"Contemporary society had significantly humanized the forms of punishment by abandoning the savage corporal brutality that prevailed in the bad old days, in favor of the hidden concrete-and-steel carceral system of the modern era."

Michel Foucault

Philosophy behind punishment

Though endowed with conscience, human's basic nature is that of an animal. Sometimes his bestial element overpowers the conscience and he violates the rules of the society. This will disturb the organized society and if allowed would end in the collapse of its setup. Hence to reduce such trends the concept of punishment has been evolved.

The concept of punishment defeats all attempts for a clear and precise definition.

In Halsbury's Law of England, the object of punishment is state as follows:

"The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims. The retributive element is intended to show public revulsion to the offence and to punish the offender..."

for his wrong conduct. The concept of justice as an aim of punishment means both that the punishment should fit the offence and also that like-offences should receive similar punishments. An increasingly important aspect of punishment is deterrence and sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law”.

Plato was of the opinion that punishment was warranted only on the assumption that virtue must be taught. No one reproves another for a harm which has to be fallen him naturally or accidentally.

People are however, wrathful and reproving where they suffer harm at the hands of another without any manner of justification for such reprehensible conduct of the other. That seemed to be the idea of punishment. No rational man, undertakes to punish in order to avenge himself for a past offence since he cannot undo what was done. The object in punishing must therefore be both reformation and by necessary implication a conclusion must be drawn to the effect that virtue can be produced by training.

Jurists, right from the time of Aquinas, have always considered the concept of justice by making a distinction between corrective justice and distributive justice. Infact this concept was borrowed by Aquinas from

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3 Laws 934 A-B, quoted in 'Legal Philosophy from Plato to Hegel'-by H.Cairns -1949 pp60-70,John Hopkins Press ,Baltimore
Aristotle. Aquinas felt that three conditions must be fulfilled for a judgment to be an act of justice. First, it must proceed from the inclination of justice. Secondly, it must be pronounced according to the Right ruling of prudence or in accordance with that intellectual discernment which perceives the golden mean of moral virtue and the way to rescue the mean.4

Kenny says, crime is a wrong whose sanction is punitive and in no way remissible by the crown alone if remissible at all. O. Garofallio developed a concept of the natural crime and defined it as a violation of the prevalent sentiments of pity and probity.5 The various definitions have been given above only to highlight the problems faced by jurists and sociologists in defining crime. It is interesting to note that the Indian Penal Code does not even attempt to define the word ‘crime’ and in fact it avoids the very word and uses the term ‘Offence’. The Supreme Court Of India, in Ram Narayan’s Case stated “the object of punishment of an accused found guilty in progressive civilized societies is to impress on the guilty party that commission of crimes does not pay and that it is both against his individual interest and also against larger interest of society to which he belongs”.6

To be effective as a deterrent to crime, punishment should be prompt and applied to all alike for similar crimes. "It is not cruelty or severity that renders punishment as an effective deterrent, but rather it's certainty."7

It could be suggested, that the accused should be tried as speedy as possible in order to reduce to a minimum the time that elapses between the commission of the crime and it's punishment. This will produce a more lasting effect and tend to strengthen the association between crime and punishment. Many criminologists have opined that the sought for connection between crime and punishment can be made more impressive where it is possible to make the punishment analogous to crime. It is the strength of the association of crime and punishment that is believed to be most effective deterrent. Hence it is true to say with all emphasis that the punishments that are severe, cruel and inhuman do not prevent crime. As a matter of fact it could be argued that extremely severe penalties actually encourage persons to commit crime.

As punishment becomes more cruel and more severe, the minds of men grow more hardened and callous. In every calculation of the excess of evil over good, it is necessary to include the certainty of the penalty and the denial of the expected advantage produced by the crime.

7 Punishment and severity and certainty, Journal of Criminology and Criminal Law and Police Science; Vol.63. quoted in Criminal trial justice by Prof A Laksmikanth & Dr.J Krishnakumari p.65Alt Publications 2003
Theories of punishment

In order to prevent persons from upsetting the balance, the state might take either preventive or corrective action. The former is based on the principle “prevention is better than cure” Chanakya who wrote a broad guidelines for rulers says that “Na dandadakaryani kurvathi”. That means: due to fear of the punishment rod, people do not do things which should not be done.8

It can be seen that the various theories of punishment have been advocated keeping in mind the objects that authors felt were attributable to the punishment .Sir Henry Maine observed, “all theories of punishment have more or less, broken down, and we are at sea as to the first principles”.9

In view of the absolute uncertainty as to the basis of punishment, all that could be done is to study various theories of punishment and critical review the purposes which they seem to emphasise.

Although traditionally the theories of punishment are considered separately, in practice they are not as easily drawn. This is particularly the case with the utilitarian theories of punishment: deterrence and rehabilitation. Utilitarianism arose in the eighteenth century and was originally addressed to

social policy as a basis for penal reform and legislation. In the twentieth century it is still probably the most influential philosophy, at least in the penal sphere, and utilitarian principles largely determine present penal policy.

