CHAPTER – II

CONCEPT AND THEORIES OF
CRIMINAL JUSTICE ADMINISTRATION
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ADMINISTRATION

Society has to be controlled. In all ages the law giver has expatiated on this truism that men being what they are each keen to see his own interest and passionate to follow it society can exist only under the shelter of the state, and the law and justice of the State is a permanent and necessary condition of peace, order, and civilization¹.

This end of social control is achieved by the State, by the administration of justice, through the instrumentality of law. So the administration of justice is defined as ‘the maintenance of right within a political community by means of the physical force of the State.’ So Law and the State are inseparable and its authority and sanction is a necessary characteristic of Law. Sanctions, we have seen, do not always involve the idea of duty and punishment. Many of our laws are of a declaratory or permissive character, Moreover, it must be recognized that there could be no substitute for administration of justice by the state for controlling society, for even though most people obey most laws because of habit, or imitation or public opinion rather than the fear of punishment, yet if law-enforcing agencies were withdrawn, it would soon be discovered that the evil-doers would with impunity defy all public opinion and thus break down the customs and habits of obedience of others. There may yet come at a time when communities reach the utmost in civilization, when all use of force may cease, whether by way of administration of justice or by way of war, and when that happens—‘A society in which the power of the state is never

¹ Salmond: Jurisprudence, (10th Edn.) p.103
called into actual exercise marks, not the disappearance of governmental control, but the final triumph and supremacy of it. But, till the society reaches that stage of civilization force has to stay.

[A] Concept:

The term ‘Administration of Justice’ means exercise of judicial power to maintain and uphold rights and punish wrongs.2 “The expression ‘Administration of Justice’ include within its ambit several thing as component parts of it namely the Constitution, organization of Courts, jurisdiction, powers and the laws to be administered by the Courts.”3 In India, the Supreme Court and High Courts have the power to review the Administration of Fundamental Rights of the citizens along with limitations of powers of Government, Parliament and Tribunals with a view to administer justice according to law to ensure the supremacy of the Constitution.

Under the Constitution, the ultimate authority is given to the Courts to restrain all exercise of absolute and arbitrary powers, not only by the executive and the officials and lesser by tribunals but also by the legislature and even by Parliament itself.4 In the case of M.R. Venkatarama v. Commissioners of Police, Madras, Menon, J. indirectly support the notion of “justice” according to procedure established by law of the land which does not offend or is neither indecent. Thus no one is to be deprived of life, liberty and property in disregard of those fundamental rules of procedure which are well established in the Indian Legal system. The object of ‘justice, according to law’ is to save from arbitrary interference by the Executive and

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3 State of Bombay v. Narottam Das: AIR 1951 SCR 51 (120)
the Legislature. Such Fundamental Principles of procedure which are well recognized as principle of justice.5 The Supreme Court laid down the doctrine of prospective overruling and re-emphasized the supremacy of the rule of law and of justice according to law.6 The Indian philosophy of justice according to law alone guarantees the individual liberty and dignity against the despotism of Executive or of Legislature or of inferior Tribunals. It alone reassures men, the government, of laws and not of men. In such system people are governed by certain laws and not by men or by a party or person as we come across in totalitarian system of China, Spain and U.S.S.R. etc. According to Salmond ‘Administration of Justice’ ensures infirmity and certainty in the Administration of justice.

Prof. Pound has found that there are many advantages of the Administration of Justice according to law:-

The idea of justice according to law is supported by Prof. Pound on the ground that it successfully includes the personal equation on all matters affecting life, liberty and property. The administration of Criminal Justice has a social dimension and society at large has a stake in impartial justice. Therefore, the Bench and the Bar as a collective profession must respond to current chaos if it has patriotic commitment

[B] Criminal Justice Administration in Different Periods

The criminal justice administration in India developed in several stages and then the present form came, so it is essential to know the precise form of criminal justice in different periods.

