compiled by the Pandits of Banaras at the instance of Warren Hastings when he was Governor-General of India. It was called "Gentoo code". It provided death penalty for murder. Theft was divided into open theft and concealed theft and different punishments were prescribed as in Roman law. The former was punished by fine and the latter by the cruelest punishment of cutting off the hand or foot at the discretion of the judge. House breaking and highway robbery were punished with death sentence.

There was distinction between the people of higher and lower caste in the matter of imposing of punishment. Brahmans and women were exempt from death sentence. This was the provision of the former Travancore State Penal Code till recently. If a man belonging to a lower caste, i.e., if an Savarna committed adultery with a Savarna wife, say a Namboodiri lady the man will be awarded death penalty. If a higher caste women—a Savarna committed adultery with a lower caste man she will be stripped naked and exposed to public gaze seated on an ass, or cast out of the house and city and thrown to the dogs or in some cases burnt alive. Various tariffs of damages were provided for different types of assaults and defamation. These practices were common in Malabar till the coming of the Indian Penal Code.1
diyut – the porice of blood; 2) Hud, specific penalties; and 3) Tazeer, or discretionary punishment.

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2.3.7. Punishments under ancient Mohammedan Penal Law

The Mohammedan Jurisprudence had four broad principles of punishment. They are Kisas or retaliation; Diyut or blood-money; Hadd or fixed punishment, and Tazeer and Siyasa or discretionary and exemplary punishment.

2.3.7.1. Kisas or retaliation

The principle of Kisas was very simple – a life for a life, and a limb for a limb. Under this head crimes called Jinayat were included. The legal meaning of 'Jinayat' was offences against the person. It was restricted to willful homicide, maiming and wounding. The punishment of retaliation is classified under two heads under two heads: (1) in cases of death; and (2) in cases short of death. Retaliation in cases of death was considered to be the right of man in contradistinction to the right of God, and specifically, to be the private right of the person murder and it devolved on his legal heirs who represented him in the execution of it.

When a charge of willful homicide was legally established the punishment of retaliation was incurred but the offender was a sane and adult person. But there was one condition to be fulfilled for this punishment being inflicted. It was that the blood of the deceased should have been under the protection of the law, he should be permanent resident of the territory of a Muslim state subject to its authority. The murder of an unprotected non Muslim, whether by a Musalman or by an established and the crime did not fall under any of the exceptions, the punishment of retaliation was inflicted on the murderer by the Qadi and it was executed. The established mode of execution, under the Muslim rule, was by decapitation.

1 Hedaya, vol. IV P 270.
2.3.7.2. Diyut or blood – money

The second head of punishment was called Dryut which meant the fine or compensation for blood in cases of homicide. The punishment of Kisas in all cases of willful homicide was exchangeable with that of Diyut, if the person having the right of retaliation wished, the end being relief and satisfaction to the mind. So, practically, the punishment of Diyut was an alternative to the punishment of Kisas.

In cases of quasi-deliberate homicide, erroneous homicide, involuntary homicide in addition to the payment of the fine of blood, the offenders were liable to the penalties of expiation and exclusion from inheritance. But in the case of accidental homicide by an intervening cause no other punishment was added to the payment of the fine of blood, for the immediate act of bloodshed in this case was not attributed to any person.

2.3.7.3. Hadd or specific penalty

The third principle of punishment under the Muhammedan law was called Hadd which was defined in the Heddaya to comprise of the specific penalties fixed with reference to the right of God, or in other words, to public justice. It was distinguished from Kisas, which was considered the right of man, or a private right, as well as from Tazir. Which was indefinite and left to the discretion of the Qadi. Under Hadd the quantity and quality of punishment was fixed for certain offences and this could not be altered or modified. If the offence was proved, the Qadi had no other alternative but sentence the convict to the prescribed punishment. But Hadd could not be executed if there was any doubt, or legal defects and the ruler was directed to administer the law with moderation.
The punishment of Hadd extended to the crimes of adultery, of illicit sexual intercourse between married or unmarried persons, of false accusation of incontinence of dinking wine of theft and of high way robbery.

Zina was defined as an unlawful conjunction of the sexes. The punishment for the offence of Zina, when legally established against a man of sound understanding and mature age, being a Musalman and free, and being married with a woman of the same description, was lapidation or stoning or stoning to death. If the convict was free, sane, and adult, but either not a Musalman, or unmarried, he was liable to the sentence of one hundred stripes. If he was a slave, the punishment was reduced to fifty stripes.

The penalties for a man and a woman in same circumstances were the same. The punishments of whipping and stoning were not to be united. The object of the former, which was the correction of the party being incompatible with the latter, which was intended to be an example and warning to others. The addition of banishment or imprisonment for a limited period or to stripes was left to the discretion of the ruler or Qadi. The execution of a sentence of whipping, but not for lapidation was ordered to be suspended in cases of illness and both were to be postponed in the case of a pregnant woman, until she had recovered from her Labour. Indeed, it was very difficult and some times impossible to prove a charge of Zina, for which at least four witnesses were necessary. The law prescribed that if two persons were found lying in bed together, they could be punished with thirty stripes, but the crime of fornication or adultery, which was punishable with stoning to death could be proved only by four Hon'ble witnesses who not merely saw the guilty persons under the same coverlet but actually saw
them in the act.\textsuperscript{1} Again, in a case of conviction for Zina upon evidence, if the witnesses or any one of them declined to stone first, the sentence of lapidation could not be put in execution. If a convict fled after receiving part of his punishment and was seized after an interval of some days, the further punishment could not be enforced; but, if he was reprehended immediately he had to suffer the remainder of his sentence. Hadd for Zina was prevented by a lapse of time. Finally, if a man had been guilty of several acts of Zina and was punished for one, he was not liable to any additional punishment for the rest.

The penalty for slander when legally established was declared to be eighty stripes, if the offender was free forty stripes, if he or she was a slave. Twenty strips of a single punishment for slander included all past offences, the aim not being private satisfaction, but, on the principle of public justice to deter by an example from a repetition of the offence in future.

The punishment for theft was amputation but there were several restrictions on the infliction of this punishment that prevented actual mutilating in most of the case. A sentence of amputation could not be passed upon a thief, without the attendance of and prosecution by the person whose property had been stolen is his representative\textsuperscript{2} Further, it was declared in the Hedaya that “if, after witnesses bearing evidence to a theft, the thief plead that the article, alleged to have been stolen is his own property his hand is not to be cut off, although he produce no evidence in support of his plea. If any one among a gang of robbers committed murder, the whole were liable to the prescribed penalty.

\textsuperscript{1} Aspinall, Conswallis in Bengal 60-61(1931) and Bengal Revenue Consultations, December 30, 1789; and May 28, 1790.

\textsuperscript{2} Sec.396 of Penal code. If any member of a group of dacoits commits murder in the course of committing dacoity (Robbery by five or more persons) every member of the group is liable to be punished with death.
2.3.7.4. Tazir and Siyasa

The last principle of punishment was Tazeer and Siyasa which meant discretionary punishment and exemplary punishment respectively in which where the kind and amount of punishment rested entirely on the discretion of the judge. Under Tazeer the punishment could be anything from imprisonment and banishment to public exposure.

The general doctrine of discretionary punishment was clearly set forth in the preamble to regulation 53, 1803, as follows: "The Mohammedan law vests in the sovereign and his delegates, the power of sentencing criminals to suffer discretionary punishment¹ in three cases. First, in the cases of offences for which no specific penalty of Hadd or kisas has been provided by the law;

Secondly, for crimes within the specific provisions of Hadd and Kisas, when the proof of the commission of such crimes may not be such as the law requires for a judgment of the specific penalties.

Thirdly, for heinous crimes in high degree injury to society and particularly for repeated offences of this description, which, for the ends of public justice may appear to require exemplary punishment beyond the prescribed penalties; and with respect to crimes of this description an unlimited discretion extending to capital punishment is admitted to have been left by the Mohammedan law to the sovereign authority of every country in which that law prevails as well as to its judicial delegates.

Tazeer was legally defined as an infliction undetermined in its degree by the law, on account of the right either of God or of the individual or in other words for the ends of public as well as private justice. The penalties of Tazeer were of

¹ Under the legal denomination of Tazeer, Accobut and seexasut
two kinds; one of a private nature, being in satisfaction of individual right and the other public was and considered to be the right of God.

The Qadi was authorized to exercise a just discretion according to the nature of the offence and the rank and situation of the offender in adjudging him to receive an admonition such as might render him ashamed of his conduct or a public reprimand on personal arrest and exposure at the door of the court; or imprisonment or stripes within limits. Blows on the back of the neck and pulling by the ears were also legal ways of chastisement. Tazeer by reproach which was not to be slanderous was also legal. At the discretion of Qadi banishment was also allowed. And public exposure with the face blackened was expressly declared to be the punishment to be inflicted upon a false witness in addition to forty stripes.\(^1\)

Siyasa technically meant exemplary punishment, such as the ruler or his delegate might deem expedient for the protection of the community against dangerous characters especially such as habitually committed atrocious crimes, and of whom there could be no hope of reformation.

Tazeer and Siyasa might in all cases be inflicted by the ruler upon strong presumption, whether arising from the credible testimony of such incompetent witnesses or from circumstances which raised a presumption of guilt or from any other reasonable cause.

### 2.4. Evolution of punishments

In the evolution of punishment the most primitive agency for administering Justice has been the kin group. Family and clan groups frequently do seek blood

\(^1\) The preamble to Regulation XVII of 1797
revenge or satisfaction from the kin group of the offender, and kinsmen are frequently collectively responsible for injuries inflicted by one of their members on a member of another kinship group. But in the Tribes that have blood feuds or blood revenge and desk punitive procedures will be administered also by elders, councils, chiefs, or kings for those offences considered to be crimes against the tribe rather than private injuries.

