Chapter XI

ALCOHOLISM, DRUG ADDICTION AND CRIME

Alcoholism and drug addiction may be conceptualised as crime without victim, *i.e.*, addict himself is the victim who becomes a prey of its misuse.[1] This devastating melody is eroding the roots of social, economic and cultural fibre of Indian society. It gives rise to criminality and criminal behaviour which eventually leads to social disorganisation.

Alcoholism and drug habituation has been prevalent in most socities over the ages because of their allegedly pleasurable and relaxing effects or as a means of relieving physical tensions, fatigue and as stimulant to withstand adversities. However, with the unprecedented expansion of pharmaceutical industry, the use, abuse and misuse of alcohol and drugs has increased[2] leaps and bounds covering almost all sections of society.

Alcoholism and drug addiction are indicative of the irresponsibility and weakness of the character of the persons using these intoxicants. The relation between alcoholism and various aggressive and criminal acts is often confirmed by police records and prison statistics which indicate that in the present day there is a considerable increase in such alcoholic-criminal episodes.[3] Experience has shown that various preventive and punitive measures such as fine, imprisonment or detention for drukenness and other disorderly behaviours have failed in eliminating this menace.

It has been generally agreed that criminality in human beings is to be attributed to their mental depravity. Persons with balanced emotional and physical health normally do not indulge in criminality or aggressive conduct ; nor do they take to alcoholism beyond control. Investigations made by sociologists and criminologists on alcohol-crime relationship reveal that there is a close resemblance between the structure of alcoholics and criminals. This proposition brings us to the following conclusions regarding the impact of alcoholism and drug-addicts on criminality[4] :

(1) Crimes are often planned in liquor shops and bars where alcohol is sold.

(2) Offenders generally consume liquor and alcohol or drugs to overcome their inhibitions and emotional strains.

(3) The booty and gains of crime are often distributed and shared in

1. P. Kundram & V.N. Murty, "Drug Abuse And Crime : A Preliminary Study" (1979) 7 Indian Jour. Crime 65-68.
2. J.K. Mason : Forensic Medicine For Lawyers (1983) p. 251.
3. Robert Seliger's Articles on "Alcohol and Crime" published in the Journal of Criminal Law and Criminology XLI (May-June, 1950), pp. 24-31.
4. *Ibid.*

liquor or wine-shops.

(4) Alcohol and narcotic drugs help to remove the element of self-criticism from the criminal in relation to himself and his acts.

(5) Juvenile delinquency and drinking are intimately connected.

(6) The illegality of purchase and possession of alcohol and narcotic drugs make alcoholics or drug addicts delinquent *ipso facto*.

(7) Alcoholism and drug addiction being forbidden by law, their procurement gives rise to a number of related crimes such as illicit spirit-distilling, smuggling of wine or intoxicating drugs, racketeering, drug trafficking underhand deals in transmission of alcohol and narcotics from one place to another and bribing the officials to escape arrest and punishment.

(8) Research studies have shown that alcohol is more contributory to criminality than other drugs, probably because its legal and common usage makes it readily available.

Of late, drug abuse seems to have become a fashion for fun to relieve boredom, to get rid of tensions at home and in society, to feel good and high, to revolt against establishment, to heighten sexual experience, improve studying and so on.

Main Causes of Drug Addiction :

Alcoholics and drug addicts take to drinking or use of drugs for a variety of reasons. The factors mainly responsible for the spread of this evil are :—

1. Rapid industrialisation and urbanisation have ushered a new way of life with new values like permissiveness. As a result, the age-old inhibitions, taboos and traditional social control mechanisms have ceased to have force. Many cases of drug or alcohol addicts arise after apparent failure in business or professional life.[1] Unemployment is also an important factor contributing to drug and alcohol addiction especially among youths.

2. The lack of parental care and control partly due to working situation of both spouses and disintegration of joint family system are also contributory factors to encourage this vice. The manace of drug abuse is more common among the middle, upper-middle, and high economic class families. Urban areas seem to be more affected by this vice.

3. The recent developments in pharmarceutical and medical sciences have provided scope for production of a variety of toxic synthetic substances. This has contributed substantially to drug-abuse and addiction.

4. People often take drugs for relief from painful illness and ultimately get addicted to it. Besides, there are some addicts whose neurological heritage is such that they find it difficult to

1. H.R. Sharma & D. Mohan "Drug Abuse in India : Prevalence, Pattern, Policy and Prevention" Social Defence Vol XVI No. 63 (1981) p. 63.

survive without the use of alcohol or narcotic drugs and this ultimately makes them habitual alcoholics or drug addicts.

5. Frustration and emotional stress due to failures, sorrows or miseries of life, diverts people to join the company of addicts. For them drugs or alcohol is a medicine—a blessing in disguise.[1] In course of time they become addicted to this vice.

6. Hippie-culture also detracts youngsters to drug addiction and they start it as a 'fun' or enjoyment. They start consuming drugs or alcohol on an experimental basis out of fun and enjoyment. The frequency of consumption gradually increases due to its narcotic effect and finally a good majority of them turn out to be drug addicts and habituals.

7. The lack of knowledge of child psychology and communication-gap between parents and young addicts are also contributory factors for drug-abuse and alcoholism. People who do manual work often believe that use of drugs such as alcohol, opium, *ganja* etc. provides them added strength and vigour to withstand hard labour. This delusion of physical vitality by use of alcohol or narcotic drugs ultimately makes them confirmed addicts.

8. Social disorganisation is also a contributing factor for the menace of drug abuse or misuse. Frequent family strifes and breakdowns due to poverty, temperamental differences, neighbourhood influences etc. may divert a person to alcohol or drug consumption to overcome his domestic and family problems. This may itself be a cause of tension and quarrel in the family. Such persons ultimately fall a prey to drug abuse.

Thus the process of alcoholism and drug-addiction sets in when a person knowingly or unknowingly begins to consume alcohol or narcotic-drug as a medicine for a sound sleep at night or to get stimulation for work or to get relief from domestic problems or to repress depression, resentment, or to get rid of disturbing mental restlessness and so on.[2] He prefers to remain in the world of imagination rather than facing realities of life. Gradually, he becomes addicted to alcohol or drug consumption and his dependence on these intoxicants increases at a relatively faster rate. Finally, he reaches a stage when he cannot live without wine or drug since it becomes his life-habit.

It must be stated that the use of opium and cannabis in the form of *ganja* and *bhang* was tolerated in India and had a religious sanction but addiction to them was confined to aged persons only. In modern times addiction has affected the Indian society to such an extent that even journalists, politicians, educationists etc. have started talking about this problem, particularly in college campuses. The spectrum of drugs abuse today is very wide covering the drugs of plant origin and a number of synthetic drugs of varying potency.

The National Committee on Drug Addiction was set up by the

1. George Caltin. E.G : Alcoholism In the Encyclopaedia of Social Sciences (1930) p. 155.
2. Dressler David : Readings in Criminology & Penology (1966 Reprint) p. 103.

Government of India in 1976 to enquire into—

(i) the extent of addiction to drugs in the country ;

(ii) to determine motivation for drug addiction ;

(iii) to identify types of drugs that are misused and suggest steps to prevent misuse ;

(iv) to recommend suitable de-addiction and rehabilitation programmes.

The Committee in its Report suggested establishment of a National Advisory Board on Drug Control. It outlined the need for cooperation of Police, Excise and Drug Control Departments to curb this menace and necessity for creating awareness against drug addiction in the public. A Narcotics Central Board was established in 1985 under the Act.

International Perspective of the Problem.

With the rapid expansion of trade and commerce beyond national boundaries, the problem of drug addiction and trafficking has become a global phenomenon. Therefore, as a measure of drug control, a thirteen-nation international conference on narcotic drugs was held in China[1] in 1909. Thereafter, the International Opinium Convention called the Hague Convention on Narcotics was held in 1912 which was the first drug traffic control treaty at the international level. This was followed by a series of conventions and declarations which were made to combat illegal drug trafficking.

One of the most important conventions in this regard was the Single Convention on Narcotic Drugs, 1961 (SCND) which attempted to simplify and consolidate international drug control machinery. The convention codified all the existing multi-national treaties and merged the Permanent Central Board and Drug Supervisory Board into a Single International Narcotics Control Board (INCB) in 1961. It has been assigned the responsibility of ensuring the balance between supply and demand for narcotics purposes and make all out efforts to prevent illicit drug cultivation, manufacture, traffic and misuse.

Article 38 *proviso* (1) of SCND insists that facilities for medical treatment, care and rehabilitation should be provided.

The Protocol of 1972 brought about a further improvement in SCND. It came into force on August 8, 1975. It insists on prior authorisation for the cultivation, production, manufacture, conversion and compounding of, preparations, trade, distribution and import or export of drugs. It also emphasised the need for treatment and rehabilitation of drug abusers as an alternative to their incarceration in prison. Under the Protocol, the International Narcotics Control Board (INCB) was assigned the responsibility of ensuring a balance between supply and demand of narcotic purposes and for endeavouring to prevent illicit cultivation, manufacture or use of drugs.

Another International Convention on prevention, abuse and illegal trafficking in narcotics called the Convention on Psychotropic Substances was signed in 1971 which came into force on 16 August, 1976. The

1. This was termed as Opium Commission in China (1909).

convention has stressed the need for prevention of abuse of psychotropic substances and early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved.[1] This was followed by setting up a five-years action programme by the General Assembly of the United Nations in 1981 under the International Drug Abuse Control Strategy. It provides for a number of measures dealing with drug control, drug trafficking and treatment and rehabilitation strategy for addicts. It also seeks to intensify efforts to dismantle illegal drug-trafficking gangs and organisations.

An International Conference on Drug Control was held in Vienna from 17 to 26 June, 1987 under the auspices of United Nations. It focused attention on drug control policies and strategies which could be enforced at the national, regional and international level to prevent drug abuse and illegal trafficking of narcotic substances.

It must be stated that drug abuse is not only a national problem but it has transgressed the national boundaries and has become an international problem. It has, therefore, been realised in recent years that no country can deal with this problem of abuse of drugs without international co-operation and action. The Commission on Narcotics Drugs in close colloboration with the World Health Organisation adopted a convention on psychotropic substances and India has enacted the Narcotic Drugs & Psychotropic Substances Act, 1985 to prevent drug-addiction. This Act was amended in 1988 and called the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988. It provides for death penalty on conviction for a second drug trafficking offence.

An International Conference on Global Drugs Law was organised by the Indian Law Institute, Delhi, in co-sponsorship with the UNDCP[2] and the International Law Association (India Regional Branch) from February 28 to March 3 in 1997. The conference reiterated its faith in human dignity and the legitimate aspiration of humankind for a decent life. It emphasised the need for generating universal consciousness of, and determination to battle, the drug problem in all its pervasive forms at the national, regional and international level. The conference, *inter alia* resolved :—

1. to accelerate the struggle against the scourge of drugs and to adopt measures to strengthen international co-operation and multi-disciplinary approach to tackle the problem.
2. to formulate effective strategy against drug-abuse, illicit production and trafficking within the framework of guidelines in major international conventions;
3. to prevent and control the supply of drugs to affluent nations as the bulk of demand for drugs comes from these nations;
4. to formulate a comprehensive system for the collection, evaluation and dissemination of relevant data relating to drugs;
5. to workout an effective education programme for counteracting drug abuse worldwide and preparing training and educational material for the young people to assist them in developing

1. Art. 20(1) of the Convention on Psychotrophic Substances Act, 1971,
2. UNDCP stands for United Nations International Drug Control Programme.

vocational and self-employment opportunities;

6. to ensure proper enforcement of a system of the international control of narcotic drugs which includes control of cultivation, production, manufacture, use, demand and supply of drugs for illicit use;
7. to ensure absolute curtailment of the enormous funds generated from the drug trade by means of money laundering;
8. to create a special task-force of committed honest personnel having the sanction of relevant government agency to infiltrate the network of drug trade operators and bring them to justice.

The participants of the Conference recognised the fact that fight against drug-related crime is undermined by corruption, therefore, the State must review the effectiveness of their national laws and strategies against corruption.

Illicit Drug Trafficking

Illicit drug trafficking is so complex in nature that it involves a large variety of drugs from many sources throughout the world. It not only violates national drug laws and international conventions but also involves several other allied activities such as racketeering, conspiracy, bribery and corruption, tax-evasion, illegal money transactions, violation of import and export laws, crimes of violence and terrorism. The wide range of illegal and criminal activities associated with illegal drug trafficking poses a threat to law-enforcement agencies throughout the globe.

Considering the ever-increasing demand and consumption of liquor, opium, heroin etc. and huge profit in their illicit trafficking, the legislative control measures have not been able to countenance the menace, particularly because big tycoons and drug syndicates having international linkage are involved in this illegal trade.

In the Indian context, the geographical location of this country is most suited to the unabated inflow of drugs and illicit drug products by sea and land routes from all sides. Iran, Afghanistan and Pakistan which are the largest producers of opium, manufacture heroine from it and the same is smuggled into India. So is also the case with North-East neighbouring countries namely, Burma, Thailand and Laos. The State of Bihar provides entry-route for *ganja* from Nepal. Quite a large quantity of opium and cannabis are being illicitly cultivated within India itself, besides the licensed cultivation for medical purposes.[1] All these factors cumultatively provide a fertile ground for illicit drug trafficking both within and outside the country.

On-Line Drug Trafficking—A Menace

The International Narcotics Control Board (INCB) in its annual report released on 20th February 2001 observed that internet is fast becoming a growing source of on-line trafficking since it provides an easy access to controlled substances including narcotic drugs and psychotropic substances like benzodiazepines, barbiturates and various amphetamine-type

1. S.V. Joga Rao : Law & Policy on Drug Trafficking—A Phenomelogical Study 35 J.I.L.I. (1993) p. 56-57.

stimulants. While expressing concern over on-line shopping the report said that widespread overuse of controlled drugs to treat psychological problems caused by social pressures needs to be restricted by legal measures. With the expansion of internet shopping in recent years not only the internet sales have expanded but some companies are openly advertising on Internet that they provide controlled drugs without prescription. The remedy suggested by INCB is that countries should introduce legislative changes to allow prosecution of illicit internet drugstores. Shri C. Chakraborty, member of INCB has suggested that the government should take preventive measures to restrict the "excessive availability" of controlled drugs on-line shopping as over-medication leads to untold physical and mental suffering.[1]

Classification of Drugs

The International Convention on Drugs to which India is a signatory has classified drugs under two categories :—(a) Narcotic Drugs; and (b) Psychotropic Substances.

(a) Narcotic Drugs.—The main drugs covered under this head are the following :—

(i) Opium[2] and its derivatives like brown sugar, heroin and codeine,

(ii) Cocoleaf, cocaine ;

(iii) Cannabis, cannabis resin, extracts and tinctures ;

(iv) Methadene, pethedine, hebaine.

(b) Psychotrophic Substances include valium, daizepam, tidijesic, morphine etc.

Alcoholism

Like drug-addiction, alcoholism also causes disillusionment, unhappiness and troubles in family life. An alcoholic finds it difficult to adjust with other people and so are the others uncomfortable with him due to his drinking-habit. The mental faculty of an alcoholic does not function in a normal way with the result he loses self-control and often behaves improperly at times picking up quarrels, accusing, abusing or insulting others or committing acts of aggression and violence. Thus an alcoholic, while he is drunk is an irresponsible person faultering and pampering in many ways and prone to criminality at any moment. The acts of indecency or assault are usually committed by the persons who are under the influence of liquor or narcotic drugs.

The abuse of drugs[3] and alcoholism spells disaster not only for the addict but also to his family and the society as a whole. It affects the individual's health and upsets his family life. That apart, these evils give rise to law and order problems, reduction in economic production and retards human welfare. Some of these drugs alter the senses while others cause depression. They are mostly derived from herbs and plants.

1. Annual Report of the International Narcotics Control Board dated 21st February, 2001.
2. Opium is taken from opium poppy called "*papaver somniferum*" and is generally used as pain killer and hypnotic in certain regions of India.
3. These include drugs such as morphine, opium, heroin, cocaine, hashish, brown sugar etc.

Drug-Addicts and Crime

Besides alcoholism, drug-addiction is also closely interconnected with crime. Compulsion for narcotic makes every drug-addict a law-violator and criminal. Mere possession of narcotic is also an offence punishable under the law and therefore drug-addiction by itself adds to the crime-statistics.

American researches on relationship between drug-addiction and crime have shown that narcotic addicts often commit predatory crimes such as larceny, shop-lifting, stealing, burglary, robbery etc. The drug-addicts generally lead a criminal life. It is often noticed that addicts of narcotic drugs mostly resort to theft to obtain money for procuring drugs.[1] Most persons become delinquent after they have started use of narcotic drugs. Many violent offenders take narcotic drugs to get stimulation and courage and commit violent acts such as murder, burglary, extortion, rape etc. which they might not otherwise commit when not drugged.[2] *Dr. Kolb*, however, disagreed with this view and suggested that crimes committed by opiate addicts are generally of a parasitic, predatory and non-violent type. If drug addicts commit violent crimes it is not because they are addicts, but because so many of them are psychopaths. *Dr. Kolb* further observed that narcotics like opium, heroin, morphine and cocaine change the violent fighting psychopaths into dull, cowardly non-aggressive idlers. In his view, drug addiction eliminates or at least reduces sex-desire of the addict.

Another question which is too often raised in context of criminal traits of drug addicts is whether criminality in them precedes or follows addiction. That is to say, whether the addicts are already delinquents before they take to addiction or they become so subsequently. Conflicting views have been expressed on this point by *Prof. Percor* and *Dr. Kolb*. An intensive study of 1,036 addicts undertaken by *Prof. Parcor* in Lexington that seventy-five per cent of them had no history of delinquency prior to addiction.[3] *Anslinger*, however, has expressed a contrary view and suggested that drug-addicts are already criminals before they take to addiction.[4] *Dr. Kolb* also studied a group of 119 persons who became drug-addicts as a result of medical prescription of narcotics for ailments and found that ninety of them were without any prior career of delinquency[5] and crime. The studies conducted by the researchers of New York and Chicago Universities, however, suggest that delinquency precedes as well as follows addiction. Be that as it may, it is now generally agreed that after addiction, the criminal hardly sheds off his habit of delinquency as he adopts it as a way of life with his advancing age. Thus, most addicts who are adolescent offenders turn into habitual and professional criminals when they grow older in life.

A British study reveals that the problem of criminality has been further aggravated by drug addiction. The British Health Education Council has estimated that consumption of alcohol in Britain increased by 37 per cent

1. Special Report on Heroin Addiction in Chicago (1957), p. 43.
2. Mauter & Vogel : Narcotics and Addiction (1951), p. 211.
3. Percor's article entitled "A study of Drug Addicts" published in Public Health Reports Supplement No. 143 (1943).
4. Anslinger, H. J. : The Traffic in Narcotics, New York (1953), p. 170.
5. Kolb's article on "Drug Addiction" A Study of some Medical Codes published in Archives of Neurology & Psychiatry, Vol. 20 (1928), p. 171.

and the number of alcoholics has increased by 47 per cent.

Alcohol or drug abuse may result in mental impairment. If a person, through the use of intoxicants or drugs, is rendered insane, the *M' Naghten's rule*,[1] shall apply. That is, defence of insanity will be available to him if he proves that he was under a insane delusion and did not appreciate the nature or quality of his actions or did not know that what he did was wrong. However, this defence will not be available if the use of such substances induces a temporary insanity in persons who are mentally unstable but not normally insane.[2]

The British criminal law recognises two broad categories of drugs for the purpose of defence of insanity, namely, (i) those which are known to have effects which may make the taker more-aggressive and unpredictable; and (ii) those, like valium, which are not normally associated with problematic changes in behaviour. It is in the latter case that a defence of temporary mental impairment may possibly be acceptable.[3]

The U.N. Report on abuse of drugs has concluded that the relationship between drugs and misery and crime compelled the governments to interfere in their use and sale.[4]

Global statistics indicate that various parts of the world are drastically affected by drug hazard and the problem has reached alarming dimensions particularly in Middle East, South-East Asia, Eastern Europe, Canada, Mexico, U.S.A., Central America and Africa. Heroin which was practically unknown in Africa, is now extensively being used (abused) in Mauritius and Nigeria. Ghana has also become a centre of drug abuse in recent years.

Since Bolivia, Peru and Columbia commonly known as "*Cocaine triad*" are largest cocaine producers in the world, they are obviously the largest supplier of this narcotic to other parts of the world. In Brazil also, illicit drug trafficking has lately increased due to its extensive borders with Columbia, Peru and Bolivia. It has now become the largest manufacturer of *acetone* and *ethylether*.

Indian Law.

In view of the alarming increase in drug menace in India, the Parliament enacted the Narcotics Drugs & Psychotrophic Substances Act, 1985 which was later amended and called the Prevention of Illicit Traffic in Narcotic Drugs & Psychotrophic Substances (Amendment) Act, 1988 and came into force on July 4, 1988. The Act emphasises on the preventive aspect of drug evil and covers a wide list of substances that are recognised as narcotic drugs. It seeks to prevent people from the dangers of drug-abuse. It was for the first time in India, that legislation recognised a wide list of substances that were categorised as dangerous drugs.

The main policy underlying the Act is to prohibit supply and distribution (trafficking) of prohibited drugs, for which minimum sentence of ten years, which may extend to 20 years, with a minimum fine of rupees one lakh, and a maximum upto two lakhs has been prescribed. The Act makes

1. (1843) 10 CL & F. 200.
2. *Attorney-General for Northern Ireland* v. *Gallaghar*, (1963) AC 349.
3. *R.* v. *Hardie*, (1985) 1 WLR 64.
4. Facts Sheet No. 1. National Council on Crime & Delinquency; USA (1983).

no distinction between a drug addict and a drug-trafficker in respect of punishment except under Sections 27 and 64-A of the Act.

Section 27 of the Act provides that if a drug addict proves that he possessed drug of less than 'small quantity'[1] as notified by the Central Government and that it was for his own personal consumption and not for sale, he or she shall be liable to punishment which may extend to maximum one year.

Section 64-A provides immunity to a drug addict from criminal liability provided he proves that the offence is committed for the first time and he or she voluntarily agrees to be treated for de-addiction in a recognised institution.

Section 71 of the Act provides for rehabilitative and reformative measures for an addict whether he is an offender or not. The provision of this section seems to have been based on the principle that the purpose of reformative penology is to "destroy criminality in a human being without destroying humanity in a criminal". This is undoubtedly, more in tune with the Supreme Court's view that "right to life includes right to live with dignity" as envisaged by Article 21 of the Constitution. Thus the Act combines within it deterrance and reformative techniques of punishment to tackle the problem of drug addiction and trafficking effectively.

It is significant to note that heroin addiction in India was virtually non-existent before 1980 as per the enforcement agencies report. In 1989 there were an estimated 800,000 heroin addicts in India and their number has increased almost ten times in 1994.

In India also drug addiction is spreading like wild fire as could be seen from the fact that heroin was being recently smuggled even in dead bodies. Two Nigerian nationals were sentenced to 12 years' rigorous imprisonment and a fine of Rs. 2 lakh by Greater Bombay Principal Judge Mr. S.A. Kirtikar on 25th Dec., 1987 under the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPSA) for smuggling huge quantity of heroin in dead bodies.

The Supreme Court of India, in *Dawood Lama's* case,[2] confirmed the conviction of the accused, a foreign national under the Narcotic Drugs & Psychotropic Substances Act, 1985, and sentenced him to 10 years' rigorous imprisonment and to pay a fine of Rs. 100,000/- and in default further undergo rigorous imprisonment for two years. In this case brown sugar was seized from the accused which is a narcotic drug and not a psychotropic substance. The Court further ruled that under NDPS Act the police officer taking search is duty bound to inform the person arrested that if he so desired he shall be searched in the presence of a Gazetted Officer or a Magistrate.

---

1. The Central Government specified the 'small quantity' of drugs as follow :
   (i) Heroin commonly known as Brown Sugar or Smack—250 gms.
   (ii) Hashish or charas—5 gms.
   (iii) Opium—5 gms.
   (iv) Cocaine—125 gms.
   (v) Ganja—500 gms.
2. *Wilfred Joseph Dawood Lama* v. *State of Maharashtra*, (1990) Cr. L.J. 1034.

In *Birendra Kumar Rai* v. *Union of India*,[1] the Supreme Court further held that in a case falling under the Prevention of Illegal Traffic in Narcotic Drugs & Psychotrophic Substances Act, 1988, the accused should be sternly dealt with under Section 3 of the Act and provisions of Article 22(5) of the Constitution of India are not attracted in such cases. Therefore, the detention of the accused under the Act shall not be held arbitrary.

Measures to Control Alcoholism & Drug Addiction

Efforts to control alcoholism and drug addiction have been made by introducing stringent legislative measures to regulate the manufacture, transportation and sale of these products and ban on their possession or use for other than medical and scientific purposes. The use of alcohol and narcotic drugs for cure or treatment purposes has, however, been permitted to cater to the legitimate needs through a proper licensing system and regulatory measures. International control of narcotic drugs is attained through International agreements and conventions reached between nations under the United Nations Commission on Narcotic Drugs to which India is a signatory.

Apart from regulatory measures to control alcoholism and drug addiction, the system of licensing physicians to give drugs to addicts at a reasonable rate also helps in preventing their exploitation from the underworld peddlers and thus mitigating this crime.

In India, various legislative measures have been introduced to control alcoholism and sale of alcoholic beverages. Several States introduced prohibition laws during the preceding decades.[2] The Prohibition Enquiry Committee appointed by the Planning Commission in its report of June, 1955, recommended that the scheme of prohibition and anti-drug should be integrated with the country's development plans with a view to control alcoholism and improve the standard of living of the people. The Committee also suggested that a Central Prohibition Committee[3] be established to review the progress of prohibition and co-ordinate the related activities in different States. Accepting the recommendations of the Committee the Lok Sabha by a resolution passed on March 19, 1956 made prohibition an integral part of the Second Five-Year Plan. In result, several States introduced regulatory measures to curb the tendency of alcoholism. Some States resorted to complete prohibition while others preferred to follow a phased programme.

Despite these prohibitory measures to control alcoholism, the consumption of liquor and other intoxicating drugs has hardly been reduced. The theory of creating scarcity of liquor by prohibitory laws with a view to discouraging 'drinking' habit has not yielded desired results. On the contrary, demand for liquor has all the more increased[4] and opened new

1. AIR 1993 SC 942.
2. Art. 47 of the Constitution of India requires that the State should endeavour to bring about prohibition of intoxicating beverages and drugs which are injurious to public health.
3. The Central Prohibition Committee was set up by the Ministry of Home Affairs in 1960 to intensify the prohibition campaign.
4. The Unrestricted depiction of drink-scenes in almost all the T.V. serials is a contributory factor to this ever-increasing evil. It needs to be strictly banned.

vistas for blackmailing, smuggling and illicit distilling. The Government have realised that strict laws prohibiting sale and consumption of alcohol have not delivered the goods and the policy needs to be reviewed once again. In fact, the consumption of wine and liquor has taken the shape of a fashion in today's ultra modern societies. Therefore, it cannot be curbed by prohibitory laws unless people who habitually drink volunatrily give it up. It is for this reason that many States have withdrawn their prohibition-laws and are content with a balanced regulatory policy under which liquor is available for sale only in licensed shops at a fair price. The heavy loss of revenue due to "dry-laws" is perhaps the real cause which has prompted the States to withdraw 'prohibition'. Presumably, the State Governments prefer to risk the dangers of alcoholism rather than losing crores of rupees by way of revenue. In result, the liquor industry has thrived in huge proportions and has gained importance among the public in spite of continued opposition.[1]

As stated earlier, Article 47 of the Constitution of India contains a mandate relating to policy of prohibition. It casts a duty on the Union and the States to initiate adequate measures to implement this directive principle for improvement of public health. This subject is at present in the State List. But in view of the laxity on the part of State Governments to implement the policy of prohibition on liquor, it is desirable that a national policy on the subject be framed. This would obviously require the transference of this subject from State List to the Union List as a Central subject. The consumption of liquor at public places, functions, farewells and receptions etc. must be totally banned and violation of liquor laws should be severely dealt with.

Enforcement Agencies

The entire gamut of legislation in India is directed against illicit trafficking in drug and alcoholic substances. The machinery utilised for the purpose at Central level includes the Department of Customs, Central Excise Narcotics Commissioner, Central Bureau of Investigation, Central Economic Intelligence Bureau, Directorate of Revenue Intelligence, Border Security Force and the Drugs Controller. At State level the State Excise, Police and Drug Control authorities control the menace of drug addiction and alcoholism.

In order to co-ordinate the activities of the various enforcement agencies involved in the anti-drug trafficking, a Central authority called the Narcotic Control Bureau with a wide range of functions has been set up. The main functions of the Bureau are—

(1) Co-ordination of all enforcement actions by various Central and State authorities.

(2) Implementation of counter measures against illicit drug trafficking under international protocols, conventions and treaties.

(3) Assistance to the concerned authorities in foreign countries.

The NDPS[2] Act has provided for the establishment of special courts for

1. Donald Taft : Criminology (4th Ed.) p. 232.
2. Narcotic Drug & Psychotropic Substances Act, 1985.

expeditious trial of drug addicts and traffickers.

Particularly, the problem of use and abuse of drugs and trafficking in drugs has wide ramifications. The organised criminal-gangs in smuggling of drugs operate-across national frontiers. The United Nations Commission on Narcotic Drugs and the International Narcotic Control Board are the international organisations which are seized with the problem of eradication of drug addiction. The main function of the international bodies is to provide machinery for giving full effect to the international conventions relating to narcotic drugs and to provide for continuous review and progress in the international control of these drugs.

An unprecedented convention against drug trafficking was adopted by consensus in Vienna on December 19, 1988 by 108 countries seeking better international co-operation in bringing drug-traffickers to justice. It was a major step towards solving the 'global crisis' of today's drug problems. It was characterised as a "major achievement" in international co-operation. The convention, however, regretted that signatories could not agree on the mandatory extradition of drug trafficking nationals to third countries wanting to prosecute them.

The Narcotics Control Board (NCB) in India has suggested that person convicted of drug crimes should automatically forfeit any property he or she acquires with illegal drug money.

It would not be out of place to mention here that corruption which is rampant among the enforcement agencies because of the temptation of economic advantage is also one of the contributory factors for inadequate enforcement of the NDPS Act. Drug traffickers generally operate and carry on their nefarious activities in close liaison with the concerned officials or the enforcement agencies paying them handsomely for the illegal favour shown to them. The so called 'deal' being quite attractive, the officials get lured by the temptation.

The lack of adequate training to the concerned officials in skilful investigation of drug-trafficking cases often leads to lacunae and loopholes in the procedure of investigation which enables drug peddlers and addicts to escape prosecution. That apart, lack of motivation on the part of enforcement agencies is also one of the causes for the inefficient implementation of the NDPS Act.

Thus, it would be seen that despite these efforts, the sale and purchase of narcotic drugs as also the alcohol is a major crime-problem which perturbs the law enforcement officials who are concerned with prevention of crime. Systematic rackets operate throughout the country to supply liquor and other narcotic drugs to alcoholics and addicts. Those involved in these illegal activities earn huge profits. Even international gangs dealing with this contraband traffic are known to be operative throughout the world.[1] News regarding raid cases in which narcotics worth lakhs of rupees is seized by the Excise or the Customs Department are often seen in papers and magazines. Commenting on this aspect of the problems, *Donald Taft* observed that many crime-problems in relation to alcoholism and drug addiction are not so much drug created problems as law created crime

1. Donald Taft : Criminology (4th Ed.), p. 236.

problems.[1] After all, the harm caused to addicts and their families on account of these ill-habits is far greater than the injury resulting therefrom to the society. Perhaps, some sort of moral education and constructive use of regulatory licensing may help in curbing the problem of alcoholism and drug-addiction to a considerable extent. In fact, there is need to re-define the twin problems of alcoholism and drug-addiction in a socio-medical perspective rather than considering it as a mere law enforcement problem.[2]

Remedial Measures :

Like any other socio-legal problem, the problem of drug addiction and abuse is a complex problem. Besides the legislative measures for combating this menace, some other remedial measures to help, to a large extent, in preventing this evil are as follows :

1. There is dire need to evolve an effective control mechanism to check unrestricted production of drugs and their sale in open markets. The present licensing system has proved inadequate in exercising proper control on the producers of drugs especially cannabis and alcohol.
2. As stated earlier, lack of proper enforcement and implementation of related legislation on drugs has resulted into steady increase in drug and alcohol menace. For this purpose, there is greater need to muster public support and co-operation through active publicity programmes.
3. Perhaps the best remedy to contain this evil is to educate people about the harmful effects of drug addiction and consumption of liquor. This kind of education would be most beneficial for the adolescents and school or college going students. The voluntary social organisations and mass-media can also usefully impart this education. Scientifically correct knowledge and education about evil effects of intoxication and drug-addiction should, in fact, form a part of regular curriculum at the school level.[3]
4. Early detection of drug addicts and their prompt treatment and resocialisation may help to prevent drug addiction to a large extent. The role of social organisations in rehabilitating the drug addicts need hardly to be emphasised. The Government of India is providing liberal grants to the State Governments to start drug de-addiction centres. As the problem of drug abuse is very acute especially in North-Eastern Region, the Government has decided to give 100 per cent assistance to these States.