**Retributive Theory:**

This theory is based on the principle that evil for evil. It means an act of inflicting injury in return of injury. Since the adoption of the code of Hamurabi the principle of 'an eye for an eye and tooth for a tooth' has been accepted as a principle of punishment where wrongdoer merited punishment. According to Dr. Edwig the retributive theory of punishment involves two main concepts: (1) It is an end in itself that the guilty should suffer the pain (2) The primary justification of punishment is always to be found in the fact that an offence has been committed which deserves punishment not in any future advantages to be gained by its infliction whether for society or for the offender as an individual.¹⁰

The utilitarian theories are forward looking; they are concerned with the consequences of punishment rather than the wrong done, which, being in the past, cannot be altered. A retributive theory, on the other hand, sees the primary justification in the fact that an offence has been committed which deserves the punishment of the offender. As Kant argues in a famous passage:

"Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else ..... He must first of all be found to be deserving of punishment before any consideration is given of the utility of this punishment for himself or his fellow citizens."\textsuperscript{11}

According to Kant retribution or retaliation gratifies the human instinct of revenge. So he supports the theory on grounds of human revenge. "Thine eye shall not pity, but life shall go for life, eye for eye, tooth for tooth, hand for hand, and foot for foot".\textsuperscript{12} According to this view it is right and proper that evil should be returned for evil and that a man as he deals with others so should himself be dealt with. Bentham also envisaged the necessity of retributive punishment and equated the 'pleasure of vengeance' with 'honey dropping from the lion’s mouth'. In India too the supreme Court has applied Retributive theory of punishment while awarding capital punishment by postulating the doctrine of 'rare of the rarest' to justify retribution, vengeance or revenge on the person causing injury. Indeed the death penalty serves the


\textsuperscript{12} S.N.Dhyani,p.166.
two purposes – it satisfies the instinct of retribution as well as works as a deterrent to like minded criminals.\textsuperscript{13}

The Law commission in 1967 had also suggested that time is not ripe for the abolition of capital punishment as it fulfills the society’s sense of justice against the criminal as it abhors heinous crimes and rudely shock it’s conscience.

According to Supreme Court “Punishment must also respond to society’s cry for justice against the criminal. While considering the punishment to be given to the accused, the court should be alive not only to the right of the criminal to be awarded just and fair punishment by administering justice tempered with mercy as the criminal may deserve, but also to the rights of the victims of the crime to have the assailant appropriately punished and the society’s reasonable expectation from the court for the appropriate deterrent punishment conforming to the gravity of the offence and consistent with public abhorrence for heinous crime committed by the accused”.\textsuperscript{14}

According to Justice V.R.Krishna Iyer “ the retributive theory has had its day and no longer valid. Deterrence and reformation are the primary social goals which make deprivation of life and liberty as penal panaceae”.\textsuperscript{15}

\textsuperscript{14} Surja Ram v State of Rajasthan , A I R, 1997 S C 18& 19.
While considering the related discussions regarding the significance of deterrence we can see that it is contrary to modern principles of methods and civilized way of life. The methods of penal servitudes, hard labour is opposed to the theory and philosophy of religion, piety and humanity. It is on account of this reason that capital punishment is being abolished in many civilized countries. Salmond says that retribution is in itself not a remedy for the mischief of the offence but an aggravation of it. It involves pain and suffering and is offensive to the consideration of humanity.\footnote{Quoted by Prof. S.N.Dhyani, Jurisprudence and Indian Legal Theory, Central Law agency, Allahabad, 1999. p.168.}

**Deterrent theory**

The deterrence theory of punishment emphasize the necessity of protecting society for so treating the prisoners that others will be deterred from breaking the law. The evil doer is made an example and a warning to the like minded with him. It also aims at checking of the recurrence of crimes again and against the society. Thus the deterrence theory becomes an instrument of social reform. It provides citizen an object lesson. In this spirit an English judge interpreted this theory "Man, thou are not to be hanged for stealing a horse, but that horses may not be stolen". The basis principles behind this method is to protect the society rather than reform him or prevent him from committing crimes. It can be said to be a self-defence of society.
against the crimes. Plato, the Sophists, Fitche and Bentham were the adherents of this theory. J. Bentham, as the founder of this theory, states:

"General prevention ought to be the chief end of punishment as its real justification. If we could consider an offence which has been committed as an isolated fact, the like of which would never recur, punishment would be useless. It would only be only adding one evil to another. But when we consider that an unpunished crime leaves the path of crime open, not only to the same delinquent but also to all those who may have the same motives and opportunities for entering upon it, we perceive that punishment inflicted on the individual becomes a source of security for all. That punishment which considered in itself appeared base and repugnant to all generous sentiments is elevated to the first rank of benefits when it is regarded not as an act of wrath or vengeance against a guilty or unfortunate individual who has given way to mischievous inclinations, but as an indispensible sacrifice to the common safety".\(^{17}\)

Bentham's theory was based on a hedonistic conception of man and that man as such would be deterred from crime if punishment was applied swiftly, certainly, and severely. But being aware that punishment is an evil, he says,

If the evil of punishment exceed the evil of the offence, the punishment will be unprofitable; he will have purchased exemption from one evil at the expense of another.\(^\text{18}\)

Recently India witnessed increasing incidents of criminality due to dowry-deaths, bride burning, murder of children to extract ransom, rape and ragging etc. For the same reason the Supreme court of India has adopted deterrent theory of punishment. The court upheld the conviction for the mother in law for murder by way of bride burning of her daughter in law. It declared "It would be a travesty of justice if sympathy is shown when cruel act like bride burning is committed. It is rather strange that the mother in law who herself is women should resort to killing another women. The language Deterrence must speak in that it may be a conscious reminder to the society. Undue sympathy would be harmful to the cause of justice. It may even undermine the confidence in the efficacy of law. Mere fact that the accused, mother in law, has spent more than a decade in jail cannot be ground to show any leniency.\(^\text{19}\)

Basically the criminal law is not concerned with reform or social protection but with preventing of the individual from committing a crime. Hence punishment is not motivated by considerations of social protection but from the point of prevention of wrong doer from committing crimes.


