CHAPTER - I

SOCIETY, CRIME AND PUNISHMENT
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1.1: Introduction

It is an undisputed fact that in every society, primitive and modern, institutions have been developed to serve the interests of the ruling class and such institutions work with the sole aim of gaining control over the society so that the very purpose of their creation is not defeated. In this process maintenance of order and discipline in the society assumes the foremost position. It is worthwhile to mention that the creation of these institutions has always been attributed to the demand of the society itself. The structural pattern, mode of functioning and authority of these institutions have been devised in accordance with the felt needs of the contemporary society—the needs that are inextricably linked to the interests of the ruling class but divorced from the basic interests of the masses. The liberal school of thought is, however, of the view that the institutions created by the society have always served the common interests of the people without making any discrimination between one class and the other as well as cutting across caste, creed, sex, and religious belief. This catholic approach of governance was fundamentally derived from the spirit of renaissance and ideals of the French Revolution. The growth of democratic system of governance has thus benefited the society and the institutions created by it have made significant contributions to the progress of civilization. This school of thought defends the executive role of the different pillars of the government including the institutions of police, standing army and bureaucracy for the overall progress of society. According to them, maintenance of stability and order in the society is the dominant factor in ensuring qualitative improvement of the life of the community as a whole. The essence of it is inclusive democracy. The proponents of this school of thought refute the Marxist interpretation of the history of the progress of social development and term it as dogmatic. But, whatever be the arguments it is widely accepted that the process of evolution of all social institutions has always progressed through struggle and crystallized in definite shapes through fierce conflicts for many hundred years. The social realities, the value system and the fundamental determinants of social advancement—the factors motoring the driving force—at the turn of the development of society also called for concrete manifestation of the crystallized aspirations of the people into institutions. The emergence of the gentile constitution at a definite stage of the historical development of the society is one of the many such institutions that significantly contributed to the evolution of state at a subsequent period.
This gentle constitution had, however, grown out of a society that knew no internal antagonisms, but was adapted only for such society. It had no coercive power except public opinion. But, subsequently a society had come into being that by the force of all its economic conditions of existence had to split up into freemen and slaves, into exploiting rich and exploited poor; a society that was not only incapable of reconciling these antagonisms but had to drive them more and more to a head. Historically, such a society could only exist either in a state of continuous, open struggle of these classes against one another or under the rule of a third power which, while ostensibly standing above the classes struggling with each other, suppressed their open conflict and permitted a class struggle, at most in the economic field, in a so-called legal form. Eventually, the gentle society as result of the class struggle had outlived its usefulness. It was burst asunder by the division of labour and by its result, the division of society into classes. Its place was taken by the State. The State is by no means a power forced on the society from without; just as little is it "the reality of the ethical idea", "the image and reality of reason" as maintained by Hegel. It is essentially an apparatus whereby the exploiters keep the working people into submission.

This apparatus is the product of the society at a certain stage of its development. But, with the efflux of time, this society became entangled in an insoluble contradiction with itself; it split into irreconcilable antagonisms. But in order these antagonisms, classes with conflicting economic interests, might not consume themselves and society in fruitless struggle, it became necessary to have power seemingly standing above society that would alleviate the conflict, and keep it within the bounds of "order"; and this power, arisen out of society, but placing itself above it, and alienating itself more and more from it, is the state.

The state thus not only epitomises the collective will of the people but also reflects its vision: the journey of social advancement, of the whole process of productive system, of trade and commerce and of art and culture.

Because the state arose from the need to hold class antagonisms in check, it is, as a rule, the state of the most powerful, economically dominant class, which, through the medium of the state, becomes also the politically dominant class, and thus acquires new means of holding down and oppressing the oppressed class. The institutions created by the state in the long journey of its historical evolution were, therefore, essentially the institutions of exploitation; the manifest acts of such exploitation were carried out by mechanisms under its sole command. The officials as organs of the society in possession of public power stood above the society. Being the vehicles of a power that was becoming alien to society, respect for them was being enforced by means of exceptional laws and by virtue of such laws they enjoyed special sanctity and inviolability. The institution of Police was created and the "shabbiest police servant"
in the civilised state has more authority than all the organs of gentile society put together.

It is also an unmistakable fact of history that the state of antiquity was above all the state of the slave owners for the purpose of holding down the slaves, as the feudal state was the organ of the nobility for holding down the peasant serfs and bondsmen, and the modern representative state is an instrument of exploitation of wage labour by capital. The laws and the institutions created by it to implement them at the varying stages of its development are fundamentally the requirements of the ruling class to exercise its authority over the classes placed far apart from the possessing class. This possessing class has constantly been influenced by naked greed - the driving spirit of civilisation from the very first day of its existence to the present time, and since exploitation of one class by another class is the basis of civilisation, its whole development moves in a continuous contradiction. It has also been argued by Frederick Engels that the cohesive force of civilised society is the state, which in all typical periods is exclusively the state of the ruling class. And the State took its distinctive modern form as the enforcement of bourgeois rights by coercion. Police, standing army and laws were all brought into being to protect the haves from the 'free' desires of have-nots. Bourgeois liberty at once gives rise to bourgeois coercion, to prisons, armies, contracts, to all the sticky and restraining apparatus of the law, to all the ideology and education centred round the sanctity of private property to all the bourgeois commandments.

The present study of the problem of the undertrial prisoners is essentially based upon the dynamics of the society. Such a study obviously necessitates proper appreciation and comprehension of the historical process of the evolution of the society and understanding of the characteristics of every antagonistic society as well as the basis of existence of antithetical classes. The comprehension of the dynamics of transition of the society in which social consciousness flowers out of social effort can only help one to make a scientific assessment of the realities of the contemporary age. The age we have been living in is characterised by dominance of market forces and neo liberal economic order. The old institutions are unable to withstand the onslaught of the upcoming institutions with their wings spread out all over the world. The changing value system is swayed by mad race for opulence, fierce competition, greed and self-interests. The social fabric stands critically exposed to new realities where interplay of conflicting forces has been generating intense and uncontrollable social tension. This has the effect of the growth of multifaceted and multidimensional crimes - far more fearsome and awe inspiring that one can ordinarily comprehend. While examining the issues integrally connected with crime, criminals, Criminal Justice System and the rights of the undertrial prisoners one has to take into account the social realities that principally determine the policy formulations of the government of the day. The growing highhandedness of the police, its lack of sensitivity and assumed
authority to abrogate the rights of the people with impunity also merit close scrutiny in the context of present social perceptions. It, however, needs no reiteration that incarceration of the deviants in every social system has been the integral component of the prevailing legal and penal system and its fundamental objective has always been to keep at bay the opponents of the ruling class in the name of the maintenance of order in the society though the freedom of every citizen to live according to his own pleasure is the cornerstone of democratic polity and 'universal arithmetical equality is the democratic principle of justice'. In the world of such 'arithmetical equality' undertrial prisoners are the ones who are deprived of their individual liberty and detained for trial and punishment for defying the code of conduct of the society. This is aimed at preserving and protecting the inviolability and sanctity of the values of the society. The violators of the code of conduct of the society are separated from the rest of the people and subjected to incarceration for so long a period as the existing laws - the very creation of the ruling class - determine.

They are placed opposite the situation where liberty is a positive and not a negative concept; liberty is the presence of opportunity rather than the absence of constraint; liberty is the ability to do what we want.

It is against this broad socio-political and cultural canvas that I have studied the basic issues that critically affect the undertrial prisoners in the custody of the Kolkata Police - one of the executive arms of the Left Front Government of West Bengal - the Government that has been in power uninterruptedly for more than twenty seven years.

The study of the issues that concern the undertrial prisoners also demands that these are examined against a wider perspective - the perspective that unfolds the causal factors of crimes and development of criminal propensities among people. Whether the deviants are the product of the society or born as deviants is a fundamental question. The question has haunted man from the dawn of civilisation and it continues to do so even now. While attempting to find an answer to the question in the present social context, it necessarily requires an appraisal of various theories of crime and penology; trace the origin and development of Criminal Justice System as well as the basic features of contemporary correctional system. An in-depth study of the fundamental aspects of the Criminal Justice System that has developed over the centuries where the deviants, undertrial prisoners, convicts, police, prison officials are the main actors is also necessary for proper appreciation of the entire gamut of this complex problem. Moreover, the theoretical construct of crime, criminality, punishment which are essential features of the Criminal Justice System need to be thoroughly analysed to get an insight into the process of their evolution and relate them to the contemporary realities.
1.2: Crime and Criminality

The history of the development of crime and punishment is of compelling interest to various cross sections of the society. In this context, it is necessary to mention that with the gradual progress of ideas a number of theories of crime and punishment have evolved in the course of last centuries.

Though the jurists of recent times have found considerable difficulty in defining crime, we find Serjeant Stephen in his edition of Commentaries of Blackstone laying down the definition of crime as: "A crime is violation of right considered in reference to the evil tendency of such violation as regards the community at large". We, however, need to know who are criminals and why they are so and how the society treats them.

Crime is essentially a violation or neglect of some duty imposed by law of a country for which there is a penalty prescribed by the law itself. It is as old as human society because of man's inherent tendency to commit crime and unless his mind which is the motive power behind all his actions, undergoes a change for the better it will stay there. The idea of crime, however, varies according to the law of the state concerned. For what is crime in one state may not be so in another and may even be a religious and social necessity in a different state. In other words, "A crime is an act or omission ascribed to a person when he is punished by the authorities in continuous political control over the territory in which he is."

Prof. Sutherland defined crime as a "legal description of an act as socially injurious and legal provision for the penalty of the act". The critical point is this: Though acts themselves may be indisputable, their criminality is always an interpretation. It is this socio-legal interpretation alone which confers the status of crime upon the act, and status of criminal upon the actor. Again, what is considered an innocent act in one age may come to be regarded as an offence in a subsequent age. In the early stages of our civilisation the wife of one person could be taken away by another person and her husband and children would have no right to stop it as it was not an illegal act then. But, later on this was prohibited and made criminal. Again, we find instances of persons being engaged to beget children in widows and women whose husbands were alive, out of social necessity. The sacrifice of human beings to propitiate the gods at the time of so-called divine visitations like outbreak of famine, plague, devastating natural calamity etc. and the rite of Sati i.e. setting to funeral pyre of the wife with her dead husband were in vogue in India until they were stopped by legislation. In western countries offences against religion such as...
blasphemy and heresy were, in olden days, made penal like ordinary crimes such as theft and murder. Witchcraft in England was also punished in England till the later part of the 17th century with death sentences. The idea of crime, it would thus appear, underwent a gradual evolution along with the growth of civilisation. Crime and punishment were gradually placed on a rational footing by legislation. Even, many of the provisions of the Manu Sanhita which epitomises the earliest legislation of India and used to be a guide for all legal decisions and punishments for many centuries, were later on considered out of date in the light of the present day requirements and enlightened civilization. 21

Crime is, therefore, a matter of legal definition. It differs in time and place in accordance with variations in standards that the law may have established. Crime is, thus, variable, relative and dynamic rather than absolute or permanent in quality. This variability is one reason why some authorities have suggested that crime as defined by law is not a sociological entity, derived from the nature of a sociological subject matter. It is well known to us that all forms of normative control are relative and variable in some measure. Similarly, custom, fashion, morality, and tradition are embedded to the culture of the society. Legal norms, more than others, are the product of reflection and rational deliberations by legislatures and courts. They are the result of real efforts to fit social rules to the needs of a people.

William Chambliss and Robert Seidman 22 devoted a good deal of attention to articulation of an interest-group theory of the origins of criminal laws in modern societies. They argued that: "Every detailed study of the emergence of legal norms has consistently shown the immense importance of interest-group activity, not the public interest, as the critical variable in determining the concept of legislation." 23 They averred, "Deviancy is not a moral question. No act, nor any set of acts, can be deemed inherently "beyond the pale" of "community tolerance". 24 Rather, there are in effect an infinite number and variety of acts as occurring in any society which may or may not be defined and treated as criminal. Which acts are so designated depends on the interest of the persons with sufficient political power and influence to manage to have their views prevail. Once it has been established that certain acts are to be designated as deviant, then how the laws are implemented will likewise reflect the political power of various affected groups.

Don. C. Gibbons observed that in the ultimate analysis, it is the society that creates crime by singling out acts as bad and criminal. By society is meant groups of persons who manage to get some act included within a set of statutes that declare certain behaviours criminal in form. Crime is not inherent in behaviour; somebody has to identify acts of one kind or another as criminal. For behaviour to become criminal, some one's conception of an act as criminal must get widespread adoption. The social character in conceptions of crime is evident in the fact that the number of acts regarded
as crimes has steadily increased over the past several hundred years as "lawmaking bodies have created more and more statutes." 25

Richard Quinnney also observed that the state is organised to serve the interests of the dominant economic class, the capitalist ruling class. According to him, "criminal law is an instrument of the state and ruling class to maintain and perpetuate the existing social and economic order." 26 Chambliss' observation was far more forthright. He noted: "Acts are defined as criminal because it is in the interests of the ruling class to so define them." 27

The Indian Parliament also enacted a number of legislations in the post-independence era to meet the exigencies of the age. The Acts are fundamentally designed to consolidate the strength of the ruling class as well as to maintain social stability. The Defence of India Rules, Preventive Detention Act, Maintenance of Internal Security Act, TADA, and Prevention of Organised Terrorists Act are some of the pieces of legislation that overtly seek to safeguard the interests of the nation and maintain peace and order in the society but they are in most cases designed to meet political ends. It is also claimed by the so-called revolutionary and terrorist outfits that the Indian bourgeoisie enforces these laws to suppress the people's aspirations - the aspirations for ushering in a brave new world and thereby maintain peace and order in its own class interests. Behind the plea of fighting terrorism and organised violence through strict enforcement of these laws - it is argued - is hidden the real purpose of fighting political rivals. The detention of Shri Vaiko-leader of MDMK-under POTA in the state of Tamilnadu was a glaring example of misusing laws for political ends. In the seventies also, MISA was mainly used to silence the voice of dissent and opposition. Never before had the State abused its authority more than it did during the Emergency period and used the draconian laws to gag the critics. But, with the passage of time there have been far reaching changes in ethos and temperament, outlook and attitude, polity and culture.

Today, we are living in the "Network Age" 28 which is characterized by far reaching technological changes. Besides, Biotechnology is set to give new direction to the course of human history. Against this background, it is necessary to explore the contours of the criminological theories hitherto developed so that the unfolding situations could be addressed adequately. The situations referred to are necessarily the situations where the social institutions will have redefined their respective roles in keeping with the ground realities. In this context, the theories of crime developed by different schools of thought at various stages of the development of society are being revisited with the precise objective of identifying their relevance in the emerging scenario. Moreover, the study that is integrally connected with the theories of crime requires appraisal of the historical context in which the theories were developed. To comprehend the contemporary social perspective in the background of the prevailing
Criminal Justice System such an appraisal is extremely crucial. We have already learnt that in every society crime existed but their forms have changed with the advancement of civilization (the emergence of cyber crime is a case in point) and have varied according to the attitude and value system of different ages. In the present phase of the development of society, the wide presence of genomics, DNA profile, genetically modified food, genomic driven drug delivery system and nuclear aspects vitally influence temperament and outlook of man and the various social institutions. As we are aware that the causative factors of crime have been traced to different origins and explained by the exponents of various theories from different angles, it is to be seen how they address the current modes and the complexities of our times.

1.3.1: Criminal Anthropology : The Italian Positivist School

Lombroso propounded the Theory of Positivism which emphasized crime as a natural phenomenon produced by a variety of factors (multiple causation), some of which are biological, others environmental. Lombroso's famous claims centered around the notion that the criminal is of different physical type than the noncriminal. Though he propounded initially that crime is caused almost entirely by the anthropological characteristics of the criminal but in later editions of "The Criminal" he assigned to social and other factors their legitimate value in producing the criminal characteristics. In "Crime: Its Causes and Remedies" Lombroso gave due weight to all the various factors that go to make up the constitution of the criminal. Meteorology and climate, geology, (mountainous and other formations of soil) race, heredity, civilization, density of population (immigration and emigration, birth rate, etc.) means of subsistence, (economic condition, famine, food -price), alcoholism, prostitution, unemployment, education, religion, bad government – in short, almost every conceivable cause, hereditary and environmental, that affects and determines human conduct, directly or indirectly, was given its proper place in his etiology of crime.

