Criminology

PROBLEMS & PERSPECTIVES

Ahmad Siddique

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Faculty of Law
University of Delhi

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PREFACE TO THE FOURTH EDITION

The present edition is making its appearance after a much shorter time-gap than what it took in the earlier revised editions. Some chapters have been further strengthened by the inclusion of topics of vital importance like child abuse, domestic violence and violence against weaker sections of the community. The material throughout the book has been thoroughly revised and updated as far as necessary and feasible.

Jan. 13, 1997 — AHMAD SIDDIQUE

PREFACE TO THE FIRST EDITION

There is no dearth of standard books on Criminology and Penology by eminent foreign writers. What, however, prompted me to write the present volume has been the realisation on my part of the fact that hardly any work is available with the Indian context providing the frame of reference. Again, almost all the works dealing with the subject, even in the foreign context, have been primarily written keeping in view the requirements of the students of Sociology and Social Work. They, therefore, lack the legal treatment which is so essential to the understanding of the practical application of various principles through courts of law and other agencies. The significance of the legal bias can be appreciated by keeping in view the fact that Criminology is now taught as a subject both at LL.B. as well as at LL.M. level in the Indian Universities. Recently the Supreme Court of India, while delivering the judgment in an appeal relating to the sentencing process, has emphasised the importance and utility of the training of judicial personnel in modern Penology. This book attempts to deal with the various problems of Criminology on the basis of the factors mentioned above. In the process, comparison of the situation obtaining in India has been made, wherever possible, with that of other countries, particularly the U.S.A. and England.

As will be readily noticed, the endeavour has been to present a broad, comprehensive view of the subject, rather than dealing intensively with a segment of it. This is especially true of the chapters relating to the causation of crime. Even so, intensive coverage, wherever desirable, has been maintained in areas concerning probation, punishments, juvenile delinquency and police. The chapter on 'Criminal Law and its Administration' on the other hand seeks to provide only a broad and general picture of criminal law and its process to enable a non-lawyer to appreciate the fundamentals of criminal justice.

In addition to providing basic information on the subject, this study attempts to define issues, to raise questions and to present an overall picture emerging out of these issues, questions and the possible answers. I have not hesitated to express my personal opinions on the various debatable issues dealt with in the book.

The person to whom I am most indebted in writing this book is Prof. Lotika Sarkar, my senior Faculty colleague with whom I have been associated in teaching Criminal Law and Criminology in the Delhi University

over a number of years. Apart from contributing the foreword to the book, she made various constructive suggestions which I found extremely useful.

I am also grateful to Mr. Surendra Malik, Editor, Supreme Court Cases, for the great personal interest which he evinced in the preparation and publication of the book.

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— AHMAD SIDDIQUE

FOREWORD TO THE FIRST EDITION

It is indeed a pleasure to write the foreword to the book on Criminology by my colleague Ahmad Siddique. He is eminently suited to writing this book as this has been a subject which he has taught for a number of years and has been greatly interested in.

The subject of Criminology has assumed great importance as the question of Crime Prevention and the Treatment of Offenders is engaging the attention of legislators, jurists and sociologists in most countries. The days when retribution was regarded as the determining factor in inflicting punishment has, as Mr. Siddique points out, "lost much of its ground in the context of modern and more enlightened views on the functional value of penal law". There is a growing awareness that very often a person committing a crime is not a free agent, as Mr. Siddique explains in the chapters dealing with Crime Causation. The aim of penal administration should therefore be to help a person to rehabilitate and reform himself, as otherwise it would be "prejudicial to the larger interests of the society as a whole" (Dua, J.). Mr. Justice Krishna Iyer, who has in a number of judgments pointed out the need for a sympathetic approach, has said that in a "scientific system...the focus (is) not only on the crime but also on the criminal, and...to personalise punishment...the reformatory component is as much operative as the deterrent..."

Mr. Siddique points out the difficulty faced by the criminologist, as there is no unanimity about that definition of crime for the purpose of this subject. A legal definition is hardly an indicator about the state of the individual as there are bound to be many crimes where "there are some exceptional situations or there is negligence or is a social welfare offence based on strict responsibility". He, therefore, favours the definitions given by Stephen as an "act which is forbidden by law and revolting to the moral sentiments of society". He also cautions against the tendency of using Criminal Law as a norm-setter because it results in many offences remaining only on the statute book unimplemented and therefore does not even succeed in bringing about an attitudinal change. He cites as examples the Sarda Act and the Dowry Prohibition Act.

In the second and third chapters, the author has given the various theories of crime causation. Instead of merely explaining them, he has tried, wherever feasible, to link them to Indian conditions. For example, explaining Merton's theory of anomie, he cites the example of Indian students using

unfair means in the examination to achieve "success" as "the goals are more important than the means of achieving those goals". Similarly discussing Bonger's theory of crime he cites statistics to illustrate the direct nexus between poverty and criminal behaviour in India. Mr. Siddique, however, has reservations about Bonger's theory as he opines that according to this theory "the phenomenon of crime should have come to an end or at least controlled to a very great extent in socialist countries like the USSR which is not at all the factual position". He has, perhaps, overlooked the fact that even though there are crimes and criminal courts in the socialist countries, the traditional crimes of violence, sex and property, which Bonger dealt with, have been reduced to a minimum.

Following the various theories of crime causation, the author evaluates various kinds of punishment prevalent today as well as the ones proposed by the Law Commission or suggested in the Indian Penal Code (Amendment) Bill, 1972. In Chapter 10—Sentencing Process—he deals in greater detail with the advantages and disadvantages of some of those sentences like imprisonment—short and long, and fine. In his discussion on Capital Punishment, he clarifies the position that in spite of the controversy in India regarding its abolition and the reluctance of the Legislature to recommend it, the legislative trend (Criminal Procedure Code) as well as the judicial approach has succeeded in limiting it to the very minimum.

Dealing with the questions of fine, he draws attention to the anomalous position which arises when a fine has been imposed as a punishment on a person who is unable to pay it due "to incapacity of the offender or the lack of means". Even though Section 64 I.P.C. legally enables a court to give the alternate of a prison sentence in case of non-payment of fine, the magistrates by mechanically suggesting an alternate sentence of imprisonment in all sentences of fine have defeated the underlying principle of the provision. The effect has been that though the sentence was meant to be one which would keep the person out of prison, he ultimately goes there and comes out with the stigma of a prison sentence because no thought was ever given to finding out the facts about the ability of the person to pay. While sentencing a person to paying a fine judges would do well to remember the words of Dua, J. that "true dictates of Justice seem to us to demand that all the attending relevant circumstances should be taken into account for determining the proper and just sentence".

In the chapter on Therapeutic Approach, Mr. Siddique has stressed on the importance of both prison reforms and parole. Understandably he has

given probation the most important place in this approach. The Probation of Offenders Act, which became law in 1958, has been described as a "milestone in the progress of the modern liberal trend of reform in the field of penology" (Subba Rao, J.) but the proper implementation has not yet taken place, owing to the lack of awareness on the part of the Judiciary. This was very forcibly mentioned by Mr. Justice Krishna Iyer when he said : "The ghosts of Macaulay and men of his ilk haunt our criminal court still, so much so, probation still fares ill in the law courts. Twenty-five years of freedom have not freed our Judiciary from the obsolescent British Indian penology, bearing on suppression and crime." Mr. Justice Sikri has also stressed the need for both the Judiciary and the Bar to be fully aware of the advantages of probation but has regretted that "very little serious attention is paid to this aspect of the Judiciary or the Bar". By his critical evaluation of some of the cases under the Probation of Offenders Act, Mr. Siddique has more than proved these observations. He has done more. By giving the figures of the number of probation officers in the various States and number of persons placed under supervision, he has shown that only an attitudinal change of the Judiciary will not suffice. Supporting machinery is required and unless there were qualified probation officers, the two most important objectives—reformation and rehabilitation—cannot be implemented.

The need for an enlightened judicial approach so that the steps taken towards a more enlightened criminal policy is not defeated is the provision requiring the magistrate to give a hearing to the accused on the question of sentence. This would partly remedy the lacuna in the "processual system (where) there is neither comprehensive provision nor adequate machinery for collection and presentation of the social and personal data of the culprit..." (Krishna Iyer, J.) and would go a long way in helping the judge to awarding the right sentence. Mr. Siddique has pointed that though this cannot be a substitute for a "system based on pre-sentence reports" it will give some scope to the sentencing issues. But from recent reports it would appear that magistrates have not appreciated the policy underlying the legislative innovation in the Criminal Procedure Code.

In a detailed chapter on the Police, Mr. Siddique has dealt with all aspects of their working as well as the law which governs them. In substantiating some of the weaknesses in their working, he has given data e.g. he has given very detailed figures about the number of police stations and the number of police attached to them, in order to prove that "the position is very uneven as between the urban and rural areas". He has also

referred to the image the police have in dealing with the problems of the minority groups. But he has been objective in his observations because quite clearly he mentions the grievance of the police force about political interference in their working. Among other examples, he cites the circular of the West Bengal Government to the police not to take any action when there is a gherao.

The great credit of the book is the comprehensive manner in which Mr. Siddique has dealt with all aspects of the subject including a simple, concise chapter on jurisdiction, evidentiary and procedural rules governing criminal cases. Wherever feasible he has given figures and statistics to substantiate his observations. His presentation is simple and lucid and written for the Indian reader. I venture to hope that many of the problems he has raised will be discussed not only by students and teachers but will be thought-provoking even for the policy makers.

— LOTIKA SARKAR

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THE AUTHOR

A teacher and scholar of considerable standing. Mr. Ahmad Siddique received his education at Lucknow and the Aligarh Muslim University. He has served in half a dozen universities in India and abroad including the premier Law Faculties of Allahabad, which marked the beginning of his teaching career, and of Delhi University, where he has been teaching for about two and a half decades.

In 1970-71, Mr. Siddique was a visiting scholar at the University of Michigan Law School of the U.S.A. and was one of the founding Faculty members of the Law Department in Kashmir University where he served as a Reader in 1973-74 and also acted as the Head of the Department and Faculty Dean for sometime. From 1978 to 1984 he was at the University of Maiduguri in Nigeria and, as the first Head of the Department of Sharia (Islamic Law), was responsible for its establishment and early development in the Law Faculty of the University. Mr. Siddique served as Professor and Dean, Faculty of Law at the Jamia Millia Islamia, New Delhi during 1994-96.

The author has been frequently invited to lecture in a number of universities and institutions; the National Institute of Criminology and Forensic Science has him on its regular guest faculty for the in-service courses organised by the Institute for the judicial, police and correctional officers serving in various parts of the country.

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Chapter I

CRIME AND CRIMINOLOGY

Crime is inevitable in any human society since some violation or the other of any code of conduct prescribed for the members of a society is bound to occur. Not only is crime inevitable but, paradoxical as it may sound, some sociologists have gone to the extent of saying that crime, to some extent, helps in promoting social solidarity among people constituting the society. The inevitability and universality of the phenomenon of crime has been described by Emile Durkheim in the following words :

> "There is no society that is not confronted with the problem of criminality. Its form changes; the acts thus characterized are not the same everywhere; but, everywhere and always, there have been men who have behaved in such a way as to draw upon themselves penal repression.... No doubt it is possible that crime itself will have abnormal forms, as for example, when its rate is unusually high. This excess is indeed undoubtedly morbid in nature. What is normal, simply, is the existence of criminality, provided that it attains and does not exceed, for each social type, a certain level.... To classify crime among the phenomena of normal sociology is not to say merely that it is inevitable, although regrettable, phenomenon, due to incorrigible wickedness of men, it is to affirm that it is a factor in public health, an integral part of all healthy societies."[1]

According to Durkheim, even a society composed of persons possessing angelic qualities would not be free from violations of the norms of that society with the result that faults which appear venial to the layman will create there the same scandal that the ordinary offence does in ordinary consciousness.

Be that as it may, the fact remains that crime is a phenomenon which is of primary concern to every member of the human society. The concern for crimes and criminals is reflected in various forms of curiosity among people. First, there is the idle curiosity in certain minds where the object is not so much to understand something seriously about crime but just to get some sort of thrill or kick out of it. This need is generally catered to by horror comics, movies based on violence and through other means of mass media. There are many who expect spicy crime reporting in their newspapers just as they would expect their breakfast every morning. It is a curious fact of life that crime, something horrible in itself, should provide so much relief

1. Emile Durkheim : *Rules of Sociological Method* (1950), p. 65.

and recreation to many when written about in fiction or portrayed in movies or on television.

There are some persons whose interest in crime may be slightly more concrete and meaningful in the sense that they do ponder over the problem for a while without being seriously interested in pursuing it subsequently. Then there is the practical curiosity which is shown by those who have to deal with criminals in an official capacity, like the police and prison officials, but that too remains unproductive since the curiosity is seldom channelized into organized research or systematic study and, therefore, generally results in unreliable speculation.

The kind of curiosity which is the basis of interest in criminology can be termed scientific curiosity. This type of curiosity is concerned with the quest for answering various questions relating to crime, its causation, and the response by the society to the challenges posed by it. The answers thus provided form the basis of general theories of criminology.

The significance and extent of the crime problem, and hence the utility of criminology, may be gauged by the following crime figures in India during the past few years for some of the more serious offences.

During the year 1993, 40,105 murders, 20,518 cases of kidnapping and abductions, 37,752 of robbery and dacoity, 350,582 thefts and 104,749 riots were reported to the police in the country.[2]

Crime : Legal and Social Definitions

The starting point of the discussion, like any other area of study, is to define and delimit its subject-matter. This has to be done, at least to some

2. *Crime in India* (1993), Govt. of India, Bureau of Police Research and Development, New Delhi.

Crime Rate*

COUNTRY	YEAR	
	1990	1991
(1)	(2)	(3)
Argentina	177.05	114.05
Austria	6002.70	6074.30
Belgium	3337.80	3639.30
Canada	11913.00	12735.00
Egypt	3314.40	3666.61
India	**592.26**	**594.29**
Netherlands	7613.00	9507.00
England & Wales	N.A.	10403.00
Japan	1396.50	1450.00
Spain	2635.08	2482.78
Singapore	1672.80	1629.40
U.S.A.	N.A.	5897.80

Note: 1. * per lakh of population
2. N.A. stands for not available

extent, despite the fact that it is difficult to appreciate a definition without knowing something about the subject in the first instance, and definitions should be attempted towards the end rather than in the beginning of the discussion of the subject.

The most convenient starting point for understanding the nature and scope of criminology is obviously the concept of crime itself since the subject concerns itself with the study of crime and criminals from various perspectives.

The obvious way of defining crime is in legal terms, to distinguish it from sin, religious and moral wrongs. A legal definition gives a basic premise in which the pitfalls resulting from individual or group opinions are avoided, to give, as far as possible, a scientific and precise character to criminology. The lawyer-sociologist Paul W. Tappan has defined crime as "an intentional act or omission in violation of criminal law, committed without defence or justification, and sanctioned by the laws as felony or misdemeanour".[3] It appears, however, that the definition could conveniently be reduced to "an act or omission in violation of criminal law," since any defence or justification is to be found within the criminal law, and there is no question of violating the criminal law if some defence or justification is available for a particular act or omission in certain circumstances. Further, it is not necessary for an act or omission to be intentional in order to be a crime; it could be made punishable on the basis of knowledge, recklessness or negligence or even without any reference to the mental element of the wrongdoer i.e. based on the concept of strict responsibility.

There is, however, another school of thought which considers the legal definition to be inadequate and unsuitable for the purpose of criminology. It insists on giving a definition which is broader as compared to the legal definition and is called the social definition. Crime accordingly is defined as "an act which the group (social) regards as sufficiently menacing to its fundamental interests, to justify formal reaction to restrain the violator".[4] Raffeale Garofalo, one of the three leading exponents of the Italian school of criminology, rejected the 'juridical' conception of crime which according to him fails in that it both includes and excludes behaviour properly encompassed in a "sociological notion of crime". For his sociological purpose, he formulated his theory of "natural crime". By "natural crime" he meant acts which offend the basic moral sentiments of pity (revulsion against the voluntary infliction of suffering on others) and probity (respect for property rights of others).[5]

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3. *Crime, Justice and Correction*, p. 10.
4. Elmer Hubert Johnson : *Crime, Correction and Society*, p. 11.
5. Francis Allen : *Borderland of Criminal Justice*, p. 67.

TABLE 1

INCIDENCE & RATE OF TOTAL COGNIZABLE CRIMES UNDER INDIAN PENAL CODE (IPC) AND LOCAL ACTS & SPECIAL (L&SL) 1983-93

SL. NO.	YEAR	ESTIMATED MID-YEAR POPULATION* (IN LAKHS)**	INCIDENCE			RATE			PERCENTAGE OF IPC CRIMES TO TOTAL COGNIZABLE CRIMES
			IPC	L&SL	TOTAL	IPC	L&SL	TOTAL	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1	1983	7204	1349866	2921063	4270929	187.4	405.5	592.9	31.6
2	1984	7356	1358660	2916808	4275468	184.7	396.5	581.2	31.8
3	1985	7509	1384731	3096481	4481212	184.4	412.4	596.8	30.9
4	1986	7661	1405835	2984654	4390489	183.5	389.6	573.1	32.0
5	1987	7814	1406992	3589326	4996318	180.1	459.3	639.4	28.2
6	1988	7966	1440356	3765669	5206025	180.8	472.7	653.5	27.7
7	1989	8118	1529844	3847665	5377509	188.5	474.0	662.4	28.4
8	1990	8270	1604449	3293563	4898012	194.0	398.3	592.3	32.8
9	1991	8496	1678375	3370971	5049346	197.5	396.8	594.3	33.2
10	1992	8677	1689341	3558448	5247789	194.7	410.1	604.8	32.2
11	1993	8838	1629936	3803638	5433574	184.4	430.4	614.8	30.0
12	PERCENTAGE CHANGE IN 1993 OVER 1983	22.7	20.7	30.2	27.2	-1.6	6.1	3.7	-5.1
13	COMPOUND GROWTH RATE PER ANNUM	2.1	2.5	2.4	2.5	0.4	0.4	0.4	0.1

*SOURCE: THE REGISTRAR GENERAL OF INDIA

**ONE LAKH = 0.1 MILLION

TABLE 2

PERCENTAGE BREAK-UP OF COGNIZABLE CRIMES (IPC) UNDER DIFFERENT CRIME HEADS 1989-1993

SL. NO.	CRIME HEAD	1989	1990	1991	1992	1993
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1	MURDER	2.0	2.2	2.3	2.4	2.3
2	ATTEMPT TO COMMIT MURDER	1.6	1.7	1.8	1.8	1.8
3	C.H. NOT AMOUNTING TO MURDER	0.3	0.3	0.3	0.3	0.2
4	RAPE	0.6	0.6	0.6	0.7	0.7
5	KIDNAPPING & ABDUCTION	1.1	1.2	1.2	1.2	1.2
	(*i*) OF WOMEN & GIRLS	0.9	0.9	0.9	0.8	0.9
	(*ii*) OF OTHERS	0.2	0.3	0.3	0.4	0.4
6	DACOITY	0.6	0.7	0.6	0.7	0.6
7	PREPARATION & ASSEMBLY FOR DACOITY	0.1	0.1	0.1	0.1	0.1
8	ROBBERY	1.5	1.6	1.6	1.6	1.5
9	BURGLARY	8.4	8.2	7.9	7.5	7.5
10	THEFT	22.3	22.0	21.6	20.8	19.7
11	RIOTS	6.5	6.4	6.3	6.2	5.8
12	CRIMINAL BREACH OF TRUST	1.1	1.0	1.0	1.1	1.0
13	CHEATING	1.5	1.5	1.6	1.7	1.8
14	COUNTERFEITING	0.1	0.2	0.3	0.3	0.2
15	OTHER IPC CRIMES	52.1	52.4	52.8	53.7	55.4
16	TOTAL COGNIZABLE CRIMES UNDER IPC	100.0	100.0	100.0	100.0	100.0

TABLE 3

PERCENTAGE DISTRIBUTION OF COGNIZABLE CRIMES (L&SL) UNDER DIFFERENT CRIME HEADS 1989-1993

SL. NO.	CRIME HEAD	1989	1990	1991	1992	1993
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1	ARMS ACT	1.4	1.8	1.8	1.8	1.7
2	NARCOTIC DRUGS & PSY. SUBSTANCES ACT	0.3	0.4	0.6	0.6	0.6
3	GAMBLING ACT	4.2	5.1	5.0	4.7	4.3
4	EXCISE ACT	2.3	2.9	2.8	2.7	2.5
5	PROHIBITION ACT	18.5	18.1	16.3	17.6	15.8
6	EXPLOSIVES & EXP. SUBSTANCES ACT	0.1	0.2	0.2	0.3	0.2
7	IMMORAL TRAFFIC (PREVENTION) ACT	0.3	0.5	0.4	0.4	0.3
8	INDIAN RAILWAYS ACT	0.9	1.2	1.0	0.7	0.6
9	REGISTRATION OF FOREIGNERS ACT	0.1	0.1	0.1	0.1	0.0
10	PROTECTION OF CIVIL RIGHTS ACT	0.1	0.1	0.1	0.1	0.1
11	INDIAN PASSPORT ACT	0.0	0.0	0.0	0.0	0.0
12	ESSENTIAL COMMODITIES ACT	0.3	0.2	0.2	0.2	0.2
13	TERRORIST & DISRUPTIVE ACTIVITIES ACT	0.0	0.1	0.1	0.1	0.1
14	ANTIQUITY & ART TREASURE ACT	0.0	0.0	0.0	0.0	0.0
15	DOWRY PROHIBITION ACT	0.0	0.1	0.1	0.1	0.1
16	OTHER L&SL CRIMES	71.3	69.4	71.2	70.6	73.4
17	TOTAL COGNIZABLE CRIMES UNDER L&SL	100.0	100.0	100.0	100.0	100.0

Note: Percentage less than 0.05 is also shown as 0.0

TABLE 4

PERSONS ARRESTED UNDER IPC CRIMES DURING 1993

(CRIME-HEAD & SEX-WISE)

SL. NO.	CRIME HEAD	MALE	FEMALE	TOTAL	PERCENTAGE TO TOTAL	
					MALE	FEMALE
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1	MURDER	85356	3400	88756	96.2	3.8
2	ATTEMPT TO COMMIT MURDER	74080	1523	75603	98.0	2.0
3	C.H. NOT AMOUNTING TO MURDER	8448	341	8789	96.1	3.9
4	RAPE	16239	214	16453	98.7	1.3
5	KIDNAPPING & ABDUCTION	26640	1248	27888	95.5	4.5
	(*i*) OF WOMEN & GIRLS	17876	1020	18896	94.6	5.4
	(*ii*) OF OTHERS	8764	228	8992	97.5	2.5
6	DACOITY	30735	169	30904	99.5	0.5
7	PREPARATION & ASSEMBLY FOR DACOITY	5894	4	5898	99.9	0.1
8	ROBBERY	29494	94	29588	99.7	0.3
9	BURGLARY	82501	1048	83549	98.7	1.3
10	THEFT	209708	4945	214653	97.7	2.3
11	RIOTS	502337	19917	522254	96.2	3.8
12	CRIMINAL BREACH OF TRUST	15600	318	15918	98.0	2.0
13	CHEATING	27466	643	28109	97.7	2.3
14	COUNTERFEITING	1276	21	1297	98.4	1.6
15	OTHER IPC CRIMES	1300846	61648	1362494	95.5	4.5
16	TOTAL COGNIZABLE CRIMES UNDER IPC	2416620	95533	2512153	96.2	3.8

It is interesting to note that the exponents of each one of the above schools accuse the other of being unscientific in approach. The legal definition has been criticised on the ground that whether any act or omission is recognized as a crime at a given time in a society depends upon values which are relative and not on any intrinsic worth of the act or omission and that makes the study of crime unscientific. As aptly commented upon by an advocate of the sociological approach, the categories set up by criminal law are of a "fortuitous nature" and do not arise intrinsically from the nature of the subject-matter the scientists attempt to analyse.[6] This charge of variation in the legal attitude towards various acts is countered by the supporters of the legalistic approach by pointing out that not only do the legal norms vary due to various circumstances but also all the social norms which are essentially relative and impermanent. It is pointed out that criminal law not only gives precise definitions of forbidden acts but also has the machinery and procedure to determine the violations and, therefore is able to identify the offenders, which is not possible in cases where certain conduct is branded as criminal in social terms irrespective of prevailing legal notions. This certainly is the advantage in the legal definition over the social one despite the various inherent weaknesses of criminal law processes like non-prosecution of many offenders, the possibility of false conviction, greater possibility of failure to convict all guilty persons and of innumerable cases remaining unreported to the police. The best exposition of the case for legal definition has been made by Paul W. Tappan in the article "*Who is the Criminal* ?" in the following words :

> "The validity of this contention (based on social definition) must depend, of course, upon what the nature of the subject-matter is. These scholars suggest that, as a part of the general study of human behaviour, criminology should concern itself broadly with all anti-social conduct, behaviour injurious to society. We take it that anti-social conduct is essentially any sort of behaviour which violates some social interest. What are these social interests? Which are weighty enough to merit the concern of the sociologist, to bear the odium? What shall constitute a violation of them ? Particularly where, as is so commonly true in our complicated and unintegrated society, these interests are themselves in conflict? Roscoe Pound's suggestive classification of the social interests served by law is valuable in a juristic framework, but it solves no problem for the sociologist who seeks to depart from legal standards in search of all manner of anti-social behaviour. However desirable may be the concept of socially injurious conduct for purposes of general or abstract description, it does not define what is injurious. It sets no

6. Thorsten Sellin : *Culture, Conflict and Crime*, p. 21.

standard. It does not discriminate cases, but merely invites the subjective value-judgment of the investigator."[7]

It is because of the 'confusion' caused by the social definition that the use of the expression 'white collar crime' by Professor Sutherland irks Tappan. He clinches the issue in favour of the legal definition by observing that convicted criminals represent the closest possible approximation to those who have in fact violated the law even if this group may not be complete or fully representative of all those who have committed crime. Further, the criminal law establishes substantive norms of behaviour, standards more clear-cut, specific and detailed than the norms in any other category of social controls.[8]

Basis of Criminalization

Even if the legal definition of crime is accepted in preference to the social definition for the study of criminology, it does not provide any guide as to what kind of human conduct should be declared 'criminal'. It is true that in most of the crimes there is the common element of immorality and the harmful nature of the acts constituting crime. This is particularly true of the traditional crimes like murder, theft, rape, etc. known as *mala in se*. But there are various other offences in which there is no element of immorality in the traditional sense, these are known as *mala in prohibita*, and, on the other hand, there are many acts which are not crimes, despite the element of immorality being present in the accepted sense. To illustrate the latter category, it may be mentioned that adultery is not an offence in England and incest as such is not punishable in many countries. What conduct should be made criminal depends not only on the question whether the conduct is moral or immoral but also on the considerations of the possibility of its implementation through the legal machinery.

As regards the moral quality of an act, the question arises as to who is to determine it? Should it be decided by the law-giving body in a society or should it be judged with reference to the hypothetical 'average' person of that society? Is it possible to divide morality into the two compartments of public and private morality and to leave private morality untouched by law as recommended by the Wolfendon Committee in England? The Committee observed that the function of criminal law is to preserve public order and decency, to protect citizens from what is offensive or injurious and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are young, weak in body or mind, inexperienced, or in a state of physical, official or economic dependence. It is not the function of the law to intervene in the private lives of citizens or to seek to enforce

7. American Sociological Review, (February 1947) Vol. 12, pp. 96-102.
8. For further debate on the issue, *see* Chapter XII on White-Collar Crime.

any particular pattern of behaviour further than is necessary to carry out the above purposes.

To answer the fundamental points raised in the above recommendation, a reference may be made to the lively debate between Lord Devlin and Prof. H.L.A. Hart regarding the extent to which criminal law ought to be applied in dealing with human behaviour. Lord Delvin, while attacking the Wolfendon Report which recommended legalisation of homosexual activity between consenting adult males since it was a matter of private morality,[9] maintained that criminal law ought not to be confined to the preservation of order and decency and the protection of the lives and property of the citizens. In his view criminal law should also be used to sustain the public morality without which it is impossible to have an integrated society. Any act which is beyond the tolerance of society, as reflected through an average person, should be the concern of criminal law and there should be no theoretical limits to the state power against immortality. Durkheim, the illustrious French sociologist, has subscribed to the same view in her *Division of Labour in Society* by asserting that enforcement of public morality is necessary for social solidarity which is symbolised by penal law.

Prof. H.L.A. Hart has exposed some of the weaknesses inherent in the arguments advanced by Lord Devlin. He is convincing in pointing out that it is not enough for making an act criminal that it is intolerable to an average person because of 'indignation' and 'disgust' caused to him.

> "Surely the legislature should ask whether the general morality is based on ignorance, superstition or misunderstanding, whether there is a false conception that those who practice what it condemns are in any other way dangerous or hostile to society; and whether the misery to many parties, the blackmail and other evil consequences of punishment, especially for sexual offences, are well understood."

Professor Hart rightly asserted that two questions must be answered in the affirmative before declaring an activity to be criminal.

> "Firstly, whether the activity which offends moral feeling is harmful, independently of its repercussions on the general moral code ?
>
> Secondly, whether the whole moral fabric of the society would go to pieces if the offending act is not made criminal ?"

Apart from the issue whether the state is justified in tackling those activities through criminal law which essentially pertain to private morality, the problem is also to be looked into from a practical angle. Even if it is conceded that the state, as suggested by Lord Devlin, has no theoretical limits to prevent and punish immorality, the more pertinent point is to evaluate the practical limits of the state in the area of activity. Surely, it is

9. *See* in detail in Chapter XIV on Sex Offences, Prostitution and Abortion.

one thing to make an activity criminal but quite a different thing to enforce it. It is common knowledge that many offences, for all practical purposes, are confined to the statute books and the laws are not enforced either because there is no will to enforce them or the criminal law machinery is inadequate or unsuitable to enforce them. The Sarda Act was passed in this country in 1929 but child marriage, in violation of the Act, is even now a common phenomenon in India, particularly in rural areas. Similarly, anti-dowry and anti-untouchability laws have proved to be somewhat futile attempts to change the attitudes of people in social areas where criminal law's potential is next to nothing. As Sutherland observes :

> "Laws have accumulated because the mores have been weak and inconsistent; and because the laws have not had the support of the mores they have been relatively ineffective as a means of control. When the mores are inadequate, the laws are ineffective."[10].

Lack of effective enforcement of the criminal law dealing with offences like homosexuality, abortion and gambling creates problems both for the law as well as for the person whose conduct comes within the prescribed category. It results in contempt and cynicism towards law in general because the condemnation of the prohibited conduct is only in word and not in deed. The hypocrisy inherent in such a situation has been brought out very aptly by Thurman Arnold :

> "These laws are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals."[11]

The effects of such laws which are seldom enforced are formidable on the person involved in the prohibited activity. Blackmailing is just one such problem faced by the offenders in this type of offences in general and homosexuality in particular. In a House of Lords debate in 1954, the Right Honourable Earl of Jowitt remarked that during his term as Attorney-General "at least 95 per cent of the cases of blackmail which came to my knowledge arose out of homosexuality".

It is ironical that in offences like homosexuality, abortion and drug addiction the offender should himself become the victim of law even in cases where no prosecution is brought against him or he is not even identified as an offender. The way his personality is damaged has been well summed up in the following words :

> "But the impact on the deviant of this criminalization of his behaviour transcends any actual experience of official reaction. Even when he is not publicly identified and officially dealt with he is only too aware that his behaviour is legally proscribed as well as socially disapproved. Sensing that he is different or is doing an unusual act is

10. Edwin Sutherland and Donald Crassey : *Principles of Criminology*, 6th Edn., 1960, p.11.
11. *Symbols of Government* (1936), p.160.

one thing, feeling that his act is strongly disapproved is another, and knowledge that he has become a law-breaker yet another."[12]

If the person involved in any proscribed behaviour of the types discussed above is so much damaged in his psychic structure without prosecution or even formal identification, certainly the damage is of higher degree in a case where prosecution takes place since the 'status-degrading ceremony' is bound to alter his image not only in the eyes of others but also in his own.

In the words of Harold Gaifinkels :-

"The work of denunciation effects the recasting of the objective character of the perceived other. The other person becomes in the eyes of his condemners literally a different and new person... the former identity stands as accidental; the new identity is the 'basic reality'. What he is now is what 'after all, he was all along'."[13]

It is, therefore, imperative that criminal law should not act with misplaced overzeal. It should come into the picture only when it becomes necessary and where it can provide an appropriate and effective machinery to cure the intended evil.

Criminology : Nature And Scope

As must be obvious from the preceding discussion, the concept of crime is a highly debatable issue and the subject-matter of criminology also varies accordingly both in its nature and scope since broadly speaking, criminology is the systematic study of crime in all its aspects. Criminologists like Sutherland, Gellin and Clinnard have either rejected the legal definition or have extended the criminological researches beyond the limits of criminal behaviour laid down by law. Among those who have opposed such an approach are Paul Tappan and Jerome Hall who are of the opinion that criminology is synonymous with the sociology of criminal law. The view that crime is an undesirable social behaviour is in particular reflected in the field of juvenile delinquency since delinquency is a wider term than criminality. The procedure in a juvenile court is very different from the ordinary one and a juvenile offender does not enjoy many constitutional and procedural rights which are enjoyed by adult offenders.

Even when the word crime is used in the legal sense by criminologists, it is not all types of violation of criminal law which would fall within the domain of criminology as the proper subject of study. It is obvious, for instance, that no systematic study would either be expedient or even needed in relation to situational offenders who commit an offence in some exceptional situations but, as such, cannot be said to have criminal tendencies. For instance, a husband killing his wife or her paramour on grave and sudden

12. Edwin M. Schur : *Crimes Without Victims*, p. 5.
13. "*Conditions of Successful Degradation Ceremonies*", American Journal of Sociology, Vol. 61 (March 1956), pp. 421-22.

provocation arising out of their illicit relationship is not a criminal in theordinary sense. Again, there are crimes which are not committed wilfully but the responsibility is assigned either because of negligence or because the offence is one of strict responsibility i.e. punishable without any reference to the mental state. In contemporary society many offences have been created which are known as 'social welfare offences' based on strict responsibility. They are different from traditional crimes and, therefore, *mala in prohibita* and not *mala in se*. The distinction has been well-recognised in the English law since medieval times between offences created by the political authority (*mala in prohibita*) and those created by the higher laws i.e. established by God and nature (*mala in se*).[14] To the former belong offences like murder and adultery while the offences like counterfeiting fall in the latter category. The concept of *mala in prohibita* almost coincides with the modern notion of 'public welfare offences'. The distinction has often resulted in a dichotomy of the attitudes of the sociologists and lawyers towards certain crimes. The controversy whether white-collar crime should at all be regarded as a crime for the purpose of criminology is the direct result of such a dichotomy.[15]

The widening of the area of crime by 'public welfare offences' has been caused due to the tremendous governmental activity almost everywhere in the world to deal with various socio-economic problems. The spate of legislation has not always been welcomed by those concerned with criminal law and its administration. Commenting on the trend, Francis A. Allen expresses his concern in the following words :[16]

> "It is more than poetic metaphor to suggest that the system of criminal justice may be viewed as a weary Atlas upon whose shoulders we have heaped a crushing burden of responsibility relating to public policy in its various aspects. This we have done thoughtlessly without inquiring whether the burden can be effectively borne."

It appears that the definition of crime as given by Stephen conveys the nature of acts which are the proper subjects of criminology. According to him, crime means an act which is both forbidden by law and revolting to the moral sentiments of the society.[17]

There has been a debate as to whether penology and correction should be included in the discipline of criminology. In its narrower sense, criminology involves the study of crime i.e. the forms of crimes, their extent and the causative factors responsible for them. In its wider sense it also includes

14. Blackstone : *Commentaries on the Laws of England*, Vol. I, p. 53.
15. See *infra*, Chapter XII.
16. *The Borderland of the Criminal Law : Problems of "Socializing" Criminal Justice*, SOC Serv. Rev., Vol. 32, No. 2, June 1958, pp. 107 and 108.
17. *General View of Criminal Law of England*, p. 3.

penology, the study of punishment and of similar methods of dealing with crime, and of the problem of preventing crime by non-punitive measures.[18]

According to Marvin E. Wolfgang, penology and correction are fit subjects for criminology only if scientific methods involving studies, predictions and experiments are employed in these areas. Pure issues of practice and administration relating to penology and correction are not included in the field of criminology.

> "May we legitimately include 'corrections' or 'penology' under our meaning of criminology? The answer, I believe, should be negative if by 'correction' it meant the social work activities of probation and parole officers, the organization and administrative functions of the police, or the management of penal institutions. The answer should be affirmative, however, if we mean, as previously indicated, the scientific analysis, measurement and interpretation of patterns, regularities, causal or associational relationships and probabilities of the same sub-areas of criminology. If control and prediction in experimentation are integral goals of research and, regardless of the substantive areas, if analysis proceeds by means of the scientific method, then we may include within the scope of criminology any correctional research that embraces these goals and this method. Matters purely of public administration may have peripheral interest but do not constitute a science of crime. Technical operations in the management of a police force or of a prison do not fall within our framework of reference to criminology...."[19]

Elucidating the above, Wolfgang further observed :

> "The juvenile court judge who would make use of the 'Social Prediction Scale' devised by the Gluecks and suggested them as an appropriate guide in sentencing, is not engaging in a scientific pursuit. What the Gluecks have done is Criminology; what the Judge does with the results of Criminology is public administration...."

Among the criminologists who advocate the inclusion of a wider field in criminology is Sutherland who regards the subject as the body of knowledge encompassing the processes of making laws, of breaking laws, and of reacting toward the breaking of laws.[20]

It is also a matter of opinion as to whether 'criminalistics' should also be included in the study of criminology. The word 'criminalistic' denotes the technical processes applied by the police and criminal courts to obtain evidence of the commission of a certain crime by a certain individual or a number of individuals i.e. techniques such as dactyloscopy, photography,

18. Hermann Mannheim : *Comparative Criminology* (1965), p. 3.
19. *Criminology and Criminologist*, Journal of Criminal Law, Criminology and Police Science, 1963, Vol. 54, No. 2, pp. 156-58.
20. E.H. Sutherland : *Principles of Criminology* (1934), p. 3.

toxology, or the application of blood tests, lie detectors, hypnosis, narco-analysis.[21] In some countries of Europe like Austria, Belgium, France, Italy and in the U.S.A. at the University of California at Berkeley, criminalistics are included in the study of criminology in the universities while in Great Britain and West Germany these aspects of the practical problems of the administration of criminal justice are left for the police colleges, probably in view of their being better equipped to deal with them. In India, except in some of the institutions offering courses in forensic sciences, the teaching of criminology as conducted by the universities in the fields of sociology, social work and law, does not include criminalistics.

Criminology—Whether a Science

A question often raised is as to whether criminology is a science or not. The answer will be determined by the use which we want to make of criminology. The positive school of sociology founded by August Comte, visualized sociology as an instrument which could be used as an instrument for reorganising human life. The German school of sociology developed on lines opposite to Comte. Max Weber regarded sociology as value-free, that it does not give answers as to how people should behave. According to this approach, a science cannot be value-oriented and the purpose of scientific sociology is to understand social events and not to suggest value-oriented solutions. It appears, therefore, that criminology can be a science if its only aim is to study crime, criminal, criminal law and prisons, etc. The advocates of the German school, therefore, conclude that studies of criminals and prisons will never tell us how we ought to treat the criminal any more than studies of the atom will tell us how we ought to use the atomic bomb.[22]

As seen earlier, criminology can claim to be scientific only if penology or administration of criminal justice are not included in its ambit but are given a distinct and separate status. Thorsten Sellin would, therefore, prefer to use the terms 'science' and 'technology' to describe the respective natures of criminology and penology.[23]

Schools of Criminology

Two schools of criminology with diverse views on the nature and causation of crime and theories of punishment have been in existence since the 18th and 19th centuries. The first, which was established by Bentham and Beccaria, is known as the classical school while the other, known as the positivist school, was established in the 19th century by Lombroso, Garofalo and Ferri of the Italian School. The main points of difference between the two schools are as follows:

21. Hermann Mannheim : *Comparative Criminology* (1965), p. 16.
22. Clarence Ray Jaffery : *The Historical Development of Criminology* in *Pioneers of Criminology*.
23. *Culture, Conflict and Crime* (New York, Social Science Research Council, Bulletin 41, 1938).

1. While the classical school defined crime in legal terms, the positive school rejected the legal definition and developed the social definition.

2. The classical school believed in the free-will theory i.e. a person was free to choose between right and wrong conduct. The positive school, on the other hand, maintained that under a particular set of conditions a person was bound to commit a criminal act and hence is not a free agent to choose between the different options. The problem of free will versus determinism remains insoluble even after centuries of efforts directed towards it by the thinkers and philosophers. To quote Immanual Kant, "a thousand years' work had been expended in vain on its solution". It is improbable, therefore, at least in the practical sense, to find the answer in pure terms of either free will or determinism. A compromise is inevitable in a field like criminology. The view, both in theology and criminal law, had to be based on free will to make any sense of crime and sin and the consequent sanctions. Criminal law though by and large continues to base responsibility on free will, has accepted determinism to a limited extent as manifested in the therapeutic and rehabilitative ideals in the administration of criminal justice and prison reforms.

3. The classical school believed in the deterrent effect of punishment. The positive school, however, stood for the replacement of punishment by scientific methods for the protection of society.

4. The classical school focussed its attention on the crime while the positive school laid greater emphasis on the personality of the offender.

The contribution of the positive school to the contemporary criminological and penological thought notwithstanding, the basic structure of criminal law continues to be based on the theories propounded by the classical school. Even today, broadly speaking, it is crime which continues to be the focus of attention of the agencies of criminal law administration though some changes have been effected to emphasize the personality of the offenders. This change in thinking is largely reflected in the area of juvenile delinquency and the corrective and rehabilitative techniques introduced in the penal system as will be evident in some of the later chapters.

Approaches to Criminology

1. The Descriptive Approach.—This approach is employed to describe the phenomenon of crime and those who commit it. It may, therefore, cover all aspects such as the personal traits of the criminals and the various forms of criminal behaviour. According to Hermann Mannheim it can be called the phenomenology or symptomatology of crime.[24]

2. The Causal Approach.—This involves the observation of facts in relation to the phenomenon of crime and interpreting them in relation to the

24. Hermann Mannheim : *Comparative Criminology* (1965), p. 3.

possible causes of criminal behaviour. This raises the question of the meaning of 'cause', a question which many philosophers have attempted to answer. For the purposes of criminology, however, it is important to appreciate the distinction between necessary and sufficient causes of a particular result. Unlike physical sciences, no causes can be attributed to any criminal behaviour which may be both sufficient and necessary. For example, none of the factors like poverty, age, sex, race and neighbourhood, which may be relevant in the interpretation of criminal behaviour, is either sufficient or necessary for the commission of crime. An illustration should make the distinction between 'necessary' and 'sufficient' cause clear. If result *B* invariably follows cause *A* whatever else may or may not happen, *A* would be called a sufficient, but not always a necessary cause. If however, *B* follows *A* only if *A* and certain other factors are present, then *A* is a necessary, but not a sufficient cause. If *B* invariably follows *A* without any other factors being required, and *A* cannot be replaced by any other alternative, then *A* is both a sufficient and a necessary cause.[25] This is the reason why no particular crime or criminal behaviour in general can be explained by one cause alone nor can it be said that a particular cause shall always lead to a particular criminal situation.

The danger which, therefore, exists in social sciences is to confuse sometimes the correlations between observed facts and situations with the nexus between them. Correlations despite being valuable in understanding a certain phenomenon, are certainly not an infallible guide.

3. The Normative and non-Normative Approaches.—A debatable point is whether criminology as a discipline should be treated as one which is normative or on a factual, non-normative basis. The scope of criminology shall differ accordingly. If treated as a normative subject like law, which itself is debatable, then it may cover not only the study of facts and their interpretation but the scope is widened to include the issues of reform of criminal law and penal system. On the other hand, criminology can be dealt with as a non-normative discipline just like sociology or psychology keeping it detached from the 'oughts' of the policy questions and instead focussing only on the observed phenomenon.

Statistics in Criminology

The various approaches to criminology outlined above indicate the use of crime statistics and a brief discussion of the problem is therefore necessary for appreciating what follows in the subsequent chapters.

The pioneer in making use of criminal statistics was Adolphe Quellet, the Belgian statistician and astronomist. He applied the statistical method in criminological research in the same way as it was applied in the study of

25. Karl Britton : *John Stuart Mill* 1953, p. 152.

other social phenomena to determine the possible patterns and regularities in mass criminal behaviour. The approach being concerned primarily with mass criminal behaviour could hardly be expected to take into account factors like the will of the individual and was therefore highly deterministic in its orientation. The other eminent statistician who did some pioneering work with statistics in his 'cartographic' technique was A.M. Guerry. His work eventually paved the way for what has come to be known as the Chicago school of criminal ecology.

Recording of Crime Statistics

Criminal statistics are collected with different objectives depending upon the intended use contemplated by the individual or the agency doing the job. Broadly speaking, they may fall into four categories.

(*a*) Crime statistics may be gathered and compiled by government departments. These statistics generally indicate the kind and extent of various kinds of crime at a given time in a defined geographical area, the personal characteristics of the persons committing the crime and modes of their disposal by the various government organs. This simple recording of crime which has limited objections, is, to quote Mannheim, nothing but simple 'book-keeping'.[26]

(*b*) Statistics are often collected by researchers and this involves the collection of data in the context of the problem contemplated.

(*c*) Statistics based upon the work of the police, i.e, the offences coming to their knowledge and the extent of their clearance by them.

(*d*) Statistics based on judicial disposal of cases brought before the courts.

Constraints and Pitfalls

The crimes actually committed at a given time or in a given area cannot be accurately measured or assessed. The various constraints and pitfalls, both in the data available and its interpretation, can be referred to briefly as follows :

1. Not all the crimes committed are reported to the police nor are all the crimes reported to them detected by the police. Crimes may be detected by the police without their being reported to them. Finally, many crimes go unreported as well as undetected. All this presents the problem of 'invisible' crime and the extent of the unknown real situation is referred to as 'dark figures' which can at best be a matter of speculation in particular circumstances. Less than a dozen countries in the world, mostly the small ones, are estimated to be able to offer reliable criminal statistics. Even in a small and efficiently administered country like England, estimates vary regarding the percentage of crimes recorded out of those actually committed. The percent-

26. Hermann Mannheim : *Comparative Criminology*, p. 99.

age of recorded crime there, according to Howard Jones, is twenty-five while Leon Radzinowicz holds it to be around fifteen only.

Common examples of crimes giving rise to 'dark figures' are illegal abortions, homosexuality and occurrences involving family honour, particularly sexual assaults on females. Such offences are either undetectable due to their very nature or some of them are what have been termed as 'crimes without victims'. Some of them are 'unreportable' to the police and even to the community at large.

2. Court statistics are intrinsically better than the police statistics in the sense that they may provide some information regarding personal characteristics of the offender. Further, it is only after the judicial disposal of a case that it is determined as to whether any crime was committed in the first place and what crime, if any, had been actually committed. The qualitative appreciation by the police of an alleged particular offence may be at variance with what is eventually held in the case by the court. Thus an accused in a murder case may be found guilty of culpable homicide or even of grievous or simple hurt under the Penal Code.

Court statistics cannot however be considered in isolation from police statistics since the courts can generally take up only those cases which are sent to them by the police and it is in this context that the police discretion is of relevant significance. So another factor, besides the 'dark figures', which may influence the court statistics is the decision of the police to launch prosecution in a particular case or not. The decision to arrest and prosecute is generally taken having regard to the availability of the evidence, seriousness of the offence and even to the social class to which the offender belongs. A famous study of an American community made by W. Lloyd Warner and Paul S. Lunt revealed the percentage of arrests to be 0.43, 7.80 and 64.49 from 'upper-upper class', 'lower-middle class' and 'lower-lower class' respectively. Apart from establishing possible nexus between poverty and criminality, the findings may also reflect the police reluctance to touch persons of a relatively higher strata of society. There is also the possibility that an offender is let off by the police after a warning or note of caution.

3. Crime statistics are also effected over a period of time due to the variations in the criminal law and procedure and also in the attitudes of the police, judiciary and community towards particular crimes. Criminal procedure may be amended to make it either more or less biased against the prosecution or the accused, a possibility which may affect the outcome in many cases, and hence may tilt the court statistics one way or the other. Depending upon socio-economic or political conditions obtaining at a given time, the police may launch a vigorous drive against some 'topical' crimes or they may generally ignore crimes of a particular kind. Public attitude may

get relatively relaxed vis-a-vis certain kinds of violations which lead to less frequent reporting of those crimes to the police.

Trends and Patterns in Criminality

Irrespective of the differences in social, cultural and political systems, an upsurge in criminality is evident among all the societies in the world at the various stages of their development. Nowhere have the efforts to prevent the phenomenon of galloping criminality seem to have succeeded. Increase in populations and the resulting greater number of youngsters, rightly considered as having greater criminal potential, may be relevant but not sufficient factors by themselves to explain the ever-escalating phenomenon of crime. The fast pace of urbanization and of industrialization[27] in some of the developing countries are important factors causing a wide gap between people's material expectations and the ground realities. Greater and more efficient means of communication lead to much more 'psychic mobility' which, along with the ever-widening gap between rich and poor classes, may lead to alienation, frustration and socially and legally disapproved behaviour.[28]

Some of the recent trends and emerging patterns can be identified as given below :

1. There is internationalization of certain crimes like drug-trafficking; earlier it was skyjacking in the seventies.
2. Rural areas are also witnessing the phenomenon of crime. They provide good bases and recruitment grounds for terrorists.
3. Criminality is no longer confined to the lower and poor classes; referred to as "the dangerous classes" comprising in the 19th century urban beggars, pimps, prostitutes and vagrants. White-collar criminals i.e. professionals, businessmen, politicians and government officials along with 'blue-collar' criminals in industry, offices and shops represent a different kind of criminal operating in an expanded world of criminality.

At the international level, as well as in India, the crime situation was somewhat better and stable during the mid-fifties. The reported low criminality in India at that period can also be attributed to some possible deficiency in crime statistics since it was around that time that the compilation of such statistics commenced in the country. Interestingly enough, somewhat lower criminality was reported in India during the years 1962, 1965 and 1972, a phenomenon which could be explained, to some extent, in terms of the external aggression faced by the country during those periods leading to greater internal discipline and responsibility. A survey and analysis of crime statistics of India and comparing them with the available statistics

27. *See* Chapter IV *infra.*
28. For detailed discussion, *see* Chapter XVI on 'Violence' *infra.*

from some other countries may give some insights into the Indian criminal scenario.[29]

The highest crime rate, per lakh of population in 1991 was 12,735 in Canada; the corresponding figure being 594.29 for India. It is striking that in the U.S.A., a neighbouring country of Canada, where overall conditions may not apparently be much different, the figure was 594.29 for the same year. As regards the offence of murder, the Netherlands topped the rate chart (21.00) while India with a rate of 4.61 was much below it. Similar relatively low rates in India are found in some other violent as well as non-violent crimes : rape (Canada 113.00, India 1.22), robbery (Spain 275.90, India 1.50), theft (England 7938.00, India 42.71), fraud (Canada 507.00, India 2.95) and drug offences (Canada 212.00, India 2.46).

Though the situation, as reflected through the above statistics, seems to be much less alarming than many other parts of the world, the trends in India do not warrant any complacency either. The total cognizable crimes in the country have been steadily rising over the past 40 years. The number of cognizable crimes reported was 54,33,574 in 1993 reflecting an increase of 27.2 per cent in the decade 1983-93. The increase in the violent IPC crimes rose from 8.2% of the total crime in 1953 to 14.3% in 1993. The decade 1983-93 witnessed a steep rise in rape cases; 6,019 in 1983 to 12,218 in 1993. An even more disturbing phenomenon is the increase of child rape or 'paedophilia' in recent years : 19.2 per cent increase being recorded in 1993 over the previous year.[30]

The ratio of crimes under the Penal Code to the crimes under local and special legislation has been 1 : 2 in the previous years which in the ratio of 1:2.33 in 1993 reflects the greater share of local and special offences. Another notable trend over the years is the decline, in terms of percentage, of property crimes vis-a-vis other IPC crimes. The percentage share of property crimes in the years 1953 and 1993 was 67.1 and 27.2 respectively. The position of white-collar crimes under the Penal Code has been rather steady around 3% over the last few decades. Theft and rioting, though showing some decline recently, but with 19.7% and 5.8% respectively, still top the recorded IPC crimes while prohibition and gambling take the lead under local and special laws with 15.8% and 4.3% respectively.

Role of Criminology in Public Policy

The practical role of criminology in shaping and influencing social and penal policies is a subject of debate. There are criminologists who do not visualise any such role because of various reasons while some others

29. Source for all the crime statistics here and elsewhere in the book : *Crime in India, 1993*, compiled by Crime Records Bureau, Govt. of India.

30. To some extent, the increase may also be attributed to better reporting to the police and greater response on their part regarding registration of these crimes.

maintain that contributions made by criminologists not only have the potential but they must play their rightful role towards legal and social policies.

Nigel Walker's assertion that the role of a criminologist is not the same as that of a penal reformer is valid in the context of the objectivity to be maintained by the former in his job.[31] Again, it is theconcern for the objectivity and unbiased research that led Leon Radzinowicz to insist that the proposed Institute of Criminology and Criminal Justice in New York should be independent of Government, devoted to pure research and without any commitment to the achievement of a particular result.[32] The position enunciated by Walker has been expressed more strongly by Stanley Cohen who does not hold that it is the professional job of criminologists to "advise, consult, recommend or make decisions".[33]

Taking a position contrary to the one mentioned above, criminologists like Joseph Vigh from Hungary believe that criminologists have a significant role in shaping social and penal policy. In his view a measure of the viability and strength of criminological views in the socialist countries is the extent to which they are capable of enforcing their own concepts in the penal sciences and in criminal policy, as well as in social policies.[34]

Some criminologists take a pessimistic view regarding the potential and applicability of criminological research in the context of penal administration and policies. One such authority is Prof. James Q. Wilson of the Harvard University. According to him, factors of a socio-psychological nature and processes like urbanization, community and family breakdown, identified by criminologists as significant in the explanation of criminal behaviour are rarely, if at all, capable of cognizance in the formulation of public policy.[35] This only shows that though criminology alone cannot be the means of deciding the aims of penal policy 'criminological theory and impartial, empirical and historical inquiry must play their part in the formulation, development and assessment of policy'.[34]

There is one aspect which needs to be kept in mind even if it is conceded that criminological research has a contribution to make to the formulation of social and penal policies. The researches and findings in criminology, as in other social services, are to be consumed with great caution. Besides the honest mistakes possible in the findings, analysis and conclusions, there is also the risk involved of ideology and personal opinions influencing the

31. Nigel Walker in Preface to *Crime and Punishment in Britain* (Edinburgh University Press, 1965).
32. Leon Radzinowicz : *The Need for Criminology* (London : Heinemann, 1965), p. vi.
33. *Visions of Social Control* (Cambridge Polity Press, 1985), p. 238.
34. Quoted by Roger Hood in "*Role of Criminology in Public Policy*", Criminal Law Review, 1987, p. 530.
35. *Supra*, p. 531.

solutions offered leading to the valid view that the 'writings in the sociology of crime and deviance tend to be factious, partisan and combative.'[36]

Radical Criminology

Radical criminology has its origin in the rebellion and protests by the students, workers and ghetto poor in the industrialised countries of the West in the sixties. At the most general level, it holds that criminal law and its administration function in the interest of the capitalist class as part of the states' repressive apparatus. It began largely as a "negative critique"; a reaction to criminology as a positive science. According to the positive perspective, the "science" of criminology represents an objective, value-neutral search for universal laws governing criminal behaviour.[37] The focus of positive criminology is on adjusting and accommodating individuals through "correctionalism and reformism" to the prevailing structure.[38]

New Conflict Theories

The definition and concept of crime as dealt with above and the various approaches to the causation of crime described later,[39] on the other hand, suggest a consensual view of the society. The popular view, as explained by Chambliss and Seidman,[40] is that (1) the law represents the values of society; (2) if it does not represent the values of everyone, then it at least expresses the best common denominator of the society and operates through a value-neutral governmental structure, which is ultimately controlled by the choice of the people; and (3) in the long run the law serves the best interest of the society. A contrary view has been taken by the modern conflict criminologists holding that the apparent consensus may be deceptive and a deeper analysis would lead to the conflicting forces operating in the formulation of criminal conduct and administration of criminal justice. In the early fifties, sociologist Ralf Dahrendorf formulated a conflict theory of society which challenged the dominant paradigm of consensus in social theory. Dahrendorf holds that the consensus view is comparable to the unrealistic utopian ideals in which there is no conflict of any kind in the society. Around the same time, Vold was in the process of writing his well-known book on theoretical criminology in which he propounded his theory based on the group conflicts. The works of Dahrendorf and Vold led quite a few sociologists to come out with their

36. There has been a mushroom growth of political and ideological schools of criminology during the last two decades e.g. "Mainstream", "Correctionalist", "Technicist", "Administrative", "Conservative", Neo-Conservative", "Working Class", "Radical", etc. The most significant development commencing from the mid-1960s is what has come to be termed the school of 'Radical Criminology', *infra*.

37. *See* Chapter III.

38. Chapters VI, VII & IX.

39. *See* Chapters III and IV *infra*.

40. William J. Chambliss and Robert B. Seidman, *Law, Order and Power* (1971), pp. 473-75, 502-504.

own conflict theories. Some of the better known of the *modern*[41] conflict theories are briefly described below.

1. Sellin's Culture Conflict Theory.—The theory presented in 1938 by Thorsten Sellin preceded the works of Dahrendorf and Vold and it sought to explain the causation of crime on the basis of cultural conflicts between the various groups of society. These conflicts do not, by and large, occur in simple and homogeneous societies but present themselves as society becomes more and more complex. In a situation like this, law would evidently reflect the values of the dominant class and not of the society as a whole; the phenomenon thereby often bringing the members of the non-dominant group in collision with the legal norms.

Conflicts between the norms of divergent cultural codes may arise in the following situations:[42]

(*i*) when these codes clash on the border of contiguous culture areas;

(*ii*) when, as may be the case with legal norms, the law of one cultural group is extended to cover the territory of another; or

(*iii*) when members of one cultural group migrate to another.

To illustrate the above possibilities, Sellin offers examples arising out of the operation of French law in Algeria, Russian law in Siberia and of American law vis-a-vis American Indians.[43]

2. Vold's Group Conflict Theory.—In his book, *Theoretical Criminology* (1958), George B. Vold propounded his theory based on conflicts among various interest groups; emergence of new groups making it a continuous process. Despite the conflict and competition involved in the group interests, some adjustments are sought and achieved as reflected in legislation incorporating compromise between the antagonistic groups. Nevertheless the process of law making and its enforcement reflects the will of the majority power groups. Criminal behaviour, therefore, is the behaviour of minority power groups lacking sufficient power to promote and defend their interests and purposes in the legislative process.

3. Quinney's Theory of Social Reality of Crime.—Richard Quinney sought to study the problem of crime and criminality with focus on the conflicts of groups in the context of the various institutions, political, economic, religious, kinship, educational and public. In particular, his thinking was moulded by the protest movement against the Vietnam war around

41. These are regarded *modern* because certain kinds of conflicts were the basis of some of the earlier theories too; the Marxist theory being the most prominent of them. The *modern* conflict theories have proved to be popular among American sociologists because of their being beyond and independent of Marxist approach.

42. Thorsten Sellin : *The Conflict of Conduct Norms*, from (Eds. Farell and Swigert), *Social Deviance* (1975), p. 310.

43. For relationship between cultural conflict and social disorganization, *see* Social Disorganization Theories in Chapter IV.

1970. The diverse groups, according to Quinney, were linked to the major institutional concerns but the interest structure was characterised by the unequal distribution of power. He rejected the pluralist notion that law represents the compromising of diverse interests; rather law supports some interests at the expense of others.[44]

Quinney laid down six propositions regarding crime and operation of criminal law, the propositions by no means original but based on earlier theories.[45]

Proposition 1 (Definition of Crime) : Crime is a definition of human conduct that is created by authorised agents in a politically organised society.

Proposition 2 (Formulation of Criminal Definitions) : Criminal definitions describe behaviours that conflict with the interest of the segments of society that have the power to shape public policy.

Proposition 3 (Application of Criminal Definitions) : Criminal definitions are applied by the segments of society that have the power to shape the enforcement and administration of criminal law.

Proposition 4 (Development of Behaviour Patterns in Relation to Criminal Definitions) : Behaviour patterns are structured in segmentally organised society in relation to criminal definitions and within this context, persons engage in actions that have relative probabilities of being defined as criminal.

Proposition 5 (Construction of Criminal Conceptions) : Conceptions of crime are constructed and diffused in the segments of society by various means of communication.

Proposition 6 (The Social Reality of Crime) : The social reality of crime is constructed by the formulation and application of criminal definitions, the development of behaviour patterns related to criminal definitions, and the construction of criminal conceptions.[46]

Some of the aspects in the propositions may be elaborated as follows:[47]

(*i*) Law in operation is an aspect of politics. Thus crime is not a matter of individual pathology, "but is a judgment made by some about the actions and characteristics of others".

(*ii*) In the creation and interpretation of laws, the values of some necessarily taken into account may negate the values held by others. The relative power and influence of the segments to which individuals may belong would determine the situation.

44. James T. Cary: *Introduction to Criminology*, pp. 133-36.
45. Propositions 2 and 3 are clearly based on Vold's group interest theory and proposition 4 linked to Sutherland's differential association theory. Between Vold and Quinney there is, however, the difference that while Quinney included all criminal behaviour in his proposition, Vold had specifically excluded "impulsive, irrational acts of a criminal nature that are quite unrelated to any battle between different inter-groups in organised society".
46. Richard Quinney : *The Social Reality of Crime* (1970), pp. 15-23.
47. *See* George B. Vold and Thomas J. Bernard : *Theoretical Criminology*, 3rd Edn., pp. 277-80.

(*iii*) The *politics of reality* is that people grant those in power the authority to carry out the actions that best promote the interests of the authorities.

4. Turk's Theory of Criminalisation.—The main thrust of Austin Turk's theory is that cultural differences alone do not cause social conflicts, the crucial factor is the difference between the perspectives of authorities and subjects which are bound to be at variance and may clash overtly. In his analysis Turk uses the factor of *sophistication* 'by which is meant knowledge of patterns in the behaviour of others which is used in attempts to manipulate them'. His conclusions regarding the likelihood of conflict between authorities and subjects are :

> "...(conflict) is most probable if the subjects are highly organised and relatively unsophisticated, less probable if they are unorganised and unsophisticated, *still less* probable if organised but sophisticated and *least* probable if unorganised and sophisticated."

5. Chambliss and Seidman's Analysis of Criminal Justice.—Some conflict criminologists have studied the working of criminal justice system and one such study made by Chambliss and Seidman is the most exhaustive.[48]

Chambliss and Seidman did not find consensus theory operating in the criminal justice system. According to them, "every detailed study of the emergence of legal norms has consistently shown the immense importance of *interest-group activity*, not the 'public interest', as the critical variable in determining the content of the legislation.[49] Like other conflict criminologists, they also maintain that "higher a group's political and economic position, the greater is the probability that its views will be reflected in the laws".[50] The authors also find that the personal values of the judges, as reflected in deciding 'trouble cases' are primarily oriented to the wealthy than the poor. This bias on the part of the appellant judges can be appreciated keeping in view their privileged social and economic background. Thus public interest in criminal justice is represented only to the extent that it coincides with the interest of the existing power groups.[51]

A number of studies have been made to test the 'differential behaviour of criminal law'; to examine whether the system operates in favour of wealthy and powerful persons. Not all the studies support the hypothesis and the general consensus is that 'serious crimes, irrespective of the class to which the offender may belong, invite more active enforcement by the agents of criminal justice'. Even such studies, however, concede that wealthy

48. William J. Chambliss and Robert B. Seidman : *Law, Order and Power* (1977).
49. Chambliss and Seidman, *op. cit.*, p. 73.
50. *Id.* pp. 473-74.
51. Chambliss and Seidman, *op. cit.*, p. 503.

and powerful persons are necessarily handled more leniently by the system.[52]

The conflict criminologists must be credited for having taken up certain issues relating to crimes, criminal law and administration of justice in a realistic manner. These theories, to some extent are appropriate in relation to legislative and administrative policies pertaining to issues of political nature or big business but are hardly relevant in the context of the bulk of the criminality of the traditional nature involving persons and property.

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52. Nettler, *Responding to Crime*, pp. 57-59, quoted in Vold, *op. cit.*, p. 291.

Chapter II

CRIMINAL LAW AND ITS ADMINISTRATION

Criminal law provides the ultimate means to the society for the protection of its individuals and institutions. Criminal law has to be strong enough, both in its content as well as in its implementation, without being harsh or arbitrary. These qualities are needed in all branches of law but nowhere are they so crucial as in criminal law since the stakes involved are exceptionally high in terms of social injuries of various kinds. To understand the mechanisms employed to achieve the above-mentioned objectives, it is necessary to examine the fundamental features of the administration of criminal law through police and courts. A brief description of the substantive criminal law, and the rules of evidence and procedure followed in administering it, is made here.

Substantive Criminal Law — A General View

The penal law in force in India is to be found in the various statutes enacted by the Central and State legislature. The general substantive criminal law, operative throughout the country, is laid down in the Indian Penal Code enacted in the year 1860. The Code, well known for its skilful drafting, was the creation of Macaulay and his colleagues. Some minor changes have been made in the Code since then but, by and large, it has retained its original form and content. The Penal Code incorporates various theories and principles of the common law of England with some modifications here and there to suit the Indian conditions.

Besides the general substantive law of crimes as laid down in the Penal Code, there are many special and local enactments confined in their application to special fields of crimes or to particular local areas. These enactments deal with, for example, prevention of corruption, food adulteration, violation of customs and foreign exchange rules, gambling, dowry, untouchability, prohibition, narcotics and cattle trespass. The modern State is concerned not only with traditional law and order problems but has to enforce various socio-economic policies as well. This new resonsibility undertaken by the State has given rise to the enactment of many laws creating a vast number of regulatory and welfare offences.

The Penal Code, being the general code of criminal law in the country, covers a vast variety of offences. It seeks to protect the individual from injuries relating to mind, body, property and reputation. Some of the obvious examples are the acts of murder, kidnapping, rape, criminal intimidation, theft, cheating, criminal breach of trust and defamation, which have been made punishable under the Code.[1] Then there are offences relating to the

1. *See* Sections 302, 363, 376, 506, 379, 420, 406 and 500 respectively.

State, government, public tranquillity, social institutions like marriage, religion and public decency and morals.[2] The following is a brief survey of the principles of criminal law.

Jurisdiction

The following two kinds of jurisdiction provide the basis for the application of the Penal Code :

1. Territorial jurisdiction[3].—The Penal Code is applicable throughout the Indian territory except the State of Jammu and Kashmir. According to International Law, the general territorial jurisdiction of a State extends into the sea as far as a cannon shot would travel, the conventional distance being one marine league or about three miles. The tendency on the part of many countries, including India, in the recent past has been to extend the maritime belt. The territorial jurisdiction is based on the principle that all crime is local. It follows, therefore, that all persons including foreigners on Indian soil are subject to the law laid down in the Code. Some exceptions from criminal law process have been made by the Constitution and international conventions regarding President and Governors while holding their office, foreign sovereigns and ambassadors, etc.

2. Extra-territorial jurisdiction[4].—The Penal Code is also applicable to any citizen of India without or beyond India. This is based on the theory that every nation possesses the right to regulate and govern its own subjects everywhere on the basis of natural allegiance which it claims from its citizens. The jurisdiction also extends to any person on a ship or aircraft registered in India, wherever it may be.

Elements of Crime

A criminal offence generally consists of two elements, i.e., the mental and physical elements. A certain mental state viz. intention, knowledge, negligence or rashness is ordinarily necessary for committing a legally forbidden act. The requisite mental and physical conditions are expressed by the terms *mens rea* and *actus reus* respectively. Since both the components are generally necessary for the commission of a crime, it is said that no crime is committed unless there is concurrence of guilty act and guilty mind. The common law maxim *actus non facit reum nisi mens sit rea* conveys the same principle.

The concept of 'act' constituting *actus reus* is of very wide import. According to Salmond the term means any event which is subject to the

2. Sections 121, 124-A, 149, 494, 497, 295, 292 respectively.
3. Section 2.
4. Penal Code, Sections 3 and 4, CrPC, Section 188.

control of the human will.[5] The term therefore means not only positive acts but also negative acts. i.e., omissions to act. It should, of course, be understood that omission to act can be a component of a criminal act only if there is a legal duty to act in a given situation. The framers of the Indian Penal Code made the following observations to indicate the extent to which omissions were to be treated as acts in the context of criminal liability.

> "...[S]ome of these omissions ought to be punished in exactly the same manner in which acts are punished; secondly, that all these omissions ought not to be punished. It will hardly be disputed that a gaoler who voluntarily causes the death of a prisoner by omitting to supply that prisoner with food, or a nurse who voluntarily causes the death of an infant entrusted to her care by omitting to take it out of a tub of water into which it has fallen, ought to be treated as guilty of murder. On the other hand, it will hardly be maintained that a man should be punished as a murderer because he omitted to relieve a beggar, even though there might be the clearest proof that the death of the beggar was the effect of this omission, and that the man who omitted to give the alms knew that the death of the beggar was likely to be the effect of the omission...."

Mens rea or the guilty mind is the other essential component of a criminal offence. Just as *mens rea* alone is not punishable unless followed by the *actus reus, actus reus* without *mens rea* can also not constitute an offence. Various expressions like intentionally, knowingly, rashly, negligently and dishonestly are used to denote the various mental states involved in different offences.

As mentioned earlier, the maxim *actus non facit reum nisi mens sit rea* is of common law origin.[6] The doctrine has been incorporated in most of the statutory crimes in England, India and other countries. The difficulty, however, arises in interpreting these statutes where there is no reference whatsoever to the mental state of the wrongdoer. The problem is that on the one hand, the courts are required to interpret the statute as it is without resorting to any extraneous considerations, and at the same time the judges find it extremely unfair to find a person liable in the absence of a guilty mind. The courts have therefore been unable sometimes to get rid of the common law principle even in statutory offences. Lord Goddard, LJ. observed in *Brend* v. *Wood*[7]:

> "It is of the utmost importance for the protection of the liberty of the subject that a court shall always bear in mind that, unless a statute either clearly or by necessary implication rules out *mens rea* as a

5. Salmond On *Jurisprudence*, 8th Edn., p. 380.
6. The judge-made law of England is distinct from the law subsequently laid down in the statutes.
7. (1946) 62 TLR 462.

constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."

The same principle has been applied by the Indian courts in many cases and the courts have been very cautious in finding *mens rea* absent in the various statutory crimes. In *State of Maharashtra* v. *Mayor Hans George*[8], Subba Rao, J. explained the position as follows :

> "It is a well settled principle of common law that *mens rea* is an essential ingredient of a criminal offence. Doubtless a statute can exclude that element, but it is a sound rule of construction adopted in England and also adopted in India to construe a statutory provision creating offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded *mens rea*. To put it differently, there is a presumption that *mens rea* is an essential ingredient of a statutory offence : but this may be rebutted by the express words of a statute creating the offence expressly or by necessary implication. But the mere fact that the object of a statute is to promote welfare activities or to eradicate grave social evils is in itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of the offence. It is also necessary to enquire whether a statute by putting a person under strict liability helps him to assist the State to promote observance of the law: Can we do anything to promote observance of the law?... *Mens rea* by necessary implication can be excluded from a statute only where it is absolutely clear that the implication of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their act or omission to assist the promotion of the law..."

General Exceptions

As mentioned earlier, generally there is no liability under criminal law unless there is a guilty mind. Following this principle, an entire chapter in the Penal Code has been devoted to the conditions which negate criminal liability due to lack of *mens rea* and the provisions of the Penal Code are subject to it.[9]

The following are some of the more important situations covered by the exceptions :

1. Act committed due to mistake of fact in good faith. Mistake of law is not recognised as a defence. (Sections 76 and 79)
2. Act caused by accidents or some mishap despite proper care and attention observed. (Section 80)
3. Act committed because of necessity, i.e. to prevent greater harm in a compelling situation. (Section 81)

8. AIR 1965 SC 722 : (1965) 1 Cri LJ 641.
9. Chapter IV, IPC.

4. Act of a child under 7 years in all cases and the act of a child above 7 years but below 12 years of immature understanding. (Sections 82 and 83)
5. Act of a person of unsound mind is exempted from criminal liability if at the time of the commission of the act he was incapable of knowing the nature of his act or that what he was doing was wrong or contrary to law. (Section 84). The law is based on M'Naghten's Rules propounded in England about one hundred years back. Nothing less than total destruction of cognitive faculties is covered under the exception and hence it is evident that the concept of legal insanity is narrower as compared to the concept of medical insanity. The defence of irresistible impulse, recognised in some of the American jurisdictions, is not covered under the Indian law.
6. Act of an intoxicated person is a complete defence if the intoxication is involuntary. Even voluntary intoxication may provide a defence in limited situations. (Sections 85 and 86)
7. Acts done by the consent, express or implied, or without consent of the sufferer in his own interest. (Sections 87, 88, 89 and 92)
8. Act (except murder or any offence against State punishable with death) committed under threat of death. (Section 94)
9. Acts done in the reasonable exercise of the right of private defence of person or property. (Sections 96-106)

Parties to the Crime

Ordinarily a person is liable for his own guilty acts. There are, however, some situations when one is liable for the criminal acts of others also. Under the statute, a duty may be cast upon a person to manage things in a certain manner and he may be liable even if the failure regarding the statutory duty is not his own but of someone acting on his behalf. A master may be made liable for the acts of his servant under a statute. So far as the general law of crimes is concerned, one may be involved in certain situations in such a way that though he did not commit the criminal act himself, he either acted in concert with others or abetted the criminal act. Every member of a group becomes liable for every act committed by any of them in furtherance of the common intention of the group members irrespective of the actual part played by the individuals.[10] Similarly members of an unlawful assembly may become liable for any criminal act committed by any member in the prosecution of the common object of the assembly.[11]

Abetment of a crime is also a crime. Abetment may be committed by instigating another to commit a crime or by entering into a conspiracy to commit a crime or by providing necessary aid to another in the commission

10. IPC. Section 34.
11. IPC. Section 149.

of the crime. The aid may be given before the commission of the offence or at the time or subsequent to the commission of the offence. The abetment of an offence is punished in the same way as the actual commission of the offence if the abetment actually results in the offence abetted, otherwise a lesser punishment is provided for the abettor.

Inchoate Crimes

Crimes like conspiracy and attempt to commit an offence are complete crimes in themselves and therefore, the word 'inchoate' may not be very apt to describe them. They are nevertheless sometimes referred to as 'inchoate' crimes since these are not by themselves the ends contemplated by the offenders.

There are three stages involved before the actual commission of an offence, viz., intention to commit an offence, preparations made towards the commission of the offence and finally the attempt to commit the offence which if successful would result in the ultimate crime. Generally speaking, the first two stages in the commission of a crime, i.e., the intention and preparation, are not punishable but the act becomes punishable when the stage of attempt is reached. The rule that mere intention or preparation is not cognizable is subject to a few exceptions. The offence of criminal conspiracy is committed as soon as there is an agreement between two or more persons to commit an offence.[12] Similarly some preparations are also made punishable in the Penal Code. Examples are preparation to commit dacoity, to wage war against the Government of India and to counterfeit coins.[13] The reason as to why criminal intention and preparation are not punishable as such is that firstly, it may be difficult to establish the guilt in such cases and secondly, mere intention or preparation do not cause much alarm or any damage to society.

Evidence in Criminal Proceedings

The purpose of the law of evidence is to provide rules for the reception of relevant evidence in courts of law relating to matters in issue and to help the judge in drawing rational inferences from the evidentiary material produced before him. Without such rules of evidence the trial could at times go on indefinitely with all sorts of conceivable evidence being tendered by the parties to the proceedings. In India, the rules of the English law of evidence have been codified in the Indian Evidence Act, 1872. The main principles underlying the law of evidence are the following :

1. Evidence must be confined to the matters in issue.
2. Hearsay evidence must not be admitted.
3. The best evidence out of what is available must be given in all cases.

The following is a brief description of the rules of evidence which are of peculiar relevance to the administration of criminal justice.

12. IPC, Section 120-A.
13. IPC, Sections 399, 122, 235.

Corroboration of Evidence

Since the stakes are very high in criminal trials, corroboration of evidence given by a witness is of utmost importance in certain situations.

1. Evidence of accomplices : The conviction of an accused person is possible on the testimony of an accomplice. This is the position both in England and in India. The Indian Evidence Act provides:[14]

> "An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

But generally the courts do not convict on the basis of uncorroborated evidence of an accomplice. This attitude is particularly justified in view of another provision of the Evidence Act which provides that the court may presume that an accomplice is unworthy of credit, unless he is corroborated.[15]

2. Child witnesses : The position of a child witness may be appreciated in the light of the following provision in the Evidence Act:[16]

> "All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

It is obvious, therefore, that a child is a competent witness unless he suffers from any one of the handicaps enumerated above. The courts are generally reluctant to place absolute reliance on the evidence tendered by a child witness and corroboration is required as a rule of prudence.

In the words of Prof. Kenny:

> "The precaution is wise, for a tribunal of adults may place undue reliance upon such evidence forgetting that, though children are less fraudulent than adults, they are often more imaginative. Hence the judge should caution the jury...."[17]

3. Sexual offences : In England, corroboration of evidence is essential in certain sexual offences against women and children, and conviction, therefore, is not possible upon the evidence of a single witness. In India, though it is possible to convict an accused person on the uncorroborated evidence of a victim of rape, the courts have nevertheless insisted on corroboration in some cases.

14. Section 133.
15. Section 114, Ill.(*b*).
16. Section 118.
17. *Outlines of Criminal Law*, 18th Edn., p. 505.

Hearsay Rule — Exceptions

Some exceptions have been recognised to the general rule that hearsay evidence is not admissible. These exceptions are based on necessity since the person making a statement cannot be made to testify in a court of law in certain situations. Out of the various exceptions to the hearsay rule[18], the one which is of special importance in the administration of criminal justice is as follows:

> "When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.
>
> Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."[19]

The second part of the above provision makes the Indian law different from England where the rule will not apply unless the deceased thought his death to be quite imminent.

This exception to the hearsay rule is usually justified on the ground that the religious awe inspired by the approach of death is deemed fully equal to the sanction of any judicial oath.[20]

Evidence of the Accused's Character

In criminal proceedings, evidence of the fact that the accused is of good character is relevant and can be admitted by the court.[21] But the fact that the accused is of bad character is, by and large, irrelevant. The Evidence Act provides:[22]

> "In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant."

The explanations are to the effect that evidence of bad character is relevant in a case where bad character is itself a fact in issue and evidence of a previous conviction of the accused is relevant to establish bad character.

This safeguard is to eliminate the possibility of the court getting biased against the accused person on account of his past criminality.

Confessions

A confession is a statement made by an accused person by which he either admits having committed an offence or at any rate substantially all

18. Evidence Act, Sections 32 and 33.
19. Section 32(1).
20. Kenny, *op. cit.*, p. 510.
21. Evidence Act, Section 53.
22. Section 54.

the facts which constitute the offence. The confession made by an accused person is relevant since the presumption is that a man of sound mind and full age will not make a statement against himself. Obviously a confession by a person is the safest kind of evidence provided that it has been made in a voluntary manner. A confession is said to be voluntary when it is made without any inducement, threat or promise. The principle is enacted as follows:[23]

> "A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

Confessions made to a police officer or made in police custody are regarded as untrustworthy and hence they are inadmissible. This rule is meant to curb the tendency of the police personnel to use third degree methods against persons suspected of committing a crime. Not only are the confessions made to a police officer inadmissible but confessions are also inadmissible when made to any person while the accused person is in police custody, unless it is done in the immediate presence of a magistrate.[24]

A limited use of the confession made in police custody is however made possible by Section 27 of the Act :

> "Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

For instance an accused person in police custody makes the confession : "After committing murder of *X* with a knife I threw it on the terrace of *X*'s house." The knife is subsequently recovered from the place indicated by the accused. The admissible part of the confession is "I threw it on the terrace of *X*'s house" since the fact that he knew the knife having been thrown on the terrace of *X*'s house is discovered as a result of this part of the confession. The other part of the confession, "after committing murder", is not admissible.

Rights and Protection of the Accused

The procedure to apply the criminal law is laid down in the Code of Criminal Procedure, 1973. While the substantive law defines criminal acts

23. Evidence Act, Section 24.
24. Evidence Act, Section 25.

and provides punishments for them, the procedural law inter alia prescribes the manner in which arrests, searches and seizures can be made by the police, the constitution and powers of the criminal courts, the manner in which the various kinds of trial are to be conducted and protections afforded to an accused person.

Criminal law and its process cannot be appreciated without some understanding of the rights and protections given to the accused person not only during his trial but also before and after the trial. These rights and protections aim at providing a fair trial to an accused person so as to eliminate any possible abuse of process resulting in miscarriage of justice. This has to be so since criminal law is expected to maintain certain values in a civilized society and the means to obtain conviction of a guilty person are no less important than getting the conviction itself.

Right to be Produced before Magistrate

The police cannot keep a person under arrest for a longer time than is necessary without producing him before a magistrate. There are provisions in the Constitution and the Criminal Procedure Code according to which a maximum time of 24 hours is allowed to the police to produce an accused person before a magistrate.[25] These provisions go a long way in guarding the personal liberty of the individual.

Right to Bail

A person is guilty of an offence only after being found to be so by a competent criminal court. Since the processing of a case by the police and the subsequent trial in the court may take a fairly long time, it is desirable that wherever it is expedient to do so, the accused person must be released on bail since his guilt is yet to be established. Under the scheme of the Code of Criminal Procedure, offences have been classified into bailable and non-bailable offences.[26] While offences which are of lesser gravity are bailable, the more serious offences are non-bailable, the difference between the two categories being that while in the former bail can be claimed by the accused as a matter of right, bail can be granted in the latter category in the discretion of the court provided that there are no reasonable grounds to believe that the accused is guilty of an offence punishable with death or life imprisonment. Even when the offence is punishable with death or life imprisonment the court may direct that any person under the age of sixteen years or any woman or any sick or infirm person be released.

According to the policy laid down in the various judicial decisions in India, releasing a person on bail should be the normal practice and refusal to do so an exception. Besides accepting the basic principle that there is no

25. Constitution of India, Article 22 and CrPC, 1973, Section 76.
26. *See* First Schedule.

justification for depriving a person of his liberty unless his guilt is proved, such a policy has the advantage that overcrowding in the jails, to some extent, can be avoided by making a liberal but judicious use of the bail technique.

As regards the amount of bond, the Code provides that the amount of every bond executed shall be fixed with due regard to the circumstances of the case and shall not be excessive.[27] This is absolutely necessary otherwise an accused person of limited means may be unable to execute the bond and may not, therefore, get the benefit of bail just because of his poverty. Despite the presence of such a clear and sensible provision in the Code of Criminal Procedure, the courts are not always careful regarding this aspect and there have been glaring examples of the bond amount being fixed at a level disproportionate to the means of the person to be released. One such case was *Moti Ram* v. *State of M.P.*[28] in which a poor mason was required to provide a surety of a sum of Rs. 10,000. The Supreme Court referred to the Manhattan Bail Project of the U.S.A. and to the recommendations of some committees in India, particularly that of Gujarat, entrusted to study the problem of bail. Besides making the obvious point that an excessive bond amount may cause injustice to poor people, the Court reminded the magistracy of the country that monetary bail was not a necessary element of the criminal process and urged that if a magistrate was satisfied after an enquiry into the condition and background of the accused that he had his roots in the community and was not likely to abscond, the accused could be released on order to appear on his own recognizance. The Supreme Court cited the results of the Manhattan Project which indicated the risk of financial loss was an insubstantial deterrent to flight for a large number of defendants compared to their ties with the community; the latter generally being sufficient to bring them back to the court. Of 2,195 defendants released without bail, less than one per cent failed to appear when required.

The Court mandated the magistrate to release the petitioner on his own bond in a sum of Rs. 1,000 and concluded the judgement with 'an afterword' which is as follows :

> "We leave it to Parliament to consider whether in our socialist republic, with social justice as its hallmark, monetary superstition, not other relevant considerations like family ties, roots in the community, membership of stable organisations, should prevail for bail bonds to ensure that the 'bailee' does not flee justice. The best guarantee of presence in court is the reach of the law, not the money tag...."

27. Section 440(*i*).
28. (1978) 4 SCC 47 : 1978 SCC (Cri) 485.

In this connection it may be profitable to know the position regarding grant of bail in England which is different from the one in India, the U.S.A. and Canada. In England, bail does not involve the provision of some form of security that can be realised or the obtaining of a bond which guarantees payment. It is simply a recognizance which is an undertaking by the accused that in case he does not appear at the court he will become indebted to the Crown to the extent of a specified sum of money, big or small, having regard to the circumstances.[29] The system, therefore, works in the same way irrespective of the poverty or wealth of the accused. The Criminal Justice Act of 1967 restricts the magistrates' powers to refuse bail to specified situations. The Act also allows a grant of bail to be subject to conditions such as surrender of passport or reporting to the police.[30]

The release on bail presupposes an arrest but situations arise where a person, though not actually arrested, may apprehend arrest in view of the allegations levied or investigations being carried against him. Under the old Code of Criminal Procedure, there was no express provision for release apprehending arrest, the courts nevertheless quite often released persons by granting them what was commonly called 'anticipatory bail'. The Law Commission in its report on the Code of Criminal Procedure recommended the inclusion of a specific provision for this kind of bail which now finds a place in Section 438 of the Code of 1973. According to the Law Commission, it was highly desirable in view of the frivolous proceedings undertaken by some people, especially politicians, for humiliating their opponents and adversaries by getting them arrested. The power to grant anticipatory bail is exercisable by High Courts and sessions courts only.

Right to Counsel and Legal Aid

A person facing trial must have a counsel in order to be defended effectively. The Constitution provides that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice.[31] Similarly, it has been provided in the Code of Criminal Procedure that any person accused of an offence before a criminal court, or against whom proceedings are instituted under the Code, may of right be defended by a pleader of his choice.[32] But the right to engage a counsel is meaningful only if the accused has the means to engage the same. A person too poor to afford a lawyer to defend himself is much handicapped during his trial. It is in this context, therefore, that the importance of legal aid to the indigent is

29. R.M. Jackson, *op. cit.*, p. 142.
30. *Id.*, pp. 148-149.
31. Article 22(3).
32. Section 303.

to be appreciated in a poor country like India. Before the enactment of the Code of Criminal Procedure, 1973, there was no right given to an accused person to be provided with a lawyer if he could not engage one himself. The courts did, however, generally provide the services of a lawyer, known as *amicus curiae*, to the persons standing trial for more serious offences. The problem has been taken care of, at least to some extent, by inserting a provision, in the Criminal Procedure Code of 1973 which inter alia provides as follows:[33]

> "Where, in a trial before the court of session, the accused is not represented by a pleader, and where it appears to the court that the accused has not sufficient means to engage a pleader, the court shall assign a pleader for his defence at the expense of the State."

The State Government may also extend the application of the provision to trials conducted in courts other than sessions courts.

In Britain and the U.S.A. much useful work is done by the legal aid and advice societies. In India a beginning is now being made to provide legal aid to the poor through the legal aid organisations.

The responsibility of the State Governments in the area of legal aid has been highlighted by the Supreme Court in *Husainara Khatoon (V)* v. *Home Secretary*[34] :

> "...it is the constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of such reasons as poverty, indigence or incommunicado situation, to have free legal services provided to him by the State and the State is under a constitutional mandate to provide a lawyer to such accused person if the needs of justice so require.... Let it not be forgotten that if law is not only to speak justice but also deliver justice, legal aid is an absolute imperative.... If free legal services are not provided to such an accused (suffering from poverty or indigence), the trial itself may run the risk of being vitiated as contravening Article 21 and we have no doubt that every State Government would try to avoid such a possible eventuality."

The Principle of Legality

The fundamental principle of criminal law is that no one can be found guilty of an offence without his having violated some predetermined law defining a prohibited conduct. The principle is expressed by the maxim *nullum peona sine lege*. In other words, unless there is violation of some existing law defining a crime clearly and unequivocally, no crime is committed. The Indian Constitution provides:[35]

33. Section 304.
34. (1980) 1 SCC 108 : 1980 SCC (Cri) 50.
35. Article 20(1).

> "No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than which might have been inflicted under the law in force at the time of the commission of the offence."

The provision manifests what can be called the 'great charter of liberty' in countries having the rule of law. The position in totalitarian countries is different which can be illustrated with reference to the position obtaining under the Nazi rule in Germany :

> "Whoever commits an action which the law declares to be punishable or which is deserving of punishment according to the fundamental idea of a penal law and the sound perception of the people, shall be punished according to the law, the basic idea of which fits it best."[36]

Presumption of Innocence

There are two systems, i.e., the accusatorial and inquisitorial systems, followed in different parts of the world in administration of criminal justice. In the accusatorial system followed in common law countries, the burden of proving that an accused person violated some law is on the prosecution while in the inquisitorial system which is followed in some European countries like France, it is for the accused person to prove that he is not guilty of the crime allegedly committed by him. In India, where the accusatorial system is followed, there is a presumption in favour of the accused that the offence has not been committed by him and the presumption continues to be operative until the prosecution is able to prove its case according to the rules of procedure and evidence prescribed by law.[37] The same principle has been incorporated in the Evidence Act :

> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."[38]

The life and liberty of the individual would be in jeopardy if the rule was otherwise. The principle is sometimes expressed by saying that to be on the safer side, the acquittal of ten guilty persons is to be preferred to the conviction of a single innocent person. A very high standard of proof is, therefore, required to establish the culpability of an accused person. The distinction between the standards of proof in civil and criminal proceedings has been brought about in the following words :

36. Quoted in Journal of American Institute of Criminal Laws and Criminology 26 (1936) 847.
37. The position in some special laws like the Prevention of Corruption Act may be different due to public policy and the burden is on the accused to free himself from the criminal charge.
38. Section 101.

"A higher minimum of proof is necessary to support an accusation of crime than will suffice when the charge is only of a civil nature. For in the latter it is sufficient that there be a *preponderance* of evidence in favour of the successful party, whereas in criminal cases the burden rests upon the prosecution to prove that the accused is guilty *beyond reasonable* doubt."[39]

Proof beyond reasonable doubt does not, however, imply that the prosecution must eliminate even fanciful doubts regarding the criminality of the accused person. In *Miller* v. *Minister of Pensions*[40], Lord Denning observed :

"The degree of cogency need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, that the case is proved beyond reasonable doubt, but nothing short of that will suffice."

Once the prosecution has proved its case the burden is on the accused, though the burden of proof is not as exacting as that of the prosecution, to disprove the prosecution case or to prove that the act committed by him is covered by one of the general exceptions provided in the Penal Code. Section 105 of the Evidence Act provides :

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances."

Protection against Self-incrimination

A cardinal principle of the English system of criminal jurisprudence is that an accused cannot be compelled to give evidence against himself. The principle has been recognised in the Indian legal system. The constitutional guarantee of the right in India is that no person accused of any offence shall be compelled to be a witness against himself.[41] The principle is to eliminate the possibility of third degree methods being used against the accused person to extort confession or any other information from him. Some of the

39. Kenny, *op. cit.*, p. 501.
40. (1947) 2 All ER 372, 377.
41. Constitution of India, Article 20(3).

provisions in the Evidence Act and the Criminal Procedure Code also seek to achieve a similar objective.[42]

Protection against Double Jeopardy

It is a well established principle of the English legal system that no man shall be twice punished if it appears to the court that it is for one and the same cause. The principle is expressed in the well-know maxim, *nemo debet bis vexari, si constat curiae quod sit pro una et eadem causa*. The principle has been incorporated in the Indian Constitution :[43]

> "No person shall be prosecuted and punished for the same offence more than once."

While the constitutional guarantee recognises only *autrefois convict* (previous conviction) as a bar to the subsequent prosecution for the same offence, the provision in the Criminal Procedure Code incorporates *autrefois acquit* (previous acquittal) as well to bar another trial for the same offence. The main principle laid down is that a person who had once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence.[44]

The same act committed by a person may amount to two different offences, i.e., the same act may invite the application of the definitions of two distinct offences and the protection against double jeopardy is not available in such situations. The offences are distinct if their ingredients are different and it makes no difference that the allegation of fact is the same in both the cases.[45]

Right to Speedy Trial

'Justice delayed is justice denied' is the well-known maxim highlighting the importance of quick justice. In the context of the administration of criminal justice, it has a dual significance. Viewed from the angle of the accused person, it is in his interest that there should be a speedy trial so that there may be an early end to the proceeding against him resulting in acquittal or conviction. The accused may have to spend long periods full of uncertainty and mental anxiety possibly in jail or in police lock-up if the proceedings against him are not expedited. Speedy trial also limits the possibility of long delay impairing the ability of an accused person to defend himself effectively or handicapping the prosecution in the trial. Either of the two sides may suffer because witnesses may die, their memories may fade and testing may become more vulnerable to cross-examination. Besides the interest of the

42. Evidence Act, Sections 24 to 26 and Code of Criminal Procedure, 1973, Section 316.
43. Article 20(2).
44. Section 300.
45. For a detailed discussion see *State of Bombay* v. *S.L. Apte*, AIR 1961 SC 578 : (1961) 1 Cri LJ 725.

accused, it is also in the community's interest that the criminal proceedings come to a reasonably quick end since promptness of criminal sanctions is one of the requisites of the deterrent aspect of punishment; the other requisite being the certainty of the application of penal sanctions.

The legal basis of the right was provided by the Magna Carta (1215) which proclaimed that justice or right will neither be sold nor denied or deferred to any man. According to Coke, prolonged detention without trial would not only be contrary to the law and custom of England but delay in trial, by itself, would be an improper denial of justice. Coke's Institutes had a direct impact on the American colonies and the right of speedy trial is guaranteed by the Sixth Amendment of the United States Constitution and also by all the States.

The founding fathers of the Indian Constitution perhaps being conscious of the formidable hurdles involved, did not incorporate the right, as such, in the Constitution but in *Hussainara Khatoon* v. *Home Secretary, State of Bihar*[46] the Supreme Court held the right to be implicit in Article 21 of the Constitution. In holding so, the Supreme Court reaffirmed its ruling in *Maneka Gandhi*[47] that to fulfill the requirement of Article 21 the procedure should be 'reasonable, fair and just' and a quick trial can be regarded as having these qualities. The petition in *Hussainara* was moved on behalf of certain pre-trial prisoners, many of whom had been languishing in jails for years together waiting for the commencement of their trials. The Court ordered the immediate release of all such prisoners.

It has been held by the Courts that the constitutional right of speedy trial includes within its sweep the expeditious filing and hearing of substantive appeals against convictions as well as acquittals.[48] The right has been given extended scope to operate against long delay in the disposal of a mercy petition against death sentence by the President of India.[49]

Besides Article 21 of the Constitution and the Sixth Amendment of the U.S. Constitution which has been found highly persuasive in the Indian decisions, there are ample provisions in the Code of Criminal Procedure and Police Act designed to accomplish quick disposal of matters at various stages. These are as given below :

1. Sections 157 (early investigation and report to the Magistrate), 167 (minimising the pre-trial custody), 173 (expeditious investigation and filing of the charge-sheet) and 309 (expeditious enquiry and trial).

46. (1980) 1 SCC 81.

47. *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597.

48. *Ramdas Ahir* v. *State of Bihar*, 1985 Cri LJ 584; *Maksoodan Singh* v. *State of Bihar*, AIR 1986 Pat 38 (FB); *Anurag Baitha* v. *State of Bihar*, AIR 1987 Pat 274 (FB); *S. Guin* v. *Grindlays Bank Ltd.*, (1986) 1 SCC 654 : 1986 SCC (Cri) 64 : AIR 1986 SC 289.

49. *Madhu Mehta* v. *Union of India*, (1989) 4 SCC 62 : (1989) SCC (Cri) 705 : 1989 Cri LJ 2321.

2. Rules framed under Sections 7 and 12 of the Police Act, 1861 incorporating similar objectives as above.
3. The committal proceedings with respect to sessions trials have been virtually abolished in the Criminal Code of 1973, in any case simplified to a great extent.

The problem of delayed criminal justice is endemic in the Indian judicial system though it has reached alarming proportions during the last two decades or so. There are many factors responsible for this state of affairs; many of them have been identified by the Supreme Court and the Law Commission in various decisions and reports. While some of the issues relate to the gap between the legal services available and the much higher demand created by the galloping rate of crime, the others pertain to the quality of judicial personnel and legal services and the faulty procedures and practices in the administration of criminal justice. According to the Supreme Court, the inadequacy in the number of magistrates and judges, their working conditions and lack of adequate staff provided to them are the factors which cause delay in criminal justice.[50] These factors and many others have been pointed out by the Law Commission in the fourteenth and seventy seventh Reports and some worthwhile recommendations have also been made.[51] In the seventy seventh Report it has been recommended that in a criminal case the disposal period should not exceed six months. It would be sheer optimism to expect the target to be achieved even if all the suggestions and recommendations of the Supreme Court and the Law Commission are implemented which in itself appears to be highly improbable. The Law Commission, as indicated by them in their seventy ninth Report, is sceptical about the implementation of its recommendations in view of the fate of its earlier recommendations.

Besides the shortage of judicial personnel in relation to the huge number of cases they are required to deal with,[52] as referred to above, there are quite a few other factors responsible for the inordinate delays in the administration of criminal justice.

1. Frequent adjournments are sought, mostly by the busy defence lawyers, and allowed by the courts.[53]
2. Shortage of prosecutors and their unfavorable working conditions also contribute substantially to the delays, the scarcity of prosecutors

50. *Sheila Barse (I)* v. *Union of India*, (1986) 3 SCC 596 : 1986 SCC (Cri) 337 : AIR 1986 SC 1779.
51. Recommendations regarding evidence before the Sessions Judges, separation of investigation and law and order wings of the police, representation by the Counsel in the absence of accused in certain situations and appointment of more public prosecutions may prove beneficial if implemented through legislation or otherwise.
52. A research study reveals that 30 to 50 cases per day are listed in the trial courts of Delhi which obviously cannot be coped up with and thus the calendering is for statistical purposes only.
53. This goes on despite Section 309 of the Code of Criminal Procedure providing for expeditious trials by conducting day-to-day examination of witnesses and recording reasons for not doing the same in a particular instance.

being particularly acute for prosecution in cases of food adulteration and the C.B.I.[54]. The prosecutors do not have enough office space and hardly any library facilities are available in most of the courts.

3. Non-apperance of accused persons, particularly while enlarged on bail, on some pretext or the other, is also a frequent phenomenon. Same is often true of witnesses whose lack of cooperation can also be attributed to the low allowances admissible to them and the frequent adjournments of proceedings. Inability of the official witnesses such as investigating officers and medical experts to appear on the dates summoned to appear as witnesses, because transferred or engaged elsewhere, is also an important contributory factor towards protracted trials.[55]
4. Quite often, there is non-service on time or the delay in the issue of summons of service by the *ahalmad*, there is also delay in the return of the process from the police station.
5. Cross-examination of each and every witness is sometimes unnecessary and time-consuming.
6. Generally, there is inadequacy and deficiency of record rooms and copying facilities in the courts.