Justice Holmes in his *Common Law* debunks deterrent theory of punishment as immoral in as much as it gives 'no measure of punishment except the law giver's subjective opinion.....It is said to conflict with the sense of justice ..... that the members of such communities have equal rights of life, liberty and personal security.20

**Preventive theory**

According to this theory the main object of punishment is to prevent the wrong doer of his power and capacity of inflicting injuries or committing repeatedly crimes against the individuals by way of disabling him or by way of detention or imprisonment. According to Salmond it's primary is to deter by fear and secondary purpose is to prevent a repetition wrong doing by disablements of the offender.21

In India Criminal procedure Code and Indian Penal Code contains provisions contain provisions concerning punishment of attempts and conspiracies to commit crime. Thus detention ,deportation, imprisonment, exile, disablement and death penalty are the chief modes of preventive punishment by which the wrong doer is removed from the scene.

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Preventive theory of punishment has great utility for India in the prevailing law and order situation against extremists, terrorists, secessionists, drug peddlers, smugglers, underworld armed gangs of mafias, criminals and communalists etc. Who cannot be controlled or reformed by soft and curative methods.

Highlighting the purpose of preventive punishment the Supreme Court declared "there can be no gainsaying that freedom of individual must yield to the security of the state. The right of preventive detention of the individuals in the interest of security of the state in various situations ... has been upheld by the court. The action of the state, however, must be right, just and fair. The state terrorism would only provide legitimacy to terrorism. That the terrorist has violated human rights of innocent citizens may render him liable for punishment but it cannot justify the violation of his human rights except in a manner permitted by law..."\(^{22}\)

Preventive theory is sometimes considered immoral because it overlooks the ill desert of the wrong doing, and furnishes no measure of the amount of punishment, except the law givers' subjective opinion in regard to the sufficiency of the amount of preventing suffering. According to Kant "it treats man as a thing not as an end in himself". Moreover it is said to conflict with the sense of justice and violates the fundamental principle of all

\(^{22}\) D.K. Basu v State of West Bengal, AIR 1997 SC 3669.
free communities, that the members of such communities have equal rights to life, liberty and the personal security.

**REFORMATIVE THEORY**

The Reformative theory of punishment which is as old as Plato, is said to be the soul of criminal justice; is the art of recovering the soul of the man smeared by crime. This must be achieved by the sentencing process and the prison treatment. This constructive objective of the punishment is central to the penal policy. The essence of the theory is that crime like other diseases is to be diagnosed and treated. By this way state can make the criminal a useful citizen.

Victor Hugo remarks "We should look upon the crime as a disease. Evil will be treated in charity instead of anger. The change will be simple and sublime. The cross shall displace the scaffold."^23

Likewise Aristotle considered punishment as a sort of medicine. But some medicines are ratrogenic and induce new disease. Gandhiji also said likewise; 'hate the sin and not the sinner' which should be the guide in the administration of criminal justice. According to Gandhiji the outlook of the jail staff should be that of the physicians in a hospital. They were to help them to regain their mental health and not harass them in any way. Progressive criminologists approves the view and describe this as the right panacea and

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^23 Anoted from Holmes, common law, 43-43 (1940).
key to the delinquency—to not only reform the delinquents but also a solution to many complex social issues by salvaging them for society.

In this context eminent judge V.R Krishna Iyer’s remarks has it’s importance: “A holistic view of sentencing and finer perception of the effect of imprisonment give short shift to the draconian severity and self defeating….Perhaps the time has come for Indian criminologists to rely more on Patnjali Sutra as a scientific curative for crimogenic factors than on the blind jail term set out in the Penal Code and that may be why western researchers are now seeking Indian Yogic ways of normalizing the individual and the group.”

Krishna Iyer focuses on certain elemental factors which are of great significance for criminological thoughts particularly so far as our country is concerned to him the Gandhian diagnosis is the key to the pathology of delinquency and therapeutic role of punishment. The spirit of correctional philosophy in criminology is rightly described by Krishna Iyer, “If every saint has past, every sinner has a future and it is the role of the law to remind both of this (indeed) the technology of rehabilitation is the key to the manifestation of the divinity of man”.

25 Quoted from In the matter of: P.R.E. of wages of labour, AIR 1983 Ker 261 at 266
In fact the Universal Declaration of Human Rights, 1948 and the International Covenant on Civil and Political rights, 1966 contain the essence of penological approach of the modern civilized communities.

The main defect of reformative theory is that it can be applicable to minor offence. It cannot be applicable to serious crimes like murder or with regard to habitual criminals. Moreover it is criticized as contrary to the principles of natural justice. The aggrieved may not be rewarded but the guilty person must not go unpunished. It also cannot be applicable to professional or habitual criminals. Oppenheimer says: “It robs punishments of its sting. the criminals looked upon as an object of pity, not of hatred and punishments becomes the work of charity.”