At present 94 Drug-De-addiction Centres are being run in 20 States and in Delhi by non-government organisations. The Ministry of Welfare provides grants to voluntary organisations for this purpose. These Centres are actively involved in the task of treatment and rehabilitation of drug addicts.

---

1. Donald Taft : Criminology (4th Ed.), p. 236.
2. Sec. 86 IPC contains that a person voluntarily drunk will be deemed to have the same knowledge as he would have had if he had not been intoxicated.
3. 35 JILI. (1993) p. 271.

Drunkenness and Criminal Responsibility

Consumption of alcohol and intoxicating beverages results into drunkenness. Therefore, a word must be said about 'drunkenness' as a defence for criminal responsibility. Section 85 of the Indian Penal Code provides :

> "Nothing is an offence which is done by a person who at the time of doing it, by reason of intoxication, was incapable of knowing the nature of the act, or that what he is doing is either wrong or contrary to law provided that the thing which intoxicated him was administered to him without his knowledge or against his will."

Thus, the provision makes it clear that voluntary drunkenness is no excuse for the commission of a crime. Nevertheless, drunkenness, does not, in the eye of the law, make an offence more heinous. But if a man is made to drink through stratagem or the fraud of others or through ignorance or any other means causing intoxication without the man's knowledge or against his will, he is excused. If a person, by the unskilfulness of his physician or the connivance of his enemies eats or drinks such a thing as causes frenzy, this puts him in the same condition with any other frenzy and equally excuses him.

Section 84 of the Indian Penal Code provides immunity from criminal responsibility on the ground of unsoundness of mind. Unsoundness of mind can be caused due to madness, sickness, lunacy or intoxication. Thus insanity brought on by drunkenness is a good defence provided it is caused involuntarily.

A person is said to be insane when he does not, and cannot understand the nature and quality of his act, or is incapable of knowing that what he is doing is wrong or contrary to law. Intention or guilty knowledge being an essential element of the crime, the fact that the accused was intoxicated at the time he committed the act may be taken into consideration in deciding whether he formed the intention necessary to constitute the crime.[1]

In order to make the point clear, it would be prudent to refer to the observations made by the Court of Appeal in the famous case of *Director of Public Prosecutions* v. *Majewski*.[2] The facts of the case in brief were :

In this case *M*, a drug addict, took about 20 tablets of deszedrine and the next evening he took about eight tablets of barbiturate, he then went into a public house to take a drink. There was a disturbance and the landlord began to escort *M*'s friend to the door. The friend cried, "he's pulling me out." *M* got up, abused the landlord, butted him in the face and punched a customer. The landlord and the customers ejected the pair from the bar, but they re-entered by forcing the other door, and breaking a glass panel. *M* then punched the landlord and started swinging a piece of broken glass and injuring him. When the police arrived, a fierce struggle took place to get him out. He shouted at the police, "You pigs, I will kill you all", and kicked two of the officers. *M* said he could remember nothing of this incident. The Court found on facts that *M* was able to respond to a request for assistance by his

1. *Maung Gyi* v. *Emperor* (1913) 14 Cr. L.J.
2. (1977) AC 443.

companion ; he was able to direct his violence, and he was able to utter abuses and issue threats before he attacked. Therefore, on these facts his plea of intoxication was rejected.[1]

In *R.* v. *Tandi*,[2] the accused, a woman who was habitually taking 'yarmouth' or 'barley' brand of moderate alcohol daily consumed a full bottle 'Vodka' a highly intoxicant variety of liquor on the day of incident. Having lost control over herself and her emotions and in a fit of aggression, she strangulated her eleven years old daughter to death. She raised the plea of insanity in her defence. But the Court disallowed her plea and observed that she had deliberately and voluntarily consumed a heavy dose of highly intoxicant 'Vodka' instead of her usual mild drink in order to lose her mental ability to think and act rationally. Therefore, it was a clear case of voluntary intoxication for which the defence of insanity must fail.

The High Court of Madhya Pradesh in *Jethuram Sukhra Nagbanshi* v. *State*,[3] disallowed the defence of involuntary intoxication to the accused under Section 85 of IPC and held that since the accused drank liquor at persuation of his father to alleviate pain, the intoxication was neither without his knowledge nor could it be said to be against his will. The Court observed that Section 85 lays down the principle of English law formulated by *Baron Parke* in *Pearson* v. *R.*,[4] wherein it was held that "voluntary drunkenness is no excuse for crime. If a party be made drunk by strategies or the fraud of another, he is not responsible". Likewise this defence may be allowed to a person who had been made drunk by the fraud of another or through ignorance, or coercion practised by his friend or foe.

The Indian case of *Manindra Lal Das* v. *Emperor*[5] is yet another illustration of Court's attitude towards the defence of intoxication. In this case the accused, a police officer, shot a prostitute with whom he was friendly and wounded her. He was charged with the offence of attempt to commit murder under Section 307, I.P.C. and voluntarily causing grievous hurt under Section 326. He set up the defence of intoxication. The trial judge in his direction observed :

> "If an act is done in a state of intoxication and that intoxication is voluntarily incurred he is equally liable before the law as if he had done that act in a state of soberiety."

In an appeal before the High Court the direction was held to be wrong on the ground that "knowledge" is not synonymous with intention. The Court held that although voluntary drunkenness cannot be an excuse for the commission of an offence yet where the question is whether the act was premeditated or done due to sudden heat and impulse, the fact of the party being intoxicated, is held to be a circumstance proper to be taken into consideration in mitigation of sentence justifying leniency.

The main problem in cases where intoxication is pleaded in defence is whether the offender was really intoxicated at the time of the commission of

1. *See* also the decision in *Patrick Okeke* v. *State*, (1966) All. NLR 275 decided by Supreme Court of Nigeria.
2. (1989) All ER 267 (AC).
3. AIR 1960 MP 242.
4. (1835) 168 ER 1108.
5. AIR 1937 Cal 432.

the offence. Medical evidence quite often helps to reach a correct conclusion in this regard. That apart, a more recent device to determine the alcoholic condition of a person is through the use of an instrument called "drunkometer". This apparatus detects the presence of alcoholic percentage in the blood stream of a person and thus helps to find out whether the person was under the influence of liquor or not at a given time. It also helps in determining the extent of alcoholic condition of the drunken person and its effect on his mental faculty.

Studies on drug addiction, however, reveal that the problem of drug abuse and alcoholism is not confined to cities alone but it persists in rural areas as well. It equally affects the economically depressed classes, middle classes, upper classes and ultra-modern social groups. However, in cities mostly youth and students are affected whereas in rural areas the agriculturists and labour classes are generally addicted to drugs.

More recently, special treatment centres have been set up by social welfare agencies to deal with alcoholics and drug addicts. In Bombay, *The Samaritans* a social welfare agency is doing commendable work in the area of rehabilitation of drug addicts. It is high time that Government should also consider setting up special treatment centres for the rehabilitation of drug-addicts and alcoholics.

The modern processes of development have opened the floodgates of offences and drug-offences are no exception to this global phenomenon. It hardly needs to be stressed that alcoholism and drug-addiction are the off-shoots of modern fast changing social patterns, hence these twin problems should be tackled in their socio-legal perspective. Then only concrete results may be possible. Undoubtedly intensive surveillance on the border check-posts and awareness among the public about the evil effects of drug and alcohol addiction have brought about a decline in drug trafficking in recent years but much more still remains to be done in order to eradicate this menace which is damaging the moral fabric of Indian society and culture.

Chapter XII

CRIME STATISTICS

Crime statistics are the indices of intensity of crimes recorded annually in a particular country, region or place. It reflects upon the ascending or descending trends in crime and also gives information as to how new forms of crime are emerging and the old ones are disappearing or assuming new dimensions. Thus crime statistics are indicative of the general moral-tune of a given society and throw light on the general efficacy of police, prosecuting agencies and law courts. Therefore, the role of crime statistics in analysing causation of crime and devising measures to combat criminality need not be over-emphasised. The statistics of crime help the law enforcement agencies to spot out the preponderance of crime at a particular time, place and region.

Criminologist, however, differ as to their views about the scope of criminal statistics. Some of them assert that the data should mainly concern with offences and offenders, administrative actions and decisions of the Courts, while others maintain that it should only be limited to offenders and convicted persons. But the generally accepted view is that crime statistics should not only be confined to data on offences and offenders but also include numerical figures pertaining to the criminal law administration agencies such as police, prosecution, courts, parole and probation services, juvenile delinquency, prisons, drug law violations and trafficking records etc. The data so presented should be scientifically classified, tabulated and analysed so as to present a realistic picture of crime situation of a particular region or country. The periodical publication of such statistics is equally important so that the criminal law agencies may utilize it to the best of their advantage for combating crimes.[1]

Emphasizing the need for statistics in the field of criminology *Donald Taft* observed that quantification which includes counting, measuring and collating the phenomena under study is the basic process in modern scientific approach to criminal science.[2] Without this process, investigative efforts would hardly serve any useful purpose. Crime statistics, therefore, involve compiling crime-record in order to relate them to time, place and circumstances. It tells us about the magnitude of crime and the extent to which they change in terms of time, place and location. Crime statistics also depict the picture of distribution of crimes in different areas, regions, and locations. It must, however, be stated that mathematical accuracy of crime figures at a given place and time is rather difficult to ascertain. The statistics only present an over-all picture of incidence of crime and make it

1. K.D. Gaur (Ed.) : Criminal Law & Criminology (2003) p. 793.
2. Donald Taft : Criminology (4th Ed.) p. 46.

possible to compare the crime-rate at regional, national and international level.

Speaking about the importance of periodical statistical records of prisons and prisoners Bentham observed :

> "The ordering of these returns is a measure of excellent use in furnishing data for the legislature to work upon. They will form together a kind of political barometer by which the effect of every legislative operation relative to the subject may be indicated and made palatable. It is not till lately the legislators have thought of providing themselves with necessary documents."[1]

Thus, it would be seen that crime statistics provide a useful guideline for the legislators and criminal law administrators to fight against criminality and find effective anti-dote of crimes.

Pointing out the significance of statistical data on crime and criminals, *Edwin Sutherland* observed that these statistics are sometimes usefully utilized in the formulation of social policies and theories of criminality. Besides, it also provides valuable source-material for crime investigators. The social information contained in them forms the basis of extensive research in the field of criminology. In the absence of statistical record of crime it would become virtually impossible to form any valid opinion about the crime picture in a given place.[2]

Reasons for Unreliability of Crime Statistics :

The magnitude of the problem of various forms of crime in a particular country can be ascertained after an analysis of the criminal statistics. But the fact remains that these statistics deal mainly with recorded crimes. It is, therefore, not possible to detect all criminal acts committed by people in a country. It is for this reason that it is generally believed that statistics of crime and criminal are most deceptive of all the statistics and hardly present a true picture of crime position. Some of the reasons generally attributed to unreliability of crime statistics are as follows :—

1. The concept of crime being dynamic, it is difficult to determine the quantum of crime with accuracy.

2. Quite a large number of crimes committed remain undetected, there are others which are detected but not reported and many more are reported but not recorded.

There are several reasons for not reporting crimes. The offence may be considered trivial ; the police-post might be too far away ; one sincerely wants that the culprit should be punished but he may apprehend harassment from him or he may not be willing to go through the cumbersome process of criminal trial or he or she may feel embarassed, as in case of sex-offences. The victim may also not be interested in reporting crime because he may not have confidence in the criminal justice system.

3. At times, there is a deliberate non-registration of crimes because lesser number of crimes project a better image of police performance. Commenting on this aspect of crime-statistics, *Shri S. Venugopal Rao*, a

1. Radzinowicz : History of English Criminal Law (Vol. I) p. 395.
2. Sutherland : The Reliability of Criminal Statistics p. 10.

member of the Indian Police Service observed that police too often adopt ingenious methods of manipulation. Perhaps the "tendency of judging police efficiency against a statistical background has had the most debilitating effect on free-registration of crime...even politically, spectacular increases in crime are not relished since they have become a convenient handle for the opposition who interpret them as a breakdown of public order."[1]

Expressing concern for non-registration of crimes by Police, Mr. Sripat Mishra, former Chief Minister of Uttar Pradesh observed that a "manipulated fall in the crime-graph due to non-registration of crimes is no indication of a better law and order situation". Referring to crime statistics of Uttar Pradesh he said, "it is estimated that with free and faithful registration of offences the crime-graph would immediately record a jump of at least one hundred per cent".[2]

4. Quite a large number of crimes are lost between arrest and prosecution and many more are lost between prosecution and conviction. Explaining this point further, *Leon Radzinowicz* observed that crimes fully brought out into the open and punished, "represent not more than fifteen per cent of the great mass actually committed".

5. The police is often inclined to give exaggerated figures of arrest and prosecution in their records because their promotional prospects largely depend on the number of convictions to their credit. This renders the police-statistics highly controversial and their reliability doubtful. The significance of these statistics, therefore, depends on the honesty and efficiency of the police. Individual police officer's decision to record an incident as crime or not also affects the crime statistics.

6. The crime statistics at different places do not present a true picture of volume of crimes because of the socio-economic differences and variations in the criminal law. The behaviour which may be a crime at one place may not be necessarily so in another place or time. This reduces the significance of crime-index for the purposes of comparison. It is primarily for this reason that comparisons of the crime rates of various countries are seriously limited by wide variations in their national legal systems.[3]

7. The crime figures for the purpose of comparisons are to be stated in proportion to population or some other base and as *E.H. Sutherland* rightly points out, determination of this base is often difficult.[4] The accuracy of population-figures is equally a matter of doubt and suspicion.

8. The judicial statistics or the statistical data given by law courts regarding number of convictions do not generally tally with the statistics of prisoners compiled by prison authorities because all convictions do not necessarily result into imprisonment. Many of the convicted persons are let-off after admonition or fine or released on probation or parole or booked to a correctional institution.

9. The prison statistics often give a distorted picture of criminality. They are least reliable to be used for appreciating the magnitude of the real

1. Venugopal Rao. S. : Dynamics of Crimes : Spatial and Socio-Economic Aspects of Crime in India.
2. Quoted from News Letter in Indian Express, dated September, 2, 1982.
3. Sutherland and Cressey : Principles of Criminology (6th Ed). p. 29.
4. *Ibid.*

crime problem or the types of crimes committed, or the types of offenders booked for crimes. In fact, they are simply indicative of the persons who are institutionalised rather than having any bearing upon actual number of crimes or criminals. Moreover, these statistics are reflective of why people are caught and prosecuted rather than of why they commit crimes, which is the central concern of criminologist.[1]

It would thus appear that accuracy of crime-statistics depends, by and large, upon the societal reaction towards different crimes and the honesty, efficiency and working of Police Department and other investigating agencies. Crime being concerned with behavioural patterns, accuracy of crime-figures is a myth. Statistics, therefore, depict only a general picture of criminality at a given place and time. Commenting on the unreliability of crime statistics, *B. Wehner* observed that unreported crimes vary between a minimum of twice and maximum of four-times the number actually shown in criminal statistics.

Available statistics of crime may broadly be classified into two major categories, *viz.*, serious crimes and minor crimes. Serious crimes generally cause greater alarm in the society and huge revenue loss to the State such as tax evasion, bank frauds, scams etc. The minor offences, on the other hand, are less alarming and are generally viewed mildly by the society.

Considered from the point of view of different agencies connected with the administration of criminal justice, criminal statistics may be placed under three broad heads, namely, (i) Police statistics; (ii) Judicial statistics or Court statistics; and (iii) Penal statistics.

Police statistics are primarily concerned with the number of crimes reported, the number of persons apprehended and the number of offences cleared or accounted for by the arrests made.

The judicial or Court statistics are concerned with the number of offences prosecuted the number convicted and the method of procedure followed in determining guilt, the number not convicted and the stage at which cases were dropped. These statistics also account for the number of convictions and the type of sentences imposed upon guilty persons.

Penal statistics comprise the details of different types of custodial measures, the characteristics of the inmates, time spent in custody, number of escapes and offence-wise number of recidivists.

It may be stated that equally important is the data of post-correctional criminal behaviour but it is practically not feasible to follow up the post-release conduct of the convicted offenders. But the Government should at least make efforts to collect the statistical data concerning repetition of crimes which may help the administration in suitably dealing with the habitual offenders.

Sources of Criminal Statistics :

The police, the court and the prison are three main sources of crime statistics. These agencies administering criminal justice, collect statistics of crime and criminals and forward them to the State Departments and the Central Bureau of Crime Statistics compiles them and publishes the Report

1. Katherine S. Williams : Textbook on Criminology (2001) p. 95.

on behalf of the Government. In India, crime statistics are published by the National Crime Records Bureau, Ministry of Home Affairs, Government of India. Commenting on the inter-relationship between the crime statistics of these agencies, *Thorston Sellin* observed that police records are more reliable index than arrest statistics, arrest statistics are more reliable than court statistics, and court statistics are more reliable than prison statistics.[1]

The satistics on juvenile delinquency and probation are, however, published by the Social Welfare Department of the States and the Department of Social Defence functioning under the Ministry of Home Affairs, Government of India, New Delhi. Some States, notably Gujarat have an independent Department of Correctional Services for rehabilitation and after-care of offenders.

The offences relating to drug-trafficking and narcotics are dealt with by the Narcotics Control Bureau constituted under the Ministry of Finance in 1985. Therefore, the statistics pertaining to drug trafficking and drug abuse at the national and international level are compiled by this Bureau which enables the enforcement agencies to intensify their efforts to smash major national and international gangs of drug-traffickers and provide adequate investigation and intelligence support at vulnerable points such as border-areas, sea-shores and airports etc. This has helped in suppression of drug-trafficking and prevention of offences relating to drug-abuse to a great extent.

Crime Records Bureau

The Crime Records Bureau operating under the Ministry of Home Affairs, Government of India, is engaged in collecting and disseminating information relating to crime, criminal and property in respect of various offences on the basis of monthly statements/returns received from State Police.

The data available in the Crime Record Division is used for the purpose of co-ordination of recovered or seized properties such as motor vehicles, firearms, etc. with data of lost or stolen motor vehicles and firearms and *vice versa*. The outcome of co-ordination is communicated to the concerned District Police Superintendent through wireless message for follow-up action.

The data pertaining to 'TALASH' is used to co-ordinate the persons arrested, wanted, missing, kidnapped, escaped, deserter, unidentified dead-bodies with each other and the concerned authorities are informed accordingly.

The Crime Record Division also prepares a data relating to foreigners involved in crimes and their activities for use of immigration authorities.

The Publication Branch of NCRB besides creating a data Bank on crime statistics, also compiles and publishes Prison statistics and collects, collates and disseminates crime statistics to Parliament, State Assemblies, Central/State Governments, Judiciary, NGO's, Human Rights Commission, UN Organisation etc.

---

1. Sellin Thorston "The significance of Records of Crime" published in Law Quarterly Review (Oct. 1951) pp. 496-504.

Crime Statistics in India :

The various crimes that are being recorded, can be broadly grouped under the following categories for statistical information purposes.

Broad Classification of Crimes under the Indian Penal Code (IPC)

(i) Crimes Against Body.—Murder, its attempt, Culpable Homicide not amounting to Murder, Kidnapping & Abduction, Hurt, Causing Death by Negligence.

(ii) Crimes Against Property.—Dacoity, its preparation and assembly, Robbery, Burglary, Theft.

(iii) Crimes Against Public Order.—Riots, Arson.

(iv) Economic Crimes.—Criminal Breach of Trust, Cheating, Counterfeiting.

(v) Crimes Against Women.—Rape, Dowry Death, Cruelty by Husband and Relatives, Molestation, Sexual Harassment and Importation of Girls.

(vi) Crimes Against Children.—Child Rape, Kidnapping and Abduction of Children, Procuration of Minor Girls, Selling/Buying of Girls for Prostitution, Abetment of Suicide, Exposure and Abandonment, Infanticide, Foeticide.

(vii) Other IPC Crimes.

Under the Special and Local Laws (SLL)

(i) Arms Act;
(ii) Narcotic Drugs & Psychotropic Substances Act;
(iii) Gambling Act;
(iv) Excise Act;
(v) Prohibition;
(vi) Explosives & Explosive Substances Act;
(vii) Immoral Traffic (Prevention) Act;
(viii) Indian Railways Act;
(ix) Registration of Foreigners Act;
(x) Protection of Civil Rights Act;
(xi) Indian Passport Act;
(xii) Essential Commodities Act;
(xiii) Terrorist & Disruptive Activities Act;
(xiv) Antiquity & Art Treasure Act;
(xv) Dowry Prohibition Act;
(xvi) Child Marriage Restraint Act;
(xvii) Indecent Representation of Women (P) Act
(xviii) Copyright Act;
(xix) Sati Prevention Act;
(xx) SC/ST (Prevention of Atrocities Act);
(xxi) Forest Act;
(xxii) Other crimes (not specified above) under Special and Local

Laws including Cyber Laws under Information Technology Act (IT) 2000.

Statistics of crime in India reveal that the country is fast heading towards criminalisation and it will be in the midst of a crime explosion in coming years. The annual total of recorded cognizable offences under the Indian Penal Code have recorded a constant rise in subsequent years thus showing an upward trend. This is evident from the comparative crime statistics of India as indicated in the Table given below :—

TABLE SHOWING
TREND OF VIOLENT CRIMES, PROPERTY CRIMES AND WHITE COLLAR CRIMES (1997-2002)[1]

Year	Total Cognizable Crimes (IPC)	Violent Crimes		Property Crimes		White Collar Crimes	
		Incidence	% to total	Incidence	% to total	Incidence	% to total
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1997	1778815	249200	14.5	390396	22.7	54711	3.5
1998	1764629	255128	14.3	438552	24.6	56721	3.2
2000	1771084	238381	13.5	419321	23.7	55124	3.4
2001	1769308	230930	13.1	381654	22.5	56807	3.7
2002	1780330	221810	12.5	370629	22.1	56128	3.5

During 2002, percentage of share of violent crimes reported in India was 12.5 per cent of the total IPC crimes. This percentage during 2000 and 2001 was 13.5 and 13.1 per cent respectively. Of the total 221810 violent crimes reported during the year (from States and Union Territories), 44.2 per cent crimes were affecting life (47966 cases) and 12.0% affecting property (26706 cases) and those affecting public safety were 36.4% (80705 cases).

The crime rate during 2002 recorded decrease of 3.3. per cent as compared with the year 2001.

Of the total 221810 violent crimes, crime against women were 146678; against children 10469, against SC/ST 40281, against property 370629 and cyber crimes 808. There were 84 custodial deaths in the year 2002 and 32 policemen were charge-sheeted but none convicted.

Trend of Violent Crimes

The incidents of violent crimes under IPC and their rate during 2002 are given in the Table below. Uttar Pradesh recorded the highest incidents with 30,061 cases of the total violent crimes (2,21,810) reported in the country during 2002.

1. Source : CRIME IN INDIA–2002 published by NCRB, Delhi.

Table showing
Crime Rate for Violent Crimes under I.P.C. during 1998-2002

Sl. No.	Crime Rate for Violent Crimes (IPC)	1998	1999	2000	2001	2002
1.	Affecting life	10.6	10.2	10.2	9.8	9.3
2.	Affecting property	3.4	3.0	3.0	2.7	2.5.
3.	Affecting Public Safety	10.7	9.3	9.0	8.4	7.7
4.	Affecting Women	1.6	1.6	1.6	1.6	1.6
	Total Crimes	26.3	24.1	23.8	22.5	21.1

The crime rate (21.1) for total violent crimes under IPC declined by 6.2 per cent during 2002 over 2001 (22.5) at All India level. The rate of crime decreased for all categories (except of women) of violent crimes during 1998-2002. A declining trend has been noticed in violent crimes during 1998 to 2002.

The highest crime rate for violent crimes under IPC was recorded in J. & K. (45.9). The lowest crime rate was observed in West Bengal (10.1 per cent).

The Pattern of IPC Crimes

A comparative study of cognizable crimes committed under Indian Penal Code (IPC), Local Acts and Special Laws (L & SL) during 1992-2002 as indicated in Table below would reveal that the pattern of crime in 2002 did not vary much from the preceding years. However, the percentage of 'murder' to the 'total cognizable crimes' recorded a marginal rise whereas the incidence of burglary and theft as also riots recorded a slightly receding trend. The incidence of dacoity has also shown a declining trend.

TABLE

INCIDENCE & RATE OF TOTAL COGNIZABLE CRIMES UNDER INDIAN PENAL CODE (IPC) And SPECIAL AND LOCAL ACTS & SPECIAL LAWS (SLL) 1992-2002.

Sl. No.	YEAR	Estimated Mid -Years Population (In Lakhs)**	INCIDENCE			RATE			Percentage of IPC Crimes to Total Cognizable Crimes.
			IPC	SLL	TOTAL	IPC	SLL	TOTAL	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1.	1992	8677	1689341	3558448	5247789	194.7	410.1	604.8	32.2
2.	1993	8838	1629936	3803638	5433574	184.4	430.4	614.8	30.0
3.	1994	9000	1635251	3876994	5512245	181.7	430.8	612.5	29.7
4.	1995	9160	1695696	4297476	5993172	185.1	469.2	654.3	28.3

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
5.	1996	9319	1709576	4586986	6296562	183.4	492.2	675.6	27.2
6.	1997	9552	1719820	4691439	6411259	180.0	491.1	671.2	26.8
7.	1998	9709	1778815	4403288	6182103	183.2	453.5	636.7	28.8
8.	1999	9866	1764629	3147101	4911730	178.9	319.0	497.8	35.9
9.	2000	10021	1771084	3396666	5167750	176.7	338.9	515.7	34.3
10.	2001	10270	1769308	3575230#	5344538	172.3	348.1	520.4	33.1
11.	2002	10506	1780330	3750842	5531172	169.5	357.0	526.5	32.2
12.	Percentage change in 2002 over 1992	21.1	5.4	5.4	5.4	-13.0	-12.9	-13.0	0.0
13.	Compound growth rate per annum	1.9	0.9	-0.9	-0.4	-1.0	-2.8	-2.2	1.2

* Source : CRIME IN INDIA 2002 (National Crime Record Bureau Ministry of Home Affairs Govt. of India, New Delhi.

** ONE LAKH = 0.1 MILLION

\# EXCLUDING JHARKHAND STATE

Crime Statistics of Narcotic Drug Seizures

Apart from the crimes under the Indian Penal Code, the magnitude of offences under the Narcotic Drugs and Psychotropic Substances Act, 1985 are by no means less alarming. This is evident from the statistics of total seizures of all drugs and narcotics affected by the enforcement agencies and quantity of drugs seized during the period 1998-2002 as given below :—

TABLE SHOWING SEIZURES OF NARCOTICS AND DRUGS (NO. OF CASES) DURING 1998-2002

Sl.No.	Drugs	1998	1999	2000	2001	2002
1.	Opium	954	927	1257	1205	1167
2.	Morphine	56	125	142	146	148
3.	Heroin	3095	2937	2841	3891	4328
4.	Ganja	6018	6518	6073	7613	3687
5.	Hashish	2193	2500	2078	2117	2121
6.	Cocaine	6	4	5	10	5
7.	Methaqualone	114	8	31	8	7
8.	Amphetamine	—	—	11	0	0
9.	Ephedrine	—	—	8	5	4
10.	L.S.D.	1	3	0	—	0
11.	Acetic anhydride	9	7	14	8	4
	Total	12446	13029	12460	15003	11471

During 2002, offences under NDPS Act (25,279) declined by 23.5 per cent as compared to previous year when 24,377 cases were reported.

TABLE SHOWING QUANTITY OF DRUGS SEIZED (1998-2002)[1]

Sl. No.	Drug	Qty. in Kgs.				
		1998	1999	2000	2001	2002
1.	Opium	1834	1635	2684	2533	1867
2.	Morphine	14	36	39	26	66
3.	Heroin	597	861	1240	889	933
4.	Ganja	62591	40113	100056	86929	93477
5.	Hashish	8478	3391	5041	5664	4487
6.	Methaqualone	2087	474	1095	2024	7458
7.	Cocaine	1	1	0.350	2	2
8.	Ephedrine	—	—	—	930	126

The drug-wise analysis reveals that there was decline in trafficking (in most of drugs) during 2002 over 2001 with marked decrease in Ganja and Cocaine. There were 4 cases relating to Ephedrine during 2002.

On an average, the year 2002 witnessed 31 cases of drug seizures per day as against 41 such cases in 2001.

The quantity-wise analysis of the drugs seized shows that during 2002 the quantity of seziure of Morphine, Heroin, Ganja and Methaqualone has increased as compared to 2001.

Conclusion

From the foregoing crime-statistics, the following generalisations in respect of crimes in India may be drawn :—

1. Crimes have become common even in areas which were relatively crime-free a few years ago. Thus, the States of Andhra Pradesh, Orissa and Gujarat which were comparatively peaceful till late have now become notorious for atrocious crimes such as highway robberies, dacoities and murders. Communal disorders and riots are frequent in Gujarat in recent years.

2. Rapid industrialisation of India during preceding years has resulted into enormous increase of wealth and expansion of trade and manufacturing activities, thus opening new vistas for crimes. The phenomenal expansion of banking in rural and remote areas has given rise to offences such as bank-dacoities and robberies, frauds, embezzlement, corruption, etc. The socio-economic offences of blackmarketing, hoarding, smuggling, adulteration, drug-trafficking have recorded a steep rise mainly due to new spurt in commercial activities.

3. The impact of development activities and democratisation has also

1. Source : Directorate General Narcotics Control Bureau; Govt. of India, 2002.

contributed to crimes by aggravating social tensions. Intensification of trade union activities and development of political institutions has led to struggle for political power and group rivalries. Criminalisation of Indian politics and links between criminals and political personalities or government functionaries quite often results into murder, assault and other related crimes.

Criminal gangs often enjoy patronage of local level politicians who ignore their criminal deeds. Thus, criminalisation of India's politics is virtually making criminal actions respectable and beyond public indignation.

4. Social legislations such as land-reforms, abolition of untouchability, prohibition of bonded labour, removal of casteism, etc., have aggravated tensions. It is significant to note that rivalries between Brahmins and Thakurs have been the major cause of aggravating dacoity menace in the dacoit-infested States particularly in Uttar Pradesh and Bihar. Strikingly, the Behmai-massacre committed by dacoit turned Member of Parliament.[1] Phoolan Devi, it is alleged, was essentially an outcome of caste-rivalry between two predominant Hindu castes. The dacoits in these areas assume the role of protectors of their caste and thus play the role of a hero in atrocious crimes. The protection extended to these criminals by their caste members makes the problem worse for the criminal justice administrators.

5. Urbanisation has also contributed to unprecedented rise in crime-rate in cities and towns of India. Analysing this factor as a cause of increase in crime. *Durkheim* commented that disharmony, conflict and cultural differentations of urban settings make the life of the people complex and difficult. This destroys earlier congenial social relationship creating a social vacuum which proves to be a fertile ground for criminality.

The existence of slums adjacent to industrial centres is also a spawing ground for crimes. These slums are the centres of extreme deprivation which breed vices and crime as acceptable economic activities for survival.