The study brought about a new orientation which led to the emergence of criminology as a new branch of knowledge. The criminal came to be studied as an individual patient, exhibiting pathological conditions which might either lend themselves to successful treatment or might be too deep–seated for any attempt at cure or rehabilitation. The old system of cataloguing crimes and assigning specific punishments to specific crimes threatened to fall into disrepute and, as in medicine so in penology, the criminal like the patient came to occupy the foremost place. He further stated that most of the criminal cases could be prevented if the state undertakes to improve the general social and economic condition of those who get the least. It is, therefore, obvious that socio-economic factors have always contributed to the genesis of crimes.
Lombroso was greatly influenced by the work of Laplace and Darwin. He had himself observed:

"The novelty of my most discussed conclusions goes back to pre-historic times... Soloman writes that the heart alters the face of the evil man and above all, Aristotle, Avicenna and J.B.Dalla Porta discussed extensively criminal physiognomy, the last two going perhaps further than we ourselves. What else shall be added when Polemon, after having insisted upon the narrow forehead of criminals speaks even of their mancinisismo (left-handedness), an observation which I thought to have been the first to make." 30

Lombroso propounded the doctrine that the criminal is an atavistic phenomenon. According to him, he represents a throw-back or reversion to an earlier type of the past. Crime according to Lombroso proceeds from abnormal anatomical, physiological and psychological characteristics or stigmata and he proceeded to classify criminals into (1) born criminals (2) criminal by passion 3) insane criminal (4) occasional criminal. According to Lombroso, distinct anthropological type having not only special, physical and anatomical characteristics but also the characteristic moral insanity makes the born criminal a class by himself. The criminals by passion exhibit characteristics which are sometimes traceable to epilepsy and impulsive insanity. He branded the political criminals as a special class of criminals by passion and stated that "in nearly all political criminals by passion we have noticed an exaggerated sensibility... it is never wealth, vanity, the smile of women (even though often eroticism is not lacking in them, as in Garibaldi, Mazzini, Cavour) which impel them, but rather the great patriotic, religious, scientific ideals." 31

The third class, the insane criminal is by no means on the same footing as the born criminal. But, Lombroso discovered certain analogies between the two, and he accounted for certain kinds of crimes by means of insanity. The fourth class, the occasional criminal has three sub-divisions viz. Pseudo-criminals, criminaloids and habitual criminals.

Pseudo criminals are those who commit crimes not out of their nature, but owing to extraordinary circumstances, often without meaning to do wrong, such as for self defence, for sustenance of the family, etc. Their crimes are rather "juridical than real because they are created by imperfection of the law rather than by those of men". The acts that they commit do not involve danger to the body social. Nor do they offend the social conscience.

The criminaloid has "only a touch of degeneracy". The tendency to do wrong is organic to them, but it is less intense so that a determining occasion must arise to put it in operation, whereas, in the born criminal, the organic tendency is strong enough to be itself the determining factor.
The habitual criminal, on the other hand, is distinguished from the born criminal as well as from the criminaloid in that he does not suffer from abnormal heredity. He is normal from birth and is without any tendencies, or a peculiar constitution, for crime, so that it is not only one determining circumstance which makes him a criminal, but a series or number of circumstances such as want of early education, of parents, school etc., etc. that cause him to turn a criminal.

Dr. Goring described Lombroso's theory as a superstition, "kith and kin with misnamed 'sciences' of Phrenology, chiromancy and physiognomy." 32

There is, however, no denying the fact that Lombroso was the first who introduced the application of the methods of inductive science to the science of crime. Sir Evelyn Ruggles-Brise, in his preface to Goring's work called it the "first attempt that has been made in this, or any other country, to arrive at results in criminology by the statistical treatment of facts." 33 This completely transformed the attitude of the penalists all over the world. They realised that the central point in penology was neither the crime nor punishment: it was the criminal himself who was henceforth to be studied in relation to the heredity, his psychology and his environments, physical and social.

It is recognized that, historically, the teachings of Lombroso furnished the turning point of European thought from the crime to the criminal. Enrico Ferri said that Lombroso's greatest merit was to draw the attention of the world to the personality of the criminal: before, men knew penal justice, penal justice did not know men, as was stated by Van Hamel, who, together with Liszt and Prins, founded the new school of penal law. From its beginning the school of Lombroso made a distinction between different classes of criminals and has always recognized the influence of the social environment on the genesis of the criminality. Also, the Italian school did not consider merely the physical qualities of the offender, but his psychological, intellectual, sentimental and moral personality, too. 34

The work of Pinel (1745 – 1826) as well as that of Esquirol, as observed by Bernaldo de Quiros, "extended the boundaries of mental infirmity and reduced the field of delinquency and prepared the explanation of the morbid nature of crime" 35. Despine drew attention more particularly to the psychological side of the criminal's mind. 36 Clapham and Clarke 37, Winslow 38, Thompson 39 and Maudsley contributed to the theory on psychological sides of the criminal mind. However, as regards the influence of the social factor on crime, the English and French thinkers were the first sponsors of the doctrine.

Quetelet as a social criminologist sounded the first note that "Society prepares crime: the criminal becomes its executive" 40. He also propounded the thermic law of
crime by which he maintained that the larger number of blood in the southern countries of Europe, and of crimes against property in the northern, were attributable to thermic conditions.

1.3.2: Theory of Factors

After Lombroso appeared Enrico Ferri the Italian exponent of criminal sociology. He propounded the Theory of Factors by which he meant that the three factors, anthropological, physical and social, were jointly responsible for crime. He explained thus:

"No crime, whoever commits it, and in whatever circumstances, can be explained except as the outcome of individual free will, or as the natural effect of natural causes.

As a matter of fact, this school has always from the beginning maintained that crime is the effect of anthropological, physical and social conditions which evolve it by their simultaneous and inseparable operations." 41

He also observed that the physical factors of crime are climate, the nature of the soil, and the relative length of day and night, the seasons, the average temperature, meteoric conditions, and agricultural pursuits. According to him, the social factors comprised the density of population: public opinion, manners and religion; industrial pursuits; alcoholism, economic and political conditions; public administration; justice and police; and in general legislative, civil and penal institutions 42. Ferri observed that the level of criminality in any one year is determined by the different conditions of the physical and social environment combined with the hereditary tendencies and occasional impulses of the individual in obedience to a law – the law of criminal saturation. 43

1.3.3: Theory of Criminal Psychology

Raffaele Garofalo, one of the prominent exponents of the Positive School treated the problem of crime from the evolutionary standpoint tracing the evolution of moral sense and defined what he called natural crime as "an offence against the fundamental altruistic sentiments of pity and probity in the average measure possessed by a given social group" 44. He distinguished these so-called natural crimes from others which were called artificial and positive. The natural crimes arise from a psychological anomaly. This, once fixed in the process of evolution, remains unaltered and
inexorably leads to offending acts. He classified criminals into murderers, violent criminals, and offenders against property, sexual or lascivious criminals.

According to Garofalo, murderers and violent criminals are natural offenders against humanity, because there is a fundamental psychological anomaly they labour under in respect of the sentiment of pity. Thieves and sexual criminals suffer from the same anomaly in regard to the sentiment of probity. These crimes, the essence of which in his opinion is that they affect the society injuriously, are brought within a compact area.

1.3.4: Theory of Endocrinology

The noted endocrinologist Hoskins propounded the importance of the endocrines in the regulation of growth, metabolism, reproduction, sexual development and general physiological balance. Disturbed hormonal function may have also characteristic effects on behaviour. M.G Schlapp estimated that one third of all prison inmates were victims of some form of toxic infection or glandular dysfunction. He subsequently published a treatise reaffirming his theory that all criminality was attributed to glandular dysfunction. Louis Berman also ascertained that a definite, detailed, systematic study of the condition of different endocrine glands in juvenile delinquents and criminals led to the conclusion that (1) crime was due to a perversion of the instinctive drives dependent upon a deficiency and imbalance of the endocrine glands. (2) Certain types of crimes were associated with certain types of endocrine malfunctioning. Pedolsky also held that many categories of offences are associated with hypoglycemia, and endocrinologically produced inability of the body to maintain an adequate level of blood sugar. Instances of "hypoglycemic crime" were said to include theft, violence, traffic violations, clashes with policemen, murder, cruelty to children and other domestic offences. However, though hypoglycemia exhibited various psychological symptoms including impairment of willpower, irritability, loss of associational power and decreased moral sense, among others, these manifestations were viewed as effects rather than causes.

1.3.5: Theory of Phrenology

The discipline known as Phrenology was based on the theory that character and behavior are determined by the balance among thirty five faculties or propensities localized in the brain. Gall propounded the theory in 1800s. Comte and William James also belonged to this School.
Persons of phrenological persuasion argued that conformations of the skull reveal "faculties" or propensities to behaviour which are the product of biological inheritance. Criminals were held to be deficient in some of the normal faculties influencing behaviour.

1.3.6: Theory of Biological Inferiority

Ernest Hooton, a physical anthropologist, in his study published in 1939 noted that (a) criminal behavior is a direct result of inherited biological inferiority (b) Thieves and burglars tend to be sneaky little constitutional inferiors, (c) Robbers lean to several variants of the wiry, narrow hard bitten, tough, not notably undersized. He also added that it is a remarkable fact that tall, thin men tend to murder and rob, tall heavy men to kill and to commit forgery and fraud, undersized thin men to steal and to burglarize, short heavy men to assault, to rape and to commit other sex crimes, whereas men of mediocre body built tend to break the law without obvious discrimination or preference.

1.3.7: Constitutional Psychiatry

William Sheldon, a psychiatrist building largely on the earlier theory of Kretschmer, had sought to demonstrate that individual differences in behaviour and personality are basically determined by differences in physiological functioning. It was not only something new but unparalleled in its diagnostic potentialities. Sheldon held that the different forms of behavioural functioning – and, hence different forms of criminality – could be identified by visual inspection of the individual's physique. He held that the make-up of every one represented some combination of three components, their distribution in any individual was usually unequal, with one component tending to predominate slightly or markedly over the others. The person's predominant component indicated his predominating psychological tendencies. Sheldon described the structural and mental characteristics of each of the three types - viscerotonic, cerebrotonic and somatotonic.

The ultimate conclusion is, however, research in the relationship between crime and physical factors has not only failed to reveal any causal link but has failed to produce evidence of any association whatever. It does not of course imply that physical factors have no relationship with criminal behaviour. It does not also prove the correctness of psychological or sociological views of criminal behaviour. Finally, it does not even prove that the main theses of the physical theorists are wrong. The causal question would still be open; it would still be necessary to explore the
possibility that both crime and physiological defects are the products of other factors, and that the same conditions which produce a defective physical organism produce a socially objectionable human being as well.

1.3.8: The Classical View

The classical school refers to the writings of a number of European scholars in the late 1700s, particularly Cesare Beccaria in Italy and Jeremy Bentham in England. The core concepts of the classical frame of reference are hedonism and free will. Prevailing opinions of the time agreed that all men, criminals included, act rationally and deliberately to avoid pain and encounter pleasure. Bentham and Beccaria were not involved in the statement of criminological theories out of any fundamental or overriding interest in the explanation of crime. Instead, the classical version of criminological theory represented a by-product of other kinds of interest. Bentham, Beccaria, and others were social critics and reformers, interested in modifying the social control practices of their native societies. They were concerned about the severe and barbaric punishments and were appalled by the existence of tyrannical and capricious judges administering harsh and unfair punishments to offenders.

1.3.9: The Cartographic School

The cartographic or geographic school of criminology pursued the ecological facts of crime and examined the distribution of forms and rates of criminality among spatial areas. Adolph Quetelet in Belgium and A. M. Guerry in France. Alfred Lindesmith and Yale Levin listed many factual studies of crime and delinquency following this approach.

The cartographic school arose out of the development of systems of social bookkeeping first established in European countries in the 1500s, such as the systematic recording of births and deaths.

Sutherland and Cressey enumerated a large number of these investigations carried on since the 1800s. Studies of ecological variations in crime and delinquency rates in individual cities provide another modern version of cartographic interests. The work of Calvin Schmid was notably representative of such activity. Through conduct of a survey from an ecological perspective in the city of Seattle, USA, it was found that in general, illegal activities and criminal actors are most common in areas of low social cohesion, weak family life, low economic status, physical deterioration of property, high population mobility, and various forms of personal demoralization.
1.3.10: Ecological Theory

The ecologists viewed crime as a more or less normal and inevitable by-product of social change. In the course of social change there occur sharp discontinuities in the physical and interpersonal modes of life – discontinuities unevenly operating in space and, for this reason, unevenly and unequally affecting people at different times and places. In their theory of criminalization, which was largely implicit because of a marked empirical bent, they attempted to explain how individuals, in the normal process of appropriately responding to their environment, revealed on an interpersonal level the strains of discontinuity affecting the community at large.

The sociologist R.D. McKenzie defined human ecology as the study which deals

"... with the spatial aspects of the symbiotic [i.e., mutually dependent] relations of human beings and institutions. It aims to discover the principles and factors involved in the changing patterns of spatial arrangements of populations and institutions resulting from the interplay of human beings in a continuously changing culture." 64

In their survey of theories of human ecology, Llewellyn and Hawthorne pointed out that certain writers regard ecological factors as distinct from cultural factors, while others speak of ecology in terms of the spatial distribution of cultural phenomena.

None of the writers of the first school denied the importance of the cultural factor within society, but, as Llewellyn and Hawthorne pointed, "they generally assume that human society is organized on two levels, the biotic [read "ecologic"] and the cultural, with the cultural resting upon the biotic, which is basic." 65

Shaw viewed delinquency as the more or less inevitable result of certain consequences of city growth and expansion. Such factors as poor housing, over-crowding, low living standards, and social and racial conflict were viewed as symptoms that "reflect a type of community life" rather than as direct contributors. Shaw wrote: "Even the disorganized family and the delinquent gang, which are often thought of as the main factors in delinquency, probably reflect community situations." But at another point Shaw wrote: "Behavior of a delinquent may be in part a reflection of family conflict which drives him into a gang... The delinquent gang may reflect a disorganized community life or a community whose life is organized around delinquent patterns...The point is," continued Shaw, "that...behavior of persons becomes intelligible when studied in terms of the social situation in which it has occurred." 66
1.3.11: The Multiple Approach Theory

Another trend of thought on questions of causation that flourished alongside the theoretical endeavours already discussed is known as Multiple Approach Theory which holds that causal analysis must be eclectic, providing room for a multitude of factors of different kinds, all bearing some relationship to crime and delinquency. Exponents of this view have often taken pride in their avoidance of dogmatism and rigidity and in their willingness to include biological, psychological, and social factors within some kind of explanatory porridge. Advocates of multiple-factor thinking have suggested that because the causes of criminality vary from individual to individual, lengthy inventories of these causes are needed in each instance of deviant conduct. According to this line of reasoning, the best explanatory system is a detailed set of variables or "categoric risks" all bearing some statistical association to criminality. Supporters of this viewpoint maintain that no one factor can be isolated to show an invariant relationship to criminality.

Multiple-factor orientations as now structured are not explanations at all. To explain criminality scientifically, it is required to develop propositions of the form: "If conditions A, B, C, and D occur, criminality of some kind will also occur (and if these conditions are absent, non-criminality will be observed)." 67 Few modern criminologists would hold that criminality is the result of one variable, although many would aver that some large but finite number of factors do combine to produce criminality. Efforts to develop sociological theories of criminality involve an extensive list of variables considered to play a role in criminal etiology. 68

1.3.12: Theory of Differential Association

Edwin H. Sutherland contributed substantially to the study of criminological theory. He propounded the theory of "differential association" which comprises the following fundamental features.

- Criminal behaviour is learned. Negatively, this means that criminal behaviour is not inherited.

- Criminal behaviour is learned in interaction with other persons in a process of communication.

- The principal part of the learning of criminal behaviour occurs within intimate personal groups. Negatively, this means that the impersonal agencies of communication, such as movies, newspapers, play a relatively unimportant part in the genesis of criminal behaviour.
When criminal behaviour is learned, the learning includes (a) techniques of committing the crime, which are sometimes very complicated, sometimes very simple; (b) the specific direction of motives, drives, rationalizations, and attitudes.

The specific direction of motives and drives is learned from definitions of the legal codes as favourable or unfavourable.

A person becomes delinquent because of an excess of definitions favourable to violation of law over definitions unfavourable to violation of law. This is the principle of differential association. It refers to both criminal and anti-criminal associations and has to do with counteracting forces.

Differential associations may vary in frequency, duration, priority and intensity.

The process of learning criminal behaviour by association with criminal and anti-criminal patterns involves all the mechanisms that are involved in any other learning.

While criminal behaviour is an expression of general needs and values, it is not explained by those general needs and values since non-criminal behaviour is an expression of the same needs and values.

The essence of Sutherland's argument is that criminal behavior is enacted by individuals who have acquired a number of sentiments in favour of law violation, sufficient to outweigh their proposal or anti-criminal conduct definitions. Sutherland observed that "It is not necessary ... to explain why a person has the associations he has; this certainly involves a complex of many things." He, however, maintained that the state of differential social organisation characteristic of modern societies is responsible, in general terms, for the varied associational ties of different persons. Donald Cressey, however, prepared an extremely detailed and incisive account of the differential association controversy. According to Cressey, allegations of defects in the differential association theory fall into two groups: those based on misinterpretation of the language of the theory or on ambiguities contained in it and those directed at substantive claims in the argument. There was an erroneous interpretation that the theory suggested persons who associate with criminals become criminals in turn. But, close examination of the argument shows that Sutherland maintained that criminality ensues from an excess of criminal association over non-criminal ones. Another incorrect interpretation asserted that the theory says that criminality results from involvement with criminal persons, while the formulation actually refers to criminal
patterns, many of which are carried and communicated by persons who are not
gangsters or robbers. Other objections were raised that the theory does not specify why
individuals have the associations they have, even though Sutherland did give much
attention to this question at other points in his work. Still another class of erroneous
judgement arose from incorrect notions about the role of theoretical framework. 76
Differential Association theory has also been criticised for ignoring "personality traits"
or "psychological variable". As Cressey made clear, Sutherland wrestled at length with
this objection.