PENAL CODE IN INDIA WITH REFERENCE TO INDIAN PHILOSOPHY

In ancient India rulers administered the law and punished their subjects according to the directions written in Smritis. Chanakya in his writings made a number of remarks regarding punishment. According to him there should be rules for punishment to control the people.

*Sarvo dandajitho loko*

*Durlabho hi shuchirnara*

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26 Oppenheimer, Rationale of punishment, 245- Quoted by Prof. S.N.Dhyani, Jurisprudence and Indian Legal Theory, Central Law agency, Allahabad, 1999. p.175
Dandasya hi bhayath

Sarvam jagth bhogaya kalpeth

That means: people are controlled by punishment, the intrinsically pure man is rare. Out of fear of punishment the world enjoys blessings.\(^2^7\)

He also points out that without proper law and regulations the situation will be like the “survival only of the strongest”.

Apraneethohi danda

Matsyanyayamudbhavayathi

means : if no punishment is given the law of fishes(strong swallowing the week) is created.\(^2^8\) He further says that only through punishment there should be discipline in the society.

Vinayamoolo danda

Pranabhootham yogaksemavaha

i.e. punishment, the root of discipline is the source of prosperity for the people.\(^2^9\)

Suvinhathapraneetho hi

Danda praja darmartha kamairyathithi

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\(^2^8\) Maxims of Chanakya, p.162.
\(^2^9\) Maxims of Chanakya, p.162.
i.e. punishment meted out after due consideration keeps the people attached to righteousness and to tasks conducive to material wealth and enjoyment.

Manusmrthi is one of the authoritative books in that time. In chapter 8 of Manusmrthi describes certain rules to administer justice. Punishments for various crimes were suggested in the chapter. There are similarities between our present penal laws, but dissimilarities are more. At that time punishments were prescribed by Purohits. The implementation was done by rulers. Manusmrthi stood as guideline for the Purohits. There were clear influence castism in prescribing punishments. The same crime attracted different punishments for people from different castes. Severe punishments were imposed on lower caste people. Even the case of theft is punished with death penalty.

For eg.

"Dhnyam Dasabhya: kumbasyo
harathobyadhikam vadha:
seshpyeka dasagunam
dapyasthyasya cha thaddhanam"\textsuperscript{30}

This means: Those who stole more than 10 pots of cereal is to be punished with death and fined an amount equal to 11 times of the cereal. And it is to be paid to the owner.

\textsuperscript{30} Manusmrthi, Mathrubhumi books, 19--., p. 371.
Indian Penal Code suggests seven years imprisonment for rape, which may be increased up to life sentence according to circumstances. But Manusmrithi suggests capital punishment for the same.

"yuo kamam dooshayeth kanyam
sa sadyo vadhamarhathi"\(^{31}\)

Which means: Those who molest girl without her consent is to be punished with death.

According to Indian penal Code section 497 sexual intercourse with the wife of another person is an offence punishable with five years imprisonment or fine. In such cases women shall not be punishable as an abettor. But according to manusmrithi Intercourse with others husband and wife is considered as severe crime which attracts capital punishment.

**Indian Penal Code**

Our Penal Code is modelled on the Indian Penal Code, which was introduced in the Legislative Council in 1836. The author of this legislation was Thomas Babington Macaulay, who was the first Law Member of the Legislative Council who believed that law reform in general, and codification in particular should be animated by the principle; uniformity where you can have it; diversity where you must have it; but in all cases certainty. The substantive criminal law of India is mainly contained in the Indian Penal

\(^{31}\) Manusmrithi, Mathrubhumi books, 19---, p.379.
Code. The code measures the gravity of violation by the seriousness of the crime and its general effect upon the public tranquility, whatever be the object of theory of punishment. The measure of guilt is, therefore, the measure of punishment. The law indicates the gravity of the act by the maximum penalty provided for its punishment and courts will have to consider how far the crime committed falls short of the maximum punishment and what, if any, are the extenuating circumstances justifying the adoption of a lower punishment than the maximum provided.

Sections 53 to 75 of Chapter III of Indian Penal code laid down the general provisions relating to punishments. Sections 53 enumerates several types of punishment that can be imposed on a convicted criminal viz., death, imprisonment, forfeiture of property and fine. There is a marked change in the outlook of Indian Criminal Justice System both legislative and judicial, after the end of the colonial rule. This can be seen from the change bought out to section 367 of Criminal Procedure Code 1898 in omitting sub section 367 under Amendment Act 26 of 1952. As per provisions of sub section (5) of sections 367 when an offence is punishable with death sentence and a sentence other than the death is passed, the court shall in its judgment state the reasons for imposing lesser penalty. After omitting this sub section, now the courts shall state the reasons in judgment for passing capital punishment and not for imposing lesser sentence. Where life imprisonment and penalty of death are prescribed as alternative sentences, imposition of life imprisonment
of life imprisonment has become the rule and capital punishment is the exception to be resorted to for the reasons to be stated[ (section 354(3) of Criminal Procedure Code1973]

Even prior to the above stated amendment Where-under sub section (5) of section was omitted, there was marked change in the judicial perception regarding the imposition of the maximum sentence prescribed. Supreme court of India, while dealing with a case of murder, in Aftah Ahmed Khan’s case held “it seems to us desirable as a matter of convention though not as a matter of strict liability that ordinarily the extreme penalty should not be imposed”.32

