

PROBATION AND PAROLE

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UNIT-I Criminology

1. The concept of Crime
2. Nature and scope of criminology
3. Schools of criminology
4. Causation of Crime (Etiology)

The concept of crime involves the idea of a public as opposed to a private wrong with the consequent intervention between the criminal and injured party by an agency representing the community as whole. Crime is thus the intentional commission of an act deemed socially harmful; or dangerous and the reason for making any given act a crime is the public injury that would result from its frequent participation.

The society therefore takes steps for its prevention by prescribing specific punishments for each crime. The word 'crime' is of origin viz; 'Crimean' which means 'charge' or 'offence' Crime is a social fact. The Waverly Encyclopedia defines it as, "An act forbidden by law and for performing which the perpetrator is liable to punishment".

What is considered as crime? If at one time crime was only an act against the King, nowadays hacking and sex in public is also a crime. The concept of crime is determined by the norms, morals and beliefs of a certain society/country. So, as the values of people were changing so was the concept of crime. A world without crime is impossible and crime will always be there. It is a normal, inevitable phenomenon. Historically, concept of crime has been changing along with the human evolution, society norms and values.

Difference between sin and crime

1. Crime is an action that is against the law. In general, this means the civil law of the society. Sin is a Abrahamic concept that is a violation of God's will.
2. Crime is identified by the government but sin is identified by God.
3. Crime is happened in this world but sin is happened for the after death life.
4. The punishment of crime is given in this world but the punishment of sin is given after death.
5. Every crime is a sin but every sin is not a crime.
6. Sin is a subjective term, and has no parameters to base exactly what it is. It is believed by religious people and ignored by others as a delusion. Crime is something that is set by social codes of the country you live in, and if broken a penalty is to be paid.
7. Brief of crime is given in criminal statutes, penal code, CrPC etc & brief of sin is given in religious books.
8. For non believers anti-social activities are not sin but for both believers and non believers anti-social activities are crime.

Different stages of crime development

Early Stage

In ancient India Ordeals were used in cases with not enough evidences. People thought that social relations were governed by spiritual, supernatural forces, so they believed that if the accused is not guilty then surely God/Angels would save/help him during an ordeal (Ordeal is like a test for guiltiness, using fire, water, stones etc. If accused survives or his injuries heal, then he is considered innocent)

Ordeals were of two types-

- Water Ordeal – person is thrown into deep fast-moving river. If he drowns, he is guilty
- Fire Ordeal – person walks on red-hot metal or walks holding a red-hot iron. Lack of injury or quick healing of injuries means he is innocent

12th-13th century

At that time only certain acts were considered a crime: Only the acts against the state itself. For example: Treason, mutilation, stealing the King's property, etc.

18th-19th century

A huge change in criminal thinking came. Abandoning superstitions and myths, crime and criminals get approached in a scientific way. Establishing that nothing and no one else but the offender himself is responsible for the crime committed. Since then crime is closely related to the social policy of given society. By looking at society's laws you can tell about that society's morals, beliefs and norms.

20th century

High-tech world and urbanisation has given rise to criminality and introduced grounds for new type of crimes (cyber crime), which need a different approach when dealing with them. E-commerce and cyber crimes are added to the old concept of crime. Corruption, terrorism are also something new in concept of crime.

Classification of crime

General classification of crimes is discussed below:-

1. **Legal crimes**- they can be termed as traditional crimes such as, theft, robbery, dacoity, rape, hurt and rioting.
2. **Political crime**- Those which are motivated politically or committed in violation of the election laws or norms set out for the politicians in course of their political activities.
3. **Economic crime** – It include white collar crimes such as tax evasion, exchange violation, smuggling, prostitution, gambling, foreign exchange violation, offence under MRTTP (Amendment) Act 1991 etc.
4. **Social crime**- Which are committed under social legislation such as Child marriage Restraint Act, 1978, Protection of Civil Rights Act, 1955, The Dowry Prohibition Act, 1961 etc.
5. **Other crime**- Which is committed under local or social Acts are termed as miscellaneous crimes, such as Prevention of Food Adulteration Act, 1954, Drugs Act. 1940, Consumer Protection Act, 1986 etc.

Classification of offences under IPC

1. Offences against person.
2. Offences against property.

3. Offences against public tranquillity.
4. Offences against State.
5. Offences relating to documents.
6. Offences relating to public servant.
7. Offences affecting mental order.

Elements of crime

Criminal law is a body of rules and statutes that defines conduct prohibited by the state because it threatens and harms public safety and welfare and that establishes punishment to be imposed for the commission of such acts. Criminal law differs from civil law, whose emphasis is more on dispute resolution than in punishment.

The term criminal law generally refers to substantive criminal laws. Substantive criminal laws define crimes and prescribe punishments. In contrast, Criminal Procedure describes the process through which the criminal laws are enforced. For example, the law prohibiting murder is a substantive criminal law. The manner in which state enforces this substantive law through the gathering of evidence and prosecution is generally considered a procedural matter.



1. **Human Being**- The first element requires that the wrongful act must be committed by a human being. In ancient times, when criminal law was largely dominated by the idea of retribution, punishments were inflicted on animals also for the injury caused by them, for example, a pig was burnt in Paris for having devoured a child, a horse was killed for having kicked a man. But now, if an animal causes an injury we hold not the animal liable but its owner liable for such injury.

So the first element of crime is a human being who- must be under the legal obligation to act in a particular manner and should be a fit subject for awarding appropriate punishment.

Section 11 of the Indian Penal Code provides that word 'person' includes a company or association or

body of persons whether incorporated or not. The word 'person' includes artificial or juridical persons.

2. **Mens Rea**- The second important essential element of a crime is mens rea or evil intent or guilty mind. There can be no crime of any nature without mens rea or an evil mind. Every crime requires a mental element and that is considered as the fundamental principle of criminal liability. The basic requirement of the principle mens rea is that the accused must have been aware of those elements in his act which make the crime with which he is charged.

There is a well known maxim in this regard, i.e. "actus non facit reum nisi mens sit rea" which means that, the guilty intention and guilty act together constitute a crime. It comes from the maxim that no person can be punished in a proceeding of criminal nature unless it can be showed that he had a guilty mind.

3. **Actus Reus** [Guilty Act or Omission] - The third essential element of a crime is actus reus. In other words, some overt act or illegal omission must take place in pursuance of the guilty intention. Actus reus is the manifestation of mens rea in the external world. Prof. Kenny was the first writer to use the term 'actus reus'. He has defined the term thus- "such result of human conduct as the law seeks to prevent".

4. **Injury**- The fourth requirement of a crime is injury to another person or to the society at large. The injury should be illegally caused to any person in body, mind, reputation or property as according to Section 44 of IPC, 1860 the injury denotes any harm whatever illegally caused to any person in body, mind, reputation or property.

Stages of a Crime

If a person commits a crime voluntarily or after preparation the doing of it involves four different stages. In every crime, there is first-intention to commit it, secondly, preparation to commit it, thirdly, attempt to commit it and fourthly the accomplishment. The stages can be explained as under-

1. **Intention**- Intention is the first stage in the commission of an offence and known as mental stage. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. But the law does not take notice of an intention, mere intention to commit an offence not followed by any act, cannot constitute an offence. The obvious reason for not prosecuting the accused at this stage is that it is very difficult for the prosecution to prove the guilty mind of a person.
2. **Preparation**- Preparation is the second stage in the commission of a crime. It means to arrange the necessary measures for the commission of the intended criminal act. Intention alone or the intention followed by a preparation is not enough to constitute the crime. Preparation has not been made punishable because in most of the cases the prosecution has failed to prove that the preparations in the question were made for the commission of the particular crime.

If A purchases a pistol and keeps the same in his pocket duly loaded in order to kill his bitter enemy B, but does nothing more. A has not committed any offence as still he is at the stage of preparation and it will be impossible for the prosecution to prove that A was carrying the loaded pistol only for the purpose of killing B.

Preparation When Punishable- Generally, preparation to commit any offence is not punishable but in some exceptional cases preparation is punishable, following are some examples of such exceptional circumstances-

- Preparation to wage war against the Government - Section 122, IPC 1860;
- Preparation to commit depredation on territories of a power at peace with Government of India- Section 126, IPC 1860;
- Preparation to commit dacoity- Section 399, IPC 1860;
- Preparation for counterfeiting of coins or Government stamps- Sections 233-235, S. 255 and S. 257;
- Possessing counterfeit coins, false weight or measurement and forged documents. Mere possession of these is a crime and no possessor can plead that he is still at the stage of preparation- Sections 242, 243, 259, 266 and 474.

➤ 3. **Attempt**- Attempt is the direct movement towards the commission of a crime after the preparation is made. According to English law, a person may be guilty of an attempt to commit an offence if he does an act which is more than merely preparatory to the commission of the offence; and a person will be guilty of attempting to commit an offence even though the facts are such that the commission of the offence is impossible. There are three essentials of an attempt:-

- Guilty intention to commit an offence;
- Some act done towards the commission of the offence;
- The act must fall short of the completed offence.

Attempt Under The Indian Penal Code, 1860- The Indian Penal Code has dealt with attempt in the following four different ways-

- Completed offences and attempts have been dealt with in the same section and same punishment is prescribed for both. Such provisions are contained in Sections 121, 124, 124-A, 125, 130, 131, 152, 153-A, 161, 162, 163, 165, 196, 198, 200, 213, 240, 241, 251, 385, 387, 389, 391, 394, 395, 397, 459 and 460.
 - Secondly, attempts to commit offences and commission of specific offences have been dealt with separately and separate punishments have been provided for attempt to commit such offences from those of the offences committed. Examples are- murder is punished under section 302 and attempt to murder to murder under section 307; culpable homicide is punished under section 304 and attempt to commit culpable homicide under section 308; Robbery is punished under section 392 and attempt to commit robbery under section 393.
 - Thirdly, attempt to commit suicide is punished under section 309;
 - Fourthly, all other cases [where no specific provisions regarding attempt are made] are covered under section 511 which provides that the accused shall be punished with one-half of the longest term of imprisonment provided for the offence or with prescribed fine or with both.
3. **Accomplishment Or Completion**- The last stage in the commission of an offence is its accomplishment or completion. If the accused succeeds in his attempt to commit the crime, he will be guilty of the complete offence and if his attempt is unsuccessful he will be guilty of an attempt only. For example, A fires at B with the intention to kill him, if B dies, A will be guilty for committing the offence of murder and if B is only injured, it will be a case of attempt to murder.

Schools of Criminology

In the mid-18th century criminology arose as social philosophers gave thought to crime and concepts of law. Over time, several schools of thought have developed. There were three main schools of thought in early criminological theory spanning the period from the mid-18th century to the mid-twentieth century: Classical, Positive, and Chicago. These schools of thought were superseded by several contemporary paradigms of criminology, such as the sub-culture, control, strain, labeling, critical criminology, cultural criminology, postmodern criminology, feminist criminology and others discussed below.

1. Classical school

The Classical School, which developed in the mid 18th century, was based on utilitarian philosophy. Cesare Beccaria, author of *On Crimes and Punishments* (1763–64), Jeremy Bentham (inventor of the *panopticon*), and other classical school philosophers argued that:

1. People have free will to choose how to act.
2. Deterrence is based upon the notion of the human being as a 'hedonist' who seeks pleasure and avoids pain, and a 'rational calculator' weighing up the costs and benefits of the consequences of each action. Thus, it ignores the possibility of irrationality and unconscious drives as motivators.
3. Punishment (of sufficient severity) can deter people from crime, as the costs (penalties) outweigh benefits, and that severity of punishment should be proportionate to the crime.
4. The more swift and certain the punishment, the more effective it is in deterring criminal behaviour.

The Classical school of thought came about at a time when major reform in penology occurred, with prisons developed as a form of punishment. Also, this time period saw many legal reforms, the French Revolution, and the development of the legal system in the United States.

2. Positivist school

The Positivist school presumes that criminal behaviour is caused by internal and external factors outside of the individual's control. The scientific method was introduced and applied to study human behaviour. Positivism can be broken up into three segments which include biological, psychological and social positivism.

3. Italian school

Cesare Lombroso (1835-1909), an Italian sociologist working in the late 19th century, is sometimes regarded as the father of criminology. He was one of the largest contributors to biological positivism and founded the Italian school of criminology. Lombroso took a scientific approach, insisting on empirical evidence for studying crime. Considered as the founder of criminal anthropology, he suggested that physiological traits such as the measurements of one's cheek bones or hairline, or a cleft palate (regarded as throwbacks to Neanderthal man) could indicate "atavistic" criminal tendencies. This approach, influenced by the earlier theory of phrenology and by Charles Darwin and his theory of evolution, has been superseded. Enrico Ferri, a student of Lombroso, believed that social as well as biological factors played a role, and held the view that criminals should not be held responsible when factors causing their criminality were beyond their control. Criminologists have since rejected Lombroso's biological theories, with control groups not used in his studies.

4. Sociological positivism

Sociological positivism suggests that societal factors such as poverty, membership of subcultures, or low levels of education can predispose people to crime. Adolphe Quetelet made use of

data and statistical analysis to gain insight into the relationship between crime and sociological factors. He found that age, gender, poverty, education, and alcohol consumption were important factors related to crime. Rawson W. Rawson utilized crime statistics to suggest a link between population density and crime rates, with crowded cities creating an environment conducive for crime. Joseph Fletcher and John Glyde also presented papers to the Statistical Society of London on their studies of crime and its distribution. Henry Mayhew used empirical methods and an ethnographic approach to address social questions and poverty, and presented his studies in *London Labour and the London Poor*. Émile Durkheim viewed crime as an inevitable aspect of society, with uneven distribution of wealth and other differences among people.

5. Chicago school

The Chicago school arose in the early twentieth century, through the work of Robert E. Park, Ernest Burgess, and other urban sociologists at the University of Chicago. In the 1920s, Park and Burgess identified five concentric zones that often exist as cities grow, including the "zone in transition", which was identified as most volatile and subject to disorder. In the 1940s, Henry McKay and Clifford R. Shaw focused on juvenile delinquents, finding that they were concentrated in the zone of transition.

Chicago School sociologists adopted a social ecology approach to studying cities and postulated that urban neighbourhoods with high levels of poverty often experience breakdown in the social structure and institutions such as family and schools. This results in social disorganization, which reduces the ability of these institutions to control behaviour and creates an environment ripe for deviant behaviour.

Other researchers suggested an added social-psychological link. Edwin Sutherland suggested that people learn criminal behaviour from older, more experienced criminals with whom they may associate. Theoretical perspectives used in criminology include psychoanalysis, functionalism, interactionism, Marxism, econometrics, systems theory, postmodernism, genetics, neuropsychology, evolutionary psychology, etc.

Causation of crime

The causes of crime are one of the important phases of the crime problem. The factors which make a criminal can be divided into physical factors, mental factors, regionalism and economic causes, alcoholism, etc. To explain the causation of criminal behaviour, criminologists have propounded various theories at different times of the existence of society.

1. Pre-Classical Theory

During the seventeenth and the eighteenth centuries, the dominance of religion in State activities was quite prominent. In political sphere, thinkers like Hobbes and Locke concentrated on social contract as the basis of social evolution. The concept of Divine right of the King advocating supremacy of monarch was held in great esteem. As the scientific knowledge was unknown, the concept of crime was vague. There was a general belief that man by nature is simple and his actions are controlled by supernatural powers. Thus crime is committed by a man when he gets influenced due to some external spirit called 'demon' or 'devil'. No attempt was ever made to probe into the real factors that cause crime. Worships, sacrifices and ordeals were prescribed to specify the spirit and relieve the victim from its evil influence. Trial by battle was common mode of deciding the fate of the criminal. However, the society had the right to punish the offender. Thus, the offender was generally seen as a deprived person who could only be cured and relieved of the evil spirit by torture and pain.

The evolution of law was still vestigial. Hobbes suggested that fear of punishment at the hands of monarch was a sufficient deterrent for the members of early society to keep them away from sinful acts, which were synonymous to crime. Ordeals and oaths played an important role in the ancient society. The pre- classical thinking however, withered away with the lapse of time and advancement of knowledge. With the advent of the British rule in India- penal law was rationalized.

Classical Theory

During the middle of the eighteenth century, Cesare Beccaria (pioneer of modern criminology) expounded naturalistic theory and rejected the omnipotence of evil spirit. Beccaria's theory of criminal behaviour provides the foundations of the rational actor model and is based on the concepts of free will and hedonism. The classical theory or classicism emphasises the notion of individual rights, the importance of free will and the rule of law.

It can thus be said that Beccaria's major contribution to criminological thought was the concept that punishments should fit the crime. Torture was considered as a useless method of criminal investigation, as well as being barbaric. Moreover, capital punishment was not necessary. A life sentence of hard labour was preferable, both as a punishment and deterrent. Essentially, the use of imprisonment should be greatly extended, the conditions of prisons improved, with better physical care provided and inmates should be segregated on the basis of gender, age and degree of criminality. Beccaria was influenced by the utilitarian philosophy and proposed that human behaviour is essentially purposive and is based on the pleasure- pain principle.

Thus, punishment should reflect that principle. Fixed punishments for all offences must consequently be written into the law and not be open to interpretation, or the discretion, of judges.

Beccaria was a strong supporter of 'social contract theory' with its emphasis on the notion that individuals can only be legitimately bound to the society if they have given their consent to the societal arrangements. It is the law that provides the necessary conditions for the social contract. Punishments exist only to defend people's liberties against those who would interfere with them. It is important to recognize that Beccaria's ideas have had a profound effect on modern criminal law. The doctrine of free will is built into many legal codes and strongly influences popular conceptions of justice.

Jeremy Bentham was a leading disciple of Beccaria. As a philosopher, he is tagged as hedonistic utilitarian, due to his emphasis on the pursuit of pleasure. He was very much influenced by the philosophical materialism of John Locke which denied the existence of innate ideas and traditional, established religious notions of original sin. He therefore ascribed criminal behaviour to incorrect upbringing or socialisation rather than innate propensities to offend. For Bentham, criminals were not incorrigible monsters but 'forward children', 'persons of unsound mind', who lacked the self discipline to control their passions, according to the dictates of reason.

Bentham's ideas were very similar to those of Beccaria. His greatest principle, the fundamental axiom of all utilitarian philosophy, is 'the greatest happiness for the greatest number'. People are rational creatures who will seek pleasure and avoid pain. Thus, punishment must outweigh any pleasure derived from criminal behaviour, but the law must not be as harsh and severe as to reduce the greatest happiness. Moreover, the law should not be used to regulate morality, only to control acts harmful to society, which reduce the happiness of the majority. He agreed with Beccaria about capital punishment, that it was barbaric and unnecessary, but disagreed about torture, allowing Bentham believed in the doctrine of free will, there is a strong hint in his work that suggests criminality might be learned behaviour.

Criticism- However, the classical theory has been criticised on various aspects. The strict, formal, philosophical elegance of the Classical model was breached. The Classical theorists deliberately and completely ignored differences between individuals. First offenders and recidivists were treated

exactly alike, solely on the basis of the particular act that he had been committed. Children, idiots and insane people were treated as if they were fully rational and competent. It became increasingly recognized that people were not equally responsible for their actions and a whole range of experts gradually came to be invited into the courts to pass opinion on the degree of reason that could be expected of the accused. Judges started to vary sentences in accordance with the degree of the culpability argued by these expert witnesses. It was this theoretical compromise that led to the emergence of a modified criminological perspective that came to be termed the neo Classical School.

Anthropological Theory

Anthropological criminology (sometimes referred to as **criminal anthropology**, literally a combination of the study of the human species and the study of criminals) is a field of offender profiling, based on perceived links between the nature of a crime and the personality and physical appearance of the offender. Although similar to physiognomy and phrenology, the term criminal anthropology is generally reserved for the works of the Italian school of criminology of the late 19th century (Cesare Lombroso, Enrico Ferri, Raffaele Garofalo). Lombroso thought that criminals were born with inferior physiological differences which were detectable. He popularized the notion of "born criminal" and thought that criminality was an atavism or hereditary disposition. His central idea was to locate crime completely within the individual and utterly divorce it from the surrounding social conditions and structures. A founder of the Positivist school of criminology, Lombroso hereby opposed social positivism developed by the Chicago school and environmental criminology. In the 19th century, Cesare Lombroso and his followers performed autopsies on criminals and declared that they had discovered similarities between the physiologies of the bodies and those of "primitive humans", monkeys and apes. Most of these similarities involved receding foreheads, height, head shape and size, and based on these Lombroso postulated the theory of the 'born criminal'. Lombroso also declared that the female offender was worse than the male, as they had strong masculine characteristics.

Cesare lombroso (1835-1909)

Cesare lombroso, a physician wrote, the criminal man during autopsy, certain physical stigmata was apparent, concluded the certain number of theses indicated a born criminal, atavistic criminal stigmata related to an atavistic criminal; deviation He consistently emphasized the need for direct study of the individual, utilizing measurements and statistical methods in anthropological, social, and economic data.

He began with the basic assumption of the biological nature of human character and behavior:

- a. he first conceived of the criminal as a throwback to a more primitive type of brain structure, and therefore of behavior.
- b. he later modified this to include general degeneracy of defectiveness.
- c. he never claimed that the born criminal constituted more than 40% probably less, only about 1/3 of the total criminal population.

With successive years of study, discussion, and contact with critics, he modified his theory and method more and more to include all kinds of social, economic, and environmental data. Through it all, he always attempted to be:

- a. objective, in method, often statistical
- b. positive in the sense of deterministic
- c. faithful to the basic idea of cause as a chain of interrelated events, not the more familiar and popular doctrine of self-determinism of human behavior, to say nothing of the demonistic the female offender 1909 most women are not criminal those that are, are most often occasional criminals but, some women are atavistic criminals harder to detect than men more vicious.

Lombroso popularized the notion of the *born criminal* through biological determinism, claiming that criminals have particular *physiognomic* attributes or deformities. *Physiognomy* attempts to estimate character and *personality* traits from physical features of the face or the body. Whereas most individuals evolve, the *violent* criminal had *devolved*, and therefore criminals were societal or evolutionary regressions. If criminality was *inherited*, then the *born criminal* could be distinguished by physical *atavistic stigmata*, such as:

- large jaws, forward projection of jaw, low sloping foreheads
- high cheekbones, flattened or upturned nose
- handle-shaped ears
- large chins, very prominent in appearance
- hawk-like noses or fleshy lips
- hard shifty eyes, scanty beard or baldness
- insensitivity to pain, long arms .

He attempted to construct a purported scientific methodology in order to predict criminal behavior and isolate individuals capable of the most violent types of criminal activity. Lombroso advocated the study of individuals using measurements and statistical methods in compiling anthropological, social, and economic data. Along with the natural origin of the crime and its social consequences, various remedies can then be provided to the criminal, which would offer the greatest effects.

With successive research, he modified his theories with more thorough statistical analysis. Lombroso continued to define additional *atavistic stigmata*, as well as the degeneracy of effectiveness in the treatment of born criminals. He was an advocate for humane treatment of criminals by arguing for rehabilitation and against capital punishment.

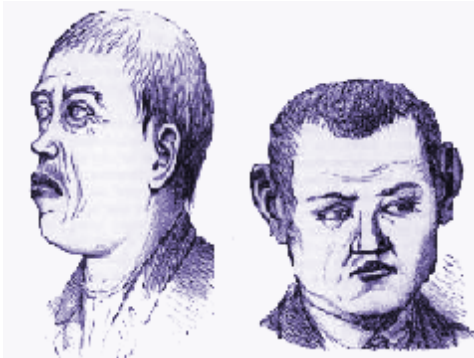
Lombroso's work, however, was hampered by his Social Darwinist assumptions, and especially by his pre-genetic conception of evolution as "progress" from "lower life forms" to "higher life forms," and his assumption that the more "advanced" human traits would dispose their owners to living peacefully within a hierarchical, urbanized society far different from the conditions under which human beings evolved. In attempting to predict criminality by the shapes of the skulls and other physical features of criminals, he had in effect created a new pseudoscience of forensic phrenology and craniometry. While Lombroso was a pioneer of scientific criminology, and his work was one of the bases of the eugenics movement in the early twentieth century, his work is no longer considered one of the foundations of contemporary criminology.