The accepted theory of the evolution of punishment states that crimes such as murder, and assault were the responsibility of the kin group and that crimes such as witchcraft, treason, violation of taboos were the responsibility of the tribe. Feuds were often started as a result of one clan attempting to retaliate for the injury or wrong done by an offending member of a different clan. Frequently, payment in kind was extracted from the offending person or his clan for the murder or theft or other injury committed. This was a form of compensation and represented an effort to compose the difference between contending parties, so as to prevent blood feud. Later, presumably the chiefs and kings were supposed to act themselves or assign a third party to act, as final adjudicators of the composition of different crimes. Thus the system of punishment established in the society. The punishment is defined in several ways by several jurists. Banishment was the punishment prior to the development of prisons. Thus the system of punishment established in the society the punishment is defined by several jurists in se3versal ways banishment was the punishment prayer to the development of visions. Different kinds of punishment developed in the course of long time
2.4.1. Definition of Punishment

Sutherland has defined punishment and stated that the punishment must require the following two essential ideas (a) It is inflicted by the group in its corporate capacity upon one who is regarded as a member of the same group. War is not punishment for in war the action is directed against foreigners. The loss of status, which often follows crime is not punishment, except in so far as it is administered in measure by the group in its corporate capacity (b) Punishment involved pain or suffering produced by design and justified by some value that the suffering is assumed to have. If the pain or suffering is merely accidental, to be avoided if possible, it is not punishment. A surgical operation performed on a prisoner to correct a physical defect is not punishment, for the pain is not regarded as valuable or desirable. The confinement of a psychiatric person may involve suffering for him, but it is not punishment.¹

According to Walter C. Reckless, that punishment is a means of social control. A group seeks redress for a wrong, an injury, or for a violation of law and custom, society, the common wealth, or the group meaning in this instance persons in authority, conceive punishment as a device to hold persons in line, to maintain a status quo, to induce conformity. The sanctions applied to the erring individual represent a show of authority over the individual. Society believes that its show of authority through redress is efficacious. It is doubtful that punishment is ever as successful as instrument of social control as men in authority believe. But this is the fate of all methods of societal control, including ceremonies

education, propaganda, public disapproval, leadership, suppression by force and so on. Social control often misfires.¹

According to Grunhut, three components must be present if punishment is to act as reasonable means of checking crime. Firstly speedy and inescapable detection and punishment must convince the offender that crime does not pay. Secondly after punishment, the offender must have a fair chance for a fresh start. And thirdly the State which claims the right of punishment must uphold superior values which the offender can reasonably be expected to acknowledge.

Ceaare Beccaria, in his book "On Crimes and Punishment", has mentioned that "no lasting advantage is to be hoped for from political morality if it is not founded upon the ineradicable feelings of mankind. Any law that deviates from these will inevitably encounter a resistance that is certain to prevail over it in the end. In the same way that any force, however small, if continuously applied, is bound to overcome the most violent motion that can be imparted to a body"². Beccarie says that men parted part of their personal libery in order to protect the society.

Primitive man share with the animals the emotion of resentment at injury. Man's superior intelligence, however, has led him to refine his methods of reaction and therefore to multiply the devices with which he punishes injury. In general among primitive man death, mutilation, banishment, and compensation have been prevalent. The ties of blood that held man together in a group had some mitigating influence upon the severity of punishment. On the other hand, ignorance and fear

led often to barbarous treatment of the offender and the passionate punishment of those whose offenses were not serious so far as the welfare of the group was concerned.

2.4.2. Punishments before the development of prisons

Prior to the development of the prison, most criminals were either banished to another community or punished with fines, various forms of corporal punishment, public humiliation, or execution. The prison represented a significant development at this time. It was envisioned as an institution that could change offenders through hard labor, repentance, isolation, and discipline. More broadly, it was viewed as an important reform and a humane alternative to the brutality of earlier times. The prisons were not designed to scare criminals straight or incapacitate them. The prison was seen as a new punishment fitting a new society that valued liberty and self-determination, and it was cast as a noble institution that had the power to transform individuals morally.

2.4.3. Development of Different kinds of Punishments after development of Prisons

There were several types of punishments in ancient period at different parts of India. The death sentence which occupied first place among other punishments is into imposed to major crimes since ancient period. The punishment of transportation is developed by the British people in India. The punishment of banishment, mutilation, imprisonment, imposition of crime and forurte of property were already in practice during the periods of Hindu and Mahamaduiin rulers During the period of Koutilya punishments for killing others was very barbaric discriminatory and fearful. Koutilya who was the author of
Arthasastra mentioned various types of capital punishment basing on the caste, religion and rank in the society.

2.4.3.1. Capital punishment

Capital punishment is a method of retributive punishment as old as civilization itself. Both the Greeks and the Romans invoked the death penalty for a wide variety of offenses. Socrates and Jesus were perhaps the most famous people ever condemned for a capital crime in the ancient period. Hammurabi's Code, a code of laws developed by the king of one of the first empires, dates back from the third or second millennium before Christ. This code claims that retribution, an eye for an eye and a life for a life, is justice. In Anglo-American law the death penalty has been a customary response to certain kinds of offenses.

As per Koutilya Arthasastra, the Capital punishment was different for different offences. For killing in a quarrel punishment shall be death with torture; for cruel killing punishment shall be hanged; for killing by a woman death shall be the punishment; for killing by poisoning punishment shall be drowned in water; for killing in rash act punishment shall be simple death; for killing relatives or elders shall be put to death by setting fire; if woman kills her husband shall be torn off by bullocks and killing by prostitute she shall be burnt alive or drowned in water.\(^1\)

Capital punishment means the officially authorized execution of the death penalty on persons determined by appropriate legal procedures to have committed a criminal offense. The capital punishment is presently playing a

prominent role in the administration of criminal justice in many nations of the world and has typically characterized the criminal law since the beginning of recorded history. Capital punishment as it emerges in civilized communities, presupposes a system of criminal law predicated on the assumption that certain harms committed by one individual upon another represent injuries to the interests of the corporate society. Thus, they are punishable by the society. Social control of private wrong was principally concerned with the avoidance or regulation of private warfare rather than with the direct imposition of penalties by the organized community upon the offender.

The sentence of death stands in the forefront in the category of punishments. The question whether the State has the right to take away a man's life has often been agitated, but it is a question upon which the moralists and the jurists are never likely to agree. Some persons in the society may condemn it as a relic of barbaric age in which life for life is the way of the common form of revenge. Some others justifies it on the ground that its retention in the Penal Laws is itself a terror or which has a deterrent effect upon criminals, while its application furnishes an object lesson which not only purges society of its canker worms but tends generally to elevate its conception of, and respect for, human life. The tendency of modern times has been to abolish the capital sentence, and its abolition in several European States does not appear to have had any unfavorable effect on crime. U.K. is, however, one of those countries in which the capital sentence is still retained. But confined to the following cases, namely:

(1) High treason\(^1\)

\(^1\) Treason Act, 1814, Secs.1 and 2
(2) Piracy with violence

(3) Setting fire to any of Her Majesty's ships, stores, etc. and

(4) Capital murder, that is to say, any murder (a) done in the course or
furtherance of theft; (b) by shooting or by causing an explosion; (c) done in the
course or for the purpose of resisting or avoiding or preventing a lawful arrest, or
of effecting or assisting an escape or rescue from lawful custody; (d) any murder
of a police officer acting in the execution of his duty or of a person assisting a
police officer so acting; (e) in the case of a person who was a prisoner at the time
when he did or was a party to the murder, any murder of a prison officer acting in
the execution of his duty or of a person assisting a prison officer so acting. The
above are subject to sub-section (2) of the same Sec.5. Further, the death
penalty is also incurred for repeated murders, that is where before a conviction of
murder, a person has been convicted of another murder on a different occasion,
both murders being done in Great Britain. Further, the death penalty is also
incurred for repeated murders, that is where before a conviction of murder, a
person has been convicted of another murder on a different occasion, both
murders being done in Great Britain.

The word Capital punishment or Death Sentence itself indicates the taking
of life of a person as a punishment for the crime he has committed. From the
times immemorial people accepted it as a best reward for major crimes. But now,
in civilized society, it is viewed as some sort of barbaric act. There is a conflict of

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1 Piracy Act, 1837, Sec.2
2 Dockyards Protection Act, 1772.
3 Sub-section (1) of Sec.5 of the Homicide Act, 1957.
4 Sec.6 of the Homicide Act, 1957.
opinion on this capital punishment in the World nations. For example, in Muslim
countries it is used as a must for all major crimes. But in western world
and other democracies, it is used rarely, even its use is prohibited by Law in other
countries. But in India courts used to give it as a punishment now and then
subject to restrictions developed by the Apex Court. Thus now death penalty is
confused to rarest of rare case in India. But in majority cases they refused.
2.4.3.2. Mutilation as punishment

This was one of the form of punishment which was in vogue in India prior to invasion of Britishers. The meaning of mutilation is cutting of either legs or hands as punishment. The chief drawbacks are that it cripples the victim for life and thus diminishes his utility to the State. Moreover, affords no safe guard against reputations of the crime and in that case the same punishment cannot be resorted to. It gives no chance to the individual to reform himself, and as a punishment it lacks its one essential i.e., remissibility in case of wrong conviction or for any other costs. This punishment was abolished as punishment by the English rulers in India.

2.4.3.3. Imprisonment

Imprisonment is the main and most commonly used form of the punishment. In the primitive society, the imprisonment was either unknown or if known was very rare. Imprisonment as a mode of punishment is of recent origin. It became major part of the punishment in the 19th century and followed in the 20th century. When certain individualizing measures were introduced into the penal servitude and certain substitutes for the imprisonment were developed. It was originally proposed to fix both minimum as well as maximum sentence to several offences of Indian Penal Code, but the propriety of prescribing a minimum sentence was questioned by the Select Committee and it was ultimately resolved to fix only the maximum and the apportionment of sentence in each case being left to the discretion of the Judge.

Imprisonment is ordinarily confinement of a person in a penitentiary or gaol by way of punishment. But such confinement must necessarily be in a place
prescribed for the purpose. "It seems clear that any place, whatsoever, wherein a person under a lawful arrest for a supposed crime is restrained of his liberty—whether stocks at the street, or in the common gaol, or in the house of a constable or private person, or the prison of the ordinary is properly a prison within the statute; for imprisonment is nothing else but a restraint of liberty\(^1\) So it is imprisonment in the true sense of the term where a person is thus restrained though the person so sentenced is not confined in gaol or subjected to gaol Discipline. Of this sentence the framers of the Code wrote: "Of imprisonment we propose to institute two grades, rigorous imprisonment and simple imprisonment. But we do not think the Penal Code is the proper place for describing, with minuteness, the nature of either kind of punishment." This was, therefore, left the gaol discipline and tasks varying, with the locality health and culture of the prisoners have been prescribed as forms of rigorous imprisonment. In England the picking of oakum and working the treadmill, in India the picking of wool, the crushing of grain, the breaking of metal and the pressing of oil are regarded as the usual tasks allotted to rigorously imprisoned offenders; while lighter work or no work at all is exacted from those sentenced to simple imprisonment. Indeed, simple imprisonment is really detention in gaol custody, the prisoner being at liberty to do light work to break the monotony of prison life. Such sentence is appropriate to men of position or culture to whom the ignominy of imprisonment is a sufficient punishment\(^2\).