The same trend is being continued, and there is a marked change in the judicial trends and a new trend is set in by the Apex Court from Ediga Anamma’s case.33 The Supreme Court in Rajendra Prasad’s case held “the retributive theory has it’s day and is no longer valid. Deterrence and reformation are the primary social goals which make deprivation of life and liberty reasonable as penal penance”.34

A five judge bench of the Apex Court accepted the deterrence as one of the accepted, valid punitive component in “Sunil Bhatra’s case.35 Supreme court in Mohammad Giasuddin’s case found that the crime is a pathological

32 A.I.R. 1954 S C. 436,
34 1979 Cr.L.J 792(815).
35 A.I.R. 1978 S.C 1675
aberration that a criminal can ordinarily be redeemed, that the state has to rehabilitate rather than revenge.36

The Supreme Court in Maru Ram’s Case Observed that “the rehabilitation and reformation of the criminal has the main component of the penal policy as social defence.”37 Though the Supreme Court is advocating time and again the need for reformation of the criminal and his restoration to the society, the court also stressed the need of to employ the punishment as deterrent and as a public denunciation. This stand is evident from the verdict of the supreme court in Bachan Singh’s case While retaining the death penalty though limiting it to “rarest of rare cases”(A.I.R 1980 S C 898). This is more evident from the fact that Justice V.R.Krishna Iyer himself recommended for the retention of the death penalty in certain classes of cases.

Since there is lack of scientific evidence to support, theories of rehabilitation are largely speculative. But it has been influential in the development of modern penology. Similarly Justice A.D. Khosla and Justice S.M.Fazal Ali in Maru Ram’s case while passing concurrent but separate judgments disagreed with the majority opinion delivered by Justice V.R.Krishna Iyer that the main object of every punishment must be reformation of the offender and that the other objects of punishment must be relegated to the back ground and be brought into play only incidentally.

37 A.I.R 1980 S C 2147
Supreme Court in Maru Ram’s case and also several other decisions stressed the need of reparation or the restoration of the loss, of healing the injury of the victim as part of punitive exercise. The court has evolved a multiple sentencing approach for the sentence to be meaningful and to serve it’s object as a social defence. The Apex court maintaining the severity of punishment where ever it is necessary, considering the gravity of crime and the circumstances in which it is committed and there by upholding the deterrence retribution as the justification for the punishment.

Supreme court is liberal in admitting the offenders to probation and is showing indulgence and modifying the sentence and framing guidelines for the execution of sentence where ever possible and permissible to reform the offender and to restore the society and there by to achieve the ultimate object of sentence. Thus the Penological approach of the Indian Judiciary, is in the words of Apex court itself, tiarsh and humane.\textsuperscript{38}

In the common interest of all members of society, crimes should not be allowed to be committed and that crimes should be prevented. It becomes necessary, therefore to provide legislators with means to achieve these objectives. The goals or objectives can be attained by the enlightened utilization of punishment which should be inflicted measures commensurate

with the effects of the crime is to societal welfare and existence, the more severe the punishment inflicted should be.

A study of the classification of crimes indicates three categories of crimes based on varying degrees of injury to society, the first category consists of crimes considered to be injurious to the very existence or stability of society. Crimes such as high treason, or acts of an individual against the state or its representatives are considered to be most serious since such crimes threaten the existence or well being of all members of society. Second, in seriousness and in importance are crimes that injure the life, limb and property of individuals. Third category of crimes are those that are disruptive of public peace and tranquility, such as riots, rabble rousing, inciting disorder etc. These categories of crimes, as indicated are considered to represent different degrees of harm to society and to its members. Such crimes should carry different penalties whose severity would differ as the seriousness of the crime differs.

The main purpose of punishment is not to torment offenders nor to undo a crime already committed. It is rather to prevent offenders from doing further harm to society and to prevent others from committing crimes. Punishment is thus looked upon as an educative process and the types of punishments selected and how they are imposed should always receive serious consideration so as to make the greatest impact and the most enduring
impression upon all members of society, while inflicting the least pain on the body of the offender.

Penal laws to be Changed to the need of time

The committee on Criminal Justice Reforms (CJRC) set up by the Government conducted a three day seminar on economic crimes at the Indira Gandhi Institute of Development Research, Mumbai, between March 22 and 24, 2000. The seminar, organised in collaboration with the National University of Juridical Sciences, Kolkata, was attended by seasoned professionals in banking, finance and capital markets besides eminent jurists and senior officers of the investigating agencies.

It was held in the background of the proven inability of the existing criminal justice system to cope with the vastly changing environment, which has rendered the legal regulation of offences against property particularly daunting. Technological developments have compounded the difficulties. As Mr. N. R. Madhav Menon, CJRC member and an eminent legal teacher, put it: "Traditional concepts of theft, misappropriation and cheating are inadequate to comprehend the newer varieties of crimes. Special laws have been enacted to define new crimes outside the Indian Penal Code (IPC). Changes in procedure and evidence were introduced from time to time creating a jurisprudence different in many ways from the conventional approach to crime and criminal justice. For all that, however, the changes in
the legal framework have not been sufficient to bring about the desirable changes in the regulation and punishment of economic crimes. Nor have they been able to check the frequency and intensity of such crimes."