Lombroso's criminology supported degeneration social theory, whereby it was believed the human species may negatively evolve into a criminal class. Lombroso claimed that the modern criminal was the savage throwback of "degeneration". Lombroso concluded that skull and facial features were clues to genetic criminality. These features could be measured with craniometers and calipers, and the measurements analyzed by quantitative research. Lombroso assumed that whites were superior to non-whites by heredity, and that Africans were the first human beings that evolved upwards and positively to yellow then white. Racial development was signified by social progress from primitive to modern, "only we white people have reached the ultimate symmetry of bodily form"

Thus in sharp contrast to classicism, Lombroso's answer to the problem of criminal behaviour lay in biology, specifically a complex set of externally visible physiological variations that, he claimed, marked out certain individuals as predestined to commit crime. By observation and careful measurement of the bodily features of the criminal, Lombroso attempted to prove scientifically that those who broke the law were physically distinct from those who did not.

Lombroso conducted thousands of post- mortem examinations and psychological studies of prison inmates and non criminals. He concluded that the criminal existed, in the natural order of things, as a lower form of human evolution than the average man, with very distinct physical and mental characteristics. Lombroso proffered a four-fold classification:

- i. **Born criminal**- These criminals were of distinct type who could not refrain from indulging in criminality and the environment had no relevance for the crimes whatsoever to the crimes committed by these atavists. Thus, these criminals were those with true atavistic features. He, therefore, considered these criminals as incorrigible, i.e., beyond reformation. In his view, criminals resemble those apes and ape like characteristics and thus, both mentally and physically inferior.



Lombroso's theory used physical characteristics as indicators of criminality. He enumerated sixteen physical characteristics which were peculiar in all criminals- unusual short or tall height; small head but large face; fleshy lips with thin upper lips; bumps on head, back of head and around ear; size and shape of head; wrinkles on forehead and face; abnormal teeth; large sinus cavities on bumpy face; tattooed bodies; receding hair line; bushy eyebrows tending to meet across nose; large eye socket with deep set eyes; beaked or flat nose; long or flat chin; thin neck; sloping shoulders but large chest; large

protruding ears; long arms; high cheek bones; unusual size of fingers or toes.



- ii. **Insane criminals**- According to Lombroso, insane criminal resorted to criminality on account of certain mental depravity or disorder. Insanity means a temporary period during which a person is not in his senses. 'Madness' is permanent unsoundness of mind. Lombroso further divided these criminals into the following sub categories:
- Alcoholic;
 - Hysterical- this may be caused due to a person, thing or an incident;
 - Criminal Mattoid- criminal mattoids were further categorized as idiocy, epilepsy, paralysis.
- iii. **Criminals of passion** - who commit crime because of honour, love or anger. They are propelled by a (temporary) irresistible force.
- iv. **Occasional criminals or criminaloids**- whose crimes were explained largely by opportunity. These criminals were furthermore categorized into the following:
- Pseudo criminals- these types of criminals are not dangerous to the society as such and whose act might be in defence of honour, for mere subsistence or committed under unusual circumstances;
 - Habitual criminals- they are conditioned to crime unfavourable to the environmental circumstances, though free from inherent criminal tint;
 - Criminoid- persons who switch between born criminal and honest man, who shows upon an examination a touch of degeneracy.

Criticism- Lombroso's theory has been severally criticized by the criminologists. He has been criticized for his anthropometric measurements on which he formulated his theories of criminal behaviour. Enrico Ferri criticized Lombroso's theory as under:

- His approach assumed individual physique as something fixed and not prone to changes. He did not take into consideration the morbid process affecting the human physique.
- For actual measurements of his subjects, he depended on others and thus created doubts regarding the reliability of the data employed by him.
- Sophisticated statistical techniques, developed subsequently, were not available to Lombroso which proved his analysis to be highly deficient.
- Lombroso had no control groups and was, therefore, unable to compare the so called characteristics of criminals with those of non- criminals.
- The data did not cover sufficient number and it could not, therefore, be regarded as truly representative of the relevant groups.
- He did not take into account the racial and ethnic differences among the members of his samples and treated them as homogenous which was not always the case.

Importantly, Lombroso was not alone in his search for the criminal type. Enrico Ferri (1856-1928) and Raffaele Garofalo (1852-1954) also contributed to this theory. Ferri was not simply a biological positivist. Significantly, he argued that the criminal behaviour could be explained by studying the interaction of range of factors. First there are physical factors such as race, geography, and temperature. Second, there are individual factors such as age, sex and psychological variables. Thirdly, there are social factors such as population, religion and culture.

Ferri worked out a five-fold classification of criminals, namely:

- i. Born criminal;
- ii. Occasional criminal;
- iii. Passionate criminal;
- iv. Insane criminal; and
- v. Habitual criminal.

In the field of punishment, he gave two theories. Firstly, on the individualisation of offenders, the punishment should be decided because the choice of means of social difference would be different for the different categories of criminals. Secondly, indeterminate sentences with maximum period limit should be given.

Many critics, however, opposed Ferri's law of criminal saturation. Raffaele Garofalo criticized Ferri's theory:

- Ferri's classification of criminals is without any scientific basis and thus lacks exactness;
- The habitual offender is neither anthropologic nor of pathologic variety. The attempt to distinguish the born and the habitual criminal and the passionate criminal is without anthropological justification; and
- It lacks clear defined class limit and it may assign same offender differently to anyone of the several classes proposed.

Ferri emphasised that a criminal should be treated as a product of the conditions which played in his life. Therefore, the basic purpose of crime prevention programme should be to remove conditions making for crime. According to Ferri, improving social conditions of the poor could control crime and to that end advocated the provision of subsidised housing, birth control and public recreation facilities.

Raffaele Garofalo was a magistrate, a senator and a professor of criminal law. He stressed the need for a closer study of circumstances and living condition of criminals. He firmly believed that a criminal is a creature of his own environment. He followed the theories of Lombroso and Enrico Ferri, but approached the problem of crime and criminals in a different manner than those of his

contemporaries. Rejecting the classical theory of free will as a cause of crime, Garofalo defined crime as an act which offends the sentiments of pity and probity possessed by an average person and which are injurious to the society. He emphasised that lack of pity generates crimes against person while lack of probity leads to crimes against property.

As to the classification of criminals, he rejected Ferri's classification and placed offenders into four main categories viz:

- a) Endemic- These criminals are murderers who commit offences characteristic of their locality or crimes out of passion;
- b) Criminals deficient in probity- These are in majority, thieves;
- c) Lascivious criminals- They perpetrate crimes against chastity;
- d) Violent criminals- They are affected by such environmental influences as "prejudices of honour, politics and religion".

Garofalo propounded a theory for punishment. He rejected the common belief that punishments deter potential offenders in their acts. He, however, admits the value of criminal penalties operating in a more subtle fashion, by providing and reinforcing general moral attitudes toward certain form of conduct. The law, by making such behaviour unrespectable, subjects the individual to powerful extra legal sanctions of public opinion. He, however realised that public opinion would not support death penalty in case of murder. He, therefore, recommended imprisonment and transportation in cases other than murder and was of the opinion that criminals ought to make good through money payments, the material and the moral damage cause by their crimes.

The psychodynamic theory

Of the several classical perspectives on personality, the psychoanalytic is perhaps the most conceptually rich and yet the most widely misunderstood. Sigmund Freud, the father of psychoanalysis, was born in 1856. As the oldest child of an adoring mother whose belief in her son's destiny never flagged, Freud knew he would be famous. Naturally attracted to science and influenced by Darwin, he settled on a medical career and spent a period of time involved in pure research. Eventually, practical necessity intervened, and Freud began a more applied course, specializing in neurology and psychiatry. In 1885, he travelled to France and witnessed Jean Charcot cure a case of hysterical paralysis using hypnosis. Because the psychiatric treatments of the times were highly ineffective, Freud was impressed and began to experiment with the technique on his own, eventually developing the foundational ideas of psychoanalysis (Gay, 1988).

The Topographic Model

By the early 1890s, Freud and his friend Josef Breuer, a respected physician and original scientist in his own right, had begun to explore the use of hypnosis together. Breuer had already discovered that when subjects with hysterical symptoms talked about their problems during a hypnotic state, they often experienced a feeling of **catharsis**, or emotional release. Eventually, the two formed the theory that hysterical symptoms resulted from early sexual molestation, leaving memories so distressing that they were intentionally forgotten and could only be fully remembered under hypnosis. Later, Freud discovered that when these memories were completely recalled to consciousness in an emotional release, the symptoms disappeared. This became Freud's first theory of neuroses, the idea that behind every neurotic conflict lies a forgotten childhood trauma. Such memories are said to be **repressed**. Motivated to forget what it knows, the mind defends against the painful experiences by actively excluding them from conscious awareness. The past cannot be rewritten, but its impact can be contained. In fact, massive repression is one of the major coping strategies used by the histrionic personality, the contemporary parallel to the turn-of-the-century hysterical syndromes through which the basic principles of psychoanalysis were discovered.



Freud elaborated his insights into what is known as the **topographic model**, the idea that the mind has an organization or architecture that overflows consciousness and can be described in terms of different levels or compartments. At the foundation lies the unconscious, a mysterious realm consisting of everything that we cannot become aware of by simple reflection alone. According to classical psychoanalytic theory, the unconscious is the only part of the mind that exists at birth. Just above the unconscious lies the preconscious, which consists of everything that can be summoned to consciousness on command, for example, your phone number. And finally, there is the part of the mind that forms our waking lives, which we call **conscious awareness**. According to Freud, the desire to bring satisfaction to our unconscious instincts continues to be the main motivator in human behavior throughout the life span. By declaring the unconscious and its drives to be the origin and center of psychological existence, Freud affected a Copernican revolution against the Enlightenment rationalism that dominated the times. Behavior was not fundamentally rational; it was irrational. Just as the earth is not the center of the universe, conscious awareness is but a backwater that conceals the main currents of mental life. For this reason, the idea of making the unconscious conscious, the goal Freud and Breuer had in mind with hypnosis, is a major goal of much contemporary psychotherapy.

It is hard to specify distinctively psychological theories of crime. The guiding principle in this theory is that psychological theories focus especially on the influence of individual and family factors on offending. Psychological theories are usually developmental, attempting to explain the development of offending from childhood to adulthood, and hence based on longitudinal studies that follow up individuals over time. The emphasis of such theories is on continuity rather than discontinuity from childhood to adulthood. A common assumption is that the ordering of individuals on an underlying construct such as criminal potential is relatively constant over time.

Psychologists view offending as a type of behaviour that is similar in many respects to other types of antisocial behaviour. Hence, the theories, methods, and knowledge of other types of antisocial behaviour can be applied to the study of crime. Typically, psychological theories may include

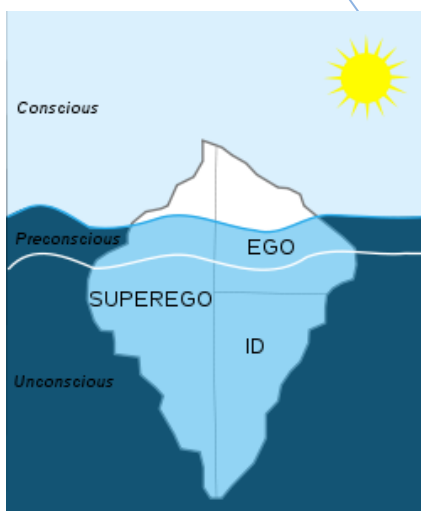
motivational, inhibiting, decision-making, and learning processes. The most common motivational idea is that people (and especially children) are naturally hedonistic and selfish, seeking pleasure and avoiding pain, and hence that children are naturally antisocial. Another classic idea is that people are motivated to maintain an optimal level of arousal; if their level falls below the optimum, they will try to increase it, whereas if it is above the optimum they will try to decrease it. Thus, someone who is bored might seek excitement.

Since offending is viewed as essentially natural, most psychological theories attempt to explain the development of mechanisms that inhibit offending such as the conscience. The conscience is often assumed to arise in a conditioning process (depending on the association between antisocial behaviour and the anxiety created by parental punishment) or in a learning process (where the probability of behaviour increases or decreases according to parental rewards or punishments). Psychological theories often include cognitive (thinking or decision making) processes that explain why people choose to offend in a particular situation. A common assumption is that offending is essentially rational, and that people will offend if they think that the expected benefits will outweigh the expected costs.

The possible causal mechanisms or processes that intervene between and explain the link between risk factors and crime are:

- family influences, such as broken homes (associated with attachment theories), poor child-rearing methods (associated with social learning theories), and criminal parents (associated with intergenerational transmission theories); and
- Individual influences such as personality. The most important personality factor in relation to crime is impulsiveness, while the most influential theory of the link between personality and crime is that put forward by Hans Eysenck. A significant theory focusing on impulsiveness was propounded by James Q. Wilson and Richard Herrnstein.

Psychodynamic (Psychoanalytical) theory was developed by Sigmund Freud in the late 1800's and has then become a significant theory in the history of criminality (Siegel, 2005). Freud believed that every individual carries the residue of the most significant emotional attachments of our childhood, which then guides our future interpersonal relationships. The theory is a three-part structure made up of the id, the ego, and the super ego. The id is considered the underdeveloped or primitive part of our make-up. It controls our need for food, sleep, and other basic instincts. This part is purely focused on instant gratification. The ego controls the id by setting up boundaries. The superego is in charge of judging the situation through morality.



Psychodynamic theorists believe that offenders have *id*-dominated personalities. In other words, they lose control of the ego and the id's need for instant gratification takes over. This causes impulse control problems and increased pleasure-seeking drives. Other problems associated with a damaged ego are immaturity, poor social skills, and excessive dependence on others. The idea is that negative experiences in an offenders childhood damages the ego, therefore, the offender is unable to cope with conventional society. Other psychoanalytical theorists believe that many criminals are driven by an unconscious need to be punished for previous sins (either real or imaginary). Therefore, crime is a manifestation of feelings of oppression and people's inability to develop the proper psychological defence and rationales to keep these feelings under control.

The Structural Model

Despite his original enthusiasm for hypnosis, in time, Freud developed additional techniques that allowed him to map the contents of the unconscious, such as free association. In doing so, he discovered an additional organizing principle, the structural model of id, ego, and superego. The id consists of the basic survival instincts and the two dominant drives of personality: sex and aggression. At birth, infant behavior is motivated by the desire for immediate instinctual gratification, which Freud referred to as the **pleasure principle**: I want what I want, and I want it now! In a way, the id is like a dictator that knows only how to repeatedly assert its own desires, something that makes the world a very frustrating place. To relieve this frustration and ensure greater adaptability in the organism, a second part of the personality, the ego, develops to mediate between the demands of the id and the constraints of external reality. Whereas the id is fundamentally irrational, the ego is fundamentally rational and planful, operating on the **reality principle**. To be effective, the ego must perform sophisticated intellectual activities such as risk-benefit and means-ends analysis, projecting the consequences of various courses of action into the future, judging the range of possible outcomes and their respective cost and reward, all the while modifying plans and embracing alternatives as necessary. Not every course of action that the ego might imagine is acceptable, however. Eventually, a third part of the personality emerges that internalizes the social values of caretakers, the superego. The process by which the superego forms is called **introjection**, which literally means “a putting inside.” The superego consists of two parts, the conscience and the ego ideal: what you shouldn’t do and what you should do and should become. The conscience is concerned with the **morality principle**, the right and wrong of behavior. In contrast, the ego ideal pulls each of us toward the realization of our unique human potentials. Breaking moral codes results in feelings of guilt; satisfying the ego ideal results in feelings of pride and self-respect. For Freud, personality is seen as a war of attrition fought by three generals. As the executive branch of the personality, the ego must balance and mediate between constraints on all sides. On the one hand, the id, upwelling from below, is always percolating, yearning for gratification. On the other hand, the prohibitions of the superego prevent its desires from being directly satisfied. For this reason, the psychoanalytic perspective is often regarded as intrinsically pessimistic: Human beings are said to exist in a state of perpetual conflict between the needs and constraints of various parts of the personality. We can endure, but we cannot escape. Many of the personality disorders are in exactly this situation. Avoidant personalities, for example, deeply desire close connectedness to others, but also feel a sense of shame about themselves so profound that very few such relationships are possible. Instead, avoidant retreat into a shell where they can at least be alone with their humiliating defects and deficiencies. Compulsive and negativistic personalities wrestle with issues related to the obedience versus defiance of authority. Compulsives express this conflict passively by over conforming to internalized superego demands; on the surface, they appear normal and in control, but beneath, they are taut, anxious, and ever circumspect of their own conduct. In contrast, the negativistic personality, formerly called the passive-aggressive, expresses conflict actively by vacillating between loyalty and insubordinate sabotage. Knowing the outcomes that others seek, they work subtly within the system to bring the plans of others to ruin or at least cause them great frustration. Only a subset of the antisocial personality, the psychopath, escapes conflict. Given their stunted superego development, psychopaths have no need to evaluate their actions according to some standard of right or wrong; instead, their ego is free to select any pathway to gratification that seems realistically possible, even if it includes deceitfulness, misconduct, or irreparable damage to the lives of others. Accordingly, they pause only when self-conscious of the raw punishment society might inflict on them because of their transgressions.

Defence Mechanisms

Because the ego is constantly trying to satisfy the impulsive demands of the id while honouring the constraints of reality and the moral constraints of the superego, awareness is always vulnerable to feelings of anxiety. On the one hand, id instincts are like barbarians at the gate, always threatening to

break through ego controls and saturate behaviour with raw animal forces. Awareness of this possibility produces what Freud referred to as **neurotic anxiety**. On the other hand, the superego demands perfection, threatening to flood awareness with guilt whenever the satisfaction of id demands is not sufficiently disguised, which Freud referred to as **moral anxiety**. One is a sinner; the other, a saint. Finally, threats from the external world can produce **reality anxiety**. If you hear on the radio that the stock market has just crashed, your concern about your investments is realistic. Whatever the source, anxiety is a signal to ego that some form of corrective action must be taken to reinforce its controls. But how does the ego protect itself from being overwhelmed? In time, Freud and his disciples discovered the **defence mechanisms**. Through his studies of hysteria, Freud had already been led to the existence of the unconscious and the discovery that guilt can be transformed into a symptom. He found, for example, that uncontrollable aggressive urges might lead to a hysterical paralysis in the hand that might be used to strike someone. Although the goal is always the same to protect the sanctity of awareness by reducing the level of perceived anxiety or threat different defence mechanisms work in.

Carl G Jung's Contribution to Personality Theory

Although Jung is among the seminal thinkers in personality, his contributions have rarely been applied in the personality disorders. Once Freud's primary disciple, Jung broke from Freud, insisting that there is more to mental life than sex. Most students are acquainted with his distinction between extroversion and introversion. Extroverts explain events from the viewpoint of the environment. They see the focus of life as being driven by events outside themselves and fix their attention firmly on the external world. In contrast, introverts are essentially subjective, drawing from the environment that which satisfies their own inner dispositions. Because, for most of us, the external world is primarily social, extroversion is also associated with sociability, whereas introversion is associated with turning inward, away from the interpersonal world. Among the contemporary personality disorders, the histrionic is notoriously gregarious, an important facet of the larger extroversion construct. In contrast, the schizoid personality is almost completely asocial. The avoidant personality, who desires social relationships yet recoils from engaging others for fear of humiliation, can be seen as conflicted on these dimensions.

Interacting with his famous extroversion-introversion polarity, Jung proposed that thinking-feeling and sensing-intuiting form four additional psychological modes of adaptation or functioning (Jung, 1921). Thinking refers to logical and directed thought, a tendency to approach situations in a cool, detached, and rational fashion; feeling refers to a tendency to value your own subjective, emotional appraisals over any rational process.

Because feelings very often have multiple contradictory aspects that are deeply felt and have to be figured out, this mode need not refer to impulsive emotionality. Sensation refers to stimuli experienced immediately by the senses. As an orientation, it refers to a tendency to be oriented to the events of the present moment, without reinterpretation or inference. Intuition is the analogue of sensation in the internal world. Like sensation, its products are given immediately to consciousness, without awareness of any intermediate process. As an orientation, it refers to a tendency to go with your hunches, global appraisals that come from within but whose source or justification is not immediately clear. Although these additional dimensions do not translate directly into contemporary Axis II constructs, certain personality disorders nevertheless seem stuck in one of Jung's four modes. Compulsive personalities, for example, are famous for a "paralysis of analysis," a heroic effort to get all of life into a rational mode, though mainly because they fear making a mistake and being condemned for it. Histrionic and antisocial personalities are famously sensation seeking, so much so that they fail to anticipate the consequences of their actions in favour of momentary pleasures. Because Jung is now mainly a historical figure, the study of the thinking-feeling and sensing-intuiting polarities in connection with pathological personality has not yet come to fruition.

Pathognomy



Pathognomy is the study of passions and emotions. It refers to the expression of emotions indicated by the voice, gestures and facial expression. While physiognomy is used to predict the overall, long-term character of an individual, pathognomy is used to ascertain clues about one's current character. Physiognomy is based on shapes of the features, and pathognomy on the motions of the features. Physiognomy (Gk. *physis*, nature and *gnomon*, judge, interpreter) is a theory based upon the idea that the assessment of the person's outer appearance, primarily the face, may give insights into one's character or personality. The term *physiognomy* can also refer to the general appearance of a person, object or terrain, without reference to its implied or scientific characteristics. Physiognomy is *not* a strict science, but rather a method of analysis that proponents say indicates a variety of correlations in its subjects. Hence, physiognomy is not used as the basis of biological or psychological theory. Physiognomic

applications can be considered folk science or pseudoscience, and were once used with other tools of scientific racism, in order to promote discriminatory ideas.

The term was common in Middle English, often written as *fisnamy* or *visnomy* (as in the *Tale of Beryn*, a 15th Century sequel to the *Canterbury Tales*: "*I knowe wele by thy fisnamy, thy kynd it were to stele*"). Physiognomy's validity was once widely accepted, and it was taught in universities until the time of Henry VIII of England, who outlawed it (along with "Palmestrye") in 1531. Around this time, scholastic leaders settled on the more erudite Greek form 'physiognomy' and began to discourage the whole concept of 'fisnamy'.

The following types of physiognomy may be distinguished:

- absolute predictive physiognomy, a disproven concept which poses that there are invariable 100% correlations between physical features (especially facial features) and character traits.
- scientific correlation physiognomy, in which there are believed to be rough statistical correlations between physical features (especially facial features) and character traits due to a person's physical preferences that are caused by corresponding character traits, such that gene mixing causes the correlations; this type of physiognomy is therefore allegedly based on genetic determinism of character. Although this form of physiognomy has generally been disproven as well, the concept has been revived as personology, which is premised on the (widely deemed pseudoscientific) idea that different physical makeups correlate with different behaviors. For example, an illegal drug user often has a gaunt/desperate appearance, people who appear frail are unlikely to be demanding, and more generally, a life of smiling (or frowning) may leave a physical mark (especially on older people).

Phrenology

Phrenology is a defunct field of study, once considered a science, by which the personality traits of a person were determined by "reading" bumps and fissures in the skull. Developed by German physician Franz Joseph Gall around 1800, the discipline was very popular in the 19th century. In 1843, François Magendie referred to phrenology as "*a pseudo-science of the present day.*" Phrenological thinking was, however, influential in 19th-century psychiatry and modern neuroscience.