The right to speedy dispensation of criminal justice, as shown in the preceding discussion, is a highly vulnerable kind of fundamental right and does not hold much promise for achieving any worthwhile break through in curbing delays in the administration of criminal justice. Not only the right, as such, has severe inherent limitations but it is also extremely doubtful whether all that is being transmitted by the higher judiciary to the lower rungs of the judiciary, police and prison administrator in the form of decisions and directions would register any impact and make any significant dent in the highly impregnable and inert criminal justice system operating at present in the country.

CRIMINAL COURTS IN INDIA

For a discussion of the trials in criminal courts some knowledge of the constitution and powers of the courts in India is necessary. There are four classes of criminal courts created under the Criminal Procedure Code. Besides these courts, the Supreme Court and High Courts created by the Constitution, wield wide powers in criminal matters. High Courts have also been given original as well as appellate jurisdictions under the Code of Criminal Procedure.

54. As per the findings of the same research study (*supra* note 53), a prosecutor has to handle about 700 files at any given time in the Delhi courts.

55. In *John Albert* v. *State*, 1985 Cr LJ 478, it was mentioned that in a certain trial court, out of 1800 pending cases before it, 800 cases lingered on because the investigating officers could not be examined due to their non-availibility. Under the prevailing circumstances, Patna High Court, on its administrative side, had to take the decision that all those cases to be treated as closed where investigating officers or doctors had not turned up for evidence for two years.

TABLE 5

DISPOSAL OF IPC CRIME CASES BY COURTS DURING 1993

SL. NO.	CRIME HEADS	TOTAL NO. OF CASES FOR TRIAL INCLUDING PENDING CASES	NO. OF CASES				
			COMPOUNDED OR WITHDRAWN	IN WHICH TRIALS WERE COMPLETED			PENDING TRIAL
				CONVICTED	ACQUITTED OR DISCHARGED	TOTAL {(5) + (6)}	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1	MURDER	125843	303	7958	11248	19206	106334
2	ATTEMPT TO COMMIT MURDER	97706	774	6175	9638	15813	81119
3	C.H. NOT AMOUNTING TO MURDER	14151	94	959	1304	2263	11794
4	RAPE	38178	137	1907	4386	6293	31748
5	KIDNAPPING & ABDUCTION	48194	608	2306	4921	7227	40359
	(*i*) OF WOMEN & GIRLS	37635	492	1559	3799	5358	31785
	(*ii*) OTHERS	10559	116	747	1122	1869	8574
6	DACOITY	32646	92	1056	2776	3832	28722
7	PREPARATION & ASSEMBLY FOR DACOITY	4384	4	296	444	740	3640
8	ROBBERY	66746	297	2882	5495	8377	58072
9	BURGLARY	209845	3363	15942	19790	35732	170750
10	THEFT	603378	8218	50543	49483	100026	495134

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
11	RIOTS	379640	13669	14865	36162	51027	314944
12	CRIMINAL BREACH OF TRUST	67246	968	2386	5113	7499	58779
13	CHEATING	79722	1480	3294	5620	8914	69328
14	COUNTERFEITING	1798	57	90	181	271	1470
15	OTHER IPC CRIMES	2734919	107811	235153	250479	485632	2141476
16	TOTAL COGNIZABLE CRIMES UNDER IPC	4504396	137875	345812	407040	752852	3613669

TABLE 6

DISPOSAL OF IPC CRIME CASES BY COURTS DURING 1993

SL. NO.	STATE/UNION TERRITORY	TOTAL NO. OF CASES FOR TRIAL INCLUDING PENDING CASES	NO. OF CASES				PENDING TRIAL	PENDENCY PERCEN-TAGE	PERCEN-TAGE OF PENDENCY TO ALL INDIA TOTAL
			COMPOU-NDED OR WITH-DRAWN	IN WHICH TRIALS WERE COMPLETED					
				CONVICTED	ACQUITTED	TOTAL [(5) + (6)]			
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
STATES :									
1	ANDHRA PRADESH	203163	6965	28673	30005	58678	137520	67.7	3.8
2	ARUNACHAL PRADESH	6538	77	207	66	273	6188	94.6	0.2
3	ASSAM	99387	4459	3179	17169	20348	74580	75.0	2.1
4	BIHAR	342768	11336	13910	35967	49877	281555	82.1	7.8
5	GOA	14131	186	608	522	1130	12815	90.7	0.4
6	GUJARAT	328890	13188	23749	30773	54522	261180	79.4	7.2
7	HARYANA	89407	371	10589	7267	17856	71180	79.6	2.0
8	HIMACHAL PRADESH	20208	1368	762	2635	3397	15443	76.4	0.4
9	JAMMU & KASHMIR	47009	1864	1894	2195	4089	41056	87.3	1.1
10	KARNATAKA	210637	10842	10683	22717	33400	166395	79.0	4.6
11	KERALA	170448	12721	6633	29017	35650	122077	71.6	3.4
12	MADHYA PRADESH	688855	18666	77758	42044	119802	550387	79.9	15.2
13	MAHARASHTRA	730566	17358	21413	42033	63446	649762	88.9	18.0
14	MANIPUR	3276	14	5	6	11	3251	99.2	0.1
15	MEGHALAYA	4893	138	309	18	327	4428	90.5	0.1

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
16	MIZORAM	2122	13	366	58	424	1685	79.4	0.0
17	NAGALAND	2493	54	329	31	360	2079	83.4	0.1
18	ORISSA	185192	561	5273	29765	35038	149593	80.8	4.1
19	PUNJAB	26763	472	2359	3910	6269	20022	74.8	0.6
20	RAJASTHAN	397445	16992	18241	15012	33253	347200	87.4	9.6
21	SIKKIM	848	1	157	70	227	620	73.1	0.0
22	TAMIL NADU	233486	3256	56773	32602	89375	140855	60.3	3.9
23	TRIPURA	5023	170	112	790	902	3951	78.7	0.1
24	UTTAR PRADESH	422448	14113	47833	42536	90369	317966	75.3	8.8
25	WEST BENGAL	137155	1357	3693	11049	14742	121056	88.3	3.3
	TOTAL (STATES)	4373151	138542	335508	396257	733765	3502844	80.1	96.9
UNION TERRITORIES :									
26	A & N ISLANDS	2299	75	132	80	212	2012	87.5	0.1
27	CHANDIGARH	3213	1	350	269	619	2593	80.7	0.1
28	D & N HAVELI	947	0	106	176	282	665	70.2	0.0
29	DAMAN & DIU	353	21	28	40	68	264	74.8	0.0
30	DELHI	119846	0	8119	7298	15417	104429	87.1	2.9
31	LAKSHADWEEP	53	1	6	5	11	41	77.4	0.0
32	PONDICHERRY	4534	1235	1563	915	2478	821	18.1	0.0
	TOTAL (UTs)	131245	1333	10304	8783	19087	110825	84.4	3.1
	TOTAL (ALL INDIA)	4504396	137875	345812	407040	752852	3813669	80.2	100.0

Note : Percentage less than 0.05 is also shown as 0.0.

TABLE 7

DISPOSAL OF L & SL CRIME CASES BY COURTS DURING 1993

(STATE & UT-WISE)

SL. NO.	STATE/UNION TERRITORY	TOTAL NO OF CASES FOR TRIAL INCLUDING PENDING CASES	NO. OF CASES					PENDENCY PERCEN-TAGE	PERCEN-TAGE OF PENDENCY TO ALL INDIA TOTAL
			COMPOUN-DED OR WITH-DRAWN	IN WHICH TRIALS WERE COMPLETED			PENDING TRIAL		
				CONVIC-TED	ACQUITTED OR DISCHARGED	TOTAL-[(5) + (6)]			
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
STATES :									
1	ANDHRA PRADESH	731118	1102	691972	12409	704381	25635	3.5	0.9
2	ARUNACHAL PRADESH	202	0	9	2	11	191	94.6	0.0
3	ASSAM	9144	162	610	1224	1834	7148	78.2	0.3
4	BIHAR	30902	1387	2567	2645	5212	24303	78.6	0.9
5	GOA	6677	2	1623	87	1710	4965	74.4	0.2
6	GUJARAT	806094	2087	63293	87312	150605	653402	81.1	24.0
7	HARYANA	77173	1	11578	7465	19043	58129	75.3	2.1
8	HIMACHAL PRADESH	17371	68	925	2377	3302	14001	80.6	0.5
9	JAMMU & KASHMIR	5816	1	253	271	524	5291	91.0	0.2
10	KARNATAKA	521908	9929	356521	15465	371986	139993	26.8	5.1
11	KERALA	11324	111	3038	1531	4569	6644	58.7	0.2
12	MADHYA PRADESH	326905	120	218151	5438	223589	103196	31.6	3.8
13	MAHARASHTRA	1214104	8666	282017	65638	347655	857783	70.7	31.5

14	MANIPUR	3253	3	1878	0	1878	1372	42.2	0.1
15	MEGHALAYA	713	0	205	1	206	507	71.1	0.0
16	MIZORAM	725	0	295	27	322	403	55.6	0.0
17	NAGALAND	1024	3	185	2	187	834	81.4	0.0
18	ORISSA	11380	2	1164	2553	3717	7661	67.3	0.3
19	PUNJAB	44189	614	9897	6086	15983	27592	62.4	1.0
20	RAJASTHAN	65128	323	8592	2128	10720	54085	83.0	2.0
21	SIKKIM	583	0	422	13	435	148	25.4	0.0
22	TAMIL NADU	1045887	6933	707483	77445	784928	254026	24.3	9.3
23	TRIPURA	234	1	18	35	53	180	76.9	0.0
24	UTTAR PRADESH	689743	2359	219776	62132	281908	405876	58.8	14.9
25	WEST BENGAL	376047	71782	283434	3322	286756	17509	4.7	0.6
	TOTAL (STATES)	6997644	105858	2865906	355808	3221614	2670474	44.5	98.0
UNION TERRITORIES :									
26	A & N ISLANDS	5157	0	2953	29	2982	2175	42.2	0.1
27	CHANDIGARH	634	0	318	52	370	264	41.6	0.0
28	D & N HAVELI	65	0	28	3	31	34	52.3	0.0
29	DAMAN & DIU	25	0	1	5	6	19	76.0	0.0
30	DELHI	43078	0	7116	3631	10747	32331	75.1	1.2
31	LAKSHADWEEP	10	0	8	0	8	2	20.0	0.0
32	PONDICHERRY	71213	0	51072	22	51094	20119	28.3	0.7
	TOTAL (UTs)	120182	0	61486	3742	65238	54944	45.7	2.0
	TOTAL (ALL INDIA)	6117826	108888	2927402	159950	3286782	2725418	44.5	100.0

Note : Percentage less than 0.05 is also shown as 0.0.

TABLE 8

PERCENTAGE OF L & SL CRIME CASES DISPOSED OF BY COURTS DURING 1993

SL. NO	CRIME HEAD	PERCENTAGE OF CASES TO TOTAL CASES FOR TRIAL				
		COMPOUNDED OR WITH-DRAWN	IN WHICH TRIALS WERE COMPLETED			PENDING TRIAL
			CONVICTED	ACQUITTED OR DISCHARGED	TOTAL [(4) + (5)]	
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1	ARMS ACT	0.3	13.5	7.7	21.2	78.6
2	NARCOTIC DRUGS & PSY. SUBSTANCES ACT	0.2	7.5	9.3	16.8	83.0
3	GAMBLING ACT	0.2	36.1	5.7	41.8	58.1
4	EXCISE ACT	0.3	22.5	8.1	30.6	69.1
5	PROHIBITION ACT	0.4	20.3	8.7	29.0	70.6
6	EXPLOSIVES & EXPLOSIVE SUBS. ACT	0.1	7.5	10.7	18.3	81.7
7	IMMORAL TRAFFIC (PREVENTION) ACT	0.0	53.4	5.6	59.0	40.9
8	INDIAN RAILWAYS ACT	0.4	54.1	2.0	56.1	43.5
9	REGISTRATION OF FOREIGNERS ACT	0.2	47.8	7.2	55.0	44.9
10	PROTECTION OF CIVIL RIGHTS ACT	1.0	5.8	11.8	17.6	81.4
11	INDIAN PASSPORT ACT	0.5	56.6	3.1	59.7	39.8
12	ESSENTIAL COMMODITIES ACT	1.3	6.1	7.8	13.9	84.8
13	TERRORIST & DISRUPTIVE ACTIVITIES ACT	0.2	3.1	3.8	6.9	92.9
14	ANTIQUITY & ART TREASURE ACT	0.0	8.8	14.7	23.5	76.5
15	DOWRY PROHIBITION ACT	3.9	6.0	11.3	17.3	78.8
16	OTHER L & SL CRIMES	2.9	70.5	3.9	74.4	22.6
17	TOTAL COGNIZABLE CRIMES UNDER L & SL	1.7	47.9	5.9	53.7	44.5

Note : Percentage less than 0.05 is also shown as 0.0.

TABLE 9

DISPOSAL OF PERSONS ARRESTED UNDER IPC CRIMES BY COURTS DURING 1993

SL. NO.	CRIME HEAD	TOTAL NO. OF PERSONS UNDER TRIAL INCLUDING THOSE FROM PREVIOUS YEAR	NO. OF PERSONS WHOSE			NO. OF PERSONS CONVICTED	PERCENTAGE OF PERSONS	
			CASES COMPOUNDED OR WITHDRAWN	TRIAL COMPLETED	TRIAL REMAINED PENDING		WHOSE TRIALS REMAINED PENDING [(COL. (6) X 100/COL. (3)]	CONVICTED TO TRIALS COMPLETED [(COL (7) X 100/COL. (6)]
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1	MURDER	351160	593	53249	297318	20738	84.7	38.9
2	ATTEMPT TO COMMIT MURDER	284578	2149	45155	237274	15626	83.4	34.6
3	C.H. NOT AMOUNTING TO MURDER	36511	244	6050	30217	2605	82.8	43.1
4	RAPE	60438	233	10006	50199	2956	83.1	29.5
5	KIDNAPPING & ABDUCTION	104972	970	15741	88261	5083	84.1	32.3
	(*i*) OF WOMEN & GIRLS	79647	799	10715	68133	3446	85.5	32.2
	(*ii*) OF OTHERS	25325	171	5026	20128	1637	79.5	32.6
6	DACOITY	161204	352	20598	140254	5037	87.0	24.5
7	PREPARATION & ASSEMBLY FOR DACOITY	22650	2	3320	19328	1231	85.3	37.1
8	ROBBERY	139791	409	20744	118638	6979	84.9	33.6
9	BURGLARY	394406	3975	69518	320913	27512	81.4	39.6
10	THEFT	905403	11968	144871	748564	60721	82.7	41.9
11	RIOTS	2484451	77948	324290	2082213	86719	83.8	26.7

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
12	CRIMINAL BREACH OF TRUST	89266	1417	11597	76252	3695	85.4	31.9
13	CHEATING	117220	1724	14863	100633	5390	85.8	36.3
14	COUNTERFEITING	3770	85	731	2954	209	78.4	28.6
15	OTHER IPC CRIMES	4738589	217873	823353	3697363	335242	78.0	40.7
16	TOTAL COGNIZABLE CRIMES UNDER IPC	9894409	319942	1564086	8010381	57973	81.0	37.1

TABLE 10

DISPOSAL OF PERSONS ARRESTED UNDER L & SL CRIMES BY POLICE DURING 1993

SL. NO.	CRIME HEAD	TOTAL NO. OF PERSONS UNDER-ARREST* INCLU-DING THOSE FROM PREVIOUS YEAR	PERSONS RELEASED BEFORE TRIAL		PERSONS CHARGE-SHEETED		PERSONS UNDER INVESTIGATION AT THE END OF THE YEAR	
			NO.	PERCEN-TAGE TO TOTAL	NO.	PERCEN-TAGE TO TOTAL	NO.	PERCEN-TAGE TO TOTAL
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1	ARMS ACT	80104	1276	1.6	67293	84.0	11535	14.4
2	NARCOTIC DRUGS & PSY. SUBSTANCES ACT	34967	463	1.3	22291	63.7	12213	34.9
3	GAMBLING ACT	349269	874	0.3	334096	95.7	14299	4.1
4	EXCISE ACT	117508	5316	4.5	97076	82.6	15116	12.9
5	PROHIBITION ACT	733135	9581	1.3	624826	85.2	98728	13.5
6	EXPLOSIVES & EXPLOSIVE SUBS. ACT	11597	412	3.6	7189	62.0	3996	34.5
7	IMMORAL TRAFFIC (PREVENTION) ACT	16827	76	0.5	15514	92.2	1237	7.4
8	INDIAN RAILWAYS ACT	28327	1123	4.0	25413	89.7	1791	6.3
9	REGISTRATION OF FOREIGNERS ACT	3622	117	3.2	3183	87.9	322	8.9
10	PROTECTION OF CIVIL RIGHTS ACT	11580	543	4.7	8951	77.3	2086	18.0
11	INDIAN PASSPORT ACT	3037	8	0.3	2496	82.2	533	17.6
12	ESSENTIAL COMMODITIES ACT	13137	703	5.4	7691	58.5	4743	36.1
13	TERRORIST & DISRUPTIVE ACTIVITIES ACT	8753	1410	16.1	1761	20.1	5582	63.8
14	ANTIQUITY & ART TREASURE ACT	45	1	2.2	35	77.8	9	20.0

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
15	DOWRY PROHIBITION ACT	8033	622	7.7	5322	66.3	2089	26.0
16	OTHER L & SL CRIMES	3397843	293704	8.6	2977496	87.6	126643	3.7
17	TOTAL COGNIZABLE CRIME UNDER L & SL	4817784	316229	6.6	4200633	87.2	300922	6.2

* In custody or on bail.

TABLE 11

DISPOSAL OF PERSONS ARRESTED UNDER L & SL CRIMES BY POLICE DURING 1993

SL. NO.	STATE/UNION TERRITORY	TOTAL NO. OF PERSONS UNDER ARREST* INCLUDING THOSE FROM PREVIOUS YEAR	NUMBER OF			PENDENCY PERCENTAGE	PERCENTAGE OF PENDENCY TO ALL INDIA TOTAL
			PERSONS RELEASED BEFORE TRIAL	PERSONS CHARGE-SHEETED	PERSONS UNDER INVESTI-GATION AT THE END OF THE YEAR		
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
STATES							
1	ANDHRA PRADESH	742635	12050.	703687	26898	3.6	8.9
2	ARUNACHAL PRADESH	209	46	123	40	19.1	0.0
3	ASSAM	12454	1058	2669	8727	70.1	2.9
4	BIHAR	22608	527	17896	4185	18.5	1.4
5	GOA	3117	14	2708	395	12.7	0.1
6	GUJARAT	325542	126	264091	61325	18.8	20.4
7	HARYANA	39289	393	30598	8298	21.1	2.8
8	HIMACHAL PRADESH	7733	65	5763	1905	24.6	0.6
9	JAMMU & KASHMIR	2075	323	1315	437	21.1	0.1
10	KARNATAKA	470045	2406	460404	7235	1.5	2.4
11	KERALA	20879	5230	13524	2125	10.2	0.7
12	MADHYA PRADESH	352867	181	350639	2047	0.6	0.7
13	MAHARASHTRA	528552	7240	477142	44170	8.4	14.7
14	MANIPUR	3754	591	2133	1030	27.4	0.3

15	MEGHALAYA	524	6	266	252	48.1	0.1
16	MIZORAM	982	0	943	39	4.0	0.0
17	NAGALAND	1194	177	652	365	30.6	0.1
18	ORISSA	7800	167	7624	9	0.1	0.0
19	PUNJAB	26104	722	17650	7732	29.6	2.6
20	RAJASTHAN	26471	184	25754	533	2.0	0.2
21	SIKKIM	520	165	348	7	1.3	0.0
22	TAMIL NADU	1138215	270700	788074	79441	7.0	26.4
23	TRIPURA	284	42	121	121	42.6	0.0
24	UTTAR PRADESH	456101	11405	426899	17797	3.9	5.9
25	WEST BENGAL	564841	2108	541266	21467	3.8	7.1
	TOTAL (STATES)	4754795	315928	4142289	296580	6.2	98.8
	UNION TERRITORIES :						
26	A & N ISLANDS	2863	0	2762	101	3.5	0.0
27	CHANDIGARH	562	23	512	27	4.8	0.0
28	D & N HAVELI	71	0	69	2	2.8	0.0
29	DAMAN & DIU	16	0	7	9	56.3	0.0
30	DELHI	24568	271	20118	4179	17.0	1.4
31	LAKSHADWEEP	28	0	28	0	0.0	0.0
32	PONDICHERRY	34881	9	34848	24	0.1	0.0
	TOTAL (UTs)	62989	303	58344	4342	8.2	1.4
	TOTAL (ALL INDIA)	4817784	316228	4200633	300922	6.2	1000

Note : 1. * In custody or on bail.

2. Percentage less than 0.05 is also shown as 0.0.

TABLE 12

DISPOSAL OF PERSONS ARRESTED UNDER I. & SL CRIMES BY COURTS DURING 1993

SL. NO.	CRIME HEAD	TOTAL NO. OF PERSONS UNDER TRIAL INCLUDING THOSE FROM PREVIOUS YEAR	NO. OF PERSONS WHOSE			NO. OF PERSONS CONVIC-TED	PERCENTAGE OF PERSONS	
			CASE COMPOU-NDED OR WITH-DRAWN	TRIAL COMPLE-TED	TRIAL REMAINED PENDING		WHOSE TRIALS REMAINED PENDING (COL. (6) X 100/ COL. (3)	CONVICTED TO TRIALS COMPLETED [(COL. (7) X 100/COL. (6)]
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1	ARMS ACT	242946	438	53502	189006	33153	77.8	62.0
2	NARCOTIC DRUGS & PSY. SUBSTANCES ACT	78807	142	13051	65614	5740	83.3	44.0
3	GAMBLING ACT	775582	1229	302091	472262	252645	60.9	83.6
4	EXCISE ACT	276199	754	89180	186265	67507	67.4	75.7
5	PROHIBITION ACT	1768485	9058	524357	1235070	374568	69.8	71.4
6	EXPLOSIVES & EXPLOSIVE SUBS. ACT	23892	34	4269	19589	2004	82.0	46.9
7	IMMORAL TRAFFIC (PREVENTION) ACT	28393	141	15532	12720	13864	44.8	89.3
8	INDIAN RAILWAYS ACT	48413	96	22031	26286	21066	54.3	95.6
9	FOREIGNERS REGISTRATION ACT	4767	3	3076	1688	2738	35.4	89.0
10	PROTECTION OF CIVIL RIGHTS ACT	30411	377	6177	23857	1589	78.4	25.7
11	INDIAN PASSPORT ACT	3822	28	1621	2173	1409	56.9	86.9
12	ESSENTIAL COMMODITIES ACT	37653	91	5697	31865	2354	84.6	41.3

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
13	TERRORIST & DISRUPTIVE ACTIVITIES ACT	5996	34	414	5548	189	92.5	45.7
14	ANTIQUITY & ART TREASURE ACT	102	3	20	79	4	77.5	20.0
15	DOWRY PROHIBITION ACT	15492	328	2542	12622	901	81.5	35.4
16	OTHER L & SL CRIMES	3901150	114556	2778705	1007889	2579097	25.8	92.8
17	TOTAL COGNIZABLE CRIMES UNDER L & SL	7242110	127312	3822265	3292533	3358828	45.5	87.9

Court of Sessions

These are established by the State Governments, one each for each session division in the State, but the appointment of the Sessions Judge is made by the High Courts in order to maintain the independence of the judiciary. Additional and Assistant Sessions Judges may also be appointed by the High Courts.

Like the High Courts, the Sessions Judges and Additional Sessions Judges can pass any sentence authorised by law but any sentence of death passed by them is subject to confirmation by the High Court. An Assistant Sessions Judge cannot award death sentence or imprisonment exceeding ten years.

Judicial Magistrates

In every district of non-metropolitan areas the State Government may appoint any number of judicial magistrates of the first class and second class after consultation with the High Court. One judicial magistrate of the first class in each district shall be appointed by the High Court as the Chief Judicial Magistrate. The High Court may also appoint any first class judicial magistrate as Additional Chief Judicial Magistrate and he shall have the same powers as those of Chief Judicial Magistrate.

Section 29 of the Code lays down the sentences which can be passed by the magistrates :

1. The court of Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years.

2. The court of a magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding five thousand rupees, or of both.

3. The court of a magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, or of fine not exceeding one thousand rupees, or of both.

In metropolitan areas the courts of metropolitan magistrates are established. The High Court also appoints Chief Metropolitan and Additional Metropolitan Magistrates. Any district or town whose population exceeds one million may be notified to be a metropolitan area by the State government. The jurisdiction and powers of every metropolitan magistrate shall extend throughout the metropolitan area. The powers of the court of a Chief Metropolitan Magistrate are the same as those of Chief Judicial Magistrate and a metropolitan magistrate enjoys the powers of the court of a magistrate of the first class.

Executive Magistrates

In addition to the judicial magistrates, executive magistrates are also appointed by the State Government in each district. One of the executive magistrates is appointed as the District Magistrate and all the executive magistrates, except the Additional District Magistrates, are subordinate to him. The executive magistrates are not controlled by the High Court and are from the executive branch of the government. The executive magistrates are generally assigned to deal with certain provisions of the Criminal Procedure Code like those relating to preventive action, disputes relating to immovable property and situations created by public nuisances and breach of peace.

Procedure — Crime to Conviction

A crime committed may be either cognizable or non-cognizable depending upon the gravity attached to it in the scheme of the Criminal Procedure Code. Cognizable offences are graver offences compared to the non-cognizable offences and in such cases a police officer may arrest without warrant which is not possible in offences falling in the other category.[56] While in cognizable offences investigation may be commenced by the police on their own initiative, they cannot investigate a non-cognizable case without the order of a magistrate having power to try such case or commit the case for trial.[57] Police officers authorised to investigate into the commission of an offence are empowered to examine orally any person supposed to be acquainted with the facts and circumstances of the case.[58]

Generally speaking, a search warrant from a magistrate is needed to enable a police officer to effect searches and seizures of the premises or of the incriminating materials suspected to be connected with the crime but in appropriate cases the police officer may go ahead with search and seizure even without warrant.[59] The procedure for search and seizure is elaborately provided in the Criminal Procedure Code.[60]

If the investigation leads the officer in charge of the police station to believe that there is sufficient evidence to indicate a reasonable case against the accused person, the officer shall forward the accused to the magistrate empowered to act under the Code. In the absence of sufficient material against the person, he is to be released by the police.

56. First Schedule of the Code.
57. Sections 155, 156.
58. Section 161.
59. Section 165.
60. Section 100.

Cognizance by Magistrate

A magistrate empowered under the Criminal Procedure Code may take cognizance of an offence in one of the three ways—[61]

(*i*) upon receiving a complaint of facts which constitute such offence ;

(*ii*) upon a police report of such facts;

(*iii*) upon information received from any person other than a police officer, or upon his own knowledge that such offence has been committed.

The magistrate taking cognizance of the offence may dismiss the proceedings after preliminary enquiry if there appears to be no good reason to proceed with the case.[62] Otherwise the magistrate issues a summons or a warrant to the accused for his appearance before him.[63] If the case is exclusively triable by the sessions judge, the magistrate has to commit the accused to the sessions court.

Trial of the Accused Person

Four modes of trial are provided in the Code, viz., trial before a court of session, trial of warrant cases by magistrate, trial of summons cases by magistrate and summary trials.

As discussed earlier, the sessions court has to try the more serious offences. In warrant cases triable by the magistrate, an elaborate procedure, almost the same as in a sessions court, is followed while summons cases are disposed of by following a simpler and shorter procedure. Summary procedure is almost the same as the procedure for summons cases and is to be followed in all summons cases and a few other offences.[64]

A trial in a sessions court is always conducted by the public prosecutor. The starting point of the trial is the presentation of the case against the accused by the prosecutor. The sessions judge has to consider whether there are sufficient grounds for proceeding against the accused after perusing the record and submissions, if any, of the accused. If the judge forms the opinion that there are no sufficient grounds for proceeding against the accused, he shall then discharge the accused after giving reasons for his action. Otherwise if there are grounds, charges shall be framed against the accused. A charge is an accusation containing all the relevant details about the offence allegedly committed by the accused. Without a proper charge the accused would not be in a position to defend himself in an effective manner. If the accused pleads guilty to the charge,

61. Section 190.
62. Section 203.
63. Section 2(x) defines warrant cases as those which are punishable with two or more than two years' imprisonment. Others are summons cases.
64. Section 260.

the judge may convict him accordingly. In case he does not, a date is fixed for hearing the prosecution's evidence and the accused has the right to cross-examine the witnesses for the prosecution. If at this stage the judge is of the view that there is no evidence to support the prosecution, the accused shall be acquitted. If the judge finds that there is some worthwhile evidence against the accused and, therefore, no order of acquittal is passed, the accused is to be called upon to enter on his defence. When the defence case has been heard the prosecutor sums up his case to which the defence lawyer has the right to reply. The judge shall give a judgment in the case after hearing the arguments and point of law. In case of conviction the judge may either pass an order of probation and Section 360 of the Code or award him any punishment authorised by law. The judge, however, shall have to give a hearing to the accused on the question of sentence.

The trial of a warrant case by a magistrate proceeds almost on the same lines described above. The procedure in summons cases is however different in a number of ways. In warrant cases, charge is framed against the accused person if a *prima facie* case is made out against him. In summons cases, the particulars of the offence are stated to the accused when he appears before the magistrate. He is asked whether he pleads guilty and in case he does, a summary conviction may follow. In summons cases, prosecution evidence is recorded only if the accused does not plead guilty, while in warrant cases, it is only after the evidence of the prosecution has been given and a charge is framed that the accused is questioned about his guilt.

Appeals

There is an elaborate system of appeals in India from the decisions of the trial courts to the High Courts[65] and eventually to the Supreme Court in some limited situations.[66]

As regards the appeals to the High Court, an appeal is possible both against acquittal and conviction. The right of at least one appeal against conviction in serious cases is a substantial right and the High Court should not, therefore, summarily reject such an appeal. The following principles have been laid down in some of the judgments of the Supreme Court regarding the jurisdiction of the appellate courts :

1. An appellate court has full powers to review the evidence upon which the order of the trial court is founded.

65. *See* in particular Sections 410 and 417 of the Criminal Procedure Code.
66. Articles 132, 134 and 136 of the Constitution.

2. The appellate court should bear in mind the fact that the trial court had the benefit of seeing the witness box : a benefit not available to the appellate courts.

3. If two reasonable conclusions can be reached on the basis of the evidence on record, the appellate court should not disturb the findings of the trial court.

4. There is a presumption of innocence in favour of accused which has to be kept in mind, especially when the accused has been acquitted by the court below. Benefit of doubt, if any, must therefore be given to the accused.

The Supreme Court, quite understandably, has been given a very limited jurisdiction regarding criminal matters under the Constitution. An appeal is possible in the following situations:

1. Where an order of acquittal by a trial court is reversed by the High Court and the accused is sentenced to death.
2. Where the High Court certifies a case as fit for appeal to the Supreme Court because it involves a substantial question of law.
3. Where special leave to appeal is granted in a case by the Supreme Court.

Conclusions

It should be evident from a perusal of the various constitutional and legal provisions and other safeguards provided in trial and appeals that the present system is heavily loaded in favour of the accused person. It can, therefore, be quite safely assumed that a person who has been convicted is rightly convicted but the same cannot be assumed when someone is acquitted. In the past not only did the system work against the accused persons, the punishments awarded were also draconian. Now it is the other way round. In fact now a general criticism made against the administration of criminal justice is that accused persons are overprotected by it which is contrary to the public interest. This along with the legal aid facilities available now and the multiplicity of appeals has resulted in greater litigation and longer hearings making impossible demands on an already overloaded criminal justice system.

Stemming from the general belief that the massive safeguards for accused persons are somewhat irrational and out of proportion with the protection now afforded to law-abiding citizens, came recently the various suggestions from Chief Justice Warren Burger of the U.S.A.[67] According to him only one round of appeal per defendant should be enough. Subsequent judicial review should be limited to "genuine claims of miscarriage of

67. Time, February 23, 1981.

justice" and should not hinge on "technical errors, unrelated to guilt or innocence". Further, he urged greater stringency regarding bail to prevent the release of suspects likely to commit a crime while released on bail.

The biggest challenge to the contemporary criminal jurisprudence is to devise a system which while protecting the legitimate interests of accused persons shall not pamper them unduly. It is only then that criminal law will be able to serve the interests of the community at large.

Chapter III

EXPLANATION OF CRIME — INDIVIDUALISTIC APPROACHES

As a result of barbarity and arbitrariness in the criminal law and its processes in Europe in the 18th century the classical school represented by Beccaria and Bentham came into existence. Any discussion of the development of modern criminological thinking must commence with reference to Cesare Bonesana, Marchese de Beccaria (1738-1794). The writings of Montesquieu, Hume, Bacon and Rousseau had a great liberalising effect on him. His famous work *Essays on Crimes and Punishments* was received extremely well all over Europe and proved a great stimulant to criminological thinking in the contemporary West. He sought to humanize the criminal law by insisting on the natural rights of human beings. He was opposed to severe punishments, torture and death penalty and in particular fought a grand battle against severe punishments for crimes such as adultery, sodomy and the murder of illegitimate children. In his urge for detection of the sources from which these crimes sprang, he was in fact raising a fundamental question as to why certain types of crimes were committed and this was despite the fact that Beccaria belonged to the school of free-will theory. As a result of Beccaria's work and the wholehearted support given to him by a great thinker like Voltaire, the rigours of criminal law were reduced in many European countries and capital punishment was abolished in quite a few of them.

Jeremy Bentham (1748-1832), the great English legal philosopher and penal reformer, was greatly influenced by Beccaria and carried on the work in the same direction subsequently. Bentham, like Beccaria, was an outright utilitarian and to him the only rational basis of any law could be the greatest happiness of the greatest numbers. The principle, known as utilitarian hedonism, requires that punishment, being an evil in itself, should not exceed more than what is absolutely necessary to produce the desired effect on the criminal and society.

On account of the good work done by Beccaria, interest grew towards crime and the criminal, resulting in the appearance of the neo-classical school by the middle of the 19th century. This school was responsible for emphasising that the mental element ought not to be ignored while dealing with certain types of offenders. As a result protections were accorded to child and insane offenders under the penal law and the question of premeditation or lack of it in the commission of certain offences, also became relevant.[1]

1. Sections 82 and 83 of the Indian Penal Code excusing children from criminal liability; Section 84

The Italian Positive School

The stage was now well set for the advent of the Positive school of Italy which focussed its attention on the personality of the offender and rejected the free-will theory. The school owes its origin to the contributions of Cesare Lombroso (1836-1909), Enrico Ferri (1856-1928) and Raffaele Garofalo (1852-1934). These and some other criminologists tried to explain crime primarily in terms of factors within the criminal i.e. physical, biological and mental traits and, therefore, either ignored external factors altogether or gave them secondary importance. There are, on the other hand, criminologists, who argue that criminal behaviour cannot be explained without reference to social, sociological, cultural and economic factors and criminal conduct is largely attributable to factors extraneous to the offender. The former approach is referred to as 'subjective' while the latter as 'objective' by Donald R. Taft. This may cause some confusion. The use of the word 'subjective' may create an impression that personal speculation or opinion of the investigator of causation is involved. It will, therefore, be more appropriate to call them individualistic and environmental approaches respectively. As is evident, most of the individualistic theories have been discredited to a very great extent by modern researches and theories but their main utility lies in the fact that for the first time, the focus of attention was shifted from crime to the criminal. A brief survey of some of the more important works would not be out of place.

Though the first scientific attempts to understand the personality of offenders, mainly in physical terms, were made by Lombroso in the 19th century, general speculations and comments about them were made much earlier. In the classical works of Homer and Shakespeare, for instance, one finds the evil nature of some of the characters matched by their ugly appearances and the same is reflected in the portrayal of the demons in the Greek, Indian and other ancient mythologies and folklores. Physiognomists were among the earliest who made speculations regarding a direct relationship between the appearance and criminal propensities of human beings. An interesting example of the early period is of Aristotle who was examined by a Greek physiognomist who allegedly found indications of a ruthless personality and an inclination to be alcoholic.[2]

Phrenology was one step forward in the same direction. It was an attempt to find meaningful correlation between the skull, the brain and the social behaviour. By the 18th century, physiognomy, the study of facial features, and phrenology, the study of the external conformation of the

providing the defence of insanity : Exceptions (1) and (4) to Section 300, exonerating on the ground of grave and sudden provocation and absence of premeditation are some examples.

2. Havelock Ellis : *The Criminal* (2nd Edn., New York, 1900), p. 27.

cranium, developed almost as disciplines.[3] In the U.S.A. many surveys were conducted of the prisoners by phrenologists but the significance of the findings in such surveys is extremely limited as seen in retrospect since the exercises were conducted without any corresponding measurements of controlled groups.

Lombroso and other Positivists

Cesare Lombroso is regarded as the father of modern criminology since he was the first to employ scientific methods in explaining criminal behaviour and shifted the emphasis from crime to the criminal.[4] A man of multifarious interests, Lombroso was trained to be a doctor and specialised in psychiatry. Eventually, by sheer chance he got interested in the anthropological study of criminals. While a doctor in the army, he noticed wider and more indecent prevalence of tattoos on the bodies of offensive soldiers as compared to the disciplined ones. Also, while dealing with insane patients, he learnt to study the insane person rather than the mental disease itself. He measured and compared the size of skulls and the degree of sensitiveness to touch in three different categories of persons, namely, insane, criminal and normal persons. Once, while performing a post-mortem examination on a notorious outlaw, he was struck by an abnormal feature in the skull; some characteristic depression on the interior of the lower part of the skull, which he had noticed also in some other forms of life. This prompted him to believe that criminals were different physically from normal persons and had physical characteristics of savages and inferior animals. This throwback or atavism in the criminal represented the punitive and savage qualities of the remote ancestors of human beings. According to Lombroso such atavistic physical stigma is disclosed by a low forehead, receding chin, ears standing out from the head, too many fingers, abundance of wrinkles, a typical size or shape of the head, and peculiarities of the eyes. The criminals in whom the atavistic qualities were disclosed were termed 'born criminals' by Lombroso and according to him about one-third of criminals belong to this group. The other major type according to him was of 'insane criminals' who committed crimes because of mental conditions like general paralysis, dementia, pellagra, alcoholism, epilepsy, idiocy, or hysteria. Subsequently Lombroso did take into account certain circumstances which can make an otherwise normal person, a criminal. This type of criminal he termed "criminaloid", a person who commits criminal and vicious acts under certain circumstances despite the absence of physical stigmata or mental aberrations.

3. Stephen Schafer : *Introduction to Criminology* (Reston : Virginia, 1976) p. 38.
4. Even before the positivists school there were some efforts to identify special physical traits in criminals in a somewhat unscientific manner. Physiognomy was the art of discovering character by observation and measurement of outward appearance, especially the face. Phrenology, another subject, sought to correlate criminal behaviour with the shape of the skull.

Lombroso's theories have been severely criticised by modern criminologists. It has been pointed out that he used the term atavism loosely since physical traits of the criminals as well as social customs were regarded by him as of atavistic significance. His assumption regarding some sort of nexus between atavism and criminal behaviour has no scientific base. He also failed to appreciate that both criminal as well as non-criminal behaviours were the result of the same process operating on the basis of various social and physical factors.

According to Gabriel Tarde, one of the many critics of Lombroso, crime being of social origin is of changing nature i.e. it depends upon social definitions and cannot be explained with reference to atavism. Tarde maintained that crime could not be attributed to some kind of insanity, a phenomenon peculiar to civilized society and could not, therefore, be found in a savage society, devoid of any such definitions. Finally, Lombroso's theory, according to Tarde, did not explain the lower rate of criminality among women having the same stigmata ; a dichotomy which may possibly be explained by a number of social and sociological factors.

Besides the fundamental objections raised against his explanation of crime, Lombroso has also been criticised for his anthropometric measurements on which he formulated his theories of criminal behaviour. Some of the more important criticisms are :

(*a*) His approach assumed individual physique as something fixed and not prone to changes. He did not take into consideration the morbid process affecting the human physique.

(*b*) For actual measurement of his subjects he depended on others and thus created doubt regarding the reliability of the data employed by him.

(*c*) Sophisticated statistical techniques, developed subsequently, were not available to Lombroso which proved his analysis to be highly deficient.

(*d*) Lombroso had no control groups and was, therefore, unable to compare the so-called characteristics of criminals with those of non-criminals.

(*e*) The data did not cover sufficient numbers and it could not, therefore, be regarded as truly representative of the relevant groups.

(*f*) He did not take into account the racial and ethnical differences among the members of his samples and treated them as homogenous which was not always the case.

It is not surprising therefore that Lombroso has been praised as well as criticised extensively for his theories to explain criminal behaviour. As mentioned earlier, he has been designated as the putative father of modern criminology because of his pioneering work dealing with the personality of criminals.

Critics like Lindesmith and Levin believe, however, that he, because of his faulty assumptions, hindered the progress of scientific criminology.[5]

Ferri, the second among the three major positivists, is closer to the contemporary line of thinking since apart from anthropological factors he also took into account geographical, psychological and economic factors while explaining criminal conduct. He classified criminals into five categories : insane criminals, born criminals, habitual criminals, criminals by passion and occasional criminals. The first category is of those who act criminally due to congenital reasons. The habitual criminal, though showing atavistic tendencies, is also influenced by social and physical environments. Criminals by passion are otherwise fit but commit the criminal act due to impulse, anger or jealousy and feel repentant subsequently.

Regarding the punishment of offenders, Ferri provided a basis for it in his positivist system of social defence. In this he emphasised two elements. Firstly, he emphasised the individualization of the offender by pointing out that the choice of means of social defence would be different for the different classes of offenders. In the case of imprisonment he was of the view that indefinite periods should be prescribed keeping in view the potential harm the person is capable of and the chances of his readjustment in the society. Indeterminate sentences, with maximum period limits, now prevalent in the U.S.A. and some other countries, represent the same philosophy in sentencing.

Garofalo was a magistrate, a senator and a professor of criminal law. He defined "natural crime" as conduct which offends the basic moral sentiment of pity and probity. Garofalo constitutes alongwith Lombroso and Ferri what has rightly been called a kind of trinity, though Garofalo differs from the other two due to his political and penal conservatism. In his major treatise known as *Criminology*, he divides criminals into four classes. "Endemic" criminals are murderers who commit offences characteristic of their locality or crimes out of passion. "Criminals deficient in probity" are thieves. "Lascivious criminals" perpetrate crimes against chastity and the "violent criminals" are affected by such environmental influences as "prejudices of honour, politics and religion".

Garofalo rejected the common belief that punishments deter potential offenders in their acts. He, however, admits the value of criminal penalties operating in a more subtle fashion by providing and reinforcing general moral attitudes toward certain forms of conduct. The law, by making such behaviour unrespectable, subjects the individual to powerful extra-legal sanctions of public opinion.

5. For a detailed criticism, *see* A. Lindesmith and Y. Levin : "*The Lombrosian Myth in Criminology*", American Journal of Sociology 42 (1937), pp. 653-71.

"No doubt for many persons the consciousness of the evil involved would destroy any pleasure which the criminal act might afford and is, therefore, sufficient to cause abstention from crime. But even these persons involuntarily think of the extralegal social reaction attendant upon the offence, namely by their honest neighbours, and this thought is continually strengthening their resolution to abstain from the acts in question."[6]

Garofalo was quite sceptical about the reform of criminals. He was greatly influenced by social Darwinism in his attitude towards criminals. As in nature, so it is in society, only the fittest have the right to survive. He, therefore, favoured death as the most efficient means of eliminating criminals. He realised however that public opinion would not support death penalty except in case of murder. He, therefore, recommended imprisonment and transportation in cases other than of murder and was of the opinion that criminals ought to make good through money payments, the material and moral damage caused by their crimes.

Post-Lombrosian Researches : The Modern Crimino-Biological School

Lombroso's theories received a severe jolt as a result of the studies made by Charles Goring which revealed that there was no significant difference between the physical characteristics of criminals and non-criminals and also among criminals of different kinds. This was stated by Goring in *The English Convict* (1913) a statistical study in which he compared measurements of 37 specific physical characteristics of some 3,000 English recidivist prisoners with similar measurements of university students, hospital patients and members of the British army.

Shortly afterwards, another development occurred in certain countries of Europe which also influenced some criminologists in the U.S.A. The school known as the Modern Crimino-Biological School originated in the third decade of the present century in Germany, Austria and Italy and sought to revive the discredited theories based on physical types. Its exaggerated claims of the relationship between criminality and certain physical traits had the blessings of the totalitarian regimes of these countries since it was in consonance with some of their notions of 'racial superiority'. Ernest Kretschmer, the famous German psychiatrist, classified the major constitutional types as *leptosome* or asthenic type, the athletic type and the pyknic type; the three types showing different behaviour.[7]

6. Quoted in Francis Allen : *The Borderland of Criminal Justice*, p. 85.
7. Inspired by Kretschmer, William H. Sheldon subsequently developed his own classification of somototypes using the expressions ectomorphs, mesomorphs and endomorphs. A discussion of these classifications is not within the scope of the present work.

Yet one more effort to relate criminal behaviour to the human organism was made in England after the Second World War with reference to abnormal combinations of chromosomes.

The optimism of a breakthrough in understanding the criminal behaviour on these lines has however faded out since the subsequent researches did not support the earlier findings and conclusions.

Studies made by Eavert A. Hootan and William H. Sheldon sought to give a new lease of life to the theories which were dependent on physical deformity in criminals but failed, as will be evident from the following discussion. As as result of the study of 13,873 male criminals in various American States and a control group consisting of 3023 persons, Hootan concluded :

> "Criminals are organically inferior. Crime is the resultant of the impact of environment upon low grade human organism."

According to him criminals were characterised by low and sloping foreheads, thin lips, compressed jaw angles, straight hair, thin beard and body hair, thick hair on the head, red-brown hair, blue-grey and mixed coloured eyes, nasal bridges and tips varying to both extremes of breadth and narrowness, protruding and small ears, tattooing, long thin necks and sloping shoulders. Hootan, however, failed to demonstrate as to why he regarded these traits as 'organically inferior'.

Hootan also tried to establish some nexus between the physical characteristics of the offenders and the type of offences committed by them. His study disclosed that murderers and robbers were of tall and thin stature, thieves and burglars were undersized, while sexual offences and assaults were committed by persons of short and heavy constitution. George B. Vold, in his *Theoretical Criminology*, contradicts such a nexus by pointing out that half of the prisoners studied by Hootan were convicted of different offences earlier.

Another notable effort to connect criminal tendencies with certain physical traits was made by William H. Sheldon. He classified the human constitution into three types which he called endomorphic, mesomorphic and ectomorphic. The first *somototype* is represented by round, soft, fat bodies with short tapering limbs and small bones; the second type is reflected in muscular bodies with large trunk, heavy chest, large wrists and hands and heavy bones; and the third is shown in lean and delicate bodies, drooping shoulders, small face and delicate bones. Sheldon found the delinquent to be predominantly mesomorphic. He rejected the legal definition of delinquency as inadequate for a dynamic society and good enough for a "Ph.D. thesis in Sociology" only. He substituted an undefined expression 'disappointing performance' in place of delinquency, which has rightly been held as bizarre by some critics. As regards the findings on the basis of physical

characteristics, it has rightly been pointed out that he did not employ any control group for the purpose of comparison with non-criminals.

There is yet another defect as pointed out by Marshal B. Clinnard in the studies undertaken by Hootan and Sheldon. The two have different ideas regarding physically inferior type of people. To Hootan the criminal is an inadequately developed, runty fellow, while Sheldon chooses the husky and athletic type as the typical criminal.[8]

Finally, Sheldon and Eleanor Glueck made some studies applying the test of *somototype* on delinquent and non-delinquent school boys of Boston and found the presence of mesomorphic traits among the delinquents having "some sort of internal disharmony" conducive to delinquency. However, their general observation that "it should be even more evident that there is no unit cause of delinquency" denies physical peculiarity as a form of determination of criminal behaviour.[9]

Commenting on the inadequacy of the physical theories, Gabriel Tarde made the apt comment :

> "This school, intoxicated with the wine of natural sciences, lacks the dry, substantial bread of historical and social sciences."

Mental Deficiency

The next most popular explanation based on individualistic traits is in terms of mental deficiency in criminals. There was a time when no distinction was made between mental deficiency and insanity as maintained both in law and medicine today till the distinction was made clear by two psychologists, Jean E.D. Esquirol in France and Isaac Ray in the U.S.A. in the eighteenth and nineteenth centuries respectively.

Various studies have been made to determine the relationship between mental deficiency and criminal behaviour by employing psychometric tests. Henry H. Goddard found mental deficiency in almost half of all criminals while Goring was convinced that mental deficiency was a major cause in all criminal behaviour except the ones requiring some cleverness as in the case of fraud. Goddard's figures are not supported by 395 studies made in America and reported by Sutherland. Mary Woodward examined all the studies pertaining to the relation between low intelligence and crime and was convinced that low intelligence does not play any significant role in delinquency.[10] It will be more correct to say that mental deficiency does not play any direct role in the causation of criminal tendency in a person but indirectly it may be relevant because social adjustment can be more difficult for persons with low intelligence.

8. *Sociology of Deviant Behaviour* (1963), p. 124.
9. Elmer Hubert Johnson : *Crime, Correction and Society*, p. 114.
10. "*The Role of Low Intelligence in Delinquency*", British Journal of Delinquency, Vol. 5, pp. 281-303 (April 1955).

Mental Disorders

In terms of mental quality, an offender may be either (*a*) normal, or (*b*) pathological or abnormal. The pathological offenders vary in the magnitude and degree of abnormality and may be classified as follows :

1. The psychotics i.e. the most seriously abnormal group.

2. The neurotics and psychopaths, the group next in order of degree of abnormality.

3. The mental defectives i.e. the residue class of abnormal offenders with varying degrees of abnormality.

As regards the class of psychotics, they can further be classified into two categories i.e. those having psychosis of organic origin and those afflicted by psychosis of functional or the non-physical kind. A detailed discussion not being within the scope of the present work, what follows therefore is a brief discussion of psychosis and other mental disorders.[11]

Organic Psychosis

(*a*) *The general paralysis of the insane.*—In the early stages the patient may commit offences with 'astonishing openness and silliness'. Gradual deterioration may subsequently set in damaging the whole personality.

(*b*) *Traumatic psychosis.*—This may result from brain injuries by accident. Patients suffering from it may easily get excited and be inclined to crimes of violence.

(*c*) *Encephalitis Lethargica.*—Also known as 'sleeping sickness', this is an acute infectious fever affecting the very young persons and may lead to mental abnormality resulting in criminal behaviour, particularly of the explosive and sexual kind.

(*d*) *Senile Dementia.*—This on the other hand is a mental illness which may hit old people. It may take a depressive maniacal or paranoidal form and the kind of crime may vary accordingly.[12]

(*e*) *Puerperal Insanity.*—This may occur in women during pregnancy or in post-pregnancy period. This may be due to the birth of an illegitimate child or may be the result of economic stress and strain. The resulting crimes generally are infanticide and petty thefts.

(*f*) *Epilepsy.*—Cesare Lombroso was the first criminologist to visualise the connection between epilepsy and criminal behaviour when he pointed out that all born criminals were epileptics. He referred to the class of occasional criminals as 'epileptoids' who had a trace of epilepsy which explained their criminal tendencies. Epilepsy is a nervous disease having

11. A great mass of literature, produced by psychiatrists and psychologists exists in the area. For the brief discussion here, the present writer is indebted to Mannheim, *op. cit.*, pp. 242-311.

12. *See* the discussion on 'functional' psychosis for the concepts 'depressive', 'manic' and 'paranoid' *infra.*

various forms and it is not always easy to diagnose it in spite of the use of technical aids like electro-encephalogram. It is difficult to establish whether a particular crime was committed because of epilepsy but many instances of sudden violence without any apparent motive are attributed to epilepsy. The awareness in the patient of the handicaps of the disease may also have an indirect influence on his behaviour. It is not only that crime may be committed during an epileptic fit, it is also possible in the epileptic equivalents, which are known as states of delirium, unconsciousness, epileptic furore or post-epileptic automatism.

(*g*) Psychosis may be caused by alcohol and other intoxicants and in this way intoxicants may also contribute indirectly to crimes besides the crimes directly committed due to intoxication.

Functional Psychosis

The following are the most important kinds of functional psychosis:

(*a*) *Paranoia.*—The patient is afflicted with delusions which are 'systematised and unshapable'. The sufferer may imagine himself to be mercilessly and continuously persecuted by his enemies, real or imaginary, and the solution may appear to him to kill them for self-preservation.

In paraphrenia, a concept closely related to paranoia, the crime committed is not due to systematised delusions but may be due to sudden reactions to hallucinations.

(*b*) *Manic-depressive psychosis.*—In this the sufferer undergoes alternating moods of elation and excitement and of depression and melancholia. Offences like petty stealing, swindling are more likely to be committed in the period of excitement while crimes involving violence including murder may be committed in the depression period.

(*c*) *Schizophrenia.*—This disease, also known as 'split-mindedness' is regarded as the most frequent and important form of functional psychosis and the suffering generally commences during adolescence and gradually affects the whole personality. The patient withdraws into himself, a progressive deterioration and disorder of thought, emotions and conduct occurs alongside. The disease is also marked by defect of judgment, peculiar mannerisms, delusions and hallucinations and flights into fantasies.[13]

Neurosis and Psychopathy

There are two view points regarding the difference between neurosis and psychoneurosis on the one hand and psychosis on the other. According to one point of view the difference is not qualitative but of degree only i.e. psychosis is more severe as compared to neurosis and psychoneurosis. Others make a qualitative distinction. According to them, living in a world of fantasy, the psychotic is no longer subject to the ordinary laws of nature

13. Mannheim, *op. cit.*, p. 252.

and has completely lost contact with reality; the neurotic, on the other hand, still lives in the real world but can no longer cope with its difficulties.[14]

The relationship between crime and neurosis is not so close as is popularly imagined. According to psychiatrists the two may even be mutually exclusive in an individual. If the victim views the difficulties as the result of his own failures or shortcomings, he may unconsciously choose neurosis; if the victim perceives his problems as created by others, delinquency may be the unconscious choice. That this is the correct view is supported by an experienced prison officer of England.[15]

The word psychopathy has been given such a varied meaning and is so vague that some authorities have urged that it be abandoned. Broadly, it is used to refer to groups of mentally abnormal individuals who do not fit into the categories of neurosis, psychosis or intellectual deficiency. The term was used first by Koch in 1988 and before that almost the same concept was conveyed through the expression 'moral insanity'. Having regard to the varied use of the term 'psychopathy' the best course is to note down the various characteristics of psychopathic offenders as catalogued by Michael Craft after a perusal of the vast literature on the subject.[16] They are as follows in order of frequency :

(*a*) affectionless or lack of relation with others;
(*b*) disregard of community or group standards with anti-social behaviour on a verbal, acquisitive, personal or sexual plane;
(*c*) apparent absence of guilt feeling and failure to learn by punishment;
(*d*) emotional liability and immaturity, leading to short-circuit relations with immediate pleasure, satisfaction or unpremeditated violence;
(*e*) a lack of foresight;
(*f*) continued sexual experimentation, immaturity or aberration; and
(*g*) undue dependence on others.

Mental Disorders and Criminality: An Overall Assessment

Quite a few studies have amply demonstrated that the various mental disorders in themselves are not sufficient to explain criminal behaviour. It is being increasingly recognised now that an approach focussing on mental factors of pathological nature shall also have to give due allowance for psychological as well as social and other factors. Schuessler and Crassey wrote a well-known article in which they surveyed 113 studies conducted in the U.S.A. up to 1950.[17]

14. Mannheim, *op. cit.*, p. 257.
15. W.F. Roper in British Journal of Delinquency, Vol.1, p. 23.
16. Quoted in Mannheim, *op. cit.*, p. 264.
17. Karl F. Schuessler and Donald R. Crassey : "*Personality Characteristics of Criminals*", American Journal of Sociology, Vol. 50 (March 1950), p. 476-78.

In those studies comparisons had been made of the personality traits of delinquents with those of non-delinquents. The survey revealed that personality differences were found only in 42 per cent of the studies and no differences were found in the remaining 58 per cent. Their conclusion, therefore, though itself subject to some valid criticism, was that no significant association between criminality and personality had emerged.

Criminal Law and Mental Abnormality

The medical and legal viewpoints on mental abnormality are inevitably and irreconcilably at variance, which is not surprising, and the dichotomy can be easily explained with reference to the roles which psychiatry and law have to play in human life. The primary role of law is to safeguard the interest of the society and law has, therefore, to be normative in character. Psychiatry, on the other hand, being concerned with the mental diseases of the individual patients, psychiatrists endeavour to find solutions according to the peculiar needs of the individual. Law cannot, and certainly does not, claim to be a science like psychiatry since it has to lay down policies in clearest possible terms and the choices available to the lawmakers cannot be made without reference to social and moral values as well as to the hard realities involved in the administration of justice. While psychiatry cannot obviously base its theories on 'free will', laws can be formulated and enforced only on the basis that normally a person has a choice between right and wrong and he is therefore, responsible for making the choice.

Development of Law of Insanity

In its primitive stage, law was only concerned with external behaviour without any reference to the mental state of the law-breaker. The stage when *mens rea* became an essential element of crime was reached much later.[18] The position of an insane law-breaker was even worse than normal offenders. He was in a sense considered to be doubly guilty i.e. not only for breaking the law but also for being mad since the quality of madness was regarded as retribution for acts committed against divinity.

The present law relating to insanity as a defence in India is based on what are known as M'Naghten Rules laid down in England in the year 1843. Before taking up the M'Naghten Rules, reference may be made to two well-known English decisions in *R* v. *Arnold case*[19] and *R* v. *Hadfield*[20]. The 'wild beast' test was applied in *Arnold* which required that in order to be eligible for the defence, the accused must be totally deprived of his understanding and reasoning; so much so that he did not know what he was doing any more than an infant or a wild beast. In the next case, Hadfield suffered

18. See *infra*, Elements of crime and General Exceptions in Chapter II.
19. 16 St Tr 695.
20. 27 St Tr 1281.

from the delusion that the world was coming to an end and that he had been destined by God to sacrifice himself to save mankind. Suicide being regarded as wicked he decided to shoot King George III in order to be hanged for the crime. Quite clearly, he was not eligible for the defence of insanity if the 'wild beast' test was applied, he was nevertheless acquitted. The judicial attitude in the case reflected a more progressive attitude than in *Arnold case*, a trend which was reversed in *M'Naghten's case*[21].

M'Naghten's Rules

Daniel M'Naghten suffered from paranoia and imagined the Prime Minister, Sir Robert Peel, to be one of his enemies and decided to kill him, but happened to kill Peel's secretary by mistake. Tried for murder, M'Naghten was acquitted on the ground of insanity. The decision focussed the attention of the government and public on the uncertain state of the law of insanity in the country. The issue was debated in the House of Lords and an unusual procedure was employed to seek clarification of the law. The House submitted some abstract questions of law to the High Court Judges. The answers elicited formed the M'Naghten Rules which provide the basis of the defence of insanity in England, India, the U.S.A. and other common law countries and can be summarized as follows:

1. Everyone is presumed to be sane until the contrary is proved.

2. A person has the defence of insanity if, due to disease of the mind, he was incapable of knowing the nature and quality of his act or if he did know this, he did not know that he was doing a wrong.

3. That if a man commits a criminal act under an insane delusion, he is under the same degree of responsibility as he would have been on the facts as he imagined them to be.

This test has become rather obsolete and the judges had referred to it as based on 'partial delusions'.

It is evident from the above that it is not every kind or degree of insanity recognised by psychiatry which may provide a valid defence in criminal law. The legal concept is much narrower and is confined to the cases of total destruction of cognitive faculties i.e. when the accused is found *incapable* of distinguishing between right and wrong.

The M'Naghten Rules continue to be valid in all the countries following English law though some modifications have been made in England, Australia and in some of the jurisdictions in the U.S.A.

In India, the Penal Code incorporated the rules right from its inception and no change whatsoever has been introduced during the last 120 years or so. Section 84 of the Code provides :

21. 4 State Tr. N.S. 847 : 8 E.R. 718 : [1843-60] All E.R. Rep : 10 Cl & F 200.

"Nothing is an offence which is done by a person who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law."[22]

Criticism of the Rules

The rules have been criticised as being unscientific, vague and involving procedural difficulties for the accused. The points which are frequently made against the rules are as follows :

1. The 'right and wrong' test is concerned solely with the rational elements of knowledge and altogether ignores the equally vital questions relating to will, emotions and unconsciousness.

2. The meanings of the expressions 'quality' and 'wrong' are not clear. It is debatable whether these words are used in the legal or in the moral sense.

In the English case *R.* v. *Windle*[23], it was held that the expressions were used in the legal sense but the contrary opinion was expressed in *Stapleton* v. *Queën*[24], a case decided by a High Court in Australia. In India conflicting opinions have been expressed by the Calcutta and Allahabad High Courts.[25]

3. The rules recognise only the extreme case of insanity i.e. when there is a *complete* impairment of the cognitive faculties. According to the rules, a person is either sane or insane as if there are no shades of insanity in between the two extreme positions.

In England this has been corrected by the incorporation of the concept of 'diminished responsibility' in the Homicide Act of 1957. Section 2 of the Act provides :

"Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing; instead he is liable to be convicted of manslaughter...."

4. The defence of insanity (also 'diminished responsibility') has to be specifically raised by or on behalf of the accused with his consent. So the defence cannot be available if the accused pleads innocence;

22. The defence, as should be evident, is generally invoked in capital offences and has become almost obsolete with the gradual elimination of capital punishment from the Indian penal scene.
23. (1952) 36 Cr App R 85.
24. (1952) 86 CLR 358.
25. AIR 1949 Cal 182 and AIR 1959 All 534.

even if a reasonably credible case of insanity is made out having regard to the evidence produced by the prosecution and defence.

Irresistible Impulse

One of the criticisms against the M'Naghten Rules is that mental illness may affect not only the cognitive faculties of the actor but also his will and emotions. An individual is not criminally responsible under the irresistible impulse test, though he may be under the M'Naghten Rules if he had a mental disease that kept him from controlling his conduct despite his knowledge of the nature and quality of his act and his awareness that it was wrong.

Interestingly enough, the irresistible impulse test has been criticised both on the ground that it would let the doors of immunity too wide open and also that the test does not go far enough to extend the M'Naghten Rules. According to those who do not agree to the inclusion of the test in the defence of insanity, the test is fraught with dangers of abuse of the defence since it can never be proved or disproved whether the impulse was 'irresistible' or otherwise in a given case.

Those who want to broaden the scope of the M'Naghten Rules find the test to be inadequate. Professor Herbert Wechsler objects to the concept because it requires a total impairment of volitional capacity.[26] In Britain, the Royal Commission on Capital Punishment did not approve the test since in their view the word *impulse* implied that the defence is applicable only to those criminal acts which "have been suddenly and impulsively committed after a sharp internal conflict".

The 'irresistible impulse' test has been accepted in some jurisdictions in the U.S.A. and Australia.

The American Developments

In *Durham* v. *United States*[27], a test, subsequently known as the Durham test, was formulated which was couched in more general terms than that of *M'Naghten* and broadened the scope of the expert testimony. The new test laid down by the Court of District of Columbia was :

> "An accused is not criminally responsible if his unlawful act was the product of mental disease or defect."

The test is based on the medical truth that the human mind is to be viewed as an integrated whole and is not capable of being divided into compartments of cognitive and controlling junctions.

The Durham Rule was applauded by the medical profession but has been criticised by lawyers as a "non-rule", being ambiguous and depending too much on expert opinion. The court has tried to keep the rule within

26. Herbert Wechsler : "*The Criteria of Criminal Responsibility*", 22 University of Chicago Law Review, 1955.
27. 214 F 2d 862 (D C Cir 1954).

manageable limits through subsequent cases like *McDonald* v. *United States*[28], and *Washington* v. *United States*[29].

Shortly after the Durham Rule was pronounced by the Court of District of Columbia, the following test was suggested in the Model Penal Code of the American Law Institute:

> "*1.* A person is not responsible for criminal conduct if at the time of such conduct as result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.
>
> 2. As used in this Article, the term 'mental disease or defect' does not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."

Psychoanalytical approach

The psychoanalytical approach is based on certain concepts formulated by Sigmund Freud. According to him, *id* is the source of basic biological drives in a human being and is present at the time of birth and also operates in the unconscious state. Throughout life the *id* constantly seeks expression of a social drive. The viewpoint that we are all potential criminals is not peculiar to psychoanalytic approach alone but has been expressed by many other philosophers and writers. The great German thinker Goethe observed once : "There is no crime of which I do not deem myself capable." Dostoievsky in his novel '*The Brothers Karamazov*' wrote :

> "Nobody in the world can be the judge of the criminal before he has realised that he himself is as much a criminal as the one who confronts him.... Everyone pretends to hate evil, but deep down they all like it, all of them."

Ego is the conscious personality, an attitude which grows out of contact with the material and social world. Arising out of relations of the *id* and the *ego*, the *super ego* reflects the mores of the group shaping the individual's social experience. The *ego* mediates between *id*, the control from the *super ego*, and social processes within the community. With basic weakness of *ego* or when *ego* function is impaired due to fatigue, physical illness, intoxication, psychological conflict or any other cause, personality problems arise resulting in socially disapproved behaviour.

In times of social upheaval, the restraints exercised by society are diminished while temptations are increased. External restraints against anti-social behaviour are weakened as a result of inefficient corrupt law enforcement resulting in an increase in the crime rate. For example, during the

28. 312 F 2d 847 (D C Cir 1962).
29. 390 F 2d 444 (D C Cir 1967).

Boston police strike in the U.S.A., an immediate rise in the number of crimes was produced.

The adherents of the approach appear to hold the view that no other approach is capable of disclosing the whole truth about the criminal. The obvious merit of the psychoanalytical approach is that social factors are also accommodated in the analysis of the ultimate personality of the offender by taking into account the interaction of *ego* and *super ego*.

The difficulty in the application of psychoanalytical approach in cases of individual criminal behaviour is the fact that it is quite difficult to examine the actual mental state of a person with the tools available to psychoanalytical sciences at present. To investigate and measure emotion is an extremely complex job. Besides the lack of proper tools, it has also to be appreciated that emotions and feelings themselves may be in a flux and may undergo changes, for instance, while criminal investigation is being carried out against a person.

Physiological approach

There is yet another approach which has sought to explain the criminal behaviour in terms of glandular malfunctioning. The persons connected with endocrinology, in its heyday in the early part of the present century, made efforts to study the connections between glandular functions and human conduct with a zeal which was probably not warranted.

Many factors, social and scientific, gave rise to this approach to explain criminal behaviour. It was around the same time that great progress was made in biochemical and other scientific researches. Taft and England have made the following succinct observations in the American context :

> "While the great body of endocrinological findings were reported and interpreted with traditional scientific restraint, a number of workers in the field, perhaps caught up in their own enthusiasm, began sensationalizing their science by advocating its application as a panacea for social problems. Socially, the times were ripe : problems of urban adjustment were severely aggravated in the years before and after World War I by the vast 'new immigration' from the rural regions of southern and eastern Europe. The spoils of bootlegging and vice were being fought over in our cities by ruthless gangs of these immigrants and their children. Problems of dependency among the newcomers arose, similar to those existing today among Negroes. Criminals, the unsuccessful, the socially inadequate, the impoverished, the psychologically disturbed—all were seen by some endocrinologists as the products of malfunctioning glands."[30]

30. Taft and England : *Criminology*, 4th Edn., p. 91.

Taft and England cite the example of Dr Max G. Schlapp to show the extreme confidence which the endocrinologists had in their new science. Dr. Schlapp is quoted as follows :

> "We hope to establish that such aberrations from the norm of conduct as we call crime are explicable under pathology, that there is in fact a Criminal Imperative, an inner drive which implies these forbidden and extraordinary human acts, and that this drive is to be completely accounted for under physiochemical laws."[31]

The propositions suggested by the endocrinologists have been severely criticised as would obviously be expected. It has been pointed out that there are many criminals in whose case there is no malfunctioning of endocrine glands and similarly there are many persons having glandular troubles unaffected by any problem of social deviancy. Professor M.F. Ashley-Montagu observes :

> "I should venture the opinion that not one of the reports on the alleged relationship between glandular dysfunctions and criminality has been carried out in a scientific manner, and that all such reports are glaring examples of the fallacy of false cause.... The fact is that as far as the endocrine system and its relation to personality behaviour are concerned, we are still almost completely in a world of the unknown. and to resort to that system for an explanation of criminality is merely to attempt to explain the known by the unknown."[32]

Ashley-Montagu makes the pertinent observation that crime is a social condition, not a biological one.

Heredity and Crime

Some efforts have been made by criminologists to establish a relationship between hereditary features in a person and his criminal or non-criminal behaviour. The difficulty in tracing any possible correlation between heredity and behaviour of any type lies in the fact that it is almost impossible to make any scientific study based on hereditary factors independent of environmental factors of various dimensions.

The studies made by Charles Goring, Healy and Broner, Sheldon and Eleanor Glueck and Cyril Burt do not indicate any positive evidence that there is necessarily any similarity between the conduct of the members of the same family e.g. between father and son or brother and brother.

Twin Researches

Since it is almost impossible to determine the effect of heredity on crime due to the seemingly insoluble problem of separating hereditary factors from the environmental ones, the researches on twins are thought to be of practical

31. Quoted by Taft and England in *Criminology*, 4th Edn.
32. Quoted by Barnes and Tellers in *New Horizons in Criminology*, 3rd Edn., p. 129.

advantage. This is because the genetical factors may be the same, at least in identical or mono-zygotic twins i.e. twins resulting from the same fertilized egg. Twins from separate fertilized eggs, known as dizygotic, binovular or ordinary, may have different genetical characteristics. A number of studies have, therefore, been made of twins to understand the role of heredity in criminality, notably in Europe, the U.S.A. and Japan. The first and the last known of these studies was by the German psychiatrist Johannes Lange in which he concluded that as far as crime is concerned, monozygotic twins on the whole react in a similar manner, whereas dizygotic ones often behave differently ('discordant') although their upbringing and environment had been just as much alike as those of the monozygotic twins.[33] The findings of Lange have been attacked on many grounds, some of them being as follows :

1. The data, as is somewhat inevitable in twins studies, was too small for sweeping generalisations.

2. Some of the cases were taken from a psychiatric clinic and the possibility that the criminal behaviour was the result of some mental abnormality could not be ruled out.

3. Twins, generally of like appearance and living in the same environment, tend to receive the same responses from others and may also be influenced by each other. The similarity in the social and anti-social responses from the twins may not therefore, necessarily be due to inherited factors.

4. Though identical twins are always of the same sex, the reverse is not necessarily true. It cannot be held with certainty as to whether the twins in a certain case are identical or otherwise.

Other studies are also, more or less, open to the same criticism and it is highly doubtful whether the twin research studies support a nexus between heredity and criminal behaviour.

Heredity and Criminal Families

The factor of heredity has been found to be significant by some criminologists in explaining the concentration of criminal behaviour and this they have sought to establish by the finding that there is a heavy concentration of criminals in certain families. There have been two well-known interesting studies in this context in the U.S.A., *The Jukes* (1877)[34] and *The Killikaks* (1912).[35] The Juke family, a family of 'mental degenerates', was traced back by Arthur Dugdale and the study was later continued and

33. Mannheim, *op. cit.*, p. 232.

34. Richard Louis Dugdale : *The Jukes, A Study in Crime, Pauperism, Disease and Heredity* (New York, 1895); Arthur H. Estabrook : *The Jukes in 1915* (New York, 1916).

35. Henry Herbert Goddard : *The Killikak Family, A Study in the Heredity of Feeblemindedness* (New York, 1913).

expanded by Arthur H. Estabrook. A person named Max, a descendant of Dutch settlers in New York, married Ada Juke, one of the six illegitimate sisters of the family and who subsequently came to be known as "the mother of criminals". Dugdale traced well over 1,000 descendants and other blood relatives of Ada. Out of them were found 280 paupers, 60 habitual thieves, 7 murderers, 140 other criminals, 50 common prostitutes, 440 with venereal disease and a number of others who could be labelled as deviants. Estabrook's follow-up study up to 1915 swelled the number of analyzed family members to over 2,000 and an additional 170 paupers, 118 criminals, 378 prostitutes, 86 brothelkeepers and a number of other kinds of deviants.

The other study, *The Killikaks*, made by Henry Herbert Goddard, concluded that crime was the result of low grade mentality, primarily feeblemindedness, which is an inherited quality of criminals. A feebleminded girl had an illicit relationship with Martin Killikak resulting in the birth of an illegitimate son. The study traced 480 relatives of the son and these were compared with 496 descendants of Killikak through his legitimate wife, a Quaker girl of good reputation. Among the descendants through the legitimate union only one mentally abnormal person, two alcoholics and no criminals were discovered but the illegitimate feebleminded bloodline produced 143 mentally sick persons, 36 illegitimates, 33 sexually perverted individuals or prostitutes, 24 alcoholics, 8 brothelkeepers, 3 epileptics, 3 convicted offenders and a number of other abnormal persons or deviants.[36]

The above studies cannot be said to be based on sound research methods and if at all they disclose anything it is transference of feeblemindedness through heredity rather than criminal propensities as such.

To sum up, it may be stated that the influence of heredity on a person's behaviour cannot be satisfactorily established since it is not practically possible to isolate the hereditary factors from various kinds of environmental factors. It may, however, be conceded that certain physical and mental traits may be inherited which can indirectly result in criminal behaviour.

The Chromosal Factor

The characteristics of the organism in the nucleus of plant and animal life are determined by complex structures known as chromosomes. A normal human cell contains 23 pairs of chromosomes; one of these pairs being responsible for the primary and secondary sexual characteristics. Normal male and female chromosomes are denoted as XY and XX; an unusual excess of male or female chromosomes are referred to as XYY and XXY respectively. Studies have been made of the XYY model on the hypothesis that a person with an extra Y chromosome might be a "supermale" with aggressive tendencies resulting in a possible criminal behaviour. Several

36. Quoted in Schafer, *op. cit.*, p. 61.

studies, which have been conducted, do not, however, support the hypothesis. Sarbin and Miller concluded:[37]

> "Contrary to the expectations generated by popular reports and mass media, the studies done thus far are largely in agreement and demonstrate rather conclusively that males of XYY type are not predictably aggressive. If anything as a group they are somewhat less aggressive than comparable XY's."

Individualistic Approaches : Conclusion

The individualistic approaches have lost much of the credibility with the advent of more sophisticated environmental theories. Their main weakness lies in the fact that they fail to see that crime represents a socio-cultural phenomenon which is not associated with the physical or mental equipment of an individual as such. To use the words of Taft and England, individual conformity or non-conformity to criminal codes are as much socio-cultural phenomenon as speaking or failing to speak grammatical English and are not necessarily indicative of the possession of abnormal biological or psychological traits. It cannot, however, be denied that the constitutionalists focussed attention on the personality of the criminals for the first time, which was a step in the right direction towards modern criminology.

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37. Quoted in George B. Vold and Thomas J. Bernard, *Theoretical Criminology*, 3rd Edn., p. 94.

Chapter IV

EXPLANATION OF CRIME— ENVIRONMENTAL APPROACHES

As opposed to the individualistic approaches which focus attention on the biological, mental and other characteristics of the offender to explain the cause of his delinquent behaviour, there is the sociological approach which seeks to explain the phenomenon of criminal behaviour with reference to factors outside the personality of the delinquent. The subject-matter for the analysis of criminal behaviour extends from the individual delinquent to the community, social institutions and group relationships which shape both criminal and non-criminal behaviour. This approach does not subscribe to the view that offenders are generally abnormal, biologically or psychologically, and does not seek to identify the causes as if they are enclosed within the body of the offender. Instead, criminal behaviour is looked upon as resulting from social interactions.

Social and Sociological Study of Crime and Criminals

Environmental approaches may take two forms. One is to make a sociological study of crime and criminals with reference to society i.e. its organization and culture, and the other is to find the causative factors of crime in the institutions of society like family relationships, educational institutions, economic relationships, organized religion and means of mass communication.

Criminality : A Result of Imitation

Gabriel de Tarde, the French jurist and social psychologist, provides the starting point of the explanation of crime in terms of social factors. The importance of his contribution to criminology is primarily due to the fact that he was the first criminologist who offered a social explanation of crime while others were banking on the physical traits of offenders. Just as Lombroso was the putative father of scientific criminology, Tarde is considered the father of social psychology.

Tarde criticised and even ridiculed the theories of his contemporary, Lombroso. He compared the detection of criminality on the basis of physical traits by Lombroso with the detection of divinity by Tibetan priests in a newborn baby on the basis of appearance while choosing the future great Lama. He observed :

> "From the social point of view crime may be monstrosity but not from the individual or organic point of view, because it is the absolute triumph of egoism and of the organism over the brakes of society. The

man who is a true born criminal could thus be nothing more than a very fine animal, a sample which was a credit to his race."

Tarde did not think that even psychological criminals were unique compared to non-criminals. According to him criminal behaviour is the result of a learning process. A person *learns* criminal behaviour just like any other trade which he picks up in his childhood.

> "The majority of murderers and notorious thieves began as children... and the true seminary of crime must be sought for upon each public square or each crossroad of our towns... in those flocks of pillaging street urchins who, like bands of sparrows, associated together, at first for marauding and then for theft... without any natural predisposition on their part, their fate is often decided by the influence of their comrades."

It is fairly apparent that Tarde's theory was the precursor of the modern ecological and differential association theories, to be discussed later in this chapter.

Social Disorganization Theories

Social change is inevitable in a dynamic society and though not bad in itself, it results sometimes in disharmony, conflict and cultural dichotomy. This is specially true when the social change happens to be of a fast pace. Developing nations, like India, are attempting to achieve within a short span developmental targets which took industrially advanced societies centuries to achieve. This kind of unnatural pace obviously is inevitably to lead to disorderly social change. Goals are the same as in developed countries but conditions are totally different in terms of population, productivity and political participation. Social change may in such a situation, produce what is called 'social disorganization'.

Social disorganization has been defined as a decrease of the influence of existing social rules upon individual members of the group. This phenomenon is different from the violation of social rules by individuals, because that is something normally expected in even relatively stable societies where not much damage is possible due to effective social sanctions, including criminal law. The consequences brought about by the Second World War, like industrialization, modernization and urbanization have, in many countries, caused breakdown of traditional patterns of social organization in them. In India, social change has taken place at a fast rate during the period extending to about 50 years after Independence and though the volume of crime is somewhat low as compared to many other countries, its rate has already gone up in urban areas, particularly big cities.[1] The village

1. The escalation is reflected in all kinds of crime; in particular there has been a great spurt in robberies, murders and sexual assaults.

society in India is still what is called the 'sacred' society by sociologists; people are bound together by caste and kinship and social sanctions are powerful. There is no anonymity of the individuals as found in the bigger cities and the chances of any deviation are limited in such an environment. Industrialization and urbanization are causing substantial migration to cities and the hold of social kinship is slackening. This process, in itself good and desirable, is also resulting in relaxation of some social sanctions which were sometimes more effective in curbing anti-social behaviour than criminal law.

Social disorganization may be due to cultural conflicts between different values of different sections of society. The difference may be between old and new values, local and imported values and traditional values and the values imposed on a community by the government or other agencies. Two studies relating to the Polish peasants settled in the U.S.A. and the Eskimos serve as interesting illustrations. Thomas and Znaniecki found a vast difference in the old and new value system among the most disorganized group of Polish peasant settlers in the United States. The members of the group no longer had the urge to continue to cherish their status on the basis of family but had developed highly individualistic tendencies. They had developed a taste for luxurious things like fashionable clothes and liquor which they were not willing to share with the other members of the group. Under the influence of the new environment, the "we-attitudes" based on peasant-family values changed into highly hedonistic individualistic attitudes.[2]

Ruth and Jordan Cavan have collected data regarding incidences of delinquency in many countries while studying the effect of the social complexity problem on the crime situation in those countries.[3] The Cavans found the Eskimos were free from the problem of delinquency until recently, but the situation changed as a result of movements to towns, increase of social contacts with non-Eskimos and the resultant breakdown of the traditional social structure. The deviant behaviour was largely reflected in loitering, drunkenness and permissive sexual attitudes.

The process of social disorganization is also sometimes explained on the grounds of 'cultural lag'. Cultural lag means that sometimes the various components of culture in a society grow unequally resulting in a gap between those components. It is said, for instance, that machines and scientific inventions are developing at a much faster pace than other cultural components, say, relating to behaviour, thus resulting in deviant behaviour.

The theories of social disorganization have been criticised on the ground of lack of objectivity in using concepts like 'disorganization' and 'cultural lag'. It is pointed out that the question whether a society is organized or

2. William J. Thomas and Florian Znaniecki : *The Polish Peasant in Europe and America.*
3. *Delinquency and Crime : Cross-Cultural Perspectives* (Philadelphia : J.B. Lippincott Co., 1968).

disorganized involves subjective enquiries. It also argued that to say that some components of culture go ahead of others is also a matter of opinion. For instance, as observed by Lewis Mumford, it may be that machine technology (increased capacity to kill in war) is the laggard while non-material culture (a deeper sense of humanitarianism and concern for the underprivileged people of the world) is the pacesetter.

Differential Association and Criminality

The theory of criminality based on 'differential association' has been presented by Sutherland, which he summarized as follows:[4]

> "A person becomes delinquent because of an excess of definitions favourable to violation of law over definitions unfavourable to violation of law. Criminal behaviour is explained as a product of learning in interaction with other persons, principally within intimate personal groups. It is assumed that any person inevitably assimilates the surrounding culture unless other patterns are in conflict."

Sutherland does not think that delinquents are disorganized and hence has no use for the expression 'social disorganization'. He prefers instead the term 'differential group organization'. In other words, according to Sutherland, there are in fact two types of organizations operating within the community namely, organizations for criminal purposes and organizations against criminal activities.

Sutherland maintained that so far as the learning process was concerned, it was the same for both criminal and non-criminal conducts. Some techniques relating to the commission of crimes may be learnt through association with criminals alone but others are acquired in the normal course of education since it is not the difference between criminal and non-criminal techniques as such which matters but the particular use made of them. So what is actually needed to develop criminal behaviour in many instances is not the crime-committing technique but some sort of rationalization to use the techniques for criminal purposes. This rationalizing capacity is learnt through association with criminals which gives him definitions justifying his deviant conduct.

Various criticisms and questions have been directed towards Sutherland's theory of differential association. Firstly, it has been said that not all those persons who come in contact with criminals become criminals themselves. Quite rightly, Sutherland found the answer in the counteracting influence of contact with anti-criminal groups. In other words, the *definitions* provided by the contact with anti-criminal groups happen to be more persuasive in their case than the ones provided by the contact with criminals. Another connected question posed is that once initiated, why does not

4. Edwin H. Sutherland and Donald R. Crassey : *Principles of Criminology* (1960), p. 78.

criminal behaviour increase indefinitely until everyone is a criminal? Once again Sutherland has no difficulty in answering it on the basis of his concept of differential group organization. The measures taken by the anti-criminal group organization, as a result of the threat of crime posed by the opposite group, are effective enough to curb the delinquent tendencies.

There has been much criticism that the differential theory cannot be extended to all crimes. Thus, it has been said that the theory does not apply to rural offenders, to white-collar criminals, to perpetrators of "individual" and "personal" crimes, to irrational and impulsive criminals, to "occasional", "incidental" and "situational" offenders, to murderers, non-habitual criminals, to persons who commit crimes of passion, and to men whose crimes were perpetrated under emotional stress.[5]

In fairness to Sutherland, it must be said that some of the above types of criminals like situational offenders and those who commit crime under some emotional stress, are not really 'criminals' to warrant a study in criminology and even theories other than of differential association would find it difficult to explain them in terms of any particular causative factor. Crassey argues that most of the comments above are not based on research and therefore, "criticisms" actually are proposals for research.[6]

Another criticism has been that Sutherland meant "contact" when he used the term "association" and thereby implied physical proximity with the criminal. This perhaps was not exactly what Sutherland wanted to convey. What he meant by "association" is made clearer by Daniel Glaser who reconceptualises Sutherland's theory using the term "differential association". According to him, most individuals are believed to identify themselves with both criminal and non-criminal persons in the course of their lives. They may have first-hand experience in delinquency groups. They may identify themselves with criminal roles presented in fiction, movies, television, or the press. They may react against any criminal group.[7]

One of the principal criticisms against the theory of differential association is that it does not adequately take into account the "personality traits", "personality factors" or "psychological variables" in criminal behaviour. Sutherland took this kind of criticism seriously, and in an early period he stated that this theory probably would have to be revised to take account of personality traits.[8] Later on he pointed out what he believed to be the fundamental weakness in his critics' argument: "Personality traits" and "personality" are words that merely specify a condition, like feebleminded-ness, without showing the relationship between that condition and crimi-

5. All these have been catalogued by Donald R. Crassey in his article "*The Development of a Theory : Differential Association*" in which he defends Sutherland.
6. *Ibid.*
7. Elmer Hubert Johnson: *Crime, Correction and Society*, p. 1.
8. *The Sutherland Papers* (1956), pp. 25-27.

nality. He posed three questions for advocates of "personality traits" as supplements to differential association: (*i*) What are the personality traits that should be regarded as significant? (*ii*) Are there personal traits, to be used as supplements to differential association, which are not already included in the differential association? (*iii*) Can differential association, which is essentially a process of learning, be combined with personal traits, which are essentially the product of learning? Sutherland did not attempt to answer these questions, but the context of his discussion indicates his belief that differential association does explain why some persons with a trait like "aggressiveness" commit crimes, while others possessing the same trait do not.[9]

Anomie

Anomie is a vital term vaguely defined and generously applied. The literal meaning of the word 'anomie' is normlessness. Durkheim formulated the concept and used it in particular to explain the behaviour which he referred to as *anomie suicide*. Human beings have unlimited desires, the only control to these being provided by society and public opinion which lose much of their efficacy in times of economic changes and moral stresses and strains. A high rate of both suicide and homicide is to be found in an anomie-ridden society.

Robert K. Merton, the other sociologist who based his theory on 'anomie', not only used the concept a bit differently but was also able to illustrate his theory with concrete American situations and was, therefore, not as abstract as Durkheim in his formulations. He did not base his theory on the premise that human beings had unlimited needs and ambitions but that the needs and desires went beyond that could be achieved through socially approved channels in societies which profess to be of egalitarian character capable of giving equal opportunities to all.

It is paradoxical, though true, that sometimes the very norms which are laid down by society for achieving conforming behaviour tend to produce just the opposite result in the form of criminal behaviour. According to Robert Merton's theory of anomie delinquency (and other forms of deviance) is a response to the unavailability of conventional or socially approved routes to success, and is characteristic of lower-class persons since the social structure strains the cultural values, making action in accord with them readily possible for those occupying certain status within the society and difficult or impossible for others.[10] The term anomie was used by Merton for a condition in a social system when cultural regulation of behaviour is weakened. In other words, what is encouraged in society is "success" and so goals are more important than the means to achieve those goals. Merton gives the example of sports and games, the way they are sometimes played

9. Donald R. Crassey : *The Development of a Theory : Differential Association.*
10. Robert K. Merton : *Social Theory and Social Structure*, pp. 131-94.

in the U.S.A. Winning the match is more important than the spirit of the game.

In India this theory is reflected in one very important area of contemporary concern, namely, the use of unfair means in examinations by some students. It is very clear that those who employ such questionable means are not much concerned with the amount of labour needed to distinguish themselves in the examinations but would like to secure success leading to degrees, the only thing which they think is relevant for evaluating their academic worth and achievement. Not only are unfair means used or attempted to be used but quite often it results in violence against invigilators and destruction of property. The behaviour of the elders in the family, neighbourhood and educational institutions and real or imaginary belief that everyone is corrupt in public life make things more difficult. It is argued that it is not the real worth of a person but the pulls and pressures which one can exert which will determine one's status in society. Consequently everyone feels justified in seeking shortcuts to academic achievements, employment and ultimately to success in life.

The position obtaining in contemporary Indian society does not appear to be an absolute misfit in the "scale of anomie" developed by Leo Srole. The scale comprises five items related to an individual's perception of his social environment and his perception of his own place within that environment.[11] They are as follows :

1. The perception that community leaders are indifferent to one's needs.
2. The perception that little can be accomplished in society which is seen as basically unpredictable and lacking order.
3. The perception that life's goals are receding rather than being realized.
4. A sense of futility.
5. The conviction that one cannot count on personal associates for social and psychological support.

Theories of Juvenile Gang Delinquency

Though poverty and lower-class status do not necessarily lead to delinquency, their influence can directly lead to formation of juvenile gangs. A gang is obviously more dangerous, because the potentiality of doing harm of a number of persons acting for a common goal together is higher than their capacity to do mischief individually. The likelihood of formation of such gangs is higher in areas populated largely by lower class persons compared to neighbourhoods of mixed or predominantly middle class socio-economic status. Frederick M. Thrasher in one of the earlier studies on juvenile delinquency focussed attention on the groups to which the delin-

11. Quoted by Robert K. Merton in "*Continuities in the Theory of Social Structure and Anomie*" in *Social Theory and Social Structure*.

quents belonged.[12] According to him the delinquent must be dealt with as a member of all the various groups to which he belongs—the family, neighbourhood, school, religion, occupational group and so on, as well as his gang. Thrasher found more than 1,300 gangs in Chicago and its environs. He reported that the gangs were typically found in what he called "the poverty belt". The characteristics of the 'poverty belt', according to his study, were deteriorating neighbourhoods, shifting populations and high mobility. Group delinquency, according to Thrasher, develops in slums out of the acts committed by the gang members to derive excitement from the adventure involved in such acts.

Albert K. Cohen discerned some sort of peculiar culture among the gang delinquents which he termed as 'delinquent sub-culture'.[13] According to Cohen, a delinquent sub-culture may be defined as "a way of life that has somehow become traditional among certain groups in American society". These groups are the boys' gangs that flourish most conspicuously in the "delinquency neighbourhoods of our larger American cities".[14] The reason why such a culture is developed is given by Cohen by saying that the members of the gang share a number of problems and the sub-culture is a response to find out the solution to the problems. The shared problems of the gang flow from their low status in the community and the expectations from them of typically middle-class behaviour like ambition, individual responsibility, talent, asceticism, rationality, courtesy and control of physical aggression. Such a situation, according to Cohen, creates a problem for the lower-class boys since they do not have the advantage of the same socialising process as the middle-class boys whose conduct is regarded as the standard conduct.

Regarding the characteristics of the delinquent sub-culture Cohen is of the view that it is non-utilitarian, malicious and negativistic. It is non-utilitarian since the delinquent acts are sometimes committed "for the heck of it" and not because of any gains occurring to them, and the culture is malicious and negativistic in the sense that they enjoy committing the delinquent acts not because of any comfort derived for themselves but from the discomfort they have caused to others and find cause for pride in reputations they have acquired for "meanness".[15]

John Kitsuse and David Dietrick have pointed out many flaws while evaluating Cohen's theory of sub-culture.[16] They don't agree that boys of lower class families care very much about what middle class people think

12. Frederick M. Thrasher : *The Gang*, (2nd Revised Edn., University of Chicago Press, 1960).
13. *Delinquent Boys* (The Free Press, New York, 1955).
14. *Ibid.*, pp. 25-30.
15. "*Delinquent Boys : A Critique*", American Sociological Review Vol. 24 (April 1959), pp. 208-15.
16. As pointed out by Richard A. Cloward and Floyd E. Ohlin : *Delinquency and Opportunity*, in *Delinquent Behaviour* by Don C. Gibbons, p. 119.

of them. Nor do they agree that delinquent acts are always non-utilitarian or malicious towards respectable persons. They also point out that the theory does not explain clearly as to how the sub-cultures are sustained after being developed once. While trying to answer this question, Kitsuse and Dietrick put an alternative formulation. According to them, the original motives of the gang members are not the same for participating in delinquent activities but later on they develop one thing in common with each other which maintains the sub-culture. The common bond is that they reject their rejectors i.e. the respectable persons and those responsible for correctional programmes for the young who develop hostile reaction to the deeds of the gang members. It has also been argued that it is the economic injustice and not the middle class expectation problem that leads young persons to gang culture.

> "It is our view that many discontented lower class youth do not wish to adopt a middle class group. The solution they seek entails the acquisition of higher position in terms of lower class rather than middle class criteria."[17]

Cloward and Ohlin draw attention to the fact that access to deviant behaviour differs in case of children belonging to different classes. In other words, whether a child shall have access to deviant behaviour or not depends upon differential opportunity. The difference between Merton's "means-end" theory and the theory of "differential opportunity" is that the former emphasises differences in access to legitimate means according to position in the social structure, while the latter considers the possibility of unequal opportunities for illegitimate means which is often referred to as the "Chicago tradition".

Social Institutions and Crime Causation

Delinquent and criminal behaviour is shaped within the various institutions of society. In other words, one who ultimately turns out to be a delinquent or criminal is the product of the different socio-economic institutions of which he happens to be a member. Therefore some understanding of the social institutions and their impact on human behaviour is imperative.

Family and Crime Causation

The first and most important social institution which determines the individual's behaviour towards society in general subsequently is the family of the individual. The family not only gives him the first social contact in the world i.e. with other members of the family, but also determines his position vis-a-vis the larger world. The perception of environment by the child and his attitudes towards it are, therefore, greatly influenced by the

17. As pointed out by Richard A. Cloward and Floyd E. Ohlin : *Delinquency and Opportunity*, in *Delinquent Behaviour* by Don C. Gibbons, p. 119

family. According to psychologists, the formation of the basic personality of a child is complete in the first ten or twelve years of his life and it is obvious that the family's impact in this period is almost exclusive.

Lack of affection, either actual or as perceived by the child, is regarded as an important contributory factor in anti-social attitude. It is because the child is dependent on its parents for its physical as well as social needs. The lack of affection may arise due to different reasons, like disharmonious relationship between the parents, a broken home e.g. when one or both parents are missing due to death, divorce or desertion.

One study, which brought out the element of parental rejection as a contributory factor in delinquency, was made by Ruth Topping in the New York State Training School. The personality characteristics of the aggressive delinquents included an acute desire for acceptance and affection, aggressive speech flavoured with threats to kill people, and a sense of having a hard life and being faced with unequal odds.[18] Another study of 500 children in a Michigan child guidance clinic revealed that many of the aggressive ones in the sample had experienced psychological rejection by their parents. The aggressive attitudes can be attributed to the inadequate socializing influence due to lack of affection.

A family may be either structurally normal or a broken family. A structurally normal family is the one in which both parents are alive and live together with the children while a family is designated as 'broken' if the children do not live with both the parents either because one of the parents is dead or a separation has occurred between the two parents.

Lack of affection can result from broken homes and many studies have established the obvious relationship between this factor and delinquent behaviour. The process may not however be as simple as it appears on the face of it. The reporting of delinquent behaviour of children from broken homes to the police and the follow-up action by the police and correctional service officers may be greater in magnitude as compared to corresponding reporting and action in case of delinquents from unbroken families.

Sometimes there may be lack of affection, or its perception by the child, even in families which cannot be termed as broken families like the ones where the parents, due to some reason or the other, have no time for their children. It may be because of too much involvement in their occupations on the part of the parents but quite often owing to too much preoccupation with so-called social activities. The latter phenomenon is particularly discernible among the upper strata of society in big cities, both in India and abroad. The institution of working mothers is also coming up fast in middle class educated families which has its own strong and weak points, and an

18. Don C. Gibbons : *Delinquent Behaviour* (1970).

endless debate goes on as to whether married women should confine themselves to their homes and children or should they have distinct personalities in terms of professional career and employment. The problem is obviously not simple and involves consideration of factors of multidimensional nature. In this connection it may be said that despite the various arguments against the joint family system in India, there is at least one good aspect of it : parents are not the only source of socialization in the family, and lack of affection, if any, is therefore compensated through other relations, particularly grandparents.

Other relevant factors in the analysis of a child's behaviour may be the size of the family and the sibling order in which the child is placed. Cyril Burt made a study in the context of the family size and his finding was that "children from the poorest social classes not only have an intelligence that is nearly two years below that of the children from the better social classes, but are drawn from families that are nearly twice as large"[19].

While some studies[20] have found the order of the birth to be significant i.e. there is excess of criminal behaviour in case of the eldest child or even in the second one, the conclusion of Emanuel Miller is to the contrary. Miller surveyed the English and American literature up to 1944 and found the available information to be 'singularly poor and contradictory' and to him none of the many variables involved in juvenile delinquency seemed to be especially related to the birth order.

As regards the problem of working mothers and delinquent behaviour of the children, Sheldon and Eleanor Glueck attempted to analyse the problem in their well-known study *Unravelling Juvenile Delinquency*. In doing so they matched pair by pair 500 persistent delinquents with 500 true non-delinquents in respect to general intelligence, ethnico-racial derivation and age. All the person constituting 'delinquent' and 'non-delinquent' samples were taken from culturally and economically underprivileged urban areas. The Gluecks reached the following conclusions[21]:

> *1.* A significantly greater proportion of the mothers of the non-delinquents who worked (whether regularly or occasionally) than of those who were housewives neglected to give or provide suitable supervision to their children. Thus, entirely apart from the problem of delinquency, there is a strong hint that working mothers, at least of low-income groups, are not as conscientious about arranging for the supervision of their children as are those who remain at home.
>
> 2. The supervision of those children who actually became delinquent was far less suitable on the part of working mothers (whether

19. *Intelligence and Fertility* (London, 1946), p. 15.
20. *The Problem of Birth-Order and Delinquency in Mental Abnormality Crime*, pp. 227-39.
21. "*Working Mothers and Delinquency*", Mental Hygiene 41 (July 1957), pp. 329-33.

they are employed regularly or occasionally) than on the part of the mothers who were house wives.

3. A boy who is carelessly supervised and who has a mother who is of the kind who works occasionally is far more likely to become a delinquent than is the poorly supervised son of a mother who does not go to work.[22]

Religious Control

The relationship between religious control and delinquent behaviour has attracted a great deal of attention from sociologists. There are, however, some basic difficulties in assessing the relationship. Firstly, it is not possible to give a generally acceptable definition of religion. Is it confined to mere practices and rituals or must some deeper meaning be attached to it in terms of moulding of attitudes and behaviour of an individual? Evidently it is only the latter meaning which could be regarded as socially relevant. Another problem is the lack of data available on the basis of empirical research. The problem in research is how to keep religion and other factors like social class or cultural background as distinct variables in the analysis of the problem.

The interrelation between religion and delinquency may be viewed from two angles i.e., religion is considered in its positive sense as a source of constructive morality or as a negative instrument in terms of its undesirable leadership, distorted practices and abuses due to corruption and 'commercialization'. According to sociologists, the influence of religion in the first sense plays a significant role in preventing criminal behaviour by moulding the individual personality. In this sense it can also be used as an instrument of reformation of a delinquent. In its negative aspect, religion is not only incapable of serving any useful purpose, it may in fact promote delinquent behaviour among young persons as a result of their disillusionment with the system based on hypocrisy and dishonesty.

It must, however, be appreciated that the impact of religion on an individual during the formative years of personality may be only indirect and very subtle. In the words of Thomas M. Gannon[23]:

> "[T]he effectiveness of religion depends upon the internalization of standards during the critical formative years of childhood and is developed through close identification with parents, family members and other significant primary groups. Much of this control is exercised unconsciously and depends largely upon behavioural examples and religious experience rather than on precept. Only later does it reach the level of conscious decision and personal commitment."

22. For further discussion on relevancy of family *See* 'Social Control Theories' in Chapter IV.
23. "*Religious Control and Delinquent Behaviour*", Sociology and Social Research 51 (July 1967), pp. 418-31.