One important recommendation of the seminar relates to the enactment of a new "Economic Offences Code" which will "identify, segregate, classify and consolidate" what are called serious economic crimes now spread over 30 or more economic criminal statutes and the IPC. By bundling them into one comprehensive legislation, a new code called the Indian Economic Offences Code can have a relook at some of the grave offences and remove legal gaps as well as ambiguity in identifying and prosecuting them. The need for a central enforcement agency to investigate and prosecute specified economic crimes was voiced at the seminar.

Recent economic crimes have exposed the vulnerability of the mainline financial regulators such as the SEBI and the RBI. Even the special legislation that has created fast track procedures (special courts, confining the appellate procedures to the Supreme Court), has not lessened the delay in prosecuting the accused. It is imperative to develop and foster expertise in the newer areas in finance, accounting and so on. Investigative agencies have been hard put to identify the nature of the crime and have not exactly fared well when seen in the context of the long delays and the meagre rate of conviction in most economic crimes. (Conviction rate in certain serious crimes has been as low
as 5 to 10 per cent). With growing globalisation, domestic liberalisation, the enactment of intellectual property rights and the widespread use of E-commerce, there has to be a pro active approach to tackle the "newer" crimes. The need for regulatory agencies to work in tandem with a rejuvenated criminal justice system has never been more keenly felt. Institutional building is a must and without it criminal justice system however refined cannot by itself deliver.

**Law regarding sexuality**

Penal Code embodied the moral standards and social perspectives of an early Victorian age. There are several profound changes in contemporary mores and values relating to gender equality, which must be reflected in law. The first development relates to the growing global consciousness with regard to the phenomenon of violence against women and the need for international and domestic action to address the causes and consequence of such violence.

The second relates to the growing sensitivity to the reproductive health rights of women and the right of an individual to have control over and to decide freely on matters related to her body and to her sexuality. A related concern to the health risks to which women are subjected are unsafe abortions. A third development relates to the need to be responsive to the alarming incidence of sexual exploitation of children, including the phenomenon of child pornography. Finally, there is a need for the law not to
discriminate and punitively deal with persons with different sexual preferences, and to move away from puritanical attempts by the law to legislate morality.

Our law relating to abortion is in urgent need of reform. There is no other aspect of our criminal law that is so discriminatory in its impact on different social classes. The more affluent social classes are able to have recourse to a simple surgical procedure performed by an experienced practitioner to terminate an unwanted pregnancy. The predicament of the poor and the unmarried, who have to turn to illegal abortion clinics or quacks, is deplorable.

One of the important changes introduced by the law is the creation of the new offence of sexual harassment. Sexual harassment in the workplace and elsewhere has become an increasingly important issue on the agenda of the women's movement. Several legal scholars have struggled to frame an adequate definition of sexual harassment, having regard to the diverse behavior for which regulation is ordinarily sought. There are two important ingredients. First, it is conduct that is unwanted by the recipient - in other words, unwelcome sexual attention. Second, it is conduct that, from the recipient's point of view, is offensive or threatening. The German Penal Code and the Penal Code of Denmark have focused on contexts of subordination or financial dependence where authority is abused to extract sexual favours.
In India Visaka case made landmark judgment referring sexual exploitation in working places. In 1997, the Supreme Court delivered the judgment on sexual harassment in work places in "Visakha vs. State of Rajasthan".\(^{39}\) In this case, the Supreme Court expressed grave concern over the fact that there is no legislation to protect victims. Relying on the International Convention for Elimination of Discrimination Against Women (CEDAW), the Supreme Court used a set of guidelines to be followed by all institutions until a law is enacted. The Apex Court directed that all institutions should set up complaint mechanisms to deal with complaints of sexual harassment at work places. This should consist of a committee headed by a woman. The majority of members should be women. In order to ensure an unbiased enquiry, the Court directed that the committee should consist of an NGO member with expertise in women's issues because in most cases, the accused is likely to be a person in authority. The Court also held that, apart from holding such behaviour as misconduct and taking disciplinary action, the complaints mechanism should provide for a complete solution to the problem. It held that transferring the woman complainant or the delinquent employee, if the complainant so desired, counseling and awarding compensation should be provided. After the Supreme Court judgment in Maneka Gandhi's case in 1978, this was a quantum leap in expanding the principle of fairness in procedure. In this case, for the first time, the apex court expanded the scope of

\(^{39}\) (1997) 6 SCC 241).
Article 14 of the constitution, which guaranteed equality before law, and equal protection of law. The Court observed that the right to equality would also include the right not to be treated in an arbitrary manner.

New Legislation

Law relating to rape and sexual assault have remained more or less unchanged since the introduction of the IPC in 1860. It was only in 1983 that some amendments to the rape law was made. Now for the first time, a piece of legislation covering some aspect of sexual assault against women and minors made through the The Criminal Law Amendment Bill.

The practice of capital punishment, or a state-sanctioned death penalty for certain crimes, appears to be as ancient as history. The Code of Hammurabi, discovered only in AD 1902 but estimated to have been promulgated between 2100 and 1700 BC, was the first systematic attempt to foster disinterested, impartial state governance -- at least as the concept was understood in the Mesopotamian context, which fused autocracy, patriarchy, and theocracy. The Code deals extensively with property and agricultural rights and military obligations, all of which function at the king's pleasure. Men are required to serve in the armed forces, and disloyal refusal inheres in death and deprivation of property. Military expeditions appear to lie exclusively at royal discretion, for repeated references are made to the fact that soldiers may be obliged to fight, in person, on the king's behalf. Military
misfortune in general belongs to the king, not his subjects. Thus military
officers may not hire mercenary soldiers to fight in their place, and the
penalty for a commander who attempts to do so is death.