(i) Ancient Hindu Period

In ancient India, we find a proper criminal justice system which was chiefly based on retribution and deterrence. The penal law of ancient communities is not the law of crimes; it is the law of wrongs because in those days there was no such classification of wrongs as torts and crimes. At that time the deviations from the prescriptive standards of behaviour was minimum and the system was efficient in checking that. The guilty intention was not necessary element of crime in those days. There was not much difference in the nature of punishment for the two modern varieties of wrongs. This view of ancient penal law, though true in case of almost all systems of the world, is not correct in case of ancient Hindu Criminal Law. In the Hindu law, punishment of crimes occupies a more prominent place than compensation for wrongs. Although under certain circumstances wrongdoer had to compensate the person but it was generally levied in addition to or in substitution for the penalty. The right to punish the offender lay in the hands of individual in western criminal jurisprudence and this right was only during middle ages transferred from individual to the society and later on to the state. But in ancient Hindu law, it was the duty of the king to punish the offender. The Hindu Law, givers did not expressly distinguished between civil wrong and crime.

According to Manu, if the king failed to punish the offenders unremittingly, the powerful would roast the weak life fished on a pit. In Matsya Purana, it is stated that if the king did not inflict punishment, the strong would oppress the weak just as big fish swallow the smaller one. Kautilya stated that if punishment is too deterrent, it will create fear but if it

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7 Maine, Ancient Law.
8 P.N. Sen, Hindu Jurisprudence, Ch. XII
9 Manu Smriti, VII. 22
10 Matsya Purana, Ch. CCXXVII, 9
is proper and just then it will inspire to behave properly. Vedic literature nowhere refers to the king as a judge either in civil or criminal cases, offences like murder, theft and adultery are mentioned, but there is nothing to indicate that they were tried by the king or any officer authorized by him. It has been suggested that Sabhapati of the later Vedic period may have been a judge. Such slight indications as exist seem to show that normally it was the Sabha or the popular village assembly rather than the king who tried to arbitrate where it was feasible to do so.\textsuperscript{11}

The Dharmasutras and the Arthashastra reveal to us a more or less full-fledged and well-developed judiciary. The King was at its head and he was to attend the court daily to decide disputes. It was his sacred duty to punish the wrongdoers; if he flinched from discharging it, he would go to hell. The \textit{Dharmasastra} and \textit{Nitisastra} literature regards the King as the fountain source of all justice\textsuperscript{12}. The King was also the highest appellate court. Narada points out how an appeal was possible to the city court against the village court decision, and how a litigant could appeal to the King against the decree of the city court\textsuperscript{13}. The King was expected to be strictly impartial and to decide according to law; otherwise he would be guilty. Law was regarded as based on \textit{sruti} and \textit{Smritis} which were revered as superhuman in origin.\textsuperscript{14}

In addition to the above official courts, there were a number of popular courts in the ancient Indian polity, which constituted one of its special features. \textit{Yajnavalkya} mentions three types of popular courts, \textit{Puga}\textsuperscript{18}

\textsuperscript{11} A.S. Altekar, \textit{State and Government in Ancient India}, p. 246
\textsuperscript{12} Ibid.
\textsuperscript{13} Ibid.
\textsuperscript{14} Ibid.
court (for village disputes) *Kula* (for family disputes) and *Sreni* court (for family disputes).\textsuperscript{15}

In case of the first offence of thieves at holy places, pickpockets, the punishment shall be the four *panas*. In case of the second, the cutting off of five fingers or a fine are hundred; in case of the third, cutting off of the right hand or a fine of four hundred, in case of the fourth, death.\textsuperscript{16}

(ii) Muslim Period

This law was based on *Quran and Hadis* and was developed through *Ijma* and *Kiyas*. The Kazis were responsible for elucidating and expounding of the laws. Crimes were divided in to two classes, namely (i) crimes against God e.g. adultery and drunkenness; and (ii) Crimes against man (e.g. murder and robbery). The offences against God were considered as public wrongs and could, therefore, be punished by community society. The offences against man were private wrongs and therefore could be punished by individual in most of the cases, crime was a wrong done to the individual wronged and not to the state. Therefore, prosecution lay in the hands of the individual. Punishment was of four kinds namely, (i) qisas (Retaliation), (ii) Diyut (blood money), (iii) Hadd (defined punishment which could either be increased or reduced), and (iv) Tazer and Siyasa (discretionary and exemplary punishment).