Further, the relationship of religion with delinquency may not be very different from that of any other social control with delinquency. Religion may, therefore, be a useful but not a necessary instrument in preventing crime.[24]

Formal Education and Delinquency

After the family, it is the school which provides the most important opportunity to a child for the development of his social attitudes. Apart from other factors, the prime reason is that the child spends a very substantial part of his total time in a day at school.

The school may be responsible for the development of delinquency in certain ways or it may be that certain problems come to the surface only after the child's entry into the school. Truancy or running away from school may either be due to certain factors operating within the school structure or due to certain factors already unfavourable to the child which are precipitated due to interaction of factors connected with the school. In any case, truancy may be the first step towards criminal behaviour. Factors such as low socio-economic status of the family, low intelligence, lack of motivation and related poor school performance, emotional instability and personality defects, ineffective adjustment of instruction and subjects to pupil's needs, lack of participation in extracurricular activities, disinterest in subjects, unsympathetic attitude of parents to eduction, feeling of not "belonging" in the classroom are important factors affecting the attitudes towards school even in a highly advanced country like the U.S.A. Certainly some of these factors operate with much more severity in a country like India where most of the government and municipal schools are poorly equipped and education is imparted without creating any motivation for the children of the lower class families which form a substantial part of the population. For most of the parents of this class, it is almost a luxury to send their children to schools, provision for free education up to a certain level notwithstanding. Mostly this is so because such parents need to supplement their meagre incomes through employing their children in whatever way possible.

There is a general feeling that schools are dominated by middle class values which create problems of adjustment for children coming from lower groups. Unconsciously, the teachers frequently react differently to children from different social classes. One reason could be that most of the school teachers come from typically middle class families. They detest conduct which is more common among lower class families, such as profanity, vulgarity in language and physical aggressiveness. Stephen Abrahamson, an American scholar, goes even to the extent, on the basis of overwhelming

24. Martin and Fitzpatrick : *Delinquent Behaviour* (New York, Random House, 1964), p. 93.

evidence, of saying that upper middle class and lower middle class pupils receive much more than their share of high grades in the school tests.

Economic Factors and Crime

The importance of economic factors in the causation of crime and of economic crimes in general can be pointed out by quoting Hermann Mannheim. According to him, if traffic offences are omitted, the administration of criminal justice all over the world has to devote probably three-quarters of its time and energy to "economic crimes".[25] There cannot be any doubt that poverty contributes a great deal both directly and indirectly, to the commission of delinquent and criminal acts. But it is equally "obvious that poverty alone cannot be made accountable for all the economic crimes committed. It hardly requires any research to say that there are many people who manage to keep themselves honest and upright even in the most trying circumstances while there may be others who after earning millions would like to earn another million by employing dishonest means. This aspect has been discussed later in the chapter on white-collar crimes.

Almost all the theories connecting crime causation with economic factors are based on the Marxist theory that all human behaviour is primarily determined by economic factors and not by conscience which itself is influenced by one's economic experiences and surroundings. More than Karl Marx it was Friedrick Engels who directly focussed his attention to the problem of crime. He attributed the sixfold increase in crime in England between 1815 and 1842 to the adverse position of the proletariat due to the class exploitation. Surprisingly enough it was, however, in the agricultural rather than industrial areas that the crime rate was found to be more pronounced.

It should also be appreciated that the approach to law and crime was essentially different in the erstwhile Soviet Union and other socialist countries governed by the "dictatorship of the proletariat and the poor peasantry". Law as a device was to defend the new economic system and the concept of "guilt" was viewed accordingly. The element of 'social dangerousness' was emphasised in defining crime. According to the criminal codes of many socialist countries, an act was not be regarded as a crime even if it was formally declared to be such, unless the effect of it was 'socially injurious'.

Bonger's Theory of Economic Structure and Crime

The most notable and stimulating contribution to criminology in understanding the relation of crime and economic structure has been made by William Aldrian Bonger (1876-1940) who sought to explain the phenomenon of crime on the basis of the Marxist approach. Born in a religious Dutch family, he developed an antagonism to religion as a reaction to the stuffy

25. *Criminal Justice and Social Reconstruction* (1958), p. 82.

atmosphere at home. Without denying the influence of hereditary traits in human behaviour, he emphasised the importance of environmental factors not only in the case of criminals but also in great men. It was due to him that criminology became a separate field of science in Holland. Through his classic book, *An Introduction to Criminology* and his doctorate thesis, *Criminality and Economic Conditions*, Bonger had great influence on American and English minds. Bonger insisted that the criminal was a product of the capitalistic system which, instead of promoting altruistic tendencies among members of the society, created selfish tendencies. The system based on 'capitalistic exchange' is motivated by profit element. In such a system each member tries to get the maximum from others in return of the minimum from himself. This attitude of the capitalist according to Bonger, affects the attitudes of the proletariat as well:

> "The oppressed resort to means which they would otherwise scorn... the basis of social feeling is reciprocity. As soon as this is trodden underfoot by the ruling class, the social sentiments of the oppressed become weak towards them."

Bonger identifies many evils in the capitalist system which are conducive to the spread of criminal behaviour. Child labour according to Bonger is entirely a capitalistic phenomenon which is one of the salient features of juvenile delinquency. Long hours of work by workers have a brutalizing effect on them. Finally, illiteracy among people of lower classes contributes greatly to the commission of crimes.

The theory propounded by Bonger no doubt indicates one very important basis of the causes of criminality. He, however, ignores the tangle of inter-relationships among social, cultural, economic, political, religious and other sets of factors. According to his theory, the phenomenon of crime should have come to an end, or at least controlled to a very great extent in socialist countries like the U.S.S.R., which is not at all the factual position. According to the study made by the Cavans, juvenile delinquency was frequent in all strata of the Soviet society.[26]

The proponents of the Marxist view, however, hold that crime cannot be eliminated in socialist societies within a short period after a new economic order has been introduced. It will need a long time for the "remnants" of criminality to disappear altogether, which can happen only after "the remnants of the bourgeois way of thinking are eventually eliminated".

There is no doubt, however, that poverty does play an important role in delinquency and the capitalistic system may also contribute to poverty in certain sections of the society and give values which determine success in life purely in terms of money. In India, criminal statistics clearly reveal that there is a direct nexus between poverty and criminal behaviour. Out of the

26. Cavan and Cavan : *Delinquency and Crime*, pp. 104-31.

total of 96,144 juvenile offenders about whom data of economic set-up was available, 80% were from lower classes.[27] Out of 1,62,789 juvenile offenders about whom data of economic set-up was available, 85% were from lower class families.[28]

Criminal statistics showing high representation of lower groups may not necessarily give the exact relative positions of deviants from different socio-economic strata because of differential police action in different situations. The chances of a crime committed by someone from the upper strata going unreported to the police or lack of action by the establishment are higher than in cases of persons from lower economic strata.

The indirect effects of poverty have been noted by Clifford Shaw by focussing attention on his well-known concept of "delinquency area".[29]

These areas are characterised by physical deterioration, high proportion of population or welfare rolls and a high proportion of ethnic and racial minorities.

Inadequate housing is one of the most serious problems in such delinquent areas which creates tension between members of the family living in a cramped atmosphere.

Mass Communication Media and Crime

In today's world, means of mass communication like the cinema, press, radio and television have assumed very great significance. Not only do they serve the various positive purposes but their enormous capacity has created some problems which are of interest to those who have to study human behaviour, including criminologists. The means of mass media have some interesting characteristics. The message through them is of an impersonal nature i.e., directed towards a large body of persons of heterogeneous character, and different effects are produced by the same message on different persons. Another characteristic of the mass media is that there is a whole complex system sending the message, not just to one individual, and so some mechanical element is inevitable in such a situation. Finally, the message is to be consumed instantaneously and ordinarily there is no time to think or ponder over the message. These characteristics have made the means of media not only very powerful but have also created danger in the system.

Among the mass communication media, television and cinema have the potential for the maximum impact on the viewers because of the combined audio-visual components in the system. Further, the audio-visual experience does not require much effort on the part of the viewer unlike other media like newspapers which are usually read by adults. An American study

27. *Crime in India, 1971*, Ministry of Home Affairs, Govt. of India.
28. *Crime in India, 1982*, Government of India.
29. Clifford R. Shaw and Henry D. Mckay: *Juvenile Delinquency and Urban Areas* (1942), pp. 435, 436.

revealed that approximately 60 per cent of children watch television during hours when programmes featuring crime and violence are usually presented.[30] In India, though the magnitude and quality of the problem is quite different, young persons are found highly "appreciative" of the films depicting violence shown on the television and in the theatres. The excitement which "fighting scenes" generate in many of them is to be seen to be appreciated; they look almost 'participants' in the whole process.[30] Some of the Indian movies, which have created unprecedented records of financial successes in the recent past, had virtually nothing but violence of a highly morbid quality.

The assessment of criminological impact of mass communication media through learning behaviour has undergone three stages in the following sequence:

1. The 'imitation' theory was quite popular with the criminologists. It maintained that juvenile delinquency was sometimes the result of what youngsters saw in movies and on television and what they read in comics. A United States Senate Sub-Committee considered the televised crime programme as a 'calculated risk' while some others have referred to it as the 'school for violence'.

2. The theory of imitation, to a great extent, was replaced by the psychological approach of William Healy and Cyril Burt. According to them, violence depicted in films and elsewhere provided 'vicarious enjoyment' and as such served as 'safety valves' and 'healthy outlets' to the potential aggressive tendencies.

3. The belief has subsequently developed that the 'safety valve' theory was as much without a scientific support as the 'imitation' theory.

It is, however, evident that the mass communications media is, as such, neutral and has nothing intrinsically dangerous about it. Much depends upon the use made of it. In the context of combating crime, the mass media can play, and it does play sometimes, a positive role by raising pertinent issues and supplying relevant information about crime to the society.

Social Control Theories

Social control theories differ from the earlier theories which explain criminality and delinquency in terms of social, biological and personality factors. The earlier theories lead one to think that delinquents were essentially and fundamentally different from non-delinquents. Control theories do not support a clear-cut categorization of delinquent and non-delinquent youths and focus on 'restraining' and 'controlling' forces which keep a

30. William Adrian : "*Tele-Violence: The Crime in Your Home*", The Reader's Digest, Vol. 78 (April 1961), pp. 31-34.

person in check and delinquency results when these forces get weakened. The same idea, of course, is inherent in the theories of Durkheim and Freud.

Control theories came into vogue from the early fifties; Albert J. Reiss, Jackson Toby, Ivan Nye and Walter C. Reckless being the early criminologists to propound such theories. Reiss, first among these, made studies in the context of likelihood of revocation of probation orders and concluded that such a likelihood was higher in case of those who were disorganised, having a weak ego or super ego; the children having lack of "personal controls" to keep away from violation of social and legal norms. The main weakness of his theory lies in the fact that strength of family and community controls over the juveniles were not taken into account as valid components among the controlling mechanisms.

Jackson Toby based his theory on the premise that temptation to violate the norms is among all the persons but control will depend upon the stakes an individual may have in conforming to the norms. School performance, for instance, will determine the stakes in conformity, the "basis for school adjustment is laid down in the home and community".

Ivan Nye, another control theorist, came to conclude from his studies that family was the single most important control group in determining the nature of the juvenile behaviour. Nye made an empirical study of 780 school boys and girls on the basis of a questionnaire regarding their attitudes and relationship with the family members and delinquent acts committed by them. On the basis of the respondents' replies, they were classified into 'most delinquent' and 'least delinquent' groups. Youths in the 'most delinquent' group were found enjoying either too much freedom or no freedom and had larger sums of money at their disposal. They rejected their parents and almost everything about them. Parents were also far from being normal, 'seldom cheerful and often moody, nervous, irritable, difficult to please, dishonest and who "took out" on the youth when things went wrong. The youths in the 'least delinquent' area tended to come from religious and localitywise stable families and from rural areas.

Subsequently, Walter C. Reckless came out with his 'containment theory'. According to this theory, delinquent behaviour was the result of social pressures and pulls of all the kinds counteracted by containments, external and internal, with reference to an individual. The containments are explained and illustrated thus :[31]

> "External containment consists in effective family living and support groups, and includes such items as consistent moral front, institutional reinforcement, reasonable norms and expectations, cohesiveness, effective supervision and discipline.... Inner containment is the product of internalization and consists in self-control, ego strength, super ego,

31. Vold, *op. cit.*, p. 237.

frustration tolerance, sense of responsibility, resistance to diversions, goal orientation, ability to find substitute satisfactions, and so on."

There is really nothing new in the theory developed by Reckless except that he attempted to fuse together some of the earlier theories in a general framework. The theory has been criticised in that the key terms 'pressures' and 'pulls' have not been defined. Because of the vagueness there is no clear-cut division of categories of the variables involved in his theory.[32]

The theories described above led to a couple of theories known as modern control theories; they have been expounded by David Matza and Travis Hirschi. According to Matza, the theories of criminal causation found the determinants in social, biological and psychological terms i.e. these were the constraints which led to crime and indicated the essential and fundamental difference between delinquent and non-delinquent persons. The main thrust of Matza's approach is that the deviant behaviour of the 'delinquents' is only a small part, and that too only for a limited period of their life. Most of the time and in most of the situations, the 'delinquents' behave normally. Even otherwise, most delinquents "age out" of delinquency by the time they reach early adulthood despite the continued existence of the factors supposed to be responsible for their delinquent behaviour. The delinquent behaviour, according to Matza, is the drift caused due to the loosening of social control; 'freeing the delinquent to respond to whatever conventional or criminal forces happen to come along'. A theory of criminal behaviour cannot, therefore, predict delinquent behaviour but can predict only the likelihood of the loosening of the social control. Another important aspect pointed out by Matza is that delinquents do not regard their behaviour as morally justified but rationalise it by reference to a 'pervasive sense of injustice'. Matza, however, acknowledges that there may be some *positive* causes of delinquency indicating as to why a delinquent opts for delinquent behaviour rather than the non-delinquent behaviour in certain situations.

Hirschi's approach, reminiscent of the Freudian approach, is different from Matza's in the sense that he believes that "we are all animals and thus all naturally capable of committing criminal acts" while Matza considered delinquent behaviour as reflecting the delinquent freeing himself from conventional behaviour in spite of conventional moral beliefs. Hirschi proposed his obviously valid social control theory that individuals tightly *bonded* to social groups such as the family, the school, and peers would be less likely to commit delinquent acts.[33] He elaborated his theory in terms of four factors : attachment, commitment, involvement and the belief an individual has vis-a-vis the closely placed persons and the social institutions.

32. Clearence Sahray : *Crime and Justice : American Style* (1971), pp. 82-9; Vold, *op. cit.*, pp. 238-39.
33. Travis Hirschi: *Causes of Delinquency* (1969), p. 31.

1. Attachment.—Hirschi's study regarding the factor of 'attachment' was based on a self-report survey of about 4,000 school students in San Fran-cisco. The students were required to answer a questionnaire containing a variety of items relating to family, school and peer relations and their involvement in some specified varieties of delinquent acts such as stealing and causing physical hurt. As regards the correlation between delinquent behaviour and attachment to parents, schools and peers, the study disclosed that boys attached more closely to their parents were less likely to report committing delinquent acts than those who were attached less closely. Consistently with these results, he also found that those who reported more delinquent acts did not score well in the school tests, nor felt much attached to the school and were indifferent to the opinion of their teachers.

2. Involvement.—Those who are relatively more involved in conventional activities are less likely to indulge in delinquent acts. This is based on the common sense observation that "idle minds are the devil's workshop", and that being busy restricts opportunities for delinquent activities.

3. Commitment.—The greater the commitment of an individual to the conventional society, the lesser is the likelihood of his deviating from the conventional behaviour. The commitment depends upon what has been described as stake in conformity by Toby.

4. Belief.—As put by Hirschi, "there is variation in the extent to which people believe they should obey the rules of society, and, furthermore, that the less a person believes he should obey the rules, the more likely he is to violate them". As observed earlier, this is regarded as in contrast to Matza's theory in which existence of belief in conventional behaviour and morality did not prevent a person from straying onto the forbidden path in some situations.

Control Theories : Evaluation

The control theories have been supported by a good number of studies though it has been pointed out that the supportive studies generally covered only relatively trivial offences committed by essentially non-delinquent youths. Vold's valid observation is as given below:[34]

> "Control theory may adequately explain delinquency in boys who spend only a few hours per year engaged in it but whether it explains delinquency among the boys that Cohen was talking about is another question entirely. Serious delinquency cannot be adequately explained by control theories."

The theories have also been questioned on the ground that they take into account the 'naturally motivated' delinquency but not the outside

34. Vold, *op. cit.*, p. 246.

pressures operating among the delinquent youths. The relative merit of control theories has, however, been conceded :[35]

> "Control theories appeal to criminologists for several reasons. First, they provide criminologists with very testable theories. Many other criminological theories, in contrast, are much more difficult to test in that their concepts and variables (like "an excess of definitions favourable to law violation) are very difficult to operationalise. Second, control theories have been linked from the outset with a new research technique, the self-report survey.... The combination of a testable theory with a research technique that produces supportive results is very attractive, to say the least."

Conclusions

In the preceding discussion, a survey has been made of various approaches beginning with the Lombrosian approach, which sounds very naive in retrospect, to the extremely plausible theories based on socio-economic factors at the other end. The discussion makes one thing quite clear that it is not possible to lay down all the causes of crime which will give foolproof answers to all questions of criminal causation in general. As observed by Albert Cohen, a single theory of explanation of crime does not mean a single factor in the causation of crime. Different types of offences like theft, murder, blackmail and rape obviously have different kinds of motivations and all of them cannot be explained by the same theory. Further, the theories are of a general nature and cannot explain particular situations. No one would hold that delinquency is the product of one variable, although many would contend that some large but finite number of factors do combine to produce delinquency.

A more fundamental objection regarding the search of causes of crime with reference to the individual criminals is that this approach assumes something being wrong with the violator of the criminal law and that the laws and legal system are without any blemish. The proponents of "critical criminology" point out that the so-called 'deviance' found in a criminal law violator need not always be 'authentic' and may be independent of any social or personal pathology. A little awareness that the law itself may be problematic is of very recent origin and the solution of the crime problem sought by even liberals has been, by and large, in terms of changing the law-breaker rather than altering the legal system. It is pointed out that the main concern of the social scientists has been confined to social order and any existing arrangement of norms is good enough to serve as their point of reference.[36]

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35. Vold, *op. cit.*, p. 247.
36. See generally *Critical Criminology* (Ed. Taylor, Walton & Young, 1975).

Chapter V

REACTION TO CRIME—PUNITIVE APPROACH

Reactions to crime have been different at different stages of human civilization and even at a given time they have been different in various societies. It has rightly been said that the attitude towards crime and criminals at a given time in a society represents the basic values of that society. The attitude towards criminals has always been coloured by the extreme type of emotions displayed by the society. In the words of Elmer Hubert Johnson, he (criminal) may be described as a monster or be pictured as a hunted animal or as the helpless victim of brutality.[1] As a result of the changing attitudes, three types of reactions can be discerned in various societies. The first is the traditional reaction, of a universal nature, which can be termed as the punitive approach. It regards the criminal as a basically bad and dangerous sort of person and the object under this approach is to inflict punishment on the offender in order to protect the society from his onslaughts. The second approach, of relatively recent origin,. considers the criminal as a victim of circumstances and a product of various factors within the criminal and society. This approach, since it regards the criminal as a sick person requiring treatment, is termed as the therapeutic approach. Finally, there is the preventive approach which instead of focussing attention on particular offenders, seeks to eliminate those conditions which are responsible for crime causation. It should, however, be understood that the three approaches are not mutually exclusive. Not only do they overlap with each other, but sometimes they may coexist as parts of the overall system in a society. It should, however, be understood that the theories reflecting these approaches are not 'theories' in any normal sense, they are not assertions but are in the nature of moral claims.[2]

The punitive approach has its focus of attention, as observed earlier, on the damage caused to the victim and danger posed to the society. The criminal is treated as something incapable of being reformed. He is judged on the basis of his past conduct and not on what improvements he is capable of in the future. This approach, even today, remains a potent force though not many will justify it in the same way, as was done earlier, and now some rationalizations are made to suggest that the therapeutic ideal is also covered by this approach.

1. *Crime, Correction and Society*, p. 3.
2. *See* generally H.L.A. Hart : *Punishment and Responsibility* (1968).

Punitive Reaction—Justification and Motivation

An interesting question may be raised at this point. How can the urge in people to punish the offenders be explained ? Various answers have been given to explain the human psychology involved in this context. Donald R. Crassey tried to answer it on the basis of his "scapegoat hypothesis"; the criminal is made a scapegoat to give relief or gratification to the members of the community. This relief or gratification is due to their sense of freedom from their own guilt feelings about the crime, as a result of punishment given to the offender. This is based on the theory that all human beings have criminal propensities though in most cases they may not be reflected in actual behaviour. If no outlet to such feelings is provided by punishment, even lynching may be resorted to by the people. According to another view, the hostile reaction to the criminal works as a bond between the non-criminal members of the community. The bond represents the reassertion of moral principles common to the members of the society and serves as a reminder of the taboos to all of them.

Whatever may be the real impulses in the human mind responsible for the infliction of punishment on the wrong-doer the rational explanations advanced are quite a few and a brief examination of some of them follows.

Though the ideas regarding the nature of necessity may differ, almost all the justifications are offered on the basis of 'grim necessity'. It is only the extreme and pure retributionists who perceive punishment as inherently good i.e. *per se* and according to them no justification whatsoever is required for punishing an offender. Justification for punishment is also argued on the basis of 'social contract' which creates a 'give and take' situation. To enjoy individual rights and benefits, it is only reasonable and inevitable that individuals curtail their freedom *vis-a-vis* others and in the event of their failure to do so, punishment must be inflicted on them.

The rationalizations of punishment may be divided into two classes, based on retributive and utilitarian theories. While the retributionists assert that the infliction of punishment is justified in itself since offenders should be given their just desserts, the utilitarians regard punishment as an evil which should be used only if it serves some real purpose like deterrence from commission of crime.

Retribution Theory

Retribution has been regarded as a very important feature in the punitive scheme. According to Hegel, the great German philosopher, punishment 'annuls' the crime. It aims at restoring the social balance disturbed by the offender. The offender should receive as much pain and suffering as inflicted by him on his victim to assuage the angry sentiments of the victim and the community. Sir James Stephen claimed that criminal law stands to the

passion of revenge in much the same relation as marriage to sexual appetite.[3] Various theories have sought to justify the retributive aspect of punishment in theological, aesthetic and expiatory grounds. Retaliation fulfils a religious mission of punishing the offender, it re-establishes the social harmony affected by the offence and the offender's guilt is washed away through suffering.[4]

The most forceful presentation of the case for retribution is the justification for punishment by the eighteenth century German philosopher, Immanuel Kant. He expressed his opposition to the utilitarian concepts in the following words:

> "Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime, for a human being can never be manipulated merely as a means to the purposes of someone else and can never be confused with the objects of the law of things."[5]

The Kantian objection is that a mere use of a person for some social purpose violates his moral autonomy and he, therefore, finds the justification of punishment in retribution alone. Emphasising the supremacy of legal justice, Kant observed:

> "The law concerning punishment is a categorical imperative and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it in keeping with the Pharsatic motto: 'It is better that one man should die, than that the whole people should perish: If legal justice perishes, then it is no longer worthwhile for men to remain alive on this earth'."[6]

The extreme limits to which the retribution element must be carried is expressed thus:

> "Even if a civil society were to dissolve itself by common agreement of all of its members (for example, if the people inhabiting an island decide to separate and disperse themselves around the world) the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the blood guilt thereof will not be fixed on people because they failed to insist on carrying out the punishment, for if they fail to do that, they may be regarded as accomplices in this public violation of legal justice."[7]

3. Stephen : *General View of the Criminal Law of England*, p. 99.
4. Heinrich Oppenheimer : *The Rationale of Punishment* (1913).
5. *The Metaphysical Elements of Justice*, translated by John Ladd (Bobbs Merrill, U.S.A.), p. 100.
6. *Ibid.*, p. 100.
7. *Ibid.*, p. 102.

Some other supporting arguments for retribution may be summarised as follows :

1. Retribution connects the offender to correct values; it sends the message to the wrongdoer that what he did was wrong. Retribution should, therefore, not be confused with revenge.
2. It would be unfair to victims if there is no retribution against the wrongdoers.
3. It would also be unfair to the law-abiding citizens if the offenders get undeserved benefit through their criminal acts.

These postulates of retributivism have been criticised. It has been asked, for instance, that if individuals have no moral right to exact retribution, how can a group of individuals in the society acquire such a moral right. As regards expiation, Blackstone urged that atonement and expiation should be left to the Supreme Being.[8] There is some merit, at least theoretical, in the expiation argument that the offender gets an opportunity of making a new start after the 'atonement'. The practical snag is that it becomes extremely difficult for a person to start with a clean slate after being convicted of an offence. The chances of his being admitted to society as a normal human being are certainly affected after undergoing punishment. In a very interesting comment on retribution, Nigel Walker observes:

> "If the retributionist is arguing that punishment is justified in spiritual improvement, he is asking that the penal system should do the work of the Church. He is certainly entitled to ask that it should not make the work of Church impossible (for example, by placing obstacles in the way of contact between offender and the priest). But if he asks that it should adjust the nature of the penalty to assist in the work of the Church he is raising awkward questions. For example, would this justify longer (or shorter) prison sentences, for Christians than for atheists? But I do not think that genuine retributionists regard retribution as a means in this way. For them it is an end in itself."[9]

The theories of punishment based on retribution have also been sought to be defended on the ground that punishment reflects denunciation of the criminal and his act by the society. The idea of denunciation as an expression of the moral sentiments of the community is expressed rather forcefully by Sir James Stephen in the following words:

> "The sentence of the law is to the moral sentiment of the public in relation to any offence is what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment. The mere general suspicion or knowledge that a man has done something dishonest may never be brought to a point, and the disap-

8. Blackstone : *Commentaries* IV, p. 11.
9. *Sentencing in a Rational Society*, p. 13.

probation excited by it may in time pass away, but the fact that he has been convicted and punished as a thief stamps a mark upon him for life. In short, the infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offence, and which constitutes the moral or popular as distinguished from the conscientious sanction of that part of morality which is also sanctioned by the criminal law. The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it.... This close alliance between criminal law and moral sentiment is in all ways healthy and advantageous to the community. I think it highly desirable that criminals should be hated, that the punishment inflicted upon them should be so contrived as to give expression to that hatred.... No doubt they (punishments) are peculiarly liable to abuse, and in some states of society are commonly in excess of what is desirable, and so require restraint rather than excitement, but unqualified denunciations of them are as ill-judged as unqualified denunciations of sexual passion. The forms in which deliberate anger and righteous disapprobation are expressed and the execution of criminal justice is the most emphatic of such forms, stand to the one set of passions in the same relation in which marriage stands to the other."[10]

In his evidence to the Royal Commission on Capital Punishment, 1949-53, Lord Denning observed:

> "The ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime."

In the opinion of Prof. H.L.A. Hart such an approach tends to invert the priorities since punishment should not be for the sake of denunciation alone but a deserved punishment does serve as a denunciation. According to him, we do not live in society in order to condemn though we may condemn in order to live.[11]

It follows, therefore, that the concept of denunciation belongs to the utilitarian rather than to the retributive theories.

It appears from the above discussion that the retribution theory in its purest form, which provides that the penal system should be designed to ensure that offenders atone by suffering for their offences and their suffering should be of the same magnitude as that of their victims, has lost much of its ground in the context of modern and more enlightened views on the functional value of penal law.

10. *A History of the Criminal Law of England* (1883), pp. 81-82.
11. *Punishment and Responsibility*, p. 182.

Utilitarian Theory

As mentioned earlier, the utilitarians view punishment as a means to achieve certain ends with the aid of criminal law. Punishment must serve as an instrument for reducing crimes either by deterring the offender and others from doing similar acts in future or it should prevent the commission of offences by incapacitating the offenders. Reformation of the offenders through punishment is also sought to be achieved, though the efficacy of the punitive approach in the reformation of the offender is extremely doubtful.

Utilitarians accept punishment only for achieving 'good consequences' but there may be disagreement as to the nature of the 'good consequences'. Three issues to be considered in a given situation are as to whether the punishment would be (*i*) useless (*ii*) needless, and (*iii*) involving more evil than what it purports to solve.

Deterrent Theory

One of the utilitarian rationalizations which are advanced to justify punitive reaction is that punishment acts as a deterrent to the offender punished and also to others in the community. It is assumed that as in day-to-day life the infliction of pain or its apprehension keeps people away from certain proscribed behaviour, the same purpose is served by punishment in relation to conduct forbidden by law. It has been suggested that the so-called deterrent approach is a veiled form of the retributive spirit. There seems to be no answer to the question as to whether punishment really deters the offender in future or other members in the community. Obviously it will be a difficult task, almost next to impossible, to establish in a clearcut manner as to who has been deterred, and on what occasions, by the apprehension of infliction of punishment. As a result, the statistical evidence for the effectiveness (or the lack of it) of deterrents is scarce and of limited applicability. An interesting study to test the deterrent effect of penal sanctions was made by Professor Schwartz and Miss Sonya Orleans with reference to income tax laws. Nearly 400 taxpayers were divided into four matched groups. Members of the 'sanction' group were interviewed, and asked questions designed to remind them indirectly of the penalties which they might suffer if they tried to evade taxes. Members of the 'conscience' group were interviewed, and asked questions designed to arouse their civic sense and feeling of duty. The third, or 'placebo' group were asked only neutral questions, which avoided both sort of stimuli. The fourth group were not interviewed at all. The interviews took place in the month before the taxpayers were due to file their returns for 1962. The Internal Revenue Service compared the returns of the four groups for the year before the experiment and the year 1962. The reported gross incomes of both the 'sanction' and the 'conscience' groups showed an increase, compared with

small decreases in the 'placebo' and uninterviewed groups. The study, therefore, showed that the element of deterrence did have some effect in changing the attitude towards taxation laws.[12]

That punishment has some deterrent effect on many people can be accepted without much debate.[13] But there are some other deeper aspects which cannot probably be asserted with the same amount of confidence. The study made by Schwartz and Orleans may explain the role of sanctions in offences like tax violations but the situation may be more complex in a different type of offence like murder, where even the extreme threat of death penalty has not been proved to have much deterrent effect in many studies. The problem in fact is quite complex and one element which may really change the attitude one way or the other is not the threat of punishment as such but the belief regarding the chances of application of penal law. In other words, effective enforcement of penal law is a more important dimension than the mere presence of provision for punishment on the statute book. By the year 1800, over two hundred offences, it has been estimated, were punishable by death in England.[14] The reason was that the police was not so well-organised as it is now and the uncertainty of detection of crime and conviction of offenders was sought to be compensated through the provision for extremely severe punishment. An 18th century judge, while awarding death sentence to a person guilty of stealing a sheep, observed: 'You are to be hanged not because you have stolen a sheep but in order that others may not steal sheep.'

Efficacy of the deterrent aspect of punishment can be pointed out with reference to the Islamic law of crimes as applied in Saudi Arabia, the only country where the system with all its severity is being applied even now. Muslim law of crimes, like other laws of medieval ages, is very severe in its application to offenders. For instance, mutilation of a limb is possible as punishment in a case of theft. It is reported that crimes are almost unknown in Saudi Arabia and it is a common sight in towns that people leave their shops open and unattended while they are away from them for some time. It may be pointed out, however, that several other factors might be operating for creating such a situation, like economic security and religious injunctions. Further, it may be observed that deterrence is not the only purpose of criminal law but has to maintain some other values as well.

12. Schwartz and Orleans (1967), quoted by Nigel Walker in *Sentencing in a Rational Society*, p. 59.
13. The results achieved by the Income Tax Department under the voluntary disclosure scheme of 1975 in the wake of the national emergency in India serve as an impressive illustration. According to the press reports, undisclosed assets worth about one hundred and fifty million rupees have been unearthed.
14. Leon Radzinowicz : *A History of English Criminal Law and its Administration from 1750*, Vol. I, p. 3.

Empirical evidence relating to the deterrent effect of imprisonment, the most common mode of punishment, is of complex and doubtful nature. The report of the Panel of the National Research Council in the U.S.A. on Research and Deterrence and Incapacitation Effects concluded that there was no subsequent difference in recidivism irrespective of 'treatment'; neither 'crimogenic' nor 'reformative' or rehabilitative effects of imprisonment were proved. It is also difficult to distinguish at observational level between individual deterrence and rehabilitation. Though some evidence of 'individual deterrence' is available, but that might be found even where no action is taken except detection of the offender and subsequent reprimand only. General deterrent effect could be achieved in certain areas of behaviour but not at all in others. The Panel did not share the findings of some studies that 'increasing the frequency or severity of punishment does reduce the likelihood that a crime will be committed'; the perceived reduction could be because of the 'overburdened criminal justice system'. Reduction of crime may not be the effect of severity of punishment alone but may also because of law enforcement.

Incapacitation

The punitive reaction is justified on the ground of incapacitation which results to the offender due to punishment. It is believed that the danger to the society is removed by placing the offender under imprisonment for a certain period which may be very long in case of persons with greater potential for mischief. It is obvious that such a rationalization takes a very dim view of the personality of the offender and his disablement to commit any offence for a duration of time is taken as an end in itself. It is only in recent times that the idea of possible reformation of the offender has found a place in the scheme of incarceration.

Retribution and Utilitarianism — A Compromise

The critics of the utilitarian approach assert that, carried to the logical extreme, the principle of utilitarianism would even justify the framing and punishment of an innocent person if it leads to prevention of violence and loss of life and property in a situation where it is not possible to book and convict the real culprits. Thus, in the pure utilitarian context, it may be the right solution to defuse the trouble arising out of a communal or racial conflagration. No utilitarian, however, is likely to accept the effective remedy based on the fabricated penal liability of an innocent person. Pure retributive considerations, on the other hand, also not being plausible, a kind of synthesis or compromise has been effected in a few theories of the basis of criminal liability. As propounded by H.L.A. Hart, the general justifying aim of punishment is utilitarian which is protection of society from the harm

caused by crime but justice requires that the application of punishment should be restricted to only those who have voluntarily broken the law.[15]

KINDS OF PUNITIVE APPROACHES

Various forms of punishments have been evolved and applied in different societies through the ages. Tortures, sadistic forms of executing death sentences and all sorts of cruelties in the prisons were some of the distinguishing features of the penal philosophy all over the world till relatively recent times.

The punishments provided in many parts of the world, including India[16], are death, imprisonment for life, rigorous and simple imprisonment, forfeiture of property and fine. A discussion of the problems involved in them may be useful at this point.

Corporal Punishment

Before the rise of humanitarianism in the penal philosophy, mutilation, branding and flogging were well-recognized modes of punishment. In India, the corporal punishment of whipping which was first added and regulated by the Whipping Act of 1864 (repealed and replaced by the Whipping Act of 1909), was abolished in 1955. In England, flogging was abolished quite some time ago. Yet, if this type of punishment is itself a dead letter, the issue whether or not to reintroduce it is very much a living one, and as recently as 1960 the Advisory Council on the Treatment of Offenders was asked to consider the desirability of such a course.[17] In the U.S.A., Delaware is the only State still using the whipping post while the State of Maryland has reserved it for wife-beaters only.

To prove the efficacy of whipping, it is argued frequently by some people that flogging by parents or school teachers in childhood has a constructive effect. Such an argument ignores two aspects of whipping as a correctional measure. Firstly, the whipping administered by a parent or even a teacher is to be viewed in the context of the emotional relationship between the child and the pain-inflicting source. That certainly is lacking in the case of a person doing it on behalf of the police, jail or some other authority. Secondly, the whipping done by a parent or school teacher inflicts pain generally within a very short time after the delinquent act is committed by the child and such promptness in the punishment is bound to heighten the effect of the chastisement.

Various studies made in the U.S.A. and England do not seem to support the view that whipping has any particular deterrent effect. In a research carried out by the British Home Office the subsequent criminal records of

15. H.L.A. Hart : *Punishment and Responsibility*, p. 3.
16. Section 53, Indian Penal Code.
17. P.J. Fitzgerald : *Criminal Law and Punishment* (Clarendon Law Series, 1962), p. 228.

440 persons sentenced for robbery with violence in the 1921-1930 period were compared with 142 sentenced to corporal punishment. Of those flogged, 55 per cent were subsequently convicted of a serious crime compared to 43.9 per cent of those not flogged.[18] Elmer Hubert Johnson sounds a note of caution before any conclusions can be drawn because the sentencing court may have considered personal characteristics of the convicted offender before deciding whom to whip.[19] It may be observed that even if the punishment of whipping is used, it is not likely to have much effect on hardened criminals like robbers (as shown in the above study) but it does cause some deterrence to wife-beaters and eve-teasers.

Contrary to the prevalent philosophy against violent punishments and, therefore, somewhat quite unexpectedly, the cause of corporal punishment has been taken up very forcefully by Graeme Newman in his book[20] published recently at a time when scepticism is being already expressed by many regarding the efficacy of rehabilitation and reformative techniques. Newman is in full agreement with Sigmund Freud that the psychological reality reflected in the human urge for retribution is the only true basis of all the punishments. Not at all apologetic or defensive about retribution, Newman does not regard pain as an inherent evil and holds that it has more merit than either deterrence or incapacitation.

Newman being a trenchant critic of imprisonment as a mode of punishment believes, like many others, that prisons do not serve the purpose of either rehabilitation or punishment and the cost involved in any case is too enormous to be worthwhile.[21] Imprisonment involves pains of all the possible varieties, physical, mental, social and economic which are neither intended to be inflicted nor deserved by the convicts. The corporal punishment fits the various crimes rather well and is capable of being regulated in consonance with the nature and magnitude of the crime. Unlike imprisonment, it does not have a tangible effect on the members of the convict. While imprisonment may be confined to habitual offenders, corporal punishment may be an appropriate punishment to fill the gap between the severe punishment of prison and the non-punishment of probation especially in property offences.

Fines

Fines as an additional or alternative form of punishment have been increasingly favoured by the law as well as judicial authorities.[22] They are

18. Quoted in Gordon Rose : *The Struggle for Penal Reform* (1961).
19. *Crime, Correction and Society*, p. 404.
20. *Just and Painful* (Macmillan Publishing Co., London, 1983).
21. U.S.A. has a prison population of more than 400,00 and the expenditure per head per year works out to be twenty thousand dollars.
22. For a detailed discussion of punishment of fine, *see* Chapter XI dealing with Sentencing Process.

singularly more appropriate in offences relating to traffic, employment of persons unauthorised by law and violation of laws regarding manufacture and distribution of goods. They are very frequently imposed in relation to property crimes like embezzlement, fraud, theft, violations of lottery and gambling laws and minor offences like loitering and disorderly conduct. In the Indian Penal Code the provision for fines, as punishment, was justified by its framers thus:

> "Fine is the most common punishment in every part of the world and it is a punishment the advantages of which are so great and obvious that we propose to authorise the courts to inflict it in every case.... Imprisonment, transportation, banishment, solitude, compelled labour are not equally disagreeable to all men. With fine the case is different. In imposing a fine it is always necessary to have regard to the pecuniary circumstances of the offender, as to the character and magnitude of the offence. The mulet which is ruinous to the labourer is easily borne by a tradesman and is absolutely unfelt by a rich zemindar."[23]

The framers of the Indian Penal Code were Benthamites and it is not surprising, therefore, that the above observation is an echo of what Bentham had said regarding the utility of fines. According to him, the punishment of fine had the advantage of being capable of regulation according to the means of the offender, implied no disgrace and was remissible in case of unjust convictions as discovered subsequently. The disadvantages according to Bentham are that the family and dependants of the offender are hit and the punishment is not exemplary, as in its execution no spectacle is made.

The imposition of fines may be made in four different ways as provided in the Penal Code. It is the sole punishment for certain offences and the limit of maximum fine has been laid down; in certain offences it is an alternative punishment but the amount is limited; in certain offences it is imperative to impose fine in addition to some other punishment; and in some offences it is obligatory to impose fine but no particular pecuniary limit is laid down.

As regards the question of quantum of fines, no general provision exists in England to regulate it. But both the Magna Carta and the Bill of Rights contain provisions prohibiting excessive and unreasonable fines and assessment. In India, the framers of the Penal Code observed that in offences, which are the result of greed, the amount of fines ought to be so excessive as to reduce the offender to poverty.[24]

There must be some power vested under the law to realise the fine imposed upon the offender. In many cases the courts award imprisonment

23. Note A, Reprint, p. 97 of the Commission's Report, quoted by R.C. Nigam : *Law of Crimes in India.*

24. *See* Note A, Reprint, p. 97 of the Commission's Report.

in default of fine. This power to courts has been given under Section 64 of the Penal Code. Legally speaking, the position is that the fine pronounced in a judgment becomes a debt in favour of the State or Crown in England. An interesting question arose in England as to whether such a debt was personal to the offender so that it was extinguished by his death or it was capable of being recovered from his estate after his death. It was held that the debt was not extinguished by the death and was accordingly recoverable from his estate in the suit filed by the Crown.[25]

Forfeiture and Confiscation of Property

Forfeiture of the property which is the subject-matter of the offence, is a possible mode of punishment under the Indian Penal Code in certain circumstances.[26] But forfeiture of the whole of the property of the criminal is not possible according to the present law. Such a punishment was possible under the original Penal Code but the provisions were repealed in 1921. Recently the Law Commission invited opinions on the basis of a questionnaire relating to the question of introduction of some forms of punishment in the Code. One of the items in the questionnaire was regarding the confiscation of the entire property of the criminal. The opinions received by the Commission were largely against the introduction of confiscation as a punishment in the Code. The Commission too was of the view that "this harsh punishment, which will fall not only on the criminal but on his dependent family, is not to be commended"[27]. It may be observed here that the Commission does not appear to have applied its mind to the problem in depth. Simply saying that the family and dependents would be affected is probably not enough. Such a punishment is certainly called for in cases of smugglers[28] and blackmarketeers where prima facie the source of income or property acquired by the offender may be illegal. As regards hardships to the family, the same is caused in varying degrees by all forms of punishment. When a killer is sentenced to death or life imprisonment, hardship is inevitable to his family if he happens to be the sole or the most important breadwinner for the family. In a country, which claims to be a welfare State, the family, if hit hard, must be provided financial relief by the government agencies and the family's possible suffering need not be used as an argument for withholding a punishment from an offender who deserves it otherwise. The punishment was retained in the Indian Penal Code Bill of 1972.[29]

25. *H.M. Treasury* v. *Harris*, (1957) 2 All ER 455.
26. Sections 126, 127 and 169 of the Code.
27. Law Commission of India, Forty-second Report (IPC), p. 58.
28. Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (13 of 1976).
29. Clause 19(*vi*).

Banishment

This punishment is one of the most ancient ones. The object is to eliminate the criminals from the society by sending them to far-off places and sometimes even rebels, revolutionaries and reformers were also taken care of by this process. In India, transportation meant the despatch of more dangerous criminals to '*Kala Pani*' i.e. to Andaman and Nicobar Islands. The draftsmen of the Indian Penal Code, while proposing this punishment, took note of the extraordinary fear among Indians of the sea, particularly those living far away from it and felt that the punishment caused more terror in the Indian minds than what was actually warranted by the actual punishment. It was, therefore, thought to have it in the Penal Code because of its peculiar deterrent value. As observed by Sir Hari Singh Gaur, it had an additional dimension for Hindus because going beyond the seas involved the forfeiture of one's caste.[30]

The practice of sentencing by transportation to Andaman Islands came to a halt in the early forties during the occupation of the islands by the Japanese. Finally, by an amending Act of 1955, the punishment was abolished altogether and transportation for life or a shorter duration was substituted by imprisonment for life or shorter period as the case may be. In England also, transportation as a punishment was abolished in 1854. This type of punishment is possible in the U.S.S.R. where it is known as exile, which means the removal of the convicted person from the place of his residence, with obligatory settlement in a certain locality, usually Siberia, where living conditions are extremely bad due to the freezing cold. Recently, the question of introduction of this form of punishment was considered by the Law Commission of India which concluded:

> "The suggestion did not find favour in any quarter. From the practical point of view, it almost necessarily involves the establishment of a penal settlement in each State, somewhat similar to the settlement in the Andaman Islands....The running of such settlements and keeping effective control over the convicts banished thereto will give rise to difficult problems of administration. If the control were to be strict, the settlement would degenerate into concentration camps. As an alternative to long-term imprisonment, banishment does not appear to have any appreciable advantage, and cannot be recommended."

Imprisonment

Imprisonment in its pure and simple form is a kind of punitive reaction, its object being primarily to deprive the offender of his liberty which is the most serious damage which can be caused to a human being, next only to deprivation of life by death sentence. In recent times, the correctional idea

30. *Penal Law of India*, Vol. 1 (1972 Edition), p. 380.

has also been brought in to introduce some changes in prison philosophy but even now, imprisonment remains the most common mode reflecting the punitive approach and its fundamental character remains the same.

Imprisonment as a form of punishment is of relatively recent origin and got prominence as a result of the decreasing use of capital punishment and transportation in most of the countries during the last century or so. The traditional concept of prisons was different from the one in which it has been understood since the middle of the last century.

> "Traditionally it was held that imprisonment should be used only for the custody of offenders until such time as they could conveniently be dealt with, and this view prevailed in Europe from the time of the Roman Emperor Justinian for the next thousand years or so. In medieval England prisons were places where suspects were detained until the royal Judges came round on circuit with a commission of 'gaol delivery', to empty the jails and inquire into the alleged crimes."[31]

The most serious problem associated with imprisonment is what has been termed as 'prisonisation'.[32] The prisoner, introduced to a new environment which has its own culture and values is affected by the direct impact on the earlier culture which the prisoner was exposed to before entering the jail resulting in 'acculturation' of the offender. His personal identity is the first casualty in the process. From a human being bearing personal characteristics, he is converted into a mere impersonal entity in the new subordinate social groups. His name is replaced by a number. His clothes, food and working and leisure hours are just the same as those of other members of the group i.e. the fellow prisoners. In other words, he is a unit to be processed by the prison employees and to quote Alfred Hassler, the prisoner is perceived as a job, rather than as a person.[33] All this results in some sort of social debasement of the convict in his own eyes.

Equally damaging is the effect on family relationships. Many legal systems even recognise imprisonment as a ground of divorce available to the spouse of the convict. The only possible contact with the family members is through periodic visits permitted to them under the jail rules. These contacts by their very nature are bound to be after sufficiently long periods of time and that too, for a short duration under the claustrophobic atmosphere created by the carefully laid down rules. It has been suggested by some reformers of the present system that prisoners should be allowed to continue their family life within the prison but the practicability of such a proposal has also been questioned. It is only in certain prison systems in Europe and

31. P.J. Fitzgerald : *Criminal Law and Punishment*, p. 233.
32. Donald Clemmer : *Imprisonment as a Source of Criminality* (1950).
33. *Diary of a Self-Made Convict* (Chicago, 1954).

South America that arrangements are made for 'connubial visits' between the spouses.

Instead of moving the criminal away from criminal tendencies, imprisonment sometimes results in something just the opposite. Gambling and deviant sexual behaviour, in the form of homosexuality, are some of the offences for which the prison provides the ideal breeding ground. In case the employees of the prison happen to be corrupt, the prisoner comes to know the efficacy of bribe as a means to gain some minor favours from them.

Finally, the most serious thing which happens to the prisoner is the stigma arising out of a prison term. He cannot be kept in prison for all time to come and sooner or later he has to go back to the society from which he came to the jail. The difficulties which he faces in getting accepted once again in society are obvious and need not be overemphasised. Prisoners often feel, quite justifiably, that the real punishment begins after they leave the prison.

All the defects in the imprisonment process, as discussed above, are capable of being used as very good arguments to highlight the deterrent and retributive elements of the punitive reaction. They are however certainly incompatible with any rehabilitative ideals which some reformers might be contemplating in the prison system.

Capital Punishment

Capital punishment is one of those subjects of human concern which give rise to an endless debate without producing any conclusions which can be scientifically tested to make them convincing to both the parties to the debate. To abolish or not to abolish is the problem which has been faced in many countries and is being faced in others even now.

The crusade against capital punishment started in England and Europe as a result of the works of utilitarians like Bentham and Beccaria who insisted that punishment being an evil in itself should be just sufficient to curb the menace of the crime and no excessive punishment, including capital punishment, ought to be inflicted where some lesser penalty could achieve the same result. In England the movement against capital punishment was carried on by Romilly and some other reformers, and in the recent past by Sydney Silverman, whose efforts led to the almost total abolition of capital punishment under the Murder (Abolition of Death Penalty) Act 1965. The present position is far different from the position obtaining in England at the end of the eighteenth century when about 200 offences were punishable with death. In India too, the problem has been engaging government and public attention over the years but the death sentence is still there on the statute book though its use has been sparingly made in the "rarest of rare

cases"[34] *and there is a tendency to restrict its use to grave offences committed under aggravating circumstances.*[35]

In England a sentence of death can still be given for high treason (Treason Act, 1814), piracy with violence (Piracy Act, 1837), setting fire to the Queen's ships, arsenals etc. (Dockyards etc. Protection Act, 1772). As for murder, the Act of 1965 provides life imprisonment. While sentencing a person for murder to life imprisonment, the court may at the same time recommend a minimum period to the Secretary of State which in its view should elapse before the person could be released under Section 27 of the Prisons Act, 1952. In *R.* v. *Flemming*[36] it has been suggested that no such recommendation be made for a period of less than twelve years.

In the U.S.A., the trend for abolition of capital punishment commenced in the nineteenth century when the State of Michigan abolished it, except for treason, in 1847. Since then many more States have followed suit.

The constitutionality of capital punishment, as violative of the Eighth Amendment[37] of the Constitution, was challenged before the American Supreme Court in *Furman Georgia*[38]. The Court by a majority of five to four held that capital punishment, at least as generally administered, violated the Eighth Amendment. The decision in the case is regarded as not being very clear and it did not exactly say that death penalty was unconstitutional *per se* but it was so in the particular circumstances of the case in the light of the Eighth and the Fourteenth[39] Amendments of the Constitution. Some of the judges based their verdict on the ground that no general guidelines were being followed regarding death sentence and it was being awarded in an unpredictable and fortuitous manner.

Mr. Justice Douglas held that the death penalty was cruel and unusual because "it was being applied irregularly and selectively to minorities whose members are few, who are outcasts of society and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the boards". Mr. Justice Stewart expressed similar sentiments regarding the discriminatory administration of the death sentence.

34. *Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684.
35. The capital punishment is confined by the Code only to five principal offences, namely:
(*i*) Treason e.g. waging war against the Government of India (S. 121); abetment of mutiny (S. 132);
(*ii*) Perjury resulting in conviction and death of an innocent person (S. 194);
(*iii*) Murder (Ss. 302 and 303);
(*iv*) Abetment of suicide of a minor or insane person (S. 305); and
(*v*) Dacoity with murder (S. 396).
36. (1973) 2 All ER 401.
37. The amendment forbids 'unusual and cruel' punishment.
38. (1972) 408 U.S. 239.
39. The amendment provides 'due procedure' safeguard for life and liberty.

While some judges expressed themselves in favour of abolition of capital sentence in order to achieve "a major milestone in the long road from barbarism", some others expressed a dissenting opinion and felt that the matter was essentially political and properly the domain of the legislature, not the judiciary.

As a result of the *Furman* decision, thirty-five States in the U.S.A. made changes in the procedural laws to gear them up to the constitutional requirements regarding death penalty. The solution to the *Furman* objections was sought to be found in one of the following ways by the various States:

1. Pre-sentencing hearing is made essential after the trial to examine the fairness of the death penalty having regard to similar cases.
2. Death sentence is made mandatory for a few specified offences.

Five State Supreme Courts have held the death penalty under the above procedures to be constitutional. In 1976, the Supreme Court of the U.S. delivered judgments in quite a few cases in the light of laws laid down by some of the States and held capital punishment to be constitutional. The reasons given by the Court in *Gregg* v. *Georgia*[40] are particularly illuminating.

1. History and precedent do not support the conclusion that the death sentence is a *per se* violation of the Constitution.
2. The argument against death sentence based on the argument that it was indecent and uncivilised had been substantially undercut in the last four years (after *Furman*) because a large segment of the enlightened population regards the death penalty as appropriate and necessary, as seen in the legislation passed in response to *Furman.*
3. The death sentence served two principal social purposes of retribution and deterrence and the death sentence for murder was:
   (*a*) not without justification,
   (*b*) not unconstitutionally severe,
   (*c*) not invariably disproportionate to the crime.

As noted earlier, in India the issue of capital punishment has been engaging some attention over the last many years but the punishment is still there on the statute book for a few offences.[41] Due to certain changes in the Criminal Procedure Code and the aversion of the judiciary, particularly at the highest level, to this mode of punishment, the use of capital punishment has progressively declined over the last many years.[42]

40. 428 US 153 : 49 L Ed 2d 859 (1976).
41. *See* footnote 35.
42. See *infra* for the position under the Constitution and the Criminal Procedure Code. For the judicial attitude *see* Chapter XI on the Sentencing Process.

To understand the points for and against the abolition of capital punishment we have to examine the justification of the death sentence and also to see whether any alternative measure would have the same effect.

The abolitionists, generally speaking, hold that capital punishment cannot be justified in terms of retributive purposes in the contemporary civilised world. This is consistent with the rejection of retribution in general in the form of retribution of any punishment. Even some of those who are for retention of capital punishment do not bring in the idea of retribution while dealing with the issue of death sentence and instead they rely rather more heavily on the deterrent aspect of the punishment. Nevertheless there are some eminent authorities who have no hesitation in basing their views regarding capital punishment on retribution as such. Dr Earnest Van Den Haag, a New York psychologist and author, is of the view that death penalty has a very strong symbolic value. He offers a rationalization for death sentence in the following words:

> "The motives for the death penalty may include vengeance. Legal vengeance solidifies social solidarity against law-breakers and probably is the only alternative to the disruptive private revenge of those who feel harmed."[43]

The Law Commission of India also has supported the element of retribution inherent in capital punishment albeit in a somewhat subtle form. Retribution and deterrence, it has been pointed out, are not two divergent ends of capital punishment but ultimately merge into one. The process of merger was explained in the following words:

> "The fact remains, however, that whenever there is a serious crime, the society feels a sense of disapprobation. If there is any element of retribution in the law, as administered now, it is not the instinct of the man of jungle but rather a refined evolution of that instinct—the feeling that prevails in the public is a fact of which notice is to be taken. The law does not encourage or exploit it for any undesirable ends. Rather, by reserving the death penalty for murder, and thus visiting this gravest crime with the gravest punishment, the law helps the element of retribution merge into the element of deterrence."[44]

The Commission also considered the deterrent aspect of capital punishment and concluded that capital punishment does act as a deterrent. They came to this conclusion on the basis of the following factors:

1. Basically, every human being dreads death.
2. Death, as a penalty, stands on a totally different level from imprisonment for life or any other punishment. The difference is one of quality and not merely of degree.

43. Quoted in *Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684, 722.
44. Para 265 (18), *Thirty-fifth Report*.

3. Those who are specifically qualified to express an opinion on the subject, including particularly the majority of the replies received from State Governments, Judges, Members of Parliament and legislatures and members of the bar and police officers, are definitely of the view that the deterrent object of capital punishment is achieved in a fair measure in India.
4. As to the conduct of prisoners released from jail (after undergoing imprisonment for life), it would be difficult to come to a conclusion without studies extending over a period of years.
5. Whether any other punishment can possess all the advantages of capital punishment is a matter of doubt.
6. Statistics of other countries are inconclusive on the subject. If they are not regarded as proving the deterrent effect, neither can they be regarded as conclusively disproving it.

The question whether capital punishment has the necessary deterrent quality or not, dominates the debate regarding the efficacy of capital punishment. The advocates of retention of capital punishment hold that punishments have a deterrent effect in general and, logically speaking, capital punishment should have the maximum deterrent effect. Their contention is based on the argument that abolition of capital punishment would unleash criminals now restrained by their fear of the executioner. The abolitionists, on the other hand, are not so sure of the deterrent effects of death sentence. By way of illustration, an episode is recalled: once the pocket of a police constable was picked by someone in a crowd watching the public execution of a person found guilty of pickpocketing in England. Various studies have been made in the U.S.A. where crime rates have been compared within a State on the basis of statistics before and after the abolition of death penalty and also between States which had abolished it and which had not done so. It is claimed on the basis of such studies that no increase in murders and other serious crimes took place as a result of abolition. This contention ignores two aspects of the question. Firstly, the reliability of the statistics remains untested. Secondly, there are many factors of socio-economic nature which determine the quantum of crime committed in a society. For instance, the economic and employment situation in the two States which are compared may be different or it may be different even in the same State before and after the abolition. The relative efficiency of police may likewise be different. In the words of Dean Francis Allen:

> "But the fallibility of such statistical inquiries is obvious, and it is important here to be aware of what we do not know. In the first place, most of these studies require accurate statistics on the number of capital offences actually committed. This presupposes a system of crime reporting that is both accurate and in a form which makes the information accessible. The fact is that, particularly in the United States, these

conditions do not obtain. But even if such basic data were at hand, other difficulties would emerge. Suppose, for example, it is shown that in State *X* murder rates declined in ten-year period after abolition. Having learned this, what do we know? Simply that abolition did not prevent a decline. Whether there is a casual connection between the two occurrences, whether the crime rates would have been the same, higher or lower, had the death penalty been retained, are questions that quite clearly remain unanswered. Comparisons of jurisdictions that have and have not abolished capital punishment are afflicted by similar infirmities."[45]

Regarding the deterrent aspect of capital punishment, Edward J. Allen gives a convincing argument by raising a pertinent question:

"If this be true, then why do criminals, even the braggadocian Chessman type, fear it most? Why does every criminal sentenced to death seek commutation to life imprisonment?"

The same argument was put forward more than a hundred years ago by Sir James Fitzjames Stephen:[46]

"No other punishment deters men so effectually from committing crimes as the punishment of death. This is one of those propositions which it is difficult to prove, simply because they are in themselves more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction. The threat of instant death is the one to which resort has always been made when there was an absolute necessity for producing some result. Was there ever yet a criminal who, when sentenced to death and brought out to die, would refuse the offer of commutation of his sentence for the severest secondary punishment? Surely not. Why is this? It can only be because, 'all that a man has will he give for his life'. In any secondary punishment, however terrible, there is hope; but death is death; its terrors cannot be described more forcibly."

One of the most comprehensive studies regarding capital punishment in general and its deterrent aspect in particular has been undertaken by Thorsten Sellin. In his book *Capital Punishment* he concluded that, as used, capital punishment performed none of the utilitarian functions, including deterrence, claimed by its supporters, nor was it capable of serving such functions.

The methodology employed by Sellin in his study has been criticised, notably by Isaac Ehrlich, for the following reasons:[47]

45. Francis Allen : *Borderland of Criminal Justice*. 1964, p. 98.
46. Quoted in *Royal Commission on Capital Punishment, 1947-1955*, p. 19.
47. *Criminology Review Year Book 1979*, Vol. I, pp. 31-33.

1. There is no systematic examination of the main implications emanating from the general theory of deterrence.
2. No competing theory has been developed or tested in the study.
3. No statistical tests were reported in the study to support the strong and unqualified inferences made regarding the failure of the deterrent aspect.
4. The variables such as the probability of apprehension, the conditional probability of conviction giving apprehension, the severity of alternative punishments for murder, the distribution of income, the probability of unemployment and other indicators of differential gains from criminal activities occurring jointly with murder, are relevant in understanding the efficacy of capital punishment as a deterrent. These variables make the comparisons between the different areas or between the situations prevailing in the same State at different times unreliable and unscientific.

Professor Ehrlich concluded as follows:

"If investigations indicate that probability and length of imprisonment do impart significant deterrent effects, then failure of the research to demonstrate specifically the deterrent efficacy of capital punishment may be taken more as evidence for shortcomings in the research design and methodology or in the measures of the theoretically relevant variable used than as a reflection on the validity of the deterrence theory itself."

Not only did Professor Ehrlich find the evidence against the deterrent aspect to be unsatisfactory, he claimed from his own studies to have identified a significant reduction in the murder rate due to the use of capital punishment.[48]

The central question according to Hart in the debate is as to what is the weight and character of the evidence that indicates that death penalty is required for the protection of society? There are two possible approaches to answer the query based on common sense and statistics; both having some pitfalls. The Royal Commission on Capital Punishment reported:

"There is no clear evidence in any of the figures (collected from Europe and the U.S.A.) that the abolition of death penalty has ever led to an increase in the rate of homicide or that its restoration has even led to a fall.

The Royal Commission, however, preferred the common sense approach by holding the view that death sentence was 'likely to have a greater effect' on the reduction of offences."[49]

48. *The Deterrent Effect of Capital Punishment*, 65 American Economic Review, 1975, p. 397.
49. Hart, *op. cit.*, p. 87.

It can be argued here that the point involved really is of the likelihood of death sentence as perceived by the potential offender which is necessarily not the case when the offender who committed the criminal act might have been sceptical about the penal consequences of his act. Many serious offences like murder or rape are committed under momentary impulses where the reasoning of the offender becomes too clouded to be effective in terms of appreciating the penal consequences.

The crux of the matter is that the numbers of those who are found guilty of capital offences do prove that capital punishment has failed to deter but it is impossible to find out as to in how many cases it actually deterred the potential offenders. As the Royal Commission on Capital Punishment of England remarked: "We can number its failures. But we cannot number its successes." The Commission was probably echoing the views of John Stuart Mill, who while speaking on the deterrent aspect of capital punishment, observed in the House of Commons:[50]

> "As far as what is called the failure of death sentence, who is able to judge that. We partly know who those are whom it has not deterred; but who is there who knows whom it has deterred or how many human beings saved who could have lived?"

Next, it is argued that capital punishment brutalizes human nature. It may be countered by saying that just the opposite is true. Brutality, like many other concepts, is to be understood in a particular context. It is a relative concept, not an absolute one. Capital punishment is a reaction against certain types of brutalities committed by some of the human beings. So, far from brutalizing the human nature, it seeks to remind people to get rid of their brutal tendencies and there is no evidence to suggest that it does not succeed in this mission. The most crucial or important aspect of death sentence is not that it puts fear of death in the mind of potential murderers but that it endeavours to generate revulsion against the horrible act of murder. In this sense capital punishment helps in inculcating values to have the highest regard for the lives of innocent and law-abiding citizens. This aspect of capital punishment was succinctly explained by the Royal Commission on Capital Punishment by pointing out that abhorrence against murder is built up by capital punishment over a long period of time in a society.

One popular argument in the armoury of abolitionists is that the death sentence is irrevocable and there have been some instances of innocent persons being hanged.[51] Another argument is that it is the poor people who run greater risk of capital punishment and rich persons are always able to

50. Quoted by Sen, J. in *Rajendra Prasad* v. *State of U.P.*, (1979) 3 SCC 646 : 1979 SCC (Cri) 749, 794.

51. The heavy burden of proof on the prosecution however minimises such a risk to a very great extent.

avoid it with the help of their wealth. There is some substance in both these arguments but on careful scrutiny, it is clear that they point out defects in the administration of justice and not anything against capital punishment as such.

It is said, and there is some force in it, that the courts are sometimes reluctant to find a person guilty of a capital offence due to the severity of the punishment involved, and thus legal interpretation is accordingly strained. This has sometimes some bearing even on the constitutional rights of the accused. In one case, for example, Mr. Justice Harlan said that the 'due process' requirement in case of an offender facing trial with possible punishment of imprisonment or fine, might not be adequate for an accused being tried for a capital offence.[52] For a number of years the constitutional law of right to counsel explicitly distinguished capital cases from those involving other penalties, even life imprisonment.[53]

The abolitionists emphasise the rigidity of the punishment in cases of mental abnormality of the offender where he is not found legally insane. Even before the abolition of the capital punishment in England, the doctrine of diminished responsibility for such offenders was incorporated in the Homicide Act of 1957. In the U.S.A. the Durham Rule has removed the harshness of criminal law in case of mentally abnormal offenders who do not have such a high degree of unsoundness of mind as to qualify as legally insane under the old McNaghten rules. In India, though the test of insanity in criminal law[54] is based on the rigid principles of *M'Naghten's case*, death sentence is generally not awarded in case of an offender not being legally insane but mentally insane otherwise.[55]

Sometimes a popular argument advanced by the abolitionists, due to the lack of appreciation of the legal position on their part, is that many murders are committed in the heat of the moment without premeditation on the part of the offender. For many such killings death penalty is either not possible or is not awarded. 'Grave and sudden' provocation and killing in the heat of passion are treated as culpable homicide if falling within exceptions one and four of Section 300 of the Penal Code and the maximum penalty permissible is life sentence. Otherwise also, judges have discretion not to give death sentence in a case of murder and give lesser sentence of life in the presence of some extenuating circumstances. It may be pointed out in this connection that under Section 367(5) of the Criminal Procedure Code, as it stood before the 1955 amendment, the normal rule was to sentence the accused to death on a conviction for murder and to impose the lesser

52. *Reid* v. *Covert*, (1957) 354 US 1, 77.
53. *Bute* v. *Illinois*, (1948) 333 US 640 ; *Powell* v. *Alabama*, 287 US 45.
54. Section 84 of the Indian Penal Code, 1860.
55. *Queen Empress* v. *Kadar Naryer Shah*, 23 Cal 604 ; *Emperor* v. *Gedka Goala*, AIR 1937 Pat 363.

sentence of imprisonment for life for reasons to be recorded in writing. That provision was deleted in 1955 and now under the Criminal Procedure Code of 1973 the court has to give reasons for awarding capital punishment.[56]

The issue of capital punishment involves questions of dialectical nature, and some of the issues not being capable of being proved or disproved, certain assumptions and conjectures are therefore inevitable. The debate between the abolitionists and retentionists is, therefore, bound to be endless. Prof. H.L.A. Hart sums up the position thus:[57]

> "There are indeed ways of defending and criticising death penalty which are quite independent of the utilitarian position and of the questions of fact which the utilitarian will consider as crucial. For some people the death penalty is ruled out entirely as something absolutely evil which, like torture, should never be used however many lives it might save. Those who take this view find that they are sometimes met by the counter-assertion that the death penalty is something which morality actually demands, a uniqely appropriate means of retribution or 'reprobation' for the worst of crimes, even if its use adds nothing to the protection of human life."

Here we have two sharply opposed yet similar attitudes: for one the death penalty is morally excluded; for the other it is a moral necessity; but both alike are independent of any question of fact or evidence as to what the use of the death penalty does by way of furthering the protection of the society. Argument in support of views as absolute as those can consist only of an invitation, on the one hand to consider in detail some awful murder and then to await the emergence either of a conviction that the death penalty must never be used or, alternatively, that it must never be completely abandoned.

Capital Punishment Controversy in India

The debate regarding the retention of the death sentence has been going on for quite some time now. A bill was introduced in the Lok Sabha in 1956 which was rejected by the House. Efforts were also made in the Rajya Sabha to move the resolution for the abolition of capital punishment in 1958 and in 1962 but they were withdrawn each time after some debate in the House.

The Law Commission in its Thirty-fifth Report concluded that the risks involved in the abolition of capital punishment could not be undertaken in the present state of the country.[58] They summed up their impressions as follows:

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56. *See* Chapter XI for sentencing in capital cases.
57. "*Murder and Principles of Punishment : England and the United States*", Northwestern University Law Review, Vol. 52, 1957-58.
58. Thirty-fifth Report, Law Commission, Govt. of India, p. 354.

"The issue of abolition or retention has to be decided on a balancing of the various arguments for and against retention. No single argument of abolition or retention can decide the issue. In arriving at any conclusion on the subject, the need for protecting society in general and individual human beings must be borne in mind. It is difficult to rule out the validity of or the strength behind many of the arguments for abolition. Nor does the Commission treat lightly the argument based on irrevocability of the sentence of death, the need for a modern approach, the severity of capital punishment and the strong feelings shown by certain sections of public opinion in stressing deeper questions of human values.

Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in 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."

In *Jagmohan Singh* v. *State of U.P.*[59], the constitutional validity of capital punishment was challenged before the Supreme Court. It was argued that the 'right to live' was basic to the freedoms guaranteed under Article 19 of the Constitution. The Supreme Court rejected the contention and held that capital punishment cannot be regarded as unreasonable *per se* or not in the public interest and hence could not be said to be violative of Article 19 of the Constitution.

The question of constitutionality of capital punishment *per se* and its application as an alternative punishment under Section 302 came up once again before the Supreme Court in *Bachan Singh* v. *State of Punjab*[60]. Three main contentions were advanced in a number of petitions filed before the Court, some of which had been made in *Jagmohan Singh* earlier and were rejected by the Court:

1. Capital punishment is violative of Article 19 of the Constitution because the freedoms guaranteed therein cannot be enjoyed without the basic right to life and that it defiles the dignity of the individual vouchsafed in the preamble of the Constitution. Regarding the

59. (1973) 1 SCC 20 : 1973 SCC (Cri) 169.
60. (1980) 2 SCC 684 : 1980 SCC (Cri) 580.

inherent nature of the death sentence it was contended that it served no social purpose.

2. Capital punishment as an alternative punishment in Section 302 of the Penal Code violates Article 21 of the Constitution inasmuch as the legislative policy laid down therein and in Section 354(3) of the Criminal Procedure Code of 1973 give too wide a discretion to the judges without proper and adequate legislative guidelines.
3. India being a party to the Stockholm Declaration of 1977 was committed to abolish capital punishment.

The Court through the majority of four judges, Bhagwati J. dissenting, rejected all the above contentions and did not find capital punishment to be unconstitutional or unreasonable *per se*. Regarding the alleged violation of Article 19, the Court held that 'in pith and substance, the penal laws do not deal with the subject-matter of rights enshrined in the Article and that Section 302 of the Penal Code does not have to stand the test of Article 19. The Court after surveying all the relevant case-law right from *A.K. Gopalan*[61] to *Maneka Gandhi*[62] concluded that a law or an order made thereunder will be hit by Article 19 if the *direct and inevitable consequences* of such a law or order is to abridge or take away any freedom under Article 19 e.g. a law or order relating to preventive detention. It is not so if the effect and operation of the statute, by itself, upon a person's fundamental right is remote or dependent upon factors which may or may not come into play e.g. the penal laws dealing with murder, rape or theft.

As to the second argument, the Court mentioned that the discretion permitted under Section 354(3) of the Code of Criminal Procedure was to be exercised judicially having regard to various factors in a given situation and rigid standardization in this regard was neither possible nor even desirable. It was not attempted to be achieved by the legislature and cannot be expected from the courts either. Article 21 was therefore not violated through Section 302 of the Penal Code and Section 354 of the Criminal Code.

Finally, after examining the relevant provisions of the International Covenant on Civil and Political Rights, which provided the basis to the Stockholm Declaration, 1977, that the Covenant did not stand for the abolition of death sentence but required that the penalty ought not to be awarded arbitrarily and must be confined to extremely heinous crimes only, the Court was satisfied that the Indian position was identical to the Covenant by virtue of Articles 20 and 21 of the Constitution and Section 354(3) of the Criminal Procedure Code.[63]

61. AIR 1950 SC 27.
62. (1978) 1 SCC 248.
63. For the actual application of the punishments of fine and imprisonment and capital punishment in the context of sentencing policies *see* Chapter XI.

The Supreme Court did not also agree with the contention that capital punishment did not serve any purpose and after surveying substantial literature on the controversial subject concluded that the punishment might have some significant deterrent effect; a position taken by many eminent personalities and the Law Commissions of India and the United Kingdom.

The Court noted that in India very few scientific studies in regard to crime and punishment in general and capital punishment in particular have been made. The data used by some abolitionists from within the country and also from abroad was stale and incomplete. It also noted that the various attempts made in India from time to time to abolish or restrict the death sentence to specified kinds of murders had not met with any success in the Parliament.[64] The Court was also impressed by the fact that not only did many countries still retain capital punishment but in many others the punishment has either been reintroduced or efforts have been made to revive it.

Yet one more, rather very desperate, futile attempt was made in *Shashi Nayar* v. *Union of India*[65] to get capital punishment declared unconstitutional. Raj Gopal Nayar, the petitioner's husband, was sentenced to death for killing his father and step brother. After having failed to get the death sentence struck off through all the judicial and mercy channels, the constitutionality of the death sentence was challenged before the apex Court employing almost the same arguments as in *Jagmohan* and *Bachan Singh* earlier. Besides invoking Article 21 of the Constitution and asserting that capital punishment does not serve any social purpose, it was argued that the Law Commission's 35th Report of 1967[66], which the majority opinion cited in support of the capital punishment in *Bachan Singh*, ought not to continue to guide the Court because much water had run under the bridge since then and that there was no empirical study before the Court that the situation prevailing in 1967 was still prevailing. The Court rejected the contentions and held:

> "The death penalty has a deterrent effect and it *does* serve a social purpose.... No material has been placed before us to show that the view taken in *Bachan Singh* requires reconsideration. Further, a judicial notice can be taken of the fact that the law and order situation in the country has not only not improved since 1967 but has deteriorated over the years and is fast worsening today. The present is, therefore, the most inopportune time to reconsider the law on the subject."[67]

Hence the request for referring the matter to a larger bench was rejected.

64. This was in 1949, 1958, 1961 and 1978. In 1978 the bill to restrict death sentence to only certain kinds of murders was passed by the Rajya Sabha but not by the Lok Sabha.
65. 1992 SCC (Cri) 24.
66. *See* above.
67. Earlier, in *Jumman Khan* v. *State of U.P.*, 1991 SCC (Cri) 283 also, the Court had declined to reconsider the constitutionality of capital punishment.

Modes of Death Sentence

Various methods have been employed as mode of execution of death sentence in different societies in various phases of their developments in terms of their perceptions of justice, decency, moral values and civilised behaviour. As very aptly put by a writer, men have exhausted their ingenuity in the destruction of the condemned criminal. It is not mere killing of the condemned persons which satiated the desire of man in terms of vengeance and retribution but the mode and manner of producing the result was no less important. Condemned criminals, rebels and deviants have been hanged, burned, flayed alive, boiled in oil, thrown to wild beasts, crucified, drowned, crushed, strangled, torn apart, impaled and exposed to the hot rays of the sun and vicious bites and attacks of birds and insects.[68] In the contemporary world only a few modes e.g. electrocution, hanging, asphyxiation, shooting and beheading are being employed, hanging being the most widespread amongst all the alternatives.

In India, hanging has been the well accepted mode of inflicting capital punishment and the same has been provided in Section 354(5) of the Code of Criminal Procedure and in the Jail Manuals of the various States. The issue regarding the constitutionality of Section 354(5) came up before the Supreme Court in *Deena* v. *Union of India*[69]. Though the Court asserted that it was a judicial function to probe into the reasonableness of a mode of punishment, it refused to hold the mode of hanging as being violative of Article 21 of the Constitution.[70] The Court held that even if a method is the least objectionable, it is still open to the objection that it involves more pain than necessary or if a lingering death is the consequence of such a mode. The Court also expressed the evident truth that it was not possible to demonstrate the relative merit of other modes like electrocution, lethal gas, shooting or lethal injection in terms of their being less painful than hanging. In support of hanging as a means of death sentence, it was pointed out that a responsible body of scientific and legal opinion did not find hanging by rope to be a cruel method. The method was in vogue in the major part of the world; there being no lingering death, no possibility of accident or failure of the mechanism involved, almost perfected into a science and as could be imagined, perhaps produced least pain.

The issue of mode of execution of death sentence was once again raised in *Shashi Nayar*[71] where it was submitted that capital punishment being barbaric and dehumanising should be substituted by other decent and less

68. Robert H. Caldwell : *Criminology*, (1956) pp. 408-15.
69. (1983) 4 SCC 645 : 1983 SCC (Cri) 879.
70. In *Bachan Singh*, Bhagwati J., in his dissenting opinion, came out strongly against hanging as a model of execution; the issue was not, however, involved, as such, in the appeal.
71. 1992 SCC (Cri) 24.

painful method. The Court held that since the issue had already been considered in *Deena*, there was no good reason to take a different view.

Another issue which deserves attention is whether the death sentence would have greater deterrent potential if executed in public after giving advance publicity to the event. Such a practice was quite common all over the world and is still being practised in Saudi Arabia. The assumption behind the policy is not only that it would have greater deterrent value but also would be more capable of satisfying the society's urge for retribution. It is not possible to argue one way or the other on the basis of empirical evidence but what is absolutely clear is that such a practice may not be acceptable to most of the people in our contemporary world. It would be regarded as uncivilized and barbaric and stands to inevitable rejection even if it may have greater deterrent value and may also negate the social solidarity against the crime and criminal. The issue of public hanging came to the attention of the Supreme Court in *Attorney General* v. *Lachma Devi*[72]. This was a writ petition which challenged the order of the Rajasthan High Court regarding the execution of the petitioner by public hanging at one of the specified venues at Jaipur after giving widespread publicity of the date, time and place of the execution according to the relevant rules of the Jail Manual.[73] The Supreme Court held that public hanging, even if permitted under the rules, would violate Article 21 of the Constitution being "barbaric, disgraceful and bringing shame on any civilised society".

To sum up, it may be observed that the present position regarding capital punishment is quite a balanced one. The framers of the Penal Code had recommended sparing use of it and it has not been employed in this country with a vengeance. *To have it on the statute book but to use it rarely seems to be the best compromise between the extreme attitudes of the retentionists and abolitionsists of the capital punishment not only in India, in view of the conditions pointed out by the Law Commission, but also in many other countries.*[74]

Other Sanctions

Apart from the conventional punishments on which attention was focussed in the preceding discussion, there are some other possible modes of dealing with offenders. Some of them were considered by the Law Commission while reviewing the contents of the Penal Code and it made recommendations which are given below.[75]

72. 1989 Supp 1 SCC 264 : 1989 SCC (Cri) 413.
73. Rajasthan High Court was expecting the change in rules to permit public hanging which, however, did not occur.
74. *See* Chapter XI.
75. *Forty-second Report, 1971*, pp. 44-81.

Externment from Locality

The rationale of this punishment is that dissociation of the offender from his surroundings may reduce his capacity to commit crimes of a particular nature. The Commission did not favour such a punishment due to the possibility of its repercussions on the offender, his family and the likely exploitation of externment by the politically motivated violators. This form of punishment has, however, been accepted in the Indian Penal Code (Amendment) Bill of 1972.[76]

Corrective Labour

This form of punishment is not a type of punitive reaction in the strict sense since the emphasis is on the reformation and rehabilitation of the offender. This mode provides an opportunity to the offender for working at his own residence or some work centre outside the prison. It is a common mode of punishment in the U.S.S.R., Lenin's teachings providing a basis for the approach. The Commission felt that the Russian scheme could be put to good use with some modifications in the Indian set-up. Some of their recommendations were as follows:

1. The essence of the punishment will be working on reduced wages at a public work centre.
2. The punishment of corrective labour will be primarily suitable for persons belonging to the labouring classes.
3. Offences punishable with death, imprisonment for life or imprisonment for a term exceeding 7 years should be excluded from this punishment.
4. Deductions from the wages of the person sentenced to corrective labour will be made at a rate laid down by the judgment of the Court and credited to the State. The rate may be between 5% and 20% of the wages.

Compensation for Injury by the Offender

Ordinarily, criminal law is not concerned with the problem of compensation to the victim of a crime. For this the victim may seek remedy in the law of torts through a civil court. But sometimes compensation is payable by an offender to the victim as a part of the punishment awarded to him. Compensation to a victim may be made in three different ways. The State may be made responsible for the payment of compensation, or the offender can be sentenced to pay a fine by way of punishment for the offence and, out of that fine, compensation can be awarded to the victim, or the court trying the offender can in addition to punishing him according to law, direct him to pay compensation to the victim of the crime, or otherwise make amends by repairing the damage done by the offence.[77] The Commission

76. *See* Clause 19.
77. *See* Chapter XVII on 'Victims of Crimes'.

noted that the pattern existing in some European countries like France and Germany was not suitable for India and neither did they see any great advantage in the Russian model. The Commission favoured a substantive provision in the Penal Code for payment of compensation out of the fine imposed on the offender. In this connection the Commission was of the view that Section 545 of the Criminal Procedure Code, 1898 was quite a comprehensive provision which was not fully utilised by the courts and, therefore, inclusion of a substantive provision in the Penal Code was recommended by the Commission. The Indian Penal Code (Amendment) Bill of 1972 provides for this kind of sanction.[78]

Public Censure in Certain Anti-Social Offences

This punishment is based on the premise that the offenders of the upper strata of society indulging in crimes characteristic of that strata may be punished more effectively by bringing their deeds to public notice through effective publicity. The Commission noted that such a form of punishment was already in vogue in countries like the U.S.S.R. and British Columbia. In India, the rationale of the punishment is manifested in its limited application in certain provisions of the Prevention of Food Adulteration Act, 1954[79] and the Income Tax Act, 1961.[80] The Commission recommended the insertion of a new provision in the Penal Code for such a punishment in the event of a second conviction of a person for offences relating to currency and stamps, weights and measures, food and drug adulteration, extortion, criminal misappropriation, breach of trust and cheating and offences relating to documents. This form of punishment has also been incorporated in the Bill of 1972.[81]

Punitive Reaction—The Future

The necessity of punitive reaction, as well as its defects and shortcomings, are evident from the preceding discussion, and as the next few chapters will indicate, the trend all over the world has been towards the therapeutic methods for quite some time now. It is doubtful, however, as to how far the increasing trend in favour of the therapeutic and rehabilitative ideal will continue. As will be seen, even the therapeutic approaches are not altogether free from difficulties and criticism.

Crime, particularly of the violent kind, is on the increase in many highly developed and even in not so developed countries; some of these highly developed countries have been trying the therapeutic techniques for a fairly long time. The U.S.A. is a good illustration in this context. Very recently, Chief Justice Warren Burger expressed his serious concern over the state of

78. Clause 19(*v*).
79. Section 16(2).
80. Section 287.
81. Clause 19(*viii*).

affairs regarding crime and the attitude towards criminals in that country.[82] He branded the U.S.A. as an "impotent society" that had failed to come to grips with the problem of violent crime. He also made the following observations in the Supreme Court's annual report to the Convention of the American Bar Association:

> "Why do we show such indignation over alien terrorists and such tolerance for the domestic variety? Are we not hostages within the borders of our own self-styled, enlightened, civilized country?"[83]

To combat the "reign of terror in American cities", the Chief Justice called for greater stress on the "deterrent effect" of "swift arrest, prompt trial, certain penalty and at some point—finality of judgment".

In the U.S.A. the 'liberal' criminologists of 1960s and 1970s are treated by many with contempt and accused of having "trifled with the wicked, made sport of the innocent, and encouraged the calculators".[83]

A significant aspect of the episode in the State of Bihar, in which some undertrial prisoners were allegedly blinded by the police, was the fact that there were public protests when some of the police officials, suspected to be responsible for the blindings were suspended by the government. The attitude displayed by the public might be termed perverse or based on ignorance but it clearly showed that having suffered for too long at the hands of the criminals, the public was all out for the liquidation of criminals and gangsters by any means, fair or foul.

Having regard to normal human nature, which seeks vengeance, and to the need of self-preservation and also to the fact that criminal propensities are likely to increase in most of the societies, the punitive reaction is bound to be of eternal relevance. The society should find it difficult, at any stage of civilization, to give up the penal sanctions altogether, and punitive philosophy, in some form or the other and in varying degrees of importance, shall continue to serve the cause of law and order.

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82. Time, February 23, 1981.
83. J.Q. Wilson : *Thinking About Crime*, (New York Basic Books, 1975) p. 209 & 2nd Rev. Edn. 1983, p. 260.

Chapter VI

THE THERAPEUTIC APPROACH— PRISON REFORM

The therapeutic approach, as noted earlier, is of recent growth even in countries where great progress has been made in science, education, business and industry. In countries like India, the approach so far has been in a somewhat rudimentary form. Before the British rule in India, the Muslim law of crimes was applied in the country which, like other medieval systems, was severe in its attitude towards criminals and treated them as incorrigible without having the slightest prospect of reformation. Though the Britishers introduced a criminal law system which was milder as compared to the Muslim law of crimes in terms of punishments, the basic attitude towards the criminal remained the same i.e. punitive. It was only in the later part of the British rule and during the last three decades after Independence that there has been a change in the attitude towards criminals, the change from punitive to therapeutic or corrective approach.

Whatever has happened in India in the field of correctional approach is the direct outcome of developments taking place in the penological thought of various countries, particularly in England and the U.S.A. It will therefore, be useful to know about the evolution of the therapeutic ideal in England and other western countries.

It was only around the twelfth century that administration of justice was taken over by the Crown in England. Before that, like other tetonic tribes in North-Western Europe crime was regarded as a wrong against a person for which compensation was payable by the wrongdoer to the victim. This is the reason for holding that the ancient law of crimes was not really the law of crimes but the law of torts. Subsequent to the Crown taking over the administration of criminal justice, the compensation was to be paid not to the victim but to the Crown. In course of time, this became an important source of revenue. Imprisonment, as understood then, was not an end in itself by way of punishment. It was used to compel the offender to pay the fine, or to spend the period between arrest and trial or between the conviction for a capital offence and its execution. Torture, mutilation of limbs and outlawry were the common modes of punishment in the early days. Capital punishment had not become as common a punishment as it was by the end of the eighteenth century. Cellars, gate-houses and towers, which were used to serve as detention houses were kept in extremely inhuman conditions. Criminals, guilty of serious as well as of petty offences, debtors, and insane persons were all put together in those detention houses. There was no separate arrangement for men and women. These gaols were not maintained

by the State and private parties conducted them on commercial lines. Inmates were charged for the accommodation, even for the chains used on their bodies and of course for supplying meals, liquor and women. In the words of Lionel W. Fox, the gaols were dens of lechery, debauchery, moral corruption and pestilence.[1]

In the meantime another development took place which further checked the significance of imprisonment as a mode of punishment and any possibility of serious thinking about the problems inside the jails was adversely affected. This was the rise of capital punishment in England and increasing use of transportation to the newly-discovered colonies of North America. Leon Radzinowicz has given a detailed account of the factors responsible for the greater use of capital punishment and also the figures regarding the increase in the number of capital offences.[2] Among the reasons which he advances was the fact that many Englishmen were not convinced that imprisonment and transportation were as deterrent as capital punishment. Another reason was that the property-owning class, which dominated the English public life, naturally had large stakes in having death sentence in many offences against property. All this resulted in the increase of capital crimes from fifty in 1688 to about two hundred by the end of the eighteenth century.

The punishment of transportation which was commonly used was also criticised. It was described by Lord Ellenborough as "a summer's excursion" to "a happier and better climate". Even this "summer's excursion" was difficult to continue after England lost its American colonies and consequently the 'unsettled' continent of Australia was the only choice available to the government for sending the criminal away. The lack of faith in transportation as a good deterrent and the difficulties experienced in executing the punishment contributed a great deal to the spectacular rise of capital punishment.

The period which saw the rise in cruelties in the criminal law and its administration, also witnessed the birth and growth of the 'enlightenment' era in England and Europe which ultimately paved the way for the more humane approach towards criminals. The 'enlightenment' stood for the original worth and dignity of all human beings since the movement insisted on a rational method of thinking in all sciences including the ones dealing with social behaviour. The rationalist philosophers believed in the natural rights of human beings and did not concede the right to take away any one of those rights to the State. Prominent among these philosophers of enlightenment were John Locke (1632-1704), David Hume (1711-1756), Jeremy

1. *The English Prison and Borstal System* (1952).
2. Leon Radzinowicz : *A History of English Criminal Law and its Administration from 1750*, Vol. 1.

Bentham (1748-1832), Voltaire (1694-1728) and Charles L. de S. Montesquieu (1689-1775). A reference to the contributions of Voltaire and Jeremy Bentham to the reformation of criminal law has already been made in the earlier chapters. Montesquieu was more concerned with improving the behaviour of people rather than the punishment. He was of the view that moderate punishments would result in better administration of justice and the punishments must not be out of proportion to the offence the guilty person is punished for.

These ideas had great appeal to the middle class people. This middle class was the outcome of socio-economic changes brought about by the Industrial Revolution and was influenced by the humanitarian philosophy of the enlightenment. The humanitarianism in the middle class can be attributed to several factors. Many members of this class had risen from the lower strata and it was easier for them to be moved by the sufferings of children, the poor, the disabled, lunatics, defectives and prisoners. In other words their concern for criminals was a part of the general feeling for the underdog. In this way a process of reformation of the criminal law system was initiated which resulted not only in the improvement of the prison system but also found expression in probation, parole, juvenile courts and other institutions and crime prevention. It is also argued by some believers in economic determinism that it was not so much the element of humanitarianism which impelled the middle class to act for reformation but their own selfish interests based on cheap labour which was adversely affected sometimes by many persons of the lower strata being confined in jails or sentenced to death.[3] Whatever may be the real motives, the crux of the matter is that these ideas had a profound effect not only in England and Europe but also in many other countries.

British Prison Reforms

Since penal reforms are mostly reflected in prison reform during the last two centuries or so, the study of the therapeutic approach can be taken up beginning with prison reforms. We have seen the emergence of the humanitarian movement around the end of the eighteenth century which was directed towards the problem of better administration of justice and the issue of capital punishment in general. With the gradual reduction in the number of capital offences and the transportation of convicts falling in disuse, imprisonment as a mode of punishment was bound to gain more eminence. John Howard may be rightly called the pioneer in the prison reform movement in England. He believed in the reformation of personal character as the goal of imprisonment and when appointed High Sheriff of Bedfordshire in the year 1773 he sought to translate his ideas into practice and

3. George Ruche and Otto Kirchheimer : *Punishment and Social Structure* (Columbia University Press, New York, 1939).

continued the good work up to the time of his death in 1790. For the first time he tried to do something about the bad sanitary conditions prevailing in prisons and made separate arrangements for prisoners of different sex. He recognised the importance of religious and moral instruction and the utility of learning trades and crafts in the prison. Today these elements are considered a must in any prison. At the same time Romilly was trying to effect new trends through his efforts in Parliament. Shortly afterwards, England got some of its first prisons constructed. Greater progress, in the meantime, had been made in the prison philosophy in the United States where two rival methods known as the Pennsylvania and the Auburn system were pursued. The question in England was whether to follow the Pennsylvania or Auburn systems. Some familiarity with the two systems, therefore, becomes necessary at this point.

Pennsylvania System

The Quakers established this system in the last years of the eighteenth century and the beginning of the nineteenth century, Philadelphia's Walnut Street Jail giving them the opportunity to experiment with solitary confinement. In the beginning only hardened criminals of more serious offences were given solitary confinement. Others were kept in big rooms, eight to ten together, and were given work like carpentry, etc. for which they were paid wages. Later on it was felt that solitary confinement was an effective means of regeneration as the person left to himself would have better opportunity of reflection and would be saved from the contaminating influence of fellow prisoners. As a result, the inmates were kept in complete seclusion all through the sentence. Denial of work was the rule and offer to work an exception. Emphasis was on exposure to religious sermons. Two French observers of the American prison system acknowledged the reformative effects of absolute solitude in the following words with which many may not agree:

> "Generally, their (prisoners') hearts are found ready to open themselves and the facility of being moved renders them also fitter for reformation. They are particularly accessible to religious sentiments, and the remembrance of their family has an uncommon power over their minds.... Nothing distracts, in Philadelphia, the mind of the convicts from their meditations, and as they are always isolated, the presence of a person who comes to converse with them is the greatest benefit....When we visited this penitentiary, one of the prisoners said to us: 'It is with joy that I perceive the figures of the keepers who visit my cell. This summer a cricket came into my yard, it looked like a companion. When a butterfly or any other animal happens to enter my cell, I never do it any harm.' "

It is obvious that the French observers came to know only the brighter side of the story without even imagining the shattering effects which continuous solitary confinement might produce on the inmate. The disillusionment came at Auburn prison at New York when it was discovered that character reformation was not achieved by solitary confinement as evident from the return of many criminals to the prison. Many suffered in health and some even made attempts to commit suicide. A change in prison philosophy was, therefore, needed.

Auburn System

A kind of compromise was effected in this scheme as compared to the Pennsylvania system. The inmates were allowed to associate during the daytime only in connection with hard work required for maximum production. They were to be kept separate from one another at night and visits from relations were allowed in exceptional circumstances. The prisoners were not allowed to speak to one another and strict discipline was maintained inside the jail.

For a long time a controversy went on in the U.S.A. regarding the relative merits and demerits of the two systems with the result that the States were divided on the issue. The Pentonville prison in England was one of the earliest constructed in England in 1842 which served as a model to many more constructed subsequently. It was the Pennsylvania system which was accepted at Pentonville.

Some significant changes occurred in the prison administration in the latter half of the nineteenth century. As a result of the abandonment of transportation as an alternative punishment, the problem of overcrowding in the prisons assumed serious dimensions and so from 1853 the system of 'ticket of leave' was resorted to for tackling the problem of overcrowding. Under this system the prisoners could be released before the completion of sentence on the condition that they would not indulge in crime and instead, find employment. In this practice the basis of the modern system of parole can be detected. Another important development was that the control of prisons was transferred to the national government from the municipal authorities under the Prisons Act of 1877. Even up to this stage the new philosophy of correction and rehabilitation had not found firm roots, and the policy fluctuated between harsh and less harsh methods. This will be evident by the fate of what was called the Irish system.

The man who created the Irish system was Sir Walter Crofton, Chairman of the Board of Directors of Irish prisons. The system worked on a scheme in which the prisoners passed through three stages. At the first stage the prisoners were kept under strict discipline and given some schooling for an hour a day. All prisoners, except those who were 'violent' and 'idlers', were then transferred to another prison where labour opportunity on fortifications

was provided and modest wages were also paid. Prisoners who were found 'violent' and 'idlers' were put in chains and given a low diet. The third stage sought to carry the process further and prepare the prisoners for release. The prisoners were sent to different prison units of small size. They were employed on land reclamation projects under ordinary labour conditions without any armed guards being posted around. Moral education was imparted and some efforts were also made to find jobs for the prisoners to be released under tickets of leave. Many current reformatory methods, it appears, involve the same techniques i.e. prison labour, open institutions and conditional release before the term of imprisonment.

The Irish system fizzled out subsequently due to strong public opinion in favour of deterrent punishments which gained further momentum due to the increase in the number of crimes in general and armed robberies in particular in Britain in 1862. The Royal Commission on Penal Servitude voiced the same sentiments favouring more severe punishments. The policy followed during that period was to achieve deterrence by "uniform discipline including silence, cellular labour, deprivation of all luxuries, absence of news from outside and the like".[4]

Nothing happened by way of change in the English prison system till the year 1898 when the Prison Act was passed, which to this day remains the basic source of prison administration in England. An important provision in the Act was to vest rule-making power in the Home Secretary who was empowered to make rules allowing remission of a part of the sentence of a convict on the basis of good conduct and hard work inside the prison. The Act was passed on the basis of recommendations of the Gladstone Committee which recommended that for the future, reformation and deterrence should be treated as "primary and concurrent objects", and the men and women coming to prisons should go out as better persons, physically and morally. The Committee also made special recommendations relating to discharged persons, professional criminals and young offenders.[5]

The present prison administration and philosophy in England is based on the following concepts:[6]

1. The sentence in prison should be utilised for moral, mental and vocational training.
2. The help of the community outside the prison should be made useful for such training.
3. The responsibility of the outside community should continue after the convict's discharge from the prison.

4. S.H. Smith : *Prison*, p. 63.
5. Lionel W. Fox : *The Modern English Prisons*.
6. For details, *Prison and Borstals*, a Home Office publication, is a good source.

American Prison Reform

As noted earlier, the first significant development in the American prison reform was the Pennsylvania system which was a model for prisons for about forty years. The reasons which led to another scheme, known as the Auburn system, and its functioning have also been referred to earlier. Despite the difference between the two systems, there were many similarities too. In both the systems, the prisoners were not allowed to communicate with each other because of solitary confinement in one and the ban on communication in the other. In both there was a separation of prisoners at night, in the Pennsylvania system the separation being round the clock. Both the systems recognised the importance of labour in the goal of imprisonment. But since the Auburn system was more economical to operate due to better industrial potential as a result of the prisoners working together, it was accepted by the majority of the States and the Auburn system continues to provide the basic structure of prison administration in the U.S.A. Over the years many new ideas have modified the system as originally understood.

The reformation in the American prisons has not been uniform all over the country. It has been achieved at a higher level by the northern States particularly those on the east coast, as compared to the southern States. Some of the distinguishing features of American prisons shall be brought out while discussing the goals of prison sentences and the ways to achieve them.

Prison Reform in India

Prisons in India at the time of the takeover of the country by the East India Company were in a terrible condition. This was inevitable in a criminal justice system where deterrence was the only aim of a prison sentence. The situation, as seen earlier, was no better even in more developed and enlightened countries like England at that time. It is not surprising that the East India Company was not interested in investing any money in non-profit welfare programmes like improvement of jails. It was ultimately left for Macaulay to initiate the task at a time when he was in the process of shaping the criminal law of India which eventually resulted in the Indian Penal Code. A Committee was appointed by the Government in 1836 to give a report on the existing conditions in jails in the country and to suggest steps for future administration in the prisons. Understandably, the Committee in its report ruled out the introduction of any reformative ideas in the prison policy. This attitude was inevitable since even in England, at that time, there was a lot of scepticism regarding the possibility of reformation of criminals. The committee recommended the exclusion of all reforming influences such as moral and religious teaching, education or any system of rewards for good conduct and suggested the building of central prisons where the convicts might be engaged not on manufactures which it condemned but in some dull, monotonous, wearisome and uninteresting work in which there shall

be wanting even the enjoyment of knowing that a quicker release can be got by working harder for a time.[7]

The only good thing which proved to be important was that the problem of prisons was given more serious consideration from then onwards. Many committees were appointed and various Acts passed subsequently and some of the landmarks in the changes brought about by them may be taken note of here.

The Second Jail Committee of 1864 recommended a certain minimum space for each prisoner inside the prison, better clothing and food, and regular medical check-up of the prisoners.[8]

The recommendations made by the Third Jail Committee of 1877 proved quite unproductive but the reports of the committees appointed in 1889 and 1892 led to the passing of the Prison Act of 1894. The penal policy as reflected through the Act continued to be far from reformative and contemporary. The English thinking of deterrence was the basis of the Act.[9]

It was not before 1919 that a really progressive and modern approach was manifested by the Indian Jails Committee in its report to the Government. A clear departure from the earlier stands on the deterrent aspect was made. For the first time, the principle of reformation of the convict was accepted. The Committee observed :

> "The Indian prison administration has lagged behind on the reformative side of prison work. It has failed so far to regard the prisoner as an individual and has convicted him of rather as a unit in the jail administrative machinery. It has lost sight of the effect which humanizing and civilizing influences might have on the mind of the individual prisoner."[10]

The report discouraged the use of corporal punishment in jails. It suggested that labour in prison should be productive but the main object should be to reform the offenders. The Committee also made valuable suggestions regarding education for convicts and aftercare programmes for helping ex-convicts.

Immediately after Independence the Government of India sought to achieve further reforms in prisons. Dr W.C. Reckless, an expert of the U.N.O. was invited in 1951 to make his recommendations. Later on, a committee was appointed to prepare an All India Jail Manual in 1957 on the basis of the recommendations of Dr. Reckless and the All India Conference of Inspectors General of Prisons. Some of the important recommendations,

7. Quoted in the *Report of the Indian Jails Committee, 1919.*
8. *Ibid.*
9. Vidya Bhushan : *Prison Administration in India,* pp. 20, 21.
10. *Report of the Indian Jails Committee, 1919,* p. 32.

dealing with the reformative and rehabilitative problems of convicts, were as follows :

(*i*) The correctional services should be integrated together under a Director or Commissioner under the control of the Home Department in each State.

(*ii*) Greater use of probation system to avoid too much pressure on prisons.

(*iii*) Creation of a Central Bureau of Correctional Services at the Centre.