In ancient India death penalty was common in the administration of
law and order. The code, which was followed by rulers in the case of
punishments, like Manusmṛthi advice capital punishment even for small
offences. Chanakya the author of Arthasastra also recommends severe
punishment like death sentence for crimes. According to him such
punishment is necessary to maintain law and order in a country.

Arguments against death penalty

The common argument is that death penalty is killing. All killing is
wrong, therefore the death penalty is wrong. The death penalty is a violation
of human rights primarily Article 3 and Article 5 of the Universal Declaration
of Human Rights. Some assert that it violates the "natural rights" as laid out by
John Locke.

The death penalty is not a deterrent; in the recent studies do not
support the view that capital punishment acts as a deterrent. It is also argued
that anyone who would be deterred by the death penalty would already have
been deterred by life in prison, and people that are not deterred by that would
not be stopped by any punishment. This argument is typically supported by
claims that those states that have implemented the death penalty recently have
not had a reduction of violent crime. A stronger variant of this argument suggests that criminals who believe they will face the death penalty are more likely to use violence or murder to avoid capture, and that therefore the death penalty might theoretically even increase the rate of violent crime.

- The death penalty is unnecessary. This view, espoused by Pope John Paul II, an outspoken critic of capital punishment, holds that modern prisons are secure enough to reliably protect society from further harm by death row prisoners, whereas in centuries past, life imprisonment may not have been feasible. Therefore, the death penalty serves no purpose to society and violates the sanctity of human life. And also it is argued the death penalty brutalises society, by sending out the message that killing people is the right thing to do in some circumstances.

The death penalty can be turned into a lethal act of revenge by all those involved. Some view the executioners as the 'Law's Hitman'it also allows citizens to feel as though they are not morally incriminated by supporting death, because it is death for a "just cause". This psychologically creates a false reality where they are in no ways responsible for a killing. The victim of execution becomes a scapegoat for the overall problem of violent crime.

Death penalty is often justified on the ground that it will have deterrent effect on crime. However, such claims of deterrence are without any empirical support. Criminological studies have shown that capital punishment does not
deter criminal behavior. It precluded rehabilitation of human beings and is opposite of true atonement. Again, like all other forms of punishments, the error of judgement cannot be ruled out in the case of death penalty. Judicial error is always possible. In such cases, death penalty is an unpardonable crime committed against the society.

After examining all available information in 1968, the United Nations Consultative Group on the Prevention of Crime and Treatment of Offenders summarised the situation in the following terms:-(

where it is used, capital punishment is increasingly a discretionary rather than a mandatory sanction. The Consultative Group also noted that a number of countries had abolished capital punishment for humanitarian reasons, irrespective of any possible deterrent effect it might be thought to have.40

In India, despite the ruling of the Apex Court, that death penalty may be imposed in the "rarest of the rare" cases, it extends to a wide range of offences. The Government of India in practice has applied the death penalty to a wide range of offences. Under the Indian Penal Code, death penalty can be applied for murder (section 302 of IPC), dacoity with murder (IPC 396), for abetting the suicide of a child or insane person(IPC 305), for waging war against the Government (IPC 121), for abetting mutiny by a member of the Armed Forces (IPC 131. Death sentences may also be imposed for a number of offences committed by members of the Armed Forces under the Army Act,

40 Sanker Sen, Criminal Intelligence Digest, JAN-2000 ISSUE, Death penalty in India.
1950, the Air Force Act, 1950 and the Navy Act, 1956. In 1987, the
Government of India passed the Commission of Sati (Prevention) Act, 1987,
which applied the death penalty to individuals convicted of abetting a
successful Sati.

The death penalty as provided under section 302 of the penal code
read with section 354 sub section(3) of the Cr.P.C does not subserve any
legitimate end of punishment. It leaves entirely to the discretion of the court
whether to impose death sentence or to award only life imprisonment to an
accused convicted of the offence of murder. According to section 302 of IPC

"Whoever commits murder shall be punished with death, or
imprisonment for life, and shall also be liable to fine".41

In the case of death sentence the direction is that the court shall point
out special reasons for the judgment. Sub section 3 of section 354 says "When
the conviction is for an offence punishable with death or, in the alternative,
with imprisonment for life or imprisonment for a term of years, the judgement
shall state the reasons for the sentence awarded, and, in the case of sentence
of death, the special reasons for such sentence".

Supreme Court suggests:

"it would thus be noticed that awarding of the sentence other than the
sentence of death is the general rule now and only special reasons, that is to

say, special facts and circumstances in a given case, will warrant the passing of the death sentence."\(^{42}\)

Section 302 of IPC does not lay down any standards or principles to guide the discretion of the court in the matter of death penalty. The critical choice between physical liquidation and life long incarceration is left to the discretion of the court and no legislative light is shed as to how this deadly discretion is to be exercised.