Phrenology is based on the concept that the brain is the organ of the mind, and that certain brain areas have localized, specific functions (see in particular, Brodmann's areas) or modules (see modularity of mind). Phrenologists believed that the mind has a set of different mental faculties, with each particular faculty represented in a different area of the brain. These areas were said to be proportional to a person's propensities, and the importance of the given mental faculty. It was believed that the cranial bone conformed in order to accommodate the different sizes of these particular areas of the brain in

different individuals, so that a person's capacity for a given personality trait could be determined simply by measuring the area of the skull that overlies the corresponding area of the brain. Phrenology is currently dismissed as quackery by the scientific community.

Phrenology, which focuses on personality and character, should be distinguished from craniometry, which is the study of skull size, weight and shape, and physiognomy, the study of facial features. However, these disciplines have claimed the ability to predict personality traits or intelligence (in fields such as anthropology/ethnology), and were sometimes posed to scientifically justify racism.

Phrenology as a pseudoscience

Phrenology has long been dismissed as a pseudoscience, in the wake of neurological advances. During the discipline's heyday, phrenologists including Gall committed many errors in the name of science. In the book, *The Beginner's Guide to Scientific Method* by Stephen S. Carey, it is explained that pseudoscience can be defined as "fallacious applications of the scientific method" by today's standards. Phrenologists inferred dubious inferences between bumps in people's skulls and their personalities, claiming that the bumps were the determinant of personality. Some of the more valid assumptions of phrenology (e.g., that mental processes can be localized in the brain) remain in modern neuroimagine techniques and modularity of mind theory. Through advancements in modern medicine and neuroscience, the scientific community has generally concluded that feeling conformations of the outer skull is not an accurate predictor of behavior.

Sociological Theories

Sociologists argue that criminal behaviour is learnt and is conditioned by social environment, unlike the biological, physiological, psychiatric and psychological theoretical explanations of causation. Sociologists have used different approaches in studying the causation of crime.

The sociological theories are rooted in functionalism and find their origins with Emile Durkheim. It is pertinent to note that the functionalist theories see society as an integrated whole, where ultimately all parts or subsystems operate in an integrated ('organic') and coordinated way. A healthy society is one where balance is achieved- which is the natural tendency of social functioning. Individuals are perceived to undergo a process of 'socialization', where they are taught appropriate role behaviours and values that contribute to the overall functioning of the system as a whole.

Durkheim opined that a certain level of crime is not only inevitable but also functional to the society. He argued that because crime produces a social reaction (that is rituals of sanction and punishment, whether repressive or restitutive)- it serves to re-bind the various parts of the society and members into a strengthened whole. Further on a social order predicted on stabilizing mechanisms and conformity, sources of innovation and change are rare, so deviance is also valuable in challenging established moral values.

According to him, both, the absence of crime and a surplus of crime are socially pathological. A society, in which there is no crime, would be a rigidly over-policed oppressive society. But a society, which experiences too high a crime rate, is a society in which the balance between the regulation and individuality has broken down. As Durkheim saw it, if progress is to be made, individual originality must be able to express itself. For the originality of the idealist to find expression, it is necessary that the originality of the criminal also be expressible. It would never have been possible to establish the freedom of thought we now enjoy if the regulations prohibiting it had not been violated by people who were at one time classified as criminals

Concept of Differential Association

A renowned French scholar, Gabriel Tarde, was among the first to contend that patterns of delinquency and crime are learned in much the same as any other occupation. Learning, according to Tarde, occurs by imitation and in association with others. Imitation, as Tarde conceived it, involves

more than simply emulating the behaviour of another. The process is similar to that of “identification”, as the term used in modern psychology. The individual is assumed to have selected as role model and fashioned his behaviour after that model. To Tarde, crime is not a characteristic that the individual inherits or a disease he contracts; it is an occupation that he learns from others. The only difference between crime and any lawful occupation is in the content of what is learned.

A more systematic explanation of the way criminal behaviour patterns are acquired was developed by Edwin Sutherland and later elaborated upon by Donald Cressey, his student and collaborator. The central thesis of the theory, known as differential association, is the criminal behaviour is learned through interaction with others in intimate personal groups. The learning includes techniques of committing criminal acts, plus the motives, drives, rationalizations, and attitudes favourable to the commission of crime. The basic principles of differential association are as under:

- i. Criminal Behaviour is learned- Negatively, this means that criminal behaviour is not inherited, as such; also, the person who is not already trained in crime does not invent criminal behaviour, just as person does not make mechanical inventions unless he has training in mechanics.
- ii. Criminal behaviour is learned in interaction with other persons in a process of communication- This communication is verbal in many respects but includes also “the communication of gestures”.
- iii. The principal part of learning of the criminal behaviour occurs within intimate personal groups. Negatively, this means that the impersonal agencies of communication, such as movies and newspapers, play a relatively unimportant part in the genesis of criminal behaviour.
- iv. When criminal behaviour is learned, the learning includes :
 - a) Techniques of committing the crime;
 - b) The specific directions of motives, drives, rationalizations, and attitudes.
- v. The specific direction of motives and drives is learned from definition of legal codes as favourable or unfavourable. In some societies, some individuals are surrounded by persons whose definitions are favourable to the violation of the legal codes.
- vi. A person becomes a delinquent because of an excess of definition favourable to violation of law over definitions unfavourable to violation of the law. This is the principal of differential association. It refers to both criminal and anti-criminal associations and has to do with counteracting forces. When persons become criminal, they do so because of contacts with criminal patterns and also because of isolation from anti-criminal patters.
- vii. Differential associations may vary in frequency, duration, priority and intensity. This means that associations with criminal behaviour and also associations with anti-criminal behaviour vary in those respects. “Frequency” and “duration” as modalities of association are obvious and need no explanation. “Priority” is assumed to be important in the sense that lawful developed in early childhood, may persist throughout life, and also the delinquent behaviour developed in early childhood, may persist throughout life. “Intensity” is not precisely defined but it has to do with such things as the prestige of the source of a criminal or an anti-criminal pattern and with emotional reactions related to associations. In a precise description of a criminal behaviour of a person these modalities would be stated in a quantitative form and a mathematical ratio be reached.
- viii. The process of learning criminal behaviour by association with criminal and anti-criminal patterns involves all of the mechanisms that are involved in any other learning. Negatively, this means that learning of the criminal behaviour is not restricted to the process of imitation. A person who is seduces, for instance, learns

criminal behaviour by association, but this process would not ordinarily be described as imitation.

- ix. 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 exception of the same needs and values. Thieves generally steal in order to secure money, but likewise honest labourers work in order to secure money. The attempts by many scholars to explain criminal behaviour by general drives and values, such as the happiness principle, striving for social status, the money motive, or frustration, have been and must continue to be futile since they explain lawful behaviour as completely as they explain criminal behaviour.

Criticism- It may be important to note that this theory was also subjected to criticism. The theory does not explain why some people associate with those who approve of violation of the law while others do not, nor does it explain why some individuals become intensely committed to definitions favorable to law, while others, with similar association do not.

Anomie

Durkheim identified four distinct environmental conditions that he believed to be responsible for various patterns of high suicide rates: egoism, altruism, anomie, and fatalism. At this point, we shall focus only on the best known of these four causes of suicide, anomie.

Anomie refers to an environmental state where society fails to exercise adequate regulation or constraint over the goals and desires of its individual members. It is important to note that Durkheim's conceptualization of anomie is based on a general assumption about the psychological or biological nature of individual human beings. From Durkheim's viewpoint, individual happiness and well-being depends upon the ability of society to impose external limits on the potentially limitless passions and appetites that characterize human nature in general. Under the condition of anomie, however, society is unable to exert its regulatory and disciplining influences. Durkheim's work has been the subject of extensive discussion and criticism. Nonetheless, his study of suicide has endured as a classic example of the macro normative approach to theory and research on deviance.

Merton's theory of social structure and anomie

The other major contribution to the anomie tradition is Robert Merton's theoretical analysis of "Social Structure and Anomie". Durkheim's work provided the intellectual foundation for Merton's attempt to develop a macro-level explanation of rates of norm-violating behaviour in American society. But, in Merton's hands, the anomie tradition advanced well beyond Durkheim's singular concern with suicide to become a truly general sociological approach to deviance. In contrast to Durkheim, Merton bases his theory on sociological assumptions about human nature. Merton replaces Durkheim's conception of insatiable passions and appetites with the assumption that human needs and desires are primarily the product of a social process: i.e., cultural socialization. For instance, people reared in a society where cultural values emphasize material goals will learn to strive for economic success.

Anomie, for Durkheim, referred to the failure of society to regulate or constrain the ends or goals of human desire. Merton, on the other hand, is more concerned with social regulation of the means people use to obtain material goals. First, Merton perceives a "strain toward anomie" in the relative lack of cultural emphasis on institutional norms the established rules of the game that regulates the legitimate means for obtaining success in American society. Second, structural blockages that limit access to legitimate means for many members of American society also contribute to its anomic tendencies. Under such conditions, behaviour tends to be governed solely by considerations of expediency or effectiveness in obtaining the goal rather than by a concern with whether or not the behaviour conforms to institutional norms. Together, the various elements in Merton's theoretical model of American society add up to a social environment that generates strong pressures toward deviant behaviour:

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, deviant behaviour ensues on a large scale.

This chronic discrepancy between cultural promises and structural realities not only undermines social support for institutional norms but also promotes violations of those norms. Blocked in their pursuit of economic success, many members of society are forced to adapt in deviant ways to this frustrating environmental condition.

Just how do people adapt to these environmental pressures? Merton's answer to this question is perhaps his single most important contribution to the anomie tradition. Merton presents an analytical typology, shown in the following table, of individual adaptations to the discrepancy between culture and social structure in American society.

Merton's typology of individual adaptations to environmental pressures

Type of adaptation	Cultural goal	Institutionalized means
I. Conformity	+	+
II. Innovation	+	-
III. Ritualism	-	+
IV. Retreatism	-	-
V. Rebellion	±	±

Note: + signifies acceptance, - signifies rejection, and ± signifies rejection of prevailing goal or means and substitution of new goal or means.
 Source: Adapted from Robert K. Merton, *Social Theory and Social Structure*, rev. ed. (New York: Free Press, 1957), p. 150.

These adaptations describe the kinds of social roles people adopt in response to cultural and structural pressures as is portrayed in the figure. Conformity, for instance, is a non-deviant adaptation where people continue to engage in legitimate occupational or educational roles despite environmental pressures toward deviant behaviour. That is, the conformist accepts and strives for the cultural goal of material success (+) by following institutionalized means (+). Innovation, on the other hand, involves acceptance of the cultural goal (+) but rejection of legitimate, institutionalized means (-). Instead, the innovator moves into criminal or delinquent roles that employ illegitimate means to obtain economic success. Merton proposes that innovation is particularly characteristic of the lower class—the location in the class structure of American society where access to legitimate means is especially limited and the “strain toward anomie” is most severe. Driven by the dominant cultural emphasis on material goals, lower-class persons use illegitimate but expedient means to overcome these structural blockages. Thus, Merton's analysis of innovation, like Durkheim's analysis of anomic suicide, arrives at an environmental explanation of an important set of social facts; i.e., the high rates of lower-class crime and delinquency found in official records.

However, Merton goes on to explain a much broader range of deviant phenomena than just lower-class crime and delinquency. His third adaptation, ritualism, represents quite a different sort of departure from cultural standards than innovation. The ritualist is an over-conformist. Here, the pursuit of the dominant cultural goal of economic success is rejected or abandoned (-) and compulsive conformity to institutional norms (+) becomes an end in itself. Merton argues that this adaptation is most likely to occur within the lower middle class of American society where socialization practices emphasize strict discipline and rigid conformity to rules. This adaptation is exemplified by the role behaviour of the bureaucratic clerk who, denying any aspirations for advancement, becomes preoccupied with the ritual of doing it. Since the ritualist outwardly conforms to institutional norms, there is good reason to question, as does Merton, whether this (adaptation) represents genuinely deviant behaviour?

Merton has no doubts about the deviant nature of his fourth adaptation, retreatism, the rejection of both cultural goals (-) and institutionalized means (-) Therefore, retreatism involves complete escape from the pressures and demands of organized society. Merton applies this adaptation to the deviant role “activities of psychotics, autists, pariahs, outcasts, vagrants, vagabonds, tramps, chronic drunkards, and drug addicts. Despite the obvious importance of ritualism to the study of deviant behaviour, Merton provides few clues as to where, in the class structure of society, this adaptation is most likely to occur. Instead, Merton’s analysis of retreatism has a more individualistic flavor than does his discussion of other types of adaptation. Retreatism is presented as an escape mechanism whereby the individual resolves internal conflict between moral constraints against the use of illegitimate means and repeated failure to attain success through legitimate means. Subsequently, Merton’s conception of retreatism as a private way of dropping out was given a more sociological interpretation by theorists in the subcultural tradition.

The final adaptation in Merton’s typology, rebellion, is indicated by different notation than the other adaptations. The two ± signs show that the rebel not only rejects the goals and means of the established society but actively attempts to substitute new goals and means in their place. This adaptation refers, then, to the role behaviour of political deviants, who attempt to modify greatly the existing structure of society. In later work, Merton uses the term nonconformity to contrast rebellion to other forms of deviant behaviour that are “aberrant.” The nonconforming rebel is not secretive as are other, aberrant deviants and is not merely engaging in behaviour that violates the institutional norms of society. The rebel publicly acknowledges his or her intention to change those norms and the social structure that they support in the interests of building a better, more just society. Merton implies that rebellion is most characteristic of “members of a rising class” who become inspired by political ideologies that “locate the source of large-scale frustrations in the social structure and portray an alternative structure which would not, presumably, give rise to frustration of the deserving”. Merton has continued to play an active part in the cumulative development of this macro-normative tradition through his published responses to various criticisms, modifications, and empirical tests of his theory of social structure and anomie.

Social disorganization/ ecological theory

Social Disorganization theory is one of the most enduring and widely appealing contributions of the early Chicago School in sociology to criminological theory; and it seems as viable and valuable in explaining contemporary crime patterns in U.S. as it did almost a century ago. Yet despite its widespread familiarity and substantial research attention, significant ambiguity persists regarding the specific content contents of the theory, its ideological presumptions, and its theoretical scope.

The link between social disorganization and delinquency was associated with the work of two sociologists, Clifford R. Shaw and Henry D. McKay. Affiliated with the University of Chicago and the Illinois Institute for Social Research, Shaw and McKay were primarily interested in crime and delinquency. They wanted to demonstrate how crime was a normal response to social, structural, and cultural characteristics of a community and to explain how deviant behaviour was produced among lower class, urban males. Shaw and McKay's work was influenced by Robert E. Park and Ernest W. Burgess, in which the Concentric Zone Model was applied in an analysis of urban growth. Indeed, Shaw and McKay's work played a part in merging fact with theory in this area of delinquency research. Their explanations represent the earliest modern sociological and social psychological explanations of delinquency and crime. In fact, the concepts, hypothesis, and research produced from these theories have influenced the analysis of delinquency and crime for most of the 19th century.

In "Juvenile Delinquency and Urban Areas", for example, Shaw and McKay explicitly attempted to link the idea of "area" to human behaviour (especially criminal behaviour).

In this respect, the basic thrust of their study can be outlined thus:

- The area in which people live is significant in relation to such things as density of occupation, the stability or otherwise of communal life and so forth.

- People's behaviour is conditioned by reference to the behaviour of others and, in this respect, people take their guide-lines for behaviour from the way in which the people around them appear to behave.

If, for example, this behaviour is conditioned by non-criminality, this will be the prevailing ethos; if, on the other hand, people suspect that everyone is involved in deviant / criminal behaviour, then they will also involve themselves in this kind of behaviour.

There were four specific assumptions of social disorganization as an explanation of delinquency. First, delinquency is mainly the consequence of a collapse of institutional, community-based controls. The people who live in these situations are not personally disoriented; instead, they are viewed as responding naturally to disorganize environmental conditions. Second, the disorganization of community-based institutions is often a result of rapid industrialization, urbanization, and immigration processes that occur primarily in urban areas. Third, the effectiveness of social institutions and the desirability of residential and business locations correspond closely to natural, ecological principles that are influenced by the concepts of competition and dominance. This assumption associates the term "ecological approach" with the social disorganization explanation of delinquency. The fourth assumption is that socially disorganized areas lead to the development of criminal values and traditions that replace conventional ones and that are self-perpetuating.

Criticism- There has been some noteworthy criticisms about Shaw and McKay's work. First of all, social disorganization as an explanation of delinquency downplays the significance of ethnic and cultural factors. Some ethnicities may encourage criminal activity where the crimes would not be considered criminal or wrong within the cultural environment that such activities are committed. In addition, the duplication of Shaw and McKay's work in different countries has usually supported their argument that delinquent rates are highest in areas with economic decline and instability. However, such research has not reproduced the findings of decreasing rates from the center of the city outward. In fact, in some countries the wealthy are often near the center of the city, while the poorer zones of the city are found near its fringes. Not to mention, Shaw and McKay's work does not address non-delinquency in delinquency areas. The large percentage of non-delinquents in delinquent areas should be addressed if this theory is to be considered a major explanation of delinquency. When compared to unofficial measures of delinquency, the use of official court records lowers the percentage of recognized delinquency in Shaw and McKay's research. It is unrealistic to expect a theory to explain all cases of delinquency. In summary, the social disorganization theory developed by Shaw and McKay has pointed to social causes of delinquency that seem to be located in specific geographical areas. Indeed, the theory contributed to the understanding of delinquency, but the lack of specification of why delinquent rates are concentrated in certain areas of a city reduces the value of the theory.

Subculture/affiliation theory (The Concept of Subculture)

Subcultures emerge from the moral springboard of already existing cultures and are the solutions to problems perceived within the framework of these initial cultures. Culture is seen as the ways people have evolved to tackle the problems which face them in everyday life. It includes language, ways of dress, moral standards, political institutions, art forms, work norms, modes of sexuality - in sum all human behaviour. That is, people find themselves in particular structural positions in the world; their age, class, gender, race, for instance, and in order to solve the problems thus posed, certain cultural solutions are evolved to attempt to tackle them. That is, people in each particular structural position evolve their own subculture. And, of course, the major structural axes are those of age, class, ethnicity and gender. The shape people's levels in the context of the particular space they occupy (e.g. the inner city, or rural) and the particular time and country we are talking about. Thus the structural predicaments which give rise to problems for particular groups are varied and stratified throughout society. Subcultures, of course, overlap; they are not distinct normative ghettos: the subculture of young black working class men will overlap a great deal with their female counterparts. But there will also be distinct differences stemming from the predicaments of gender. And, of course, people in the

same structural position can evolve different subcultures and these will change over time. For subcultures are human creations and can vary as widely as the imagination of the participants involved.

All human beings create their own sub-cultural forms and although we tend to use the term for the young and the deviant, it is important to note how this is just a matter of focus. Policemen and Army Officers, for example, form their own subcultures which are in their way as developed and exotic as those that exist in the underworld.

Albert Cohen wrote of subculture theory, which was created out of merger of anomie theory and the Chicago School. He felt that subcultures formed in groups, gangs, and in inner city neighbourhoods abandoned by middle-class residents who moved to the suburbs. He saw subcultures as inherently non-utilitarian, malicious, and negative. Those who remained in slum neighbourhoods would feel status-frustration, much like in conflict theory. These subcultures are often subcultures of deviance. While subcultures can develop among individuals who are not poor, the members of a gang or an inner-city slum are certainly suffering from poverty or unemployment. A non-integrated community would lack organization, lack social control over juvenile offenders, and lead individuals to associate in groups that provide respect and a sense of belonging. This may also be known as a conflict subculture, having abandoned the norms of society, seeking belonging, seeking money-making opportunities that are unlawful, and otherwise rebelling against the dominant culture as a group.

Social process theory

Social process theorists believe that criminality is a “function of individual socialization, and the interactions people have with organizations, institutions, and processes of society”. Perhaps the most common approach to the social process theory is learning theory. Albert Bandura, an influential psychologist of the twentieth century, was the first to experiment with this idea. His observations began with animals and showed that they do not have to actually experience certain events in their environment to teach effectively. In relation to criminality, one can learn to be aggressive by observing others acting aggressively. An example being: if “A” beats up other children on the playground and steals money from the victims, his little brother “B” is observing this situation. When “A” then uses the money to buy toys, “B” witnesses his big brother getting rewarded for the violent act through purchasing fun things to play with. In reality, it didn’t matter that “A” was wrong; his behaviour resulted in a positive result.

There are two other approaches to social process theory. Social control theory is when one’s behaviour is groomed through the close associations of institutions and individuals. The second is social reaction theory. If an individual is already viewed (labeled) as a criminal from an early age, then it is more likely that this person will see becoming a criminal as fulfilling a prophecy, thus beginning his criminal career.

Conflict theory

Social conflict theorists believe a person, group, or institution has the power and ability to exercise influence and control over others. Conflict theorists are concerned with the role government plays in creating a crimogenic environment; the relationship between personal or group power and the shaping of criminal law; the prevalence of bias in justice system operations, and the relationship between a capitalist, free enterprise economy and crime rates”

They define crime as “a political concept designed to protect the power and position of the upper classes at the expense of the poor. The idea is that each society produces its own type and amount of crime. They have their own way of dealing with crime, and thus, get the amount of crime that they deserve. In other words, to control and reduce crime, societies must change the social conditions that promote crime.

Labelling Theories

The labelling theory was propounded by Tannenbaum in 1938 who believed that tagging, defining, identifying, segregating and describing criminals by labelling them under different heads was helpful in treatment of offenders. Thereafter, Lemert preferred to label offenders as persons with primary deviance (which arises out of biological, psychological and or sociological reasons) and secondary deviance (which is caused by social reaction to primary deviation). The former do not accept the fact that they are deviants whereas the latter accept their deviant status.

‘Labelling’ is the term that the American sociologist Howard Becker, writing in the 1960s used to describe the profound effect on a person of naming them as deviant. Such social ‘proclamations’ transform the doing of a deviant act into a core part of a person’s identity- a symbolic reorganization of self- that, in a theatrical metaphor, ‘prescripts’ their future performances according to their new conferred role as a deviant. Becker explained that the deviants first indulge in primary deviance intentionally or unintentionally and gradually steps into the arena of secondary deviance. A deviant, who is denied the means to carry out daily routines, turns to illegitimate means to make up a living.

Becker’s theory does not deal with the question as to why a person becomes a criminal but tells why the society labels some people as criminals or deviants. Some men who drink heavily are called alcoholics while others are not; some people who behave oddly are committed to hospitals while others are not. Thus, according to this theory, what is important in the study of deviance is the social audience and not the individual person. What is important in crime is not the act of the individual but the reaction of the society in terms of rules and actions. According to Becker, deviance is not a quality of the act a person commits but rather a consequence of the application by others of rules and sanctions to an ‘offender’. The deviant is not to whom that label has successfully been applied; deviant behaviour is behaviour that person so label.

Becker recognizes four types of citizens according to their behaviour in society labelling them differently. The numbers of society that are rule abiding and free of labels are described as conforming citizens, while those who are labelled without breaking a law are termed as falsely accused. Those citizens who exhibit law breaking behaviour are labelled as pure deviants, while those that break law yet avoid labelling are called secret deviants. In the case of criminals, it is the society which brands some people as criminals but not the others. If a lower class boy steals a car, he is branded a ‘thief’ but if an upper class boy does so, he is described as a ‘mischievous pleasure seeker’. Thus, the labelling theory shifted the focus to those who label, i.e., to persons responsible for the process for the process of rule making and rule enforcement.

Though the theory became popular but the same was criticized by many sociologists and criminologists on the ground that it fails to explain the reason of causation of crime. Besides, this is purely a theoretical approach to crime and criminals without any empirical basis. The distinction between the primary and secondary deviance seems to be futile as it is influenced by changing variables.