The following arguments give a better summary evaluation of differential
association which is far more discerning than Cressey's judgement:

"... it also seems safe to conclude that differential association is not a precise
statement of the process by which one becomes a criminal. The idea that criminality is
a consequence of an excess of intimate association with criminal behavior patterns is
valuable because, for example, it negates assertions that deviation from norms is
simple a product of being emotionally insecure or living in a broken home, and then
indicates in a general way why only some emotionally insecure persons and only some
persons from broken home commit crimes. Yet the statement of the differential
association process is not precise enough to stimulate rigorous empirical tests, and it
therefore, has not been proved or disproved" 71

Recently there have been efforts to revise and renovate the differential
association theory so as to make it more serviceable. C.R.Jeffery criticized the
argument on the grounds that it is not stated in terms of modern learning theory. 72
Robbert Burgess and Ronald Akers actually restated the differential association
formulation in terms of modern learning theory from psychology . 73 Melvin L. De
Fleur and Richard Quinney also contributed significantly to the development of this
theory. Both of them were of the view that differential association is a label for an
assortment of factors or experiences implicated in different forms of law breaking.

Desire for achieving Social Goals

There is a view - well established in public opinion - which holds that society
and the criminal are everywhere at odds. This view seems warranted when one
considers certain types of conventional criminals. The homeless, friendless drifter who
lives by petty theft as he moves in an endless round from grooming house to the county
jail and "skid row" certainly fits the picture of the social parasite who contributes
nothing to the social order that nurtured him. He lives for himself, steals for himself,
and gives nothing in return for what he takes. He is the eternal outsider - the shabby
drifter pointed out by mothers to their small children, who must learn their necessary
lessons of fear and coldness toward the stranger. Looking at him and his nondescript fellows as they crowd the police courts, it may seem plausible to assert: "He is a criminal because he has no friends, because he is so isolated with nothing to bind him, and no one to hold him back from doing wrong."

The histories of many successful criminals, however, show that they are far better assimilated into "respectable" society than many honest persons living on the socio-economic fringe. They maintain good relations with many noncriminal enterprises; they pay their debts. Frequently, they own legitimate businesses and large tract of real estate, administered by honest employees using efficient methods and sound bookkeeping.

There are plenty of examples that create an insoluble paradox for any theory attempting to correlate crime as a whole with social conflict and detachment. A part of this dilemma springs from the fact that the term criminal itself is so broad as to be virtually useless for meaningful description of all types of law violators. 74

Mental defect has been used by a few authors almost as a specific explanation of crime. Their theory includes these propositions: first, almost all criminals are feeble-minded; second, feeble-minded persons commit crimes, in the absence of special inhibiting conditions, because they do not have sufficient intelligence to appreciate the reasons for laws and the consequences of violations of law; third feeble-mindedness is inherited as a unique character in accordance with Mendel's law of heredity; fourth, a policy of sterilization or segregation of the feeble-minded is the only effective method of preventing crime and of dealing with criminals. Subsequently, however, on the basis of results of several studies this theory was abandoned though this does not mean that it may not be a very important condition in individual cases. The proposition that feeble-mindedness is inherited as a unique characteristic has now been generally abandoned. Again, there are a few psychoanalytic theories which emphasise unconscious emotional difficulties of some kind in the causation of crime. However, the fact which stands out most clearly from the organized research studies which have been conducted by scholars representing different schools of thought is that no trait of personality has been found to be very associated with criminal behavior. 75

In preliterate and peasant societies the influences surrounding a person were relatively steady, uniform, harmonious and consistent. The individual was surrounded by all his relatives, and this larger family determined his career and ambitions. His principal satisfactions were found in co-operation with that group, which was considered as extending beyond his own life into the distant future. Within this group he has perfect individual security, for the group cared for him in case of sickness, accident, old age, insanity, or any other emergency. The social organization provided few alternative patterns to follow. The social organization provided few opportunities
for "individualism" in behaviour. But, competition, mobility, and conflict have
developed a kind of social organization that accompany an individualistic ideology
which has been logically and intellectually harmonious with a criminalistic theory. This
means that society has become organised in such a way that a premium has been placed
both on refraining from crime and on perpetrating crime. A person may now be a
member of a group organised against crime, while at the same time, he is a member of
a group organised for criminal behavior. The effects of globalisation have given
further impetus to this kind of social organisation.

It is important to remember that following the final breakdown of the feudal
system where the ownership of land had been limited and in which the fixed social
classes had mutual duties to each other and with the development of machinery, the
production of wealth passed from the control of the consumer to the control of the
capitalist; the labourer followed his work from the home to the factory, and thus the
city developed around the factory and the market place. The traditional restrictions on
economic activity were irksome as world commerce began to develop, and rebellion
against these restrictions resulted in a system of relatively free competition with an
accompanying individualistic ideology according to which social welfare is best
tained if every person works only for his own selfish interests and in today's age of
fierce competition emphasis is upon individual enterprise where each person is
expected to pursue his private ends in the most efficient manner possible, and the
expected result is increased economic wealth for all.

The participants in the new economic system resist any measure, which would
inhibit free competition, and the slogan "the least government the best" is given pride
of place. In the emerging situation, driven by competition, a tendency has developed to
keep the Government weak and individuals and industries are in the mad race for
securing special favours from the government. They do not also hesitate to resort to
bribery and fraud in order to secure favourable legislation. In the process, government
has been rendered less effective as a control of behaviour. Since the time of
development of organisation as noted above, the ideology of individualism has
encouraged the individual to disregard social welfare in the interest of his selfish
satisfactions. Under such conditions the significance of laws becomes relative: some
are obeyed and others are not, depending on whether one "believes in" them. In
today's society the ambition for luxurious standards of life and for easy money has
become effective for all social classes, since the fixed barriers which previously
restricted these privileges to nobility have been removed. Now, the businessmen
constitute the elite, and wealth is respected above all other attainments; necessarily,
poverty is disgrace. The desire for symbols of luxury, ease, and success developed by
competitive consumption and by competitive salesmanship, spread to all classes and
the simple life is no longer satisfying. These expanded wants, therefore, tend to become
stronger than inhibitions.
Now, crime is an expression of a Machiavellian ideology regarding the accumulation of wealth. That is, criminality often is merely an alternative reflection of the general values of a social system in which great emphasis is placed upon the success goal: attainment of individual wealth - and relatively slight emphasis is placed upon the proper means and devices for achieving this goal. In this type of social organisation the generally approved "rules of the game" may be known to those who evade them, but the emotional supports which accompany conformity to the rules are offset by the stress on the success goal. This general observation, however, does not constitute a sufficient explanation of criminality, for even in a society disproportionately stressing the success goal most persons do not use unsanctioned means for achieving the approved ends. An individual who is a member of one group will use one means for achieving the success goal, while an individual having membership in another group will use other means. McKay pointed out that alternative educational processes are in operation and that a child may be educated in either "conventional" or criminal means of achieving success. The development of such alternative systems, he suggests, is facilitated by the following five conditions:

- A fluid status structure in which possession of material goods is a symbol of power and prestige.
- Free competition for the acquisition of goods.
- A weakening of traditional controls through organisation of society on an impersonal basis.
- Presence of obstacles to acquisition of skills and education needed in the status struggle.
- The assumption that all have access to the luxury pattern, so that if the individual does not get what he wants he believes that he is being deprived of what he deserves.

**Family Factors**

The family is a very crucial social institution having a unique degree of control over the socialization process. The primary group interaction within family setting probably greatly influences the behaviour of all youngsters, delinquent or non delinquent. As a consequence, much interest has centred on relationship among home conditions, child rearing practices, and delinquent conduct.

The family is also an important force in adult criminality, but for somewhat different reasons. Some form of adult lawbreaking may result from distortion and pathologies in the offender's childhood experiences in his family. A wealth of evidence indicates that the family is the major anchorage point for most adults; given that an
individual is in stable family units his behaviour will be conventional. On the other hand, since disruptions of marital relationships often seem implicated in a host of forms of aberrant, deviant or otherwise unusual behaviour, some kinds of criminality may represent responses to distorted family relationships. As far as investigations of the role of family dynamics in criminality are concerned, Sutherland and Cressey summarised the generalisation involving home condition and delinquency. They indicated that delinquents tend to come from homes characterised by one or more of the following conditions:

- Other members of the family are criminal, delinquent, or alcoholic;
- One or both parents are absent from the home through divorce, desertion, or death;
- The home is marked by a lack of parental control;
- Home uncogeniality is evidenced by such things as domination by one member, favouritism, over solicitude, over severity, neglect, or jealousy;
- Racial or religious differences in conventions and standards; foster home or institutional home situations; and economic pressures stemming from unemployment or insufficient income ⁸⁰.

Again, the influence of family patterns on delinquent conduct cannot be denied. However, to argue that family variables always have primacy over other factors would be to draw a caricature of real life. Claims that some particular family pattern is found in all forms of criminality are equally erroneous.

**Mobility Factors**

Perhaps the most significant social condition accompanying the industrial and democratic revolutions is increased mobility. The condition of mobility is compatible with the individualistic ideology, and it was at the same time, incompatible with political absolutism. In the first place, the large family and homogeneous neighbourhood which had been the principal agencies of social control disintegrated, primarily as a result of mobility. ⁸¹ They have been replaced by small, nuclear family consisting of parents and children, detached from the other relatives, and by a large neighbourhood in which the mores were not homogeneous and the behaviour of one person was a matter of relative indifference to other persons. Similarly, the neighbourhood ceased to function as an effective primary group in which the pressures for conformity were intimate and personal and in which any deviation from the conventional was immediately known to the entire group. Because of increased mobility, a condition of anonymity has been created, and the agencies by which control had been secured in almost all the earlier societies have substantially weakened.
Second, the problem of control has greatly intensified in the context of the world having been reduced to a global village. Consequently, there has been extension of boundaries of frequent and effective interaction from the local community to the whole world in the form of commerce, travel, newspapers, Internet and other means of communication. When the interaction was confined to the local community, the spontaneous and sentimental influences controlled behaviour, for the effect of the behaviour of a person was immediately apparent to himself and to others. When interaction extended beyond the area of intimate association, the effects were not immediately discernible either to the members of any local community or to the participants in the broader area of interaction. Consequently, consensus regarding "proper" modes of behaviour outside the local community diminished. A certain national loyalty, somewhat comparable to the loyalties in the earlier primary groups, had flourished in connection with the doctrine of the divinity of royalty, but apparently the common people did not take this doctrine as seriously as did royalty, and when the belief in this doctrine disintegrated, no effective substitute was found.

It may be concluded that mobility of persons and of commodities inevitably widens the area within which control becomes necessary and at the same time inevitably weakens the local agencies of control in the communities into which the migrants go. It is possible that the whole process could be described in terms of Ogburn's concept of culture lag. According to the concept, crime has been prevalent because the no-material culture does not develop as rapidly as the material culture. That is, rapid changes in technology may create conditions under which the criminal laws, written for social conditions as they existed before the technological changes, must almost necessarily be violated if the new technologies are to be retained. Certain students of law, on the other hand, have insisted that prevalence of crime is due to the fact that law has been extended much more rapidly than the general mores, and that when the law is not thus supported by general mores it is relatively impotent and is violated frequently.

**Situational Factors**

Many offenders may not be any more motivated to engage in criminality than non-offenders may. Their law breaking behaviour may arise out of some combination of situational pressures and circumstances, along with opportunities for criminality. Many offenders may be virtually indistinguishable from other citizens at the point of initial involvement in deviance, so traditional views of casual relationships may not hold for many contemporary criminals although he identified situational or mechanistic causation. Ms. Sanjukta BasuRoy alias Bulbuli alias Saira alias Shehnawaz, an undertrial prisoner now lodged in Presidency Correctional Home, Kolkata who masterminded the dacoity in the residence of her maternal grandfather was also a victim of situational factors. She had no reason to become a criminal but her lust for
money and infatuation to Md. Muqtar, the tailor who had stitched her modeling apparels, drove her to a situation wherefrom she could not return and eventually turned a criminal.

Sutherland gave scant attention to this way of looking at etiology. He declared: “the objective situation is important to criminality largely to the extent that it provides an opportunity for a criminal act.” 83 In his view, different persons will define the same “objective situation differently: for some, the situation is conducive to criminality, but for others it is not. Thus, only individuals motivated to engage in criminality will do so when confronted by particular situation.

However, in many cases criminality may be a response to nothing more temporal than the provocation and attraction bound up in the immediate circumstances out of which deviant acts arise. For some instances of criminality, however, historical or genetic factors are quite powerful and situational elements are of minor significance such as certain types of deviant sexual conduct involving exhibitionism, voyeurism, or pronounced sexually aggressive acts. In regard to such conduct John Gagman and William Simon had asserted that the causal nexus of the behaviour appears to exist in the family at personalities structure of the individuals and is linked to the contingencies of his biography rather than those of social structure. 84

However, according to Don. C Gibbons the following 17 claims represent a set of exceedingly broad assumptions about the causation of crime and delinquency.

(I) The members of a society are the carriers of an organisation of social roles, that is, behaviour patterns reflecting different social statuses or positions.

(II) Social roles are the product of social organisation and socialization, that is, of the ongoing structure of society and of learning processes in primary groups.

(III) Various patterns of social organisation and socialisation exist in complex societies so that, in turn, a variety of statuses and roles exist in them. There is a variety of nondeviant roles as well as great many deviant ones.

(IV) All people play criminal or delinquent roles at one time or another, if only symbolically.

(V) Sociologically, “criminals” or “delinquents” are persons who play criminalistic roles heavily and/or who are identified by “society” as criminals or delinquents.
Criminal or delinquent behaviour is one social role, but not the only one, that persons play. Criminal or delinquent individuals also play roles as "citizen", "father", "employee", and so forth.

Among persons identified as criminals or delinquents, there are variations in the character and intensity of the deviant role. These include variations in both (a) actual deviant role behaviour, and (b) role-related social-psychological characteristics. The illegal acts carried on by offenders vary from one individual to another. Also, some persons have no self-image as deviant, whereas others exhibit such self-definitions.

Stable patterns of criminal or delinquent roles, involving recurrent forms of deviant activity accompanied by uniform social-psychological role characteristics can be observed in the population of offenders. In these terms, it can be said that types of criminalistic deviance exist.

Although behavioural and social-psychological changes occur in specific criminal or delinquent roles during the development of the role, these changes are related, orderly, and identifiable. As a result, it is possible to define specific, stable criminal and delinquent role-careers. Offenders do not engage in random and unpredictable patterns of role behavior; they do not "play the field" of offences.

The specific etiological process that leads to one particular kind of criminalistic role behaviour involves a number of causal variables and differs from that which produces another criminal role. In this sense, criminal and delinquent behaviour is the product of multiple-causation. At the same time, it is possible to identify the different etiological processes which are implicated in the various forms of criminalistic deviance.

The learning of criminal and/or delinquent roles is maximised in a criminalistic society.

Much, but not all, criminal and delinquent behaviour in the competitive, materialistic society is societally generated and takes the form of assault upon property. Property crime is not usually the expression of hidden motives but, rather, of surface ones.

Crime and delinquency in complex societies are encouraged in a variety of ways by that complexity. For example, police ineffectiveness is a correlate of a democratic, complex, urban social
organisation. In turn, ineffectual police work aids in the commission of crime and is an encouragement to criminality.

(I) Some criminalistic roles are mainly the consequence of social-class variations in socialisation and life experiences, along with other social-structural variables.

(I) Some criminalistic roles are produced by family and other socialization experiences which are not class-linked or class-specific. Among these are "parental rejection", "deviant sexual socialization", and others. These kinds of experiences occur at all social class levels.

(I) The "defining agencies" (police, probation services, courts and so forth) play a part both in the definition of deviants and in the continuation of deviant roles.

(I) Variations can be seen in societal reactions to criminality of different kinds. Personal offences and crude, visible attacks upon property are likely to be severely dealt with and punitively handled.

It has been argued that without the presence of the situational correlates the necessary and sufficient causes of at least some kinds of criminality fails to occur. Situational elements are probably involved in a good many non-trivial instances of criminality. Thus, the prisons may be filled with many persons who became enmeshed in criminality more out of adverse situation than out of differential learning. A thief becomes a safe rubber from upper middle class background who drifted into deviance after becoming detached from familial types, rather than being inducted into crime through some kind of associational learning. Once involved in the thief life, he discovers that he enjoys stealing and the "wine, women and song" life style that accompanies it.

1.3.13: Theory of Collective Order and Crime

Sociologists have approached the problems of crime from two distinct vantage points. The first approach viewed crime as a social phenomenon related to other social phenomena. How is crime, viewed broadly, related to social structures and institutions? What is its place in the social system? More fundamentally, how does crime arise in the first place — and what does its existence imply about the functioning of the social order? These are very crucial questions. The second approach attempted to explain how individuals acquired criminal behaviour patterns. How are these patterns learned, how are they transmitted — why do they vary? Thus, where the first approach raised the question: How does crime come about — how does society acquire crime? The second
approach asked: How does the individual acquire criminality – how does the person become a criminal? The contributions of sociologists to the clarification of these questions have been both rich and diverse. In this context, the functionalist analysis of deviance represented by Emile Durkheim's is being taken up first.