6. Indiscreet opening of educational institutions in the name of expansion of education has opened new opportunities for crime. Due to deteriorating standard of education, the centres of learning are turning into "meeting points for bored students, uninvolved with their studies and angry about their uncertain future—ready for diversion even of a criminal type". This has led to the politics of violence. Murders, assaults and knife-wielding is frequently reported from the educational centres which has added new dimensions to criminality in recent years. The indiscipline and gangsterism of the campuses are part of a wider process of criminalisation of youth leading to widespread rowdyism.[2] The tendency of law-violation is more conspicuous among educated youths than in non-literate groups.

7. Another trend discernible in crime in India is the increasing criminality due to affluance, that is, urge to possess more and more wealth. Commenting on this aspect, *Erich Fromm* rightly observes that with the

1. Phoolan Devi was the Member of Parliament from Uttar Pradesh during the 11th and the 12th Lok Sabha. She was shot dead near her residence while she was returning from Lok Sabha in her car during lunch-break in the afternoon of 25th July, 2001.

2. These days the incident of looting, shooting, killing, arson and destruction of property are a common occurrence in campuses in India.

urge to possess more and more, the attitude of men has centred on property and profit which necessarily produces the desire for power. Thus, in the present day ultra-modern society, one's happiness lies in one's superiority over others, in one's power, and in the last analysis, in one's capacity to conquer, rob or kill.[1]

8. There has been a tremendous rise in terrorist's activities in India during the preceding decade which has escalated violence and incidence of murder, kidnapping and abduction, criminal assaults etc. The alarming rise in the violent-crime statistics in recent past is predominantly due to this reason. The brutal killing of Sardar Beant Singh, the former Chief Minister of Punjab on 31st Aug, 1995 by a suicide-bomber is an example of the dreaded act of terrorists.

The foregoing generalisations in context of crime trend in India amply demonstrate that crime-index and crime-statistics have a practical significance and utility. These indices enable the criminal law administrators to formulate adequate policies to handle criminals and prevent crimes. Crime statistics also guide law-makers and legislators to enact appropriate laws[2] or amend or repeal[3] them to meet the exigencies of time and place. This renders the task of prevention of crime easier.

The general view about crime statistics, like any other statistics, is that they are nothing but a mere formality and has only a theoretical significance. It is too often asserted that the statistics recorded by courts are more reliable than those of police, prison or a correctional institution. The obvious reason for this view is that courts have no interest, whatsoever, in twisting their crime records whereas for the police or the prison officials they are indices reflecting their efficiency and hence they prefer to present a better picture of their performance through crime statistics. It is, therefore, desired that the attention of these agencies must be drawn to real purpose of statistics and the role they are required to play in prevention of crime and rehabilitation of offenders.

Undoubtedly, the unreliability and uncertainty of criminal statistics for reasons stated earlier has been a cause of great concern for the legislators, social scientists and social reformers. Expressing their anguish and dissatisfaction about the authenticity of the available crime statistics some experts have come out with a suggestion that it is preferable to direct our efforts on apprehending and convicting the offenders rather than wasting time and money on counting crimes and criminals or 'quibbing over statistics'. They argue that 'it is better not to have statistics, than to have a false or concocted one.' But it is submitted that such an extreme view will do more harm than good as it would destroy the very source of information which forms the basis for formulating policies and revising, reshaping or remodelling of the criminal justice system.

---

1. Quoted from 'The Land of the Rising Sun' published in Indian Express Magazine (February 20, 1983), p. 6.
2. The Dowry Prohibition (Amendment) Act, 1986. For the full text of the Act *See* Appendix IV.
3. The Terrorist Disruptive Activies Act (TADA) was repealed in May, 1995. Later POTA was enforced in 2002 which is also repealed by the Unlawful Activities (Prevention) Act, 1967 as amended in 2004.

It therefore follows that despite the doubts expressed about the authenticity of the crime statistics, the fact remains that they serve as a primary source of information about the types of crimes which are more likely to occur in a particular area or in a particular season. It also enables the Investigating Officer to draw a comparison about the pendency of cases in different States/Union Territories as well as the charge-sheet ratio in the cases. Such information also acts as a basis for planning, administration, management and policy formulation by police administrators to evolve strategies for detection and prevention of crimes at various level. Crime Reporting work needs to be given priority and importance because it is an in-house exercise to put the Police Station/District in preparedness for future. Regular updation and publication of the crime statistics are the two essential requisites which would certainly enhance the utility and validity of the Crime Criminal Statistical System.

The major purpose underlying crime statistics is to explain and predict the phenomenon of criminality and focus attention on causes of different crimes in different locations. The reliability of such statistics, however, depends on the validity of data collected for the purpose. Analysis of data involves the ordering or breaking down of relevant figures into constituent parts in order to find out the cause for increase or decrease in the rate of various crimes. Thus, statistical methodology serves as a useful technique for formulating strategies to combat crimes and criminality. It must, however, be pointed out that collection and collation of statistics is really a specialised subject which requires presentation of information in the form of tables, charts, graphs etc. Therefore, this job should be handled only by well trained and qualified professionals who have real apptitude for this work. Besides crime statistics, the periodical statistics regarding juvenile delinquency, probation, parole, reformatories, etc., have helped immensely in working out effective programmes and strategies for after-care and rehabilitation of offenders.

PART II

PENOLOGY

Chapter XIII

THEORIES OF PUNISHMENT

Some of the major questions which are engaging the attention of penologists today are whether the traditional forms of punishment should remain the exclusive or primary weapons in restraining criminal behaviour or should be supplemented and even replaced by a much more flexible or diversified combination of measures of treatment of a reformative, curative and protective nature. And if so, to which classes of offenders should these improvised measures be applicable and how should their choice in particular cases be determined ? And finally, how could the reintegration of offenders into society be placed so as to efface the penal stigma and to cut off the supply of potential recidivists at its source ?[1]

Punishing the offenders is a primary function of all civil States. The drama of wrong doing and its retribution has indeed been an unending fascination for human mind. In fact it has been the theme of much of the world's greatest literature since ages. However, during the last two hundred years, the practice of punishment and public opinion concerning it have been profoundly modified due to the rapidly changing social values and sentiments of the people. The crucial problem today is whether a criminal is to be regarded by society as a nuisance to be abated or an enemy to be crushed or a patient to be treated or a refractory child to be disciplined ? Or should he be regarded as none of these things but simply be punished to show to others that anti-social conduct does not finally pay.

It is in this perspective that the problem of crime, criminal and punishment is engaging the attention of criminologist and penologists all around the world. A 'crime' has been defined by *Salmond* as an act deemed by law to be harmful for society as a whole although its immediate victim may be an individual. Thus "a murderer injures primarily a particular victim, but its blatant disregard of human life puts it beyond a matter of mere compensation between the murderer and the victim's family."[2] Those who commit such acts, if convicted, are punished by the State. It is, therefore, evident that the object of criminal justice is to protect the society against criminals by punishing them under the existing penal law. Thus, punishment can be used as a method of reducing the incidence of criminal behaviour either by deterring the potential offenders or by incapacitating and preventing them from repeating the offence or by reforming them into law-abiding citizens. It is this principle which underlies the doctrines concerning the desirability and objectives of punishment. Theories of punishment, therefore, contain generally policies regarding handling of crime and criminals. There are four generally accepted theories of

1. Leon Radzinowicz : In Search of Criminology, p. 4.
2. Salmond : Jurisprudence (12th Ed.) p. 92.

punishment, namely, deterrent, retributive, preventive and reformative. It must, however, be noted that these theories are not mutually exclusive and each of them plays an important role in dealing with potential offenders.

Concept of Punishment :

Before dealing with the theories of punishment, it would be pertinent to explain the concept of punishment. *Sir Walter Moberly*, while accepting the definition of punishment as given by *Grotious*, suggests that punishment presupposes that :—

1. what is inflicted is an ill, that is something unpleasant;
2. it is a sequel to some act which is disapproved by authority;
3. there is some correspondence between the punishment and the act which has evoked it;
4. punishment is inflicted, that it is imposed by someone's voluntary act;
5. punishment is inflicted upon the criminal, or upon someone who is supposed to be answerable for him and for his wrong doings.

Theories of Punishment :

To punish criminals is a recognised function of all civilized States for centuries. But with the changing, patterns of modern societies, the approach of penologists towards punishment has also undergone a radical change. The penologists today are concerned with crucial problem as to the end of punishment and its place in penal policy.

Though opinions have differed as regards punishment of offenders varying from age-old traditionalism to recent modernism, broadly speaking four types of views can be distinctly found to prevail. Modern penologists prefer to call them 'theories of punishment', which are as follows :—

Deterrent Theory

Earlier modes of punishment were, by and large, deterrent in nature. This kind of punishment presupposes infliction of severe penalties on offenders with a view to deterring them from committing crime. It is the fulfilment of one's vengeance that underlies every criminal act. The deterrent theory also seeks to create some kind of fear in the mind of others by providing adequate penalty and exemplary punishment to offenders which keeps them away from criminality. Thus, the rigour of penal discipline acts as a sufficient warning to offenders as also others. Therefore, deterrence is undoubtedly one of the effective policies which almost every penal system accepts despite the fact that it invariably fails in its practical application. Deterrence, as a measure of punishment particularly fails in case of hardened criminals because the severity of punishment hardly has any effect on them. It also fails to deter ordinary criminals because many crimes are committed in a spur of moment without any prior intention or design. The futility of deterrent punishment is evinced from the fact that quite a large number of hardened criminals return to prison soon after their release. They prefer to remain in prison rather than leading a free life in society. Thus, the object underlying deterrent punishment is unquestionably defeated. This view finds support from the fact that when capital punishment was being

publicly awarded by hanging the person to death in public places, many people committed crimes of pick-pocketing, theft, assault or even murder in those men-packed gatherings despite the ghastly scene.

Suffice it to say that the doctrine concerning deterrent punishment has been closely associated with the primitive theories of crime and criminal responsibility. In earlier times, crime was attributed to the influence of 'evil spirit' or 'free-will' of the offender. So the society preferred severe and deterrent punishment for the offender for his act of voluntary perversity which was believed to be a challenge to God or religion.[1]

The punishment was to be a terror to evil-doers and an aweful warning to all others who might be tempted to imitate them.

Retributive Theory :

While deterrent theory considered punishment as a means of attaining social security, the retributive theory treated it as an end in itself. It was essentially based on retributive justice which suggests that evil should be returned for evil[2] without any regard to consequences. The supporters of this view did not treat punishment as an instrument for securing public welfare. The theory, therefore, underlined the idea of vengeance or revenge. Thus, the pain to be inflicted on the offender by way of punishment was to outweigh the pleasure derived by him from the crime. In other words, retributive theory suggested that punishment is an expression of society's disapprobation for offender's criminal act.

As rightly observed by *Sir Walter Moberly*, "the drama of wrong doing and its retribution has indeed been an unending fascination for the human mind".[3] The theory of retribution is based on the view that punishment is a particular application of the general principle of justice, that men should be given their due. Punishment serves to express and to satisfy the righteous indignation which a healthy minded community regards transgression. As such, it is sometimes an end in itself.[4]

It must be stated that the theory of retribution has its origin in the crude animal instinct of individual or group to retaliate when hurt. The modern view, however, does not favour this contention because it is neither wise nor desirable. On the contrary, it is generally condemned as vindictive approach to the offender.

Retributive theory is closely associated with the notion of expiation which means blotting out the guilt by suffering an appropriate punishment. It is this consideration which underlies the mathematical equation of crime, namely, guilt *plus* punishment is *equal to* innocence.

Most penologists refuse to subscribe to the contention that offenders should be punished with a view to making them pay their dues. The reason being that no sooner an offender completes his term of sentence, he thinks that his guilt is washed off and he is free to indulge in criminality again.

Hegal opposed the theory of retribution and observed that it is the

1. Barnes & Teeters ; New Horizons in Criminology, (3rd Ed.) p. 216.
2. Sen. P. K. : Penology Old and New (1943), p. 27.
3. Sir Walter Moberly : The Ethics of Punishment (1968 Ed.) p. 14.
4. *Ibid.*

manifestation of revenge for an injury. To quote him, he said,

> "You hurt me so I will hurt you. Indeed that is the literal meaning of retribution. And if I cannot hurt you myself, I demand that you should be hurt by others. The desire to make the offender suffer, not because it is needed so that the guilt is purged, not also because suffering might deter him from future crime, but simply because it is felt that he deserves to suffer, is the essence of retribution."[1]

It must, however, be stated that Sir James Stephen defended the doctrine of retribution on the ground that "criminals deserved to be hated and the punishment should be so contrived as to give expression to that hatred, and to justify by gratifying a healthy natural sentiment."[2]

Thus, modern penology discards retribution in the sense of vengeance, but in the sense of reprobation it must always be an essential element in any form of punishment.

Preventive Theory

Preventive philosophy of punishment is based on the proposition 'not to avenge crime but to prevent it'. It presupposes that need for punishment of crime arises simply out of social necessities. In punishing a criminal, the community protects itself against anti-social acts which endanger social order in general or person or property of its members.

In order to present preventive theory in its accurate form, it would be worthwhile to quote *Fichte* who observed, "the end of all penal laws is that they are not to be applied". Giving an illustration he continued, "when a land owner puts up a notice 'trespassers will be prosecuted' ; he does not want an actual trespasser and to have the trouble and expense of setting the law in motion against him. He hopes that the threat will render any such action unnecessary, his aim is not to punish trespass but to prevent it. If trespass still takes place, he undertakes prosecution. Thus, the instrument of deterrence which he devised originally consisted in the general threat and not in particular convictions".

The real object of the penal law, therefore, is to make the threat generally known rather than putting it occasionally into execution. This indeed makes the preventive theory realistic and humane. It is effective for discouraging anti-social conduct and a better alternative to deterrence or retribution which now stand rejected as methods of dealing with crime and criminals.

In England utilitarians like *Bentham* supported preventive theory because of its humanising influence on criminal law. They asserted that it is the certainty of law and not its severity which has a real effect on offenders.

As an off-shoot of preventive view regarding crime and criminals, the development of prison institution gained momentum. The preventive theory seeks to prevent the recurrance of crime by incapacitating the offenders. It suggests that prisonisation is the best mode of crime prevention as it seeks to eliminate offenders from society thus disabling them from repeating

---

1. Studies in Hegalian Cosmology p. 133, cited by Ewing AC. The Morality of Punishment pp. 73-75.
2. Sir James Stephen : History of Criminal Law of England, p. 82.

crime. The supporters of preventive philosophy recognise imprisonment as the best mode of punishment because it serves as an effective deterrent as also a useful preventive measure. It pre-supposes some kind of physical restraint on offenders. According to the supporters of this theory, murderers are hanged not merely to deter others from meeting similar end, but to eliminate such dreadful offenders from society.

Reformative Theory

With the passage of time, developments in the field of criminal science brought about a radical change in criminological thinking. There was a fresh approach to the problem of crime and criminals. Individualised treatment became the cardinal principle for reformation of offenders. This view found expression in the reformative theory of punishment.

As against deterrent, retributive and preventive justice the reformative approach to punishment seeks to bring about a change in the attitude of offender so as to rehabilitate him as a law abiding member of society. Thus, punishment is used as a measure to reclaim the offender and not to torture or harass him. Reformative theory condemns all kinds of corporal punishments. The major emphasis of the reformist movement is rehabilitation of inmates in peno-correctional institutions so that they are transformed into good citizens. These correctional institutions have either maximum or minimum security arrangements. The reformists advocate humanly treatment of inmates inside the prison institutions. It also suggests that the prisoners should be properly trained to adjust themselves to free life in society after their release from the institution. The agencies such as parole and probation are recommended as the best measures to reclaim offenders to society as reformed persons.

The reformative view of penology suggests that punishment is only justiciable if it looks to the future and not to the past. "It should not be regarded as settling an old account but rather as opening a new one". Thus, the supporters of this view justify prisonisation not solely for the purpose of isolating criminals and eliminating them from society but to bring about a change in their mental outlook through effective measures of reformation during the term of their sentence.

Undoubtedly, modern penologists reaffirm their faith in reformative justice but they strongly feel that it should not be stretched too far. The reformative methods have proved useful in cases of juvenile delinquents and the first offenders. Sex psychopaths also seem to respond favourably to the individualised treatment model of punishment. Hardened criminals, however, do not respond favourably to the reformist ideology. It is for this reason that *Salmond* observed that though general substitution of reformation for deterrence may seem disastrous, it is necessary in certain cases specially for abnormals, and degenerates who have diminished responsibility.[1] It, therefore, follows that punishment should not be regarded as an end in itself but only as a means, the end being the social security and rehabilitation of the offender in society.

Many penologists have denounced 'rehabilitative ideal' or the 'reformist ideology' underlying individualised treatment model because in practice they

1. Salmond : Jurisprudence (12th Ed., 1966), p. 27.

are more punitive, unjust and inhumane than retribution or deterrence. Writing about the condition of prisons in Russia and France, *Peter Kropotkin* observed, "prisons are seen as symbols of our hypocrisy regarding rehabilitation, our intolerance of deviants, or our refusal to deal with the root causes of crime such as poverty, discrimination, unemployment, ignorance, over-crowding"[1] and so on.

Yet another argument which is often advanced against reformative treatment is that there is no punishment involved in it in the sense of some sort of pain and, therefore, it cannot be regarded as punishment in true sense of the term. But it must be pointed out that though reformative treatment involves benevolent justice, yet the detention of the offender in prison or any other reformative institution for his reformation or readjustment is in itself a punishment because of the mental pain which he suffers from the deprivation of his liberty during the period he is so institutionalised. Therefore, it is erroneous to think that institutional detention for reformation is not a form of punishment. In fact, surveillance and close supervision is itself punitive though it involves no physical pain or suffering.

The authors of an American study also criticized reformist ideology saying, "it never commended more than lip service from most of its more powerful adherents. Prison administrators who embraced the rehabilitative ideal, have done so because it increased their power over inmates".[2]

It is a known fact that punishment always carries with it a stigma inasmuch as it fetters the normal liberty of individual. It has become an integral part of law enforcement for securing social control. Punishment is inevitable for recidivists who are habitual law-breakers. The tendency among recidivists to repeat crime is due to their inability to conform to the accepted norms of society. Investigations reveal that it is the mental depravity of the offenders which makes them delinquent and, therefore, a system of clinical treatment seems inevitable for the correction of such offenders. However, there is a need for compartmentalisation of offenders for this purpose on the basis of age, sex, gravity of offence and mental condition. This object is achieved by scientific classification of criminals into different categories such as the first offenders, habitual offenders, recidivists, juvenile delinquents, insane criminals and sex offenders. Thus, punishment should be a sort of social surgery since criminal is essentially a product of conflict between the interests of society.

Efficacy of Punishment

In order to assess the adequacy of modern penal systems, it is necessary to probe into the origin and evolution of the system of punishment from the earliest time.

Early Stages

In primitive societies, men shared with animals the emotion of resentment at injury. The sense of fear and ignorance led to barbarous

1. Kamenka & Brown : Ideas and Ideologies Law and Society, p. 112.
2. An American Report on Crime and Punishment entitled. "Struggle for Justice" prepared by American Friends Service Committee (New York 1971), p. 112.

method of treatment of offenders. The concept of law and order was not yet known. Consequently, the common methods of settling disputes were through personal vengeance such as dual blood feuds and reparation, etc. As pointed out by *Gillin*, "in those days punishment was reflective reaction to injury". Thus, in early societies the basis of punishment was retribution and vengeance. This obviously led to exploitation of the weaker by the stronger which resulted into complete chaos. The life and property were most insecure and always exposed to dangers. At times even the family members of victim or his clan settled disputes with the offender or his family.

It is significant to mention here that even the oldest epic *Bhagwat Gita* has justified killing in some cases as noble—a virtuous act and to act contrary to it is a sin—an act of cowardice—unbecoming of a man. According to *Dharma-Sastra* killing a murderer (*Atatayinah*) is one's duty, may the killer be a preceptor, child, old man or a learned *Brahmin*. The murderer should be slain at once without considering whether the act is virtuous or vicious. As pointed out *Mr. Justice K.B. Panda*, this exhibits profound knowledge and forsightedness of ancient Hindu law-makers who had not only contemplated of a right of private defence but had given due recognition to it.[1]

The cases of property damages were generally settled by compelling the offender to pay compensation to the injured. This remedy was, however, rarely used for personal injuries. With the advance of civilization, the sense or respect for mutual rights and duties developed among people which eventually led to the evolution of law. Later, the State came into existence and took to itself the task of maintaining law and order in the community by punishing the law-breakers. The State also sought to redress the grievances of victims who were injured by the wrongful acts of criminals. Thus, the Sovereign used punishment as a substitute for personal vengeance through retribution. In early days, the popular modes of punishment were exile, banishment and outlawry. These methods acted as an effective deterrent in maintenance of the law and order within the community. *Prof. Maitland* has pointed out that four main forms of punishment *viz*., outlawry, blood feuds *bot, wite,* and *wer*[2] and loss of life or limbs were commonly used in the early English society.

Medieval Period

The medieval period in the history of human civilization witnessed an era of religious predominance in the western world. The tenets of religion had great influence on the administration of justice and penal policy. Crime began to be identified with sin and violence was abhored. Ecclesiastical punishments were mixed up with the religious notions of cleansing of the soul for the reformation of criminal. Ordeal by fire and water were commonly used to establish the guilt or innocence of the accused.[3] Thus the genesis of punishment then lay in supernatural forces. It was generally

1. Lecture delivered by *Mr. Justice K. B. Panda* of the Orissa High Court on *SANATAN DHARMA AND LAW* in All-World Religious Conference at Puri on 1st Dec. 1974.
2. In Anglo-Saxon law the word '*bot*' was used for the quantum of compensation, a part of which was to go to the State for its services and was called '*wite*' while the balance of it was to be retained by the party injured and was called '*wer*'.
3. Dr. Pendse S.N. : Oath And Ordeals In Dharmsastra. p. 2.

believed that an offender by his criminal behaviour invoked the wrath of God which entailed him punishment. Offender's guilt could be washed off by penance, remorse or expiation which by itself was a sufficient punishment to mitigate his wrong.[1] This finally led to the evolution of solitary confinement as means of penance by putting the wrong-doer in isolation. Particularly, the ancient penal law of India laid greater emphasis on penance or *Atma-Shuddhi* of the offender and believed that if the offender sincerely repented for his offence, the mental torture that he suffers due to remonstrance was in itself a great punishment for him. The noted Italian criminologist *Garofalo*, however, rejected the theory of moral expiation on the ground that a criminal by nature lacks moral consciousness and, therefore, expiation as a punishment has only a theoretical significance. It must, however, be stated that *Garofalo*'s conclusions on expiation as a mode of punishment may be true so far habitual offenders or recidivists are concerned but expiatory methods do have a great force in reforming the first offenders and those delinquents who commit crime impulsively.

Criticising the theory of expiation, *Sir Leo Page* observed that "the theory is not only wrong but actively mischievous as it would mean imposing a duty on courts to determine the degree of pain precisely adequate to expiate moral guilt." This, in his view was patently impossible. According to him, "to assess the moral culpability of a man involves the ability to look into his heart, to take account of the strength of the temptations to which he was subjected as well as the conditions which have made him what he is."[2]

Enrico Ferri, the noted Italian criminologists also discarded the idea that expiation should enter the arena of punishment and said, "the question of moral guilt of a criminal or of any other human being, lies within the domain of religion and moral philosophy....the State and its system of criminal justice can do no more than to adopt such measures to defend the community against criminals as are reasonable to themselves and proportionate to the danger threatened to society.[3]

Thus, the theory of expiation presented practical difficulties in the determination of exact quantum of punishment which would be adequate to wash off the moral guilt of the offenders. Besides, it also meant assigning the Judge a task which cannot be accomplished by any human agency.

With the advance of science and knowledge in social disciplines, there has been a wave of renaissance and reformation throughout the European continent. The Declaration of Rights of Man in France in 1787 marked the end of draconic punishments and the beginning of methodical system of punishment founded on sound principle that right to punish is limited by the law of necessity. This brought about radical changes in the administration of criminal justice. In result, penology began to develop as an independent branch of criminal science with new treatment methods of punishment for the reformation of inmates. A scientific approach to crime and criminals has shown beyond doubt that torturous punishment tends to turn offenders more dangerous and aggressive towards society. Alternatively, their rehabilitation through the method of reformation is considered more useful. With this end

1. Howard W.F. : 'Punishment And Reformation'. p. 149.
2. Sir Leo Page : Crime & the Community p. 67.
3. Enrico Ferri : Criminal Sociology p. 347.

in view, the modern judicial trend is to incorporate correctional methods in the penal programme so as to bring about rehabilitation and re-socialisation of inmates in the community.

During medieval period, the condition of prisons was awefully bad and prisoners were virtually living a life of hell on earth. Deterrence was the cardinal rule of justice which meant considerable torture and harassment to offenders. Punishment was used as a means to inflict pain on the offenders. The theory of vengeance which is otherwise known as *lex-talionis* (poetic-penalties) was nothing but a perverted form of retributive method of punishment. It was founded on the principle of 'eye-for-an-eye and tooth for-a-tooth'. The agencies implementing these punishments adopted a very stiff attitude towards the offenders.

Modern or New Penology

With new criminological developments, particularly in the field of penology, it was generally realised that punishment must be in proportion to the gravity of the offence. It was further suggested that reformation of criminal rather than his expulsion from society was more purposeful for his rehabilitation. With this aim in view, the modern penologist focused their attention on individualisation of offender through treatment methods. Today, old barbarous methods of punishment such as, mutilation, branding, hanging, burning, stoning, flogging, amputation, starving the criminal to death or subjecting him to pillory or poetic punishment, etc. are completely abandoned. Pillory was a method of corporal punishment under which the offender was subjected to public ridicule by exposing him to punishment in public places. Different poetic punishments were provided for different crimes. Thus, cutting off hands for theft, taking off tongue for the offence of perjury, emasculation for rape, shaving off the head of a woman in case she committed a sex-crime or whipping her in public street and similar other modes were common forms of poetic punishment during Middle Ages. Modern penologists have substituted new forms of penal sanctions for the old methods of sentencing. The present modes of punishment commonly include imposition of monetary fines, seggregation of the offender temporarily or permanently through imprisonment or externment or compensation by way of damages from the wrong-doer in case of civil injury. Undoubtedly, it goes to the credit of eminent criminologists, notably, *Beccaria, Garofalo, Ferri, Tarde, Bentham*, and others who formulated sound principles of penology and made all efforts to ensure rehabilitation of the offender so as to make him a useful member of society once again. *Garofalo* strongly recommended 'transportation' or 'banishment' of certain types of offenders who had to be seggregated from society. Modern penal systems, however, limit the punishment of transportation within the homeland so that potentiality of prisoners is utilised within the country itself. Of late, open air jails are being intensively used for long-termers so that they can earn their livelihood while in the institution.

It was *Beccaria* who pioneered classical view of penology, raised voice against cruel and brutal punishments and advocated equalised treatment for all criminals for similar offences. He reiterated that it was not the personality of offender but his antecedents, family background and

circumstances, which had to be taken into consideration while determining his guilt and punishment. This, in other words, meant greater emphasis on the 'act' (crime) rather than the criminal. He was equally opposed to the discretionary power of the court and argued that the function of determining appropriate punishment for different offences must be confined to the legislators and law-makers alone. The system of trial by jury is essentially an outcome of the classical thinking which treated 'act' and not the 'individual' as the object of punishment. The function of jury is to determine the question of fact, *i.e.* whether the crime has been committed by the offender or not, while it is for the magistrate to decide the guilt or innocence of the accused in accordance with the established principles of law. The central theme of penal policy advocated by adherents of classical school was equality of punishment for similar offences.

As a reaction to classical view, neo-classists voiced their criticism against equality of punishment on the ground that it did not respond well with the requirements of certain categories of criminals such as minors, idiots, mentally depraved offenders or those committing crime under extenuating circumstances.[1] The adherents of neo-classical school, therefore, suggested that punishment should be awarded in varying degrees depending on the mental condition and intent of the criminal. Thus, it was for the first time that an attempt was made to shift the emphasis from '*crime*' to '*criminal*'. The greatest contribution of this school in the field of penology lies in the fact that it emphasised the need for individualized punishment. This finally led to classification of criminals into different categories according to the genesis of their criminality. The object was to make the reformative methods of punishment more effective. Commenting on this change, *Dr. P. K. Sen* rightly observed that punishment is now divested of its retaliatory characteristic and is converted into a treatment method for bringing about reformation of the offender.

Among modern penologists the names of *Raffaele Garofalo* and *Enrico Ferri* deserve a special mention. *Garofalo* was an eminent criminologist of Italy who held distinguished positions as a Judge, a Professor of law as also a Minister of Justice and, therefore, he was deeply involved in administration of criminal justice and treatment of offenders. Out of his vast experience as a magistrate, he suggested that insane criminals should be treated leniently. In his opinion vengeance had only a theoretical basis for penal sanctions. Curiously enough, *Garofalo* was a critic of reformative theory of punishment and believed that it had only a limited utility in cases of young or first offenders and it hardly served any useful purpose in cases of recidivists and hardened criminals. He also rejected deterrent punishment since it failed to determine the exact quantum of punishment for a given offence under varying social circumstances. He, however, agreed with *Beccaria* that retention of punishment is necessary for recognition of individual rights and social co-existence.

Enrico Ferri was yet another Italian penologist who supported positive school of criminology. He asserted that punishment was necessary for the protection of society because crimes in society are inevitable. In his opinion punishment was a social deterrent. Since society has to defend itself against

1. Sen, P.K. : Penology Old and New (1943 Ed.). p. 45.

aggressors, it has a right to punish the offenders. He strongly commended compensation as an effective sanction against crimes, particularly those relating to property. *Ferri* believed that dumping the prisoners in prison cells throughout their term of sentence served no useful purpose. It was wholly an unproductive process. He, therefore, suggested that inmates should be utilised to work on agricultural farms or construction sites and thus engaged as labour during working hours. This, in his view was in the best interest of the inmates as well as the State. He preferred indeterminate sentence to a fixed term of institutionalised sentence and recommended clinical treatment for insane criminals.

In short, it is now well recognised that prevention of crime and protection of society are the main objects of punishment. It therefore, follows that no single theory of punishment will serve the real purpose. Commenting on this aspect of penal justice, *Caldwell* observed :

> "Punishment is an art which involves the balancing of retribution, deterrence and reformation in terms not only of the Court but also of the values in which it takes place and in the balancing of these purposes of punishments, first one and then the other receives emphasis as the accompanying conditions change."[1].

The modern penological thinking is that punishment should be rationalised by taking into consideration the various approaches in their proper perspective and making use of them to suit the given situation and requirement of the offender in accordance with the principle of individualisation.

Indian Perspective

Dr. P. K. Sen, a well known authority on Indian penology has given a comparative account of the old and new penal systems. He observed that penology embodies the fundamental principles upon which the State formulates its scheme of punishment. He further pointed out that punishment always lacks exactness because it is concerned with human conduct which is constantly varying according to the circumstances. He, therefore, suggested that punishment must be devised on case law so that it could be free from rigidity and capable of modification with changing social conditions. He emphatically stressed that penal science is not altogether new to Indian criminal jurisprudence. A well defined penal system did exist in ancient India even in the time of *Manu* or *Kautilya*. In ancient penal system the ruler was expected to be well versed in *Rajdharma* which included the idea of *Karma* and *Dand*. The ancient Indian criminal justice administrators were convinced that punishment serves as a check on repetition of crime and prevents law-breaking. They believed that all theories of punishment whether based on vengeance, retribution, deterrence, expiation or reformation are directed towards a common goal, that is, the protection of society from crime and criminals. Thus, punishment was regarded as a measure of *social defence* and a means to an end. The modern trend, however, is to replace retributive and deterrent methods by reformative and corrective measures, the object being the rehabilitation of the offender. Commenting on this aspect *Dr. P.K. Sen* asserted that the concept of

1. Caldwell : Criminology p. 403.

punishment has now radically changed inasmuch as it is no longer regarded as a reaction of the aggrieved party against the wrong-doer but has become an instrument of *social defence* for the protection of society against crime.

