CHAPTER - II

Punishments - History, Theory, Purpose .......

Annadale in his Dictionary gives the accepted meaning of Punishment: "Punishment involves the infliction of pain or forfeiture, - the judicial visitation with a penalty, chastisement or castigation".

Dr. Walter Reckless defines punishment as "the redress that the commonwealth takes against an offending member". Westermarck observes: "Punishment is limited to such suffering as is inflicted upon the offender in a definite way by, or in the name of, the society of which he is a permanent or temporary member". Professor Sutherland is of opinion that two essential ideas are contained in the concept of punishment as an instrument of public justice - namely,

1. it is inflicted by the group in its corporate capacity or one who is a member of the group, and

2. it involves pain or suffering produced by design and justified by some value that the suffering is assumed to have.

The word punishment is derived from the Greek word "Pu" meaning "to clean". The original basis of punishment is that it cleanses the wrong-doer of his wrong by means of infliction of pain on him.
This is a sort of an imitation of nature, and a harmful human being is made harmless by a proper punishment, which may vary in its severity according to the nature of the wrong. The infliction of pain may be caused by imprisonment, or fine, or forfeiture of property, or incapacitation, or such other restriction imposed as a mark of the disapproval of the act of the criminal punished.

The science of penology mainly deals with the penal policies adopted from time to time by different states, and embraces studies which deal with the moral or social justification of punishment, and in that effort goes into the fields of psychology, psychiatry, sociology and statistics as applied to criminal behaviour. As the concept of crime has been considered from various angles, punishment for crime, its justification, purpose and effect have become subjects of very close analysis. Experts on Penology have covered very vast fields in this respect and have revealed in their studies new approaches to the subject of punishment and the purposes it should serve. Broadly speaking all thinking on this subject, apart from the different objects of punishment, relates to two main ideas on the purpose of punishment — one being to make the criminal pay for the wrong he has done, and the other being to make him a better person.
than he is. Early history of harsh punishments centres round the idea of pain or suffering of the criminal, while later history of the subject has opposed this suffering and sponsored correctional treatment. The problem before all societies from the dawn of history has been to find the punishment suited to the crime, punishment which not only punishes a particular wrong-doer for a particular crime, but also serves to prevent or deter further commission of similar acts. It should also be a punishment that will correct the criminal and make him a useful member of the society. The problem still continues, and the fact that crime has not been eradicated indicates that society even today has not been able to tackle and solve this problem completely. A brief glimpse, therefore, of this interesting history should profitably engage our attention for a while.

In the present context of the subject it is essential to outline the history of punishment in the East and West. The evolution of punishment in the primitive societies is chiefly on the principle that punishment is the reflexive reaction to an injury sustained by one individual from another. As Professor Gillin observes, the early measures adopted in punishment by the tribes are retributive in nature and such mode
of punishment is generally described as **Blood Vengeance**. The duel is a survival of this primitive method. Several illustrations have been cited of private blood vengeance in the Hebrew Scriptures; for example, Joab, the leader of King David’s army, slew Abner in revenge for the blood of Asahel, Joab’s brother. Russell shows how among Pima Indians of the Southwest the law of vengeance operated to prevent homicide.

Another mode of primitive punishment is **Expiation** by the eradication of an impious criminal, to avert ill-luck or the wrath of the supernatural being. Under this religious superstition, punishment becomes a sort of religious ceremony, a ritual in which a verdict is passed and executed. A tribal assembly passes the verdict and the execution takes the form of an expiatory sacrifice. The criminal is offered as a sacrifice to the Gods of the tribe. He is not an enemy to be put to death, but he is one to be immolated to satisfy the demands of the Gods.

As Saleilles puts it: "The tribe does not claim the right to kill for the sake of killing; to appease the vengeance of the Gods is the excuse for the immolation". Oppenheimer says that in this ritual the notion of crime blends with that of sin, and sin being infectious the sinner must be destroyed to save the innocent members from the curse of God upon all who
might be infected. In the later philosophies of Kohler, Kant and Hegel, the religious basis of expiation shifted to culture, for the preservation of which the extermination of the criminal was the only way.

Banishment - is a common method in the old days to get rid of an offender. It is a substitute for capital punishment in certain kinds of crimes, political and religious in nature.

Poetic Punishments - It is also common to inflict punishment in a manner that would demonstrate the wrong dramatically; e.g. the thief had his hands cut off, the false witness had his tongue pierced and the crime of rape punished by emasculation. Branding with a certain letter is used as a poetic punishment - illustrated in Hawthorne's 'Scarlet Letter'. The Code of Hammurabi the King of Babylon (C.2130-2087 B.C.) is the earliest Code and a manual of instructions for administration of law in general and for infliction of punishments in particular. Among other provisions the Code provides for equitable relief between offender and the victim, the wrath against the offender has to be wiped out, and so the offender is also required to share the loss of the victim. If a man destroys the eye of another man, they shall destroy his eye" - Lex Talionis.

In the Mosaic Legal Tradition, the subject of
punishment assumes a strong religious bias and the objective of punishment is to appease the victim and to remove the pollution created by the offence. This double purpose fortified the power of the religious authorities in their struggle against the political power.

Magie. Curses - Professor Gillin refers to ancient punishments by magic, curses, incantations etc. Many pre-literate people had the notion that words carry a certain potency. Hence, curses and magical incantations were used to produce evil results towards the offender. The punishment was inflicted privately or publicly.

As Society progressed, certain limitations on the cruel bloody procedures grew up. Among these were the right of Sanctuary, individual or group Composition for crime, and the Truce of God. These limitations paved the way towards the final control of crime by the state.

The device of the right of Sanctuary was helpful to stay the hand of the private avenger till the question whether the injury done was accidental or intentional was properly investigated and settled. The right of sanctuary thus made room for the examination
of the intent of the offender and eventually in the absence of intent a modification of the revenge became possible. In this right, therefore, the victim had shelter from immediate revenge. The right of Sanctuary, however, was not based on any considerations of extenuating circumstances nor did it lead to the examination of the personality of the offender.

In addition to the right of sanctuary in primitive society, a custom gradually grew up to make a settlement between the offender and the injured party and his family. Even the Code of Hammurabi includes a provision for composition of crime, particularly when there is property damage and no personal injury. An offender thus could settle his accounts with the avenger by agreeing to compensate and satisfy the injured person in respect of the damage done. Among the Hebrews even personal injuries could be the subject of composition. In Arabia the transition from blood vengeance to Compensation appears to have helped settlement of disputes of the nomadic tribes very readily and the practice was also preferred by towns-people. The same principle is referred to in the early Saxon laws known as the 'Dooms of Alfred'. The laws of Franks provided for practical rules to fix compensation in detail and the gradation was based on the social and economic status of the parties. The impression, therefore, is
unmistakable that this practice of composition of crime is almost universal among the ancient people. Homer and Tacitus refer to it. "Even homicide is atoned, by a certain fine in cattle and sheep; and the whole family accepts the satisfaction to the advantage of the public weal, since quarrels are most dangerous in free society". Tacitus. In Sweden this composition for homicide is called 'Kinbote'. The practice, therefore, was popular and universal in the ancient peoples. Even the early Jewish and Christian practice admitted this redemptive purpose of punishment, and Israel was the first to give effect to this practice which later received a fresh emphasis at the hands of Jesus Christ. The new religion laid stress upon forgiveness and love of God and so the punishment of the sinner need not necessarily be revengeful in order to liquidate him, but may be allowed to be redemptive so that his repentance and atonement for the sin will help his regeneration.

In the Middle Ages, it became necessary to put additional curbs on the barbaric blood vengeance because sanctuary and composition were not enough. So the truce of God was accepted all over Christiandom, and it afforded good protection to Churches, priests and labourers. The truce was accomplished by the council of Tuluges in 1027, and it spread in effect offering
protection to pilgrims, women, merchants, farmers, and it became a sure guarantee against reckless revenge. There is no doubt that during this disturbed period, the truce of God played a very important part in limiting the predatory and blood thirsty practices of the barbarisms of Europe.

As the Church was very influential in early developments of the society, it became possible for it to establish Canonical Courts to settle disputes and discourage self-help or revenge. Religious officials were required to investigate into the disputes and bring the offenders to trial and to assist judges to adjudicate fairly upon the disputes. The jurisdiction of these Courts was wide, and through these courts the doctrines of individual responsibility for crime and the reformation of the criminal were slowly introduced into Penal law in the Middle Ages. Working on the principle of individual criminal responsibility the judges administered punishment to the offender by measuring the indignation of the community, and not the circumstances under which the crime was committed. The crime was an act of the will and the criminal has done it wilfully and deserved punishment according to the discretion of the judge. This discretion was abused by the judge, and for the same offence criminals
were punished in different ways as the judge thought proper. The canonical administration, therefore, became tyrannical and that was one of the reasons why the church lost its battle for supremacy over the state.

