CHAPTER II

A GENERAL VIEW OF THE VARIOUS CONCEPTS
AND THEORIES OF CRIME AND PUNISHMENT

Preview

The second chapter is divided into two main points, ‘Crime and Punishment,’ which will lay the theoretical foundation in order to understand its meaning and its operation from the various concepts and notions prevailing on the issue of crime and punishment in dealing with the definition, the theory and kind of crimes committed, the circumstance and cause of crime, the principle and forms of punishment that is again studied from the various disciplinary perspective.

Therefore, this chapter is divided into two sections as follows;

2.1 Section I: Crime

2.1.1. Meaning and Definitions of Crime from various Disciplines
2.1.2. Conceptual Paradigms of Crime
2.1.3. Elements of Crime
2.1.4. Theoretical Paradigms of Crime Causations
2.1.5. Characteristic Paradigms of Crime:
2.1.6. Classification of Crime
2.1.7. Crime Statistics

2.2 Section II: Punishment

2.2.1. Meaning and Definitions of Punishment from various Disciplines
2.2.2. The History of Punishment
2.2.3. Justification of Punishment
2.2.4. Conceptual Paradigms of Punishment
2.2.5. Purposes of Punishment
2.2.6. Elements of Punishment
2.2.7. Theoretical Paradigms of Punishment
2.2.8. Forms of Punishment

The details of which are as follows:-
2.1 Section I: Crime

2.1.1. Meaning and Definitions of Crime from various Disciplines

Etymology: The word crime is derived from the Latin root *cernō*, meaning “I decide, I give judgment”. Originally, the Latin word *crīmen* meant “charge” or “cry of distress.” The Ancient Greek word *krīma* (κρίμα), from which the Latin cognate derives, typically referred to an intellectual mistake or an offense against the community, rather than a private or moral wrong.¹

How is Crime Defined? The justice system concentrates on crime and its control. Although for most of us the concept of “Crime” seems rather simple – a violation of criminal law – the question remains: Why are some acts considered a violation of the law and others, seemingly more serious, legal and non-criminal? There are three views of how and why some behaviors become illegal and considered as crimes while others remain non-criminal.

[1]. Consensus View: According to what is considered as the consensus view of crime, behaviours that become crimes are those that are essentially harmful to a majority of citizens living in society and therefore have been controlled or prohibited by the existing criminal law. Using this definition, criminal law is a set of rules, codified by state authorities that express the norms, goals, and values of the vast majority of society. The definition implies that criminal law and the crimes it defines represent the consensus of public opinion and that there is general agreement about which behaviors society needs to control and which should be beyond state regulation. The consensus view rests on the assumption that criminal law has a social control function - restraining those whose behavior would otherwise endanger the social framework by taking advantage of others’ weaknesses for their own personal gain. Criminal law applies to control behaviors that are inherently destructive and dangerous in order to maintain the existing social fabric and ensure the peaceful functioning of society. The consensus view is so named because it infers that the great majority of citizens agree that certain behaviors must be outlawed or controlled and that criminal law is designed to protect citizens from social harm.

[2]. Conflict View: According to the conflict view of crime, the ongoing class struggle between the rich and the poor, the haves and have-nots, controls the content of criminal law and thereby the definition of crime. According to this view, criminal law is created and enforced by the ruling class as a mechanism for controlling dissatisfied, have-not

members of society. The law is the instrument that enables the wealthy to maintain their position of power and control the behavior of those who oppose their ideas and values or who might rebel against the unequal distribution of wealth. Laws defining property crimes, such as larceny and burglary, are created in order to protect the wealth of the affluent. Drug laws are developed to ensure that workers will be productive, clearheaded, and sober. Laws defining violent crimes are created to keep the anger and frustrated lower classes under control. People who violated these laws are subject to severe punishments. In contrast, business and white-collar crimes receive relatively lenient punishment considering the extent of the harm and damage they cause.

[3]. Inter-actionist View: Falling between the consensus and conflict visions, the inter-actionist view of crime suggests that criminal law is structured to reflect the preference and opinion of people who hold social power in a particular legal jurisdiction. These people use their influence to impose their definition of right and wrong on the rest of the population. Crimes are outlawed behaviors simply because the law defines them as such, and not because they are inherently evil or immoral acts. So, for example, it is illegal to purchase marijuana and hashish, while liquor and cigarettes are sold openly, even though far more people die of alcoholism and smoking than from drug abuse each year. The inter-actionist view of crime is focused on the role of people who dedicate themselves to shaping the legal process. These moral entrepreneurs wage campaigns (moral crusades) to control behaviors they view as immoral and wrong (such as abortion) or, conversely, to legalize behaviors they consider harmless social eccentricities (such as smoking marijuana). The basics of these views are set out in Concept Summary as follows;

Table No.1: Concept Summary of Three Views of Crime

<table>
<thead>
<tr>
<th>Consensus View</th>
<th>Conflict View</th>
<th>Inter-actionist View</th>
</tr>
</thead>
<tbody>
<tr>
<td>• The law defines crime.</td>
<td>• The law is a tool of the ruling class.</td>
<td>• Moral entrepreneurs define crime.</td>
</tr>
<tr>
<td>• The law reflects traditional beliefs, morals, and values.</td>
<td>• Crime is a politically defined concept.</td>
<td>• The definition of crime is subjective and reflects contemporary values and morals.</td>
</tr>
<tr>
<td>• Consensus exists on what is right and wrong.</td>
<td>• “Real crimes” are not outlawed.</td>
<td>• Criminal labels are life-transforming events.</td>
</tr>
<tr>
<td>• Laws apply to all citizens equally.</td>
<td>• The law is used to control the underclass.</td>
<td></td>
</tr>
</tbody>
</table>

Though these views of Crime differ, they generally agree on four points: (1) Criminal law defined crime; (2) The definition of Crime is constantly changing and evolving; (3) Social forces mold the definition of Crimes; and (4) Criminal law has a social control function.
Therefore, as used here, the term “crime” is defined as follows:

“Crime is a violation of social rules of conduct, interpreted and expressed by a written criminal code, created by people holding social and political power. Its content may be influenced by prevailing public sentiments, historically developed moral beliefs, and the need to protect safety. Individuals who violate these rules may be subject to sanctions administered by state authority, which include social stigma and loss of status, freedom, and on occasion, their lives.” 2

Therefore, for understanding the definitions of crime, it can be divided into two kinds namely: - general definitions and various disciplinary definitions. The details of which are as follow:-

[1]. General Definitions

A precise definition of ‘crime’ is by no means an easy task. Generally speaking, almost all societies have certain norms, beliefs, customs, and traditions, which are implicitly accepted by its members as conductive to their well being and healthy development. Infringement of these cherished norms and customs is condemned as anti-social behaviour. Thus, many scholars have defined ‘crime’ as an anti-social, immoral or sinful behaviour.

Therefore, there are some scholars who have expressed their opinions with reference to the definition of the ‘Crime’, it is as followed:-

1. An integrated crime defined by Larry J. Siegal says that “Crime is a violation of social rules of behavior as interpreted and expressed by a criminal legal code created by people holding social and political power. Individuals who violated these rules are subject to sanctions by state authority, social stigma, and loss of status.” 3

2. Prof. N.V. Paranajape gives the meaning that the word ‘crime’ is derived from the Latin word ‘krimos’ which means ‘to accuse’. It covers those acts, which are against social order and deserve disapproval and condemnation of society.