Emile Durkheim found occasion for several highly pertinent references to crime and the social order. The positivists had defined the criminal as an anthropological deviant, and in so doing had suggested answers for some of the most fundamental sociological problems of crime by the direct expedient of doing away with the questions. If the criminal is the product of a defective biological organisation, he cannot simultaneously be a product of his culture – except in so far as the culture tolerates the reproduction of misfits. In effect, the positivists were asserting that crime exists because criminals exist – an assertion carrying with it the corollary that crime will be abolished when criminals are no more. It was against these views and their implication that Durkheim leveled his critical fire. He was responsible for at least two seminal themes on crime and deviance.

He was one of the firsts to insist on the "normality" of criminality. He maintained that the "normal" and the "pathological" are not intrinsically different forms of behavior but rather are labels standing for social distinctions men impose on behavior. Why is criminality a natural and inevitable feature of social life? Durkheim pointed out that crimes are matters of social definition. Members of a society condemn behavioural deviations that depart markedly from prevailing norms, singling these out as crimes. The criminal serves as an identifying sign of the limits of permissible behaviour. If these major violations of normative sentiments could be repressed, men would become sensitive to the less marked deviations they now overlook, and these acts would be regarded as crimes. In turn, if these were repressed, even slighter deviations would be elevated to the statues of crimes, and so on, in an unending process of crime definition. These increasingly intolerable demands for conformity, which would then be imposed on individuals not now thought of as criminal, would be detrimental to social progress, for "to make progress, individual originality must be able to express itself. In order that the originality of the idealist whose dreams transcend his century may find expression, it is necessary that the originality of the criminal, who is below the level of his time, shall also be possible. One does not occur without the other."

Durkheim's second and most important contribution to the study of deviant behavior is in the theory of anomie, originally developed as an explanation of suicide.

According to Durkheim, the social needs or desires of humans are potentially insatiable, so collective order (social organization) is necessary as an external regulating force to define and control the goal-seeking of men. If the collective order is
disrupted or disturbed, men's aspirations may increase to the point of outdistancing all possibilities of fulfillment. At this point, when traditional rules have lost their authority over behaviour, a state of deregulation, normlessness, or anomie is said to exist. Durkheim claimed that the regulatory functions of the collective order most commonly break down at the occurrence of sudden depression, sudden prosperity, or rapid technological change, when men are misled into aspiring to goals extremely difficult if not impossible to achieve. Sudden depressions have this effect because individuals cannot adapt readily to a reduced state of existence. Sudden prosperity is conducive to anomie because it lures some individuals into supposing that they can attain seemingly limitless wealth and achievement. Much the same effect stems from rapid technological change, which instills in some persons imagination of boundless possibilities of achievement. According to Durkheim, these conditions engender pressures toward suicide, particularly in western, industrialized societies.91

Durkheim was not concerned about criminality in the theory of anomie. However, Robert K. Merton modified and elaborated on Durkheim's original thesis. In the most widely used contemporary theory of deviant behaviour, Merton generated some specific applications to criminal conduct. The social structure and anomie theory of Merton has been discussed hereafter.

A social fact, according to Durkheim, is to be defined in terms of its essential external characteristics (our only clue to reality), and not according to an intellectual ideal. The essential external characteristic of those acts called crimes is that they evoke punishment; hence we call every punished act a crime, and crime thus defined becomes the object of a special science, criminology. Durkheim also took Garofalo to task for restricting the definition of crime to acts that violate "universal moral feelings" 92 and insisted that Garofalo's elimination of other punished acts is entirely subjective.

Durkheim held that it is the social reaction to the act, rather than the act itself, which determines its character as criminal. Thus: what confers this [criminal] character is not the intrinsic quality of a given act but rather "that definition which the collective conscience lends it." 93

Durkheim acknowledged that all criminologists view crime as pathological. But, he doubted its correctness and observed:

"Crime is present in all societies of all types. Its form changes; the acts thus characterised are not the same everywhere; but, everywhere and always, there have been men who have behaved in such a way as to draw upon themselves penal repression. If, in proportion as societies pass from the lower to the higher types, the rate of criminality...tended to decline, it might be believed that crime, while still normal, is tending to lose this character of normality. [Actually ] it has everywhere
increased ••• There is, then, no phenomenon that presents more indisputably all the symptoms of normality, since it appears closely connected with the conditions of all collective life." 94

Darkheim argued that crime is not only normal but also inevitable; without it, society as we know it would be inconceivable – and not quite desirable. He developed this argument with his discussion of crime in *The Rules of Sociological Method*. 95 Crime is an inevitable consequence of social complexity and individual freedom; it is one of the prices paid for freedom. More than this, it is one of the ways in which individuality expresses itself. If the collective sentiments at the basis of morality were too strong, there could be no change – and, hence, no progress or moral evolution. "Nothing" writes Darkheim "is good indefinitely". 96 Darkheim also observed that in order to classify the different kinds of crimes, one has to try to reconstruct the ways of living and occupational customs that are practised in the different worlds of crime. One will then recognize as many criminological types as there are different forms of this organization.

It is an established fact that human behaviour in all its forms is exceedingly complex, but particularly with regard to law breaking because many different forms of behaviour fall under the umbrella term "crime". Variations in the forms and rates of crime are the product of basic features of social organization. Crime is no more or no less "normal" than any other kind of behavior. Modern criminologists avoid the "evil causes evil" view in which criminality is attributed to bad homes, adequate parent or other evils. They are, in stead, inclined to examine socio structural variables included within such broad categories as value patterns, social stratification influences, differentials in families structures, or interaction with agencies of social control.

Thus, in consideration of the present day realities it can be averred that "crime is normal and functional" 97 and this conception is unique with Darkheim.

1.3.14: Theory of Social Structure and Anomie

American sociologist Robert K. Merton developed a rich body of elaboration on Durkheim's initial notions regarding the breakdown of regulatory norms and deviant behavior. Merton continuously enunciated the sociologist's operating premise that "some unknown but substantial proportion of deviant behaviour does not represent impulses of individuals breaking through social controls, but, on the contrary, represents socially induced deviations-deviations which the culture and the social organization conjoin to produce." 98 In his analysis, Merton distinguished between two major elements of social and cultural structures: the culturally defined goals men are enjoined to pursue, and the social structure that regulates and controls the acceptable
modes or means for the pursuit of goals and interests. He noted that goals and institutionalized norms may vary independently of each other, sometimes leading to malintegrated states, one extreme being the instance of excessive stress on goals with little concern for prescribed means. In this case, a condition of "anything goes" prevails, with only considerations of technical expedience governing goal-striving behavior.

While discussing on American society, Merton said:

"The cultural system of American society enjoins all men to strive for success goals by means of certain normatively regulated or approved forms of behavior. Yet at the same time, opportunities to reach these goals through socially approved means are unequally distributed." 99

According to Merton, in situations of this kind, "it is only when a system of cultural values extols, virtually above all else, certain common success-goals for the population at large while the social structure rigorously restricts or completely closes access to approved modes of reaching these goals, for a considerable part of the same population, that deviant behavior ensues on a large scale". 100

Merton identified five modes of adaptation to the situation of disjunction viz. conformity, innovation, ritualism, retreatism, and rebellion. The category of innovation was of particular interest to the criminologist, for it referred to cases in which individuals continue to aspire to approved goals, but by means of deviant or illegitimate techniques. In accounting for the adaptations or directions different individuals take, Merton strongly emphasized variations in class-linked patterns of socialization, arguing that innovative responses are most common among relatively imperfectly socialized persons.

In several different ways, Richard A. Cloward had an important role in the further development of anomie theory. Cloward directed attention to the fact of differentials in illegitimate opportunities in addition to varied legitimate opportunity structures. 101

He pointed out that the forms of deviant behavior are conditional both on the situation of disjunction and on the opportunities to engage in deviant conduct. Just as the prospects for achievement of cultural goals through institutionalized means are unequally distributed, so are the opportunities for various kinds of careers in deviant conduct. For example, the use of drugs depends in part on contacts with suppliers of illicit narcotics. Similarly, development of a career as a professional criminal is partly contingent on contact with individuals who will induct the person into this kind of deviant pattern. 102
Cloward was also involved in two major applications of anomie theory to specific cases of social deviation. In the first, he studied a military prison in which the captors encouraged the prisoners to strive for restoration to active duty through certain approved forms of conduct summed up in the injunction, “Do your own time.” However, the inmates quickly came to understand that the “open-class” ideology the administrators put forth was a deception, for only 6 percent of the prisoners were actually restored to active duty, and even those individuals were given this status for reasons different from those the officials presented. Cloward observed that this situation led some to conformist adaptations, whereas others followed the pattern of ritualism or passive non-cooperation.103

The other application of anomie theory is found in the explanation of subcultural delinquency by Cloward and Lloyd Ohlin104.

But the essentials of that theory are that lower-class boys share a common value commitment to success measured largely in materials terms. But, unlike middle-class youths, they do not have access to legitimate means or avenues to attain these success goals. If they do have access to legitimate means, they perceive their chances of success as limited. Thus, for many lower-class boys, a severe gap exists between aspiration levels and expectations. The goals-means disjunction generates pressures to engage in deviant behaviour. In turn, the particular deviant adaptation that develops is a function of opportunity structures for deviant behaviour, at least in part. Some lower-class areas are characterized by integration of criminalistic and conformist patterns of social organization, whereas others are lacking in stable criminalistic patterns. In the organized, criminalistic area, criminalistic gang subcultures develop in which boys are involved in instrumental acts of theft and in careers that often eventually lead to adult criminal behaviour. In areas lacking criminalistic traditions, gang delinquency tends to take the form of “conflict” sub-cultural behaviour, in which “bopping” (gang fighting) predominates. Finally, some boys, failures in both the legitimate and illegitimate opportunity structures, engage in retreatist behaviour and become narcotics users.

Albert Cohen, however, made a number of points on the Mertonian schema regarding deviant behaviour.105 Cohen argued that “delinquency is a collective rather than an individual response... the delinquent subculture takes its norms from the larger culture but turns them upside down.” Cohen has, however, been criticised for his selective use of the idea of lower class subculture. David Bardua argued that Cohen had used this subculture to explain the educational failure of lower working class boys, with the notion of cultural deprivation but he did not use it to explain delinquency.106
1.3.15: Theory of Culture Conflict

In sharp contrast to Darkheim's conception of crime, the recent conceptions of crime have developed as expression of social disorganization. According to this view, the criminal is responding to values that are outside the major norm systems of his society, or in conflict with them.

Thorsten Sellin presented a systematic exposition of the culture -conflict theory of crime. Rejecting a legalistic definition of the criminal, Sellin argued that the major difference between the criminal and the non criminal is that they are responding to different conduct norms.

The connection between culture and crime, the latter being regarded as the infraction of what was loosely termed "norm of culture", was studied by the jurists before the sociologists took any interest in the matter. It was Max Ernst Mayer who, in the first edition of his Der Allgemeine Teil des Deutschen Strafrechts (1915) formulated the Kulturnormen theory of crime and criminal law. Mayer held that "culture creates a series of norms of varying importance, many of which entail prohibitions or commands of different types which may or may not be observed by members of society. Because of their social importance some of these norms are incorporated in the criminal law." Mayer's theory was, however, severely criticized on the counts that the term culture was vague and it was difficult to separate norm from criminality. Of course, this did not mean that the relationship between culture and crime had been denied in Germany or for that matter elsewhere, but the number of variables involved and above all the lack of specificity of the term 'culture' prevented it from being considered as an all-embracing source of crime. This relationship was recognised by Sauer, who also pointed out the important fact that, while crime follows culture, the latter never follows the former. In other words, crime does not create culture. In Exner and Mezner, culture conflict as a general explanation of crime was not mentioned. Following the traditional distinction between Anlage and Umwelt ('tendency' and 'environment' would be the approximate translation of these words), both authors examined the factors of crime, among which cultural conflicts may here and there play a role. Like them, Seelig did not regard crime in general as the outcome of cultural conflicts.

Thorsten Sellin was of the opinion that crime is the sequel of an external conflict of conduct norms. These are the crystallization of social rules, the violation of which arouses group reaction. As an instrument to secure conformity, criminal law should be regarded as an important body of rules which Sellin called crime norms, the function of which is to protect certain interests. The conflict between individual reaction and conduct norms-apparently crime norms-may be avoided by acculturation i.e. by the absorption of ideas with meanings which, as cultural elements embodied in
the mind, become personality elements or, more conveniently and broadly, personality. According to Sellin, personality is a social product and whether the manner in which a person responds in a life situation is the result of habit or of deliberation, his reaction may be regarded as an expression of his personality. The decisive factor is whether or not the conduct norm has become an element of his personality. If not, whatever the significance of norm to the group, it has none to the person concerned.

Sellin defined the conduct-norm in the following manner:

"For every person ...there is from the point of view of a given group of which he is a member, a normal (right) and abnormal (wrong) way of reacting, the norm depending upon the social values of the group which formulated it."  

Conflict between conduct-norms resulted from a more fundamental process which may be called culture conflict. Sellin identified two forms of culture conflict: primary and secondary. Primary culture conflict results when the norms and value systems of different cultures clash - as in the case of immigrants who, in their new country, continue to observe the customs of their country of origin. Secondary culture conflicts, on the other hand, "grow out of the process of social differentiation which characterises the evolution of the country's own culture." Sellin's account of the origin of secondary culture conflict is central to his explanation of crime. He maintained that "culture conflicts are the natural outgrowth of processes of social differentiation, which produce an infinity of social groupings, each with its own definitions of life situations, its own interpretations of social relations, its own ignorance or misunderstanding of the social values of other groups. The transformation of a culture from a homogeneous and well-integrated type to a heterogeneous and disintegrated type is, therefore, accompanied by an increase of conflict situations."  

Basically, there is no culture without violence whether legitimate or not, neither is there any culture without crime. Culture embraces exalted as well as lowly expressions of creativeness and inventiveness in the moral, juridical, scientific and other fields. It also brings forward and tries to preserve knowledge, art, literature, etc. It contributes in many ways, including violence, to the organisation, continuity and expansion of high types of life - as something different from high standards of living - for the greater enjoyment and sense of accomplishment for mankind.

In a figurative way as Ortega Y. Gasset put it, "culture is the continuous natatory exercise of man in the bottomless sea of his existence, it is the plank on which the radical and constitutive insecurity of human existence may temporarily become firm and secure. In the last instance, culture is the only way through which man can be rescued but salvation is always possible if the essential is only aimed at."  

33
The fact, however, remains that crime, prostitution, vagrancy etc. are the patterns of society but not necessarily features of its culture. In fact, culture is independent of society not only because it may contradict some prevailing social patterns in a given society but also because sometimes it survives the society in which it was created. The crux of the differences between Darkheim's position and the culture-conflict theory lies in two related assumptions made by proponents of the culture-conflict theory:

(I) The assumption that criminals are responding to norms and values at variance with those of the general culture.

(II) The assumption that criminals derive from groups who are more or less culturally isolated.

Taken together, these assumptions add up to the conclusion that crime is the product of value systems fundamentally at odds with those of culture at large.

Despite, however, its internal consistency, the culture conflict theory, it has been argued, labours under two difficulties. The first of these derives from a failure to distinguish between the idea of values as means or techniques and the idea of values as goals or ends. When Sellin spoke of norms as defining right and wrong ways of doing things, he seemed to be referring to differences in means or techniques and to leave the question of goals or ends open. At another point he spoke of a norm as "dependent on the social values of the group which formulated it". This definition carried the implication that differences in means derive from differences in ends. In Social Theory and Social Structure the sociologist Robert Merton stressed the importance of differentiating cultural goals from institutional norms. A second major difficulty of the culture conflict position derived from the first. The assumption that the conflict between criminals and non-criminals arises from different values and goals neglects the possibility that conflict may arise between individuals and groups who are pursuing the same goals - and who may even be using essentially similar techniques. Many similar conflicts of interest may arise in the society where large numbers of people compete to achieve the same goals. Moreover, it is precisely because the values and goals are similar that conflict arises in the first place. If the different competitors were each pursuing a different goal, there would be no danger that some would deprive others - and no conflict would arise.

Sociologists Donald R. Taft and Ralph England, while dwelling on American society, also argued that the value conflicts, impersonality, individualism, disrespect for law and order, exploitativeness and other ingredients are central to the American way of life and make inevitable by-product of that cultural system. Talcott Parsons advanced the theory of "deviance" which fundamentally runs parallel to that of
Merton, Jack Douglas and Edwin Lemert assert that deviance often arises as a positive response to one set of subcultural values that happens to be out of tune with another set. Accordingly, particular forms of deviance develop out of different societal dynamics rather than from single state of anomie.