The rules of evidence were also defective. Some of them were even against the rules of ‘natural justice. The procedure to be followed by the courts in trial of criminal courts was also unsatisfactory. In some cases, the

\textsuperscript{15} Id. at p. 252
\textsuperscript{16} R.P. Kangle, *The Kautilya Arthasastra*, Part II at p. 255
law was defective to such an extent that it was impossible for any civilized
government to administer it. For example, a non-Mohammedan could not be
admitted as a witness in evidence in any case affecting a Mohammedan.
Similarly, the punishment of stoning for sexual offences or mutilation for
theft was impossible to enforce.

(iii) British period

When East India Company took over the administration of Indian
dominion, Muslim criminal law was in force. In 1765, the East India
Company acquired the Nizamat of the three provinces of Bengal, Bihar and
Orissa. The Company had then to administer justice. In the beginning they
adopted the policy of maintaining status quo. Gradually the defects of
Muslim Criminal Law became clear and therefore, efforts were made to
remove those defects. The first attempt was made by Warren Hastings who
tried to do away with the punishment of mutilation for dacoity. Some
important criminal reforms were made by Lord Cornwallis. Law of homicide
was changed and murder was no more a private wrong. Law relating to
robbery, perjury and sexual offences were also changed. Effort was made to
rationalize the punishment by making it proportionate with the crime. A
Regulation of the year 1832 provided that in case of a trial for an offence
under the Regulations non – Muslims could claim exemption from trial
under the Muslim criminal law. But the changes introduced in Muslim
criminal law were not uniformly applicable to all Presidencies. Most of them
applied in Bengal alone. The result was that different rules prevailed in
different Presidencies. These shortcomings became quite obvious when all
the Presidencies were put under the control of central government.
Therefore, a commission was appointed to examine these conflicting features and suggest necessary modifications.

Later on it was realized that no satisfactory improvement was possible by piece meal legislation and a penal code was thought necessary. In the Presidency of Bombay a penal code was enacted under the guidance of the Governor Elphinstone which code was known as Elphinstone code. This code was short and sketchy and consisted of forty-one sections only. In 1884, a separate code was drawn for the Province of Punjab after its annexation. These codes were meant for the respective provinces only.

An all India legislature was created by the Charter Act of 1833. The Office of Law Member in the Council of Governor General was created; Provision was also made for the appointment of a Law Commission.

The first Law Commission was appointed in 1834 with Lord Macaulay, the then Law members as its Chairman, Sarvshri Macleod, Anderson and Millet were the other members of the Commission. The commission prepared a Draft Penal Code for India which was submitted to the Governor General of India in Council on October 14, 1837. It was revised by Sir Barnes Peacock, Sir J.W. Calville and several others. The drafting was completed in 1850 and it was presented to the legislative council in 1856. The Bill was passed on October 6, 1860. It received the assent of the Governor General on the same date and thus became the Indian Penal Code, 1860. The code came into operation on 1st January, 1862. The Code is universally acknowledged as a cogently drafted code, ahead of its time it has substantially survived for over 150 years in several jurisdictions without major amendments. Modern crimes involving technology unheard of
during Macaulay's time fit easily within the Code mainly because of the broadness of the Code's drafting.

[C] THEORIES OF PUNISHMENT

There are five theories of punishment; retributive theory, deterrent theory, preventive theory, reformative theory and theory of compensation.

(i) Retributive Theory

In primitive society, punishment was mainly retributive. The person wronged was allowed to have his revenge against the wrongdoer. The principle of "an eye for an eye, a tooth for a tooth" was recognized and followed. Justice Holmes writes: "It is commonly known that the early forms of legal procedure were grounded in vengeance". Early criminal law was based on the principle that all evil should be required. It was believed that the community could be regarded as purged of the evil only in that way. Among the ancient Jews, even animals which killed human beings were regarded as contaminated and were got rid of for the good of the community. Plato was a supporter of the retributive theory. He wrote; "If justice is the good and the health of the soul as injustice is its disease and shame, chastisement and is their remedy. If a man is happy when he lives in order, than when he is out of it, it is of importance to him to enter it again and he enters it through chastement. Every culpa demands expiation; the culpa is ugly, it is contrary to justice and order; the expiation is beautiful because all that is just is beautiful and to suffer for justice is also beautiful".
To quote Sir James Stephen; the criminal law stands to passion of revenge in much the same relation as marriage to the sexual appetite.\(^{17}\)

The view of Sir John Salmond is that the retributive purpose of punishment consists of avenging the wrong done by the criminal to society. Another view is that the retributive punishment is an end in itself. Apart from gain to society and the victim, the criminal should meet his reward in equivalent suffering. Expiation means the suffering or punishment for an offence. The murderer has expiated his crime on the gibbet\(^{18}\).