3. Lining crime with morality, Garafalo, an eminent Italian criminologist observed that “Crime is an immoral and harmful act that is regarded as criminal by public opinion because it is an injury to so much of the moral sense as is possessed by a community.” 4

4. Michael and Adler highlighted the unsuccessful attempts to reach a satisfactory definition of crime. They wrote:–“Attempts have been made to define crime in moral terms and in social terms. The definition of crime as behaviour, which is immoral lacks precision and clarity. The definition of crime as anti-social behavior is hardly more precise or less

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3 Ibid., p.18.
ambiguous although it does shift the emphasis somewhat from what is thought of as the intrinsic quality of conduct to its social consequences. The most precise and least ambiguous definition of crime is that, which is prohibited by the criminal code.”

(5). Crime defined by Damayanti Doongaji says that “The violation of a right when considered in reference to the evil tendency of such violation, as regards the community at large, and in this sense, therefore, includes every act, which infringes upon the rights and privileges of the society.”

(6). Tappan had defined Crime as “An intentional act or omission in violation of criminal law committed without any defence of justification and penalizes by the law as felony or misdemeanour”.

(7). According to Kenny, “Crime are wrong whose sanction is punitive, and is in on way remissible by any private person, but it remissible by the Crown alone, if remissible at all”. But this definition has evoked criticism on the ground that there are indeed a number of compoundable offences that are remissible by the consent of the parties.

(8). Expressing his views on definition of crime, Roscoe Pund commented that: “A final definition of crime is impossible, because law is a living and changing thing, which may at one time be based on sovereign will and at another time on juristic science, which may at one time be uniform, and at another time give much room for judicial discretion, which may at one time be more specific in its prescription and at another time much more general.”

(9). Halsbury defines ‘Crime’ as “An unlawful act, which is an offence against the public and the perpetrator of that act is liable to legal punishment.”

(10). Clarence Darrow states that “A Crime is an act forbidden by the law of the land, and one which is considered sufficiently serious to warrant providing penalties for its commission. It does not necessarily follow as to which act is either good or bad; the punishment follows for the violation of the law and not necessarily for any moral transgression.”

From the foregoing definitions, it may be said that “A crime is a wrong to society involving the breach of a legal wrong, which has criminal consequences attached to it, i.e. prosecution by the State in the criminal court and the possibility of punishment being imposed on the wrongdoer.”

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[2]. The Various Disciplinary Definitions

[2.1]. Psychiatric and Psychological Definitions

Whereas legal and moral definitions concentrate on the normative aspects of crime, psychiatric and psychological definitions stress the behavioural aspect of criminal conduct and/or the characteristics of the perpetrator. The late Swedish psychiatrist/criminologist, Olof Kinberg defined crime as:

“A form of social maladjustment, which can be designated as a more or less pronounced difficulty that the individual has in reacting to the stimuli of his environment in such a way as to remain in harmony with that environment.”

Unlike legal definitions of crime, which emphasize the legal proscription and the punishment the law provides for the act, and unlike sociological definition, which stress the social harm or injury resulting from the behaviour. Kinberg defines crime by referring to the characteristic of the perpetrator. He does not refer to the act itself but to the actor. But Kinberg does not explain the difference between crime and other forms of social maladaptation or maladjustment. Is every form of social maladjustment a crime? Is every one who has difficulty in reacting adequately to the stimuli of the environment and who is unable to remain in harmony with that environment a criminal? Kinberg’s definition seems to fit mental disease more than it does to crime. Are the two identical? If not, what is the difference? Finally, the definition makes no mention of society’s reaction to the behaviour or the form such reaction takes.

As may be seen from the above, definitions of crime are varied. There is no universal or agreed upon definition. Different definition reflects the multi-disciplinary background of students of crime and suggests that the term ‘crime’ does not have a single, consistent meaning. It means different things to different people. Each scholar has his/her own conception of what crime is. For this reason, working out a generally satisfactory definition of crime is not as simple as it might appear. One wonders whether it will ever be possible to formulate a definition that integrates the various views and does not place the emphasis on any one aspect of crime to the exclusion or to the neglect of others, or whether Fritz Sack is right when he predicts that all attempts are doomed to fail. ⁹

[2.2]. Legal Definitions

There are two popular legal definitions of ‘Crime’, they are;

(1). According to the first definition, ‘Crime’ is what the law says it is. This simple but evasive definition neither enhances our knowledge nor understanding of crime. It is similar to the one some psychologists use to explain intelligence: ‘intelligence is what intelligence tests measure’; (2) the second legal definition defines ‘crime’ as ‘an act or omission punishable by law.’

The second definition has the advantage of being objective, clear, and concise. It does not suffer, from the ambiguity that characterizes most sociological definition of crime, but it raises a number of problems:

(a). If crime is simply an act or omission punishable by law, then it would be possible to pass all kinds of laws to fit what we want to call crime. Would the existence of a certain law decreeing punishment for a certain conduct automatically convert such conduct into crime? In other words, is the term ‘crime’ synonymous with the term ‘illegal act’? Is illegal behavior a crime? Does the mere prescription of penalties suffice to confer criminal character on acts otherwise not regarded as such? Could a punishable act be considered a crime if it is committed daily by a large majority of the population? For example, many traffic rules (and the rule governing the speed limit is only one example) are daily violated by a substantial number of motorists. According to the legal definition, these violations are crimes and the perpetrators are criminals.

(b). According to the legal definition, any act punishable by law is a crime. Yet there is a wide variety of behaviors of which the law prescribes some kind of penalty (a conservative estimate puts the number in Canada at 70,000 offences). Could it be said that each and every one of these prohibited, punishable behaviors is a crime?

(c). To accept the legal definition of crime, one would have to agree with authors, such as Michaela and Adler who argued that the criminal law is the ‘formal cause’ of crime and that crime could be eradicated simply by abolishing the criminal code since ‘without a criminal code there would be no crime.’ Although this argument may appear convincing, its sophistry can be easily demonstrated. Hermanus Biachi is, in my opinion, right when he argues that the objective semantic function of the term ‘crime’ is, as much as the phenomenon itself, independent of any legislative operation, that both the term and the phenomenon are evidently pre-legislative that they exist independently of, and in spite of any legislative use of the terms. Several arguments can be advanced in support of the claim
that ‘Crime’ is a pre-legislative phenomenon that exists independently of any legislative operation.

(i) Crime is a social, not a legal phenomenon. It does exist in societies that do not have formal criminal laws (written or customary) defining what acts are criminal and decreeing sanctions for such acts; (ii) The origin of crime can be traced to the origin of society, not to the origin of the criminal law. The Criminal law originated as a way of dealing with crime. Crime is not created by criminal laws; it is simply recognized by them, and it can, therefore, be defined independently of those criminal laws. Rules making certain behaviours punishable succeed rather than precede the existence of these behaviours. The criminal code designates certain acts as criminal because those acts generate a specific social reaction. The criminal law recognizes and formalizes such reaction. It would, therefore, be incorrect to claim that those acts evoke this social reaction because they are made criminal by the law. In Durkheim’s words, we must not say that an action shocks the common conscience because it is criminal, but rather that it is criminal because it shocks the common conscience. We do not reprove it because it is a crime, but it is a crime because we reproce it.\(^{10}\)

(d). The legal definition of crime does not explain why certain types of behaviour are singled out, defined as criminal, and made punishable by law while other similar or even identical forms of behaviour are left uncriminalized and consequently unpunishable. It does not explain why the same conduct may be treated as criminal for some purposes but not for others. Violent acts and aggressive behaviours are not invariably ‘criminal’ or punishable. Why is it that the criminal law punishes certain types of violence but not others? Why is it that the use of certain psychoactive drugs is legal while the use of others is forbidden, illegal, and punishable? The legal definition does not provide answer to any of these questions.