As the power of the state becomes supreme, the era of secular administration of justice begins. The secular courts eliminate self-help and administer criminal law and mete out punishment on the basis of the policies of the state in respect of crime. As Aristotle indicates long ago, justice must be administered impartially because men's relations to one another depend upon the unity and stability of society. It is needless to say that the whole backbone of the secular administration of justice is in the settlement of citizens' disputes through the courts of law, thus putting an end to the primitive practice of revenge, self-help, composition and so on.

In ancient India there appears a coherent picture of the system of justice, civil and criminal. The Dharmashastra contains elaborate descriptions of the working of the system. The principal authorities on the subject are Manu, Yajnavalkya, Narada and Brihaspati. The King was the head of the justice and held his court regularly and his judgements laid down the law and gradually a case law grew up in which the king and the
other judges made additions to the law and helped its growth.

Some punishments were meaningless as they were based on old superstition. The idea of compensating the injured party was prominent. The main types of punishments were fines, whipping, imprisonment, mutilation, confiscation and banishment. Death penalty was common, and the execution of all punishments was very severe. Trials by ordeal were recognized as strict forms of procedure, and ordeals by fire and water were frequently used besides many others. The social condition of the victim was considered while meting out punishment to the offender, and the status of the offender generally determined the severity of the punishment; e.g. a slave was put to death for assaulting a priest; sex offences were treated with contempt and severity. The chief purpose of punishment was expiatory, reformatory and deterrent. Punishment also was a means of public defence and social safety.

In the Mughal period, much attention was paid by the kings to improve administration of justice, and the Kazis adjudicated on the basis of the Koran and the professed idea in punishing the wrong-doer was that of teaching him righteousness.

The Maratha system was simple and suitable to
the times. The ancient law and custom prevailed and the procedural importance of the ordeals did not diminish in the determinism of the guilt or innocence of the accused. The Peshwas were reputed administrators and often toured the country every year for trial of cases of first instance or an appeal. Fines, imprisonment, ex-communication and mutilation were common punishments and the objective was deterrence.

It was in the mid 19th Century that the influence of English law came, when Lord Macaulay proposed his draft of the Indian Penal Code which became the Criminal Law of India in 1860.

At this stage of the discussion, the view of jurists in respect of criminal punishment and its objects may be considered. Jurisprudence has been preoccupied with the purpose of law, and therefore, it is called a purposeful enterprise. The main purpose of law is justice and the question whether justice is achieved or not in a legal system is a very absorbing question. Penological jurisprudence is concerned with the problem of criminal justice, and penologists have often scrutinized punishments and their purposes. A review of certain theories of punishment will show how these theories attempt to meet the need of criminal justice adequately.
The classical Theory - Even in the primitive societies the crude punishments appear to satisfy the community and the balance of the social order is maintained by taking the extreme step of killing the criminal. The orgy of the savage punishment, the dreadful superstition in it and its blood thirsty character are typical of the barbaric times, but justice as conceived then is done by avenging the criminal act. As already indicated, the religious influence of Christianity diverts the revenge motive and expiation, compromise by composition, and sanctuary to canonical administration of justice. The religious courts take the basis of criminal responsibility through the concept of free will and the courts punish the criminal according to their discretion which was often extremely abused and which never took into account the circumstances of the crime that might lessen the nature of the guilt.

The classical School is the direct outgrowth of two influences, namely -

1) protest against the abuse of the discriminatory power of the judges of the Christian courts, and

2) the influence of the social contract theory of Rousseau. Beccaria is the leader of the School.
The objective principle of the classical school is to fit the punishment to the crime and not to the criminal. As Dr. P.K. Sen pithily puts it: "In essence the position of the classical school of thought may be thus indicated: it beholds the offence as an objective fact and to meet it, it lays down an objective punishment. Here is an offence, there is a punishment - the latter balances, equates, cancels the former". Another objective of the School is to achieve equality of punishment for all. This idea of equality, Dr. Sen says, imparts to the classical school a great rigidity. Thus combining the principle of objectivity with the principle of equality, the classical conclusion is that the offence must be taken in its definite objective, physical and outward form, that a definite punishment must be prescribed for it, and that such punishment must apply to all alike without the least variation.

Beccarvinia, the founder of the School in Italy, believes that the only aim of punishment is deterrence, and it is not the severity of punishment, but rather its certainty that leaves a lasting impression on the minds of men. He holds that severe and cruel punishments have an adverse effect and they even encourage persons to commit crimes. Moderate but certain punishments make a stronger impression on the popular mind. The barbarity
of the barbarian did not mitigate an account of atrocious retaliation. It is necessary to calculate the effect of crime on the society and the effect of punishment on the criminal. The measure for this calculation is the pleasure and pain involved, and Beccaria speaks earnestly of the need of this Hedonistic calculus, in framing punishments. His *Crimes and Punishments* (1764) is the foundation-stone of the classical doctrine of punishment. Beccaria views the entire subject through the social contract theory. A Crime is ultimately an offence to the society which is created by men as an integral whole for their own security and happiness. A crime is a transgression against such a society, and any encroachment on it must be punished. Beccaria’s very elaborate analysis makes a profound impression, and he has paved the way to various radical reforms in criminal punishment. His conclusion is so apt that it may be given in his own words: "That a punishment may not be an act of violence, of one, or many, against a private member of society, it should be public, immediate and necessary, the least possible in the case given, proportioned to the crime and determined by the laws."

Jeremy Bentham of England is another writer who cannot be ignored in this discussion. This utilitarian philosopher speaks of punishment with such robust common sense that we can at once see why he expedited the
reform of the Penal law of England. His motto was "proportionate punishment". The distinction he makes between the real and the apparent value of punishment is worthy of notice, because the real value lies in the effect it produces on the criminal in terms of his suffering, while the apparent value lies in the effect it has on the minds of the community. Bentham often regards the profit of the apparent value as an important factor to be taken into account.

The classical theory has two advantages:

1) The punishment is easy to administer, as the judge is only the instrument to apply the law; and

2) There is no element of arbitrariness as seen in the precritical procedure. But this theory has its own difficulties, namely -

1) It treats all criminals as mere digits without reference to the differences in their individual natures or the circumstances under which they commit crimes.

2) It does rank injustice by laying down the same punishment for all, thus treating the first offender and the hardened criminal, or the accidental criminal and the habitual criminal alike. Such equal punishment may become farcical.
3) It gives to the professional criminal a magna charta, because he can coolly calculate the risk of punishment and the benefit of the crime and determine his plan of action.

4) It considers the injury inflicted by the criminal but not the state of his mind and his nature as a human being.

5) Professor Gillin and Professor Saleilles look upon the classical doctrine as too abstract and idealistic, divorced from the most dreadful and also despairing realities of criminal life, and as such it tends to be inhuman and unjust, though obviously simple and easy to apply.

The Neo-classical Theory - The classical school has served a very useful purpose of stopping arbitrary punishment, but it could not go far enough. The French Code of 1791, based on this theory, was found extremely difficult to administer. This led to the rise of the Neo-classical School. It was left to this school to concentrate on the circumstances of the crime, which the classical theory would not admit. The classical theory stuck to the absolute responsibility of the criminal and gave the judge no power to make the punishment lighter or heavier according to the extenuating circumstances.
Moreover, insanity, minority, physical or mental disorder, mischance or mistake, or any such circumstance affecting the question of responsibility would not come within the classical purview. The presumption of free-will and the consequent responsibility, were absolute and irrebuttable. A departure from this classical stand-point was inevitable. With the advance of the sciences of biology, physiology, pathology and psychiatry, a great deal that was obscure in human conduct came to be accounted for by natural causes. The firm faith in the absolute free-will was rudely shaken, giving place to the conviction that there were degrees of responsibility shading off into irresponsibility. The Neo-classical school responds to this growing public consciousness and makes room for extenuating circumstances for complete or partial exemption from liability.

Rossi, Garrand and Joly are the representative writers of this school which accepts free will as the basis of responsibility, but provides for the modification or variation of the degree of responsibility in the light of extenuating circumstances. Thus responsibility may become partial or it may become completely absent, according to the relevant compelling circumstance. In all criminal systems this New-classical measure of responsibility is accepted today and the condition of the mind of the criminal, while exercising his free will, is examined on the grounds of his minority, insanity, idiocy et
As Professor Gillin says, this is a naturalistic view of human behaviour under certain conditions. It is this view which gradually shifts the emphasis from the crime to the criminal.