1.3.16: Theory of Labelling

A new and different set of themes or orientations about deviant behaviour has sprung up in recent years, which is sometimes identified as the "Western" or "Pacific Coast" school. One of the most influential statements on deviance is contained in what Howard S. Becker had said. This newer and lively perspective on deviance is most commonly designated as the social interactional or labelling view. The theorists of this persuasion remind us that deviance is problematic as well as a matter of social definition; standards or norms are not universal or unchanging. Then, too, deviance is the result of social judgments that a social audience imposes on persons. As already mentioned, Becker's view on this point is frequently cited which is quoted below:

"Social groups created deviance by making the rules whose infraction constitutes deviance, and by applying those rules to particular people and labeling them as outsiders. From this point of view, deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an "offender". The deviant is one to whom that label has been applied; deviant behavior is behavior that people so label."

A second common theme in labelling views is that deviance arises out of diverse sources or circumstances. Labellers do not agree that some small core of cultural values and unequally available opportunity structures can account for the varied forms of deviance. Instead, these theorists stress the value pluralism of modern societies and underscore the significance of subcultural normative patterns in nonconformity. Deviant acts often develop in situations where individuals are pulled and tugged by competing interests and values. Whatever the circumstances producing norm violation, they can not be covered by some all-embracing theory such as anomie.

Labelling formulations have, however, paid relatively little attention to rates of deviance and social structural factors producing them. It has been argued that the labelling perspective has developed as a divergent alternative to social-structural or anomie arguments. Nanette J. Davis commented that the labeling theory, "as practised, has been largely astructural, ahistorical, and noncomparative, and tends to promote a sociology of the segmental, the exotic, and the bizarre. It is important to mention that the labelling theorists are generally pessimistic about training schools, prisons, mental hospitals, and other such institutions for they suspect that these places may often aggravate the problems of the deviant. The arguments have been found to be valid while studying the behaviour of Abdullah Kazi, Kanaiya Bansphor, Laloo
Mollah and other undertrial prisoners in the custody of Kolkata Police as comprehensively discussed in chapter V of this study. Incarceration of the deviants in the prisons also make them more aggressive and revengeful. Attitude of the undertrial prisoners like Sk. Benod and others in the Alipur and Presidency Correctional Homes also support this contention.

Edwin Lemert's work represents seminal version of the labelling theory. Lemert's viewpoint is based on the assumption that "behavioural deviations are function of culture conflict which is expressed through social organisation". He rejected structural-functional arguments, such as anomie, in favour of value pluralism which emphasises subcultural values and value conflicts as the source of deviance. Much of Lemert's emphasis was on processual aspects of deviant behavior in which he showed that deviant careers often undergo marked changes over time. In Lemert's theorizing, initial acts of deviant behaviour are frequently instances of "risk taking" representing tentative flirtations with forbidden behavior patterns.

1.3 : Social Disorganization and Crime

The concept of social disorganization has an important place in sociology. The usual definition of social disorganization is a breakdown or disruption in the bonds of relationship, coordination, teamwork, and morale among groups of interrelated persons so as to impair the functions of the society or smaller social organization. In this view, the United States and other Western nations are in various stages of disorganization, and their apparent high crime rates (and rates of deviation of other kind) are to be attributed to that source. With the geographical barriers among the nations having withered away and the impact of globalisation all pervasive, no country can remain away from the sweep of the western culture. As a matter of fact, the cultural invasion has resulted in the spurt of some crimes alien to the oriental value system. Consequently, the cultural ambience is eroding very fast.

Thus, Robert Redfield described the folk society -the society which is antithesis of modern, urban, criminalistic societies is the folk society- in terms of small size, isolation from surrounding cultures, non-literate population, dependence on folk knowledge, little unconventional behaviour, homogeneity of personality types, complex kinship relations, dependence on folkways, and use of informal social controls rather than formal codes of law to control personal behaviour. Little non-conforming behaviour exists, because culturally prescribed aspirations and socially structured ways of realizing them are in tune. Little personal insecurity or confusion is engendered, and only slight motivation toward deviant behavior is evident.
The concept of folk society represents an ideal which various cultures resemble in greater or lesser degree. Robert Faris described the characteristics of successful social organizations, as opposed to modern, relatively disorganized systems, in much the same terms. He pointed out that they are characterized by high morale, little personal deviation, and a predominance of integrated customs and folk knowledge, along with informal controls.

Both Redfield and Faris found the closest approximations of folk societies mainly in the underdeveloped, agrarian nations of the world. Within the bracket also comes India. But, with the rapid industrialisation and urban aggregation the old value system is facing onslaught from the developed countries. The effect of globalisation has also direct impact on the faster growth of criminal propensities among different cross sections of people. Kolkata's crime scenario supports this contention particularly in respect of the changing pattern of crime.

It is pertinent to mention that in comparison with urban society, personal deviation is uncommon in folk society. But, there is certainly no scope for coming to general conclusion that men are uniformly moulded in one image even in folk societies or that deviations from conventional roles are non-existent. But, as a formerly isolated folk group undergoes contact with other societies, certain persons react to culture conflict and marginality of status, with a resulting increase of serious mental aberrations.

In contrast to the folk culture, the developed countries are complex, dynamic, materialistic, impersonal, and characterized by other features conducive to widespread crime and other kinds of deviant behavior. Faris said:

"The essential feature in the social disorganization that underlies criminality appears to be partial failure of the normal mechanisms of social control. In a modern secular civilization this control is not as strong as in isolated and homogeneous primitive or peasant societies, or as in... religious societies. In cities, and particularly in urban slums, the weakening of family and neighborhood controls may be so extreme as to constitute complete failure. In such a situation children who have not already acquired life-organizations based on habits of conventional behavior are, though not inevitably delinquent, at least easily subject to the positive influences of the boy gangs, "fences," and the organized rewards of underworld criminal organizations....

Generalized confusion of standards in our changing contemporary society is also a factor in the encouragement of criminal behavior. The underworld organization of professional criminals is provided with important support by the non-criminal citizen who vigorously insists upon his right to consume prohibited beverages or drugs, to engage in illegal gambling, to purchase goods in evasion of rationing and price
regulations, and the like. “Right” of different kinds and of different origins have come into conflict, and no unified code is accepted by the mass of the population. In this confusion it becomes easy to make and to rationalize moral decisions on the basis of individual interest."

Critics of social disorganization notions, however, suggest that applications of the theory to real-life situations are often tautological. Lemert argued that few specific propositions to account for forms of pathological behaviour were derived from the general theory of social disorganization. Cohen was also critical of the ambiguity of the concept.

Nearly all sociologists agree that modern, industrialized societies represent an amalgam of competing value patterns and normative systems, different social strata with varied “life styles,” and subcultures and contra-cultures of one kind or another. Consensus exists on the question of “differential social organization”; the diversified character of modern societies is not at issue. The drift of thinking in recent decades has been away from disorganization views and toward stress on complexity and differential social organization.

1.3.18: Mainstream Theories of Criminality

In countless textbooks on social disorganization, social problems, and criminology, sociologists have dealt with the question of causal factors in crime and delinquency. The result is a bewildering accumulation of claims that initially projects a formidable image to the criminology student. However, nearly all sociological commentators follow some basic assumptions, to the effect that criminality is “normal” in all societies and lawbreaking is the product of various organizational features of particular nations. Crime rates vary from country to country because of organizational or structural variations. Within a society, specific individuals become criminals or non-criminals as a consequence of their positions in that system, a result of variations in organizational components within societies. Beyond these presuppositions, most sociologists agree that the causes of criminality are found in value patterns, normative systems and conflicting patterns of conduct standards, social class influences of various kinds, family and peer group influences, and other identifiable social forms and variables.

The mainstream or liberal criminology has emphasized the study of the etiology of criminal behaviour rather than lawmaking processes. It has been argued that many mainstream viewpoints on criminality are based on societal models that emphasize normative consensus, social stability, and related characteristics. Lemert, Douglas, and others stress that value pluralism, social conflicts, and racism are the
sources of deviance and crime in modern society. On this point, there have been other recent departures from earlier modes of liberal thought, with criminologists arguing that crime reflects social power struggles in which some groups manage to get their norms and values embodied in criminal law, with the deviations from these standards being defined as crimes.\(^{134}\) According to these contentions, persons who get labeled as criminals come from the ranks of those who lack social power, lower-class individuals, transients, youths, and women. Michel Foucault observed, "Crime is almost exclusively committed by a certain class; that criminals, who were once to be met within every social class now emerged, almost all from the bottom rank of the social order; that nine tenths of murderers, thieves and idlers come from what we have called the social base; that it is not crime that alienates an individual from society, but that crime is itself due rather to the fact that one is in society as an alien, that one belongs to that "bastarised race", to that class degraded by misery whose vices stood like an invincible obstacle to the generous intentions that wish to combat it, ... law was made for all in the name of all; ... it was made for the few and that it was brought to bear upon others, that in principle it applies to all citizens but that it is addressed principally to the most numerous and least enlightened classes; that unlike political and civil laws, their application does not concern everybody equally; that in the courts society as a whole does not judge one of its members, but that a social category with an interest in order judges another that is dedicated to disorder."\(^{135}\) Thus lawbreaking is the outcome of struggles between the powerless and the powerful.

**Socialist Theory**

Socialist explanations of crime grew as an expansion of Karl Marx's theory, first published in 1867. The birth of "new criminology,"\(^{136}\) "critical criminology,"\(^{127}\) "radical criminology,"\(^{138}\) or "Marxist criminology,"\(^{139}\) is a significant development in the last century. The newer criminology is termed Marxist in that it is structured around the central tenets of Marx's arguments about the political economics of capitalist societies. The socialist approach to the theory\(^{140}\) of crime is based on the following premises:

Marxist-Leninist philosophy, broadly stated philosophical materialism, which regards economic evolution as the determining factor, not only of the total social structure, but above all of its 'ideological superstructure'. Consequently not only material living conditions are determined by the ways of production but social, political and spiritual processes as well. It is, therefore, not consciousness that determines what man is, but his social self that determines his consciousness. It was in the light of these tenets that Marx, Engels and Lenin referred occasionally to the problem of crime. To them crime is the outcome of competitive economic conditions and exploitation which will eventually disappear in a socialist structure of society. Eventually, because none of them nurtured the illusion that abolition of crime was an easy matter. Lenin said: that a
high degree of impatience with the enemies of the working people whose crimes are directed against the foundations of the Soviet system, should be combined with a degree of patience towards those who do not oppose the Soviet system. According to dialectical materialism, the socialist transformation implies as a prerequisite with respect to crime, important changes in other fields such as education, health and culture. Another important assertion is that by its own structure and aims the conflict between individual and social interests does not arise in socialist society.

Marx was never in favour of mechanistic psychological conceptions and hence his thesis that men are producers of their concepts and particularly that it is not consciousness that determines life but life that determines consciousness. The thesis is important and in all probability constitutes the most distinctive feature of socialist criminology in the sense that it opposes social development to natural processes and, therefore, man participates actively making his own history, a principle which is found in contemporary criminological writings. This means that man is responsible and consequently criminal responsibility, although it may be denied in certain cases, can not be abolished as is sometimes claimed in the West. It is to be noted that Marxist-Leninism and socialism are two different things and by itself socialism can not explain the complex socio-political character of crime or of any other socio-political problem.

The socialist authors lay emphasis on the importance of the historical and socio-political condition of crime but it is frequently ignored in the West since they consider the role of the individual as actor and creator. The closeness of the relationship between the criminal law and criminology, the criminological role of criminal procedure, not from an individualistic but from socio-political point of view, and the need for a concept of criminal responsibility which can not be construed only psychologically, however, deserve close attention inasmuch as they represent a more realistic approach to crime than that of the West.

The most eminent contributor to socialist theories was Dutch sociologist William A. Banger who argued that the very nature of the capitalistic economic system encourages egoism, that is, the relatively unrestrained pursuit of self-interest. He summarized his perspective thus:

"In recapitulating now the egoistic tendencies of the present economic system and of its consequences, we see clearly that they are very strong. Because of these tendencies the social instinct of man is not greatly developed; they have weakened the moral force in man which combats the inclination towards egoistic acts... To mention only the most important things, in a society in which, as in ours, the economic interests of all are in eternal conflict among themselves, compassion for the misfortunes of others inevitably becomes blunted, and a great part of morality consequently disappears. The slight value that is attached to the opinion of others is also a
consequence of the strife of economic interests, for we can be responsive to that opinion only when we do not see adversaries in our fellows."  

Studies of economic influences on criminality have been numerous since Bonger's early works. In their summary of the principal findings of such inquiries, Sutherland and Cressey noted that one "frequent conclusion is that lower economic class groups have much higher crime rates than upper-class groups." 143 A great many investigations have been conducted of samples of arrested, convicted, or committed adult or juvenile offenders, all of which show that working-class groups are heavily overrepresented in the population of detected lawbreakers. Ecological studies of the distribution of crime and delinquency rates in cities have repeatedly pointed to the concentration of criminality in lower-class neighbourhoods. The results that have come out from my study in the West Port Police Station, Narkeldanga police Station and Tangra Police Station areas of Kolkata Police, particularly in the colonies where the Jute Mill Workers, wage earners in the unorganised sectors and Plastic Factory workers live, also confirm this position.

It is, however, felt that although certain juvenile and adult forms of crime, such as gang delinquency, do appear to be disproportionately the activity of working-class individuals, 144 the same is not true of "total crime." If statistics were available on white-collar offences and a variety of other kinds of under-reported or unreported criminality, the socioeconomic picture of illegal conduct might well be quite different.

Studies of fluctuations in crime rates and the business cycle have also been numerous since the days of Bonger. 145 A variety of theoretical and methodological inadequacies have flawed these investigations, but taken as a whole the studies appear to show that serious crimes increase during times of depression, whereas the general or total crime rate tends not to increase during periods of economic decline. These studies also suggest that property offences accompanied by violence increase during depressions, whereas nonviolent property crimes do not. Drunkenness and crimes against persons do not show any consistent relationship to economic fluctuations, but rates of juvenile delinquency seem to increase during depression periods.

In this context, Vold raised a series of important questions. He noted that different assumptions regarding the time interval between the onset of economic changes and alterations in rates of criminality led to drastically different conclusions from the same basic date. 146 He showed that in a study by Dorothy Thomas of crime rates and economic variations in England and Wales for the period 1857-1913, the correlation between economic conditions and criminality was -.25 when the crime rates and economic measures for the same years were correlated. 147 However, the correlation between economic conditions for particular years and the crime rates observed two years later was +.18. As Vold argued, it is to be assumed that some time lag is required
before economic and business changes have repercussions on the volume of lawbreaking.

Don C. Gibbons noted that the most sensible conclusion on this issue is uncertain. At best, the influence of economic changes and business trends on crime appears to be relatively slight. The total of criminal behaviour is compounded out of many discrete forms of behaviour, some of which may be influenced by economic variations and others of which may be insensitive to such fluctuations. The causative factors in criminality are doubtless too many and too complex for the kinds of indices of economic fluctuations that are at hand to reflect or measure easily.

Let us now examine the nature of radical criminology. In their most extreme form, Marxist claims contain certain premises. It is argued the “ruling class” relying on a close-knit power structure is bent upon economic exploitation. And all forms of crime in the capitalist society including international exploitation are manifestations of the inherent contradictions of the political economic organization of monopoly capitalism. Because of these facts, major reductions in criminality are viewed as impossible without the overthrow of corporate capitalism. Indeed, it is this conclusion that crime control is impossible within the prevailing social-economic order that most clearly sets radical criminology off from mainstream theorizing.

It is further held that laws are used to repress the masses of citizenry. The police are mercenaries of oppression and the hired lackeys of powerful interests. One of their major tasks is to repress those who would rebel against the exploitative system. Exploitation and repression are most severe in the case of underprivileged and backward sections of people irrespective of the countries they belong to. These sections of people are deliberately being held captive; they are the innocent victims of a corrupt, capitalistic, exploitative society which hopes to defuse their revolutionary potential by harassing and jailing them.

The emergence of the prison in tune with this exploitative system marks the institutionalisation of the power to punish ... and the punishment is being treated as a technique for the coercion of the individual.

Economist David Gordon has offered one version of radical criminological thought that avers that nearly all crimes in capitalistic societies represent rational responses to the organization of capitalist institutions.

Crimes constitute attempts by offenders to survive in a situation of economic precariousness generated by that social order. Further, he argued that many of the important differences among particular kinds of lawbreaking, such as garden-variety property violations, organized crime or white-collar offences, are related to the class structure of corporate societies and to the class biases of the State. Gordon, while
studying on American society, also has articulated a functional argument contending that imprisonment of blacks and other minority persons serves to keep them out of the job market and also operates to prevent them from organizing with others to attempt to change the economic system that oppresses them. Some of that argument is less than persuasive, but the main thing to be said about his views is that they are radical to the extent that they call for fundamental and sweeping alterations in the structure of basic economic institutions in American society.

William Chambliss has recently set forth a broad sketch of major elements in a Marxist formulation on crime and the criminal law. That argument involves the following elements:\footnote{151}

**On the Content and Operation of Criminal Law**

(I) Acts are defined as criminal because it is in the interests of the ruling class to so define them.

(I) Members of the ruling class will be able to violate the laws with impunity while members of the subject classes will be punished.

(I) As capitalist societies industrialize and the gap between the bourgeoisie and the proletariat widens, penal law will expand in an effort to coerce the proletariat into submission.