Essentials of an Ideal Penal System

By way of generalisation, it may be stated that efficacy of a penal system is to be assessed in the light of its impact on society in general and the criminal in particular. Punishment of offenders though necessarily arduous, is inevitable in the interest of the community at large, therefore, every civilized nation must have a definite penal programme. An ideal penal system must essentially consist of the following elements :—

1. A rational penal policy should aim at protecting the society from crimes and reclaim criminals by removing imperfections in the penal law of the country. Greater emphasis should be on prevention rather than cure. Necessary steps should be taken to ensure that people do not get opportunity to commit crime rather than trying to reform them after they have indulged into criminality. The law must provide scope for adjustment of punishment according to variations in culpability.

2. Expressing his concern for the efficacy of punishment. *Bentham*, the great English law reformer commented that penal policy must be in conformity with the principle of hedonism, that is, the utilitarian doctrine of *pain* and *pleasure*. The pleasure derived from criminal act must not outweigh the pain inflicted by way of punishment, otherwise the punishment is bound to lose its significance. That apart, punishment to be effective, should be proportionate to the gravity of the offence.

3. It is an accepted fact that delay defeats justice. Inordinate delay in sentencing negatives its deterrent effect. It is, therefore, desired that punishment must follow the crime. Elimination of delay in awarding punishment is perhaps the most fundamental requirement of an ideal penal programme. It must be noted that inordinate delay in disposal of cases by courts is causing untold miseries to poor litigants, particularly in India, as a result of which people are losing faith in these institutions of justice.

4. Punishment connotes society's disapprobation for a particular human conduct and penal sanctions act as a threat to the aggressor to refrain from committing such forbidden acts of violence. Thus the ultimate object of punishment is to protect society against law-breakers. As *Beccaria* puts it, the purpose of punishment is 'to make crime an ill-bargain for the offender'.

5. Experience has shown that the principle of equal punishment for similar offences does not prove effective for all types of criminals. The young and the first offenders must be treated differently than the recidivists and habitual offenders. The justification for this differential treatment lies in the fact that the effect of punishment varies from criminal to criminal depending on his age, sex, intellect, mental depravity, responsive attitude and social circumstances. It is for this reason that classification of criminals into different categories is deemed necessary so that they could be reformed through adequate correctional measures.

6. It is significant to note that efficacy of punishment essentially

depends on the proper functioning of agencies[1] which administer criminal justice. These agencies must command respect among the public. Everyone including the criminal himself should feel convinced that justice shall be done to him. Disproportionate and unduly harsh punishment shall make the members of community feel that their life is unsafe and insecure in the hands of criminal law administrators and their distrust for law and penal institutions shall jeopardize the cause of criminal justice. Unfortunately, the position in India in this regard is hardly satisfactory. Particularly, the functioning of the police and courts needs improvement so that people regain their lost faith in these august institutions of law and justice.

7. Reformation of criminals should be the object of punishment while 'individualisation' the method of it. Thus, reformation in case of juveniles, first offenders and women offenders and deterrence for hardened criminals and recidivists should be the ultimate object of penal policy. Emphasising on the reformative aspect of penal justice, the Supreme Court in *Mohd. Giasuddin* v. *State of A.P.*,[2] held that the State has to rehabilitate the offender rather than avenge. Mr. Justice Krishna Iyer further observed, "sub-culture that leads to anti-social behaviour has to be countered not by undue cruelty but by re-culturialisation". The punishment to be efficacious must include the combination of deterrence, prevention and reformation so that it prevents a future wrong besides bringing a change in the attitude of the offender through reformative measures during the period of his incarceration.

8. While appreciating the need for reformative approach towards criminals, a word of caution as to the extent to which the principle is to be applied, seems necessary. It is generally observed that in their enthusiasm to reform the criminals authorities associated with the penal institutions such as prisons and reformatories convert these institutions into an earthly paradise providing all sorts of comforts to inmates. Consequently, inmates often take the institution as an easy resort to spend their life comfortably without shouldering any responsibilities. This obviously defeats the very object of reformation. It is, therefore, desired that life in these institutions must involve certain degree of hardship and rigour so that the inmate is always reminded of his bitter experiences of institutional life after his release. This will help in keeping him away from repetition of criminal acts. The penal system should be designed so as to ensure that offenders improve by suffering for their offences.[3] Unfortunately, in India the trend of judicial sentencing is towards excessive reformation with the result punishment is losing all its effect and there is steep rise in crime rate.

9. The authorities concerned with the criminal justice administration should refrain from projecting the image of offenders as "big shot". It must be remembered that punishment fails when it raises the status of the punished criminal in his group.[4] This is particularly, true with criminal

---

1. The important agencies of administering penal justice are the police, the law courts, the prisons and similar penal institutions. Lawyers and political and social leaders also play an important role in criminal justice delivery system.
2. AIR 1977 SC 1926.
3. Nigel Walker : Sentencing in a Rational Society (1972), p. 17.
4. Donald Taft : Criminology (4th Ed.), p. 295.

gangs. Rewards so often announced by the Government on the heads of notorious murderers, dacoits and criminals seem to undermine this aspect of penal policy.[1] To cite a concrete illustration *Mr. Kalyan Mukherjee* in his Book entitled, 'The Story of Bandit King'[2] describes dacoit Malkhan as "a man who wove terror and pity to create a legend". Again, the making of a film on the Bandit Queen Phoolan Devi by film director Shekhar Kapoor and its clearance by the Censor Board in September 1995 had projected this women-dacoit as a great Indian personality forgetting all about her past murderous deeds. The patronage extended to her by certain political parties further indicates how this fundamental principle of penal justice has been flouted with impunity. Far from being punished for her criminal acts, she was elected as the President of the *Aklavya Sena*, an off-shoot of Bahujan Samaj Party and also M.P. for the 11th and 12th Loksabha.

To cite yet another illustration, the manner in which the governments of Karnataka and Tamil Nadu were held to ransom by the sandalwood jungle dacoit Veerappan[3] has shaken the conscience of the nation. It was rather disgusting to note that the official emissary R.R. Gopal set out to meet the outlaw four times during August-September, 2000 to secure the release of noted Kannad film Star Dr. Raj Kumar who was held as hostage by Veerappan, but both the State Governments were unable to arrest the bandit. On the contrary, they surrendered to his threats and released on bail several hard-core TADA detenues who had committed murders. During all this time Veerappan moved in and out of the forest, and R.R. Gopal, the emissary kept returning with interviews and video tapes of his meeting with the bandit. The prevailing situation was indeed a sad reflection on our criminal justice delivery system which drew strictures from the Supreme Court.

10. Modern penologist are opposed to retention of capital punishment on humanitarian grounds. They argue that killing of man is inhumane. That apart, if an innocent person is executed due to erroneous justice, that will do irreparable harm. Some argue that putting an offender to death virtually amounts to a cold-blooded murder which serves no useful purpose. The real object of punishment being reformation and not destruction of the criminal, death sentence hardly serves any purpose. Thus, enlightened view is averse to the retention of capital punishment since it is grossly unjust and against the principles of humanity.

It must, however, be pointed out that despite growing disinclination for awarding death penalty, there is a growing reluctance to abolish it. It is so because of a general feeling that threat of infliction of death sentence itself

1. The dramatic surrender of Bandit Queen Phoolan Devi at Bhind in Madhya Pradesh before the Chief Minister of Madhya Pradesh on 12th February, 1983 in a well arranged ceremony was vehemently criticized for this very reason.
2. The book entitled the Story of Bandit King Malkhan written by Kalyan Mukherjee and published by Lanner International 1985 is priced Rs. 250/- which in itself is enough to glorify the image of notorious dacoit Malkhan of Madhya Pradesh.
3. Veerappan was operating in the sandalwood jungle ever since 1980's. He had cut down hundreds of sandalwood trees, killed elephants for ivory and shot dead many policemen. He was shot dead by the Tamil Nadu Police Special Task Force headed by Addl. IGP in an encounter at Paparapatti villege in Dhermapuri on 18th October, 2004.

proves as an effective deterrent. Therefore, the ideal policy is to retain capital punishment in the Statute Book to be used in 'rarest of rare' cases.[1] It is true that the test of 'rarest of rare cases' has not been acceptable to many because of the fact that what may appear to be a rarest of rare case to one Judge may not necessarily appear to be so to another Judge.[2] The principle has, however, been incorporated in the judicial process by Section 235(2) of the Code of Criminal Procedure, 1973 which provides that when a court awards death sentence by choosing between it and any other alternative punishment permissible under the law, then the reasons for doing so must be recorded by the Court.

11. Punishment should include both compensation as well as imprisonment. As a matter of general policy, it would be ideal to prescribe reparation or payment of compensation for offences relating to property while penal sentence with or without fine may be awarded for crimes against person.

12. The efficacy of punishment, by and large, depends on its impartiality. The penal policy should, therefore, be completely free from considerations as to the caste, creed, religion or status of the offender. It would be pertinent to note in this context that the failure of criminal justice during Moghul-rule in India was solely due to the discriminatory nature of Muslim law of crimes and evidence. Thus, no Mohammedan could be awarded capital punishment on the evidence of an infidel, that is, the unbeliever in the Muslim faith. Further, the evidence of one Mohammedan was equivalent to two Hindus and evidentiary value of two female witnesses was equal to one male witness under the Muslim law. A thief could be convicted only on the evidence of two men. This amply evinces irrationality of the Muslim criminal law and the bias which it carried against Hindus and women.[3]

13. As a sound principle of criminal justice, it is for the legislature to prescribe maximum limit of punishment for every offence in the Penal Code without laying down any minimum limit. This will enable law-courts to award punishment according to the requirements of individual offender thus infusing an element of discretion in judicial sentencing which is *sine qua non* for individualized treatment model.

14. The system of solitary confinement has now become obsolete and outdated. It is discarded because it is torturous and imposes excessive suffering on the offender. Modern penologists treat solitary confinement as a method of putting offenders to death without bloodshed.[4] Confining convicts in isolated prison-cells without any work makes them idle and aggressive and they return to society as more dangerous and aggressive criminals after their release. The torture of solitude and isolation is so painful that it completely destroys the personality of the offender and he turns hostile and indifferent to the community.

---

1. *Bachan Singh* v. *State of Punjab*, AIR 1980 SC 898. For detailed discussion on capital punishment, see *Infra* Chapter XV.
2. *Kunju Kunju Janardhanan* v. *State of Andhra Pradesh* ; Criminal Appeal No. 511 of 1978 (AIR 1979 SC 916) *see* dissenting Judgment of Mr. Justice A.P. Sen.
3. Paranjape N.V. Dr. : Indian Legal & Constitutional History (5th Ed. 1998) p. 172.
4. Sen, P.K. : Penology Old and New (1943), p. 35.

15. Punishment should always serve as a measure of social defence. This, in other words, means that elimination of incorrigibles and rehabilitation of corrigibles should be the ultimate object of penal justice. An ideal penal policy should have enough elasticity so as to mold itself with the changing needs of time and place.

The above generalisations with regard to punishment amply suggest that no single theory whether deterrent, preventive, retributive or reformative can help in eliminating crimes and criminals from society. It is only through an effective combination of two or more of these theories that an ideal penal programme can be drawn to combat crimes. Some socialist countries have explicitly mentioned in their criminal codes the aims of sentencing the offender.[1] This is indeed a welcome step which other countries should take note of while formulating their penal policy.

More recently, British and American penologist have shown considerable concern for plight of the 'victims' by focusing their attention on the diverse aspects of victimology. This relatively new concept covers within its ambit not only the victims of individual criminality, but also those of the abuse of criminal process and administration of justice. For this purpose it is necessary to develop human rights consciousness among the law-enforcement personnel particularly, the police and Jail officers. Undoubtedly, the setting up of the National Human Rights Commission[2] in 1993 in India is a welcome step in this direction.

Penal Policy in India

The penal reforms in India during the past few decades have brought about a remarkable change in the attitude of people towards the offenders. The old concepts about crime, criminal and convicts have radically changed. The emphasis has now shifted from deterrence to reformation of the criminal. The age old discriminatory and draconian punishments no longer find place in the modern penal system. Indian penologists are greatly impressed by the recent Anglo-American penal reforms and have adopted many of them in the indigenous system. This does not, however, mean that India did not have penal policy of its own prior to British influence. In fact, the Indian law givers of the olden times were well versed in the science of penology and attached great importance to penal sanctions. This is evident from the fact that *Brihaspati Shastra* contains directions that an ideal penal policy always seeks the support of public opinion or *Lokniti*. Again, *Kautilya* in his *Arthashastra* modelled his penal policy on utilitarian principles taking into consideration various social factors, traditions and customs of the people. Expressing his views on punishment *Kautilya* commented that punishment if too severe alarms a man, if too mild frustrates him, but if

1. For example, Yugoslavia Code of 1951, Art. 3 provides that the 'Purpose of Punishment' is :
   to prevent activity perilous to society ;
   to prevent the offender from committing criminal offence and to reform him ;
   to exercise educational influence on other people in order to deter them from committing criminal offences ;
   to influence development of social morals and social discipline among citizens.
2. The National Human Rights Commission of India was set up in 1993 headed by Justice Venkatchalliah, former Chief Justice of India and four other members.

properly determined, makes man conform to *Dharma* or rightful conduct. The function of law (*Vyavhar*) according to him was to bring the wrong-doer on the right track by a change in his attitude. One peculiar feature of the ancient penal system of India was that it acknowledged the supermacy of Brahmins in matters of punishment. Perhaps the reason for this privilege to Brahmins was that they were regarded as the spiritual leaders of Indian society and hence were held in great esteem. This privileged section of the society enjoyed certain concessions in matters of punishment. For example, where the normal punishment for an offence was death and if the offender happened to be Brahmin, he was to be punished only with shaving of his head.[1] Curiously enough, leniency towards Brahmins in matters of punishment revived once again during the British period although for different reasons. The British administrators were basically against any discrimination in penal laws. But they accepted leniency towards Brahmins in matters of punishment perhaps because they wanted to gain the sympathy and support of this prestigeous class of Hindu society by conceding certain concessions to them. These concessions were, however, withdrawn in subsequent years of British rule in India.

As to the modes of punishment in ancient India, four main forms were known to have existed. They were :

(i) Admonition or warning (*Vakdanda*),

(ii) Remonstrance (*Prayaschitta*),

(iii) Fine (*Arthadanda*), and

(iv) Imprisonment, death or mutilation (*Vadhadanda, Mritudanda or Aung Vichheda*).

The first offenders were usually punished with admonition. Remonstrance or penance was regarded as an adequate punishment for improper acts perilous to society. If the wrong-doer caused injury to someone's property or person, he was punished with fine while those who committed serious crimes were imprisoned, amputated or done away to death.

During medieval period the Muslim rulers introduced their own penal laws in India. The system being retributive in nature and irrational and discriminatory in its application, failed to meet the ends of justice. The Muslim law arranged punishments for various offences into four main categories,[2] *viz.* (1) *Kisa*, (2) *Diya*, (3) *Hadd* and (4) *Tazeer*.[3] These punishments carried with them a bias and contempt for Hindus. However, with the decline of Moghul rule the British captured political power in India.

1. *Yajnavalakya*, the great commentator on Hindu Jurisprudence, however, criticised partiality towards Brahmins in the administration of justice in ancient times.
2. Jain, M.P. "Outlines of Indian Legal History" (3rd. Ed.), p 405.
3. *Kisa* or retaliation meant, life for life and limb for limb. It applied to the cases of wilful killing and gave the injured party or his heirs a right to inflict a like injury on the wrong-doer. *Diya* or *diyut* meant blood money. Thus in case of murder, the heir of the murdered man could accept *diya* and forego his right to claim death of the murderer. '*Hadd*' under the Muslim criminal law signified specific offences, which the society regarded as anti-social or anti-religious. These offences could be either against God or against 'public justice'. The punishment prescribed under *Hadd* could not be varied, increased or decreased. The Judge had no discretion in the matter. Most of the *Hadd* punishments were severe and barbarous in nature. *Tazeer* was an indefinite and discretionary punishment awarded by the magistrate.

The defects of Muslim criminal law provided an opportunity for British law administrators to substitute their own system of laws with necessary modifications so as to suit the needs of this country. While introducing the principles of English criminal law and methods of punishment in the Indian criminal justice system, they exercised great caution to ensure that the changes did not offend the sentiments of the indigenous people. The new system introduced by the British rulers was far more rational, impartial and reasonable than their predecessors and was, therefore, readily accepted by the people of India. As already stated, the supremacy of Brahmins no doubt revived once again but it was essentially a part of British diplomacy to divide and rule Indian community. It, however, came to an end in the closing years of British rule in India.

The common methods of punishment introduced by British administrators in India included the sentence of death, deportation, transportation, solitary confinement, imprisonment and fines. Petty offences were punishable with fine. A well-organised system of police was introduced to suppress crimes and apprehend criminals. The advance of penology in Anglo-American world during 18th and 19th centuries had its own impact on Indian penal system. Particularly, during the last fifty years significant penal reforms have been introduced in India. The sentence of transportation, mutilation, solitary confinement, whipping or punishing the offenders in public place are completely abolished and new reformative methods such as parole, probation, open air prisons, borstals, reformatories, etc. have been adopted for the rehabilitation of offenders. The modern techniques of handling the offender have proved a great success inasmuch as they offer a 'chance' to an inmate to return to society as a law abiding citizen and this inculcates in him a sense of 'hope' that he is going to be trusted by the society after his release from the institution. Modern penologists generally agree that reformation of offenders should be the basic purpose of every penal system but at the same time the importance of deterrence should not be undermined. Thus, reformation may be used as a general method of treating the offenders but those who do not respond favourably to this corrective method of treatment must be severely punished. The penal measures must be directed to show society's abhorrence to crime.

It must, however, be stated that the Indian penal system seems to be less effective as a control mechanism because it leaves many a criminals to enjoy the ill-gotten gains of their criminal acts. Undoubtedly, the Indian penal policy is based on individualised system but it seems to be working unjustly in favour of advantaged groups, particularly the political high-ups[1] and those who are in power, with the result the deterrent effect of punishment is considerably diminished. This is more true with punishment in bribery and corruption cases and big financial scams where influential persons are dealt with leniently because they are more articulate and are capable of manoeuvring things in their favour. Mild punishment or no

1. The cases of former Prime Minister Shri Narsimha Rao; former Chief Minister of Maharashtra Shri A.R. Antuley; Bihar supremo Lallo Prasad Yadav; Jharkhand Leader Shri Sibu Soren; sitting M.P. from Bihar Shri Rajesh Ranjan *alias* Pappu Yadav; Tantrik Chandraswamy etc. are only a few illustrations to support this contention.

punishment in such cases undermines the effectiveness of punishment as a measure of crime control mechanism.

Sum-up

In drawing up a penal programme for the prevention of crime and the treatment of offenders, it must be borne in mind that human nature is complex and it is not possible to comprehend it fully. This is the reason why all human being do not respond in the same manner in a given situation. This basic realisation has led to the innovation of a number of treatment methods for offenders. The prisons are no longer regarded as custodial institutions as they have acquired a new dimension as treatment and training centres for those who violate law. The emphasis has thus shifted from custody to training as re-education of offenders and from mere isolation to rehabilitation in the community. It has been amply realised that protection of society can be better ensured if the offender is corrected and reformed through individualised treatment. It has also been realised that mere treatment in institutions does not help in the ultimate rehabilitation of the offenders because of the stigma society attaches to the released inmates. An adequate after-care service programme is therefore most vital requirement in the correctional field.

An ideal penal policy should resort to reformation in case of juveniles or first offenders and deterrence for recidivists and hardened criminals. It is for this reason that modern penologists lay greater emphasis on institutional methods of treating the offender rather than the traditional methods of punishment which have now become obsolete and out-dated. The penal system should be so devised as to cause minimum of suffering to offenders and at the same time develop social morals and social discipline among citizens. In short, it should neither be intolerably severe nor unrealistically lenient. It must be stated that penal policy reflects the societal reaction to crime and, therefore, the motive for punishment should largely depend on the social structure and accepted norms and values of a given society. Truly speaking, the need of the day is for a rehabilitation programme for all inmates with a substantial diminution in the use of imprisonment and incarceration.

Of late, there has been a sweeping transformation in the penal programmes of progressive countries but there is still a greater need for some deeper insight into some of the manifestations of crimes and criminals such as the classification of offenders, working of penal institutions and effectiveness of punishment and other methods of treatment. Particularly, in the sphere of penology the influences of criminology and the law must be strengthened for effective realisation of the ends of penal justice and humanly treatment of offenders. This is possible by reaffirming faith in fundamental human rights and realising the dignity and worth of human beings. It is hopefully expected that under this dispensation the implementation of criminal justice system will work effectively in order to attain the desired objectives of progressive penology.

Chapter XIV

FORMS OF PUNISHMENT AND JUDICIAL SENTENCING

It is well known that punishment is one of the oldest method of controlling crime and criminality. However, variations in modalities of punishment, namely, severity, uniformity and certainty are noticeable because of variations in general societal reaction to law-breaking. In some societies punishments may be comparatively severe, uniform, swift and definite while in others it may not be so.[1] This accounts for the variations in use of specific methods of punishment from time to time.

An enquiry into the various forms of punishments which were in practice in different societies through ages would reveal that forms of punishment were mainly based on deterrence and retribution which have lost all significance in modern penology. The primitive societies did not have well-developed agencies of criminal justice administration, therefore, settlement of private wrongs was entirey a personal matter and aggrieved party could settle the issue directly with the wrong-doer.

Blood-feud was one of the common modes of punishment in early societies which was regulated by customary rule of procedure.[2] It was undoubtedly a retaliatory method which underlined the principle of *lex talionis*, meaning eye for an eye and tooth for a tooth. These blood-feuds sometimes led to serious clashes between the clans which made life extremely difficult.

Some time later, restitution for injury through payment of money compensation was substituted for blood-feud. The quantum of compensation, however, varied depending on the nature of the offence and the age, sex or status of the victim.

With the advance of time, primitive societies gradually transformed into civil societies and the institution of kingship began to exercise its authority in settling disputes. Thus private vengeance fell into disuse giving rise to public disposition of wrong-doers.[3] With the State assuming charge of adiministration of criminal justice, the process of public control of private wrongs started which eventually culminated into modern penal systems of the world. The institution of police as a law-enforcement agency and the court as justice dispensation mechanism developed only after crime and punishment became the matters of public control.

Dharmashastra Interpretation of Punishment

It must be stated that even the Hindu *Shastras* have emphasised on

1. Sutherland and Cressey : Principles of Criminology (6th Ed.) p. 255.
2. Barnes and Teeters : New Horizons in Criminology (3rd Ed.) p. 287.
3. *Ibid*, p. 288.

King's power to punish the law-breaker and protect the law-abider. According to *Manu*, king was *Danda Chhatra Dhari i.e.*, holder of *Danda* (Punishment) and *Chhatra* (Protector). According to *Gautam* the word *danda* meant restrains. *Vasista Samhita* also upheld king's power to punish and destroy the wicked and the evil. But "punishment must be awarded after due consideration of place, time, age, learning of the parties and the seat of injury". For *Manu, Danda* i.e., punishment was the essential characteristic of law. He justifies punishment because it keeps people under control and protects them. To quote him, "Punishment remains awake when people are asleep, so the wise have recognised punishment itself as a form or *Dharma*".[1] Punishment maintains law and order, it protects person and property. The fear of punishment is an essential attribute of judicial phenomena. Offenders refrain from wrongdoing for fear of punishment. Punishment and law are inseparable.

Forms of Punishment.

The history of early penal systems of most countries reveals that punishments were tortuous, cruel and barbaric in nature. It was towards the end of eighteenth century that humanitarianism began to assert its influence on penology emphasizing that severity should be kept to a minimum in any penal programme. The common modes of punishment prevalent in different parts of the world included corporal punishments such as flogging, mutilation, branding, pillories, chaining prisoners together etc., simple or rigorous imprisonment, forfeiture of property and fine.

Flogging — চেরাগত করা

Of all the corporal punishments, flogging was one of the most common methods of punishing crimes. In India, this mode of punishment was recognised under the Whipping Act, 1864, which was repealed and replaced by similar Act in 1909 and finally abolished in 1955. The English penal law abolished whipping even earlier. In Maryland (U.S.A.) whipping was recognised as late as 1953 although its use was limited only to "wife-beating". Flogging as a mode of punishment is being used in most of the middle-east countries even to this day.

The instruments and methods of flogging, however, differed from country to country. Some of them used straps and whips with a single lash while others used short pieces of rubber-hose as they left behind traces of flogging. In Russia, the instrument used for flogging was constructed of a number of dried and hardened thongs of raw hide, interpersed with wires having hooks in their ends which could enter and tear the flesh of the criminal. It has now been discontinued being barbarous and cruel in form.

Penological researches have shown whipping as a method of punishment has hardly proved effective. Its futility is evinced by the fact that most of the hardened criminals who were subjected to whipping repeated their crime. There is a general belief that whipping may serve some useful purpose in case of minor offences such as eve-teasing,

1. *Manu Smriti* VII 8. It says :
दण्ड : शास्ति प्रजा : सर्वा दण्ड एवाभिरक्षति।
दण्डसुप्तेषु जागर्ति दण्ड धर्म विदुर्वधा :॥

drunkenness, vagrancy, shop-lifting, etc. but it does not seem to have the desired effect on offenders charged with major crimes.

Mutilation — অঙ্গহানি / অপরিহার্য অংশের হানি → শারীরিক

Mutilation was yet another kind of corporal punishment commonly in use in early times. This mode of punishment was known to have been in practice in ancient India during Hindu period. One or both the hands of the person who committed theft were chopped off and if he indulged in sex crime his private part was cut off. The system was in practice in England, Denmark and many other European countries as well.

The justification advanced in support of mutilation is that it serves as an effective measure of deterrence and retribution. The system, however, stands completely discarded in modern times because of its barbaric nature. It is believed that such punishments have an inevitable tendency to infuse cruelty among people.

Branding — উত্তপ্ত লৌহের দ্বারা / ফলক লৌহদ্বারা চিহ্নিত করা / স্থলচিহ্নিত

As a mode of punishment, branding of prisoners was commonly used in oriental and classical societies. Roman penal law supported this mode of punishment and criminals were branded with appropriate mark on the forehead so that they could be identified and subjected to public ridicule. This acted as a forceful weapon to combat criminality. England also branded its criminals till 1829 when it was finally abolished.

The system of branding was not uncommon to American penal systems also. The burglars were punished by branding letter "T" on their hand and those who repeated this offence were branded "R" on the forehead. In Maryland (U.S.A.) blasphemy was punishable with branding the letter "B" on the forehead. In India, branding was practiced as a mode of punishment during the Moghul rule. This mode of corporal punishment now stands completely abolished with the advent of humanitarianism in the field of penology.

Stoning — পাথর নিক্ষেপ

Stoning the criminals to death is also known to have been in practice during the medieval period. This mode of sentencing the offender is still in vogue in some of the Islamic countries, particularly in Pakistan, Saudi Arabia etc. The offenders involved in sex-crimes are generally punished by stoning to death. The guilty person is made to stand in a small trench dug in the ground and people surround him from all sides and pelt stone on him until he dies. Though, it is a punishment barbaric in nature, but due to its deterrent effect, the sex crimes, espacially crimes against women are well under control in these countries.

Pillory[1]

Pillory was yet another form of cruel and barbaric punishment which was in practice till 19th century. The criminal was made to stand in a public place with his head and hands locked in a iron frame so that he could not

1. This type of punishment was also called poetic punishment though it was more often used in fiction than in poetry.

move his body. The offender could also be whipped or branded while in pillory. He could be stoned if his offence was of a serious nature. At times the ears of the criminal were nailed to the beams of the pillory. Restraining physical movements of the criminal had the most agonising effect on him and it was believed that the deterrence involved in this mode of punishment would surely bring the offender to books.

The system of pillory existed slightly in different form during the Moghul rule in India. Hardened criminals and dangerous offenders were nailed in walls and shot or stoned to death. The punishment undoubtedly was more cruel and brutal in form and, therefore, it has no place in modern penal systems.

Hanging condemned prisoner to death in a public place was common mode of pillory punishment in most part of the world until the middle of the twentieth century.

Fines

The imposition of fine was a common mode of punishment for offences which were not of a serious nature and especially those involving breach of traffic rules or revenue laws. This mode of punishment is being extensively used in almost all the sentencing systems of the world even today. Fines by way of penalty may be used in case of property crimes and minor offences such as embezzlement, fraud, theft, gambling, loitering disorderly conduct etc. Other forms of financial penalty include payment of compensation to the victim of the crime and payment of costs of the prosecution. Financial penalty may be either in shape of fine or compensation or costs.

The Indian Penal Code provides for imposition of fine—

(i) as the only disposition method;

(ii) as an alternative to imprisonment;

(iii) as a punishment in addition to imprisonment;

(iv) the actual amount of fine to be imposed is left to the discretion of the sentencing court.

Fine as an alternative to imprisonment is used only against short-term imprisonment *i.e.*, imprisonment upto 2 or 3 years.

The real problem involved in imposition of financial penalties is the quantum of fine or costs and enforcement of its payment. The usual methods of enforcement are forfeiture of property,[1] and threat of incarceration.[2] Recovery of fines from the source of income of the offender may also be one of the best methods of enforcing this penalty.

In fixing the amount of fine or pecuniary penalty financial condition of the convicted person must be kept in mind. Imposition of an exhorbitant sum by way of fine beyond the means of the offender would be unrealistic and, therefore, frustrate the cause of penal justice.

In India, however, in the matter of recovery of fines the provisions of Section 421 of the Code of Criminal Procedure, 1973 would apply. The Code provides that when a Court imposes a sentence of fine or a sentence of which fine forms a part, it may direct that whole or part of the fine may be paid as

1. Sections 125 to 127 and 169, IPC.
2. Nigel Walker : Sentencing in a Rational Society, (1972) p. 105.

a compensation to the victim for the loss or injury caused to him on account of the crime.[1]

In determining the amount and method of fine, the court should take into consideration the financial resources of the defendant and the nature of burden that its payment will impose on him. Normally, court should not sentence an offender only to pay a fine, when any other disposition is authorised by law, unless having regard to the nature and circumstances of the crime and prior history and antecedents of the offender, the sentence of fine alone is deemed sufficient for the protection of public interest.

While awarding the sentence of fine, the court must keep in mind the gravity of offence and the financial capacity of the offender to pay the amount of fine. Besides, it is not desirable to impose fine in addition to death sentence or long-term imprisonment, which may be an unnecessary burden on the family of the convicted person.

Doubts have always been expressed about the adequacy of fine as a method of punishment in cases of economic offences such as adulteration, tax-evasion, hoarding, bank frauds, FERA violations, financial scams, bribery etc. because of the fact that it may prove highly discriminatory between offenders having means to pay and those having no means to pay the fine. For rich and wealthy persons payment of fine would virtually mean purchasing the punishment

While expressing its views about fine as a punishment the Supreme Court in *Adamji Umar Dalal* v. *State*[2] observed as follows :—

> "In imposing fine, it is necessary to have as much regard to the pecuniary circumstances of the accused person as to the character and magnitude of the offence".

In the instant case the appellant was convicted for the offence of blackmarketing and sentenced to pay a fine of Rs. 1,500/- along with a substantial sentence of imprisonment. The Court reduced the fine to Rs. 1,000/- keeping in view the fact that the accused was merely a commission agent and the fine imposed by the trial court was unduly harsh.

In case of default in payment of fine leading to imprisonment of the accused, the ideal policy is to convert unpaid fine into imprisonment not automatically but by a court decision in each individual case.[3]

Forfeiture of Property

Section 53 of the Indian Penal Code also 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.

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

1. Section 357, Cr. P. C.
2. AIR 1952 SC 14.
3. Dr. Chhabra K.S : Quantum of Punishment in Criminal Law In India, p. 213.

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.

Security Bond

A security bond for good behaviour though strictly speaking not a punishment, may serve a useful purpose as a form of restraint on the offender. This may entail compulsory treatment or supervision of the offender. The court may 'defer' sentence on some offender conditionally subject to his normal behaviour. This 'conditional disposal' of offender is increasingly being recognised as an effective mode of corrective justice in modern penology.

The greatest advantage of this nominal measure of punishment is that it offers an opportunity to the offender to become a law-abiding citizen and chances of his reformation are better than those who are imprisoned or subjected to institutional sentence. That apart, the family members of the offender are not adversely affected by this mode of punishment as they are not deprived of their bread winner.