\(^1\) Hawk, P.C. 18, Sec.4.
\(^2\) Section 398 of Indian Penal Code.
2.4.3.4. Banishment

The primary form of state administered punishment during the ancient times and middle ages was Banishment or exile. The banishment was one of the form of punishment previous to the enactment of Indian penal code and it was also continued even after I.P.C is enacted. This type of punishment was provided only for 3 offences viz., Sedition, waging war against the king and unauthorized residence in British India. The Law Commissioners in those days deprecated its infliction as an unwarranted severity. It was more popular punishment for political unpopularity or popular displeasure in olden days. It was also abolished long back.

2.4.3.5. Transportation

The sentence next after death in gravity is transportation for life, which is only another name for banishment. At the time the Penal Code was enacted transportation meant transportation beyond the seas. For may years the only place to which they have been sent is the Andaman Islands. In England transportation beyond seas ceased as a punishment in 1854. In India it was still a part of the penal system until it was abolished.

The draftsmen of the Indian Penal Code explained the appropriateness of this sentence as follows. The consideration which has chiefly determined us to retain that mode of punishment is in our persuasion that it is regarded by the natives of India, particularly by those who live at a distance from the sea, with peculiar fear. The pain which is caused by punishment is an unmixed evil. It is by the terror which it inspires that it produces good, and perhaps no punishment inspires so much terror in proportion to the actual pain which it causes as the
punishment of transportation in this country. Prolonged imprisonment may be more painful in the actual endurance, but it is not so much dreaded before hand, nor does a sentence of imprisonment strikes either the offender or with so much horror as the sentence of exile beyond what they call the Black Water. The separation resembles that which takes place at the moment of death. The criminal is taken for ever from the society of all who are acquainted with him, and conveyed by means of which the natives have but an indistinct notion over an element which they regard with extreme awe to a distant country of which they know nothing and from which he is never to return. It is on this feeling that the efficacy of the punishment depends and this feeling would be greatly weakened if transported convicts should frequently return after an exile of seven or fourteen years to the scene of their offences and to the society of their former friends.¹

This sentence was probably as ancient as other sentence of death and it has been used as favorite method of putting out of the political offenders, rebels, revolutionaries, patriots and reformers. Transportation was one of form of banishment coupled with forcible servitude in an appointed locality. The sentence of Transportation for life was next to death in order of gravity of punishments. But it was figured more largely than the death penalty. At that time the I.P.C. was originally enacted it was thought that the ordinary man in India feared very much the black water and going beyond the sea. In India for many years the only place to which they have been sent is Andaman Islands upto it was abolished in 1955.

2.4.3.6. Prison Sentences

¹ Lard Macauley, and his
The justification of punishment as a means of reforming the offender also arose in the era of widespread use of prison sentences. The houses of correction, which in England and other European countries antidote the convict person, were supposed to teach the offenders a lesson and correct their short comings. The early prison system in America was predicated on penitence, hence comes the word penitentiary. As a place to reflect on misdeeds and to become contrite. Later, reformatories were established, with a programme to work, education, recreation and religious services with the purpose of rehabilitating the offender and preparing him for his entrance back into the law-abiding society. The indeterminate sentence with a deduction of some time from the full lengths of the sentence for good behavior in prison and the accompanying use of parole as a form of conditional release before full expiration of the sentence were also additions to the modern prison system calculated to foster quick reformation of the offender.

2.4.3.7. Imposition of Fine

The fine as punishment has been in practice since beginning of tribal system in the society. In some of the parts of the country where still some treble people are living has been using the fine as prominent punishment. Payment of fine brings home the sense of responsibility in a surer fashion than even short terms of imprisonment in some case.\(^1\) The punishment of fine has been specified in a number of offences under the Indian Penal Code and other Penal Statutes. It also stands as an alternative to the sentence of imprisonment, in majority of the case. The authors of the Penal Code state that punishment is for all offences to which men are prompted by cupidity and it is punishment which operates directly

\(^1\) Ashok Kumar V. State (Delhi Administration) (1980) 2 S.C.C.20.
on the very feeling which impels men to such offences. The sentence of fine is allied to forfeiture of the property. It is forfeiture of money by way of penalty. It has been justified by the Law Commission on the ground of its universality, though they admitted that its severity should be proportionate to the means of the offender, because the fine not only affected him but his dependants also. The Supreme Court of India has stated in number of cases that while imposing fine, it was necessary to have as much regard to the pecuniary position of the offender as to the character and magnitude of the offence. The Courts are also empowered to award a sentence of imprisonment in default of payment of fine.

The fine if recovered from the prisoner is to be deposited in the account of the State. But the Supreme Court of India in recent years has shown a new trend and has given due consideration to victimology. In Mahinder Pal Jolly v. State of Punjab the Court directed that fine if recovered would be paid to the widow of the deceased. Similarly, in Bhupendra Singh v. State of Madras, the Supreme Court ordered the amount of fine to be paid to the dependants of the deceased.

The sentence of fine is allied to forfeiture. It is, indeed, forfeiture of money by way of penalty. It was justified by the Law Commissioners on the ground of its universality, though they admitted that its severity should be proportionate to the means of the offenders, since the sentence not only affected him but also his dependants.

Since fine with all its defects continues to be a sentence and the Code does not invariably prescribe the maximum it is necessary that it should confirm to certain well-defined principles ensuring that its amount, in each case, is reasonable but not excessive.

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1 AIR 1979 SC 577
2 Tandon M.P. Indian Penal Code, Central Law Agency 4th Edn. 1992
There are certain sections where Penal Code authorizes the imposition of fine but the amount of fine is not mentioned. In such cases Section 63 of the IPC says where the sum is not indicated then the amount of fine may be unlimited but should not be excessive. When a fine is imposed and is not paid the court can prescribe default sentence of imprisonment. This may act harshly in some cases of genuine incapacity to pay. Therefore, the community service may be prescribed as an alternative to default sentence. The amount of fine as fixed in 1860 has not at all been revised. The replace one now long in an age of galloping inflation. Money value has gone down. Incomes have increased and crime has become low risk and high return adventure particularly in matters relating to economic offences and offences like misappropriation breach of trust and cheating.

2.4.3.8. Forfeiture of Property

The Indian Penal Code also provides for the 'forfeiture of the property'. Forfeiture of the property is very ancient in its nature and was meant mostly for the rich in the British India. This type of punishment has gradually since become obsolete and is no longer favored by the sociologists. Sections 61 and 62 of the Indian Penal Code, which provided for absolute forfeiture of the property of the offender have been repeated in 1921. At present, there are only three case in which specific property of the offender is liable to forfeiture.

The punishment of absolute forfeiture of all properties of the offender is now abolished. Section 61 & 62 of the Indian Penal Code dealing with such forfeiture are repelled by Indian Penal Code (Amendment) Act, 1921. There are however 3 offences in which the offender is liable to forfeiture of specific
property. They are 1) Committing depredation on territories of power at peace with the Govt. of India. 2) receiving property taken by war or depredation mentioned in Sec.125 and 126 of I.P.C. and No.3) public servant unlawfully buying or bidding for property.
2.4.3.9. Flogging as punishment

Flogging is not included in the list of punishments of the Code. This punishment was also passed in review by the draftsmen and condemned for the reason as pillory and donkey-riding on the ground that, to a person who is leading in decent station in life, it adds disgrace to the severity which could not be justified except when inflicted upon juvenile offenders. The draftsmen, however, admitted that their remarks did not apply to juvenile offenders in whose case that form of sentence is both deterrent as well as unexceptionable. In 1864, a Whipping Act was passed and it introduced the sentence of flogging as punishment for certain crime. This Act was replaced by the Whipping Act, 1909\(^1\) which modified the rigor of the old Act and confined the sentence of flogging to old and juvenile offenders only. The Abolition of Whipping Act, 1955 has abolished whipping, and repealed the whipping Act, 1909. There was an element of brutality in the sentence of flogging and it was a stain on civilization. The Indian Parliament has removed this blot disfiguring the Statute Book.

2.4.4. The beginning of State Intervention

Long before any of the early codes, injuries were considered private wrongs. When an individual was harmed by another, vengeance was the right of the injured party or their family or clan. If the victim did not seek private justice, there was no societal mechanism for official intervention. The State did not involve itself in these systems of private justice, and many injuries or deaths resulted in blood feuds that some times spanned generations.

The Code of Hammurabi and other early Near Eastern codes attempted to move from a system of private vengeance and blood feuds to one in which
victims were compensated for their injuries. Due to their often irrational manifestations, blood feuds made the settling of cities more difficult and affected the ability of leaders to govern. Because leaders had an interest in ending such feuds, the first step taken after war was often the establishment of a scale of compensation for wrongs. If compensation was not made, the victims or their families still had a right to exact private revenge.

2.4.5. Determination of punishment

The determination of punishment is a difficult task. To determine what amount of punishment is necessary for safety and what is excessive, the legislators who are the "dispassionate students of human nature" must define the punishments for each crime. Since members of society are of rational human beings with freewill, they will commit acts if the pleasure of the act outweighs the cost. To stop individuals from committing prohibited acts, punishments must be set to make the punishment just over the amount of pleasure the individuals receive from the deviant acts. Any punishment that grossly or even slightly goes over the amount necessary to stop individuals from committing prohibited acts would be considered unjust.

In the treatise "On Crimes and Punishments", Beccaria¹ wrote a short chapter on preventing crime because he thought that preventing crime was better than punishing them.

¹http://www.crimetheory.com/Archive/Beccaria/index.html
2.4.6. Severity of punishments

The punishment imposed by the ancient rulers were very severe and barbarous. The mohammadan rulers also used very stringent punishments. Though lenient in providing loopholes for escape from punishment, when punishment was inflicted, Mohammedan law was cruel and severe. It allowed punishments of crucification, mutilation, stoning to death retaliation for murder, and the like. But rule of evidence often made it difficult to get a conviction. Lastly, under the Mohammedan administration, the contents of the penal law were not known to the majority of the subjects, as the Hindus who formed the bulk of the population were ignorant of the language in which the law was written.

Most of these defects in the Mohammedan law were not peculiar to itself, but were the concomitant elements of the every law of every country, including England\(^1\). The code of Hammurabi\(^1\) in Babylon was no less based on personal responsibility, and the 'justalionis' tempered with the law of ransom were no less characteristic features there. In Greece, the Code of Draco less severe in its provisions\(^2\).