**On the Consequences of Crime for Society**

(I) Crime reduces surplus labour by creating employment not only for the criminals but for law enforces, locksmiths, welfare workers, professors of criminology, and a horde of people who live off of the fact that crime exists.

(I) Crime diverts the lower classes' attention from the exploitation they experience, and directs it toward other members of their own class rather than toward the capitalist class or the economic system.

(I) Crime is a reality which exists only as it is created by those in the society whose interests are served by its presence.

**On the Etiology of Criminal Behaviour**

(I) Criminal and non-criminal behaviour stem from people acting rationally in ways that are compatible with their class position. Crime is a reaction to the life conditions of a person's social class.

(I) Crime varies from society to society depending on the political and economic structures of society.
(III) Socialist societies should have much lower rates of crime because the less intense class struggle should reduce the forces leading to the functions of crime.

While speaking about American society, Richard Quinney in one of his essays focussed on the following aspects of crime and criminality. 152

- American society is based on an advanced capitalist economy.
- The state is organized to serve the interests of the dominant economic class, the capitalist ruling class.
- Criminal law is an instrument of the state and ruling class to maintain and perpetuate the existing social and economic order.
- Crime control in capitalist society is accomplished through a variety of institutions and agencies established and administered by a governmental elite, representing ruling class interests, for the purpose of establishing domestic order.
- The contradictions of advanced capitalism—the disjunction between essence and existence—require that the subordinate classes remain oppressed by whatever means necessary, especially through the coercion and violence of the legal system.
- Only with the collapse of capitalist society and the creation of a new society, based on socialist principles, will there be a solution to the crime problem.

The Marxist criminological arguments have come in for criticism from different quarters. It has been alleged that the contemporary radicals are incorrect in alleging that earlier generations of criminologists were oblivious to the origins of criminal laws in social and economic conflicts. 153 However, it is the case that mainstream criminologists opt for a diffuse and pluralistic model of countervailing influence and power balances in modern societies, while radicals maintain that a small group of persons holds a monopoly on effective power and influence.

There are, however, people who concede that radical theorists are partially correct, in that some laws operate in the interests of the socially powerful. Again, some would contend that the radical position is exaggerated, in that there are many criminal statutes that are supported by general societal consensus and that do not grow out of interest-group processes or represent the exercise of oppressive power. Then, too, some critics contend that radical theorists are off the mark in implying that criminal laws grow up as the codification of the interests of socially and economically powerful groups only on corporate capitalistic societies. Social conflict may be characteristic of
all complex industrial societies, with laws arising out of this conflict in all of them.\textsuperscript{154}

These criticisms centering on the nature of criminal laws suggest that radical theorizing puts forth an oversimplified portrayal of the real world.

Radical theorists charge that mainstream criminology is beclouded by mystification and that the radical task is to demystify the understanding of crime. Mystification refers to false accounts of crime causation that disguise the role played by the ruling class in creating the conditions out of which lawbreaking arises. The radical goal is to strip away the false accounts of the nature of the social world as presented in liberal criminology. There are, however, counter arguments that there is a good deal of mystification in the radical accounts of exploitative, monolithic power structures of corporate capitalism. It has been argued that radical criminological analyses are replete with claims about the ruling class and its machinations that produce criminality and that have created the criminal justice apparatus in order to deal with those who threaten ruling class interests. But, the signal contribution of the radical theorists to criminology lies in their assertion that crime and responses to it are the outcome of the political-economic organization of society.

With rapid social change\textsuperscript{155} as a general explanation of crime, we face what may be regarded as the most embracing criminological theory of our time. Its main ingredients are industrialisation, urbanisation, technological revolution, population growth, system transformation, social forces, migration, social mobility, and modernisation. The latter is so ambiguously conceived that it covers up the entire theory of social change. Different forms of industrialisation and urbanisation have been going on for centuries and nothing can stop it but experience shows that as contributing or explanatory factors of crime they are ambivalent in the sense that may create new forms of crime, but reduce and eradicate others.

The term "anomy" so often used by the theoreticians of change is so rapidly expanding that it is becoming more and more difficult to ascertain exactly what it means. Sometimes, it is used as alienation with no explanation from what the alienation takes place; sometimes as lack of access to means with no further clarification, and sometimes it implies achievement, apparently individual, social or both, or success often interpreted first as financial success than as social and even political, but seldom as intellectual or professional success.

The terminological confusion serves the all-embracing meaning of social change. Behind the facade of technological change or modernisation in material aspects of living, traditional attitudes are still alive and form a social and political point of view more important than "technological attitude". Whether or not these attitudes will eventually disappear is a matter of conjecture, but certainly not under the sole impact of technological change. The distinction is important for criminal policy purposes.
because, contrary to what is criminologically affirmed by the theory of social change, fundamentally crime has remained the same after many centuries of social change. Here again the confusion between new forms or modalities of a peculiar crime and perennial types of crime should be avoided.

Social evolution necessarily implies conflict, violence and change, and each playing a beneficial as well as disorganizing role according to circumstances. On the other hand, the complexity of society prevents all its parts being affected by social evolution, and those reached by it are not affected in the same way and to the same degree. While social evolution implies, among other things, change, the prevailing descriptions of social change do not imply evolution but social breakdown, conflict, disintegration and the like. It, however, remains a fact that developing as well as developed countries are always changing in one way or the other. The result is that the expression "crime in a changing society" except for its dramatic appeal has little, if any meaning, since every society is always changing.

Now that the discussion on the various theories of crime having been concluded the question naturally arises as to what has come out of this discussion. The answer to the question contains in the objective of the discussion as already stated in the beginning. The very purpose of the review of the theories hinges on the intention to trace the history of the socio-economic development of the society and to comprehend the contemporary realities in which crimes occur. The study of the theories has led to the inevitable conclusion that crime is as old as civilisation and that no single cause can be responsible for crime. Rather, it is because of combination of several factors that causes crime to take place and contributes to the growth of criminal propensities among different cross sections of the society. As a matter of fact, crime is a matter of social definition. It remains a fact that any particular act is branded as crime because society terms it so. Moreover, what is to be defined, as crime is not entirely dependent upon the contemporary value system of the society and interests of the ruling class. It also emanates that crime varies from society to society depending on the political and economic structure of the society. It also brings home the point that punishment should contain the spirit of expiation and must give the offender the scope for atonement. And this constitutes the essence of correctional approach to punishment. With the lessons learnt from the study of the theories on crime and criminality I shall set out for discussion on penology- the penitentiary science.

1.4: Penology and Punishment

Penology derived from Latin word poena comprises penitentiary science and is concerned with the processes devised and adopted for the punishment, repression and prevention of crime. With the gradual change in the approach to crime
and criminal in different societies, the nature and degree of punishment for maintaining 
order in the society also constantly changed to suit the contemporary realities. The 
theories of punishment developed in different social systems, however, need a 
comprehensive discussion to have an insight into their historical perspective and social 
context because a fair understanding and appreciation of the theories of punishment is 
crucial to the proper appreciation of the objective conditions of the undertrial prisoners 
in the custody of Kolkata Police. I have, therefore, attempted a brief review of the 
various theories of punishment. Moreover, the historical importance of these theories 
as well as their social context will give significant inputs to the understanding of the 
different forms of punishment incorporated in the laws of different social systems. It is 
needless to mention that respect for individual liberty and human rights is the basic 
spirit of civilised human conduct. The inviolability of freedom has perpetually 
enlivened human civilisation. How far our penal system in the ancient times 
conformed to the lofty ideals of tolerance and piety and to what extent they have 
contributed to the enrichment of the Criminal Justice System in the successive periods 
down to our times needs to be examined to comprehend the contemporary realities 
particularly when the thrust of the study is on the undertrial prisoners - the prisoners 
who are incarceraded in the prisons or detained in the police custody before trial.

1.4.1: Concept of Punishment: Its Evolution and Development

The crude theories of primitive societies afford ample food for reflection as to 
the primordial sentiment of justice, equality, retribution, expiation, betterment and the 
like, which underlie them. Coming to the later times we find that punishments assumed 
diverse forms, and were administered in a perfectly arbitrary and autocratic manner. 
The classical and neo-classical schools represented the reaction against such 
arbitrariness.

The Positive Criminal school, or the Italian School, represented the reaction 
against the view of penology that penology is only to supply the counteractive to the 
crime in the form of punishment. It makes the criminal, and not the crime, the principal 
object of study in penology. It also insisted that the punishment must be adapted, not to 
the crime, but to the criminal. Further, the reaction of society is not necessarily to be in 
the form of punishments, but in the form of preventive measures which were, in 
appropriate cases, to be substitutes for punishment.

One of the schools regarded the classical idea of afflictive punishment, in the 
sense of vengeance, intimidation or expiation, as fundamental and indispensable. 
Another exalted the concept of responsibility not on the old metaphysical basis of free 
will but in a metamorphosed form, calling it the doctrine of identity or individuality. 
The view attributed to every man living in a society a definite 'character', or 'identity'
the result of the impact of forces -physical, psychical, and social- impinging on him, which he was free to uphold or violate as a responsible being.

Another school dwelt on the principle of 'psychic responsibility' as distinguished from moral responsibility, the old idea, and from the point of view of psychic responsibility held that punishment must remain. What is noteworthy is that all these schools show the marked influence on them of the positivist school of criminology and a scientific rather than the time-honoured metaphysical trend in dealing with crimes and criminals.

1.4.2: The Reformers School

The school of Liszt, Prins, and Van Hamel represented an interesting thought. Bernald de Quiros called this school the 'Reformers' and observed that "the reformers are noted for planning a kind of 'double entry penology.'" The double entry meant their two-fold attitude, namely, that for certain criminals the time-honoured penalties with the object of repression must be maintained, while for others preventive measures must be provided, in accordance with the teachings of modern criminology, for preventing relapse of contamination. The International Union of Criminal Law founded by Liszt, Prins, and Van Hamel in Paris in 1889 for the promotion of penal reform set forward that punishment is one of the most efficacious means the state can use against criminality, although not the only one. Punishment must never be isolated from other social remedies nor must preventive measures be neglected. Accordingly they emphasised among other things the following aspects:

- Distinction between occasional and habitual criminals must serve as the basis for criminal regulations;
- Amelioration of prisons and allied institutions with particular emphasis on doing away with the concept of "punishment by deprivation of liberty";
- Substitution of short sentences by more efficacious measures;
- The length of the imprisonment, must depend not only on the material and moral gravity of the offence, but on the results obtained by the treatment in prison;

So far as incorrigible habitual criminals are concerned, the Union held that, independently of the gravity of the offence, and even with regard to the repetition of minor offences, the penal system ought before all to aim at putting these criminals for as long a period as possible under conditions where they can not do injury.
1.4.3: The French School

Though the first impetus for comprehensive penal code and penal institutions combining the parallel claims of punishment and measures of safety came from Italy, the home of criminology from Beccaria onwards, other countries had taken their due share in advancing the cause in their own characteristic manner. France through her strong contingent of penalists like Tarde, Saleilles, Garraud and Fouille'e adhered to the theory of penal responsibility, but in a considerably modified form, and sought to introduce into her juridical and legislative system for humanising principle of individualisation. Saleilles was the apostle of individualisation. He declared responsibility to be the basis of punishment and individualisation the criterion of its application as evident from the following observation.

"The concept of punishment implies responsibility. One must believe in responsibility in order that a measure taken against an offender shall be a punishment. But the application of punishment is no longer a matter of responsibility, but of individualisation. It is the crime that is punished but it is the consideration of the individual that determines the kind of treatment appropriate to his case." 162

It is worth noting that there is a clear classical note in the observation that it is the crime that is punished. Yet the principle of individualisation which he advocated culminated in the law of parole, associated with the name of Berenger- one of the earliest in the line of penal substitutes.

Durkheim attributed the fluctuations in the punitive reaction to change in the division of labour of the society. His theory contained three propositions viz. (1) Offences which attack the collective values of a society elicit more severe punitive reactions than those which attack individual values. (2) Punishments for crimes are ordered by tribunals made up of all the people or of only a select number, and they are imposed primarily for the purpose of reinforcing the collective values, not for vengeance, intimidation or reformation. (3) As the principle of social organisation changes from mechanical solidarity to organic solidarity the punitive reaction to law-breaking tends to disappear and in its place is substituted restitution and reparations. 163

It is also pertinent to note what Michel Foucault had observed regarding punishment. According to Foucault, "Penalty must be made to conform as closely as possible to the nature of the offence so that fear of punishment diverts the mind from the road along which the prospect of an advantageous crime was leading to. The ideal punishment would be transparent to the crime that it punishes; thus, for him who contemplates it, it will be infallibly the sign of the crime, the index of offence will be enough to arrange the sign of the punishment." 164
What the modern concept of punishment suggests is that if criminals are to be reformed they should be studied, understood, and helped, or else segregated, rather than made to suffer. 165

1.4.4: The German School

The anthropological or individual factor of Italian school appeared in Germany as the doctrine of 'endogenous' origin of crime of which Baer, Koch, Nacke and Kirn, and subsequently, Ascheffenburg were the advocates. Germany gradually built up a system of legislative sanctions paving the way for a larger scope for measures of social defence. The latter history of penology in Germany was, however, one of continued depredations on the inalienable rights of man, individual and collective, through the operation of forces quite beyond ordinary foresight or control. Its reflection was quite apparent in the address of Dr. F. Gurtner, Minister of Justice of the Reich at the Xth. International Penal and Penitentiary Congress held in Berlin in August, 1935. 166

1.4.5: The Hammurabi Code of Punishment

One of the earliest written survivals of ancient penal practices is the Code of Babylonian King, Hammurabi (circa 2130-2087). The Code is one of the earliest and most systematic attempts to achieve social and ideological objectives through minutely details technical procedures. Hammurabi announced his mission "to cause justice to prevail in the land, to destroy the wicked and the evil, to prevent the strong from oppressing the weak, to go forth like the sun... to enlighten the land and to further the welfare of the people." 167 For enforcement of the regulations, the sole reliance was on a detailed system of punishments: personal redress of any kind was sternly ruled out.

The Babylonian wrath against the offender extended also to the offence; it, too, was to be wiped out, and things were to be made as if it had never happened. Where this could not be done - where lives or limbs had been lost - the only alternative method of restoring equity was to force the offender to share, as precisely as possible, the loss and the suffering of his victim. Thus: "If a man destroy the eye of another man, they shall destroy his eye" 168

Subsequent commentators, in deploiring the savagery of the lex talionis, tended to favour the hypothesis that revenge was the principle or major motive for the bloody doctrine of an eye for an eye.

Exclusive of fines, four forms of punishment seemed to have existed in the Babylon of Hammurabi: death, mutilation, branding and banishment - the last, apparently only for paternal incest.
1.4.6: The Mosaic Legal Tradition

In the Mosaic tradition we encounter a body of legal lore that represented a considerably less sophisticated, less professional approach to the perennial problem of social control. In the Babylon of Hammurabi, virtually every violation of religious interests is simultaneously a violation of a State or secular interests. By contrast, the Mosaic codes fairly bristle with fatal sacerdotal crimes. Opmheimer had categorised the capital offences as follows.

- Idolatry, especially the cult of Moloch, divination in the name of false gods, sorcery, blasphemy, violation of the Sabbath, sodomy;
- Bestiality, the beast being killed too;
- Incest with mother, father's wife or daughter-in-law, marrying mother and daughter;
- Adultery; ravishing or seducing a "virgin betrothed unto a husband" and for such virgin to be a willing victim; for a damsel to enter matrimony without the tokens of virginity; for the daughter of a priest to prostitute herself; manstealing; smiting or cursing father or mother, or being a stubborn and rebellious son and incorrigible withal.
- Apostasy of a city was punished with its utter destruction; the inhabitants and the cattle thereof were smitten with the edge of the sword, the city and all the spoil thereof was burnt with fire, to remain an heap for ever, and not to be built again. 169

The Mosaic codes, in common with equally undeveloped systems of earlier and later periods, reserved the punishment of murder to the vengeance of the victim's clan. It was observed by Maestro that "the Mosaic Law based on the talio (an eye for an eye, and so forth) was regarded as a direct divine command. The " (1) lex talionis " is the highest justice according to the Law of God, i.e. the Mosaic Law; (2) the legislator shall endeavour to restrain miscreants from criminal actions by the most severe penalties; (3) the legislator shall seek to soften the wrath of the Deity and save the realm from His vengeance by the most severe punishment. 170

1.4.7: The Heritage of Rome

The uninterrupted reign of Roman law was the longest and widest the world has yet known. In their punishment, as in other aspects of culture, the cosmopolitan Romans were wide borrowers as well as ingenious inventors. There was virtually no form of punishment known to the ancient world that was not at one time or other meted...
out under Roman auspices. Every method of execution was practised including burial alive, impaling, crucifixion, drowning, enforced suicide, beheading, sawing in half, burning, and death by wild beasts in the arena. One uniquely Roman method, responsible for the death of many eminent citizens (including Cicero) was the proscription. This technique, mentioned in Shakespeare's Julius Caesar, involved the secret preparation of lists of citizens to be assassinated during temporary suspension of the laws.

Among non-capital punishments degradation to slave status, branding on the forehead, mutilations, fines, confiscation, imprisonment at hard labour, exile, sentencing sturdy young offenders to serve as gladiators etc. were common. All these suggest that Roman punishments were highly discretionary, varying with administrative or economic considerations and, frequently, with political expediency.