(*iv*) Establishment of State After-care Organization in every State.

(*v*) Abolition of solitary confinement as a mode of punishment.

(*vi*) Classification of prisoners according to their needs in terms of personality.

(*vii*) Periodic revision of the Jail Manuals in the States.

The administration of prisons being a State subject, the above recommendations are not of mandatory nature and only provide guidelines to achieve some uniformity in all the States. Most of the States have fallen in line with the recommendations.

The Government of India recently appointed the All India Jail Reforms Committee, 1980-83 with Justice A.N. Mulla as its Chairman which has recommended a draft national policy on jail reforms. It has recommended the creation of a permanent national body by the Ministry of Home Affairs to be known as the "National Commission of Prisons". The objective is to bring about basic uniformity in various States and Union Territories regarding the management of prisons, treatment of offenders and to provide a "National Policy on Prisons".[11] Some of the more important general recommendations in the National Policy draft are as follows:[12]

1. There shall be in each State and Union Territory a Department of Prisons and Correctional Services dealing with adult and young offenders — their institutional care, treatment, aftercare, probation and other non-institutional services.

2. The State shall endeavour to evolve proper mechanism to ensure that no undertrial prisoner is unnecessarily detained. This shall be achieved by speeding up trials, simplification of bail procedures and periodic review of cases of undertrial prisoners. Undertrial prisoners shall, as far as possible, be confined in separate institutions.

3. Since it is recognised that imprisonment is not always the best way to meet the objectives of punishment the Government shall endeavour to provide in law, new alternatives to imprisonment such as com-

11. All India Jail Reforms Committee, 1980-83 : *National Policy on Jail Reforms draft*, pp. 339 - 42: 26: 13.

12. Id., pp. 343 - 46: 27.2 and the sub-para.

munity service, forfeiture of property, payment of compensation to victims, public censure, etc. in addition to the ones already existing, and shall specially ensure that the Probation of Offenders Act, 1958 is effectively implemented throughout the country.

4. Living conditions in every prison and allied institutions shall be compatible with human dignity in all aspects such as accommodation, hygiene, sanitation, food, clothing, medical facilities, etc. All factors responsible for vitiating the atmosphere of these institutions shall be identified and dealt with effectively.

5. Prison service shall be developed as a professional career service. The State shall endeavour to develop a well-organised prison cadre based on appropriate job requirements, sound training and proper promotional avenues. An all-India service, namely, the Indian Prisons and Correctional Service shall be constituted to induct better qualified and talented persons at higher echelons. Proper training facilities for prison personnel shall be developed at the national, regional and State levels.

6. Prisons are hitherto a closed world. It is necessary to open them to some kind of positive and constructive public discernment. Selected eminent public men shall be authorised to visit prisons and give independent report on them to appropriate authorities.

7. Probation, aftercare, rehabilitation and follow-up of offenders shall form an integral part of the functions of the Department of Prisons and Correctional Services.

8. The development of prisons shall be planned in a systematic manner keeping in view the objectives and goals to be achieved. The progress of implementation of such plans shall be continuously monitored and periodically evaluated.

9. The Governments at the Centre and in the States/Union Territories shall endeavour to provide adequate resources for the development of prisons and other allied services.

10. Government recognizes that the process of reformation and rehabilitation of offenders is an integral part of the total process of social reconstructions, and, therefore, the development of prisons shall find a place in the national development plans.

Eight years after submission of the report there are no visible signs of any follow-up action by the Government. The 1987 report of the National Expert Committee headed by Krishna Iyer J. on women prisoners does not give the impression that conditions have in any way changed since 1983 when the Jails Committee finished its work. It is ironical that the Committee itself was somewhat sceptical regarding the implementation of its recommendations and there appears to be no justification for much optimism regarding the future outcome.

Reforms relating to Young Offenders

The first and most significant move in this direction was the enactment of the Reformatory Schools Act of 1897, in the interest of children below the age of 15 years. The Act laid down :

> "Whenever any youthful offender is sentenced to transportation or imprisonment, and is, in the judgment of the court by which he is sentenced, a proper person to be an inmate of a Reformatory School, the court may... direct that, instead of undergoing his sentence, he shall be sent to such a school, and be there detained for a period which shall not be less than three or more than seven years."[13]

Children's Acts were passed in relatively recent times by the various States and the Centre as well. They laid down guidelines for juvenile courts and other institutions for delinquent and neglected children and have now been replaced by the Juvenile Justice Act, 1986.

Prison Objectives and Problems

If the objective of prison sentence, as evident from the discussion above, is not to have retribution against the offender but to make him a better human being so as to be more useful to society, the question then arises as to how to achieve it. Obviously it is a stupendous task since it involves the reconciliation of two apparently conflicting forces. On the one hand there is the compulsive element of detention with all the evil consequences in terms of the social relationships and of the individual personality of the offender, as spelled out in the last chapter. On the other hand there are the efforts of the society to reform him. This clearly is a contradictory situation on the face of it and one need not be over-optimistic about the efficacy of various measures for correction and rehabilitation of offenders. Even if it is assumed that reformation is possible, the response to the various measures will be different for different categories of offenders. Hardened criminals obviously do not have much likelihood of changing themselves. There may be, on the other extreme, convicts who might have committed even serious offences like murder in a highly exceptional situation and do not really need any reformation since they are not criminals in the true sense. Consider, for example, a typical Indian peasant, who as we know is quite hardworking, not at all dishonest, and very religious in his outlook. In a dispute relating to some agricultural land, a common phenomenon in rural India, caught in a highly emotional and exciting situation he may happen to cause someone's death in a weak moment through a thoughtless act. If he is found guilty of murder the least he can be given is a life term. What possible 'reformation' is going to take place in him? The prison labour, education and religious instruction are not needed by him. In a way it may be said that he is not

13. Section 8. Reformatory Schools Act, 1897.

being sent to jail for 'reformation' but to deter other potential killers in a similar situation. Then there may be a difference in response of criminals to reformation owing to the age factor. Other factors being the same in two offenders, the impact of the corrective measures is bound to be more powerful on the younger one as compared to that on the other. With these words of caution in mind an analysis may be made of the techniques employed in correctional programmes and the difficulties involved therein.

Classification of Offenders

Individualization of treatment of offenders means that the personality of each offender is to be assessed and prison programmes designed to meet the individual requirements as far as possible. For that, it is of utmost importance that offenders are classified. Classification of offenders involves consideration at two different stages. Firstly, at the time of determining which particular type of prison the offender is to be sent to and secondly, within a given prison the offenders are to be classified through medical, psychiatric and psychological examinations, through educational and vocational studies and through case work interviewing. As regards the classification of prisons, one way to do it is in terms of their security. Prisons with maximum security lay emphasis on efficiency in terms of guard force and other measures taken for risk-free custody and are used for dangerous and escape-prone convicts. On the other end are minimum security prisons where selected prisoners are kept on the basis of their trustworthiness. Between these two types, there are others known as close custody and medium custody prisons in the U.S.A. There are certain specialised institutions like those for women, first offenders and psychotics. The rationale for having different types of prisons depending on whether the convict is dangerous or otherwise, trustworthy or not, is based on the policy that a convict may be transferred to a better or more appropriate category depending upon his performance in jail.

For classifying convicts in a given prison, it is necessary to have the details of their backgrounds for diagnosis. After the diagnosis is made, treatment is the next step. All this requires the co-operation of persons of diverse fields like social workers, doctors, psychiatrists and psychologists. In the U.S.A. and some other advanced countries, the work of diagnosis and treatment of the offender is done by committees of these experts. In England exhaustive enquiries are made of the convict's family history, his past record and mental state and classification is done by a body of experts.[14]

As per the rules in the jail manuals of some States, prisoners are now classified on the basis of age, sex, mental health, nature of offence and whether a habitual or a casual prisoner. Casual prisoners are sub-classified into (*i*) star, and (*ii*) general; and habituals into (*i*) non-professional, and (*ii*)

14. Lionel W. Fox : *The Modern English Prisons*, p. 76.

professional. A casual prisoner is "one who is first offender and who lapses into crime not because he has a criminal mentality but on account of his surroundings, physical disability or mental deficiency". Casual prisoners whose previous character was good, antecedents not criminal and whose crime does not indicate grave cruelty and moral turpitude or depravity of mind, are classified into the 'star' sub-category. Other casual prisoners are placed in the 'general' sub-category.[15]

Non-professional habituals are those prisoners who lapse into crime owing to their surroundings, or some physical or mental defect, and who are not first offenders. In the other sub-category are included all other habitual prisoners, for instance, those who are men with an object, sound in mind and mostly sound in body, often highly skilled who deliberately and with their eyes open prefer a life of crime, and know the manoeuvres necessary for that life.[16]

Unlike the U.S.A. and England, in India the classification work is not performed by committees of experts in the prisons. It is done by the court convicting the offender. The courts do not apply their mind in a given case and the whole process tends to be of a routine nature. According to Vidya Bhushan, the classification slip is filled up by a clerk of the court and the presiding officer of the court clears it as a matter of routine.[17] The undesirability of such a practice is obvious. Even if classification is not to be done by the committees, the least which can be done is that the judicial mind be applied to the question having regard to the various personal factors of the convict.

The Committee of 1980-83 has described the system of classification as old and archaic, not based on scientific principles since there is no homogeneous grouping or classification of prisoners. The All India Jail Manual Committee, 1957-59 had advised a strong individualised approach on the basis of age, physical and mental health, length of sentencing, degree of criminality and character, but the recommendations, by and large, remain unimplemented. The Committee of 1980-83 has urged for the implementation of these recommendations and has provided the guidelines for the classification of prisoners in terms of the following factors:[18]

(*a*) sex;

(*b*) age i.e. whether the prisoner is a child, young offender, adult, or old;

(*c*) the kind of law, civil or criminal, under which confined;

15. *U.P. Jail Manual*, Rule 274 quoted in Vidya Bhushan : *Prison Administration in India*, pp. 68, 69.
16. *Id.*, p. 69.
17. *Ibid.*
18. *Report of the All-India Jail Reforms Committee, 1980-83*, p. 112: 9.8

(*d*) stage of investigation and trial e.g. whether remanded or undertrial prisoner;

(*e*) nature of sentence; simple, rigorous, short, medium or long term of imprisonment, life imprisonment or death sentence;

(*f*) casual or habitual offender;

(*g*) disease or infirmity : criminal lunatic, leper or TB patient;

(*h*) socio-economic status i.e. A, B or C class.

These suggestions were made by the Committee after assessing the current situation in the following words :[19]

> "Segregation of offenders on the basis of sex, age, criminal record, social background and sequence of criminal behaviour is an essential feature of modern prison system. But during our visits to various States and Union Territories we observed that undertrial prisoners, prisoners sentenced to short, medium and long terms of imprisonment, prisoners sentenced to simple imprisonment, habitual offenders, lifers, hard and dangerous prisoners, children, young offenders, women offenders, civil prisoners, prisoners sentenced by court martial, criminal and non-criminal lunatics, detenus under the National Security Act, smugglers, etc. were all kept in the same institution and the arrangements for their segregation even in different wards were not effective. It was also observed that factors like overcrowding and periodic large turnover of prisoners override all principles and requirements of segregation. In reality segregation has become a provision only on paper."

Based on the segregation imperatives, the Committee suggested the following varieties of institutions to meet the needs of different categories of prisoners:[20]

(*i*) Separate prisons or annexes for undertrials.

(*ii*) Separate prisons or annexes for women.

(*iii*) Separate camps for prisoners courting arrest in connection with socio-economic movements and protests.

(*iv*) Separate institutions for young offenders which should be semi-open with medium security arrangements.

(*v*) Separate prison yards and enclosures for non-habitual offenders.

(*vi*) Maximum security prisons for habitual offenders, professional and organised criminals, sophisticated criminals and criminal careerists.

(*vii*) Special security prisons for difficult discipline cases, escape risks and dangerous and violent prisoners.

19. *Report of the All India Jail Reforms Committee, 1980-83*. p. 108: 9.1
20. *Id.*, pp. 110-11, 9.7 and the sub-paras.

Prison Education

The tradition of imparting education to prisoners in the U.S.A. dates back to the establishment of the Elmira Reformatory in 1876. In America it is done on the simple assumption that education and rehabilitation are directly connected in the sense that better education leads to better earning capacity and school is regarded as the cure of all evils. In India, owing to mass illiteracy most of the prisoners do not have even elementary education. Only 33 per cent of the male convicts are literate. In the case of women the percentage is only twelve.[21] In such a situation, education is welcome even if it does not serve the rehabilitative ideal. In this connection, the observation of MacCormick is quite apt :

> "If on no other grounds than a general resolve, to offer educational opportunities to under-educated persons whenever they may be found is something worthwhile."[22]

According to him, prison education should have the following components, so that the individual needs of the prisoners may be fulfilled by some or any of them :

(1) Fundamental academic education, designed to provide the intellectual tools needed in study and training and in everyday life.
(2) Vocational education, designed to give training for an occupation.
(3) Health education, designed to teach the fundamentals of personal and community health.
(4) Cultural education, embracing the non-utilitarian fields which one enters for intellectual or aesthetic satisfaction alone.
(5) Social education, to which all other types of education and all the activities of the institution should contribute.

The same view was expressed by the All India Jail Manual Committee : Diversified education is the principal channel of correctional treatment.[23]

Academic education gives a sense of achievement to the prisoner which goes a long way in exercising corrective influences. In Indian prisons, a big handicap is the lack of adequate number of teachers. Sometimes the services of educated convicts are utilised, which has the obvious handicap that most of them do not possess either the training or aptitude for teaching. The only sound alternative is to have qualified teachers, if not on wholetime basis due to economic incapability, at least on part-time basis. It should not be very difficult to invite some members of the local community to help in a voluntary manner.

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21. *Probation and Prisons : A Statistical Analysis 1964-68*. Central Bureau of Correctional Services.
22. A.H. MacCormick : *The Education of Adult Prisoners*, p. 34.
23. *Report of the All India Jail Manual Committee*, p. 46.

The importance of vocational education cannot be overemphasised. But the most important aspect to be kept in mind is the relevance of the vocational education to the sort of life which the convict would be exposed to after completing the sentence. In this connection, it may be pointed out that agricultural orientation is most suitable for a majority of the prison population in the Indian context. Forty-five per cent of the prisoners in India come with an agricultural background.[24]

Among the methods suggested by Glenn M. Kendall for social education, the most important is that the prison inmates may be given some measure of self-government and self-direction.[25] In Indian conditions, the panchayat system is an ideal approach to impart training in socialization. This system is being applied in many prisons in the various States in India.

Religious and Moral Education

The recognition of the importance of religious education in the American prisons is reflected in one of the principles of the American Correctional Association's "Declaration of Principles" which says :

> "Religion represents a rich resource in the moral and spiritual regeneration of mankind. Especially trained chaplains, religious instruction and counselling, together with adequate facilities for group worship of the inmates' own choice are essential elements in the programme of a correctional association."

The position of the chaplain was, however, quite established before the recognition came from the penologists. Even before the organized treatment of prisoners, the chaplains showed keen interest in the prisoners and their families. In England too, religious instruction forms an important part of the treatment programmes. A chaplain is attached to every prison to carry out religious and moral education.

In India, rules in the jail manuals recognise the significance of religion and religious instruction for the reformation of prisoners. Prisoners of all communities are offered facilities for their religious observances. Honorary teachers, selected by the district magistrates, deliver lectures on religious and moral subjects for an hour once a week.[26] Vidya Bhushan is quite right in pointing out that the suggestion of the U.P. Jails Inquiry Committee, 1929, that maulvis and pandits be appointed in prisons on the line of the appointment of chaplains in England, was not suitable in the Indian context.[27] Whatever might have been the position before Independence when the committee gave its report, it is an absolutely outmoded approach in the

24. *Probation and Prisons : A Statistical Analysis 1964-68*, Central Bureau of Correctional Services.
25. *General and Social Education in Correctional Treatment* (1946), pp. 105-17.
26. Vidya Bhushan : *Prison Administration in India*, p. 188.
27. *Id.*, p. 189.

secular set-up of the post-Independence era. It will be much better to confine the programmes to the teaching of general principles of morals and ethics without reference to any particular religion.

Prison Labour and Industry

The punitive approach used labour as a form of punishment. The emphasis was on hard unproductive labour and efforts were made to make it as unpleasant as possible. In the reformative approach it is to be used not as an end in itself but as a means to achieve certain skills in the prisoner which, apart from disciplining him, shall be helpful to him in finding some vocation to sustain himself after his release and also enable him to earn wages while serving in prison. In addition to these aspects, some prison administrators look at it from the utilitarian angle to justify it since it helps in the prison finances. The prisoner is in a position to contribute something for his maintenance in jail. There are many difficulties faced in organising industry in prisons. Though not evident any more, there was hostile reaction from organized free labour and some businessmen and industrialists when the movements of prison labour and industry were launched for the first time in the U.S.A. In India, such a problem never cropped up but there were certain other problems which presented themselves in the Indian prisons, some of them being of universal nature.

It is found, for instance, that many prisoners do not find any occupation to put to use any of the skills or trades learnt in prison. In one of the studies made in the U.S.A., it was found that two-thirds of reformed men did not use the trades they learnt in the institution and the rest who used their training were in the same trade before the imprisonment.[28] Not only may inmates be sometimes not interested in learning the trade due to lack of aptitude or its irrelevance after release, even the prison administrators have been found to be lukewarm towards the programmes at times. For instance, the U.P. Jail Industries Enquiry Committee also noted that training has never been taken by jail administrators seriously.[29]

The payment of wages for the industrial work done by the prison inmates has also been criticised by those who are convinced of the need for the deterrent element of the jail sentence. It has been argued that punishment should involve the deprivation of the earning capacity of the offender. It is also pointed out that it is anomalous that while many law-abiding citizens find it difficult to find employment, work and wages are provided to a convicted person.[30]

28. William H. Sheldon and Eleanor Glueck : *500 Criminal Careers*.
29. *Report of U.P. Jail Industries Enquiry Committee*, p. 13.
30. The criticism is levied in spite of the fact that the wages generally paid to jail inmates do not compare favourably with the wages received by others for similar work.

Prison labour in India was viewed in the beginning as a tool of punishment in order to serve as a deterrent to the inmates. A typical illustration of the approach to the problem was provided by the somewhat cynical and sceptical view expressed by Macaulay in his Minute of 1835. According to him, the experiment of prison labour in terms of acquisition of gainful skills by the prisoner was to prove either successful or otherwise and in either case it was an undesirable consequence. If successful, the essential element of the deterrent aspect of punishment would be neutralised. On the other hand if the experiment proved unsuccessful, all the effort and cost involved would come to naught. He apprehended that if the plan was completely successful, the result would be that by far the best workmen in the country would be those punished as robbers, thieves and rogues of every sort. Further, he was of the view that prison labour ought not to be viewed as a productive asset to meet the finances of jail administration.

Despite the unmitigated conservative strain present in Macaulay's opinion on the subject, it must be conceded that some negative aspects may be involved due to the competition between prison labour and private industry. The impact of prison labour or training may not, however, be as dramatic and powerful as visualised by Macaulay.

The trend continues to be in favour of not only prison work but there is support also for eliminating free labour rendered by prisoners. The Jail Committee of 1980-83 has made the following recommendations:[31]

> 1. The State shall endeavour to develop vocational training and work programmes in prisons for all inmates eligible to work. The aim of such training and work programmes shall be to equip inmates with better skills and work habits for their rehabilitation.
>
> 2. *Payment of fair wages* and other incentives shall be associated with work programmes. The incentives of leave, remission and premature release to convicts shall also be utilised for improvement of their behaviour, strengthening of family ties and early return to society.

Judicial support has also been forthcoming in large measures just as is discernible in the context of various human rights of prisoners during the last decade. In *Mohammad Giasuddin* v. *State of A.P.*[32], the Court found three years' rigorous imprisonment awarded to a well-educated white-collar Government employee for the offence of cheating to be inappropriate and ordered its substitution by 18 months' imprisonment along with suitable mental-cum-manual work. Regarding wages, the Court held that unpaid work was "bonded labour and humiliating" and expressed its shock and surprise that two decades after all discussions regarding correction and rehabilitation

31. *Report of All India Jail Reform Committee, 1980-83*, 344: 27.2: 11 and 12.
32. (1977) 3 SCC 287 : 1977 SCC (Cri) 496 : AIR 1977 SC 1926.

in the country, the A.P. Government had yet to frame rules for the payment of wages to prisoners.

The philosophy of reformation and rehabilitation of prisoners through work training found support from the Supreme Court in the case of *Dharambir* v. *State of Uttar Pradesh*[33].

In *Dharambir* v. *State of Uttar Pradesh*[33], the Court reiterated its support to the work training progress in the following words :

> "We are told that the two prisoners are agriculturists by profession. It is better, therefore, that they are put to use as agriculturists, whether within or without the prison campus. Being young, they should also be trained in any other useful craft, if they have aptitude, therefore, so that when eventually they emerge from the prison walls, they may become sensitive citizens and that when prisoners are made to work, as these two ought be under our directions, a small amount by way of wages could be paid and should be paid so that the healing effect on their minds is fully felt. Moreover, proper utilization of services of prisoners in some meaningful employment, whether as cultivators or as craftsmen or even in creative labour, will be good from the society's angle as it reduces the burden on the public exchequer and the tension within."

Continuing the same approach the courts have gone further to hold that prisoners are entitled to *fair wages* for the work done by them even if they have to do it involuntarily as a part of punishment. The issue has been directly and squarely dealt with by the Kerala High Court in the matter of *Prison Reforms Enhancement of Wages of Prisoners*[34] where free labour by the prisoners was held to be violative of Article 23(1) of the Constitution.[35] The court justified the ruling by pointing out that what is authorised by Section 53 of the Penal Code is *hard labour* and not *free labour*. The court also considered the issue of quantum of wages on the basis of fair wages and enhanced the wages on *ad hoc* basis to Rs. 8 per day.

The advantages accruing out of fair wages to a prisoner were described by the court thus :

1. The punishment would appear to be just and fair and not as an exhibition of vindictiveness.
2. There would be a possibility of the prisoner being rehabilitated on release.
3. The severity of the resultant punishment on the dependants of the prisoner may be softened by payment of a substantial part of the fair wages due to the prisoner to them.

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33. (1979) 3 SCC 645 : 1979 SCC (Cri) 862.
34. AIR 1983 Ker 261.
35. This guarantees right against exploitation which prohibits forced and free labour.

4. Any provision for payment of wages to a prisoner is a recognition of his humanhood, his right as an individual. That may preserve his self-respect.
5. Such a measure would take away reasons for nursing vengeance against the society.
6. A humane approach would make it easier for the prison authorities to enforce discipline.
7. The prisoner may be induced to dedicate himself to the work.
8. More than all these, the State can absolve itself of the charge that it is exploiting the prisoners by taking free labour, a charge which, in the case of a civilized Government, is certainly not commendable.

The points made against the 'free labour' may be highly plausible keeping in view modern penology but is the labour really and totally "free" if wages, and that too fair wages, are not paid to the prisoner? Does it not follow that a convict, if working like an ordinary labourer or workman inside the jail and getting paid fairly for it, should pay for his food, lodging and clothing like the non-criminal labourers and workers outside the prisons? Such a policy besides being logical and fair would also ensure 'recognition of his humanhood' and 'self-respect' and would greatly reduce the burden of the tax-payers toward the maintenance of prisons and prisoners.

In a case brought before the Andhra Pradesh High Court through a writ petition[36], the issue of 'free labour' by the prisoners was however decided on the basis of the right guaranteed by Article 21 of the Constitution.[37] The court did not, however, go to the extent of fixing the minimum wages for the prisoners, holding that such an action was not possible under the particular writ petition.

Security and Discipline

Prison discipline involves the enforcement of rules and regulations in the management of the prison system. It is obvious that the problem of prison discipline, by its very nature, is qualitatively different from discipline in other organizations e.g. the armed forces and educational institutions, since the issues regarding prison administration and the relationships between the managers and those who are managed in the system pose very different and peculiar problems.

As can be expected, the concept of prison discipline has undergone a change since Macaulay's Minute of 1835. The trend has been from the

36. Writ Petition No. 1822 of 1985. See *Report of National Expert Committee on Women Prisoners*, Vol. II, p. 72.
37. The provision prohibits deprivation of a person's life or personal liberty except according to procedure established by law.

deterrent aspect to somewhat more refined ideas ; though the position, as shall be discussed later, is still ambivalent. The element of deterrence was emphasised by the earlier Jails Committees of India of 1835 and 1864. The latter recommended:[38]

> "....we may rest assured that if the punishment of imprisonment is not deterrent, the fault must lie in the prison discipline, and when that is lax and unsustained we can entertain no reasonable expectation that the fear of imprisonment will deter commission of crime."

Recommendation was also made for the vesting of powers in the jail superintendent enabling him to inflict direct punishment for violations of discipline.[39] The punishments recommended were aimless labour, solitary confinement and flogging. The recommendations of the Jails Committee of 1919-1920 paved the way for the abolition of inhuman punishments for indiscipline and hard labour such as short drill, treadmill, crank, grinding grain by *chakki* and metal breaking have been abolished. At the same time a gradual trend developed in the form of enforcement of discipline based on inducements like remission of punishment due to good conduct, payment of wages for labour rendered, creation of facilities like canteens and granting the privilege of writing letters and allowing interviews with friends and relations.

Solitary Confinement

Solitary confinement as a mode of preserving discipline has provoked much debate. While many prison administrators value it as an efficient tool to maintain discipline, there are criminologists and many others who regard it as something extremely cruel and dehumanising. Writing in his autobiography, Jawaharlal Nehru observed :[40]

> "Solitary confinement, even for a short period, is a most painful affair; for it to be prolonged for years is a terrible thing. It means the slow and continuous deterioration of the mind till it begins to border on insanity ; and the appearance of a look of vacancy, or a frightened animal type of expression. It is killing of the spirit by degrees, the slow vivisection of the soul. Even if a man survives it, he becomes abnormal and an absolute misfit in the world."

The Law Commission of India in its Forty-second Report favoured the abolition of solitary confinement since it was "out of tune with modern thinking". The punishment, however, is retained in the Penal Code, Section 73 of which provides :

38. *Report of the Indian Jails Committee*, 1864, p. 25.
39. *Id.*, p. 30.
40. Jawaharlal Nehru : *An Autobiography*, p. 222.

"Whenever any person is convicted of an offence for which under this Code the court has power to sentence him to rigorous imprisonment, the court may by its sentence 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, that is to say—

a time not exceeding one month if the term of imprisonment shall not exceed six months ;

a time not exceeding two months if the term of imprisonment shall exceed six months and shall not exceed one year ;

a time not exceeding three months if the term of imprisonment shall exceed one year."

Section 74 lays down the time limits for which solitary confinement can be given at a time or during a certain period of time.

In the leading decision[41] of the Supreme Court which disposed of two writ petitions by Sunil Batra and Charles Gurmukh Sobhraj, the problem of solitary confinement was dealt with at length. Besides the Penal Code provision referred to above, Section 30 of the Prisons Act was also considered. The provision reads as follows :

"(1) Every prisoner under sentence of death shall, immediately on his arrival in the prison after sentence, be searched by, or by order of, the Jailor and all articles shall be taken from him which the Jailor deems it dangerous or inexpedient to leave in his possession.

(2) Every such prisoner shall be confined in a cell apart from all other prisoners, and shall be placed by day and by night under the charge of a guard."

The petitioner, Batra, was found guilty by the sessions court of the offence of murder and was awarded the capital sentence in January 1977. Till then, he was a 'B' class prisoner eligible for certain amenities. After the death penalty was pronounced, the prison superintendent stripped him of the 'B' class facilities and locked him up in a single cell with a small, walled yard attached but beyond the view of other human beings except the jail guards and formal visitors who visited in discharge of their official duties, and a few callers on rare occasions. He filed an appeal against his conviction and sentence to the High Court which dismissed the appeal. He also challenged in the High Court his quasi-solitary confinement but without success. Thereafter, he filed the present petition under Article 32 of the Constitution of India to the Supreme Court. He challenged the solitary confinement under Articles 14, 19 and 21. The respondent State justified the action of the superintendent under Section 30 of the Prisons Act, 1894. It was held by the Supreme Court that having regard to the scope of Section

41. *Sunil Batra* v. *Delhi Administration*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155.

30(2), persons in the position of the petitioner are not to be completely segregated except in extreme case of necessity which must be specifically made out and that too after he is, in the true sense of the expression, 'a prisoner under sentence of death'.

The following points were laid down by the Court in support of the judgment :

1. Prisoners are entitled to all constitutional rights unless their liberty has been constitutionally curtailed. If Section 30(2) of the Prisons Act enables the prison authorities to impose solitary confinement on a prisoner under death sentence, not as a consequence of violation of prison discipline but on the sole and solitary ground that the prisoner is one under sentence of death, the provision would offend Articles 14, 19 and 20.[42] Further, if by imposing solitary confinement there is total deprivation of camaraderie amongst co-prisoners co-mingling and talking and being talked to, it would offend Article 21.[43]
2. Sub-section (2) of Section 30 does not purport to provide a punishment for a breach of jail discipline. Prison offences are set out in Section 45 and the power to deal with them has been vested in the superintendent under Section 46 of the Act which authorises him to put a prisoner in separate or cellular confinement.
3. Solitary confinement is by itself a substantive punishment which can be imposed only by a court of law as provided in Sections 73 and 74 of the Penal Code.
4. Section 30(2) merely provides for confinement of a prisoner under sentence of death in a cell apart from other prisoners and he is to be placed day and night under the charge of a guard. Such confinement can neither be cellular nor separate and in any event, it cannot be a solitary confinement.[44]
5. The expression "prisoner under sentence of death" can only mean a prisoner whose sentence of death has become final and conclusive and indefeasible, which cannot be annulled or voided by any judicial or constitutional procedure. To be 'under sentence of death' means 'to be under a finally executable death sentence'.

42. The three articles guarantee equality before law, seven freedoms including that of movement subject to reasonable restrictions, and protection against 'double jeopardy' respectively.
43. It guarantees the right to life and liberty with procedural safeguards.
44. Sub-sections (8) and (10) of Section 46 of the Prisons Act give the meaning of the words 'separate' and 'cellular' confinements respectively. In both, the prisoner is secluded from communication with other prisoners but not from sight. In 'separate' confinement the prisoner is allowed meals in association with other prisoners. Solitary confinement has not been statutorily defined. According to the Jail Manual it means such confinement with or without labour as entirely secludes the prisoner both from sight of and communication with other prisoners.

6. If solitary confinement is a revolt against society's humane essence, there is no reason to permit the same punishment to be smuggled into the prison system by naming it differently. Law is not a formal label, nor logomachy, but a working technique of justice. The Penal Code and the Criminal Procedure Code regard *punitive* solitude as too harsh and the legislature cannot be intended to permit preventive solitary confinement, released even from the restrictions of Sections 73 and 74, IPC, Section 29 of the Prisons Act and the restrictive Prison Rules. It would be extraordinary that a far worse solitary confinement, masked as safe custody, sans maximum limit, sans intermission, sans judicial oversight or natural justice, would be sanctioned. Common sense quarrels with such nonsense.

Some Comments

One can clearly discern and also appreciate the anxiety of the court to apply the liberal ideas based on modern prison philosophy. It may, however, still not be possible to agree with all the points mentioned above ; particularly with the interpretation given to the expression 'prisoner under sentence of death'. It is fairly clear that Section 30 of the Prisons Act has nothing to do with punishment of any kind, substantive or otherwise, and it just provides security measures to be taken by the jail authorities immediately when a prisoner under death sentence arrives in jail after the sentence. The provision certainly cannot mean that the prisoner is to be searched and all dangerous things to be taken from him only after the sentence of death has become final and conclusive and indefeasible which cannot be annulled or voided by any judicial or constitutional procedure.

It seems doubtful that the power regarding award of punishment, including solitary confinement, vested in the court is exclusive or necessarily ousts the administrative or disciplinary powers of the jail authorities under the Prisons Act or any other legislation. In fact it is significant that there are some sanctions e.g. whipping, which though not permissible under the Penal Code can still be applied by the jail authorities under certain circumstances.

There is no scope for a detailed discussion of constitutional provisions in a work like the present one. It is, however, doubtful that the application of Section 30 of the Prisons Act, as such, can offend against Articles 14, 19, 20 and 21 of the Constitution.

Fetters

The other important issue for the court to decide was regarding the use of fetters for the 'safe custody' of prisoners in jails. The question arose as a result of the petition submitted to the court by Sobhraj in the circumstances described below.

Sobhraj was in custody since 1976. His Interpol dossier was stated to be grave and his exploits included jailbreak and other serious crimes. He was in continuous and indeterminate detention since July 1976 partly under the Maintenance of Internal Security Act and at the time of the petition faced serious charges including murder. He had been continuously subjected to torturesome bar fetters for twenty-four hours every day of the month for nearly two years. In a petition under Article 32 he complained against the persistence of bar fetters notwithstanding the wounds on his heels and medical advice. The respondent-State defended the bar fetters under Section 56 of the Prisons Act, 1894. That section provides that "whenever the superintendent considers it necessary (with reference either to the state of the prison or the character of the prisoners) for the safe custody of any prisoners that they should be confined in irons, he may, subject to such rules and instructions as may be laid down by the Inspector-General with the sanction of the local government, so confine them". The Supreme Court on an earlier occasion had directed a little relaxation in the vigour in the bar fetters, but the petitioner complained that he continued to be fettered by such bar fetters.

The following points emerge out of the judgment :

1. Bar fetters, to a very considerable extent curtail, if not wholly deprive, locomotion which is one of the facets of personal liberty.

2. The power given under Section 56 can be exercised only for reasons and considerations which are germane to the objective of the statute, namely, safe custody of the prisoner which takes into consideration the character and propensities of the prisoner. The determination of the necessity to put a prisoner in bar fetters must be relatable to the character and safe custody of the prisoner. The nature and length of sentence or the magnitude of the crime committed by the prisoner are not relevant. Ordinary routine reasons cannot be sufficient for putting a prisoner in bar fetters. The reasons have to be fully recorded in the superintendents' journal and the prisoner's history-ticket, and this narrows down the discretionary powers conferred on the superintendent.

3. The court cannot be oblivious to the fact that the treatment of human beings which offends human dignity, imposes avoidable torture and reduces man to the level of a beast would certainly be arbitrary and can be questioned under Article 14 of the Constitution. Putting bar fetters for an unusually long period without due regard to the safety of the prisoner and security of the prison would certainly not be justified under Section 56. Particularly, it would be so when the medical opinion is that bar fetters should be removed.

4. Undertrials shall be deemed to be in custody but not undergoing punitive imprisonment and they shall be accorded more relaxed conditions than convicts.

5. The 'iron' regimen shall in no case go beyond the intervals, conditions and maxims laid down for punitive 'irons'. They shall be for short spells, light and never applied if sores exist.

6. The grounds for 'fetters' shall be given to the victim and the reasons shall be recorded in the superintendent's journal and in the history-ticket of the prisoner.

7. No 'fetters' shall continue beyond daytime as nocturnal fetters on locked-in detenus are ordinarily uncalled for, viewed from considerations of safety.

8. The prolonged continuance of 'irons' as a punitive or preventive step shall be subject to previous approval by an external examiner like a Chief Judicial Magistrate or Sessions Judge who shall briefly hear the victim and record findings.

9. The Inspector General of Prisons shall, with quick despatch, consider revision petitions by fettered prisoners and direct the continuance or discontinuance of the 'irons'. In the absence of such prompt decision, the fetters shall be deemed to have been negatived and shall be removed.

Handcuffing

Handcuffing is yet another device to control and discipline the prisoners in the context of preventing undesirable conduct on their part and is frequently resorted to while an undertrial prisoner is being escorted between the prison and court. It is evident that such a device inevitably involves limitation and degradation of the highest degree and it can be justified only in a situation where extreme vigilance and caution is warranted. In *Prem Shankar Shukla* v. *Delhi Administration*[45], the Supreme Court upheld the contention of the petitioner that the distinction between ordinary and better class prisoners for the purpose of handcuffing as provided in the Punjab Police Rules was violative of the fundamental rights enshrined in Articles 14, 19 and 21 of the Constitution.[46] Quite predictably, the Court following the same philosophy as propounded in *Sunil Batra* described handcuffing as an inhuman and overharsh practice to be employed only in exceptional circumstances and with judicial safeguards. The Court held that the distinction based on the class of persons and nature of accusation was unsustainable

45. (1980) 3 SCC 526 : 1980 SCC (Cri) 815 : 1980 Cri LJ 930.

46. Under the impugned rules, undertrial prisoners are divided into two classes, based on previous standard of living. The classifying authority is the trying court subject to the approval of the District Magistrate but the police has the power to provisionally classify before the matter comes up before the court. Only those should be classed provisionally as 'better class' who by social status, education or habit of life have been accustomed to a superior mode of living.

and 'compulsive need' could be the only basis of handcuffing in some unusual circumstances. While Krishna Iyer J. for himself and on behalf of Chinnappa Reddy J., emphasised the desirability of judicial control and supervision, R.S. Pathak J., though broadly agreeing with Krishna Iyer J., struck a more realistic and pragmatic note when he said that the decision to handcuff or not is primarily a decision of the authority responsible for the custody.

According to the instructions issued by the Government of India, Ministry of Home Affairs, handcuffs are normally to be used by the police only where the prisoner is violent, disorderly, obstructive or is likely to attempt to escape or commit suicide. The fact of a person being handcuffed when brought to a police station or despatched from there must be recorded by the duty officer along with the reasons for doing so. There is also a specific prohibition against making political prisoners walk handcuffed through the streets.

Whether the Court's rulings and the Home Ministry's exhortations actually percolate down and influence the working of the police is highly doubtful. If the recent episode of handcuffing of an accused, a lawyer, in Delhi, which gave rise to a chain of events culminating in the nationwide strike of lawyers and open confrontation between them and the police, is any indication, handcuffing continues unabated; judicial pronouncements and executive orders notwithstanding.

PRISONERS' RIGHTS

Besides the physical protection afforded to the prisoners and the elimination of unnecessary restraints as described above, many other issues regarding prisoners' rights have engaged the attention of courts in India and other countries. The Declaration of Human Rights, 1948 showed its concern for prisoners through some of its provisions. Article 5 of the declaration stands against torture and inhuman and cruel punishments. Article 6 incorporates the vital principle that everyone has the right to recognition everywhere *as a person* before the law; a principle signifying that a prisoner does not cease to be a 'person' inside a jail and is, as such, entitled to receive a reasonably decent and civilised treatment in the prison. The European Convention on Human Rights, the United Nations Declaration of 1975 and Amnesty International have all contributed towards the awareness and enforcement of prisoners' rights.

An acute awareness of the rights of prisoners on the part of the prisoners themselves and organizations involved in protecting civil liberties has marked prison administration during the past two decades. Powers exercised by authorities are being scrutinised and challenged more closely everywhere and prison administrators are no exception. In Europe and the U.S.A. the prisoners' rights movement coincided with the protest movements of youth,

students and workers in the mid-sixties. The situation in general and the intensity of the movement can be gauged from the following:[47]

> "Already in 1966, prison protest in Sweden had led to the creation of a new organization, KRUM, and the holding of a 'parliament of thieves'. Norway followed suit in 1967 with KROM and Finland in 1968 with two new groups, KRIM and a neo-Marxist body. In Denmark in April 1967, psychology students of the University of Copenhagen arranged a 'Criminals' week' which sired an 'Association of Humane Criminal Policy' called KRIM.
>
> In Britain, a more significant and interesting development occurred in 1972 when some prisoners formed an association, Preservation of the Rights of Prisoners (PROP) in order to do something on their release to help their fellow inmates and to open up to public discussion the whole question of imprisonment. The main concern of PROP has been regarding the control excercised by the prison administration on the inmates. The government has not, however, accorded recognition to PROP despite the latter's struggle for it."

Unlike the U.S.A. or India, the battle in Britain regarding the prisoners' right is not possible with reference to any written constitutional rights but judicial intervention can be sought on the basis of the rule of law and principles of natural justice. Thus, the judicial process has been invoked by questioning the correctness of the procedure in hearings before the 'Boards of Visitors' for the prisons. Another possible avenue for the redressal of grievances is the European Court of Human Rights established under the European Commission on Human Rights. All this has resulted in the enforcement of various rights including prisoners', freer communication and access to legal advisers and independent medical experts.

In *St. Germain Re,*[48], Shaw LJ. expressed the view that the rights of a citizen however circumscribed by a penal sentence or otherwise, must always be the concern of the courts unless their jurisdiction is clearly excluded by some statutory provision. In his opinion it is irrelevant that the Secretary of State may afford redress where the rules have been infringed or their application has been irregular or unduly harsh. That a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication was also the view taken by Lord Bridge in *Raymod* v. *Honey*[49]. In *Leach* v. *Governor of Parkhurst Prison*[50], these views have been endorsed by the House of Lords which rejected the contention that the prisoner could invoke the judicial process only after

47. Peter Evans, *Prison Crisis* (1980), p. 66.
48. (1979) QB 425.
49. (1983) 1 AC 1.
50. (1988) 2 WLR 290.

exhausting the remedy available through executive officers concerned and the Secretary of State. The House of Lords also did not agree with the apprehension that judicial intervention would lead to a large number of capricious and frivolous complaints from the prisoners; in any case such an eventuality if it occurred could be taken care of only by legislation and not by refusal by the judiciary to do their job.

In the U.S.A. the courts have generally bestowed rights on the basis of constitutional safeguards during the last two decades which is somewhat at variance with the 'hands off' policy earlier adopted. The extremely indifferent and callous attitude displayed earlier would be evident from the following dictum :

> "He (prisoner) has, as a consequence of his crime not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being, the slave of the State."[51]

The matter of internal management of prisons or correctional institutions is vested in and rests with the hands of those institutions operating under the statutory and their acts, administration of prison discipline and overall operation of the institution are not subject to court supervisions and control.[52]

While the first dictum perhaps reflects the penal philosophy prevailing hundred years ago, the second is an admission of the 'hands off' judicial policy and limitations of judiciary vis-a-vis prison administration. The change in the American judicial attitude came slowly and steadily and now it is well established that, consistent with the imprisonment, the prisoner continues to be entitled to his constitutional rights. In *Wolf* v. *McDowell* [53], the issue was whether the respondent could be deprived of his right of confronting and cross-examining the witnesses produced by the prison officers in disciplinary proceedings without affecting his constitutional rights under the due process requirement. Though the majority of the judges held that no constitutional violation had actually occurred against the respondent, the general principle was stated as follows :

> "Petitioners assert that the procedure for disciplinary proceedings against prison inmates for serious misconduct is a matter of policy raising no constitutional issue. If the position implies that prisoners in State institutions are wholly without the protections of the Constitution and the Due Process Clause, it is plainly untenable. Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a 'retraction justified by the considerations underlying our penal system'.... But though his rights may be dismissed by the

51. *Ruffin* v. *Commonwealth*, (1871) quoted by the Supreme Court in *Sunil Batra*, *op. cit.*, p. 124.
52. *Douglas* v. *Sigler*, 386 Fed. Rep. (II), 684.
53. 418 US 539.

needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country."[54]

In India a similar development regarding prisoners' rights has taken place during the last decade commencing with *Sunil Batra* where the Supreme Court expressed the same concern regarding prisoners' rights as was manifested in *Wolf* and *Pell* in the U.S.A. Citing the above American authorities along with others the Supreme Court observed :

"It is no more open to debate that convicts are not wholly denuded of their fundamental rights.... However, a prisoner's liberty is in the very nature of things circumscribed by the very fact of his confinement. His interest in the limited liberty left to him is then all the more substantial. Conviction for a crime does not reduce the person into a non-person whose rights are subject to the whims of the prison administration...."

Subsequently, various aspects of prisoners' rights have been coming before the Indian courts and they have interpreted the rights rather liberally in spite of the absence of anything like a 'due process' clause in our Constitution : This in particular has been made possible by giving a deeper and innovative meaning to the concept of 'procedure' and 'liberty' in Article 21 of the Constitution; a trend which commenced with the Supreme Court's decision in *Maneka Gandhi*[55] and which has made a significant contribution to what is referred to as the emergence of 'judicial activism' in the country. The constitutional rights of prisoners cover a wide range of rights of personal and political nature including rights such as pertaining to religion, associates and elections; what, however, follows is regarding rights which are more vital and of direct relevance in the context of prison reforms in India.

1. Access to Court and Legal Facilities

A substantial part of the prison population in the country consists of undertrials and those detenus whose trials have yet to commence and the significance of this right is obvious. The right to have a lawyer of one's choice and to legal aid is provided for both in the Constitution and the Code of Criminal Procedure.[56] In *M.H. Hoskot* v. *State of Maharashtra*[57] the Supreme Court dealt with the problem at length in the context of the inmates of the prisons. The petitioner was found guilty of attempt to cheat by forging and the High Court in an appeal by the State enhanced the punishment to three years. He sought an appeal to the Supreme Court both against the conviction as well as the enhancement but, as claimed by him, did not receive

54. See *Pell* v. *Procunier*, 417 US 819 for similar observations by Douglas J., in his dissenting opinion.
55. (1978) 1 SCC 248 : AIR 1978 SC 597.
56. *See* Chapter II : Right to Counsel and Legal Aid.
57. (1978) 3 SCC 544 : 1978 SCC (Cri) 468.

a copy of the judgment for about three years from the prison authorities. The Court found this to be violative of his rights under Articles 21, 22 read with Articles 39-A and 42 of the Constitution. The following principles were laid down by the Court :

(*i*) Courts shall forthwith furnish a free transcript of the judgment when sentencing a person to a prison term.

(*ii*) In the event of any such copy being sent to the jail authorities for delivery to the prisoner by the appellate, revisional or other court, the official concerned shall with quick despatch, get it delivered to the sentencee and obtain an acknowledgment thereof from him.

(*iii*) Where the prisoner seeks to file an appeal or revision, every facility for exercise of that right shall be made available by the jail administration.

(*iv*) Where the prisoner is disabled from engaging a lawyer, on reasonable grounds such as indigence or incommunicado situation, the Court shall, if the circumstances of the case, the gravity of the sentence, and the ends of justice so require, assign a competent counsel for the prisoner's defence, provided the party does not object to that lawyer.

(*v*) The State which prosecuted the prisoner and set in motion the process which deprived him of his liberty shall pay to assigned counsel such sum as the court may equitably fix.

In *Frances Coralie Mullin* v. *Union Territory of Delhi*[58], the Supreme Court got the opportunity of considering a few other aspects of the prisoner's right to have a lawyer and reasonable access to him without undue interference from the prison staff. It was said that the right of a detenu to consult a legal adviser of his choice for any purpose is not limited to criminal proceedings but also for securing release from preventive detention or for filing a writ petition or for prosecuting any civil or criminal proceedings. A prison regulation, it was pointed out, cannot prescribe any unreasonable and arbitrary procedure to regulate the interviews between the detenu and the legal adviser.

2. Meetings with Family Members and Friends

In *Frances Coralie Mullin*[59] the petitioner, a British national, was detained in Tihar Jail of Delhi in connection with her alleged involvement in violation of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. One of the issues was regarding the procedure and frequency of the exercise of her right to meet her five-year-old daughter and her sister who was looking after the girl. Rules of the Punjab Jail Manual, applicable in Delhi, permitted the detenus to meet friends and

58. (1981) 1 SCC 608 : 1981 SCC (Cri) 212 : AIR 1981 SC 746.
59. *Ibid.*

relatives only once a month while similar facility under the rules was available once and twice a week to the convicts and undertrials respectively. Such a dichotomy being clearly wrong and arbitrary, the Court held the relevant provisions of the conditions of the Detention Order to be violative of Articles 14 and 21 of the Constitution. The Court also found the provision of the Order prescribing that a detenu can have an interview with a legal adviser only after obtaining permission of the District Magistrate and that the interview had to take place in the presence of certain officials of the Customs and Excise Department to be invalid. In reaching the above conclusions the Court also emphasised the distinction between convicts and detenus under preventive detention; the latter being on a higher pedestal compared to the former.

3. Expression and Communication

The right to speech and expression is an extremely valuable right; essential not only for the democratic functioning of society but also for the development and protection of the creative faculties of human beings. The issue regarding the right of a prisoner to publish a book arose quite a few years before other rights were asserted by prisoners in the era of judicial activism. In *State of Maharashtra* v. *Prabhakar Pandurang Sanzgiri*[60], the respondent was detained under the Defence of India Rules, 1962. He wrote a scientific book on science but was not allowed to publish it by the prison authorities. The Bombay High Court issued a writ allowing Pandurang to publish the book. The State Government in an appeal to the Supreme Court argued that freedom to publish was only a component part of speech and expression and as the detenu ceased to be free in view of his detention, he could not exercise his freedom to publish his book in view of an observation made by Das J. in *Gopalan's case*[61]. Without going into the question regarding the relative positions of Articles 19 and 21, the Court observed that the view of Das J. in *Gopalan* was not the last word on the subject. The Court also found that there was nothing in the Bombay Detention Order, 1951, prohibiting a detenu from writing or publishing a book. Dismissing the appeal, the Court further held that the book being a scientific work could not in any case be detrimental to public interest or safety as envisaged under the Defence of India Rules (1962).

An important aspect of the right to free speech and expression relates to the Press. Quite often the Press is interested in interviewing a prisoner as a part of investigative journalism and a prisoner on his part may also be keen for an interview for his own reasons. The situation therefore, involves the fundamental right of expression and information of both the parties to an interview. In *Prabha Dutt* v. *Union of India*[62] the petitioner, a newspaper

60. AIR 1966 SC 424.
61. AIR 1950 SC 27.
62. (1982) 1 SCC 1 : 1982 SCC (Cri) 41.

correspondent, filed a petition to interview two condemned prisoners, Ranga and Billa, for which she was not accorded permission by the Superintendent of Tihar Jail, Delhi. The Court allowed the interview holding that the Press is entitled to interview prisoners unless weighty reasons to the contrary existed. The Court noted that the right claimed by the petitioner was not the right to express any particular view or opinion but the right to means of information through the medium of an interview.

It is interesting to note that the prisoners, though they were willing to be interviewed, were not asserting any constitutional right of their own in the instant case. The Court nevertheless cited the relevant rules of the Jail Manual to support the rights of the prisoners to communicate and have interviews with relatives, friends and legal advisers and also the Press, people not specifically included in the rules.

Pell v. *Procunier*[63] is a leading American case on the rights of both the Press and prisoners regarding interviews and the constitutionality of a State regulation, which prohibited face to face interviews between news media representatives specifically named and requested to interview. A majority consisting of six judges held that no constitutional right of speech of the inmates was violated in view of the alternative channels of communication (i.e. letters, visits from family members, attorneys and clergy) available to them ; five of the six majority judges holding that the free expression right of the Press was not violated either, since its representatives had no greater right to have access to prison information than the general public, expressed the apprehension that interviews of designated inmates would bring extreme Press attention resulting in undesirable publicity to them which could adversely affect the prison discipline.

Douglas J. joined by two other judges dissented, expressing the view that an absolute ban on interviews with specifically designated inmates was far broader than was necessary to protect any legitimate governmental interest and, therefore, violated the free press guarantee of the First Amendment. According to Douglas J., the foremost among the Bill of Rights of prisoners is the First Amendment and the prisoners are still 'persons' entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all the requirements of the due process. The minority opinion in the case is evidently closer to the Indian judicial view as reflected in *Prabhakar Pandurang*[64] where the Supreme Court cited with approval many of the observations of Douglas J. in *Pell*[65].

63. 417 US 817.
64. (1982) 1 SCC 1 : 1982 SCC (Cri) 41.
65. 417 US 817.

4. Compensation

The remedy of compensation to prisoners must be available in appropriate situations involving various legal injuries to them during detention. It is only recently that the courts have become less hesitant in giving relief to the prisoners in cases of wrongful imprisonment and physical injuries suffered by the prisoners due to intentional or negligent acts of the prison staff.

In may cases where the State is sued for wrongful imprisonment or other injuries, the defence generally offered and accepted is what is known as 'Act of State' i.e. the liability is negatived on the plea that the injury was received or violation of a right took place in the course of the exercise of sovereign functions of the State.[66] In *Rudul Sah* v. *State of Bihar*[67] the Supreme Court has, however, changed its stance and awarded damages to a victim of wrongful imprisonment for fourteen years after his acquittal.

In England and elsewhere also the same trend is discernible. Compensation has been awarded, for instance, where a prisoner received injuries from a fellow prisoner due to the negligence of the prison authorities, for injuries caused due to faulty equipment or outfit supplied by the prison administrators and injuries received while doing some hazardous job assigned to the prisoner.[68]

Jail Committee on Prisoners' Rights

The Jail Reforms Committee 1980-83 has also made recommendations regarding prisoners' rights and the Committee appears to have been inspired and influenced by the judicial pronouncements on the various issues. The Committee has recommended the incorporation of the following rights in the proposed scheme of 'National Prison Legislation':

1. Right to Human Dignity
2. Right to Minimum Needs
3. Right to Communication
4. Right to Access to Law
5. Right against Arbitrary Prison Punishments
6. Right of Meaningful and Gainful Employment
7. Right to be released on due date.

All the above rights are more or less are already contained in the Constitution, jail manuals and judicial pronouncements but the real challenge is regarding their implementation.

66. *Kasturi Lal* v. *State of U.P.*, AIR 1965 SC 1039 is an instance of such an approach.
67. (1983) 4 SCC 141 : 1983 SCC (Cri) 798 : AIR 1983 SC 1086.
68. See *D' Arey*, 1956 (DC) Crime LR 56 ; *Morgen*, 1965 NZLR 134 ; *Donald* v. *R.*, (1971) FC 417.

Nutrition and Hygiene

The problem of health hazards in Indian prisons has been felt acutely right from the beginning of the present system in the middle of the last century. To begin with, the mortality rate among prison inmates was so high that the Jails Committee of 1864 found the number of persons who died in the jails to be 46,309 in one decade. They attributed the main causes to the following factors:[69] (1) overcrowding, (2) bad ventilation, (3) bad conservancy, (4) bad drainage, (5) insufficiency of clothing, (6) sleeping on the ground, (7) deficiency of personal cleanliness, (8) bad water, (9) extraction of labour from unfit persons, and (10) insufficient medical inspection.

The Committee made a number of recommendations, quite a few were implemented and the death rate was brought down. Despite the improvements which are claimed or might have been achieved, the hygienic conditions may still be far from ideal. In this connection the observations of Kuldip Nayar, who got first-hand information of prison life during his incarceration during the Emergency in 1975, are quite revealing :[70]

> "There were only three dry latrines for the twenty-eight inmates in our 'dormitory' (the number rose to ninety-six in a fortnight), and we had to queue up in the morning. A long-sentence prisoner was our scavenger and he was getting a princely sum of ten rupees a month for the job. He would clean the latrines only once a day, and in the evening even burning incense, which some detenus had brought along, could not get rid of the smell brought to the 'dormitory' by the fitful breeze."

Writing about the food, he had the following to say :

> "The *dal* (lentils) was watery and the *chapatis* half-baked.... I could see a few flies floating on the surface.... After some days I became so accustomed to finding flies in food that I would simply fish them out and start eating without a qualm...."[71]

The other component of the problem is the food given to the prisoners. The first issue here is that the quality and quantity of food supplied must relate to the objective of the imprisonment. It is, therefore, argued by the proponents of the deterrent aspect that providing good food in the prisons would be inconsistent with the very purpose of punishment.

The other issue—even if the deterrent aspect is dismissed—is regarding the justification of providing food to prisoners of a quality superior to what the majority of law-abiding citizens may be getting outside the prisons. The Indian Jails Committee of 1836 had the above issues in mind when it recommended :[72]

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69. *Report of the Indian Jails Committee, 1864*, p. 10.
70. *In Jail* (1978) p. 29.
71. *Id.*, p. 22.
72. Quoted in R.N. Datir : *Prison as a Social System* (1978), p. 357.

"...no greater provision ought to be made in each district than may be sufficient for purchasing the staple article of the prisoner's food, the coarsest grain on which the mass of the people of that district lives."

To the assertion that a prisoner should not be served better food than an honest labourer the counter-argument given is that prisoners are required to do much hard work in the jail and the diet must be nutritious enough to be commensurate with the needs of the prisoner. The present policy, at least in theory, is to provide standard diet sufficient enough to preserve health and strength. But how much of the prescribed food and of what quality eventually reaches the prisoner is a matter of speculation for it is common knowledge that corruption is rampant in jail administration. On the violations regarding food, Kuldip Nayar has the following observations to make :[73]

"The wheat and rice given to prisoners were adulterated. There would be dust, stones and other elements mixed with them to increase the weight. The wood given to us for the fuel was soaked in water for the same purpose. And the weighing machine was also tampered with....

Perhaps the way almost everyone had his cut was most evident in our milk supply. It came in bulk to the main gate (*phatak*); there, enough milk for the top officials was taken out of the cans which were then topped up with water. And as the cans moved to the wards, all those who handled them appropriated their share, again topping up with water. Once, when we complained to the warder that milk was more watery than usual, he laughingly said that everyone from the superintendent downwards shared the milk...."

If this has been the experience of the well-known public figures who were political prisoners kept in "better conditions" the plight of ordinary criminal prisoners can well be imagined.

The Jail Committee of 1980-83 has endorsed the above description regarding the hygenic, sanitary and dietary conditions prevailing in the country's prisons. The Committee noticed dirt and stink in most of the prisons visited and a great paucity of latrines and toilets everywhere. The extremely unsatisfactory conditions regarding the food supplied to the prisoners and its being the root cause of some of the troubles arising in the jails are described thus :[74]

"Monotony of prison diet has ever been an additional ingredient of punishment. Half-baked or over-baked *rotis*, maggots and worms in cooked food, bad quality of vegetables and lesser issue of diet than that prescribed in rules are the common complaints about prisoners' diet. The origin of many disturbances in prisons can be traced to bad quality of food issued to prisoners. Prisoners take resort to hunger strikes and

73. *In Jail* (1978) pp. 32-33.
74. *Op. cit.* (*supra*) Note 18, p. 72 : 6.6.

demonstrations to protest against the quality and quantity of food issued to them."

Besides the quality and quantity of food, the arrangements regarding preparation of food, management of kitchens, distribution of food and eating places were all found to be not at all satisfactory. The Committee, while urging top priority to be given to the improvement of the entire system of diet, made the following specific recommendations :

1. Purchasing of food articles through contract system should be discontinued.
2. Food articles of good medium quality should be used.
3. There should be two types of diet for labouring and non-labouring prisoners.
4. For better management, there should be decentralization of kitchens ; not more than 200 persons to be getting food from one kitchen.

After-care Programmes

Theoretically, the difficulties of a prisoner are over after his release since not only is his personal freedom recovered but his prison training makes him a fit person to start a new life on a clean slate. In practice, it is rarely the case. As the Central After-Care Association of England put it succinctly, "many a prisoner approaches at the end of a long sentence in a state of bewilderment and fear as to what the future will hold for him".[75] This is evident in view of the stigma, loss of job, loss of family ties and alienation from friends with may directly flow from the imprisonment. The Maxwell Committee on Discharged Prisoners' Aid Societies described the plight of many persistent offenders thus :

> "Such offenders often have no home or family ties, or no such home or family ties as will supply the support and stimulus they need ; no trustworthy friends ; no niche in society to buttress any legitimate self-esteem : there is merely a bewildered and frustrated malcontent floundering in a sort of social limbo between prison and a world with which he cannot come to terms ; a man not confirmed in criminality but with no strength or standard upon which to build a useful and honest life."[76]

After-care has two connotations. In its narrow sense, it is somewhat like probation i.e. the released person is put under the care of a probation officer performing the role of a social worker. In its wider sense, after-care implies all efforts to enable the prisoner to overcome all the various social, economic and psychological problems after his release. Under the treatment philosophy, the after-care work, in a way, should commence as soon as the convict begins his prison life. In its very rudimentary form, it simply means that at the time

75. *Annual Report, 1959.*
76. Quoted in McClean and Wood : *Criminal Justice and Treatment of Offenders*, p. 142.

of departure the prisoner is given some money by the State or his savings, made out of the wages earned in the prison, and a set of clothes to equip him for the 'new life'.

In India, the after-care work was done for a very long time by philanthropic organizations which, in spite of some good work done by them, had all the limitations which such private organizations tend to have in this country. Various Jail Committees in their reports emphasized the need for having effective after-care programmes but hardly anything was achieved. The All India Jail Manual Committee, 1957 observed :

> "After-care is the released person's convalescence. It is the process which carries him from artificial and restricted environment of institutional custody to satisfactory citizenship, resettlement and to ultimate rehabilitation in the free community.... Institutional training, treatment and post-release assistance is a continuous process. After-care service, therefore, should form an integral part of correctional work."

As a consequence of the Gorey Committee's report on the subject, a comprehensive after-care programme was envisaged in the second and third Five-year Plans at the instance of the Central Government. A few after-care homes and shelters were set up in some states but because of lack of sustained interest and paucity of funds, most of them were either closed or became defunct. As could be expected, the Jail Committee, 1980-83 has pleaded for the revival and re-strengthening of these programmes and several recommendations have been made for the development and functioning of after-care programmes.[77]

Besides emphasising the role of voluntary agencies and the need for proper counselling and adequate financial assistance to the prisoners at the time of their release, some other recommendations have also been made:

1. After-care programmes should be a statutory function of the Department of Prisons and Correctional Services. At district level, the probation officer is to be in charge of these programmes.
2. After-care and follow-up units should be created for the assessment of the needs of the released prisoner.
3. Legal assistance to be provided to those whose land has been grabbed.
4. Material assistance in the form of food, clothing and journey expense for reaching their destination to be provided to the prisoners on their release.

At present, some good work is being done by a few public societies in various States. In U.P., one of the functions of the Crime Prevention Society is to carry on after-care work through its district committees. The district committees not only provide money or clothing to the released prisoner but

77. *Op. cit.* (*supra*) Note 18, pp. 263-267 : 22 and sub-paras.

they also arrange for food and shelter to those in need of it. Efforts are also made to find employment for some of them. In a few cases even land has been managed for those who needed it. The other States where after-care work is being done in a relatively good manner are Tamil Nadu, Maharashtra and West Bengal, though work in some way or the other is being carried out in most of the States. It is obvious that the magnitude of the task yet to be performed is stupendous in a vast and developing country like India.

The help generally offered in India relates to family welfare, financial assistance, employment and basic necessities like food, shelter and clothing. Of these the most difficult and challenging task is to provide employment to ex-prisoners. Most of the employers, including the government, are extremely inhibited in employing persons with a record of conviction. The problem is further aggravated by large-scale unemployment in India and even many law-abiding citizens find it difficult to get employment. The same may even be true to some extent regarding the provision for food, shelter and clothes. These must be provided, under ideal conditions, till the person is rehabilitated but it may not be feasible to achieve this ideal in a society where a substantial part of the normal population is deprived of these basic amenities.

In England, the Central After-Care Association (Men's Division) is responsible for statutory supervision, primarily of prisoners serving sentences of imprisonment of four years and over, and sentences of corrective training and preventive detention. Under the Criminal Justice Act, 1961, supervision will be compulsory for prisoners under a sentence of four years and over and also for those serving sentences of imprisonment of six months or more who are recidivists or under twenty-six years of age at the date of sentence.[78] The association is completely financed by the State. An important recommendation of the Maxwell Committee for the guidance of aid societies was that aid societies should be more concerned with 'after-care' and less with 'aid on discharge' and that to assist in this process prison welfare officers should be appointed at local prisons to 'submit' to the appropriate aid society recommendations for the after-care of such prisoners as are willing and able to benefit from their services and appear suitable for special attention and assistance.[79]

Two more developments in the prison system may be noted here which have some bearing on the question of after-care in England. One is the home-leave system and the other is the establishment of pre-discharge hostels. Home-leave may be granted to prisoners on corrective or long sentences. The leave is up to five days and gives an opportunity to the prisoner to contact those responsible for his after-care and also potential

78. J.P Martin : *After-Care in Transition* (1964).
79. *Ibid.*

employers. The pre-discharge hostels are meant for carefully selected men serving sentences of preventive detention. The hostels are in the campus of the prison, the inmates go out to work in the local establishments and they have to pay for their upkeep out of the wages earned.

The need and philosophy of after-care programmes has been convincingly summed up by J.P. Martin in these words :

> "An effective penal system must aim for the re-integration of prisoners into society. In the last resort this is because there is a moral argument for after-care. It is simply that no man is so guilty, nor is society so blameless, that it is justified in condemning anyone to a lifetime of punishment, legal or social. Society must be protected but this is not done by refusing help to those who need it far more than most of their fellow citizens."[80]

Women Prisoners

The bulk of the persons who come in conflict with criminal law happen to be males. With some variations this can be described as a universal phenomenon and India is no exception to the general rule. Criminologists have usually focussed their attention on offenders in general irrespective of the sex factor and consequently scant attention has been given to female criminality and related issues. Though most of the criminological and penological issues are common to both males and females, it should be evident that because of the peculiar social, cultural and biological factors, female criminality and women prisoners deserve much more attention that what has been accorded to them in the past.

Some of the problems faced by women prisoners are not only different but also much more acute as compared to those faced by their male counterparts. The handicaps from which women generally suffer in society are also present in the minuscule prison society. Perhaps they get aggravated and operate with greater severity in jails. The female vulnerability to sexual exploitation is enhanced in the male dominated prison set-up. Rehabilitation and social acceptance, difficult for any ex-prisoner, is more difficult in the case of female convicts. Their perception and awareness of various legal rights available to them is generally abysmal and it is, therefore, a challenge to make them assert their rights and obtain appropriate remedies. In general, a female prisoner is in greater need of privacy, seclusion, medical and psychiatric care ; facilities which are generally inadequate for all prisoners, males or females. There is the problem of young children's placement when the mother is serving a jail term. The prison rules permit children of five to six years to stay with their prisoner mothers but the problem of slightly older children presents complex humanitarian and social dimensions.

80. J.P Martin : *After-Care in Transition* (1964).

The central issue, about which there cannot possibly be any controversy, is to provide separate and exclusive prisons and institutions for female prisoners. All the committees, the Jail Committees of 1919-20 and 1980-83 and National Expert Committee on Women Prisoners 1986-87 included, have been recommending and reiterating quite vehemently the need for separate prisons for women but, to date, this ideal remains far from being fulfilled. According to information available, there are only four separate institutions for women prisoners in the whole country, one each in Andhra Pradesh, Maharashtra, Tamil Nadu and Uttar Pradesh. There are two more prisons for women, one each in Bihar and Rajasthan, but they form part of the Central Prisons where male prisoners are also confined. These prisons, however, are not meant for undertrials but restricted to convicted women prisoners only.[81] One factor responsible for not having adequate and separate prisons for women, not only in impoverished countries like India but even in the U.S.A., is the relatively small numbers of female prisoners to be catered to by the system.[82] The hard choice is, therefore, between a few exclusive prisons for women where they would be lodged away from their homes and the non-exclusive local or nearby prisons. The Jail Committee of 1980-83 endorsed the view that if the choice was to be made between removal from the hometown and sub-human conditions of incarceration in the local prison, the former should be accepted as the lesser evil. The Expert Committee on Women Prisoners 1986-87 observed that the smaller number of women prisoners, in comparison to men, cannot be held as a valid factor limiting the creation of custodial facilities.

Besides recommending separate institutions/annexes the Committee of 1980-83 recommended that the staff for these institutions and annexes shall comprise women employees only.[83] The same approach to protect women is reflected in the following recommendations of the Committee:[84]

1. All police investigations involving women, must be carried out in presence of a relative of the accused or her lawyer and of a lady staff member. Women should not be called to the police station for investigation.
2. Police personnel should treat women with due courtesy and dignity during investigation and while they are in police custody.
3. Women kept in police lock-up should invariably be under the charge of a women official and while in transit they should always be accompanied by woman escorts.
4. Bail should be liberally granted to women undertrial prisoners.

81. Kum Kum Chadha : *The Indian Jail*, p. 73.
82. As on 30.6.1986, the percentage of women in different categories in the country's prison population were : average female population 2.98%, convicted 2.75%, civil 2.2% , other categories 22.25 ; Source : *National Expert Committee Report*, Appendix V, Table II.
83. *Report of the National Expert Committee on Women Prisoners, 1980-83*, p. 345: 27.2.17.
84. *Id.*, p. 187: 11.1, 11.2, 11.3, 11.7.

5. The Probation of Offenders Act should be extensively used for the benefit of women offenders in order to keep them away from prison as far as possible.

The women prisoners, as should be evident, have to face all the usual problems faced by the male prisoners (e.g. overcrowding, bad food, bad sanitary and hygenic conditions) in addition to those peculiar to them. It is, however, a pleasant surprise that the National Expert Committee did find a few points to commend regarding the functioning of the prisons in the context of female prisoners :

1. Generally, health care of women prisoners in the few separate institutions for women was observed to be satisfactory. A certain element of concern and care was visible in respect of the expectant mother and some amount of enhanced diet and nutrition in the pre- and post-natal period were being offered. The same institutions also had a reasonably well-organized creche or *balwadi* for children of women prisoners.[85]
2. In general, jails are comparatively less violative of women's dignity and right to basic necessities of life than are some other non-prison custodial institutions.[86]

Open Prisons and Other Trends

Prisons have come to occupy the central place in the administration of punishment all over the world. The prison system has come a long way since the time jails were dens of lechery, debauchery, moral corruption and pestilence where inmates were exposed to cruelties of the highest degree while they waited for the ultimate punishment (death sentence or transportation).

The change can be gauged by noting radical developments, like the recent concept of part-time imprisonment in Belgium. In part-time imprisonment in that country convicts continue to work or study in the community, their evenings and weekends being spent in prison. The Scandinavian countries had, of course earlier established a system of weekend gaol sentences, particularly for those convicted of driving under the influence of alcohol.[87]

In the U.S.A. the above technique was employed much earlier under the Huber Law in 1913. This was an adaptation of the open institution idea termed as "day parole" or "work release". This system stands between probation and imprisonment.

A radical feature of the new prison philosophy is the emergence of 'open prisons' in many parts of the world including India. A prison, as such, stands for containment of prisoners i.e. to keep them 'out of circulation' and hence

85. *National Expert Committee Report*, Vol. I, p. 131: 112.
86. *Id.*, p. 143: 143.
87. Nerval Morris : *Prison in Evolution* (1964).

'open prison' is a contradiction in terms. 'Containment' of convicts is still the dominant objective in the minds of prison administrators and quite frequently the other professed objectives like the rehabilitative ideal are sacrificed to attain it.

The 'open prisons' in the beginning were not truly open but they were in the nature of 'minimum-security' prisons. A pioneering effort in this direction was the Witzwill establishment in Switzerland as far back as in 1891 ; similar developments took place in the U.S.A., U.K. and some other countries shortly afterwards. The institution of 'open prisons' in the contemporary sense did not materialise before the 1930s in the U.K. and the 1940s in U.S.A. In the U.K., Sir Alexander Paterson, a member of Prison Commission from 1922 to 1947, played the pioneering role in the creation of open prisons. His prison philosophy is reflected in his two dictums:

"*1.* A man is sent to prison *as* a punishment and not *for* punishment."

"*2.* You cannot train a man for freedom under conditions of captivity."

The best thing about the open prisons is that the system counters what is known as 'prisonisation' of the convict ; institutionalization and criminalization denoting the two components of 'prisonisation'.[88] Because of more extensive terrain and freer movements, the inmates may be more relaxed and tension free; a condition more conducive to the administration and reception of rehabilitative techniques. It may also generate a greater sense of discretion and responsibility as expressed below :

> "The open fields, the absence of gun guards, not regimentation men, allowed to go to meals and to go unescorted, challenge each individual to begin again to stand on his own feet. He is constantly faced with the ease of escape. The fact that he rejects this possibility....indicates he has taken a great moral step, a great social step. By accepting this responsibility, he has admitted to himself that he wishes to be a social rather than an asocial animal."[89]

In *Dharambir* v. *State of Uttar Pradesh*[90] the Supreme Court supported the institution of open prisons since such prisons, the court felt, had certain advantages in the context of young offenders who could be protected from some of the well-known vices to which young inmates were subjected to in the ordinary jails. The Court, therefore, directed the State Government to despatch the two prisoners, in their early twenties to one of the open prisons in U.P. 'without standing on technical rules, if substantially they fulfil the required conditions'.

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88. *Supra*, p. 76.
89. Kenyon Scudder, the first warden of the famous American Open Prison at Chino in Southern California; quoted in *Open Prisons* by Jones and Cormes, (1977), p. 9.
90. (1979) 3 SCC 645: 1979 SCC (Cri) 862.

The optimism regarding the potential of open prisons does not appear to have been confirmed by the later experience at some places. Studies made in Holland and Finland do not indicate any significant differences in terms of recidivism among the inmates released from closed and open prisons[91] and the controversy regarding the dichotomy inherent between 'containment' and open prisons continues.

In India, a beginning in the open prison system was made in 1952 under the inspiration of Dr. Sampurnanand when a camp was opened at Chakia in the Varanasi district of Uttar Pradesh. The inmates were allowed to work on their own or in local factories and wages were paid to them. At the end of the year 1980, there were twenty-seven open prisons in the country and the number evidently is not adequate as pointed out by the Jail Reforms Committee. The Committee expressed its satisfaction regarding the open prisons, especially the Sanganar Jail in Rajasthan where the prisoners live with their families. In the twenty years of its existence, only two prisoners escaped from Sanganar which is not significantly different from figures available for the traditional jails. The Committee, however, was much perturbed over Section 433-A, Code of Criminal Procedure which provides for a minimum imprisonment of fourteen years for life convicts and thus takes away the incentive to earn remittance by working in the open prisons. An apprehension, somewhat exaggerated, is expressed by the Committee that the open prisons may eventually close because of Section 433-A of the Criminal Procedure Code.

The Committee has recommended the creation of three kinds of open prisons i.e. semi-open, open, and open camps (Sanganar type). It has also recommended that assignment to open jails should not depend on long or short sentences but on suitability of the person.

Prisons : Present Position and Future Outlook

Despite some advance made in prison reform in India, it must be patently clear from the foregoing discussion that there is a wide gap between the theory and claims on the one hand and the hard realities and actual practices on the other. Quoting from the report of a judicial inquiry recently conducted by Mr. Justice Ismail in a Tamil Nadu prison, the Supreme Court observed in the *Batra case(II)*[92]:

> "The black hole of Calcutta is not a historical past but a present reality. The report finds the detenus were deliberately lodged in the ninth block which was previously occupied by leprosy prisoners.
>
> On the night of February 2, there were brutal, merciless and savage beatings of the detenus in the ninth block. Earlier in the afternoon, the

91. Kenyon Scudder : *op. cit.*, Note 86, p. 11.
92. *Sunil Batra(II)* v. *Delhi Admn.*, (1980) 3 SCC 488: 1980 SCC (Cri) 777.

Chief Head Warder went to the block and noted down the names of the detenus and the cells in which they were locked up. The exercise was undertaken. The judge finds that the beating of the detenus that took place on the night of February 2, 1976 was a premeditated, pre-planned and deliberate one and not undertaken on the spur of the moment either because of any provocation offered by the detenus to go into the cells as contended by the jail officials'."

The Supreme Court also noted that "lurid judicial reports" from other States had also appeared.

The Court had made yet one more plea for the reformation of prisons in the following words in *Dharambir*[93]:

"We may take advantage of this opportunity to make a general direction to the State Government to draw up a set of rules to reform the pattern of prison life and to transform the present system in itself so that the harsher technologies inherited from imperial times are abandoned in favour of humane processes constitutionally enlivened under the Republic. These days, Prison Commissions are at work in many States and we do hope that the State of Uttar Pradesh will hasten to bring compassion into prisons."

Shortly afterwards, the Supreme Court utilised the opportunity in *Sunil Batra(II)* v. *Delhi Administration*[94], to emphasise once again the constitutional and legal rights of prisoners. The role of the courts was asserted in the context of the enforcement of human rights within the prison walls to see that the prisoners were not treated in arbitrary and cruel ways. While in *Dharambir*[90] the State Government was advised to effect reforms by drawing up a set of rules for a more enlightened prison administration, the Supreme Court now itself spelt out some of the obligations of the prison administrators. Some of the directions are :

1. Violation of provisions of Section 27(2) and (3) of the Prisons Act must be visited with judicial correction and punishment of the jail staff.[95] Sex excesses and exploitative labour are the vices adolescents are subjected to by adults. The young inmates must be separated and freed from exploitation by adults. Violation of these imperatives will offend Article 19 of the Constitution.

93. (1979) 3 SCC 645: 1979 SCC (Cri) 862, 863, 864.
94. (1980) 3 SCC 488: 1980 SCC (Cri) 777.
95. Section 27(2) requires that in a prison where male prisoners under the age of twenty-one are confined, means shall be provided for separating them altogether from the other prisoners and for separating those of them who have arrived at the age of puberty from those who have not. Section 27(3) provides that unconvicted criminal prisoners shall be kept apart from convicted criminal prisoners.

2. Subject to search and discipline and other security criteria, the right to the society of fellow men, parents and other family members cannot be denied in the light of Article 19 and its sweep.

3. Lawyers nominated by the District Magistrate, Sessions Judge, High Court and the Supreme Court be given all facilities for interviews, visits and confidential communication with prisoners subject to discipline and security considerations.

4. District Magistrates and Sessions Judges shall personally or through surrogates, visit prisons in their jurisdiction and afford effective opportunities for ventilating legal grievances; shall make expeditious enquiries thereinto and take suitable remedial action. In appropriate cases reports shall be made to the High Court for the latter to initiate, if found necessary, *habeas corpus* action.

5. The State shall take early steps to prepare in Hindi a prisoner's handbook and circulate copies to bring legal awareness home to inmates. Periodical jail bulletins stating how improvements and rehabilitative programmes are brought into the prison may create a fellowship which will ease tensions. A prisoner's wall paper, which will freely ventilate grievances, will also reduce stress. All these constitute implementation of Section 61 of the Prisons Act.

6. The State shall take steps to keep up to the standard Minimum Rules for Treatment of Prisoners recommended by the United Nations, especially those relating to work and wages, treatment with dignity, community contact and correctional strategies.

7. The Prisons Acts needs modification and the Prison Manual total overhaul. A correctional-cum-orientation course has become necessitous for the prison staff inculcating the constitutional values, therapeutic approaches and tension-free management.

8. The prisoner's right shall be protected by the court by its writ jurisdiction plus contempt power. To make this jurisdiction viable, free legal services to the prisoner programmes shall be promoted through recognised legal aid societies. The district Bar shall keep a cell for prisoner's relief.

What then is the future of prisons? It appears that the system of imprisonment is bound to continue in view of the gradual disappearance of some other modes of punishment, the most important of them being capital punishment. Hermann Mannheim seems to be too optimistic regarding the eventual demise of the prison as a means of punishment when he observes :

"For centuries mankind had been accustomed to regard imprisonment as nothing but a preparatory stage for the infliction of other penalties. It is useful to remember this fact, because it may make it

easier to many minds to reconcile themselves to the inevitable if imprisonment should again fall into disuse."[96]

Whether the disuse of imprisonment is 'inevitable' or not and what sanctions would replace imprisonment in case of its total disappearance are questions difficult to answer. But there is no doubt that imprisonment as a mode of punishment has already been affected adversely to a significant extent by other methods like probation, parole and work release.

Prisons, however, continue to get more and more overcrowded almost everywhere in the world and in many countries scepticism is already being expressed regarding the reformation and rehabilitation potential of prisons.

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96. *The Dilemma of Penal Reform* (1939), p. 45.

Chapter VII

THERAPEUTIC APPROACH—PROBATION AND OTHER FLEXIBLE TECHNIQUES

Various techniques of individualized action have been developed based on the idea that not all offenders are of the same kind. Not only do offenders differ from each other in the sense of having committed different varieties of crime, but persons committing even the same crime may be poles apart from each other in terms of personal traits, motivations and the likelihood or otherwise of committing crimes in future. The recognition of the difference between various kinds of offenders has led to the realization that some kind of flexibility is desirable in the various sanctions available to courts, prison administrators and other agencies to deal with offenders. The desired flexibility has been sought to be achieved through techniques like probation, parole, pardon and suspended and indeterminate sentences.

Origin and Development

Probation and parole emerged as techniques to mitigate the consequences of severe punishment when imprisonment became the more common mode of penal sanction in place of transportation and capital punishment. Probation came into existence to save some selected types of persons from the rigours of punishment even if found guilty by a court of law. Parole on the other hand developed due to a number of factors operating independently of each other. Before transportation as a mode of punishment came to an end, the convicts were sent to America and Australia from England and the job of transportation was assigned to the shipmaster or some contractor. After 1717, the British Government gave the contractor or shipmaster "property in the service" of the prisoner until expiration of his term. As the owner of the services of the convict for the period of transportation, the contractor or the shipmaster sold the services to the highest bidder on arrival in the colonies and the criminal became an indentured servant under a contract. In the process the prisoner was released subject to certain conditions. This has some similarity with the parole practice as developed subsequently. Other factors which contributed to the growth of the technique were the English and Irish experiences with the ticket of leave system and the work of nineteenth-century American reformatories.[1]

In England and the U.S.A. the source of probation can be traced to the binding over of a person for good behaviour or recognizance for appearance in the court when required. This was done with the cooperation of friends

1. Frederick A. Moran : *The Origins of Parole*, National Probation Association Year Book, 1941.

or other persons who voluntarily stood sureties for the person who would have otherwise been sent to prison. In Massachusetts in 1830 a woman was prosecuted for committing a theft in a house. She pleaded guilty but upon application of her friends, the court did not sentence her on the condition that the friends be responsible for her appearance when called by the court. In 1831 she was acquitted before the same court of another charge of larceny. Curiously enough she was sentenced on the basis of the earlier crime of larceny.[2] John Augustus, a bootmaker of Boston, and member of a society working against alcoholism, is regarded in a way the pioneer of probation work in U.S.A. His shop was situated close to the police court in Boston. Once, while watching the court proceedings as a spectator, he asked the judge to permit him to be a surety for an offender who was to be given imprisonment. He continued providing bail to many offenders afterwards and was careful in selecting his cases on the basis of suitability for probation.

The first legislative piece on probation in India was Section 562 of the Code of Criminal Procedure, 1898. It provided for release on probation of the first offenders in the discretion of the court for minor offences punishable up to two years of imprisonment. The provision was liberalised in 1923 to include offences punishable up to 7 years' imprisonment both under the Penal Code as well as under special or local laws. In case of young male offenders under the age of 21 years and all female offenders, the benefit extended to all the offences except those punishable with death or life imprisonment. The judicial discretion had to be exercised having regard to the age, character or antecedents of the offender. Release after admonition was also possible in trivial offences i.e. punishable up to two months' imprisonment. Section 360 of the Code of Criminal Procedure of 1973 has identical content on probation but the policy has been reinforced by Section 361 which requires special reasons to be given by the court for not granting probation under the Code, Probation of Offenders Act, 1958 and the Juvenile Act.

In 1934, the Government of India suggested to the provincial governments to enact probation laws and the same was complied with by quite a few of them. While there was no uniformity of laws among the various provinces some of them even did not have any enactment on the subject. The most significant development occurred when the Jail Manual Committee under the stewardship of Dr. Walter Reckless was formed by the Government of India to review the working of jails and make recommendations for reforms. The recommendations of the Committee led to the passing of the Probation of Offenders Act, 1958 by the Central Government which sought to bring about uniformity of probation laws in the country.

2. Frank W. Grinnel : "*The Common Law History of Probation*", Journal of Criminal Law and Criminology (May-June 1941).

Concept and Object

The concept of probation may now be understood so that it may be distinguished from certain analogous techniques like parole. In England probation has not been defined anywhere in the statutes and the nearest thing to an official definition was provided by the Morrison Committee which observed that probation is the "submission of an offender while at liberty to a specified period of supervision by a social caseworker who is an officer of the court". It is apparent that in England probation order is not a sentence; it was the implied consequence of, and is now the condition of, a type of binding over since probation originated in the form of voluntary assistance and guidance given to persons bound over to be of good behaviour.[3] Probation order is made instead of sentencing and therefore cannot be regarded as conviction in general in future proceedings except when the offender prefers an appeal against the basis of the order itself pleading that he was wrongfully found guilty of the alleged offence. In England the law provides:

> "Where a court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law) is of opinion that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do so, the court may, instead of sentencing him, make a probation order, that is to say, an order requiring him to be under the supervision of a probation officer for a period to be specified in the order of not less than one year nor more than three years."[4]

The position under the Indian law will be evident from the following extracts of the relevant law:

> "When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be "of good behaviour."[5]

3. McClean and Wood : *Criminal Justice and the Treatment of Offenders*, p. 157.
4. Criminal Justice Act, 1948, Section 3(1).
5. Probation of Offenders Act, 1958, Section 4(1).

It is further provided that when an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient to do so, in addition pass a supervisory order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the offender.[6]

It follows, therefore, that the Indian law differs substantially from the corresponding English provision. Under English law, in every case when an offender is to be released under probation, he is to be placed under a supervisor which is not necessarily the position in India. The court in India may not resort to Section 4(3) and may release the offender under Section 4(1) of the Act under a bond with or without sureties and without any arrangement for supervision.

The sole intention of the legislature in passing probation laws is to give persons of a particular type a chance of reformation which they would not get if sent to prison. The type of persons who are in the contemplation of the legislature under the probation laws are those who are not hardened or dangerous criminals but those who have committed offences under some momentary weakness of character or some tempting situation. By placing the offender on probation the court saves him from the stigma of jail life and also from the contaminating influence of hardened prison inmates. Probation also serves another purpose which is quite significant though of secondary importance. It helps in eliminating overcrowding in jails by keeping many offenders away from them under probation programmes.

Selection of Offenders for Probation

Selection of suitable cases for being placed on probation and parole and subsequent follow-up through competent supervision of the probationers and parolees are the two basic elements of any effective programme of probation or parole. The report of the probation officer is of primary importance as an aid to the court for making the decision regarding the release on probation. An ideal report should give information regarding family history and personal, social and economic factors of the offender and a plan for the correctional treatment of the offender if the recommendation is for the grant of probation. In short, the probation officer has to evaluate the personality of the offender. The court has to make the decision after taking into consideration the probation officer's report and nature and circumstances of the offence.

The most important consideration is to appraise the risk involved to the society in releasing the offender and whether the risk is worth taking in the context of the offender's personality and the community at large. To some

6. Probation of Offenders Act, 1958, Section 4(3).

extent the job is done by the legislature by laying down that probation shall not be granted in some serious offences which are punishable with death or life imprisonment. The legislature may also lay down some guiding principles in terms of the age of the offenders, making probation more desirable in case of younger offenders. For instance, the Probation of Offenders Act in India provides:

> "When any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under Section 3 or Section 4, and if the court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so."

Further, it is provided that the report of the probation officer shall be considered in order to conclude that probation order would be undesirable.[7]

Section 360 of the Criminal Procedure Code makes release on probation mandatory in any case where the offender is less than 21 years of age and the offence is punishable with fine or maximum imprisonment of 7 years.

Probation and Judicial Attitude

The first thing to be taken note of here is that the use of probation has not been made as adequately and properly by the lower courts in India as is possible under the Probation Acts and the Criminal Procedure Code. In *Musa Khan* v. *State of Maharashtra*[8], the Supreme Court pointed out that though the provisions of Section 6 of the Probation of Offenders Act were mandatory, the courts did not appear to make wise use of the provisions, which was necessary to protect our younger generation from becoming professional criminals and, therefore, a menace to society.

So far as the higher judiciary is concerned, somewhat greater enthusiasm in favouring probation laws is noticeable. *Rattan Lal* v. *State of Punjab*[9] is a good example of liberal approach where Subba Rao J. gave retrospective application to the Probation of Offenders Act which had been notified in a certain district a few months after the conviction of the appellant. The same concern in favour of probation is reflected in applying Sections 360 and 361 of the Criminal Procedure Code. While applying the provisions, the Supreme Court observed in *Bishnu Deo* v. *State of West Bengal*[10]:

7. Probation of Offenders Act, 1958, Section 6.
8. (1977) 1 SCC 733 : 1977 SCC (Cri) 164.
9. AIR 1965 SC 444.
10. (1979) 3 SCC 714 : 1979 SCC (Cri) 817 : AIR 1979 SC 964.

"In the context of Section 360, 'the special reasons' contemplated by Section 361 must be such as to compel the Court to hold that it is impossible to reform and rehabilitate the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed...."

Applying the above test, it seems, there would hardly be any case to hold that it is *impossible to reform and rehabilitate* a particular offender.

The same observations were made by the Orissa High Court in *Bipin Bihari Sahu* v. *State of Orissa*[11].

While the importance of probation laws has been much emphasised by the courts in general, they also expressed reservations regarding their use in crimes of socio-economic nature. Beginning with *Ishar Dass* v. *State of Punjab*[12] through a few other decisions, the Supreme Court expressed itself in favour of the exclusion of the probation laws in food adulteration cases, a policy also recommended by the Law Commission in its Forty-seventh Report.[13] The desired legislation was eventually passed in 1976 by inserting Section 20-AA in the Prevention of Food Adulteration Act which barred the application of Section 360, Criminal Procedure Code and the provisions of Probation of Offenders Act to the violations under the food adulteration laws.

Within the area permitted by the legislature, the court shall have to exercise its discretion having regard to a number of factors. The judicial attitude can be appreciated with reference to some decided cases.[14]

In *Abdul Qayum* v. *State of Bihar*[15] the appellant was only 16 years of age at the time of his conviction for the offence of the theft of Rs 56 which he had committed by pickpocketing. He was given six months' rigorous imprisonment and a probation order was refused in spite of the fact that the probation officer had recommended it. The trial court observed :

"In spite of his recommendation I do not feel inclined to extend the benefit of the provisions of the Probation of Offenders Act to the accused Qayum. Apparently he is an associate of the accused Shamim who is a hardened criminal and a person of doubtful character. Incidents of pickpocketing are very rampant in this sub-division and it was just a stray chance that the accused Qayum was caught in this case. Having regard to these facts and the nature of offence and the circumstances in which the accused Qayum was caught, he does not deserve the benefit of Section 4 of the Act."

11. 1986 Cri LJ 406.
12. (1973) 2 SCC 65 : 1973 SCC (Cri) 708 : AIR 1972 SC 1295.
13. See *infra*, under Public Policy in this chapter.
14. A few more cases on probation have been dealt with in Chapter XI relating to sentencing process.
15. (1972) 1 SCC 103.

The appeal and the revision petition having been rejected by the Patna High Court, the appellant finally came to the Supreme Court which upheld the appeal and directed the trial court to place him on probation on the ground covered in the following observation:

> "...there was no warrant for inferring that the appellant was his (Shamim's) associate. A reference to the report of the Probation Officer would show that the accused was physically and mentally normal. Though he was illiterate he had a vocational aptitude for tailoring and was working in the Bihar Tailoring Works. He was interested towards his work as a tailor and behaves properly with his father and brothers and has normal association with friends.... Both his father and his elder brother are employed. The attitude of the family towards the offender appellant was one of sympathy and affection and the father exercised reasonable control over him. The report of the neighbours is also in his favour... there is no report against the character of the offender, no previous conviction has been proved against him prior to this case and in the circumstances... the release on probation may be a suitable method to deal with him."

The extreme liberality shown by the Supreme Court in the case is obvious. Not only did the Supreme Court refuse to see that the offender was in fact an associate of Shamim, a seasoned pickpocket, but the Court also ignored two very pertinent observations made by the trial court while refusing probation to the offender. Firstly, it was pointed out by the trial judge that incidents of pickpocketing were very rampant in the sub-division and secondly, that it was just a stray chance that accused Qayum was caught in this case. These considerations were weighty enough to warrant a refusal for probation to the offender. The nature of the offence of pickpocketing is such that the first conviction does not ordinarily mean that it was really the first act of pickpocketing committed by the person. It is common knowledge that this type of offence requires intensive training before the offender embarks on his criminal career and the chances of the offender being detected while on the job and his arrest are generally not very bright. In this context it is appropriate to quote what Professor Lotika Sarkar observed while criticising the provision for the unsupervised release of certain offenders under Section 3 of the Probation of Offenders Act, the criticism being valid even for supervised probation in cases like the present one:[16]

> "In this context I would like to share with you the views of the Superintendent of Tihar Jail. A few years ago when we visited the place he regretted the fact that most pickpockets were let off the first time. He maintained that they were caught the first time but their modus

16. Lotika Sarkar : "*Probation of Offenders Act, 1958 : A Reappraisal*", a paper read in the Correctional Services Seminar held in Delhi University (1973).

operandi would make it clear that this was not the first time they were pickpocketing. Moreover most pickpockets, in his view, acted in little gangs and therefore this release had no effect either on him or his friends...."

Another case decided by the Orissa High Court[17] shows even much more latitude to young offenders, though in a more questionable way. In this case, the accused, a young boy of fifteen years, was found guilty of robbery under Section 394 of the Penal Code and sentenced to undergo rigorous imprisonment for one year. The boy had removed jewellery from the body of a young girl after making her unconscious by inflicting grievous injuries to her. In this case it was held that probation could not be granted since the offence was punishable with life imprisonment. But strangely enough, after holding that the boy could not be released on probation, the High Court ordered his release by saying that the accused was a young boy of 15 years and a longer stay in the company of criminals would only turn him into a hardened criminal and the sentence was reduced to the period already undergone. It was ironical that by placing a restricted construction on the statute the court found probation inapplicable and let the boy loose, unsupervised, on society. A better way of doing the same thing would have been to hold that since life imprisonment was not the only punishment laid down in the Penal Code for robbery, the boy could be released on probation, in which case at least the advantage of supervision would have been available.[18] The Orissa High Court in interpreting the expression 'punishable with life imprisonment' with reference to Section 394 of the Penal Code took support from certain decisions of other High Courts in which probation was refused with the object of imprisoning those offenders, unlike the present case where the court not only refused probation but ordered the release of the offender as well.

The decision in *Uttam Singh* v. *State (Delhi Administration)*[19] is, on the other hand, somewhat harsh and of debatable nature. The appellant was convicted under Section 292, IPC for being in possession, for the purpose of sale, three packets of playing cards with obscene photographs and sentenced to six months' rigorous imprisonment and a fine of Rs 500. The Supreme Court refused to interfere with the sentence on the following grounds :

"The accused is married and is said to be 36 years of age. Having regard to the circumstances of the case and the nature of the offence and the potential danger of the accused's activity in this nefarious trade

17. *Jogi Nayak* v. *State*, AIR 1965 Ori 106.
18. In any case, the operation of Section 6 does not appear to bar the grant of probation in offences punishable with life imprisonment; the mandatory condition of recording reasons for the refusal to release on probation is not however applicable in such cases.
19. (1974) 4 SCC 590 : 1974 SCC (Cri) 626.

affecting the morals of the society, particularly of the young, we are not prepared to release him under Section 4 of the Probation of Offenders Act. These offences of corrupting the internal fabric of the mind have got to be treated on the same footing as the cases of food adulteration and we are not prepared to show any leniency...."

It is not very clear but it appears from the above observation as if the fact of the appellant being married had also an adverse effect on his sentence which is a bit intriguing. The comparison between offences relating to obscenity and adulteration also seems to be somewhat misplaced. While the direct effects of adulteration of food are absolutely clear and hence predictable, the same cannot probably be said regarding the impact of the obscene photographs in objective terms.

The interpretation of Section 6 of the Act by the courts that probation cannot be given even if life imprisonment is only an alternative punishment prescribed for an offence, has given rise to great hardship to many young offenders in cases where they are found guilty of voluntarily causing grievous hurt punishable under Section 326, IPC along with others on the basis of constructive liability under Sections 34 and 149 of the Penal Code.[20]

Kalu v. *State*[21] brings out the point that such an interpretation defeats the very purpose of the section. The offender was a young man, less than 18 years of age, who was convicted under Sections 326/34 of the Penal Code. Despite the fact that the judge appreciated that the offender was a "junior member acting merely under the influence of the senior member of the family", he pleaded helplessness in the matter in view of the "prevalent interpretation of Section 6" and sentenced the young accused to one year's imprisonment.

In *J.K. Prasad* v. *State*[22], the same story was repeated. The offender aged 19 was convicted under Section 326 read with Section 149 of the IPC and sentenced to five years' imprisonment which on appeal was reduced to three. The Supreme Court upheld the prison sentence as the offence carried a sentence of life imprisonment.

Sometimes the courts, it seems, have not really applied their mind to the question as to whether the offender deserved probation on the merit of the case and decisions have focussed more attention on some questions of a technical nature. For instance, in some cases the question which arose for consideration was whether the age of the offender for the purpose of Section 6 of the Act was to be considered with reference to the date of the commission of the offence or to the date when the offender is convicted. In *Ramji Missar* v. *State of Bihar*[23] the Supreme Court held that the relevant

20. Lotika Sarkar : *Probation of Offenders Act, 1958 : A Reappraisal.*
21. AIR 1965 Raj 74.
22. (1972) 2 SCC 633.
23. 1963 Supp 2 SCR 745 : (1963) 2 Cri LJ 173.

date was at the point of time when the court has to choose between the two alternatives i.e. imprisonment and probation. It was observed :

> "The object of the Act is to prevent the turning of youthful offenders into criminals by their association with hardened criminals of mature age within the walls of a prison. The method adopted is to attempt their possible reformation instead of inflicting on them the normal punishment for their crime. If this were borne in mind it would be clear that the age referred to by the opening words of Section 6(1) should be that when the court is dealing with the offender...."

It is submitted that though it may be the correct legal position, as held by the Supreme Court, that the age of the offender relevant to Section 6 is to be reckoned at the time of disposal of the case by the court, it is not correct to say that the object of the Act is to prevent the turning of only youthful offenders into criminals by their coming into contact with hardened criminals. Section 6 certainly emphasises the importance of probation for young offenders but the overall object of the Act is to protect offenders of selected types irrespective of the age factor.

The English courts have, on the other hand, frequently shown extreme liberality in granting probation to persons whom D.A. Thomas refers to as 'intermediate recidivists'.[24] These recidivists, according to him, are persons between the age of twenty and forty who have a number of previous convictions and a corresponding experience of institutional life but still there is some chance of rehabilitation as suggested by the presence of some special circumstances brought to the notice of the court by a probation officer. In a case cited by Thomas, a man of twenty-nine with a number of previous convictions and sentences of imprisonment pleaded guilty to house-breaking and factory-breaking committed on the day of his release from prison. The probation officer reported that there was a real chance of the person's rehabilitation since a job and a place of residence could be found for him. The court accepted the recommendations of the probation officer.

The attitude of Indian courts in comparison appears to be extremely cautious as illustrated by the following two cases. The appellant was arrested in 1971 while moving in a local train in suspicious circumstances but was released on a bond of good behaviour for the sum of Rs. 100. Subsequently, she was convicted for the theft of a gold necklace and was sentenced to 18 months' rigorous imprisonment and a fine of Rs. 500 or 6 months' imprisonment in default of payment of fine. The appellant stated before the probation officer that she had committed similar thefts on two or three other occasions but those thefts went undetected. The Supreme Court held that though at the relevant time she was under 21 years of age, it was not a proper case for

24. D.A. Thomas : *Principles of Sentencing*. Heinman London, 1970, p. 20.

probation having regard to the nature of the offence and character of the appellant.[25]

In the case of *Ramji Missar* cited above, two brothers, Ramji and Baist, were convicted for offences of attempted murder, grievous hurt and hurt under Sections 307, 326 and 324 of the Penal Code respectively. The elder brother Ramji, who was below 21 years at the time of the commission of the offence but above 21 years at the time of sentence, was sentenced to rigorous imprisonment for 2 years under Section 324 of the Penal Code. Baist, the younger brother who was of 19 years, was convicted for attempted murder and grievous hurt under Sections 307 and 326 of the Code and was sentenced to six and four years' rigorous imprisonment respectively. The trial court did not grant probation to any of them. In the case of Baist it was not possible to release him on probation since the offences under Sections 307 and 326 are punishable with life imprisonment. The trial judge refused to grant probation to Ramji since the assault committed by him was 'premeditated'. On appeal, the High Court found Baist guilty of the offence of hurt under Section 324 and imprisonment for two years was substituted in place of the sentence passed by the trial court. The conviction of Ramji under Section 324 was upheld but since he was suffering from tuberculosis the sentence of imprisonment was reduced from 2 years to 9 months. Both the brothers were refused probation by the High Court. It was refused to Ramji on the ground that he was above 21 years and in case of Baist the High Court refused to exercise what it thought to be its discretion. It was unfortunate that despite the finding of the High Court that no proper reasons were given by the trial court while refusing probation to Ramji, his case was decided solely on the point that his case was not covered by Section 6 of the Act. On appeal, the Supreme Court did come to the rescue of the younger brother by directing the High Court to exercise its discretion on the basis that it was judging the matter with reference to the criteria laid down in Section 6 of the Act but confined itself to the question of age so far as the case of Ramji was concerned. It appears that even independent of Section 6, which was found inapplicable to Ramji, probation could have been granted to him.