2.5. Role of different Theories in Development of Punishment

There are several theories to support the use of punishment to maintain Law and order in the society. The theories of punishment can be divided into two general philosophies: 1) utilitarian and 2) retributive. The utilitarian theory of punishment seeks to punish offenders to discourage, or "deter" future offences. The retributive theory seeks to punish offenders because they deserve to be

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\(^1\) Harper, The Code of Hammurabi. Hammurabi was the 6\(^{th}\) King of the First Dynasty of Babylon and reigned for 55 years, about the period 2,250 B.C. W A Robson, Civilization and the Growth of Law, pp. 88-9,103-4

\(^2\) B K Acharya, Codification in British India, PP. 18-19:
punished. Under the utilitarian philosophy, laws should be used to maximize the happiness of society. The crime and punishment are inconsistent with happiness, they should be kept to a minimum understand that a crime-free society does not exist, but the endeavor to inflict only as much as is required to prevent future crimes.

The utilitarian theory is consequentiality in nature. It recognizes that punishment has both the offender and society and holds that the total good produced by the punishment should equal to the total evil. In other words, punishment should not be unlimited If the prior is imminent, society is not served by his continued confinement because he is no longer capacity for committing crimes.

Under the utilitarian philosophy, laws that specify punishment for criminal conduct should deter future criminal conduct. Deterrence operates on a specific and a general level. General means that the punishment should prevent other people from committing criminal acts. This serves as an example to the rest of the society, and it puts others on notice that criminal behavior must be punished. The conceptions of primitive religion affected society's treatment of the sinner and the criminal.

In the course the first twelve centuries of Christianity, classical philosophy, Roman law and administrative practices and Christian doctrine were fused. The result was medieval theology, which is the disturbed period called the middle ages molded all thoughts including Law and Penology. Earlier alongside the Roman Law, Common Law was developed. On the decay of the Empire Common Law coalesced with Roman Law .Edwin Sutherland, considered by many to be the father of American criminology, is perhaps best known for his
theory of differential association. Inspired by the works of French sociologist Gabriel Trade and American Social theorist George Herbert Mead, Sutherland's theory of differential association lays the foundation for most contemporary social learning theories of crime.

According to Sutherland and his collaborator Donald Cressey, criminal tendencies are neither inborn nor a product of faulty learning, but they are acquired through the normal process of learning. Crime and delinquency, like anything else, involve socialization or social learning and human social interactions.

Administration is a necessary ingredient of any civilized government. The question what is the end of criminal justice leads one to the question what is the purpose of punishment. A number of theories have been propounded to answer the question out of which the following five have been given more prominence.

There have been various theories of punishment prevalent in various ages. Even in the same age, there are found different justification among different countries according to variations in culture and civilization of respective important theories.

2.5.1. The Theory of Deterrence

This theory aimed at the protection of the society by making certain action as punishable offences, with the expectation that people will refrain from committing the offence through fear of punishment. However, the fact that people nevertheless continue to commit the offence is itself a proof that deterrence does not act universally and with everyone alike.
According to the exponents of the theory of deterrence, punishment is meant to prevent other persons from committing similar offences. The advocates for the retention of capital punishment rely on this theory in support of their contention. If deterrence is really to be brought about and if prevention of crime is to be substantially effected, one of the ways of doing so is to introduce compensation as a factor of punishment. Just as reformation is an important factor, so also should compensation of the aggrieved party be a fundamental factor associated with punishment. The springs of criminality are a desire to acquire something dishonestly from another person, and if the wrong-doer can keep and enjoy his ill-gotten gains he does not mind undergoing even painful years of imprisonment.

It is not always pleasure that induces a person to do a thing; nor is it pain that deters him. But the idea of having to give up the ill-gotten gain is most repulsive to the prospective or intending offender. If every offender then is made to pay punitive damages to the aggrieved party in addition to his liability by way of detention for a sufficiently long term, that would to a great way in deterring in wrong-doer. So also it is the fear of a long time loss of liberty that is the real deterrent. To the desperado the whip means nothing. He is accustomed to pain or soon will be comfortably conditioned to the lashes or the chains or even the solitary cell. What he dreads, however is the loss of liberty for a long time and having to give back what he took after such heavy pains and risks. So compensation will help deterrence. It should be introduced as a necessary commitment of punishment.

Later view of the legislators with regard to punishment veered round the principle of deterrence. This is based on the idea that infliction of severe
punishment on a wrong-doer shall serve as a check on others. In the matter of infliction, the punishment as a deterrent is expected to serve two-fold purpose: individual and general. The object is to teach the offender a lesson to that he will be deterred from repeating his offence; but it is also to demonstrate to the potential offender the consequences if he violate the law. Logically it ought to follow that the more severe the punishment, the more certain the deterrent effect. Yet the whole history of penal law shows that the severity of punishment did not curtail the volume of crime. In the time of Queen Elizabeth I, for instance, it was a capital offence to pick pocket. But these offences were not reduced considerably at that period. The belief in the value of deterrence rests on the assumption that humans are rational beings who always think before they act and then base their actions on a careful calculation of the gains and losses involved.

2.5.1.1. The intimidation version

The important version of deterrence theory regards the intimidation of those who are tempted to commit a crime as being a social necessity that justifies the intimidating threat, and views the need to keep the threat effective as the justification for carrying it out. Creating the imposing liability to punishment each have separate grounds of justification and each must be justified in order to justify criminal liability this in social practice that embraces both phases, but there are difficulties with both. There is another objection to the intimidation theory, is it based on the severity of penalties prescribed. It is intuitively clear that crimes for which the heaviest punishment is laid down on the whole are not crimes in which temptation is either particularly strong or especially common.
Murder is punished most severely, but it is often not a result of temptation at all. Crimes are punished most severely because they are the most serious, which is to say that the harm done or threatened when such crimes are committed is most serious and the risk in what is done intentionally is especially great. Another version of deterrence stands in contrast to mere intimidation. When a threat has failed to deter, that is not the end of the matter. The threat must be kept generally effective by carrying out what was threatened, and this feature is taken account of in the intimidation version. The reason that punishment cannot be justified as a means of deterring law breakers from further crime if it fails to do that. In this version stress is still placed on the threats made by the law, and for that reason it can be called a deterrence theory. According to this theory, punishment for violating the rules of conduct laid down by the law is necessary if the law to remain a sufficiently strong influence to keep the community on the whole law-abiding and so to make possible a peaceable society. Without punishment for violating these rules the law becomes merely a guide and an exhortation to right conduct.

2.5.2. The Theory of Retribution

This theory proceeds on ethical grounds, moral culpability of the culprit is the focal point of attention. This theory was nurtured more prominently in the olden days when the injured person was given a right to take revenge on the person causing the injury.

Salmond\(^1\) point out the conceptions of retributive justice still retains a prominent place in popular thought. It flourishes also in the writings of

theologians and protagonists of the theological modes of thought and even among the philosophers it does not lack advocates. Kant, for example, expresses the opinion that punishment cannot rightly be inflicted for the sake of any benefit to be derived from it either by the criminal himself or by society and that the sole and sufficient reason and justification of it lies in the fact that evil has been done by him who suffer it. The view of the great philosophers in the past had been that punishment should be based on the principle of retribution. The doctrine that the offender should be made to suffer in proportion to the injury caused to the victim has been the source of enactment of various penal laws. The theory stems from the Mosaic law of tooth for a tooth and an eye for an eye. The principle is regarded by all as a relic of the past. It is a barbarous form of punishment and betrays an utter ignorance of the cause of crime. Instead of curing the disease scientifically it tries to deal with criminality superficially.

This theory is linked with the concept of expiation insofar as both are to some extent concerned to restore a balance. Whereas the account which is being squared when a crime is expiated is felt to be, first, a normal account, and secondly, an account personal to the offender with the notion of retribution the interests of the injured party enter into the balance, Retribution is revenge for an injury. Hewgal says:

"Punishment is only the manifestation of crime, the second half of which is necessarily pre-supposed in the first, retribution is the turning back of crime against itself. Philosophers from Socrates to Hobbes have questioned whether the infliction of evil upon any one can ever be is itself good.

Further more, concept of retribution as an object of punishment implies a relationship between the severity of punishment and the degree of guilt. Modern
psychological knowledge of unconscious motivation shows that it is really quite impossible for any lawyer, and probably for anyone, to make an assessment of guilt present in any individual case.

Such arguments, together with the growing realization that those who commit crimes are not always free agents but are to some extent at any rate, at the mercy of constitutional and environmental factors, have lead to decline in the importance of the doctrine of retribution. Sir Leo Page says:

"Violence is the child of violence and that useless punishment produces in the offender, not a spirit of meek contribution but one of implacable hostility which, by making his reformation more difficult injures not only him but the whole community".¹

It is arbitrary to fix six days or six weeks or six months as the just sentence for stealing of an umbrella worth of Rs.15. But in the sense in which the retribution implies that a criminal deserves punishment, this feeling is connected with the notion of justice itself. The justice as an ultimate value, akin to the idea of truth closely connected with the principle of equality. The extent that it render the commission of offence as a prerequisite for punishment and for that matter provides outermost limit for infliction of punishment, theory of retribution will always remain in sight.

2.5.2.1. History of Retribution

Retribution has been around for millennia. It predates the birth of Christ by at least 2000 years, as retributive elements appear alongside restorative principles in law codes from the ancient codes including the Code of Ur-Nammu

¹ http://en.wikipedia.org/wiki/Sir_Leo_Hielscher_Bridges
In these legal systems, crimes were considered violations of other people's rights. Victims were to be compensated for the intentional and unintentional harms they suffered, and offenders were to be punished because they had done wrong.

It is difficult to know when retribution was first used as a philosophy of justice, but the concept regularly recursion many religions. There are mentions of it in several religious texts, including the Bible and the Quran. In the Christian tradition, for example, Adam and Eve were cast out of the Garden of Eden because they violated the Lord's rules and thus deserved to be punished and many Christians believe sinners will suffer a fiery after life for their transgressions. The Quran discusses retribution by the Lord for those who are disobedient or wicked Allah is specifically addressed as the “Lord of retribution” in a selection that discusses those who reject belief in him. The Buddhist Dharmapada mentions retribution as following bad acts, and the Hindu Bhagavad Gita ties retribution to bad Karma, where retribution is in exact proportion to the crimes and the faults committed.

Around 1116, England's King Henry-I penned his Leges Henicrt, which redefined offenses as crimes against the king or government, thus shifting the focus of justice away from concern for victims. Instead of harming victims, crimes came to be viewed as transgressions against an amorphous “king's peace.”