Social Control Theories

American criminology, largely through the work of Travis Hirschi took up a reading of Durkheim’s ideas and combined this with the assumption of classical criminology (that a tendency to crime is normal in any human being) to argue that criminal behaviour results from a failure of conventional social groups (family, school, social peers) to bind or bond with the individual. In other words, to maintain social order, society must teach the individual not to offend. Control theory argues that we are all born with a natural proclivity to violate the rules of the society; thus, delinquency is a logical consequence of one’s failure to develop internalized prohibitions (controls) against lawbreaking behaviour.

In his early ‘social bond theory’, Hirschi focused on how conformity is achieved- this was a theory not of motivation, but of constraint. In other words, what is it that stops individuals from offending? Hirschi outlined four major elements of social bond:

- i. Attachment- the ties that exist between the individual and primary agents of socialization (parents, teachers, community, leaders, etc). It is a measure of the degree to which law abiding persons serve as a source of positive reinforcement for the individual.
- ii. Commitment- Investment in conformity or conventional behaviour and consideration of future goals which are incompatible with a delinquent lifestyle.
- iii. Involvement- a measure of one's propensity to participate in conventional activities (sports, pastimes, work, etc)
- iv. Belief- acceptance of the moral validity of the societal norms.

Delinquency was thus associated with weak attachment/ bonds to conventional institutions and modes of conduct.

According to the self control theory, officials' action taken to deter crime in adulthood is not likely to have much effect. Self control, they contend, is already fixed, and therefore only preventative policies that take effect early in life and have a positive impact on families have much chance of reducing crime and delinquency.

Biological Theories - Biological Factors

Biological influences, including psycho physiological and biochemical measures are thought to mediate the relationship between genetics and criminal behavior. Psycho physiological measures, including electroencephalogram (EEG) activity, heart rate (HR), event-related potentials (ERP), and skin conductance (SC), have been identified as potential biological markers that may help to distinguish criminals from non criminals. This literature has been thoroughly reviewed by Raine.

Other, more direct measures of biological functioning may provide additional information regarding the role of biological factors in the etiology of criminal behavior. One such factor that has been widely investigated since the last edition of this volume is the role of serotonergic dysregulation in criminal behavior.

Sarnoff Mednick contributed to this theory by arguing that the biological factors are only a part of the explanation of criminal behaviour. Physical and social environment also play an important role in bringing a criminal tint in one's behaviour.

Mednick suggested that all individuals must learn the art of controlling one's natural urges that drives one towards antisocial and criminal behaviour. There is an acknowledgment that the learning process takes place in the family and the peer groups during the interaction and is connected with the punishment for undesirable behaviour. However, the punishment is response is mediated by the automatic nervous system. If the reaction is short lived, the individual is said to have rewarded him/her, and criminal behaviour is inhibited. Mednick ultimately proposed that criminals are those who have slow automatic nervous system responses to stimuli.

Jeffery has argued strongly that this new biological theory is not non-Lombrosian. He proposes that to produce criminal behaviour, there ought to be an interaction between the biological, psychological and sociological characteristics. Central to this argument is the notion that individuals are born with particular biological and psychological characteristics that not only may predispose them to, but actually may cause, certain forms of behaviour.

Jeffery notes that poor people tend to experience poor quality diet and are more likely to be exposed to pollutants. The resulting nutrients and chemicals are transformed by the biochemical system into neuro-chemical compounds within the brain. Poverty, therefore, leads to behavioural differences through the interaction of individuals and environment.

Feminist Theories

Feminism is a set of theories & strategies for social change that take gender as their central focus in attempting to understand social institutions, processes, and relationships. Mainstream feminism holds

the view that women suffer oppression & discrimination in a society run for men by men who have passed laws and created customs to perpetuate their privileged position.

Feminist theories focus on gender differences in power as a source of crime. These theories address two issues:

- why are males more involved in most forms of crime than females, and
- why do females engage in crime.

Most theories of crime were developed with males in mind; feminists argue that the causes of female crime differ somewhat from the causes of male crime.

Feminist-influenced writing started in criminology in earnest in the 1970s and has provided a fertile source of challenges and critiques to the mainstream criminological enterprise. Traditional and radical criminology stood accused not only of neglecting the study of women but falsely implying that the theories produced were theories of crime, rather being what they actually were- theories of males committing crime. As a result, it was not surprising that women 'did not fit' the standard explanation. Even on the rare occasions when they have been considered, a stereotyped distortion was imposed on females in those explanations. Social customs and superstitions, caste and religion permeate every phase of our Indian life, more so for the uneducated masses. Thus in many respects criminal disposition and the activities of certain groups are connected with these- especially that of a rural woman, from which background most of the female prisoners come from.

In an analysis, it was discovered that most of the crimes committed by women are offences against person. It may be pertinent to note that the miscellaneous group included theft, prostitution and brawls, etc.

Gender differences in crime are said to be due largely to differences in social learning and control. Females are socialized to be passive, subservient, and focused on the needs of others. Further, females are more closely supervised than males, partly because fathers and husbands desire to protect their "property" from other males. Related to this, females are more closely tied to the household and to child-rearing tasks, which limits their opportunities to engage in many crimes.

Some females, of course, do engage in crime. Feminist theories argue that the causes of their crime differ somewhat from those of male crime, although female crime is largely explained in terms of strain theory. This high rate of sexual abuse is fostered by the power of males over females, the sexualisation of females-especially young females-and a system that often fails to sanction sexual abuse. Abused females frequently run away, but they have difficulty surviving on the street. They are labelled as delinquents, making it difficult for them to obtain legitimate work. Juvenile justice officials, in fact, often arrest such females and return them to the families where they were abused. Further, these females are frequently abused and exploited by men on the street. As a consequence, they often turn to crimes like prostitution and theft to survive. Theorists have pointed to still other types of strain to explain female crime, like the financial and other difficulties experienced by women trying to raise families without financial support from fathers. The rapid increase in female-headed families in recent decades, in fact, has been used to explain the increase in rates of female property crime. It is also argued that some female crime stems from frustration over the constricted roles available to females in our society.

Economic Theory

The relationship between economic conditions and crime is founded broadly on two main conflicting views, namely:

- i. The relationship between economy and crime is inverse; that is when economic conditions are favourable, the incidence of crime is comparatively low but in times of economic depression criminality records an upward trend. This assumption finds support in all Marxist doctrines and leftist policies. Willian A. Bonger, the noted Dutch social scientist strongly supported this contention and propounded the Bonger theory to crime. He concluded in his theory that capitalism was one of the potential causes of

criminality because the system created an atmosphere for promoting selfish tendencies in men. While establishing a co-relationship between economic condition and crime, W.A. Bonger drew the following conclusions:

- a) He prepared a statistical data and demonstrated that almost 79% of criminals belong to non-profitable class. Thus he tried to establish a co-relationship between poverty and delinquency and concluded that crimes relating to property such as theft, stealing, robbery, dacoity, house-breaking, etc record an abnormal increases during the period of depression when the prices are high.
 - b) Bonger further observed that the influence of the economic conditions on delinquency is essentially due to the capitalistic economy which breeds disparity and leads to unequal distribution of wealth, the capitalist resort to hoarding and monopolistic trends thus creating artificial scarcity and consequent rise in prices. This in turn stops production which ultimately leads to unemployment of labour as a result of which offences such as alcoholism, vagrancy, beggary, assault, violence, etc record an upward trend.
 - c) In an economic system based on capitalism, economic cycles of inflation and deflation are frequent. Inflation gives rise to bankruptcy and insolvency with the result the persons affected thereby are forced to lead an anti-social life and some of them may even resort to criminality.
 - d) Another peculiar feature of capitalistic economy is the competitive tendency among entrepreneurs. Efficiency, low-production cost and better quality of products are some of the admirable result of competitive economy and vice-versa
 - e) There is yet another danger of the capitalistic economy which contributes to enormous increase in crimes. The employment of children and women furnishes soothing ground for criminality despite effective legislative restriction.
- ii. The relationship between economic structure and crime is direct or positive; that is to say criminality being an extension of normal economic activity, increases or decreases with the rise or fall in the economy. Thus, according to this proposition, the crime rate shows an increase in periods of prosperity and decrease during periods of economic depression. This view has been most explicitly developed by Phillips Polett as a supplement to the original research of Enrico Ferri and his famous work, 'Law of Criminal Saturation' Thorsten Sellin however concluded that unemployment which is necessarily an off shoot of depression did not have an adverse effect on crime rate perhaps because of governmental relief measures.

Marxists have propagated a view that crimes emerge solely out of capitalist denomination of society. Under such society the upper class can exploit the weak, put them in physical danger, and transgress their human rights either with impunity or with only lighter punishment. Marxists, however differ in their view regarding the effect of economic conditions on criminality. In their opinion, the two vary in inverse proportion.

It may be interesting to note that the new type of crime may be called crime as business, organised crime, corruption and "white-collar crime". The nature and distribution of these crimes vary according to the economic and social development of the countries concerned but the available evidence suggest that they may pose especially serious problems for the developing countries.

The term "White-collar crime" was coined by Edwin H. Sutherland in 1939. The notion of "white collar crime" was thus introduced for the first time in the field of criminology. He defined white collar crime as a "crime committed by persons of respectability and high social status in the course of their occupation". It is surprising that these crimes have not drawn much public attention the last few years.

One hypothesis which may account for this lack of concern is that, those involved in such crimes as business, have a close relationship with those persons who control, or at least influence, the social and legal definition of the crime problems. They are thus able to influence, either directly or indirectly, public perception of their own illegal behaviour. However, it may also be true that the traditional forms of violent and property crime, assault, robbery, burglary, and the like, have an emotional or symbolic significance which would outweigh the economic and social consequences of crime in the public mind even under conditions of more complete knowledge. These types of crimes are primarily committed for economic gain and involve some form of commerce, industry or trade. Acts like kidnapping for ransom and the skyjacking of aircraft for ransom, may be excluded from the category of crime as business. Now the crimes are committed in an organized manner, in the sense that, a set or system of more or less former relationship exists between the parties committing these crimes, such as syndicated crime and price fixing among juridical entities. Individual illegal act, by the agents of business organizations, such acts include defrauding on income tax or the solitary embezzlement of a bank teller or union treasures.

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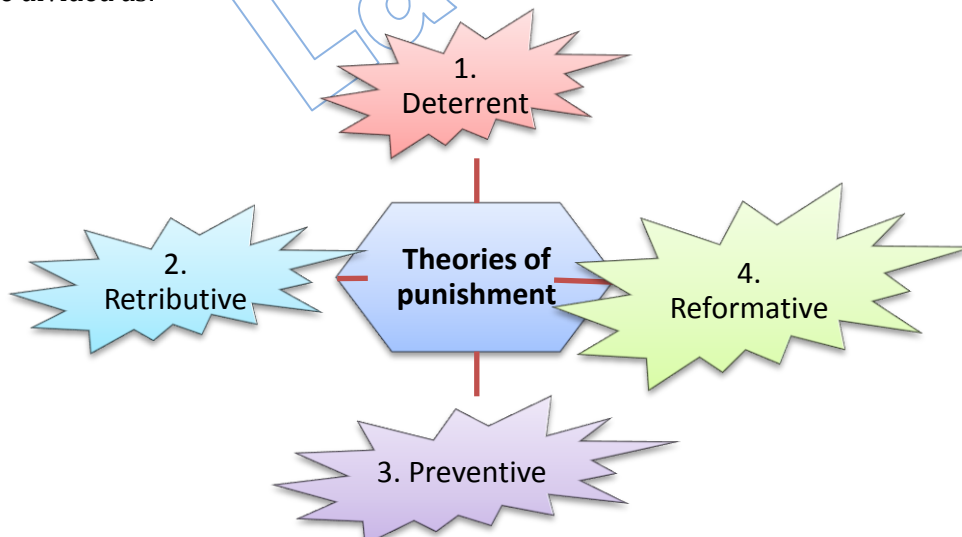
UNIT- II Nature of Punishment

1. Theories of punishments- deterrent, preventive, retributive, reformatory and expiatory theory
2. Kinds of punishment and judicial sentencing
3. Capital punishment
4. The police system
5. Criminal laws Courts protection to the accused
6. Strict construction of penal statutes
7. Penal law not to be retrospective in operation

Theories of Punishment

With change in the social structure the society has witnessed various punishment theories and the radical changes that they have undergone from the traditional to the modern level and the crucial problems relating to them. Kenny wrote: "it cannot be said that the theories of criminal punishment current amongst our judges and legislators have assumed...." either a coherent or even a stable form. B.Malinowski believes all the legally effective institutions....are....means of cutting short an illegal or intolerable state of affairs, of restoring the equilibrium in the social life and of giving the vent to he feelings of oppression and injustice felt by the individuals.

The general view that the researcher finds is that the researcher gathers is that the theories of punishment being so vague are difficult to discuss as such. In the words of Sir John Salmond, "The ends of criminal justice are four in numbers and in respect to the purposes served by them", punishment can be divided as:



a) Deterrent theory-

The term “Deter” means to abstain from doing an act. The main purpose of this theory is to deter (prevent) the criminals from doing the crime or repeating the same crime in future. Under this theory, severe punishments are inflicted upon the offender so that he abstains from committing a crime in future and it would also be a lesson to the other members of the society, as to what can be the consequences of committing a crime. This theory has proved effective, even though it has certain defects.

b) Retributive theory-

This theory of punishment is based on the principle- “An eye for an eye, a tooth for a tooth”. Retribute means to give in turn. The object of this theory is to make the criminal realize the suffering of the pain by subjecting him to the same kind of pain as he had inflicted on the victim. This theory aims at taking a revenge rather than social welfare and transformation.

This theory has not been supported by the Criminologists, Penologists and Sociologists as they feel that this theory is brutal and barbaric.

c) Preventive theory -

This theory too aims to prevent the crime rather than avenging it. As per this theory, the idea is to keep the offender away from the society. This criminal under this theory is punished with death, life imprisonment etc. This theory has been criticized by some jurists.

d) Reformatory theory -

This theory is the most humane of all the theories which aims to reform the legal offenders by individual treatment. The idea behind this theory is that no one is a born Criminal and criminals are also humans. Under this theory, it is believed that if the criminals are trained and educated, they can be transformed into law abiding citizens. This theory has been proved to be successful and accepted by many jurists.

e) Expiatory theory -

Under this theory, it is believed that if the offender expiates or repents and realizes his mistake, he must be forgiven.

Various kinds of punishments are prescribed for various types of Crimes. Various Punishment theories are proposed with the various intentions. The variations in the modality of punishment occur because of the variation of societal reaction to law breaking.



**Punishments as
per IPC**

Capital punishment

The punishment of death may be imposed on the following offences:—

- (a) Waging or attempting to wage war or abetting the waging of war against the Government of India -Section 121 I.P.C.;
- (b) Abetment of mutiny actually committed – Sec. 132 of I.P.C.;
- (c) Giving or fabricating false evidence upon which an innocent person suffers death – Sec. 194
- (d) Murder – Section 302; We
- (e) Punishment for murder by a life-convict – Sec. 303, This Section was struck down by the Supreme Court holding that it was unconstitutional, while disposing the case Mithu v. State of Punjab, AIR 1983 SC 4731;
- (g) Attempt to murder by a person under sentence of imprisonment for life, if hurt is caused – Sec. 307 I.P.C.;
- (h) Dacoity with murder – Sec. 396 I.P.C.

The Courts have a high range of discretionary powers in passing death sentences. The death punishment is also called “Capital Punishment”. The word “capital” means “the head or top of the column”. Thus the capital punishment means “removal of head”, “death penalty” or “beheading”.

It is the maximum punishment possible to be imposed on a criminal. This punishment occupies topmost position among the grades of punishments. This punishment can be imposed in extreme cases and rarely that too in extremely grave crimes.

The capital punishment can be imposed on a criminal who commits a pre-planned and premeditated murder in cold blood. The offences with sections in which the death penalty can be imposed are explained above.

Most of the developed countries have removed death sentences from their respective penal code due to agitations caused by the suggestions of sociologists, reformists, criminologists, etc.

In India too, there is a serious discussion on this topic. Sections from 366 to 371 of the Criminal Procedure Code, 1973 explain the “Submission of Death Sentences for Confirmation”. Sections from 413 to 416 of Code, 1973 explain the provisions for “execution, suspension, postponement of capital sentences”

(f) Abetment of suicide of a child, an insane or intoxicated person – Sec. 305 of IPC;

Imprisonment for Life:

Before 1955, the words “transportation for life” was used. The Code of Criminal Procedure Amendment Act, 1955 (Act No. 26 of 1955) substituted the words “Imprisonment for life” in place of “transportation for life”.

The general public thinks that imprisonment for life means only 14 years imprisonment, and the convict shall be released as soon as the 14 years period is lapsed. It is wrong presumption.

Actually, the punishment under the Imprisonment for Life means imprisonment for the whole of the remaining period of the convicted person’s natural life. During the British Rule, the convicts under “transportation for life” was used to be deported to the Andamans and other Colonies and were taken for ever from the society of all who were acquainted with him.

After independence, such system was stopped. Now the convicts under imprisonment for life are imprisoned in the Prisons of the States concerned. The life convict is not entitled to automatic release on completion of fourteen years’ imprisonment, unless on special occasions, the Government may pass an order considering the good behaviour and conduct of the convict remitting the balance of imprisonment for life.

Imprisonment:

The next kind of punishment is “Imprisonment”. It is of two descriptions, viz.—

- (i) Rigorous, i.e., with hard labour; and
- (ii) Simple.

(i) Rigorous Imprisonment i.e. with Hard Labour:

There are certain offences defined in the Indian Penal Code, for which rigorous imprisonment may be imposed by the Courts. Examples: House- trespass under Section 449 of IPC; fabricating false evidence with intent to procure conviction of an offence which is capital by the Code (Sec. 194); etc.

For such offences, rigorous imprisonment may be imposed. In rigorous imprisonment, the convicted person is put to do hard labour such as digging earth, cutting stones, agriculture, grinding corn, drawing water, carpentry, etc. The Supreme Court suggested that the offenders imposed hard labour should be paid minimum wages.

The trial Court, while disposing Bombay Blast Case (2007), sentenced Sanjay Dutt, a Bollywood Hero, for rigorous imprisonment for a period of six years. Until the Supreme Court gave the Bail, Sanjay Dutt did carpentry work for 30 days and earned Rs. 39/- during that period.

While disposing the case Sunil Batra v. Delhi Administration (AIR 1980 SC 1675), the Supreme Court observed: “Hard labour in Sec. 53 has to receive a humane meaning.

A girl student or a male weakling sentenced to rigorous imprisonment may not be forced to break stones for nine hours a day. The prisoner cannot demand soft jobs but may reasonably be assigned congenial jobs. Sense and sympathy are not enemies of penal asylums.”

(ii) Simple imprisonment:

1. This punishment is imposed for the lighter offences. **Examples:** public servant unlawfully engaging in trade or unlawfully buying or bidding for property (Sections 168-169); absconding to avoid service of summons or other proceedings, or not attending in obedience to an order from a public servant (Sections 172-174); to obstruct traffic or cause public nuisance; eve-teasing, drunken brawls, etc.; refusing oath when duly required to take oath by a public servant (Section 178); wrongful restraint (Sec. 341); defamation (Sec. 500) etc.

Solitary Confinement:

Section 73 of the Code empowers the Courts to impose solitary confinement to certain persons and in relation to certain offences. This punishment is also part of the imprisonment.

A harsh and hardened convict may be confined in a separate cell to correct his conduct. He is put separately without intercourse with other prisoners. All connections are severed with other world.

The object of this punishment is to reform the hardened and habitual offender and in order to experience him with loneliness. There are certain restrictions in imposing solitary confinement. They are:—

- (a) Solitary confinement should not exceed three months of the whole term of imprisonment.
- (b) . It cannot be awarded where imprisonment is not part of the substantive sentence.
- (c) It cannot be awarded where imprisonment is in lieu of fine.
- (d) It cannot also be awarded for the whole term of imprisonment. Further according to Section 73, the following scale shall be adhered,—
 - (i) Time not exceeding one month if the term of imprisonment shall not exceed six months;
 - (ii) A time not exceeding two months if the term of imprisonment shall exceed six months and shall not exceed one year;
 - (iii) A time not exceeding three months if the term of imprisonment shall exceed one year.

In several European countries, including Great Britain, this punishment was repealed.

Section 74 limits the solitary confinement. If it is imposed for a long time, it adversely affects on human beings and creates mental derangement.

This Section says that solitary confinement shall in no case exceed fourteen days at a time with intervals between the periods of solitary confinement of not less duration than such periods, and when the imprisonment awarded shall exceed three months, such confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

Forfeiture of Property:

“Forfeiture” is the divestiture of specific property without compensation in consequence of some default or act of forbidden by law. The Courts may order for forfeiture of property of the accused in certain occasions.

In white collar crimes, and where a Government employee or any private person accumulates black money and black assets, and there is no genuine answer and proof for such money and properties with such person, the Court may award for forfeiture of property.

In cases of smugglers, goondas, anti-national personalities, etc., the Government or the Courts are empowered to forfeiture of property of such anti-social elements.

Fine:

The Courts may impose fine along with or without imprisonment. The Indian Penal Code mentions the punishment of fine for several offences, generally with or without imprisonment.

Amount of fine:

According to Section 63, where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

Sentence of imprisonment for non-payment of fine:

According to Section 64, in every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.

Limit to imprisonment if fine imposed is not paid:

Section 65 lays down that the term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.

Description of imprisonment for non-payment of fine:

Section 66 lies down that the imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence.

Imprisonment for non-payment of fine when offence punishable with fine only:

According to Section 67, if the offence be punishable with fine only, the imprisonment which the Court imposes in default of payment of the fine shall be simple, and the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale,—

When the fine shall not exceed fifty rupees – the term of imprisonment shall not exceed two months;

Termination of imprisonment on payment of fine:

According to Section 68, whenever the fine is paid the imprisonment shall be terminated forthwith.

According to Section 69, if, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.

Illustration:

A is sentenced to a fine of one hundred rupees and to four months' imprisonment in default of payment. Here, if seventy-five rupees of the fine be paid or levied before the expiration of one month of the imprisonment, A will be discharged as soon as the first month has expired.

If seventy five rupees be paid or levied at the time of the expiration of the first month, or at any later time while A continues in imprisonment, A will be immediately discharged.

If fifty rupees of the fine be paid or levied before the expiration of two months of the imprisonment, A will be discharged as soon as the two months are completed. If fifty rupees be paid or levied at the time of the expiration of those two months, or at any later time, while A continues in imprisonment, A will be immediately discharged.

Fine vs. Imprisonment:

It is the general presumption that if the offender passes the imprisonment in default of fine imposed upon him, such imprisonment shall liberate the fine. It is wrong presumption. Section 70 says that fine and imprisonment for default of fine are two different things.

Imprisonment for default of fine shall not liberate the offender from his liability to pay the full amount of fine imposed upon him. Imprisonment in default of fine is not a satisfaction for the fine, but it is a punishment for non-payment or contempt or resistance to the due execution of the sentence.

Such fine shall be recoverable from the offender within six years from the date of sentence passed by the trial Court or during imprisonment. Fine may be recovered from the property of the offender. Death of the offender shall not discharge property from liability.

Forfeiture of Property:

Section 53 of the Indian Penal Code provides forfeiture of property as a form of punishment. There are two offences specified under Sections 126 and 169 of IPC which provide for confiscation of property besides the punishment of imprisonment with or without fine. These sections are as follows:—

Section 126 provides that a person committing depredation on territories of Power at peace with the Government of India shall be punished with imprisonment of either description for a term which may extend to seven years and also liable to fine and the property so used or intended to be used in committing such depredation or acquired by such depredation, shall be liable to forfeiture.

According to the provision contained in Section 169, IPC, a public servant who being a public servant is legally bound not to purchase or bid for certain property, if he does so either in his own name or in the name of another, or jointly, shall be punished with imprisonment which may extend to two years or with fine, or with both, and the property, if purchased, shall be confiscated.