The above case brings forth another factor which must be given due consideration while deciding whether an offender is to be given probation or not. The factor is length of the sentence of imprisonment which is to be given as an alternative to release on probation. Whether the object of imprisonment is to cause incapacitation of the offender to commit crime or it is to effect reformation of the offender, in either case a short imprisonment is not going to deliver the goods. In the case cited above, the imprisonment of 9 months just does not make any sense from any plausible angle. As an

25. *Kamroonissa* v. *State of Maharashtra*, (1975) 3 SCC 272 : 1974 SCC (Cri) 880.

ordinary rule of prudence, it can be stated that short-term imprisonments should always be avoided as far as possible either by employing probation or some other alternative.

It must also be seen, while deciding the question of probation, as to what will be the effect of the particular decision on the morale of law enforcement officers, other offenders or prisoners and on correctional staff. Each decision is likely to have an impact on many other persons and hence this dimension must not be ignored.

Respectability of Offender

In *Akhtar Munir* v. *Emperor*[26] a person was convicted under the Arms Act for possessing an unlicensed dagger. No sentence was passed but he was placed on security under Section 562 of the Criminal Procedure Code.[27] The reasons given for not imposing sentence were as follows: (*i*) The accused was a lambardar; (*ii*) he was 30 years of age; and (*iii*) it was his first offence. It was held on appeal to the High Court that the first reason was no reason whatever for leniency. The position of the offender, if at all relevant, showed that he should have set a better example for others. To treat him leniently because he held that position would be to differentiate the application of law as between responsible and irresponsible persons in favour of the former. The second reason regarding age also did not carry any weight because at that age he was fully responsible for his actions and fully capable of realizing their nature. If the punishment was waived merely because he was a first offender, the principle would have to be applied in all similar cases under the Arms Act. It was, therefore, held that the law should take its normal course and if not allowed to do so, the result would be that an exception would be made in favour of an offender merely because he was a man of above-average position which would amount to gross failure of justice.

In the case of *Atmacoori* v. *State*[28] however, 'respectability' of the offender was given due consideration by the Orissa High Court. A merchant from Berhampur was caught with 13 maunds and 16 seers of poppy seed from his godown and shop. He was given the benefit of the Act because in the opinion of the court he was a "respectable merchant" and a "fairly important businessman". They were also impressed by the fact that the poppy seed being stored by the merchant was not for "preparing opium for *his* consumption but for carrying on the business of despatching... and making some profit". It is obvious that no consideration was given by the court of 'setting good example' by the 'respectable merchant' as was done by the Peshawar High Court in *Akhtar Munir*.

26. AIR 1937 Pesh 51.
27. This provision was almost similar to Section 4 of the Probation of Offenders Act, 1958 and was operative before the present Act and enforced in the various States.
28. AIR 1967 Ori 54.

Public Policy

A peculiar fact-situation was involved in a case decided by the Rajasthan High Court in *Ahmad* v. *State*[29] where one Ahmad and his friend were convicted for stealing an idol from a temple. In sentencing them to imprisonment and refusing them the benefit of probation, the Rajasthan High Court referred to the "explosive situation which could have triggered off a chain of reactions producing results which may have been more lamentable and far-reaching. This case has no place for leniency or grant of probation."

Prof. Lotika Sarkar expresses her inability to reconcile the judicial attitudes in the Orissa and the Rajasthan cases in the following words:

> "In both the cases the interests of society had to be protected and interests of the individual had been judged against this background. Whether stealing an idol was more injurious to society than storing poppy seeds and helping in the preparation of opium is a matter of opinion."

Professor Sarkar is fully justified in asserting that the Rajasthan case was not worse than the Orissa case, considering the interests of the society from the angle of the enormity or dangerous nature of the two offences. The Rajasthan court, however, seems to have considered something more which raises a problem of greater significance and complexity. By using the expression "explosive situation which could have triggered off a chain of reactions producing results... more lamentable and far-reaching" the Rajasthan court appears to have implied that it was not an ordinary theft case but something more serious involving religious and communal passions. The court was justifiably concerned about the communal disturbances which might have erupted and that it would be a risky proposition to release the offender in this particular context. Whether the court was justified in estimating the potential danger to the extent it did, is a question which involves conjecture and hence cannot be answered with even a fair amount of precision. But whether the courts should deny probation in an otherwise fit case on such considerations is an entirely different matter. The court, it appears, did not confine itself to the question of the interests of society in the usual context i.e. whether the offender would be reformed or not and what were the chances of his committing similar offences in future if released on probation, but it applied policy considerations in a different and an unusual context.

An extreme example of public policy being considered in deciding the question of probation is presented by an English case where an elderly woman of small means pleaded guilty of a charge of having attempted to take out of the country £85 sterling knowing that she was permitted to take

29. AIR 1967 Raj 190.

only £5 sterling under the Exchange Control Act, 1947. She pleaded that "it was a matter of life and death" that she should take the money to her son in Italy who had no work and was in debt. She was released on probation but on appeal it was held that it was extremely difficult to imagine any circumstances which would justify a court in treating an offence under the Exchange Control Act, 1947 as a trivial offence, and that as the respondent by her own admission knew that she was committing and intended to commit an offence, the justices were not justified in dealing with the case under the Probation Act. The case was remitted to the justices with a direction that a penalty must be inflicted, and that it must not be a nominal penalty.[30]

This was a case where too much emphasis was given on the enforcement problem of an Act regulating a country's economy resulting in great harshness to the offender who did not, as such, have any criminal propensities and was probably a good case for probation. Contrary to this sort of judicial attitude is the one reflected in an American case where considerations for the individual offender outweighed the possible risk in releasing a confirmed drug addict and one who was responsible for the sale of narcotics in certain college campuses.[31] A judge of the Judicial Circuit had found the accused guilty of violating the drug laws and refused to grant probation in view of the seriousness of the offence. The appellate court disagreed with the verdict regarding probation and sent back the case to another judge of the Judicial Circuit for reconsideration of the application for probation. The appellate court was influenced by the fact that "the defendant had, until recently, been a boy of excellent character who received a commendation as a National Merit Scholar and had been accepted for attendance at Boys State by the American Legion". Also, the record indicated that this was the first time that the defendant had ever experienced any kind of trouble with the law, and that his mother and stepfather were ready and willing to furnish him excellent psychiatric care.

The problem of public policy assumed greater significance in the context of socio-economic or white-collar crimes and the choice of punitive sanctions in preference to the rehabilitative ideal is obvious. The Supreme Court, speaking through Krishna Iyer J., has made it absolutely clear that the philosophy of Probation of Offenders Act, 1958 is not suitable for persons indulging in activities such as adulteration of food.[32] It was observed:

> "The rehabilitative purpose of the Probation of Offenders Act, 1958 is pervasive enough technically to take within its wings an offence even under the Prevention of Food Adulteration Act. The kindly application of the probation principles to offences under Prevention of Food Adul-

30. *Pickett* v. *Fesq.*, (1949) 2 All ER 705.
31. *People* v. *McAndrew*, Appellate Court of Illinois, 1968.
32. *Pyarali K. Tejani* v. *Mahadeo Ramachandra Dange*, (1974) 1 SCC 167 : 1974 SCC (Cri) 87.

teration Act, however, is negatived by the imperatives of social defence and the improbabilities of moral proselytisation. No chances can be taken by society with a man whose anti-social operations, disguised as a respectable trade, imperil numerous innocents. Secondly, these economic offences committed by white-collar criminals are unlikely to be dissuaded by the gentle probationary process. Neither casual provocation nor motive against particular persons but planned profit-making from number of consumers furnishes the incentives—not easily humanised by the therapeutic probationary measure. It is not without significance that the Forty-seventh Report of the Law Commission of India recommended the exclusion of social and economic offences from the Act by suitable amendments of the law."

The Law Commission was quoted in the context as follows:

"We appreciate that the suggested amendment would be in apparent conflict with the current trends in sentencing. But ultimately, the justification of all sentencing is the protection of society. There are occasions when an offender is so anti-social that his immediate and sometimes prolonged confinement is the best assurance of society's protection. The consideration of rehabilitation has to give way because of the paramount need for the protection of society."

The Court noted that the conditions of the probation services in India did not warrant the inclusion of such offences at present though a different approach might be needed in the future.

Though the Supreme Court refused to apply the provision of the Probation of Offenders Act, 1958 in the case of a person found guilty of an offence under the Prevention of Food Adulteration Act[33] because of "imperatives of social defence and the improbabilities of moral proselytisation", it appears that the court is not always averse to probation in such offences. In a later case[34] the benefit of probation was given on the ground that the conviction was based on an offence committed many years before the disposal of the appeal by the Supreme Court. The appellant was found guilty of an adulteration offence committed in 1965 and the Assistant Sessions Judge ordered release under Section 4 of the Probation Act. The order of probation was quashed by the High Court. The Supreme Court accepted the appeal against the High Court's order holding that it was not proper to send the appellant to jail in view of the fact that the offence was committed a long time ago.

The Supreme Court has also granted probation even in food adulteration cases having regard to age and some other factors. In *Ishar Das* v. *State of Punjab*[35] the facts that the accused was less than 20 years of age and appeared

33. *Tejani* v. *Dange*, (1974) 1 SCC 167 : 1974 SCC (Cri) 87.
34. *Ghanshyam Das* v. *Municipal Corporation of Delhi*, (1975) 4 SCC 821 : 1975 SCC (Cri) 774.
35. (1973) 2 SCC 65 : 1973 SCC (Cri) 708.

to be in a repentant mood were taken into account and it was held that the offender was not to be deprived of the benefits of the Probation Act. The same judicial attitude is reflected in *Sitaram* v. *State of Maharashtra*[36] where the accused was 19 years of age and happened to sell the adulterated material in his father's shop since the latter was not present at that time.

It is debatable as to whether the 'peculiar circumstances' identified by the court in the two cases were relevant for the purpose of release on probation; maybe the factors were good enough for being taken into account in determining the length of imprisonment. The reasons given by the Court in *Tejani* v. *Dange*[37] are sound and probation may not serve any purpose in situations like these. The better course in such situations appears to be to prevent the further commission of crimes by stopping the commercial or manufacturing enterprise. If imprisonment is to be avoided due to young age or any other peculiar circumstance, exemplary punishment by way of heavy fine is the remedy to act as a deterrent and also to set off the illegal gains from past activities. Legislative needs, if any, must be fulfilled to enable the courts to act on these lines.

Another area in which the probationary philosophy should have no relevance is the one relating to sexual offences; particularly where commercial exploitation or immoral trafficking is also involved. An illustration is provided by the situation in *Devki alias Kala* v. *State of Haryana*[38]. The victim, an unsophisticated girl of 17 years of age, was abducted by the petitioner and was taken to various towns where she was presented to affluent lecherous youths. The Supreme Court disallowed the petition and expressed its anguish saying that such a case ought not to have come for the benefit under the probation laws. It was observed:

> "Counsel dared to urge that the Probation of Offenders Act should be extended to this abominable culprit who had shown sufficient expertise in the art of abduction, seduction and sale of girls to others who offer a tempting price.... It is an insulting stultification of the ameliorative legislation, viz., Probation of Offenders Act, to extend its considerate provisions to such anti-social specialist criminals. All that we can do is to reject the plea with indignation."

In *State of U.P.* v. *Sadhu Saran Shukla*[39], a different kind of problem cropped up for judicial determination. Rule 3(*a*) under the Prisoners' Release on Probation Act, 1938 prohibits the release of prisoners convicted for certain offences, including dacoity or murder, punishable under Section 396 of the Penal Code, even if the prisoner satisfies the condition of good conduct

36. 1979 SCC (Cri) 623 : 1979 Cri LJ 1082.
37. (1974) 1 SCC 167 : 1974 SCC (Cri) 87, 103.
38. (1979) 3 SCC 760 : 1979 SCC (Cri) 861.
39. 1994 SCC (Cri) 553.

under Section 2 of the Act. As per Rule 3(*a*), the prisoner convicted for the offence under Section 396 was not released despite his satisfying the conditions required for release. The respondent moved the High Court challenging the constitutionality of Rule 3(*a*) and the Court struck down the provision to the extent that it prohibited the release of the prisoners convicted under Section 396 of the Code. The appeal by the U.P. Government to the Supreme Court failed; the Court concurring with the view of the High Court that no ban on probation regarding convicts under Section 396 could be imposed since holding it otherwise would defeat the very purpose of Section 2 of the Act of providing incentive to the prisoners to reform themselves.

Probation—Innovative Uses

Recently the courts have been making innovative use of the probation techniques to achieve certain objectives not strictly covered by the laws or philosophy of probation. The probation technique is being employed quite often to protect the offender from penal consequences or to compensate the victims of crime[40].

In *Sushil Kumar Parida* v. *State*[41], the appellant had been convicted for offences under Sections 353 (criminal force), 294 (nuisance by obscenity) and 506 (criminal intimidation) of the Penal Code but the conviction under Section 506 was subsequently struck off by the Sessions Judge on appeal. On appeal, the High Court maintained the conviction but held that notwithstanding the fact that the accused had already served his sentence, he was still entitled to the benefit of Sections 3 and 4 of the Act of 1958 i.e. eligible for release after admonition or on parole. In holding so, the court relied on the Supreme Court's ruling in *Rajbir* v. *State of Haryana*[42]; the sole object of the High Court's decision was to save the petitioner with the help of Section 12 of the Act from the consequences flowing out of his conviction. Section 12 of the Act protects a person released under Section 3 or 4 from any disqualifications attached to conviction but in cases like the present one the provision is used to nullify the disqualifications having already come into being against the offender. As such, it was of course a fit case for probation at the sentencing stage in the trial court but these hassles arose primarily because the issue of probation was raised perhaps for the first time only in the High Court.

State of U.P. v. *Mata Bhikh*[43] is another case where the Court did something very unusual to aid the respondents even though the appeal against them regarding conviction under Section 188 (contempt of lawful authority)

40. As to the compensation to the victims through probation technique, *see*, Chapter XVII : Victims of Crimes.
41. 1993 Cri LJ 544.
42. AIR 1985 SC 1278.
43. 1994 SCC (Cri) 831.

of the Code was upheld. On the question of the three months' imprisonment awarded, the verdict was as follows:

> "However... after taking into consideration the fact that the proceedings commenced in the year 1968 and the judgment in revision by the High Court was rendered in August 1979, *we admonish* the respondents under Section 3 of the Probation of Offenders Act instead of directing them to undergo the sentence passed by the trial court and as confirmed by the lower appellate court."

A plain reading of Section 3 is enough to know that admonition and release are to be done by the court convicting the offender and not by the apex court of the country.

Model Penal Code, Proposed Official Draft, 1962

In connection with the consideration of various factors by the courts, the provisions made in the Model Penal Code drafted by the American Law Institute may be useful as guidelines for a probation policy. They are as follows:[44]

> "(1) The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because:
>
> (*a*) there is undue risk that during the period of a suspended sentence or a probation the defendant will commit another crime; or
>
> (*b*) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
>
> (*c*) a lesser sentence will depreciate the seriousness of the defendant's crime.
>
> (2) The following grounds, while not controlling the discretion of the Court, shall be accorded weight in favour of withholding sentence of imprisonment:
>
> (*a*) the defendant's criminal conduct neither caused nor threatened serious harm;
>
> (*b*) the defendant did not contemplate that his criminal conduct would cause or threaten serious harm;
>
> (*c*) the defendant acted under a strong provocation;
>
> (*d*) there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defence;

44. Section 7.01 : Criteria for Withholding Sentence of Imprisonment and for Placing Defendant on Probation.

(*e*) the victim of the defendant's criminal conduct induced or facilitated its commission;

(*f*) the defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury he sustained;

(*g*) the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;

(*h*) the defendant's criminal conduct was the result of circumstances unlikely to recur;

(*i*) the character and attitude of the defendant indicate that he is unlikely to commit another crime;

(*j*) the defendant is particularly likely to respond affirmatively to probation treatment;

(*k*) the imprisonment of the defendant would entail excessive hardship to himself or his dependants.

(3) When a person who has been convicted of a crime is not sentenced to imprisonment the court shall place him on probation if he is in need of the supervision, guidance, assistance or direction that the probation service can provide."

Prediction Tables

An important aid in probation decisions can be provided by what are known as 'prediction tables'. Prediction implies anticipation of the probable result of correctional treatment on a particular offender. This can be done if some data is available regarding the response of similarly situated offenders to probation and parole programmes in the past. The prediction tables may, therefore, be defined as any compilation of statistics on the post-release behaviour of different types of offenders. The prediction tables can only serve to supplement the assessment of the offender's personality which requires the individualised study of the variable factors connected with the offender. Because the prediction tables are based on the past experience of the correctional agencies, they cannot take care of any changes which might have taken place in the environmental factors in the period between the compilation of the statistics and the presentation of an individual offender's case before the court.

The advantages of prediction tables are that inconsistencies can be avoided to some extent by applying the standard tests in all the cases coming up for probation and parole decisions. After eliminating the cases, which are clearly inappropriate for parole and probation, the courts are left with relatively fewer cases where more intensive studies of individual needs are possible. They are useful for responses to public criticism. If, for instance, a Parole Board is asked, "Why did you parole that murderer?" the Board

can cite the low violation rate of paroled murderers when compared with other types of offenders.[45]

Supervision in Probation and Parole

The major objectives of probation and parole are the rehabilitation of the offender and protection of society from his actions at the same time. Accordingly, the duty of the probation agent, commonly known as probation officer, should be to see that an effective programme for the rehabilitation of the offender is prescribed and implemented and the responses of the offender are watched. In case of positive response the probation officer has to continue the good work but in case of negative response of a substantive degree reflected by violation of probation or parole order, the agent has to take suitable action which may even extend to recommending the alternative prison term to the court. While including certain positive values in the offender, the probation or parole agent has to provide help, counsel and guidance for the client which requires high competency and involvement on the part of the agent. In dealing with the other aspect of supervision that no violations of probation or parole orders go unnoticed and unreported to the appropriate court, the agent works like a policeman. The true challenge to the agent is not in his work as a policeman but in his capacity to make the client adjust to the community.

David Dressler describes four general techniques which are employed by supervision agents.[46]

1. Manipulative techniques.—By employing this technique, modification is sought in the offender's environment in terms of family relationship, employment and community life.

2. Executive techniques.—Here the probation or parole officer tries to help the offender by referring him to an appropriate organization like public and private welfare agencies, recreational programmes and employment services.

3. Guidance techniques.—The agent may give advice or even help the client through psychological methods which do not require great professional training or skill. The client is encouraged to be self-reliant and recognition is given to any good factors in the client's personality.

4. Counselling techniques.—These techniques differ from the guidance techniques in the sense that these require training and skill which are not possessed by probation and parole agents ordinarily. These techniques are needed to solve serious personality problems.

45. John W. Mannering : *Current Plans for use of Parole Experience Tables in Wisconsin*, quoted by Elmer H. Johnson, *Crime, Correction and Society*, pp. 688-89.
46. *Practice and Theory of Probation and Parole*, (Columbia University Press, 1959).

It is apparent from the discussion of the nature of supervision involved in parole and probation that before an offender is released either on parole or probation, it must be seen whether the probation agent has the skill needed for dealing with the client and also whether he would have adequate time to devote to the client. One of the serious arguments against probation and parole schemes is that the workload of the agents is too heavy to be taken care of in a conscientious and responsible manner. The following figures would give some idea of the case-load of the probation and parole agents in India for the period 1964-68.[47]

The probation scheme has been extended to 182 districts in India up to the year 1968. The average number of probation officers in 1968 in the country was 377 including the voluntary probation officers. There is no criteria or standard prescribed by any State for the workload on a probation officer. The five-year statistics show a slight increase in the number of inquiries received from courts or institutions, etc. and the number of probationers under supervision. The inquiries in 1968 were 136 while supervision cases were 54 per probation officer. It is evident that for one probation officer to dispose of 136 inquiries and to deal with 54 probationers in one year is quite a stupendous task. Statistical studies reveal that about 85 per cent of the convicts come to Indian jails with terms of less than 6 months.[48] Obviously most of these convicts should provide good human material for probation services but the proportion of those who are released on probation to those sent to prisons is very low. In fact what was said by Chief Justice S.M. Sikri in 1971 reveals the extent to which the probation services have been given a back seat in the Indian judicial system. He observed:

> "As a matter of fact I was shocked to see that in a number of cases, which came to the Supreme Court recently, even the existence of the local Probation of Offenders Act was not known or easily ascertainable. No reference to the relevant Probation Act was made in the courts below but the point was for the first time taken in the grounds for special leave to appeal to the Supreme Court."[49]

If India has to go in for probation programmes in a sincere and effective way, it needs many more personnel than it has at present and a better awareness of the probation system shall have to be created.

Probation of Offenders Act, 1958—An Appraisal

In 1951 the United Nations Economic and Social Council recommended the adoption and extension of the probation system by all the countries as a major instrument of policy in the field of prevention of crime and the

47. *Probation and Prisons : A Statistical Analysis*, Central Bureau of Correctional Services, 1964-68.
48. *Social Defence in India*, Central Bureau of Correctional Services, 1970.
49. *Judges and Probation*, p. 1, Central Bureau of Correctional Services, 1971.

treatment of offenders. At that time the only piece of central legislation reflecting the philosophy of probation was Section 562 of the Code of Criminal Procedure which gave discretion to a criminal court to release a person who was convicted of an offence punishable with imprisonment for not more than seven years on probation of good conduct by entering into a bond, with or without sureties. The section also provided that anyone convicted of theft, dishonest misappropriation, cheating or any offence under the Indian Penal Code punishable with up to two years of imprisonment could be released after due admonition. The central legislature extended the scope of the probation technique, as recommended by the UNESCO, by enacting the comprehensive Act of 1958. A critical evaluation of some of the provisions of the Act may be made in the light of the problems which have had to be faced due to judicial pronouncements or otherwise.

One criticism which has been levelled at the Act is the unsupervised release permitted by Section 3 of the Act after due admonition in offences like theft, cheating or any offence punishable with imprisonment up to two years. The section applies to first offenders and the court has to use discretion in view of the circumstances of the case including the nature of the offence and the character of the offender. The courts, it appears, use this discretion quite liberally. The provision has been criticised on the ground that it does not require the court to call for a report from the probation officer and hence the court would not possess the information to decide the issue of the character of the person and other relevant facts. There is no doubt that not only would the situation be much more satisfactory if the report of the probation officer is made available, but also if the release is made under the supervision of a probation officer. At present this is not at all required under Section 3 of the Act. This should particularly be provided for in view of the fact that many cases of theft and cheating are really not petty in nature and may reflect dangerous criminal potentialities in the offender. At present there are only two alternatives for the court in offences falling under Section 3, viz., to release the offender with mere admonition or to send him to prison. Release after admonition on probation should provide a better alternative in many cases. But it is also doubtful whether it would be possible to provide supervision in all the cases where offenders are released under Section 3 or even to have the report of a probation officer before action is taken under Section 3 in view of the very insignificant number of probation officers in the country. It may also be observed that even without any report of the probation officer, the courts would not exactly be groping in absolute darkness regarding the facts connected with the character and other factors about the accused. The circumstances of the crime and even the character of the offender become fairly clear to the court during the ordinary course of the proceedings.

It may be noted, however, that release of an offender without supervision is not restricted to Section 3 only. Even under Section 4, which is the key section in the Act, the court may release a person on probation on his entering into a bond with or without sureties. Sub-section (3) of the section, however, provides for an additional order of supervision if 'in the interests of the offender and of the public it is expedient so to do'. In other words, Section 4 of the Act has not fully incorporated the philosophy of probation in which supervision is an essential element. In fact Section 4, it appears, is a combination of probation and the type of preventive action which can be taken by the court under the Code of Criminal Procedure against a vagrant or a person convicted of an offence.

Section 6 of the Act provides for the consideration of the probation officer's report when the decision to grant or refuse probation to a person below the age of 21 years is to be taken. But it seems that though the court has a duty to call for a report of the probation officer, it may take the final decision even if no such report is forthcoming or made available. This is the conclusion which follows from the expression 'if any' occurring after the words 'and consider the report'.[50] It follows, therefore, that it is not only in cases of release after admonition under Section 3 but also in some other situations that the court may not have the benefit of the report by a probation officer.

In this connection it may be instructive to take note of what was held by the Supreme Court in *Chand* v. *State of U.P.*[51] According to the ruling in the case, there was no necessity to obtain the information as to whether any probation officer was appointed in the particular district where the probationer resided. All that the court granting the probation order had to be satisfied about was that the offender or his surety had a fixed place of abode within the court's jurisdiction and it would be sufficient if the court directs the District Magistrate concerned to conform to the requirements of the provisions under the Probation Act.

Confidential Nature of the Probation Report

Under the Act it is provided that the report of the probation officer referred to in Sections 4 and 6 of the Act should be treated as confidential.[52] An exception, however, has been provided that the court may, if it so thinks fit, communicate the substance thereof to the offender and may give him an opportunity of producing such evidence as may be relevant to the matter stated in the report. The exception is obviously meant to give an opportunity to the offender to rebut by producing evidence anything unfavourable to him in the report. In the public interest it shall be equally worthwhile to give the

50. Section 6(2).
51. (1972) 1 SCC 642 : 1972 SCC (Cri) 371.
52. Section 7.

same opportunity to the prosecution by communicating any report favourable to the accused after the conviction because the prosecution may be in possession of some material which may help them in rebutting something in the probation officer's report. At present such a communication to the police is not possible under the Act.

Problem of Bond and Sureties

A problem which defies an easy solution is that the court can release an offender on probation only on his entering into a bond with or without sureties. It is also provided that it is necessary that the offender or his surety, if any, has a fixed place of abode or regular occupation within the area of jurisdiction of the court.[53] Many offenders in need of such a release are not in a position to provide sureties and cannot be released on their own bond without sureties either because many of them do not have a fixed place of abode or they do not have any regular occupation. The result is, as observed by Prof. Lotika Sarkar, that the imprisonment which the court wishes to avoid comes in through the back door. In her paper *Probation of Offenders Act — A Reappraisal*, she cites the case of a person who had been convicted for stealing some biscuits and cigarettes from a railway vendor's shop. He was offered probation but as he possessed no property of his own nor could give sureties, he was sent to jail.

It is obvious that the court is absolutely helpless in such cases. Even the legislature cannot do anything to tackle such problems on the basis of probation since to release a person on probation without retaining any control whatsoever over him is simply meaningless. It is quite another matter that in a welfare State, it is the duty of the Government to provide everyone with employment and a fixed place of abode. It is submitted, however, that the hard cases like the one mentioned above can be taken care of under Section 3 of the Act by providing release to the offender after admonition.

Extent and Results of Probation Work in India

As noted earlier, the Central Probation Act was enacted in 1958. Before the enactment of 1958, many States had their own probation laws and some of them continue to have them even now. Most of the States have, however, adopted the Probation of Offenders Act, 1958.

As indicated by the figures available, the total number of persons being supervised under the various enactments[54] at the commencement of and during the year 1984-85 was 19,192 out of whom slightly over 50% i.e. 10,725 continued to be under supervision at the end of the year. This, however, does not give any idea regarding the cases in which the probation order was revoked during the same period.

53. Section 4(1).

54. [illegible] figures regarding certain States available up to early eighties only.

As indicated by the tables referred to above, the work-load of probation officers, both in terms of pre-sentence investigation and supervision, varies a great deal in different States. While the load in pre-sentence investigation is heaviest in Madhya Pradesh, in supervision it is maximum in Punjab. Besides the obvious conclusion which can be reached on the basis of such figures regarding the relative strength of probation officers in the various States, the statistics may also neglect the variation in attitudes and practices of the courts vis-a-vis pre-sentence investigation and supervision in different States.

According to Nigel Walker, it is still possible, even at conferences of experienced judges and magistrates, to hear anecdotes of the form : 'I remember sentencing a man with twenty previous convictions. I put him on probation two years ago, and the probation officer told me the other day that he is doing well.' It should not be necessary to point out either that the probation officer's report is not very strong evidence of permanent reform, or that even if it were, a single case is no evidence in the scientific sense.[55]

Probation : Legal Consequence

The only objective of probation laws is to avoid contamination of relatively soft and young offenders by hardened ones in prisons. It does not by any means signify the clearance from the guilt and the legal consequences so far as stigma and disabilities are concerned. This obvious position was explained by the Supreme Court in *Divisional Personnel Officer* v. *T.R. Chellappan*[56]. It was pointed out that an order of release on probation came into existence only on the accused being found guilty and getting convicted for the offence. This clearly shows that the factum of guilt on the criminal charge is not swept away merely by passing the order releasing the offender on probation. The order of release on probation does not, therefore, obliterate the stigma of conviction.

Parole : Concept and Object

Probation and parole have the same objectives—rehabilitation of offenders. In both the techniques, skilful supervision of selected offenders is involved outside the prisons. But there is an important distinction between the two. In probation the offender is not sent to jail after being found guilty and the decision to grant probation is to be made by the court. In parole the convict is released after serving his sentence for some time and the release is not the result of any judicial decision.

Parole is the release of an offender from the prison before the expiration of the term of imprisonment. The object of parole is to prepare the prisoner for adjustment to normal social life outside the prison and it therefore

55. *Sentencing in a Rational Society*, p. 90.
56. (1976) 3 SCC 190 : 1976 SCC (Cri) 398.

signifies the transitory phase from imprisonment to normal freedom. While on parole the prisoner lives at liberty subject to the conditions which may be imposed by the parole order. Violation of any condition in the parole order may result in the cancellation of the order and the convict is to be sent back to prison.

The term parole is also often used to express the idea of 'furlough' granted to the prisoners to visit their families for short periods while completing their terms of imprisonment. The object evidently is to keep the prisoner in contact with society in general and his family in particular which would not otherwise be possible in case of long imprisonment. In particular, it is conducive to a normal sex life of the prisoner, not possible otherwise, and an opportunity is also provided to the prisoner to make financial contribution to the family by his earnings outside the jail.

Decision of Release

The decision to release a prisoner on parole is generally taken by a Parole Board. In India, under the rules in force in some of the States, the opinion of the police department is also given due consideration in taking the decision. The crucial question faced in making the decision, one way or the other, is to be able to make the prediction regarding the outcome of release. This involves the examination of issues such as whether the convict had profited by his stay in the institution, whether he was so reformed that he was unlikely to commit another offence, what his behaviour was in the prison, whether any suitable employment awaited him on release, whether he had a home or other place to go, whether he told the truth when he was questioned by the Parole Board, how serious his crime was and in what circumstances it was committed, his appearance when interviewed by the Board and what behaviour he had demonstrated if he was already on parole in connection with another imprisonment.[57] Based on such factors, 'predication tables' have been developed in the U.S.A., Britain and some other countries. It should be evident that such tables have limited utility and by no method it is possible to predict a situation involving a large number of variables even with a reasonable amount of certainty.

According to some writers, not many prisoners are able to get the benefit of parole in India, a situation, which according to them, to a great extent can be explained in terms of the rigidity of parole rules and the apathy of the police officers. In her study of the situation in the State of Rajasthan, Nirmala Advani found that only two persons had been released on parole during the entire period covered by the study.[58] In Maharashtra, 95,449 prisoners were admitted to prisons in 1970, out of whom 1117 applied for parole and 718 were released on parole. In the same year 1160 prisoners

57. Stephen Schafer, *op. cit.*, p. 243.
58. *Perspectives on Adult Crime and Correction* (1978).

applied for furlough and it was sanctioned in 781 cases.[59] From these figures it appears that the percentage of prisoners who applied for parole or furlough and got it was fairly high i.e. around 65, but the low number of actual applicants might to some extent be due to the fact that not many out of the total prison population were eligible for release under the rules. In this connection it is interesting to know that in England the odd thing noted is that a substantial number of eligible prisoners do not apply for parole, though it is by no means clear what the real reasons for their refusal are.[60]

Parole and Courts

The courts in India have shown increasing interest in the use of parole by issuing directives to the prison administrators in appropriate cases. In *Hiralal Mallick* v. *State of Bihar*[61], the appellant was found guilty of the offence under Section 326 of the Penal Code (causing grievous hurt) by the trial court and was sentenced to 8 years' imprisonment. At the time of the commission of the offence, the appellant was 12 years of age and having regard to his young age the High Court reduced the period of imprisonment to 4 years. The Supreme Court referred to the need for parole in such cases in the following words:

> "One method of reducing tension is by providing for vital links between the prisoner and his family. A prisoner insulated from the world becomes bestial and, if his family ties are snapped for long, becomes dehumanised. Therefore we regard it as correctionally desirable that this appellant be granted parole and expect the authorities to give consideration to paroling out periodically prisoners, particularly of the present type, for reasonable spells, subject to sufficient safeguards ensuring their proper behaviour outside and prompt return inside."

In *Krishan Lal* v. *State of Delhi*[62] it was held that economic necessity to commit the offence of forgery was not a relevant factor in fixing the length of imprisonment. Parole could, however, be tried in the case.

Dharambir v. *State of Uttar Pradesh*[63] was a case where the appellant had been awarded life imprisonment for the offence of murder. There was no scope for the reduction of the period of imprisonment but the Court found parole desirable in the circumstances of the case. According to the direction given to the State Government and the Jail Superintendent, the prisoners were to be permitted to go on parole for two weeks once a year throughout the period of incarceration provided their conduct, while at large, was found to be satisfactory.

59. R.N. Datir : *Prison as a Social System* (1978), p. 257.
60. R.B.M. Jackson : *Enforcing the Law* (Pelican Edition, 1971), p. 214.
61. (1977) 4 SCC 44 : 1977 SCC (Cri) 538.
62. (1976) 1 SCC 655 : 1976 SCC (Cri) 146.
63. (1979) 3 SCC 645 : 1979 SCC (Cri) 862.

In *Hari Singh* v. *State of Haryana*[64], the Punjab and Haryana High Court held that the denial of parole on the flimsy ground that the prisoner's release would endanger the public order was not justified. In many other cases also the High Court rejected the government's plea that the release on parole would endanger public order. *Baldev Singh* v. *State of Punjab*[65] is yet another decision signifying the judiciary's close scrutiny of the government's orders regarding parole to a prisoner. Released on parole, the prisoner overstayed outside the jail for five days. Empowered under the law, the jail administration deducted by way of punishment 10 days of prisoner's earned remission and the order was approved by the district judge in just one cryptic sentence. Quashing the order since the judicial mind was not applied, the High Court held that the district judge should have given his approval only after furnishing the reasons for the same.

Evaluation of Probation and Parole

The advantages of probation and parole have been mentioned in terms of protection of the offenders' personality from the contaminating influence of prison life. The released offender has the advantage of continuing to have normal social relationships and his employment. The offender is also spared of the stigma of a prison sentence making the task of rehabilitation easier. A study undertaken in the Michigan State of U.S.A. proved that in the ultimate analysis, it is more economical to conduct probation services than to construct new prisons and maintain them.[66] It is also pointed out that unlike the dependants of an offender sent to prison, the dependants of a probationer do not have to be supported by welfare agencies.

Notwithstanding the strength of these points in favour of probation and parole, they have been severely criticised. It is said that while inadequate supervision may not serve the purpose of correction, any intensive programme is bound to be too much of an economic burden.

A study carried out by Dr W.H. Hammond of the Home Office Research Unit of England disclosed among other things that probation had lesser corrective efficacy than imprisonment. In other words, probation was followed by more re-convictions than imprisonment. The consequences of maladministration of the parole and probation programmes have been described by J. Edgar Hoover in the following words:

> "No less than 92 of the 109 dangerous criminals listed among the FBI's 'Ten Most Wanted Fugitives' since March 1950, had been the recipients of parole, probation or other forms of clemency. The service martyr plaques of the Nation's police agencies are filled with the names

64. 1993 : 2 Chandigarh Criminal Cases 373.
65. 1993 : 1 Chandigarh Criminal Cases 288.
66. The Saginaw Probation Demonstration Project : Michigan Crime and Delinquency Council, 1963.

of dedicated men slain at the hands of gunmen who were the recipients of ill-advised clemency."[67]

The criticism of Hoover is obviously not against probation or parole as such but against their maladministration. The two techniques have many qualities to commend themselves for dealing with selected offenders only. The real problem in probation and parole is to make the proper selection of cases and then to pursue them with all the vigour and resources at one's command.

Suspended Sentence

There is a subtle difference between probation and suspended sentence. In suspended sentence a sentence of imprisonment or fine is pronounced but the execution of it is suspended for a period. The difference between a probationer and one under suspended sentence is that while the former does not know the exact punishment which would be inflicted upon him in case of violation of the terms of probation, the latter is fully aware of the nature and quantum of the punishment which could be enforced. Suspended sentence is used in Germany, France and some of the states in U.S.A. In France, for example, the use of suspended sentence is confined to offenders not previously imprisoned for crimes or delicts. Punishments like death sentence, banishment, loss of civic rights or certain types of long-term imprisonment cannot be suspended. The period of suspension is five years, and if during this period the offender is not convicted of a further crime the conviction is wiped out and the sentence lapses. If, on the other hand, he is so convicted, the sentence is automatically enforced.[68]

Some people have argued in England that suspended sentence is more effective than probation since probationers do not understand that they were liable to be punished for the original offence. But the Home Secretary's Advisory Council considered the proposition and concluded that the enforcement of suspended punishment might be inappropriate or unduly severe because of the difference in the circumstances of the offender at the time of the pronouncement of the sentence and its execution. Nor did the council accept that probationers did not understand the sanctions underlying a probation order. They concluded that the court's present powers to order probation or conditional discharge were able to achieve as much, if not more, and that in European systems suspended sentence was developing on lines resembling the English probation system.[69]

67. "Statement of Director J. Edgar Hoover", FBI Law Enforcement Bulletin No. 27 (November 1958).
68. Nigel Walker : *Crime and Punishment in Britain*, pp. 171-72.
69. *Ibid.*

Indeterminate Sentence

The law generally provides for the maximum and sometimes the minimum punishment also, for commission of various crimes. Ordinarily it is the function of the courts to determine the length of imprisonment within the limits set up by law after a person has been found guilty of an offence. In an 'indeterminate sentence' the court leaves the question of the period of imprisonment to the discretion of the authorities executing the punishment; the decision to release the offender at the appropriate time is to be taken by the prison authorities when satisfied that the offender had been reformed. In the real sense, the sentence is 'indeterminate' only when no minimum or maximum period of imprisonment is laid down but in actual practice the minimum and maximum limits are set out by the court before the commencement of the imprisonment.

The indeterminate sentence technique is not employed in India but is in vogue in the U.S.A. and in some European countries.

In purely theoretical terms an indeterminate sentence is the ideal sentence since the offender is to be kept in the jail for the optimum period only and the period is to be determined by those who have the advantage of directly watching the impact of imprisonment on the offender. The assumption is that the prison administrators shall release the offender as soon as he is corrected but not before it.

There are, however, sound arguments against indeterminate sentences in view of the practical realities which make its proper application not only difficult but also fraught with danger.

The most difficult aspect of the problem is to determine the appropriate time of release. It is evident that the issue whether the offender has been reformed or not at a certain stage is difficult, if not impossible, to be resolved. The issue involves not only the right assessment of the personality changes manifested by the convict's conduct in the jail but also some kind of conjecture regarding the future. The prisoner may present himself in a favourable light by feigning reformation without having undergone any change for the better.

Indeterminate sentence is also criticised because of the risk involved regarding the arbitrary use of discretion by the prison authorities.

Chapter VIII

THERAPEUTIC APPROACH—JUVENILE INSTITUTIONS

Juvenile Delinquency and Juvenile Institutions

The most interesting aspect of the subject of juvenile delinquency is that in every age it has been regarded as a problem peculiar to the contemporary society while the fact is that like adult criminal behaviour it has always existed in some form or the other and there is no apparent reason to expect that it will not remain so in the future. This phenomenon has a two-dimensional basis. Firstly, the violation of any code of conduct, whether for adults or for young persons, is inevitable. Secondly, the definition of juvenile delinquency as deviant child behaviour itself depends upon the norms laid down by the society, in other words by the elders, and clash of values due to generation gap is bound to occur. The following two quotations by Edward H. Stullken in his article *Misconception about Juvenile Delinquency* may be reproduced here in order to understand the continuing nature of the problem.[1]

"An Egyptian priest almost 6000 years ago wrote on the walls of a tomb:

> Our earth is degenerate in these latter days. There are signs that the world is coming to an end because children no longer obey their parents.

Socrates wrote a paragraph over 2400 years ago that might well have appeared in a morning paper of today:

> Children now love luxury, they have bad manners, contempt for authority, they show disrespect for elders, and love chatter in place of exercise. Children no longer rise when elders enter the room. They contradict their parents, chatter before company, gobble up dainties at the table, cross their legs and tyrannize over their teachers."

It is apparent, therefore, that the deviant behaviour of children has posed problems from times immemorial, and what has changed is only the nature and definition of the behaviour considered undesirable. The starting point for the discussion on juvenile delinquency is, therefore, the meaning given to the expression 'juvenile delinquency'.

Definition of Juvenile Delinquency

It is not easy to give a precise definition of juvenile delinquency. Several factors are responsible for not allowing a clearcut formulation. One hurdle

1. Journal of Criminal Law, Criminology and Police Science 46, 1956, No. 6, pp. 833-36.

is similar to that encountered while defining crime in general *i.e.* the choice between the social and legal definitions.[2] Sociologists insist that legal definitions are of no help in understanding the true nature of delinquency and in knowing who are juvenile offenders, since the arrest or conviction of a child may depend upon various fortuitous circumstances. They also maintain that legal definitions differ from place to place and time to time and hence are not suitable for scientific studies. The reasons as to why legal definitions are to be preferred are the same as in the case of the definition of crime.[3] The legal definition of juvenile delinquency is obvious. Any act prohibited by law for children up to a prescribed age limit is juvenile delinquency and it follows, therefore, that a child found to have committed an act of juvenile delinquency by a court is a juvenile delinquent.

Another aspect of the definition problem is that quite frequently the statutes defining the various delinquent acts are vague in terms of their contents, which is contrary to the basic principle of criminal law as expressed through the Latin expression *nullum crimen sine lege*, 'no crime without law.' Laws defining crimes should not be vague since the citizens must be able to know with a fair amount of certainty the acts which are proscribed for them. To quote Ruth Cavan:

> "Most of the behaviour which gets a child into trouble with the police and courts comes under a much less definite part of the law on juvenile delinquency. The Illinois law defines a delinquent as one who is incorrigible or who is growing up in idleness, one who wanders about the streets in night time without being on any lawful business, or one who is guilty of indecent or lascivious conduct. Laws in some other States are still more vague. New Mexico rests its definition on the word 'habitual'. A delinquent child is one who, by habitually refusing to obey the reasonable and lawful commands of his parents or other persons of lawful authority, is deemed to be habitually uncontrolled, habitually disobedient, or habitually wayward, or who habitually is a truant from home or school; or who habitually so deports himself as to injure or endanger the morals, health or welfare of himself or others. In these laws there is no definition of such words or phrases as incorrigible, habitual, indecent conduct or in night time. How much disobedience constitutes incorrigibility? How often may a child perform an act before it is considered habitual?"[4]

This vagueness in the definition given in the statutes is defended on the ground that the maxim '*nullum crimen sine lege*' which applies in relation

2. *See* Chapter I.
3. *Ibid.*
4. *The Concepts of Tolerance and Contra-Culture as Applied to Delinquency*, Sociological Quarterly 2 (Fall 1961), p. 244.

to criminal statutes is not relevant in delinquency laws since the latter are not created to punish the juveniles but to protect them. This justification may be evaluated with reference to the philosophy and techniques of juvenile courts discussed later in this chapter.

Juvenile delinquency laws are characterised by the feature that they proscribe many acts which are regarded as non-criminal or even socially acceptable if indulged in by adults, like drinking or smoking. Some of the acts proscribed for children would be torts if committed by adults.[5] The great variety of acts declared by law to be acts of juvenile delinquency can be appreciated with the help of the following list which catalogues the acts generally prohibited in the various American States. Of course, not every State, nor any State, has all these items in its definition of delinquency. However, eight or nine items in the list are apart from and in addition to violations of law[6]:

(*i*) Violation of any law or ordinance
(*ii*) Immoral or indecent conduct
(*iii*) Immoral conduct around school
(*iv*) Engaging in illegal occupation
(*v*) Knowingly associating with vicious or immoral persons
(*vi*) Growing up in idleness or crime
(*vii*) Knowingly entering or visiting houses of ill repute
(*viii*) Patronising, visiting policy shop[7] or gaming place
(*ix*) Patronising saloon or dramshop where liquor is sold
(*x*) Wandering in streets at night, not on lawful business
(*xi*) Habitually wandering about railroad yards and tracks
(*xii*) Jumping on to trains or entering cars or engines without authority
(*xiii*) Habitually remaining truant from school
(*xiv*) Incorrigible
(*xv*) Habitually using vile, obscene or vulgar language in public place
(*xvi*) Absenting oneself from home without permission
(*xvii*) Loitering and sleeping in alleys
(*xviii*) Smoking cigarettes (around public places)
(*xix*) Begging or receiving alms (or wandering in streets for purpose of).

The extension of the concept of juvenile delinquency to extremely wide limits has drawn criticism on the ground that it is not necessary nor desirable to use police and courts in 'private matters' which can be better tackled by families themselves. The issue was discussed by the Second United Nations

5. For example, frequenting public places like railway yards aimlessly without criminal intention.
6. Sol Rubin : *Crime and Juvenile Delinquency* (1958), p. 46.
7. A policy shop is a place where illegal gambling on the terminal digits of certain numbers takes place.

Congress on the Prevention of Crime and the Treatment of Offenders held in August 1960 in London. The Congress adopted, among other recommendations, the following:

> "The Congress considers that the scope of the problem of juvenile delinquency should not be unnecessarily inflated. Without attempting to formulate a standard definition of what should be considered to be juvenile delinquency in each country, it recommends (*a*) that the meaning of the term juvenile delinquency should be restricted as far as possible to violations of the criminal law, and (*b*) that even for protection, specific offences which would penalize small irregularities or maladjusted behaviour of minors but for which adults would not be prosecuted, should not be created."[8]

Earlier, even in the U.S.A., the need was felt for shrinking the extent of juvenile delinquency and the Standard Juvenile Court Act, modelled by the National Probation and Parole Association, avoids most of the items of delinquency cited in the list by Rubin. The Standard Act includes in its provisions corresponding to the usual delinquency definition, only two items in addition to violation of law or ordinance. These items are a child "who deserts his home or who is habitually disobedient or is beyond the control of his parent or other custodian; and who being required by law to attend school, wilfully violates rules thereof or absents himself therefrom".[9]

In England, in addition to the violation of a penal statute, the children's department of a local authority, a police constable, or an officer of the National Society for the Prevention of Cruelty to Children must bring a child before a juvenile court if they have reasonable grounds for believing him to be in need of care, protection or control on any of the following grounds:

> *1.* That the juvenile is not receiving such care, protection and guidance as a good parent may be reasonably expected to give, and in addition (*i*) that he is falling into bad association or is being exposed to moral danger; or (*ii*) that the lack of care, protection or guidance is likely to cause him unnecessary suffering or seriously affect his health or proper development; or (*iii*) that he has been the victim of a sexual offence or an offence involving bodily injury, or lives in the same household as a perpetrator of an offence of this kind against a juvenile.
>
> 2. That he is beyond his parent's control.[10]

The Concept of Juvenile Delinquency in India

In India, the definition of juvenile delinquency presents no such problems as are faced in the U.S.A. and some other countries. The concept is

8. Manuel Lopez Rey, Advisor on Social Defence, U.N.O., in the publication of the All-India Crime Prevention Society, dated March 1961.
9. Rubin : *Crime and Juvenile Delinquency*, p. 50.
10. Nigel Walker : *Crime and Punishment in Britain*, p. 180.

confined to the violation of the ordinary penal law of the country so far as the jurisdiction of the juvenile court is concerned. The Juvenile Justices Act, 1986, for instance, defines a delinquent juvenile as a juvenile who has been found to have committed an offence.[11] Juvenile under the act means a boy under 16 years of age and a girl under 18 years.[12] The word offence means any act or omission made punishable under any law in force at a given time.

As regards the age factor for qualifying as 'juvenile' the crucial factor is the relevant date for determining the status of the person; whether it is the date of committing the offence, of arrest or of the trial. Somewhat surprisingly, the rulings of some of the High Courts[13] are at variance with that of the Supreme Court on the subject[14]. While the Supreme Court, taking a liberal stand, holds that the age on the day of the commission of the offence is the relevant age, the age at the trial is the material age according to some of the rulings of the High Courts. Further, the Supreme Court issued a directive that in any case where an accused appears to be less than 21 years of age, it is the duty of the Magistrate to enquire into his age for possible eligibility under the juvenile justice system.[15]

Establishing the age of the offender also presents a somewhat difficult task and it is not possible to discern any consistent judicial approach as reflected in the various rulings of the High Courts. Though birth certificates, school records and reports based on medical examination are the best, and often the only sources of evidence, the judicial verdicts are quite unpredictable. While the judicial approach, for instance, has been less rigid in *Vunnam Lakshminarayan*[16], it was far from being protective in *Anita* v. *State of M.P.*[17] In the former case, the age was determined by reference to the statement of the medical officer without a medical examination but in the later case even a certificate of births issued by the Registrar of Birth and Deaths was not acceptable to the lower court though the authenticity of the certificate was not questioned. In *Balbir Singh* v. *State of Rajasthan*[18], the obvious approach based on common sense was adopted—that the court must be extra cautious when determining age, giving opportunity to both parties to adduce evidence and to cross-examine the opposite party. To this it may be added that the matter regarding age must be dealt with, with abundant caution in situations involving serious offences like rape and murder. As it is, the upper age limits prescribed for juvenile delinquents seem to be on

11. Juvenile Justice Act, 1986, Section 2(*f*).
12. Section 2(*j*).
13. *Sheo Mangal Singh* v. *State of U.P.*, 1990 Cri LJ 1698.
14. *Vunnam Lakshminarayan* v. *State of A.P.*, 1992 Cri LJ 334 (AP); *Umesh Chandra*, 1982 Cri LJ 994.
15. *Gopinath Ghosh*, 1984 Cri LJ 168.
16. *Supra*, note 14.
17. 1993 Cri LJ 549.
18. 1994 Cri LJ 2750.

the higher side keeping in view the escalating phenomenon of violence in the society. The present age limits were perhaps more appropriate when offences carrying death sentence or life imprisonment committed by juveniles were beyond the purview of juvenile courts.

Through its two recent rulings, the Supreme Court has also been more cautious than what appeared from some of its earlier rulings. In *Rajan Sinha* v. *State of Bihar*[19], the trial court, as per the offender's school record, found him above the prescribed age on the date of commission of offence but the High Court holding that the school record was unreliable reversed the trial court's verdict giving more credence to the statement of the offender regarding his age. The Supreme Court held that the reversal order by the High Court was wrong and the school certificate provided better evidence of age. In *Dayachand* v. *Sahib Singh*[20], the Court laid down that in case of a conflict between the school certificate and the medical report regarding age, the medical report shall prevail.

Under the Juvenile Justice Act separate provisions have been laid down for neglected and uncontrollable children. They are dealt with by the Juvenile Welfare Boards and not by the juvenile courts.[21] A neglected juvenile has been defined by the Act as a child who—

(*i*) is found begging; or

(*ii*) is found without having any home or settled place of abode or any ostensible means of subsistence or is found destitute, whether he is an orphan or not; or

(*iii*) has a parent or guardian who is unfit to exercise or does not exercise proper care and control over the child; or[22]

(*iv*) lives in a brothel or with a prostitute or frequently goes to any place used for the purpose of prostitution, or is found to associate with any prostitute or any other person who leads an immoral, drunken or depraved life.[23]

Uncontrollable juveniles are to be dealt with in the same way as neglected juveniles under the Act.[24]

It follows, therefore, that the Indian position is different from the one in the U.S.A. in two ways. Firstly, the juvenile courts in India do not have jurisdiction in relation to neglected children as they have in the U.S.A. and also in England. Delinquency is the only area which gives jurisdiction to the juvenile courts in India. Secondly, the Indian definition has been given

19. 1991 SCC 1015.
20. 1991 SCC (Cri) 438.
21. *See* Juvenile Justice Act, 1986, Section 4, which creates the Board.
22. The definition on this point has been widened under the Children (Amendment) Act, 1978. *See* Appendix.
23. Section 2(*l*)
24. Section 17.

more briefly and clearly and the content of delinquency is the same as that of adult offences. The only difference between adult and juvenile offenders is in the jurisdiction of the courts and the procedure followed by them. On this point, the Indian position is closer to the Canadian position where the parliamentary law provides:

> "Juvenile delinquent means any child who violates any provision of the Criminal Code or any Dominion or provincial statute, or any by-law or ordinance of any municipality, or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under the provisions of any Dominion or provincial statute."[25]

The Indian position is obviously in consonance with the principle *nullum crimen sine lege*, and the recommendation of the U.N.O. body on social defence.

Nature and Extent of Juvenile Delinquency in India

To point out that juvenile delinquency is on the increase in India is to state the obvious and this can easily be demonstrated with the help of statistics. What is probably more interesting and useful is the rate at which delinquency is continuing to rise and the types of crime in which it is manifested in a higher degree than in others. Also it may be significant to find out the patterns of juvenile delinquency in terms of differentials based on age, sex and religion.

In 1992 and 1993[26] the total number of juveniles apprehended in India for cognizable crimes under the Penal Code and local and special laws was 21,358 and 20,067[27] respectively. The facts which emerge from the figures are as follows:

1. Juvenile delinquency, as manifested the world over and quite understandably for obvious reasons, is essentially a problem of males, about 18.3% of the offenders are females.
2. Though the number of violent crimes like murder, rape, robberies and rioting is quite substantial, the number is much smaller compared to offences like theft and other non-violent crimes. Again the crimes committed under the special and local laws e.g. gambling and bootlegging are much more than the Penal Code crimes.

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25. Juvenile Delinquents Act of the Central Parliament (R.S. 1952, C. 160).
26. These and other figures have been taken from *Crime in India, 1993*, the publication of the Ministry of Home Affairs, Govt. of India.
27. The sudden change here, as well as under other heads during 1988, has been explained in '*Crime in India*' as the consequence of enactment of the Juvenile Justice Act, 1986 which defines a 'juvenile' as "male below 16 years of age and female below 18 years of age", prior to which juvenile boys and girls were of the same age i.e. below 21 years. This is not the correct statement of the position before the Act of 1986; in the Central enactment as well as in the States generally the ages for boys and girls were 16 and 18 respectively.

3. The highest number of arrests were made for the offences of theft, gambling, rioting and those under the Prohibition Act.

The tables on the accompanying pages give the detailed break-up of juveniles apprehended for the offences under the Penal Code and local and special laws for the year 1993.

Socio-economic background of juveniles apprehended

1. Family Background.—About 80% of juveniles, about whom information was available, were living with their parents and guardians and about 20% were homeless. This is somewhat surprising but the statistics available for 1993 reveal a gradual shift of juvenile delinquency from poorer economic strata towards the affluent class.[28]

2. Economic Set-up.—The income of about 50 per cent of the parents or guardians was less than five hundred rupees per month and of 33 per cent between five hundred and one thousand rupees; only in a microscopic number of cases i.e. about 0.021 per cent, the income crossed the three thousand rupees per month mark.

The above figures show that most of the apprehended juveniles came from extremely poor families which just confirms the obvious relationship between poverty and crime. Such a conclusion must, however, be made with some caution since statistics may vitally be affected by the fact that the police acts differently towards juveniles coming from different backgrounds. Other factors being the same, the possibility of a lower class child being arrested is more likely as compared to a child of a higher class.

3. Religion.—Figures over the years[29] indicate that Muslims, Christians and others are slightly over-represented compared to Hindus having regard to the population ratio. One possible reason may be that Muslims and Christians, compared to Hindus are located in the urban areas and are bound to have a higher share in the overall criminality, criminality and juvenile delinquency being essentially urban phenomenon.

4. Education.—More than sixty-five per cent of the juveniles apprehended in 1993 were illiterates and the number of those having gone up to primary classes was 40 per cent. Only 5 per cent of the arrested juveniles had studied up to matric level and above.

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28. The number of delinquents belonging to the upper income groups has soared from 1.3 per cent in 1989 to 2.2 whereas delinquents from the poorest strata declined from 67.9 per cent to 52 per cent during the same period.
29. *Crime in India, 1988* has no classification on religious basis as was done in the earlier releases.

5. Sex.—As could be expected, the number of female juveniles apprehended is much lower than that of boys. In 1987, the number of boys and girls was 1,66,407 and 13,555 respectively. However, there has been a steady rise in the percentage of girls, over the years, the percentage for the year 1993 being about 20 per cent.[30]

6. Regional Distribution.—As regards the regional distribution, Maharashtra and Andhra Pradesh have the dubious distinction of topping the list in the Penal Code and special laws' categories respectively. In the case of Uttar Pradesh, somewhat surprisingly, the figures are 0.4 extremely low though it does not lag behind in terms of its contribution to general criminality. Though the disparity can be explained to some extent because of Maharashtra's peculiar industrial, cultural, urban and geographical nature, primarily manifested through Bombay, perhaps some other factors such as the attitude of law enforcement agencies towards juveniles could also be among the determining factors.

Juvenile Courts

Juvenile offenders have always received a different type of treatment from the criminal law systems of most of the societies as compared to adult or grown-up offenders. This has been reflected in the difference in the concept of responsibility for prohibited acts in the case of young and immature violators of law, the obvious reason being that persons of very young age do not possess sufficient maturity to understand the nature and consequence of their acts and it would be unjust to deal with them in the same manner as those who do not have similar disabilities. That the misbehaviour of young persons has always invoked a differential legal reaction would be manifest by pointing out that the Code of Hammurabi in 2270 B.C. prescribed specific treatments for children who disowned their parents or ran away from home.[31] The Hebrews divided young people into three age categories—infant, pre-pubescent and adolescent—and established increased penalties in that order. Old English law also indicated differential treatment for juvenile offences by providing less severe punishment for persons under sixteen.[32] The founding of Hospes St. Michael in Rome for the rehabilitation of young people indicates a concern for this problem by the Vatican as early as the seventeenth century.[33] The position at present in England is that a child below the age of 10 cannot be convicted of any criminal offence because of the irrebuttable presumption that he lacks the necessary competency to commit the same.[34] The old common

30. In 1988, the number of boys and girls was 33,065 and 5103 respectively indicating the female percentage to be 13.4. The phenomenon is explained in *Crime in India* on the basis of the change in the definition of juvenile in the Act of 1986. *See* footnote ante, p. 225, fn. 27.
31. Quoted by Haskell and Vablonsky in *Crime and Delinquency* (1971), p. 224.
32. *Ibid.*
33. *Ibid.*
34. Children and Young Persons Act, 1933, Section 50.

TABLE 13

DISPOSAL OF JUVENILES ARRESTED (UNDER IPC AND L&SL CRIMES) AND SENT TO COURTS DURING 1993 (STATE, UNION TERRITORY & CITY-WISE)

SL NO.	STATE/UNION TERRITORY	ARRES-TED & SENT TO COURTS	SENT TO HOME AFTER ADVICE OR ADMONITION	RELEASED ON PROBATION AND PLACED UNDER CARE OF		SENT TO SPECIAL HOMES	DEALT WITH FINE	ACQUITTED OR OTHERWISE DISPOSED OF	PENDING DISPOSAL
				PARENTS/ GUARDIANS	FIT INSTT.				
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
STATES:									
1	ANDHRA PRADESH	1244	52	76	126	11	317	79	583
2	ARUNACHAL PRADESH	24	0	24	0	0	0	0	0
3	ASSAM	268	2	23	5	23	1	91	123
4	BIHAR	2907	791	370	335	260	159	435	557
5	GOA	53	10	15	0	0	2	2	24
6	GUJARAT	2670	312	250	116	33	329	578	1052
7	HARYANA	222	5	13	0	0	56	37	111
8	HIMACHAL PRADESH	67	0	0	0	0	0	0	67
9	JAMMU & KASHMIR	0	0	0	0	0	0	0	0
10	KARNATAKA	480	90	71	33	43	22	48	173
11	KERALA	86	1	0	0	0	2	5	78
12	MADHYA PRADESH	2767	355	257	80	75	198	358	1444

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
13	MAHARASHTRA	3178	397	353	65	193	61	232	1877
14	MANIPUR	18	0	0	13	5	0	0	0
15	MEGHALAYA	105	3	2	15	0	0	11	74
16	MIZORAM	39	0	0	29	4	6	0	0
17	NAGALAND	32	0	0	0	22	0	0	10
18	ORISSA	139	1	0	22	0	0	32	84
19	PUNJAB	1	0	0	0	1	0	0	0
20	RAJASTHAN	726	18	157	55	6	1	0	489
21	SIKKIM	14	2	10	0	0	0	2	0
22	TAMIL NADU	4526	2676	170	109	436	269	66	800
23	TRIPURA	11	0	0	0	0	0	11	0
24	UTTAR PRADESH	154	10	16	0	19	0	66	43
25	WEST BENGAL	34	4	1	0	1	0	3	25
	TOTAL (STATES)	19765	4729	1808	1003	1132	1423	2056	7614
UNION TERRITORIES:									
26	A & N ISLANDS	4	0	0	0	0	0	3	1
27	CHANDIGARH	10	0	0	0	0	1	0	9
28	D & N HAVELI	2	0	2	0	0	0	0	0
29	DAMAN & DIU	6	0	5	0	1	0	0	0
30	DELHI	265	1	5	0	39	1	19	200
31	LAKSHADWEEP	0	0	0	0	0	0	0	0
32	PONDICHERRY	15	1	12	0	1	0	1	0
	TOTAL (UTs)	302	2	24	0	41	2	23	210
	TOTAL (ALL INDIA)	20067	4731	1832	1003	1173	1425	2079	7824

TABLE 14

INCIDENCE AND RATE OF JUVENILE DELINQUENCY UNDER IPC

1983-93

SL. NO.	YEAR	INCIDENCE OF		PERCENTAGE OF JUVENILE CRIMES TO TOTAL CRIMES	ESTIMATED MID-YEAR POPULATION* (IN LAKHS)	RATE (CRIMES PER LAKH OF POPULATION)
		JUVENILE CRIMES	TOTAL COG. CRIMES			
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1	1983	55473	1349866	4.1	7204	7.7
2	1984	42803	1358660	3.2	7356	5.8
3	1985	49317	1384731	3.6	7509	6.6
4	1986	55887	1405835	4.0	7661	7.3
5	1987	52610	1406992	3.7	7814	6.7
6	1988**	24827	1440356	1.7	7966	3.1
7	1989	18457	1529844	1.2	8118	2.3
8	1990	15230	1604449	0.9	8270	1.8
9	1991	12588	1678375	0.8	8496	1.5
10	1992	11100	1689341	0.7	8677	1.3
11	1993	9465	1629936	0.6	8838	1.1

*SOURCE: THE REGISTRAR GENERAL OF INDIA, NEW DELHI

**DATA ON JUVENILES FOR 1988 ONWARDS IS NOT AT ALL COMPARABLE TO EARLIER YEARS DUE TO CHANGE IN THE DEFINITION OF JUVENILES FROM 1986.

TABLE 15

JUVENILE DELINQUENCY (IPC) UNDER DIFFERENT CRIME HEADS & VARIOUS PERCENTAGE CHANGES DURING 1993

SL. NO.	CRIME HEAD	1983	1988	1989	1990	1991	1992
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1	MURDER	12576	661	496	377	348	292
2	ATTEMPT TO COMMIT MURDER	*	271	255	218	171	177
3	C.H. NOT AMOUNTING TO MURDER	84	41	52	38	24	19
4	RAPE	454	317	263	184	189	158
5	KIDNAPPING (*i*) OF WOMEN & GIRLS (*ii*) OF OTHERS	665 * *	314 283 31	179 142 37	92 83 9	141 133 8	79 62 17
6	DACOITY	548	226	136	116	52	51
7	PREPARATION & ASSEMBLY FOR DACOITY	*	25	15	9	9	2
8	ROBBERY	991	408	258	185	164	87
9	BURGLARY	5795	2722	2131	1764	1553	1464
10	THEFT	13531	5584	4470	3778	4638	3203
11	RIOTS	8795	3021	1916	1525	1270	906
12	CRIMINAL BREACH OF TRUST	226	157	47	104	21	21
13	CHEATING	281	77	78	47	47	46
14	COUNTERFEITING	18	1	4	0	2	0
15	OTHER IPC CRIMES	22828	11002	8157	6793	3959	4595
16	TOTAL COGNIZABLE CRIMES UNDER IPC	55473	24827	18457	15230	12588	11100

NOTE: 1. * INDICATES THAT THE CRIME HEAD WAS INTRODUCED IN 1988.

TABLE 15 (*Concluded*)

SL. NO.	CRIME HEAD	QUINQUENNIAL AVG. 1988-1992 (Q.A.)	1993	PERCENTAGE CHANGE IN 1993 [(+) INCREASE/(-) DECREASE] OVER		
				1983	Q.A.	1992
(1)	(2)	(9)	(10)	(11)	(12)	(13)
1	MURDER	435	297	-76.4	-31.7	1.7
2	ATTEMPT TO COMMIT MURDER	218	182	—	-16.7	2.8
3	C.H. NOT AMOUNTING TO MURDER	35	15	-82.1	-56.9	-21.1
4	RAPE	222	168	-63.0	-24.4	6.3
5	KIDNAPPING	161	184	-72.3	14.3	132.9
	(*i*) OF WOMEN & GIRLS	141	140	—	-0.4	125.8
	(*ii*) OF OTHERS	20	44	—	115.7	158.8
6	DACOITY	116	51	-90.7	-56.1	0.0
7	PREPARATION & ASSEMBLY FOR DACOITY	12	5	—	-58.3	150.0
8	ROBBERY	220	98	-90.1	-55.5	12.6
9	BURGLARY	1927	1138	-80.4	-40.9	-22.3
10	THEFT	4335	2404	-82.2	-44.5	-24.9
11	RIOTS	1728	1023	-88.4	-40.8	12.9
12	CRIMINAL BREACH OF TRUST	70	15	-93.4	-78.6	-28.6
13	CHEATING	59	63	-77.6	6.8	37.0
14	COUNTERFEITING	1	1	-94.4	-28.6	@
15	OTHER IPC CRIMES	6901	3821	-83.3	-44.6	-16.8
16	TOTAL COGNIZABLE CRIMES UNDER IPC	16440	9465	-82.9	-42.4	-14.7

NOTE : @ INDICATES INFINITE VARIATION.

TABLE 16

JUVENILE DELINQUENCY (L&SL) UNDER DIFFERENT CRIME HEADS DURING 1992-1993

SL. NO.	CRIME HEAD	NUMBER OF CASES REPORTED DURING		PERCENTAGE CHANGE IN 1993 OVER 1992
		1992	1993	
(1)	(2)	(3)	(4)	(5)
1	ARMS ACT	96	100	4.2
2	NARCOTIC DRUGS & PSY. SUBSTANCES ACT	20	13	-35.0
3	GAMBLING ACT	828	818	-1.2
4	EXCISE ACT	135	127	-5.9
5	PROHIBITION ACT	1385	1161	-16.2
6	EXPLOSIVES & EXPLOSIVE SUBS. ACT	13	2	-84.6
7	IMMORAL TRAFFIC (PREVENTION) ACT	95	128	34.7
8	INDIAN RAILWAYS ACT	15	6	-60.0
9	REGISTRATION OF FOREIGNERS ACT	12	3	-75.0
10	PROTECTION OF CIVIL RIGHTS ACT	3	7	133.3
11	INDIAN PASSPORT ACT	0	3	@
12	ESSENTIAL COMMODITIES ACT	0	1	@
13	TERRORIST & DISRUPTIVE ACTIVITIES ACT	0	0	—
14	ANTIQUITY & ART TREASURE ACT	0	0	—
15	DOWRY PROHIBITION ACT	11	17	54.5
16	OTHER L&SL CRIMES	4919	4813	-2.2
17	TOTAL COGNIZABLE CRIMES UNDER L&SL	7532	7199	-4.4

NOTE: @ INDICATES INFINITE VARIATION

law fixed the age of responsibility at seven, either by holding that a child of such tender years should not be convicted, or that he should be pardoned at once.[35] Between the ages of 10 and 14, children in England are in "a twilight zone... in which they are morally responsible not as a class, but as individuals, when they know their act to be wrong".[36] In India there is no criminal responsibility for children up to 7 years of age as was the position under the English common law and they are in the twilight zone if in the age group of 7 years to 12 years.[37] But, by and large, the concern for the interests of children was confined to the question of legal responsibility or the lack of it on the basis of what Prof. Glanville Williams describes as "the mystical theory of moral responsibility"[38] and criminal law hardly made any difference between a child, if found responsible, and an ordinary offender. There have been instances in England where children of tender years were given death sentences such as the case in which two kids of eight or nine years were given capital punishment for stealing a pair of shoes. The concept of separate courts, institutions and procedures for juvenile offenders is quite a recent one. Up to the latter part of the nineteenth century, children were tried for their offences in ordinary criminal courts both in England and the United States. It was only when the new penology, based on reformative and rehabilitative ideals, came to be applied towards the end of the nineteenth century that it was realised that courts, procedures and prisons meant for adult offenders could hardly be expected to serve the interests of juvenile offenders. As a result, therefore, juvenile courts came into existence with their own distinct philosophy incorporating various reforms on the basis of new theories of human behavior. In the words of Dean Francis Allen:

> "These reforms were part of a broader effort to advance the welfare of children, evidenced both in the United States and Western Europe, which included the rise of public education, the development of protective services for dependent and neglected children, and agitation against child labour and other abuses of children in industry."[39]

History of Juvenile Court Movement

In England, chancery courts were the first courts which looked after the interests of children. They saw to it that parents fulfilled their duties laid down in common law which provided for support, supervision and care of the children. The chancery courts were concerned with the "neglected" and "dependent" children and not with the behavioural problems of juveniles as such. The chancery courts acted in *loco parentis* i.e. in place of parents, to

35. *Russel on Crime*, pp. 98-99.
36. 1954 Criminal Law Review 494, quoted in McLean and Wood : *Criminal Justice and the Treatment of Offenders* (1969).
37. Sections 82 and 83 of the Penal Code.
38. 1954 Criminal Law Review 493.
39. *The Borderland of Criminal Justice* (1964), p. 46.

protect the interest of the child. The same principles of common law were applied in the U.S.A. by the courts of equity to prevent injuries to the interests of children.

The realization that child offenders ought not to be sent to correctional institutions meant for adults came long before the establishment of separate juvenile courts in the U.S.A. and England. In the U.S.A. separate correctional facilities for child offenders were for the first time provided in the House of Refuge in New York city which was established in the year 1925. This led to the creation of correctional arrangements for children separate from adult offenders in other States as well due to the efforts of the reformers who were greatly concerned with the unhealthy effects produced on young offenders by their being placed with adult and hardened criminals in the same institutions. The number of such special institutions went up to 16 by 1960.

Illinois was the first State in the U.S.A. to pass legislation for the establishment of a juvenile court in 1899 and the term "delinquent child" was also defined under the legislation. By the year 1945 all the States had passed legislations to take care of the peculiar problems of juvenile delinquents.

While the U.S.A. was witnessing the development of juvenile courts and other institutions, a similar movement occurred in England for the differential treatment of young offenders around the same time. In 1811 the Select Committee on laws relating to penitentiary houses reported:

> "It is highly inadvisable to expose young persons of twelve or thirteen years of age to the instruction of those who can initiate them in all the mysteries of fraud and villainy."[40]

Giving evidence before another Select Committee in 1847, Serjeant Adams said that as far as children between 7 and 12 were concerned, "prison discipline is incompatible with their reform".[41]

During the last hundred years or so, the trend has been the gradual elimination of imprisonment as a form of punishment for young offenders. In England this has been made possible by passing enactments like the Children Act, 1908, Children and Young Persons Act, 1933, Criminal Justice Act, 1961 and Children and Young Persons Act, 1963. Under these Acts the minimum age limits for imprisonment have been gradually increased and alternatives to imprisonment like Borstal training have been provided. Under the Criminal Justice Act, 1961, the minimum age for imprisonment has been fixed at 17 and it is provided that the court must pass a sentence of Borstal training for offenders between the ages of 17 and 21 if the court wishes to

40. Quoted in McLean and Wood : *Criminal Justice and Treatment of Offenders*, p. 179.
41. *Ibid.*

give a custodial sentence of 6 months to three years.[42] The Act of 1908 was the first legislation in England relating to juvenile courts but it did not have any elaborate provisions on the subject. The present legislation is mainly based on the scheme as laid down under the Act of 1933 and modified by the Act of 1963.

The Growth of Juvenile Institutions in India

1. Apprentices Act, 1850.—Young offenders were treated by criminal law in India in the same manner as adult offenders. The laws governing them sentenced them to institutions like prisons where adult and juvenile offenders were dumped together. The situation remained the same even after the British takeover of the country. The first legislation concerning children came in 1850 when the Apprentices Act was passed. This Act in fact was not primarily concerned with the delinquent behaviour of children but laid down, as the name of the Act itself implies, the provisions relating to the relationship between employers and young persons learning a trade from them as apprentices. The Act, however, did contain some provisions wherein may be discerned some of the principles and practices of the future juvenile courts and institutions. The Act provides that the father or the guardian could bind a child between the ages of 10 and 18 years up to the age of 21 years. Magistrates were authorised to act as guardian in respect of a destitute child or any child convicted of vagrancy or the commission of a petty offence and could bind him as an apprentice to learn a trade, craft or employment.[43]

2. Reformatory Schools Act, 1897.—This Act is a landmark in juvenile legislation in India. The considerations which lead to separate correctional institutions for young offenders in the U.S.A., and England had their impact in India as well. Under this Act a beginning was made for incorporating the rehabilitative techniques in the penal philosophy for juvenile offenders. The Act provided that young offenders up to 15 years of age found guilty of offences punishable with imprisonment or transportation were not to be sent to ordinary prisons but to reformative schools. The Act even today acts as the basic law in those areas where no Children's Acts or any other special laws dealing with juvenile offenders have been enacted.

3. Relevant provisions in the Code of Criminal Procedure.—The Code of Criminal Procedure of 1898 contained provisions[44] regarding the jurisdiction of criminal courts and custody of juvenile offenders. The present position under the Code of Criminal Procedure, 1973 regarding jurisdiction is as follows:

42. Criminal Justice Act, 1961, Sections 2 and 3.
43. The Act was repealed by the Apprentices Act, 1961 which does not contain provisions relating to destitute or delinquent children. Children's Acts, passed in the meantime, have taken care of these problems.
44. Sections 29-B and 399.

"Any offence not punishable with death or imprisonment for life, committed by any person who at the date when he appears or is brought before the court is under the age of 16 years, may be tried by the Court of Chief Judicial Magistrate, or by any Court specially empowered under the Children Act, 1960 (60 of 1960) or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders."[45]

There was initially some doubt and judicial controversy as to whether Section 27 of the Code overrides the provisions in the Children Acts prohibiting the trial of juveniles in any court except children's courts. The issue has been set to rest by the Supreme Court in *Raghbir* v. *State of Haryana*[46], where it was held that the Haryana Children Act, 1974 was to prevail over Section 27 of the Code and even a child accused of an offence punishable with death or life imprisonment could not be tried by ordinary criminal courts.

4. The Children Acts.—The years from 1920 onwards saw legislation for juvenile courts and other institutions in the various parts of the country in the form of Children's Acts. The first Children's Act was passed by Madras in 1920 followed by Bengal and Bombay in 1922 and 1924 respectively. Five more provinces had Children Acts by the time the country got its Independence and many more States have enacted legislation during the years after Independence. The only States which have not yet enacted any legislation in the area of juvenile delinquency are Nagaland, Orissa, Sikkim and Tripura. The Central Children Act has not so far been enforced in the Andaman and Nicobar Islands, Arunachal Pradesh, Chandigarh, Dadra and Nagar Haveli, Lakshadweep and Mizoram. Further, in many of the States the Children Acts have not been implemented in all the districts.[47]

In *Hiralal Mallick* v. *State of Bihar*[48] the Supreme Court expressed its anguish regarding the lack of Children Acts in some of the States. Krishna Iyer, J. made the following observations: (para 13)

"It is a badge to our humanist culture that we hold fast to a national youth policy in criminology.... A necessary blossom of this ideology is the legislative development of criminological pediatrics. And yet it is deeply regrettable that in Bihar, the land of Buddha—the beacon light whose compassion encompassed all living beings—the delinquent child is inhospitably treated. Why did the finer consciousness of juvenile justice not dawn on the Bihar legislators and government? Why did the State not pass a Children Act through its elected members? And one

45. Criminal Procedure Code, 1973, Section 27.
46. (1981) 4 SCC 210.
47. National Institute of Social Defence : *Towards Delinquency Control*, 1979, p. 22.
48. (1977) 4 SCC 44 : 1977 SCC (Cri) 538.

blushes to think that a belated Children Act, passed in 1970 during President's rule, was allowed to lapse[49]... with all our boasts and all our hopes, our nation can never really be decriminalised until the crime of punishment of young deviants is purged legislatively, administratively and judicatively. This twelve-year-old delinquent would have had a holistic career ahead, instead of being branded a murderer, had a Children Act refined the statute book and the State set up children's courts and provided for healing the psyche of the little human beings...."

Children Act, 1960.—The most significant legislation in the area of juvenile delinquency was the Central enactment for Delhi and other Union Territories of the year 1960.[50] This enactment was intended to be and can be regarded as a model legislation on the subject. The Children Acts of Assam, Rajasthan, Jammu & Kashmir, Haryana and Madhya Pradesh, adopted the Act more or less on the same pattern.

Children (Amendment) Act, 1978.—Some lacunae were identified in the Act of 1960 and amendment was, therefore, desirable. This was done by the Children (Amendment) Act, 1978. Some of the changes introduced were as follows:

A. The definition of the term 'neglected child', was widened by including the cases where the parents are not able to exercise proper care and control over the child. Previously the definition referred to those parents only who were unfit to exercise care and control over the children. In other words, fitness could now be looked into with reference to economic factors as well. The case of a child whose parents are too poor to take care of the child but who are otherwise fit could now be covered by the Act. It must, however, be said that though the provision is sound in theoretical terms, there may be practical difficulties in the implementation of this policy having regard to the extreme poverty among large sections of the country's population. Probably there may be millions of children who may need the benefits of this provision.

B. There were two kinds of authorities i.e. juvenile courts and child welfare boards, to deal with delinquent and neglected children respectively under the Act of 1960. Now sometimes delinquency may be nothing but the consequence of parents' negligence and a 'delinquent' child in such a case must be sent to the welfare board rather than to the juvenile court. Such a course was not permissible under the Act of 1960. The Amending Act removed this difficulty. Now it was possible to achieve some mobility between the two agencies. A child could now be sent from the juvenile court to the welfare board and vice versa.

49. Subsequent to the Supreme Court's strictures, the Bihar Government produced a Children Act through an ordinance.

50. Appendix I.

C. During the pendency of any enquiry under the Act, the child was to be kept in an observation home established under Section 11 of the Act of 1960. The problem with these observation homes is that they are of an institutional kind i.e. quite official and impersonal in their approach and environment. Beside the observation home, a child could now be sent to any other place of safety which may be better in terms of individual attention and personal warmth.

D. To the children's courts constituted under Section 5 of the Act of 1960 were available only magistrates without any social worker; a deficiency in view of the correctional philosophy of the court. This was taken care of by the amending Act.[51]

5. Juvenile Justice Act, 1986.—Over the years the need was felt for a uniform legislation regarding juvenile justice for the whole country and the Juvenile Justice Act of 1986 fulfils this need. Besides bringing uniformity at the national level, it also takes care of the States where no legislation was forthcoming in the area of juvenile justice.

The Act is virtually a verbatim reproduction of the Children Act, 1960 introducing only a few minor and non-vital changes here and there; some of them being as described below:

1. In the preamble, the words maintenance, welfare, training and education are substituted by the words 'training and development' signifying only a symbolic semantic change. Similarly, the word 'child' has been replaced by the term 'juvenile'. The word 'trial' has been dropped in favour of the more benevolent and appropriate expression 'adjudication of certain matters relating to and disposition of'.
2. Some new definitions have been provided in Section 2 i.e. 'fit person', 'fit institution' and 'place of safety'. The definition of neglected child has been expanded to include a juvenile who is being or is likely to be abused or exploited for illegal or immoral purposes or unconscionable gain.
3. Section 10 providing for 'special homes' (formerly 'schools') has been given an additional clause enabling the State Governments to make rules for the classification and separation of the delinquents on the basis of age and nature of offences committed by them. While this is a step in the right direction, the new Act does not alter the existing position under Section 11 which provides for the temporary reception of juveniles of all the varieties in the observation homes irrespective of their antecedents.
4. Enabling provisions have also been made under Sections 52, 53 and 54 for the creation of welfare and rehabilitation funds for juveniles,

51. *Towards Delinquency Control, op. cit.*, p. 45.

establishment of advisory boards and appointment of visitors to the juvenile institutions.

Distinctive Characteristics of Juvenile Courts

The historical development of juvenile courts shows that the motivating force which created them was concern for children and not that of punishing them for any prescribed behaviour. The same idea may be conveyed by saying that the courts were visualised as *parens patriae*, to act in place of the parents in case of their failure to take proper care of the child on or their being absent to supervise and support him. Whether the juvenile courts fulfilled the role of parents in cases where it was needed is a different issue which has been raised quite recently but the assumptions made regarding the role of these courts lead to very special type of procedure and practice in them. The salient features of the difference between the juvenile and adult courts are reflected in the following aspects:

A. Separate hearings for children's cases

The juvenile courts are meant exclusively for children. These courts are either distinct and independent of ordinary courts in terms of personnel or may be parts of the ordinary courts with wider jurisdiction. There may be wholetime judges for these courts or magistrates and judges of ordinary courts may be given special duties in juvenile courts.

The principle that children are to be tried by juvenile courts is, however, subject to certain exceptions. For instance, a child or a young person charged with homicide must be tried by a higher court in England.[52] In India, however, it has been held that Section 27 of the Code of Criminal Procedure being an enabling provision does not affect the provisions of any Children's Act which gives exclusive jurisdiction to the juvenile court.[53] The contrary view held by the majority of the Madhya Pradesh High Court[54] was held to be erroneous by the Supreme Court. The view taken by the Supreme Court is now further strengthened in view of the fact that the Juvenile Justice Act, 1986 like the Criminal Procedure Code, is also a Central legislation and that it has been enacted subsequent to the Code of 1973. It may be, however, worthwhile to reconsider as to whether serious offence punishable with death or life imprisonment committed by juveniles should be triable by the juvenile court. This is desirable in view of the enhanced violence at every level including that of young persons and the situation is aggravated by the easy availability of deadly weapons to anyone who may desire to use them. Perhaps, because of many factors such as greater exposure to mass media and increased population mobility, the juveniles everywhere are more clever, mature and potentially dangerous than their counterparts of yesteryears. The

52. Magistrates Courts Act, 1952.
53. *Raghbir Singh* v. *State of Haryana*, (1981) 4 SCC 210.
54. *Devi Singh* v. *State of M.P.*, 1978 Cri LJ 585.

benign nature of juvenile justice was not meant for the perpetrators of cold-blooded murders and heinous crimes. In the U.S.A., the fairly recent murders of some Indian immigrants by some fanatic American youths, known as 'dot-busters', in Jersey led to fresh attention on this issue. The highly agitated Indian community had certainly a point when they demanded the trial of such young murderers by ordinary criminal courts and the demand was accepted by the administration.

B. Informal hearing

The proceedings in a juvenile court are characterised by the nature of the hearing which is very simple and informal compared to the one in adult courts. Unlike the position in adult courts, where the procedure and evidence are based on legalistic considerations, the proceedings in a juvenile court are somewhat in the nature of a conference taking place between the judge, the probation officer, the social worker, the child and the parents. The issue, generally speaking, is not whether the child committed an alleged offence, since that is ordinarily not denied, but why he did so, and what is more relevant is social rather than legal evidence. The report of the probation officer assumes great significance in this context.

Another advantage which may be expected from the informal nature of learning is the speedy administration of justice. Partly because of the delays in the police processing, this objective is, however, not achieved. In *Sheela Barse* v. *Union of India*[55], the Supreme Court had to issue the directive that in case of offences punishable with less than 7 years, investigations must be completed within 3 months and failing which the case must be closed. The maximum length of trial was fixed at six months.

The informal nature, however, does not imply that the general basic rules of criminal law can be disregarded. As regards the procedure, it has been provided by Section 39 of the Juvenile Justice Act, 1986 that in the absence of any specific procedure under the Act, that, while dealing with inquiries or hearing the competent authority shall follow the procedure for summons cases prescribed by the Code of Criminal Procedure, 1973.

The question then arises as to whether the ordinary principles of burden of proof and evidence are applicable in juvenile court proceedings. In the U.S.A. it has been held by several courts that at least in cases where the alleged act is criminal, the guilt must be established beyond reasonable doubt.[56] In India, where delinquency is synonymous with criminality, there seems to be no reason for the position to be any different.

55. (1986) 3 SCC 596 : 1986 SCC (Cri) 337.
56. *Urbasek*, 38 Ill 2nd 535, *USV Castanzo*, 395 F 2d 441.

C. Private hearing

Unlike the adult courts, only those who are directly concerned with the case are allowed to be present inside the court. Apart from the judge and the court officials like probation officers, the only persons allowed at the hearing are the child, the parents and the police officers involved in the process. The court may even order any one of these persons to withdraw from the court if so required in the interest of the child. Unless it is in the interest of the child, the Press are not allowed to report the proceedings, offender's name, address or school, or any other particulars likely to identify him or to publish a picture of him.[57]

D. Curtailed right to counsel

Since the procedure and evidence in a juvenile court are of informal nature and the assumption being that the proceedings are in the interest of the child, it is believed that a child need not be represented by a lawyer, a constitutional right available to non-juvenile offenders both in India and the U.S.A.[58] Section 28(3) of the Juvenile Justice Act, 1986, however, provides that no legal practitioner shall be entitled to appear before a Board in any case or proceeding before it except with the special permission of that Board. It is implied, therefore, that lawyers can appear before the juvenile court but not before the Board which deals with neglected and uncontrollable children. An interesting question arises as to how far this provision is violative of Article 22(1) of the Constitution.

In the well-known American decision, *Gault, Re* it was held that the due process clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in *commitment to an institution* in which the juvenile freedom is curtailed, the right to a counsel shall be available to the child. Subsequently, many commentators in the U.S.A. pointed out that the commitment factor emphasised in *Gault* does not limit its application to criminal conduct only but shall also cover cases where 'commitment' is not possible, particularly in proceedings in which 'stigma' is inherent irrespective of the action taken under the juvenile laws.[59] In *Heryford* v. *Parker*[60], it was held that a juvenile committed to a training school for the feeble-minded was entitled to representation by a lawyer. In the light of this line of thinking it is difficult to figure out as to how and in what kind of situations the Board can refuse to permit the representation by a lawyer as envisaged in the Act.

57. Section 22(*i*) of the Act, 1986.
58. 387 US 1.
59. See "*Kent* v. *U.S. and In re Gault : Two Decisions in Search of a Theory*", 19 Hast LJ 29 (1967) and Paulson : *The Constitutional Domestication of the Juvenile Court* (1967).
60. 396 F 2d 393.

E. Protection against legal consequences and stigma

The law provides certain safeguards to save juvenile offenders from the criminal stigma and from disabilities arising out of the legal consequences of an action by a juvenile court. In England, the words 'sentence' must not be applied to juveniles tried summarily; instead the terms 'finding of guilt' and 'order made upon finding of guilt' are used.[61] Nigel Walker wonders rightly though as to whether the 'verbal safeguard' really protects the child offender from stigma.[62] Laws may also provide that no disqualification would be attached to the child delinquent due to conviction in a juvenile court.[63]

F. Appeals from the Juvenile Courts' orders

An appeal can be made both against conviction as well as acquittal of an adult offender by an ordinary criminal law court. A second appeal is also possible in certain cases. In case of juvenile courts the right of appeal may not be available or it may be well regulated. Under the Act of 1986 it is laid down that no appeal shall lie from (*a*) any order of acquittal made by the children's court in respect of a child alleged to have committed an offence, or (*b*) order of the Board that the child is not neglected.[64]

It is further laid down that only one appeal against the order of conviction shall lie to the sessions court whose decision shall be final.

G. Non-penal sanctions

The very basis of juvenile justice is to rehabilitate and reform delinquent children and the ordinary penal sanctions are, therefore, absolutely excluded from the system. Section 22(*i*) of the Act provides that no delinquent juvenile shall be sentenced to death or imprisonment or committed to prison in default of payment of fine or in default of furnishing security. Section 21 lays down the various options available to the court after a child is found to be delinquent. The court may allow the juvenile to go home after advice or admonition, or release him on probation under the care and supervision of parents or any other fit person or institution or direct the juvenile to be sent to a special school. Similar provisions existed in the Children Acts passed by the various States which were in force before the present all-India enactment. The difficult decision to be made quite frequently is as to whether the delinquent should be restored to the parents or sent to a special school or home. The judicial attitude appears to be somewhat ambivalent and reflects various tensions and conflicts between the competing penal and rehabilitative philosophies. *Satto* v. *State of U.P.*[65] is a good illustration of

61. Children and Young Persons Act, 1933, Section 59 as amended.
62. *Crime and Punishment in Britain*, p. 176.
63. Juvenile Justice Act, 1986, Section 25.
64. *Ibid*, Section 37.
65. (1979) 2 SCC 628 : 1979 SCC (Cri) 534.

the possible pitfalls involved. Three boys, of ages between ten and fourteen, committed rape on an eleven-year-old girl while she happened to be tending cattle in a village field. The trial court passed a sentence of two years' imprisonment to be served out by detention in an approved school and the same was confirmed by the sessions court which devoted just one sentence to the sentencing aspect of the case: "Due to seriousness of the crime there is no justification to release on probation." The High Court agreed giving the following reasons:

> "....it is urged that the sentence awarded be reduced in view of their ages. I am reluctant to do so because they committed a crime which repels against moral conscience. They chose a girl of 11 years to satisfy their lust...spoiled her life.... Such an act deserves to be deprecated. The sentence...does not at all err on the side of severity. Moreover, the learned lower courts have already shown sympathy by keeping them in an approved school...."

On appeal the Supreme Court preferred release on probation under parental care and the supportive reasons were based on the age factor and the 'impulsive' nature of the act. It was said:

> "...In a case where the child has acted on impulse in committing an offence and there is nothing to show the presence of any viscious streak of character, it would be more appropriate to leave him to the care and attention of parental authority rather than to send him to an approved school...."

Krishna Iyer J. sought to play down the gross culpability by employing expressions like 'erotic experimentalism' and 'adolescent exercise of rape'. To the learned judge, both approved schools as well as adult prisons were like 'animal farms'.

The significant point which emerges is that the lower courts and the High Court as well as the Supreme Court did not accept the position accorded to approved or special schools on its face value in the scheme of juvenile justice i.e. a place for reformation and rehabilitation. All the courts in question treated the institutional custody as something incorporating the penal philosophy. Because of the same factor, the lower courts preferred the approved school while the Supreme Court showed aversion to it.

The Supreme Court appears to have been too much influenced by the factor of 'sudden impulse' which in any case is frequently present in rape situations whether the offence is committed by a juvenile or an adult offender. One cannot also be sure of lack of 'vicious streak' among the delinquents in the instant case as found by the Supreme Court, in view of their having tied up the cowherd who could have rescued the victim. Further, it is also not clear as to what persuaded the Court to believe that proper parental authority was available in the case when at the same time it lamented the

lack of availability of the report of the reformation officer. If, to quote the Supreme Court, the sessions court was oblivious of the offender and obsessed with the offence, it was the other way round as regards the Supreme Court's reasoning and verdict.

Finally, the crucial factor of the age of the delinquents appears to have escaped the attention of the Court.[66] The delinquents claimed and were accepted to be between the ages of 10 years to 14 years. Whose burden is to establish the age factor ? Is it possible for a child of 10 years or even slightly more to commit rape? In common law there is the presumption that a boy below the age of 14 years is incapable of committing the offence. Even if this presumption is not available in India, recourse can be had to Section 114 of the Evidence Act to draw such a presumption. Once it is clear that a delinquent is of fourteen years of age or above, the more appropriate action would be under the proviso to Section 22(*i*) of the Act.[67] In India, after the verdict of the Supreme Court in *Raghbir*[68] the juvenile courts have jurisdiction even in murder cases.

Disposal of Cases of Delinquent and Neglected Juveniles

1. Neglected Juveniles.—Neglected juveniles can be dealt with in a number of ways depending upon the individual circumstances of the child. He may be sent to the care of a home run by the local authority or some institution which may be certified as a fit institution by the local authority. Thus the Juvenile Welfare Board may order a child to be sent to a juvenile home created under Section 9 of the Act or any other certified institution.[69]

Another mode of dealing with the juvenile in appropriate cases is to give him in the custody of his parents or of any other person who may be considered fit for the purpose by the Juvenile Welfare Board.[70]

2. Delinquent Juveniles.—Delinquent juveniles may be dealt with in a number of ways depending upon the gravity of the situation. The lightest action may be to release the delinquent after advice or admonition and the extreme action may be an order for the custody of a juvenile in Borstal or special school. In some situations, a more desirable technique is to release the offender on probation in the care of a parent, guardian or any other fit

66. Section 32 of the Act provides that the competent authority shall determine as to whether a person brought before him under the Act is a juvenile *after making enquiry and taking evidence* and the age recorded by him shall be the true age. It is evident, therefore, that the issue regarding age cannot be decided in an arbitrary manner and the issue cannot be treated as closed if the age has been determined without proper enquiry and adequate evidence.

67. According to this provision where a juvenile above the age of 14 has committed an offence and it is not desirable either to send him to a special school or to take any other action under the Act, the court may order the delinquent child to be kept in safe custody in such place and manner as it thinks fit.

68. *Raghbir* v. *State of Haryana*, (1981) 4 SCC 210.

69. Juvenile Justice Act, 1986, Section 15.

70. *Ibid.*, Section 16.

person. In fact, the origin of the concept of probation in penal philosophy lies in the special problems of juvenile offenders. The following orders may be passed by a juvenile court under the Juvenile Justice Act, 1986 for dealing with juvenile delinquents:[71]

(*a*) The juvenile may be allowed to go home after advice or admonition.

(*b*) The juvenile may be released on probation under the care of any parent, guardian or other fit person on their executing a bond for well-being and good behaviour of the juvenile for a period not exceeding three years.

(*c*) The juvenile may be sent to a special school[72] to remain there till he ceases to a juvenile or for a period of at least three years if the offender is a boy above 14 years or a girl above the age of 16 years.

The Act also lays down that no sentence of death or imprisonment can be imposed on a delinquent. Section 22 of the Act further provides that in case of a serious offence by a juvenile above 14 years of age, he may not be sent to a special school if not in his or other juvenile's interest. Such a juvenile may be placed in safe custody elsewhere. The place and manner of detention is to be determined by the administrator of the Union Territory. The section also lays down the very significant principle that the period of detention can in no case exceed the maximum period of imprisonment prescribed for the offence.

Section 22 of the Act of 1986 places a total ban on imprisonment of juvenile delinquents since it would be a negation of the philosophy of the juvenile court and everything for which it stands. The realities, however, are sometimes slightly different. According to a news agency report, more than 3000 juvenile delinquents were lodged in jails across the country along with adult criminals despite the legal ban.[73] Even some of those States completely covered by the Children Acts were reported to have some cases of juvenile delinquents lodged in ordinary prisons along with adult criminals.[74]

Munna v. *State of U.P.*[75] presented a situation which indicated the pathetic state of affairs with regard to imprisonment of children and their sexual abuse in the adult jails. A news report in the Indian Express and the consequent writ petitions in the Allahabad High Court led to an enquiry regarding the allegation that more than 100 children were lodged in the Kanpur Central Jail and they were being sexually exploited by the adult prisoners. According to the report of the enquiry officer, a sessions judge,

71. Section 21.
72. Created under Section 10 of the Act.
73. Indian Express, August 18, 1979.
74. The number of such cases reported from Andhra Pradesh, Haryana and Gujarat was 64, 8 and 4 respectively.
75. (1982) 1 SCC 545 : 1982 SCC (Cri) 269: AIR 1982 SC 806.

there were admittedly seven juvenile undertrial prisoners below the age of 16 in the Kanpur Central Jail.[76] The Supreme Court observed:

> "We would strongly impress upon the Magistrates... that they must be extremely careful to see that no person apparently under the age of 16 years is sent to jail but he must be detained in a Children's Home or other places of safety. It is absolutely essential in order to implement the provisions of Uttar Pradesh Children Act, 1951 that Children's Home or other suitable places of detention are set up by the Government for the purpose of providing a place of detention for children under the age of 16 years. No words we can use would be strong enough to convey our feelings in this respect. A nation which is not concerned with the welfare of the children cannot look forward to a bright future."

Apparently, the situation continues to be bad despite the judicial exhortations. In a later case, *Sanjay Suri* v. *State*[77], the Supreme Court had to lay down a duty on the jail authorities that no young person was to be admitted to an adult jail unless the Court certified that the person was above the age prescribed for juvenile offenders.

The malady continues unabated and as late as in 1988, the Supreme Court issued the directive that in all warrants of detention, the age of the detenu must be specified to ensure that no juvenile is sent to adult prisons.[78] Further, the jail authorities must not accept any warrant unless age is specified in it.

Section 33 of the Act provides the guidelines to the juvenile courts and the child welfare boards for making orders under the Act. According to it the factors to be considered are the age of the child, the circumstances in which the child is living, the report made by the probation officer and the religious persuasion of the child. In order to ensure that such factors do not bias the court regarding the issue of guilt of the child, it is also provided that in case of a delinquent child the above considerations are to be made only after the issue of guilt has been decided.

An assessment can be made regarding the use of the various techniques described above with the available statistics. In the year 1993, the total number of juveniles arrested and sent to court was 20,067 and out of these 12,193 cases were disposed of by using the devices prescribed by the Juvenile Justice Act. The majority of juveniles, about 38%, were sent home after admonition and advice, 23% were released on probation, 11% were fined and about 15% were either acquitted or otherwise disposed of by the courts. Only 10% of the juveniles were sent to special homes; the most

76. Many more, it appeared, had been released or shifted to juvenile institutions in the wake of writ petitions.

77. 1988 Supp SCC 160: 1988 SCC (Cri) 248.