In the case of section 354 of Cr.P.C also there is no legislative guidance for providing special reasons. "It is left to the Judge to grope in the dark for himself and in the exercise of his unguided and unfettered discretion decide what reasons may be considered as 'special reasons' justifying award of death penalty and whether in a given case any such special reasons exist which should persuade the court to depart from the normal rule and inflict penalty of the accused. There is no legislative policy or principle to guide the court in exercising its discretion of the court is bound to vary from judge to judge."\(^{43}\)

Analysis of death penalty with reference to Constitution

It is not mere a legalistic problem which can be answered definitively by the application of logical reasoning but it is a problem, which raises

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\(^{43}\) Prof. A. Lakshminath & Dr. J.Krishna Kumari, Criminal Trial and Justice, Alt Publication Hyderabad,2003 p.164.
profound social and moral issues and the answer must therefore necessarily depend on the judicial philosophy of the judge. This would be in case of any problem of constitutional interpretation where the constitutional conundrum is enmeshed in complex social and moral issues defying a formalistic judicial attitude.

That is the reason why in some countries like the United States like and Canada where there is power of judicial review, there has been judicial disagreement on the constitutionality of death penalty. On an issue like this, as pointed out by David Panick in his book on ‘Judicial Review of the Death Penalty’, judicial conclusion emanate from the judicial philosophy of those who sit in judgment and not from the languages of the constitutional significance, the judges must take care to see that they are guided by objective factors to the maximum possible extent.

The culture and methods of the nation as gathered from it’s history, its tradition and its literature would clearly be relevant factors in adjudging the constitutionality of death penalty and so would the ideals and values embodied in the constitution which lays down the basic framework of the social and political structure of the of the country, and which sets out the objectives and goals to be pursued by the people in a common endeavour to secure happiness and welfare of every member of the society. Justice
V.R.Krishna Iyer said "judicial dispensers do not believe like caveman but breathe the fresh air of finer culture".44

There is reason why, in adjudication upon the constitutional validity of death penalty. Judges should not obtain assistance from the writings of men like Dickens, Tolstoy, Dosoyevsky, Kowster and Camus or from the investigation of social scientists or moral philosophers in deciding the circumstances in which and the reasons why the death penalty could be seen as arbitrary or a denial of equal protection.

It may be pointed out that our constitution is a unique document, it is not a mere pedantic legal text but it embodies certain human values cherished principles and spiritual norms and recognizes and upholds the dignity of man. It accepts the individual as the focal point of all development and regards his material, moral and spiritual development as the chief concern of its various provisions. It does not treat the individual as a cog in the mighty of all-powerful machine of the state but places him at the centre of the constitutional scheme and focuses on the fullest development of his personality.

The Preamble makes it clear that the Constitution is intended to secure to every citizen social, economic and political justice equality of status and opportunity and to promote fraternity assuring the dignity of the individual. The Fundamental Rights lay down limitations on the power of the legislature

and the executive with a view to protecting the citizen basic human rights which are enforceable against the state in a court of law. The Directive Principles of state policy also emphasise the dignity of the individual and the worth of the human person by obligating the state to take various measures for the purpose of securing and protecting a social, economical and political, shall inform all the institutions of national life. What is the concept of social and economic justice which the founding father's had in mind is also elaborated in the various Articles setting out the Directive principles of state policy. But all these provisions enacted for the purpose ensuring the dignity of the individual and providing for his material moral and spiritual development would be meaningless and ineffectual unless there is rule of law to invest them with life and force.

Defining penal laws and implementing them is an important process in the administration of justice. Ensuring justice impartially to each person in a society is a tedious task. As the people include individuals with various character, any act of a person may cause a situation which may infringe the rights of another. The human instinct is to live according to his pleasures. Moreover hurdles in the life also tempt a person to deviate from public order. In a modern society men have higher needs, where primitive men were satisfied by fulfilling his primary need only. Modern era open it’s doors towards infinite possibilities and lifestyles. Invasion of consumerism and the situation of decreasing moral values toppled over the social relations. Crime
rate is increasing year by year. Tendency to evade laws and regulations is also at its peak. Here the administration of criminal justice poses a big task. The existing government has an important task to renew the penal laws and to enact new one.

For example Cyber crime is a new development where our penal laws show their helplessness. The Administration of criminal law should also be competent one to manage the situation. There should be more action needed on the part of the rulers. The initiative to start Fast track courts and utilization of provisions regarding special courts are examples. The Criminal Law Amendment Bill is also another landmark. However there are arguments change in the penal code. Not mere administrative but ideological perspectives should be changed.

The question of ethical validity of an act always changed according to the socio-political transformation. Citing an example, protest against the ruler is a serious crime in ancient time, but now the penal laws considering it not at all a serious issue. Another debate which is going on is that about some sections in the IPC which penalizes the homosexual relation. Western community already approved the Lesbianism and homosexuality. For the same reason one of the main demands of the campaign for the rights of sexual minorities in India has been the repeal of section 377 of the IPC, which criminalizes sodomy. According to them, in India historically same sex
relationships were by and large tolerated. Influenced by the Victorian campaigns for sexual purity the British tried to change Indian marital, sexual and familial arrangements, which they saw a primitive.

But the government has argued that section 377 has been used to deal with cases of child abuse and for complementing rape laws. Another argument of the government is that “law does not run separately from society” and when Section 377 was brought under the statute; it “responded to the values and mores of the Indian society”.

The controversy cited above is not a single event. There are increasing incidents of conflicts between changing morality and existing laws, which analysis of public morals in the light of changing values is a necessity.