The classical influence on the concept of punishment continued to be predominant, though a material change came when punishment came to be regarded as an instrument of social defence. The advance consists in this that the reparation is now estimated to be in relation to society, and not in relation to the individual injured. Thus the modern version of the classical theory of punishment is that it universalises resentment. The objective is no longer to satisfy individual resentment but social resentment. This is what Aristotle explains as 'corrective justice'. According to this view, punishment should be so calculated as to nullify or counter-balance the evil suffered by society. But a further change in the view of punishment came which involves the criminal himself.

The Positive Theory So far the aim of punishment has been objective reparation, but this purpose came to be regarded as inadequate. A new School of thinkers point out to the final purpose of punishment, viz. the health or rehabilitation of the individual offender or ultimately the health of the society. This school is known as the Positive School. It denies individual responsibility and
shows an essentially non-punitive reaction to crime and criminality. The Italian scholars Lombroso, Ferri and Garofalo, who are the pioneers of the Positive doctrine, maintain that a crime is a natural phenomenon like a flood, a stroke of lightning, and they deny the ethical and the practical desirability of punishment. They contend that the criminals should be reformed, and if they cannot be reformed, they should be segregated or killed, but all effort must be made to improve the conditions which produce criminals. This school holds the searchlight on the personality of the criminal and the social environment which is the genesis of criminality. The total personality of the criminal - the physical, intellectual, psychological, sentimental and moral - falls under the close scrutiny of the Positivists. The punishment must fit the criminal. It is foolish to punish all alike, since the motivational pattern for each may be quite different and the background may show the most unexpected results as to the social conditions of the victims. Each criminal, therefore, should be individually treated according to his psychological and sociological needs. In the end punishment must be such as would help a proper re-adjustment, enabling the criminal to return to society.

The Positive school gained its name from the
Positive philosophy of the 19th century, which applied scientific method to social problems. It maintained the position that criminology must become scientific — i.e. the explanation of criminal behaviour and the treatment of criminals must be accomplished by scientific means. Consequently they reject the legal definition of crime and treat crime as anti-social behaviour. To them punishment is almost tantamount to treatment - a process most essential for the protection of the society, which is the only reasonable aim of punishment. Clarence Ray Jeffery appreciates this new outlook which places the study of the criminal within a scientific framework. It has created a healthy interest in criminals, which is the urgent need of a changing society. More attention must be paid now to the meaning of crime in terms of law, social structure and social change. An overhaul revaluation of the entire position is inevitable.

To Cesare Lombroso, both crime and punishment were of natural necessity. A crime is simply an inevitable consequence of social life, and a law of punishment is inevitable for the protection of society. Thus this relationship of crime and punishment, on the basis of social necessity, was to Lombroso a proper formulation of justice. But he adds a new concept of punishment. If its first object is the protection of
the society, the second object is the improvement of the criminal. A crime is an abstraction, but a criminal is a definite individual demanding a treatment which is in accord with his special personal conditions. A criminal, in short, is a patient who needs careful individualistic treatment for proper healing. Lombroso, therefore, suggests that penal sentence should be carried out by expert criminal anthropologists representing the judge, the defence and the prosecution. These men should be commissioned for the very important task to protect the criminal and help his regeneration. This task has a humanitarian purpose. Even in the case of incorrigible and born criminal types, Lombroso suggests the same human treatment.

Enrice Ferri advances his theory of social accountability. He suggests the equivalents of punishment (preventive measures) on a very large scale. Among these equivalents he mentions abolition of monopolies, suppression of certain taxes, cheap houses for workmen, institutions for invalids etc. He holds that punishment cannot go far to rid society of crime. Force is always a bad remedy for force. In the Middle Ages, when punishments were brutal, crimes were equally savage. It is a natural law that forces cannot conflict or neutralise each other unless they are of the same kind. So punishment, as a psychological motive, can
only oppose the psychological factors of crime. Ferri, therefore, comes to the conclusion that for social evils we require social cures, and crimes are mostly the offspring of social evils. Social defence against the criminal should be found not in repression but in prevention. Punishments will always have a place in the scheme of social defence. But there are more indirect and effective methods of combating crime. This brings us to Ferri's equivalents or 'Penal Substitutes'. He recommends numerous preventive measures by putting his finger on the dark spots of present day society.

Raffaele Garofalo - This magistrate differs from his other colleagues in certain respects, but he is interested in the study of the criminal. His treatment is more psychological than sociological, and he refers to the necessity of punishments from the judicial and administrative point of view. He makes a distinction between natural crimes (offences against the sentiments of pity and probity in a social group) and other crimes which may be called artificial and positive. The natural crimes arise from a psychological anomaly. As to punishments, he is in favour of elimination, total or partial, in respect of natural criminals, by death or imprisonment for life or transportation. He recommends reparation for those who have committed crimes under the pressure of exceptional circumstances. The scheme of punishment
is not based on vengeance, retribution or expiation. It is based on the principle of social defence.

Pedro Dorado Montero is another exponent of the school. This writer was crippled for life and lived in isolation and poverty. It is remarkable that he should have advanced one of the most humanitarian theories of punishment. He says that the purpose of criminal law is not to punish but to afford effective moral and social protection to the offenders. He considers the judicial function as a correctional function and a protective function. The treatment of offenders should be essentially psychological, because crime is a moral and psychological problem. Montero emphasizes the spiritual regeneration of the criminal as the ultimate aim of punishment.

In conclusion we may accept Professor Gillin's view that the Italian school very ably shifted the emphasis from penology to criminology by focussing their attention on the scientific study of the criminal and his conditions. The retributive basis of punishment is replaced by the correctional basis. Protection of the society by the reformation of the criminal becomes the primary motive of punishment,
and crime prevention receives a considerable attention, even apart from the punishment and treatment of the criminal.

Modern Penology owes much to the work of the Italian scholars. Modern clinical research studies have revealed the criminal rather than the crime. The emphasis is put on the psychological and social characteristics of the criminal. The vast advances of modern science have opened the criminal mind, which is supposed to be the product of biological inheritance. Conditioned by experiences of life to which the mind has been exposed. The punishment of the criminal, therefore, according to modern view, can only be effective if the criminals are removed from prisons to hospitals for a proper clinical and correctional analysis and treatment. Only in this new direction can the law of crime and punishment move and find a proper solution for the problem of social justice.

Professor, J.H. Gillin in his book 'Criminology and Penology' describes theories of punishments as attempts to rationalize society's procedure with reference to the criminal. They are affected by the culture of the society, i.e. current beliefs, philosophies, religious conceptions and contemporary
science. Four great influences appear to have moulded penal theories - Greek philosophy, Roman jurisprudence, Judeo Christian Religion and Modern Science. Changes in the character of punishment are often related to the social and economic changes in a society. Often two or more theories and practices of punishment co-exist in a given social period. We witness sometimes the concurrent existence of the theories of retribution and reformation, or of the practice of mutilation and training for avocation. Three major elements in punishments are characterized by Fitzgerald:

(1) It is an imposition by someone in authority over the offender;

(2) It involves the infliction of something unpleasant on the victim - physical pain or deprivation of liberty etc; and

(3) It entails the actual commission of an offence.

As regards justification of punishments, modern scholars have been able to accumulate several views as they have come down through the ages. Professor W.C.Reckless summarizes the existing justifications of punishment, and they may be listed as follows: (1) Retribution, (2) Atonment,
(3) Deterrence, (4) Protection and (5) Reformation. These stereo-typed rationalizations of the use of punishment are current in the modern society. Retribution and Atonement are the oldest justifications. Deterrence and Protection are the sophisticated justifications. The Reformer has a faith in the use of punishment as a means of reformation.

Justifications for punishment indicate the society's punitive reaction to crime and depend upon the motives of the members of the society. Punishment was a necessity and the problem was how to formulate an acceptable statement of this necessity. The question of opposition to punishment or the value of the punishment in dealing with criminals was left out of consideration by the earlier scholars.

Broadly speaking, the chief aim of punishment is the protection of the society. By retribution the society satisfied itself by inflicting pain on the criminal and by deterrence the object of prevention was achieved. By composition the society was able to make good the loss and this method has been supported by scholars like Dr. Sethna.