That transformation took place relatively quick, within a century of the Leges Henrici, English barons were already complaining about the penalties the crown had begun to heap upon them, arguing that they were being unfairly penalized. This outcry resulted in the 1215 signing of the Magna Carta by King
John, which acknowledged a number of basic rights, including a right to due process before property could be seized as a penalty for committing crimes.

2.5.3. The Reformatory Theory

The reformatory theory implies that the offender should, while punished by detention be put to educative and healthy or ameliorating influences. He should be re-educated and his character traits reshaped and put once again in the furnace for being molded. Reformatory punishment may mean either that the offender is reformed while being punished, or that he is reformed by the punishment itself.

Salmond observes that “The purely reformatory theory admits only such forms of punishment as are subservient to the education and discipline of the criminal, and rejects all those which are profitable only as deterrent or disabling. Death is in this view no fitting penalty; we must cure our criminals, not kill them. Other forms of corporal punishment are rejected as brutalizing and degrading both to those who suffer and those who inflict them.

According to Hegel, punishment as such tends to reform the offender. The theory of reformation of the offender is in no way conflicting with that of retribution. As Dr. James Seth has put it, the theories of punishment are interdependent and not mutually exclusive. He says, “In virtue of man-hood or personality the criminal must be convinced of the righteousness of the punishment he must see the righteousness of the punishment, before it can workout in him its peaceable fruits of righteousness. Here, in the force of this appeal and in such an awakening of the men’s slumbering conscience lies the

1 www.jstor.org/stable/1957562
ethical value of punishment. Without this element we have only a superficial view of it as an external force operating upon the man. A man may be restrained from a particular act of crime on a particular occasion, but the criminal nature in him is not touched, the criminal instincts are not extirpated. They will bloom again in some other deed of crime. Punishment is, in its essence, a rectification of the moral order of which crime is the notorious breach. Yet it is not a mere barren vindication of that order; it has an effect on character and moulds that order. Unless the punishment has the effect of molding character, unless re-education is regarded as an essential commitment of punishment, there can be no hope of making punishment useful. Mere infliction of useless pain can lead to no results. The Beccarian doctrine that punishment should involves infliction of pain proportionate to the gravity of the offence is based on the doctrine of psychological hedonism. Reformation involves individualization of treatment and reeducation. Plato recognizes the objects of punishment as those of deterrence and reformation. The offender should be healed, made harmless, through sufficiently long term detention, and thus society also should be protected.

Hard work under healthy conditions, the development of a love for work, payment of wages according to the quantity and quality of the work done, and re-education of the personality traits are the most important matters to be understood carefully and adopted scrupulously in penal form. It is maintained also that punishment tends to reform criminals and that it accomplishes this by creating a fear of repetition of the punishment.
2.5.4. Denunciatory Theory

One of the rationales for punishment is denunciation. Under the denunciation theory, punishment should be an expression of societal condemnation. The denunciation theory is a hybrid of retribution. It is utilitarian because the prospect of being publicly deserved as a deterrent. Denunciation is likewise retributive because it promotes the idea that deserve to be punished. The denunciatory theory of punishment is only a different shade of the retributive theory. According to Lord Denning, the ultimate justification of any punishment is not that it is a deterrent but there is the emphatic denunciation by the community of a crime. The truth is that some crimes are so outrageous that society consists on adequate punishment, because the wrong-doers deserve it.

2.5.5. Quantum theory of punishment

Quantum theory of punishment suggests certain situations which may help the judiciary for arriving at a conclusion, that whether a particular offender can be released on giving reformatory measures.

In every society the human race would like to have a peaceful and crimeless atmosphere with which they could make their livelihood for the upliftment of the society as a whole. But there are some deviant behavior existing among the human race for some of other reasons. At that juncture it necessitated the society to correct and rehabilitate the deviant behavior to its maximum possible extent with the help of procedure established by law. The deviant behaviors are made to face the charges by the administrative agencies of criminal justice system and are put into the test and get punished, if found guilty.
All of the men and women may be viewed as having entered a compact that binds them together as a society in which each of them have reciprocal rights and duties, including duties to forbear from engaging in harmful conduct. As in many contracts, there are penalty provisions, in this case the items of sanction to be found in a penal code. The public authority created to enforce the contract invokes these when a duty of forbearance is breached. The penalty exacted can be viewed, then, as a contract debt that must be paid to society according to the terms of the social contract.

2.5.6. Preventive Theory

The protection of society demands at least a measure of disablement to restrain incorrigible offenders and hardened criminals also from further harmful activity, and that is why disablement consists primarily in physical restraint. It aims to prevent a repetition of the offence by the offender by imposition of such penalties as imprisonment, death and exile. Punishment in this sense is preventive or disabling. It is now generally recognized that, with the advance of civilization, death penalty has become incongruous.

2.5.7. Debt payment theory

Observation about crime and punishment seems less controversial than that a criminal must pay his debt to society. Not everyone will agree in regarding as a criminal anyone found guilty of committing a crime no matter what the circumstances may be under which he was prosecuted and no matter what the law he has broken requires of him. But almost everyone acknowledges that some things truly are crimes and that those who truly commit them have incurred a debit
to society that is paid by criminal punishment. The metaphor of paying a debt is perhaps best understood, once again, by reference to the more elaborate metaphor of a social contract.

Another version of this metaphorical debt suggests itself that the aim of criminal liability must be to allow one who has incurred the debt to discharge it and thereby restore himself to the ranks of the respectable citizens of the community. Much that is commonly said about paying a debt to society suggests that its purpose is not to benefit a creditor but rather to bring about the benefits which the debtor enjoys when he no longer has the debt as a weight on his conscience and a mark against his good name. But this version of the metaphor is seriously flawed. The position of the criminal who pays his debt to society is analogous to a debtor who goes into bankruptcy and receives a discharge, not a debtor who pays and extinguishes his debt. After having been discharged, there is a continuing stigma and suspicion. A convicted person does not renew his credit and good name by paying his debt to society. On the contrary, he enhances his bad reputation by having been in the company of undesirables.

2.5.8. The Secular Theory of Punishment

Resting upon the primitive retaliatory practice and justified by the remarkable cathartic theory of the purpose of punishment implicit in the theory of individual explanation, the penology of Jewish, Grecian, Roman and Teutonic peoples only developed further the theory of social expiation and added to it the purpose of deterrence.
Aristotle in his book "Nicomechean Ethics" discusses "Corrective justice". In his analysis of the nature of justice, Aristotle carries over into the relations between man and his conception of punishment as a means of restoring the balance between pain and pleasure.

Corrective justice of Aristotle means that the loss suffered by the Victim man is compensated. Suffering by the offender restores the balance between injured and transgressor. But Aristotle says that retaliation for injury does not in all cases restore this balance. He says that there are people who have a notion that reciprocation is simply just for an eye for an eye. But this simple reciprocation will not fit on either to the distributive justice, or the corrective justice. In many cases differences arise, as, for instance, suppose one in authority has struck a man, he is not to be struck in turn; or if a man has struck one in authority he must not only be struck but punished also. And again, the voluntary or involuntary actions makes a great difference.

It is clear, that Aristotle has attempted to rationalize the practice of his day in terms of retaliation, admitting, however, the modifications necessary by reason of the different social status of offender and injured, or because in one case injury is intentional and in the other unintentional, in view of the changed social relations brought about by a good deed done to another. In all his discussions appears the generalization that upon man's relations one to another depends on the unity and stability of society.

Both, the Christian doctrine of punishment and the secular theory of punishment for crime, originate in a combination of man's natural reaction to injury with the theories resulting from reflection upon his experience in their respective

1 http://library.thinkquest.org/18775/aristotle/bioar.htm
histories each had been influenced by certain quite different factors. The Christian doctrine of punishment for sin in its early history had to face the difficult problem of legal administration in a civil state. Moreover, some of its sanctions were supernatural rather than civil. It could leave at least a part of the punishment of the sinner to God either here or in the hereafter. The doctrine of sin was accompanied by a most humanitarian doctrine of redemption. On the other hand, the secular theory of punishment for crime had only society sanctions to be applied here and now.

2.5.9. Psycho analytical theory

According to Psychoanalytical theory society is considered to have advanced through three stages. First, there was in social life a stage in which there was free expression of the instincts of sexuality and aggressiveness, and this was the period of no punishment. Next, the expression of the instincts was repressed and, hence, the instincts obtained their outlet in superego activities, directed against their original form; this was the period of severe and open punishments. In the third stage there has been a further degree of repression and an open expression of the libidinal and aggressive instincts is no longer tolerated, even in the indirect or symbolic form of punishment.

2.5.10. The Scape-goat theory

Psychoanalysis have advanced a theory which correlates the many variations in the punitive reaction with variations in the alternative systems for satisfying aggressive instincts. The general notion is that these instincts must be expressed in some fashion and that the criminal serves as a scape-goat for their legitimate expression. Thus, it is maintained that in punishing criminals society
expresses the same urges which are expressed among criminals in committing crime.

A more popular version of this theory deals more directly with aggression. The essential notion is that the human organism, because of unconscious conflicts contains a fixed amount of aggression which must be expressed. It may be expressed in criminality and it may be expressed in punishment of criminals. According to the theory the First World War was a substitute for punitive aggression against criminals. Punishment of criminals then is considered a system for sublimation of aggressive tendencies; persons who are aggressive secure satisfaction in the punishment inflicted and this satisfaction is socially proper. In this way, many persons can avoid illegal aggressions just as they avoid them by other kinds of sublimation.

2.5.11. Theory of Expiation

The crime and sin were in fact synonymous. But now it is recognized that there are many sins which are not crimes, and equally that there are many offences which are not sins. The Italian Criminologist Enrico Ferri puts the matter succinctly. He stated that

"The question of moral guilt of a criminal or of any other human being lies within the domain of religion and of moral philosophy¹. The state and its system of criminal justice can do no more than adopt such measures to defend the community against criminals as are reasonable in themselves and proportionate to the danger threatened to society"

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¹ Enrico Ferri was Italian Criminologist, he is author of 'Criminal Sociology' in which he explained moral philosophy.
The theory of expiation thus presents practical difficulty in the matter of assessment of quantum of punishment which may be equal to and which may be capable of washing off the moral guilt. It puts on the judge work incapable of accomplishment by human agency. On the point of stopping offender from repeating the crime, apart from uncertainty about repentance, one after undergoing punishment may feel that he had paid the debt and therefore undertake further debt of committing crime again without much weight on his conscience.