Critics point out that punishment in itself is not a remedy for the mischief committed by the offender. It merely aggravates the mischief. Punishment in itself is an evil and can be justified only on the ground that it is going to yield better results. Revenge is wild justice.

(ii) Deterrent Theory

To quote Salmond, “Punishment is before all things a deterrents and the chief end of the law of crime is to make the evildoer an example and a warning to all that are likeminded with him”. A similar view was expressed by Locke when he stated that the commission of every offence should be made “a bad bargain for the offender”. According to the deterrent theory of punishment, the object of punishment is not only to prevent the wrongdoer from doing a wrong a second time but also to make him an example to other persons who have criminal tendencies. A judge once said,

\(^{17}\) V.D. Mahajan, Jurisprudence and Legal Theory, V. Ed., EBC at p. 146
\(^{18}\) Id. at 147
“I do not punish you for stealing the sheep but so that sheep may not be stolen”\textsuperscript{19}.

The aim of punishment is not revenge but terror. An exemplary punishment should be given to the criminal so that the others may learn a lesson from him. The view of Manu was that “penalty keeps the people under are asleep, so the wise have regarded punishment as a source of righteousness”.

Paton writes: “The deterrent theory emphasizes the necessity of protecting society, by so treating the prisoners that others will be deterred from breaking the law”\textsuperscript{20}.

Criticizing the deterrent theory, it is contended that the deterrent theory has proved ineffective in checking crime. Hardened criminals are not afraid if punishment. Punishment loses its horror once the criminal is punished.

(iii) Preventive Theory

Another effect of punishment is preventive or disabling. The offenders are disabled from repeating the offences by such punishments as imprisonment, death, exile, forfeiture of office etc. By putting the criminal in jail, he is prevented from cutting another crime. By dismissing a person from his office, he is deprived of an opportunity to commit a crime again. Paton writes: “The preventive theory concentrates on the prisoner but seeks to prevent him from offending again in the future. Death penalty and exile serve the same purpose of disabling the offender”.

\textsuperscript{19} Id at 137
\textsuperscript{20} G.W. Paton, A Textbook of Jurisprudence, Oxford, 1972
Justice Holmes writes: “There can be no case in which the law-maker makes certain conduct. Prevention would accordingly seem to be the chief and only universal purpose of punishment. The law threatens certain pains if criminal without thereby showing a wish and purpose to prevent that conduct of you do certain things, intending thereby to give you a new motive for not doing them. If you persist in doing them, it has to inflict the pains in order that its threats may continue to be believed”.

An example of preventive punishments is the cancellation of the driving license of a person. As he has no license, he is prevented from driving.21.

(iv) Reformative Theory

According to this theory, the object of punishment should be the reform of the criminal. Even if an offender commits a crime, he does not cease to be a human being. He may have committed a crime under circumstances which might never occur again. The object of punishment should be to bring about the moral reform of the offender. He must be educated and taught some art or industry during the period of his imprisonment so that he may be able to start his life again after his release from jail. While awarding punishment, the judge should study the character and age of the offender, his early breeding, his education and environment, the circumstances under which he committed the offence, the object with which he committed the offence and other factors.