(e). If crime is simply defined as an act punishable by law, what would happen if society abandoned punishment in favour of other forms of justice? If restitution to the victim or community service orders are substituted for punishment for some offences, will these offences still fit the legal definition of crime.?\(^{11}\)

[2.3]. Sociological Definitions

Durkheim’s definition of crime according to which “An act is criminal when it offends the vigorous and well defined state of the collective conscience”\(^{12}\) is popular among sociologists. This definition may be useful in defining crime in small, harmonious, and homogeneous societies, but is less suitable when the task is to define crime in large, pluralistic, multicultural, and heterogeneous societies. In small, not-state societies it may be

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possible to discern a state of ‘collective conscience’ and to detect a fair degree of ‘consensus’ regarding social norms and values. This is impossible, however, in complex industrial societies, characterized as they usually are by heterogeneity and cultural diversity. In such societies, very few acts would shock the collectivity or the whole community. An act may be offensive to a certain social group but quite acceptable to another; it may be shocking to a certain class but tolerated by another. This lack of consensus and this absence of agreement regarding basic values and norms, can easily be seen in controversies surrounding acts that put an end to human life (euthanasia, assisted suicide, etc.) or acts involving sex (incest, homosexuality, prostitution) or morality (gambling, drug addiction, pornography). Many other sociologists have attempted to formulate a definition of crime. In his book entitled Criminology, Maurice Parmelee suggests that “A crime is usually an anti-social act of such a nature that its repression is necessary or is supposed to be necessary to the preservation of the existing system of society.”

Although this statement contains elements not found in other definition, it still raises some questions. What is an anti-social act? According to what criteria may an act be considered anti-social? Why is it that criminal law punishes many acts that cannot be regard as anti-social? Sociological definitions that define crime as ‘socially harmful act’ or as a ‘socially injurious act’ share many of the problems of Parmelee’s definition. What are the characteristics of a socially harmful or a socially injurious act? Why is it that certain acts that are not socially harmful are punishable (for example abortion in an overpopulated society) while others that are harmful are left unsuitable. The notion of harm is essentially relative. An act maybe harmful to some social group but useful to another. Theft is harmful to those who have, but it does not harm the have-nots. Some economists consider certain property offences where the goods are not destroyed but simply change hands as economically useful since they lead to a more equitable distribution of goods and/or an increase in the economic value of certain wares.

Conflict theorists maintain that the various segments of society do not share common interests and that the interests of different groups are quite often in conflict. They claim, therefore, that the criminal law is likely to protect the interests of the powerful groups and to define as crimes those acts that are harmful to the interest of those groups. The social history

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15 Ezzat A. Fattah, Loc.Cit., p.36.
of the criminalization of vagrancy and mendacity shows that laws against vagabonds and beggars were passed in the 16th century Europe to protect the interests of capital suffering from labour shortages caused by the Black Death. According to Reed, the suppression of birth control information in the United States in the late 19th and early 20th centuries through federal and state legislation was the result of the fear of American men that middle class women would become dissatisfied with their traditional role as well as their concern about the high fertility of the foreign born in comparison with those from genteel backgrounds.16

[2.4]. Political Definitions

Several political considerations intervene in the process of defining certain acts as criminal. The political dimension in making certain behaviours illegal and punishable has been forcefully stressed in recent years by radical and critical criminology (Quinney, Chammliss, Taylor, Walton, and Young, among others) who regard the criminal law as an instrument of social control in the hands of powerful interest groups. Radical criminologists argue that defining a particular behaviour as criminal is invariably an act of authority by people or groups who have the power or the means to use the law to protect their own interests and to impose their own values, ideas or beliefs on society as whole.

In their view, there exists in every society powerful pressure groups, groups of ‘elites,’ or ‘moral’ entrepreneurs’, as Howard Becker prefers to call them, who use their own value system, their own social and economic interests, to define what should and what should not be punishable.17

[2.5]. Definition of Crime according to Modern Indian Penal Law

No doubt even the Indian Penal Code does not define a crime or an offence, and section 40 merely states that it is either a thing punishable by the same Code, or under any special or local law, but section 2(n) of the Code of Criminal procedure defines an offence as meaning any act or omission made punishable by any law for the time being in force. Thus, the emphasis has now shifted from the fact that is an evil against society to what is actually punishable as such. For example, attempting to take one’s own life may not be strictly speaking an evil violating any right of the society, but it has become a crime as it is punishable as such.18

16 Ibid., pp.35-36.
17 Ibid., pp.34-35.
[2.6]. Dharmasastras 19 Definition of Crime

So far as ancients Indians are concerned it is interesting to observe that for them crime is principally meant an evil act done with a certain amount of daring. The criminal was said to be a person who without minding the physical or the spiritual effects of his acts was prompted by the sheer spirit of violence and openly engaged himself in causing suffering to others by his acts, such as theft, hurt, adultery, etc. From them also offences against the King were the most serious, particularly joining hands with the enemy, and they also punished severely those who violated a trust, for example, violating a Guru’s bed. Such offences could be compared with treason and felony, and in the later class would come particularly those for which forfeiture of property has been prescribed. The rest of the offences punishable with fine or imprisonment can be said to be similar to misdemeanours. Consequently, though there is no classification as such, it can be said that from the very inception of Criminal law, punishments, varied according to whether an offence was against the King or the ruling authority, or against a person to whom the offender owed duty or allegiance, or amounted to only misdemeanours. Thus, a failure or refusal on the part of an individual or a group to live upto the standard of conduct deemed binding by the rest of the community, or any action in contravention of positive law (Dharma) constituted a crime in Dharmasastras. The Dharmasastras laid down the cultural rites to be observed and observance of the same helped to transform a person from the lower to the higher standard of conduct. Non-observance thereof degraded him, and he becomes a sinner and a criminal. Ancient Indians laid particular emphasis in this way on the observance of certain modes of life for the system that can regulate the functioning of the community. They devised the privileges, duties, right and obligations of men, his standard of conduct as a member of the Aryan community, as a member of one of the castes, and as a person in a particular stage of life. This they called Dharma. 20

19 Dharmasastras are the Sanskrit texts which deal with the customs, practices, ethical conduct and laws of Hindus. The term Dharma Shastra is sometime taken to include all texts dealing with Hindu law, but it also refers to specific set of texts, probably composed from the second century onwards, which expand on the Dharma Sutra. The Dharma Shastras form part of Smriti or ‘remembered’ literature, rather than the more sacred Shruti or divinely revealed literature, such as the Vedas. The Manava Dharma Shastra (of Manu), also known as the Manu Smriti, is the earliest, while those of Yajnavalkya, Vishnu and Narada are probably from the third to fifth centuries. There are several other Dharma Shastras, including those of Atri, Apastamba, Angiras, Brihaspati, Daksha, Pulasta and Vyasa, some dating to medieval times. Commentates on these, such as the Dayabhaga and Mitakshara, are additional sources for customary Hindu law.: Quoted in Roshen Dalal, The Penguin Dictionary of Religion in India, New Delhi: Penguin Reference, 2006, p.131.