Expiation is an ancient justification for punishment. The offender is made to atone for his crime through suffering. Mead contented that the criminal in the process of punitive action becomes a scape-goat, that is, the object of chastisement, scourging and degradation; his punishment provides an outlet for the outraged feelings created by his offence. Society also preserves an attitude of hostility toward law breaker as a common foe, and the emotions of the battle are projected towards the violator. The moral values become even more sacred because society must fight to maintain them in the face of understanding threats of the criminal. Punitive action against the culprit gives the community a sense of its moral superiority, an assurance that virtue is rewarded after all. It allows society to rally around its moral values and to vitalize its sense of solidarity. Hostile action against offenders brings about cohesiveness in society. When male factors are made to expiate, especially before the multitude, society goes on a moral orgy, the recovery from which restores equilibrium.

The trend in modern society to do away with physical torture and to withdraw the application of punishment from the public eye has lessened to some
extent by the force of expiation. The community is still able to derive satisfaction from the fact that justice is being done, even though it is hidden from view.

2.5.12. Rational Choice theory:

The classical view of criminology has been steadily growing in popularity. The criminological theory of Rational Choice takes many of the Classical ideas and makes them more relevant to today's issues. Rational Choice theory also deals with the issues of general and specific deterrence. General deterrence is that the general public will not commit crimes due to a fear of getting caught, prosecuted, and severely punished. Specific deterrence is using punishments to prevent a known deviant from committing future crimes or said that if a criminal receives enough punishment for committing an act, that criminal will not commit that act again. Incarceration is the use of prisons to punish criminals and by taking them out of society, criminals are prevented from committing new harm. Just desserts simply means that an individual commits a deviant act then they deserve to be punished by the government. Beccaria did not write in depth about general and specific deterrence, but he did write in a general manner about the use of laws and punishment, if these both are certain and prompt can deter the general public and specific criminals from committing crimes. Beccaria also supports the Rational Choice Theory.

2.5.13. The theory of Rehabilitation

Rehabilitation is another utilitarian rationale for punishment. The goal of rehabilitation is to lessen the future crime by giving offenders the ability to succeed within the confines of the law. Rehabilitation measures for criminal offenders
usually include treatment for afflictions such as mental illness dependency, and chronic violent behavior. Rehabilitation also includes the use of education that give offenders the knowledge and skills needed to compete in the job market.

This theory emphasizes the treatment of the offender rather than the punishment of the act. The ideology behind the correctional emphasis on rehabilitation grew out of the progressive movement in the United States. These reformers advocated discovering the causes of crime and curing crime, delinquency and mental illness on a case by case basis. In the late 18th and early 19th centuries, there was a proliferation of rehabilitation programs that focused on finding the cause of individual criminal behavior and treating that behavior. These programs sought to deter future crime through counseling and treatment rather than severe punishment. Probation, an alternative to incarceration, and parole, release from incarceration prior to the expiration of the prison term, were two of the programs that grew out of the rehabilitative ideal. Juvenile court, first established in Cook Country, Illinois, in 1899, was another outcome of attempts to rehabilitate. Group counseling programs, diversion programs, drug treatment programs, and vocational educational programs all followed as reformers of the penal system continued their crusade to cure criminals.

In the 1960s rehabilitation came under attack by the conservatives who pointed the rising crime rates as evidence that the rehabilitation approach did not deter or prevent crime.

2.5.14. The Judaeo-Christian Theory

This theory grew out of religious root. The expiation theory continued in force among the Jews down at least to the Christian era. There is a
evidence that in the eighth century B.C. certain new elements were entering into the theory of punishment for sin. For example, Amos, while retaining the retaliatory and expiatory theory of the purpose of punishment, seemingly emphasized its ethical and social basis for recreant Israel. The sins for which Israel is to be punished are not unfaithfulness in the matter of sacrifices and religious ceremony, but greed, selfishness, injustice to one another and disregard of the bonds of fellowship. His God is a god of social righteousness, punishing those guilty of social injustice. Apparently Amos theory of purposes of punishment was based upon his conception of the relation of social injustice to the safety of the group.

The younger contemporary of Amos, however, introduces a new note. Finding in his own experience with his unfaithful wife a revelation of the will of god against unfaithful Israel, Hoses conceived of the wrath of God against Israel not only in the terms of moral indignation, as did Amos, but found in his own love for faithless spouse, inspite of her sins, the suggestion that God so loved Israel that he could not utterly destroy her, as Amos believed. He would punish her and through punishment purify her and redeem her unto himself. Here the redemption purpose of punishment appears for the first time in ancient Israel. The theory of the purpose of punishment thus introduced into human though found a confirmation in the experience of Israel during the awful of exile in Bablonic following the destruction of southern kingdom in 586 B.C. This theory of punishment was taken over by Jesus and at his hands received a fresh emphasis. In spite of the fact that historic Christianity carried over from Judaism and Paganism the theory of expiation, the stress Christianity laid upon the forgiving
love of God towards sinners and upon forgiveness of fellow-men meant that in the Christian church punishment for sin was redemptive in purpose.

2.5.15. Theory of men's free will

In classical penology there is another theory that of the individual's responsibility for his acts. This doctrine rests upon the theory of men's free will. Like the doctrine of reformation of Christianity derived the doctrine of individual responsibility from Judaism. Jeremiah was the first among realistic thinkers to declare it. Christian theologians emphasized it. Even Augustine, who taught that the individual's will is not free until he has experienced the grace of God, held firmly to the doctrine of the responsibility of the individual.

A third concept common to theology and to secular penology was that of intent. The carrying over of these theories into penology created difficulty when the reformatory theory came to be applied. While the church retained its power for purposes of ecclesiastical control to punish sins here and now when the purpose was made clear either by confession or by circumstantial evidence, it never undertook to relieve the Almighty of his responsibility for punishment in the hereafter.

2.5.16. The Theory of Restorative Justice

In addition to the traditional theories outlined above, courts and other officials have recently begun to apply the theory of restorative justice. This new paradigm seeks to obtain restitution or other satisfaction for the victim or the community, promote victim-offender reconciliation and healing, and provide more opportunities for victims and community representatives to participate in the
adjudication, sentencing, and punishment processes. In pursuing these additional goals, restorative justice programs give little emphasis to assessments of deserved punishment;

2.6. The History and Role of the Indian Penal Code in Development of Punishments

The Indian Penal Code prepared by the English Rulers through their commissioners to apply it to all parts of British India to made administration of justice as uniform and easy. The ground work of the Code which the four Law Commissioners, of whom Lord Macaulay was the chief, prepared and which they submitted to the Governor General in Council on the 14th October, 1837. The Bill as so revised appears to have remained pigeon-holder for twelve or more years and it was only on the 6th October, 1860 see the light of the day. The Code is the only Statute in which all types of punishments were prescribed and explained.

The Mohammedan Law with the necessary modifications continued to govern the people of India for a considerable period of the East-India Company’s administration. Legislative Council was established composed of members of the Supreme Council, one representative each from the Local Governments and two judges of the Supreme Court of Calcutta. This legislature enacted for a time all laws whether of provincial or all-India application.

The increasing legislative powers of the different Provincial Governments from 1813 onwards were responsible for the growth of a heterogeneous system of laws, both substantive and procedural, as enacted by the Regulations of the

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1 Fyzoolab (Prosecutor) V. Deo Rai and Dhun Singh(Prisoners)1831. Proceedings of the Sudder Nizamut Adawlut at Calcutta.
2 S.22 of the Charter Act of 1853.
different Provinces. This led to the appointment of a Law Member of the Council of the Governor-General. The first Law Member, T.B. Macaulay, assumed the charge of his office on 27th June, 1834.

According to the Mohammedan Criminal Law mutilation was one of the prescribed forms of punishment – for some offences the loss of one limb, and for some the loss of two limbs had been prescribed. Lord Cornwallis with his humane spirit protested against such barbarous punishment and changed the law. He substituted 7 years' imprisonment for the loss of one limb, and 14 years' for the loss of two. This reform continued throughout the period before the India Penal Code came into existence, and these were taken into the Penal Code Unaltered.

2.6.1. The situations lead to enactment I.P.C.

The punishment for same offence was entirely different in all the different Presidencies. Hence the Britishers with an intention to bring the system of uniform punishments in entire British India started to prepare the penal code and enacted it as a Statute. There was no systematic development of the penal law in India up to 1861. The law commissioners who drafted the Penal Code thought it desirable not to take any of the existing systems of law in force in India, But they took suggestions from all.

The conception of crime and the systems of punishment under the Muslim rule differed on many fundamental points from the corresponding British conception or system. Nonetheless, it was effective. Hastings wrote in 1772,

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1 In a letter to the governor-General –in-Council, dated October 14, 1837, the Law which the people regarded with partiality, the Law Commissioners would try to digest it and moderately to correct it and would not propose a system fundamentally different.
"Let the justice of this distinction of punishment be examined by its effects. There are not many instances of robbery in India, where these principles prevail, scarce any of murder. A traveler may pass through a whole province unarmed and sleep in security in the open plain. He will have no enemies to dread but the wild beasts. The two guiding principles of the British administrators in India at the end of the 18th century and at the beginning of the 19th Century had been to change the laws of the country as little as possible and to apply the maxim of justice equity and good conscience, where and when it was necessary to change such laws. Under this process of change the English notion of crime and punishment crept into the structure of the Mohammedan law and the system was gradually anglicized".

2.6.2. The period of Transformation: 1772 to 1834

Warren Hasting who was one of the Governor General of British India with whom this period starts was generally of the opinion that even the most injudicious or most fanciful customs with ignorance or superstition among Indians should be substituted. But he was convinced that any attempt to free them from such laws would be a ‘severe hardship’. Only the most glaring defects in the indigenous system were gradually removed by regulations and a ‘patched up and modified’ law was put in its place. In this period significant change took place in the field of law in colonial India. The following mentioned events are noteworthy.


2.6.2.1. The origin of 14 years and 7 years imprisonment in I.P.C.

On 3rd December, 1790, on the basis of a minute of Lord Cornwallis, certain reforms were effected in the law of homicide\(^1\). In 1790 Cornwallis also advocated the abolition of the punishment of mutilation, but nothing was done till 1791 when the Government resolved that the punishment of mutilation should not be inflicted on any criminal in future, and all criminals sentenced by the courts to lose two limbs were to suffer, instead of it hard Labour in prisons for 14 years, and those sentenced to lose one limb were to be imprisoned with hard Labour for 7 years in lieu of it\(^1\). Mohammedan law made no distinction between involuntary homicide in the prosecution of a lawful intention.

By regulation VIII of 1801, these two types of accidental homicide were distinguished, and for the latter two types of this crime, death sentence was prescribed. In 1833 it was seen that generally too lenient sentences were passed by the Courts of Circuit for the offence of affray attended with homicide, and so on the recommendation of the Nizamat Adalat the minimum punishment for this offence was fixed at imprisonment for 5 years\(^2\).