78. *Sanjay Suri* v. *Delhi Administration*, 1988 Supp SCC 160 : 1988 SCC (Cri) 248.

undesirable course according to the current philosophy of juvenile justice. Removal from home has rightly been regarded as the most drastic measure among the modes of disposal of offenders by a juvenile court since it involves not only the personality of the offender but may give rise to mental torture to the family as well. This is particularly tragic in a case where the family is less to blame for the delinquency than the associates of the child. Nigel Walker, therefore, suggests that the child should not be removed from the family except when it becomes very necessary as in the following circumstances:

(*i*) cases in which the juvenile seems to be beyond parental control;

(*ii*) cases in which removal seems necessary for the safety or welfare of others;

(*iii*) cases in which the behaviour seems to be the result of mental disorder of a nature or degree which justifies in-patient treatment or care.

It is in this context of severity of consequences in the form of child's removal from the family that Nigel Walker justifiably questions the justness of the laxity in the evidence rules of the juvenile courts by making the observation:

> "It must be admitted that the care with which a man is tried should be related to the most drastic penalty that can be imposed on him if he is convicted, rather than the most probable penalty...."[79]

One special problem connected with the detention of juveniles relates to their sudden release from the institutions without any rehabilitation or after-care programmes to ensure a smooth transition from detention to life outside the institutions. *Laxmikant Pandey* v. *Union of India*[80] was basically a case relating to the adoption of children by foreigners but the issue cropped up during the proceedings as to what happens to persons who cease to be juveniles after a certain period of stay in the various homes and schools under the Children's Acts and the Act of 1986. The Supreme Court put the question to the government counsel but no provisions could be cited to deal with such eventualities and the court wondered whether juveniles moving out of the institutions were to be thrown out on the streets.

Probation Work in Juvenile Delinquency

The probation technique is of vital importance in dealing with the problem of juvenile delinquency. Section 57 of the Act of 1986 provides for the appointment of probation officers and also lays down his functions. Some of his primary duties are : to enquire into the antecedents and family history of the juvenile, to visit neglected and delinquent juveniles, to report his

79. *Sentencing in a Rational Society* (1969), p. 182.
80. 1991 SCC (Cri) 836.

behaviour to the competent authority and to advise and assist neglected or delinquent juveniles in various ways including finding suitable employment for them. In other words, the probation officer, under ideal conditions, is the friend, philosopher and guide of the deviant juvenile and the most vital and meaningful link between him and the juvenile courts and welfare boards. He submits pre-sentence reports to juvenile courts and child welfare boards and provides supervision to a juvenile released on probation, if so ordered.

Unfortunately, there being a wide gap between the ideal conditions and the hard realities, the probation schemes leave much to be desired in actual practice. The probation officer is overloaded with cases assigned to him and ordinarily he is not in a position to give due care and attention to his juvenile subjects. Because of the shortage of probation personnel, generally only a very small percentage of the juveniles are put under the supervision of a probation officer, the premature termination of supervision is rare and court interference by way of appellate orders is also not very common. Though the figures available generally indicate that most of the juvenile offenders completed their supervision period satisfactorily according to their probation officers, such a heartening situation ought to be taken with a pinch of salt in view of the realities mentioned above.

Police and Juvenile Delinquency

The police has a very important and sensitive role to play in the prevention and treatment of juvenile delinquency. It is evident that the role demands an entirely different kind of approach and handling than is generally associated with police personnel in the context of the adult criminal and preservation of law and order in society.

The function of the police in relation to juvenile delinquency may be appreciated in two distinct contexts i.e. (*i*) the duties assigned to them under the juvenile enactments, and (*ii*) the activities and programmes for the prevention of delinquency launched by the police departments themselves.

1. Duties under the Acts.—Under the Children Acts it is the policeman or officer with whom the neglected or juvenile delinquent has the first contact once the process commences under the law. In fact, the issue whether a child is neglected or not is itself to be decided by the police officer and subsequent proceedings take place only after the preliminary issue has been decided in the affirmative.[81] Similarly, the police has been given the discretion to release or not to release a juvenile delinquent on bail after his arrest and before his being produced before the court. The officer-in-charge may not release the delinquent if he has reasonable grounds for believing that the release is

81. Section 13, Children Act, 1960.

likely to bring him into association with any reputed criminal or expose him to moral danger or that his release would defeat the ends of justice.[82]

The above provisions place an onerous responsibility on the police officer and he should therefore be careful, conscientious and diligent to justify the trust reposed in him by the law. The child needs sympathy and understanding and must be dealt with in a decent and polite way. The discretion must be exercised with only one objective i.e. the welfare of the child.

It must be realised that only police officers with special aptitude and commitment or special training can achieve the objectives of juvenile legislation.

2. *Other functions and activities.*—The police may keep an eye on potential delinquents and difficult children and act even before the need may arise to take formal cognizance under the legal provisions. It may be in the form of police caution to the delinquent as is done in the U.K. In the U.K., in certain cases, informal supervision is also possible by a specially selected police officer.

The police may undertake special programmes of patrolling high delinquency areas and places of entertainment. They may also launch programmes to educate the youth regarding their legal obligations and to have contacts with the parents. B.K. Bhattacharya provides the information about various countries in this connection.[83]

In Japan, plain clothed juvenile police officers in patrol busy streets, visit parks, cinemas, dance halls and other such places to discover 'problem juveniles'. Parents, guardians and teachers having problems with juveniles consult juvenile police officers. By employing this method of 'discovery', about 55 per cent of problem juveniles have been identified while the percentage is only 7 by way of consultation and 38 by ordinary police services.

In some countries, youth clubs, holiday camps and other leisure-time activities are often conducted directly by the police.

In Israel the police organise visits of school children to agencies connected with the administration of criminal justice. In Sweden the police educate school children up to 16 years of age about the laws and regulations of the country to inculcate in them a sense of responsibility.

In India some useful work is being done by the Juvenile Aid Police Unit of Bombay which was established in 1952. Its main functions are:[84]

(*a*) It takes special measures for patrolling high delinquency areas.

(*b*) It organises recreational activities in the pre-delinquent areas.

82. Section 18(1), Children Act, 1960.
83. *Violence, Delinquency and Rehabilitation* (1977), pp. 119-20.
84. *Towards Delinquency Control*, p. 49.

(*c*) It helps women and children in trouble.

(*d*) It raids places of ill repute like brothels, dancing schools, etc. to salvage the actual or potential victims.

The Juvenile Court Judge

The juvenile courts being different from ordinary courts, the judges are expected to be of different outlook in view of the social welfare function which is assumed to be the primary responsibility of children courts. For instance, it is laid down that no one shall be appointed a member of the Board or a Magistrate in the children court unless the administrator is of the opinion that he has special knowledge of child psychology and child welfare.[85] It is also laid down that there should be at least one woman magistrate in the children court and one woman member in the Child Welfare Board.[86] In U.S.A., a juvenile court judge should be:

(*i*) deeply concerned about the rights of people,

(*ii*) keenly interested in the problems of children and families,

(*iii*) sufficiently aware of the contributions of modern psychology, psychiatry and social work; that he can give due weight to the findings of these sciences and professions,

(*iv*) able to evaluate evidence and situations objectively, and make dispositions uninfluenced by his personal concepts of child care,

(*v*) eager to learn,

(*vi*) a good administrator,

(*vii*) able to conduct hearings in a kindly manner and to talk to children and adults sympathetically on their level of understanding without loss of the essential dignity of the court.[87]

The guidelines laid down by the National Probation and Parole Association require that the juvenile court judge have a working knowledge of social case-work, child psychology, the elements of psychiatry and other behavioural sciences.

The lofty ideals, as mentioned above, are not achieved sometimes in actual practice. In the U.S.A. the juvenile court judges are either elected or appointed by the governors or mayors with or without the recommendations of the local Bar associations. The governors and mayors appoint the persons selected for the job largely as a reward for political services rendered to them. A recent survey of juvenile court judges in the United States revealed that half of all juvenile court judges have no undergraduate degree, a fifth have received no college education at all, and a fifth are not members of the Bar. Almost three-quarters devote less than a quarter of their time to

85. Juvenile Justice Act, 1986, Section 6(3).

86. *Ibid.*, Sections 4 and 5.

87. U.S. Department of Heath, Education and Welfare : *Standards for Juvenile and Family Courts*, pp. 103-4.

juvenile and family matters and judicial hearings often turn out to be little more than attenuated interviews lasting from ten to fifteen minutes.[88]

The situation may be equally disturbing in India. Though the juvenile justice philosophy insists that their must be specially trained judicial personnel in the juvenile courts, the general practice in India is to assign the job to the ordinary magistracy.[89]

Evaluation of Juvenile Courts

The juvenile courts won instant applause for their lofty philosophy and high ideals when they were created for the first time around the beginning of the present century. It is only in the recent past that questions regarding the validity of certain assumptions of the philosophy have been raised and some sort of disenchantment and pessimism has arisen out of the actual working of the juvenile courts. Attacks have mounted both from the advocates of the interests of the juvenile offenders as well as from those for the protection of the society. The issues relating to constitutional and legal safeguards have already been discussed and attention may now be focused on certain other aspects of the problem.

Apart from the shortcomings which the juvenile courts really suffer from, their difficulty is also enhanced by the fact that the initial optimism in the juvenile courts generated hopes which were too ambitious to be fulfilled. The ideal which was set is best expressed by Julian Mack J. in the following words:

> "To find out what the child is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen."[90]

In order to find out 'what the child is' and 'to uplift and develop him', not only are vast resources in terms of money and human material needed, which are not always forthcoming, but the reliability and efficacy of the various measures adopted for the rehabilitative ideal are themselves of a doubtful nature. As observed by the American Commission in its report, though there is no shortage of theories of causation of delinquency, experts in the field agree that it is extremely difficult to develop successful methods for preventing serious delinquent acts through rehabilitative programmes for the child.[91]

88. *The Challenge of Crime in a Free Society* : A Report by the President's Commission on Law Enforcement and Administration of Justice, p. 80.
89. The deficiency was pointed out and remedial action directed by the Supreme Court in *Sheela Barse* v. *Secretary, Children Aid Society*, (1987) 3 SCC 50 : 1987 SCC (Cri) 458.
90. Mack : "*The Juvenile Court*", Harvard Law Review 23 (1909).
91. President's Commission on Law Enforcement and Administration of Justice : *Task Force Report : Juvenile Delinquency and Youth Crime*, pp. 7-9 (1967).

Though adequacy of resources is not the only factor, it is an important dimension in the problem faced by the juvenile courts. In countries like India the resources may just not be available while in countries like the U.S.A. there may be resistance on the part of the community in view of the scepticism regarding the juvenile court philosophy and working of the juvenile courts and a feeling that the rehabilitative ideal has been pursued a bit too far. Eminent personalities like Dean Francis Allen have recommended the role to be played by the juvenile courts in the following words:

> "In a great many cases the juvenile court must perform functions essentially similar to those exercised by any court adjudicating cases of persons charged with dangerous and disturbing behaviour. It must reassert the norms and standards of the community when confronted by seriously deviant conduct and it must protect the security of the community by such measures as it has at its disposal, even though the available means may be unsatisfactory, when viewed either from the standpoint of the community interest or of the welfare of the delinquent child."[92]

The President's Commission noted the consequences of the lack of resources on the quality and status of juvenile court judges and the availability of trained personnel and other facilities to the court. The Commission observed:

> "In few jurisdictions, for example, does the juvenile court judgeship enjoy high status in the eyes of the Bar, and while there are many juvenile court judges of outstanding ability and devotion, many are not.[93] One crucial presupposition of the juvenile court philosophy—a mature and sophisticated judge, wise and well-versed in law and the science of human behaviour—has proved in fact too often unattainable. Other resources are equally lacking. The survey of juvenile court judges reveals the scarcity of psychologists and psychiatrists—over half a century after the juvenile court movement set out to achieve the coordinate application of the behavioural and social sciences to the misbehaving child. Where clinics exist, their waiting lists usually are months long and frequently they provide no treatment but only diagnosis. And treatment, even when prescribed, is often impossible to carry out because of the unavailability of adequate individual and family case-work, foster home placement, treatment in youth institutions."

Summing up, the Commission observed that in theory the juvenile court was to be helpful and rehabilitative rather than punitive but in fact the

92. *The Borderland of Criminal Justice*, p. 53.

93. The status and image in India too leaves much to be desired. As per information by some lawyers to the author, posting of a magistrate in juvenile court is often regarded as a sanction against him due to his not having a very favourable image in the set-up.

distinction often disappeared, not always only because of the limits of knowledge and technique. In theory, the courts' action was to affix no stigmatizing label. In fact, a delinquent is generally viewed by employers, schools, the armed services—by society generally—as a criminal. In theory the court is to treat children guilty of criminal acts in non-criminal ways but in fact it labels truants and runaways as junior criminals.

Finally the Commission quoted Mr. Justice Fortas, speaking for the Supreme Court in *Kent* v. *United States*[94] :

> "There may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."

The Commission concluded by saying that though rehabilitation of child offenders should be the primary aim of juvenile courts, rehabilitation should not be the exclusive preoccupation of the court since it has to protect the community from threatening conduct, like any court of law.

Probably it was due to the unsatisfactory working of the juvenile courts because of the various problems cited above that in England a White Paper was issued in 1965 which provided for the creation of family courts in place of the present juvenile courts. It also sought to reduce the age of non-criminal proceedings from 17 years to 16 years. The recommendations, however, proved to be quite unpopular and the juvenile courts are retained in England to this day and the age for non-criminal proceedings also remains 17 years.

Juvenile Court and Constitutional Safeguards

The peculiarities of the juvenile court procedure have given rise to a paradox which has resulted in some problems of constitutional law in the U.S.A. The paradox is provided by the interesting situation that the courts work on the assumption that they act on behalf of children and in the process the child offenders are denied certain constitutional and legal rights which are available to adult offenders. Sometimes the consequences of a juvenile court action may be more severe as compared to the consequences the child might have suffered at the hands of an adult court.

The first case where the constitutional validity of the juvenile court procedure was challenged before the U.S. Supreme Court was that of Holmes in 1955 in which the Court even refused to give a hearing on the basis of constitutional and legal issues raised, which were as follows:

(*i*) Holmes had not been represented by counsel.

(*ii*) He had not been informed of the specific charges against him (Holmes was arrested while in a stolen car driven by another boy).

94. 383 US 541, 556 (1966).

(*iii*) He was not informed of his constitutional rights, particularly of his right to refuse to testify.

(*iv*) Testimony admitted into evidence at his trial was incompetent and inadmissible.

(*v*) The competent evidence presented at the trial did not link Holmes with any illegal acts.

In an appeal to the Supreme Court that the due process was not followed in depriving Holmes of his liberty, which violated the Fourteenth Amendment of the Constitution, the Court held, without hearing the case on merit, that "since juvenile courts are not criminal courts, the constitutional rights granted to persons accused of crime are not applicable to the children before them".[95] This position of the Court was based on the proposition that it was not that the juvenile court aimed to punish Holmes but it was only to salvage him and safeguard his interests.

Paul W. Tappan expressed his viewpoint against the deprivation of the due process right to juveniles in the following words:

> "It has been popular practice thus to rationalize the abandonment, partial or complete, of even the most basic conceptions of due process of law; right to counsel and appeal; rejection of prejudicial, irrelevant and hearsay testimony; adjudication only upon proof or upon a plea of guilt. The presumption is commonly adopted that since the State has determined to protect and save its wards, it will do no injury to them through its diverse officials, so that these children need no due process protections against injury. Several exposures to court; a jail remand of days, weeks or even months; and a long period in a correctional school with young thieves, muggers and murderers—these can do no conceivable harm if the States' purpose be beneficent and the procedure be 'chancery'; children are adjudicated in this way everyday without visible manifestations of due process. They are incarcerated. They become adult criminals, too, in thankless disregard of the States' good intention as *parens patriae*."[96]

A few year afterwards' Gault, a young boy, was given an indeterminate sentence by an Arizona juvenile court for conveying obscene expression to a woman neighbour over the telephone. The Arizona law did not provide for any appeal from the decision of a juvenile court. The Arizona appellate court refused to review the findings of the juvenile court. An appeal was therefore made to the U.S. Supreme Court that Gault was not given notice of the charges against him nor was he given the right to have a lawyer. Also that he was not allowed to cross-examine the witnesses against him and was made to give self-incriminating answers in the proceedings. Further, the

95. *Holmes, Re*, (1955).
96. *Juvenile Delinquency*, p. 205.

conviction was challenged on the ground that a transcript of the proceedings was not given to the accused and the law did not provide for any appeal. The Supreme Court accepted each one of these contentions and held:

> "Neither the Fourteenth Amendment nor the Bill of Rights is for adults only. Under our Constitution, the condition of being a boy does not justify a Kangaroo court."[97]

It is interesting to know a few things more about Gault's case to appreciate the reason for the Supreme Court's concern for the offender's position before the juvenile court. The penalty for violation of the Arizona law, which Gault was found guilty of, was a fine of $5 to $50 for an adult offender or an imprisonment of two months. The 15-year-old boy was committed as a "juvenile delinquent" by the judge to the State industrial school "for the period of his minority (six years) unless sooner discharged by due process of law". The judge defined "juvenile delinquent" as one who was habitually involved in immoral matters. The only evidence of any past immoral behaviour on the part of young Gault was a referral made two years earlier alleging that he had stolen a baseball glove and lied to the Police Department about it. No petition or hearing apparently resulted from this "referral".[98]

The extremely high-handed action taken by the Arizona judge made it clear to many, including the justices of the Supreme Court, that the time had come to stop such abuses. Although the decision does not give to juveniles all of the protections accorded to adults charged with crimes, the disenchantment with the juvenile courts was explicit and the trend of opinions predictable.[99]

The Supreme Court, while deciding Gault's case, made some other observations questioning certain assumptions of juvenile court justice by quoting facts and figures regarding juvenile delinquency and concluded that non-observance of due procedure did not necessarily lead to a better crime situation. The Court observed:

> "It is claimed that juveniles obtain benefits from the special procedures applicable to them which more than offset the disadvantages of denial of the substance of normal due process standards.... The observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process. But it is important, we think, that the claimed benefits of the juvenile process should be candidly appraised. Neither sentiment nor folklore should cause us to shut our eyes, for example, to such startling findings as that reported in an

97. *Gault, Re*, 387 US 1 (1967).
98. Haskell and Yablonsky : *Crime and Delinquency*, p. 235.
99. *Ibid.*

exceptionally reliable study of repeaters or recidivism conducted by the Standard Research Institute for the President's Commission on Crime in the District of Columbia."

The Court then quoted the President's Commission's Report:

"In the fiscal year 1966 approximately 66 per cent of the 16 and 17 year-old juveniles referred to the court by the Youth Aid Division had been before the court previously. In 1955, 56 per cent of those in the Receiving Home were repeaters. The SRI study revealed that 61 per cent of the sample juvenile court referrals in 1965 had been previously referred at least once and that 42 per cent had been referred at least twice before."

The Court, therefore, took the view that these figures could not lead to the conclusion that the absence of constitutional protections reduces crime or that the juvenile system, functioning free of constitutional inhibition, was effective to reduce crime or rehabilitate offenders.

It is submitted that though the Court was justifiably upset about the phenomenon that child offenders were not given some of the basic rights given to adult offenders, their conclusion, on the basis of repeated delinquent activity by the child offenders shown by the SRI study, that non-observance of constitutional safeguards did not reduce crime, was somewhat beside the relevant point. The question of giving constitutional safeguards is significant in the proceedings for the determination whether the child has committed a delinquent act or not. Whether he would be reformed or not by the treatment given to him and whether he would violate the law again are questions which involve so many other dimensions rather than the issue of constitutional protections at the hearing. In fact the assertion that many offenders had a second appearance before the juvenile court may appear to strengthen the impression that the finding of guilt was proper, constitutional considerations notwithstanding.

The lack of observance of constitutional safeguards in a juvenile court may, however, be relevant to the growth of delinquent behaviour in a different context which was also pointed out by the court. The Supreme Court quoted approvingly the sociologists Wheeler and Cottrell:

"When the procedural laxness of the *parens patriae* attitude is followed by stern disciplining, the contrast may have an adverse effect upon the juvenile, who feels that he has been deceived or enticed. Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel."[1]

1. *Juvenile Delinquency : Its Prevention and Control* (Russel Sage Foundation, 1966), p. 33.

Another significant observation of the Court was regarding the claim of the juvenile courts that notices of charge of specific offences are not given to the offenders with the object of preventing the disclosure of their deviational behaviour. The Court said that the claim of secrecy was more rhetoric than reality. Disclosure of court records of the juvenile offenders to the FBI was quite common and the police also have complete files of the offenders which are sometimes made available not only to the FBI and military organizations but also to private employers.

Constitutional Position in India

The rights guaranteed to an accused person are nearly the same as in the American Constitution except that the right to trial by jury has not been given in India. Also, there is no provision corresponding to the right of speedy trial as given in the American Constitution though the same is now read into Article 21 of the Indian Constitution. There is the right against self-incrimination, the right to have a lawyer of one's choice and the right not to be deprived of life or liberty except according to procedure laid down by law.[2] The constitutional issues have not been raised in India till now because of the different nature of the juvenile courts in India and also due to some difference between the Indian and American Constitutions regarding the procedure to be employed for depriving a person of his life or personal liberty. In India, the juvenile courts are criminal courts unlike in the U.S.A. and England where they are regarded as courts of a civil nature.[3] It was probably due to this reason that safeguards have been provided to the juvenile offenders on the lines of adult offenders. A neglected child must be produced before the Welfare Board within 24 hours of his being taken charge of by a police officer.[4] The period of detention of a delinquent child in a reformatory school cannot exceed the maximum period of punishment provided for the offence.[5] Under the Indian Constitution, what is required to deprive a person of his life or liberty is the procedure established by law. Any procedure laid down by law which does not violate any fundamental right is a valid procedure. Reasonable restrictions can be placed on the fundamental rights and the restrictions on the rights of juvenile offenders laid down in Children Acts are likely to be upheld by the Indian courts. Under the due process clause the American courts have a much wider latitude to declare special procedures as 'unconstitutional' as compared to their Indian counterparts though by making a very liberal use of Article 21 the Indian courts have brought the position almost on a par with the one obtaining in the U.S.A.

2. Articles 20, 21 and 22 of the Indian Constitution.
3. *Surrinder Singh* v. *State*, 67 Punj LR 149.
4. Children Act, 1960, Section 13(3).
5. *Ibid.*, Section 22.

Evaluation of Juvenile Justice

There is a well-founded general perception that a wide gap exists between the theory and practice of juvenile justice in India. The ground realities regarding juvenile justice are much at variance with the idealism projected through the legislation. A few factors responsible for this state of affairs are :

(*i*) There is no specialization among the personnel in the courts and police dealing with the juveniles.

(*ii*) There is a heavy work-load all around, in courts, police and probation services.

(*iii*) There is lack of coordination the various agencies viz. police, courts and probation officers and sometimes even conflicts.

(*iv*) Lack of proper planning and dearth of resources affect the quality and working of the institutions.

(*v*) There is hardly any public interest and support regarding juvenile delinquency and its control.

(*vi*) There is lack of proper and adequate evaluation of the work connected with the juvenile justice and effective follow-up action and remedies are, therefore, not possible.

THERAPEUTIC APPROACH—EVALUATION

In this and the last two chapters, the rationale and techniques of the rehabilitative ideal as manifested in prison reform, probation, parole and juvenile courts have been examined. The criticism against the juvenile court and its procedure having been noted already, the evaluation of rehabilitative philosophy in action may now be made. Obviously, no one can seriously object to the rehabilitative ideal as such, but what has been debated is whether it is really possible to reform a criminal and if so whether it is worthwhile to attempt it in view of the knowledge and skill available, the repercussions on the law-abiding citizens and having regard to the interests of the offenders to be reformed and rehabilitated.

Regarding the efficacy of therapeutic techniques it has been said that human beings are not putty that can be remoulded at will by benevolent intentions. The role of education and religion in reforming offenders has been questioned since a fair number of offenders do have good education and schooling and are fairly religious before being committed to corrective institutions. The records of juvenile offenders show that the reformation of even young offenders is not always possible. A number of studies made in the U.S.A. viz. Cambridge-Somerville Youth Study, the study made by two psychiatrists Hodges and Tait, and the one by Gaig and Furst, which commenced in 1939, 1954 and 1965 respectively, showed that there was no difference regarding the future criminal careers of juvenile delinquents given treatment and those not exposed to any treatment.

Pessimism regarding the potential of correctional techniques has emerged from quite a few other studies carried out in the U.S.A., a comprehensive study by Walter Bailey being an ambitious effort to test the extent of the efficacy of the correctional and rehabilitational measures.[6] After analysing a sample of 100 reports, two-thirds of them dealing with the 'sick' model of the offender in need of psychotherapeutic handling, Bailey concluded that it was quite clear that, on the sample of the outcome reports, with all its limitations, evidence supporting the efficacy of correctional treatment is slight, inconsistent, and of questionable reliability. Perhaps the most ambitious project demolishing the correctional and rehabilitational ideal has been undertaken by Lipton, Martinson and Wilks.[7] The team examined 231 treatment projects intensively from different angles and the central conclusion was that with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism. In a few studies, however, the researchers were able to discern some limited positive results in the context of "intensive milieu treatment directed at younger boys, group counselling of young first offenders, certain funds for individual psychiatric therapy given to younger adolescents, provisions of plastic surgery to selected cases".[8]

The reformists present the analogy of criminal law's possible efficacy to deal with offenders to the use of medicine in case of patients. The analogy is quite attractive and appealing but breaks down when it is considered that the surgeon can determine with a fair degree of accuracy the cause of the distress and remove it, as an inflamed appendix or cancerous growth, which is not possible in a complex social system for a social physician to do. He cannot find out any cause of criminalization even with a fair amount of certainty and remove it from the personality of the offender or from his social surroundings.[9]

To this it may also be added that while a patient is aware of his disease and desires to get rid of it and has faith in the healing art of his physician, such is generally not the state of affairs so far as the violators of law are concerned.

Considering the cost involved in the rehabilitative programmes, Cohen observes:

> "Suppose that fiendish perpetrators of horrible crimes on children could be reformed by being sent first for several years to a special hospital. Will people vote large funds for such purposes when honest

6. Walter C. Bailey : "*An Evaluation of 100 Studies of Correctional Outcome*", Journal of Criminal Law, Criminology & Police Science 57 (June 1966), pp. 153-60.
7. *The Effectiveness of Correctional Treatment : A Survey of Treatment Evaluation Studies* (Springfield, Mass : Praeger, 1975).
8. Shireman, Mann, Larsen and Young : "*Findings from Experiments in Treatment in the Correctional Institutions*", Social Service Review 46 (March 1972), pp. 38-59.
9. Cohen : *Moral Aspects of Criminal Law*, 49 Yale Law Journal 987, at pp. 1012-14.

law-abiding citizens so often cannot get adequate hospital facilities? Suppose that we find that a certain social environment or that an elaborate college course will reform a burglar or a gunman, would our community stand for the expense when so many worthy young people cannot afford to go to college because they have to go to work? We certainly should not give even the appearance of reward for criminality. Let us not forget that there is always a natural resentment in any society against those who have attacked it...."[10]

What has been said in the context of the affluent societies like the U.S.A. is certainly much more true of the developing countries where a substantial part of the population lives below the poverty line. How can employment be given to ex-convicts when millions of law-abiding citizens are unemployed or under-employed? Is it possible or even desirable to provide a balanced diet to the prison inmates when for millions outside it is difficult even to get two square meals a day? And is it possible to find resources to establish special schools and to appoint probation officers, psychologists, social workers and other personnel required to man the services to reform the delinquents when a country has yet to provide universal primary education to its teeming millions? These are economic and moral questions which cannot easily be answered. In the developed countries of Europe and North America only a small percentage of the population may suffer from poverty, illiteracy and unemployment compared to a majority of the persons in countries in the Third World. In affluent countries, therefore, whenever any factor is identified which rightly or wrongly is regarded as responsible for deviation, appropriate steps are feasible for the removal of the diagnosed cause. In developing countries, where there is mass poverty, unemployment and illiteracy it really makes no practical sense to identify criminality in terms of poverty, slums, illiteracy or unemployment. Nothing less than a total change in the approach to the socio-economic conditions of the society as a whole may produce any real change and even then there can be no guarantee that different and new kinds of crimes would not emerge, some of which may already be frequent in the developed countries.

There is a more basic argument against rehabilitative techniques that they are incompatible with the reformative objectives in the sense that curtailment of liberty, in any form or with any motivation, is bound to produce a reaction in the mind of the criminal which may not be conducive to the reformatory ideal. It was asserted long ago by Garofalo that the mere deprivation of liberty, however benign the administration of the place of confinement, is undeniably punishment. Whether it is the correctional programme in a prison or in probation or parole, the element of authoritarianism may provide the offender with new rationalizations for continued deviant behaviour.

10. Cohen : *Moral Aspects of Criminal Law*, 49 Yale Law Journal 987, at pp. 1012-14.

According to Dean Francis Allen, the rehabilitative ideal has adversely affected certain basic legal interest and values.[11] One casualty which he points out is the idea of deterrence, many modern criminologists being hostile to it. He asserts that criminal law has a general preventive function to perform in the interests of public order and of security of life and limb, and the influence of criminal sanctions on the millions who never engage in serious criminality is of greater social importance than their impact on the hundreds of thousands who do commit criminal acts.

Another very serious charge against rehabilitative techniques, as already dealt with in the context of juvenile courts, is the greater loss of individual liberty involved in the supposed rehabilitative programmes than probably under the ordinary process of law. Allen gives an extremely unfortunate example in the following words:

> "Some time ago we encountered a man in his eighties incarcerated in a State institution. He had been confined for some thirty years under a statute calling for the automatic commitment of defendants acquitted on grounds of insanity in criminal trials. It was generally agreed by the institution's personnel that he was not then psychotic and probably had never been psychotic. The fact seemed to be that he had killed his wife while drunk. An elderly sister of the old man was able and willing to provide him with a home and he was understandably eager to leave the institution. When we asked the director of the institution why the old man was not released, he gave two significant answers. In the first place he said, the statute requires one to find that this inmate is no longer a danger to the community; this I cannot do, for he may kill again. And of course the director was right. However unlikely commission of homicide by such a man in his eighties might appear, the director could not be certain. But, as far as that goes, he could not be certain also about himself or about you or me. The second answer was equally interesting. The old man, he said, is better off here. To understand the full significance of this reply it is necessary to know something about the place of confinement. Although called a hospital, it was in fact a prison, and not at all a progressive prison. Nothing worthy of the name of therapy was provided and very little by way of recreational facilities."

In the words of Allen, perhaps the case reflects that arrogance and insensitivity to human values to which men who have no reason to doubt their own motives appear peculiarly susceptible.[12]

Those who do not have faith in the prison's potential for therapeutic effects point out that the goals set for the prisons are ambiguous and vague and therefore difficult to achieve, there being no agreed definitions of

11. *The Borderland of Criminal Justice*, pp. 25-41.
12. Francis Allen : *The Borderland of Criminal Justice*.

'failure', 'success' or even recidivism in the context of the results of the prison confinements. The prisons do not have a representative sample of criminals from the community. Most of the factors believed to be causing criminality are outside the purview and control of enforcement agencies. Further, it is the judiciary who decides as to who should be 'rehabilitated' and, therefore, those who are engaged in correctional work have no control over the 'input', the persons assigned to prisons. Norman Carlson of the U.S. Bureau of Prisons is of the view that there will be in future less emphasis on rehabilitation. A more realistic approach would discard 'medical' model and prison programmes like education and vocational training would not be labelled 'treatment'.

Finally, the attack on the present rehabilitative programmes has come even from those who favour such programmes. It is on the ground of inadequacy of the resources available for rehabilitative techniques and the archaic nature of the legal system despite the introduction of new penology into it. In his well-known article, '*The New Penology : Fact or Fiction*?' Alfred C. Schnur came to the conclusion, after making various calculations on the basis of statistics in the U.S.A., that there is not more than 82 seconds of psychiatric help available for each inmate during a whole month. He observed:

> "It is appalling to realize that the average prisoners will have had about 30 hours of treatment time allocated to him during the time that he was withdrawn from society to make him safe for return to society. One cannot avoid concluding from this that such rehabilitation as does occur must be largely the consequence of prisoners' do-it-yourself projects. It should come as no surprise that so many men return to crime following such 'lavish' treatment programmes. It is, indeed, remarkable that there are not more recidivists."

The question posed by the title of the paper, '*The New Penology : Fact or Fiction*?', is answered by Schnur in these words: "I don't know. It has not been tried."[13] Probably the greatest handicap of the therapeutic approach lies in the fact asserted by Schnur that it has not really been tried so far and hence it is difficult to make a reasonable assessment of its potentialities.

But whether the therapeutic methods are at all *triable* in a country like India seems to be doubtful. It is, however, ironical that while in India, despite an abysmal record of implementation and achievements, there is lot of optimism regarding reformative and rehabilitative techniques, disenchantment with these kinds of programmes is already discernible in the countries of their origin having far more resources and experience of over one hundred years.

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13. Journal of Criminal Law, Criminology and Police Science XLIX (November-December, 1958).

Chapter IX

PREVENTION OF CRIME

Prevention of crime and juvenile delinquency like the prevention of any other phenomenon of an unpleasant and destructive nature is obviously much better than their subsequent control after they occur. Prevention of crime or delinquency can be achieved in a number of ways and contexts. When an offender is sent behind bars or is given capital punishment, he is prevented from committing further crimes during the period of his incarceration or forever, as the case may be. In fact the idea inherent in any form of punishment is to prevent the commission of crimes by the actual as well as the potential offenders. Prevention in the present context, however, is used by criminologists in a limited sense, i.e., forestalling criminal behaviour by taking advance action in terms of individual and environmental adjustments. In other words, prevention in this sense includes the efforts to improve family relationship, promote better adjustments in school, provision of education and recreation designed to produce useful and upright citizens and the use of aids in the fields of social work, medicine and psychiatry. It is evident that these programmes can be implemented in societies which are at least reasonably affluent. In countries like India, afflicted with mass poverty, the limitations of preventive programmes experienced elsewhere are bound to manifest themselves more severely.

It follows from the concept of crime prevention, as explained above, that the programmes for the prevention of crime and delinquency are to be directed not only to those who have already indulged in criminal behaviour sufficient enough to warrant cognizance by law enforcement authorities but also to those who either have manifested some tendency to suggest possible delinquency by them in future or who may be otherwise normal but because of individual or environmental factors operating against them criminal or delinquent behaviour can be expected from them. Though the preventive programmes do not pertain exclusively to the juvenile delinquents, they are obviously more relevant and useful in the context of young persons in view of the fact that the chances of a person turning criminal after reaching a certain age, when the values and attitudes are more or less fixed, are somewhat lower than in the case of persons of immature age and understanding.

Identification of Potential Delinquency

The timely identification of potential delinquents is implicit in the concept of crime prevention. Efforts have been made by some criminologists to devise methods for predicting delinquency in appropriate cases. The most

notable contribution in the area of early delinquency prediction is that of Sheldon and Eleanor Glueck. By employing actuarial methods, the Gluecks found that the quality of a particular set of circumstances made it possible to differentiate between future delinquents and non-delinquents. The circumstances considered by them were: discipline and supervision of a boy by his father and mother, affection of father and mother for the boy and cohesiveness of the family.

Prediction tables, as developed by the Gluecks and also by others, however, cannot be very reliable. While the tables developed by the Gluecks have resulted in overprediction, some other tables suffer from the shortcoming of underprediction. While underprediction of future delinquency means that many cases of future delinquency may go unnoticed and, therefore, unattended, the overprediction is that even cases where there may be no actual delinquency would be subjected to preventive measures—a contingency which has been questioned both on practical as well as moral considerations.

Kinds of Programmes

The prevention programmes may take one of two forms, *viz.*, programmes focussing on an individual and programmes having an environmental orientation. The former involves the prevention of delinquency through counselling, psychotherapy and proper education while the latter approach employs techniques with a view to changing the socio-economic context likely to promote delinquency. These two forms of preventive approach are reflected in the following strategies which are adopted in crime prevention programmes.

Psychiatric Clinics

The object of psychiatric aids through psychiatrists, clinical psychologists and psychiatric social workers is to help potential delinquents by understanding their personality problems and, thereafter, treating and counselling them at appropriate times. Taft and England have listed the functions of psychiatric clinics as follows:[1]

(*i*) To participate in the discovery of "pre-delinquents".
(*ii*) To investigate cases selected for study and treatment.
(*iii*) To treat cases itself or to refer cases to other agencies for treatment.
(*iv*) To interest other agencies in the psychiatrically-oriented types of treatment of behavioural disorders in children.
(*v*) To reveal to the community un-met needs of types of children.
(*vi*) In some communities, to engage in behavioural research.
(*vii*) To cooperate in the training of students intending to specialize in the treatment of behavioural problems.

1. *Criminology, op. cit.*, p. 524.

The psychiatry-oriented sciences and services suffer from serious handicaps even in extremely advanced countries such as the U.S.A. in which context George Ablee has commented as follows:[2]

> "These clinics are treating the wrong people ; they are using the wrong methods; they are located in the wrong places; they are improperly staffed and administered."

The availability and scope of psychiatric services in countries like India can be well imagined.[3]

The question whether child guidance clinics are successful or not is difficult to answer, since the concept of 'success' itself is both subjective and relative. The perception of 'success' has been found to be different, as can be expected, among the children themselves, the policemen, parents, teachers and foster parents. Taft and England raise some pertinent questions:[4]

> "It is difficult to evaluate the child guidance clinic as a crime prevention agency. Shall we judge it in terms of its success with the juvenile recidivist, or shall we hold that its role is with relatively simple and earliest beginnings of behaviour problems? Shall we measure its success as of the date when it ceased treatment, and if so shall we consider cases dealt with for the minimum or for the maximum periods? Or shall we expect the 'cure' to last into the future after the clinic has ceased to function? What, again, shall be the test of success? Must angelic, or average, or only slightly improved behaviour define a successful case?"

Educational Programmes

Unlike India, in countries where almost every child goes to school the impact of educational institutions is very significant and preventive programmes can, therefore, be launched in an effective manner through the schools. Three goals of school education have been suggested in this context.[5]

(*a*) Developing a new value system in which the school would be a force working against the discrimination and rejection experienced by pupils drawn from the lower classes.

(*b*) Making the schools an instrument for fostering work attitudes, self-esteem and job skills to improve the employability of graduates of schools in deprived areas.

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2. George W. Ablee, "*A Spectre is Haunting the Outpatient Clinic*" in Alan B. Tulipan and Saul Feldman (Eds.), *Psychiatric Clinics in Transition*, (1969) pp. 1-24.
3. According to a report in the Times of India of July 20, 1976, there are in all not more than 500 trained psychiatrists in India.
4. *Criminology*, *op. cit.*, p. 525.
5. William E. Amos, "*Prevention through the Schools*" in *Delinquency Prevention : Theory and Practice*, pp. 132-35.

(*c*) Providing school experiences designed to improve the self-image of delinquency-prone children.

Recreational Programmes

There is a popular belief that recreational programmes are a good check on delinquency since idleness provides a fertile ground for many evils. It is believed that the energies of youth can be very well channelized into pursuits like sports, games and other healthy activities which would counteract delinquent propensities among the participants.

The popular belief regarding the efficacy of recreational programmes has not, however, found support in a number of studies. In 1957, a sub-committee of the U.S. Senate reported:[6]

> "(1) Being a good athlete is no deterrent at all to delinquency; (2) experience in team-play through recreation can have no significant amount of carry-over to general character traits or conduct patterns; (3) even highly organised recreational activities do not absorb enough of the energy or time of the child to at least appreciably decrease his opportunities to engage in delinquency; (4) in fact, a play group may itself help to stimulate its members to illegal activities engaged in for fun after the games are over. The probability of this is increased when there are delinquent or near-delinquent members in the group; (5) many of the recreational programmes do not in any event reach those children who are presumed to need them most because of their problems of health or delinquency; (6) if a child is disposed towards law violation because of the influences of the family and neighbourhood, his early training, his personality distortions or his attitudes towards an authority, it will require much more than games and sports to do anything effective about it; (7) where children have come to enjoy their delinquency as games, so commonly the case, the thrills thus provided are usually greater than those which organized recreation can provide."

It is clear from the above report that not only do the programmes lack reaching power and crime prevention efficacy, they may in fact promote delinquency sometimes.

Community Programmes

The strategies discussed above are mainly directed to individuals with a view to eliminating the factors responsible for their social maladjustments. Besides these there are programmes involving community and group participation where efforts are made in terms of environmental factors. The basic strategy of such programmes is to reach the people in need of help instead of the people approaching the workers and agencies. Another significance of such programmes is that the participation of the local community is

6. *Juvenile Delinquency*, Report of the Committee on the Judiciary (Washington, U.S. Senate, 85th Congress, First Session, 1957), quoted in Walter C. Reckless, *op. cit.*, p. 777.

considered to be more important and the role of professional leadership is sought to be kept at the minimum level.

Marshall B. Clinard has outlined the key assumptions of these programmes as follows:[7]

(*i*) Local people will participate in efforts to change neighbourhood conditions,

(*ii*) because they do not accept an adverse social and physical environment as natural and inevitable, and

(*iii*) because self-imposed changes in the immediate environment will have real significance to the residents and consequently will have more permanent effect.

The Chicago Area Project and detached workers' programmes in the U.S.A. are among the most notable programmes based on these premises.

Functioning since 1934, the Chicago Area Project is one of the oldest community programmes in the U.S.A. This project was founded by Clifford R. Shaw who conceived that the local leadership of high delinquency areas had a more useful role than the professionally trained workers. The advantages available to the local leadership are that they are more familiar with the area conditions and have better communication with the residents. Moreover they have greater involvement in the local problems and can be more efficacious in finding the required financial resources.

The distinguishing feature of detached workers' programmes is that though the workers may be associated with social agencies, they do not work within the agency walls. The workers try to reach the 'street-corner gangs' in order to provide assistance and guidance to the members of the gangs. These programmes were launched when the experts on delinquency found recreational programmes to be inadequate for dealing with delinquents. The function of the worker in these programmes is to act as an adult friend for moulding their values in order to make their behaviour socially acceptable. The mechanism of the change in values is explained by Dr Walter B. Miller thus:[8]

> "The process of inducing changes in the value configuration of the group is predicted on the existence of substantial support for the maintenance of law-abiding behaviour within the value system of the lower-class community itself. Hence, shifting the groups' values from an emphasis on law-violating behaviour as a basis of prestige to an emphasis on law-abiding behaviour entails increasing the availability of law-abiding avenues to valued ends already present in the groups' own

7. Quoted in Elmer Hubert Johnson, *Crime, Correction and Society* (1974) p. 553.
8. Walter B. Miller, *Preventive Work With Street-Corner Groups : Boston Delinquency Project*, The Annals of the American Academy of Political Science, Vol. 322, March 1959, pp. 98-106, quoted in Reckless, *op. cit.*, p. 787.

cultural milieu. The method thus aims to affect individual behaviour by altering the value configuration of the group that exerts most immediate influence on external behaviour."

According to Dr Miller, the corner-group method of inducing behavioural change in adolescent groups has an excellent potential for controlling delinquency during the years of adolescence.

Attendance Centres

Apart from the techniques employed to deal with children by the juvenile courts discussed above, there is one more which is used in England and some other countries. It requires the juvenile delinquents to spend their leisure period at prescribed places known as attendance centres. Attendance centres are a post-war innovation intended to vindicate the law by imposing loss of leisure, a punishment that is generally understood by children to mean bringing the offender under discipline for a period and, by teaching him something about the constructive use of leisure time, to instruct him to continue organised recreational activity on leaving the centre by joining youth clubs or other organisations.[9] The loss of leisure is imposed on the delinquent by making it obligatory for him to present himself on fixed days at certain hours, generally for two hours on connective Saturdays, to participate in physical exercises and handicrafts under the supervision of a police officer. The philosophy of the attendance centre has been derived from the researches of some criminologists who found a correlation between the leisure available to a child and his delinquent behaviour. In a study of 501 problem children in foster families, Healy, Bronner and two others came to the conclusion that nothing in the treatment of delinquency is so effective as the development of substituting activities and interest.

According to Sullenger, more than 90 per cent of delinquent acts are committed during leisure time.[10] Cyril Burt expressed the same sentiment when he observed that most of the juvenile offences were committed in the afternoon when the delinquents have more leisure.[11]

In its Report on Juvenile Delinquency (1956) the Bombay Child Welfare Society disclosed that in Bombay 15 per cent of the juvenile offences were committed before 11 a.m., 50 per cent between 11 a.m. and 4 p.m. and 35 per cent after 4 p.m. but before 7 p.m.

From the above studies it may not be very accurate to infer that offences during certain hours are directly attributable to the leisure available to children at that time. Maybe victims of the delinquent acts also have more leisure around those very hours giving better opportunity to the offenders

9. *Ingleby Report 1960*, quoted by Nigel Walker in *Crime and Punishment in Britain*, p. 187.
10. *Social Determinants in Juvenile Delinquency* (1936).
11. *The Young Delinquent* (1938) p. 160.

by being away from homes or occupied elsewhere. Nevertheless the fact remains that there is a significant relationship between leisure and delinquency since an idle mind is rightly regarded as the devil's workshop.

Vagrancy Laws

The object of these laws is to take preventive action against vagrants who may be a potential source of criminality. A vagrant is an idle person who is without visible means of support and who refuses to work despite the ability to work. England had vagrancy laws in the eighteenth century. Almost all the American States have adopted the English laws though now the main purpose of these statutes is "no longer the control of labour but rather the control of the undesirable and the criminal". Vagrancy type statutes are regarded as essential criminal preventive measures which enable the police to arrest, investigate and detain suspected persons. Persons indulging in disorderly public behaviour, drunkenness and loitering are included in the vagrant 'type'.

The beginning of vagrancy laws in England is to be found in a statute of 1349 which made it a crime to give alms to any person unemployed voluntarily in spite of being of sound mind and body. In 1351 it was further provided that none shall go out of the town where he dwelled in winter to serve in the summer, if he may serve in the same town. These laws have been attributed to the interests of the landlords to whom less and less labour was available due to the drastic reduction in the number of labourers, epidemics and crusades taking a heavy toll of them. The whole idea was to discourage immigration in order to get labour and that too at a cheaper rate. Severe punishments were provided by way of penal sanctions and legislation continued further in the direction of focussing attention on loitering, rogues, vagabonds and sturdy beggars. While the earlier statutes commencing from 1349 were directed more towards those who refused to labour, by 1743 a shift in emphasis was discernable with more focus on the unlawful activities of rogues and vagabonds, a position which continues up to the present times.

Developments in India

Shortly after the advent of the East India Co., the first vagrancy type law of India was framed in Bengal under Section X of the Bengal Regulation XXII of 1793. It provided, inter alia, that the *darogha* could arrest any number of certain specified tribes who might be lurking about in his jurisdiction without any ostensible means of subsistence and was unable to give a satisfactory account of himself. The person apprehended was then forwarded to the magistrate, who if satisfied that the person was "disorderly or ill-disposed", could employ him for some "public works" until he was able to arrange "a security for good behaviour" or could find someone willing to employ him. Many more regulations dealing with the problem of

vagrancy were subsequently passed in the three Presidency towns. The problem of vagrancy was not confined to Indians alone but "numerous persons of European extraction" were also found "wandering in destitute condition" and such state of affairs appeared to be "prejudicial to public order". To meet the situation the European Vagrancy Act XXI of 1869 was enacted. Almost similar provisions found their way into the Criminal Procedure Code of 1861. Sections 109 and 110 of the Criminal Procedure Code of 1898 continued to incorporate the same policy regarding vagrants. Section 109(*b*) empowered a magistrate of the first class to secure a bond with security for good behaviour from a person found in his jurisdiction having no ostensible means of subsistence or unable to give a satisfactory account of himself.

It is evident that vagrancy provisions such as those mentioned above have a good potential for abuse of police powers and the desirability of such provisions has, therefore, been questioned. The Law Commission in its Thirty-seventh Report considered the issue in the context of the new democratic and constitutional set-up of the country. The Commission, however, did not find anything unconstitutional regarding the provisions and no need was felt by it to alter the existing position. The provisions, however, did not find a place in the new Criminal Procedure Code of 1973.

Some other provisions, which can be invoked in vagrancy and other problems are to be found in the Code of Criminal Procedure and the anti-beggary legislation enacted by the various States in the country. Sections 106 and 107 of the Code of Criminal Procedure are basically meant to prevent the commission of offences disturbing peace and public tranquility while Section 108 aims at preventing the spreading and distribution of seditious and defamatory material.

Habitual Offenders

Recidivism as a phenomenon raises questions which penology finds difficult to answer. What is to be done to habitual offenders who repeatedly commit crimes and on whom the punishments given do not have any deterrent or reformative impact? According to Dr D.J. West, habitual offenders may be either mentally normal human beings or mental deviants. There are two kinds of mental deviants, i.e., those who are active aggressive deviants possessing psychopathic characteristics and the other type who are called passive inadequate deviants.[12] While in the case of mentally normal offenders, it may possibly be argued that some appropriate punishment may have a corrective impact it certainly cannot be said to be true about habitual offenders who cling to a criminal career due to their mental deviation. Surely prisons are not the answer to the problems posed by them. The solution lies

12. *Habitual Offenders*, Institute of Criminology, University of Cambridge, 1962.

in the therapeutic diagnosis and appropriate treatment which in the Indian context is almost impossible at present.

In India the problem of recidivism has been sought to be tackled in three ways, i.e., by providing for longer punishments in certain situations, keeping track of the movements of the offender after his release from prison, and taking preventive action in the nature of security for good behaviour from a habitual offender.

The provision for longer sentences is to be found in Section 75 of the Penal Code. The section lays down that persons once found guilty of any offence under Chapter XII or XVII of the Code[13] and sentenced to a term of three years or more imprisonment, may be awarded life imprisonment or imprisonment up to a 10-year term if again found guilty of any offence under any one of the two chapters.

Longer sentences have their shortcomings.[14] Not only are they quite unnecessary and even futile sometimes, they are highly demoralising to the offender. A human being with no hope in the future is not likely to derive any benefit from his incarceration. The other inmates may, on other hand, be adversely affected by being in contact with hardened and insensitive souls. Anyway, the courts have been extremely lukewarm in applying Section 75 of the Code. It has been emphasised by some of the High Courts that though Section 75 enables the courts to give enhanced punishment in certain cases, the provision is not of mandatory nature and hence should be applied discriminately.[15] *Kasim Ali* v. *Emperor*[16] illustrates as to how the courts drag their feet so far as enhanced punishments under Section 75 are considered. It was held in that case that Section 75 should not be applied mechanically and when the appellant yielded to the sudden temptation of pickpocketing, a heavy sentence was not justified.

The Law Commission of India has recognised the utility of Section 75 of the Penal Code for protecting the public against persistent offenders.[17] The Commission was of the view that there was no reason to confine the application of the provision to offences relating to coins and stamps and offences against property and, therefore, recommended the extension of Section 75 to all the offences under the Code punishable with imprisonment up to three years or more. They also recommended that Section 75 ought not to be applied where there was no imprisonment on the last conviction but some other course like fine or probation was adopted. Further, it was recommended that the provision for enhanced punishment be applied only

13. These two chapters deal with offences relating to stamps and coins and property like theft, extortion, robbery and dacoity.
14. *See* under Imprisonment in Chapter XI *infra*.
15. *See* 1957 Cri LJ 275.
16. 7 Cri LJ 293.
17. Forty-second Report, pp. 78-80.

if the subsequent offence was committed within three years of the offender's release from the prison for the last offence committed by him.

The Commission is fully justified in recommending an extension of the provision to the other offences but there appears to be no adequate reason for not applying the provision if the subsequent offence takes place after a certain period of time. It would be better if the judicial discretion is not controlled by any such stipulation so as to enable them to adjust the sentence according to the peculiar circumstances of a case.

The Penal Code Bill of 1972, however, incorporated almost all the recommendations of the Commission with minor variations[18] :

> "Whoever, having been convicted by a court in India of an offence punishable under this Code with imprisonment of either description for a term of two years or upwards, commits within five years from the date of his final release from prison after serving that sentence, any offence punishable under this Code with imprisonment for the like term, shall be subject for every such subsequent offence to imprisonment for life, or to imprisonment of either description for a term which may extend to ten years."

The other strategy adopted in India is to impose certain obligations on the convict in order to enable the Government to keep itself informed about his movements. This has been provided under the various Habitual Offenders Acts passed by the various States and also under Section 356 of the Criminal Procedure Code of 1973 which, *inter alia*, provides as follows :

> "When any person, having been convicted by a court in India of an offence punishable under Section 215, Section 489-A, Section 489-B, Section 489-C or Section 489-D of the Indian Penal Code, or of any offence punishable under Chapter XII or Chapter XVII of that Code, with imprisonment for a term of three years or upwards is again convicted of any offence punishable under any of those sections or chapters with imprisonment for a term of three years or upwards by any court other than that of a magistrate of the second class, such court may, if it thinks fit, at the time of passing a sentence of imprisonment on such person, also order that his residence and any change of, or absence from, such residence after release be notified as hereinafter provided for a term not exceeding five years from the date of expiration of such sentence."

The State Governments have been empowered to make rules to carry out the provisions of the sub-section reproduced above. In many States, Habitual Offenders Acts have been passed which have probably been enacted because orders are seldom passed under Section 356, CrPC (Section 565 of

18. Clause 30.

the old Code).[19] No doubt such a provision is not in consonance with individual freedom and dignity but it should be accepted as a necessary evil based on rational considerations.[20] There appears to be no alternative to the conditions obtaining at present.

The idea of penal colonies where habitual offenders may be made to live with their families and allowed to work has been mooted by some criminologists. Compared to prisons, the penal colonies may be better in certain aspects but stigmatisation and contamination of the families of the offenders is a serious potential risk. A system based on the frequent and efficient application of Section 356, CrPC and analogous provisions of the Habitual Offenders Acts can produce good results to some extent if integrated with adequate probation and after-care programmes.

The Habitual Offenders Acts in the various States provide the law and procedure for the registration of habitual offenders which make it possible to take certain regulatory measures against them. The regulatory measures which may be either coercive or corrective are as given below. Such measures are also possible under some other enactments.

Coercive Measures

1. Reporting by the Habitual Offenders.—An order may be issued by the District Magistrate that the offender report to the police at fixed intervals and inform of his actual or intended absence from his usual place of residence.

2. Reporting about Residence.—The registered offender must notify his place of residence including any intended change to the police.

3. Restrictions on Movements.—A notification can be issued by a competent authority restricting the movement of the offender within a certain specified area. The superintendent of police may authorise a police officer not below the rank of a sub-inspector to take the roll-call of the offenders at notified intervals.

4. Domiciliary Visits.—The police officer may visit the house of the offender anytime to check his whereabouts and make appropriate enquiries regarding his movements.[21]

5. Externment.—Externment is yet another method by which the recidivists are dealt with to prevent crimes. The rationale is that an externed offender may not be able to operate criminally in a new place as effectively as in his own familiar area. Externment is possible under the various Police

19. Kripal Singh Chhabra, *Quantum of Punishment in Criminal Law in India* (1970), p. 196.
20. Only a few States like U.P. and Maharashtra have enacted provisions for reformatories where recidivists can stay for three years after release.
21. But as laid down in *Gobind* v. *State of M.P.*, (1975) 2 SCC 148, such visits must be reduced to clear cases of danger to community's security only. Earlier, in *Kharak Singh*, AIR 1963 SC 1295, domiciliary visits were held to be violative of Art. 21 of the Constitution.

Acts. The order is passed when the presence of gangs or a body of persons is causing alarm, or when a person is just about to commit a crime or when someone has been convicted of a crime such as violation of any prohibition, customs or anti-immoral traffic law or law relating to coins and government stamps.

The Constitution permits preventive detention with certain safeguards and certain legislations specifically provide for it. Among such enactments are: (*i*) The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, (*ii*) The Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities, 1980, and (*iii*) the National Security Act, 1980. Under these enactments a person is liable to detention without trial or the ordinary procedure of law. Though not as such designed for habitual offenders, these Acts can be used against them in appropriate circumstances.

Corrective Measures.—Under the State law dealing with habitual offenders, corrective institutions may be setup for offenders to be selected on the basis of age, state of health and other factors. The maximum age limit is generally 40 years. Labour or some suitable work is provided to the inmates of these institutions.

Security Bond.—Section 110 of the Criminal Procedure Code deals with the preventive action to be taken against habitual offenders. Under the provision, security for good behaviour may be required from habitual offenders. Section 110 contains a long list of offences which by their nature, can be committed repeatedly by those indulging in them. The security bond acts as a brake to their criminal activities. In short, the offences included are (*a*) property offences, (*b*) socio-economic offences, (*c*) offences disturbing public tranquility, and (*d*) offences of kidnapping and abduction.

Situational Prevention.—The preventive actions and strategies been described above are of general nature. In other words, they relate to the general measures of crime prevention which may have an impact in the long run. There may be, on the other hand, some specific measures to prevent or reduce crimes with the aim of eliminating or reducing the opportunities for the commission of crimes. As would be seen, such measures have greater potential against non-violent property crimes which, almost universally, constitute the bulk of the crimes; the offences against person and property involving violence are much less frequent. In India, crime statistics published over the years by the Home Ministry of the Government of India show that the maximum number of offences are of petty thefts. In England, a survey revealed that there was no forcible entry in 30 per cent of the cases of domestic burglaries.[22] All this goes to show that a large number of property offences can be prevented by methods designed for improved security.

22. *Criminal Justice—A Working Paper*, (revised Edn.), Home Office, London, 1986, p. 8, cited by Lord Windlesham in *Response to Crime* (1987) p. 286.

A report of an Inter-Departmental Group on Crime set up under the aegis of the Home Office in 1983 brought out the "importance of the setting in which crime occurs, stressing that crimes result not only from the motivation of the offender but also from the *situation* in which he finds himself".[23]

Situational prevention, especially in the context of property crimes in the urban areas, may require better lighting and alarm systems, more caretakers and entry phones to flats and devices which may enhance chances of detection. These measures along with others may also have some potential in violent crimes. Special efforts are to be made in violence-prone areas and situations. Some of the common risks of violence are associated with late night travel on buses and trains and public places of consumption of liquor. In India, violence is commonplace during elections of all kinds, e.g. elections for national and State legislatures, local bodies and even university and college unions. Much violence can be prevented in these settings if appropriate and earnest action is taken at the right time. Similarly, many communal clashes can be averted if properly anticipated and dealt with by the political and administrative machinery.

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23. *Criminal Justice—A Working Paper*, (Revised Edn.), Home Office, London, 1986, p. 8, cited by Lord Windlesham in *Response to Crime* (1987) p. 289.

Chapter X

THE POLICE

The ideal purpose of the police in a community can be best described in the following words which spell out the duties of law enforcement officers as laid down in the International Code of Enforcement Ethics:

> "As a law enforcement officer, my fundamental duty is to serve mankind; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence and disorder; and to respect constitutional rights of all men to liberty, equality and justice."

But paradoxical as it may sound, it is a universal phenomenon that the police have been criticized and condemned for committing the very acts which are just contrary to the cherished ideal expressed in the above words. The basic cause of such an unfortunate situation is that the powers which are given to the police to fulfil their legitimate and essential functions are capable of being abused by them to torture mankind, to destroy lives and property, to oppress and intimidate the weak and to trample the constitutional rights of the community as well. Whether policemen are solely to blame for the notoriety they have earned, whether their misdeeds have been exaggerated, are questions which involve the consideration of a number of issues regarding the functions of the police, the social milieu in which they live and work, the quality and number of persons and other resources available to the police force and various constitutional and legal limitations within which they have to operate to produce the desired results.

Functions of the Police

The traditional function of the police, which remains the most important even today, is to deal with the criminal in action. This function requires detection and investigation of crime, arrest of the offenders and the collection of evidence against those who are prosecuted in the courts of law.

Another purpose of the police force is to effect prevention of crime. Traditionally this function involves patrolling by the police and preventive action against potential wrongdoers under the vagrancy laws. In a more modern context, the prevention of crime by the police includes the detection of juvenile delinquency and the reference of suitable cases to the juvenile courts and other correctional agencies.

The third function of the police is owing to the growth of certain problems of the contemporary period involving the enforcement of a wide variety of regulations which are not concerned directly with the criminal :

direction of automobile traffic, enforcement of sanitation and licensing regulations, control of crowds, action against obscene literature and films, civilian defence and disaster duty.

The police in India has to perform all the functions enumerated above as in other countries, but their burden is exceptionally heavy due to the peculiarities of the socio-economic life of the community, heterogenous nature of the population and the existence of almost all the political philosophies. To quote R. Prabhakar Rao, a police officer from Andhra Pradesh :

> "In fact one can say that for the variety of law and order problems, few countries can compete with ours. Every conceivable type of conflict in society is possible in our country due to its widely diverse sociological groups. Political elements of every conceivable shade from extreme conservatives to the Maoist reds, religions, castes, communities, sects, sub-sects by their hundreds and glaring economic disparities, all combine to make a fertile breeding ground for conflicts. Instances are not wanting when an injured cow or a slogan on a mosque or disfiguring of an unworshipped idol have led to large-scale clashes. Similarly, quarrels at water taps or common wells or at cinema queues have sometimes developed into major conflagrations. A traffic accident, an objectionable scene in a cinema, quarrel between a student and a bus conductor have proved sufficient bases to build up mass violence resulting in looting or damaging public and private property and assaults on innocent persons. The rise of senas and local organisations with the avowed intention of playing up feelings of citizens on local issues projecting them completely out of focus has been a disturbing feature. Goonda elements with their vote-catching power have been becoming more and more active. We also see the gradual deterioration of the 'politics of opposition and politics of agitation' into 'politics of mass violence'. Hartals, bandhs, gheraos, self-immolations, holding up of trains have become daily features . . . ."[1]

Prof H. Bailey makes a similar observation in the following words:

> "Crime in India is bewildering in its variety; the police must cope with a range of crime as diverse as any in the world. While people are vicious to one another in India in much the same ways that they are in the West, what distinguishes the Indian scene is the enormous variety of circumstances within which crime becomes manifest. It is the richness of social and geographical conditions that gives to Indian crime its incredible and fascinating heterogeneity. Only in a country which, as someone has remarked, is advancing in uneven stages from the first to the twentieth centuries could one have cattle thievery and insurance

1. *Police in a Developing Society* (Osmania University Publication, 1972) p. 99.

frauds, dacoity and stock swindles, murders for witchcraft and vehicular homicide".[2]

How far is the police in India capable and adequate of meeting such a stupendous challenge? What are the various obstacles which the police face while discharging their functions? To answer these and other related questions, let us first understand the present structure of the Indian police force with reference to its roots in the past since many of the present-day problems may be understood better in the historical perspective.

Development of Police Organization in India

Police force, of some kind or the other, has always been present in all civilized societies from times immemorial. In India also, the police organization in various forms dates back to very ancient times. Even in old epics like the Ramayana and Mahabharata there are references to the existence of police organizations. Manu, the great law-giver of India, dealt with the subject of police at length and recommended that the police administration should be entrusted to those persons only who had knowledge of local people and the region for the efficient enforcement of law and order, a proposition held to be valid even in the contemporary period. In India, throughout its recorded history, there have been two distinct police systems for rural and urban areas. The duality was there during the periods of Maurya, Gupta and Moghul empires and persists to some extent even today. The imperial powers did not assume the direct responsibility of maintaining law and order for the rural areas. It was left to be taken care of by the local dominant landowner or the village headman who were accountable, in theory, to the subordinate officers of the empire who did not exercise their authority to interfere very often.

The imperial governments maintained a more elaborate police system in the cities and towns where a *kotwal* used to be the head of the police administration. Although the post may date back to Mauryan times, the clearest description of its activities comes from Moghul sources, especially the *Ain-i-Akbari*. The *kotwal* was to raise and maintain a police force, to regulate night patrolling, to maintain surveillance over visitors, spies and migrants, to arrest criminals, to keep the prisons and to eliminate prostitution and consumption of alcoholic beverages. The position was coveted by many, particularly for the opportunities it provided for extortion and receiving bribes. The *kotwal* is usually pictured as being ruthless, cruel, arbitrary and effective when it was in his interest to be.[3] But there was nothing unusual in the *kotwal's* being oppressive, ruthless or arbitrary since the police in India has always been credited with like qualities. Commenting on the

2. *The Police and Political Development in India* (Princeton University Press, 1969) p. 106.
3. Bailey, *op. cit.*, pp. 38-39.

eighteenth century police situation, the Police Commission of 1902-1903 observed :

> "Extortion and oppression flourished unchecked through all gradations of officials responsible for the maintenance of law and order."[4]

The East India Company started its commercial activities in India in the year 1706 and found itself wielding political power by the middle of the next century over a substantial territory, particularly in the Presidencies of Calcutta, Bombay and Madras. The company did not touch the existing police system up to 1792 when Lord Cornwallis, for the first time, took police administration out of the hands of the large landowners and introduced a new police force responsible to the company. Under the new scheme, the post of *darogha* was created in every district. *Daroghas* were made responsible to the district judges and it was their responsibility to supervise the village landowners and headmen policing the villages. Professor Bailey quotes John Beames[5] to give a graphic account of the personality and power of the *darogha* :

> "They ruled their territories like little kings. Their misdeeds were legion and always went unpunished, for who would have the temerity to report him to the Collector. The *darogha's* powers of harassment were enormous; he could have a person indicted for harbouring a bad character or failing to assist an officer in arresting a criminal. Obtaining witnesses presented no problem to the *darogha*. They were close to the people and were themselves wily and unscrupulous enough to meet the criminal on his own ground."

Beames is also quoted to have credited the *daroghas* with being splendid detectives.

The *darogha* system failed to deliver the goods, in particular they failed to supervise the village police and the scheme was eventually abrogated in the three Presidencies in 1814 when the traditional village police system was reintroduced. In the new system, the Collectors through their subordinates became responsible for the law and order problem in their districts. The *darogha* was, however, found indispensable in Bengal and continued to survive the onslaughts of the scheme of 1814. Despite the abolition of the *darogha* system, the situation continued to be chaotic as reflected in increased crimes like dacoity and overall insecurity.

The opportunity for reformation was provided by the conquest of Sind by Sir Charles Napier in 1843. Sind had neither the revenue system headed by the Collectors in the districts nor the village police system prevalent in other territories controlled by the East India Company and

4. Government of India, *Report of the Indian Police Commission, 1902-1903*, p. 5.
5. John Beames, *Memories of a Bengal Civilian* (London : Chatto and Windus, 1961) pp. 140-41.

Napier had, therefore, an absolutely clean slate in Sind to create a police organization on a new pattern. He used as a model the Royal Irish Constabulary. Napier created a separate police organization directed by its own officers. The direction of the police force was in the hands of an inspector-general of police throughout the provincial territory; it was with the superintendent of police in each district. The responsibility for law and order was assumed by government through the Collector, but the mechanics of police administration was entrusted to a new, functionally specific, department.[6] The model was adopted in other provinces also subsequently and it provides, even today, the basic structure of the police in the country.

This was the situation regarding the police system when the country was taken over directly by the British Crown in 1858 after the abortive mutiny of 1857. The next few years saw hectic activity in the legislative field and two basic criminal codes, viz., the Indian Penal Code and the Criminal Procedure Code which were enacted in 1860 and 1861 respectively. With the two criminal codes coming into existence, it was imperative to have a police code for the implementation of criminal law in the country. The Government therefore appointed a Police Commission in the year 1860 and its recommendations provided the basis for the Police Act passed in 1861. There was, however, nothing very new in the Act of 1861 which only extended the system already prevalent in various parts of the country to the entire British Indian territory. Despite the many political changes which have occurred since then, including the grant of independence to India, the police organization even today rests largely on the policy laid down in the Act of 1861.

The Police Commission of 1860 established the following principles of police organization :

(1) Military police were to be eliminated and policing was to be entrusted to a civil constabulary.

(2) Civil police were to have their own separate administrative establishment headed by an inspector-general in every province.

(3) The inspector-general was responsible to the provincial government as the Superintendent was to the civilian collector.

(4) The superintendent was to supervise the village police.[7]

In 1902, Lord Curzon appointed a new Police Commission which criticised the police force on grounds of corruption and inefficiency but did not, however, make any substantial recommendations.

6. Bailey, *op. cit.*, p. 44.
7. *Id.*, p. 45.

Present Police Structure and Organization in India

Under the Constitution, police is a state subject and only residuary powers have been vested in the Centre. Under the residuary powers, the Centre controls the Central Bureau of Investigation, Central Reserve Police and the police forces of centrally administered territories. The items 'police' and 'public order' are specifically included in the State list. There are, however, certain other features of the Constitution which indicate that the Centre, if it so desires, can intervene in the law and order problems of the States in certain situations. Under Articles 256 and 257, the executive power of the States is subordinate to that of the Union. Parliament is empowered to transfer any subject from the State list to the concurrent list in the national interest.[8] The Centre has the duty to protect the States from internal disturbances.[9] This right of the Centre has been considered in detail by a committee headed by J.N. Bhagwati, a former judge of the Supreme Court.[10] The committee was inclined to recommend the transfer of 'law and order' subjects to the concurrent list of the Constitution.

One reason for assigning the subject of police to the States and not to the Centre is that in a democratic set up it is considered more desirable that the law enforcement bodies should have roots in the localities where they operate. A police force brought from outside may alienate the local people and it may not be easy for the police to act effectively in such a situation. The policemen belonging to the local or adjoining areas have the advantage of knowing the conditions and the people rather intimately. In England, this is the rationale for entrusting the local bodies with the law and order problem. In the U.S.A., the police forces are maintained both by the State as well as by the local bodies. There is no doubt that local police has its advantages but, as such, it does not provide any guarantee that the rule of law shall be respected more by the local police as compared to the federal or national police. The observations of a British Police Commission are illuminating in this context :

> "British liberty does not depend, and never has depended, upon any particular form of police organization. It depends upon the supremacy of Parliament and on the rule of law. We do not accept that the criterion of a police State is whether a country's police force is national rather than local—if that were the test, Belgium, Denmark and Sweden should be described as police States. The proper criterion is whether the police are answerable to the law and ultimately, to a

8. Article 353.
9. Article 355.
10. Kerala Enquiry Committee.

democratically elected Parliament.... In the countries to which the term police State is applied opprobriously... the foundations upon which British liberty rests do not exist."[11]

Classification and Stratification

The Indian police is classified vertically and stratified horizontally. The classification is in two categories, viz., armed and unarmed police wings. On this point India is different from both Britain and the U.S.A. In the U.S.A. every policeman is armed while in England arms are not provided to any policeman. The unarmed police do most of the routine work of patrolling, prevention and investigation of crime while the armed branch is made use of in situations involving violence or physical force as in dealing with riotous mobs or for guard duties in banks or important public places or buildings.

The policemen are divided into a number of categories according to their status in the hierarchy. At the top in every State there is the Inspector-General followed by a number of Deputy Inspectors-General and other officers down to the Constable. The Inspector-General, Deputy Inspectors-General, Superintendents and Assistant Superintendents from the superior service group belonging to the prestigious Indian Police Service while Deputy Superintendents, Inspectors, Sub-Inspectors, Head Constables and Constables are appointed by the State Governments. The Superintendent of Police is in charge of the entire police force in a district and is responsible to the District Magistrate, an I.A.S. officer, for the law and order problem in his district. This situation has quite often given rise to an interesting though sterile debate as to whether the District Superintendent of Police is subordinate to the District Magistrate or is his equal colleague in the district administration. There is, however, no doubt that many IPS officers do not relish the idea that they are regarded as subordinates to the comparable IAS officers.

The situation is somewhat different in metropolitan cities like Delhi, Calcutta, Bombay, Madras and Hyderabad where the office of the Police Commissioner combines the powers of the Superintendent of Police and those of District Magistrate for the purpose of law and order.

Education and Calibre of Personnel

August Volmer in his book *The Police and Modern Society* states :

"The ideal police officer is expected to have the wisdom of Solomon, the courage of David, the strength of Samson, the patience of Job, the leadership of Moses, the kindness of the good Samaritan, the strategy of Alexander, the faith of Daniel, the diplomacy of Lincoln, the tolerance

11. *Royal Commission on the Police*, 1962 Comnd. 1728, p. 45.

of the Carpenter of Nazareth and finally an intimate knowledge of every branch of natural, biological and social sciences."[12]

The same spirit is conveyed in the following words, though in more realistic terms, in an essay on police in the *Time* magazine :

> "Nothing is tougher than being a policeman in a free society : the policeman is supposed to mediate family disputes that would take a Supreme Court judge, soothe angry ghetto negroes despite his scant knowledge of psychology, enforce hundreds of petty laws without discrimination, and use only necessary force to bring violators to courts. The job demands extraordinary skills, restraints and character."[13]

The extracts quoted above not only give some idea about the hazards involved in police work but also convey the nature of the qualities required in a policeman. An evaluation of the human material available to the police in India may, therefore, be attempted at this stage.

The recruitment to the Indian Police Service (IPS) is made on the basis of a keen competitive examination in which only fairly bright graduates and post-graduates are able to compete successfully. They do not, however, represent the top intellectual talent of the country since most of the top students opt for careers in sciences, medicine, engineering and technology and lucrative jobs in the private and public sector. Even in government service, the Indian Foreign Service and the Indian Administrative Service are considered more prestigious.

The officers belonging to the State services, i.e., not belonging to the IPS, more often than not do not possess adequate educational and intellectual attainments. This is especially true of the lower level officials. The constable, lowest in the police hierarchy, is the most common visible manifestation of the police force so far as the lay public is concerned. He has rightly been called the backbone of the police organisation. Viewed from this angle, the constable must be a man of stature, educated, intelligent, alert, truly interested in work, possessing a good judgment, initiative and courage. Unfortunately, partly due to the legacy of the British rule and partly due to emoluments and other working conditions, the quality of human material recruited to this crucial post leaves much to be desired.

As regards the British legacy the present position can be traced back to the scheme visualised by the Police Commission of 1902 that the duties of a constable were to be of a mechanical character and he was not to be entrusted with duties requiring the exercise of discretion and judgment. That this should not be so is evident having regard to the legal provisions and the qualitative and quantitative change in the role of policemen in India. The stakes involved can be gauged by referring to the fact that the constable is

12. Quoted by B. Sreekanth Reddy, *Police in a Developing Society*, p. 144.
13. *Ibid.*

an 'officer' under the Criminal Procedure Code, 1973 which gives him substantial powers extending to making arrests without a warrant in certain situations.[14]

According to the National Police Commission, which submitted its report in 1979, the position after Independence is different now so far as the style and methodology of police functioning is concerned, both in qualitative and quantitative terms. The change has been "from an aggressive and mailed fist attitude to peaceful and persuasive handling of agitating groups".[15] Besides crimes arising from public order situations, the Commission pointed out that other professional crimes relating to property have also increased enormously. In view of the changed conditions, the Commission observed, the constable of the present day has moved far from the predominantly mechanical role assigned to him by the 1902 Commission and he has now to interact with the public in larger numbers in a variety of situations where he has to apply his mind, exercise his judgment, use his powers of persuasion and appeal and enforce law with public understanding and cooperation.

The Commission has made the following recommendations to improve the lot of the constabulary in the country:[16]

> "*1.* The constabulary should no longer be treated as a cadre meant only for duties of a mechanical character as visualised by the 1902 commission. They should be so recruited and trained that they could be deployed also on duties involving exercise of discretion and judgment with due regard to the paramount need for securing public cooperation and understanding in any situation.
>
> 2. The promotional structure within the police system should be radically revised to permit a smooth and quick promotional flow from the rank of constable to higher ranks—even the highest—on the basis of showing worth in the performance of police tasks."

In the context of wages, the Commission noted that having regard to the fact that matriculation is the minimum qualification for entry as a constable, intensive training in specialised skills including a course in law and the role and duties is necessary. There is a case for treating the constable as an operative somewhere between a highly skilled worker and skilled worker with reference to the norms laid down by the Labour Ministry.

The requirement of higher education, as suggested by the various police commissions, may improve the situation to some extent but nothing very tangible shall be achieved unless the working conditions and emoluments are radically changed. What minimum qualification is to be prescribed is an important but only a single aspect of the problem. To devise methods for

14. Section 151.
15. First Report of the National Police Commission, p. 10.
16. *Id.*, p. 18.

securing the best men out of those who fulfil the minimum qualifications and eligibility conditions is a different issue altogether.

The situation regarding sub-inspectors and other officers up to the level of the deputy superintendents is not very satisfactory either. The qualifications prescribed in various States vary from matriculation to higher secondary and intermediate level though many of the entrants now are graduates or even post-graduates. This is different from the position obtaining in the U.S.A. and Britain where a college graduate will seldom be found in the police force. But apart from the issue of the relative merit of the degrees of the Indian universities and the universities in England and the U.S.A., a more pertinent question is as to what type of human material is actually available to the police. It is common knowledge that a police job is the last refuge for many who are unable to find anything more worthwhile.

Even in a much advanced country like the U.S.A. it is a problem to find out and recruit persons of good calibre in the police force. Writing about the New York City Police Department, the largest in the world, Jimmy Breslin observes :

> "There are a number of reasons why a young man in New York takes a job as a policeman, nearly all of which are the pension. The pension, half pay after 20 years, runs a policeman's life. It is the only thing he is afraid of losing and it is the only thing he wants out of the job. After 20 years, he retires and collects the half pay and works as a security man at a bank or manufacturing plant somewhere. He starts this job at between the ages of 40 and 45. He holds it until he can quit and collect Social Security. At the end, he is a terribly bitter old man who wonders if he has wasted his life."[17]

About the position in Denver, one of the big cities in the U.S.A., an officer of the police force made the following comments :

> "Almost any able-bodied man can become a policeman in Denver. If he is within the age brackets, if he is an high school graduate, if he has no criminal record, he is a cinch. At that, there aren't enough applicants to fill the vacancies. Maybe it has to do something with the pay, the hours, the risk. There could be other reasons, but you don't know them until you get in."[18]

The selection process in the U.S.A., unlike that in India, is fairly rigid despite the fact that bright people do not generally opt for the profession. The extremely non-competitive situation of Denver may not be truly representative of the American position in general. For instance, the selection

17. New York Post, September 9, 1968.
18. Journal of Criminal Law, Criminology and Police Science, 1962, Volume 53, No. 1.

process in the Berkeley police is described by Richard Blum in the following words :

> "For every two hundred applicants, approximately one hundred qualify on the basis of their application forms. After the written examination (primarily psychological testing including a standard intelligence test requirement of IQ 112) only 25 men remain to go on the next step of the selection process. Three will fail the physical agility test, leaving twenty-two men of the original 200. Of these, four will be failed by the oral test and this leaves 18. The psychiatric examination will eliminate two men, while one man will fail the medical examination; this leaves 15 men. Of these one-third, i.e. five will be rejected on the basis of background investigation. Ten men out of the original group of two hundred will be hired. About 20 per cent of these are lost during the two-year probationary period, so that eight permanent employees remain."[19]

It follows, therefore, that twofold remedial action is required to improve the quality of police personnel in India. Firstly, the qualifications and emoluments of the policemen must be substantially revised so as to attract better persons. Surely, even in a poor country like India, there is a good case for policemen getting better emoluments than the peons and clerks employed in private and public sectors. Secondly, the selection process should be made more objective and scientific. It must be remembered that no amount of training is going to make basic changes in the human personality. Persons of low intelligence or of dishonest disposition are to be avoided very carefully. All this requires a thorough check-up of the applicants for police jobs in terms of psychological and psychiatric factors and their social and cultural background.

Police Strength in India

The police in India are largely concentrated in cities and towns where the proportion of the police force to the population may not be very low compared to the highly developed countries such as the U.K. and the U.S.A. In 1988, there was one policeman for every 769 persons in India.[20] The density of police personnel is 36.4 per square kilometres. The disparity can be gauged by the fact that the density in Delhi and Chandigarh per square kilometre is while it is just in Arunachal Pradesh.[21] The position is very uneven as between the urban and rural areas. The average jurisdiction of a police station is about 200 square miles, covering one hundred villages with a population of approximately 75,000 persons.[22] According to a report of

19. *Police Selection* (Springfield, III : Thomas), 1964, p. 161.
20. In 1961, Great Britain had one policeman for every 565 persons.
21. *Crime in India*, (1988).
22. A.R. Nizamuddin, *Unarmed Police in India*, p. 12.

the National Sample Survey, police stations, in the mid-fifties, were on an average about 8 miles from any village.[23] The situation has improved to some extent during the last few years but the basic rural scene in terms of police remains the same.

The tables on pages 290 to 294 show the actual strength of police, civil, armed and general, in the different States and the Union territories.[24]

There is of course the village police to supplement the regular police in the rural areas. Its quality, however, leaves much to be desired as pointed out by some police commissions and administrations. The West Bengal Police Commission observed :

> "*Chaukidars* and *defadars* are generally recruited from the lower stratum of society and many of them are illiterates and aged persons who are generally cultivators living within their beats."[25]

Fendall Currie paints an interesting picture of the village *chowkidar* in his book *Below the Surface* in the following words:

> .... pasi by caste, thief by birth, hence selected to catch thieves and protect the villagers' property. His badge of office, a brass-bound lathi or club, a leather belt and a chronic irritation of the larynx from sundown to sunrise. His leisure moments, when not perambulating the village making horrible noises, are occupied in assisting neighbouring *chowkidars* to carry out previously planned burglaries."[26]

According to the National Police Commission, policemen work for long and arduous hours on most days of duty, very much in excess of the normal eight hours.[27] A survey carried out by the National Productivity Council has revealed that the normal working time put in every day by an average subordinate police officer employed in public order or crime investigation duties is 13 hours. Not only are the policemen obliged to work on gazetted holidays, they are sometimes not able to avail their normal entitlement of leave every year. These observations by the Commission suggest that police strength is not adequate in the country.

Investigation and Prosecution

Criminal investigation commences when the police comes to know of the commission of a crime. Crimes have been classified under the Code of Criminal Procedure as cognizable and non-cognizable. The former are more serious offences than the latter. In cognizable offences, the police has the power to investigate without any directive from a magistrate, while in case of non-cognizable offences the police cannot proceed with investigation

23. Report on Indian Villages, 196.
24. *Crime in India*, 1993, pp. 73-74.
25. Bailey, *op. cit.*, p. 74.
26. *Ibid.*
27. *Crime in India*, 1993, p. 70.

without the order of a magistrate. It is also provided by law that the police can arrest a person for the commission of a cognizable crime without a warrant issued by a court of law; but cannot do so without an arrest warrant in case of non-cognizable crime. When the police comes to know of the commission of a cognizable offence as a result of the information given by a person, the information, if not in writing, is to be reduced into writing and such a report whether given in writing originally or reduced to writing is known as the first information report.[28] The report, though not admissible by and large in trial proceedings, is nevertheless of crucial importance sometimes. Any inconsistency between the F.I.R. and the testimony given by a witness may even prove fatal for the prosecution in certain cases. Having regard to the importance of the F.I.R., police officers tend to be extra careful in preparing it and any negligence in making out this report is the "most heinous sin a policeman can commit".[29]

Difficulties of the Police

The work of investigation involves a visit to the location of the crime by the investigating officer, recording of testimony, making of arrest wherever possible and desirable, with the object of launching prosecution in a court of law. The job of investigation, quite tough and challenging as such, is rendered even more difficult in Indian conditions. The difficulties are mainly due to three factors : inadequate investigating staff, lack of scientific and technical personnel and equipment and the most important of all factors, lack of social support to the police agencies.

The investigating officers have to devote time to other kinds of routine work also and, as it has been seen earlier, their number is also not very large in view of the large population within their areas and the variety of problems in the Indian set-up. This leaves the investigating officers with very little time for actual detective work. The delay in the investigation may prove fatal in quite a few cases.

Very few cities in India have been provided with forensic laboratories with the result that sometimes the relevant objects are to be sent over long distances for expert analysis and report. In many police stations, there is no equipment to deal with fingerprints or to take photographs of various objects connected with a crime.

The problem created by the lack of cooperation with the police by the people is a most serious one and of great complexity and, therefore, requires to be examined in depth.

Firstly, people in India are generally not willing to testify against their friends, relatives or neighbours. Unlike the highly urbanised and developed western countries, relationships of various kinds tend to be more intimate

28. *See* Sections 41, 154 and 156 of the Code of Criminal Procedure, 1973.
29. Alakh K. Sinha, *Thirty-two Years in the Police and After*, 1952, p. 182.

TABLE 17

ACTUAL POLICE STRENGTH IN RELATION TO AREA, POPULATION & IPC CRIMES DURING 1993

STATE/UT	AREA (IN SQ. KMS.)	ESTIMATED MIDYEAR POPULATION (IN 000*)	TOTAL COGNIZABLE CRIMES (IPC) INCLUDING PENDING CASES	ACTUAL POLICE STRENGTH			NO. OF POLCE-MEN PER 100 SQ. KMS. AREA	NO. OF POLICE-MEN PER 1,000 OF POPULATION	IPC CASES PER I.O.
				CIVIL	ARMED	TOTAL			
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
STATES:									
ANDHRA PRADESH	275045	693338	135805	61158	9647	70805	25.7	1.0	25.6
ARUNACHAL PRADESH	83743	915	2336	2686	1436	4122	4.9	4.5	6.1
ASSAM	78438	23593	70820	25568	19685	45253	57.7	1.9	15.4
BIHAR	173877	90952	184510	61196	17504	78700	45.3	0.9	15.0
GOA	3702	1224	5225	1988	556	2544	68.7	2.1	24.1
GUJARAT	196024	43093	143092	52798	12379	65177	33.2	1.5	43.4
HARYANA	44212	17338	36797	24686	3693	28379	64.2	1.6	14.1
HIMACHAL PRADESH	55673	5403	15033	8487	3776	12263	22.0	2.3	12.9
JAMMU & KASHMIR	222236	8133	20775	18091	11192	29283	13.2	3.6	8.2
KARNATAKA	191791	46667	137548	45264	7066	52330	27.3	1.1	30.0
KERALA	38863	30073	94204	31136	5445	36581	94.1	1.2	45.2
MADHYA PRADESH	443446	69407	188592	62560	26890	89450	20.2	1.3	23.7
MAHARASHTRA	307713	82634	227513	115508	12679	128187	41.7	1.6	17.0
MANIPUR	22327	1939	4531	4711	6865	11576	51.8	6.0	5.7

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
MEGHALAYA	22429	1872	3871	5418	1730	7148	31.9	3.8	4.1
MIZORAM	21081	742	2617	2819	2350	5169	24.5	7.0	3.3
NAGALAND	16579	1302	4020	7644	9395	17039	102.8	13.1	5.6
ORISSA	155707	33057	59427	25873	7170	33043	21.2	1.0	12.3
PUNJAB	50362	21011	19767	49729	8473	58202	115.6	2.8	3.7
RAJASTHAN	342239	46281	126053	45718	9066	54784	16.0	1.2	26.7
SIKKIM	7096	438	780	1940	855	2795	39.4	6.4	3.0
TAMIL NADU	130058	57188	170571	57013	8391	65404	50.3	1.1	31.9
TRIPURA	10486	2909	7059	4382	5130	9512	90.7	3.3	7.4
UTTAR PRADESH	294411	145056	227412	120586	34597	155183	52.7	1.1	20.6
WEST BENGAL	88752	70871	137206	56542	21399	77941	87.8	1.3	12.1
TOTAL (STATES)	3276290	871436	2025564	893501	247369	1140870	34.8	1.3	18.8
UNION TERRITORIES:									
A & N ISLANDS	8249	305	879	1775	509	2284	27.7	7.5	2.8
CHANDIGARH	114	713	3059	2616	1517	4133	3625.4	5.8	7.4
D & N HAVELI	491	148	396	223	0	223	45.5	1.5	30.5
DAMAN & DIU	112	107	274	247	0	247	220.5	2.3	18.3
DELHI	1483	10223	56842	37682	10421	48103	3243.6	4.7	7.9
LAKSHADWEEP	32	55	83	310	0	310	968.8	5.6	1.7
PONDICHERRY	492	847	3411	985	783	1768	359.3	2.1	37.5
TOTAL (UTs)	10973	12398	64944	43838	13230	57068	520.1	4.6	8.0
TOTAL (ALL INDIA)	3287263	883834	2090508	937339	260599	1197938	36.4	1.4	18.1

TABLE 18

DISPOSAL OF PERSONS ARRESTED UNDER IPC CRIMES BY POLICE DURING 1993

SL. NO.	CRIME HEAD	TOTAL NO. OF PERSONS UNDER ARREST* INCLUDING THOSE FROM PREVIOUS YEAR	PERSONS RELEASED BEFORE TRIAL		PERSONS CHARGE-SHEETED		PERSONS UNDER INVESTIGATION AT THE END OF THE YEAR	
			NO.	PERCEN-TAGE TO TOTAL	NO.	PERCENT-AGE TO TOTAL	NO.	PERCEN-TAGE TO TOTAL
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1	MURDER	121396	5935	4.9	86632	71.4	28829	23.7
2	ATTEMPT TO COMMIT MURDER	103453	4664	4.5	75141	72.6	23648	22.9
3	C.H. NOT AMOUNTING TO MURDER	11921	910	7.6	8256	69.3	2755	23.1
4	RAPE	21335	715	3.4	15981	74.9	4639	21.7
5	KIDNAPPING & ABDUCTION	39133	3365	8.6	25135	64.2	10633	27.2
	(*i*) OF WOMEN & GIRLS	25473	2458	9.6	16918	66.4	6097	23.9
	(*ii*) OF OTHERS	13660	907	6.6	8217	60.2	4536	33.2
6	DACOITY	51419	5140	10.0	29586	57.5	16693	32.5
7	PREPARATION & ASSEMBLY FOR DACOITY	8622	318	3.7	5542	64.3	2762	32.0
8	ROBBERY	40219	4200	10.4	25772	64.1	10247	25.5
9	BURGLARY	99826	9190	9.2	75386	75.5	15250	15.3
10	THEFT	260432	27994	10.7	186890	71.8	45548	17.5
11	RIOTS	718671	56957	7.9	519836	72.3	141878	19.7
12	CRIMINAL BREACH OF TRUST	23510	1744	7.4	14828	63.1	6938	29.5
13	CHEATING	40100	2483	6.2	26085	65.0	11532	28.8
14	COUNTERFEITING	2557	250	9.8	1025	40.1	1282	50.1
15	OTHER CRIMES	1539924	69211	4.5	1273600	82.7	197113	12.8
16	TOTAL COGNIZABLE CRIMES UNDER IPC	3082518	193076	6.3	2369695	76.9	519747	16.9

* IN CUSTODY OR ON BAIL.

TABLE 19

DISPOSAL OF IPC CRIME CASES BY POLICE DURING 1992

SL NO.	CRIME HEAD	TOTAL NO. OF CASES FOR INVESTIGATION INCLUDING PENDING CASES	NO. OF CASES IN WHICH					NO. OF CASES PENDING INVESTIGATION
			INVESTIGATION WAS REFUSED	INVESTIGATION WAS COMPLETED				
				CHARGE FOUND FALSE/ MISTAKE OF FACT OR OF LAW ETC.	FINAL REPORT TRUE SUBMITTED	CHARGE-SHEETS WERE LAID	TOTAL [(5) + (6) + (7)]	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1	MURDER	60549	111	1304	7804	30621	39729	20709
2	ATTEMPT TO COMMIT MURDER	41431	73	1237	4568	24562	30367	10991
3	C.H. NOT AMOUNTING TO MURDER	6537	7	137	724	3271	4132	2398
4	RAPE	17179	51	962	741	10334	12037	5091
5	KIDNAPPING & ABDUCTION (*i*) OF WOMAN & GIRLS (*ii*) OF OTHERS	29554 20840 8714	139 125 14	4599 3525 1074	3601 2398 1203	11284 8151 3133	19484 14074 5410	9931 6641 3290
6	DACOITY	20036	13	692	4138	5560	10390	9633
7	PREPARATION & ASSEMBLY FOR DACOITY	1732	0	3	132	1049	1184	548
8	ROBBERY	35591	77	2564	9526	12328	24418	11096
9	BURGLARY	156806	436	5234	72225	45372	122831	33539

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
10	THEFT	412130	1481	15759	181309	128696	325764	84885
11	RIOTS	134871	308	12319	12529	75431	100279	34284
12	CRIMINAL BREACH OF TRUST	29439	202	2662	4678	9817	17157	12080
13	CHEATING	49238	420	6278	7250	15972	29500	19318
14	COUNTERFEITING	6495	939	216	2099	525	2840	2716
15	OTHER IPC CRIMES	1088920	6196	58379	107608	731613	897600	185124
16	TOTAL COGNIZABLE CRIMES UNDER IPC	2090508	10453	112345	418932	1106435	1637712	442343

and personal and very few would risk putting strains on the sensitive relationships.

Secondly, the relationship between the police and the public being somewhat strained, the people are ordinarily scared of the police and would, therefore, rather scrupulously like to avoid any contact with them. The witnesses have real and imaginary fears regarding the possible infliction of violence on them by the police.

Thirdly, there is a universal tendency among people to keep away from the problems of others. This lack of social responsibility bordering on callousness is visible everywhere in the Indian society. Instances are not wanting where murders have been committed in the presence of scores of persons around in broad daylight without even one person having the courage to interfere with the offender. This tendency can be noticed even in some non-criminal situations like street accidents. Quite frequently the helpless victim may lie injured for hours without anyone coming to his rescue even though the injuries may prove fatal sometimes.

Fourthly, the people are scared of retaliation from those against whom they testify. This fear of retaliation is not only reflected in inhibited behaviour in the context of tough guys and bullies but is present even in less dangerous situations. One has just to travel in a public transport bus in a city like Delhi to see how eveteasing goes on unabated, sometimes in full view of many passengers around.

Fifthly, people are inhibited from coming forward with evidence before the police because a witness has to face all sorts of hardships while appearing in courts. The distance a witness has to travel before reaching the courts, inadequate transport facilities and the frequent adjournments of court hearings are more than enough to curb the enthusiasm of many a witness. India being a poor country, most of the people make a day-to-day living and for many witnesses it amounts to financial hardship if they spend time in attending the courts. Though the government is supposed to pay for the maintenance and travel of witnesses, the rates of payment are extremely low and unrealistic and there is sometimes a lot of delay in even getting whatever amount is payable. The Law Commission in its Fourteenth Report made the point that many witnesses are deterred from going to courts because of the absence of waiting facilities offered there.[30] Prof Bailey, however, differs with the Commission and makes the following convincing observation :

> "I would hazard the opinion that relative to standards of life in both countries, waiting facilities in India are better than in most public buildings in the United States. Perhaps the highborn, educated

30. Vol. II, p. 754.

townman in India needs to be provided a chair and an interior room, but is this true for the majority of Indians? I suspect that provision of ample travel and maintenance allowances would be the most important reform that could be made."[31]

Sixthly, Indian rural society being what the sociologists term 'sacred' and therefore, opposed to the secular concept, the villagers have their own notions of right and wrong. They may pass judgments on the wrongdoer and the victim on the basis of their moral notions which may be at variance with the legal or police view of the situation. The village community may in all earnestness believe that the victim was to blame for what happened to him or that the matter was 'personal' between the two individuals or groups and, therefore, the police had no business to intervene. There is no cooperation possible between villagers and the police in such a situation.

There is yet another difficulty experienced by the police while investigating a case against a suspect or putting him under arrest. All sorts of pressures are exerted on the police by the members of the social, caste or professional group which the suspected or arrested person belongs to, to have the proceedings dropped. It is not an unknown phenomenon that when the police arrests a sweeper for an alleged offence, within a few minutes the police station is besieged by a hundred sweepers. A taxi-driver is apprehended, and a lightning strike by the taxi-drivers and other operators may paralyse the transport in the city. Instances have occurred where the students have staged strikes in their institutions or have taken out processions demanding the release of some student arrested for ordinary crime. Police work is made difficult in such situations when political forces promptly appear on the scene to exploit the situation for their own ends.

The problem of perjury has special relevance in the Indian context since it is widespread in the country. The Law Commission in its Fourteenth Report observed :

> "The percentage of acquittals in criminal cases has reached a high figure; and this is not always due to the police being unable to place adequate evidence before the courts. What often happens is that the witnesses when they appear to give evidence in courts display a tendency to reduce the effectiveness of their evidence by deposing to a version different from that given by them in their statements to the police. The Inspector-General of Police, Bihar, told us that at least fifty per cent of the police cases failed because the witnesses turned completely hostile under the influence brought to bear upon them by the accused and his supporters."[32]

31. Bailey, *op. cit.*, p. 159.
32. Law Commission Fourteenth Report, Vol. II, p. 754.

Difficulties regarding Procedure and Evidence

There are some problems faced by the police flowing out of certain provisions of the Criminal Procedure Code and the Indian Evidence Act. Under the Criminal Procedure Code it is required that whenever the police enter any premises for the purpose of search and seizure, they must be accompanied by at least two respectable inhabitants of the locality.[33] Since it is not always possible to find two respectable persons willing to associate with the police for the purpose, the police find themselves in a difficult situation and hence try to observe the formality with the cooperation of some 'respectable' persons who might be of dubious character and reputation. Courts being aware of such police practices treat the evidence produced by search and seizure with utmost suspicion and even genuine prosecution cases are adversely affected in the process.

Then there is the provision in the Criminal Procedure Code which bans the use of any statement made by a person to a police officer in the course of investigation at any inquiry or trial in respect of any offence under investigation at the time when such statement was made.[34] It is, however, permissible to use the statement for the limited purpose of contradicting a witness if there is an inconsistency between his statement made before the police and the subsequent testimony in court.[35] The rationale of this principle can be appreciated by referring to the observations made by the Supreme Court :

> "... This police officer in the course of his investigation finds himself more often in the midst of an excited crowd and babel of voices raised all round. In such an atmosphere, unlike that in a court of law, he is expected to hear the statements of witnesses and record separately the statement of each one of them. Generally he records only a summary of the statement which appears to him to be relevant. These statements are, therefore, only a summary of what a witness says and very often perfunctory. Indeed, in view of the aforesaid facts, there is a statutory prohibition against police officers taking the signature of the person making the statement, indicating thereby that the statement is not intended to be binding on the witness or assurance by him that it is a correct statement."[36]

The Evidence Act contains some provisions which are meant to protect persons suspected of crimes from police brutalities. A confession made to a police officer is not admissible as evidence in a court of law.[37] This provision, though enacted with good motive nevertheless creates unnecessary hardships to the police in prosecution work. There is no harm

33. Section 100(4).
34. Section 162.
35. Evidence Act, Section 145.
36. *Tehsildar Singh* v. *State of U.P.*, AIR 1959 SC 1012.
37. Section 25.

in making confessions before a police officer admissible in evidence though the courts may be extra-cautious while dealing with the question of authenticity of such confession. Obviously admissibility of a piece of evidence as relevant is one thing but relying on it is quite another thing. The same holds true of the statements made to a police officer whose admissibility has been barred under Section 162 of the Criminal Procedure Code. There are good reasons, as pointed out by the Supreme Court, for not treating a statement made to the police as a good and highly dependable piece of evidence, but surely there is nothing wrong about its being made admissible before a court of law. There are some police officers who justifiably argue that it is not possible to make the police law-abiding unless some confidence is reposed in them. They insist that police *has* to use third degree methods because of so many legal disabilities.

The Law Commission, however, is strongly against removing the ban on the admissibility of confessions made to the police officers. It observed :

> "The large mass of offences in our country are investigated only by the subordinate police officials. The high sense of fairness and justice which might actuate the superior personnel does not permeate the lower ranks. To make a confession made to a subordinate police official admissible in evidence would therefore be fraught with dangerous consequences."[38]

The Commission therefore recommended that, on experimental basis, confessions made to an officer of the deputy superintendent level or above may be made admissible provided the officer concerned conducted the investigation himself.