1.4.8: Early Germanic Legal Systems

Earliest records of Germanic law suggest a society where social control was in an early stage of transition from private vengeance to group arbitration. The only crimes known to the early Germanic tribes were offences against religion or morality and the group. Oppenheimer listed the following offences:

- Treason against the king or the tribe;
- Desertion, sacrilege, murder if by magic or poison;
- Killing in violation of a peace or a composition;
- Killing hostages;
- Murder of a husband by his wife (or vice versa);
- Patricide;
- Murder of close relatives or of a household inmate;
- Murder by stealth or during sleep with concealment of the body,
- Secret theft. 171

Death and outlawry were the original punishments for religious and tribal crimes. For these offences the priests were the judges and usually the executioners as well. Frequently the executions were sacrificial, serving to appease the gods and to remove a pollution from the group.
1.4.9: Criminal Justice During the Feudal Period

The basic source of medieval justice was the Germanic law, which had been but briefly superseded by the reforms of the Corolingian revival. In the system, like the trial by battle, the ordeal was supposed to reveal the divine judgment on the guilt or innocence of the accused. Many ordeals involved the infliction of specific injuries on the person of the accused. The wounds were sealed and the question of guilt was decided by an examination of the extent of healing after a number of days.

The most drastic ordeals were almost invariably inflicted on the accused and rarely, if ever, on the plaintiff. Medieval justice placed the burden of proof on the accused; it was he who "had to bear the law". Unless and until he proved his innocence, he was considered guilty. Secondly the nature of the ordeals themselves suggested their punitive intention. The most common form involved physical suffering or injury of some kind, and, as Seagle pointed out, its advantage lay in the fact that "it could be not only a form of proof but an automatic means of punishment, for the guilty person might not survive the test".

Revival of Torture

The use of torture had been unknown in the law-ways of the barbarian conquerors of Rome. The Church had always been opposed to it, and its use in the extracting of confessions was forbidden by canon law. The rediscovery of the Codes of Justinian, in which torture was sanctioned, gave Inquisition an appropriate legal authority for a method toward which the logic of its processes was irresistibly drawn. Torture was explicitly authorised by the Pope in 1252, and manuals detailing precise instructions for its administration were placed in the hands of the inquisitors.

The use of Imprisonment as Penance

Heretics who evaded the death penalty by means of confession were required to undergo various forms of penance. Of these, the most severe and most common was imprisonment.

There were two kinds of imprisonment, the milder or "murus largus", and the harsher, known as "murus strictus" or "durus" or "arctus". All were on bread and water, and the confinement, according to rule, was solitary, each penitent in a separate cell, with no access allowed to him.

With temporary and local exceptions, each succeeding century of the medieval period saw a worsening in the severity of all forms of punishment. As the number of crimes punishable by death increased, there was a corresponding increase in the ingenuity and variety of techniques of execution. Death by burning, suffocation,
drowning, poisoning, impalement, fracture (breaking at the wheel), and burial alive was refined to the point where execution had become a profession combining many characteristics of an art, a science, and a public spectacle. The city of Hanover developed a specialty in which death was inflicted by wasps. Later this method was refined to provide a slower death by ants and flies—an innovation that increased audience appeal by prolonging the length of the entertainment. The ingenuity and technical skill of the executioners is suggested by the complexity of the instructions they were required to follow. Sometimes the victim had to be kept conscious for a considerable period, during which a detailed sequence of tortures and mutilations were carried out in order to follow preserving life even while they destroyed it. It was one of the age's ironies that the anatomical knowledge and sheer medical competence of the executioners often rivaled that of the doctors of the day required to master. 

Second in frequency to the death penalty was the punishment of mutilation. For lesser offenses, public humiliation was a frequent punishment. This included exposure in the pillory and the enforced wearing of badges, headgear, and other distinguishing symbols of degradation. The purposes of these forms of punishment were several. They identified the offender and his offence and they invited the abuse of any passerby who might be in need of venting his spleen without danger of retaliation. Often the wearing of these symbols of degradation involved considerable physical suffering. Common penance for religious misdemeanours was wearing of heavy iron crosses, which were forged around the offender's neck or trunk. These weights were frequently to be carried for long periods; in many cases the offender bore his crosses to the grave.

Prior to the eighteenth century, except for certain categories of heretics, imprisonment was not generally viewed as a punishment and was used chiefly as a method of detention before trial. Members of the clergy and heretics were occasionally imprisoned. In general, however, the significant emergence of confinement as a punishment for ordinary crimes was the development of a later era. It is important to note that the medieval punishment were singularly uncertain and capricious. One can just wonder at the curious nature of the provision that a felon might be saved from death and recommended for pardon if a maiden offered to marry him. In addition, special dispensations were sometimes granted to those whose services were considered essential. Because of the almost superstitious veneration of learning students and others able to read and write were frequently granted these special dispensations.
1.4. 10: The English System

In 1863, the memorandum appended to the report of the Royal Commission by Lord Chief Justice Cockburn reiterated the primacy of punishment and laid down the principles which in his opinion should govern the punishment of offender. He observed:

"These purposes are twofold, the first that of deterring others exposed to similar temptations from the commission of crimes; the second, the reformation of the criminal himself. The first is the primary and more important object, for though society has, doubtless, a strong interest in the reformation of the criminal and his consequent indisposition to crime, yet the result is here confined to the individual offender, while the effect of punishment, as deterring from crime, extends not only to the party suffering but to all who may be in the habit of committing crime or who may fall into it. Moreover, the reformation of the offender is in the highest degree speculative and uncertain, and its permanency, in the face of renewed temptation, exceedingly precarious. On the other hand, the impression produced by suffering inflicted as the punishment of crime, and the fear of its repetition are far more likely to be lasting and much more calculated to counteract the tendency to the renewal of criminal habits. It is on the assumption that punishment will have the effect of deterring from crime that its infliction can alone be justified, its proper and legitimate purpose being not to avenge crime but to prevent it. The experience of mankind has shown that, though crime will always exist to a certain extent, it may be kept within given bounds by the example of punishment. This result it is the business of the lawgiver to accomplish by annexing to each offence the degree of punishment calculated to repress it. More than this would be a waste of so much human suffering; but to apply less out of consideration for the criminal is to sacrifice the interests of society to a misplaced tenderness towards those who offend against its laws. Wisdom and humanity no doubt alike suggest that if, consistently with this primary purpose, the reformation of the criminal can be brought about no means should be omitted by which so desirable an end can be achieved. But this, the subsidiary purpose of penal discipline, should be kept in due subordination to its primary and principal one. And it may well be doubted whether, in recent times, the humane and praiseworthy desire to reform and restore the fallen criminal may not have produced too great a tendency to forget that protection of society should be the first consideration of the lawgiver." 176

In 1910 Mr. Winston Churchill, Home Secretary of Great Britain, made a statement in the House of Commons striking almost a different note - a dramatic change in attitude. He said:

"The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country. A calm,
dispassionate recognition of the rights of the accused and even of the convicted criminal against the State; a constant heart-searching by all charged with the duty of punishment; a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment; tireless efforts towards the discovery of curative and regenerative processes; unfailing faith that there is a treasure if you can only find it in the heart of every man - these are the symbols which, in the treatment of crime and criminals, mark and measure the stored up strength of a nation, and are sign and proof of the living virtue in it. "  

1.4.11: Standardisation of Continental Criminal Procedure during the Renaissance

As the chronicle of penological history moved from the late medieval period into the Renaissance, the main focus of interests turned away from the punishments themselves and fixed on procedure. The major forms of punishments remained, though certain older techniques fell away and certain refinements were added. Many new crimes were added, but these were punishable by the same penalties. As before, death, mutilation, humiliation, banishment and fines remained the basic responses of the political community towards its offenders.

The centralisation of political power was accompanied by a widespread movement toward consolidation and standardisation of judicial procedures compatible with the growing absolutism of the rulers.

In the system, trial itself was little more than a ceremony in which the foregoing conclusion of the offender's guilt was to be demonstrated to the public. Thus, from the time of his arrest, there could be little doubt in the mind of the accused that he had met with an almost inescapable calamity.

Relief from the inquisitorial mode of criminal justice was slow and cautious in coming. The consolidation of the national states had been followed, in the High Renaissance, by an unparalleled outburst of creative energy. In virtually every area of human activity, and on every level, there was a bursting through to new frontiers. The progress was continuous and accelerating. Copernicus was followed by Kepler and Galileo, who looked ahead to Newton. Bacon and Montaigne were followed by Hobbes and Descartes, who dared to ground his whole philosophical system on universal doubt. In England the creative ferment had been paralleled by a political struggle which began by lifting men's eyes to new vistas of personal freedom and ended by securing British liberties once and for all.

Bold ideas of freedom of conscience and toleration were in the air as the new critical spirit made inroads into long-sacrosanct areas of superstition and prejudice.
Then, almost at the moment of fruition, there broke a storm which almost drowned reason out. Theology had searched the scriptures and discovered that witches still walked among men. An orgy of witch-hunting and witch burning broke out. Against this tide, which spread from one end of Protestant Europe to the other, science was impotent and philosophy either covered its mouth or looked away.

The Theological terror revived the worst excesses of Inquisition and served to fetter the old procedures on the back of European jurisprudence for another hundred years. The human toll was frightful.

1.4.12: The Enlightenment Attack on the Inquisitorial Mode of Justice

For a century, resistance to the witchcraft trials and the procedures supporting them grew and smoldered in the minds of thinking men. Throughout the early decades of the eighteenth century, resistance increased, though still expressing itself indirectly, in the gradual reduction and, here and there, the quiet suppression of the trials themselves. When the attack finally came, it came with the suddenness and effect of two lightning bolts striking a forest in a state of tinder-box readiness.

In 1764, Cesare Bonesana Beccaria, a twenty-nine-year-old mathematician and economist, published in Italy a treatise entitled An Essay on Crimes and Punishments. This book, repeatedly called to be the single most consequential work on criminal justice, created an immediate sensation.

Beccaria and his supporters had a positive philosophy and a detailed practical programme to replace the abuses they attacked. The core of this philosophy was a revolutionary new conception of the relation between man and the State, from which there followed a new conception of the role of law and the proper function of punishment.

In the new dispensation based on the touchstone of social contract theory, it was the obligation of the State to protect the safety and promote happiness of its constituent members. In return for these services, it was the obligation of the individual to surrender a small portion of his natural liberty in obedience to the valid laws of the State. The purpose of these laws - which express the obligations of the State - was to promote the greatest possible happiness for the greatest possible number. On the other hand, the purpose of punishment was to protect these laws and the social services they rendered from abuse by individual members. To best secure this end, the proper objective of punishment was not to exact vengeance but to deter the individual from committing crimes.
Having promulgated his positive philosophy, Beccaria proposed a penal programme to carry it out. The method was to be imprisonment for a stated period of time, this system offering the most benign and flexible possibilities for adjusting punishments to crimes. The jails and houses of correction, familiar to Europe for over one hundred and fifty years but hitherto restricted to minor offenders, vagrants and children, provided a sound basis for developing the positive programme.

The availability of an already known, presently existing means of carrying out his programme was the keystone of Beccaria's success. Justinian cited a principle elaborated earlier by the Roman jurist Ulpian: "prisons ought to be used for detention only, but not for punishment." The conflict between legal principle and administrative expediency continued throughout the Middle Ages and well into the modern period.

However, punishment still retained its majesty and exceeding efficacy, and measures of safety stood on the footing of a danger experiments. Between the two extremes there was a large range of opinion of varying shades and intensities for or against measures of safety. One raised the time-worn objection that retribution and intimidation ought to be the immediate object of criminal sanction and contended that if measures of safety were at all to be resorted to, it should be only in the case of occasional or "passional" offenders. Another formulated the typically classical proposition that measures of safety were necessarily restricted in their operation and that punishment had a wider swipe altogether, for it contemplated not only its effect on the offenders' mind but also on those of his neighbours. Still another raised the point that in the then state of public opinion, punishment qua-punishment was essential and must be retained on grounds of public policy. If punishment was discarded the law would run counter to public opinion. In that event, not only might the law loose its hold on the people, but it might give place to lynch law. Law must evolve gradually and not by violent catastrophic changes.

Prof. Enrico Ferri said that law corresponds to the idea of moral responsibility while measures of safety correspond to the idea of social defence. The acceptance of the punishment by the offender himself in recognition to the fact that he had earned the dis-appropriation and censure of the of the society was important. Similarly, willing expiation was also a significant a factor in so far as punishment was concerned.

We shall see later on what an ample space this idea of expiation, or 'psychic' acceptance of the fitness of punishment by the offender, occupies in ancient Hindu penology. As regards the educative aspect of punishment as expiation, Lord Haldane further observed:

"No doubt punishment conveys a lesson to the public. But that lesson is more than one of intimidation only. It should inculcate, for the criminal and the outsider
alike, a recognition of the true nature and moral quality of the deed. The criminal must be led to say, if it be possible, not only that he has been a fool, by that he has been a sinner and has been rightly served in the eyes of decent people. The educative effect of punishment thus depends on the recognition of its justice, and its justice does not depend merely on its educative effect. The 'serve him right' sense has to be awakened. 

It is argued that society seeks to counteract the degeneration by means of punishment prescribed in law. But legislation is inspired by class interests: the party in power, the strong, the opulent, the influential determines it. Hence criminal laws are hardly, if ever, aimed at defending the entire social body. It is only the powerful or favoured few whose interests are served by law. Social defence is a misnomer. The term "legal defence" is more in conformity with the real facts of life. Therefore, says Vaccaro, "it often happens" that the fittest, physically and morally succumb and the mediocre or the unfit triumph, favoured by wealth or by other casual circumstances.

1.4.13: Penal Science in Ancient India

The science of penology has evolved in different forms, at different epochs and in different countries, but its fundamental problems are the same everywhere. Each country has developed its own theories of crime, its own methods for combating it. These, to a great extent, may be attributed to its native genius and national outlook, intellectual and emotional texture as well as its traditions, moral and social values. But, in the last analysis, the fundamental questions to which they address themselves are universal. They are: What is the essential quality of crime, as distinguished from other breaches? How is crime to be combated—by applying defensive reaction to the crime, or to the criminal? Is the reaction to be by way of punishment, or by way of measures of security for social defence? In any event, how is to be adapted to the individual wrongdoer? On what principles and by what methods is individualisation to be effected?

Before we embark on different approaches to these problems and the various solutions to them, by means of legislative, judicial and administrative measures, it is necessary to form an idea of the sources of penal law in ancient India and of the steps in the gradual course of its evolution.

Vedas, the Sources of Hindu Jurisprudence

There is one original source from which, in theory, all law in Hindu jurisprudence emanates. It is the three Vedas—Rik, Sama and Yajur. Penal law is no
exception to this general rule. Like all ancient systems of law, Hindu law of penology
at its very inception must have been made up of precepts and ordinances which are
partly religious, partly moral and partly legal in the strict sense of the term. Positive
law is in course of time differentiated from moral and religious precepts and also from
ceremonial rules -from the vast mass of 'ought ' and 'ought-nots ' at the initial stage. A
similar process takes place in penology. When we come to the Arthasastra of Kautilya
we find a synthesis in which, while recognising the background of religious
injunctions, moral precepts and social conventions, penology is placed on a scientific
basis which makes room for every one of these essential factors constituting penal
concepts.

The sutras are the first attempt to deal with topics on the basis of a proper
classification into Dharma, Artha, Kama and Mokhsa. Under Dharma , we get the
wider conception of recht and sitte, law and custom. Dharma is derived from the root
dhr, to hold -it is that which holds , or maintains in order , the universe of things, and
every one and every thing in its proper place. It may be said that the scientific starting
point is furnished by the Sutras, treating of dandaniti, penal science, with a clear
conception of its separate claim and importance. Of these, the earliest Sutra on penal
science is of Brhaspati of the 5th. Century B.C. The most important of the early
dharmasastras is of Manu as promulgated by Sumati Bhargava about the second
century B.C. Subsequent Dharmasastras like Yajnavalkya about the fifth century A.D.
, followed by well-known commentators on Manu , such as Kullakabhatta and
Medhatithi about the 9th. and 10th. centuries A.D. led the way to the later stages of the
Nibandhas or digests about the 11th. Century A.D.

The Mahabharata

The Mahabharata is a veritable encyclopaedia of the life and knowledge of
ancient India. We find the Mahabharata replete with references to it as forming an
essential part of Rajadharma, royal policy. There is never a doubt entertained as to the
efficacy of penal science or as to the place of punishment in sociology. It is almost
accepted as an axiomatic truth that penal science is God-given to man for the
maintenance of order in society. Its source is divine, its study and cultivation a primary
duty with the King , and its application by the King is guided and controlled by
definite principles. Prominent among these is the principle that penal law is to be
closely controlled by considerations of social realisation. The goal of self-realisation
varied with the varna , caste, which classified the people into four distinct orders . Each
had his own sphere - the Brahma, the Kshatriya, the Vaisya and the Sudra - his own
code of conduct , his own sphere of activity, his own ideal his own standard of self
realisation. The observance and non-observance of these would bring on social
approbation or disapprobation. It is important to note that Karma remained essentially
Brahminical and militated against laying down a standard of responsibility for human action based on the conception of absolute free will. Not absolute but only a relative freedom was attributed to human action. Individual responsibility came to be based on this relative freedom. Such responsibility could accordingly not be absolute but qualified and yet it could justify punishment. Thus the central idea in Hindu criminal jurisprudence from the very beginning was that punishment for wrong-doing was to be meted out by the King for the preservation of social order as it was conceived in ancient India. Penal science was accordingly regarded as a part and parcel of Royal policy (Rajadharma).