2.6.2.2. Infanticide

In 1802 the practice of destroying children by throwing them into water was declared to be willful murder and on conviction liable to the punishment of death, and the same punishment was to be inflicted on all the abettors and accomplices and even an attempt to commit the crime of infanticide, where the victim escaped death, was declared liable to proper and adequate punishment at

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\(^1\) For the minute of Cornwallis, and the Regulation that was made upon it, December 3, 1790

\(^2\) Regulation -II of 1823.
the discretion of the courts of circuit with due consideration of the nature and circumstances of the case

2.6.2.3. Reforms of Robert Clive

In 1765, Robert Clive came to India for the third time and succeeded in obtaining the grant of the Dewani from the Moghul Emperor. The grant of the Dewani included not only the holding of Dewani Courts, but the Nizamat also, i.e., the right of superintending the whole administration in Bengal, Bihar and Orissa.

2.6.2.4. Reform of Warren Hastings

The scheme of justice adopted by Warran Hastings had two main features. First, he did not apply English law to the Indian provinces; and secondly, Hindu and Muslim laws were treated equally. The administration of criminal justice remained in the hands of the Nawab, and therefore Mohammedan criminal law remained in force. These were the Courts in the capital.

In the rest of the country the administration of justice was in the hands of Zamindars. In Bengal and Madras, Mohomeddan criminal law was in force.

In the Bombay Presidency, Hindu criminal law applied to the Hindus, and Muslim criminal law to the Muslims. The Vyavahara Mayukha was the chief authority in Hindu law. But the Hindu criminal law was a system of despotism and priest craft. It did not put all men on equal footing in the eye of law, and the punishments were discriminatory.

\[1\] Regulation VI of 1802.
2.6.5. Importance of Regulations

The practice and procedure in Courts in Bengal, Madras and Bombay were prescribed by Regulations which were passed from time to time. In Bengal 675 Regulations were passed from 1793 to 1834, in Madras 250 Regulations were passed from 1800 to 1834 and in Bombay 259 Regulations were passed during the same period as Madras.

In 1833, Macaulay\(^1\) moved the House of Commons to codify the whole criminal law in India and bring about uniformity. He told the house of Commons that Mahomedans were governed by the Koran and in the Bombay Presidency Hindus were governed by the institutes of Manu. Pandits and Kazis were to be consulted on points of law, and in certain respects, the decisions of Courts were arbitrary. Indeed, laws were often uncertain and differed widely from province to province. Thus the year 1833 is a great landmark in the history of codification in India. The Charter Act of 1833 introduced a single Legislature for the whole of British India. The Legislature had power to legislate for Hindus and Mahomedans alike for Presidency towns as well as for mofussil areas.

2.6.6. Influence of Mohammedan Criminal Law on I.P.C.

Manu's code continued in India till the Mohammedan rule was established. The Muslim legal system had its origin in Koran, which is said to be revealed by the God to the Prophet. The Mohammedan criminal law as stated in the Hedaya presents a curious mixture of great vagueness and extreme technicality. The English Commissioners adopted some of the provisions into the code.

\(^{1}\) The Resolution in the Proceedings of the Governor-General-in-council of October 10, 1791.
2.6.7. Criminal Law of Bombay and Punjab

Bombay was the first province in India in which a Penal Code was enacted. This was done while Mount Stuart Elphinstone was governor by a regulation in the year 1827. The Code is extremely simple and short. It was successful and effective, and it remained in force for upwards of thirty years, till it was superseded by the Indian Penal Code.

The Bombay Code, that is, Bombay Regulation XIV of 1827, was not found by the commission fit to be the groundwork of a Code for all India. In framing the Bombay Regulation XIV of 1827, the principles according to which crimes ought to be classified and punishments apportioned had been less regarded than in the legislation of Bengal and Madras.

The Bombay Code, according to the Commission, though a distinct improvement and was free from any evils, yet the manner in which it apportioned punishments to crimes could not be approved. Simple theft, for example, was punishable for six months' imprisonment, while embezzlement was punishable with imprisonment for seven years. Many important classes of offences were not even noticed at all.

2.6.8. First Indian Law Commission

When the first India Law Commission took up the task of drafting a penal code for India, the systems of penal law then established in the different parts of British India widely differed, from one another. In the words of the Commission, "The Criminal law of the Hindus was long ago superseded by that of the Mohammedan The Mohammedan criminal law has in its turn been superseded, to great extent by the Regulation. Indeed, in the Territories subject to the
presidency of Bombay, the criminal law of the Mohammedans, as well as of the
Hindus, has been altogether discarded, except in one particular class of cases
and even in such cases, it is to imperative on the judge to pay any attention to it.
The British Regulations, having been made by three different legislatures contain
as might be expected very different provisions. Thus in Bengal serious forgeries
are punishable with imprisonment for a term double of the term fixed for
perjury. In the Madras Presidency the two offences are exactly on the same
footing. In the Bombay Presidency the escape of a convict is punished with
imprisonment for a term double of the term assigned to the offence in the two
other Presidencies. While a coiner is punished with little more than half the
imprisonment assigned to his offence in the other two Presidencies. In Bengal
the purchasing of Regimental necessaries from soldiers is not punishable, except
in Calcutta, and is there punishable with a fine of only fifty rupees. In the Madras
Presidency it is punishable with a fine of Rs. 40/-6. In the Bombay presidency it is
punishable with imprisonment for four years. In Bengal the vending of stamps
without a licence is punishable with a moderate fine; and the purchasing of
stamps from a person not licenced to sell them is not punished at all. In the
Madras Presidency the vendor is punished with a short imprisonment; but there
also the purchaser is not punished at all. In the Bombay Presidency, both the
vendor and the purchaser are liable to imprisonment for five years and to flogging

All the penal law of the Bombay Presidency was by the time contained in the

1 Bengal Regulation XVII of 1817, Section IX
2 Madras Regulation VI of 1811, Section III.
3 Section XXIV, and Reg. V of 1831, Section 1. Bengal Reg. XII of 1818, Section V, cl. 1. Madras Reg. VI of
1822, Section V, cl. 2.
4 Section XVIII. Bengal Reg. XVII of 1817, Section IX. Madras Regulation II of 1822, Section V
5 Calcutta Rule Ordinance and Regulation passed 21st August, Registered 13th November, 1821
6 Madras Reg. XIV of 1832, Section II, cl. I.
7 Bombay Reg. XXII of 1827, Section XIX.
8 Bengal Reg. X of 1829, Section IX, cl. 2.
9 Madras Reg. XIII of 1816, Section X, cl. 10.
Regulation; and almost all of it was to be found in the extensive Bombay Regulation XIV of 1872. The penal law of Bengal and of the Madras Presidency was, as noted before the Mohammedan penal law.

The first Indian Law Commission was constituted in 1834 under the Charter Act of 1833. Elucidating the task before the Commission Lord Macaulay observed, "I believe that no country ever stood so much in need of a code of law as India and I believe also that there never was a country in which the want might be so easily supplied. Our principle is simply this uniformity when you can have it; diversity when you must have it; but in all cases, certainty" In preparing the Penal Code they drew not only upon the English and the Indian laws and regulations, but also upon Livingstone's Louisians Code and the Code Napoleon. A Draft Code was submitted to the Governor General in Council on October 14, 1837.

It was presented to the Legislative Council in 1856 and was passed on October 6, 1860. It superseded all Rules, Regulations, and Orders, of Criminal law in India and provided a uniform criminal law for all the people in the then British India irrespective of caste, creed or religion. It must be said to the credit of Lord Macaulay and his colleagues that in spite of tremendous difficulties, they firmly laid the foundations of the Indian Criminal law and did an excellent pioneering work. The Indian Penal Code has stood the test of about one and half century and still meets the needs of present day society. In days when the concept of individualization of punishment was totally unconceived, it defined offences and prescribed separate punishment for each. This indeed, even though monument to the law making capacity of the First Law Commission cannot be continued either as it is or by simple patch of amendments. It needs
comprehensive review in general and punishments of various offences in particular.

2.6.9. Livingston Code

In 1821, Livingston\(^1\) began the preparation of a new code of criminal law and procedure, afterwards known in Europe and America as the Livingston Code. It was prepared in both French and English, as was required by the necessities of practice in Louisiana, and actually consisted of four sections: crimes and punishments, procedure, evidence in criminal cases, reform and prison discipline. Though substantially completed in 1824, when it was accidentally burned, and again in 1826, it was not printed in its entirety until 1833. It was never adopted by the state. It was at once reprinted in England, France and Germany, attracting wide praise by its remarkable simplicity and vigor, and especially by reason of its philanthropic provisions in the code of reform and prison discipline, which noticeably influenced the penal legislation of various countries. In referring to this code, Sir Henry Maine spoke of Livingston as "the first legal genius of modern times\(^2\). Lord Mecaulay and his other members of the 1\(^{st}\) Law commission adopted several provisions from the Livingston's Code with slight changes. The spirit of Livingston's code was remedial rather than vindictive; it provided for the abolition of capital punishment and the making of penitentiary labor not a punishment forced on the prisoner, but a matter of his choice and a reward for good behavior, bringing with it better accommodations. His Code of Reform and Prison Discipline was adopted by the government of the short-lived United States of Central America under liberal president Francisco Morazan. Livingston was


\(^2\) Cambridge Essays, 1856 p.17.
the leading member of a commission appointed to prepare a new civil code, which for the most part the legislature adopted in 1825, and the most important chapters of which, including all those on contract, were prepared by Livingston alone.
2.6.10. Participation of Indian Scholars in making of I.P.C.

The Englishmen knowledgeable in law and holding positions of responsibility in different parts of India took an interest in the Penal Code as it ultimately emerged in 1860 was mainly the work as originally proposed by the Law Commissioners when T. B. Macaulay was the President of the Commission. The Indian section of the community, though equipped and actively interested even from the first quarter of the nineteenth century in the day to day legislation for British India, had no hand in the making of the India Penal Code of 1860. The considerable period of time taken in the making of the Code, as well as the huge sums of money expended on the Commissions did not fail to invite strictures from the intelligentsia of that time. A section of the Indian Community also resented the technical and cumbersome procedure of the foreign laws as embodied in the Indian Acts. The authors of the Draft Indian Penal Code themselves observed that it would be greatly difficult to procure good translation of their work. The succeeding Law Commissioners found the Draft Indian Penal Code absolutely untranslatable. According to the Hindu Patriot of January 29, 1857, the promises of simplicity, completeness and general intelligibility which codifiers made of their work, failed grossly when brought to the test of practical application.