The issue of admissibility of confessions made to police officers cropped up in *Kartar Singh* v. *State of Punjab*,[39] a landmark judgment of the Supreme Court where the petitioner had challenged the constitutionality of a large number of provisions of the Terrorists and Disruptive Activities (Prevention) Act (TADA). Among the impugned provisions was Section 15 of the Act which allowed evidence based on confession recorded by a police officer not below the rank of a Superintendent of Police. The majority opinion upheld the validity of the provisions in view of the extreme danger the country faced from terrorism, an extraordinary situation not capable of being tackled by ordinary laws and, therefore, a separate law for terrorists being justified. K. Ramaswami and Sahai, JJ. in their separate dissenting opinions held the provision to be violative of the Constitution. The sum and substance of their opinions is can be put as follows :

1. It is not the rank of the officer but the nature of the source of evidence which is relevant to identify the possible abuses like

38. *Law Commission Fourteenth Report*, Vol. II, p. 748.
39. SCC 1994 SCC (Cri) 899.

compelling a person to be a witness against himself by resorting to third degree methods of torture. Irrespective of the rank of the officer, the police has its own methods to determine the truth without much regard for due process of law ; an approach not permitted in any civilised system of administration of justice.

2. Since the police has its own distinct operational culture in India, citing the law and practice of the U.K. or the U.S.A. may not be appropriate. What, therefore, is needed first is to endeavour to bring about changes in the attitudes of the police before any changes in the existing policies are contemplated.

The ban on the admissibility of the confessions made to a police officer has not, however, succeeded to a great extent in protecting the accused persons from the third degree methods used by the police. Though the confession made to a police officer, as such, may not be admissible in trial, the law permits the use in evidence of anything recovered as a result of the confession made to a police officer by the accused.[40] Thus, if a weapon used in a murder or burglary is recovered by the police as a result of a confession made by an accused person, the recovery of the weapon becomes a relevant piece of evidence. The police makes quite liberal use of violent methods to extort confessions which may lead to the discovery of some incriminating evidence with the result that the protection given under Section 25 of the Evidence Act is taken away to a substantial extent under Section 27 of the Act.

Record of Police Performance

There are two standards which are generally applied to test the efficiency of the police. One is to see the number of arrests made by the police for the offences coming to their knowledge and the other is the rate of conviction for the cases brought by the police to the courts of law. It is obvious that none of the two standards is capable of measuring the real efficiency of the police. The 'clearance by arrest' test suffers from the fact that the decision to arrest a person may not always be on the bona fide belief of suspicion and the arrest may sometimes be made just because someone or the other has got to be arrested for the commission of the crime since failure to arrest anyone would reflect on the efficiency of the officer concerned. The 'clearance by conviction' test may give more scientific results in the sense that the conviction of an accused person provides that the police case has been vindicated beyond any reasonable doubt under the prescribed law and procedure. But whether a person is convicted or not depends not only upon the merit of the prosecution case but also upon other variables like the cooperation of the witnesses and the judicial attitude regarding the appreciation of the evidence tendered by the police. In India it is fairly usual for the witnesses to change their earlier statements while in the witness-box.

40. Evidence Act, Section 27.

It is not only because the majority of the witnesses, particularly in rural areas, are uneducated and inarticulate, but also, as discussed earlier, due to the pressure brought by the accused person and his supporters through all imaginable means. As regards appreciation of evidence by the courts, it is common belief among policemen that no case, howsoever strong against the accused, can be successfully prosecuted in a court unless some extra evidence is invented to eliminate any possible risk of failure to get a conviction.[41]

Be that as it may, the clearance rate by reference to the number of arrests and convictions is regarded as a good indication of police efficiency. Comparing the 'clearance by arrest' rate in India with those in the U.S.A. and Great Britain, Professor Bailey has concluded that the Indian police has shown greater efficiency than the other two countries. He supports his contention by noting that charge-sheets were laid in 52.5 per cent of all true cases in 1959; and in 50.6 per cent in 1958 and sums up the position as follows :

> "This means that in just over half of all crimes known to the police, persons were arrested and charged with the offence. The 'cleared by arrest' figure has remained within a percentage point or two above fifty since that time. The Indian record is significantly better than that of Great Britain or the United States. England and Wales in 1963 had a clearance rate of 43.1 per cent for all indictable offences. In the U.S.A., the clearance rate for serious crimes was 26.5 per cent. And while the Indian clearance rate appears to have remained steady during the late fifties and early sixties, the rates in the U.S.A., England and Wales have declined steadily."[42]

The police performance in 1993 can be evaluated by the following available information for the period. During the year, a total of 20,90,508 Penal Code cases including the pending cases from the previous year were taken up for investigation by police out of which 78.8 per cent cases (16,48,165) were disposed of by the police. The average pendency of the Penal Code cases to be investigated during the decade 1983-1993 was around 20 per cent. The pedency rate is even lower for the cases falling under local and special legislations. Out of the total of 40,68,181, including the pending cases from previous year, as many as 38,00,829 cases were disposed of recording a percentage of disposal of 94.1 for the year under review. Compared with the pendency of investigation of cases by the police (21.2 per cent), standing at 80.2 per cent, pendency in courts was much higher.

41. A middle level police officer of Delhi told the author, on the basis of his long experience in Delhi and U.P., that it is not very infrequent that in some cases the court rejects some pieces of genuine evidence but accepts the padding part of the prosecution story.

42. Prof. Bailey, *The Police and the Political Development in India.*

Though the above figures may show that police efficiency in India is fairly high compared to some other countries, such heartening inferences ought to be drawn with great caution. Firstly, it must be understood that the efficiency of the police as manifested through arrests and convictions is not the only factor to be considered in evaluating the quality of police work. The vital point not to be lost sight of is the *quality* of methods employed by the police. Third degree methods, illegal searches and wrongful confinements may give better results in terms of statistics, but a decent society may not like to achieve 'better' results at such a heavy price in terms of human dignity and individual liberty. Keeping this aspect in view, it has been suggested that the record based on the clearance rate should not be the guide for giving promotions to police officers. Such a basis for giving credit gives rise to a perverted attitude on the part of the police officers which may be manifested in all kinds of unscrupulous techniques employed with the sole objective of getting impressive statistical results. That there is no necessary correlation between efficiency and the results achieved can be appreciated by keeping in mind the fact that the world-famous London Metropolitan Police is not credited with more than 30 per cent to 40 per cent of successful prosecutions out of the total cases launched by them in the courts.

Secondly, the issue of police efficiency is intimately connected with the quality of crime reporting and registration in a community. Obviously, in a country where a vast mass of crimes go unreported or uninvestigated, the statistics on the basis of actual arrests and convictions may give a relatively heartening picture of police achievements which they might not in fact deserve.

Police and Public Disturbances

The police has to perform a much more delicate and dangerous task while dealing with riots and public disturbances as compared to what they have to do in dealing with problems of ordinary crime. It is in this area of police activity that the risk of public criticism and condemnation is maximum. Traditionally, the police has always been used the world over by persons wielding political power to serve their interests, which provides the most potent cause of public antagonism towards police today. Some time ago it was easier for the police to get unanimous support from the upper and middle class people since the police stood for persons who, despite their belonging to the upper and middle classes, do not subscribe to the traditional values of those classes. In some affluent countries these groups, known at the New Left, have clashed frequently with the establishment resulting in direct confrontation with the police. In the U.S.A., race riots also have posed frequent problems to the police in the past.

In India, as observed earlier, the variety of public disturbances is unique and exceptionally wide. Riots take place due to the exploitation of religious, communal, regional and political issues. The two most difficult situations faced by the police are disturbances where students or labourers happen to be the parties involved in the trouble. In both the situations, a very great degree of forbearance and tact is required. The police stands to gain unpopularity if the force used is considered 'excessive' and also if they do not use adequate force. It is obvious that in theory it is alright to tell the police that they should exercise restraint and use minimum amount of force, but practically it becomes difficult to implement. When the situation flares up and gets beyond control, senior police officers have to control two mob-like groups, the rioters and the policemen.

The relative magnitude of the problem created by riots can be appreciated by comparing the figures for police personnel killed and injured in controlling riots and in controlling ordinary criminal activities.[43] A total of 394 police personnel of various ranks were killed and 3829 were injured while performing different types of duties during the year 1988. Of the policemen killed, 215 lost their lives in accidents while of the total number of policemen injured during the year, 66.3% numbering 2539 were injured by riotous mobs.

Police-Community Relations

The unpleasant police-community relationship is almost of universal nature, the degree of bitterness varying from community to community and from time to time. The 'bobby', the London Metropolitan Police constable, with his image of a friend, philosopher and guide to the common man, is an exception in the police-public relationship. The extent of the apprehension of possible abuse of power by the police can be judged by the fact that Sir Robert Peel, the British Prime Minister, faced stiff resistance when he introduced the same Metropolitan Police for the first time in the early nineteenth century. Charles Reith, in his book *The Police Idea*[44], describes the hostility to the idea of developing a metropolitan police force out of fear that the notorious activities of the pre-revolutionary French police would be duplicated. He cites a parliamentary report of 1818 which considered the idea of police and opposed the establishment of a police force :

> "The police of a free country is to be found in rational and humane laws—in an effective and enlightened magistracy—and in the judicious and proper selection of those officers of justice, in whose hands, as conservators of the peace, executive duties are legally placed, but above all, in the moral habits and opinions of the people; and in proportion

43 *Crime in India*, 1988.

44 Charles Reith, *The Police Idea: Its History and Evolution in England in 18th Century and After* (London: Oxford University Press, 1938).

as these approximate towards a state of perfection, so that people may rest in security; and though their property may occasionally be invaded or their lives endangered by the hands of wicked and desperate individuals, yet the institutions of the country being sound, its laws well-adjusted and justice executed against offenders, no greater safeguard can be obtained without sacrificing all those rights which society was instituted to preserve."[45]

The police-community relationship in India has always been far from pleasant. Some of the aspects of the problem have already been touched on in the discussion relating to the difficulties faced by the police in investigation and trial of crimes. It has also been seen that the police force, as represented by the villainous *darogha*, was known for its wanton atrocities and unabashed corruption in the medieval period. The British rule did not make much difference except that the *darogha* was replaced by the sub-inspector. Subsequently the police-public relationship has continued to be rather uneasy.

Apart from the factors which operate to make the police unpopular anywhere in the world, an additional problem in India is the history of hostility dating back to the Freedom Struggle during the British rule. The police, as was expected of them, had the duty to enforce law and order and a confrontation with the public was inevitable. The policeman, being the most visible manifestation of the alien rule and oppression, was placed in an unenviable position and was the obvious target of public fury. The scars created due to the conflict remain even to this day and the tarnished image of the police continues unfadingly.

Unfortunately, the clashes between the forces representing the government and the public have continued due to the stresses and strains experienced in an infant democracy, aggravated by the difficult socio-economic conditions. While identifying the factors responsible for the confrontation between the police and public, the National Police Commission observed :

"Police performance in India today is under close review and critical assessment by a demanding public is in far greater measure than at any time in the past. Increasing crime, rising population, growing pressure of living accommodation, particularly in urban areas, violent outbursts in the wake of demonstrations and agitations arising from labour disputes, agrarian unrest, problems and difficulties of students, political activities including the cult of extremists, enforcement of economic and social legislations, etc., have all added new dimensions to police tasks in the country and tended to bring the police in confrontation with the public much more frequently than ever before."

45. Quoted in Jerome H. Skolnick, *Justice Without Trial*, p. 1.

Judicial and Public Image of the Police

The literature on Indian police is full of adverse comments made against them for their dishonesty, corruption, unscrupulous methods in investigations and general lack of efficiency. In the words of O. Chinnappa Reddy, Judge, Supreme Court, the police have always been the object of attacks by the Press and politicians, Bench and Bar, lawyers and legislators, rogue and reformer, citizens and criminals. The police practices during the Moghul and East India Company periods have already been referred to earlier. The Police Commission of 1902 made the following comment :

> "The police is far from efficient; it is defective in training and organization; it is inadequately supervised; it is generally regarded as corrupt and oppressive; and it has utterly failed to secure the confidence and cordial cooperation of the people."[46]

There is no apparent reason to think that the situation has altered very much during the last 94 years or so.

Speaking of unscrupulous practices employed by policemen in investigation work and extorting confessions, Mr. Justice Straight of the Allahabad High Court reached the following pessimistic conclusions :

> "These legislative provisions leave no doubt in my mind that the legislature had in view the malpractices of police officers in extorting confessions from accused persons in order to gain credit by securing convictions, and that those malpractices went to the length of positive torture; nor do I doubt that the legislature, in laying down such stringent rules, regarded the evidence of public officers untrustworthy.... It requires no vivid imagination to picture what too often takes place when two or three of these not very intellectual highly-paid police officers are called away to a village to investigate a grave crime, of which there are no very clear traces. Naturally it is much the easier way for them to begin by endeavouring to obtain a confession from the suspected person or persons instead of searching out the clues to the evidence from independent sources.... I say it in no harsh sense of disparagement, but it is impossible not to feel that the average Indian policemen... is not likely to be over nice in the methods he adopts to make a short cut to the elucidation of a difficult case by getting a suspected person to confess."[47]

More than a century later, the police practices retain the same old dubious quality and the bad image of the police force continues its unmitigated hold on the public. Why is the police image so bad? The answer cannot be given in terms of one or two factors. There are many contributory factors

46. *Police Commission Report*, 1902, p. 150.
47. *Queen Empress* v. *Babu Lal*, (1884) 6 All 509.

responsible for the unfortunate situation, some of which have been referred to earlier. To quote Chinnappa Reddy, J.:

> "I think it is due to a combination of several circumstances. Occasional highhanded behaviour including acts of violence; occasional perjury; more important than the actual highhandedness and perjury an attitude of casualness and indifference in the exercise of highhandedness and the giving of perjured evidence; the corruption of a few; a general misunderstanding of the police procedure, methods and work; a reminder of one's own acts of trespass and a general resentment of authority are several of the factors which contribute to a citizen's hostility towards a policeman."[48]

A few recent events in which policemen were involved caused unprecedented sensation and they indicate the extent to which sometimes the members of the police force may go. There was the Baghpat episode in which a married woman of a respectable family was alleged to have been made to walk nude through the town after her husband and another man were killed by the policemen just because the deceased had protested to the teasing of the woman by a police officer. The Bhagalpur police in Bihar earned worldwide notoriety when it came to light that they had been blinding a number of persons under trial by the 'acid treatment'. It is also a common belief that in some instances the killings of political extremists and other persons wanted by the police in so-called encounters with the police were nothing but cold-blooded murders committed by the police of persons in their custody. Instances are also not few of rapes committed by policemen, particularly on women belonging to the weaker caste groups. Cases like these may be few and far between but they do not exactly help in building up a favourable image of the police in the public eye.

Police Torture

The problem of police violence on suspected offenders and others is of almost universal nature. The concern regarding the problem was one of the reasons leading to provisions against torture and inhuman and degrading treatment and punishments in the Magna Carta and Constitutions of the U.S.A. and many other countries of the world. Article 5 of the Declaration of Human Rights incorporated the right of protection against torture and the same has been sought to be achieved through the Declaration of the Fifth United Nations Congress held in the year 1975. Though there is no specific and separate protection in the Indian Constitution against torture, the combined effect of rights against self-incrimination and of life and liberty is too evident. Moreover, there are adequate provisions in the Evidence Act with the same objective.

48. In his paper in *Developing Society and Police*, Osmania University Publication, p. 2.

In *Sunil Batra*[49], the Supreme Court did not find itself handicapped by the absence of a specific provision against torture in the Constitution and gathered support from Articles 14 and 19 in holding against the permissibility of torture vis-a-vis persons suspected and accused of crimes. All this notwithstanding, the use of third degree methods by the police continues unabated as should be evident from some of the cases heard by the Supreme Court. In *Raghbir Singh* v. *State of Haryana*[50], where the violence employed by the police to extract a confession resulted in the death of a person suspected of theft, the Court observed :

> "We are deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of the law gore human rights to death. The vulnerability of human rights assumes a traumatic, torturesome poignancy; the violent violation is perpetrated by the police arm of the State whose function is to protect the citizen and not to commit gruesome offences against them as has happened in this case. Police lock-up, if reports in newspapers have a streak of credence, are becoming more and more awesome cells. This development is disastrous to our human rights' awareness and humanist constitutional order.
>
> The State, at the highest administrative and political levels, we hope, will organise special strategies to prevent and punish brutality by police methodology. Otherwise the credibility of the rule of law in our republic vis-a-vis the people of the country will deteriorate."

The formidable problem in an alleged case of police torture is to establish the guilt of the perpetrators of violence. Quite frequently, the wrongdoers may either be able to escape conviction due to lack of required degree of proof or may be found guilty of a lesser offence than the one warranted by the actual facts. This is primarily due to the situation that the offenders are the comrades and colleagues of the prosecutors and the complete lack of neutral witnesses. *State of U.P.* v. *Ram Sagar Yadav*[51] is a really pathetic case indicative of the extreme limits to which police violence and highhandedness may extend. The victim made a complaint against a policeman who had demanded bribe from him. He was arrested for his 'audacity' and shortly afterwards while in police custody, was found in a serious condition with 19 injuries on his body eventually causing his death. The respondent-policeman was convicted of culpable homicide not amounting to murder under the second part of Section 304, Indian Penal Code and was awarded 7 years' rigorous imprisonment. The High Court set aside both

49. (1978) 4 SCC 494 : 1979 SCC (Cri) 155.
50. (1980) 3 SCC 70, 71-72.
51. (1985) 1 SCC 552 : 1985 SCC (Cri) 127 : AIR 1985 SC 416.

the conviction and the sentence. The Supreme Court affirmed the conviction and sentence expressing regret at the same time that the trial judge did not find the policeman guilty of murder as indicated by the facts proved. Chief Justice Chandrachud, while pointing out the special difficulties involved in the proof of torture by the police personnel and the need for a change in the burden of proof, made the following observations :

> "Police Officers alone, and none else, can give evidence as regards the circumstances in which a person in their custody comes to receive injuries while in their custody. Bound by ties of a kind of brotherhood they often prefer to remain silent in such situations, and when they choose to speak they put their own gloss upon facts and pervert the truth. The result is that persons on whom atrocities are perpetrated by the police in the sanctum sanctorum of the police station are left without any evidence to prove who the offenders are."

Gauri Shankar Sharma v. *State of U.P.*[52] is a typical case of a police officer trying to rescue his colleague by giving evidence favourable to the accused policeman. The High Court persuaded itself to believe that the police officer did not give false evidence since by doing so he would have risked losing his job. Consequently the High Court set aside the conviction, under Section 304, Part II and some other provisions of the Penal Code and the Prevention of Corruption Act, of the officer-in-charge of the police station where fatal injuries were inflicted on a person suspected of dacoity. Restoring the conviction and sentence of 7 years by the trial court and rejecting the plea for substitution of imprisonment by fine, the Supreme Court observed :

> "The offence is of a serious nature aggravated by the fact that it was committed by a person who is supposed to protect the citizens and not misuse his uniform and authority to brutally assault them while in his custody. Death in police custody must be seriously viewed for otherwise we will help take a stride in the direction of police raj. It must be curbed with a heavy hand. The punishment should be such as would deter others from indulging in such behaviour. There can be no room for leniency."

Regarding police brutality, the same kind of conclusions as above have been reached by some of the Commissions set-up to inquire into deaths occurring due to police torture. Some other problems like informal arrest of suspects and the submission of motivated reports by doctors with a view to help the policemen involved are also identified. Ironically, the senior officers appear to be unaware of such happenings in their jurisdiction.

52. 1990 Supp SCC 656 : 1991 SCC (Cri) 67.

One U. Narasimha[53] was informally arrested on 1.7.1986 and kept in the lock-up in a police station in Hyderabad. From then onwards, he was beaten-up everyday and received as many as 26 injuries which led to his death on 10.7.1986. His wife was disrobed in his presence to pressurise him to make a confession. Justice A.D.V. Reddy, who constituted the Commission, pointed out that not formally arresting a suspected culprit and registering a case for days together for purposes of interrogation or extracting a confession by foul means has become the normal practice.

A boy Sankuriah, who had stolen some plantains from a garden was brought to the police outpost of Yelleswaram in Andhra Pradesh by Veera Raghuvulu, the owner of the garden. Grave injuries, including some on the genitals, had been inflicted on the boy by Raghuvulu at whose instance the boy was thrown into the lock-up. The boy subsequently died of the injuries and the constable on duty tried to give it the colour of suicide. Regarding the medical report, the Commission found that the doctor who performed the autopsy, "sided the police" and "suppressed the true cause of the death".

T. Murlidharan, a Keralite, happened to be in Vijayawada and stayed in a hotel. Shortly after checking in he went out for a while when for unknown reasons he was taken to the police-station. He eventually died of the injuries caused by the policemen. Once again it was a case of informal arrest and the Commission expressed its anguish thus :

> "Is there not a single police officer at higher levels to check these illegal detentions ?... Does investigation mean nothing but torture ?... Are there no civilized means of investigation than beating and butchery ?"

Regarding the ignorance and late reception of information of police brutalities at the higher level, the Commission had the following to say :

> "The fact of death reaches the ears of the Press faster than the wireless sets at police command.... It should be a matter of serious concern that superior police officers are not kept informed of the gravest offences occurring within their own police stations. What for, then, is the huge organisation on which so much money is expended ?"

The Amnesty International in its report of 1986 has expressed grave concern regarding deaths of a number of political workers, activists and alleged terrorists as a result of police torture or shooting in different parts of the country.

Lock-up Deaths: Burden of Proof

It is crystal clear from a perusal of the cases coming before the courts and inquiry commissions that burden of proving police violence is of crucial

53. For this and reports of some other Commissions in Andhra mentioned here, *see* Mohammed Ghouse, "*State Lawlessness and the Constitution — A Study of Lock-up Deaths*" in Mahendra P. Singh, Ed., *Comparative Constitutional Law* (1989).

importance. The Law Commission in a working paper on "Injuries in police custody" has suggested the incorporation of a provision in the Evidence Act which, inter alia, is as follows :

> "In a prosecution (of a police officer) for an offence constituted by an act alleged to have caused a bodily injury to a person, if there is evidence that the injury was caused during a period when that person was in the custody of the police, the court *may presume* that the injury was caused by the police officer having custody of that person during that period."

Any change in the rules regarding burden of proof, including the above suggestion, may produce only marginal support against police torture. The problem is of a complex nature and unless the basic causes leading to the third degree methods employed by the police are probed into and understood, not much change in the existing situation is likely to occur. It should be evident that crime investigation in a proper and civilized manner entails hard systematic work, a certain level of efficiency and a highly professional attitude. Generally these factors are lacking because of reasons connected with the quality and training of policemen. More often than not, the sole object of an investigating officer is to produce 'good' results by securing convictions in court; such results being a must to show efficiency and hence useful in the advancement of the officer's career.

A confession made by an accused person to a police officer or made by him while in police custody is not provable against him in judicial proceedings. A limited use of the confession is, however, possible if it leads to a discovery of fact.[54] Whatever, therefore, is provided by Sections 24, 25 and 26 of the Evidence Act to protect an accused person against police coercion is nullified to a very great extent by Section 27 of the Act. The rationale of Section 27 has been explained in *Deoman Upadhya* v. *State of U.P.*[55] thus :

> "Section 27 is founded on the principle that even though the evidence relating to confessional or other statements made by a person, whilst he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is, therefore, declared provable in so far as it distinctly relates to the fact thereby discovered."

It is submitted that the above observations may be correct as regards the authentic nature of the contents in the confession but the same cannot be said about the confession not being 'tainted'. The foundation of the bar placed by Sections 25 and 26 is not laid down on the premise that confession made to the police or in their custody is necessarily false or made under duress but the provisions are designed to prevent third degree methods on the part of the police.

54. *See also* pp. 255-56, *supra*.
55. AIR 1960 SC 1125.

Section 27 being a very potent source of police brutality, some legislative action is warranted to either modify or scrap it altogether. An amendment may be considered which may make the provision applicable only in grave offences like culpable homicide and murder and also restricting it to the confessions made to officers not below a certain prescribed level.

Some important factors responsible for the lack of proper investigation resulting in the use of third degree methods, as identified by a senior police officer, are as follows:[56]

"*1.* The investigator in a police station is overworked and has no sophisticated aids to help him. Most police stations do not even have a room where the investigating officer can talk alone to a suspect.[57]

2. Quite often, the investigating officer hands over the suspect to a constable who has neither the training nor temperament required for the art of investigation.

3. Forensic science laboratories available to the police are generally without adequate staff and equipment.

4. In cases where some important politician gets interested in quick investigation, the police are bulldozed into fast action to achieve instant results. They may, therefore, be unwillingly encouraging the use of torture against the suspect.

5. Public support is generally not forthcoming, particularly in situations where political personalities appear to be influencing the police.

6. A majority of ministers, administrators and senior police officers are convinced regarding the inevitability and indispensability of the third degree methods. In its report, the U.P. Police Commission cited the opinions expressed before it by two Divisional Commissioners in the State Government. One defended third degree methods as the 'only effective means of controlling bad characters'. The other said the 'dishonest steps of investigation in recovery, third degree methods, creation of false evidence...are minor evils when compared to the larger evil of general national dishonesty.... We should judge the police by the results achieved.... The police has to deal with a class of men who belong to the worst section of the society...."

It is evident, therefore, that availability of more investigation officers and equipment, training in the art of interrogation and public cooperation should go a long way to eliminate the use of third degree methods by the police.

Above all, what is really needed is a radical change in the police culture and the attitudes of the policemen which of course are related to the general culture and attitudes of the society. This may perhaps be achieved, to some

56. N.S. Saksena, *Law and Order in India*, (1987).

57. As per estimates in *Crime in India*, 1993 the All India ratio of work-load for an investigating officer is around 18.1 cases per officer.

extent, by inculcating maximum constitutional, legal and moral sense among the policemen during the in-service training imparted to them.

Police and Minority Groups

The relationship between the police and the minority groups based on religion, race or language, presents some peculiar problems. It is obvious that the police being in the hands of the politically dominant majority group, the minorities are bound to have some real or imaginary grievances against them. Another factor which distinguishes the minority groups generally is their relatively weaker economic condition. The Negroes and the Puerto Ricans in the U.S.A. are examples of such minority group. The peculiar socio-economic conditions bring such groups in more frequent conflict with the police. The population of blacks in the U.S.A. is 10 per cent of the total population but they are represented in about 30 per cent of the cases dealt with by the police. How far racial prejudices are responsible for this situation cannot be established. However, what is important is the presence of such a belief in the minds of the members of minority groups, since it is the actual belief which determines their relationship with the police.

In India too, a feeling is found among some minority and weaker groups that the police does not act impartially and they are not given equal protection by the police. The instances of real or supposed occurrences of police atrocities on Harijans are legion. The National Police Commission, in its Sixth Report of March 1981, found several instances where "police officers and men appear to have shown unmistakable bias against a particular community while dealing with communal situations".

Similarly, many people of the Muslim community express a feeling that they are the worst victims of police action in the wake of communal riots in terms of number of killings caused and arrests made by the police. A perusal of what has been written in the press after various communal flares would show that such a feeling against the police is fairly widespread. Writing about the communal disturbances in Malegaon in Maharashtra, the eminent journalist, Khushwant Singh commented :

> "Since the circumstances which led the police to react the way it did may soon become *sub judice*, the best I can do is to give you the name of the people killed by the police firing : Abdul Aziz, Shakeel Ahmed, Inamdar Inayat Khan. Every one of those injured is also Muslim. (Two of them have since died.) A curfew was imposed on certain localities of Malegaon—again all Muslim."[58]

The general grievance among the Muslims is that during communal disturbances they are quite often pitted more against the police force rather than the other community; a perception supported by the community's

58. Illustrated Weekly of India, April 20, 1975.

experiences during the riots in Bhivandi, Moradabad, Meerut, Maliana and other places.[59] The Madan Commission inquiring into the Bhivandi riots concluded that the policemen had disgraced their uniforms. Perhaps the worst ever police carnage occurred during the 1987 riots in and around Meerut. In its report, the Amnesty International found strong evidence to suggest that members of the Provincial Armed Constabulary (PAC) had been responsible for dozens of extra-judicial killings and "disappearances". The report described the record of the PAC as follows :

> "Since 1972, serious charges of alleged misconduct have been made against the PAC and it has been particularly criticised for its role in the Aligarh rioting in late 1978 when it allegedly deliberately shot seven young men without provocation. The Minorities Commission in a report to the then Prime Minister blamed the PAC for involvement in the rioting. There were allegations that the PAC instigated communal rioting in Moradabad in August 1980 in which reportedly more than 130 people were killed. The PAC was also accused of participating in looting and burning shops and killing civilians. There were similar allegations against the PAC during rioting in Meerut in 1982 when they reportedly killed 30 civilians hiding in a building.... According to the Indian press, inquiries into allegations against the PAC have either been prematurely stopped or reports have not been made public. No convictions of PAC personnel are known to have resulted from any of these investigations."

On the basis of reports in the Indian and International news media and statements from eyewitnesses including survivors, Amnesty International concluded that there was strong evidence to establish the responsibility of the PAC for the "disappearance" of at least 36 men from Hashimpura area in Meerut and for the deliberate killing of at least 30 unarmed persons in Mahana the next day. There was also some evidence to suggest that at least five men arrested in connection with the rioting died in jail mainly as a result of injuries inflicted upon them after arrest.

It has been suggested, time and again, that Muslims should be recruited in greater number in the police force, particularly in the Provincial Armed Constabulary. The National Integration Council passed resolutions urging the restructuring of the PAC to give adequate representation to members of the minority community. In its Sixth Report, the National Police Commission advocated the same policy in the following words :

> "We would reiterate here our views... that the composition of the personnel in the police system as a whole should reflect the general mind of communities as exists in society and thereby commend the

59. The same tragedy has been repeated in the communal riots in the wake of the Ayodhya problem which rocked the towns of Aligarh and Bijnore during December-January 1990-91. In fact, the general Muslim opinion against the PAC has never been more bitter before and a demand has been made to abolish the force.

confidence of the different sections so that the system would function impartially without any slant in favour of any community. In this regard the senior officers particularly in positions of command have an important role to play. If they act in a correct and impartial manner and also discourage emphatically any partial or biased behaviour on the part of their subordinates, they can by their example instil confidence in the minds of people regarding the ability and impartiality of not themselves but of the entire force... there is a strong case for encouraging the recruitment of members of the minority community and other weaker sections at various levels in the police force."

The proper representation of Muslims in police and other governmental sectors, is of course, highly desirable but the malady of police partiality and hostility cannot be cured unless the members of the police force in general are provided the kind of education and training which is necessary to eliminate the communal virus from their system. Such an education and training must include specially designed courses in sociology, history and the Indian Constitution to enable them to see things in the right perspective and for the development of a liberal and tolerant attitude towards fellow citizens.

Suggested Reforms

The National Police Commission considered the problem of police image and their relationship and interaction with the general public. To improve the existing situation the Commission made the following suggestions in their Fifth Report:

1. The training imparted to the policemen should include—

(*i*) a democratic sense and idealism ;

(*ii*) the understanding that dissent on the part of public is not necessarily a threat to public order ; and

(*iii*) the idea that the police is basically to help the public.

These targets require improved training and orientation programmes for the police personnel.

2. Better amenities should be provided at the police station and lock-up.

3. The traffic police have a high visibility profile and they, therefore, need special attention in terms of improvements.

The system of patrolling must be revamped so that the public get the feeling that crime is being prevented.

The Commission, before making the above suggestions, had noted the nine principles of police reform in the United Kingdom contemplated in 1829 when the metropolitan police was completely reorganised. The principles laid down for the guidance of police were as given below:

1. The objective should be the prevention of crime and disorder, as an alternative to their repression by military force and severity of legal punishment.
2. To recognise always that the force of the police to fulfil their functions and duties is dependent on public approval of their existence, actions and behaviour and on their ability to secure and maintain public respect.
3. To recognise always that to secure and maintain the respect and approval of the public, means also the securing of the willing cooperation of the public in the task of securing observance of law.
4. To recognise always that the extent to which the cooperation of the public can be secured diminishes, proportionately, the necessity of the use of the physical force and compulsion for achieving police objective.
5. To seek and preserve public favour, not pandering to public opinion, but by constantly demonstrating absolutely impartial service to law, in complete independence of policy by ready offering of individual services and friendships to all members of the public without regard to their wealth or social standing, by ready exercise of courtesy and good humour, and by ready offering of individual sacrifice in professional life.
6. To use only necessary and minimum amount of force to achieve the objective.
7. To maintain at all times a relationship with the public that gives reality to the historic tradition that the police are the public and public are the police.
8. To recognise always the need for strict adherence to police-executive functions, and to refrain from even seeming to usurp the powers of the judiciary or the State, and of authoritatively judging guilt and punishing the guilty.
9. To recognise always that the test of police efficiency is the absence of crime and disorders, and not the visible evidence of police action in dealing with them.

The Police Point of View

The police complain that the public and politicians see only the dark spots of police enforcement. No one bothers to understand the severe limitations within which a policeman has to operate, the hard work which he has to put in with bad service conditions and poor emoluments, and the emotional strains caused by being up against criminals and bad characters all the time without adequate public sympathy and support.

Regarding the peculiar problems faced by the policemen, Martin Symonds, a medical man attached to the New York City Police for 20 years, observes :

"Considering the nature of police work and the stress it places on the individual, I have been impressed with the mental health of the ordinary policemen. The job of being a policeman is unique. It is one of the few occupations that a man engages in for which he is feared, sometimes hated, occasionally reviled, or even assaulted in the ordinary performance of his duties. When we consider that most people need and want to be liked, and that the young patrolman starts his career by seeing himself as an individual who will help and protect others, the uncooperativeness, antagonism or hostility of the public whom he serves will place an emotional strain on him."[60]

Writing on the same point, the following words written by Mart Stern provide interesting and informative reading :

"As a group, policemen have a very high rate of ulcers, heart attacks, suicides and divorces .... A man can't be a cop for eight hours and then just turn it off and go home and be a loving father and husband—particularly if he's just had somebody die in the back of his police car."[61]

One of the most serious grievances of the police in India is the political interference with their work and there is certainly a lot of substance in it. The political interference is manifested in appointments, transfers and promotions of police personnel which affects their initiative and efficiency. There is a feeling among the police personnel that it is difficult for an independent person to survive in the service. S.K. Ghosh, a retired Inspector-General of Police of Orissa, makes the following observation in this connection :

"The more original, honest and earnest the inspector-general or for that matter any other police officer down to the rank of officer-in-charge for a police station is, the less likely he is to remain in office."[62]

Events in Kerala during the period from April 1957 to July 1957 and West Bengal after the United Front ministry came to power in 1967 clearly showed the extent to which the government interfered with the police work. It was the height of irresponsibility on the part of the West Bengal government that they issued a circular to the police that they should not take any action against culprits in any industrial 'gheraos'. It was only when the High Court declared the circular to be illegal that police were able to act in such situations.[63]

Political interference is also quite in vogue regarding day-to-day functioning of the police. Instances are not wanting where political bosses bring pressure on the police for getting proceedings against accused persons

60. *Emotional Hazard of Police Work*, paper presented before the Academy of Police Science, New York City, 1969.
61. "*What Makes a Policeman Go Wrong?*" Journal of Criminal Law, Criminology and Police Science 53," 1962, No. 1.
62. *Law and Order*, Eastern Law House, 1972, p. 107.
63. See *Jay Engineering Works* v. *State of West Bengal*, AIR 1968 Cal 407.

dropped. In almost every locality there are bad characters, known to be in close contact with the political forces, who are considered to be immune from any police action.

In India we are not in a happy position to say as Lord Chesham said in the House of Lords in 1958 :

> "No public authority or anyone else has any authority to interfere in relation to the enforcement of law by the police. Full responsibility for enforcement is reserved entirely to the Chief Officer of Police. He is answerable to law alone and not to any public authority."

The National Police Commission in its second report pointed out that oral orders to the policemen and their transfers from one place to another were the instruments of pressure exerted by the politicians and the government executives. Some typical situations or matters identified by the Commission where pressure is brought to bear on the police by political, executive and other extraneous sources are as given below :

(*i*) The arrest or non-arrest of a person against whom investigation is carried out by the police.

(*ii*) Deliberately getting a person handcuffed in police custody merely to humiliate him.

(*iii*) Release or non-release on bail after arrest.

(*iv*) Suppression of material evidence that becomes available during searches by police.

(*v*) Inclusion or non-inclusion of various items in the charge-sheet placed in court on conclusion of investigation.

(*vi*) Posting or non-posting of police force in an area of apprehended trouble to create an effect to the advantage of one party or the other.

(*vii*) Taking persons into preventive custody to immobilise them from legitimate political activity in opposition to the party in power.

(*viii*) Foistering false criminal cases against political functionaries for achieving political ends.

(*ix*) Discriminatory enforcement of law while dealing with public order situations with emphasis on severity and ruthlessness in regard to persons opposed to the ruling party.

(*x*) Managing police intervention by exaggerating a non-cognizable offence or engineering a false complaint to gain advantage over another party in a situation which will be outside the domain of police action in the normal course.

(*xi*) Preparation of malicious and tendentious intelligence reports to facilitate action against an opponent.

Conclusion

People get the government they deserve. Perhaps the same is true of the police force also. The police force of a country cannot be very different from

the rest of society. Police in India may be corrupt to some extent, it may be brutal and inefficient also. But then what is the quality of the other things in our national life? Corruption is an accepted way of life in the country and the police has not monopolised it. Some of the policemen may be rude but then politeness is not a very common phenomenon in other areas of life either. Not very infrequently one experiences the same rude behaviour whether it is from the conductor of a public transport bus or an employee of a nationalised bank and the like. What is therefore needed is a positive and sympathetic attitude towards the police and their problems. Some inspiration may be derived from the following statement which was made by Sir Frank Soskier, a former British Home Secretary, in the House of Commons :

> "Quite often we are a little unreasonable in our approach to the police. We expect that the less sleep they have, the more amiable they will become. They have a different task. They are constantly in active contact with the most disagreeable members of our community. And when they have to deal with the more agreeable members, it is generally upon very disagreeable occasions and when those usually agreeable members are in their most disagreeable moods. For years we have overworked them and habitually overcriticised them. I wish that we can persuade them that the kind of criticism that we direct against them should really be taken by them as a compliment, because it indicates the very high standards that we expect from them. Their task is difficult—the kind of task that they have to encounter when they meet the sort of pompous ass who knows a little law and who, when a police officer asks him to move his car, thinks that some tremendous principle of constitutional propriety is involved. Not only is their work difficult, it is dangerous."[64]

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64. Quoted in P. S. Ram Mohan Rao, *The Developing Society and Police*, pp. 66-67.

Chapter XI

SENTENCING—PROCESS AND POLICIES

The object of a criminal trial is to determine whether the accused person is guilty of the offence he is charged with and to prescribe suitable action if he is proved guilty on the basis of an elaborate system of substantive and procedural criminal law. The determination of the second issue, i.e., the choice of an appropriate sanction out of the many permitted by law in a particular situation is of as enormous consequence to the individual offender as it is to the society at large. While the offender's life, liberty or property and his entire future hinge on the outcome of the sentencing process, it is also bound to have some impact on social interests, which ought to be the primary concern of the criminal law machinery. As discussed earlier, various means of penal sanction such as fine, imprisonment, probation and sometimes the extreme punishment of death are available to the courts under the provisions of law governing a particular kind of offence or offender. The sentencing process involves the determination of the appropriate action both in qualitative and quantitative terms.

The significance of the sentencing process is to be appreciated in the context of individualization in the administration of criminal justice. Individualization means that instead of fitting the offence, the criminal sanction should fit the offender. The first movement towards rational sentencing was launched by the English classical school as a reaction against the arbitrary nature of the punishment prescribed for a variety of offences. In eighteenth-century England, over 200 crimes ranging from pick-pocketing to murder were punishable with the death sentence. In other words, far from fitting the offenders, the punishments did not fit even the offences. Bentham sought to achieve some element of rationality in the penal policy by advocating punishments of different magnitudes for different kinds of offences. He provided the following guidelines for the gradation of offences in terms of different punishments :

1. That the value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence.[1]
2. When two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less.[2]

1. The expression 'profit of the offence' according to Bentham, includes every advantage, real or apparent, providing motivation for the commission of an offence.
2. A thief would prefer to commit theft without murder if there is a big gap in the quantum of punishments for the two offences.

3. The punishment should be adjusted in such manner to each particular offence that for every part of the mischief there may be a motive to restrain the offender from giving birth to it.[3]
4. The punishment ought in no case be more than what is necessary to bring it into conformity with the rules here given.

The other rules propounded by Bentham laid down that the quantum of punishments prescribed should be in inverse proportion to the possibility and time factor involved in the infliction of punishment. In other words, punishment ought to be greater in situations where detection of the offence and the consequent punishment is either uncertain or remote in terms of time.

Regarding the fixation of punishment in the range permissible by law, Bentham said that the quantum should vary according to the offender's capacity to suffer. He then enumerated thirty-two variables of capacity for suffering, ranging from sex, age, physical and mental health to climate, religion and lineage which, in the words of Nigel Walker, was an astonishingly modern piece of writing for an eighteenth-century penologist.

The classical school, therefore, paved the way for distinguishing the various crimes according to their gravity and the prescription of different punishments for them. The Indian Penal Code is an example of the influence exercised by Benthamites in relation to penal legislation in the nineteenth century and afterwards in various countries.

The grading of the various offences is based on their gravity as understood by the legislature ; and the gravity of an offence is generally assessed in terms of social danger, alarm, social disapproval, harm and wickedness involved in it.[4] This can be illustrated with a few examples from English and Indian statutory provisions.[5]

1. Social Danger.—Receiving stolen property is punishable with longer punishment than the one provided for theft.[6] This is because of the greater social danger posed by the professional receivers of stolen property as compared to ordinary thiefs. In terms of wickedness, the two offences appear to be of the same magnitude. Similarly, while the maximum punishment for ordinary cases of criminal breach of trust under the Indian Penal Code is three years, it is seven and ten years when breach of trust is committed by a public servant or a banker respectively.[7] Again the punishment for criminal intimidation is higher in certain situations like a threat to impute unchastity to a woman.[8]

3. Punishment for stealing a smaller amount of money should be less than that for a relatively higher sum.
4. *See* Rupert Cross, *The English Sentencing System* (1971) p. 139.
5. These factors are also considered, as will be seen later, by the court in sentencing.
6. In India the punishment, however, is the same for the two offences. *See* IPC, Sections 379 and 411.
7. IPC, Sections 405, 407, 408 and 409.
8. IPC, Section 506.

2. *Alarm.*—The gravity of an offence is also determined with reference to the alarm it causes in society. Burglary, therefore, is treated more seriously than theft.[9] This is necessary in view of what has been called "vindictive satisfaction" by Bentham as well as on the ground of general deference. One of the reasons for punishing unsuccessful attempts to commit crimes is that though the intended harm is not caused, some alarm is caused to the potential victim and others.

3. *Social Disapproval.*—The element is the basis of certain sexual offences and also of the differential punishments for different types of sexual offences. While a heterosexual intercourse is punishable only if it is against the will or without the consent of the victim or if the victim is below a certain age, a homosexual act is punishable irrespective of the age factor or whether the persons concerned consented or not.[10] It is also significant that a husband committing rape of his minor wife is treated quite indulgently by the law.[11] The legislative attitude can be demonstrated by the fact that under the Sexual Offences Act 1956 of England, an indecent assault upon a woman is punishable with a maximum of two years' imprisonment, whereas indecent assault upon a male is punishable with ten years as a result of increase in the maximum punishment by the Sexual Offences Act 1967.[12] Finally, in India, illicit relationship with a married woman is punishable but a situation where the man is married and the woman unmarried is not punishable as such.

4. *Harm.*—This is one of the factors to be considered in the sentencing policy by the legislators and the judges. Offences against a person such as murder, grievous hurt and simple hurt are punished differently under the Indian Penal Code. Attempt to commit an offence involves the same wickedness on the part of the offender as in the case of the successful commission of the crime but attempts are punishable with lesser penalties since lesser or no harm is caused in unsuccessful attempts.[13]

5. *Wickedness.*—Though the harm produced by two different offences may be the same, yet the offence involving greater wickedness should carry greater punishment. For instance, while the offence of murder is punishable with death or life imprisonment, death caused by a rash or negligent act is punishable with only two years' imprisonment.[14] Dishonest acquisition of property through cheating is treated as a more serious offence than theft. While the maximum punishment for the former is 7 years, it is only three years for the latter.[15]

9. IPC, Section 454.
10. IPC, Sections 376, 377.
11. Section 376.
12. Rupert Cross, *op. cit.*, p. 141.
13. IPC, Section 511.
14. IPC, Sections 302 and 304-A.
15. IPC, Sections 379 and 420.

It should not, however, be concluded from the above discussion that the quantum of punishments for various offences is invariably based on highly scientific or rational considerations. Before its revision in 1965, the New York penal law provided a maximum of two years' imprisonment for abandonment of children and compounding a crime but three years for injury to domestic animals and misconduct of election officials. It was apparently this kind of irrationality that led a critic to make the following observations[16]:

> "No branch of penal legislation is, in my view, more anarchical than that which deals with prison terms that may or sometimes must be imposed on conviction of specific crimes. The legislature typically makes determination of this order not on any systematic basis but rather by according its ad hoc attention to some discreet area of criminality in which there is a current hue and cry. Distinctions are thus drawn which do not have the slightest bearing on the relative harmfulness of conduct and the consequent importance of preventing it so far as possible, on the probable dangerousness of the individual whose conduct is involved, or even on a public demand for heavy sanctions which is so inexorable that it cannot safely be denied. What dictates legislation is the simple point of politics that re-election demands voting against sin, whenever ballots on the question must be cast."

Prescribing sentences for various offences is a legislative function and courts in England and India cannot question the wisdom of the legislatures even if the sentences appear to them to be unreasonable or excessive. The courts can exercise their discretion in such cases in fixing the appropriate punishment where maximum penalties have been provided but they cannot but be helpless in situations where minimum sentences are laid down. The courts in the U.S.A., however, have the power to strike down a punishment as unconstitutional if it is 'cruel and unusual' and violating the Eighth Amendment of the Constitution. *Watson* v. *U.S.*[17] is an example. The appellant was convicted under a law which provided a minimum of ten years' imprisonment for being in possession of narcotics. The Court of Appeals held the punishment of ten years to be cruel and unusual and in violation of the Eighth Amendment. The court observed :

> "....The imposition of a statutory minimum, denying the defendant the benefit of any special equity or mitigating circumstances which would otherwise result in a lighter sentence, is itself a mark of unusual severity. And we note that, at least on the record before us, this appellant has numerous special equities and mitigating circumstances in his favour. Nor is this all. The general federal rule permits the court to suspend all or part of a sentence imposed for any offence not punishable by death

16. Wechsler, 109 Pennsylvania Law Review 465, 472.
17. U.S. Court of Appeals, District of Columbia, 1968.

or life imprisonment. Moreover, most criminals are eligible for parole after serving one-third of their terms. But Congress has made a special exception for narcotic offenders, denying them either probation or parole.

The result of this sentencing scheme is that a convicted murderer, kidnapper, arsonist, rapist, traitor, robber or saboteur may receive a lighter sentence than is mandatorily imposed on an addict who possesses narcotics more than once. And all these dangerous felons may be eligible for release before the hapless addict if they are sentenced to any term less than thirty years.... We do not dispute Congress's right to set minimum prison terms.... But we think any judgment that mere possession of unstamped narcotics to meet a compelling personal need is a more heinous offence than many murders, arsons, rapes or kidnapping would be arbitrary and capricious. The only plausible justification of punishing such possession more severely is that, though less serious, it is harder to deter. But that rationale, while entitled to consideration, cannot support a penalty out of all proportion to the offence or to the culpability of the offender."

Primary and Secondary Decisions

The first issue which a court has to decide after finding an accused person guilty is to determine whether the offender needs to be dealt with through 'individualization' or by penal sanctions. The term 'individualization' includes in this context preventive as well as rehabilitative measures, and an approach different from the concepts of retribution and general deterrence. After making the choice between the two conflicting approaches, the court has to select the appropriate mode out of the available devices in the particular approach. If the choice made is 'individualization' the further issue is to choose between alternatives like probation and suspended sentence. If the punitive approach is chosen, the alternatives available are fine, imprisonment or death sentence in the extreme cases. It is obvious that in case of the imposition of imprisonment of fine, the quantum of the sanction shall also have to be fixed. The various parts of the sentencing decisions are referred to as the primary and secondary decisions.[18]

Individualization of sentence has been the leading tendency in sentencing in the contemporary period. Writing about England, D.A. Thomas observes[19]:

"...As late as 1932, the Departmental Committee on Persistent Offenders could describe sentencing behaviour almost entirely in terms of a tariff system. By 1961, the Streatfield Committee saw a changed

18. Thomas, *Principles of Sentencing* (Heinmann, London, 1970).
19. *Ibid.*

picture, the courts had increasingly come to consider the offender as an individual, whose needs, rather than whose guilt, would form the basis of the sentence passed."

Similar developments have occurred in many countries including India and the U.S.A. in varying degrees.

The Criminal Procedure Code of 1973 incorporated some provisions which can be put to use in order to personalise the sentence from various angles.[20] These provisions reflect the contemporary thinking that sentencing is an important stage in the administration of criminal justice and it should be given its due place in the system.[21]

There is a long range of factors which must be looked into by a court while making up its mind on the issue of sentencing. The Law Commission identified the various considerations to be made in its Forty-seventh Report and they have been cited with approval by the Supreme Court in its subsequent rulings.[22] The Commission summed up the issues relating to sentencing as below[23]:

> "A proper sentence is a composite of many factors, including the nature of the offence, the circumstances—extenuating or aggravating—of the offence, the prior criminal record, if any, of the offender, the age of the offender, the professional and social record of the offender, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospect of the rehabilitation of the offender, the possibility of a return of the offender to normal life in the community, the possibility of treatment or of training of the offender, the possibility that the sentence may serve as a deterrent to crime by this offender or by others, and the present community need, if any, for such a deterrent in respect to the particular type of offence involved."

Pre-sentencing Inquiry

It is evident that the sentencing authority must have sufficient information regarding the various personal factors of the accused if the primary and secondary decisions are to proceed on any scientific premises. The need for making detailed information about the offender available to the court has therefore been felt in all the modern penal systems. The significance and importance of the pre-sentence report has been described by Sheldon Glueck thus[24]:

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20. Sections 235(2), 248(2).
21. See *Santa Singh* v. *State of Punjab*, (1976) 4 SCC 190 : 1976 SCC (Cri) 546.
22. *Mohd. Giasudddin* v. *State of A.P.*, (1977) 3 SCC 287 : 1977 SCC (Cri) 496.
23. Paras 7-44.
24. 41 Journal of Criminal Law and Crime 717.

"A pre-sentence investigation is helpful even if one clings to the conviction that the chief aim of the criminal law is painful punishment with a view to general and specific deterrence ; all the more necessary it is if one believes its main objective to be the reform and the rehabilitation of the offender.

Not only is the pre-sentence report valuable as a basis for sentence and treatment in the individual case but the accumulation and study of many pre-sentence reports can lead to a realistic, rather than a merely theoretical, re-examination of the entire philosophy of punishment."

The courts not only receive and use the information given in the reports but they may also seek advice from experts like psychiatrists or probation officers regarding the desirability of a particular sentence keeping in view its likely impact on the offender. The information is of special significance in case of juvenile offenders and some of the related issues have been referred to in the chapter dealing with juvenile delinquency.

Nigel Walker emphasis the value of the pre-sentencing reports to bring home the point that the courts trying and finding an accused person guilty are not necessarily the sole instruments of doing the sentencing job as well[25]:

"Quite apart from the actual value of the information and advice, this trend is healthy, because it means a departure in practice from the legal convention that the disposal of the offender is the sole responsibility of the persons who preside over the trial of his guilt."

The Congress of the Institutional Penal and Penitentiary Commission in Brussels held in 1951 recognised the utility of pre-sentencing reports and some of the resolutions reproduced below indicate the scope and content of such reports likely to be helpful in the sentencing process :

1. In the modern administration of criminal justice, a pre-sentence report covering not merely the surrounding circumstances of the crime but also the factors of the constitution, personality, character and socio-cultural background of the offender is a highly-desirable basis for the sentencing, correctional and releasing procedures.
2. The scope and intensity of the investigation and report should be adequate to furnish the judge with enough information to enable him to make a reasoned disposition of the case.
3. In this connection it is recommended that criminologists in various countries conduct researches designed to develop prognostic methods ('prediction tables', etc.).[26]
4. It is further recommended that the professional preparation of judges concerned with peno-correctional problems include training in the field of criminology.

25. Nigel Walker, *op. cit.*, p. 97.

26. For a discussion on prediction tables see chapter on Probation.

The pre-sentence reports are now a regular feature of the English and American criminal law systems. In the U.S.A. the various States have enacted laws for the supply of these reports and they have also been the subject-matter of the constitutional issues arising due to the requirement in many jurisdictions that the reports must be kept confidential. In England, the Home Office has powers since 1967 to require any kind of criminal court to obtain a 'social inquiry report' before imposing a custodial sentence on whatever category of offender the Home Office may prescribe. In India, however, there is no such provision in the laws relating to the administration of criminal justice except those relating to juvenile offenders. The issue was considered by the Indian Jails Committee which opposed the kind of arrangement as in the U.S.A. in view of the peculiarities of the Indian context in the following words[27]:

> "Objection to this is that apart from duplication of the work which it involved, it would be too early to judge the effect of conviction and of yet unpronounced sentence on the accused. In some States of America an attempt has been made to get over this difficulty by appointing in every court an officer whose duty it is after the previous guilt has been established to make inquiries and to furnish the judge with information including a report on his mental condition which will enable to award punishment wisely and equitably. The system is said to work satisfactorily in the U.S.A. although even there it was admitted that attempts had been made, though unsuccessful, to influence the courts' officers in favour of or against the prisoner. In this country we do not think that such system would have any chance of success. The many religious and social cleavages which exist in India would inevitably lead to an unevenness in the officers' reports even if direct corruption could be guarded against, and we do not think that it would be wise to imitate the American system in this respect. At the same time, it does seem possible that more might be done specially through the instrumentality of the public prosecutor, generally a *vakil* of long standing and position, to lay before the court, after the question of the prisoner's guilt has been determined, such reliable information as would enable the court to adjust its sentence to the needs of the case."

It is evident that the views expressed by the committee in terms of 'religious and social cleavages' are a bit obsolete now though there might have been a lot of truth in it when the report was submitted more than half a century ago. Certainly the arguments based on the abuse of authority may be advanced even in the case of court personnel including judges and public

27. Quoted in Kripal Singh Chhabra, *Quantum of Punishment in Criminal Law in India* (1970), p. 179.

prosecutors. In any case the committee did not deny the potential utility of the pre-sentence reports.

In the absence of any pre-sentence reports, courts in India have to fix the punishments on the basis of whatever inadequate information they receive about the offender in the course of the actual trial. The Supreme Court has lamented more than once over this kind of unsatisfactory state of affairs. In *P.K. Tejani* v. *M.R. Dange*[28], Krishna Iyer, J. observed :

> "Finally comes the post-conviction stage where the current criminal system is the weakest. The court's approach has at once to be socially informed and personalised. Unfortunately, the meaningful collection and presentation of penological facts bearing on the background of the individual, the dimension of damage, the social milieu and what not—these are not provided for in the Code and we have to make intelligent hunches on the basis of materials adduced to prove guilt...."

Referring to the lack of opportunities for the consideration of sentencing issues in the trial courts, the Supreme Court observed in *Ramashraya Chakravarti* v. *State of M.P.*[29] :

> "Trial courts in this country already overburdened with work have hardly any time to set apart for sentencing reflection. This aspect is missed or deliberately ignored by the accused lest a possible plea for reduction of sentence may be considered as weakening his defence. In a good system of administration of justice, pre-sentence investigation may be of great sociological value."

Under the new Criminal Procedure Code of 1973, the sessions courts and the magistrates trying warrant cases have to give hearing to the accused on the question of sentencing after finding him guilty of the offence.[30] Though the system based on pre-sentence reports is yet to come, the new provisions may at least give some scope to the sentencing issues in the criminal courts in India.

The nature and scope of the provision of Section 235(2) of the Criminal Procedure Code of 1973, which deals with pre-sentencing hearing, was explained by the Supreme Court in *Santa Singh* v. *State of Punjab*[31]. It was held that the provision was mandatory and failure to give a hearing to the accused before the sentence is pronounced vitiates the sentence and it is not just an irregularity curable by Section 465 of the Criminal Procedure Code. The hearing implies opportunity to place full and adequate material before the court and, if necessary, to lead evidence.

28. (1974) 1 SCC 167 : 1974 SCC (Cri) 87.
29. (1976) 1 SCC 281 : 1976 SCC (Cri) 1.
30. *See* Sections 235 and 248.
31. (1976) 4 SCC 190 : 1976 SCC (Cri) 546.

Despite the mandatory provision contained in Section 235(2) of the Criminal Procedure Code and the above-cited ruling of the apex court, the courts quite often take up the pre-sentencing exercise in a somewhat casual manner as if it was just a meaningless formality. In *Anshad* v. *State of Karnataka*[32], the Supreme Court criticised the sessions judge for giving the sentencing decision on the day of conviction itself and even this was done in a cryptic manner in just one paragraph of the judgment. As pointed out by the court, the trial judge completely ignored the purpose of Section 235(2) which displayed lack of sensitiveness on his part as regards sentencing. In *D.D. Suvarna* v. *State of Maharashtra*[33], the sentencing hearing was given after the death sentence had been pronounced by the judge ; a procedure which was aptly described as a farce by the court.

There may, however, be some rare situations where it would be unnecessary to give any pre-sentencing hearing to the offender ; *State of Maharashtra* v. *Sukhdev Singh*[34] being such an instance. The killers of General Vaidya in their examination under Section 313 of the Criminal Procedure Code, one of them even prior to the examination as well, had not only admitted their guilt but told the Court that they were proud of what they had done since the deceased was the enemy of Sikhs and had desecrated the *Akal Takht*. The convicts did not even file an appeal from the judgment of the designated court. Because of all these considerations the Supreme Court held that the conviction and sentence on the same day was justified.

An interesting situation arose in *Padmanabhan* v. *State of Kerala* where the appellant having been acquitted by the trial court was convicted by the High Court and sentenced without any pre-sentence hearing. The question that arose was whether the High Court was also bound by the requirement of Section 235, Criminal Procedure Code. The question was left open by the Supreme Court, since it restored the order of acquittal passed by the trial court. It, however, seems logical that the same kind of opportunity should be given to the offender by the High Court in such a situation as would have been available to him at the trial court.

The Primary Decision—Illustrative Cases

The determinants of the judicial attitude can be understood with the help of some decided cases. As discussed earlier, gravity of the offence is reflected in the severity of punishments prescribed by the legislature. The same factors, e.g., alarm, harm, wickedness and public disapproval have an impact on judicial attitude as well. Grave offences like rape and robbery have generally been dealt with by deterrent sentences. Prevalence of a crime at a time in a local area warrants more strict attitude on the part of the courts.[35]

32. 1994 SCC (Cri) 1204.
33. 1994 Cri LJ 3602.
34. 1992 SCC (Cri) 705.
35. For an appraisal of sentencing issues in probation, see the various judicial decisions in Chapter VI.

Young age is certainly an important factor in deciding in favour of rehabilitative treatment but here also the courts cannot afford to ignore other factors involved in the case. Three offenders of young age were found guilty of having sexual intercourse with a group of schoolgirls who were "bored and desperate for some form of excitement" and "sexual adventures became the vogue amongst them". Eighteen girls and forty youths were found involved in these 'sexual adventures'. The court opted for deterrent sentence despite the young age of the offenders since the episode in its opinion must have caused 'grave disquiet in the locality concerned where this is going on, on a whole scale'.[36]

In a case where a boy of 14 years was found guilty of murder of a boy who did not accept his proposal for unnatural intercourse with him, it was held by the Madhya Pradesh High Court that not only did the Reformatory Schools Act not operate in murder cases[37], but even otherwise a youthful offender convicted of murder should not ordinarily be sent to reformatory schools. The court held that it was more so when the conduct, besides being extremely cruel, exhibits great depravity. It was also pointed out that it was implicit in the rules framed by the State Government under the Act that boys habituated to committing unnatural offences should not be sent to reformatory schools.[38]

On the other hand, a young man of twenty years was found guilty of an offence under Section 380 of the Indian Penal Code for committing theft of a bicycle and a few clothes. The factors which weighed with the court in releasing him after admonition under Section 3 of the Probation of Offenders Act, 1958, were that there was no previous conviction to the credit of the accused and the theft was committed on a sudden temptation without any prior planning or design on the part of the accused person.[39]

The Secondary Decision

After the primary decision is made, the court has to apply its mind in choosing one of the alternatives approaches, i.e, individualization or punitive approach. The various individualized approaches have been discussed in chapters relating to probation, parole and juvenile delinquency and now an assessment of the principles of sentencing in the punitive method may be made.

The possible modes of punishment in countries like India, where capital punishment has not yet been abolished, are capital punishment, imprisonment

36. Murphy, Galloway and Shinn, 1964 Cr LR 486.
37. Earlier there was difference of opinion between the two judges who heard the appeal in the first instance on the question of applicability of the Act in a murder case. The issue has now been settled by the Supreme Court ; *see* the Growth of Juvenile Institutions in India in Chapter VIII *supra*.
38. *Ganga Ram Raghu Nath* v. *State of M.P.*, AIR 1965 MP 122.
39. *Suna* v. *State*, AIR 1967 Ori 4.

including life-term and fine. The death sentence being permissible in extremely serious cases only, the more common modes are imprisonment and fine. The fixation of quantum of punishment is an important part of the sentencing process.

Capital Punishment

The framers of the Indian Penal Code were of the view that capital punishment ought to be used sparingly. The position of capital punishment in the Penal Code has not changed as such in more than hundred years of its existence but the trend in the direction of the abolition of capital punishment in many countries has affected legislative as well as judicial thinking on the subject. The legislative thinking is reflected in some subtle changes in the Criminal Procedure Code during the last two decades or so. Before the amendment of the Criminal Procedure Code of 1898 in 1955 it was obligatory for a court to give reasons for not awarding death sentence in a case of murder. The amendment of 1955 did away with the requirement of assigning reasons for not giving death sentence in an appropriate case. Under the new Criminal Procedure Code of 1973 the court has to record reasons for awarding death sentence. It is evident that the provisions regarding death sentence have gradually been liberalised in favour of guilty persons. The liberal judicial attitude has also been responsible to a great extent for the gradual reduction of capital sentence in the recent past as will be evident from the following principles which emerged after the legislative changes in 1955 and 1973 before further judicial efforts led almost to the abolition of death sentence in the country:

1. Brutality involved in a murder as an aggravating factor may indicate capital punishment.
2. A murder after due premeditation and planning may call for death sentence.
3. Provocation given by the deceased to the offender even if not sufficiently 'grave and sudden' to reduce the offence to culpable homicide not amounting to murder under Exception 1 to Section 300 of the IPC may still be treated as a mitigating circumstance to warrant life imprisonment in preference to death sentence.
4. Murder committed on the spur of the moment where no enmity between the convict and the deceased is involved may not be punished with death. Such cases are not necessarily covered otherwise by Exception 4 to Section 300, IPC which reduces the offence of murder to culpable homicide not amounting to murder punishable with life imprisonment up to ten years. Irresistible impulse has also been accepted as a mitigating factor.[40]

40. *Gulab Souba* v. *State of Maharashtra*, (1971) 3 SCC 931 : 1972 SCC (Cri) 179.

5. Age or sex itself is not generally enough to reduce the sentence of death to life imprisonment though there are some cases where youth of the offender has been accepted as a mitigating factor.[41] The Indian Penal Code (Amendment) Bill, 1972, however, contained the following provision :

"The sentence of death shall not be passed on a person convicted of a capital offence if at the time of committing the offence he was under eighteen years of age and death is not the only punishment provided by the law for the offence."[42]

6. If an appeal is made against the conviction for murder to the High Court and the judges agree on the question of guilt but differ on sentence, it is usual not to impose the death penalty unless there are compelling reasons for the extreme punishment.[43]

7. Another factor which has sometimes been accepted as one of the mitigating circumstances is the delay involved in the final disposal of the case by the appellate courts. The reason advanced is that the mental torture caused to the convict due to the death sentence hovering over him for a long time may be considered as a mitigating factor.[44] A possible criticism is that delay in the disposal of the appeal depends upon a number of fortuitous circumstances linked with the legal process, and as such, have no relevance to the question of death sentence. The Supreme Court has said in a recent case that the value of such delay as a mitigating factor depends upon the features of a particular case. The Court observed that the issue cannot be divorced from the diabolical circumstances of the crime itself.[45]

Some of the above-mentioned principles can be illustrated by some of the decisions of the Supreme Court. In a case the appellant attempted on various occasions to have illicit relationship with the deceased, his former beloved, after her marriage to another person. This was naturally resented by her husband and other members of the family. The appellant attacked the deceased and three other unarmed persons while they were sleeping in their house. The Supreme Court upheld the death sentence on the following grounds :

"The conduct of the appellant in attempting to disrupt the matrimonial home of the deceased was highly immoral and cannot be looked upon with commiseration, particularly when after her marriage the

41. See *Prem Narain* v. *State*, AIR 1957 All 177. *See also* the general observations by the Supreme Court on capital punishment in *Ediga Anamma* v. *State of A.P.*, (1974) 4 SCC 443 : 1974 SCC (Cri) 479 where it was said that where the murderer is too young or too old, the clemency of penal justice helps him.

42. Clause 20.

43. *Pandurang* v. *State of Hyderabad*, 1955 Cri LJ 572.

44. For delayed execution, *see* under 'Delay in Execution' in this Chapter.

45. *Lajar Masih* v. *State of U.P.*, (1976) 1 SCC 806 : 1976 SCC (Cri) 195.

deceased had returned to the path of rectitude and was firmly faithful to her husband. Again, the crime was committed in a dastardly fashion. No less than four unarmed person were indiscriminately stabbed when most of them were lying asleep, unaware and helpless. The crime was premeditated and preplanned. Melhu's injury was dangerous to life. But for timely medical aid, the injury would have proved fatal."[46]

Bishan Das v. *State of Punjab*[47] is another case where the Supreme Court refused to interfere with the award of death sentence to the appellant because the murder was committed in an extremely dastardly and cruel manner. The Court observed :

".... We are aware that the general trend in courts and among jurists as well as penal codes in the country and other countries is towards abolition of capital punishment. Indeed we had occasion to consider the matter in some detail in *Ediga Anamma* v. *State of A.P.*[48]. where we have pointed out how the draft bill before the Parliament revising the Penal Code leans towards the more humane alternative of the two punishments prescribed for murder. However, a bill is not law nor are we disposed to interference with the punishment inflicted."

The trend is clearly towards the abolition of death sentence and it appears that at present the death sentence is being allowed only in cases where there is not the slightest trace of any extenuating circumstances. The Supreme Court observed in *Ediga Anamma* :

"While murder in its aggravated form in the extenuating factors connected with crime, criminal or legal process, still is condignly visited with death penalty, a compassionate alternative of life imprisonment in all other circumstances is gaining judicial ground."

In fact, the decisions in the above case and in *Raghubir Singh* v. *State of Haryana*[49], represent the high watermark of judicial clemency in India in the context of capital punishment. In both the cases Krishna Iyer, J. commuted the death penalty of sex-stricken persons to life imprisonment in spite of the fact that in both the cases the criminals showed criminality of a high order and the murders were the result of treachery, planning and deep premeditation ; one case being of double murder. It would not be out of place to take detailed note of the judgments in the two cases.

In *Ediga Anamma* v. *State of A.P.*[50], the appellant was convicted of double murder, of a woman and her tender child because of the jealousy generated by the fact that the deceased woman had developed amorous

46. *Lajar Masih* v. *State of U.P.*, (1976) 1 SCC 806 : 1976 SCC (Cri) 195.
47. (1975) 3 SCC 700 : 1975 SCC (Cri) 145.
48. (1974) 4 SCC 443 : 1974 SCC (Cri) 479.
49. (1975) 3 SCC 37 : 1974 SCC (Cri) 733.
50. (1974) 4 SCC 443 : 1974 SCC (Cri) 479.

relationship with the same man, a widower, with whom the appellant had already been carrying on an affair. The stabbing of the two persons was planned and ghastly in nature and careful steps were taken to destroy the evidence by attempting to burn the body of the deceased woman. The Supreme Court made the following observations to justify its preference for life imprisonment to capital sentence:

"We assume that a better world is one without legal knifing of life, given propitious social changes. Even so, to sublimate savagery in individual or society is a long experiment in spiritual chemistry where moral values, socio-economic conditions and legislative judgments have a role. Judicial activism can only be a signpost, a weather-vane, no more. We think the penal direction in this jurisprudential journey points to life imprisonment normally, as against guillotine, gas chamber, electric chair, firing squad or hangman's rope. 'Thou shalt not kill' is a slow commandment in law as in life, addressed to citizens as well as to States, in peace as in war.

Let us crystallise the positive indications against death sentence under the Indian law currently.... Where the murderer is too young or too old, the clemency of penal justice helps him. Where the offender suffers from socio-economic, psychic or penal compulsions insufficient to attract a legal exception or to downgrade the crime into a lesser one, judicial commutation is possible. Other general social pressures, warranting judicial notice, with an extenuating impact may, in special cases, induce the lesser penalty. Extraordinary features in the judicial process, such as the death sentence has hung over the head of the culprit excruciatingly long, may persuade the court to be compassionate. Likewise if others involved in the crime and similarly situated have received the benefit of life imprisonment or if the offence is only constructive, being under Section 302 read with 149, or again the accused has acted suddenly under another's instigation without premeditation, perhaps the court may humanely opt for life imprisonment, even like where a just cause or real suspicion of wifely infidelity pushed the criminal into the crime. On the other hand, the weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim and the like, steel the heart of the law for a sterner sentence. We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society. A legal policy on life or death cannot be left for ad hoc mood or individual predilection and so we have sought to objectify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accepting the trend against the extreme and irrevocable penalty of putting out life.

> Here the criminal's social and personal factors are less harsh, her femininity and youth, her unbalanced sex life and expulsion from the conjugal home and being the mother of a young boy—these individually inconclusive and cumulatively marginal facts and circumstances—tend towards award of life imprisonment."

In *Raghubir Singh* v. *State of Haryana*[51] the appellant had a sexual affair with a woman who feigned pregnancy to force him into marriage. The appellant being married and, therefore, reluctant to marry her caused her death by administering poison in a cup of milk. Despite the fact that the appellant was found to be lecherous even before his involvement with the deceased and the Supreme Court accepting that the murder was treacherous, the death sentence was reduced to life imprisonment, Krishna Iyer, J. giving the following reasons :

> ".... But a few ameliorative features fall to be noticed since judicial temper has more components than indignation against murder. The convict is in his twenties, not irrelevant in considering death sentence. He is said to be a married man. He was promiscuous with women, a salacious sin for which the deceased was a contributory. The latter's pressure to get him to marry her must have planted the seed of murderous thought in him. He bargained for romance, encouraged by the victim but the pregnancy—though pretended—in a society, which views unmarried mothers as vicious, upset the appellant. These have no bearing on guilt at all but attenuate the lethal touch of the sentence. Some planning and treachery have aggravated the crime, which also must not be overlooked. Yet another circumstance. The man was sentenced to death as early as May 23, 1972 and for twenty months the spectre of death penalty must have tormented his soul. Taken separately, none of these may suffice to commute but the conspectus of factors, personal and social, tilt the scale in favour of a life-term."

The Supreme Court has continued to give judgments showing its preference to life imprisonment in all cases except those which do not have extenuating circumstances at all. A triple murder offender who killed his wife and two daughters supposedly under some kind of 'mental imbalance' as a result of a dogbite got his death sentence commuted by the Supreme Court.[52] In yet another case, the Supreme Court reduced the capital punishment to life imprisonment on the quality of evidence against the appellant. It is interesting that the Court found the approver's evidence corroborated by independent evidence to be sufficient for conviction for murder but not good enough to warrant a death sentence.[53]

51. (1975) 3 SCC 37 : 1974 SCC (Cri) 733.
52. *Nemu Ram Bora* v. *State of Assam and Nagaland*, (1975) 1 SCC 318 : 1975 SCC (Cri) 98.
53. *Subramaniam* v. *State of Tamil Nadu*, (1975) 3 SCC 414 : 1975 SCC (Cri) 40.

If *Ediga Anamma* reflected the Supreme Court's increasing aversion to the death sentence, the majority opinion in *State of U.P.* v. *Rajendra Prasad*[54] represents the most ambitious judicial attempt towards abolition of capital punishment in India. No longer did the Supreme Court work its way taking an extremely liberal position in terms of 'extenuating circumstances' ; there were hardly any in the three cases disposed of by the judgment.[55] For the first time the Court asserted that it had the right to evolve the 'supplementary principles' if the legislative text was 'too bald to be self-acting' and even if this appeared 'to possess the flavour of law-making'. The facts in the three appeals are briefly described below.

In *Rajendra Prasad* there was a long-standing feud involving the families of Ram Bharosey and Pyarelal. The appellant, the son of Pyarelal, committed a murder in the course of a trouble which flared up between two families and was sentenced to life imprisonment. After a few years in jail the appellant was released on Gandhi Jayanti day. Only a few days afterwards he committed yet another murder. On the day of the occurrence of the second murder the accused rushed towards Sri Kishan, brother of Ram Bharosey, armed with a knife but Sri Kishan ran to safety and was not hurt. Later in the evening the same day, the accused dealt several blows with a knife on vital parts of the body of Ram Bharosey who released himself from his grip and ran inside his house and bolted the door. The accused chased him all the way with the bloodstained 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 Ram Bharosey. Thereupon the accused struck the deceased Mansukh, who tried to escape, but the accused chased him over a distance of 200 or 250 feet and inflicted repeated knife injuries on the deceased resulting in his death.

The Allahabad High Court observed that the appellant was a 'desperate character' and confirmed the death sentence passed upon him.

In Kunjukunju Janardhan's case, the accused, a married man with two young children, got infatuated by the charm of a village girl who entreated him in her letters not to court her as it would destroy the happiness of his family. To these entreaties the accused responded by writing in a letter that he would exterminate his wife and children once and for all so that he may live happily with her. Later, he committed the brutal murder of his wife aged 26 and of his two sons aged 5 and 7 at the dead of night while they were asleep, by repeatedly striking them with a sharp-edged deadly weapon.

The Kerala High Court while confirming the sentence of death passed on the accused observed that he acted with extreme depravity.

54. (1979) 3 SCC 646 : 1979 SCC (Cri) 749.

55. The other two appeals disposed of were *Kunjukunju Janardhan* v. *State of Kerala* and *Sheo Shankar Dubey* v. *State of Uttar Pradesh*.

In the third case, i.e., of Dubey, the accused committed three murders in a row, one of his uncle and two of his cousins, immediately after trouble arose while the joint family property was being distributed. The accused first hit his aged uncle on the chest with a knife, who tried to run away. The accused chased him and struck him fatal blows. A son of the uncle tried to intercept the blows on his father and he too was finished off. The second son of the uncle met the same fate when he tried to rescue his brother.

The majority judgment was delivered by Krishna Iyer, J., Desai, J. concurring with him. All the three appeals were upheld and death sentences commuted to life imprisonment. The salient points of the majority opinion were as given below :

1. 'Special reasons' necessary for imposing death penalty must relate not to the crime as such but to the criminal and in spite of the crime being shocking in a particular instance the criminal may not deserve death sentence.

2. The correct approach is to read into Section 302, IPC and Section 354, CrPC the human rights and human trends in the Constitution. If the murderous operation of a die-hard criminal jeopardizes social security in a persistent, planned and perilous fashion, then his enjoyment of fundamental rights may be rightly annihilated. So, one test for imposition of death sentence is to find out whether the murderer offers such a traumatic threat to the survival of social order. (Examples: A manufacturer of drugs mixing poison in the drugs ; a trader responsible for causing death by adulteration for his private profit ; murderous band of dacoits committing armed robbery).

3. In the case of a murder if the public prosecutor informs the court at the stage of sentence hearing under Section 235(2) of the CrPC that the State as prosecutor is of the opinion that the case is not one where extreme penalty is called for and if the sessions judge agrees with the submission, the matter should end there. If on the other hand the public prosecutor states that the case calls for the extreme penalty prescribed by law, the court would be well-advised to call upon the public prosecutor to state and establish, if necessary by leading evidence, facts for seeking the extreme penalty of death sentence.

The well-reasoned and highly-persuasive dissenting judgment was given by Sen, J. who made the following points :

1. It is constitutionally and legally impermissible for the Supreme Court while hearing an appeal by special leave under Article 136 of the Constitution on a question of sentence, to restructure Section 302 of Indian Penal Code or Section 354, sub-section (3) of the Code of Criminal Procedure so as to limit the scope of the sentence of death provided for the offence of murder under Section 302.

2. Where special leave under Article 136 is given on the question of sentence only the Supreme Court should interfere only if the sentence is "erroneous in principle". Judges are not concerned with the morals or ethics of a punishment ; their duty is to administer law as it is and not as it ought to be according to their personal views. The issue regarding the death sentence or its scope is one for the Parliament to decide.

3. In cases of murders committed with extreme brutality it is not only within the power of the court but its duty also to award death sentence. To allow persons having committed cold-blooded, deliberate and brutal murders to escape with the lesser punishment of life imprisonment will deprive the law of its effectiveness and result in travesty of justice.

4. Capital punishment has its justification in deterrence value. It also meets the public demand for retribution.

The judge did not find, on facts, death sentence in each of the three appeals to be "erroneous in principle". In each of the three cases there were "special reasons" within the meaning of Section 354(3) of the Criminal Procedure Code. The sentence passed on the appellants was not arbitrary or excessive or indicative of an improper exercise of discretion by the trial court. In *Bishnu Deo Shaw* v. *State of West Bengal*, the principles laid down in *Rajendra Prasad* were reaffirmed by Krishna Iyer and Chinappa Reddy, JJ.[56]

A Bench consisting of Krishna Iyer, J., Desai, J. and Sen, J. heard the appeal in *Dalbir Singh* v. *State of Punjab*[57] and, as could be expected, the judges stuck to their well-defined positions in *Rajendra Prasad* and the majority decision commuted the death sentence to life imprisonment.

It was a case involving preplanned murder resulting in three casualties of life. The trouble between the appellants and the party of the deceased persons occurred because of 'turns of water' regarding the irrigation of their agricultural fields.

An interesting question which arose in *Dalbir Singh* was whether the decisions in *Rajendra Prasad* and *Bishnu Deo Shaw* were binding in the subsequent cases. While the majority consisting of Krishna Iyer and Chinnappa Reddy, JJ. held that they were binding precedents until overruled by a larger Bench, Sen, J., was of the opinion that it was not so. According to him only a *principle* laid down in sentencing could be binding but not the rules made by the court for reducing the scope of death sentence, which in any case the court was not competent to do. According to Sen, J, there was no *ratio decidendi* in *Rajendra Prasad* to be followed in subsequent cases.

56. (1979) 3 SCC 714 : (1979) 3 SCC (Cri) 817.
57. (1979) 3 SCC 745 : 1979 SCC (Cri) 848.

The question came up at the same time in another appeal before different judges in *Bachan Singh* v. *State of Punjab*[58]. The appellant was convicted for the murder of his wife and he underwent life imprisonment. On being released from jail he came to stay with his cousin Hukam Singh. This was objected to by Hukam Singh's wife and son Desa Singh and the appellant, therefore, developed a grievance against the family. While Hukum Singh and his wife were away in another town the appellant taking advantage of the situation killed Desa Singh and his two sisters and grievously injured a third one with a *kulhari* (axe) in an unusually brutal manner. He was awarded death sentence. The High Court, while confirming the death sentence, observed :

> "The manner in which the appellant perpetrated these crimes by killing these persons in their sleep is heinous. Under these circumstances, the case of appellant for reduction of the sentence cannot be considered and in our view the sentence awarded by the learned trial judge was the only appropriate sentence."

In the Supreme Court, Kailasam, J. did not agree with the majority reasoning in *Rajendra Prasad* mainly on the ground that it was not in conformity with the decision of the Constitutional Bench of the Court in *Jagmohan* and that the propositions laid down were not within the competence of the Court. Even though the decision, in the opinion of Kailasam, J., could not be treated as a binding precedent, he nevertheless directed the matter to be placed before the Chief Justice for constituting a larger Bench to decide the case. Sarkaria, J. concurred regarding the submission of the case to the Chief Justice for being referred to a larger Bench. He, however, reserved his opinion on the various questions regarding Section 354(3) of the Criminal Procedure Code raised in the case.

A larger Bench consisting of five judges heard *Bachan Singh* v. *State of Punjab*[59] and a number of other petitions involving the issues relating to capital punishment. A majority of four judges reaffirmed the Court's ruling in *Jagmohan*[60] and held that the death sentence, as per provisions in Section 302 of the Penal Code and Section 354(3) of the Criminal Procedure Code, was not violative of Articles 14, 19 and 21 of the Constitution. The Court did not accept the following opinion of the majority in *Rajendra Prasad* :

> "...after the enactment of Section 354(3), 'murder most foul' is not the test. The shocking nature of the crime or the number of murders committed is also not the criterion... the focus has now shifted from the crime to the criminal. Special reasons necessary for imposing death penalty must relate not to the crime as such but to the criminal...."

58. (1979) 3 SCC 727 : 1979 SCC (Cri) 830.
59. (1980) 2 SCC 684 : 1980 SCC (Cri) 580.
60. (1973) 1 SCC 20 : 1973 SCC (Cri) 169.

The Court held that in the context of Sections 354(3) and 235(2) of the Criminal Procedure Code of 1973, due regard must be paid both to the crime and criminal while examining whether 'special reasons' existed for the award of capital punishment. The Court observed that there are a large number of extenuating and aggravating circumstances which cannot be fed into a judicial computer since 'they are astrological imponderables in an imperfect and undulating society'. The Court, however, observed that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy 'writ large in Section 354(3)'.[61]

Rarest of Rare Cases

While observing in *Bachan Singh* that "standardisation" of the sentencing process in relation to capital punishment is an almost impossible task, the Court nevertheless attempted to provide some guidelines regarding the choice to be made between death sentence and life imprisonment :

(*a*) If the murder has been committed after previous planning and envolves extreme brutality; or

(*b*) if the murder involves exceptional depravity ; or

(*c*) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—

(*i*) while such member or public servant was on duty; or

(*ii*) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(*d*) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."

The Court gave examples of the circumstances which ought to be given due consideration in the determination of sentence :

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) If the accused is too young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

61. (1980) 2 SCC 684 : 1980 SCC (Cri) 580.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

In *Machhi Singh* v. *State of Punjab*[62], the accused appellants, as a result of family feud and motivated by feelings of reprisal, committed as many as 17 murders of men, women and children. The Court, while justifying the death sentence imposed on the appellants, recollected with approval the principles laid down in *Bachan Singh* and supplemented them with a few more elaborate guidelines regarding the test of 'rarest of rare' cases given below :

(*a*) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(*b*) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

The following guidelines which emerge from *Bachan Singh case* will have to be applied to the facts of each individual case where the question of imposition of death sentence arises :

(*i*) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(*ii*) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(*iii*) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crimes, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(*iv*) 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

62. (1983) 3 SCC 470 : 1983 SCC (Cri) 681 : AIR 1983 SC 957.

between the aggravating and the mitigating circumstances before the option is exercised.

In the rarest of rare cases, when the collective conscience of the community is so shocked that 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 the death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances :

(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) When the murder is committed for a motive which evinces total depravity and meanness ; e.g., murder by a hired assassin for money or reward ; or cold-blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust ; or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community, etc., is committed not for personal reasons but in circumstances which arouse social wrath ; or in cases of 'bride burning' or 'dowry deaths', or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance, when multiple murders, say of all or almost all the members of a family or a large number of person of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or an old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare case, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

In *Macchi Singh*, as regards the three appellants (viz., Machhi Singh, Kashmir Singh and Jagir Singh), the rarest of rare case rule prescribed in *Bachan Singh* is clearly attracted. They committed calculated and cold-blooded murders of innocent and defenceless women, children, veterans and newly-married couples in an exceptionally depraved, heinous, horrendous and gruesome manner for reprisal as a result of family feud with a view to wipe out the entire family and relatives of the opponent. The murders were

hair-raising for the society at large in the sequence in which they were committed, spreading the horror of a killing spree. In the circumstances only death sentence and not life imprisonment would be adequate. Accordingly, the death sentence imposed upon them was confirmed.

As regards the application of the principle of the rarest of rare case, a perusal of some judicial decisions may be helpful. The assassin and the conspirator, in Indira Gandhi's murder which shook the country and brought about problems of political and communal nature of unprecedented magnitude, were sentenced to death. The murder of the Prime Minister of the country by her own security guards was held to be covered by the 'rarest of the rare' principle.[63]

Ashrafi Lal and Sons v. *State of U.P.*[64] provides another illustration of situations where the extreme penalty under the law is warranted. The appellants committed 'reprehensible and gruesome' murders of two innocent girls to wreak their personal vengeance over the dispute they had with regard to property with their mother. Death sentence was regarded as appropriate since the murders were heinous involving extreme brutality. The Court observed that social necessity and consideration of the deterrence aspect made the capital punishment imperative in the case. In *Allauddin Mian* v. *State of Bihar*[65] on the other hand, it was held that the mere fact that infants were killed, who were not in the original contemplation of the appellants, was not sufficient for invoking the death sentence, the situation not being one of 'rarest of rare' cases.

Some of the more notable cases falling in the 'rarest of rare' category recently decided include *Shankar* v. *State of Tamil Nadu*[66] in which the appellant, leader of an organised gang engaged in operating brothels and arrack trade, was found guilty of six murders along with his associates. No mitigating factors were found in favour of the extremely depraved offender. As could be expected, a few unusual and, somewhat fantastic, 'mitigating' factors pleaded by the defence like 'respectability' of the offender, his criminal acts being made possible by the police for bribes and the likelihood of his having been influenced by sex and horror films were rejected by the Court. The Court pointed out that it was not acceptable that since it may not be possible to eradicate the crime itself, criminals could not be given the legally permissible death sentence.

In *Dhananjoy Chatterjee* v. *State of West Bengal*[67] and *Laxman* v. *State of Orissa*[68], the Supreme Court had to deal with offenders guilty of rape and

63. *Kehar Singh* v. *State (Delhi Administration)*, (1988) 3 SCC 689 : 1988 SCC (Cri) 711 : AIR 1988 SC 1883.
64. (1987) 3 SCC 224 : 1987 SCC (Cri) 470 : AIR 1987 SC 1721.
65. (1989) 3 SCC 5 : 1989 SCC (Cri) 490 : AIR 1989 SC 1456.
66. (1994) 4 SCC 478 : 1994 SCC (Cri) 1252.
67. (1994) 2 SCC 220 : 1994 SCC (Cri) 358.
68. (1994) 3 SCC 381 : 1994 SCC (Cri) 656 (P&H HC).

cold-blooded murder and death sentence, as must have been anticipated, was upheld in both the cases. In the first case, the appellant was a security guard for a housing complex and the victim an 18-year-old girl who had got him transferred; the savage act was committed by way of revenge against the deceased, while in the second case, the victim was the 7-year-old niece of the offender. In *State of Punjab* v. *Harchet Singh*[69], however, the situation being somewhat different, the child-victim of rape dying as a result of pain and haemorrage, the court awarded life imprisonment in view of the mitigating factor that the offence was committed because of lust and not due to any enmity. It is difficult to concur with the lenient view based on a distinction drawn between enmity and lust-based rapes. Further, if death results due to rape on a child, it is murder and there seems to be no legal or moral justification in distinguishing it from murders committed as a sequel to rape. A more drastic approach in any case is required to deal with the escalating rate of child rapes in the country.

Mitigating factors have often been found in the fact that the murder was committed while the offender was under great stress and mental tension. *Balraj Singh* v. *State of U.P.*[70], a case of murders of a brother, his two children and a friend due to family dispute and *Sheshappa* v. *State of Karnataka*[71], murders of four family members because of the offender's dissatisfaction with the partition of the family property, provide two such instances. However, no mitigating factor based on mental disturbance was conceded in *Bheru Singh* v. *State of Rajasthan*[72] where the appellant, doubting the fidelity of his wife, killed her along with his five children whom he imagined to be the offspring of his wife and her paramour. The court held it to be an extreme act of depravity, leading to the most heinous, cold-blooded and gruesome murders. As the court put it, even lower species like animals and birds would protect their progeny to the maximum extent. The crime committed by the offender 'being a revolt against society and an affront to human dignity', there were no extenuating or mitigating factors to warrant the lesser punishment of imprisonment for life. Though the agony and indignation expressed by the court was justified, it is arguable that in terms of the mental disturbance providing the mitigating circumstance, the present case had no less potential than the other two cases referred to above. As a matter of fact, almost all the murders by 'situational' offenders are committed under tremendous mental disturbance. The absolute unreasonableness of Bheru Singh's belief in the infidelity of his wife notwithstanding, the actual mental disturbance manifested in him almost bordered on insanity ; the

69. 1994 Cri LJ 1529.
70. (1994) 4 SCC 29 : 1994 SCC (Cri) 823.
71. 1994 Cr LJ 3372 (Karn HC).
72. (1994) 2 SCC 467 : 1994 SCC (Cri) 555.

objective enquiry as to whether he *should* have been mentally disturbed seems to be off the issue involved in sentencing. In *Bachan Singh*[73] the Court laid down that the probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society is a relevant factor in determination of the sentence. This principle could have been treated as a mitigating factor in the case as it is generally in all such situational murders.

In *Anshad* v. *State of Karnataka*[74], the apex court criticised the High Court for enhancing the sentence of life imprisonment awarded by the trial court to one of death sentence as follows :

> "Courts are expected to exhibit sensitiveness in the matter of award of sentence, particularly the sentence of death because life once lost cannot be brought back. For determining the proper sentence, while the court should take into account the aggravating circumstances, it should not overlook or ignore the mitigating circumstances...."

Some of the mitigating circumstances in the opinion of the Court, which were not considered by the High Court, were as given below :

(*a*) that A-1 to A-3 (appellants) had gone to the house of the deceased *empty-handed* and did not even pick up any weapon like knife, etc., from the house of the deceased nor used any such weapon while committing the murder of the two deceased;

(*b*) that they did not do away with the lives of PW2 and PW3 (prosecution witnesses), the only two eyewitnesses and thereby screen the offence completely;

(*c*) that there nothing on record to show that they acted in an exceptionally brutal or cruel manner while committing murder...;

(*d*) there is nothing on record to show as to which out of the three appellants stangulated which of the two deceased;

(*e*) ...that A-1 to A-3 took off the jewellery from the person of the deceased by removing the same rather than tearing it off from their bodies causing any injuries to the deceased.

None of the mitigating factors identified by the Court, particularly those mentioned in (*d*) and (*e*), seem to be quite convincing and a somewhat misplaced liberalism for the appellants is quite evident.

In *Ashok Kumar* v. *State (Delhi Administration)*[75], a situation where appellant, the paramour of a woman, killed her husband in a somewhat unexpected encounter, the Supreme declined to treat the murder as 'rarest of rare' cases. The verdict was given inspite of the death sentence passed by the trial court and confirmed by the High Court; due importance having

73. (1980) 2 SCC 684 : 1980 SCC (Cri) 580.
74. (1994) 4 SCC 381 : 1994 SCC (Cri) 1204.
75. 1995 Sup (3) SCC 626 : 1995 SCC (Cri) 1085.

been given to the appellant's defiant and unrepentant attitude and the lust-based nature of the killing by the two courts respectively. What persuaded the Court to give the lesser punishment of life imprisonment was the fact that the appellant had been carrying on the affair with the woman going back to her pre-marriage times and that there was no pre-planning to commit the murder. In the opinion of the court, the act of the appellant could not be said to be so cruel, unusual or diabolic so as to warrant death penalty.

The Decision in Rajendra Prasad : Some Reflections

Kirshna Iyer's, J.'s strong aversion to capital punishment has been made well-known through many of his rulings even before *Rajendra Prasad*. In *Rajendra Prasad* he, however, traversed much beyond the area covered by him in some radical judgments including *Ediga Anamma*.[76] It is therefore not surprising that the ruling in *Rajendra Prasad* has not been accepted unanimously in that case and by some other judges in the final disposal of Bachan Singh's appeal.[77] Besides the criticism of the majority opinion in *Rajendra Prasad* by Sen, J. and other judges in *Bachan Singh*, there are a few issues which call for comment.

It is evident that in the penal philosophy of Krishna Iyer, J. there is not much scope for the deterrent component of the capital punishment. The focus of his attention is on social justice and human rights, viewed primarily in the context of the violators of criminal law ; so much so that the issue of social defence vis-a-vis the murderers tends to take a back seat. If it is true that criminal law, more than anything else, must concern itself with the protection of society at large, then it is highly doubtful whether some of the rulings of the highly learned and humane judges helped in achieving the desired goals in that direction. The issues of social justice and human rights ought not to be seen merely in the context of the perpetrators of the heinous crimes. In none of the three cases disposed of in the appeal, the murder committed indicated that the offender was the victim of social injustice or that he was battling against some kind of social tyranny or inequities. As a matter of fact, the victims in all the three cases of murder, especially Kunjukunju, were innocent by and large.

There is no ground for the court's concern for the absence of any defined principles for the use of discretion under Section 302, IPC, i.e., the choice between death penalty and life imprisonment. There is no doubt that well-recognised principles, almost crystal clear, have evolved over the years to the extent it is possible to formulate and articulate such rules. The mandatory provision in the Criminal Procedure Code that every death sentence must be confirmed by the High Court and the usual appeal made against the sentence to the High Court not only ensure some kind of control over the sentencing

76. (1974) 4 SCC 443 : 1974 SCC (Cri) 479.
77. (1980) 2 SCC 684 : 1980 SCC (Cri) 580.

policy of the trial courts but also help in achieving uniformity. Finally, the principles propounded by the Supreme Court from time to time have made the position quite clear and unambiguous. The views expressed by Sir John Beamont, who had long experience of judicial work in India, to the Royal Commission on Capital Punishment are illuminating on the point. According to him, the system based on alternative punishments under Section 302 of the Penal Code worked well in India. He said that he had never himself felt that the responsibility of choosing between the sentence of death and a lesser punishment was unfair or excessive nor had he ever heard any judge in India express such feeling. According to him, there was no class of offences in which the degree of moral culpability differs more than in the case of murder and that it would be wholly illogical to require a judge to pass the same sentence in every case.[78]

In any case it is not clear as to how the position will improve even if the Supreme Court exercises the power to lay down principles to supplement the "too bald" provision of Section 302 of the Penal Code since any such principle laid down either by the judiciary or the legislature by its very nature is bound to prove incapable of controlling the sentencing discretion in the mathematical or mechanical sentence. In fact, the principles have become a bit more unsettled regarding the application of Section 302 as a result of some of the decisions of the Supreme Court including *Rajendra Prasad.*

A reference was made to colonial callousness to life and liberty while urging for a different and more enlightened attitude in free India. The position during the British rule regarding liberty in the political context apart, there is no doubt that the penal policy in general and the use of capital punishment in particular adopted by the colonial power in India was no different from what they had in their own country at that time. The framers of the Penal Code had recommended the sparing use of capital punishment and that policy has been maintained during the last one-and-a-quarter century. As regards the thinking of the people's representatives in independent India the Court itself noted that various bills moved in the Parliament to abolish the death sentence were either withdrawn or defeated.

The Court observed that the capital punishment ought to be used only in cases of murderers who pose a threat to the survival of social order. Examples given were of the murders committed by economic offenders and dacoits. A legitimate question arises, consistent with the philosophy regarding capital punishment propounded by the Court, that why death sentence should be awarded even is such instances? Is it not possible to achieve the desired results by life imprisonment? The Court dealing with *Kunjukunju* made some

78. *Royal Commission Report*, pp. 191-93, quoted by Sen, J. in *Rajendra Prasad case.*

observations as it was not a case of murder but a mere case of some sexual excess. It was said :

> "Is Janardanan a social security risk, altogether beyond salvage by therapeutic life sentence ? If he is, the pall must fall in his cadaver. If not, life must burn on. So viewed, no material, save juridical wrath and grief, is discernible to invoke social justice and revoke his fundamental right to life. A course of anti-aphrodisiac treatment or willing castration is a better recipe for this hypersexed human than outright death sentence. We have not even information on whether he was a desperate hedonist or randy rapist with 'Y' chromosomes in excess, who sipped every flower and changed every hour, so as to be a sex menace to the locality. Sentencing is a delicate process, not a blindman's buff...."

By applying the same principles, will it not be justified to deal with a food or drug adulterator guilty of murder by sentencing him to life imprisonment or just by revoking his licence in order to close down his dubious enterprise?

Surely, if incapacitation of the offender, the likelihood of reformation and concern for all human life including that of a murderer who extinguishes a life or lives, are the determining criterion, then even the worst of cases should not be dealt with by capital punishment. And it is here that we face an ironical situation. Krishna Iyer, J. in many of his judgments has very rightly expressed indignation over the revolting and inhuman conditions inside jails in India. He has referred to prison life as 'zoological existence' in a number of judgments and expressed pessimism regarding any good coming out of imprisonment. While sentencing a murderer to life imprisonment in preference to death sentence the learned judge has been in a way impelled to say that the offender might eventually come out of jail as a reformed human being. Such hopes of reformation may not only get belied but some utterly desperate characters may even indulge in more killings after coming out of prison as proved by experience in *Rajendra Prasad* and *Bachan Singh.*

President's Mercy Jurisdiction

Under Article 72 of the Constitution, the President of India has the exclusive power to grant pardons, reprieves or remissions of punishment or to suspend, remit or commute the death sentence passed against any person.

A favourable response by the President is an act of grace and it cannot, therefore, be claimed as a matter of right. The power exercisable by the President is of an administrative nature and is, therefore, not justiciable. The President can scrutinise the evidence on record and may come to a different conclusion from that of the court regarding guilt or sentence and the President's action cannot modify or supersede the judicial record. A con-

demned person is not entitled to oral hearing from the President, the matter being entirely within the discretion of the President.[79]

Delay in Execution

Quite usually there is a delay involved in the execution of a death sentence after the same has been confirmed by the High Court. This may be because of the appeal preferred to the Supreme Court against the conviction or sentence by the person sentenced to death. Even when the appeal is rejected by the Supreme Court, the condemned person may approach the Court for review ; in any case he may petition the President for pardon. After every remedy fails, the executive may take its own time in executing the capital sentence. All this may involve inordinate delay resulting in uncertainty and terror in the mind of the condemned person and the same has often been utilised as a successful argument for commutting a death sentence into life imprisonment. To quote the Supreme Court on the point of uncertainty and mental tension :

> "...as between funeral fire and mental worry, it is the latter which is more devastating, for, funeral fire burns only the dead body while the mental worry burns the living one...."[80]

The courts of India have linked the issue with the right to speedy trial and the peak of judicial concern was reached in *T.V. Vatheeswaran* v. *State of Tamil Nadu*[81] where it was held that any delay exceeding 2 years in the execution of a death sentence would justify its modification to life imprisonment. Evidently, such an approach fixing the time-limit without regard to the causes of the delay was bound to be debatable and quite justifiably it was reversed by a larger Bench of the Supreme Court. In *Sher Singh* v. *State of Punjab*[82] the Court beat a hasty retreat by holding that the delay in the execution of the death sentence, irrespective of the circumstances under which it was caused, will not by itself constitute an adequate grant of modification of the sentence. The Court must find as to why the delay was caused and who was responsible for it ; otherwise a person can defeat the judgment by resorting to frivolous proceedings. The Court reaffirmed the principle in *Triveniben*[83] holding that the only material delay which would be material for consideration will be the delay in disposal of the mercy petition or delay occurring at the instance of the executive. It was pointed out that no norms could be laid down and the discretion was with the Court to be exercised in view of the special features of a case.