20 Quoted in Damayantti Doongaji, Op.Cit, pp.2-3
2.1.2. Conceptual Paradigms of Crime

[1]. Early Concept of Crime: Historically, the concept of crime seems to have always been changing with the variations in social conditions during the evolutionary stages of human society. This can be illustrated by the fact that early English society during 12th and 13th centuries included only those acts as crimes, which were committed against the State or religion. Thus, treason, rape and blasphemy were treated as crime whereas murder was not crime.21 Another characteristic feature of this period (1000 to 1200 C.E.) in the history of crime was the preponderance of the system of ordeals by fire or by water to establish the guilt or innocence of the accused. This was perhaps due to the dominance of religion in early days and superstitions of the people who believed that their social relations were governed by some supernatural power, which they regarded omnipotent.22

According to Ancient Indians, the concepts of crime appear to be very old. At least during that time history has any reliable record though, it is mentioned as prevailing in society. Even in the Vedas there is a reference to cattle-lifting, drinking, gambling and other offences. After all, crime is a sin against society, which is punished by the authority administering law. It is but natural, therefore, that as society becomes more and more complex, crime takes numerous forms. Thus, before a bicycle was invented there was no crime of riding it without a light after dark. It is necessary to note this because it explains two important factors. Firstly, the ancients merely described the various crimes because they were so few that they covered the whole range of crime. Secondly, they made no distinction between crime, torts, and breach of contract because every default causing harm to another was treated as a crime.23

According to Dharmasastra writers, ordeal was a living institution in India. Epigraphic and legal records show that ordeal was practiced strictly according to the Dharmasastra rules since times immemorial in the Indian history. Ancient writers have referred to the ordeals as divine methods with various names, such as Samayakriya, Sapatha, Divya, or Pariksa. Ordeals were treated as a divine means of proof about guilt or innocence of the accused. The two important aspects of ordeals were: (1) they indicated the divine aspect of trial, and (ii) the basic idea underlying this method of trial was the need of divine intervention at a crucial moment in dispensing justice. Thus, ordeal was an antique

22 Ibid., p.2.
institution, a deep rooted custom, practiced by the people in ancient India. *Yajnavalkya* mentions five kinds of ordeals: Balance, Fire, Water, Poison, and Kosa.²⁴

[2]. Eighteenth and Nineteenth Century: In European countries particularly in France and Italy, the period of eighteenth century witnessed an era of miraculous reorientation in criminological thinking. The earlier emphasis on crime, the idea that crime was the result of divine displeasure, the superstitions and myths were all abandoned and the study of crime and criminal was started afresh on a scientific basis. It was firmly established that no one else than the offender himself could be attributed criminal responsibility for his crime and the external agencies had nothing to do with it. Thus, it would be seen that the concept of crime is closely related to social policy of a given time. With changes in ideologies the concept of crime also changes. That is to say, certain new crimes spring up whereas some existing crimes become obsolete and, therefore, they are deleted through adequate changes in the criminal law.

[3]. Twentieth Century: Twenty-first century’s Hi-tech world and use of computer network has given rise to cyber crimes and sundry other computer related unlawful activities. Cyber crimes are harmful acts committed for or against a computer or against information on computer network. These crimes differ from most terrestrial crimes in four ways. Firstly, it is easy to learn how to commit them, secondly, they hardly requires and resources, thirdly, they can be committed in a jurisdiction without being physically present in it, and fourthly, they are often not clearly illegal. Undeterred by the prospect of arrest or prosecution, the cyber criminals operate around the computer network and thus are a menace to e-mail or e-commerce users. These cyber crimes cover a wide range of illegal activities, which includes frauds, hackers, viruses, pornography, harassment, stalking, data-dodging, etc. These offences call for need to recognize the fact that criminal law must continue to evolve if it is to address itself adequately to new developments in information technology. Because of the cyber crime having international potential, there is need for an effective anti cyber space international law for preventing cyber crimes. These developments necessitate a fresh approach to crimes and criminals so as to cope with the new situations and keep crimes well within control.²⁵

The definition of crime has been stated as an anti-social, immoral or sinful behaviour, which is contrary to the cherished norms, beliefs, customs and traditions of given society. According to another school of thought, crime is an act to which a particular social group regards as sufficiently menacing to its fundamental interests to justify formal reaction to

restrain the violation. As the function of criminal law is to reprimand the offender and prevent the incidence of crime, it becomes necessary to investigate into the nature of crime. Broadly speaking, every criminal behaviour must respond to the following tests in order to be reckoned as crime:— (1) There should be an external act (actus); (2) it should be done with some criminal intent (mens rea); (3) it should be a prohibited conduct under the existing law, and (4) it should carry with it some kind of punishment.26

2.1.3. Elements of Crime

A criminal offence generally consists of two elements, i.e., the mental and physical elements. A certain mental state, viz intention, knowledge, negligence or rashness is ordinarily for committing a legally forbidden act. The requisite mental and physical conditions are expressed by the term mens rea and actus reus respectively. Since both the components are generally necessary for the commission of a crime, it is said that no crime is committed unless there is concurrence of guilt act with a guilty mind. The common law maxim actus not facit reu nisi mens sit rea conveys that same principle.27

2.1.4. Theoretical Paradigms of Crime Causation28

There are probably so many views of crime causation because there are so many types of crime. It is possible that all explanations are partially correct: some people commit crime because they are poorly socialized; some succumb to the obstacles placed in their path by life of poverty; others have psychological or biological problems; some are victims of class conflict. The various concepts of crime theory are summarized below, see table No.2

Table No.2: Concepts and Theories of Criminology: A Review

<table>
<thead>
<tr>
<th>Theory</th>
<th>Major Premise</th>
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<tbody>
<tr>
<td>Choice Theory</td>
<td>People commit crime when they perceive that the benefits of law violation outweigh the threat and pain of punishment.</td>
</tr>
<tr>
<td>1. Biosocial Theory</td>
<td></td>
</tr>
<tr>
<td>1.1. Biochemical</td>
<td>Crime, especially violence, is a function of diet, vitamin intake, hormonal imbalance, or food allergies.</td>
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<tr>
<td>1.2. Neurological</td>
<td>Criminals and delinquents often suffer brain impairment. Attention deficit disorder and minimum brain dysfunction are related to antisocial behaviour.</td>
</tr>
<tr>
<td>1.3. Genetic</td>
<td>Delinquent traits and predispositions are inherited. The criminality of parents can predict the delinquency of children.</td>
</tr>
<tr>
<td>2. Psychological Theory</td>
<td></td>
</tr>
<tr>
<td>2.1. Psychoanalytic</td>
<td>The development of personality early in childhood influences behaviour for the rest of a person’s life. Criminals have weak egos and damaged personalities.</td>
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26 Ibid., p.23.
2.2. Social learning  
People commit crime when they model their behaviour after others whom they see being rewarded and extinguished by punishment.

3. Social Structure Theory  
3.1. Social Disorganization  
The conflicts and problems of urban social life and communities control the crime rate. Crime is a product of transitional neighbourhoods that manifest social disorganization and value conflict.

3.2. Strain  
People who adopt the goal of society but lack the means to attain them seek alternatives, such as crime.

3.3. Cultural deviance  
Blends strain and disorganization. In disorganized areas, residents perceive strain because they are cut off from middleclass opportunities. They form a unique deviant subculture with it own values and belief.

4. Social Process Theory  
4.1. Learning theory  
People learn to commit crime from exposure to antisocial behaviours. Criminal behaviour depends on the person’s experiences with rewards for conventional behaviours and punishments for deviant ones. Being rewarded for deviance leads to crime.

4.2. Social Control theory  
A person’s bond to society prevents him or her from violating social rules. If the bond weakens, the person is free to commit crime.

5. Conflict Theory  
5.1 Conflict theory  
People commit the crime when the law, controlled by the rich and powerful, defines their behaviour as illegal. The immoral actions of the powerful go unpunished.

5.2 Radical feminist theory  
The capitalist system creates patriarchy, which oppresses women. Male dominance expands genders bias, violence against women, and repression.

6. Development Theory  
6.1 Development theory  
Early in life people begin relationships that determine their behaviour through their life course. Life transitions control the probability of offending.

2.1.5. Characteristic Paradigms of Crime

There are certain characteristics of a crime, which makes an unlawful act or omission of punishable under the law of the land. The main characteristics of crime are as follows:-

(1). External consequences: Crimes always have a harmful impact on society; may it be social, personal, emotional or mental.