Banishment

The practice of transporting undesirable criminals to far-off places with a view to eliminating them from society has been commonly used in most parts of the world for centuries. In England, war criminals were usually transported to distant Austro-African colonies. The terms transportation, banishment, exile and outlawry though similar, have different connotations. The difference, however, seems immaterial for the present purpose. Exile as a device merged into outlawry with earlier religious element largely supplanted by a political motive.[1]

French criminals were transported to French colonies in Guiana and New Caledonia during nineteenth century. This mode of punishment was used only for hopeless criminals, political offenders and deserters. There was no question of these criminals returning alive as they were sure to die labouring in dense fever-infested forests of the African island. The French system of deportation was most brutal, cruel and inhumane. The system was abolished after the World War II when free French-Government was installed in that country.

Russian countries transported their criminals to Siberian penal camps. The condition of these camps was far worse than those of French in Guiana. They were virtually hell on the earth and have been called "House of the Dead" by *Dostoevksi*. These camps were mostly meant for political prisoners who were completely deprived of their civil rights and were long termers.[2]

The practice of transportation is known to have existed in penal system

1. Barnes and Teeters : New Horizons in Criminology, p. 249.
2. For details *see* George Kennan's; 'Siberia and the Excile System' (New York, Century 1891).

of British India as well. It was popularly called *'Kalapani'*. Dangerous criminals were despatched to remote island of Andaman and Nicobar. It had a psychological effect on Indians because going beyond the seas was looked with disfavour from the point of view of religion and resulted in out-casting[1] of the person who crossed the seas. The practice came to an end during early forties after these islands came in occupation of Japanese. It was finally abolished in 1955.

Though a part of retributive justice, transportation as a method of punishment has been defended by some criminologists particularly, *Lombroso* and *Garofalo*. *Lombroso* favoured the system as it eliminates hopeless incorrigibles from native criminal population and thus prevents them from demoralising influences. *Garofalo* supported transportation as a punishment because of its deterrent effect. Considered from the practical point of view the practice of transportation seems to have failed to deliver the goods. It was not only primitive, cruel and barbaric but involved considerable burden on State exchequer as it required regular establishment of penal settlements. The practice has, however, been abandoned by most countries excepting some Latin American States where it still prevails as one of the vestiges of outmoded correctional justice.

It must, however, be noted that the practice of banishment still persists in miniform called "externment". The object of this method of punishment is to disassociate the offender from his surroundings so as to reduce his capacity to commit crime. This form of punishment has been accepted under the Indian penal system.[2]

Solitary Confinement

Confining the convicts in solitary prison-cells without work was a common mode of punishment for hardened criminals in medieval times. Solitary confinement was intended for elimination of criminals from society and at the same time incapacitating them from repeating crimes. The deterrence involved in this mode of punishment was deemed necessary for prevention of crime. The monotony involved in this kind of punishment had the most devastating effect on criminals. Man by nature is known to be a social being hence he cannot bear the pangs of separation and living in complete isolation from his fellowmen. Therefore, segregation of convicts into isolated prison cells under the system of solitary confinement resulted in disastrous consequences and the prisoners undergoing the sentence either died untimely or became insane.[3] Besides, they became more furious and dangerous to society if at all they chanced to come out of the prison alive after completing their term of solitary confinement. As a result of these ill-effects on prisoners the system of solitary confinement soon fell into disuse and it was finally withdrawn as a measure of punishment.

Commenting on the torture and cruelty involved in solitary confinement *Dr. P. K. Sen*, observed that it was perhaps the best way to put

1. Gaur, H. S, Sir, : Penal Law in India, Vol. I (1972), p. 380.
2. Clause 19, Indian Penal Code (Amendment) Bill, 1972.
3. Solitary confinement was first introduced in Pennsylvanian system in 1790 but the system was soon replaced by Auburn system in 1819 due to its disastrous results.

an end to the criminal without resorting to bloodshed or murder.[1] Significantly, this mode of punishment is known to have found support in ancient penology of India as an effective expiatory measure. It was believed that complete isolation of man provides him better opportunity for penance and remonstrance and the feeling of guilt and self-hatred tends to bring about his reformation speedily.

The provisions relating to solitary confinement are contained in Sections 73 and 74 of the Indian Penal Code. Section 73 provides that the Court may order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole according to the following scale—

(i) for a period not exceeding one month if the term of imprisonment does not exceed six months ;

(ii) for a period not exceeding two months if the term of imprisonment does not exceed one year ;

(iii) for a period not exceeding three months if the term of imprisonment exceeds one year.

Section 74, IPC limits the solitary confinement, when the substantive sentence exceeds three months, to *seven* days in any one month. That is to say, solitary confinement must be imposed at intervals. A sentence inflicting solitary confinement for the whole term of imprisonment is illegal, though it may be for less than fourteen days.[2]

The Madras High Court, in *Munnuswamy* v. *State*[3] has held that the imposition of the sentence of solitary confinement, although legal, should be very rarely exercised by a criminal court. It should be administered, if ever, in most exceptional cases of unparalleled atrocity or brutality. The Supreme Court has also reiterated this view in *Sunil Batra* v. *State*[4] wherein the Apex Court held that cases involving solitary confinement under Sections 29 and 30 of the Prisons Act, though legal, must be inflicted only in accordance with fair procedure as it involves harsh isolation of the prisoner from the society of fellow-prisoners which may cause his mental derangement. In *Kishore Singh Ravinder Dev* v. *State of Rajasthan*,[5] also the Supreme Court dealt with the parameters of solitary confinement. Therefore, the general view is that solitary confinement, though legal, must be inflicted sparingly and only in exceptional cases. Some critics even suggest that the provision of solitary confinement should be scrapped from the statute book as it is considered as inhuman torture by the U.N. Human Rights Charter.

Imprisonment for Life

The Indian Penal Code prescribes six types of punishment, namely, (1) Death, (2) life imprisonment, (3) rigorous imprisonment, (4) simple imprisonment, (5) forfeiture of property, and (6) fine. Thus, 'Imprisonment for life' has been authorised as a form of punishment under Section 53 of the

1. Dr. Sen, P. K. : Penology—Old and New (1943) p. 33.
2. *Nainsukh Mehtar* v. *Emperor*, (1869) 3 Beng. LR. 49.
3. (1948) Mad. 359.
4. (1980) Cri. L.J. 1099 (SC).
5. AIR 1981 SC 625.

Indian Penal Code as amended by Act 26 of 1955 with effect from 1st January, 1956. The Supreme Court, in *Naib Singh* v. *State*[1] held that the 'nature' of the punishment of imprisonment for life is rigorous imprisonment only and a criminal court could under Section 418 of the Code of Criminal Procedure, 1973 by issuing a warrant, direct the execution of sentence of life-imprisonment in a prison. The Criminal Law (Amendment) Act, 1983 has incorporated imprisonment for life of either description, rigorous or simple, in the amended Section 376 of the Indian Penal Code. There are in all fifty-one sections in the Penal Code which provide for sentence of imprisonment for life.

Section 57 of the Indian Penal Code, clearly points out that in calculating fractions of term of imprisonment, imprisonment for life shall be reckoned as imprisonment for twenty years.[2]

The executive authorities are competent under Section 55, I.P.C. or under Section 433 (b) of the Code of Criminal Procedure to commute sentence of imprisonment for life to one of rigorous imprisonment not exceeding a term of fourteen years. Such commuted sentence would entitle life convicts to be set free after undergoing the maximum sentence of fourteen years inclusive of the period of remissions earned during his incarceration. But in actual practice it is seen that the prison authorities are illegally detaining the life convicts for a much longer period than the aforesaid maximum 14 years holding that the nature of sentence of life imprisonment does not alter by the aforesaid provisions of IPC or Cr PC and the sentence remains a *sentence of life imprisonment* and does not convert into a maximum sentence of imprisonment for 14 years by these provisions. This dichotomy, however, needs to be resolved by Parliamentary intervention through necessary amendments in the existing criminal law.[3]

Imprisonment

Imprisonment presents a most simple penal and common form of sentencing for incapacitating the criminals. It proved to be an efficient method of temporary elimination of criminals apart from being a general deterrent and an individual deterrent. Conditions of imprisonment in civilized countries have undergone radical changes in recent decades. The minimum security institutions such as open air prisons and prison-hostels are being increasingly used as modified forms of incarceration of offenders.

Despite being a corrective measure, the most intricate problem involved in imprisonment as a measure of punitive reaction to crime is the "prisonisation" of offenders. The prisoner is confronted with the most crucial problem of adjustment to new norms and values of prison life. He loses his personal identity in the process of adjustment and is converted into a mere impersonal entity.

Yet another set back of imprisonmont as a mode of punishment is its damaging effect on family relationship of the offender. The offender loses contact with the members of his family and if he happens to be the only

1. AIR 1983 SC 855.
2. AIR 1997 SC 756 (757).
3. 39th Report of the Law Commission of India on *the Punishment of Imprisonment for Life under the Indian Penal Code* ; para 23 (1968).

bread-winner, the result is still worse. The members of his family suffer misery, starvation and financial crisis. Depriving the offender of his family life for a considerably long period creates new problem for prison discipline in form of homosexuality, bribery, corruption, revolt etc.

In India, however, parole and furlough are being extensively used as a part of penal substitutes for mitigating the rigours of prison inmates. The All India Jail Reforms Committee has further observed that the prisoners should be released on furlough after undergoing a specified period of imprisonment so that they maintain contact with their relatives and friends and may not feel uprooted from society and thus are saved from the evil effects of prisonisation.[1]

The social stigma attached to prisoners makes their rehabilitation more difficult. Prisoners quite often feel that the real punishment begins after they leave the prison institution. *Sir Lionel Fox*, the noted prison reformist of Britain introduced Hostel system for inmates to prevent them from stigmization and ensure them an honourable life in society.

Be that as it may, the fact remains that imprisonment is still one of the most accepted forms of punishment throughout the world. With the modern correctional techniques introduced in prison institutions, it serves as an efficient measure of reforming the criminal and at the time protecting the society from anti-social elements. Thus, it serves the dual purpose of preventive and reformative justice at one and the same time.

Capital punishment

Of all the forms of punishments, capital punishment is perhaps the most 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.[2]

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) murder (Section 302);
(iv) abetment of suicide committed by a child or insane (Sec. 305);
(v) attempt by life-convict to murder (Sec. 307);
(vi) kidnapping for ransom, *etc.* (Sec. 364A), and
(vii) dacoity with murder (Sec. 396).

It is significant to note that although 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 these offences. In fact, where the Court is of the opinion that the award of death sentence is the only appropriate

1. *Bhikhabhai Devshi* v. *State of Gujarat and others*, AIR 1987 Guj. 136.
2. *Infra* Chapter XV.

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.[1]

In recent years, there has been a tendency to give primacy to reformative methods of punishment which were hitherto used merely as supplementary measures. Hungary is perhaps the first country to initiate the Reformative educational method for its prisoners. Besides the fines, which *Prof. Jescheck* considered to be central sanction of an up-to-date penal policy, the measures 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.[2] According to *Dr. Joseph Folvari*, these 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.

Judicial Sentencing

Closely related to the forms of punishment, is the problem of judicial sentencing. It is difficult to say that a Judge is guided by a single clear criterion in imposing a sentence. A day light bank robbery involving one or two murders may be treated by some Judges as an act of warfare against the community touching new depths of lawlessness justifying severely deterrent sentences for they want society to be protected, law to reassert its authority and villains to get their deserves.[3] Similarly, in case of a few youths attacking a couple in a car and raping the woman, the Judge may be convinced that the perpetrators of such a crime must be denounced and awarded that sentence of imprisonment for a term of few years totally denying them the benefit of probation or borstal in view of the heinousness of the offence.

Expressing his views about judicial sentencing, *Sir James Fitzjames Stephen* observed that it is proper to punish criminals for the sake of the public desire for vengeance but they should not be condemned outright in the name of reinforcement of the values of a society. There may be occasion where a Judge is conscious that the values presented by the criminal law have already lost much of their credence because of the rapidly changing public opinion and he may prefer to award a lighter sentence than the one prescribed for that offence.[4] Conversely, there may be a situation where a Judge would chose to give legitimate expression to his denunciation for offender's act by passing exemplary severe sentence.[5]

Indeed, a Judge may be justified in awarding a severe and exceptionally lengthy sentence on grounds of dangerousness of the crime or a lighter one for rehabilitation or reformation of the criminal. But a sentence

1. Sec. 354 (3) Cr. P.C.
2. Hungarian Law Review No. 1—2, (1980) Preface.
3. Radzinovicz & Joanking : The Growth of Crime (Ist Ed. 1977), pp. 194-195.
4. Observations made by Mr. Justice Krishna Iyer in *Ediga Anamma* v. *State of Andhra Pradesh*, AIR 1974 SC 799.
5. *Ranga Billa* Case, AIR 1981 SC 1572.

out of all proportions to the crime is repugnant. In other words, the sentence must be warranted by the crime. A kind of balance between crime and punishment, therefore, seems inevitable for judicial sentencing. As *Sir Leon Radzinovicz* rightly observed, "the perplexities, conflicts and disagreements of Judges on the point of exactness of sentence cannot be so easily resolved but they testify to an apparently ineradicable sense that as wages should be to work, punishment should be to crime ; the more difficult or valuable the work, the higher should be the wages, the worse or more damaging the crime, severer should be the punishment. In both fields, there is a customary level of expectation".[1]

Judicial authorities all over the world have been struggling hard to establish a coherent set of principles for judicial sentencing but the fundamental question is as to which of the four, namely, deterrence, retribution, prevention or reformation, should take precedence in the process of sentencing. It is on this point that the Judges, the lawyers, the Magistrates and the people in general disagree. The crucial problem in context with judicial sentencing is whether it is the 'protection of society, or the prevention of crime', which should gain primacy in awarding the sentence. However, in the absence of any specific criterion, it would be worthwhile to suggest some general guidelines relating to judicial sentencing :

1. The personality of the offender rather than the gravity of the offence should be the guiding factor in judicial sentencing. His age, antecedents, past criminal record, responsiveness, prospects of reformation and circumstances in which he committed the crime, should be taken into consideration while deciding the quantum of punishment. As rightly pointed out by *Bentham*, quantum of punishment should vary according to the offender's capacity to suffer. He enumerated as many as thirty-two invariables of capacity for suffering some of which are sex, age, physical and mental health, religion, lineage etc. The use of individualized methods of punishment such as probation, parole, suspension of sentence, etc. may achieve some element of rationality in the penal policy.

2. Humanity, consciousness about societal values and frugality are some of the liminating factors in judicial sentencing. Disparities in sentencing may be due to disparities between individual Judges, disparities between offenders convicted for the same offence under similar situations, disparities due to locational comparisons or disparities due to racial or class prejudices[2] etc. These are rather inevitable in the modern complex society.

It must be noted that sentencing is the most critical stage in the administration of criminal justice. As Tappan rightly pointed out, "disparity in sentencing not only offends principles of justice, but also affects the rehabilitative process of offender and may create problems like indiscipline and riots inside the prison."[3] Expressing a similar view the Supreme Court

1. Leon Radzinovicz : The Growth of Crime, p. 202.
2. Black people in U.S.A. receive severer sentence than the Whites simply because of the racial prejudices. The recent Joggers Rape Trial Case of August 1990 in U.S.A. has been called by the Blacks as Judicial murder by the Supreme Court of America for its alleged anti-black attitude in sentencing a Black to death for the rape of a white woman without any substantial evidence.
3. Tappan P.W. : Crime, Justice and Correction (1960) p. 446.

in *Asgar Hussain* v. *State of U.P.*,[1] observed that disparity in sentencing creates hostile attitude in the mind of the offenders and reduces the chances of their re-socialisation as the offenders react strongly against the discriminatory treatment meted out to them.

3. The discretion of the Judge in matters of sentencing is limited by the penal law itself which sets a legal maximum sentence for a particular offence. However, there may be mandatory penalties for certain offences where the law gives the court no choice. Thus for example, the offence of murder carries the minimum sentence of life imprisonment under section 302 of the Indian Penal Code.

4. For professional criminals or political terrorists who indulge in ruthless violence and are a potential danger for the community, an extended period of preventive detention after serving the penal sentence may prove appropriate keeping in view of the public safety and security against these dangerous hardened offenders. For this purpose, a distinction has to be drawn between the hardened criminals and the recidivists. The former are 'positive danger' to society whereas the latter are a nuisance rather than a threat.

> The offences committed by public servants should be severely dealt with and deserve no leniency in sentencing. Particularly, a public servant found guilty of accepting or obtaining illegal gratification[2] or persons guilty of food adulteration[3] or any other socio-economic offence such as hoarding, profiteering, blackmarketing, tax evading etc. must be sternly punished as they are a menace to society.

5. Judicial sentencing is a personal responsibility of the Judge, a matter for his conscience alone. Any intrusion into his decision should be considered most unreasonable. But things have now considerably changed. It is said that today 'even Judges are judged'. They are expected to be fair and free from prejudices in pronouncing sentences. A Judge should also be aware of the various issues involved in the crime and the factors influencing the criminal who is standing trial before him. Though maturity and experience are great merits of a sentencer, but his decisions should not be out of tune with the advancing society. In other words, he should command public confidence through his pragmatic pronouncements.[4] Needless to say, that despite legal training and limitations of criminal law, personal backgrounds

---

1. (1974) 2 SCC 518.
2. *Som Prakash* v. *State of Delhi*, (1974) 4 SCC 84 ; *see* also *Suresh Chandra* v. *State of Gujarat*, 1976 SCC (Cri) 145.
3. *Ishwar Das* v. *State of Punjab*, AIR 1972 SC 1295 ; *P.K. Tejani* v. *M. R. Dange*, AIR 1974 SC 288.
4. The decision given by Bhopal District and Sessions Judge Mr. M. D. Deo in the historic Bhopal Gas Tragedy case (*Union of India* v. *Union Carbide Corporation*) on 17 December, 1987 ordering the Union Carbide Corporation to pay a sum of rupees three thousand five hundred millions as substantial interim compensation for the Gas victims, is a befitting illustration on the point although it relates to a claim for damages under tort-law. On appeal, the High Court of Madhya Pradesh reduced the amount of interim relief to Rs. 250 crores. The Supreme Court, however, agreed at an out of court settlement between the Union Carbide U.S.A. & Govt. of India for a lump-sum amount of Rs. 470 crores to be paid to the Govt. for gas-victims.

and attributes of the Judge do play a vital role in judicial sentencing.

6. Though remotely, the judicial sentencing is likely to be influenced by the manner and mode of appointment of the Judges, particularly in countries where the Judges are elected like legislators and are answerable to the electorates, they are prone to fall an easy prey to unjust local prejudices and pressures. Therefore political element should not be allowed to enter into the powers of appointment of judicial magistrates.

In this context working of the criminal courts in USA wherein the prosecutor or the Prosecutor Attorney plays a quadruple role as an investigator, magistrate, solicitor and an advocate, deserves a special mention. It is purely a political appointment and in fact a stepping stone for a high political office. Obviously, the political nature of the prosecutor's office does more harm than good to the community because he cannot afford to overlook the interests of politicians who have been instrumental in getting him appointed to this august office.

7. The standards of sentencing are bound to differ depending on whether the Judges are drawn from among the lawyers or laymen from public. It is generally presumed that lawyers with adequate legal training are better sentencers for the reason that they are able to take an account of genuinely relevant factors, can weigh arguments and reach conclusions and beyond all, they are rigid and less vulnerable to pressures. On the other hand, the yard-stick for lay-Judges is often the robust common sense guided by genuine human problems and they are fallible to pressures from those around them. The general trend today is to have the criminal courts staffed by well qualified lawyers.

8. Sentencing by the Judge largely depends on the way and the manner in which the case is presented before him by the police or the prosecutor. Therefore, conviction or acquittal shall inevitably depend on the evidence put forth by these personnel which may be biased or mistaken thus jeopardising the interests of criminal-justice.

Sheldon Glueck has suggested that a pre-sentence report may provide a useful information and guidance to the sentencing authority in taking decision regarding the guilt of the accused and sentence or treatment to be accorded to him. It may enable the magistrate to seek advice from experts like psychiatrists or probation officers regarding antecedents of the offender and desirability of appropriate sentence keeping in view the possible impact of that sentence on the offender. The importance of pre-sentence report has been realised by most progressive penal systems of the world and they have incorporated relevant provisions to this effect in their penal laws.[1]

9. In order to eliminate chances of injustice to the accused due to miscalculated sentencing, the law provides for appeals in higher courts. The Appellate Courts not only remove individual injustices but also formulate precedents which the subordinate courts are bound to follow in their verdicts. This is indeed an effective method of eliminating possibilities of miscarriage of justice.

The problem of a uniform sentencing policy has been engaging the attention of penologists for quite some time. It is true that "sentencing is not

1. Sec 7 of the Probation of Offenders Act, 1958.

like baking a cake, you cannot lay down in advance, for every case, the exact ingredients and proportions, the exact temperature required...In sentencing, courts are not dealing with standard ingredients but with an infinite variety of offences, offenders and situations."[1] Nevertheless, there ought to be some definite criteria to decide the sentence. Taking a lead in this direction, the Federal Authorities in U.S.A. established sentencing Institutes in 1957 to impart some sort of training for magistrates in matters of sentencing.[2] In England, vigorous efforts have been made by Lord Chief Justice ever since 1970 to ascertain definite principles of sentencing. The length of the prison sentence is usually commensurate with the seriousness of the offence as provided under the Criminal Justice Act, 1991. Section 2(2) of the Act further empowers the court to imprison a person convicted of a violent or sexual offence for longer than the seriousness of the case requires, but not exceeding the maximum in any case. Another Act passed by the British Parliament namely, the Crime (Sentences) Act, 1997 has removed the provision of remission from the penal code. In order to provide safeguard against the arbitrary use of judicial discretion, efforts are being made to introduce computerised sentencing system ever since 1998. It is to be seen as to how far it succeeds in improving the sentencing pattern under the British Penal System.[3] In the Indian context, sentencing, by and large, depends on the judicial discretion within the legal limits of penal provisions of the Indian Penal Code and other statutory enactments. However, setting up of training institutes[4] for new entrants in judicial service and refresher courses for the working Judges may equip them with the necessary know-how about the techniques of judicial sentencing which may go a long way in reasserting their role as dispensers of even-handed justice.

The magistracy, while awarding the sentence must bear in mind that grading of various offences in the Penal Code is based on their gravity, and the gravity of an offence is generally assessed in terms of social danger, social, disapprobation ; alarm it causes in the society and depravity of the offender. It is for this reason that quite often similar offence committed by two different persons is looked at differently in the matter of sentencing. The criminal act, which we call crime, being related to social behaviour, there cannot be any exact measuring rod to assess its intensity and magnitude and, therefore, any mathematical accuracy of punishment is a myth. It is for this reason that punishment has to be awarded within the broad parameters set by the penal court, its exact quantum being left to the judicial discretion of the sentencing authority.

---

1. Radzinovicz and Jenking : The Growth of Crime (1977), pp. 217-18.
2. Sentencing Councils are also set up in USA to discuss the problem of sentencing and adopting a uniform policy on judicial sentencing.
3. Katherine S. Williams : Textbook on Criminology (2001 Indian Ed.) p. 43.
4. In 1994, it was decided to set up an All India Judicial Services Training Institute at Bhopal which came into existence and started functioning from September 5, 2002. It has been named as 'National Judicial Academy' and imparts training to judicial officers including new entrant civil judges.

Chapter XV

CAPITAL PUNISHMENT

As a rule punishability, by and large, depends on the degree of culpability of criminal act and the danger posed by it to society as also the depravity of the offender. The risk of penalty is the cost of crime which the offender has to pay. When this cost (suffering) is high enough as compared to the benefit which the crime is expected to yield, it will deter a considerable number of people. This is true with crimes punishable with death sentence as well.

A dispassionate analysis of criminological jurisprudence would reveal that capital punishment is justified only in extreme cases in which a high degree of culpability is involved causing grave danger to society. It must, however, be added that a mere objective consideration of act's dangerousness to society by itself would not be enough to assess perpetrator's culpability but his personal attributes and circumstances and gravity of the offence have also to be taken into consideration to decide whether or not he deserves capital punishment. Thus, the punishment should be commensurate among other things, with the gravity of offender's act and societal reaction to it.

Experience has shown that despite fullest consciousness about the desirability of reformative justice, at times unequivocal stand is unavoidable in extreme cases where offender has been fully aware of the fatal consequences of his gruesome and brutal crime and there were no mitigating circumstances. In such aggravating situations, though unwantonly, law must take a firm stand and not hesitate even to award the extreme sentence of death to the offender. These situations have found expression in the criminal law of India as also of other countries.

Retributive Effect of Death Penalty

Death sentence has been used as an effective weapon of retributive justice for centuries. The justification advanced is that it is lawful to forfeit the life of a person who takes away another's life. A person who kills another must be eliminated from the society and, therefore, fully merits his execution.[1] Thus, the motive for death penalty may indeed include vengeance which is a compensatory and reparatory satisfaction for an injured party, group or society. When regulated and controlled by law, vengeance is also socially useful. Legal vengeance solidifies social solidarity against law-breakers and probably is the only alternative to the disruptive private revenge of those who feel harmed.[2]

Commenting on the effectiveness of death penalty *Thorsten Sellin* observed that it has failed as a measure of social protection, so also as an

1. David Dressler : Reading in Criminology and Penology (Second Ed) p. 501.
2. Ernest Van den Haag : Is Capital Punishment Just? p. 406.

instrument of retributive justice. Citing illustrations from United States to support this contention, he argued that the number of executions are far less than the number of murders committed annually which clearly indicates that death sentence is no longer looked with favour and is falling into disuse rapidly. Another argument which needs attention regarding declining effect of death penalty is that even after the award of this sentence, in most of cases, it is either commuted or pardoned in the last resort and its final execution is seldom carried out.

Deterrent Effect of Capital Punishment

The fear of being condemned to death is perhaps the greatest deterrent which keeps an offender away from criminality. Death penalty in case of murder serves as an effective deterrent to remind the murderer about the severity of law towards this heinous crime and this certainly helps in reducing the incidence of *homicide*. The old methods of public execution though abandoned today, were directed to make the sentence as frightening as possible. The present trend, however, is to keep the number of offences punishable by death to a minimum and avoid death penalty as far as possible although its retention in the statute book is favoured even to this day.

Modes of Execution

An appraisal of the administration of criminal justice of ancient times reveals that death penalty was commonly used in cases of heinous crimes. However, there was great divergence as to the mode of its execution. The common modes of inflicting death sentence on the offender were crucification, drowning, burning, boiling, beheading, throwing before wild beasts, flaying or skinning off alive,[1] hurling the offender from rock, stoning,[2] strangling, impelling, amputating, shooting by gun or starving him to death. Hanging the offender till death in public places has been a common mode of putting to an end to the life of an offender. These draconic and barbarous methods of punishing criminals to death were justified on the ground that they were the quickest and easiest modes of punishment and at the same time carried with them an element of deterrence and retribution. They have, however, fallen into disuse with the advance of time and modern humanitarion approach to penology.

Deterrence has been defined by *Dr. Johnson* as discouraging the offender by terror or naked fear from repeating his crime and at the same time preventing others from following his example. It must, however, be remembered that deterrence is a relative term, its seriousness depending on the category of the offender. Thus, the stigma attached to arrest, trial, conviction and sentence may have little effect on habitual offenders or hardened criminals but may act as a powerful deterrent to an average law-abiding citizen. Undoubtedly, of all the punishments, death penalty appears to be the strongest deterrent for there can be nothing for which a

1. Skinning alive used to be inflicted in ancient Assyria, Saytha and Persia (*See* Rawlinson, Ancient Monarchies, Vol. 1, p. 478).
2. Stoning was a characteristic method of execution among ancient Hebrews for offences of adultery, unchastity, blasphemy, idolatry, dishonouring parents etc. It is still in use in the Arabian countries of the Middle East.

man would be willing to give his life.

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

The method of execution by electrocution consists in subjecting the condemned prisoner to heavy charge of electric current. The method was first used at Auburn State Prison, New York on August 6, 1890 and is now being extensively used in USA, UK, USSR, Japan, and most of the European countries.

The device of Guillotine for execution of criminals was introduced in France in 1792. It was a kind of machine erected for execution of criminals in western countries, particularly in France, Scotland and England.

Shooting as a mode of execution of a condemned person was used for offences tried in Military Courts. In Russia and China and some East European countries death by firing squad is the customary mode of execution.

More recently, gas chambers are being used in the western world for execution of death sentence. The condemned prisoners are put to death by being stripped in a chair in a sealed gas chamber into which poisonous fumes of cynide are injected. The method prevailed in USA and was extensively used by Nazi Germany in killing Jews and other unwanted minorities.

The method of hanging the condemned prisoner till death has been commonly in use in almost all the countries since ages. In India public hanging is now held to be unconstitutional.[1]

Death sentence by means of lethal injection is relatively a later development. It was first adopted in Okhalahoma (USA) in 1977. The injection is administered intravenously with delicate skilled operation. It is preferred because it ensures instantaneous death without any suffering. It is in use in USA, UK, Canada and other developed countries.

Capital Punishment in Ancient Rome and Greece

In ancient times, the law administrators unflinchingly executed murderers because they believed that "the life of each man should be sacred to each other man".[2] They realised that it is not enough to proclaim the sacredness and inviolability of human life, it must be secured as well, by threatening with the loss of life of those who violate what has been proclaimed invioable—the right of innocent to live. Murder, being the worst of crimes, must deserve the highest penalty which is death-sentence. This shall also be in accordance of the principle that punishment must be proportioned to the gravity of the crime.

Ancient Romans accepted the deterrent value of death penalty. Under the Roman criminal law, the offender was put to public ridicule and his execution took the form of a festival. Death was caused to the condemned person in a most tortuous manner. For example, one who killed his father was sewn in a sack along with a live dog, cat and a cobra and thrown into

1. *Lachma Devi* v. *State of Rajasthan*, (1986) Cri. L.J. 364.
2. *"homo homini res sacra"*.

river. The object was to make him die most painfully. The sentence of death could be awarded even to a debtor who was unable to pay off the debt of his creditor. Thus, a creditor who found that his debtor was unable to pay off the debt, could vent his wrath upon the debtor by marching him up the Tarpeian rock and hurling him from there to death.

The Greek penal system also provided death sentence for many offences. The offenders were stripped, tarred and feathered to death publicly. Execution of death penalty in public places was favoured because of its deterrent effect.

Continental View on Death Penalty

The history of crime and punishment in England during the medieval period reveals that infliction of death penalty was commonly practised for the elimination of criminals. Henry VIII who reigned in England for over fifty years,[1] was particularly infamous for his brutality towards the condemned prisioners. He used to boil the offenders alive. His daughter Queen Elizabeth who succeeded him, was far more stiff in punishing the offenders. The offenders were not put to death at once but were subjected to slow process of amputation by bits so that they suffer maximum pain and torture. The condemned offenders were often executed publicly. These brutal methods of condemning the offenders were, however, abandoned by the end of eighteenth century when the system of transporting criminals to distant American Colonies at their option was firmly established.

Dr. Fitzgerald observed that the history of capital punishment in England for the last two hundred years recorded a continuous decline in the execution of this sentence.[2] During the later half of the eighteenth century as many as two hundred offences were punishable with death penalty. The obvious reason for the frequency of execution was the concern of the ruler to eliminate criminals in absence of adequate police force to detect and prevent crimes. The methods of putting offenders to death were extremely cruel, brutal and torturous.

As the time passed, the severity of capital punishment was mitigated mainly in two ways : Firstly, this sentence could be avoided by claiming the '*benefit of clergy*' which meant exemption from death sentence to those male offenders who could read and were eligible for holy Order.[3] Secondly, the prisoners who were awarded death sentence could be pardoned if they agreed to be transported to American Colonies. Thus, by 1767 condemned felons could be transported for seven years in lieu of capital sentence. In course of time, death punishment for felony was abolished,[4] and in 1853, the system of transporting criminals also came to an end and a new punishment of penal servitude was introduced.