Why punishment? The purpose of legal punishment is a matter of much speculation and
controversy. It implies two questions. The first one is about the reasons why men have been and are still being punished. The answer to this is complicated because the idea of punishment has deep irrational roots. Psychology claims to detect unconscious motives for punishment in man's fear, in his insecurity, and even in a sense of guilt which seeks satisfaction in the vicarious suffering of the criminal. The second question is as to why men ought to be punished. Have the human judges the right to punish their fellow-men? Canon Barnett said: "Man has no call to punish man. He always fails in the attempt and his claim destroys him. Man must educate man, but never assume the superior place of a condemner". The simple answer to these questions is that, in the world in which we live, punishment is necessary to check crime, and crime must be checked to protect society. This purpose alone justifies punishment. Legal punishment is, of course, inseparably linked with the idea of justice and cannot involve terror or reprisals. Justice is the ultimate value, and a just punishment is more than the overcoming of evil with force. It is also a spiritual power which may make an appeal to the moral personality of man.
Eminent jurists have discussed criminal punishments, in relation to their purposes, in the following order:


**Expiation** - As E. Westermarck observes, expiation seems to be a fundamental need of our moral nature, and therefore, it has an important place in the great religions of the world. The essence of the expiatory view of punishment is that in suffering his punishment the offender has purged his guilt, has paid for his crime and that his account with society is, therefore, clear. The offender himself welcomes a penalty and feels that it lightens the burden of guilt upon him.

To the criminological reference, expiation is double-edged. On the one hand it tempers social attitudes towards the criminal, making his reform possible in future; on the other hand, as Dr. W. D. Wills says, it may lead to the belief that as the guilt is wiped clean by punishment, further crime can be embarked upon. There is also the difficulty, in this connection, of showing that the criminal owes a debt to the society and that
the society has a right to compel the offender to make atonement for his wrong-doing. Blackstone believed that such atonement should be left to the Supreme Being. Apart from this, there is a valuable claim concealed in the notion of expiation, namely that the offender has paid off his debt, wiped his slate clean, and can make a fresh start in life. This claim involves a new possibility of reformation and rehabilitation, on which modern thinkers are found to lay considerable stress.

**Restitution** With restitution the rights of the victim came into the picture, and the criminal is required to make good the loss. This primitive mode brings out in a naked form the personal interest involved. The victim himself or his kin exacted the compensation. The compensation is in the form of 'Wergild' (a sum payable to the wrong-doer), it later is in the form of 'bot' (compensation to the aggrieved party) along with 'wite' (payment to the state). A tariff of payments for different offences is prescribed and the primitive community enforced it without exception.

Scholars are of the opinion that restitution will defeat the principal motive to
crime which is wrongful gain. The classical view that the balance of pleasure and pain will be upset by restitution to the detriment of the criminal is reasonable enough, but we agree with Dr. Sethna that "the very springs of criminality would be dried up" if the criminal were compelled to restore his ill-gotten gain. He would then realise the uselessness and the futility of his purpose and struggle. Restitution, therefore, is a strong method of effective deterrence and reformation. As to the victim or his dependents, restitution serves as a relief and help. Mere punishment of the offender often leaves the victim uncared for.

One feature, notably lacking in the different types of punishments, is the element of reparation. Though this is an elementary demand of justice, Fitzgerald says that criminal law takes very little account of it. Punishments have ranged from fines to death, but reparation is entirely absent.

Retribution - The retributive theory speaks of punishment to atone the wrong. By the criminal act, the wrong-doer incurs a debt to the victim and to the society, and consequently he must make recompense to both. The old theory of compo-sition and the modern retributive concept are based
on common principle - namely, to arouse a sense of
guilt in the criminal and to make him atone for it
in order to help his genuine reformation. In other
words, guilt and punishment = innocence, or debt to
society repaid.

In Professor Gillin's opinion, retributive
punishment is the reflexive reaction to injury, and
the victim is permitted to impose upon the offender
such punishment as lies in his power. The victim
or his kindred are the judges of the severity of
the punishment. Thus retribution describes the
measures taken by an individual or his kin to avenge
an injury. This has also been called "Blood Vengeance"
and the duel is a survival of this primitive method.

In the writings of Aristotle, there is a
reference to the retributive punishment, in which
the emphasis is on the wrong done without any
reference to the mens rea. The personality of the
offender or the circumstances of the offence are
beyond the scope of consideration.

Retribution and Expiation have much in
common but they are not the same. Like expiation,
retribution is concerned with restoring the moral
balance disturbed by the criminal's behaviour.
But it has no concern with the moral purgation of the criminal himself. Expiation is both the right and the duty of the offender, retribution is his desert. Retribution is punishment in its purest form; no other motive is involved - namely, inflicting pain or loss or purgation of the offender. The general public always demands the retributive punishment of the offender and this doctrine has a well-established place in British Jurisprudence. Stephen, Kenny and Goodheart support retribution since it signifies society's disapproval of crime, and hatred of the criminal. The extent to which the retributive principle was carried can be seen from the following instances. In ancient Athens, an axe which injured a citizen could be tried and if found guilty be ceremoniously exiled by being hurled over the city boundary. In England, under the law of Deodand a cart which ran over a man could be confiscated and sold for charity.

Fitzgerald advances the case for retribution on the following justifications:

(1) Preservation of the balance of justice
(2) Absence of retribution may outrage the public conscience and incite the public to self-help.
(3) Encourages to citizens to behave morally.

The case for retribution is, however, a very dubious one. How can we "adjust the suffering
to the sin”, in the words of Justice Edward Fry?

Once we go to the causes of crime to assess the moral culpability of the offender, we will get involved, and may reach a conclusion that the criminal is not responsible at all. As Howard Jones says, the criterion for exact retribution is not available readily and it is always subjective. Once the sin and suffering are not proportional, the principle of retribution fails in its purpose. The most fundamental objection to retribution is advanced by philosophers from Socrates to L.T. Hobhouse - that the infliction of evil upon anyone can never in itself be good.

Professor Sidgwick has an instinctive and strong moral aversion to retribution. In the Greek civilization, Protagoras protested emphatically against brutal retaliation as the basis of punishment. Plato is against retribution because it was likely to be unjust and what is unjust is not useful, and all that is useless in punishment should be avoided.

Since retributive punishment is the incessant demand of the people of a country, Fitzgerald thinks that the idea of retribution has an adverse effect upon the reformatory aspect of punishment.
and the correctional institutions. Such a view blocks the amelioration of prison conditions and the opportunities of rehabilitation. A severe demand for retribution is a denial of reformation, correction and rehabilitation of the criminal.

Howard Jones rightly concludes: "In either case whether it (retribution) operates on the side of severity or lenity, the retributive motive is a conservative force. It focuses attention upon the offence rather than the offender, and so is doggedly opposed to any scientific approach, aimed at the individual delinquent and intended to deter him from further delinquencies or to reform him".

Deterrence - Deterrence appears to have been the essence of punishment from times immemorial. The chief purpose of punishment is to preserve the social bonds, and, therefore, by punishing a deviator the society draws the attention of others to the need of keeping the social bonds. Thus the state has become entitled to enforce the minimum morality of the community through its laws. The criminal law of a state is generally confined within narrow limits and can be applied to acts and omissions, inflicting definite
evils on specific persons or on the community at large. The concept of deterrence has found a very firm place in the centre of every penal system in the world. An eighteenth century English Judge passed the sentence of death, saying "you are to be hanged not because you have stolen a sheep but in order that others may not steal sheep". In early criminal law severity of punishment became the common rule on account of the concept of deterrence. Death, transportation, mutilation, flogging were common punishments. Even the object of simple imprisonment was deterrence, and the life in the prison must consist of "hard labour, hard fare and hard bed". Judges in those days were convinced that reform and imprisonment were a contradiction in terms. As Lionel Fox observes on imprisonment - "For death itself, the system had substituted a living death".

A system, wedded to the idea of deterrence, tends to rely on the severity of punishment, and the more persistent the offender or the more prevalent the offence, the heavier becomes the penalty imposed.

Salmond is a very strong advocate of the principle of deterrence which, he says, is the guiding principle of all the penal laws worth the
name. This is the primary and essential end of punishment and all others - preventive, reformative, retributive - are merely secondary and accidental.Salmond sums up his view: "- and the chief end of the law of crime is to make the evil-doer an example and a warning to all that are like-minded with him. The underlying principle here is fear of a like fate deters others from committing the crime for which one has paid the extreme penalty of law". This is perhaps the best categorical statement of the principle of deterrence. Henry Maudsley is another exponent of the theory of deterrence; "Justice must be prompt, stern and summary, inspiring a wholesome fear in the criminal ..... the good of society is a larger interest than the good of individual - it is the criminal who must suffer in the larger interest of society".

There is a strong trend of opinion against deterrent punishment and according to this opinion, the utility of very severe punishments is regarded as very questionable. The ethical question raised is: whether legally correct behaviour enforced by the element of fear is really worth having? How far are we justified in inflicting severe punishments to reduce criminality? Several
thinkers suggest that severe punishments defeat their own ends, and they give the outstanding example of the ubiquitous death penalty in the beginning of the 19th century. So severe was this punishment for some petty offences that the magistrates themselves were not prepared to impose it. It is also found that some kinds of crime are on the increase in spite of the death penalty. Mark Bennon criticises deterrent punishment and says that persistent offenders are quite incapable of learning anything from it. Even young offenders resist deterrence on account of a smouldering sense of injustice that is involved in it, says Howard Jones.