Capital Punishment

Of all forms of punishments, capital punishment is perhaps the most controversial and debated subject among the modern penologists. There are arguments for and against the utility of this mode of sentence. The controversy is gradually being resolved with a series of judicial pronouncements containing elaborate discussion on this complex penological issue. However, looking to the variety of considerations involved in the problem, a detailed discussion on the subject is deferred to succeeding chapter of the Book.

The offences which are punishable with death sentence under the Indian Penal Code include:

- (i) Waging war against the State (Sec. 121);
- (ii) Abetment of mutiny (Sec. 132);
- (iii) Giving or fabricating false evidence leading to procure one's conviction for capital offence (Section 194);
- (iv) Murder (Section 302);
- (v) Abetment of suicide committed by a child or insane (Sec. 305);
- (vi) Attempt to murder by life-convict, if hurt is caused (Sec. 307);
- (vii) Kidnapping for ransom, etc. (Sec. 364A), and
- (viii) Dacoity with murder (Sec. 396).

It is significant to note that though the aforesaid offences are punishable with death but there being alternative punishment of life imprisonment for each of them, it is not mandatory for the Court to award exclusively the sentence of death for any of these offences. In fact, where the Court is of the opinion that the award of death sentence is the only appropriate punishment to serve the ends of justice in a particular case it is required to record "special reasons" justifying the sentence stating why the award of alternative punishment i.e. imprisonment for life would be inadequate in that case.

The recent penological trend is to give primacy to reformatory methods of punishment which were hitherto used merely as supplementary measures. Hungary is perhaps the first country to initiate the reformatory educational method for its prisoners, besides fines, which Prof. Jescheck considered to be central sanction of an up-to-date penal policy, the collateral sanctions such as prohibition from pursuing a profession, disqualification of driving, local punishment and confiscation of property are also being extensively used as sophisticated modes of punishment.

According to Dr. Joseph Folvari, these sanctions (measures) would refrain the perpetrator from committing a further crime and at the same time would put an end to the possibility of a further criminal act being committed. Needless to say that these measures would be equally effective if adopted in the Indian penal system.

Life imprisonment as an alternative punishment to Death sentence:

The vexed question of award of death sentence to a cold blooded murderer or life sentence once again came up before the Supreme Court in *Swamy Shraddananda alias Murli Manohar Mishra v. State of Karnataka*. The Court in this case, made it explicitly clear that a convict punished with life imprisonment means imprisonment till his last breath.

But once the judgment is pronounced the matter passes into the hands of the executive and is governed by different provisions of law and there is no guarantee that the sentence awarded to the convict by the Court after considerable deliberation would be carried out in actuality.

The remissions granted by the executive to a life convict virtually reduces the sentence to not more than 14 years. It is a matter of serious judicial concern that the sentence of life imprisonment awarded to the convict as a substitute for death should be treated alike with the ordinary life imprisonment given as the sentence of first choice.

The Apex Court in this judgment referred to the Report entitled “Lethal Lottery, the Death Penalty in India”, compiled jointly by Amnesty International India and Peoples Union for Civil Liberties, Tamil Nadu and Pondicherry based on the Supreme Court judgments, on death penalty from 1950 to 2006. The Report highlights the lack of uniformity and consistency in the award of death sentence and/or its substitution by imprisonment for life. Some of the illustrative judgments of the Supreme Court are as follows:

In *Subhash Chander v. Kishanlal and others*, four accused persons including Kishanlal were convicted for multiple murders and sentenced to death by the trial Court and the High Court confirmed the sentence. In appeal, the Counsel for Kishanlal, on instructions from the convict, submitted that Kishanlal, if sentenced to life imprisonment instead of death, would never claim premature release or commutation of his sentence on any ground i.e., under Section 401 of Cr. P.C., Prison Act, Jail Manual or other Statutes or rules meant for the grant of remission. The Supreme Court agreed to the plea of the Counsel and sentenced Kishanlal for imprisonment for rest of his life.

In *Mohd. Munna v. Union of India*, the Apex Court held that in the absence of an order of remission formally passed by the appropriate government, there is no provision in I.P.C. or Cr. PC. under which a sentence of life imprisonment could be treated as for a term of 14 years or 20 years and that a life convict could not claim remission as a matter of right.

The Court expressed its anguish for States of Bihar and Karnataka life convicts being granted remission and released from prison on completion of 14 years without any sound legal basis and remission is being allowed to them in a routine manner without any sociological or psychological, appraisal.

Having reviewed the law on award of life imprisonment as a substitute for death, the Court in *Swamy Shraddananda* case, convicted him for life and directed that he shall not be released from prison till the rest of his life.

It may, however be stated that most European countries have prescribed a minimum period of incarceration after which a lifer may apply for release on parole provided he had exhibited good behaviour during the period he spent in prison. Thus, in Germany, the minimum time to be spent by a

person sentenced to imprisonment for life is 15 years whereas it is ten years under the criminal law of Finland. Similar law may be adopted in India so as to provide a humanitarian touch to the sentencing of convicts with imprisonment for life.

The constitutionality issue

The 5th (and the 14th) amendment state that “no person shall be deprived of life, liberty, or property without due process of law”, while the 8th amendment prohibits ‘cruel and unusual punishment.’ Since 5th and 8th amendments were passed at the same time it seems that:

- The Constitution allows the death penalty.
- The Constitution, at least as understood by its proponents, does not consider the death penalty cruel and unusual punishment.

The Constitution *only allows* capital punishment and does not require it.

The issue of interpreting the Constitution:

1. Originalism
 - Textualist approach
 - Purposivist approach
2. Non-originalism: the idea of evolving standards.

The common reading of the “cruel and unusual punishment” clause renders a punishment cruel and unusual if it is *severe* and at least one of

- Degrading
- Inflicted arbitrarily
- Clearly rejected by society
- Patently unnecessary.

The issue of death penalty has been debated, discussed, studied from a prolonged time but till now no conclusion can be drawn about the retention or abolishment of the provision. Death penalty has been a mode of punishment from time immemorial which is practiced for the elimination of criminals and is used as the punishment for the heinous crimes.

India is one of the 78 retentionist countries which have retained death penalty on the ground that it will be awarded only in the ‘rarest of rare cases’ and for ‘special reasons’. Though what constitutes a ‘rarest of rare case’ or ‘special reasons’ has not been answered either by the legislature or by the Supreme Court.

The constitutional validity of the death penalty was challenged from time to time in numerous cases starting from *Jagmohan Singh v. State of U.P* where the SC rejected the argument that the death penalty is the violation of the “right to life” which is guaranteed under article 19 of the Indian constitution. In another case *Rajendra Prasad v. State of UP*, Justice Krishna Iyer has empathetically stressed that death penalty is violative of articles 14, 19 and 21. But a year later in the landmark case of *Bachan Singh v. State of Punjab*, by a majority of 4 to 1 (Bhagwati J.dissenting) the Supreme Court overruled its earlier decision in *Rajendra Prasad*. It expressed the view that death penalty, as an alternative punishment for murder is not unreasonable and hence not violative of articles 14, 19 and 21 of the Constitution of India, because the “public order” contemplated by clauses (2) to (4) of Article 19 is different from “law and order” and also enunciated the principle of awarding death penalty only in the ‘rarest of rare cases’. The Supreme Court in *Machhi Singh v State of Punjab* laid down the broad outlines of the circumstances when death sentence should be imposed.

Similarly in various other cases the Supreme Court has given its views on death penalty and on its constitutional validity. But the punishment of death penalty is still used in India, some time back the death penalty was given to Mohammad Ajmal Kasab. The Pakistani gunman convicted in 2008 Mumbai attacks was sentenced to death by hanging and after a long discussion, politics and debate was finally hanged on 21 November 2012. Next in the row is Afzal Guru, convicted in 2001 Parliamentary attacks was also hanged after a huge political discussion on 9 February 2013. The next convict in the death row is Devendra Pal Singh Bhullar, convict of 1993 car bombing will be hanged in the coming days as

his mercy petition was rejected by the Supreme Court by holding that in terror crime cases pleas of delay in execution of death sentence cannot be a mitigating factor.

There has been a diverse opinion regarding the death penalty in India as some are in the favour of the retention of the punishment while others are in the favour of its abolishment. Those who are in the favour of death penalty argue that it should be given in the most heinous and rarest of the rare crimes as for example the Delhi gang rape case the demand for death penalty for the accused was raised. But the people who are against the capital punishment argue on the religious, moral and ethical grounds and declare it inhuman and callous investment by unsure and unkempt society. It is also suggested that it should be replaced with life imprisonment or any substitute must be brought out.

Sanction is an essential ingredient of law. Punishment is a social custom and institutions are established to award punishment, after following criminal justice process. Governments prohibit taking life, liberty or property of others and specify the punishments, threaten those who break the law. Death penalty in India is not completely abolished but given in rarest of the rare cases which in my opinion must be retained for incorrigibles and hardened criminals but its use should be limited to rarest of rare cases so as to reduce the chances of arbitrariness in judicial process and failure of justice.

The police system

The **Indian Police Service** is one of the three All India Services of the Government of India. It has replaced the Indian (Imperial) Police in 1948, a year after India gained independence from Britain.

The current governing instrument of the Indian police force is the Police Act of 1861. Together with the Indian Penal Code, the Indian Evidence Act and the Code of Criminal Procedure it forms the current but outdated police system in India. In India, police is a State subject under the constitution.

The police force in modern India is typically burdened with the handling of disparate responsibilities:

- 1) maintaining routine law and order;
- 2) riot control;
- 3) crime investigation;
- 4) protection of state assets;
- 5) VIP protection;
- 6) Traffic control.

The structure in the police force is strictly hierarchical and the decision making is centralised with a few high ranking police officers. Currently there is a four-level entry system to the Indian police force with little or no scope for a fresh recruit rising from the very bottom to the very top within the hierarchy. The minimum age to be recruited is 18 years and the upper limit is 20-27 years depending on the State. Postings and transfers are commonly interfered in, by political influence. There have been many attempts to reform the Indian police system both on a State level and on a central level. Since 1971 there have been six major reform committees.

- 1) Gore committee
- 2) National Police Commission (NPC);
- 3) Riberio Committee on Police Reforms;
- 4) Padmanabhaiah Committee on Police Reforms;
- 5) Group of Ministers on National Security;
- 6) Malimath Committee on Reforms of Criminal Justice System.

However the reform proposals have mostly dealt with the symptoms of the crisis rather than with the problems sourced from its structure and design. This report has analysed the current structure of the Indian police system and listed 5 structural and design defects with the system:

- 1) unwarranted political interference and politically driven appointments, transfers and promotions;

- 2) disparate functions performed by an overburdened police force hindering efficiency and domain specialization;
- 3) lack of genuine empowerment of personnel;
- 4) lack of an independent oversight body;
- 5) inadequate collaboration between the police and the prosecutor.

This report also address issues related to the functional inefficiency in the police system with respect to:

- 1) hiring of adequate numbers of police personnel
- 2) training of police personnel
- 3) technical infrastructure
- 4) financial resources.

In India one police officer is serving approximately 700-750 citizens, while in the UK that number is 1:268 and 1:382 in South Africa. In the Andhra Pradesh only 12% of the state police force is empowered to investigate a criminal case whereas 88% are not. This report also suggests that the current training of the police personnel needs to be strengthened in the regard of specialisation. Surprisingly, India was also the first country in the world to have a finger print forensic laboratory in 1897. Today there are only 23 labs in the country compared to 203 in the US. Currently there are only three Central Detective Training Schools in India. The low number of schools causes a problem to ensure continuous training for the Indian police force. Greater resources need to be allocated towards enhancing the capacity of forensic laboratories. The relation between the police and the public has reached a point where the citizens rather avoid reporting a crime to the police. In a survey done by Transparency International India in 2005, 87% of the respondent to the survey agreed with that there was corruption in the police force, 74% felt that the quality of service they received was inadequate and 47% felt compelled to pay a bribe for their FIR to get filed. A brief chapter has been included in this Report regarding statistical data, both international and national. While comparing international crime statistics it is important to keep in mind that an absolute comparison can not be made since the definition of the crime can vary from country to country.

The crimes compared in this report is

- 1) homicide;
 - 2) violent crime; and
 - 3) robbery; and is limited to the following 14 countries
- 1) India; 2) Australia; 3) Canada; 4) Japan; 5) New Zealand; 6) Russia; 7) South Africa; 8) USA; 9) England and Wales; 10) France; 11) Germany; 12) Italy; 13) The Netherlands; and 14) Spain.

It showed that the average annual rise of crime in India between the years of 1991 to 2001 is 0.4% while the same was 4.8% in Japan and -1.8% in Canada. A brief section is also dedicated to the rate of disposal of cases by the police and courts in India. It clearly shows that the courts in the country are backlogged with 84.4% of the murder cases pending trial in the end of 2005. In the police force 40.4% of the murder cases were pending further investigation in the same year. To substantially improve the functioning of Indian police force and enhance its public accountability the report suggests a three way division of functions into: an independent crime investigation mechanism, maintenance of law and order and local police force (district level) units. To ensure the necessary independence of the police from unwarranted political interference it is suggested that a collegiums be set up to appoint a few key officers. Simultaneously, there is a need to constitute an independent oversight body that will have jurisdiction over complaints of obstruction of justice and abuse of authority by the police. At the local level this can be ensured by a local police ombudsman. Thus it is high time to bring in a new police system in India to ensure greater accountability, efficiency and a citizen service minded approach.

**Criminal laws Courts protection
to the accused**

1. Rights of the accused in Indian Criminal Trial

Right to a copy of police report and other documents

As per section 207 of CrPC, accused has the right to be furnished with the following in case the proceeding has been initiated on a police report:

- the police report;
- the first information report recorded under section 154;
- the statements recorded under sub-section (3) of section 161;
- the confessions and statements, if any, recorded under section 164;
- any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173.

And as per section 208 of CrPC, when a case not instituted by a police report but when the offence is triable exclusively by the Court of Session:

- the statements recorded under section 200 or section 202, or all persons examined by the Magistrate;
- the statements and confessions, if any, recorded under section 161 or section 164;
- any documents produced before the Magistrate on which the prosecution proposes to rely.

2. Right to be discharged when no sufficient ground

As per section 227 of CrPC, when the judge is convinced that there is no sufficient ground for proceeding against the accused after duly considering the case, it is the right of the accused that he be discharged.

3. Right to present evidence

According to section 243(1) of CrPC, the accused has the right to present his evidence and defend his case. The magistrate is duty bound to record written statements put by the accused.

4. Right to be present when evidence is taken

Section 273 of CrPC makes it obligatory on the part of the Magistrate to ensure that all evidence taken in the course of the other proceeding shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader.

5. Right to be defended

Section 303 of CrPC and Article 22(1) of the constitution of India provides a right to all the accused persons, to be defended by a pleader of his choice.

6. Legal aid at State expense in certain cases

This is not a right available to all the accused but to certain category of accused as a privilege. So where, in a trial before the Court of Session, the accused is not represented by a pleader, and the court believes that he does not have sufficient means to engage a pleader, it shall assign a pleader for his defence at the expense of the State, under section 304 of CrPC.

7. Right to cross-examination witnesses

Section 311 of CrPC gives the accused (and the prosecution) full right to cross examine a witness called by the Court.

Under section 243(2) of CrPC, if the accused applies to the Magistrate to issue any process for calling any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing.

Section 138 of Evidence Act says that the right of cross-examination available to opposite party is a distinct and independent right. When accused declined to cross-examine witness and thereafter the said witness is not available for cross-examination, the evidence of such witness recorded is admissible in evidence but that will have to be true to that account.

8. No influence to be used to induce disclosure

As per section 316, the accused shall not be subjected to any sort of influence by means of any promise or threat or otherwise, to induce him to disclose or withhold any matter within his knowledge.

9. And Right to life and liberty

Article 21 of the constitution of India provides that no accused shall be deprived of his life or personal liberty except in accordance with procedure established law which is just, fair and reasonable. This article also provides that the accused has the right to free and speedy trial.

10. Right against double-jeopardy

As per article 20(2) of constitution of India, no person shall be prosecuted and punished for the same offence more than once.

11. Right against self-incrimination

As per article 20(3) of constitution of India, no person accused of any offence shall be compelled to be a witness against himself.

2. Natural Justice and the Rights of the accused

Some of the basic elements of Natural Justice are as follows:

- No man shall be Judge in his own cause.
- Both sides shall be heard, or audi alteram partem.

Right to cross-examine

Right to legal representation

- The parties to a proceedings must have due notice of when the Court / Tribunal will proceed.
- The Court / Tribunal must act honestly and impartially.

The above principles of Natural Justice and the rights available to the accused during trial seem a striking resemblance and thus one cannot refute that natural Justice may have stirred the development of today's rights of the accused.

The elementary principle of Natural Justice, audi alteram partem or right to be heard which include right to cross-examine and right to legal representation form the fundamental structure of right available to the accused in the Indian criminal justice system.

3. Malimath Committee on the rights of the accused

The committee was of the opinion that "the rights of the accused include the obligation on the part of the State to follow the due processes of law, a quick and impartial trial, restraint from torture and forced testimony, access to legal aid etc".

Before suggesting and recommending certain changes the Committee posed three major questions:

(i) Should the basic premise of criminal law, namely, proof of guilt beyond reasonable doubt be dispensed with?

According to the Committee such a presumption is not found in the Evidence Act. And thus the standard of 'proof beyond reasonable doubt' present followed in criminal cases shall be done away with. The standard of proof in criminal cases should be higher than the 'preponderance of probabilities'

“The extraordinary burden of “proof beyond reasonable doubt” should be removed subject to the safeguards available to the accused under the Evidence Act and the Code.”

“There are three standards of proof: “a preponderance”, “clear and convincing” and “beyond a reasonable doubt”. The middle course, in our opinion, makes a proper balance between the rights of the accused on one hand and public interest and rights of the victim on the other. This standard is just, fair and reasonable. Safety lies in the fact that the accused is assisted by a lawyer and the Judge is required to give reasons for his findings. This will promote public confidence and contribute to better quality of justice to victims.”

(ii) Should we not as a consequence do away the right of the accused to silence?

(iii) Should we not as a consequence abolish the right of the accused against self-incrimination?

Article 14(3) (g) guarantees an accused not to be compelled to testify against himself or to confess guilt.

If any incriminatory statement is voluntarily made by the accused in answer to the question put by a police officer, it cannot be regarded as one made under compulsion, vide AIR 1962 SC 1831, R.K. Dalmia Vs. Delhi Administration. In AIR 1965 SC 1251, State of Gujarat Vs. Shyamlal Mohanlal Choksi the Supreme Court has upheld the validity of Section 27 of the Evidence Act which renders the portion of the statement of the accused that leads to the discovery of any fact admissible in evidence.

It cannot be denied that there is no better source of information than the accused himself. The Committee was thus of the opinion that providing the Right to Silence and Right against self-incrimination block this source of information and that there should be a way to receive information from the accused without subjecting him to any duress. Professor Ingraham holds the view that common sense expects one who is accused of the crime to reply, explain, admit or exonerate himself and that this does not threaten the privilege from self-incrimination.

The committee after discussing these points in detail suggested that the rights of the accused recognized by the Supreme Court should be subject to the clarification in Chapter 4 and the manner of their protection be made statutory, incorporating the same in a schedule to the Criminal Procedure Code.

Protection of Identity of Witnesses Vs. Rights of Accused

Amongst all these rights provided to the accused one should not forget the protection and safety of the victims and witnesses. Open trial is a universal right available to the accused. But, the legal system should also consider interests of victims and witnesses. There are two elements to be considered here. One would be rights of the accused the second would be rights of the victim and public interest.

Hence, the accused cannot be in any circumstance provided with absolute rights and reasonable restrictions can be imposed on them in order to balance other parties' interests.

For instance, the right of the accused to examine a witness in his presence in open court cannot be provided at the risk of safety of the life or property of witnesses or those of their close relatives. Or in the cases of rape, a woman cannot be subjected to unnecessary humiliation in the name of cross-examination. There should be an apt balance of rights in the interest of fair administration of justice.

The Law Commission's 178th report suggests that we do not have sufficient laws to protect the identity of the witness. Further, the law should also provide a procedure for a fair balance between the two aspects.

The Supreme Court also held that the procedure in the Act which denied permission to be present when the witness was cross-examined was not unreasonable.

The victim can be permitted to depose with an intervening screen or through video-link so that he need not face the accused; and the prosecution witnesses may depose by an arrangement under which the accused will not be able to see them and their identity will not be disclosed to the accused or his lawyer. In either case, the Judge will be enabled to see the victim or the prosecution witness while they are deposing.

Judicial pronouncements have suggested that the need for protection of victims and witnesses is not limited to severe offences like offences against state or rape etc but in any case where the judge has sufficient reasons to believe that the victim/witness or their relative's life or property might be in danger.

Conclusion

We have discussed the various rights provided to the accused during trial in India and some other countries. The hypothesis of the paper as earlier put is that the rights provided to the accused in a criminal trial owe their existence to the Natural Justice. In conclusion, I personally believe that the hypothesis comes out to be true. One can see a hint of protection to the accused in Natural Justice.

The second element of Natural Justice i.e. both sides shall be heard, or audi alteram partem and the right of the accused to cross-examine the witnesses and his right to legal representation are comparable. Another significant right would be the 'Rule against bias', a person cannot be a judge in his own cause. This is an elementary Natural Justice principle which is also the right of the accused in the present day's criminal justice system.

I do not agree with the Malimath Committee's suggestions to do away with some of the rights of the accused which form the basic premise of the criminal justice system in India, for the simple reason that altering them would require the change in the entire system which has a foundation of more than 200 years. This in my opinion is not feasible.

Strict construction of penal statutes

The term interpretation means "**To give meaning to**". Governmental power has been divided into three wings namely the legislature, the executive and the judiciary. Interpretation of statutes to render justice is the primary function of the judiciary. It is the duty of the Court to interpret the Act and give meaning to each word of the Statute. The most common rule of interpretation is that every part of the statute must be understood in a harmonious manner by reading and construing every part of it together. The maxim "A Verbis legis non est recedendum" means that you must not vary the words of

the statute while interpreting it. The object of interpretation of statutes is to determine the intention of the legislature conveyed expressly or impliedly in the language used. To ensure that justice is made available to all, the judicial system has been evolved in all nations. It is extremely important and in fact necessary also that the Courts interpret the law in such a manner that ensures 'access to justice' to the maximum. For this purpose, the concept of 'Canons of Interpretation' has been expounded. The Canons are those rules that have been evolved by the Judiciary to help Courts determine the meaning and the intent of legislation.

SALMOND has defined it as "the process by which the Courts seek to ascertain the meaning of the Legislature through the medium of authoritative forms in which it is expressed." In his *The Law-Making Process*, Michael Zander gives three reasons why statutory interpretation is necessary:

1. Complexity of statutes in regards to the nature of the subject, numerous draftsmen and the blend of legal and technical language can result in incoherence, vague and ambiguous language.
2. Anticipation of future events leads to the use of indeterminate terms. The impossible task of anticipating every possible scenario also leads to the use of indeterminate language. Judges therefore have to interpret statutes because of the gaps in law. Examples of indeterminate language include words such as "reasonable". In this case the courts are responsible for determining what constitutes the word "reasonable".
3. The multifaceted nature of language. Language, words and phrases are an imprecise form of communication. Words can have multiple definitions and meanings. Each party in court will utilize the definition and meaning of the language most advantageous to their particular need. It is up to the courts to decide the most correct use of the language employed.

Remedial Statutes

Remedial statutes and statutes which have come to be enacted on demand of the permanent public policy generally receive a liberal interpretation. On constructing a remedial statute the courts ought to give to it 'the widest operation which its language will permit. They have only to see that the particular case is within the mischief to be remedied and falls within the language of the enactment.