(2). Act (Actus Reus): There should be an act or omission to constitute a crime. Intention or mens rea alone shall not constitute a crime unless it is followed by some external or overt act. Generally, omitting to do something will not amount to actus reus of an offence. The criminal law usually punishes individuals for positive conduct and not for inaction. There are, however, some notable exceptions. For example, a police officer may have a duty to act to prevent an assault and if he does not, he will be liable to be punished under the law.
(3). Mens-rea or guilty mind: Mens-rea is one of the essential ingredients of a crime. It may, however, be direct or implied. The implied mens-rea is otherwise term as constructive mens-rea. Mens rea implies that there must be a state of mind with respect to an actus reus, that is, an intention to act in the proscribed fashion. It is, however, important to distinguish mens rea from motive. Thus, if a person steals away a few loaves of bread from someone’s kitchen to feed a child who is dying of hunger, the motive here may be honorable and understandable, nevertheless the mens rea being to commit the theft, the person would be convicted for theft. His motive may, however, be taken into account in sentencing and he may be less severely punished because of his good motive. In short, motive should be taken into consideration at the sentencing stage and not at the time of deciding the question of mens rea.

(4). Prohibited act: The act should be prohibited or forbidden under the existing penal law. An act, howsoever immoral shall not be an offence unless it is prohibited by law of the land.

(5). Punishment: The act in order to constitute a crime should not only be prohibited by the law but should also be punishable by the State. The punishment is usually set out in terms of a maximum and the actual punishment in any particular case is left to the discretion of the judge. Both, the defence and the prosecution have a right to appeal against the quantum of sentence.  

2.1.6. Classification of Crimes

The existence of crime in a society is a challenge to its members due to its deleterious effect on the ordered social growth. In fact, it leads to a colossal waste of human energy and an enormous economic loss. Therefore, with the advance in the field of criminology and behavioural sciences, efforts are being constantly made to work out a commonly acceptable classification of crimes and criminals for providing a rational basis of punishment for various categories of offenders.  

According to the Hate Crime Statistics Program of the Federal Bureau of Investigation FBI’s Uniforms Crime Reporting (UCR), under the Department of Justice, United State of America, it classified the incidents, offenses, victims, and known Offenders into two main types, namely:-

(1). First types: Bias Motivation, it is divided into two sub-types are; (1.1) single-bias incidents namely; (a) Racial, such as anti-white, anti-black, anti-American Indian/Alaskan

30 Ibid., p.7.
native, anti-Asian/Pacific Islander; (b) Religious, such as anti-Jewish, anti-Catholic, anti-Protestant, anti-Islamic, anti-Other religion, anti-Multiple Religions, group, anti-Atheism, Agnosticism/etc.; (c) Sexual Orientation, such as anti-Male Homosexual, anti-Female Homosexual, anti-Homosexual, anti-Heterosexual, anti-Bisexual; (d) Ethnicity/National Origin, such as anti-Hispanic, anti-Other Ethnicity/National Origin; (e) Disability, such as anti-Physical, anti-Mental; (1.2) Multiple-Bias Incidents.

(2). Second types: it is divided into three sub-types are; (2.1) Crime against person, such as murder and non-negligent manslaughter, forcible rape, aggravates assault, simple assault, intimidation, other; (2.2) Crime against property, such as robbery, burglary, larceny-theft, motor vehicle theft, arson, destruction/damage/vandalism other; and (2.3) Crime against society.

While the National Crime Records Bureau (NCRB) under the Ministry of Home Affairs, Government of India,\textsuperscript{32} which is engaged in collection and disseminating information relating to crime, has classified the types of crime under the Indian Penal Code (IPC) into ten types namely; (1) Violent crime, such as murder, attempt to commit murder, culpable homicide not amounting to murder, rape, kidnapping & abduction, dacoity, preparation & assembly for dacoity, robbery riots, arson, and dowry deaths; (2) crime against women (IPC+SLL), such as kidnapping & abduction of women & girls, molestation, sexual harassment, cruelty by husband and relatives, importation of girls; (3) economic crime, such as criminal breach of trust, cheating, counterfeiting; (4) property crimes, such as burglary, theft; (5) crime against SCs; (6) Crime against Sts; (7) Crime against Children; (8) Cognizable crime under IPC; (9) Cognizable crime under SLL; and (10) Cognizable crime under IPC+SLL.

Under the Indian Penal Code, various offences have been classified into seven broad categories on statistical basis. They are :- (1) Offences against person; (2) Offences against property; (3) Offences relating to documents; (4) Offences affecting mental order; (5) Offences against public tranquillity; (6) Offences against State; and (7) Offences relating to public servants. This classification seems to be more rational and elaborate from the point of view of administration of criminal law and penal justice.\textsuperscript{33}

2.1.7. Crime Statistics

Crime statistics are the indices of intensity of crimes recorded annually in a particular country, region or place. It reflects upon the ascending or descending trends in crime and

\textsuperscript{32} www.ncrb.inc.in, accessed on September 9, 2012.
also gives information as to how new forms of crime are emerging and the old ones are disappearing or assuming new dimensions. Thus, crimes statistics are indicative of the general moral-tune of a given society and throw light on the general efficacy of police, prosecuting agencies and law courts. Therefore, the role of crime statistics in analysing causation of crime and devising measures to combat criminality need not be over-emphasised. The statistics of crime help the law enforcement agencies to spot out the preponderance of crime at a particular time, place and region.34

For instance, the crime statistics in U.S.A. and India, from 2006-2010 is given in appendices No. 1a, and 1b at Pages No.407-410.

2.2. Section II: Punishment

2.2.1 The Meaning and Definitions of Punishment from Various Disciplines

Etymology: The word is the abstract substantiation of the verb to punish, which is recorded in English since 1340, deriving from Old French puniss-, an extended form of the stem of punir “to punish,” from Latin punire “Inflict a penalty on, cause pain for some offense,” earlier poenire, from poena “Penalty, punishment of great loss”. Latin “Punier” possibly was inspired by the Phoenician way to execute by means of crucifixion. Therefore the Carthagian crosses were called “signae poenae” - “Signs of the Phoenicians”. Colloquial use of to punishment “to inflict heavy damage or loss” is first recorded in 1801, originally in boxing; for punishing as “hard-hitting” from 1811.35

To understand the definitions of punishment, it can be divide into two kinds definitions namely:- general definitions and various disciplinary definitions. The details of which are as follow:-

[1]. General Definitions: Punishment has been defined by various social thinkers in various ways. Given below are the definitions of punishment of various social thinkers they are;

(1). According to Hart, the “Standard or central case of “punishment” is defined in terms of five elements: (a) it must involve pain or other consequences normally considered unpleasant; (b) it must be for an offence against legal rules; (c) it must be of actual or supposed offender for his offence; (d) it must be intentionally administered by human

34 Ibid., p.203.
beings other than the offender; and (e) it must be imposed and administered by an authority constituted by a legal system against which the offences are committed.”

(2). According to Caldwell, “Punishment is an art, which involves the balancing or retribution, deterrence and reformation in terms not only of the Court but also of the values in which it takes place and in the balancing of these purposes of punishment, first one and then the other received emphasis as the accompanying conditions change.”

(3). Dr. P.K. Sen asserted that “Punishment has radically changed inasmuch as it is no longer regarded as a reaction of the aggrieved party against the wrong-doer but has become an instrument of social defense for the protection of society against crime.”

From the definitions given above, it is more than evident that punishment is a way of checking deviant behaviour leading to disorganization of the society and so punishment exercises control over those who try to disturb the homogeneity. It is also used as a method of checking crime. Punishment is an effective agency of social control.

[2]. The Various Disciplinary Definitions

[2.1]. Legal Definition: The most common applications are in legal and similarly ‘regulated’ context, beginning with the infliction of some kind of pain or loss upon a person from a misdeed, i.e. for transgressing a law or command (including prohibitions) given by some authority (such as an educator, employer or supervisor, public or private official).