A unique opportunity for making an evaluation of the deterrent approach to crime was presented by the Danish experience during the war. In 1944, S. Hurwitz narrates, the German occupying forces deported the Danish Police and for some time the country had only a local guard force invested with police authority. There followed an immense rise in the number of robberies, thefts and frauds, but no comparable increase in murder and sexual crimes. This experience does show that crime is reduced very considerably by the prospect
of detection, and it also suggests that deterrent methods are of less value in reducing crimes in which strong passions or deep psychological problems are involved. Howard Jones wants us to bear in mind the limitations of deterrent punishment. The habitual criminal defies it, and we have to think of a method of punishment that may bring about some radical change within a criminal. It is dangerous to have in our midst an explosive group of criminals kept in reluctant subjection by constant threat of severe punishment. Thus deterrence should lead naturally to the considerations of ways of achieving reformation. It is evident that the deterrent power of deterrence has been largely over-estimated. It is on record that while persons convicted for petty larceny or pocket-picking were being publicly hung in the presence of a large crowd (as was the practice in those days), other pick-pockets were busy collecting the wallets of the onlookers.

The main practical objection to the penal system of deterrence came to light after the end of the system of transportation. While transportation remained, England was in the happy position to export her criminals overseas. After American independence and Australia's refusal to import convicts, England
found that it must live with her own ex-convicts after they had served their terms of punishment. This situation, says Fitzgerald, brought to light two factors not hitherto sufficiently realised.

(1) A category of persistent offenders who are not deterred by any penalties was discovered.

(2) A further discovery was made that a form of punishment, which might have excellent deterrent value on such members of the community as never were subjected to it, might have an entirely detrimental effect on those upon whom it is imposed. The deterrent sentence of imprisonment leads to the very factors which combine to confirm the prisoner in his criminal ways. The contamination of prison life, the new contacts with other criminals, the stigma, and the respect from other criminals, all combine to render a prison sentence a passport to the underworld. Corporal punishment - whipping and birching - has always led to the commission of similar offences.

Lundstedt maintains that the fear of punishment is not the significant value in punishment, but rather the legal sentiments, legal conscience or moral feeling which has been developed in the general public by the administration of the criminal law.
The public hates the criminal, and this hatred is expressed in the form of punishment. In standing together against the enemy of their values, the people develop group-solidarity respect for the orders and values of the group. Tarde, therefore, said that crime would increase if we ceased to hate the criminal.

Deterrence is an important and desirable effect of criminal punishment, but cannot be accepted, says Garofalo, as the proper criterion of punishment. The deterrence theory offers no clear standards by which either the kind or amount of punishment can be determined. How is the quantum of punishment to be determined to prevent a given form of anti-social conduct? How is the danger of such conduct to social interests to be reflected proportionately in the penalty applied? This inherent uncertainty may result either in an excess or deficiency of punishment. An excess may result in draconian measures injurious both to the offender and the society. A deficiency may result in crime wages threatening the community's security. As Garofalo suggests, the only rational criterion for punishment is that which measures the penalty by refer-
ence to the characteristics of the particular offender.

**Capital Punishment** by means of the death penalty is the strongest form of deterrent punishment. It is the oldest form of penalty in all the institutions of criminal law of the world. There is no community or tribe in the world that has not resorted to it. The execution of this punishment has been carried out with varying degrees of cruelty and legal history has given elaborate accounts of these public slaughters. In the modern times, civilized methods of execution appear to be followed, though it is very difficult to say that they have truly reduced the cruelty to the victim. The executions are, as a rule, not public spectacles. Present-day methods are restricted to hanging, beheading by means of the guillotine, electrocution and asphyxiation.

Capital punishment has been the most controversial subject in these times and we have its enthusiastic adherents and formidable opponents. Briefly the case for and against this punishment may be considered within the scope of deterrent punishment. It is said that this is the only method of eliminating the dangerous and hopeless
enemy of the society. All other punishments leave a scope for the criminal to return to the society and then prey upon it. Death puts an end to him. Lombrasso favours retention of the death penalty as the only recourse left to a society seeking to protect itself against irref ormable elements. The inadequate powers of natural selection should be supplemented by deliberate social selection by the elimination of extremely anti-social individuals. For the born criminal, organically fitted for evil, capital punishment is still unfortunately necessary. The supporters of this severe penalty say that death deters as no other punishment does. The high-handed criminal has to be perpetually silenced. The brutalizing effect of the death penalty is not a proper assumption. If the execution is properly carried out, without making it a public spectacle, the penalty satisfies the sense of justice and provides social satisfaction and a sense of protection. This penalty relieves the society from those who continually war upon it; and it is very expensive and also futile to maintain them. By this penalty only can the stock of dangerous criminals, averse to reform, be wiped out. Garofalo has suggested
absolute elimination of these murderers who are destitute of moral sense and the sentiments of pity and probity.

The most popular arguments in favour of death penalty refer to its effectiveness, economical character, its propriety in dealing with hardened criminals and public fury that might destroy the criminal in the absence of an adequate punishment by law. There is no doubt that capital punishment does have a practical significance from one standpoint. It gathers considerable publicity and proclaims ideals of justice more concretely than any other criminal procedure. To retain this penalty and execute thereby the worst offenders is to keep alive a symbol of the Lex Talionis. In substance the state announces that it can afford to be human to those who are open to correction, but vengeance is the sure cure for the most dangerous crimes.

Against this mode of punishment, several arguments are available. It is an irrevocable penalty. Mistakes in judgement as to guilt are not uncommon, but once the sentence has been carried out, there is no room for correcting the error. It is found that many
convictions are based on the probability of guilt. An illustration of the unjust conviction of a man for murder is supplied by the case of Andrew Toth who served 20 years of life sentence in Pennsylvania for a crime he had not committed. Another ghastly episode is "The San Quentin story". Burton Abbot was actually undergoing execution in the gas chamber (15th March 1957) and at that very moment Governor Goodwin Knight was frantically trying to get a telephone call through to the prison to stay the execution, for another hour, so that the condemned man's attorney could try again to save him through court action. The death penalty is retributive in nature. The retributive motive in punishment has now lost its power in reflective minds and is vanishing as the basis of punishment. Though the protection of society can justify this extreme step of retribution, there is a danger of including in the social protection many other motives that may not be retributive. Capital punishment can never be reformatory. As a matter of fact, it indicates the impossibility of reformation. Death closes all avenues to reformation. The difficulty is whether we can at any time say
with certainty that a criminal has reached a stage from which he will never turn back and reform himself. Since we have not tried fully the extent of reformation by various methods, our conclusion that a reformation is impossible in the case of a particular crime is of a very doubtful value. Recent trends in public sentiment against capital punishment represent a realisation that correction is more important to society than punishment. The popular opinion desires a long-term imprisonment as a substitute for capital punishment, because such imprisonment can bring about deterrence, penitence and reformation. Retribution will thus work better through Nemesis and not vengeance. Imprisonment compels the prisoner to deliberate over his wrongful act and a long period of remorse, consequent on such deliberation, is likely to change him internally. Different are the types of murderers, but it should be remembered that all of them are human beings with a human heart and that treatment and detention would be much more beneficial than the rope or the electric chair. John Bright very rightly says, "Capital punishment, whilst pretending to support
reverence for human life does in fact tend to destroy it". And the Mahabharata in the dialogue between King Dyumatsena and his son Prince Satyavan, very pointedly says that this destruction of the offender inflicts suffering on his unfortunate wife and children, parents and relatives, and spreads far beyond the victim. All chances of reformation are ended. Capital punishment is not deterrent in effect. Facts and figures show this very convincingly. Assuming that the fear of death deters a prospective murderer, such deterrence would be limited only to cases of deliberate murder. In cases of unpremeditated murder, the assaulter might not have thought of the consequences of his act and the thought of punishment could hardly have entered his mind. Dr. Sethna's investigations of about 507 cases of homicides have revealed that the percentage of cases of premeditated murder is 26.28 and that of cases of unpremeditated murder is 73.72. In India, homicide is mainly due to rage and provocation degenerating into revenge. Horrible malice leads to thoughtless homicidal acts. Dr. Anita Muhl has come to the conclusion that murderous rage is often associated with uncontrolled temper or epileptic furor or the maniac
excitement, or outbursts of low grade morale. If this is so, where is, then, the question of deterrence? Offenders who are ruled by un-governable savage passion often commit the act of crime, - be there Capital punishment or not.