The labour and welfare legislations should be broadly and liberally construed and while construing them due regard to the Directive Principles of State Policy (Part IV) and to any international convention on the subject must be given by the courts. In *MC Mehta v. State of Tamil Nadu* the Child Labour (Prohibition and Regulation) Act, 1986 was construed. The Court, having regard to the Directive Principles in Arts 39(e), 39(f), 4(i), 45 and 47 of the Constitution, the fundamental rights in Art 24, the International convention on the right of the child, not only directed a survey of child labour and its prohibition but also directed payment of Rs. 25,000 as contribution by the employer to the Child Labour-Rehabilitation-cum-Welfare Fund or alternative employment to parent/guardian of the child to ameliorate poverty and lack of funds for welfare of the child which is the main cause of child labour.

In case of a social benefit oriented legislation like the Consumer Protection Act 1986 the provisions of the consumer to achieve the purpose of the enactment but without doing violence to the language. If a section of a remedial statute is capable of two constructions, that construction should be preferred which furthers the policy of the Act and is more beneficial to those in whose interest the Act may have been passed. The liberal construction must flow from the language used and the rule does not permit placing of an unnatural interpretation on the words contained in the enactment nor does it permit the raising of any presumption that protection of widest amplitude must be deemed to have been conferred upon those for whose benefit the legislation may have been enacted.

In case there is any exception in the beneficial legislation which curtails its operation, the Court in case of doubt should construe it narrowly so as not to unduly expand the area or scope of exception. It has

been held that a law enacted essentially to benefit a class of persons considered to be oppressed may be comprehensive in the sense that to some extent it benefits also those not within that class, for example, tenants and landlords. The Control of Rent and Eviction Acts which drastically limit the grounds on which a tenant can be evicted are essentially to benefit the tenants but they also to some extent benefit the landlord can file a suit for eviction on the grounds mentioned in the Acts even though the tenancy has not been terminated in accordance with the provisions of the Transfer of Property Act.

When contracts and transactions are prohibited by statutes for the sake of protecting one class of persons, the one from their situation and condition being liable to be oppressed and imposed upon by the other, the parties are not in pari delicto and a person belonging to the oppressed class can apply for redress even if he was a party to a contract or transaction prohibited by the statute.

In *Noor Saba Khatoon v. Mohd Qasim*, it was held that effect of a beneficial legislation is not construed to be defeated by a subsequent legislation except through a clear provision. Therefore, the rights of the minor children, irrespective of their religion, to get maintenance from their parents as provided in § 127 of the Criminal Procedure Code 1973 was construed not to have been taken away in respect of Muslims by the Muslim Women (Protection of Rights on Divorce) Act 1986. § 3(b) of the Act enables a divorced Muslim woman to claim maintenance for the minor children up to the age of two years only from her former husband. It has been held that the right of children to claim maintenance under § 125 Cr PC is independent of the right of divorced mother to claim maintenance for the infant children and the former is not affected by the Muslim Women Act 1986.

(i) *Sadhoo v. Haji Lal Mohd Biri Works*

In this case the Supreme Court interpreted § 31(2) (a) of the Beedi and Cigar Workers (Conditions of Employment) Act 1966. This § 31(2) (a) provides that the employees discharged, dismissed or retrenched may appeal to the prescribed authority. It was held that by the liberal construction of the section there need to be no written order of termination to enable the employee to appeal and that an employee who was terminated by stopping him to enter the place of work could appeal to the prescribed authority.

(ii) *Central Railway Workshop, Jhansi v. Vishwanath*

In this case the question before the court was whether time-keepers, who prepared pay sheet of the workshop staff, maintain leave account, dispose of settlement case and maintain records for other statistical purposes, were workers as defined in the Factories Act 1948. § 2 defined 'as a person employed directly or through any agency, whether for wages or not in any manufacturing process used for a manufacturing process or any other kind of work incidental to or connected with the manufacturing process.' The court gave a liberal construction to the definition of worker and held that time-keepers were workers being employed in a kind of work incidental to or connected with the manufacturing process.

(iii) *Motor Owner's Insurance Co Ltd v. JK Modi*

In this case, the words 'any one accident' occurring in § 95(2) (a) of the Motor Vehicles Act 1939 was construed. Having regard to the beneficial purpose of the Act, the words were construed to signify as many accidents as the number of persons involved in the accident to enable the limit of Rs. 20,000 payable by the insurance company to apply to each person injured.

(iv) *Kuldip Kaur v. Surinder Singh*

In this case the Supreme court dealt with § 125(3) of the Cr PC. This section provides for recovery of maintenance granted in favour of a wife or minor child by issue of a warrant if the order for maintenance is not complied with 'without sufficient cause' and enables the magistrate, if the amount still remains unpaid to sentence the person against whom the order is made to imprisonment for a period of one month. The court drew a distinction between 'mode of enforcement' and 'mode of

satisfaction’ and held that even after a sentences of imprisonment, the person concerned remained liable for arrests of maintenance for non-payment of which he was imprisoned and the liability for payment could be satisfied only by payment and not by suffering the sentence.

(v) Bhagirath v. Delhi Administration

In this case the Supreme Court held that the beneficent provisions of § 428, Cr PC directing set-off of the period of pre-conviction detention against the ‘term’ of imprisonment is applicable even to cases where the sentence is imprisonment for life and that such a sentence is also imprisonment ‘for a term’ within the section.

Penal Statutes

The principle that a statute enacting an offence or imposing a penalty is to be strictly construed is not of universal application which must necessarily be observed in every case. It is now only of limited application and it serves in the selection of one when two or more constructions are reasonably open. The rule was originally evolved to mitigate the rigour of monstrous sentences for trivial offences and although that necessity and that strictness has now almost vanished, the difference in approach made to a penal statute as against any other statute still persists.

According to Lord Esher, MR, the settled rule of construction of penal sections is that ‘if there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one’

Interpretation of penal provisions must be in consonance with the principles underlying fundamental rights. Any provision which visits an accused with adverse consequences without affording him any remedy to disprove an item of evidence which stands against his innocence, is inconsistent with the philosophy enshrined in Art 21. It was held by the Supreme Court that they should so interpret such a provision as to dilute it to make it amenable to Art 21 of the Constitution.

When words employed in a penal statute are not clear the principle ‘against double penalisation’ would be applied. Failure to comply with a statute may attract penalty. But only because a statute attracts penalty for failure to comply with the statutory provisions, the same in all situations would not call for a strict construction. An interpretation which strikes a balance between enforcement of law and protection of valuable human right of accused (right of privacy) must be resorted to. § 105 of the Evidence Act 1872 says that the burden to prove that the case of the accused falls within an exception to a statutory offence lies on him. But the question whether the defence set up by an accused is really a defence of an exception or a defence setting up non-existence of a fact which is an ingredient of the offence to be proved by the prosecution depends upon the construction of the particular statute.

In applying and interpreting a penal statute, public policy is also taken into consideration. In a recent case, the House of Lords held that consensual sadomasochistic homosexual encounters which occasioned actual bodily harm to the victim were assaults occasioning actual bodily harm, contrary to § 47 of the Offences Against the Person Act 1861 and unlawful wounding contrary to § 20 Of the Act, notwithstanding the victim’s consent to the acts inflicted on him. The following are some of the propositions important in relation to strict construction of penal statutes:

(a) if the scope of prohibitory words cover only some class of persons or some well defined activity, their scope cannot be extended to cover more on consideration of policy or object if the statute.

(b) prohibitory words can be widely construed only if indicated in the statute. On the other hand if after full consideration no indication is found the benefit of construction will be given to the subject.

(c) if the prohibitory words in their own signification bear wider meaning which also fits in with the object or policy of the statute.

(i) JK (Bombay) Ltd v. Bharti Matha Mishra

In this case, it was held that the expression ‘officer or employee of a company’ applies not only to the existing officer or employee but also includes past officers or employees where such an officer or employee either

- wrongfully obtains possession of any property, or
- wrongfully withholds the same after the termination of his employment.

The expression would also include the ‘legal heirs or representatives.’ It was held by the court that the penal statutes should not be so liberally construed with the aid of presumptions, assumptions and implications as to rope in for the purposes of prosecution such persons against whom the prosecution is not intended by the statute and initiation of prosecution would be violative of Art 21 of the Constitution and against public policy.

(ii) Virtual Soft Systems Ltd v. CIT

The questions that arose before the Supreme Court in the case prior to the amendments by the Finance Act 2002 with effect from 1 April 2003 were:

- What was meant by the words ‘in addition to any tax payable’ in the charging § 27(1) (c) (iii)?
- What was meant by the term ‘total income’ in Explanation 4(a) therein?

Allowing the appeals, it was held by the court that the statute creating the penalty is the first and the last consideration and the penal provision must be construed within the term and language of the particular statute. § 271 of the Act is a penal provision and there are well established principles for interpretation of such a penal provision. Such a provision has to be construed strictly and narrowly and not widely; with the object of advancing the object and intention of the legislature.

(iii) Municipal Corpn of Delhi v. Laxmi Narain Tondon

In this case, the definition of ‘sale’ in the Prevention of Food Adulteration Act 1954 was construed in the sense having regard to the mischief intended to be remedied. It was held that the ‘sale’ in the Act would include all commercial transactions where under an adulterated article of food was supplied for consumption by one person to another person. Therefore, supply or offer of food to hotelier to a customer when consolidated charge was made for residence and other amenities including food fell within the definition.

(iv) Tolaram v. State of Bombay

In this case, § 18 of the Bombay Rents, Hotels and Lodging Houses Rates (Control) Act 1947 was construed. This section provided that ‘if any landlord receives any fine, premium or other like sum or deposit or any consideration other than the standard rent in respect of the grant, renewal or continuance of a lease of any premise, such landlord shall be punished.’ It was held by the Supreme Court that the section did not prohibit the taking of money by owner of an incomplete building in consideration.

Conclusion

A statute may in certain aspects be a penal enactment and in certain others a remedial one. In respect of those provisions which are sanctioned on the pain of punishment for a crime the rule of strict construction in the limited sense may be applied. At any rate, as undue effort to construe such a provision liberally to promote the beneficent purpose behind it may be effectively counter balanced on consideration that a breach thereof leads to penal consequences.

**Penal law not to be
retrospective in operation**

The essentiality of a right to protection from retroactive criminal law has generally been accepted without argument. Literature on the justification for the principle is scarce. Yet, it has become well

accepted that individuals have such a right. The principle has been enunciated in various declarations of human rights from 1789 until the present. Nevertheless, there are several examples in international, Australian and British law where the principle has been ignored or (at the very least) circumvented.

Three examples of retrospective law-making are mentioned below: the Nuremberg trials of the late 1940s; the decision of the House of Lords in *Shaw v. Director of Public Prosecutions* in 1961; and the Commonwealth's "bottom of the harbour" tax legislation of 1982. In each case, the actions of the defendants were considered so morally repugnant that the principle of non-retroactivity was relaxed so as to allow them to be punished. These examples differ in the extent to which the retrospective aspect of each has been accepted: the Nazis tried at Nuremberg are generally said to have been adjudged fairly; the decision in *Shaw's* case has been criticised widely; and the "bottom of the harbour" tax legislation has attracted both critics and champions.

The fundamental question raised by these three examples is this: is the right to protection from retroactive criminal law an absolute human right, or should its application be qualified by reference to the circumstances in each case? Despite the criticism that these examples provoked, none of them could easily be characterised as a miscarriage of justice. But, in each instance, the defendants were punished for committing acts which were not criminal at the time that they committed those acts: they were found guilty retrospectively. Clearly, then, the right to protection from retroactive criminal law is not an absolute human right but it is a qualified human right.

Retrospective Operation of Criminal Law

Retrospective operation is an inaccurate term and open to various interpretations. The best instances of retrospective laws are those in which the date of commencement is earlier than the enactment or which validates some invalid law; otherwise every state effects rights which would have been in existence but for the statute. A statute does not become a retrospective one because a part of the residue for its action is drawn from a time antecedent to its passing. All that it means is that save in cases where that creates a new offence or increases a penalty, a legislature is not prevented from enacting an *ex post facto* law but if any such law takes away or impairs any vested right acquired under an existing law or creates a new obligation, imposes a new duty or attaches a new disability in respect to the transactions on considerations already past, it must so provided in express terms or such should be a necessary implication from the language employed.

The word 'retrospective' is somewhat ambiguous. It literally means looking backwards; having reference to a state of things existing before the Act in question. A retrospective statute contemplates the past and gives to a previous transaction some different legal effect from that which it had under the law when it occurred or transpired. Every statute which takes away or impairs a vested right acquired under existing law or creates a new obligation, imposes a new duty or attaches a new disability in respect of transactions or considerations already past must be deemed to be prospective.

A retrospective law is one which reaches back and gives to a prior transaction some different legal effect from that which it had under the law when it took place. If an act provides that as at a past date the law shall be taken to have been that which it was not, that Act is deemed to be retrospective.

Corpus Juris defines it thus: Literally defined, a retrospective law is a law that looks backward or on things that are past; and a retroactive law is one that acts on things that are past. In common use, as applied to statutes, the two words are synonymous, and in this connection may be broadly defined as having reference to state of things existing before the act in question. A retrospective law in legal sense is one that takes away or impairs vested rights acquired under the existing laws or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already past.

No Retrospective Effect

Ordinarily, a canon of interpretation of penal legislation does not permit penal provisions to have retrospective effect. It is true that on case of statutes of a penal character which create certain offences

and make certain acts punishable as such offences for the first time, no proceedings under them are generally maintainable in respect to acts done before the commencement of the statute. The reason is plain. First of all the doer cannot be imputed with the element of mens rea which is ordinarily the principal ingredient for the proof of guilt. Further to punish a person for his act which was then not an offence under a subsequent legislation which came in to operation after the said act will per se unconscionable besides amounting to negation of fair play and justice.

It is true that mens rea is an essential ingredient of a criminal offence. But a statute may exclude the element of mens rea from the offence created by it. It is only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated that mens rea may by necessary implication be excluded from a statute. Of course the nature of mens rea that would be implied in a statute creating an offence depends on the object of the act and the provisions thereof. There were some changes in the export and import policy for the period 1984-85. In *Collector of Customs, Bombay v East Punjab Traders & Ors*, it was held that such a change couldn't be given retrospective effect since it would lead to penal consequences against the importers. It was further held that the consequences of this interpretation would lead to certain penal liabilities in regard to payment of penalty etc, and therefore an entry prescribing the limit of the width has to be read retrospectively.

Ex -Post -Facto Laws

Ex post Facto laws is used in several different senses,

an act may be called retrospective because it affects existing contracts as from the date of its coming in to operation

it may be more properly described as retrospective because it applies to the actual transactions which have been completed or to rights and remedies which have already accrued

Or it may apply again to such matters as procedure and evidence and in each of these matters retrospective legislation has a different effect.

The term retroactive and retrospective are synonymous in judicial use and may be employed interchangeably. The term ex post facto used with respect to law signifies something done so as to affect another thing that was committed before, in other words, refers to the law which affects the transaction after its happening.

Rule of questionable policy

Retrospective laws are as a rule of questionable policy and contrary to general principles that legislation by which the conduct of mankind is to be regulated ought to deal with future acts and ought not to change the character of past transactions carried upon the faith of the then existing law.

Sutherland says "in dealing with the problem of retroactivity, it is extremely difficult to establish definite criteria upon which courts decisions can be foretold. A statute must not act unreasonably upon the rights of those to whom it applies, but what is reasonable and what is unreasonable, is difficult to state in advance of actual decisions... the method to be pursued is not the unerring pursuit of a fixed legal principle to an inevitable conclusion. Rather it is the method of intelligently balancing and discriminating between reasons for and against.

Protection against Ex Post Facto Laws

An ex post facto law is a law which imposes penalties retroactively that is upon acts already done, or which increases the penalty for the past acts. Suppose a person does an act in 1954 which is not then unlawful. A law is passed in 1956 making that act a criminal offence and seeking to punish that person for what he did in 1954. Or, suppose punishment prescribed is increased in 1955 to imprisonment for a year and made applicable to the offences committed before 1955. These are both examples of ex post facto laws. Such laws are regarded as inequitable and abhorrent to the notions of justice and therefore there are constitutional safeguards against such laws.

Article.20 (1) provides the necessary protection against an ex post facto law. Under the first part, no person is to be convicted of an offence except for violating a law in force at the time of commission of the act charged as an offence. A person is to be convicted for violating a law in force when the act charged is committed. A law late enacted, making an act done earlier (not an offence when done) as an offence, will not make the person liable for being convicted under it. Immunity is thus provided to a person from being tried for an act under a law enacted subsequently, which makes the law unlawful. This means if an act is not an offence on the date of its commission, a law enacted in future cannot make it so

This proposition is illustrated by the following fact situation:

S.304B, IPC, was enacted on 19-11-1986 making a dowry death punishable as an offence under the penal code. A new offence has thus been inserted in the IPC with effect from 19-11-1986. Because of Article 20(1), S.304B cannot be applied to a dowry death which took place in 1984, i.e. prior to its enactment. S.304B is a substantive provision creating a new offence subsequent to the commission of the offence attributed to the respondent in the instant case and so he could not be tried under section 304B. The word 'offence' used in article 20 is not defined in the constitution. S.3 (38) of the general clauses act defines 'offence' as any act or omission made punishable by any law for the time being in force. The immunity against retrospective laws extends only against punishment by courts for a criminal offence under an ex post facto law and cannot be claimed against prevention detention, or demanding a security from a press under a press law, for acts done before the relevant law is passed.

Art.20 (1) doesn't bar a civil liability being imposed retrospectively. An act passed in June, 1957, imposed on the employers closing their undertakings a liability to pay compensation to their employees since November 28, 1956. This liability could be enforced by coercive process leading to imprisonment in case of failure to discharge it. The Supreme Court held that the liability imposed by the law was a civil liability which wasn't an offence and Art, 20(1) could not apply to the liability for the period November 28, 1956 to June 1957.

What is prohibited under Art 20(1) is only conviction or sentence but not trial, under an ex post facto law. The objection doesn't apply to a change of procedure or of court. A trial under a procedure different from what obtained at the time of the commission of the offence, or by a court different from that which had competence at the time cannot ipso facto be held unconstitutional. A person being accused of having committed an offence has no fundamental right of being tried by a particular court any constitutional objection the way of discrimination or violation of any other fundamental right may be involved. Art20(1) does not make a right to any course of procedure a vested right. Thus a law which retrospectively changes the venue of trial of an offence from a criminal court to an administrative tribunal is not hit by Art20(1)

In order to punish corrupt government officers, Parliament has enacted the prevention of corruption act which creates the offence of criminal misconduct. S.5 (3) creates a presumption to the effect that if the government servant for corruption has in possession property or assets which was wholly disproportionate to his known sources of income and if he cannot explain the same satisfactorily, then he is guilty of criminal misconduct

S.5 (3) was challenged before the supreme court in Sajjan Singh v. State of Punjab Vis a Vis Art20 (1). It was argued that when S.5(3) speaks of the accused being in possession of pecuniary resources, or property disproportionate to his known sources of income,, only the pecuniary resources or property acquired after the date of the act is meant. To think otherwise would be to give the Act retrospective operation and for this there is no justification. The Supreme Court rejected the contention to take into consideration the pecuniary resources or property in the possession of the accused or any other person on his behalf, which are acquired before the date of the act is in anyway giving the act a retrospective operation.

The court explained its position as follows, a statute cannot be said to be retrospective because a part of the requisites for its actions is drawn from a time antecede to its passing. The court also rejected the contention that S.5 (3) creates a new offence in the discharge of official duty. The court further stated: "It

merely prescribes a rule of evidence for the purpose of proving the offence of criminal misconduct as defined in S5 (1) for which an accused is already under trial...When there is such a trial which necessarily must be in respect of acts committed after the Prevention of Corruption Act came in to force, S.5 (3) places in the hands of the prosecution a new mode of proving an offence with which an accused has already been charged.”

A person can be convicted and punished under a law in force which means a law factually in existence at the time the offence was committed. A law passed on September 30, but act committed on August 1, cannot be taken to be a law in force on August 1, and so an act committed on August 1, cannot be punished there under. A law not factually in existence at the time enacted, subsequently, but by a legislative declaration deemed to have become operative from an earlier date, cannot be considered to be a law ‘factually’ in force earlier than the date of its enactment and the infirmity applying to an ex-post-facto law applies to it. The reason is that if such a fiction were accepted and a law passed later were to be treated as a law in existence earlier, the whole purpose of protection against an ex-post-facto law would be frustrated, or a legislature could give a retrospective operation to any law.

A slightly different situation is presented by the following fact situation. A law was made in 1923 and certain rules were made there under. The Act of 1923 was replaced in 1952 by another act, but the old rules were deemed to be the under the new Act as well. As these rules have been operative all along and did not constitute retrospective legislation, an offence committed in 1955 could be punishable under them as these were in factually in existence at the date of the commission of the offence.

When a later statute again describes an offence created by a statute enacted earlier and the later statute imposes a different punishment, the earlier statute is repealed by implication. But this is subject to Art.20 (1) against ex-post-facto law providing for a greater punishment. The later act will have no application if the offence described therein is not the same as in the earlier act, i.e., if the essential ingredients of the two offences are different. If the later act creates new offences, or enhances punishment for the same offence, no person can be convicted under such an ex-post-facto law nor can the enhanced punishment prescribed in the later act apply to a person who had committed the offence before the enactment of the later law.

Further what Art. 20(1) prohibits is conviction and sentence under an ex-post-facto law for acts done prior thereto, but not the enactment or validity of such a law. There is, thus, a difference between the Indian and the American positions on this point. Whereas in America, an ex-post-facto law is in itself invalid, it is not so in India. The courts may also interpret a law in such a manner that any objection against it of retrospective operation may be removed.

Conclusion

Nowhere throughout the world has it been written that any action is good or bad. Certain actions of man in one era are considered good and in another bad. Certain actions are considered to be legal at one time and illegal at another. It is this inconsistency in man to decide what is good and bad that has become the reason to have immunity from ex post facto laws. An act that was thought innocent at one time is no longer innocent today but is illegal. These changing circumstances have led to wrongful punishment of many innocent individuals. Thus the right to protection from laws with retrospective effect must be granted to all and must be made a universal right.

The right to protection from retrospective criminal law is well recognised throughout the international community. Yet there are many examples, in communities which claim to espouse this right as being fundamental, where retroactive criminal laws have been made. Fortunately the Indian constitution protects us from ex post facto laws.

Article 20(1) is truly a blessing to all of us. An act done innocently by an individual in the past, which is illegal in the present, the state cannot prosecute the individual as it is against the principle of natural justice because the individual when committing the act couldn't have reasonably or by any other method come to know that the act would become illegal in the future. Thus criminal laws with retrospective effect are totally absurd, unfair and unjust. Having criminal laws with retrospective effect is against the right to life.

UNIT-III Organised Crime

1. Definition Main characteristics of organized crime.
2. Organised Predatory Crime
3. Crime Syndicate
4. Criminal Rackets
5. Political grafts

Organised crime can be defined as serious crime planned, coordinated and conducted by people working together on a continuing basis. Their motivation is often, but not always, financial gain. Organised criminals working together for a particular criminal activity or activities are called an organised crime group.

Ongoing conspiratorial enterprise engaged in illicit activities as a means of generating income (as black money). Structured like a business into a pyramid shaped hierarchy, it freely employs violence and bribery to maintain its operations, threats of grievous retribution (including murder) to maintain internal and external control, and contribution to election campaigns to buy political patronage for immunity from exposure and prosecution. Its activities include credit card fraud, gun running, illegal gambling, insurance fraud, kidnapping for ransom, narcotics trade, pornography, prostitution, racketeering, smuggling, vehicle theft, etc. With the arrival of international terrorism (with which it often has symbiotic relationship) and internet, organized crime now covers practically every nation and segment of society, and uses extremely sophisticated methods and credible front-organizations (such as charities and high-tech firms) in movement of large amounts of money and weaponry. Called by names such as cartel, mafia, syndicate, and triad, these establishments do not tolerate competition and constantly fight for monopolization in their specialty (such as drug trade) or geographical region.