Commenting on the frequency of executions during the eighteenth century *Donald Taft* observed that during no period in the history of western civilization were more frantic legislative efforts made to stem crime by

1. Henry VIII ruled over England from 1491 to 1541 AD.
2. Fitzgerald, P.J. : Criminal Law and Punishment (1962 Ed.) p, 216.
3. In subsequent years, this benefit was extended to women also. It was finally abolished in 1927.
4. Death as a punishment for felony was abolished in 1827.

infliction of capital punishment as in that century.[1] In his opinion, the growing importance of this punishment was owing to the agrarian and industrial changes in the English society resulting into multiplicity of crimes which had to be suppressed by all means. Supporting this view *Radzinowicz* observed that more than 190 crimes were punishable with death during the reign of George III in 1810.

In nineteenth century, however, the public opinion disfavoured the use of capital punishment for offences other than the heinous crimes. *Bentham* and *Bright,* the two eminent English law reformers opposed frequent use of capital punishment. *Sir Samuel Romilly* also advocated a view that the use of capital punishment should be confined only to the cases of wilful murder.

The irrevocable and irreversible nature of death penalty gave rise to a number of complications which invited public attention towards the need for abolition of this sentence. Consequently the British Royal Commission on Capital Punishment was appointed in 1949 to examine the problem. As a result of the findings of this Commission death sentence was suspended in England and Wales for five years from 1965 and was finally abolished by the end of 1969.

However, the constant rise in the incidence of crime in recent years has necessitated Britain to re-assess its penal policy regarding death penalty. The two latest decisions[2] of the Privy Council emphatically stressed that the award of death sentence is not violative of human rights or fundamental rights.

Ceylon

The penal law of Ceylon abolished capital punishment in 1956 but it had to be reintroduced as a measure of social defence consequent to gruesome murder of Late Prime Minister Mr. Bhandarnaike.

The Italian view

Italian criminologists, however, expressed divergent views about the utility of capital punishment. *Lambroso* supported application of capital punishment for habituals and incorrigibles. In his view, death sentence served as an effective deterrent for such offenders. *Garofalo* opposed capital punishment on grounds of morality while *Beccaria* denounced it because it had a demoralising effect on society. He believed that life of an individual is too precious to be ended by the award of death sentence.

France

France has abolished capital punishment recently after a considerable debate and discussion among penologist and law reformers. They feel that retention of death sentence is not in keeping with the modern reformative trend of penology.

Death Sentence in U.S.A.

Available literature on capital punishment in United States testifies

1. Taft & England : Criminology (4th Ed.) p. 297.
2. *Eston Baker* v. *Queen*, 1975 PC 774 and *Michael de Fraeitles* v. *George Ramoutar Benny*, 1976 PC 239.

that in modern times the sentence of death is being sparingly used in that country. This, however, does not mean that capital punishment is altogether abolished in United States. The retention of death penalty is still considered to be morally and legally just though it may be rarely carried into practice. American penologists justify the retention of capital punishment for two obvious reasons. Firstly, from the point of view of protection of society, death penalty is needed as a threat or warning to deter the potential murderers. Secondly, it also accomplishes the retributive object of punishment inasmuch as a person who kills another has perhaps forfeited his claim for life. It is, however, generally argued that the risk of being executed in fact serves no deterrent purpose because the murderer often plans out his crime in such a way that the chances of his detection are rare and he is almost sure of his escape without being punished. The retention of death penalty for capital murderers is justified on the ground that if not executed, they will remain menace and potential danger to society.

Recent trend in America is to restrict capital punishment only to the offence of murder and rape.[1] Another noticeable trend during recent years is to make the process of execution private, painless and quick as against the old methods of public execution which were brutal, painful and time consuming. At present, the common modes of inflicting death penalty in United States are electrocution, hanging, asphyxiation with lethal gas and shooting. Several American States have abolished death punishment with beneficial results. *Mr. Justice Brennan* and *Mr. Justice Marshall* of the U.S. Supreme Court in a well-known decision *Furman* v. *The State of Georgia*,[2] observed that death penalty should be outlawed on the ground that it was an anachronism degrading to human dignity and unnecessary in modern life. But most of the Judges did not agree with the view that the Eighth Amendment of the American Constitution which prohibits capital punishment for all crimes and under all circumstances, is a good law. Some of the American decisions[3] suggest that the courts are convinced that death penalty *per se* is not violative of the Constitution. However, in some parts of the United States death penalty has been retained only for the murder of a prison officer by a life convict.

An international survey carried out in 1962 by the United Nations, however, confirmed that neither suspension nor abolition of death penalty had any immediate effect in increasing the incidence of crimes punishable with sentence of death. The countries which had abolished capital punishment, notably, Germany, Austria, Scandinavia, Netherlands, Denmark and some Latin American States reported no ill-effects of abolition.

It is significant to note that with the abandonment of the torturous and barbarous methods of inflicting death penalty, the meaning of the term 'capital punishment' now extends only to death sentence for murder or homicides. Particularly, in western countries rape is no longer serious crime for two main reasons. Firstly, with general laxity in morality, the gravity of this offence is fast declining. In the second place, scientists have established

1. Australian law also provides death penalty for the offence of murder and rape.
2. (1972) 408 US 238.
3. *Gregg* v. *George*, (1976) 428 US 153 ; *Profit* v. *Flourida*, (1976) 428 US 243; *Jurek* v. *Taxas*, (1976) 428 US 262.

rape as a mere passive surrender by the victim because in their opinion it is practically impossible to commit rape unless the victim is made unconscious. Likewise, treason being exclusively a war-time offence, it is futile to enlist it as a peace-time offence and to provide death penalty for it.

In the modern reformative era the retributive principle of *'tit for tat'* does not serve any useful purpose. Retribution can only do more harm than good to the criminals and can never be an effective measure of suppressing crime. Retaliation and retribution, apart from being outdated are also against the accepted norms of modern criminal justice. *Beccaria* was perhaps the first criminologist who raised a crusade against capital punishment in 1764. He strongly protested against the use of cruel and barbarous modes of punishing the offenders and emphasised the need of individualised treatment. He expressed a view that death as a sentence symbolises man's cruelty and insignificance of human life. In course of time *mens rea* became the guiding principle for determining the guilt and punishment of the offender. It is, however, true that in certain cases it is difficult to determine *mens rea* of the offender.[1]

Yet another reason for discarding retribution as a principle of criminal justice is to be found in the fact that putting a person to death virtually amounts to killing him deliberately. That apart, experience has shown that more than eighty per cent of the persons committing murder are not really murderers but are persons who have fallen a prey to this heinous crime due to circumstances such as passion, provocation, jealousy, sexual impulsiveness, poverty or intoxication. Obviously, death sentence is hardly an appropriate punishment for such offenders. *Prof. Scot* has expressed doubts about the adequacy of capital punishment as it involves the risk of innocent person being sent to guillotine. *Bona fide* errors of judgment as to guilt of the accused are known to have occurred. If an innocent person is hanged due to miscarriage of justice, his life is lost for ever and the loss is obviously irredeemable. Perhaps it is for this reason that slightest doubt about the guilt of the accused entitles him for an acquittal on the plea of *'benefit of doubt'* under the criminal law of most countries.

The abolitionists strongly argue that since death penalty is irrevocable, it should not be resorted to. But the elaborate safeguards provided in the procedural law clearly indicate that though the sentence of death is irrevocable, it is awarded only after a thorough scrutiny at every stage of the case and, therefore, chances of human error or judgment are not only minimised but reduced to almost nil. Slightest doubt about the guilt of the accused who is to be sentenced to death is sufficient to entail him benefit of doubt. As such, abolition of death penalty on the ground of irrevocability hardly seems to be justified.

The safeguards provided under the law to eliminate any possibility of erroneous judgment regarding award of death sentence which may briefly be stated as follows :—

Firstly, death penalty is awarded very sparingly only in cases of murder and offences against the State;

1. *Dr. Vimla Devi* v. *Delhi Administration*, AIR 1963 SC 1572.
2. *Daiya Moshya Bhil* v. *State of Maharashtra*, AIR 1984 SC 1730.

Secondly, it is now an exceptional punishment requiring the sentencing Judge to record in writing why he considers alternative punishment of life-imprisonment as inadequate in the case before him [Section 354(3) Cr.P.C.];

Thirdly, the conferment of right of pre-sentence hearing under section 235(2) to the accused person offers him an opportunity to put-forth his plea for award of life-imprisonment as an alternative punishment for death sentence;

Fourthly, the cumulative effect of the provisions contained in Sections 354(3) and 235(2) is that sentencing is completely individualised and there is hardly scope for any error of judgment in sentencing the accused person;

Fifthly, the sentence of death passed by the Court of Session has got to be sent for confirmation to the concerned High Court under Sections 366-370 Cr.P.C. alongwith entire evidence material so that the High Court may scrutinise the same. The High Court has also the power to direct further enquiry or additional evidence to be taken if necessary;

Sixthly, the provision of appeal to the Supreme Court under Section 379 Cr.P.C. and Article 136 of the Constitution; and

Seventhly, President's/Governor's power of pardon or commutation of sentence under Article 72 or 161 of the Constitution, as the case may be.

It is quite often argued that death penalty "brutalizes" human nature and cheapens human life.[1] Thus it vitiates the humanitarian sentiments concerning the sacredness of human life.[2] It is for this reason that *David Pannick* strongly argues that death penalty should be declared *per se* unconstitutional as cruel and violative of due process of law.

The American view point for and against death sentence may be summarised as follows :—

Pro-Arguments	Con-Arguments
1. Elimination of murderers by execution is fair retribution and saves potential future victims.	1. An execution arising out of miscarriage of justice is irreversible.
2. Punishments must match the gravity of offence and worst crimes should be severely punished.	2. Capital punishment is lethal vengeance which brutalizes the society that tolerates it.
3. Societies must establish deterrants against crime. Death sentence serves as an effective deterrent.	3. Capital punishment does not have deterrent effect. Hired murderers take the risks of criminal justice system whatever the penalties. Thus, it has no rational purpose.

1. D. Dressler : Reading in Criminology and Penology (2nd Reprint), p. 486.
2. (1977) Cr LJ 159.

4. Death is a just punishment and death penalty has been held constitutionally valid[1] to ensure justice for condemned offenders.	4. Death penalty is unjust and often discriminatory against poor who cannot defend themselves properly.

Capital punishment in India

The ancient law of crimes in India provided death sentence for quite a good number of offences. The Indian epics, *viz.*, the *Mahabharata* and the *Ramayana* also contain references about the offender being punished with *vadhadand* which meant amputation by bits. Fourteen such modes of amputating the criminals to death are known to have existed which included chaining and imprisonment of the offender.

Justifying the retention of death penalty, *King Dyumatsena* observed : "if the offenders were leniently let off, crimes were bound to multiply". He pleaded that true *ahimsa* lay in the execution of unworthy persons and, therefore, execution of unwanted criminals was perfectly justified.[2] His son *Satyaketu*, however, protested against the mass scale execution and warned his father that destruction of human life can never be justified on any ground. But *Dyumatsena*. ignored the advice of his son and argued that distinction between virtue and vice must not disappear and vicious elements must be eliminated from society.[3]

The great ancient law-giver *Manu* also placed the element of fear as an essential attribute of judicial phenomenon. According to him, in order to refrain people from sinful murders, death penalty was necessary and in absence of this mode of punishment, state of anarchy will prevail and people would devour each other as the fish do in water, the stronger eating up the weaker.

During the medieval period of Moghuls rule in India, the sentence of death revived in its crudest form. At times, the offender was made to dress in the tight robe prepared out of freshly slain buffulo skin and thrown in the scorching sun. The shrinking of the raw-hide eventually caused death of the offender in agony, pain and suffering. Another mode of inflicting death penalty was by nailing the body of the offender on walls. These modes of putting an offender to death were abolished under the British system of criminal justice administration during early decades of nineteenth century when death by hanging remained the only legalised mode of inflicting death sentence.

Retention of Capital Punishment—How far justified

The history of human civilization reveals that during no period of time death penalty has been discarded as a mode of punishment. This finds support in the observation made by *Sir Henry Maine* who stated, "Roman Republic did not abolish death sentence though its non-use was primarily directed by the practice of self-banishment or exile and the procedure of

1. *Bachan Singh* v. *State of Punjab*, AIR 1980 SC 898. Earlier, in *Jagmohan Singh* v. *State of U.P.*, AIR 1973 SC 947 also the Supreme Court held that death penalty *per se* is not violative of Art. 19.
2. *Mahabharat-Shantiparva* chapter CCLXVII *Verses* 4-13.
3. *Ibid.*

questiones.[1] Nor does the ancient Indian civilization know of abolition of death sentence although its disuse at some point of time in history has been effected because "the people were most truthful, soft-hearted and benevolent and to them vocal remonstrance sufficed. But in the event of failure of these measures, corporal punishment and death sentence were invoked to protect the society from violent criminals."[2]

Penologists in India have reacted to capital punishment differently. Some of them have supported the retention of this sentence while others have advocated its abolition on humanitarian grounds. The retentionists support capital punishment on the ground that it has a great deterrent value and commands obedience for law in general public. Those who support capital punishment feel that death of the killer is a requirement of justice. They believe that death of victim must be balanced by the death of the guilty party, otherwise, the victim will not be avenged and the anguish and passions aroused by the crime in society will not be allayed.

The abolitionists, on the other hand, argue that enormous increase in homicide crime-rate reflects upon the futility of death sentence. Another argument generally put forth by abolitionists is that hardened criminals commit most cold-blooded murders in a masterly manner. They proceed with their criminal activity in such a way that even if they are caught, they are sure to escape punishment due to one or the other procedural flaw in the existing criminal law.

Reacting sharply against the abolitionists' view, the Law Commission of India in its thirty-fifth Report observed :

> "Having regard to the conditions of India, to the variety of the social upbringing of its inhabitants, to the disparity of the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the abolition of capital punishment. Arguments, which would be valid in respect of one area of the world may not hold good in respect of another area in this context. Similarly, even if abolition in some parts of India may not make a material difference, it may be fraught with serious consequences in other parts. On a consideration of all the issues involved the Commission is of the opinion that capital punishment should be retained in the present state of the country."[3]

Supporting the aforesaid view of the Law Commission, the Supreme Court in *Bachan Singh* v. *State of Punjab*,[4] *inter alia* observed :

> "Notwithstanding the views of the abolitionist to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, Judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society. The

1. Henry Maine : Ancient Law (4th Ed.), pp. 374-76.
2. Kane, P.V. : History of *Dharamshastra*, p. 399.
3. 35th Report of Law Commission of India (Government of India, 1967) p. 354.
4. AIR 1980 SC 898.

Parliament has repeatedly in last three decades, rejected all attempts to abolish death penalty. Death penalty is still recognised as legal sanction for murder or some types of murder in most of the civilised countries in the world.....It is not possible to hold that the provision of death penalty as an alternative punishment for murder in Section 302 of IPC is unreasonable and not in public interest."

Statistics on homicide in various countries suggest that the incidence of this crime has not fallen despite increased risk of execution. This, in other words, means that the deterrent effect of capital punishment is vanishing in modern times. It has been vehemently argued that deterrence doesn't work against the majority of offences which are crimes of passion.

It may be inferred from the foregoing analysis that neither retention nor abolition of death sentence can be justified in absolute terms. The desirability of this punishment, by and large, depends on the nature of the crime and the circumstances associated therewith. The following generalisations may, however, serve a useful purpose in deciding the desirability of capital punishment.

1. The retention of death penalty seems desirable in cases of hardened murderers who are incorrigibles and commit cold blooded murders in a calculated manner.
2. Particularly, in agricultural countries like India, the real problem of death penalty arises in case of murders committed during agrarian riots and disputes relating to possession or ownership of land-property. In such cases, the offenders are well aware of the consequences of their act but they fall a prey to criminality due to passion, excitement or anger for the victim whom they want to put out of their way once for all. Thus these persons, though aware of the consequences, in fact do not intend those consequences to follow, hence they cannot be categorised as professional killers and death penalty can hardly serve any useful purpose in such cases.
3. Experience has shown that quite a large number of murders and homicides which occur in this country are due to permeance of racial, ethnical, and religio-political cultures. The offender often falls a prey to his surroundings and in a fit of passion commits homicide without thinking about its gravity and consequences. Such cases are more common in the Indian society where sex taboos are too strict and the marital relationships are likely to be disturbed on slightest suspicion or provocation.[1]
4. *Dr. Sethna* carried out an intensive study of cases tried at the Criminal Sessions of the Bombay High Court and concluded that out of 507 cases of homicides only 26.28 per cent were premiditated murders while remaining 73.72 per cent were cases of unpremeditated murder.[2] Thus, most of the homicides are due

1. *Rex* v. *Govinda*, ILR 1876 Bombay ; *see* also *K. M. Nanavati* v. *State of Bombay*, AIR 1961 SC 497 ; *Bishun Dev Shaw* v. *State of West Bengal*, AIR 1979 SC 702 ; *Madan Mohan Punchhi & Mrs. Sujata* v. *Manohar*, AIR 1997 SC 265.
2. Sethna, M.J. : Society and the Criminal (1964) p. 256.

to ill-will, emotion, irresistible temper or manic excitement and capital punishment serves no deterrent purpose in such cases.

5. The reason generally advanced for retaining the death penalty is protection of society. It means that the criminal is exterminated and got rid of once for all. But it must be remembered that it is not by the fear of death but by generating in the community a sentiment of horror against killing, that we can hope to deter offenders from committing that act.[1]

The above generalisations suggest that classification of different types of homicides can be made on the basis of social environment and personality of the offender. Therefore, the efficacy of death penalty in such cases should be judged in the light of the surrounding conditions. Considered from this standpoint, the habitual offenders and sex psychopaths are abnormal persons who develop a kind of menia for their crime without bothering about its gravity or evil effects. There is yet another category of criminals who take pleasure in killing human life without any apparent reason. They commit murder one after another only for the sake of fun.[2] When interrogated, these men-killers have boldly confessed that they commit homicides because they derive some kind of pleasure in watching their victim dying in pain and torture. Needless to say that death sentence is perhaps the only appropriate punishment for such beastly offenders.

Retention preferred to Abolition

The current wave of reformation in the field of criminal justice system has inspired Parliamentarians in India to launch a crusade against capital punishment. They have been constantly struggling to repeal the provisions relating to death penalty from the Penal Code for the past several years. The first proposal on this issue was tabled in Lok Sabha in 1949 but it was subsequently withdrawn at the instance of the then Home Minister Sardar Vallabhbhai Patel who characterised it as the most unopportune proposal. The matter came up for debate again in Rajya Sabha in 1958 but it again met the same fate. The subject was, however, accepted for discussion in Rajya Sabha in 1962 but the general opinion of the House favoured retention of death penalty realising that time had not yet come when its repeal from the statute book could be justified. Consequently, the proposal was dropped. The retentionists in the House opposed abolition of death sentence on the ground that its retention in the Statute Book acted as an effective deterrent for hardened and habitual murderers and dangerous criminals whose elimination from the society was inevitable. The members also pleaded that the Government was already lenient in commuting death sentence to that of life imprisonment wherever it was possible.

The question of abolition of death sentence was considered at length in a seminar[3] on "Capital Punishment in India" which was largely attended by number of eminent jurists, Judges, academic lawyers, legislators etc. The consensus was in favour of retention of capital punishment in view of the deteriorating law and order situation in the country. Those who advocated

1. Sir Walter Moberley : The Ethics of Punishment, p. 102.
2. Raghavan's case of Bombay (1971) is an illustration on the point.
3. The Seminar was held in Delhi in October, 1969.

abolition of death penalty, however, suggested that it shall be a fitting tribute to the memory of late Mahatma Gandhi if death penalty is abolished in India at the occasion of Gandhi Centenary celebrations in that year. But the retentionists argued that the cause of non-violence is equally served if the causes of explicit violence regardless of ideals involved are visited with implicit violence of capital punishment and stressed on its application in such a manner that its harshness is mitigated but efficiency retained.

The Report of the Convention of International Congress of Criminal Law[1] which was held in New Delhi on 8, 9 and 10th February, 1982 concluded that the general consensus was clearly in favour of retention of death penalty though its use may to be restricted to "rarest of rare cases". Despite strong plea for abolition by *Justice V. R. Krishna Iyer*, the former Judge of the Supreme Court of India, the convention justified retention of capital punishment, though to be used sparingly.[2] Inaugurating the Congress, *Mr. M. Hidayatullah*, the then Vice-President of India and former Chief Justice of the Supreme Court of India, observed that the doctrine of "rarest of rare case" evolved in the Indian jurisprudence for the use of death penalty is capable of discounting the possible errors and abuse of this sanction and, therefore, a dispassionate approach to this problem in the context of the mounting crime was most necessary.

This mid-way approach seems to be most appropriate particularly in the context of modern Indian society where the machinery of police as well as the magistracy is hardly adequate to tackle the problem of crime and criminals effectively. The object of punishment should be achieved by extending necessary safeguards to life and property of persons but at the same time by limiting their liberty so as to eliminate crime.

Law Commission's Report on Capital Punishment

In response to the resolution moved in the Parliament in 1962 on the abolition of capital punishment, the Government of India referred the question to the Law Commission. The Commission decided to take up this subject separately for the revision of the general criminal law in view of its importance. The Commission presented its report to the Lok Sabha on November 18, 1971, in which it *inter alia* observed :

> "even after all the arguments in support of abolition of capital punishment are taken into account, there does not remain a residium of cases where it is absolutely impossible to enlist any sympathy on the side of the criminal.[3] The Commission further expressed a view that 'retribution'

1. The Convention was sponsored by International Law Association (Association International *de Droit Penal*).
2. Besides the present author, Prof. D. C. Pande, Mr. M. Adekunie Owoada (Nigeria) ; Mr. Damel Latifi, Dr. Lurra Nezhinskaya (USSR) Prof. M. P. Singh (BHU) ; Prof. S. Venugopal Rao and others in their papers pleaded retention of capital punishment as a measure of penological expediency. Prof. (Dr.) Jurgen Meyer of West Germany, however, favoured the abolition and recounted experiences of his country which abolished capital punishment in 1949. East Germany also abolished capital punishment for all crimes in 1987. However, there has been unification of East and West Germany in 1990.
3. 42nd and 48th Report of the Law Commission of India.

involved in capital punishment does not connote the primitive concept of 'eye for an eye' but it is an expression of public indignation at a shocking crime, which can better be described as 'reprobation'."

Therefore, the Commission did not recommend any material change in the offences which are at present punishable with death under the Indian Penal Code.

As regards the question of exempting certain categories of persons from death sentence, the Law Commission in its 42nd Report published in June 1971 suggested that :

(1) Children below 18 years of age (at the time of commission of the crime) should not be sentenced to death.

(2) It is not necessary to exempt women generally from the death penalty.

(3) It is unnecessary to insert a statutory provision relating to "diminished responsibility" in the statute book.

(4) An attempt to commit suicide should cease to be an offence in India. The present law in this regard is "harsh and unjustifiable and it should be replaced".[1]

Thus, the Law Commission strongly feels that capital punishment acts as an effective, deterrent "which is the most important object and even if all objects were to be kept aside, this object would by itself furnish a rational basis for its retention". In its concluding remarks, the Commission observed that having regard to the peculiar conditions prevalent in India and the paramount need for maintaining law and order in this country, we cannot risk the experiment of abolition. This is perhaps the most appropriate approach to the problem of capital punishment so far Indian criminal justice system is concerned.

Suicide as an offence

In the context of suicide as an offence, it would be worthwhile to refer to the decision of Bombay High Court in *Maruti Shripati Dubal* v. *State of Maharashtra*.[2] In this case a police constable of Bombay City Police Force who was suffering from mental illness and schizophrenia due to a road accident in 1981, attempted to commit suicide outside the office of the Municipal Commissioner Bombay, at 10 a.m., on 27th April, 1985 by pouring kerosene on himself and trying to light his clothes. He was arrested and proceeded against under Section 309 of the Indian Penal Code. The learned J.J. *Sawant* and *Kolse Patil* of the Bombay High Court ruled that right to live as recognised by Art. 21 of the Constitution includes also a right not to live or not to be forced to live which in positive terms would mean right to die or end one's life. Section 309, I.P.C. was, therefore, *ultra vires* and violative of Articles 14 and 21 of the Constitution. The Court placed reliance on the Supreme Court decision in *Olga Tellis & others* v. *Bombay Minicipal*

1. In *Rathinam Nagbhusan Patnaik* v. *Union of India*, AIR 1994 SC 1844, the Supreme Court had ruled that attempt to commit suicide (i.e. Sec 309 IPC) deserves to be effaced from IPC being violative of Art. 21 of the Constitution.

2. 1987 Cr. LJ 743.

Corporation[1] popularly known as *Pavement Dweller's* case wherein it was held that right to life also includes right to livelihood. The Bombay High Court, however, clarified that mercy-killing or *euthanasia* is not suicide and hence would not be covered under Section 309 IPC. The reason being that suicide by very nature is an act of terminating one's own life by one's own act without the aid and assistance of any other human agency.

The Supreme Court in *P. Rathinam Nagbhusan Patnaik* v. *Union of India*[2] has distinguished suicide from *euthanasia* and observed that "the legal and other questions relatable to *euthanasia* are in many ways different from those raised in suicide". Therefore, justification for allowing persons to commit suicide cannot be played down or cut down because of any encourgement to persons pleading for legislation of mercy killing. The Court further clarified that self-killing is conceptually different from abetting others to kill themselves.

The Supreme Court, in this case[3] pointed out that "the causes of suicide are many and varying inasmuch as some owe their origin to sentiments of exasperation, frustration and resolution, some are the result of feeling of burden, torture and sadness. Some are caused by loss of employment, reverse of fortune, misery due to illness, family trouble and thwarted love. Sometimes killing is in opposition to society and sometimes in opposition to particular persons. This happens when the person committing suicide nurses a feeling of unjust treatment, mal-treatment or cruelty. Therefore, what is needed to take care of suicide-prone persons, are soft words and wise counselling of a psychiatrist and not stony dealing by a jailor followed by harsh treatment meted out by a heartless prosecutor." The Court observed that one of the objects of punishment is protection of society from the depradation of dangerous persons, there is no question of protection of society from depradation of dangerous persons in case of suicide. Considered from this point of view, suicide is not an offence. Therefore, the view that by quashing Section 309 I.P.C. which makes attempt to suicide a penal offence, Section 306, I.P.C. would also not survive, is not tenable.

The Supreme Court's ruling in *P. Rathinam's* case has, however, been overruled by a subsequent case, i.e., *Smt. Gyan Kaur* v. *State of Punjab*,[4] In this case, appellants Gyan Kaur and her husband Harbans Singh were convicted by trial Court under Section 306, I.P.C. and sentenced to 6 years, R.I. and fine of Rs. 2,000/- or in default R.I. for 9 months for abeting commission of suicide by Kulwant Kaur. The conviction of both was maintained by the High Court except that the sentence of Gyan Kaur was reduced to 3 years' R.I. This appeal was against the conviction and sentence of appellants under Section 306, I.P.C. The Supreme Court held that right to life under Article 21 does not include right to die 'because extinction of life' is not included in 'protection of life'. Therefore, penalising for an attempt to commit suicide under Section 309, I.P.C. is not violative of Article 21 and is not unconstitutional consequently, provision contained in Section 306, I.P.C. is also not unconstitutional, it is perfectly valid. Hence the appeal was

1. AIR 1986 SC 180.
2. AIR 1994 SC 1844.
3. *Ibid.*
4. AIR 1996 SC 946.

disallowed.

Should Euthanasia be legalised

The debate whether euthanasia should be legalised or not, has evoked great concern among law experts and social scientists. The protagonists who are in favour of legalisation of euthanasia argue that it will 'enable dignified exist from the misery and misfortune of the deadly diseases'. According to them, it would be noble act to get salvation from the slow and painful death. In support of their contention, they cited Gandhiji who preferred a cow suffering from some deadly and uncurable disease to be killed rather than allowed to be left suffering. There were instances when life ceased to have any meaning for patients awaiting death who reached a stage where life at that point was worse than the death. For this reason, euthanasia should be legalised for the sake of humanity.

Those who are against legalisation of euthanasia contend that it would mean "legalisation of murder" hence criminals would misuse this and the police and the law would be of no relevance then. According to these critics, "merciless living is better than merciful killing". They argue that when you cannot give life to someone, you have no right to take his life. Moreover, the serious dreadly diseases such as T.B. small pox, cancer and even Acquired Immune Deficiency Syndrome (AIDS), are no longer incurable which were potential causes for euthanasia have no longer remained incurable, therefore, there is no need to legalise euthanasia.

Offences punishable with death sentence under IPC.

It would be pertinent to refer to the relevant provisions of the Indian Penal Code which provide for death sentence for certain specified offences. These offences are :

1. Waging war against the Government.[1]
2. Abetment of mutiny.[2]
3. Giving or fabricating false evidence leading to procure one's conviction for capital offence.[3]
4. Murder.[4]
5. Abetment of suicide by child or insane person.[5]
6. Attempt to murder by a life convict, if hurt is caused;[6]
7. Dacoity with murder.[7]
8. Kidnapping for ransom etc.[8]

Until 1983, death sentence was mandatory only in one case namely, for murder committed by a person while he is already undergoing a sentence for life imprisonment.[9] For other offences, the Penal Code did not make it

1. Section 121 IPC.
2. Section 132.
3. Section 194.
4. Section 302.
5. Section 305.
6. Section 307.
7. Section 396.
8. Sec. 364-A.
9. Section 303 of the Indian Penal Code.

obligatory for the courts to award death penalty and they were free to punish the offender with an alternative sentence. But the decision of the Supreme Court delivered on 7th April, 1983 disposing of writ petition filed by *Mithu and others*[1] challenging the constitutional validity of Section 303 of IPC on the ground that it violated Articles 14 and 21 of the Constitution, the five Judges Constitution Bench presided over by Chief Justice Y. V. Chandrachud observed that Section 303, I.P.C. is unconstitutional and there shall be no mandatory sentence of death for the offence of murder by lifer. In other words, hereinafter all murder cases would fall under Section 302 which provides punishment for murder.

Delivering the judgment on behalf of JJ. Murtaza Fazal Ali, V. D. Tultzapurkar, Varadarajan and himself (Mr. Justice Chinnappa Reddy delivered a separate but concurring judgment), Chief Justice ruled that Section 303, IPC violates the guarantee of equality contained in Article 14 as also the right conferred by Article 21 of the Constitution.

The Apex Court in this case *i.e.*, *Mithu* v. *State of Punjab*,[2] distinguished Section 302 of IPC from Section 303 and pointed out as to how Section 302 is constitutionally valid, whereas Section 303 is not. Section 302 IPC is constitutionally valid for three main reasons—

(1) Death sentence provided for in Section 302 is an alternative to the sentence of life imprisonment, whereas under Section 303 death sentence is provided as a mandatory punishment without any alternative sentence.

(2) Where departing from the normal rule of imposing life imprisonment, death sentence alone is considered to be the proper punishment, special reasons are to be stated as required under Section 354 (3) of Cr.P.C. This is possible only in case of Section 302 of IPC but not in the case of Section 303.

(3) Under Section 235(2) of Cr.P.C., the accused is entitled to be heard on the question of sentence. This applies to Section 302 but has no application to Section 303 of IPC.

The Supreme Court noted that Indian Penal Code contained fifty-one sections which prescribe life imprisonment for various offences. The basic difference between Section 302 and the other sections was that whereas under those sections life imprisonment is the maximum penalty which can be imposed, under Section 302, it is the minimum sentence which has to be imposed. The Court, however, made it clear that the ruling in *Bachan Singh* v. *State of Punjab*[3] upholding the constitutional validity of death sentence could not govern death penalty prescribed in Section 303 of the Indian Penal Code.

Referring to Section 235(2) of the Code of Criminal Procedure, 1973 in context of Section 303 I.P.C., the Supreme Court held that if the court itself has no option to pass any sentence except the sentence of death, it is an idle formality to ask the accused as to what he has to say on the question of sentence. The Court further observed, "for us law ceases to have respect and

1. *Mithu* v. *State of Punjab*, AIR 1983 SC 473.
2. *Ibid.*
3. AIR 1980 SC 898.

relevance when it compels the dispensers of justice to deliver blind verdicts by decreeing that no matter what the circumstances of the crime, the criminal shall be hanged by the neck until he is dead".