1 The Indian Reform – No 1; Government of India since 1834, 16.
3 Banga Darshan, Pous, 1279 B S.
2.6.11. Ground work of the Code

The attention of the commission was also directed to the Act of crimes and Punishments as contained in the Seventh Report of the Commissioners on the criminal law of England, with a view to comparison and the detection of any omissions or other imperfections that might exist in the Draft Code.

To quote the Commission, "Under these circumstances we have not thought it desirable to take as the groundwork of the code any of these systems of law now in force in any part of India. We have, indeed, to the best of our ability, compared the Code with all those systems, and we have taken suggestions from all; but we have not adopted a single provision merely because it formed a part of any of those systems. We have also compared our work with most celebrated systems of western jurisprudence, as far as the very scanty means of information which were accessible to us in this country enabled to do so. We have derived much valuable assistance from the French Code, and from the decisions of the French courts of Justice on questions touching the construction of that Code of Louisiana, prepared by the late Mr. Livingston. We are the more desirous to acknowledge out obligations to that eminent jurist, because we have found ourselves under the necessity of combating his opinions on some important questions."

The instructive reports of the Commissioners on the English criminal law and the Digest of Crimes and Punishments contained in their Seventh Report were also made use of. References were, again, occasionally made to the Code Penal of France and Livingston's Code for Louisiana.
2.6.12. The Draft of the Penal Code

The printed Draft Penal Code prepared by the Indian Law Commissioners and submitted to the Government of India on 14\textsuperscript{th} October 1837, consisted of 488 clauses of which 233 Clauses were comprised in the Chapter reviewed in the first Report on the Indian Penal Code submitted on the 23\textsuperscript{rd} July, 1846, with a Postscript dated the 5\textsuperscript{th} November, 1846.

The Second and concluding Report on the Indian Penal Code proceeded on all the chapters offences not before examined and was submitted by CH Cameron and D Eliott, the Indian Law Commissioners on 24\textsuperscript{th} June, 1847. The Law Commissioners concluded that the Draft Penal Code was sufficiently complete and with slight modifications as suggested fit to be acted upon. The revised edition of the Penal Code was then forwarded to the judges of the Supreme Court at Calcutta on 30\textsuperscript{th} May, 1851, for the favor of any observations or suggestions on its provisions which might appear to them to be necessary. Under Home Department, Legislature, the 30\textsuperscript{th} May 1851, the judges of the Sudder Court at Calcutta were also each separately addressed for the like observations and suggestions. The said revised edition was the Draft Act of the criminal law as prepared by Mr. Bethune, the Legislative member of the Legislative Council of India. Chief Justice Lawrence Peel and Mr. Justice Buller of the Supreme Court at Calcutta made their observations on the Draft Act as prepared by Mr Bethune\textsuperscript{1}. Mr. Justice Colvile forwarded his opinion on the revised edition of the Penal Code in June 1852\textsuperscript{2}. The Judges of the Sudder Court

\textsuperscript{1} Chief Justice Lawrence Peel's letter dated cossipore, Thursday, September 11, 1851, to the Hon'ble the President to Legislative council of India in Council.
\textsuperscript{2} Mr. Justice Colvile's Memo, to Governor-General in Council, Court House, June, 1852.
at Calcutta were again addressed to give their views on the revised edition of the Penal Code.

The court of Directors in London were anxious to see the Penal Code enacted as early as it would be possible. they made, earlier, Barnes Peacock, the fourth member of Council.

The Committee to whom the Penal Code had been referred, in their letter to the Hon'ble Legislative Council dated July 7, 1854, stated that since the Committee had been constituted, several meetings had been held upon the Penal Code, and they had come to the conclusion to recommend to the Council that the Penal Code as originally proposed by the Indian Law Commissioners when Mr. Macaulay was the President of the Commission should form the basis of the system of Penal law to be enacted for India. They were accordingly taking into consideration the various alternations therein and additions thereto that had been proposed to be made; and they intended to submit to the Legislative Council a revised code embodying such of the proposed alterations and additions as might appear to them to be improvements, and such other amendments as might suggest themselves to them in the course of their revision.

2.6.13. Publication of I.P.C in the Gazette

The revised Indian Penal Code was prepared and brought in by Barnes P Peacock, Sir James William Colvile, J P Grant, D Eliott and Sir Arthur Buller. It was read a first time on the 28th December, 1856. The Indian Penal Code Bill

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1 Home Department, Legislative, March 27, 1852.
2 Letter-Legislative Department No. 15 of 1854 to the Governor-General of India in Council dated London the 5th April, 1854.
3 April, Consisting of J P Grant, B. P. Peacock, James William Colvile, D. Eliott and U I Moffatt Willis
4 National Archives of India, Legislative Dept. Act of 1860 No. XL V – Part II.
was read a second time on the 3rd January, 1857\(^1\) and was referred to a Select Committee who were to repost thereon after the 21st of April 1857\(^2\). The Supplement to the Calcutta Gazette of the 21st, 24th and 28th January, 1857, Published the Indian Penal Code Bill after its second reading. The Indian Penal Code was then passed by the Legislative Council of India, and received the assent of the Hon'ble the Governor-General on the 6th October, 1860. It was due to come into force on the first day of May, 1861. The Act as passed was published in the Appendix to the Calcutta Gazette dated 13th, 17th and 20th October, 1860, respectively. In order to enable the people, the judges and the administrators to know the provisions of the new Penal Code, the enforcement of the code was deferred till the first day of January, 1862, by the enactment of Act VI of 1861.Barnes Peacock was thanked also by the Government of India upon the accomplishment of the great work which owed its completion to the ability and indefatigable zeal which he had devoted to it\(^2\).


Punishment for sentencing of the offenders are contained in more than two hundred Indian Statutes. But the bulk of the offences and punishments are in the Indian Penal Code.

The punishments inflicted by the Indian Penal Code are death by hanging, imprisonment with or without hard labour, which may extend to fourteen years, forfeiture of property and fine. Whipping is inflicted not under the Code, but under the provisions of an act passed in 1864. Death is the punishment of waging war against the Queen, murder, attempts to murder by convicts under

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\(^1\) Supplement to the Calcutta Gazette, dated 28th January, 1857.
\(^2\) National Archives of India; Legislative Dept. 1861, A. Proceedings, February, 1861, No.9.
sentence of imprisonment for life, false evidence causing the execution of an innocents man, and of all members of gangs of robbers numbering five or more, of whom any one in committing robbery commits murder. In no case, however, is the punishment of death. The court has always a discretion to sentence to imprisonment for life, and in the case of dacoity to rigorous imprisonment up to ten years as an alternative. The punishment of transportation is inflicted only where the sentence is for life, except in cases of what should describe as treason felony, where the sentence may be for any term. There is in nearly every case an alternative power of sentencing to imprisonment up to ten or in some case fourteen years. The maximum sentence of imprisonment varies according to the offence from fourteen years to a month and one day. There is only one case, in which a minimum term of imprisonment is prescribed. That is the case of robbery accompanied by the use of a deadly weapon, or causing grievous hurt or attempting to cause such hurt, or to murder, in which case the offender must be imprisoned for seven years at least.\footnote{S.397 of Indian Penal Code.} In all this the English law exclusively followed especially in the rejection of minimum sentence and wide discretion left to the judges.

Chapter IV of the IPC deals with the subject of punishments, which is really a branch of the adjective law, but which from its importance and close association with the substantive law of crime has become by usage a part of the substantive Code. The Code sanctions five principal forms of punishments namely- (i) death; (ii) transportation; (iii) imprisonment, which may be simple or rigorous; (iv) fine; and (v) forfeiture of property, but which is a subsidiary punishment, the infliction of which is justifiable only in heinous cases and when
coupled with other substantive punishment. The Law Commissioners deprecated its infliction upon India as an "unwarranted severity". It was consequently deleted from the Code though in doing so the Legislature have only abolished what would have been a duplicate punishment, for the Government of India by Regulation III of 1818 given ample power to deport persons for reasons of State. The sentence of transportation is till retained as a punishment, and as it is only a form of banishment coupled with enforced servitude in an appointed locality, that sentence may still be held to remain as an approved form of punishment under the code. Banishment was a favorite punishment the ancient nations. With the Greeks as with the Romans, it was a punishment as much self-imposed for political unpopularity or popular displeasure, as it was a sentence sanctioned by law. It was a form of penance which the great Ram performed in this land, and it was a sentence which in the form of ostracism was visited at one time or another upon the great popular leaders of Athens. And even as a pure criminal punishment it had a distinct place in the civil law. It was either relegatio or deportatio, the farmer being a banishment to an island for a term or life, and differed from deportation in that it was generally to a more pleasant island and did not carry with it the penalty of confiscation of property. Another form of banishment called exilium was occasionally resorted to, and it was either relegation or latafuga, which was resident restricted for a particular place or a prohibition from entering it.

2.7. The laws of Pre-constitution

When the Constitution was put on the statute book, there were numerous pre- Constitution laws. It was a trite saying in law courts that while interpreting the
laws, the judiciary must so interpret the law as to sub serve the purposes for which the law was enacted. Now, a given law may have been enacted at a time when freedom was a distant dream and the imperial masters had their hegemony over our country. How is the judge in post-Constitution period interpret such laws paying respect to the cliché that the law must be so interpreted as to give meaning and effect to the intention of the law-makers. The intention of the law-makers during imperial day may be to strengthen the British Empire. Should a judge so interpret the law when India is a Republic, as to achieve the object of imperial days. To focus attention on the object of law sometimes introduces a regressive movement. Slowly, the view gained ground that the laws must be interpreted in such manner as to advance constitutional goals.

2.8. Post-Independence developments

After independence, the Constitution of India with its Fundamental Rights and Directive Principles of State Policy gave a new direction to law reform geared to the needs of a democratic legal order in a plural society. Though the Constitution stipulated the continuation of pre-Constitution Laws\(^1\), till they are amended or repealed, there had been demands in Parliament and outside for establishing a Central Law Commission to recommend revision and updating of the inherited laws to serve the changing needs of the country. The Government of India reacted favorably and established the First Law Commission of Independent India in 1955 with the then Attorney-General of India, Mr. M.C.Setalvad, as its Chairman. Since then the Govt. of India has been continuing from time to time for every three year tenure by appointing Chairman and its

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\(^1\) Art.372 of Indian Constitution.
members. The Law Commission of India submitted several reports to the Govt. of India recommending to amend several provisions of Indian Penal Code from time to time. But the Government of India not responding properly to the recommendations of the Commission.