What was the concept of punishment in the Mahabharata? Was it based on the notion of vengeance, as in the Germanic systems? Or, was it rooted in the notion of social defence? On a proper analysis it would appear that the ruling idea was the protection of society. Danda or punishment was divested of its character of mere afflictiveness and stood for means of ensuring the safety of society. Its object was not to inflict pain but to eradicate evil. It was certainly calculated to intimidate, to deter. The most interesting phenomenon was that, by an altogether different route from the Western systems of penology, social protection and well being as the end of penology, and measures of safety as the means to that end, appeared very early in Hindu criminal jurisprudence. At that distance of time in India the measures of safety were not elaborated with wealth of detail, or with conscious difference between the three standpoints, namely, punishment directed against the crime, punishment directed against the criminal and punishment aiming at social defence, as we find in the later half of the nineteenth and beginning of the twentieth century.

In ancient India Danda was conceived as an entity, a being, almost a deity as appeared in the verses 5-7 in chapter CXXL titled Rajdharmanasasana of the Mahabharata's Santiparva where the essence of Danda and Dandaniti. Danda was that by which righteousness was maintained. He is sometimes called Vyavahara (Law). "Danda is so called in order that the righteousness of the King who was wide awake may not suffer extinction" 181

The Brhaspati Sutra

In the Brhaspati Sutra penal science (dandaniti) occupied a preeminent place. In both Arthasastra of Kautilya and Brhaspati Sutra importance was attached to society, or social sanctions (loka). This is significant as it indicates a high level of development. Penal science cannot steer clear of the realities of life. It must keep contact with society, and feel its pulse so as never to become alien to its estimate of moral values. Theories of crime and punishment must be brought into harmony with every day facts of life. Not the immediate present only, but the past, the present and future form a continuum, out of which penal science emerges. Penology must drink at
the sources of life which are manifold, and of which the past (i.e. history), present, (i.e.,
the social framework of the day) and future (i.e., the end, which is always in future and
to which all things tend) are but parts and parcels. This conception occupied a high
place in the Brhaspati Sutra as well as that of the Arthasastra, thus pointing to their
mutual connection.

Tarde observed that the problem of responsibility was connected with the
philosophical search for causes and was but an application of the latter, but a very
arduous one, to the study of facts relative to man living in society. The idea of
punishment was very often deeply tinged by this idea of absolute liberty. What else can
a man deserve but to be severely punished for an act, for which he must be deemed to
be the primary, perhaps the sole cause? If, on the other hand, in stead of being the sole
or the primary cause, the individual, like every other object met with in real life, be
only a secondary cause, itself affected and determined by other causal agencies, for the
better or for the worse, the responsibility assignable to his act can not be absolute or
unlimited. It would at best be relative and limited. This gave rise to the doctrine of
determinism. For centuries the libertarians waged a war against the determinists,
unwilling to admit that the quality of human action can under any circumstances be
regarded as determined; while for centuries the determinists paid back by denying that
the category of causality can never be properly applied to human action which is but
the resultant of circumstance - "a stitch in the tissue bound about by phenomena and
woven by necessity". Libertarianism, however, learnt the lesson that so-called free
will was not absolutely free. Determinism, too, learnt the lesson that human action
though determined was not absolutely determined. Hence, there is causality in the old
libertarian sense. The study of causal relations, therefore, is not outside the scope of
responsibility for human actions. The old Hindu penologists from the commencement
had a clear conception of this central idea, and they accordingly assigned to Samkhya,
the discerning of causal relations, a prominent place in the study of penology.

As regards the principle to be followed in the administration of punishment
there appeared to be general directions given in Manu. The outstanding feature of these
directions were that they took into account not only the objective circumstances of the
offence but also the subjective limitations of the offender. In this respect the penal
science of Hindu India ranks on the same level with the most advanced systems of the
present day.

One of the things that strikes a moderner as anomalous is the excessive
inequality of treatment accorded by the law on the ground of superiority or inferiority
of caste. The point is worthy of consideration. In respect of Brahmana, a death
sentence must be commuted to one of shaving the hair of his head; death sentences
could be passed on members of all other castes. In verse 381 the discriminatory
practice of meting out justice has been spelt out. A Vaisya, found guilty of carnally
knowing a protected Brahmana woman would be punished with imprisonment for one year, after which all his estates would also be escheated to the King.

Punishments were of three classes: " By the three lawful expedients of Nirodhana (imprisonment), Bandhana (detention) or Vadha, (Killing) which includes mutilation as well as death " a first offender should be administered warning (vagdanda). A repeater (i.e. one who has committed the same offence for the second time) should be administered a strong remonstrance (dhingdanda). One who committed the offence for the third time should be punished with mutilation (vadhadanda). If even mutilation did not prove a sufficient deterrent, all these four forms of punishment should be together administered. 184

A sin unwillingly committed was atoned for by reading the Vedas; those wilfully committed at the dictates of evil impulses require separate expiatory penances. 185 Many were the forms of penance prescribed for different kinds of law-breakers who were classified into heinous offenders (mahapatakins) and minor offenders (upapatakins).

It is important to note that there was a great deal of disparity between the different kinds of penance prescribed. It is reasonable to infer that the drastic methods mentioned in verse 74 were meant for Brahminicides of lower castes, whereas the lighter ones, such as sacrifices, ascetic living, and reading of Vedas applied to Brahmana only. This is in keeping with the spirit and tenor of Manava-dharma-sastra (Concept of Humanity) in which Brahmana was all in all. As has been rightly observed, "the Brahmana, when the Code of Manu was composed, was the Emperor of India, he was the lord of all, his empire recognised sub-kings, he had smarted under the Mauryan law seeking to establish uniformity and equality before the Criminal Court (danda-samata) in contravention of the common law which was based on caste. He claimed exemption from capital punishment, he argued for a special criminal law for his caste." 186

Yajnavalkya

In Yajnavalkya a far more liberal atmosphere is evident. The excessive partiality to the Brahmana is greatly moderated and the Brahminical privileges considerably cut down. Another important feature is that Yajnavalkya tacitly differentiates between sacerdotal law (dharma) and secular law (vyavahara). The classification of offences remains essentially the same as in Manu, and equal emphasis, if not greater, is placed by Yajnavalkya on expiatory penances as necessary to mental rehabilitation.
The object of punishment falls into six broad divisions: homicide, theft, violating the chastity of another man's wife, two kinds of violence and miscellaneous—these are six subjects of punishment.

There is marked resemblance between the classification of offences in Hindu penology and that of Garofalo. Garofalo classified offenders into (1) murders (criminals deficient in pity), (2) thieves (criminals deficient in probity), (3) violent criminals, (4) lascivious criminals, or cynics in the French sense of the word.

It is important to note that punishment is to be awarded, and intensity or severity determined, with reference to various facts and circumstances: the caste and social status of the offender, his knowledge and education, his pecuniary and other circumstances, in fact all that go to make up his individuality.

It may not always be possible to visualize the exact ethical, social and religious atmosphere which made such individualisation possible. But it is by no means difficult to appreciate that it is based on scientific principles. There is no tinge anywhere of the theory of retribution or vengeance in the Hindu penal system. So far as some of the forms of punishment go, such as branding, mutilating, impaling etc., they are similar to those found in all ancient systems and appear crude and harsh to modern sensibility. One is almost inclined to think at first blush that they are out of keeping with the otherwise high standard of penal science in India. But, it has to be remembered that such so-called barbarous punishments were most common all over the civilised world as late as just two hundred years ago. 'Painless' punishments such as the electric chair, the guillotine and hanging took long to make their appearance in the world.

It thus appears that the machinery in ancient India for regulating individualisation was elaborate and carefully thought out and we get only a glimpse here and there of ancient social conditions in the Rajadharma and Anusasana of the Mahabharatan age. During the later periods the penal system did not undergo any major change. The Muslim rulers in India evolved penal system in consonance with the Islamic tenets. The colonisation of India by the Britishers marked a watershed in the Criminal Justice System and the present system is essentially based on the English pattern.

**Human Rights and Undertrial Prisoners**

Against this long history of the evolution of the Criminal Justice System, the penal system for maintenance of social order—the order that the ruling class considers crucial for its survival—the methods employed for deterrence, the treatment of crime
and criminals are major determinants of the advancement of our society which resonates our moral values and cultural ethos. In the present context, it is particularly important because human rights issue occupies a dominant position in our value system. The Universal Declaration of Human Rights on December 10, 1948 against the backdrop of untold miseries brought to human civilisation by the Second World War is a significant milestone in the history of mankind. And the Declaration generated a spontaneous urge in man to renew his pledge for defending freedom and to fight against all forms of oppression. The sustained efforts of various international and national bodies, judiciary and non-government organisations, electronic and print media, political parties and intelligentsia all over the world championing the cause of human rights essentially flow from this human urge of making the world a better place to live in. The setting up of National Human Rights Commission on October 12, 1993 in our country in pursuance of the provisions of the Protection of Human Rights Act, 1993 also reflects the collective wisdom and conscience of the nation. The pioneering step of the West Bengal Government in establishing the West Bengal Human Rights Commission in 1995 also speaks of the concern of the State towards protection of human rights. The institutional arrangements by themselves, however, do not guarantee the protection of human rights if enabling conditions are not created to fulfil the commitment to the cause through development of human rights culture. It is, therefore, important that the fundamental principles of human dignity, individual liberty, and inviolability of the inalienable rights of man are preserved and protected. Equally important is to protect the rights of the deviants and incarcerated. It is, of course, not enough that the inalienable rights of all the citizens are protected but the civil society has also to be sensitized for promotion of the cause of human rights at every level. Various social institutions have to be operationalised and supported to achieve these objectives. It is against this perspective that the present study has sought to delve deep into the matter where the undertrial prisoners in the custody of Kolkata Police are the object of focus. However, for the sake of making the study more illustrative and inclusive I had to be somewhat flexible in adhering to the geographical boundary of Kolkata Police. I did not restrict my study within the confines of Kolkata Police but extended it to a few adjoining police stations of West Bengal Police jurisdiction. Similarly, I interviewed a good number of officers and men of the West Bengal police to make proper assessment of the complex police psyche in its totality. In the Correctional Homes also I interacted with different cross sections of the undertrial prisoners and convicts who are involved in cases registered in the police stations of both the Kolkata and West Bengal Police. The basic objective in this regard was to get a comprehensive view of how the undertrial prisoners as a group are looked upon and treated. One of the thrust areas of the study was analysis of the causes of the deviance of those who are incarcerated and their plight in the police custody as well as in the Correctional Homes where they are lodged till the trial begins or they are bailed out. In the process my aim was also to have a close look at the prison system particularly in the context of promises of jail reforms and inviolability of human rights of the
prisoners as well as modern concept of correctional approach to punishment. To understand and examine the attitude of the jail officials towards the prisoners also formed an integral part of my study. Whether the undertrial prisoners have any group behaviour and whether the undertrial prisoners behave in the Police stations and in the Correctional Homes differently was a vital aspect of the study. Another important object of the study was to critically analyse the salient features of the existing Criminal Justice System and the role of the different components of this system in the background of its long history of evolution. How the principal actor of the Criminal Justice System- the Police- functions, how they behave with the undertrial prisoners and their families and others closely related to them formed the core of the study. This aspect was examined with reference to Kolkata Police in particular. Besides, the study was also directed towards understanding the complexities of the police system in general as well as the problems the officers and men of the Kolkata Police in particular with regard to the emerging challenges of combating crime and criminals in this age of scientific and technological advancement and economic liberalisation. The multidimensional and multifaceted role of the Kolkata Police in the present phase of the development of the society where people’s expectations are gradually soaring and when all sections of the society want the police to deliver the goods irrespective of their institutional hazards was also an important area of the study. Against the broad spectrum of the ground realities of the metropolitan city of Kolkata and its position in the cultural map of the country, the study had also sought to examine and analyse the subcultural traits of the Kolkata police and their social cost.

The study had another specific goal. It was intended to examine if the Kolkata Police has been able to efface its colonial character during the last more than two decades and half or still carries the colonial tradition in dealing with the persons under its custody. I have examined this aspect in detail. My intention was to come to a definite conclusion in regard to the class character of the police and to see if this social institution can play a different role under a progressive Government-the Government that stands by democratic rights of the people and is committed to protect the dignity of individuals.

There is yet another important area of discussion. This relates to the applicability of the theories of crime and punishment as discussed above. In reality no single theory can be applied for determining the cause of crime. While the theory of cultural conflict may apply in respect of some criminals, the principles of the socialist theory may apply for a completely different set of people committing crimes though living in the same social surroundings. Again, it may so happen that the theory of differential association would apply to some other groups. Theories cannot be divorced from the reality of life. On the contrary, they are rooted in the soil of the society. This proposition has been reinforced in course of analysing the criminal propensities of the undertrial prisoners whom I have interacted with.
The study of theories of crime, criminality and punishment as well as their relevance in real life with reference to the undertrial prisoners in the custody of Kolkata Police brought to surface certain significant aspects. While poverty, hunger, lack of opportunities to the basic requirements of healthy lives and various kinds of deprivations continue to be the causes of crime against property in most cases, the effects of globalisation and sweeping changes in the economic front with consequential impact on the industrial and agrarian sectors have generated new value system where mad race for wealth and opulence, greed and power, competition and possessiveness hold sway. Intense social tension leading to strife and conflict has been giving birth to criminal propensities of wide ramifications. While dealing with the emerging situations, the Police is also increasingly becoming restive. The impact of the general deterioration in the value system of the society is also evident in the police behaviour. To a great extent, increasing number of custodial violence is attributable to this reason.

As far as punishment is concerned, the civil society in general supports deterrence even through extrajudicial methods by the Police in cases where the crimes are heinous. It is in no mood to compromise with the classical framework of penology that asserts afflictive punishment and retributive justice notwithstanding the predominance of human rights issues. "Justice must be tempered with mercy" still remains a far cry.

The Police as an institution continues to be coercive instrument of the State and zealously guards the interests of the privileged. The interests of the socially and economically weaker sections, the underprivileged and the backward are, as a matter of practice, continue to be neglected. Their rights could be violated with impunity; they could be subjected to repression and atrocities with none to touch the perpetrators irrespective of the fact that a progressive Govt. is in office. They are found to invade the basic human rights of people, the human rights of the undertrial prisoners in their custody, and those of the ordinary men on the street and resort to acts not permitted under the law of the land. The keepers of law become themselves the lawbreakers in the name of maintenance of order in the society. And they have no repentance for it. Rather, a sense of self-righteousness permeates their behavioural pattern. They defend their acts as they believe that the society has given them the authority to discipline it and take corrective measures to enforce discipline even by resorting to acts not expressly sanctioned by the society. The axiom that a police officer acts as an official representative of the Govt. who is required and trusted to work within the law in all situations still remains a far cry.

As regards prisons, euphemistically called Correctional Homes, they continue to be the centres of exploitation and oppression. Here money and muscles powers rule the roost with the jail officials plunged headlong into corrupt practices. Those
incarcerated are subjected to various kinds of deprivations. They have to satisfy the jail officials and Wards-in-charge in one way or the other even to get what they are legally entitled to. Dehumanising conditions exist not only in the Thana Lock-ups but also in the Correctional Homes leading inevitably to the growth of recidivism. Custodial violence on the undertrial prisoners in the Thana Lock-ups and in the Correctional Homes by the Police and Prison officials respectively is a reality. And they mostly go unpunished mainly because such violence gets tacit indulgence from the authorities who are supposed to check these abuses. The apparent lack of political will to curb these illegalities is worsening the situation.

The former Chief Justice of India and currently the Chairperson of the national Human Rights Commission Justice Mr. A.S. Anand observed: “Custodial torture is a total violation of human dignity and degradation which destroys to a very large extent the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded civilization takes a step backward – flag of humanity must on each such occasion fly half-mast”. But, it needs to be recognised that human development shares a common vision with human rights. It is, therefore, imperative that conditions are created to achieve the ultimate goal of human freedom because in pursuing capabilities and realizing rights, this freedom is vital. Towards achieving this goal the Government has to make consistent efforts for sensitizing the people so that the charm of freedom reaches every individual. It has to shape policies in partnership with all the stakeholders to demonstrate the sincerity of purpose in regard to good governance and to ensure access to opportunities for those living in destitution and the hapless who, because of their vulnerable position, take to crimes and are forced to emerge as dreaded criminals to the detriment of the society. The enduring felicity of freedom - freedom that makes one’s social existence relevant must reach everyone for full fruition of sustainable development which lies at the core of the millennium development goals - the agenda for human freedom - freedom that acts as deterrence against crime and criminality.

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