The advocates of the reformative theory contend that by a sympathetic, tactful and loving treatment of the offenders, a revolutionary change may be brought about in their characters. Man always kicks against pricks, whipping will make him balk. The view of Salmond on the reformation theory is that if criminals are to be sent to prison to be transformed into good citizens by physical, intellectual and moral training, prisons must be turned into comfortable dwelling places. The theory of reformative punishment alone is not sufficient and there should be a compromise between the deterrent theory and the reformative theory and the deterrent theory must have the last word.\textsuperscript{22}

The primary and essential end of criminal justice is deterrence and not reformation. In modern times, there is a tendency to ignore or minimize the deterrent aspect of punishment. What is required is that the value of the deterrent elements must be given its proper place. Salmond writes: “The deterrent motive should not be abandoned in favour of the reformative altogether since permanent influence of criminal law in this stern aspect contributes largely to the maintenance of the moral and social habits which shall prevent any but the abnormal from committing crime and also directly deter any but the sub-normal, apart from exceptional circumstances, from committing crimes”.

Today, a lot of emphasis is being put on the reformative aspect of punishment in modern times. In progressive states, provision is made for the prevention of habitual offenders. Borstal Schools have been set up. Provision is made for a system of probation for first offenders. Reformation

\textsuperscript{22} V.D. Mahajan, \textit{Jurisprudence and Legal Theory}, V. Ed. EBC, 2000 at p. 140
theory is being growingly adopted in the case of juvenile offenders. The Probation of Offenders Act, 1958, has been placed with a similar object in view. Sec. 360 of the Code of Criminal Procedure, 1973 empowers the court to order the release on probation of good conduct or after admonition.

(v) Theory of Compensation

This theory contends that the object of punishment must be not merely to prevent further crimes but also to compensate the victim of the crime. The contention is that the mainspring of criminality is greed and if the offender is made to return the ill-gotten benefits of the crime, the spring of criminality would dry up.

In certain cases, the Supreme Court has awarded compensation to persons who have suffered at the hands of government servants: *Bhim Singh* case\(^{23}\) and *Rudal Shah* Case\(^{24}\) etc. But a perfect system of criminal justice cannot be based on any one theory of punishment. If the offender is a rich person, the payment of any amount may be no punishment for him.

Every theory has its own merits and every effort must be made to take the good points of all. The normal and free life is better than life in jail. The government should set up mental hospitals and reformations in place of jails and living conditions in jail should be improved.

[D] The Sentencing of Offenders

Administration of Justice is one of the essential functions of the State. The Law and Order within the State is maintained through the

\(^{23}\) AIR 1986 SC 494
\(^{24}\) AIR 1983 SC 1086
‘Administration of Justice’ and the citizens are made to realize the existence and the importance of the State. The purpose of the Criminal Justice is to punish the wrongdoer. The end of the Criminal Justice is to protect and add to the welfare of the State and the Society. The action of the State may be preventive, deterrent, retributive expiatory or reformative according to individual cases but the aim is to protect the society and welfare of the people.

A wide discretion is given to the Judges in sentencing the offenders. The sentences may be:

I. Death

II. Imprisonment (including imprisonment for life)

III. Fine (includes forfeiture of property)

The determination of appropriate sentence for the convicted person is as important as the adjudication of the guilt of the accused in the modern sentencing system. The significance of the modern sentencing system lies in the individualization of punishment and consequently to the rehabilitation of the offenders. That is the reason that the IPC and the other Penal Laws normally indicate the maximum punishment awardable for an offence and then leave it to the discretion of the court to pass a suitable sentence within such maximum limit. The impossibility of laying down standards is at the very core of criminal law administered in India invests the judges a very wide discretion in the matter of fixing degree of punishment. That discretion in the matter of sentence is liable to be corrected by Superior Courts. Laying down of standards to the limited extent possible as was done in the model judicial code would not serve the purpose of the exercise of judicial
discretion. One well recognized principle is, in the final analysis, the safest possible safeguards for the accused\(^{25}\). After the decision of Jagmohan’s Case the new Code Criminal Procedure, 1973 incorporated for the first time Sec.325(2) and 248(2) to ensure a great awareness on the parts of Courts to examine each case more closely, so as to determine the most appropriate sentence.