That the death penalty has a discouraging effect on criminal conduct is strongly refuted by Dr. George W. Kirchway in his speech in 1923. He regards this claim as very absurd and gives a very impressive illustration for his refutation. In 1877, ten men were hanged in Pennsylvania for murderous conspiracy. The New York Herald predicted the wholesome effect of the terrible lesson. It said, "we may be certain that the pitiless severity of the law will deter the most wicked from anything like the imitation of these crimes". Yet the night after this large scale execution, two of the witnesses at the trial had been murdered, and within two weeks five of the prosecutors had met the same fate. Capital punishment diminishes the certainty and speed of punishment, as Sutherland argues. As a rule the jury is reluctant to convict when they know that the penalty is death. This leads to an absurd excuse for acquittal and results in the escape of the criminal who is thus let loose upon
the society. It violates our humanitarian sentiments. With the development of the modern society and with the growth of democratic principles a humanitarian outlook is growing strong. It is now believed that we protect society and brutalize ourselves less if we treat the criminal more humanly. The criminal takes life in the heat of passion or in self-defence and has some justification for it, but to take life in cold blood by legal punishment causes our age-old humanitarian sentiments to revolt. The executioner does a deliberate act of killing, but the man who pulls the trap may not feel that he is doing a public service. In the words of Samuel Romilly (quoted in Arthur Moestler's Reflections on Hanging): "Cruel punishments have an inevitable tendency to produce cruelty in people". Capital Punishment is a barbarous survival of a savage and primitive society. The irony of our current practice (indicative of that barbarism) is the scrupulous medical care taken of a man or woman condemned to die. If a natural death ensues, the offender would cheat the gallows or electric chair or gas chamber. So much more attention is given to preserve the health and life of the condemned
person than to improve the physical condition of prisoners serving sentences of imprisonment. It is also a quixotic feature of capital punishment that a person who becomes insane after being sentenced to death cannot be executed—presumably because the lunatic would not be able to appreciate the lesson of being killed by the state as he is not in his right mind.

Besides these arguments against capital punishment, there are certain objections to it on account of its undesirable incidental effects. One harmful result is that popular sympathy may be diverted from the victim to the murderer. Obnoxious sensationalism often surrounds murder trials. Morbid interest is aroused by executions in the public places and these horrible scenes are watched by crowds in a sort of frenzy.

The real question today is about a very practical alternative to capital punishment—whether any other penalty could achieve what the death penalty achieves. It is around this practical problem that the issue of the retention or abolition of the capital punishment revolves. Since it is a burning question of the day, a very brief account of this position may be given here.
The issue was very thoroughly argued before the Royal Commission on capital punish-
ment (1949-1953) in England. The supporters of the capital sentence mainly relied on the
deterrent theory. Those who opposed the capital sentence put forward the following arguments.

(1) Every chance of the criminal's reform is lost.

(2) It does not deter homicidal crime nor does its abolition lead to any increase in such
type of crime. The commission was not able to rely on comparisons between different countries,
and it came to the final conclusion as stated below:

"Prima facie the penalty of death is likely to have a stronger effect as a deterrent
to normal human beings than any other form of punishment and there is some evidence that this
is in fact so. But this effect does not operate universally or uniformly and there are many
offenders on whom it is limited and may often be negligible. It is accordingly important to view
this question in just perspective and not to base a penal policy in relation to murder on
exaggerated estimates of the equally deterrent force of the death penalty."
Lawes, the great warden of Sing Sing
Prison and opponent of capital punishment,
saw as many as 114 legal deaths and he never
was convinced that the criminal was ever
deterred by his knowledge that he would be
sentenced to death. He quotes from his con-
versation with Morris Wasser before the
latter's execution. "No, warden, it is not
that," said Morris Wasser, "I mean that you
just don't think of the hot seat when you plug
a guy. Something inside you just makes you
kill.... I tell you the hot seat will never
stop a guy from pulling a trigger". This is
a very telling conversation for those who
ordinarily exaggerate the doctrine of
deterrence.

The position today is that in spite
of the retention of the death penalty,
examinations are rare. Year by year the number
of examinations appears to be reduced, and cases
of reprieve are increasing. The general trend
in the world is towards abolishing the death
penalty and substituting for it life imprison-
ment. The available statistics does not, however,
justify an absolute conclusion regarding the
value of the death penalty. In different
countries a variety of penal sanctions operates,
making it difficult to sum up the position in a generalization. The final answer of the scientific criminologist to the exponent of capital punishment is, however, very clear: If we desire to get rid of crime, we must adopt the same scientific attitude that we have taken for the elimination of physical disease. It is absurd to think of punishing a person, who is suffering from cancer or any other malignant disease. Criminals are those who are socially ill and punishment may not cure the illness. We have, therefore, to reduce, as far as possible, the unhealthy social environments that generate bad habits leading to criminal conduct. The problem of capital punishment thus appears to be relatively unimportant in relation to the much broader and more fundamental series of problems that involve crime causation and rehabilitation of criminals. Barnes and Teeters advance this argument and focus our attention very powerfully on the ultimate end of criminal punishment.

Beccaria even challenges the right of a state to put an individual to death (on the basis of the theory of "social contract"). Professor Gillin, Copinger, and Hentig have raised their voice against the capital punishment. Professor Sethna
advocates its abolition in India. Even in Soviet Russia this punishment was abolished in peace time (1948).

Reformation - The middle of the 18th century in England is the starting point for the change of social re-action to the offender in terms of the welfare of the victim and also the community. The conception began to grow that punishment, in addition to protecting the community, should also serve to improve the offender. In the 19th century, all older forms of punishment were replaced by the single method of imprisonment. The report of the Gladstone Committee (1895) emphasized the need for the reclamation of the offender, and subsequent developments in England and all over the world display an acceptance of the importance of reformation as an element of punishment. Judicial recognition of this purpose makes the courts strive to keep the offender out of prison rather than to send him there.

The new theorists (Positivists) look upon crime as a form of sickness and say that it cannot be expected to respond to punishment. One might as well expect to cure an epileptic by beating him. The only cure for the disease of crime is some form
of treatment, based not on the character of
the offence but on the condition of the
offender. This concept is now for several
years dominating thinkers and law-makers. The
reformation of the criminal is being viewed
from several aspects. To John Howard, this
reformation is at bottom a spiritual process.
Mary Carpenter puts it as "Touching the inner
spirit". The criminal is to be treated as a
free moral agent and is to be persuaded to
abandon his evil ways by the aid of religions
and moral admonition. This has led to the
established practice of appointing salaried
religious preachers in the jails all over the
world.

Even sociologically the approach has
shifted from society to the criminal. An act
of crime is viewed not as an act of the free
will but an act to which the offender is driven
by a multiplicity of causes. The sociologists aim
at preparing the criminal for good citizenship
by removing the causes of his anti-social conduct,
by education and other effective means.

The reformatory theory thus concentrates
on the criminal, his mind and his environment.
It comes out with a categorical declaration of
its high aim: "We must reform the criminals and not kill them; that is what a study of the causes of crime tells us". The society should assume the role of the doctor and consider the criminals as patients afflicted with the disease of crime. Prisons should be replaced by institutions like reformatories and hospitals where the criminals can be sent for treatment, and later restored to the society.

The extent of reformative treatment permitted in criminal justice is a question of time, place and circumstances, as Salmond very rightly puts it. The chances of reformation are easier in the case of juvenile offenders, first offenders and sexual offenders. Reformation is also a set process in orderly, law-abiding communities; it may be very unsafe and even fatal to public welfare in disorderly and turbulent societies. The International Commission of jurists in their "Declaration Of Delhi" have rightly indicated that the rule of law does not require any particular penal theory, but it must necessarily support the adoption of reformative measures, whenever possible, and discourage inhuman, excessive, cruel punishment. In short, a well-balanced society should aim at "reformation with social security and not in spite of it".
Scholars like Salmond take to reformation with caution, while there are others who would like to stake their all on reformation without any deterrence whatsoever. These are psychologists, psychiatrists and sociologists. To them crime is a disease born in broken homes, slum culture, poverty and unhealthy surroundings. The only way to deal with it is to cure it. Punishment is of no avail. This is an extreme view and, as Lord Pakenham says, it will lead to a confusion of values. He says: "The totality of our emphasis has diminished enormously over readiness to blame the delinquent, ....... if we are really going to excuse the vast majority of crimes as simply manifestations of disease, we should be, I repeat, well on the way to rejecting altogether the attempt to distinguish between good conduct and bad".