[2.2]. Psychological Definition: Introduced by B.F. Skinner, punishment has a more restrictive and technical definition. Along with reinforcement it belongs under the Operant Conditions category. Operant Conditioning refers to learning with either punishment or reinforcement. It is also referred to as response-stimulus conditioning. In psychology, punishment is the reduction of a behavior via a stimulus which is applied (“positive punishment”) or removed (“negative punishment”). Making an offending student lose recess or play privileges are examples of negative punishment, while extra chores or spanking are example of positive punishment. The definition requires that punishment is only determined after the fact by the reduction in behavior, if the offending behavior of the subject does not decrease then it is not considered punishment. There is some conflation of punishment and

38 Ibid.
aversion, though an aversion that does not improve behavior, it is not considered punishment.

[2.3]. Philosophical Definition: In common usage, the word “punishment” might be described an “An authorized imposition of deprivation – of freedom of privacy or other goods to which the person otherwise has a right, or the imposition of special burdens- because the person has been found guilty of some criminal violation, typically (though not invariably) involving harm to the innocent.” According to Stanford Encyclopedia of Philosophy, Augustine confesses, every inordinate act carries its own punishment.

[2.4]. Socio-biological Definition: Punishment is sometimes called retaliatory or moralistic aggression; it has been observed in all species of social animals, leading evolutionary biologists to conclude that it is an evolutionarily stable strategy, selected because it favors cooperative behaviour.

[2.5]. Dharmashastra’s Definition: It must be stated that even the Hindu Shastras have emphasized on King’s power to punish the law-breaker and protect the law-abider. According to Manu, King was Daṇḍa Chhatra Dhari i.e., holder of Daṇḍa (Punishment) and Chhatra (Protector). According to Gauthama the word Daṇḍa meant restrains. Vasista Samhita also upheld King’s power to punish and destroy the wicked and the evil. But “Punishment must be awarded after due consideration of place, time, age, learning of the parties and the seat of injury”. For Manu, Daṇḍa i.e., punishment was the essential characteristic of law. He justified punishment because it keeps people under control and protects them. To quote him, “Punishment remains awake when people are asleep, so the wise have recognized punishment itself as a form of Dhamma”. Punishment maintains law and order, it protects person and property. The fear of punishment it an essential attribute of judicial phenomena. Offenders refrain from wrongdoing for fear of punishment and, therefore, punishment and law are inseparable.

2.2.2. The History of Punishment

In ancient time, in Europe, as also in India, punishments were very severe and they were meant nothing more than the bond necessary for keeping the interest of individuals united and that punishment which exceeded the necessity for preserving that bond were in

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40 Ibid.
41 Ibid.
42 Ibid.
their nature unjust. It would be interesting to note that as far as European systems are concerned, until quite late in the Christian era, the punishment for crime was either death or the infliction of the bodily pain.\textsuperscript{44}

The study of the history of origin of the punishment would remain incomplete provided we study the development of the concept of punishment in the Indian historical background. The concept of Daṇḍa derived from the root Dam (to restrain) itself infer to punishment in the ancient criminal system in India. It was of great social significance in the sense that it removed the guilt, signifying in the sense that it remove misdeed and freed the delinquent from the wrong he had committed. Law givers have spoken in favour of just punishment. Kamandaka repeated the idea of Manu and Kautilya when he said that Daṇḍa should neither be too severe nor too mild but be just in accordance with the offences committed. Nalimata Puranā echo the same idea.\textsuperscript{45}

Larry J. Siegel stays that Historically, people who violated the law were considered morally corrupt and in need of strong discipline. If punishment was harsh enough, it was assumed, they would never repeat their mistakes. Punishment was also viewed as a spectacle that taught a moral lesson. The more gruesome and public the sentence, the greater the impact it would have on the local populace. Harsh physical punishment would control any thoughts of rebellion and dissent against the central government and those who held political and economic control. During the Middle Ages, the philosophy of punishment was to “torment the body for the sins of the soul.” People found guilty of crime faces a wide range of punishment, including physical torture, branding, whipping, and for most felony offence, death. Such barbaric use of state power is, of course, not tolerated in the United State today.

Thus, the punishment of criminals has changed considerably through the ages, reflecting custom, economic condition, and religious and political ideas.\textsuperscript{46}

2.2.3. Justification of Punishment

It is argued on the basis of ‘social contrast’, which creates a ‘give and take’ situation. To enjoy individual rights and benefits, it is only reasonable and inevitable that individuals curtail their freedom vis-à-vis others and in the event of their failure to do so, punishment must be inflicted on them. The rationalization of punishment may be divided into two

\textsuperscript{45} Ibid., pp.37-38.
classes, based on retributive and utilitarian theories. While the retributionists assert that the infliction of punishment is justified in itself since offenders should be given their just deserts, the utilitarian regarded punishment as an evil which should be used only if it serves some real purpose like deterrence from commission of crime.\textsuperscript{47}

Further, according to N.V. Paranjapee, there are valid reasons for justification of punishment to offenders who are convicted for an offence. They are briefly stated as follows:-

(1). \textbf{Deterrence}: Punishment dissuades a person from a future wrong doing by making punishment severe enough so that the benefit or pleasure derived from the offence is outweighed by the pain and probability of punishment.

(2). \textbf{Incapacitation}: Incarceration has the effect of confining the prisoner and physically incapacitating him from committing a crime. The most dangerous criminals may be sentenced to imprisonment for life or even a sentence of death may be invoked for heinous and brutal crime such as murder etc.

(3). \textbf{Restoration}: For some minor offences punishment may be in the form of restoration, such as fines or payment of compensation to the victims of crime or his/her relatives or families.

(4). \textbf{Rehabilitation}: Some punishments are directed to reform the offender and ensure his rehabilitation as a law abiding citizen. It aims at bringing about a change in the offender’s attitude to make him socially acceptable.\textsuperscript{48}

\subsection*{2.2.4. Conceptual Paradigms of Punishment}

Sir Walter Moberly, while accepting the definition of punishment as given by Grotious, suggest that punishment presuppose that:- (1) what is inflicted is an ill, that is something unpleasant; (2) it is a sequel to some act, which is disapproved by authority; (3) there is some correspondence between the punishment and the act, which has evoked it; (4) punishment is inflicted, that it is imposed by someone’s voluntary act; and (5) punishment is inflicted upon the criminal, or upon someone who is supposed to be answerable for him and for his wrong doings.\textsuperscript{49}

2.2.5. Purposes of Punishment

In the early Vedic era, it was believed that punishment frees the delinquent from the wrong he had committed. The objective behind the punishment was to check criminal behaviour against the society and to cure unrighteousness and to preserve righteousness unhindered. However, emphasis was laid on the punishment having accord with the gravity of the crime. The nature of the offence, its time and place and ability, motive of the offender were considered vitally necessary for inflicting punishment.\(^\text{50}\)

Therefore, there are many possible reasons that might be given to justify or explain why someone ought to be punished; here follows a broad outline of typical, possibly contradictory justifications.

[1]. **Rehabilitation**: some punishment includes work to reform and rehabilitate the wrongdoer so that they will not commit the offense again. This is distinguished from deterrence, in that the goal here is to change the offender's attitude to what they have done, and make them realize that their behavior was wrong.

[2]. **Incapacitation/societal protection**: incapacitation is a justification of punishment that refers to when the offender’s ability to commit further offenses is removed. This is a forward-looking justification of punishment that views the future reductions in re-offending as sufficient justification for the punishment. This can occur in one or two ways; the offender’s ability to commit crime can be physically removed, or the offender can be geographically removed.

[3]. **Deterrence/prevention**: to act as a measure of prevention to those who are contemplating criminal activity.