It must be stated that Section 307 (Part II) of I.P.C. provides mandatory capital punishment for an offence of attempt to murder by a life-convict and deprives judicial discretion in such cases. The object of this provision is two-fold, namely, to provide protection to the prison personnel ; and to deter the prisoners.

An analysis of these provisions of the Penal Code further reveals that there are valid reasons for allowing wider judicial discretion in cases of offences other than those falling under Section 303. To elaborate this point further, it would be convenient to classify the aforesaid eight offences into three broad categories, namely :—

(a) offences against the Government (these include offences under Section 121 or 132, I.P.C.) ;

(b) offences against lawful justice (Section 194) ; and

(c) offences against persons (Sections 302, 303, 305, 307 and 396, I.P.C.).

As regards offences against the Government, it is suggested that death penalty would hardly serve any purpose. Thus for example, if a person believes that there is no way out to prevent exploitation of the poor at the hands of capitalist government unless the Government itself is thrown out of power and commits an offence under Section 121 or 132 of the Indian Penal Code, he does not really want to kill persons. Therefore, there is no criminal intent or *mens rea* to commit murders in the instant case. On the contrary, his act is in fact directed towards a noble cause inasmuch as it is designed to render some service to the poorer section of the community. Obviously, death sentence would hardly serve any useful purpose in such cases. In fact, such persons are generally intellectuals who are prepared to sacrifice their life for the cause of nation. May be that due to ideological differences with the party in power, they might wage a war against the government in power.

Likewise, in cases of offences against justice or against persons, the criminal act might have been the result of peculiar mental attitude of the offender and, therefore, capital punishment would not be a fitting punishment in these cases also. In result, death penalty seems to be justified only in cases of hardened criminals and incorrigibles who are habituals and commit deliberate murders in a well planned manner and have scant regard for law and society.

Indian Law on Death Penalty

The members of the judiciary are sharply divided on the crucial issue of life or death sentence. Those who support abolition argue that death penalty is degrading and contrary to the notion of human dignity ; it is irrevocable and an expression of retributive justice which has no place in modern penology. The retentionists, on the other hand, justify capital punishment as a social necessity having a unique deterrent force.

The shifting trend towards imposition of death sentence for the offence of murder is clearly discernible from the amendments made in criminal law

from time to time. Prior to 1955, judicial discretion in awarding a lesser penalty instead of death sentence was circumscribed by requiring the Judge to record his reasons for awarding a lesser punishment. This, in other words, meant that the discretion of the Judge was open to further judicial review. However, it was subsequently realised that this restriction on the power of court was unnecessary because at times it nullified the achievement of the Judge if his reasons for awarding life imprisonment instead of death sentence, did not argue well even though he might be ultimately correct in his final judgment. Thus, in *Avtar Singh* v. *Emperor*,[1] the Judge concerned considered it proper to award a sentence of life imprisonment instead of death, for the reason that the accused was initially condemned to death which remained suspended for a period of over six months. Giving reasons for his decision, the learned Judge observed that it was unjust to keep the sentence of death hanging over the head of the accused for a long period of over six months because it must have caused him great mental torture. He, therefore, thought it proper to reduce the sentence of death to one of life imprisonment. But in another case *Queen* v. *Osram Sungra*,[2] where the accused committed a deliberate cold blooded murder for ulterior motives, the court awarded a lesser punishment of life imprisonment instead of death, without recording reasons of such leniency.

Restrictions on the discretion of the Judge to record reasons for awarding a lesser punishment of life imprisonment to the murderer instead of sentence of death were withdrawn by the Amending Act,[3] of 1955. After this amendment the Judge had the discretion to commute the sentence of death to that of life imprisonment but in case he considered the imposition of death sentence necessary, he had to state the reasons as to why a lesser penalty would not serve the ends of justice. Thus the amendment clearly reflected the shift in trend towards death penalty.

The Code of Criminal Procedure, 1973, also contains a provision regarding death sentence. Section 354 (3) of the Code provides that while awarding the sentence of death, the Court must record "special reasons" justifying the sentence and state as to why an alternative sentence would not meet the ends of justice in that particular case. Commenting on this provision of the Code, Mr. Justice V.R. Krishna Iyer of the Supreme Court of India (*as he was then*) observed that the special reasons which Section 354(3) speaks of provides reasonableness as envisaged in Article 19 as a relative connotation dependent on a variety of variables, cultural, social, economic and otherwise".[4]

The Code of Criminal Procedure, 1973 further requires that the sentence of death imposed by the Sessions Judge can be executed only after it is confirmed by High Court.[5] That apart, Section 235(2) of the Code further casts a statutory duty upon the court to hear the accused on the point of sentence. The court should also call upon the State, *i.e.*, the Public Prosecutor to mention with reasons whether or not that extreme penalty

1. 17 CWN 1213.
2. (1886) 6 WR (Cr) 82.
3. Section 66 of the Amending Act, (XXVI of 1955).
4. *Rajendra Prasad* v. *State of U.P.*, AIR 1979 SC 916 (931).
5. Section 366(1) of the Code of Criminal Procedure, 1973.

prescribed by law is called for in view of the facts and circumstances of the case.

It is thus evidently clear that a heavy duty cast by Section 302 of the Indian Penal Code on the Judge, of choosing between death and imprisonment for life for the person found guilty of muder, is now expected to be discharged in a highly responsible manner by complying with the provisions contained in Sections 354(3) and 235(2) of the Code of Criminal Procedure, 1973 so that the principle of natural justice and fair play holds its sway in the sphere of sentencing. These provisions also help the Judge to individualise sentencing justice and make it befitting to the crime and the criminal.

The rationale of the above procedural safeguards and the aweful consequences of a death sentence on the convict, his family and society were considered by the Supreme Court once again in the case of *Allauddin Mian* v. *State of Bihar*.[1] In this case the Apex Court held that when the court is called upon to choose between the convict's cry 'I, want to live' and the prosecutor's demand, 'he deserves to die', it must show a high degree of concern and sensitiveness in the choice of sentence.

The Supreme Court further observed that 'Special reason clause' contained in Sec. 354(3) of Cr. P.C. implies that the court can impose extreme penalty of death in fit cases. The provision of Section 235(2) of the Code calls upon the court that the convicted accused must be given an opportunity of being heard on the question of sentence. This provides the accused an opportunity to place his antecedents, social and economic background and mitigating and extenuating circumstances before the court.

Besides the statutory provisions, the Constitution of India also empowers the President[2] and the Governor[3] of the State to grant pardon to the condemned offenders in appropriate cases. These powers are, however, co-extensive with the legislative powers. The power to cut short a sentence by an act of executive clemency is not subject to judicial control. It is exclusive domain of the executive in India[4] and elsewhere.[5] It is significant to note that the controversy raised in this regard in *Nanavati's* case[6] has been settled by the Supreme Court once for all in the case of *Sarat Chandra* v. *Khagendra Nath*,[7] which affirmed the principle that sentencing powers of judiciary and executive are readily distinguishable.

Judicial Trend

The Magistracy has more often than not, used Section 354(3) of the Code of Criminal Procedure to justify its stand either in support of or against capital punishment. The abolitionists see this provision a green signal for dilution of capital punishment while for the retentionists the special reasons contemplated by Section 354(3) implicitly suggest that death

1. AIR 1989 SC 1456.
2. Art 72 of the Constitution of India.
3. Art. 161.
4. *Piare Dusadh* v. *Emperor*, AIR 1944 FC 1.
5. The Prerogative of Mercy the Power of Pardon & Criminal Justice, Public Law (London) 1983 pp. 398-439.
6. AIR 1962 SC 605.
7. AIR 1968 SC 497.

sentence is legally and constitutionally permissible.

It must, however, be noted that what appears to one Judge as extenuating circumstances justifying commutation of death sentence to that of life-imprisonment, may not be necessarily so with the other Judge. Thus in *Kunju Kunju Janardhanam* v. *State of Andhra Pradesh*,[1] the accused, infatuated by the charm of a village girl, committed brutal murder of his innocent wife and his two minor sons while they were asleep in dead of night. The girl, on her part, had warned the accused through her letters not to destroy his happy family life by the illicit intimacy, but the accused paid no heed and chose to commit triple murder with extreme depravity. Although the majority by 2 : 1 commuted death sentence to that of imprisonment for life, Mr. Justice A.P. Sen, in his dissenting judgment disagreed with the majority and, observed :[2]

> "The accused who acted as a monster, did not even spare his two innocent minor children in order to get rid of his wife and issues through her ; if death sentence was not to be awarded in a case like this I do not see the type of offences which call for death sentence."

A perusal of some of the Supreme Court decisions involving death penalty would reveal that sudden impulse or provocation[3] uncontrollable hatred arising out of sex indulgence,[4] family feud or land dispute,[5] infidelity of wife[6] or sentence of death hanging over the head of the accused for a considerable long period of time due to law's delay,[7] have been accepted as extenuating circumstances justifying lesser penalty of life imprisonment instead of death sentence. Mr. Justice Krishna Iyer of the Supreme Court of India, however, made it clear in *Rajendra Prasad* v. *State of U.P.*,[8] that where the murder is deliberate, premeditated, cold-blooded and gruesome[9] and there are no extenuating circumstances, the offender must be sentenced to death as a measure of social defence.[10]

The pros and cons of "life or death" sentence have been extensively dealt with by the Supreme Court of India in *Rajendra Prasad's*[11] case. Therefore it would be pertinent to state the facts of the case to analyse the entire issue in its proper perspective.

The accused in the instant case was a "desperate character" who had

1. Criminal Appeal No. 511 of 1978 disposed of alongwith *Rajendra Prasad's* case (AIR 1979 SC 916).
2. Criminal Appeal No. 511 of 1978 disposed of alongwith *Rajendra Prasad's* case. AIR 1979 SC 916 at p. 962.
3. *Ummilal* v. *State of M.P.*, AIR 1981 SC 1710 ; *see* also *Dalbir Singh* v. *State of Punjab*, AIR 1979 SC 1384 and *Gura Singh* v. *State of Rajasthan*. (1984) Cr. L.J. 1423 (1428).
4. *Ediga Anamma* v. *State of Andhra Pradesh*, AIR 1974 SC 799.
5. *Chawla* v. *State of Haryana*, AIR 1974 SC 1089 : *Guru Swamy* v. *State of Tamil Nadu*, AIR 1979 SC 1177 ; *Snidagouda Ningappa* v. *State of Karnataka*, AIR 1981 SC 764.
6. *Bishnu Dev Shaw* v. *State of West Bengal*, AIR 1979 SC 702.
7. *T. V. Vatheeswaran* v. *State of Tamil Nadu*, 1983 Cr LJ 481.
8. AIR 1979 SC 916.
9. *Harihar Singh* v. *State of U.P.*, AIR 1975 SC 1501.
10. *Sarveshwar Prasad Sharma* v. *State of M.P.*, AIR 1977 SC 2423.
11. AIR 1979 SC 1384.

undergone sentence of imprisonment for life and was released on Gandhi Jayanti day in 1972, a few days prior to the occurrence. On 25th October, 1972 the accused suddenly attacked one Rambharosey and dealt several blows on vital parts of his body with knife. Rambharosey released himself from the grip of the accused and ran inside his house and bolted the door. The accused chased him all the way with the blood-stained knife and knocked at the door asking him to open it. Meanwhile, the deceased Mansukh came and tried to entreat the accused not to assault Rambharosey. Thereupon, the accused struck deceased Mansukh, who tried to escape but the accused chased him over a distance of 200 to 250 feet and inflicted repeated knife blows on him which resulted into his death. Thus the deceased was done to death by the accused because the former tried to prevent him from assaulting Rambharosey.

The Supreme Court by a majority of 2 to 1 and speaking through Mr. Justice V. R. Krishna Iyer, attributed failure of penal institutions to cure criminality within the criminal as the sole cause of this cruel murder and allowed commutation of death sentence of the accused to that of life imprisonment. The Court, *inter alia*, observed :

> "A second murder is not to be confounded with the persistent potential for murderous attack by the murderer. This was not a menace to the social order but a specific family feud.....here was not a youth of uncontrollable, violent propensities against the community but one whose paranoid pre-occupation with family quarrel goaded him to go at the rival."

Expressing his compassion for the condemned accused the learned Judge further observed :

> "This convict has had the hanging agony hanging over his head since 1973 with near solitary confinement to boot ! He must by now be more a 'vegetable' than a person and hanging a "vegetable" "is not death penalty".

Reacting sharply to the majority view Justice A.P. Sen in his dissenting judgment in this case however, pleaded that the accused deserved no leniency in award of death sentence. To quote his own words :[1]

> **"the case of this accused is destructive of the theory of reformation. The "therapeutic touch" which is said the best of preventing repetition of the offence has been of no avail. Punishment must be designed so as to deter, as far as possible from commission of similar offences. It should also serve as a warning to other members of society. In both aspects, the experiment of reformation has miserably failed. I am quite sure that with the commutation of his death sentence, the accused will commit a few more murders and he would again become a menace to the society."**

The learned Judge further observed[2] :

> ".....the humanistic approach should not obscure our sense

1. AIR 1979 SC 916 at p. 962.
2. *Ibid.* at p. 946.

> of realities. When a man commits a crime against society by committing a diabolical, cold-blooded, pre-planned murder of one innocent person the brutality of which shocks the conscience of the Court, he must face the consequences of his act. Such a person forfeits his right to life."

In a way *Rajendra Prasad's* case provided an appropriate opportunity for the Supreme Court to express its view on need for dilution of death penalty in the context of Indian society. Citing extensively from Anglo-American literature[1] available on the subject and the relevant case law.[2] Mr. Justice Krishna Iyer tried to derive at the point that special reasons referred to under Section 354(3) of the Code of Criminal Procedure must be liberally construed so as to limit death penalty only to rare categories of cases such as white collar crime, anti-social offences like hijacking or selling of spurious liquor, etc. and hardened murderers. Justice Krishna Iyer emphatically stated that, by and large, murders in India are not by a calculated professionally cold-blooded planning but something that happens on the spur of the moment due to sudden provocation, passion, family feud, or an altercation etc., motivates one to go to extreme and commit the crime and, therefore, there are prospects for reformation of the offenders if they are not done away to death.

The learned Judge discarded the award of death penalty from the constitutional standpoint also. He emphatically stressed that death sentence is violative of Articles 14, 19 and 21 of the Constitution of India. To quote his own words :[3]

> "Corporeal death is alien to fundamental rights. Restriction on fundamental rights are permissible if they are reasonable. Such restrictions may reach the extreme state of extinction only if it is so completely desirable to prohibit totally. While sentencing, you cannot be arbitrary since what is arbitrary is *per se* unequal."

In sum, the Supreme Court concluded that commutation of death penalty to imprisonment for life is justified in the instant case keeping in view the ideological, constitutional, criminological and cultural trends in India and abroad.

The ruling in *Rajendra Prasad's* case was followed in two subsequent cases decided by the Supreme Court in the same year. In one case,[4] the accused was sentenced to death by the High Court but on appeal his sentence was commuted to life imprisonment because the murder arose out of a family quarrel relating to division of land and the fact that the

1. Mr Justice Krishna Iyer referred to the views expressed by H.L.A. Hart, Justice Cardozo, Sir Walter Moberly, James, Fitz, James Stephen, Sir Samuel Romilly etc. on Capital Punishment. References to the Stockholm Declaration of Amnesty International Conference (10th, 11th December, 1977), Royal Commission Report on Capital Punishment (England) Homicide Act, 1957 ; The Abolition of Capital Punishment Act, 1955, the Criminal Law Review Committee Report 1972 etc. were also made by Mr. Justice Krishna Iyer to support his views on dilution of death sentence.
2. *Furman* v. *Georgia*, (1972) 408 US 238.
3. *Rajendra Prasad's* case, AIR 1979 SC 916 at p. 982.
4. *Guruswamy* v. *State of Tamil Nadu*, AIR 1979 SC 1177.

appellant was under the sentence of death for six long years was by itself enough to justify mitigation of sentence.

In another case,[1] although the accused was convicted for quadruple murder and sentenced to death, but the Supreme Court in appeal reduced it to one of imprisonment for life on the ground that dispute related to regulating "turns" for taking irrigation water for agricultural purposes and the earlier provocation came from the deceased side by beating the accused.

A year later, the Supreme Court, was once again called upon to settle the controversy over choice between death penalty and imprisonment for life,[2] but this time by a larger Bench of five Judges. Overruling its earlier decision in *Rajendra Prasad*, the Court by a majority of 4 to 1 (majority view taken by Mr. Justice Y. V. Chandrachud, O. J. Sarkaria, Gupta and Untavalia, JJ. while Bhagwati, J. dissenting) expressed a view that death sentence as an alternative punishment for murder is not unreasonable and hence not violative of Articles 14, 19 and 21 of the Constitution,[3] because the "public order" contemplated by clauses (2) to (4) of Article 19 is different from "law and order". Justifying retention of death penalty as an alternative punishment in reference to Section 354(3) of the Code of Criminal Procedure, 1973 the Court, *inter alia*, observed :[4]

> "The question whether or not death penalty serves any penological purpose is a difficult, complex and intricate issue. It has evoked strong divergent views.... notwithstanding the view of the Abolitionsists to the contrary, a very large segment of people, the world over, including sociologists, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society."

The Court further observed : "The Supreme Court should not venture to formulate rigid standards in an area in which the legislators so wearily tread, only broad guidelines consistent with the policy indicated by the legislature can be laid down."

The majority, however, expressed the need for liberal construction of mitigating factors in the area of death penalty and held that dignity of human life postulates resistance to taking life through laws instrumentality, that ought not to be done save in *rarest of rare cases* when alternative option is unquestionably foreclosed.

Negativing the abolitionist's contention that vengeance which is no longer an acceptable end of punishment, that it is contrary to reformation of criminal and his rehabilitation, and finally that it is inhuman and degrading, the Supreme Court ruled that though life imprisonment is the rule, death sentence must be retained as an exception for the offence of murder under Section 302, I.P.C. to be used sparingly.

Following the ruling laid down in *Bachan Singh*, the Supreme Court

---

1. *Dalbir Singh* v. *State of Uttar Pradesh*, AIR 1979 SC 1384.
2. *Bachan Singh* v. *State of Punjab*, AIR 1980 SC 898.
3. *Jag Mohan Singh* v. *State of U.P.*, AIR 1973 SC 947 the Supreme Court observed that capital punishment is not unreasonable *per se* and is not violative of Article 19 of the Constitution of India.
4. *Bachan Singh* v. *State of Punjab*, AIR 1980 SC 898.

upheld the death sentence of the accused in *Machi Singh and others* v. *State of Punjab*,[1] on the ground that the murder committed was of exceptionally depraved and heinous in character and the manner of its execution and its design would put it at the level of extreme atrocity and cruelty. The accused in the instant case had killed two innocent and helpless women. Their Lordships of the Supreme Court opined that the *'rarest of rare cases'* doctrine was clearly attracted in this case and that the sentence of death was perfectly justified.

While deciding this case (*i.e. Machi Singh*), the Apex Court realised that the 'rarest of rare cases' doctrine had caused 'inner conflict' in the minds of the Judges because it was left much to the judicial discretion to decide whether the case fell within the category of rarest of rare case or not. Hence, the Supreme Court laid down a five-point formula based on the manner in which the murder was committed and the motive, nature and magnitude of the crime and the personality of the victim. The factors which the Court was expected to take into consideration for this purpose may be briefly stated as follows :—

1. The *manner* in which the offence of murder was committed. If it was committed with extreme brutality such as burning the victim alive or cutting body into pieces, it would be a fit case to be considered as rarest of rare case.
2. When the *motive* reveals depravity and meanness of the murderer *e.g.* crime being committed for material gain.
3. When the murder is *socially* abhorrent such as bride burning or killing of a Harijan.
4. When the *magnitude* of the offence is enormous as in case of multiple murders.
5. When the *victim* is an innocent child, a helpless woman, or a reputed figure *i.e.* the case of a political murder.

The Court, however, cautioned that these guidelines should not be applied too literally. Instead, the Judges should interpret the provisions rationally to ascertain whether 'collective conscience of the community has been shocked and it will expect the Judge to award the death penalty'.[2]

The Supreme Court reiterated its approval for death sentence once again in its decision in *Chopra Children*[3] murder case. In this case the accused Kuljeet Singh *alias* Ranga along with one Jashbir Singh *alias* Billa committed gruesome murder of two teenage children Gita Chopra and her brother Sanjay in a professional manner and was sentenced to death by Additional District Judge, Delhi. The High Court confirmed the conviction and death sentence whereupon appellant moved in appeal to Supreme Court. Dismissing the appeal, the Supreme Court upheld the conviction and sentence of the accused on the ground that the murder was preplanned, cold-blooded and committed in most brutal manner, hence there were no extenuating circumstances warranting mitigation of sentence.

The Supreme Court in its decision in *T. V. Vatheeswaran* v. *State of*

1. AIR 1983 SC 957 (decide on 21st July 1983).
2. *Dina* v. *State of U.P.*, AIR 1983 SC 1155.
3. *Kuljeet Singh* alias *Ranga* v. *Union of India*, AIR 1981 SC 1572.

Tamil Nadu,[1] once again ruled that prolonged delay in execution exceeding two years will be a sufficient ground to quash death sentence since it is unjust, unfair and unreasonable procedure and only way to undo the wrong is to quash the death sentence. The Court further observed that the cause of delay is immaterial when the sentence is that of "death" and a person under sentence of death may also claim fundamental rights, *i.e.* procedure under Article 21 must be just, fair and reasonable.

But soon after in *Sher Singh* v. *State of Punjab*,[2] the Supreme Court overruled its earlier ruling in *Vetheeswaran's* case. Delivering the judgment in this case Chief Justice Mr. Y. V. Chandrachud observed that death penalty should only be imposed in rare and exceptional cases but any death sentence upheld by the Supreme Court should not be allowed to be defeated by applying any rule of thumb. The learned Court further observed that no hard and fast rule can be laid down as far as the question of delay was concerned. If a person was allowed to resort to frivolous proceedings in order to delay the execution of death sentence, the law laid down by Court on death sentence would become an object of ridicule. Thus, dismissing the writ-petition the Supreme Court in this case directed the Punjab Government to explain the delay in execution.

In yet another case, namely, *Javed Ahmad Abdulhamid Pawala* v. *State of Maharashtra*,[3] the Supreme Court upheld the sentence of death for a gruesome and brutal murder. In the instant case the appellant was convicted for multiple murders. He killed his sister-in-law aged 23 years, his little neice aged 3 years, his baby nephew aged about one and half years and the minor servant aged about 8 years. The motive of murders was the golden ear-rings and bangles of the deceased. The sister-in-law sustained 20 stab-injuries, neice 13 stab wounds, servant 8 incised wounds and baby neice 3 injuries. The accused was convicted for murder and sentenced to death. His conviction was upheld by the High Court. He thereupon moved an appeal to the Supreme Court only on the question of sentence. Dismissing his appeal the Supreme Court, *inter alia* observed :—

> "The appellant acted like a demon showing no mercy to his helpless victims three of whom were helpless little children and one a woman. The murders were perpetrated in a cruel, callous and fiendish fashion. Although the appellant was 22 years of age and the case rested upon circumstantial evidence, the Court were unable to refuse to pass the sentence of death as it would be stultifying the course of law and justice. It was truly the 'rarest of rare cases' the Court had no option but to confirm the sentence of death."

In the notorious *Joshi-Abhyunkar* murder case[4] the accused committed a series of gruesome murders during January, 1976 and March, 1977. They were sentenced to death by the trial Court which was confirmed by the Bombay High Court on 6th April, 1979. The appellants thereupon filed special leave petitions before the Supreme Court for commutation of death

1. AIR 1983 SC 361.
2. AIR 1983 SC 465.
3. AIR 1983 SC 594.
4. *Munawar Harun Shah* v. *State of Maharashtra*, AIR 1983 SC 585.

sentence to one of life imprisonment as the "death" was hovering over their minds for five years. Two of the petitioners, namely, Shanta Ram Jagtap and Munawar Shah pleaded that during this period they had written a book entitled "*Kalyan Marg*" in Marathi and translated "*Sukshma Vyayam*" written in English by Dhirendra Bramhachari into Marathi. Dismissing the petitions the Supreme Court observed that the book-writing and translation work of the petitioners belied that any spectre of death penalty was hovering over their minds during the period they have been in jail. Therefore, any mercy shown in matter of sentence would not only be misplaced but will certainly give rise to and foster a feeling of private revenge among the people leading to destablisation of society.

The Supreme Court in *Ranjit Singh* v. *Union Territory of Chandigarh*[1] was once again called upon to decide an appeal relating to the question of sentence. In the instant case, murder was committed by appellant a life convict during parole. The accused was sentenced to death on conviction under Section 303, I.P.C. and the co-accused was awarded life-imprisonment. Agreeing with the contention of deceased's counsel the Supreme Court commuted the sentence of death to that of imprisonment for life as Section 303, I.P.C., had been declared unconstitutional in *Mithu* v. *State of Punjab*.[2] The Court held that during parole appellant should have behaved like a law abiding citizen but instead he indulged into hienous crime of murder hence the case fell within the category of "*rarest of rare cases*".

Again, in *Mahesh etc.* v. *State of M.P.*,[3] the Supreme Court maintaining the sentence of death passed by the High Court observed :

> "it would be mockery of justice to permit the appellants to escape the extreme penalty of law.....and to give lesser punishment for the appellants would be to render justicing system of this country suspect, the common man would lose faith in courts".

In the instant case father and son had axed a person and three members of his family and his neighbour who intervened merely because daughter of that person married a Harijan. The Supreme Court held that interference with the sentence was not called for because the act of appellants was extremely brutal, revolting and gruesome which shocks the judicial conscience. Therefore deterrent punishment was a social necessity in this case.

The Supreme Court in its decision in *Asharfi Lal & Sons* v. *State of U.P.*,[4] once again upheld the death sentence of the accused who committed reprehensible and gruesome murders of two innocent girls on 14th August, 1984 to wreck their personal vengeance over the dispute they had with regard to property with the mother of victims and commented that "the only punishment the accused deserved was nothing but death". Commenting on the desirablity of death sentence the Court further observed :

> "failure to impose a death sentence in grave cases where it is a crime against the society, particularly in cases of

1. AIR 1984 SC 45.
2. AIR 1983 SC 473.
3. AIR 1987 SC 1346.
4. AIR 1987 SC 1721.

> murders committed with extreme brutality will bring to naught the sentence of death provided by Sec. 302, I.P.C. It is duty of Court to impose proper punishment depending upon the degree of criminality and desirability to impose such punishment."

However, the execution of death sentence by public hanging was held as barbaric and violative of Art. 21 of the Constitution. Even if the Jail Manual were to provide public hanging, it would be declared unconstitutional.[1]

In *Kamta Tiwari* v. *State of M.P.*,[2] the accused committed the rape on a seven years old girl and strangulated her to death. He threw her body in a well and caused disappearance of evidence. The accused was convicted for the offences under Sections 363, 376, 302 and 201, I.P.C. and was sentenced to death by the trial court and the sentence was maintained by the High Court also. In appeal, the Supreme Court upheld the decision of the lower courts and held that this is a *'rarest of rare cases'* where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's abhorrence of such crimes. The Court, *inter alia*, observed :

> "Before opting for death penalty, the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the crime. A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before the option is exercised."

In yet another case, *Ravji* alias *Ram Chandra* v. *State of Rajasthan*,[3] the Supreme Court found no justification in commuting the death penalty to imprisonment for life. In this case, the accused had committed murder of five persons including his wife and three minor children and attempted to commit murder of two others. The act was committed in cool and calculated manner while victims were asleep. There was absence of provocation or any psychic disorder which could be attributed to these brutal and heinous murders. Therefore, the Court found no justification to commute the death penalty to imprisonment for life and dismissed the appeal.

In *Geneta Vijayavardhan Rao & another* v. *State of Andhra Pradesh*,[4] the two appellants were accused of setting up a super express bus on fire by sprinkling petrol with the motive of plundering the passengers. This resulted into roasting 23 passengers to death, besides a number of passengers sustained serious burn injures. The defence plea was that the accused were young and their prime motive was not murder but plundering property and wealth was not considered sufficient enough to constitute mitigating circumstances warranting commutation of death sentence to that of imprisonment for life. The Apex Court ruled that considering the overall

1. *Lachma Devi* v. *State of Rajasthan*, AIR 1986 SC 467.
2. AIR 1996 SC 2800.
3. AIR 1996 SC 787.
4. AIR 1996 SC 2791.

picture, the case was one of the rarest of rare cases not merely because of record number of innocent human beings roasted alive but the inhuman manner in which the scheme of crime was plotted and executed.

In *Manohar Lal* alias *Munna & another* v. *State of Delhi*,[1] the two accused (appellants) killed four sons in presence of the sole eye-witness, the mother by setting them ablaze. The incident was the result of the carnage fuelled by the assassination of Mrs. Indira Gandhi which scored a heavy toll on Sikh community in Delhi. The accused were convicted for offences under Sections 302 and 396 read with Section 149, I.P.C. by the Session Court and sentenced to death on the first count and to life imprisonment on the other. The High Court of Delhi confirmed the conviction and sentence. Thereupon, the appellants filed the criminal appeal by special leave. The Supreme Court held that the act of accused though gruesome, they had no special or personal enmity towards the deceased persons. It was the assassination of Prime Minister Indira Gandhi which had blind folded the accused. It could be said that the act of the mob of which the appellants were the members was only the result of a "temporary frenzy". Therefore, sentencing accused to death would not be proper in the instant case and as such it is altered to that of imprisonment for life.

Reference may also be made of the Supreme Court decision in *Kishori* v. *State of Delhi*,[2] consequent to the assassination of Mrs. Indira Gandhi, large scale rioting and arson took place in different parts of Delhi on 1st and 2nd November, 1984. Many persons were burnt alive or mercilessly killed. The charges against four accused persons, namely, Kishori (appellant), Rampal, Saroj and Shabnam were framed under Sections 148, 183, 302 and 307 read with Section 149, I.P.C. Having been sentenced to death by the trial court and confirmed by the High Court of Delhi, the appellant Kishori filed Special Leave Petition in the Supreme Court challenging the judgment of the High Court. During the hearing, it was stated that Kishori was allegedly involved in several incidents which gave rise to seven cases, four of which ended in his acquittal and in three cases, he was sentenced to death. The Supreme Court, in this case observed :

> "The law is well settled by reason of the decisions of this Court that capital punishment can be imposed in the rarest of rare cases and if there are aggravating circumstances... Experts in criminology often express a view that where there is mob-action, as in the instant case, there is diminished individual responsibility unless there are special circumstances indicating that a particular person had acted with any pre-determined motive such as use of weapon not normally found."

In the instant case, all the witnesses speak that there was a mob attack resulting in the death of three persons. Though the appellant is stated to be responsible for inflicting certain knife injuries, yet it is not clear whether those injuries themselves were sufficient to result in the death of the deceased persons. The acts of the mob of which the appellant was a member cannot be said to be the result of an organisation or group indulging

1. AIR 2000 SC 420.
2. AIR 1999 SC 382.

in planned violent activities formed with any purpose or scheme which can be called as an organised activity. The Supreme Court, therefore, decided that "on the totality of the circumstances, this is not a case which can be called "a rarest of rare cases" which warrants imposition of maximum sentence of death. Hence while confirming the conviction of the appellant on charges framed against him, the sentence is reduced from capital punishment to that of life imprisonment and with this modification, the appeal stands dismissed.

In the case of *Nirmal Singh & another* v. *State of Haryana*,[1] the two accused Dharampal and Nirmal were convicted for murder of 5 persons on the evidence of two eye-witnesses corroborated by the evidence of other witnesses and medical evidence. Accused Dharampal was already convicted in a rape case on the testimony of close in-laws of the deceased. He was sentenced to ten years' imprisonment and preferred an appeal and obtained a bail from the High Court. He had given a threat to deceased persons on previous occasion that if any body gives evidence in the rape case, the whole family will be wiped off. He has misused the privilege of bail and killed 5 persons who were all members of family of Punam (the victim of rape case) whose deposition was responsible for Dharampal's conviction. He had killed 5 persons with *Kulhari* which indicated his depraved mind. The Apex Court held that the brutal and merciless killing by the accused was certainly a case which fell within the category of rarest of rare cases and deserved the sentence of death by hanging till death.