The Courts are given sentencing powers according to their status; Sec.28, 29 empowers the different courts for different terms of sentence:

1. Supreme Court or High Court
   - any sentence authorized by law.

2. Sessions Judge or Addl. Sessions Judge
   - Any sentence authorized by law,
   - Sentence of death is subject to
   - Confirmation by High Court

3. Asst. Sessions judge
   - Imprisonment up to ten years or/and fine

4. C.J.M. or Chief Metropolitan Magistrate
   - Imprisonment up to seven year or/and fine

5. J.M.F.C. or Metropolitan Magistrate
   - Imprisonment up to 3 years or/and Fine
   - up to Rs. 5,000/-

6. J.M.F.C. or Special Judicial Magistrate or Special Metropolitan Magistrate
   - Imprisonment up to 1 year or/and Fine
   - up to Rs.1, 000/-

In considering the adequacy of the sentence which should neither be too severe nor too lenient, the Court has, therefore, to keep in mind the motive and magnitude of the offence, the circumstance in which it was committed and the age and character and station in life of the offender.\(^{26}\)

The imposition of the sentence of solitary confinement, although it is legal, should be very rarely exercised by a Criminal Court. It should be


\(^{26}\) Modi Ram Vs. State of M.P. 1972 Cr. L.J. 1521
administered, if ever, in most exceptional cases of unparalleled atrocity or brutality.\textsuperscript{27}

In India there is also a system for capital punishment. The constitutional validity of capital punishment was challenged in Jag Mohan Singh’s case.\textsuperscript{28} But in Bachchan Singh’s Case\textsuperscript{29} the Supreme Court held that “the legislative policy now writ large and clear on the face of Sec. 354(3) is that on conviction for murder and other capital offences punishable, in the alternative with death under the Penal Code, the extreme penalty should be imposed only in extreme cases. The Supreme Court finally held that a real and abiding concern for the dignity of human life postulates resistance to taking a life through law’s instrumentality. That ought not to be save in the rarest of the rare cases when the alternative option is unquestionably foreclosed.

So, according to Salmond “it is needful, then, in view of modern tendencies, to insist on the primary importance of the deterrent element in Criminal Justice. The reformative element must not be overlooked, but neither must it be allowed to assume undue prominence.”

\textbf{[E] The Principle of Legality}

The fundamental principle of criminal law is that no one can be found guilty of an offence without his having violated some predetermined law defining a prohibited conduct. The principle is expressed by the maxim \textit{nullum peona sine lege}. In other words, unless there is a violation of some existing law defining a crime clearly and unequivocally, no crime is committed. The Indian Constitution provides:\textsuperscript{30}

\textsuperscript{27} Munuswamy (1948) Mad. 359
\textsuperscript{28} Jag Mohan Singh v. State of U.P. AIR 1973 SC 947
\textsuperscript{29} Bachchan Singh v. State of Punjab AIR 1980 SC 898
\textsuperscript{30} Article 20(1)
“No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than which might have been inflicted under the law in force at the time of commission of the offence.”

The provision manifests what can be called the ‘great charter of liberty’ in countries having the rule of law. The position in totalitarian countries is different which can be illustrated with reference to the position obtaining under the Nazi rule in Germany:

“Whoever commits an action which the law declares to be punishable or which is deserving of punishment according to the fundamental idea of a penal law and the sound perception of the people, shall be punished according to the law, the basis idea of which fits it best.”

[F] Presumption of Innocence

There are two systems, i.e. the accusatorial and inquisitorial systems, followed in different parts of the world in administration of criminal justice. In the accusatorial system followed in common law countries, the burden of proving that an accused person violated some law is on the prosecution while in the inquisitorial system which is followed in some European countries like France, and it is for accused person to prove that he is not guilty of the crime allegedly committed by him. In India, where the accusatorial system is followed, there is a presumption in favour of the accused that the offence has not been committed by him and the presumption continues to be operative until the prosecution is able to prove

\footnote{31Quoted in Journal of American institute of Criminal Laws and Criminology 26 (1936),p.847}
its case according to the rule of procedure and evidence prescribed by law.\textsuperscript{32} The same principle has been incorporated in the Evidence Act:

“All who desire any court to give judgment as to any legal right or liability dependent on the existence of facts which he assets must prove that those facts exist.”\textsuperscript{33}