They are distinguished from the common (unorganized) crimes by characteristics such as:- (1) non-random nature of criminal behavior,

- (2) coordinated activities of hundreds or thousands of operatives,
- (3) diversification of activity (production, supply, retail),
- (4) regional, national, or transnational scale of operations,
- (5) large volume of turnover (running into billions of dollars in some cases),
- (6) pursuit of both profit and power, and
- (7) usually an identifiable leadership.

A 1975 UN definition of organized crime reads, "... large scale and complex criminal activity carried on by groups of persons, however loosely or tightly organized, for the enrichment of those participating and at the expense of the community and its members. It is frequently accomplished through ruthless disregard of any law, including offences against the person, and frequently in connection with political corruption." Paul Nesbitt (head of Interpol's Organized Crime Group) defined it in 1993 as, "Any group having a corporate structure whose primary objective is to obtain money through illegal activities, often surviving on fear and corruption."

Types of crime



Organized predatory crime

In this crime, the benefit is enjoyed completely by the gangster with no service or benefit to the victim. In this system, juvenile delinquents and occasional offenders turn into professional gangsters over time.

Because the victim of the crime gets nothing, the society generally reacts sharply at this.

Professional criminal gangs require experience and careful planning than occasional criminals. This includes prior selection of "spots" as well as preparing escape from punishment in case of detection.

Examples of these crimes are theft, decoity, extortion, kidnapping, pick-pocketing etc. Terrorism is a larger form of an organized predatory crime.

Crime Syndicate

Crime Syndicates refers to a criminal gang which offers an illegal or forbidden service to the desirous customers who are ready to pay handsomely. These operate because there is a market for the illegal / prohibited goods / services. Unlike Organized predatory crime, the victim gets some good / service for which he paid.

These crime syndicates are master minded by skilled and professional mastermind. Further, they are protected by political organizations who have respectable businessmen and lawyers giving money necessary to 'buy' or 'fix' law enforcing persons and shield in case of a problem.

Examples: Gambling, Commercial prostitution, bootlegging, supply of narcotic drugs and intoxicants.

Criminal Racket

Also called Racketeering, it is a systematic extortion under some kind of threat usually of personal injury or property. It is an illegal exploitation from some legitimate or illegitimate demand.

Criminal Rackets differs from Organized predatory crime in the sense that there is some service involved in it and not completely predatory.

Criminal Rackets differs from Criminal syndicates in the sense that the service is rendered to people who are normally engaged in legitimate businesses while in the syndicate the activity is totally illegitimate and prohibited.

Examples: Business rackets in which fictitious names are put on labor rolls and huge sums are drawn in their names and the expenses are shown on record. Gambling rackets lure people to put in more and more of their money in horse races or game of chance and luck and then dupe them. Cyber casinos and internet gambling have become modern forms of this crime.

Political Graft

Political graft is the usage of notorious offenders by politicians so that they can come into power or get some benefit for their political party such as getting victory in polls etc. These offenders use both legitimate and illegitimate methods (such as violence and threats) to get their master win.

Examples range from the common method such as 'buying votes' by paying the voter to advanced methods of setting up inquiry commission against a big politician to save him than to really inquire him.

Renaissance
Law College

Unit-IV Probation

1. Application of probation – utility and misconception
2. Conditions of Probation
3. Probation of offenders Act 1958
4. Power of Court to release certain offenders after admonition
5. Power of Court to release certain offenders on probation of good conduct
6. Power of Court to require released offenders to pay compensation and costs.
7. Restrictions on imprisonment of offenders under twenty-one years of age.
8. Report of probation officer to be confidential
9. Variation of conditions of probation
10. Procedure in case of offender failing to observe conditions of bond
11. Provisions as to Sureties

In some jurisdictions, the term **probation** only applies to community sentences (alternatives to incarceration), such as suspended sentences. In others, probation also includes supervision of those conditionally released from prison on parole.

An offender on probation is ordered to follow certain conditions set forth by the court, often under the supervision of a probation officer. During this testing period, an offender faces the threat of being sent back to prison, if found breaking the rules.

Offenders are ordinarily required to refrain from possession of firearms, and may be ordered to remain employed, abide to a curfew, live at a directed place, obey the orders of the probation officer, or not leave the jurisdiction. The probationer might be ordered as well to refrain from contact with the victims (such as a former partner in a domestic violence case), with potential victims of similar crimes (such as minors, if the instant offense involves child sexual abuse), or with known criminals, particularly co-defendants. Additionally, the restrictions can include a ban on possession or use of alcoholic beverages, even if alcohol was not involved in the original criminal charges. Offenders on probation might be fitted with an electronic tag (or monitor), which signals their whereabouts to officials. Also, offenders have been ordered to submit to repeat alcohol/drug testing or to participate in alcohol/drug or psychological treatment, or to perform community service work.

The earlier penological approach held imprisonment, that is, custodial measures to be the only way to curb crime. But the modern penological approach has ushered in new forms of sentencing whereby the needs of the community are balanced with the best interests of the accused:

Compensation, release on admonition, probation, imposition of fines, community service are few such techniques used. Through this paper, the advantages of probation are highlighted along with how it could be made more effective in India.

The term Probation is derived from the Latin word *probare*, which means to test or to prove. It is a treatment device, developed as a non-custodial alternative which is used by the magistracy where guilt is established but it is considered that imposing of a prison sentence would do no good.

Imprisonment decreases his capacity to readjust to the normal society after the release and association with professional delinquents often has undesired effects.

According to the United Nations, Department of Social Affairs, The release of the offenders on probation is a treatment device prescribed by the court for the persons convicted of offences against the law, during which the probationer lives in the community and regulates his own life under conditions imposed by the court or other constituted authority, and is subject to the supervision by a probation officer. The suspension of sentence under probation serves the dual purpose of deterrence and reformation. It provides necessary help and guidance to the probationer in his rehabilitation and at the same time the threat of being subjected to unexhausted sentence acts as a sufficient deterrent to keep him away from criminality. The United Nations recommends the adoption and extension of the probation system by all the countries as a major instrument of policy in the field of prevention of crime and the treatment of the offenders.

Law of Probation In India

Section S.562 of the Code of Criminal Procedure, 1898, was the earliest provision to have dealt with probation. After amendment in 1974 it stands as S.360 of The Code of Criminal Procedure, 1974. It reads as follows:- When any person not under twenty-one years of age is convicted of an offence punishable with fine only or with imprisonment from a term of seven years or less, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour.

S.361 makes it mandatory for the judge to declare the reasons for not awarding the benefit of probation. The object of probation has been laid down in the judgment of Justice Horwill in *In re B. Titus* : S. 562 is intended to be used to prevent young persons from being committed to jail, where they may associate with hardened criminals, who may lead them further along the path of crime, and to help even men of mature years who for the first time may have committed crimes through ignorance or inadvertence or the bad influence of others and who, but for such lapses, might be expected to make good citizens. In such cases, a term of imprisonment may have the very opposite effect to that for which it was intended. Such persons would be sufficiently punished by the shame of having committed a crime and by the mental agony and disgrace that a trial in a criminal court would involve.

In 1958 the Legislature enacted **The Probation of Offenders Act**, which lays down for probation officers to be appointed who would be responsible to give a pre-sentence report to the magistrate and also supervise the accused during the period of his probation. Both the Act and S.360 of the Code exclude the application of the Code where the Act is applied. The Code also gives way to state legislation wherever they have been enacted.

- Section 4 of the Act provides for probation.

S.4 Power of Court to release certain offenders on probation of good conduct

(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the Court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour.

- S. 6 of the same Act lays special onus on the judge to give reasons as to why probation is not awarded for a person below 21 years of age. The Court is also to call for a report from the probation officer before deciding to not grant probation.

The provision under the Code and the Act are similar, as they share a common intent, that, punishment ought not to be merely the prevention of offences but also the reformation of the offender. Punishment would indeed be a greater evil if its effect in a given case is likely to result in hardening the offender into repetition of the crime with the possibility of irreparable injury to the complainant instead of improving the offender.

Yet there are a few differences, which have been enumerated below. S.4 of Probation of Offenders Act S.360 of The Cr.P.C.

Any person may be released on probation, if he has not committed an offence punishable with death or imprisonment for life.(No distinction is made on ground of sex or age) Any person not under 21 years of age, if convicted of an offence punishable with imprisonment for not more than 7 years or when any person under 21 years of age or any woman is convicted of an offence not punishable with death or imprisonment for life may be released on probation. It is not necessary that the person must be a first offender. This section applies only when no previous conviction is proved against the offender.

Any magistrate may pass an order under this section. Magistrate of the third class or of the second class not specifically empowered by the state government had to submit the proceeding to Magistrates of the first class or Sub-Divisional magistrates. Supervision order may be passed directing that the offender shall remain under the supervision of a Probation Officer. No such provision.

Besides these two enactments, the Juvenile Justice (Care and Protection of Children) Act, 2000 also provides for the release of children who have committed offences to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety, or any fit institution as the Board may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years.

Procedure for Probation Service

S. 4(2) and S. 6(2) of the Probation of Offenders Act provide that the judge would consider the report of the probation officer before deciding on whether to grant probation. S. 14 of the said Act lays down the duties of the Probation Officers.

The pre-sentence report of the Probation Officer is the fundamental document for the guidance of the Court whether to grant the benefit of probation to the accused or not. The object of the pre-sentence report is to appraise the court about the character of the offender, exhibit his surroundings and antecedents and throw light on the background which prompted him to commit the offence and give information about the offenders conduct in general and chances of his rehabilitation on being released on probation.

The judge may also pass a supervision order under section 4(3) of the Act, whereby the offender is placed under the supervision of a probation officer and certain conditions are imposed upon him. This is mostly in the form of regular visits to the supervising officer. Some of the conditions which must be followed have been laid down in S. 4(4). On the application of the probation officer such conditions may be varied- S. 8(2) and also the offender may be discharged- S. 8(3). If the offender fails to follow the conditions laid down by the Court, the original sentence against him may be revived S. 9.

The Juvenile Justice (Care and Protection of Children) Act, 2000 provides for the report of a probation officer or a recognized voluntary organization to be considered before passing a sentence. The Magistrate appointed as a member of the Board constituted under this Act must know something of child psychology. The Board would pass orders against a juvenile. The Act provides for the setting up of Observation and Special Homes by the State Government where the juvenile could be placed. Here the rehabilitation and social integration of the child would take place. It also provides for an After care programme which would take care of the delinquent child after he has been discharged from these

homes, based on the report of the Probation Officer. The Probation officers appointed under the probation of Offenders Act would also function under the Juvenile Justice (Care and Protection of Children) Act.

Probation in India is mostly dependent on the policies of the State rather than a uniform Central Policy. In Karnataka a State level Probation Advisory Committee has been constituted with High Court Judge as Chairman with official and non-officials as members. A District level Probation Advisory Committee has been constituted in each district consisting of the District and Sessions Judge as Chairman with official and non-officials as members. After Care Programmes have been set up to improve the lives of those released on probation.

The After Care Programme, in Kerala, is intended to rehabilitate released prisoners and probationers coming under the supervision of District Probation Officers. By utilizing this amount they can engage in small scale income generating activities. The amount of assistance is Rs.10,000/- per head. If the amount is insufficient for meeting the expenses this can be attached with some bank loan. Department of Juvenile Welfare and Correctional Services was set up in Andhra Pradesh in 1990. It gives the following probation services taking care of probationers released by the courts and ex-convicts, released juveniles, after-care work, counseling and guidance to reform themselves and not to revert to crime and for their rehabilitation through Govt. Welfare Agencies.

Benefits of Probation Service

It serves the needs of the probationer in the following manner: -

Probation keeps the offender away from the criminal world. Further, the fear of punishment in case of violation of probation law has a psychological effect on the offender. It deters him from law breaking during the period of probation. Thus probation indirectly prevents an offender from adopting a revengeful attitude towards the society. Moreover, sentencing an offender to a term of imprisonment carries with it a stigma, which makes his rehabilitation in society difficult. The release of the offender on probation saves him from stigmatization and thus prepares him for an upright living. The shame of going through a trial process would have sufficiently chastised him. According to the labeling theory, a stigmatizing label once applied, is very likely to cause further deviance or create the deviance. People tend to conform to the label even when they didn't set out that way.

Probation seeks to socialize the criminal, by training him to take up an earning activity and thus enables him to pick up those life-habits, which are necessary for a law-abiding member of the community. This inculcates a sense of self-sufficiency, self-control and self-confidence in him, which are undoubtedly the essential attributes of a free-life. The Probation Officer would guide the offender to rehabilitate himself and also try and wean him away from such criminal tendencies.

Before the implementation of probation law, the courts were often confronted with the problem of disposing of the cases of persons who were charged with neglect of their family. In such cases there was no alternative but to send them to prison, which was an unnecessary burden on the State exchequer. With the introduction of probation as a method of reformative justice, the courts can now admit such offenders to probation where they are handled by the competent probation officers who impress upon them the need to work industriously and avoid shirking their family responsibilities.

An analysis of crime statistics would show that a large segment of offenders consists of the poor, the illiterate and the unskilled. Such offenders are seen to be victimized twice: once, when they are denied of their basic human needs in open society and forced to live in a sub-culture of social marginality, and, again, when they are grinded in the mill of criminal justice for having infringed the law. Probation would thus be an effective means to deliver justice to them, they would not be incarcerated and also they would be trained which would improve their life later.

The society is also served. The object of society that all its members playing a positive role by seeking their self-rehabilitation is achieved by the probation system, it is indeed an effective method of preserving social solidarity by keeping the law-breakers well under control. Also, during the probation period, the offender is sent to various educational, vocational and industrial institutions where he is

trained for a profession which may help him in securing a livelihood for himself after he is finally released and thus lead an absolutely upright life. And whatever work an offender is doing as a probationer, he is contributing to the national economy. Thus, he no longer remains a burden on the society.

Further, correctional task of probation staff requires closer contact with inmates during his period of probation. This helps the probation supervisor to get a deeper insight into the real causes of crime and suggests remedies for their eradication.

Criticisms against the Concept of Probation and Their Counter

There are some critics who look at probation as a form of leniency towards the offenders. To quote Dr. Walter Reckless, probation like parole, seems to the average laymen a slap thrown to the criminal and a slap at society. Probation is still generally perceived as a lenient approach rather than a selective device for the treatment of offenders who are no threat to public safety. Probation system lays greater emphasis on the offender and in the zeal of reformation the interests of the victim of the delinquents are completely lost sight of. This obviously is against the basic norms of justice. Keeping in view the increasing crime rate and its frightening dimensions, it is assumed that undue emphasis on individual offender at the cost of societal insecurity can hardly be appreciated as a sound penal policy. Some criticize probation because it involves undue interference of non-legal agencies in the judicial work which hampers the cause of justice.

Further, when non-custodial correctional measures are used arbitrarily, without being resorted to on objective grounds, there is danger of men of means taking undue advantage and abusing the system as against those who would really deserve but have no advocacy or support, and of the whole approach becoming counter-productive and coming into public disrepute.

The answers to these criticisms would lie in the fact that the aim of the criminal justice system is to correct the offender and for some offences this would be best done outside the prison. Further, laying down strict guidelines to determine when probation should be awarded would defeat the very purpose of the concept. The broad parameters laid down age of the offender, surrounding circumstances, nature of the offence, etc. provide a broad framework for the judge to apply his discretion. It would also defeat the purpose if probation has to be granted when certain conditions are satisfied, if for example the facts on record show clear pre-meditation to do a wrongful act.

Responding to the other criticism, it is essential that non-legal agencies, namely probation officers, interference is only meant for smooth functioning, and also it is not mandatory for the judge to consider using the probation officer always. He may not ask for a pre-sentence report, may not put the offender under supervision.

Problems in the Practical Implementation of Probation in India

S. 6 of the Probation of Offenders Act, which makes it easier for a person below 21 years of age to benefit from probation. This is regardless of their antecedents, personality and mental attitude. It might lead to recidivism because many of them may not respond favourably to this reformatory mode of treatment. Also, in many cases it is difficult to ascertain whether the delinquent is a first offender or a recidivist.

The Probation of Offenders Act, in sections 4(2) and 6(2), lays down that report of the probation officer is considered before awarding probation. But, the Courts generally have shown scant regard for the pre-sentence report of the probation officer because of lack of faith in integrity and trustworthiness of the Probation Officers. In their view calling for the pre-sentence report would mean unnecessary delay, wastage of time, undue exploitation of the accused by the probation officer and likelihood of biased report being submitted by him, which would jeopardize the interest of the accused and would be contrary to the object envisaged by the correctional penal policy.

On personal interview with some judicial officers and probation officers, conducted by Abdul Hamid, it has come to light that neither judicial officers feel it desirable to get report from the probation officers,

nor the probation officers feel it obligatory on their part to submit their reports in the courts unwarranted.

Section 4 of the Probation of Offenders Act does not make supervision of a person released on probation mandatory when the court orders release of a person on probation on his entering into a bond with or without sureties. This is not in accordance with the probation philosophy, which considers supervision essential in the interests of the offender, against corrective justice.

The lower judiciary in India has not at all taken into consideration the objects and reasons of this act, while applying its discretion in regard to grant of probation. In an umpteen number of cases the accused had to move the High Court and even the Supreme Court to get the relief of probation. If an accused gets relief of probation only in the High Court or the Supreme Court after passing through the turmoil of a long and cumbersome judicial process, he would, psychologically, be diverted towards hardened ness and the whole purpose of the Act would be forfeited.

Variation or discharge of the probationer is based solely on the report of the probation officer; this leaves the probationer at the mercy of the Probation Officer.

The after probation services are not very effective. Thus, even considering that a sentence of probation has been passed and the offender is placed under supervision it is nothing more that a regular visit to the officer. There is no scientific process of rehabilitation and the Probation Officers are not adequately trained. They are recruited between 20 and 26 years of age. They are grouped into districts and supervised by a state/provincial chief. There is no in-service training and occasional refresher courses, and thus they are not adequately trained.

Further, often there is a lack of interest for social service among the probation personnel. Lack of properly qualified personnel, want of adequate supervision and excessive burden of casework are attributed as the three major causes of inefficiency of the probation-staff.

Suggestions To Make Probation Service Fulfil Its Purpose

A few suggestions have been given which may be implemented at the legislative and the administrative level, which would make probation effective in India.

Changes that could be brought about in the law are enumerated below. These changes are mostly applicable to the Probation of Offenders Act as it is more widely applicable than S.360 of the Code.

Due importance must be given to the reports of the probation officers by making necessary amendments in section 4(2) and section 6(2) of the Act. Probation must be based on thorough investigation into the case history of the offender and the circumstances associated with his crime. United Nations Standard Minimum Rules for Non-Custodial Measures also provides that the judicial authority must avail of such a report.

Recidivists have often proved a failure in the process of probation. It has, therefore, been generally accepted that probation should only be confined to the cases of juveniles, first offenders and women offenders. Though S.360 of CrPC lays down that only first offenders will be granted this benefit, if they are not below 21 years of age, no such condition has been laid down in the Act. Necessary amendment may be done to incorporate the same.

It must be made mandatory for offenders to be placed under supervision of a probation officer, by amendment under S.4(3) of the Act, as that would best serve the philosophy of probation. If the officer feels that the offender would not commit a crime, he could then submit to the court an application for the offenders discharge. Also, it has been left to the discretion of the Probation Officer to decide and inform the Court about necessity to vary an order of probation or to discharge the probationer, so there must be a complaint mechanism provided is a probationer wants to complain against a decision concerning the implementation made by the implementing authority, or the failure to take such a decision.

The proviso to S(4) of the Act lays down that probation would be granted only after the offender or his surety, have fixed place of abode or regular occupation. A large segment of offenders consists of the poor, the illiterate and the unskilled. It would not be possible for them to fulfill the conditions in all

cases, hence the proviso should be amended to not make it mandatory, and leave it at the jurisdiction of the Court. Amendment could be made to The Code of Criminal Procedure to include the provisions for pre-sentence report and supervision.

To make the judiciary more responsive, an amendment could be brought about in The Probation of Offenders Act which would make it mandatory for the judiciary to lay down the grounds as to why the benefit of probation must not be given, on the lines of S.361 of the Code.

The provisions under the Probation of Offenders Act and the Code of Criminal Procedure could be amended to be similar to the Juvenile Justice (Care and Protection of Children) Act, where more detailed procedures are laid down, like for the setting up of observation homes, report of the probation officer.

Changes could be brought about in the way administration deals with probation. Some of them are enumerated below.

India, being a developing country can't spend heavily on correctional measures, as its emphasis would be more on economic improvement. Due to lack of economic resources most developing countries violate the UN Standard Minimum Rules. It wouldn't be possible for India to adopt all of the measures prescribed by the UN, but India could adopt a few of the measures.

The first among them must be to have trained probation personnel. This isn't there today because the task of the probation officers is not given much importance in India. It is considered to be a mere formality, but if utilized well they would be most effective. The quality of probation service must be improved by making the service conditions of the probation staff more lucrative. This will attract well-qualified and competent persons to the profession. The probation personnel ought to be specially trained so that they can discharge their duty as probation officer competently.

A nation-wide uniform scheme of training for probation personnel with emphasis on social-work and rehabilitative techniques would serve a useful purpose to improve the efficacy of probation service in India. Guidelines for the training of Probation officers as have been laid down in the United Nations Standard Minimum Rules for Non-Custodial Measures, may be followed to the extent possible.

South Africa, though a developing country makes it necessary that desired entrants have degrees in criminology, psychology, or social work. There are also monitoring staff who work parallel to probation officers. Loans are offered for full and part-time study and short courses. Thus it is no excuse that probation may be implemented only in the developed and rich countries.

Further an increased investment on correctional services for the poor, illiterate and unskilled would be most productive not only in reducing crime but also in improving the quality of life among the strata they come from and are ultimately to return to. The Kerala Government has provided for an After Care Programme to rehabilitate probationers. They are given an assistance upto Rs.10,000/- per head. By utilizing this amount they can engage in small scale income generating activities. The amount of assistance is. If the amount is insufficient for meeting the expenses this can be attached with some bank loan. Such services could be extended to the rest of India.

Further, this system must be extended to rural courts where there is general lack of social agencies to undertake the task of rehabilitation of offenders. Rural delinquents may be more responsive to this correctional method of treatment than the urban offenders because of their relatively simple life-style. In developing probation and aftercare services it should be ensured that women and children are specially assisted.

In U.S., Prediction Tables are compiled to plan probation strategies. Such tables may help in anticipating the probable result of correctional treatment on different offenders. There, they have proved immensely helpful in estimation of offenders personality for individualized treatment. For example, a juvenile delinquent from a broken home would be less responsive to treatment than a person from a good family background.

The present system in parts of the country, where the offender only has to present himself before the probation officer on a regular basis would not suffice.

At present the work of probation is assigned to different departments in different States. In some states probation service is placed under the Social Welfare Department while in others in functions under the Panchayat Department or the Home Department. It is advisable to have an independent Department of correctional Services on the pattern of the state of Gujarat at the national level to exclusively deal with rehabilitation of offenders, of which probation is one of the techniques.

An attitudinal change, must be sought and brought about among the judicial officers towards the significance of the probation system, this would make the concept more workable and beneficial. Probation in India as of today is mostly at the States initiative. Instead a central policy towards probation must be formulated.

Conclusion

The object of the criminal justice system is to reform the offender, and to ensure the society its security, and the security of its people by taking steps against the offender. It is thus a correctional measure. This purpose is not fulfilled only by incarceration, other alternative measures like parole, admonition with fine and probation fulfill the purpose equally well.

The benefit of Probation can also be usefully applied to cases where persons on account of family discord, destitution, loss of near relatives, or other causes of like nature, attempt to put an end to their own lives.