On a balanced consideration, it becomes clear that the reformatory theory implies that the offender in punitive detention should be put under educative and healthy influences. He should be educated and reformed by a special effort, or he should be allowed to be reformed by the punishment itself. Recent efforts, however, show active steps taken in the direction of reform. Hegel believes that punishment itself is a reformer since it appeals ethically and awakens man's slumbering conscience. Dr. James Seth
supports this view, saying that the effectiveness of punishment as a reformative agent is based on the moral realization that punishment is an act of justice. The judgement of the society through its laws must become the judgement of the criminal upon himself, and then only his rectification can come about. Thus the instruction of the criminal, through his moral impulses, has the effect of moulding his character. Reformative punishment is useful and useful punishment alone is reformative. As Dr. Sethna says, mere infliction of pain can lead to no result. Reformation itself is a good result, but its process involves individualisation of treatment and proper education. Maudsley opposes harsh punishment of criminals, since it is devoid of pity and sympathy, and beyond certain limits it actually provokes "more unreason and violence".

Scientific analysis by scholars trained in the behavioural sciences is the next step in the history of reformative punishment. Recently objective tests and measurements have been used to determine the values of punishment and learning. It is a subject, very pertinent to a criminal's reformation, which is a learning process. These tests show that a
wild punishment may promote learning, but severe punishment may cause terror and panic which interfere with the learning process. Thus opinion has gradually tended to favour more and more the proper treatment of the prisoner than his physical punishment. According to this changing outlook those who inflict pain are more morally culpable than those who endure it. Hence, George Bernard Shaw, the profound thinker of the 20th century, provoked the people by saying that there is no real difference between the confined criminal and his unconfined brother! Shaw goes on to argue that the criminal type is only an artificial type manufactured in the prison system of the day. The simple truth is that the typical prisoner is a normal man when he enters the prison and develops the type during his imprisonment. So great is this new transformation of the earlier attitude to the criminal, that the entire basis of punishment has come to be revised, and in effect the prisoner who was so far the victim has become an innocent sufferer and those who punished him have become the true offenders. Thus the time has come when we ought to use our prisons as we do our hospitals.
Gabriel Tarde carries his theory of reforms in the direction of criminal procedure and proposes that the court's function should be confined merely to the decision on guilt or innocence of the accused. A Committee of experts (Doctors and Psychologists) should be set up to determine the responsibility of the accused. That decided, the punishment should be resolved on a psychological basis. Tarde is very much against uniform punishments. They must differ from criminal to criminal.

A student of criminology today is impressed by the rapid progress made in the direction of reformation and treatment of criminals. Various ways and means are explored and put into practice by Governments of different countries. The process of reformation appears to be fully implemented and generally speaking it goes through the following stages:

(1) There is expert diagnosis and classification of criminals with the help of an elaborate clinical examination in which psychologists, psychiatrists and prison officials play a very important role.

(2) The categories of Prisoners having been determined, they are placed in different sections
in the jail where necessary attempts are made to preserve healthy conditions.

(3) Education of these prisoners is almost a whole-time activity and they receive physical, intellectual and spiritual training at the hands of wise, experienced officers and non-officers.

(4) Efforts are made to make the prisoner feel at home by allowing friendly visitors and by also permitting the prisoner visits to his home in the period of parole.

(5) The most important part of reformation begins only when the punishment ends. The after-care of the prisoner, in order to help him to adjust himself to the society, is the toughest problem for any Government in the world. Very serious attempts are made for the rehabilitation of the criminals of different types, namely, first offenders, juvenile delinquents, mal-adjusted offenders and the habituals. One knows very well that the problem of rehabilitation is very complex, but one has to admit that the progress made in this respect in civilized nations is quite astonishing.

Some thinkers have seen a danger in the theory and practice of reformation. They argue that if the criminal is encouraged to believe that the
fault lies in his circumstances rather than in himself, he will have no will to improve and he may even regard his reformation meaningless. Even worse consequences may follow. The location of crime in the environment of the criminal and not in his mind gives an easy access to fatalism or determinism, which damages the moral fibre of the whole community. Dr. Mannheim regards the emphasis on the circumstances of a crime as a fatal error, because it takes away the moral basis on which alone can we ever argue with a law-breaker. Salmond criticizes the theory of reformation, particularly in the context of the most vicious criminal who is defiant of his punishment and also of his reform. He forcefully argues: "If criminals are sent to prison in order to be there transformed into good citizens by physical, intellectual and moral training, prisons must be turned into dwelling-houses far too comfortable to serve as an effectual deterrent to those classes from which criminals are chiefly drawn". Even the most sanguine advocate of the curative treatment of criminals must admit that some incurably bad offenders are beyond the reach of reformation, since crime is not merely a habit with them but an ineradicable instinct. Ives cites the case of Jessee Pomeroy in the U.S.A., who killed 27 children
one after another and yet remained unreformed. The psychiatrists treated him in an asylum and discharged him as cured and with what result? Even after fifty years of detention he was unreformed, and retained his natural ferocity and wickedness.

Lord Gooddard, the Lord Chief Justice of England, came to make a very pertinent observation, regarding the new reformative zeal: "I believe that for years past we have thought too much of the criminal and not enough of the victim". The Police Review, London (August 1958) observes: "Punishment can operate on the body and mind of the offenders, but the effect on the minds of others is important". The knowledge that the offender is subjected to a painful punishment strengthens a general feeling of moral indignation, which is not mere revenge. But the knowledge that an offender is comfortably imprisoned to take a course in his own reform, at the hands of experts specially engaged for that purpose, has a very bad effect. In the reform of criminals we take risks with the peace of mind of the public. John Edgar Hoover, Director, Federal Bureau of Investigation, U.S.A., expresses his frank opinion that the idea of regarding criminals as innocent victims is as irresponsible and unscientific as the earlier idea
of regarding them as dangerous enemies of the society. There is always a type of criminal who understands one language only, namely that of severe corporal punishment. The emphasis has shifted from free will to circumstances, and if we begin to treat a vast majority of crimes as simple manifestations of disease, we will be on the way to rejecting the distinction between good conduct and bad.

Reformation is not only difficult but controversial. Practical disputes can arise as to what constitutes the most effective means of achieving the improvement of a certain criminal. It is not uncommon to find a conflict between lawyers, Probation officers and Social workers on this question, for each one of them may approach the question differently. What is appropriate penalty is a matter for the courts, but what is the effective treatment for reform is a matter which still remains disputed. No doubt very admirable efforts are being made to help the court through advisory committees of medical experts, probation officers and commissioners, so that the court may even decide, on the basis of full facts available, the treatment for the convicts. Scholars often refer to the Borstal treatment in this connection.
All these objections and criticisms, frankly speaking, cannot be ignored. They are valid in the larger interests of the society. Social security is the main concern of any state. None can argue that innocent members of the society should be sacrificed in an attempt to reform criminals. But considering the impact of crime as a whole and the effects of painful punishments, one arrives at a conclusion that the objective of deterrence has only partially satisfied the needs of the society. It is felt that there is a criminal type that cannot be deterred and also cannot be reformed. He must bear the extreme penalty that the state will inflict on him, and his reform is certainly no practical politics. But this criminal type should not blind us to the other criminals who can be reformed by correctional treatment. To them, this process will certainly do good. In India, we still can go a long way in this process, though it may involve a big financial burden. Many civilised nations think nowadays that it is the right thing to do, even though in slow measures. Judge Anna Kross, Commissioner of Correction, New York, says: "Correction involves the use of every phase of the science of human engineering. It must be just, humane and scientific, not only
for ordinary human decency, but also for our safety and security." "In this she finds the true protection*, the lasting protection of the society. Laws should provide for justice, and true justice involves, in several criminal cases, not barren punishment, but merciful treatment. Justice must do something useful and fruitful. It is not for nothing that Shakespeare's Portia, in her advocacy of justice, utters the famous following lines of innate, aesthetic and moral beauty:

"The quality of mercy is not strained
It droppeth as the gentle rain from heaven
Upon the place beneath; it is twice blest;
It blesseth him that gives and him that takes:
'Tis the mightiest in the mightiest".

Rev. Dean Farror very eloquently upholds reformation. It provides a new chance, opens a new leaf in the life of the offender who has gone astray. It is the duty of the society to punish this offender, who is also a member of the society. But this punishment must be such as would provide an opportunity to the offender to repent, to retract and to reform. This punishment will not then be merely destructive. It will be constructive and conducive to welfare. It will also
mean to the hopeless victim a regeneration.

Prevention - Traditionally, prevention has been associated with deterrence. However, the idea of prevention in criminology is now more appropriately applied to the remedying of the basic conditions of our society out of which criminal tendencies spring. Thus Prevention, in a more fundamental sense, is different from mere repression. Prevention involves steps to disable the offender in such a way that he is incapable of doing the wrong.