The Court, however, reduced the sentence of death awarded to the other accused, namely, Nirmal the brother of Dharampal to life imprisonment holding that it stood totally on a different footing than that of Dharampal's case. Dharampal was already undergoing a sentence of ten years in a rape case whereas Nirmal had no past criminal antecedents nor could he constitute a threat to the society. He had only assisted Dharampal in hitting the deceased after Dharampal's blows inflicted by *kulhari*. Therefore, his case cannot be said to be rarest of rare case hence the sentence was commuted to that of imprisonment for life.

In *Mohd. Chaman* v. *State of Delhi*,[2] the accused had committed rape on a minor girl Ritu aged one and a half years when her parents and two sisters were away from home. As a result of this brutal and ghastly act the child suffered several injuries and died. The trial Court convicted the accused under Sections 302 and 376, I.P.C. and sentenced him to death which was confirmed by the High Court. On appeal, the Supreme Court held that, when the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of community these should be construed as aggravating circumstances for imposition of death sentence. In the instant case the crime committed is undoubtedly serious and heinous and reveals a dirty and perverted mind of a person who has no control over his carnal desires. But taking guidelines laid down in *Bechan Singh* (supra) the case is one which deserves humanist approach and therefore capital sentence imposed against appellant is commuted to imprisonment for life.

1. AIR 1999 SC 1221.
2. 2001 (1) C. Cr. J. 121 (SC).

In the case of *Amit alias Ammu* v. *State of Maharashtra*,[1] the accused aged 20 years (appellant) took deceased, a school girl of about 12 years of age to a secluded place and committed rape on her and strangulated her to death. He was sentenced to death by the Sessions Court in view of heinousness of the crime and also ordered fine of Rs. 25,000/- to be paid to the parents of the victim for mental torture, agony and the loss sustained of their only female child. The High Court confirmed the aforesaid sentences on the ground that the case fell in the category of 'rarest of rare case'. On appeal, the Supreme Court held that conviction of the appellant for the offence under Sections 302 and 376, IPC, has been rightly recorded by the Court of Session and affirmed by the High Court. But considering that the appellant is a young man of 20 years, he was a student and there being no previous record of any heinous crime and also there being no evidence that he will be a danger to the society, and considering the circumstances of the case and cumulative facts, the Apex Court held that the case did not fall in the category of 'rarest of rare' case and hence the sentence of death was modified to one of imprisonment for life. The appeal was therefore allowed only to the extent of modification of sentence only.

In *Dhananjoy Chatterjee* alias *Dhana* v. *State of West Bengal*,[2] the appellant was found guilty of committing rape and murder of a school going 18 years old girl in retaliation for his transfer as a security guard to some other building complex, on the complaint by the deceased girl to her parents that the appellant was teasing and harassing him. His appeal having failed in the High Court and the Supreme Court and the mercy appeal being rejected by the Governor of West Bengal and also the Hon'ble President of India, he was finally hanged till death on 14th August 2004 in Alipore Jail of West Bengal in execution of his death sentence. The facts of the case were as follows :—

The appellant was security guard deputed to guard the building 'Anand Apartments'. Deceased had made complaint about the teasing by the appellant to her mother previously also and her father requested to replace the appellant and accordingly he was transferred to Paras apartment. Anguished from this, the appellant entered the house in the absence of other members, committed rape and killed her. She was found dead on the floor with her skirt and blouse pulled up and her private parts and breast were visible with patches of blood near her head and floor. According to medical evidence, hymen of the deceased showed fresh tear with fresh blood in the margins and blood stains on the vagina and matted public hair. It is settled law that when the case is based on circumstantial evidence, the motive also gets importance. In the circumstances the chain of the evidence was so complete that it led to the guilt of the accused. The High Court rightly upheld the conviction and sentence of death.

Thus, the ill-fated victim Hetal Parekh was raped and murdered on March 5, 1990 between 5.30 and 5.45 p.m. in her Flat No. 3-A, on the third floor of Anand Apartment. The appellant was challaned and tried for rape and murder and also for an offence under Section 380, IPC for committing theft of a wrist-watch from the said flat. The learned Additional Sessions

1. AIR 2003 SC 3131.
2. Criminal Appeal Nos. 393-394 of 2004 decided on 26-3-2004.

Judge found him guilty and convicted the appellant (i) for an offence under Section 302 IPC and sentenced him to death, (ii) for an offence under Section 376, IPC and sentenced him to imprisonment for life, and (iii) for the offence under Section 380 IPC, he was sentenced to undergo rigorous imprisonment for five years. The substantive sentences under Sections 376 and 380, IPC were ordered to run concurrently but were to cease to have any effect, in case the sentence of death for conviction of the appellant under Section 302 IPC was confirmed by the High Court and the appellant was executed. Reference for confirmation of the death sentence was accordingly made to the High Court. The appellant also preferred an appeal against his conviction and sentence in the High Court. The criminal appeal filed by the appellant was dismissed and the sentence of death was confirmed by the High Court. On special leave being granted, the appellant, Dhananjoy Chatterjee *alias* Dhana, filed an appeal.

There were no eye-witnesses of the occurrence and the entire case rested on circumstantial evidence. In a case based on circumstantial evidence, the existence of motive assumes significance though absence of motive does not necessarily discredit the prosecution case if the case stands otherwise established by other conclusive circumstances and the chain of such evidence is complete and takes one irresistible conclusion about the guilt of the accused. In this case there was ample evidence on record to show that the appellant had a motive to commit the alleged crime and therefore, the Court rightly found the accused guilty of aforesaid offences. Abscondence of the accused after the occurrence, though not by itself sufficient to prove the guilt of the accused, was sufficient to support the case against him. The Court, therefore, rejected the belated and vague plea of *alibi* which it considered to be only an afterthought and a plea in despair. The Court held that prosecution has successfully established that the appellant alone was guilty of committing rape of Hetal and subsequently murdering her.

As to the question of sentence, the trial Court awarded the sentence of death and the High Court confirmed the imposition of capital punishment for the offence under Section 302 of IPC for the murder of Hetal Parekh. Learned counsel submitted that appellant was a married man of 27 years of age and there were no special reasons to award the sentence of death on him. It was further submitted that keeping in view the legislative policy discernible from Section 235(2) read with Section 354(3) of Cr.P.C., the Court may make the choice of not imposing the extreme penalty of death on the appellant and give him a chance to become a reformed member of the society in keeping with the concern for the dignity of human life. The learned counsel for the State, on the other hand canvassed for confirmation of the sentence of death so that it serves as a deterrent to similar depraved minds. According to the learned State counsel there were no mitigating circumstances and the case was undoubtedly "rarest of the rare" cases where the sentence of death alone would meet the ends of justice. The Court observed as follows :—

> "We have given our anxious consideration to the question of sentence keeping in view the changed legislative policy which is patent from Section 354(3) Cr.P.C. We have also considered the observations of this Court in *Bachan Singh* v. *State of*

Punjab,[1] But in recent years, the rising crime rate—particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration."

The Court further observed :

"In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

According to the Hon'ble Court, the sordid episode of the security guard, whose sacred duty was to ensure the protection and welfare of the inhabitants of the flats in the apartment, should have subjected the deceased, a resident of one of the flats, to gratify his lust and murder her in retaliation for his transfer on her complaint, makes the crime even more heinous. Keeping in view the medical evidence and the state in which the body of the deceased was found, it is obvious that a most heinous type of barbaric rape and murder was committed on a helpless and defenceless school-going girl of 18 years. If the security guards behave in this manner who will guard the guards? The faith of the society by such a barbaric act of the guard gets totally shaken and its cry for justice becomes loud and clear. The offence was not only inhuman and barbaric but it was a totally ruthless crime of rape followed by cold blooded murder and an affront to the human dignity of the society. The savage nature of the crime has shocked our judicial conscience. There are no extenuating or mitigating circumstances whatsoever in the case. We agree that a real and abiding concern for the

1. AIR 1980 SC 898.

dignity of human life is required to be kept in mind by the Courts while considering the confirmation of the sentence of death but a cold blooded preplanned brutal murder, without any provocation, after committing rape on an innocent and defenceless young girl of 18 years, by the security guard certainly makes this case a "rarest of the rare" cases which calls for no punishment other than the capital punishment and we accordingly confirm the sentence of death imposed upon the appellant for the offence under Section 302 IPC. The order of sentence imposed on the appellant by the courts below for offences under Sections 376 and 380, IPC are also confirmed along with the directions relating thereto as in the event of the execution of the appellant, those sentences would only remain of academic interest. This appeal fails and is hereby dismissed.

As a last ditch to save his life, the appellant filed a mercy appeal with the Hon'ble President of India which was rejected by an order of the President dated 4th August 2004. Thereafter, the brother of the appellant filed a petition in the Supreme Court seeking stay of Dhananjoy's execution of death sentence. But the five-judge Bench of the Apex Court refused to review the President's decision to reject appellant's mercy petition. Consequently, Dhananjoy's death sentence was executed in Alipore Central Jail in West Bengal on 14th August 2004 by hanging him till death.

Dhananjoy's case is undoubtedly a trend-setter in the history of capital punishment in India and clearly indicates that the principle laid down in *Bachan Singh's* case *i.e.*, "rarest of rare" case is best suited to the socio-millieu of the Indian society even in the present 21st century.

In *Surja Ram* v. *State of Rajasthan*,[1] the accused brutally murdered his real brother, brother's two sons and aunt while they were asleep. He also attempted to murder brother's wife and daughter. The Supreme Court upheld the sentence of death as the murders were committed in a cool and calculated manner and without any provocation. Therefore, it clearly fell in the category of rarest of rare cases.

The Supreme Court in *Krishan* v. *State of Haryana*,[2] declined to hold that the appellant's case fell in the category of 'rarest of rare cases' and therefore, commuted death sentence to one of life imprisonment. In this case, the accused was already serving a sentence of life-imprisonment for a murder and he was found guilty of committing another murder of a person with whom he had a property dispute while he was released on parole. The Court ruled that undoubtedly felonious propensity of offender is a factor which requires consideration for the sentence of death but that cannot be made the sole basis for award of death sentence as all other factors such as motive, manner and magnitude should also be taken into consideration.

In *Raja Ram Yadav & others* v. *State of Bihar*,[3] the appellants (eight in number) were charged for committing premeditated murder of six persons in a cool and calculated manner with extreme cruelty and brutality under Sections 302, 436 read with Sections 148 and 120-B, I.P.C. The incident occurred when a group of persons committed mass massacre of 26 persons out of which 25 belonged to one community and 20 of them also belonged to

1. AIR 1997 SC 18.
2. AIR 1997 SC 2598.
3. AIR 1996 SC 1613.

the same family in the village Bhagora, Police Station Madanpur, Distt. Aurangabad on the night of 30th May, 1987. The conviction was based on the testimony of solitary child witness who was five years old son of one of the deceased. This deposition was held convincing and reliable. The Supreme Court ruled that normally sentence of death was wholly justified keeping in view the special facts of the case, but it will not be proper to award extreme sentence of death on the appellants hence it would be proper to commute the death sentence to one of the life imprisonment.

Again, in the case of *Ashok Kumar* v. *The State of Delhi Administration*,[1] the allegations against the accused were that he was having illicit relations with co-accused and killed her husband in a room of hotel by striking him with stone. The High Court enumerated as many as eleven circumstantial evidence against the appellant and spelt out the case to be 'rarest of rare' one. The Supreme Court held the view that appellant was rightly convicted of the offence under Section 302, I.P.C. as the chain of circumstances fully established the guilt of the accused. However, on the point of sentence, the Apex Court observed that the act of striking the deceased with a handy stone and causing the death cannot be said to be so cruel, unusual or diabolic which would warrant death penalty. Therefore, the Court commuted the death sentence of the appellant to that of imprisonment for life.

In the case of *Kamta Tiwari* v. *State of Madhya Pradesh*,[2] the accused committed brutal rape on a girl child of seven years and strangulated her to death and finally threw the dead body in a well to destroy all evidence. The accused was intimate to the family of the victim. Obviously, being well acquainted and intimate with the accused, the girl along with her father and brother had gone to former's shop for hair-dressing and because of her intimacy with the accused asked for biscuits from him. The accused took her to the nearby grocer's shop, purchased a packet of biscuits and gave it to the victim. Thereafter, he eloped with the victim, committed brutal rape on her and strangulated her to death. The trial Court sentenced the accused to death under Sections 302/376 which was upheld by the High Court. On appeal, the Supreme Court held that the accused committing rape on an innocent seven years old girl who reposed trust and confidence in him because of their close family relationship indicates the depravity of the accused. The vulnerability of the victim, the enormity of crime and barbaric and gruesome murder committed by the accused brings the case in the category of 'rarest of rare' case and execution of death sentence was the only proper punishment in the instant case so that others may also be deterred from indulging in such inhuman criminality. The appeal was, therefore, dismissed.

In *Mahendra Nath Das* v. *State of Assam*,[3] the appellant (accused) was a young man, who killed the deceased and chopped off the hands and head of the dead body. Thereafter, he came to the police station along with the chopped hand and head of the deceased to make a confession of his offence. The Supreme Court considered this murder as the rarest of rare case and upheld the death sentence of the accused. The Court rejected the plea that

1. AIR 1996 SC 265.
2. AIR 1996 SC 2800.
3. (1999) 5 SCR 102.

the accused was a young man having liability of his three young unmarried sisters and age-old parents who were solely dependent on him.

In the case of *Prem Sagar* v. *Dharambir & others*,[1] the accused were sentenced to life imprisonment for committing murder by intentionally causing death of the deceased in furtherance of common intention under Sections 302/34 I.P.C. In appeal against the sentence by the informant, the Supreme Court held that undoubtedly, brutality is inbuilt in every murder but in the case of every murder death sentence is not imposed because life imprisonment is the rule and death sentence is the exception. The sentence of death is imposable in rarest of rare cases. The Court further noted that having taken into consideration the mitigating circumstances indicated by the High Court, there was no scope for interference and altering the sentence of life imprisonment to one of death sentence. The conviction of accused Dharambir was, therefore, affirmed. The Court, however, ordered acquittal of the accused Karambir because the prosecution did not link him with the occurrence and, therefore, his conviction was not justified.

The Supreme Court in *Sushil Murmu* v. *State of Jharkhand*,[2] reiterated the 'rarest of rare case' doctrine and held, "when collective conscience of the community is shocked and it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence must be awarded." In this case the appellant sacrificed a child of nine years before the deity *Kali* by beheading him, for his own prosperity. The non-challant way in which he carried the severed head in a gunny bag and threw it in the pond unerringly shows that the act was diabolic of most superlative degree in conception and cruel in execution, particularly when the appellant (accused) was having his own child of the same age. The Supreme Court dismissed the appeal and laid down the test to determine as to what cases may be covered under the rarest of rare rule. According to the Apex Court the following cases would attract the 'rarest of rare cases' rule to justify imposition of death sentence:—

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community;

(2) The murder is committed for a motive which evinces total depravity and meanness;

(3) When murder is that of a member of Scheduled Caste or minority community;

(4) When murder is in enormous proportion *i.e.*, several persons are murdered;

(5) When the victim of murder is an innocent child or a helpless woman or an old or infirm person.

The Court ruled that death penalty should be the only punishment to be awarded in the aforesaid cases.

In *Satyendra* v. *State of Uttar Pradesh*,[3] the accused persons who were variously armed came in group by using cars and motor cycles and

1. AIR 2004 SC 21.
2. AIR 2004 SC 394.
3. AIR 2004 SC 3508.

intercepted a bus knowing fully well that deceased were travelling in that bus. They entered the bus from both doors without giving an opportunity to deceased persons to escape, and killed them on the spot. Two deceased who tried to escape from the bus, were chased by accused and killed. The medical report testified deaths by gun-fires. The accused were convicted under Section 149/302 (unlawful assembly and murder) and sentenced to death by the trial Court which was affirmed by the High Court. In appeal, the Supreme Court held that sentencing the accused to death was not proper because various overt acts of individual accused persons were not established. Therefore, the death sentence was converted to imprisonment for life.

In the case of *Jay Kumar* v. *State of Madhya Pradesh*,[1] the accused was a young man of 22 years of age who attempted to rape his sister-in-law (Bhabhi) but having failed in his attempt, he murdered her and hanged her mutilated head on a tree. He also murdered the 8 year old daughter of the deceased who was the sole witness to this incident. The Supreme Court rejected the appeal and upheld the death sentence on the ground that the double murder was committed in a brutal and gruesome manner and deserved no leniency in the award of sentence.

In *Molai & another* v. *State of Madhya Pradesh*,[2] the Supreme Court upheld the death sentence of the two accused and expressed a view that the case squarely fell in the category of one of the rarest of rare case. The facts of the case were as follows :—

The victim, a girl named Naveen aged 16 years was alone in her home and was preparing for her Xth class examination. Suddenly both the accused taking advantage of her being alone in the house entered the house and committed the shameful act of rape and strangulated her by using her undergarment and thereafter took her to the septic tank along with the cycle and caused injuries with a sharp edged knife. The accused further exhibited the criminality in their conduct by throwing the dead body into the septic tank totally disregarding the respect for a human dead-body. The trial court convicted the accused for rape and murder under Sections 375 and 300 and sentenced them to death. The High Court upheld the conviction in appeal. In appeal, the Apex court held that counsel for the accused (appellants) could not point any mitigating circumstance which would justify reduction of the sentence; hence the case clearly fell in the category of rarest of rare case and death sentence was the only proper punishment in the instant case.

The Supreme Court in *Ram Deo Chauhan and another* v. *State of Assam*,[3] reiterated that commission of the murder in a brutal manner on a helpless child or the woman in a pre-planned manner justify the imposition of maximum penalty of death sentence. In this case the accused caused death of four persons of a family in a very cruel, heinous and dastardly manner. His confessional statement showed that he committed these murders after previous planning which involved extreme brutality. Under the circumstances, the Court held that the plea that the accused was a young person at the time of occurrence cannot be considered as mitigating

1. (1999) 5 SCC 1.
2. AIR 2000 SC 177.
3. AIR 2000 SC 2679.

circumstance and, therefore, death sentence imposed on the accused cannot be interfered with. The Court further observed :

> "it is true that in a civilised society a tooth for tooth, and a nail for nail or death for death is not the rule but it is equally true that when a man becomes a beast and menace to the society, he can be deprived of his life according to the procedure established by law, as Constitution itself has recognised the death sentence as a permissible punishment."

The Apex Court reiterated that in offences punishable with death, life sentence is the rule and death sentence is exception, but the present case is an exceptional case which warrants the award of death sentence to the accused. The appeal was, therefore, dismissed.

In the case of *Govindaswami* v. *State of Tamil Nadu*,[1] the Supreme Court speaking through Mukerjee, J., observed that, "in case of murder committed in a gruesome, brutal and calculated manner, declining to confirm death sentence will stultify the course of law and justice. The commutation of death sentence to life imprisonment in such case will be yielding to spasmodic sentiment, unregulated benevolence and misplaced sympathy."

In the case of *Laxman Naik* v. *State of Orissa*,[2] it was conclusively proved on the basis of circumstantial evidence that the accused committed rape on his brother's daughter aged 7 years in a lonely place in forest and thereafter murdered her. The evidence on record indicated how diabolically the accused had conceived of his plan and brutally executed it, and such a calculated, cold-blooded and brutal murder of a girl of a very tender age after committing rape on her would undoubtedly fall in the category of *rarest of rare case* attracting no other punishment than the capital punishment.

The Apex Court in this case held that injuries caused on the person of the murdered child and the blood-soaked undergarments found near the body completed the chain of evidence as not to leave any doubt about the sexual assault followed by brutal, merciless, dastardly and monstrous murder which the appellant had committed. The girl of the tender age of 7 years fell prey of the lust of the accused "which sends shocking waves not to the judicial conscience but to everyone having slightest sense of human values and particularly to the blood relations and the society at large." The Court, therefore, upheld the sentence of death passed on the accused (appellant) and the appeal was dismissed.

In a recent criminal appeal[3] against the judgment rendered by a Division Bench of the Rajasthan High Court at Jodhpur on 11-2-1998 to the Supreme Court by both appellants and the respondents, the Apex Court was called upon to decide the propriety of alteration of conviction of 5 accused from Section 302 read with Sections 149, 148 and 341 of IPC to Section 304-I read with Sections 149, 148 and 341 IPC. The accused were found guilty of committing murder by beating the deceased with lathis and axes on a trifle issue of damage of crop by goats entering into their fields. This had resulted into instantaneous death of the deceased. The High Court found no

1. AIR 1998 SC 1933.
2. AIR 1995 SC 1387.
3. *Adu Ram* v. *Mukna & others*, Criminal Appeal No. 646 & 647/1999 decided by the Supreme Court on 08-10-2004.

grievous injuries having been found on the body of the deceased, altered the conviction of the accused under Section 302 to one of 304 Part I, IPC and reduced the sentence to the period undergone (*i.e.* six years) but enhanced the amount of fine from Rs. 2000/- to Rs. 10,000/- to be paid to the widow of the deceased as compensation. The Supreme Court emphasising the principle of proportion between crime and punishment held that "imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise." The Court observed :

> "The social impact of crime *e.g.* where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order and public interest, cannot be lost sight of and *per se* require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system."

Allowing the appeals partly, the Court held that custodial sentence of six years would serve the ends of justice although normally the sentence for conviction for offence relatable to Sect. 304-I, IPC would be more. But this is a case which actually falls under 304-II, IPC though there is no appeal on behalf of accused persons in this regard. The enhanced fine must be paid within two months and default custodial sentence will be two years' rigorous imprisonment.

Delay in execution of Death Sentence

A survey of available case-laws on death sentence would reveal that the attention of the Supreme Court was focused on the question whether inordinate delay in the execution of death penalty can be considered to entitle the convict to claim commutation of the sentence to that of life imprisonment. In *Triveniben* v. *State of Gujarat*,[1] the five Judges Bench of the Supreme Court overruled *Vatheeswaran* and *Javed Ahmed*[2] to the extent they purported to lay down the 'two years' delay rule, and held that no fixed period of delay could be held to make the sentence of death inexecutable. The Court, however, observed that it would consider such delay as an important ground for commutation of the sentence.

In *Madhu Mehta* v. *Union of India*,[3] the Supreme Court held that a delay of eight years in the disposal of mercy petition would be sufficient to justify commutation of death sentence to life imprisonment[4] since right to speedy trial is implicit in Art. 21 of the Constitution which operated through all the stages of sentencing including mercy petition to the President.

---

1. AIR 1989 SC 1335.
2. Supra.
3. (1989) Cri LJ 2321.
4. *See* also *Daya Singh* v. *Union of India*, AIR 1991 SC 1548 ; *Shivaji Jai Singh* v. *State of Maharashtra*, AIR 1983 SC 1155. *Jumman Khan* v. *State of U.P.*, (1991) 1 SCC 752.

In *State of U.P.* v. *Ramesh Prasad Misra*,[1] the Supreme Court reduced the death sentence of the accused to one of imprisonment for life in view of long lapse of time from the date of commission of crime. The incident had occurred on the intervening night of September 26/27, 1985 in Karwi town of Banda district of U.P. The accused was a practising advocate who had committed horrendous bed-room murder of his 28 years old wife whom he had married only 5 months ago. He was found guilty of offence under Sections 300 and 498-A (i.e., dowry death) and his plea of *alibi* was not established hence he was convicted on the basis of circumstantial evidence and sentenced to death.

Mode of Execution of Death Sentence

Section 354(5) of the Code of Criminal Procedure, 1973 requires that when a person is sentenced to death, the Judge in his sentencing order shall direct that the condemned person be hanged by neck till he is dead. The constitutional validity of this mode of execution of death sentence was challenged in *Dina* v. *State of U.P.*[2] on the ground that it was violative of Art 21 of the Constitution being barbarous and inhuman in nature. The Supreme Court, however, rejected the contention and held that hanging the condemned person by neck till he is dead was perhaps the only convenient and relatively less painful mode of executing the death sentence. The issue was once again raised in *Smt. Shashi Nayer* v. *Union of India*[3] but the Supreme Court upheld the validity of 'hanging by neck until death' reiterating its earlier decision in *Dina's* case.

An Overall view.

The pertinent issue which emerges from the foregoing discussion and the case-law is how far the present law relating to capital punishment answers the need of the time and whether its scope needs to be extended, curtailed or it should be abolished altogether. The proper approach to the problem, perhaps will be that capital punishment must be retained for incorrigibles and hardened criminals but its use should be limited to '*rarest of rare cases*'. Thus the Courts may make use of death sentence sparingly but its retention on the Statute Book seems necessary as a penological expediency. Considered from this standpoint, the position as contemplated by Section 354(3) read with Section 235(2) of the Code of Criminal Procedure, 1973, appears to be sound inasmuch as it limits the use of capital punishment to a minimum without, however, abolishing it altogether. The removal of mandatory death sentence for murderers and allowing judicial discretion to commute it to life imprisonment in suitable cases is perhaps the most appropriate approach to the use of capital punishment. In view of the present deteriorating law and order situation in India, total abolition of death sentence would mean giving a long rope to dangerous offenders to commit murders and heinous crimes with impunity.

Of late, opinion is mobilising in favour of extending the scope of capital punishment to economic offences such as profiteering, hoarding, smuggling, blackmarketing and similar other anti-social acts which upset the solidarity

1. AIR 1997 SC 2766.
2. AIR 1983 SC 1155.
3. AIR 1992 SC 395.

of society. Although Russia and other communist countries prescribe capital punishment for such offences, the policy hardly seems expedient in context of Indian society. In fact, forfeiture and confiscation of property or imposition of heavy fines by way of penalty would perhaps be more effective punishment in such cases and the revenue so collected may be utilised for the welfare of the community as a whole.

Another pertinent question that needs consideration in regard to capital punishment is whether it is for the court or the legislature to decide about the retention or abolition of this sentence.[1] Admittedly, legislatures represent the public opinion and the wishes of the people are truly expressed through legislative enactments. Further, it is an established rule of interpretation that the penal laws must be construed strictly and their application should not be extended beyond the scope of the provisions of law. However, so far the question of punishing the offender is concerned, his personality, surroundings and circumstances which actuated him to commit the offence must be taken into consideration. Obviously, it is the Judge and not the legislator, who by virtue of his superior training, insight and experience can best decide according to the settled principles of law as to what punishment should be awarded to the accused in a particular case. The Judges have readily at hand a systematic scheme of law to be applied to various offenders thus extending the offenders due protection against prejudices whatsoever. It can, therefore, be emphatically stated that judiciary is perhaps the only competent institution to determine the cases of law violations and award of punishment to offenders. This function of the court cannot be effectively discharged by legislatures. At the most, legislatures can formulate general policy for the guidance of courts but they must ultimately leave it for the court to apply those principles to individual cases.

Before concluding, a word must be said about the execution of former Prime Minister of Pakistan, Mr. Zulfiqar Ali Bhutto along with four others[2] in the famous *Nawab Mohammad Ahmad* murder case. The Amnesty International in its appeal to Pakistan's President Zia-ul-Haq for commutation of death penalty imposed on Mr. Bhutto stated :

> "we regard death penalty to be cruel, inhuman and degrading punishment and also because in a trial like Mr. Bhutto's conducted in a tense political atmosphere there is risk of miscarriage of justice."

The President of Pakistan, however, refused to accept the international appeals for clemency and all the accused were executed. It is to be noted that the four accused had confessed their guilt while late Mr. Bhutto maintained his innocence.

Despite the Stockhom Declaration of 1977, which imposes upon the United Nations the need to abolish death penalty, this sentence is frequently used as an instrument of repression against opposition, racial ethnic, religious and under-privileged group.[3]

---

1. *Emperor* v. *Dukhari*, 33 CWN 1226.
2. Mr. Bhutto was hanged to death in Ravalpindi Jail at 2-30 a.m. on 4th April, 1979 while four others convicted with him namely, Mian Mohd. Abbas, Safi Gulam Mustafa, Arshat Iqbal and Rana Iftikhar Ahmad were hanged on 25th July, 1979.
3. 1977 Cr LJ p. 74.

Conclusion

It may be reiterated that capital punishment is undoubtedly against the notions of modern rehabilitative processes of treating the offenders. It does not offer an opportunity to the offender to reform himself. That apart, on account of its irreversible nature, many innocent persons may suffer irredeemable harm if they are wrongly hanged. As a matter of policy, the act of taking another's life should never be justified by the State except in extreme cases of dire necessity and self-preservation in war.[1] Therefore, it may be concluded that though capital punishment is devoid of any practical utility yet its retention in the penal law seems expedient keeping in view the present circumstances when the incidence of crime is on a constant increase. Time is not yet ripe when complete abolition of capital punishment can be strongly supported without endangering the social security. It is no exaggeration to say that in the present time the retention of capital punishment seems to be *morally* and *legally* justified. It serves as a reminder to everyone that in case of unpardonable crime one has to forfeit his own right to life and survival.

It must also be noted that the essence of criminal jurisprudence has always been to provide protection, as also to contrive measures against the fears both from within and without, for the individuals and also for the social order itself. Thus, the criminal jurisprudence while it provides protective devices through punitive sanctions, also aims at securing better social order by insulating against the unwarranted acts emanating from the individual. It is with this backdrop that the desirability or otherwise of the capital punishment has to be judged. As a note of caution *Shri S. Venugopal Rao* who chaired the session on capital punishment of International Congress of Criminal Law,[2] rightly pointed out that there is no objection to according a humane treatment to the offender but this should not mean that the victims be at the mercy of criminals who pose a danger to the society and deserve treatment through deterrent and preventive measures. Therefore, there is a need for searching out a viable alternative to deterrence, which has a vital protective function in society.

At present as many as 122 countries of the world have retained death penalty but renovations are continuously being made by them in the methods of execution[3] so that the person on whom the sentence has been ordered suffers minimum torture. The Amnesty International has decided to launch a global wide campaign in 1989 for the abolition of death sentence. It yet remains to be seen as to how far it succeeds in its mission. The Indian law in this regard, however, seems to be satisfactory as the Supreme Court in *Allauddin Mian* v. *State of Bihar*[4] has stressed on the penological aspect of death sentence and observed that provisions of Sections 354(3) and 235(2) of the Code of Criminal Procedure, 1973, require the sentencing Judge to

1. Kethaleen J. Smith : "A Cure to Crime" Gerald Duckworth Ltd., London (1964), p. 57.
2. The International Congress of Criminal Law was held in New Delhi on 8th Feb., 1983.
3. The Law Commission of India in its 45th Report on capital punishment suggested the use of lethal injection for execution as it is simplest, decent and ensures instantaneous and painless death.
4. AIR 1989 SC 1456.

state reasons for awarding death sentence and giving an opportunity to the condemned person to be heard on the point of sentence, satisfy the rule of natural justice and fair play. This enables the sentencing Court to endeavour to see that all the relevant facts and circumstances which have bearing on the question of sentence are brought on record and no injustice is caused to the accused. In the instant case, the Apex Court noted that the trial Judge had not attached sufficient importance to mandatory requirements of the above provisions and the High Court confirmed the death sentence without having sufficient material placed before it on record to know about the antecedents of the accused, his socio-economic conditions, and impact of crime etc. which rendered the rationale of the judgment doubtful.

Undoubtedly, there are admirable principles which the Judges who have responsibility for passing sentence, should bear in mind while finalising the sentence of the accused. The objectives of sentences and the range of sentences have widened over the years and this calls for properly marshalled observation of the results of similar sentences imposed in similar circumstances in the past. The sentencing courts should, therefore, keep themselves abreast of the penological developments, specially when the choice is between 'death' or 'life imprisonment'.

In the ultimate analysis, it will be seen that considered from the angle of social justice and protection of society from hard-core criminals, death sentence is not unreasonable or unwarranted or obsolete type of punishment. The noted Italian criminologist *Garofalo*, while disapproving the abolition of death sentence from the statute Book commented, "when State abolishes the sentence of death, it authorises murderer and says to the criminal 'the risk you run in killing a human being is a change of abode, the necessity of spending your days in my house (*i.e.* prison) instead of your own.' Will it be proper to do so?

The death penalty is no doubt unconstitutional if imposed arbitrarily, capriciously, unreasonably, discriminatorily, freakishly or wantonly, but if it administered rationally, objectively and judiciously, it will enhance people's confidence in criminal justice system.