Its aim is to reform the offender and to make him see the right path. This can be achieved as has been said previously, not only by legislative action but also by sincerity on the part of the administration. In some parts of the country it is being implemented in the right spirit. The example of Kerala and Andhra Pradesh have been described in the project.

The success of probation is entirely in the hands of the State Government and the resources it allots to the programmes. Resources are needed to employ trained probation officers, to set up homes for those on probation and also for their training besides others.

Thus while concluding it can be said that the concept of Probation would be effective only where the judiciary and the administration work together there must be a common understanding between the Magistrate (or) Judge and the Probation Officer. Probation would be effective only when there is a sincere attempt made to implement it. It would be of great benefit for a country like India, where the jails are often overcrowded, with frequent human rights violations which would harden the human inside a person. Probation is an affirmation of the human inside every being and it must be given de importance.

Unit-V Parole

1. The concept of Parole and object of parole
2. Parole and Probation Compared
3. Parole Distinguished from Furlough
4. Parole in India
5. Structural set up of Parole Boards and their functions
6. Conditions of Parole
7. Judicial Trend
8. Parole Violation

Parole is the provisional release of a prisoner who agrees to certain conditions prior to the completion of the maximum sentence period. Originating from the French *parole* ("voice", "spoken words"), the term became associated during the Middle Ages with the release of prisoners who gave their word. Parole is an integral part of the correctional process. It is a kind of consideration granted to the prisoners to help them to come back into the mainstream of life. It is nothing but an instrument of social rehabilitation of the prisoner. In recent times, however, the concept has seen a wide shift with parole been utilized by the rich and influential class to escape the prison sentence. Thus, we have the infamous examples of Manu Sharma, Bibi Jagir Kaur or Biti Mohanty who are enjoying the intermittent bliss of free life, even after committing heinous offences and conviction. In contrast, stands the lakhs of other prisoners, whose pleas of parole fall in deaf ears, and being poor and uninfluential, they do not have means to utilize the process or are unjustifiably refused the benefit on flimsy grounds. The present article is an attempt to revisit the concept of parole, its underlying object, means and processes in the legal system and finally, the issues which are of immediate concern in recent times.

Concept and Philosophy behind Parole

The word 'Parole' comes from the French word "*je donne ma parole*" meaning 'I give my word', while the dictionary definition is 'word of honour'. The term 'parole' was first coined in a correctional context in 1847 by Samvel G. Howe, a Boston penal reformer. Later, Parole was introduced by Brockway Zebulon in the year 1876 as a way to reduce jail overcrowding and at the same time as a way to rehabilitate prisoners by encouraging them to win their way out of prison through good behavior. Parole is rewards granted to prisoners for good behavior, they entail a reduction in the number of years and months one serves in prison.

Parole had its root in the Positivist School. The Classical School of thought opined that people are free to choose their own conduct. While committing any crime, an offender always calculates his gain, his pleasure, at the cost of other's pain. So he must be punished. But the Positivist school argued that it is the circumstance which forces anybody to commit crime. So he must be rehabilitated. From there the thought of parole arose. It provides a second chance to the prisoner to rehabilitate himself. The offender might have committed an offence, but it is not desirable that he always be labeled and must not be given any chance to rehabilitate himself. Its objectives are twofold: the rehabilitation of the offender and the protection of society. It is a means of helping the inmate to become a law-abiding citizen, while at the same time ensuring that he does not misbehave or return to crime.

Parole ideally includes treatment in the form of supervision, guidance and assistance. It has been rightly held that all released prisoners can benefit from the guidance of parole officers, but the benefit

that society itself would derive if all prisoners were kept under close surveillance during the period of adjustment immediately following incarceration, is also considerable. A prisoner who has spent a decade inside has lost touch with the everyday world of transport, shopping and renting, but has gained a set of different everyday living skills relevant to prison life that needs to be unlearned. Parole gives a chance of reformation to the prisoner. It can have a positive impact towards changing the prisoner's attitude to what they have done and make them come to accept that their behavior was wrong.

Theoretical Foundations of Parole

There are a number of theories which state as to how and why parole as a means of reformation has come into being and provide the rationale in introducing the same into the criminal justice system.

Grace Theory: The theory draws its vitality from Justice Cardozo's famous dictum in *Escoe v Zerbst* that "probation or suspension of sentence comes as an act of grace". Under the grace theory, both the establishment of a parole system and the release of an individual prisoner are gratuitous acts by a merciful executive. Parole is analogized to a pardon, the grant of which was "an act of grace". Using the grace theory, the courts have been able to dismiss the possibility of prisoners' rights to be paroled and to minimize the legal protections accorded a parolee's limited freedom. "When the board grants a parole, it does so as a matter of grace and not as a duty". According to the theory, since parole is a gift, it may be conditioned as the grantor pleases. Thus, in permitting revocation of the gift, whatever the grounds of revocation, the courts can maintain a defensible position.

Contract Theory: When the parolee leaves the prison, he often signs a form setting forth the conditions of his release. This formality has given rise to the contract theory. The parolee accepts the conditions of his parole just as a party to a business contract agrees to be legally bound by its terms. Because he has accepted the parole terms, whatever rights they cut off, the parolee is stopped from complaining about those terms. As all of the meanings derive from the French parole meaning 'word', the term came to be associated with the release of prisoners based on their word of honor to abide by certain restrictions. Consistent with the contract concept, theoretically, the parolee may reject the proffered terms. The rejection option finds its origin in *United States v. Wilson*. The Court noted that acceptance was a requisite of an effective pardon.

Custody Theory: Parole statutes specifically state that parolees remain in the legal custody of the warden, parole board, or other agent of the executive. From this, courts have derived the custody theory. Parole "is in legal effect imprisonment", and the parolee is "constructively a prisoner...fettered by the conditions and restrictions of his parole". The parolee is in "substantially the same position as a 'trustee'....". A violation of the conditions of his release relegates him to the status of an escaped prisoner. As are the other theories, the custody theory is often used to insulate parole matters from judicial examination and review on both non constitutional and constitutional grounds. The parolee is limited to the status of an inmate, and parole is the administrative exercise of the prison discipline authority, subject to the wide discretion granted prison officials when dealing with persons committed to their custody.

Exhausted Rights: The exhausted rights theory is a concomitant of the custody theory. Its origins lie in the view that parole is a part of the prison system, and not a part of the sentencing process. After the accused is convicted by a trial in which all his rights are protected, "constitutional guarantees ... do not extend to a later enforcement of punishment already validly imposed." In short, the theory posits that the accused is entitled to a fixed quantum of due process protection, and that this is satisfied by his original trial and sentence. The prisoner's due process rights are then exhausted until the end of his maximum sentence. This theory is clearly addressed to the "criminal case" and "criminal prosecutions" applications of the fifth and sixth amendments, and seeks to insulate the parole process from applications of the amendments by denying that post-conviction disposition is within their scope.

Parens Patriae: Closely tied to custody is the parens patriae theory. Based on the rehabilitation model of correction, parens patriae limits the rights of prisoners and parolees on the basis of a

perceived need for great discretion and flexibility in rehabilitating the parolee. It assumes that “the Board of Parole as an identity of interest with the parolee ... to foster his rehabilitation...” because one need not be protected from another who has an identity of interest, the theory serves to insulate the parolee from judicial concern. This rationale and the consequences of this theory are comparable to those long applied in the juvenile law area, but rejected not many years ago in *In re Gault*.

Parole in India

In India, the grant of Parole is largely governed by the rules made under the Prison Act, 1894 and Prisoner Act, 1900. Each of the States has its own parole rules, which have minor variations with each other. There are two types of parole- custody and regular. The custody parole is granted in emergency circumstances like death in the family, serious illness or marriage in the family. It is limited to a time span of six hours during which the prisoner is escorted to the place of visit and return there from. The grant of parole is subject to verification of the circumstances from the concerned police station and is granted by the Superintendent of Jail.

Regular Parole is allowed for a maximum period of one month, except in special circumstances, to convicts who have served at least one year in prison. It is granted on certain grounds such as:

- Serious Illness of a family member
- Accident or Death of a family member
- Marriage of a member of the family
- Delivery of Child by wife of the convict
- Maintain family or social ties
- Serious damage to life or property of the family of convict by natural calamities
- Pursue filing of a Special Leave Petition.

Certain categories of convicts are not eligible for being released on parole like prisoners involved in offences against the State, or threats to national security, non-citizens of India etc. People convicted of murder and rape of children or multiple murders etc. are also exempted except at the discretion of the granting authority.

As per procedure, after an inmate seeks parole, jail authority (Superintendent) asks for a report from the police station that had made the arrest. The report, with all other papers like medical report (in case of illness being reason for parole), recommendation of the Superintendent are then sent to the Deputy Secretary, Home (General), State Government which decides on the application. In some States, the application along with the police report and recommendation is sent to the Inspector General of Prison, which is then considered by the District Magistrate. The State Government takes the decision in consultation with the District Magistrate. A prisoner who overstays parole is deemed to have committed an offence under Section 224 Indian Penal Code, 1860 and may be prosecuted with Government sanction and forfeit all remissions earned.

Judicial Approach towards Grant of Parole

Penological innovation in the shape of parole is claimed to be a success in rehabilitation and checking recidivism. That's the view of the Indian judiciary. In *Mohinder Singh*, parole has been defined as “a conditional release of a prisoner, generally under supervision of a parole officer, who has served part of the term for which he was sentenced to prison”. Parole relates to executive action taken after the door has been closed on a convict. During parole period there is no suspension of sentence but the sentence is actually continuing to run during that period also.”

In *Babu Singh and Ors. v State of U.P.*, Justice Krishna Iyer remarked that “It is not out of place to mention that if the State takes up a flexible attitude it may be possible to permit long spells of parole, under controlled conditions, so that fear that the full freedom if bailed out, might be abused may be eliminated by this experimental measure, punctuated by reversion to prison. Unremitting insulation in the harsh and hardened company of prisoners leads to many unmentionable vices that humanizing interludes of parole are part of the compassionate constitutionalism of our system”.

In *Babulal Das v The State of West Bengal*, the Court opined that persons kept incarcerated and embittered without trial should be given some chance to reform themselves by reasonable recourse to the parole power ... calculated risks, by release for short periods may, perhaps, be a social gain, the beneficent jurisdiction being wisely exercised. Again in *Inder Singh v The State (Delhi Administration)* the Court has emphasized on the need for liberal use of parole even in the case of heinous crimes.

In the recent case of *C.A. Pious v The State of Kerala and Anr.*, while discussing the scope of the term 'life imprisonment', the apex court held "In our view, penal humanitarianism and rehabilitative desideratum warrant liberal paroles, subject to security safeguards, and other humanizing strategies for inmates so that the dignity and worth of the human person are not desecrated by making mass jails anthropoid zoos. Human rights awareness must infuse institutional reform and search for alternatives." It added that "Section 433A Cr PC does not forbid parole or other release within the 14-year span. So to interpret the section as to intensify inner tension and intermissions of freedom is to do violence to language and liberty."

Critical Issues in Parole

Two significant issues arise in case of Parole in contemporary India- one, the refusal of grant of parole on insufficient grounds and second, the misuse of parole. A glance at the statics of Prison Population in the year 2011 reveals that there are about 128592 convicts lodged in different prisons in India. These persons have been found guilty of different offences under the Penal Code and special laws. Out of that, 28581 have been temporarily released in the year 2011, just about 22% of the prison population. Some states have recorded an appreciable number of released convicts like Punjab, Tamil Nadu, Haryana, while other States have recorded substantially low numbers in this regard. Though the release of prisoners is dependent upon several factors, it is important to emphasize that probably the provision of parole is not being utilized to the full.

Misuse of Parole: A Route of escape and Reoffending?

While the notion of parole has been emphasized and re-emphasized by the Judiciary and penologists alike to reduce the ills of prison life, whether parole really serves a purpose or provides a means to escape becomes a significant question. The recent case of Manu Sharma drew the ire of the entire nation towards a casual prison administration, and an even more casual State Government, which granted and vociferously supported the grant of Parole to a convict in the Jessica Murder case.

In *Sidharth Vashisht @ Manu Sharma v The State (N.C.T. of Delhi)*, Manu Sharma murdered Jessica on 30th April, 1999 at about 2 a.m. Manu belonged to a rich influential political family. On 20th December, 2008 he was sentenced with life imprisonment and fined by the Delhi High Court. On 24th September, 2009, he was granted parole for one month. Later it was extended to one more month. Manu Sharma asked for parole on three grounds: to attend religious rites for his late grandmother, to tend to his ageing mother and, as the largest shareholder of Piccadilly Industries, to take care of the family's business interest. He returned to Jail on 10th November, 2009, only after he was traced to a Delhi pub enjoying his night life with friends, drinks and dance. Media flashed the same in national newspapers. Meanwhile, his (ill) mother was found attending programs and functions in different parts of the capital. Investigation further revealed that his grandmother passed away on April, 2008 and he was appealing for parole on that very ground after one year and seven months of her passing away. Again on November 2011, the High Court granted him five days parole to attend his brother's wedding, but on the condition that he should not visit any clubs or discos. "Interestingly, the parole was granted despite Sharma violating his earlier parole. Justice VK Shali, while issuing notice to the Delhi Police on Sharma's application, had mentioned his conduct while he was on parole pointing out that he visited discotheques in violation of parole conditions. 'He need not attend all (wedding functions),' Shali had commented earlier while rejecting his request for parole from 10-20 November. The Delhi Police, however, did a U-turn on their earlier stand of opposing parole for Sharma. Senior

lawyer Pawan Sharma, appearing for the Delhi Police, did not oppose Sharma's parole plea but told the court that they had "no objection" if he gave an undertaking to the court that he would not leave Karnal and Ambala. In its earlier affidavit submitted to the court last week, the Delhi Police had objected to Sharma's plea pointing out that his past conduct did not entitle him to parole."

The day Manu Sharma sauntered out of Delhi's Tihar jail on parole, he left behind over a dozen irate, but helpless prisoners. They too had applied for parole, much before him; their reasons were as varied as a marriage in the family, the settlement of a property dispute and the need to tend to sick family members. However, there's been no word on their applications. Reportedly, till September 15, 2009, the Delhi Government had granted parole to only 11 out of 132 applicants.

Another case is **Bibi Jagir's Kaur**. Bibi Jagir was jailed for her role in her daughter's kidnapping. The murder charges against her had been dropped. She was sentenced to 5 years imprisonment. She was granted parole just after 4 months of her imprisonment. It was reported that preferential treatment had been extended to her as she was the former Cabinet Minister of Punjab.

The latest case on parole is **Bibi Mohanty** case. The convict, in the instant case, the son of a DGP, Orissa, was sentenced for rape of a German national. He was sentenced to seven years rigorous imprisonment along with fine. In November 2006, he was granted fifteen days parole to visit his ailing mother. At that moment his father stood as his surety. However, soon thereafter, he escaped and his father pleaded ignorance about his whereabouts. A significant period of seven years elapsed, after which on a tip off, the police was able to arrest him from Kerala in March, 2013. The convict had, by then, changed his identity, and refused to reveal himself as Biti Mohanty. His father, seconded him, refusing to accept that the person arrested was his son. A court has recently ordered the DNA profiling of the convict to establish his identity.

An audit finding of Comptroller and Auditor General (CAG) also showed how parole granted to prisoners had not only been abused but in a majority of the cases jailbirds had made it a favourite escape route. The auditor called for records from Amritsar central jail and from four Superintendents of Police and found that more than 8,200 prisoners convicted for serious crimes under NDPS Act, murder, rioting, armed with deadly weapons etc., and released on parole between May 2001 and May 2008, did not surrender even after expiry of their parole period.

Looking at the seriousness of the issue, CAG brought the matter to the notice of the Centre when it found that late reporting of non-surrender of prisoners by the SPs coupled with inaction on the part of SPs, SHOs and DMs facilitated the offenders to misuse the facility and that it was becoming almost a trend. The police's record of tracking parole jumpers is also dismal. In Maharashtra, only 310 were re-arrested, in Punjab, 80 and in UP, 14 between 2007 and 2011. "Jumping parole is no big deal. Even those convicted for hard crimes are easily able to obtain no-objection certificates about their character, and get parole. From there, it is a short step to not report back to prison," says a senior IPS office.

Parole also provides a dangerous opportunity to a criminal to engage in criminal activities while on parole. As in **Saibanna v State of Karnataka**, the appellant killed his first wife and was serving his life sentence. He was released for a month on parole during which time he killed his second wife and child inflicting as many as 21 injuries on the body of the person. The Supreme Court agreed that the case at hand was a "rarest of rare case" involving pre-planned brutal murders without provocation and that the only condign punishment was sentence of death. In yet another case of **Krishan v State of Haryana** punishment of life imprisonment was awarded where the murder was committed while the accused was already undergoing life imprisonment and was on parole.

Refusal of Parole: Executive Arbitrariness and Apathy

While this is the picture on one side, on the other, stands the dismal apathy of the State Governments to grant parole to prisoners. "Release on parole is a wing of the reformatory process and is expected to provide opportunity to the prisoner to transform himself into a useful citizen. Parole is a grant of partial liberty of lessening of restrictions to a convict prisoner." [xlv] However, in this country, there are

no statutory provisions dealing with the question of grant of parole. The Code of Criminal Procedure, 1973 does not contain any provision for grant of parole. By administrative instructions, however, rules have been framed in various States, regulating the grant of parole. Thus, the action for grant of parole is generally speaking an administrative action.

Parole Rules or administrative instructions, framed by the Government are purely administrative in character and for securing release on parole, a convict has, to approach the Government concerned or the jail authorities. Unfortunately, however, in most cases, the executive acts in a mere mechanical manner, without application of mind and appreciation of facts and refuses the chance of parole to the convicts. The police reports are also prepared without due consideration to ground realities and more often, indicate a threat to law and order or breach of peace, without substantiating the grounds for such apprehension. Thus, in *Asha Ram v State of Rajasthan 1978, CrilJ651*, a letter was addressed to the Court by the convict that he was behind bars for a considerable period and his plea for parole was rejected in view of a baseless police report. The Court examined the report sent by the Superintendent of Police and concluded that the same was vague and uncertain. "It is well settled that the object for grant of parole is to make necessary efforts to rehabilitate a convict-prisoner in the main stream of society. Maintaining of law and order and prevention of breach of peace are the aspects required to be taken care of by the authorities concerned but on vague and uncertain suggestions, the petitioner cannot be denied parole when he is otherwise eligible and entitled therefor." The Court accordingly ordered his release for a period of 20 days with conditions. In *Kesar Singh Guleria v State of Himachal Pradesh and Ors.*, referring to the grounds for declining parole the Court proceeded to hold that a mere disturbance of law and order leading to disorder is not the same as disturbance which subverts the public order. An apprehended breach of peace or the possibility of the prisoner committing a crime during the parole period, without anything more, would constitute a law and order problem and not a problem touching public order. It would thus appear that "public order" comprehends disorder of lesser gravity than those affecting "security of the State" and that "law and order" comprehends disorders of lesser gravity than those affecting "public order". In cases involving problems of law and order, the proper course to be adopted is not to give an opinion that the request for release be rejected but to advise that the release be ordered subject to appropriate conditions, such as, that surveillance be kept over the prisoner during the period of his temporary release and that he asked to report to the nearest police station at appropriate intervals.

Laying down the criteria for probable refusal of parole, the Delhi High Court specified the following:

- i) A reasonable apprehension, based upon material available with the Government such as the circumstances in which the offence is alleged to have been committed by him and the other cases if any in which he is involved, that the petitioner, if released on bail may not return back to Jail to undergo the remaining portion of the sentence awarded to him;
- ii) A serious apprehension of breach of law and order or commission of another offence by the petitioner if he comes out on parole;
- iii) Past conduct of the petitioner such as jumping the bail or parole granted earlier to him;
- iv) A reasonable possibility of the petitioner trying to intimidate or harm those who have deposed against him or their relatives.

The Court emphasized that it is neither possible nor desirable to exhaustively lay down all such grounds as would justify denial of parole in a particular case. Each case has to be examined by the Government dispassionately and with an open mind, taking into consideration all relevant facts and circumstances[li]. In no case, a mechanical rejection of request for release on parole, such as for breach of apprehension of peace, is warranted by law. The competent authority is required to pass reasoned and speaking order, whenever it is to decline request for temporary release specifying danger to the security of the State or of public order and the grounds on which such opinion is held.

Human Rights v. Social Security

The grant of parole is not a matter of right, but a concession granted to the prisoner. The grant is regulated by rules laid down in each state and is a part of executive discretion. Such discretion cannot be exercised arbitrarily or capriciously, without due application of mind. It is important that the power to release a prisoner is exercised objectively keeping in view the intention of the legislature and the purpose of the same.

The grant of parole should be based on twin considerations- human rights and social security. It is important to ensure that the convict is not deprived of his rights as a human being. The imposition of sentence, in itself, impairs the exercise of basic rights granted under the Constitution. The liberties and freedoms remain curtailed during the term of sentence. But that should not take away the fundamental humane considerations of life such as attending to family members in need or an opportunity of happy reunion with family and friends. Long years of incarceration without breaks are more likely to dehumanize the mental frame, while temporary release may soften the criminal proclivities.

The issue of social security is an equal area of concern where the release should not, in any way, interfere with the safety of the community or victims. It is important to ensure that the released convict does not use parole as a means to escape the rigors of law or commit further offences. A fine balance between the twin considerations have to be achieved and the State, including the Prison authorities, have a significant role to play in this regard. Parole decision makers should prepare themselves well before making a decision. They should know about the crime, how the crime affected the victim and what role the offender played. They should understand the pattern of criminality that preceded the crime and the contribution that the offender's social history and life's choices made to his criminality. Decision makers should inform themselves of the inmate's recent behavior in the institution and the inmate's needs and responsibilities on returning. The grounds on which parole is sought have to be satisfactorily established and thereupon, the decision of parole has to be objectively determined. Additionally, they must satisfy themselves, that the grant of parole should not send a wrong message to the society. The impact of parole on people should be carefully understood and appreciated.

The grant of parole to a particular convict should be based on considerations such as:

Nature of Offence and circumstances related thereto;

Time spent in prison;

Conduct of the convict;

Previous antecedents, if any;

Possibility of engaging in illegal activities, committing crimes, during the period;

Possibility of seeking vengeance, causing harassment, in specific categories of crimes;

Impact of release on society;

The decision of the State to accept or reject parole must be communicated to the convict at the earliest, along with the reasons for the same. A reasoned decision or speaking order lies at the root of fair decision-making process. The State should attempt to make more liberal use of the provision, with variations made, only in sparing cases of threats to security of State or public order. Even there, as has been earlier reiterated, an endeavor should be made to release the prisoner with such conditions as would hold him down and compel him to adhere to good conduct.

The current trend in India of grant to parole to politically influential people or wealthy groups is indeed disturbing and speaks volumes of the ludicrous manner in which the State determines cases before it. In spite of repeated judicial interventions in this regard, the State has done little to indicate the changes being made in this regard. The State government, with its known biases and political leanings, have continued to take decisions favorable to certain categories of people, while refusing innumerable others who may have justified grounds for seeking such release. Therefore, it is important to emphasize that the State must take fair, reasonable and unbiased decision for grant of parole and the same should be clarified in each case

Conclusion

The call for freedom and liberty is the highest call of conscience. The concept of parole is in line with the call of human mind to break free from the shackles of confinement and establish oneself in the warmth of societal love and acceptance. However it is more easily said than done. While the philosophy behind parole has been hailed and the judiciary has called for a liberal use of parole, the subjective satisfaction of the executive in grant of the same has posed a major roadblock in recent times. Inconsistent orders based on irrelevant grounds, callous police reports, misuse of the same to appease people in power and position has devoid the concept of its underlying purpose and utility. Probably, the fault lies, not in the underlying nobility with which it has been conceived, but in the manner of its usage. The State has displayed a lack of sound consideration in matters of determination of parole. It is important to revisit and relook at the existing system of Parole in India and give it some serious consideration

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