[4]. **Restoration**: for minor offences, punishment may take the form of the offender “righting the wrong”; for example, a vandal might be made to clean up the mess he/she has made. In more serious cases, punishment in the form of fines and compensation payments may also be considered a sort of “restoration”.

[5]. **Retribution**: retribution is the practice of “getting even” with a wrongdoer - the suffering of the wrongdoer is seen as good in itself, even if it has no other benefits. One reason for modern centrally-organized societies to include this judicial element is to diminish the perceived need for “street justice”, blood feud and vigilantism. However, some argue that this is a “zero-sum game” that such acts of street justice and blood revenge are not

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removed from society, but responsibility for carrying them out is merely transferred to the state.

[6]. **Education:** from German Criminal Law, punishment can be explained by positive prevention theory to use criminal justice system to teach people what are the social norms for what is correct and acts as a reinforcement. It teaches people to obey the law and eliminates the free-rider principle of people not obeying the law getting away with it.

[7]. **Denunciation/condemnation:** Punishment can serve as a means for society to publicly express condemnation of a crime. This serves the dual function of curbing public anger away from vigilante justice, while concurrently stigmatizing the condemned in an effort to deter future criminal activity. This is also known as the “Expressive Theory.” 51

2.2.6. **Elements of Punishment**

The elements of punishment as given by Benn and Flew, which say that: - (1) punishment must involved pain and its consequences must normally be considered unpleasant; (2) it must be for any legal wrong; (3) it must be given to the actual offender who has committed the offences; and the pain must be inflicted by the authority which has been constituted by the legal system. 52

2.2.7. **Theoretical Paradigms of Punishment**

To punish criminals is a recognized function of all civilized States for centuries. But with the changing patterns of modern societies, the approach of penologists towards punishment has also undergone a radical change. The penologists today are concerned with crucial problem as to the end of punishment and its place in penal policy. Though opinions have always differed as regard punishment of offenders varying from age-old traditionalism to recent modernism, broadly speaking four types of views can be distinctly found to prevail. Modern penologists prefer to call them ‘theories of punishment’, which are as follows:-

[1]. **Deterrence Theory**

Earlier modes of punishment were, by and large, deterrent in nature. This kind of punishment presupposes infliction of severe penalties on offenders with a view to deterring them from committing crime. It is the fulfillment of one’s vengeance that underlies every criminal act. The deterrent theory also seeks to create some kind of fear in the mind of others.

by providing adequate penalty and exemplary punishment to offenders which keeps them away from criminality. Thus, the rigour of penal discipline serves as a sufficient warning to offenders as well as for others also. Therefore, deterrence is undoubtedly one of the effective policies, which almost every penal system accepts despite the fact that it invariably fails in its practical application. Deterrence, as a measure of punishment particularly fails in case of hardened criminals because the severity of punishment hardly has any effect on them. It also fails to deter ordinary criminals because many crimes are committed in a spur of moment is evinced from the fact that quite a large number of hardened criminals return to prison soon after their release. They prefer to remain in prison rather than leading a free life in society. Thus the object underlying deterrent punishment is unquestionably defeated. This view finds support from the fact that when capital punishment was being publicly awarded by hanging the person to death in public places, many persons committed crimes of pick-pocketing, thief assault or even murder in the those men-packed gatherings despite the ghastly scene.

Suffice it to say that the doctrine concerning deterrent punishment has been closely associated with the primitive theories of crime and criminal responsibility. In earlier times, crime was attributed to the influence of ‘evil sprit’ or ‘free-will’ or the offender. So the society preferred severe and deterrent punishment for the offender for his act of voluntary perversity which was believed to be a challenge to God or religion. The punishment was to be a terror to evil-doers and an awful warning to all other who might be tempted to imitate them.

[2]. Retributive Theory

While deterrent theory considered punishment as a means of attaining social security, the retributive theory treated it as an end in itself. It was essentially based on retributive justice, which suggests that evil should be returned for evil without any regard to consequences. The supporters of this view did not treat punishment as an instrument for securing public welfare. The theory, therefore, underlined the idea of vengeance or revenge. Thus, the pain to be inflicted on the offender by way of punishment was to outweigh the pleasure derived by him from the crime. In other words, retributive theory suggested that punishment is an expression of society’s disapprobation for offender's criminal act. As rightly observed by Sir Walter Moberly, the theory of retribution is based on the view that punishment is a particular application of the general principle of justice, that men should be given their due. Punishment serves to express and to satisfy the righteous indignation, which a healthy minded community regards transgression. As such, it is sometimes an end in itself.
It must be stated that the theory of retribution has its origin in the crude animal instinct of individual or group to retaliate when hurt. The modern view, however, does not favour this contention because it is neither wise nor desirable. On the contrary, it is generally condemned as vindictive approach to the offender. Retributive theory is closely associated with the notion of expiation, which means blotting out the guilt by suffering an appropriate punishment. It is this consideration, which underlies the mathematical equation of crime, namely, guilt plus punishment is equal to innocence. Most penologists refuse to subscribe to the contention that offenders should be punished with a view to making them pay their dues. The reason being that no sooner an offender completes his term of sentence, he thinks that his guilt is washed off and he is free to indulge in criminality again.

[3]. Preventive Theory

Preventive philosophy of punishment is based on the proposition ‘not to avenge crime but to prevent it’. It presupposes that need for punishment of crime arises simply itself against anti-social acts, which endanger social order in general or person or property of its members. In order to present preventive theory in its accurate form, it would be worthwhile to quote Fichte who observed, “The end of all penal laws is that they are not to be applied”. Giving an illustration he continued, “When a land owner puts up a notice ‘trespassers will be prosecuted’; he does not want an actual trespasser and to have the trouble and expense of setting the law in motion against him. He hopes that the threat will render any such action unnecessary, his aim is not to punish trespasser but to prevent it. If trespass still takes place, he undertakes prosecution. Thus, the instrument or deterrence which he devised originally consisted in the general threat and not in particular convictions”. The real object of the penal law therefore, is to make the threat generally known rather than putting it occasionally into execution. This indeed makes the preventive theory realistic and humane. It is effective for discouraging anti-social conduct and a better alternative to deterrence or retribution, which now stand rejected as methods of dealing with crime and criminals.

In England, Utilitarian like Bentham, Stuart Mill and Austin supported preventive theory because of its humanizing influence on criminal law. They asserted that it is the certainty of law and not its severity, which has a real effect on offenders. As an off-shoot of preventive view regarding crime and criminals, the development of prison institution gained momentum. The preventive theory seeks to prevent the recurrence of crime by incapacitating the offenders. It suggests that putting in prisons is the best mode of crime prevention as it seeks to eliminate offenders from society thus disabling them from repeating crime. The
supporters of preventive philosophy recognize imprisonment as the best mode of punishment because it served as an effective deterrent and a useful preventive measure. It pre-supposes some kind of physical restraint on offenders. According to the supporters of this theory, murderers are hanged not merely to deter other form meeting similar end, but to eliminate such dreadful offenders from society.

[4]. Reformatory Theory

With the passage of time, development in the field of criminal science brought about a radical change in criminological thinking. There was a fresh approach to the problem of crime and criminals. Individualized treatment became the cardinal principle for reformation of offenders. This view found expression in the reformatory theory of punishment. As against deterrent, retributive and preventive justice, the reformatory approach to punishment seeks to bring about a change in the attitude of offender so as to rehabilitate him as a law abiding member of society. Thus, punishment is used as a measure to reclaim the offender and not to torture or harass him. Reformatory theory condemns all kinds of corporal punishments.