Control of crime is a necessary requisite of prevention. In order to prevent crime, crime has to be controlled, and if crime is to be controlled, the Preventive theory is to be applied. Sutherland discusses four general problems of crime control -

(1) A close study of crime rates, social reactions to it and possible methods of control is an enormous problem. There are various problems, various reactions and various official policies. After this study, a very workable method of control of crime may be envisaged.

(2) Efficiency of control. Is control better under a scheme of punishment or under correction-
al treatment? The criteria of efficient control should be precisely established and defined. Difficulties arise after the criteria are established, and there comes the problem of adopting the methods of crime control as a matter of policy. It is often experienced that preventive policies, however humanitarian and effective, are not immediately adopted by states.

(3) Crime control ultimately gets involved with crime causation. This lands us in the field of emotional disturbances, economic conditions, home surroundings etc.

(4) It must be noted that policies of Crime control vary from time to time. These variations are due to official and social reactions. On the whole, crime prevention is a very problematic issue. G.R. Madan draws our attention to the two-fold programme for prevention:

(a) The prevention Programme is used to avoid occurrence of crime and to mitigate its causes. The best method to control crime is to check it in the childhood of the offender. Then, as suggested by Aschaffenburg, effective curbs on the sale and distribution of alcohol, improvement in housing conditions, education, medical aid, employment
and many other helpful activities can bring out a satisfactory result.

(b) Correctional programme of all preventative steps, crime cannot be completely checked. Hence the need of a correctional programme. Dr. Ellis suggests that our prisons should be run like hospitals to treat the sick criminals. In this role of correction courts, lawyers, probation officers, medical men, psychologists, and psychiatrists should co-operate. Law and Science should co-operate. Correctional treatment should rehabilitate the criminal in the society where he belongs. Dr. Adler advises that the criminal should be educated and his mal-adjustment with society should be removed. An individualised treatment is, therefore, the most vital part of the correctional programme. Dr. Sethna emphasises the mental health of the criminal which is likely to be damaged, more and more by deterrent penalty. A vigilant care and correction during imprisonment and parole is the need of the modern age.

In order that prevention may function successfully and well, the police system should be good and efficient. It is the chief agency in the state to detect and prevent crime, and it comes in very close association with the criminal.
It is often seen that the police abuse power or act in excess of authority. While detecting crime the police hardly use the caution and the restraint which is very essential. The third-degree methods for extorting confessions are well-known. Most of the arrests are a process of brutality and detentions are arbitrary and reckless. The police threat is a violent reaction to crime, coming as it does from a state official. It is this which makes the offenders look upon the police as instruments of terror rather than the messengers of corrections.

Plans for improving the efficiency of the police system are being developed in various countries. The plan generally includes stability of organization, larger territorial organization, improvements of personnel, equipment, scientific techniques and development of preventive police work. Efforts are made to establish cordial relations between the police and the public. These efforts have enhanced the police morale, and it has been found that the trust of the public in the police system grows on account of this informal relationship. Modern equipment has provided a reliable apparatus which helps the police service to be efficient,
swift and certain. If scientific methods in the detection of crime are resorted to, the police will be able to render remarkable service to the community. Some instruments in the detection of crime in the U.S.A. and the U.K. have proved very reliable. In America the 'Keeler Polygraph' - invented by Leonard Keeler, a scientist criminologist - is used as a lie-detector for very nervous persons suspected of crime. This machine faces the suspect, so that if he is telling a lie, the machine records what goes on in the mind of the suspect. It is reported that the criminals are afraid of facing this machine and be questioned, because it records a graph of his emotion waves while answering the questions. The machine has automatically controlled pens for registering emotional changes, reaction, and disturbances. It works like a seismograph that registers an earthquake. The pens became 'feverishly animated' when a suspect gets a feeling of uneasiness or guiltiness. If there is no emotion aroused, the machine remains neutral. The machine pictures even the slightest changes in mood, emotion, blood-pressure, pulse and respiration. Primarily the machine measures emotion (that emotion associated with fear) and the detection of the
lie is only incidental. The accuracy or otherwise of this machine depends mainly on the way in which the expert user of it, questions the suspect.

Another method of probing into the truth about crime is that of injecting the 'truth-drug' (Sodium pentothal or sodium amytal) through the vein. The criminal is hypnotised and gradually begins to murmur and reveal what is lying deep in his mind.

For detecting alcoholism, there is the 'drunkometer' which determines the presence of alcohol in the blood-steam. The 'electro-encephalograph' is an instrument to detect mental abnormality, especially in border-line cases, and is found very valuable in saving abnormal offenders from extreme penalty.

The most effective method of prevention is made available to the police in these days under Preventive Detention Acts. For protecting the society police keep under detention habitual offenders. These Acts have enabled the police to prevent grave disorders in critical emergency arising out of serious social or political turmoil. There are also statutory
provisions under which courts can restrict the movements of habitual offenders. Such offenders can be made to report themselves to the police from time to time. They can also be placed in special settlements.

Concluding this discussion on Prevention, we can say that the Preventive theory has served its purpose to a large extent because crime prevention has appealed to all the new administrations in the world. Prevention before the commission of crime has led to new police policies and has opened avenues of social welfare for the improvement of human conditions. Prevention after commission of crime has opened another avenue of improvement in respect of the rehabilitation of the criminal.

Conclusion

Everyone nowadays has come to realise that punishment in itself is not sufficient for social defence. Various social organs, penological and anthropological, have been systematically fighting against the classical and neo-classical theories of punishment, and been urging other positive measures in place of punishment. A new conception about the treatment of the criminal has come into being, and one can safely say that in the 20th
century, there will be very few who will assert the supremacy of the role of punitive theory of punishment in taming human passions. Force is always a poor remedy for force. Brutal crime and brutal punishment were merely creating a vicious circle instead of solving the problem. It is increasingly realised that considering the anthropological, physical, social and psychological factors which tend to cause criminal behaviour, punishment can exert but a slight influence on it. As Enrico Ferri puts it: "Punishment in fact by its special effect as a legal deterrent, acting as a psychological motive, will clearly be unable to neutralise the constant and hereditary action of climate, customs, increase of population, agricultural production, economic and political crises which statistics innumerably exhibit as the most potent factors of the growth or diminution of criminality". He sums up his criticism by saying: "Punishment which has professed to be such a simple and powerful remedy against all the factors of crime is, therefore, a panacea whose potency is far beneath its reputation".

Reformation of the criminal and making him a useful citizen is indeed a laudable ideal. But the question arises: "Can this ideal
be applied in all the cases, or can this ideal succeed in all the cases?". An answer to these two questions cannot so easily be given, without risking great danger to society, or without sacrificing a good many human beings at the altar of a rigid and cruel code of punishments. A rigid punishment has been, so far, awarded with a view to detering potential criminals from the dangerous path of crime. The reason given is that the law should be no respecter of persons, all are equal in the eyes of law, and viewed in this context, an inquiry into the personality of the offender, his antecedents, his heredity, his family and trials, his unemployment and indulgence, his heroic but futile efforts to rise above untoward conditions, and other such factors is unnecessary. But pertinent objections have been raised to say: "Can a Jean Valjean who has been through hunger and penury and has before him his starving wife and crying babies and another who committed theft in the midst of plenty be judged and punished by the same standard?". If a criminal can be made a useful citizen by a little effort on the part of society, is it not worth attempting?

Arguments for and against deterrence as well as reformation are indeed many. All are
not without substance. The truth lies in both. We have to conclude that there are criminals who cannot be reformed, and for whom, in the circumstances in which they committed crimes, any punishment may not have any effect. In these cases there may be certain underlying deep causes, which if tackled well, may be removed, and the criminal may become a useful citizen. The conflict between deterrence and reformation is old and deep. There is no doubt that the application of the purely reformatory theory, therefore, should lead to astonishing results. In the words of Salmond: "The perfect system of criminal justice is based on neither the reformatory nor the deterrent principle exclusively, but is the result of a compromise between them. As Lord Pakenham has aptly put it, "the penalty imposed on prisoners, while it cannot, of course, be relieved of all deterrent character, is to be organised and inspired to aim at their ultimate benefit".

The properly explained and correctly understood theory of retributive punishment fits in ideally with the theories of reformation and deterrence. Through reformation and penitence, the offender can understand the heinousness of
his wrongful conduct, and thus freedom from recidivism can result. If punishment is re-
formative and retributive, it becomes deterrent also. The awarding of reformatory treatment by
detention, with a view to bringing about true retribution, is the object and justification of punishment.

The modern concept of punishment is that it should deter criminals and also try to reform their lives, by means of treatment in prisons or correctional institutions. In the wake of this concept come prison reforms, the system of extra-mural treatment like probation, parole and aftercare.