The life and liberty of the individual would be in jeopardy if the rule was otherwise. The principle is sometimes expressed by saying that to be on the safer side, the acquittal of ten guilty persons is to be preferred to the conviction of a single innocent person. A very high standard of proof is therefore, required to establish the culpability of an accused person. The distinction between the standards of proof in civil and criminal proceedings has been brought about in the following words:

“A higher minimum of proof is necessary to support an accusation of crime than will suffice when the charge is only of a civil nature. For in the latter it is sufficient that there be a preponderance of evidence in favour of the successful party, whereas in criminal cases the burden rests upon the prosecution to prove that the accused is guilty beyond reasonable doubt.”\textsuperscript{34}

Proof beyond reasonable doubt does not, however, imply that the prosecution must eliminate even fanciful doubts regarding the criminality of the accused person. In Miller v. Minister of Pensions,\textsuperscript{35} Lord Denning observed:

“The degree of cogency need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not

\textsuperscript{32} The position in some special laws like the Prevention of Corruption Act may be different due to public policy and the burden is on the accused to free him from the criminal charge.

\textsuperscript{33} Section 101

\textsuperscript{34} Kenny, op. cit., p. 501

\textsuperscript{35}(1947) 2 All ER 372, 377
mean proof beyond the shadow of a doubt. The law would fail to protect
the community if it admitted fanciful possibilities to deflect the course of
justice. If the evidence is so strong against a man as to leave only a remote
possibility in his favour which can be dismissed with the sentence, of
course it is possible but not in the least probable, that the case is proved
beyond reasonable doubt, but nothing short of that will suffice.”

Once the prosecution has proved its case the burden is on the accused,
though the burden of proof is not as exacting as that of the prosecution, to
disprove the prosecution case or to prove that the act committed by him is
covered by one of the general exceptions provided in the Penal Code.
Section 105 of the Evidence Act provides:

“When a person is accused of any offence, the burden of proving
the existence of circumstance bringing the case within any of the general
exceptions in the Indian Penal Code, or within any special exception or
proviso contained in any other part of the same Code, or in any law
defining the offence, is upon him, and the court shall presume the absence
of the such circumstances.”

[G] Protection against Self-incrimination

A cardinal principle of the Criminal Justice system is that an accused
cannot be compelled to give evidence against himself. The principle has
been recognized in the Indian legal system. The constitutional guarantee of
the right in India is that no person accused of any offence shall be compelled
to be a witness against himself.36 The principle is to eliminate the possibility
of third degree method being used against the accused person to extort
confession or any other information from him. Some of the provision in the

36 Constitution of India, Article 20(3)
Evidence Act and the criminal Procedure Code also seek to achieve a similar objective.37

**[H] Protection against Double Jeopardy**

It is a well-established principle of the Criminal justice system that no man shall be twice punished if it appears to the court that it is for one and the same cause. The principle is expressed in the well-known maxim, *nemo debet bis vexari, si constat curiae sit pro unaet eadem causa*. The principle has been incorporated in the Indian Constitution thus:38

“No person shall be prosecuted and punished for the same offence more than once.”

While the constitutional guarantee recognizes only *autrefois* convict (previous conviction) as a bar to the subsequent prosecution for the same offence, the provision in the Criminal Procedure Code incorporates *autrefois* acquit (previous acquittal) as well to bar another trial for the same offence. The main principle laid down is that a person who had once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence.39

The same act committed by a person may amount to two different offence, i.e. the same act may invite the application of the definitions of two distinct offences and the protection against double jeopardy is not available in such situations. The offences are distinct if their ingredients are different and it makes no difference that the allegation of fact is the same in both the cases.40

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37 Evidence Act, Sections 24 to 26 and Code of Criminal Procedure, 1973, Section 316
38 Article 20(2)
39 Section 300
Thus the purpose of criminal justice administration is to prevent and control the criminal acts in the society by punishing the wrongdoer. At the same time it should be in such a way that the end of criminal justice is to protect and add to the welfare of the state and society. Accordingly the idea of involving pain or suffering in awarding the sentence has been modified in the modern methods introduced in dealing with criminals. Probation, parole and open prison are treated as substitute for the punishment. Even in the prison, the basic idea is not to inflict pain or suffering but to teach the convict the methods and techniques to make the prisoner a law abiding citizen.