The major emphasis of the reformist movement is rehabilitation of inmates in correctional institution, which have either maximum or minimum security arrangements. The reformists advocate human treatment or minimum security arrangements. The reformists advocate human treatment of inmates inside the prison institutions. They also suggest that prisoners should be properly trained to adjust themselves to free life in society after their release from the institution. The agencies such as parole and probation are recommended as the best measure to reclaim offenders to society as reformed persons. The reformatory view of penology suggests that punishment is only justifiable if it look to the future and not to the past. “It should not be regarded as settling an old account but rather as opening a new one”. Thus, the supporters of this view justify putting in prisons not solely for the purpose of isolating criminals and eliminating them from society but to bring about a change in their mental outlook through effective measures of reformation during the term of their sentence.

Undoubtedly, modern penologists reaffirm their faith in reformative justice but they strongly feel that it should not be stretched too far. The reformatory methods have proved useful in case of juvenile delinquents and the first offenders. Sex psychopaths also seem to respond favorably to the individualized treatment model of punishment. Recidivists and hardened criminals, however, do not respond favorably to the reformist ideology. It is for this reason that Salmond observed that though general substitution of reformation for
deterrence may seem disastrous, it is necessary in certain cases specially for abnormal, and degenerates who have diminished responsibility. It, therefore, follows that punishment should not be regarded as an end in itself but only as a means, the end being the social security and rehabilitation of the offender in society.  

2.2.8. Forms of Punishment

The history of early penal systems of most countries shows that punishments were tortuous, cruel, and barbaric in nature. It was towards the end of eighteen century that humanitarianism began to assert its influenced on penology emphasizing that severity should be kept to a minimum in any penal program. The various forms of punishment have been evolved and applied in different societies through the ages. Thus, the forms of punishments can be divided into two main categories, in ancient time and in modern time. The details of which are as follow:-

[1]. Forms of Punishment in ancient time:

In ancient time, in Europe, as also in India, punishments were very severe and they were meant nothing more than the bond necessary for keeping the interest of individuals united and that punishment which exceeded the necessity for preserving that bond were in their nature unjust. It would be interesting to note that as far as European systems are concerned, until quite late in the Christian era, the punishment for crime was either death or the infliction of the bodily pain. In the Greek and Roman systems of Criminal punishment, prisons were not regarded as places of confinement, but merely as places of detention for under trial prisoner or those on the way to execution. The Roman penalties were:- (1) Death by hanging, (2) Hurling from the Tarpain rock, (3) Crucifixion, (4) Beheading, (5) Drawing in a sack, (6) Exile, or what is known as in Roman Laws proscription and (7) beating with rods.

According to the ancient India, the forms of punishment, which offenders were liable under the Dharmastra law were:- (1) Death under various modes; (2) Arrest & imprisonment; (3) Corporal punishment; (4) banishment; (5) forfeiture of property; (6) fines; (7) Harsh reproof; and (8) Admonition and Penances of various kinds. And the ancient Indian sages such as Manu, Yajnavalkya, and Brahaspati, classified punishment into four

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54 Ibid., p.236.
57 Ibid., p.36.
types: (1) Gentle admonition; (2) Harsh Reproof; (3) Fine; and (4) Corporal punishment.\footnote{Ibid., p.49.}

There are 12 forms of punishment also mentioned in the ancient Hindu society, are: (1) admonition; (2) censure; (3) fine; (4) imprisonment; (5) mutilation; (6) death; (7) spiking; (8) trampling under the elephants foot, (9) trampling under a bull’s hoof; (10) whipping; (11) beating by broken bamboo; and (12) corporal punishment including an iron nail into the ten fingers long red-hot thrust into the mouth, and hot oil poured into the mouth and ears. Further they also resorted to starvation, oppression, destruction of goods, and expulsion from the city, marking on the body, shaving off heads, carrying the person on ignoble animals, branding, and warfare.\footnote{Damayanti Doongaji, \textit{Op.Cit.}, pp.149-150.}

[2]. Forms of Punishment in modern time: Various forms of punishments have been evolved and applied in different societies through ages. Tortures, sadistic forms of executing death sentences and all sorts of cruelties in prisons were some of the distinguishing features of the penal philosophy all over the world still relatively prevalent in recent times. The punishment provided in many parts of the world, including India. According to the Indian Penal Code, section 53, prescribes five types of punishment, namely: (1) Capital punishment; (2) Life imprisonment; (3) Imprisonment, which may be (a) rigorous or (b) simple; (4) Forfeiture of property, and (5) Fines. The discussion of the problems involved in them may be useful at this point.\footnote{S.M.A. Qadri, \textit{Op.Cit.}, pp.128-129.} The most common forms of punishment in the modern time, which is still practiced in various countries, are:

(1). Capital punishment: It is also called death penalty; it is the execution of a convicted criminal by the state as punishment for crime known as capital crimes or capital offences. More than 14,500 confirmed executions have been carried out in America under civil authority, starting with the execution of Captain George Kendall in 1608. Most of these executions have been for murder and rape. However, federal, state, and military laws have conferred the death penalty for other crimes, including robbery, kidnapping, treason, espionage, and desertion from military service.\footnote{Larry J. Siegel, \textit{Essential of Criminal Justice, Op.Cit.}, p.345.} The offences which are punishable with the capital punishment or death sentence under the Indian Penal Code include: (1) waging war against the state (Section.121); (2) abetment of mutiny (Section.132); (3) giving or fabricating false evidence leading to procure one’s conviction for capital offence (Section 194); (4) murder (Section 302); (5) abetment of suicide committed by a child or insane
(Section 305); (6) attempt to murder by life-convict, if hurt is caused (Section 307); (7) kidnapping for ransom, etc., (Section 364A); and (8) dacoity with murder (Section 396).\textsuperscript{62}

An appraisal of the administration of criminal justice of ancient times reveals that death penalty was commonly used in cases of heinous crimes. However, there was great divergence as to the mode of its execution. The common modes of inflicting death sentence on the offender were drowning, burning, boiling, beheading, throwing before wild beasts, flaying or skinning off alive, hurling the offender from rock, stoning, strangling, impaling, amputating, shooting by gun or starving him to death and hanging in public place.

At present, the common modes of execution of death sentence which are in vogue in different parts of the world are electrocution, guillotine, shooting, gas chamber, hanging, lethal injection etc.\textsuperscript{63}

\textbf{(2). Imprisonment:} Imprisonment in its pure and simple form is a kind of punitive reaction, its object being primary to deprive the offender of his liberty which is the most serious damage which can be caused to a human being, next only to deprivation of life by the death sentence.\textsuperscript{64}

\textbf{(3). Solitary Confinement:} Solitary confinement was intended for elimination of criminals from society and at the same time incapacitating them from repeating crime. The deterrence involved in this mode of punishment was deemed necessary for prevention crime. The monotony involved in this kind of punishment had the most devastating effect on criminals.\textsuperscript{65}

\textbf{(4). Forfeiture of Property:} Another intermediate sanction with a financial basis is criminal and civil forfeiture. Both involve the seizure of goods and instrumentalities related to the commission or outcome of criminal act. The difference is that forfeiture proceedings target criminal defendants and can only follows a criminal conviction.\textsuperscript{66}

\textbf{(5). Fines:} Monetary payment, or fines, can be imposed on offender as an intermediate punishment for their criminal acts. They are a direct offshoot of the early common-law practice of requiring that compensation be paid to the victim and the state (wergild) for criminal acts. Fines are still commonly used in Europe, where they are often the sole penalty, even in cases involving chronic offenders who commit fairly serious crimes.\textsuperscript{67}

\textsuperscript{63} Ibid., p.253.
\textsuperscript{64} S.M.A. Qadri, \textit{Op.Cit.}, p.133.
\textsuperscript{65} N.V., Paranjape, \textit{Loc.Cit.}, p.241.
\textsuperscript{66} Larry J. Siegel, \textit{Essential of Criminal Justice, Op.Cit.}, p.834
\textsuperscript{67} Ibid., pp.383-834