79. *Kehar Singh* v. *Union of India*, (1989) 1 SCC 204 : 1989 SCC (Cri) 86 : AIR 1989 SC 653.
80. *Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248 : AIR 1989 SC 1335.
81. (1983) 2 SCC 68 : 1983 SCC (Cri) 342 : AIR 1983 SC 361.
82. (1983) 2 SCC 344 : 1983 SCC (Cri) 461 : AIR 1983 SC 465.
83. (1989) 1 SCC 678 : 1989 SCC (Cri) 248.

The Court, however, has continued to modify the sentence in appropriate situations. In *Madhu Mehta* v. *Union of India*[84] it was held that the right to speedy trial, implicit in Article 21, operated through all the stages including the mercy petition to the President. A delay of 8 years in the disposal of the mercy petition was held to be sufficient to warrant the commutation of death sentence to life imprisonment.[85]

Fine and Imprisonment

Fine and imprisonment are the two common modes of punishment. If fine or imprisonment is the only punishment provided for a particular offence, the only question for the court to determine is to fix the tariff within permissible limits having regard to the circumstances of the case. If, however, the court has to make a choice out of the two punishments, it has to apply its mind in choosing the appropriate mode of punishment before fixing the tariff. Where the imprisonment is the better alternative, it should not be as if a person can avoid imprisonment by paying a heavy fine because he can afford to do so. *R* v. *Markwick*[86] is a good case illustrating the point. Markwick, a man of means, was convicted for stealing a sum of 2sh. 6d. from the pockets of the trousers of a fellow member in the changing-room of the golf club. He was fined £ 500 against which he appealed to the Court of Criminal Appeal. Lord Goddard, CJ held that fine was not the proper remedy in the case and an imprisonment of two months was substituted in place of fine. Lord Goddard justified the imprisonment in the following words :

> "The gravamen of the offence was not only its essential meanness, but also the aura of suspicion which must have been thrown over the servants and other members of the club...."

Lord Goddard expressed the view that fines should not be used to give an opportunity to persons of means to avoid the punishment of imprisonment.

Dulla v. *State*[87], on the other hand, is a case which involves the opposite situation. In this case the Allahabad High Court found the imposition of a fine to be a better alternative than imprisonment having regard to the objects of punishment. The decision in the case lays down useful guidelines for choosing the appropriate punishment and the tariff to be imposed in the range permitted by the statute.

Six persons were found guilty of slaughtering a cow under the U.P. Prevention of Cow Slaughter Act and the magistrate sentenced them all to

84. (1989) 4 SCC 62 : 1989 SCC (Cri) 705 : 1989 Cri LJ 2321.

85. See also *Daya Singh* v. *Union of India*, (1991) 3 SCC 61 : AIR 1991 SC 1548 ; *Shivaji Jai Singh* v. *State of Maharashtra*, (1991) 4 SCC 375 : AIR 1991 SC 2147 ; *Jumman Khan* v. *State of U.P.*, (1991) 1 SCC 752.

86. (1953) 37 Cr App Rep 125.

87. AIR 1958 All 198.

18 months' rigorous imprisonment without giving any reasons for the quantum of punishment. The appeal against conviction and sentence was dismissed by the sessions judge and he too did not specify any grounds for the substantial period of imprisonment. On appeal to the High Court, James, J. quashed the conviction and observed that the punishment imposed would have been excessive even if the convictions were to be upheld and a fine of Rs 50 would have been adequate. The court quoted Halsbury's *Laws of England* to point out that the objects of punishment were incapacitation and reformation of the offender and intimidation of the actual and potential offenders. The court summed up the principles of sentencing and fixation of tariff in the following words :

> "The twin objects of punishment are to prevent a person who has committed a crime from repeating it and to prevent others from committing similar crimes. The sentence must be the least that will achieve both these objects. In deciding the measure of punishment the factors to be considered are the nature of the offence, circumstances in which offence was committed, the degree of deliberations, the provocation received if the crime is of violence, antecedents of the offender up to the time of crime, his age and character, etc. The prevalence of a particular crime in a particular area or during a particular period should also be taken into account. One's political, sentimental or religious pre-conceptions should be strictly disregarded. The court must bear in mind the necessity of proportion between an offence and the penalty. The maximum penalty for any offence is meant only for the worst case...."

The court considered the nature and circumstances of the alleged offence and concluded that nothing was done by the accused persons to hurt the religious feelings of the fellow citizens. No slaughtering was done in a public place nor was the flesh exposed to public view, the sole object being to procure cheap food. The court pointed out that the Cow Slaughter Act was based on economic considerations and nothing was known about the economic utility of the cow in the present case. Having regard to all these factors, the court held that a sentence of 18 months bore no relationship to the nature or gravity of the offence.

The decision shows that fine is the better alternative when the offence is not very grave or it is not really criminal in nature but is only of a technical character. The punishment of fine is particularly more appropriate when the offence is the result of cupidity of the offender or where the offender is of very young or old age.[88]

88. These principles have been laid down in many cases. *See* AIR 1930 Lah 424 ; 6 IC 952; and AIR 1942 Mad 723.

The problem of fixing the quantum of fine or imprisonment in the range provided by the statute is not a simple one since a number of factors have to be considered in fixing the sentence and no punishment can be truly regarded as the one exactly required or deserved in a given situation. In the case of *Ramashraya Chakravarti* v. *State of M.P.*[89], the Supreme Court quoted Hegel from his *Philosophy of Right* while focussing on the complexities involved in sentencing :

> "Reason cannot determine, nor can the concept provide any principle whose application could decide whether justice requires for any offence (*i*) a corporal punishment of forty lashes or thirty-nine, or (*ii*) a fine of five dollars or four, or (*iii*) imprisonment of a year or 364 days. And yet injustice is done at once if there is one lash too many, or one dollar or one cent, one week in prison or one day, too many or too few."

Regarding the factors to be considered in determining the quantum of punishment, the Court observed :

> "In judging the adequacy of a sentence the nature of the offence, the circumstances of its commission, the age and character of the offender, injury to individuals or to society, effect of punishment on the offender, eye to correction and reformation of the offender are some amongst many other factors which would ordinarily be taken into consideration by the court."

With this general background regarding the selection of the appropriate punishment and the fixation of tariff some specific issues relating to fine and imprisonment can now be examined.

Fines

There is not much difference regarding the matter of fixation of the quantum of fines or the length of imprisonments to the extent that greater tariff is provided for relatively graver offences. What, however, distinguishes fines from the length of imprisonment in the sentencing process is the additional dimension of the paying capacity of the offender which cannot be ignored. It is of course well established that the quantum of fine should not be such that it is wholly impossible for the offender to pay it without ruining himself and inflicting untold hardship on his family. This view has been reiterated by a number of High Courts in India on various occasions.

The English case, *R* v. *Lewis*[90], is apposite to the point. The accused was fined £10,000 by the trial judge for a fraud committed on the Customs. The accused was not in a position to pay such a heavy penalty but the trial judge based the tariff on the information that money would be made available

89. (1976) 1 SCC 281 : 1976 SCC (Cri) 1.
90. 1965 LR 121.

by the accused's father. The Court of Criminal Appeal while reducing the fine to £5000 observed :

> "The first consideration in a matter of this sort is whether the accused person should go to prison or whether he can be properly dealt with by way of fine. Once the court has decided that a fine is proper then there are obviously in each case many factors which may follow, but amongst the factors which the court must consider one can mention first the amount involved in the fraud, which in this instance was enormous, secondly the amount obtained out of it by the accused if known... thirdly his capacity to pay. It is, in the view of this court, wrong in principle to impose such a fine as may be utterly beyond the accused's means and will only result in the prison sentence which is mentioned at the time of the trial as the sanction for failure to pay."

The court held, therefore, that it was wrong in such circumstances to impose a fine utterly beyond the means of the accused person.

The Model Penal Code of the American Law Institute has laid down the following criteria for the imposition of fines:[91]

> *1.* The court shall not sentence a defendant only to pay a fine, when any other deposition is authorised by law, unless having regard to the nature and circumstances of the crime and to the history and character of the defendant, it is of the opinion that the fine alone suffices for protection of the public.
>
> *2.* The court shall not sentence a defendant to pay a fine in addition to a sentence of imprisonment or probation unless :
>
> (*a*) the defendant has derived a pecuniary gain from the crime ; or
>
> (*b*) the court is of opinion that a fine is specially adapted to deterrence of the crime involved or to the correction of the offender.
>
> *3.* The court shall not sentence a defendant to pay a fine unless :
>
> (*a*) the defendant is or will be able to pay the fine ; and
>
> (*b*) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime.
>
> *4.* In determining the amount and method of payment of fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose.

While the poor paying capacity of the offender is certainly relevant and there cannot be much debate about it, the situation of an affluent offender cannot be described so easily. While on the one hand the fine should depend upon the gravity of the offence and hence is independent of the monetary circumstances of the offender, the 'pinch factor' cannot also be ignored. The High Court of Allahabad observed in one of the old

91. Article 702.

cases[92], that the maximum fine prescribed for an offence is meant to be inflicted in extreme cases. Just because a man may easily pay a fine is no ground for ordering him to pay the maximum fine fixed by law, if the nature of the offence committed by him is not of the most serious character.

The opposite view that the fine should be adequate to cause a pinch to the offender has been advanced by the Advisory Council's Report on Non-custodial and Semi-custodial Penalties in England[93] :

> "In our view, it is right that penalties for similar offences should as far as possible be designed to make an equal impact on offenders, and that the well-to-do should pay more than the less affluent. The fine will be equitable only if it is assessed in this way and constitutes something more than payment for a licence to commit the particular offence."

There is much justification in the above recommendations since the purpose of punishment shall not be served unless the offender pays enough to feel the loss. In the words of Rupert Cross, at least in the case of acquisitive offences, it is surely arguable that the wealth of the offender aggravates the crime just as his poverty mitigates it. A heavier fine would be justified on tariff principles because the offence is grave.[94]

Apart from the gravity of the offence and the paying capacity of the offender, certain other factors are also to be considered. It has been held by the various High Courts that it is not desirable to impose the punishment of fine in addition to death sentence or long imprisonment, as it may result in heavy burden upon the family of the convict.[95]

The Supreme Court considered the problem of fixation of fines in the particular context of blackmarketing in the case of *Adamji Umar Dalal* v. *State*[96], and made the following observations :

> "The determination of the right measure of punishment is often a point of great difficulty and no hard and fast rule can be laid down....but the court has always to bear in mind the necessity of proportion between an offence and the penalty. In imposing a fine it is necessary to have as much regard to the pecuniary circumstances of the accused persons as to the character and magnitude of the offence.... It is no doubt true that the offence of blackmarketing is very generally prevalent in this country at the present moment and when it is brought home against a person, no leniency in the matter of sentence should be shown and a certain amount of severity may be very appropriate and even called for.

92. *Ganga Sagar* v. *Emperor*, AIR 1929 All 919.
93. Cited by Rupert Cross, *op. cit.*, p. 23.
94. *Op. cit.*, p. 23.
95. *Singram Marak* v. State, 1953 Cri LJ 1568 (Ass).
96. AIR 1952 SC 14 : 1953 Cri LJ 542.

However, when quite a substantial sentence of imprisonment is awarded to the accused, a person belonging to the commission agency class, imposition of unduly heavy fines which may have been justified to some extent in the case of the principals is not called for."

The Court held that in imposing a fine of Rs 1500 due regard had not been paid to these considerations. The Court observed that the zeal to crush the evil of blackmarketing and free the common man from the plague, had perturbed the judicial mind in the determination of the measure of punishment and the fine was, therefore, reduced to Rs 1000.

In *State of Maharasthra* v. *Jathmal Himatmal Jain*[97], the Bombay High Court found the punishment of one year imprisonment and a fine of Rs 2500 awarded to be too inadequate. The appellants were found guilty of stocking and adulterating life-saving drugs and selling medicines meant for hospitals in the open market. Since adjustment of imprisonment awarded by the Magistrate was not possible at the time of the disposal of the appeal, the fine of Rs 2500 was raised to Rs 1,00,000 on each convict on each count. The enhancement of fine was based on the view that in crimes against society, fines must be sufficiently heavy in order to be meaningful.

One fairly common problem faced in imposing the punishment of fines is the situation created by the non-payment of fines by the offender. The failure to pay may be wilful or due to the incapacity of the offender or due to lack of means. The default leads to imprisonment which creates an anomalous situation, at least in those offences where fine is the only punishment prescribed under the statute. Though imprisonment is not really needed in the case of the particular offender as such, it is nevertheless the actual punishment given to him. Section 64, IPC authorises the courts to send the offender to jail in such a situation but there is no doubt that such a practice is highly undesirable especially if the courts do it automatically in each and every case without regard to the individual factors involved. The Hague Congress of 1951 deprecating the automatic conversion resolved :

> "Unpaid fines must be converted into imprisonment not automatically but by a court decision in each individual case."[98]

Dr K.S. Chhabra, who studied the problem of the sentencing pattern with particular reference to Delhi in 1964, observations made the following:[99]

97. 1994 Cr LJ 2613.
98. Quoted in Chhabra, *Quantum of Punishment in Criminal Law in India*, p. 213.
99. *Ibid.*

"Study of the criminal court files of Delhi State showed an invariable practice of stating imprisonment in default of payment of fine in the same breath in which punishment of fine was imposed. It will be noted that Section 64 says that the court is competent to do so ; it does not make it obligatory that this must necessarily be done in the primary judgment itself. It is to avoid the botheration of fresh proceedings that this practice is being adopted as a matter of routine."

There is no reason to believe that what has been reported by Dr Chhabra about Delhi is not true of the court's attitude elsewhere in India.

Imprisonment

The problem faced in fixing the period of imprisonment is made more complex by the fact that both short term as well as long term imprisonments have their inherent disadvantages. Short term imprisonments are regarded not only as being useless but also dangerous. They are useless in the sense that no institutional training or treatment is possible in short terms like one month or six months and they are dangerous because jails provide ideal surroundings to novices and the minor offender for further training in a criminal career. In the words of Henting[1] :

"These short terms of imprisonment have no securitive function; the period is otherwise much too short to allow of an earnest educative effect or even if only a training for a profession. But this period is also quite sufficient to infect the condemned with the seeds of moral contagion and discharge them into liberty as previously convicted after the comparatively well-equipped buildings and relatively good treatment have robbed them of their fear of prison."

Because of these defects in short term imprisonments it has been recommended by many expert individuals and bodies that as far as possible, no short term sentences should be passed.[2] The better alternative is to proceed under the probation laws in such case. It is estimated, however, that the majority of the sentences in India are for less than six months. Such sentences were 66 per cent in 1911 and 87 per cent in 1961 and 74 per cent of the imprisonment below 6 months did not exceed the period of one month. The figures indicate that the trend in favour of short term imprisonment had increased between the years 1911-61.[3]

In *Lekhraj* v. *State*[4], a number of young persons were convicted of the offence of assembling to commit dacoity and shorter imprisonment was sought by the defence on the ground of the young age of some of the

1. Quoted in Chhabra, *op. cit.*, p. 158.
2. Dr Walter C. Reckless, Jails Committee, 1919-20 and the Hague Convention, 1951 have made recommendations against short-term sentences.
3. *See* Chhabra, *op. cit.*, p. 150.
4. AIR 1960 Punj 482.

offenders. I.D. Dua, J. while opting for the award of a longer punishment observed :

> "I am not unmindful of the fact that a person who spends some years in the company of hardened criminals in jail may, by the time he comes out, become much more callous than when he entered the State prison but I am also aware of the view, taken in some decided cases, that a short stay in jail sometimes proves more harmful to the accused. It brands a person as a previous convict without affording him the advantages of leading a disciplined life in jail for a sufficiently long time.
>
> The stigma of a convict without the healthy effect of a disciplined influence, which a reasonably long period in a properly administered jail in a welfare State can have, is likely to result in more harm than good, but the remedy for this situation lies in reformation of the administration of the State jails and not to abstain from punishing people for such grave offences as have been established in the instant case. It appears to me to be for the legislative and the executive wings of the Government, rather for the judiciary, to come to the rescue of the citizens in this connection."

It is interesting to note that the arguments against short term punishments, usually given when imprisonment is not to be awarded, have been employed here to give a long term of imprisonment.

Longer punishments have also been subjected to the criticism that they are unnecessary since they are based on the unestablished assumption that all long term prisoners are more dangerous than those failed for short terms. In the U.S.A., prison wardens generally agree that only a minority of their inmates can be considered dangerous. *Gideon's case*[5] is cited as an example that the offenders who are released before their scheduled term do not show more recidivism than those who are released after serving the full term. As a result of the decision 1000 prisoners in Florida were released and a comparative study of a sample group of these released prisoners with a sample of controlled-group prisoners showed that while recidivism was only 13.6 per cent in the former group it was 25.4 per cent in the latter.

In India, the Supreme Court has pointed out the dangers of long term imprisonment in a number of cases and has, therefore, reduced the period of incarceration in appropriate situations. In *Ashok Kumar* v. *State (Delhi Administration)*[6], the accused, a 19-year-old student belonging to a middle class family, was sentenced by the trial court to 2 years' imprisonment and

5. 372 US 335 (1963). In this case the prisoner was released since his constitutional right to a lawyer was violated.

6. (1980) 2 SCC 282 : 1980 SCC (Cri) 426.

fine of Rs 2000 for scooter theft and 6 months' imprisonment and fine of Rs 500 for car lifting ; both the sentences were to run concurrently. On appeal the Supreme Court reduced the period of imprisonment to 6 months which had already been undergone. Besides the fact that the accused was young and the case came up before the Supreme Court after 9 years during which time the appellant had married and had children, and his uncle guaranteed his good behaviour, what weighed with the Court was the undesirability of long-term imprisonment in general. The Court observed that a long period of imprisonment in the present condition of prisons might brutalise the boy and blunt his finer sensibilities so that the end product could perhaps be more criminal than the one at the point of entry. In some cases prison terms could be counter-productive instead of being deterrent. The observations by Lord Soper in the House of Lords in a debate on British prisons which were quoted by the Court not only go against long imprisonment but also demolish the notion that reformation is possible through imprisonment :

> "Now as to reform. I was a prison chaplain for 30 years. I cannot remember a single man who was reformed by being in prison—not one. I can remember those who serving very short sentences were for a time, perhaps, brought to recognise something of the gravity of what they had been doing ; but I am completely convinced that the longer a man stays in prison... the less is the prospect of reform and the more certain is the process of decay. That is why I have consistently tried to say that any man who is imprisoned in one particular set of circumstances for more than five years is probably dead for life... the longer a man stays in prison the less capable he will be of recovering his place and establishing his position back in the real world to which he is increasingly made alien by the very process which he undergoes."

The same attitude of the Supreme Court was reflected earlier in *Nadella Venkatakrishna Rao* v. *State of A.P.*[7] The accused was found guilty of being in possession of materials for counterfeiting coins and was awarded 10 years' rigorous imprisonment. On appeal the Supreme Court reduced it to 5 years' rigorous imprisonment since, in its view, the long imprisonment of 10 years would be self-defeating.

The sentencing policy of the courts in India in fixing the imprisonment tariff can be further assessed in the context of some specific situations.

Public Servants

Generally speaking the courts in India have taken a serious view of the offences committed by public servants. A typical attitude is manifested in a

7. (1978) 1 SCC 208 : 1978 SCC (Cri) 99.

Rajasthan case where the court outlined the dangers involved in corruption by public servants in the following observations[8] :

> "A corrupt official is a menace to the society and far from helping in the proper functioning of the government and implementing the laws, brings the government and society at large into disrepute.... If such public servants are open to corruption and coerce the public into paying them illegal gratification the whole structure of the society would be upset and the policy of the government and the legislature, howsoever beneficial it may be, would generally suffer. A public servant, therefore, once he is found to be guilty of accepting or obtaining illegal gratification, deserves no soft corner or indulgence from the courts of law."

The Supreme Court indicated its policy regarding the punishment of white-collar crimes in the context of corruption by public servants in *Som Prakash* v. *State of Delhi*[9]. Severe punishments must be prescribed to root out such social menaces. It was said that though all-intensive efforts to track down bigger criminals were needed, the courts could not slow down because bigger criminals were to be caught.

In *Suresh Chandra* v. *State of Gujarat*[10] the Supreme Court held that in case of an officer accepting bribes the considerations that he is a petty official caught for a small bribe or that deterrent punishment is not feasible do not warrant a lesser sentence.

The courts have, however, reduced the punishments in the presence of extenuating factors like other sufferings accompanying the conviction or where the offence happened to be not illegal gratification but criminal breach of trust committed due to the pressure of influence of superior officers. The loss of membership of the Municipal Board has been, for instance, accepted as a factor warranting reduction in punishment.[11] In many cases the loss of the job consequent to the conviction has been found relevant in reducing the term of imprisonment. In *Chakravarti* v. *State of M.P.*[12], a case decided by the Supreme Court, the offender was a government servant employed as a circle organiser in the Tribal Welfare Department of Madhya Pradesh. He misappropriated Rs 500 entrusted to him for distribution to Adivasi students and forged certain entries. The sessions court found him guilty of the offences under Sections 409 and 467, IPC and awarded 4 years' rigorous imprisonment and fine of Rs 500. The High Court reduced it to 2 years' imprisonment and a fine of Rs 500. On appeal the Supreme Court further reduced the period of imprisonment to one year giving the following reasons :

8. *Krishan Dayal* v. *State*, 1958 Raj LW 596.
9. (1974) 4 SCC 84 : 1974 SCC (Cri) 215.
10. (1976) 1 SCC 654 : 1976 SCC (Cri) 145.
11. *Prem Chand* v. *State*, AIR 1953 All 381.
12. (1976) 1 SCC 281 : 1976 SCC (Cri) 1.

"The appellant is a young man of 30 years. He is an educated person who was employed in government service. But for the forgery he could have been tried in the court of a first class magistrate for the offences under Section 409, IPC and in that case the maximum sentence of imprisonment would have been two years. On the face of the High Court's judgment the part played by the appellant in the forgery is rather obscure. The appellant is sure to lose his employment under the government. There is already indignity heaped upon him on account of conviction. He has no opportunity to commit such offences under the government in future. Any sentence of imprisonment imposed upon him will be a deterrent to others similarly disposed in such unlawful pursuit."

There is ample truth in what was said by the Supreme Court for justifying the reduction in punishment but the observations shall be apposite in any case relating to a public servant, including those found guilty of accepting illegal gratification. Another question which comes to one's mind is regarding the one year's imprisonment awarded by the Supreme Court. If the reasons given by the Court are accepted, then there is hardly any justification for giving even one year's imprisonment in such cases. The policy of the Court as manifested in the above case is somewhat different from the stand taken by the appellate court in England in *Fell's case*[13] where a senior civil servant pleaded guilty to unlawfully communicating documents. The court refused to reduce a sentence of two years saying that the additional suffering caused to the appellant by reason of the loss of her career did not "excuse the court from imposing a sentence which will mark the seriousness of the offence committed by a person in high position of trust".

In another case the Supreme Court gave due recognition to the role played by the superior officers of the appellant in reducing the punishment from 2 years to the 10 months' imprisonment already undergone.[14] The appellant, a cashier in the Municipal Board, was required to deposit a sum exceeding Rs 4000 in the Treasury which he failed to do since he had advanced various sums of money to the officers of the Board. In reducing the punishment the Supreme Court found force in the contention of the accused that he was more sinned against than sinning and that the misappropriation took place because he had to oblige those officers of the Board or otherwise incur their displeasure which he could hardly afford to do.

A sentence of 3 years' imprisonment awarded to a bank manager under the Prevention of Corruption Act was reduced to 6 months' imprisonment by the High Court. It was further reduced by the Supreme Court to 3 months' imprisonment since in the Court's opinion very excessive punishment was

13. 1963 Cri LR 207.
14. *Munnalal v. State of U.P.*, AIR 1964 SC 28 : (1964) 1 Cri LJ 11.

given by the trial court.[15] In another case[16], the Court reiterated the principle laid down in *B.C. Goswami* v. *Delhi Administration*[17] that too lenient as well as too harsh sentences both lose their efficacy ; one does not deter and the other may make one a hardened criminal.

In general, the judicial policy is to take into account a number of factors like the loss of job and the resulting financial crisis and mental agony over a long period of time. The usual practice in such circumstances is to reduce the imprisonment to that already undergone but to retain or enhance the fine imposed on the offender. In *Gandotra* v. *State of J & K*[18] the appellant's sentence of 2 years' imprisonment and a fine of Rs 500 was converted to 2 months' imprisonment and fine of Rs 1000. The factors considered were (*i*) proceedings pending for about 18 years, (*ii*) the appellant and family almost starving because of meagre subsistence allowances payable during suspension from service, and (*iii*) the fact that the appellant had to support a marriageable daughter and an unemployed son.

Food Adulteration

The sentencing policy of the courts in making the primary decision in the context of food adulteration offences has been discussed earlier. So far as secondary decisions are concerned, it appears that the courts have taken a tough line,[19] at least at the appellate level, but as seen in the offences committed by public servants, various mitigating factors have also been taken into account. It has been noted with concern that many a time the punishments given by the lower courts are exceedingly low. The Gujarat High Court has made strong observations against socio-economic offenders and passed severe strictures against the lenient attitude of the lower judiciary in food adulteration cases as follows[20] :

> "It is part of the function of the courts to create an ethical climate by their decisions. The decisions mould public opinion and create an appropriate ecology.... If we are seriously and sincerely striving for a just socio-economic order and an egalitarian society, can we look upon such modes of adding to one's wealth... with indulgence?... The offenders must be made to realise that the moving finger writes and having written moves on. And that the message is : Thy days are numbered. While the purpose of the sentencing policy is not to terrorise unwary persons, it certainly is to strike terror in the evil-eyed avaricious offenders to ensure that it has its desired deterrent effect. Unless it is brought

15. *P.S. Rao* v. *State of Andhra Pradesh*, 1994 SCC (Cri) 167.
16. *Lanjekar* v. *State of Maharashtra*, 1994 SCC (Cri) 56.
17. (1974) 3 SCC 85.
18. 1994 SCC (Cri) 163.
19. *See Usman Ali Khan* v. *State of U.P.*, AIR 1965 All 39 : 1964 (1) Cri LJ 606.
20. (1974) 15 GLR 736.

home to the offenders that the courts take an extremely serious view, all those who play with the health and well-being of the people and with the economy of the nation by indulging in hoarding, profiteering, blackmarketing and tax evasion will be tempted to commit and re-commit those offences.... The sentence of fine can have no meaning when it bears no relation with the profit that the offender can earn by taking a small risk of a fine by entering a plea of guilt. The frequency with which a plea of guilt is made in such cases and is visited with the deceptive sentence of tom-sized mini-fines makes one seriously doubt whether such cases should be tried by the subordinate judiciary at all...."

The scope of mitigating circumstances can be illustrated with reference to several cases. In *Bala Bahera* v. *Puri Municipality*[21], the accused, a hawker of milk, was found guilty of selling adulterated stuff. The court held that in view of the fact that it was his first offence, substantive imprisonment need not be imposed.

In *Gurmukh Singh* v. *State of Punjab*[22], the Supreme Court distinguished between selling adulterated food as such from some other violations of the Prevention of Food Adulteration Act and held the latter to be of lesser gravity than the former. The appellant was convicted for the non-renewal of licence and awarded imprisonment for six months and a fine of Rs 1000 which the Supreme Court reduced to the imprisonment of seven days already undergone and a fine of Rs 250.

While fixing the length of imprisonment or quantum of fine, the courts have taken into account the extent of adulteration and the nature and properties of the substance used for adulteration. In *Ajaib Singh* v. *State of Punjab*[23], the offender was found guilty of adulterating milk with sucrose which is the main ingredient of sugar. Having regard to the facts that sugar was not only non-injurious to the human body but also quite nutritious, the price of sugar was higher than that of milk, and the public analyst's report did not specify the percentage of sucrose in the milk which might have been quite low, the High Court held that a very lenient sentence was called for.

The minimum punishment provided for some of the violations under the Prevention of Food Adulteration Act is six months and one thousand rupees.[24] A proviso to the penal section, however, permits the court to give less than the minimum punishment for any adequate and special reasons to be recorded in the judgment. In *State of Haryana* v. *Yad Ram*[25], the issue was whether less than the minimum punishment was justified against the

21. (1973) 1 CWR 744.
22. (1972) 4 SCC 805 : AIR 1972 SC 824 : 1972 Cri LJ 634.
23. (1974) 76 PLR 45.
24. Section 16.
25. 1987 Cri LJ 79.

respondent. The trial court had imposed the minimum punishment prescribed for the offence but the sessions court, on appeal regarding the sentence, reduced the sentence of imprisonment till the rising of the court. The High Court of Haryana did not agree with the sessions court that the case warranted less than the minimum prescribed under the Act. On behalf of the offender, the following contentions were raised for leniency in sentencing :

1. It was his first offence under the Act.
2. He had a large family to support.
3. He was to wind up the business of selling milk.

Rejecting the above as not adequate and special reasons for a reduced punishment, the High Court sentenced the offender to imprisonment of six months, the minimum period under the Act.

Sex Offences

The sentencing part in a rape case quite often poses a serious dilemma. Despite much severe punishments available now, in some cases severity of punishment is not called for keeping in view the total situation surrounding the crime.[26]

The age of the parties, the relationship in which the two parties stand to each other, the fact whether or not the victim is of easy virtue, and repentance, if any, on the part of the offender are the various relevant factors while fixing the length of imprisonment.

In *Ghanshyam Misra* v. *State*[27] the victim was a young girl of 10 years and the culprit an adult of 39 years. The offender was the teacher of the girl and taking advantage of his position, he induced her to come inside the schoolroom and committed rape on her. The court did not find any extenuating circumstances in favour of the accused and enhanced his sentence from three to seven years' rigorous imprisonment which was warranted due to the aggravating circumstances of the case.

In a similar situation, where a headmaster had raped a student of the same age, life imprisonment was reduced to 10 years' sentence taking the view that the harsher punishment ought to be inflicted only in 'extreme and rarest of rare cases'[28]. Justifying the lesser punishment, the court recollected that in an earlier judgment, it had not awarded life imprisonment even in a gang-rape case.[29] It may, however, be noted that the Supreme Court pres-

26. As a result of the Criminal Law (Amendment) Act of 1983, the minimum punishment for rape in ordinary cases is 7 years while it is 10 years for custodial and gang rapes and the same minimum is prescribed when the victim is pregnant or under 12 years of age. The courts, however, have been given discretion to award less than minimum punishment in special circumstances. The maximum punishment may extend to life imprisonment.
27. AIR 1957 Ori 78.
28. *Ramroop Das* v. *State*, 1993 Cri LJ 1000.
29. *Satpal alias Sadhu* v. *State*, 1993 Cri LJ 314.

cribed severe punishment for those committing sexual assault on children. The Court took cognizance of the phenomenon of an alarming and shocking increase of sexual offences on children who are easy prey for lusty brutes who display the unscrupulous, deceitful and insidious art of luring female children and young girls.[30]

It has been held by the Supreme Court in *Nafe Singh* v. *State of Haryana*[31] that the fact that there was resignation and no resistance on the part of the victim when the act or rape was inevitable did not provide any mitigating circumstances. The Court, on the other hand, held in another case that though the sexual act committed on a girl below the age of 18 years amounted to rape, no severe sentence was called for in view of the fact that the girl appeared to be quite used to sexual experience over a period of time.[32] The issue of sentencing in the context of victims found to be used to sex relationships or being of easy virtue generated a great deal of controversy in *Prem Chand* v. *State of Haryana*.[33] This was a case of custodial rape committed by two constables on a young girl who had run away from her home with her lover and evidence was adduced to show that the girl was used to sexual intercourse. The trial court while awarding 10 years' imprisonment justified the infliction of the minimum punishment thus:[34]

> "All said and done a girl of easy virtue is entitled to all the protection of law and cannot be compelled to sexual intercourse against her will and without her consent. Offences of rape and other allied offences were created for protection of fallible, earthly mortals and not for godesses. Therefore, the argument that Suman Rani was a girl of easy virtue and, therefore, the accused are entitled to acquittal is wholly unfounded and untenable."

Though the sentence was upheld by the High Court, the Supreme Court reduced the sentence to 5 years' imprisonment by invoking the proviso to Section 376 which enables a court to reduce the punishment below the minimum, for special reasons of somewhat doubtful validity giving rise to a countrywide debate, particularly among the women's groups. S. Ratnavel Pandian, J., speaking for B. C. Roy, J., also observed that though an offence of this nature had to be viewed very seriously and punished severely, the peculiar facts and circumstances of the case coupled with the *conduct* of the victim girl, did not warrant the minimum sentence of 10 years. Deeply anguished by the sentencing principle, based on the 'conduct' of the victim, as many as 15 women's organisations challenged the decisions through a

30. *Madan Gopal Kakkad* v. *Naval Dubey*, 1992 SCC (Cri) 598.
31. (1971) 3 SCC 934 : 1972 SCC (Cri) 182.
32. *Brij Lal* v. *State of Punjab*, (1970) 3 SCC 808.
33. 1989 Supp (1) SCC 286.
34. Quoted by Naina Kapoor in The Times of India, February 13, 1990.

review petition.[35] The Supreme Court dismissed the petition since there was no error apparent on the face of record, it nevertheless sought to explain, somewhat unconvincingly, that the decision was not based on the issue of the victim being of easy virtue but what was meant by *conduct* was in the context of delayed disclosure of the crime by the victim. The court observed that factors like the character or reputation of the victim are wholly alien to the very scope and object of Section 376; the factors can never serve as either mitigating or extenuating circumstances to award sentence below the prescribed minimum. Quite obviously, the explanation offered by the Court for reducing the sentence lacks persuasive force since any delay in reporting the crime may be relevant or even crucial for the purpose of conviction but not for the purpose of quantum of punishment. The explanation given by the Court in the review proceedings, however, acknowledges the vital principle that rape is to be treated as a violation of the person of a woman rather than an infringement of her chastity.[36]

Kakoo v. *State of Himachal Pradesh*[37] was somewhat an unusual case where the culprit, a lad of 13 years, committed rape on a child of 2 years. The Court, having regard to the age of the offender, made observations emphasising the reformatory approach in such cases and reduced the imprisonment to one year. A fine of Rs 2000 was, however, imposed with the direction that it be paid, if realised, to the victim's mother.

The reformatory approach was also emphasised by the High Court of Andhra in *Reepik Ravinder* v. *State of A.P.*[38] where the sexual criminality of the 15-year-old offender employed in a lodge was traced to his exposure to blue films and to witnessing sexual acts among different kinds of people coming to stay in the lodge. Finding the imprisonment for 10 years awarded by the trial court to be inappropriate in view of the circumstances and age of the offender, the court was of the view that probation ought to have been granted to the convict. The court then proceeded to order that the appellant be sent to the Borstal school in spite of the fact that he had already reached the age of 18 years. The same High Court, however, expressed itself against any leniency in the form of probation, particularly after the amendment of 1991, even in the lesser offence of outraging the modesty of a woman.[39] Irrespective of the issue as to whether the reformative approach is called for in a particular situation, the probation technique, by its very nature, seems to be quite out of context in sexual offences. Except perhaps sex maniacs,

35. (1990) 1 SCC 249.

36. The Law Commissioners, framing the Code, considered not only the character of the victim but also the caste factor to be relevant in determining the quantum of punishment (*see* Hari Singh Gour's *Penal Law of India*, 9th Edition, p. 2955).

37. (1976) 2 SCC 215 : 1976 SCC (Cri) 270.

38. 1991 Cri LJ 595.

39. *Public Prosecutor, High Court of A.P.* v. *Godise Devaiah*, 1994 Cri LJ 349.

no offender is likely to repeat a sexual offence and it would therefore, be meaningless to infer that the person was a 'reformed' offender once he completed his probation period 'satisfactorily'.

It was held in *Uttam alias Bhadriya*[40] that a minimum 10 years' imprisonment was not merited even in case of gang-rape when the offenders were of young age. In *State of A.P.* v. *Bodem Sundaram Rao*[41], the Supreme Court, however, enhanced the imprisonment of 4 years awarded by the High Court to 7 years, the minimum period mandated by the statute. In the court's view, the High Court was clearly in error in reducing the sentence of 10 years imposed upon the respondent and that too without assigning any reason, much less special and adequate reasons. The court emphasised that in recent years crimes against women were on the rise and it was the court's obligation to society to award proper sentences keeping in view the interests of not only the offender but also that of the victim.

In *Phul Singh* v. *State of Haryana*[42], the Supreme Court spelt out the various aspects of sentencing in sex offences. The appellant of 22 years committed rape on the wife of his cousin, a woman of 24 years of age. A sentence of 4 years' rigorous imprisonment was awarded by the sessions court and the High Court affirmed it in appeal. Krishna Iyer, J. took a lenient view of the situation while reducing the punishment from 4 years to 2 years. The reasons given were : the young age of the offender ; the culprit and the victim belonged to the same family and the victim and her people had forgiven the wrongdoer ; and the signs of repentance were seen in the offender.

The judge pointed out the lack of efficacy of long imprisonment in cases of 'lust-loaded criminality'.[43] The Court expressed the hope that given correctional courses through meditational therapy and other measures, the erotic aberration of the appellant could wither away.

It may often become very difficult to award an appropriate sentence where an extraordinary situation leads to rape and despite the extreme depravity manifested by the offender, a less severe punishment may be warranted because of some peculiar extenuating circumstances. For instance, though incestous child rapes are on the increase but even in such a situation, there may be some mitigating circumstances to curtail the length of imprisonment ; *Shaikh* v. *State of Maharashtra* being one such exceptional case.[44] The appellant was convicted for rape on his eight-year-old daughter and

40. 1991 Cri LJ 1644.
41. SCC 1995 SCC (Cri) 1097.
42. (1979) 4 SCC 413 : 1980 SCC (Cri) 1.
43. The same judge has observed in *Rajendra Prasad's* case while dealing with the *Kunjukunju* appeal that a course of anti-aphrodisiac treatment or willing castration is a better recipe for the hypersexual human than outright death sentence.
44. 1993 Cri LJ 314.

sentenced to life imprisonment. On appeal against conviction and sentence, the Bombay High Court upheld the conviction but reduced the period of imprisonment to 10 years. Justifying the reduction of punishment, the High Court observed that it was essential to take cognizance of the totality of the situation. The appellant, it was pointed out, was a hutment dweller where he lived huddled in a limited space with his children. His wife left him a few years earlier and he worked hard to provide necessities and education to his children. Being from the weakest strata of society he was deprived of education and elementary ideas of propriety. It was a situation of irresistible impulse and there was no earlier record of sexual violence or even of misbehaviour. The imprisonment was, therefore, reduced to 10 years.

In *Raju* v. *State of Karnataka*[45], the victim, a young woman of 21 years, trusting two unknown persons of 24 and 21 years of age, stayed with them in a lodge, the two young men having promised to help her in reaching her destination to attend her brother's wedding on time. While staying with them, the woman was ravished by the young men and in the process they even made use of a knife to make her submit to their lust. The sessions judge found the appellant guilty but gave them unbelievably small punishments comprising imprisonment till the rising of the court and a fine of Rs 500. The other accused was acquitted but on appeal the High Court found both of them guilty and awarded 7 years' imprisonment to each of them. The Supreme Court reduced the imprisonment to 3 years because of the very young age of the offenders, the circumstances under which they could not overcome a fit of passion and the fact that the incident took place long ago; both of them suffering disrepute and mental agony over the years.

Too much latitude shown in favour of the offenders is evident from the fact that the Court ignored even the high criminality manifested by the use of a knife which the appellants used to overawe the victim and the well-executed plan to commit the offence. In any case, the offenders being 24 and 21 years old were not "too young" as described by the Court. Finally, it being a case of gang-rape, a more serious view of the situation was perhaps warranted.

As regards the offence of sodomy the courts have, generally speaking, taken a serious view and it has been said, at least in some relatively old cases, that there can be no extenuating circumstances to warrant leniency in the sentence.

In *Emperor* v. *Mohammad Yusuf Mahomed*[46], a sentence of four months' rigorous imprisonment was held to be over-lenient and was enhanced to two years' rigorous imprisonment. In some of the cases decided before the

45. (1994) 1 SCC 453 : 1994 SCC (Cri) 538 : 1994 Cri LJ 248.
46. AIR 1933 Sind 87.

abolition of whipping as a mode of punishment, the punishment was recommended as a good deterrent.[47]

Perhaps the only reported case from the Supreme Court on the question of sentencing for an unnatural offence is *Chitranjan Das* v. *State of U.P.*[48] which also happens to be a relatively new case on the subject. The accused was found to be highly educated and cultured but suffering from 'mental aberration'. The Court reduced the sentence to that already undergone. The leniency shown by the Court may be to some extent due to the more tolerant attitude towards homosexual behaviour in recent times.

Disparity in Sentencing

One difficult problem relating to the sentencing process is the lack of uniformity in the quantum of punishment given by different courts for the same or similar offences.[49] Obviously, it would be unreasonable to expect uniformity of a very high degree since penology is not the kind of discipline where a readymade formula of a precise nature can be applied to meet the various situations, nor do all the judges and magistrates possess the same attitude while sentencing since they are bound to be influenced by their own values and personalities. In this connection the following observations of Sheldon Glueck are also pertinent :

> "...it is naive self-confidence that makes a judge, or criminologist, or psychiatrist, or probation officer assume that he can detect the minutest details of difference of personality, character, motivation, socio-economic background and other subtle factors and forces that distinguish one offender from another, and on top of that determine the exact nature and amount of correctional rehabilitative treatment suited to the individual's case and to that case alone. Only God can do that ; and since judges are not gods, we get the following practical results in the 'individualisation' of sentences."[50]

Glueck refers here to an analysis of 7000 sentences to show substantial disparity in the U.S.A. Though some disparity in sentencing is inevitable in view of the factors described above, it is difficult to accept the very high degree of disparity found in sentencing by different courts since it involves not only a question of justice as such but also the offenders' perceptions of justice on the basis of punishments received by them. Even in the U.S.A. where the application of scientific penology is much more in practice than in many other countries, the sentencing disparity is quite formidable as

47. See *Sona Khan* v. *Emperor*, AIR 1937 Pesh 22 and *Emperor* v. *Shera*, AIR 1936 Lah 256.
48. (1974) 4 SCC 454 : 1974 SCC (Cri) 490.
49. In *Rameshwar Dayal* v. *State of U.P.*, (1971) 3 SCC 924 : 1972 SCC (Cri) 172, the Supreme Court noticed two different cases where on identical facts the punishment in one case was four years' imprisonment and in the other three months.
50. 41 Journal of Criminal Law and Criminology 717.

reported by the President's Commission on Law Enforcement and Administration of Justice[51]:

> "In the Federal system, for example, the average length of prison sentences for narcotic violations in 1965 was 83 months in the 10th Circuit, but only 44 months in the 3rd Circuit. During 1962 the average sentence for forgery ranged from a high of 68 months in the Northern District of Mississippi to a low of 7 months in the Southern District of Mississippi ; the highest average sentence for auto theft was 47 months in the Southern District of Iowa, and the lowest was 14 months in the Northern District of New York.
>
> Disparity among judges sitting in the same court is illustrated by the finding of a recent study of the Detroit Recorder's Court. Over a 20-month period in which the sample cases were about equally distributed among the 10 judges, one judge imposed prison terms on 75 to 90 per cent of the defendants whom he sentenced, while another judge imposed prison sentences twice as long as those of the most lenient judge. The study also showed that judges who imposed the most severe sentence for certain crimes also exhibited the most liberal sentencing policy for other offences."

The Commission pointed out the effects of sentencing disparity on the administration of criminal justice and the attitudes of the offenders :

> "Unwarranted sentencing disparity is contrary to the principle of even-handed administration of the criminal law. As Attorney General Robert H. Jackson stated : 'It is obviously repugnant to one's sense of justice that the judgment meted out to an offender should be dependent in large part on a purely fortuitous circumstance, namely, the personality of the particular judge before whom the case happens to come for disposition.' Unjustified disparity adversely affects correctional administration. Prisoners compare their sentences, and a prisoner who is given cause to believe that he is the victim of a judge's prejudices often is a hostile inmate, resistant to correctional treatment as well as discipline."

The Supreme Court took note of the problem of disparity in sentences in *Rameshwar Dayal* v. *State of U.P.*[52]. The Court said that the problem of disparity had not been solved satisfactorily so far. In the cases before it, the Court found it odd that though the two cases were identical in terms of the offence and circumstances, 4 years' imprisonment was awarded in one while only three months' imprisonment was given in the other.

51. *The Courts*, 1967, pp. 23-24.
52. (1971) 3 SCC 924 : 1972 SCC (Cri) 172.

Disparity Reduction

Though sentencing disparity cannot be eliminated altogether, yet efforts can be made for reducing it to the minimum level. The strategies indicated are the better training of judicial personnel and the coordination of sentencing policies through sentencing councils. It has also been suggested that the job of sentencing should be taken away either wholly or partly from judicial personnel and the same should be entrusted to Boards consisting of experts trained in disciplines like social work, psychiatry and allied disciplines. Provision for appellate review of sentences is also made in criminal laws which go a long way in reducing the disparities.

Improving sentencing skills should be an important part of any scheme which aims to make sentencing practices more consistent. The trial judge should be made well-conversant with all the alternative sentences and their application in appropriate situations. He should be trained to evaluate pre-sentence and psychiatric reports in cases where they are made available to him. In the U.S.A. there is a National College of State Trial Judges where short but intensive training is imparted to the newly-appointed judges. Besides, seminars wholly devoted to sentencing are frequently held for the benefit of judges in the Federal system and also in a few States like California, New York and Pennsylvania.

In *Santa Singh* v. *State of Punjab*[53] the Supreme Court emphasised the importance of training of judicial personnel in penology and sentencing procedures. Such a training, the Court observed, would enable the judges to keep abreast with the latest trends in penological thought and practice.

An effective technique employed in the U.S.A. to achieve coordination between the different judges of a multi-judge court is the system of sentencing councils. The judges meet in the sentencing councils to discuss the punishments to be awarded in the cases pending before them. This procedure is conducive to uniformity in the sentencing pattern ; the only snag is that the council meets before the judge gets an opportunity of hearing the defence on sentencing and, therefore, the judge may not be able to pass the sentence with an open mind because of the inhibitions created by the earlier discussions with his colleagues.

It has also been mooted that since sentencing requires more experience in the fields of social work and psychiatry than in law, the job must be entrusted to a board of experts since a busy judge may not have the necessary training and equipment for it. The idea, though attractive as such, has, however, been criticised because of the potentialities of abuse in view of the non-judicial character of the board. To some extent such apprehensions can

53. (1976) 4 SCC 190 : 1976 SCC (Cri) 546.

be eliminated by providing for appeals to the superior courts which may interfere with the sentence in suitable cases.

Another alternative is to try a combination of the judiciary and the board of experts by employing the technique of indeterminate sentence. The sentencing judge may award a sentence indicating maximum and minimum limits and the board then decides the actual time of release on the basis of the performance and promise of the convict in the institution. A sentence is absolutely indeterminate when no limits are laid down by the judge. Undoubtedly, indeterminate sentences are the best means to achieve the rehabilitative and reformative ideal. The Congress of Comparative Law held at the Hague in 1937 resolved that the time of detention should be capable of being shortened or prolonged as a result of the consideration of a report on the progress of the recidivist made by some component authority.

Some of the steps taken to reduce sentencing disparity aim at the reduction of sentencing discretion both of the judges and parole boards. It marks a shift towards harm-based penology in which situational and offender characteristics are bound to be excluded to a greater extent compared to the earlier position. In 1984, the Federal Sentencing Reforms Act was enacted abolishing the U.S. Parole Commission and a Sentencing Commission was created to draft sentencing guidelines, a movement signifying 'individualised' to general sentences.

Appellate Review of Sentence

In all western countries except the U.S.A. grossly excessive sentences are subject to routine review and correction by appellate tribunals.[54] In the U.S.A., in the majority of jurisdictions, appeals against sentencing are not possible since the trial judge is considered to be the best person to deal with the sentencing part. This assumption is based on the belief that sentencing involves questions of judgment and not of law and that appellate judges are less able to assess an appropriate sentence because of their inability to observe the defendant.[55]

In India, appeal against sentences are possible to the superior courts, High Courts and ultimately to the Supreme Court under the powers given to them in the Criminal Procedure Code and the Constitution. The scope of revision of sentencing in appeals is, however, limited as made clear in the various pronouncements of the Supreme Court. The question of sentence is normally a matter of judicial discretion of the trial court and the Supreme Court does not as a rule interfere with the exercise of such discretion. In a matter of enhancement, there should not be interference

54. President's Commission, *op. cit.*, p. 329.
55. *Ibid.*

when the sentence passed imposes substantial punishment. Interference is only called for when it is manifestly inadequate.[56] The High Court may be justified in enhancing a sentence which it finds very lenient in the circumstances and it would be wrong for the Supreme Court to interfere.[57]

The merit of appellate jurisdiction in matters relating to sentencing lies in the fact that apart from correcting any occasional waywardness of the trial courts in awarding punishment, the principles laid down by the appellate courts are conducive to greater uniformity in sentencing in the lower courts. This leads to the important issue of reasoned sentencing decisions without which the convicted person is likely to be handicapped while preferring an appeal against his sentence. Reasoned decisions on sentencing are a must in view of the principle of natural justice, otherwise the decisions appear to them to be arbitrary or they are at least perceived to be so by the offenders. Reasoned decisions go a long way in the rationalisation of punishments leading to a greater consistency in the sentencing policy. It is not infrequent that the trial courts in India fail to give reasons for the sentencing decisions or do not spell out the reasons adequately.

Nigel Walker's Proposals

Dr Nigel Walker is of the view that in actual sentencing the courts tend to award punishments around a certain range more frequently than the rest of the range which is authorised by law for a certain offence. By citing the sentencing statistics for the offence of house-breaking in England and Wales in the years 1964-66, he shows that there are 'about six fashionable lengths of six, nine, twelve, eighteen, twenty-four and thirty-six months, which in practice usually meant incarceration for two-thirds of these periods,' the maximum possible imprisonment being 7 years for the offence. The 'fashionable range' accounted for 85 per cent of the offences; the range beyond five years being in a negligible number of cases, 15 per cent offences were covered by what Walker calls 'odd intermediate lengths'. Walker questions the utility of these 'odd intermediate lengths' from three angles, deterrence, correction and security of the public and concludes that none of the three functions were being fulfilled by these lengths. His general conclusion is that punishments of less than six months should not be given and that a large variety of periods of imprisonment for the same offence or even for different offences did not make much sense from a practical angle. Walker maintains that the sentencing ranges of imprisonment could be streamlined by only making a limited choice available to the judges. He, therefore, suggests a system under which a person found guilty of any offence for

56. *Shiv Govind* v. *State of M.P.*, (1972) 3 SCC 399 : 1972 SCC (Cri) 549.
57. *Nabi Bux* v. *State of M.P.*, (1972) 1 SCC 7 : 1972 SCC (Cri) 7.

the first time would be sentenced to a maximum of two years' imprisonment. He shall have to be in prison for at least six months. The time of his release, between six months and two years, shall be determined by the prison authorities on the basis of his behaviour and promise shown for the future. In case of any subsequent conviction, the offender would be sentenced to five years' maximum imprisonment and the minimum period of detention is to be six months more than what he spent last time in the jail[58].

Dr Walker has raised many pertinent questions about the traditional sentencing process and has made suggestions which are truly radical. There is no doubt that his proposed scheme does away with many factors resulting in disparity in sentencing so far as courts are concerned. Whether the discretion to be vested in the prison authorities would produce better results in terms of scientific penology is anybody's guess. The obvious objection to Dr Walker's proposals is that since the minimum and maximum punishments are the same for all the offences where imprisonment is the remedy, the differences between offences based on gravity and moral considerations shall cease to have any relevance, a situation which may not be acceptable to many of us. Rupert Cross quoted Beccaria while criticising Dr Walker on this aspect :

> "Whoever sees the same penalty of death is laid down, for example, for the man who kills a pheasant, the man who murders another man, or the man who falsifies an important document, will draw no distinction between these crimes. This will destroy those moral sentiments which are the work of many centuries and the result of much spilling of blood, which have been produced solely and painfully in the human mind ; their birth, we may believe, having depended on the help of the sublimest motives and the gravest of formal observance."[59]

It should, however, be pointed out in fairness to Nigel Walker's proposals that he excluded 'dangerous offenders' from his scheme and he also emphasised that his proposals were not meant to cover the offences for which some punishment other than imprisonment was prescribed.

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58. *Op. cit.*, pp. 123-130.
59. *Op. cit.*, p. 158.

Chapter XII

WHITE-COLLAR CRIME

The anti-social activities of persons of the upper strata in their occupations, which have come to be known as 'white-collar' crimes, have been given their due importance in the recent past only after the pioneering work done by Prof. Edwin H. Sutherland in this area of great contemporary concern. It should not, however, be concluded that there was no such problem or awareness of it until Sutherland focussed his attention on this variety of crime about forty years ago. As observed by Barnes and Tetters:

> "There has always been crime among businessmen. There have always been instances of violation of trust. Most of us have read of chicanery and plunder in the history books and such acts have often constituted the central theme of the fiction of earlier times. But the American people seemed to believe that anyone who betrayed a trust or who mulcted the widow's mite in a shady but legal deal, would eventually suffer—if not here, surely in the hereafter. Existing practices, however, were generally accepted as being within the canons of good business. Business, therefore, was justified in pulling a shrewd deal. The victim either did not report what was done for fear of being ridiculed, or received little sympathy because he had been fleeced in a social, approved and even legal deal. *Caveat emptor*—let the buyer beware—expressed the prevalent attitude."[1]

Professor Sutherland was preceded by others who were aware of the damage to society from the upper socio-economic groups who exploited the accepted economic system to the detriment of the masses. Prof. Albert Morris calls attention to a paper entitled *Criminal Capitalists* read by Edwin C. Hill before the International Congress on the Prevention and Repression of Crime at London in 1872. In this paper the writer noted the "growing significance of crime as an organised business requiring the cooperation of real estate owners, investors and manufacturers and other 'honest' people". As early as 1934 Professor Morris called sharp attention to the necessity of a change in emphasis regarding crime.[2] Muckreckers condemned such practices (subsequently called white-collar crimes) decades ago. Nearly all textbooks on labour problems, corporation problems, problems of finance and so on condemn them.[3]

1. *New Horizons in Criminology*, 3rd Ed., pp. 43-4.
2. *Ibid*, p. 41.
3. Taft and England , *Criminology*, p. 202.

Professor Sutherland's contribution is unmatched in the sense that he was the first criminologist who sought to extend the frontiers of criminology by including in it the study of white-collar crimes. Prior to his focussing attention on white-collar criminality, criminologists confined themselves to the study and research of blue-collar crimes, i.e., traditional crimes like theft, burglary, robbery and acts involving violence committed by persons of lower socio-economic status. In the words of Donald R. Crassey, the lasting merit of Sutherland's book *White Collar Crime* lies in its demonstration that a pattern of crime can be found to exist outside the focus of both popular preoccupation with crime and scientific investigation of crime and criminality.[4] Subsequently quite a few other criminologists took up various research studies of white-collar crimes.[5]

Nature and Definition of 'White-Collar Crime'

Professor Sutherland presented his concept of 'white-collar' crime in his address to the American Sociological Society in 1949. Sutherland defined white-collar crime as "crime committed by a person of respectability and high social status in the course of his occupation". Later, he seems to have added a refinement to the definition by defining a white-collar criminal as "a person of the upper socio-economic class who violates the criminal law in the course of his occupational or professional activities".[6] He pointed out that white-collar crime was more dangerous to society than ordinary crimes, firstly, because the financial losses were higher, and secondly, because of the damage inflicted on public morale. Comparing the financial losses resulting from white-collar crimes with those from ordinary crimes, he observes:

> "The financial loss to society from white-collar crimes is probably greater than the financial loss from burglaries, robberies and larcenies committed by persons of the lower socio-economic class. The average loss per burglary is less than one hundred dollars, a burglary which yields as much as fifty thousand dollars is exceedingly rare, and a million-dollar burglary is practically unknown. On the other hand, there may be several million-dollar embezzlements reported in one year. Embezzlements, however, are peccadilloes compared with the large-scale crimes committed by corporations, investment trusts and public utilities holding companies, reports of fifty-million-dollar losses from such criminal behaviour are by no means uncommon."[7]

4. Donald R. Crassey, Foreword in Sutherland, *White-Collar Crime* (New York : Holt, Rinehart Winston, 1961) p. xii.
5. Clinard, Hartung, Lane, Aubert, Crassey, Newman and Quinnery.
6. Law Commission Report, No. 29 1966, p. 6.
7. Sutherland, "*Crime and Business*", The Annals of the American Academy of Political and Social Science, 217, 1941, p. 112.

Regarding the damage to morale and institutions, Sutherland expresses the view that the financial loss is less important than the damage to social relations, since it creates distrust, lowers morale and produces disorganization on a large scale. On the other hand, the social damage from ordinary crime is said to have relatively little effect on our institutions and social organizations.[8] How the legal institutions and laws are brought into contempt and disrepute is illustrated by Marshall B. Clinard. He points out that the wartime blackmarket crimes set an example of disobedience of law by presumably reputable businessmen far more flagrant than in the case of most robberies, burglaries and larcenies.[9]

Types of White-Collar Crimes

The main crimes that have attracted attention in the U.S.A. under the head of white-collar crimes may be summarised as follows:

(*a*) frauds in business in relation to sale of bonds and investments;

(*b*) adulteration of foods and drugs and misleading advertisements;

(*c*) malpractices in the medical profession, such as illegal sale of alcohol and narcotics, abortion, illegal services to underworld criminals, fraudulent reports and testimony in accident cases, extreme cases of unnecessary treatment, fake specialists, restriction of competition and fee splitting;

(*d*) crimes by lawyers, such as guiding the criminal or quasi-criminal activities of corporations, twisting of testimony to give a false picture, fake claims (bogus liability in accidents), etc.;

(*e*) trusts, cartels, combines and syndicates etc. formed to combat competition, or to raise prices or otherwise to interfere with the freedom of trade to the detriment of honest businessmen or the consuming public. This has now become a branch of law by itself and is usually dealt with under the topic of "anti-trust legislation";

(*f*) bribery and graft by public officers.[10]

Since Sutherland limits the concept to unlawful behaviour engaged in for the purpose of furthering the financial or strategic interests of legitimate callings, crimes by respectable people committed for other purposes are not white-collar crimes: murder of his spouse by a businessman or bribery of a traffic officer by a motorist who happens to be a physician are not encompassed by the concept.[11]

8. Sutherland "*Crime and Business*" The Annals of the American Academy of Political and Social Science, Vol. 217, 1941, p. 112.
9. Sutherland, "*White-Collar Criminality*", American Sociological Review 5, No. 1, 1940, pp. 2-3.
10. Law Commission Report, No. 29, 1966, pp. 10-11.
11. Taft and England, *op. cit.*, p. 200.

Criticism of Sutherland's Definition

The concept of white-collar crime as propounded by Sutherland has evoked sharp criticism particularly from those who maintain that only a person found guilty of violating a criminal law provision by a criminal court can legitimately be regarded as a criminal. Most of the white-collar crimes, though violations of penal law, are not handled by ordinary criminal courts but by commissions, administrative tribunals and Boards. It is argued, therefore, that the administrative handling of white-collar offences cannot result in the conviction of the offender in the legalistic sense and the white-collar offender, therefore, cannot be said to have acquired the status of a criminal.

Paul W. Tappan, an ardent advocate of the legal definition of crime, fears that the inclusion of administrative decisions as the basis for defining non-conformists as criminals opens the door to the extension of the concept of crime to cover behaviour which a particular administrator deems nefarious. The moral values of the administrator would be substituted for what Tappan regards as the "clarity and precision" of the legalistic definition of crime.[12]

This criticism is based on the premise that criminal proceedings involve a prescribed procedure which guarantees various safeguards to the offender. Such safeguards are lacking when an offender faces proceedings before an administrative agency. The same administrative agency or commission directs investigations, conducts hearings and award punishments; an altogether different situation from the one obtaining in criminal courts. Among other factors, one very vital difference between criminal courts and the administrative agencies is in the quantum of burden of proof against the accused persons. In criminal courts, the prosecution has to prove its case beyond any reasonable doubt which, at times, is quite an onerous job. Administrative bodies are not inhibited by these problems to the same extent.

The criticism, that Sutherland attempted to extend the concept of 'crime', has been countered by pointing out that Sutherland made it amply clear that there was only one definition of crime, the legal one, i.e., an act or omission made punishable by law. His analysis is focussed on four types of legal violations by big corporations:

(*i*) Law regarding restraint of trade

(*ii*) Misrepresentation in advertising

(*iii*) Infringement of patent and analogous rights

(*iv*) Laws regarding labour relations

Sutherland points out that two requirements are generally to be satisfied to fulfil the legal criterion, viz., (*i*) element of harm, and (*ii*) fact of the criminal conviction of the person committing the crime. According to him,

12. Paul W. Tappan, "*Who is the Criminal?*" American Sociological Review 12, pp. 96-102.

the first element is of course there but the second requirement is not needed for the purposes of a criminologist; it is needed only by criminal justice administrators like prison officials or for applying penal sanctions. Sutherland believed that the most convincing procedure for determining the fact of criminality is to read a large number of decisions of courts and commissions with detailed descriptions of the acts of the corporations and analysis of the concepts involved.

Sutherland concedes that an act is not a crime unless it is punishable by the State and to that extent he is quite consistent as compared to many other writers on white-collar crimes. Moreover, he stated that the concept was not intended to be definitive but merely to call attention to crimes which are not ordinarily included within the scope of criminology.[13] He is, however, of the view that the punishment need not necessarily be given through a criminal court. According to him, white-collar offences are crimes because they have been legally proscribed as socially harmful and because legal sanctions in the form of various punishments are available to deal with them. He also maintains that an unlawful act being *punishable* is more important than whether it is punished. A guilty man voluntarily confessing to a policeman, priest or a criminologist clearly shows that he has committed an act which is punishable. Regarding the lack of safeguards in the proceedings before the administrative bodies, Sutherland points out that sometimes a defendant may not have real safeguards even in criminal courts if he cannot afford a lawyer on account of his poverty. This argument of Sutherland, it is submitted, does not carry much weight. Lawyers are generally made available to indigent persons in criminal proceedings, particularly in more serious offences. Even where no lawyer is provided to the accused person, criminal courts are extra careful to see that the accused is not prejudiced in any way due to the lack of a lawyer to defend him.

Further, Sutherland observes that the actual difference in presumption of innocence is not great when procedures of criminal courts and administrative agencies are compared. According to him, the differences in procedures were designed to protect the offender from the stigma of criminal prosecution.[14]

The inclusion of white-collar offences has also been objected to on the basis of the sociological argument that the perpetrators of such offences do not regard themselves as criminals. This argument led to a controversy between Hartung and Burgess in the early fifties. Hartung contended that white-collar crime (and black marketing) should be considered sociologically as crime, just as any other kind of crime.[15] Burgess, on the other hand,

13. *White Collar Crime*, *op. cit.*, p. 9.
14. *White Collar Crime*, 1961.
15. Parank E. Hartung, *White-Collar Offences in the Wholesale Meat Industry in Detroit*, American Journal of Sociology 56 (1950-51), pp. 26, 29-30.

maintains that the definition of criminals should be limited to persons who conceive of themselves as criminals and are so conceived by society.[16] He illustrated it by pointing out that OPA[17] violators did not conceive of themselves as criminals and neither did the public; that the Emergency Price Control Act of 1942 and the Second War Powers Act suddenly transformed former business practices into crimes; that the public, the government and the press made no concerted effort to condemn OPA violators and stigmatize them as burglars, robbers, forgers and so forth; that large segments of the public participated in the blackmarket practices (just as they did in bootlegging in times of prohibition); that only a small fraction of OPA violators received prison sentences, which were light compared to sentences for ordinary property crimes.[18] This is countered by Mannheim by his observation that the criminal law cannot be made completely dependent on the offender's own view of whether or not he has violated the law and should be punished.[19] Moreover, it is highly doubtful that white-collar offenders do not regard themselves as violators of law. According to Clinard's finding, white-collar offenders generally regard themselves as law violators and the evasive nature of most violations indicates awareness of illegality and repudiates the contention that the violations were unwittingly committed.[20] Even Geis, who is critical of Sutherland's definition, rejects the contention that the legal offences of corporate executives are not crimes because they do not perceive of their activities as criminal. Geis supports Hartung in contending that the corporate executives involved in violation of legal norms do regard themselves as violators, both "before and after conviction".[21] This he supported by citing the testimony of high executives involved in the proceedings in the *General Electric case*. Finally, if the test to be applied for criminality is the self-image of the offender, most of the criminals, particularly situational offenders, would have to be excluded from the criminal population and only professional criminals would be relevant subjects for criminological studies.

Sutherland used the term 'white-collar' crime in the sense of legal violation but subsequently the expression has been extended beyond the legal frontiers. Unethical but lawful acts like tax avoidance as distinct from tax evasion, and undercutting the prices of goods are instances on the point. This has evoked criticism from those who insist that the definition of crime must be kept within the limits prescribed by law. Paul W. Tappan makes the

16. Earnest W. Burgess, Comment, *ibid*, pp. 32-34.
17. Office of Price Administration.
18. Walter C. Reckless, (*The Crime Problem*) 1967 p. 357.
19. Hermann Mannheim, (*Comparative Criminology*) 1965, Vol. II, p. 479.
20. Marshall B. Clinard, *The Black Market* (New York : Rinehart, 1952).
21. Dr Gilbert Geis in *Sociological Inquiry*, Vol. XXXII, No. 2, 1962, pp. 162-71.

following observations to criticise the extended meaning given to the concept of crime in white-collar offences:

> "When Professor Sutherland launched the term, it was applied to those individuals of upper socio-economic class who violate the criminal law, usually by breach of trust, in the ordinary course of their business activities. This original usage accords with legal ideas of crime and points moreover to the significant and difficult problems of enforcement in the areas of business crimes, particularly where those violations are made criminal by recent statutory enactment. From this fruitful beginning the term has spread into vanity, wide and handsome. We learn that the white-collar criminal may be the suave and deceptive merchant prince or 'robber baron', that the existence of such crime may be determined readily 'in casual conversation with a representative of an occupation by asking him, "What crooked practices are found in your occupation?".
>
> Confusion grows as we learn from another proponent of this concept, 'there are various phases of white-collar criminality that touch the lives of the common man almost daily. The large majority of them are operating within the letter and spirit of the law.' Apparently the criminal may be law obedient but greedy; the specific quality of his crimes is far from clear."[22]

Another trend has been to include even those violations of law which are either not committed in the course of occupation or profession or where the violators are not necessarily of the upper strata or of recognised respectability. Violations like tax evasion are examples of offences which are not committed in the course of an occupation and are committed by taxpayers of every strata. Similarly, shoplifting, which has been treated as a white-collar crime by some writers, is not necessarily committed by persons of any particular strata nor can it be said that shoplifting is in the course of one's occupation or profession. It emerges, therefore, that the term 'white-collar' crime does not convey the same meaning to all persons. Broadly speaking, the concept now includes some of those acts which were not contemplated by Sutherland as white-coller crimes at the time when he made use of the term for the first time in criminology.

One objection regarding white-collar crimes is based on the concept of *mens rea* or guilty mind in criminal law. The traditional concept in criminal law is that no crime can be committed without a guilty mind. Many statutes dealing with white-collar crimes do not require any *mens rea* and writers like Jerome Hall do not, therefore, recognize them as real crimes but only as regulatory offences.[23] It has, however, been held in many cases in England,

22. Paul W. Tappan, *Who is the Criminal? op. cit.*

23. Jerome Hall *Principles of Criminal Law*, Chap. X.

India and some other countries that the doctrine of *mens rea* based on common law has no applicability in statutory crimes where the requirement of guilty mind may be excluded either expressly or by necessary implication.

Perhaps the most vehement critic of Sutherland's contribution to the study of white-collar crime is Dr Gilbert Geis.[24] In one of his essays he comments on the loopholes in Sutherland's handling of white-collar crime as follows:

> "A major difficulty lies in Sutherland's striking inability to differentiate between the corporations themselves and their executives and personnel."

Geis has no problem in appreciating the criminal responsibility of the corporations or of their executives but he does not accept the proposition that a corporation is criminally liable for the acts of its executives. To support his contention, Geis offers an interesting though far-fetched argument that declaring a corporation criminal because of legal violation by its operators might be akin to declaring the State of Rhode Island criminal because one of its citizens is criminal.[25]

Donald J. Newman has, however, supported Sutherland for including white-collar offences in the category of crimes for the purposes of criminological studies. According to Newman, there is no basic difference between the nature of ordinary and white-collar crimes. White-collar crimes, as well as the traditional offences, have their roots in common law and are adaptations of principles of theft, fraud and the like to modern socio-economic institutions. The only peculiarity of white-collar offences is the relatively high status of the offenders, but the criminal content in both the types is equally present. The farmer may add water to the milk and the television repairman may charge for unnecessary repairs. According to Newman, the white-collar regulations are intended to remedy rather than to punish, but they are at least partially penal and triable in criminal courts.[26]

As regards the status of crimes of the 'white-collar' variety in India, they are crimes in every sense of the word. Many of them are committed by even those who do not belong to the upper strata of society. Most of these are defined and made punishable under the general criminal law of the country as laid down in the Penal Code. For instance, cheating, fraudulent deeds, forgery, violations of trade marks, bribery and other offences by public servants, offences relating to weights and measures and food adulteration are all Penal Code crimes irrespective of the fact as to who commits them. In addition to the general criminal law in the IPC, various other special enactments have been passed from time to time to deal either intensively

24. Gilbert Geis, *op. cit.*, pp. 162-171.
25. *Ibid.*
26. *See* Donald J. Newman, "*White-Collar Crime*": Law and Contemporary Problems 23, pp. 735-53 (Autumn 1958).

with some of the offences covered in a general way by the Penal Code or with areas not covered at all by the Code.[27]

Growth of White-Collar Criminality

The rise of white-collar criminality in many countries has coincided with the progress made in those countries in the economic and industrial fields. It is hardly surprising that the two processes should go together considering that most of the white-collar crimes are, directly or indirectly, connected with the production and distribution of wealth.

Writing about the various factors which have contributed substantially to white-collar criminality, Friedmann makes the following observations:

> "The Industrial Revolution had initiated great social changes of far-reaching consequences. The changes in the economic and social structure of property, comprising the transformation of an increasing proportion of wealth from property in tangible, visible and mainly immovable goods into ownership in intangible and invisible powers and rights such as shares, trade marks, patents and copyrights, coincided with the growth of large-sized corporations replacing individual entrepreneurs. This development, *inter alia*, led to concentration of economic and consequent political power in a few hands, absentee ownership and impersonal monopoly, emphasis on money and credit and decline in the sense of social responsibility on the part of owners of large property."[28]

The Law Commission has also noted the various factors responsible for the growth of white-collar criminality in the following words:

> "The advance of technological and scientific development is contributing to the emergence of 'mass society', with a large rank and file and a small controlling elite, encouraging the growth of monopolies, the rise of a managerial class and intricate institutional mechanisms. Strict adherence to a high standard of ethical behaviour is necessary for the even and honest functioning of the new social, political and economic processes. The inability of all sections of society to appreciate in full this need results in the emergence and growth of white-collar and economic crimes...."[29]

The two world wars also contributed towards white-collar criminality in a substantial way. The traditional mores and ethical restraints were vitally affected due to the scarcity of things and mounting demands. The end of the Second World War almost coincided with the independence of India and

27. Examples of such legislation are : Conservation of Foreign Exchange and Prevention of Smuggling Act, 1949 ; Essential Commodities Act, 1955; Foreign Exchange Regulation Act, 1947; Income Tax Acts of 1922 and 1961; Prevention of Corruption Act, 1947; Prevention of Food Adulteration Act, 1954; Customs Act, 1962 and Trade and Merchandise Marks Act, 1958.

28. Friedmann, *Law in a Changing Society* (1951) p. 186.

29. Law Commission of India, Twenty-ninth Report, 1966, p. 3.

the emergence of an avowedly welfare State in the country. In a welfare State, the government tends to control a vast number of means of production and distribution of goods and material services. Assuming that such controls are in the interests of the community the fact remains that the governmental controls provide a fertile source of white-collar criminality in a society infested with chronic shortages, corruption and endemic inefficiency in the administration of State activities.

The obligations imposed on the State regarding the ownership and distribution of national wealth and resources shall be evident from the following provisions of the Indian Constitution:

> "The State shall in particular direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment."[30]

The above philosophy led to the various regulatory legislations, the breach of those regulations giving a tremendous fillip to white-collar criminality in India.[31]

During the last thirty years, the country has seen the execution of various Five-Years plans involving a huge expenditure by the government for various nation-building activities. The corrupt officers, businessmen and contractors never had it so good. No doubt the country did make some progress but a big chunk of money earmarked for developmental projects has been pocketed by white-collar criminals.

Anti-White-Collar Crimes Legislation—Problem of Enforcement

It has already been noted that white-collar criminals are much more dangerous to society than ordinary or blue-collar criminals. The question then arises as to why many white-collar criminals go unpunished? According to Sutherland, the preferential treatment of white-collar offenders could be explained in terms of their high socio-economic status, the remedial philosophy of the laws in question and the relatively unorganized resentment of the public against white-collar crimes. The reasons for the absence of such resentment were stated to be as follows:

(*a*) The violations of law in such cases are complex, and can be appreciated only by experts.

(*b*) The public agencies of communication (like the Press) do not express the organized moral sentiments of the community, partly because the

30. Article 39(*b*) & (*c*).

31. Some of the relevant statutes are : Essential Commodities Act, 1955; Industrial (Development and Regulation) Act, 1951 ; Imports and Exports (Control) Act, 1947; Companies Act, 1956, Foreign Exchange (Regulation) Act, 1973; Central Excise and Salt Act, 1944; Income Tax Act, 1961; Customs Act, 1962.

crimes are complicated and cannot be easily presented as news, but probably in a greater degree because these agencies of communication are themselves controlled by businessmen involved in the violations of many of these laws.

(*c*) The laws for the regulation of business belong to a relatively new and specialised part of the statutes.

As to the reasons why such crimes went unpunished, Sutherland made the following observations:

> "The difference in the implementation of the criminal law is due principally to the difference in the social position of the two types of offenders. Because of their social status, implementation of the criminal law in relation to white-collar criminals becomes difficult. They are more powerful than the traditional criminals. Consumers, investors and stock-holders are unorganised, lack technical knowledge and cannot protect themselves. White-collar crime goes undetected because it transcends the visibility of ordinary cheating practices of small merchants."

Another obstruction in the prosecution and punishment of white-collar criminals apart from the fact that the public is not only indifferent and apathetic towards such violations of law is that quite often the members of the community themselves contribute to the commission of the various white-collar crimes. In other words, the 'victims' of the crimes are also to blame for white-collar criminality. In fact many such crimes cannot be committed unless there is a demand for illegal goods and services in a community. Blackmarketing and illegal gratifications to public servants are some of the common examples.

Finally, one more factor is believed to be responsible for the failure to punish or for inadequate punishments so far as white-collar crimes are concerned. The judges of the courts ordinarily belong to the upper strata of society and this factor may determine their attitude, consciously or otherwise, towards the white-collar offenders who also come from the same social strata.

White-collar crimes being different in their nature and execution from ordinary crimes present peculiar problems in terms of detection, investigation, prosecution and trial relating to such offences. It is evident that for an effective enforcement of the laws, specially trained personnel are needed to detect and investigate such crimes. It is because of the different kind of challenge that the trend now is to separate the investigating and prosecuting agencies for such crimes; a deviation from the traditional practice of vesting the two functions in the same agency. This may, however, give the desired advantages only if there is proper coordination between the two agencies.

The next problem relates to the forum of trial and the substantive and procedural aspects of the law governing it. The issue regarding the forum has generated some controversy. It has been argued that to secure greater

efficiency and effectiveness socio-economic crimes must be handled by tribunals or quasi-judicial bodies which may not be fettered by some of the unnecessary, archaic and disabling features of the ordinary criminal law. Apprehensions have been expressed on the other hand that such forums may not be immune from the influence of the executive branch of the government and they, therefore, may not command the confidence of the general public.

One possible approach is to retain the jurisdiction of the ordinary criminal courts but to do away with some of the over-indulgent provisions of criminal law in the context of white-collar crimes. As a result of the recommendations of the Santhanam Committee some of the relevant laws were amended on these lines. By these amendments greater powers have been conferred on the investigating officers and on the magistracy and summary trials are also possible for some of the offences.[32] The law has also been made slightly less benevolent to the accused persons by incorporating certain presumptions against them under certain circumstances. Under Section 4 of the Prevention of Corruption Act there is a presumption, for instance, that money received other than legal remuneration by a public servant is an illegal gratification.

Judicial Attitude—Recent Change

As discussed above, courts generally have been giving differential treatment to white-collar criminals. Sometimes, instead of punishing the guilty, the courts have used cease-and-desist orders in case of white-collar criminals, a technique which is not resorted to for ordinary criminals. As pertinently observed by Taft and England, we do not warn the burglar to desist; we arrest him forthwith.[33] There, however, seems to have occurred stiffening of the judicial attitude in the U.S.A. of late as manifested in the famous General Electric case of the electrical equipment companies decided in the year 1961. In the words of Taft and England:

> "The plea of *nolo contendere* (no contest) by a person formally accused of a crime is a backhanded plea of guilty. For decades, businessmen accused of violating anti-trust laws have pleaded *nolo contendere* when the evidence against them was clearly overwhelming. Never, until 1959, did imprisonment follow such a plea. In that year, to their astonishment four Ohio businessmen were sentenced to jail for anti-trust violations. In February 1961, 44 executives of 29 electrical equipment companies, including General Electric and Westinghouse, pleaded guilty or *nolo contendere* to charges of price-fixing and rigging bids on $ 7 billion worth of heavy electrical equipment. In addition to fines ranging

32. Some of the more important legislative pieces in this direction are : Anti-Corruption Laws (Amendment) Act, 1964 ; Foreign Exchange (Amendment) Act, 1964 ; Prevention of Food Adulteration (Amendment) Act, 1964 and Wealth Tax (Amendment) Act, 1964.

33. *Op. cit.*, p. 202.

> up to $12,500, 23 executives, one of whom was a Westinghouse vice-president were variously sentenced to 30- and 60-day jail terms. Most of these sentences were actually served. The extensive Press coverage given to this incident was apparently based not upon the enormity of the crimes involved, but upon nationwide surprise at the jail sentences meted out and upon the verbal reprimands uttered by the sentencing judge."[34]

Taft and England also note the significance of the *Time* magazine reporting the story in the 'Business' and not in the 'Crime' columns.[35]

The trial courts in India sometimes fail to realise the gravity of white-collar criminality and, therefore, tend to be contented by awarding light or even token punishments to white-collar criminals. The Law Commission has been fully aware of the judicial smugness vis-a-vis white-collar crimes and the dangers inherent in it. In its Forty-seventh Report the Commission observed:

> "Suggestions are often made that in order that the lower magistracy may realise the seriousness of some of the social and economic offences, some method should be evolved of making the judiciary conscious of the grave damage caused to the country's economy and health by such anti-social crimes.... [W]e hope that the higher courts are fully alive to the harm, and we have no doubt that on appropriate occasions, such as judicial conferences, the subject will receive attention. It is of utmost importance that all State instrumentalities involved in the investigation, prosecution and trial of these offences must be oriented to the philosophy which treats these economic offences as a source of grave challenge to the material wealth of the nation."

What has been observed regarding economic offences by the Commission is equally apposite to white-collar crimes in general. The case of *M.H. Haskot* v. *State of Maharashtra*[36] illustrates the attitude of the lower judiciary towards white-collar criminals. Haskot, a reader in Saurashtra University, was found guilty of an attempt to concoct degree certificates of the Karnataka University. The sessions court awarded him a single day's imprisonment.[37] The court justified the token punishment on the basis of the background of the offender, his not having criminal tendencies as such and the unlikelihood of his indulging in criminal activities in future. On appeal by the State, the High Court enhanced the period of imprisonment to three years. While upholding the sentence awarded by the High Court, the Supreme Court termed the sentence awarded by the sessions court as 'incredibly

34. Taft and England, *op. cit.*, p. 203.
35. *Ibid.*
36. (1978) 3 SCC 544 : 1978 SCC (Cri) 468.
37. An imprisonment up to 7 years is permissible under Section 468 of the Penal Code.

indiscreet'. Censuring the sessions court for the wrong sentencing, the Supreme Court observed:

> "It is surprising that the Public Prosecutor has consented, on behalf of the State, to this unsocial softness to an anti-social offender on conviction for grave charges. Does the administration sternly view white-collar offenders, or abet them by agreeing to award of token punishment, making elaborate trials mere tremendous trifles?
>
> Social defence is the criminological foundation of punishment.... That court which ignores the grave injury to society implicit in economic crimes by the upper-berth 'mafia' ill serves social justice. Soft-sentencing justice is gross injustice where many innocents are the potential victims.... [W]hile iatrogenic prison terms are bad because they dehumanize, it is functional failure and judicial pathology to hold out a benignly self-defeating non-sentence to deviants who endanger the morals and morale, the health and wealth of society."

The Supreme Court has made its approach to white-collar crimes absolutely clear in the above observations.[38] It is, however, submitted that Haskot's case was truly speaking not a case of white-collar criminality, according to the meaning given to the term by Sutherland and others. It certainly would be an instance of white-collar criminality if the certificates were forged or manipulated by an officer, like the registrar, of the university in the course of his duties or while exercising powers of administration as such an officer. Haskot, despite being in the university, did not commit the crime in the course of his trade, business or occupation and he could have been regarded just an ordinary forger and dealt with as such.

Besides prescribing stiffer punishments for white-collar offenders, the Supreme Court has also held in a number of cases that liberal interpretation must be given to the penal laws dealing with social welfare legislation to see that the legislative object is not defeated. In *Murlidhar Meghraj Loya* v. *State of Maharashtra*[39], the Court observed:

> "It is trite that the social mission of food laws should inform the interpretative process so that the legal blow may fall on every adulterator. Any narrow and pedantic literal and lexical construction likely to leave loopholes for this dangerous criminal tribe to sneak out of the meshes of the law should be discouraged. For the new criminal jurisprudence must depart from the old canons, which make indulgent presumptions and favoured constructions benefiting accused persons and defeating criminal statutes calculated to protect public health and the nation's wealth."

38. *See* more cases on sentencing of white-collar crimes by the Supreme Court in Chapter XI.
39. (1976) 3 SCC 684 : 1976 SCC (Cri) 493.

Similarly, in *State of Maharashtra* v. *Mohd. Yaqub* [40], the Court was of the view that penal provisions calculated to suppress smuggling activities must be construed liberally.

It may be noted that these rulings in favour of the liberal interpretation of penal provisions relating to socio-economic crimes are at variance with the ordinary rules of construction of penal statutes which require strict interpretation and benefit of doubt, if any, must be given to the accused.

Finally, the courts in India have given strict interpretation to the socio-economic statutes which do not require any *mens rea* either in the form of intention or knowledge for committing an offence. This is how it should be though it may be pointed out that the courts have been somewhat reluctant in finding *mens rea* excluded from statutes dealing with more traditional offences.[41] Dealing with a violation of the Foreign Exchange Regulation Act, 1947 the majority in *State of Maharashtra* v. *George*[42] held that the very object and purpose of the Act and its effectiveness as an instrument for the prevention of smuggling would be entirely frustrated if conditions were to be read into Section 8(1) or Section 8(1-A) of the Act qualifying the plain words of the enactment that the accused should be proved to have knowledge that he was contravening the law before he could be held to have contravened the provision.

Again, in *Tejani* v. *Dange*[43], a case under the Prevention of Food Adulteration Act, the Supreme Court said:

> "It is trite law that in food offences strict liability is the rule not merely under the Indian Act but all the world over. Section 7 casts an absolute obligation regardless of scienter, bad faith and *mens rea*. If you have sold any article of food contrary to any sub-sections of Section 7, you are guilty. There is no more argument about it."

Explanation of White-Collar Criminality

The various theories developed to explain traditional crime cannot apparently explain the criminal tendencies of the upper strata since those theories are relevant by and large in the context of criminals of the lower strata. Sutherland wrote in *Crimes of Corporation* as follows:

> "It is very clear that the criminal behaviour of businessmen cannot be explained by poverty, in the usual sense, or by bad housing or lack of recreational facilities or feeblemindedness or emotional instability. Business leaders are capable, emotionally balanced, and in no sense pathological."

40. (1980) 3 SCC 57 : 1980 SCC (Cri) 513.
41. Following *Brend* v. *Wood*, (1946) 62 TLR 462.
42. AIR 1965 SC 722 : (1965) 1 Cri LJ 641.
43. (1974) 1 SCC 167 : 1974 SCC (Cri) 87.

The only plausible theory may be the explanation offered by Bonger which to a great extent fits in with the case of white-collar offenders. In a capitalistic society, acquisition of maximum material resources by individuals is regarded not only legitimate but also essential. The only measuring-rod of success is the quantum of money one is able to amass in the name of open competition, economy and individual freedom. The inevitable result is the large-scale exploitation of the public by businessmen and professionals in the course of their occupational activities. Since the motivating force to commit white-collar crimes is provided by the overall system itself, various legislations and regulations to curb white-collar criminality are bound to be ineffective to a great extent.

Differential Association

Sutherland sought to give an explanation of white-collar crime on the basis of his differential association theory but cautiously concluded that white-collar crime has not yet been fully explained. According to him, some white-collar offences represent "normal" business procedures which are passed on as a part of the occupational sub-culture. Such procedures are rationalised by resorting to the ideology 'business is business'. A new entrant to a business activity not only learns all the unethical practices but is also sometimes made to use such tactics by his superiors in the establishment. The rapid pace of social change and the technical complexity of business affairs have aggravated social disorganization favourable to unethical business practices.[44]

Clinard, while agreeing with the 'differential association' approach of Sutherland, is of the view that all cases cannot be explained by the theory. Many businessmen do not commit such offences despite their knowledge of the techniques employed in these crimes.[45]

Rationalization of White-Collar Offences

Donald R. Crassey believes that the rationalization of white-collar offences by white-collar people can offer a better explanation than the mathematical type of differential association theory advanced by Sutherland. In his study of embezzlement Crassey found that offenders rationalized on the basis "that 'everyone' in business in some way or other converts or misapplies deposits so that it is not entirely wrong".[46]

Mary Cameron's study[47] of middle-class shoplifters who had stolen from a large department store in Chicago gave some indication that many offenders did not think of themselves as thieves. "Even when arrested, they resist

44. *White-Collar Crime*, Chapter XIV, *op. cit.*
45. *The Black Market*, p. 309.
46. *Other People's Money*, p. 102.
47. *The Booster And The Switch* (New York : The Free Press, 1966) p. 162.

strongly being pushed to admit their behaviour is theft," observes Cameron. Interrogation procedures at the store are directed specifically and cautiously towards breaking down any illusion that the shoplifter may possess that his behaviour is merely regarded as 'naughty' or 'bad'.

Many offenders found guilty of price-fixing in the U.S.A. genuinely thought that they were serving the community by 'stabilising' the prices.

Extent of White-Collar Crimes

It is not easy to assess the true extent of white-collar criminality in a community. Some of the reasons like complexity and impersonality of the offences and frequent lack of prosecutions and punishments for white-collar crimes have already been referred to in the discussion above. Moreover, the usual sources of crime statistics do not give such information on the extent of white-collar crimes since they confine their interest to the cases tried in ordinary criminal courts and many white-collar crimes are dealt with by tribunals, administrative boards and commissions of inquiry. In the U.S.A., for example, there are no consolidated statistics for white-collar crimes comparable to the FBI's Uniform Crime Reports in the area of traditional crime. Many white-collar crimes are of relatively recent origin. Moreover, it is very difficult to obtain statistics about some types of white-collar crime. It is extremely difficult to discover the existence of such crimes as anti-trust violations and tax frauds.[48]

In India, the crime statistics given in *Crime in India*, compiled by the Bureau of Police Research and Development, Ministry of Home Affairs, provide hardly any information regarding the extent of white-collar criminality in the country. The only possible sources, therefore, are the reports of the Government of India and the findings of the various tribunals and commissions dealing with white-collar crimes.

Such information, as is available, indicates that white-collar crime is pervasive in almost all the professions and occupations in our society which is also true of many other countries including the United States of America where some scientific surveys have been carried out to find out the nature and extent of white-collar criminality. Sutherland's study of 70 of the largest American corporations, published in 1948, suggests that law violation is prevalent in large business enterprises. He examined the decisions of courts and regulatory commissions under the anti-trust, false advertising, patent, copyright and labour laws as they applied to corporations. During a 45-year period, he found that 980 adverse decisions had been rendered, of which 779 indicated that crimes had been committed. Every one of the 70 corporations had a decision against it and the average number was 14.98 per cent

48. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report : Crime and its Impact—An Assessment*, pp. 102, 109.

of the 70 corporations had at least four adverse decisions. About 60 per cent of the 70 corporations had been convicted by criminal courts. They averaged approximately four convictions each. A study of blackmarket violations during World War II revealed that approximately one in every 15 of the three million business concerns in the country had been punished for serious violations of price regulations. The evidence showed that the total number of violations was much larger than indicated by officially imposed sanction.[49]

The Reader's Digest staff in 1941 sought to document by experimentation the level of white-collar crime in a study of automobile garages, radio repair shops and watch repair shops. Investigators for the magazine disconnected a coil wire in an automobile, a relatively easily diagnosed problem, and then took the automobile to 347 garages in 48 States. Of these, 129 immediately noted the trouble and either charged nothing or a nominal fee for the work. The remainder—63 per cent of the garages—overcharged, inserted unnecessary parts, charged for work not done or for parts not needed, or took other similar action. Similarly, a radio in excellent working condition was taken to repair shops after one of the tubes had been loosened. Of 304 shops, 109 honestly identified the obvious difficulty, but the rest (almost two-thirds) treated it as a substantial repair problem. And finally, the investigators loosened the small screw that fastens the winding wheel on a watch, and then requested a number of shops to repair it. In almost half of the cases the jewellers charged for cleaning work not performed, and for parts not needed or used.[50]

Some idea about the amount of tax fraud can be formed by the fact that in 1964, with the inauguration of dividend and interest reporting by banks and corporations to the taxpayer, there was a 45 per cent increase in this type of income reflected on tax forms and 28 per cent more income was collected from these sources.[51]

The most comprehensive survey of attitudes by business executives toward management and corporate practices showed that many believed that unethical conduct and criminal activities are widespread. The sample consisted of executives subscribing to the *Harvard Business Review*. Almost half of the respondents agreed with the statement: "The American business executive tends to ignore the great ethical laws as they apply immediately to his work. He is preoccupied chiefly with gains." Four out of seven believed that businessmen "would violate a code of ethics whenever they thought they could avoid detection".[52]

49. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report : Crime and its Impact—An Assessment*, pp. 102, 109.
50. President's Commission, *Task Force Report*, *op. cit.*
51. Sheldon S. Cohen, "*Morality and the American Tax System*", George Washington University Law Review, 1966, Vol. 35, pp. 839, 840.
52. Raymond C. Baumhar, "*How Ethical Are Businessmen?*" Harvard Business Review, July-August 1961.

White-collar crimes result in serious financial losses to a single individual or to the business community or consumer public. The exact financial loss to the government caused by tax fraud is difficult to determine but is undoubtedly enormous. The amount of reportable income that goes unreported each year is estimated to range from $ 25 billion to $ 40 billion. The financial loss to the public caused by a single conspiracy in restraint of trade may be untold millions in extra costs paid ultimately by the buying public. It is estimated that the cost to the public annually of securities frauds, while impossible to quantify with any certainty, is probably in the $ 500 million to $ 1 billion range. A conservative estimate is that nearly $ 500 million is spent annually on worthless or extravagantly misrepresented drugs and therapeutic devices. Fraudulent and deceptive practices in the home repair and improvement field are said to result in $ 500 million to $ 1 billion losses annually; and in the automobile repair field alone, fraudulent practices have been estimated to cost $ 100 million annually. Individual white-collar criminals are sometimes responsible for losses that are quite beyond the scale of most traditional crimes. Billy Sol Estes' $ 30 million fertilizer swindle and De Angelis' $ 125 - $ 175 million vegetable oil scandal are two notable examples.[53]

The above figures give some estimate of the financial losses caused by white-collar crimes in the most affluent country in the world. Loss to human life and limb is also caused due to some white-collar crimes which cannot be computed in terms of money. In India, scientific studies and surveys relating to the extent of white-collar criminality have not been carried out as in the U.S.A. It is obvious that white-collar criminality in a country like India should be far less than the U.S.A. Nevertheless the problem is quite acute in India both in terms of variety and the extent of white-collar criminality, as will be evident from the following discussion.

The Vivian Bose Commission, appointed to probe into the working of ten companies in the Dalmia-Jain group, found that there was a loss of an estimated 3.5 crores of rupees as a result of fraud and improper use of funds of the concerned companies by the management.

The Santhanam Committee appointed to report on the corruption in the country found that during the five-year period from 1958 to 1962, licences valued at seventy million rupees were obtained or wrongfully utilised by nearly 700 firms through misrepresentation, forgery or other breaches of the export/import control regulations.[54]

Illegal accumulation of foreign exchange through just one type of fraud—through under-invoicing of exports and over-invoicing of imports—is calculated to be between Rs. 40 to 50 crores every year.[55]

53. President's Commission, *Task Force Report, op. cit.*
54. Report of Santhanam Committee on the Prevention of Corruption, 1964, pp. 18 and 65.
55. Economic Review dated January 28, 1964, p. 28.

In 1956, the amount of income tax lost through tax evasion was estimated at Rs 300 crore per year.[56]

White-Collar Crimes in India

In the foregoing discussion, the various aspects of white-collar crimes, viz., definition, nature, extent, causative and contributive factors and difficulties in the enforcement of laws in the area were discussed. What follows now is a brief discussion relating to some of the more important white-collar crimes in India.

Business, Trade, Commerce and Industry

Sutherland emphasised the high degree of criminality among businessmen in the contemporary society and their immunity from criminal sanctions generally in the following words :

> "The most powerful group in medieval society secured relative immunity from punishment by 'benefit of clerg' and now the present most powerful group secures relative immunity by benefit of business."[57]

What Sutherland wrote about the American society is equally true of the conditions in India. The Santhanam Committee gave a graphic account of the misdeeds of businessmen and industrialists in the following words :

> "Corruption can exist only if there is someone willing to corrupt and capable of corrupting. We regret to say that both this willingness and capacity to corrupt is found in a large measure in the industrial and commercial classes....
>
> To these, corruption is not only an easy method to secure large unearned profits, but also the necessary means to enable them to be in a position to pursue their vocations or retain their position among their own competitors. It is these persons who indulge in evasion and avoidance of taxes, accumulate large amounts of unaccounted money by various methods such as obtaining licences in the names of bogus firms and individuals, trafficking in licences, suppressing profits by manipulation of accounts to avoid taxes.... and under-valuation of transactions in immovable property. It is they who have control over large funds and are in a position to spend considerable sums of money on entertainment. It is they who maintain an army of liaison and contact men, some of whom live, spend and entertain ostentatiously. We are unable to believe that so much money is being spent only for the purpose of getting things done quickly...Contractors and suppliers who have perfected the art of getting business by under cutting, of making good the loss by passing off sub-standard works and goods generally spare no pain or expenditure

56. Prof. Nicholas Kaldor, *Indian Tax Reform* (1956), p. 105.
57. Sutherland, *White-Collar Crime* (1961), p. 47.

in creating a favourable atmosphere. Possession of large amounts of unaccounted money by various persons including those belonging to the industrial and commercial classes is a major impediment in the purification of public life. If anti-corruption activities are to be successful it must be recognised that it is as important to fight these unscrupulous agencies of corruption as to eliminate corruption in the public services. In fact they go together."

Commenting on the extremely dishonest behaviour of Indian traders, it has rightly been observed :

"Business communities in India of large and small merchants are basically a dishonest bunch of crooks.... While it is true that the object of businessmen is to make profit, there are degrees and degrees of making profit, and nowhere in the world do businessmen get rich so quickly as they do in India...."[58]

Two instances of big-business criminality are provided by reports made by the Commissions dealing with the notorious Dalmia-Jain and Mundhra cases. The Vivian Bose Commission, which inquired into the affairs of the Dalmia-Jain group of companies, the third biggest in the country, held them responsible in different degrees for fraud, mismanagement, manipulation of accounts, destruction of records, personal gain at the expense of the investing public, avoidance of taxes and a number of other irregularities and violations of trust.[59]

Mr M.C. Chagla, who probed into the working of the Mundhra concerns, had to make the following observations about the business tycoon : "Mundhra is a flamboyant personality and a financial adventurer whose only ambition is to build up an industrial empire by dubious means." The reports of the Company Law Administration record about 124 prosecutions against Mundhra and companies owned or controlled by him between the years 1958 to 1960 in various courts in the country. During this two-year period, 113 ended in conviction.[60]

Hoarding, profiteering and blackmarketing of essential commodities by traders in India has become a chronic problem. Commenting on it, the Monopolies Inquiry Commission gives a graphic picture of the situation as follows :

"There is hardly anybody in India who has not been a victim of the practice of hoarding, cornering and profiteering. Whenever there is a slight shortage—even temporary—in any consumer goods for which

58. Winifred Bose, *The Trader in 'Opinion'*, quoted by N.R.M. Menon in his unpublished thesis, A *Socio-Legal Study of White-Collar Crime in India*, 1968.

59. Report of the Vivian Bose Commission of Inquiry, 1963.

60. Third and Fourth Annual Reports on the working of the Indian Companies Act, 1956, Govt. of India.

the demand is urgent and inelastic, almost every trader—it is perhaps unnecessary to use the qualification 'almost'—conceals his stock and blandly tells the customers that he has not got the commodity in stock, often putting the blame on producers for keeping him in short supply. After some time when the customer can no longer do without the goods, he proceeds to dispose of his stock at exorbitant prices.... Wheat, rice, sugar, edible oils, drugs, baby-food—each of these commodities and many others have had their share of hoarding and cornering practice.... They have been called wicked, anti-social, criminal, but still these make their appearance everytime there is any apprehension of even a slight shortage of such commodities."[61]

Another white-collar crime which is quite prevalent among businessmen is the violation of the Foreign Exchange Act and Imports and Exports Act. According to the Santhanam Committee Report, secret hoards of foreign exchange are built up abroad by Indian businessmen through under-invoicing of exports and over-invoicing of imports.[62]

A number of other offences are also committed by businessmen which require separate treatment due to their gravity. Some of them, like tax evasion, are not confined to businessmen alone.

Food and Drug Adulteration

This is easily the most atrocious crime committed by businessmen since it can cause irreparable damage to the health or even lives of innocent citizens. In India, the problem is so widespread that from 25 per cent to 70 per cent of most of the foodstuffs consumed in this country are adulterated or contaminated.[63] The same is true of the production of spurious drugs in the country. According to the Pharmaceutical Inquiry Committee, Government of India, the spurious drugs trade flourishes in India to a colossal extent. This is due to the greed of the manufacturers, ignorance of the poor consumers who go in for cheap medicines from unauthorised dealers and the shortage of genuine goods.[64]

Public opinion is so strong regarding adulteration laws in the country that a comment, signed by several citizens residing in West Bengal and submitted to the Law Commission, suggested that persons guilty of adulteration of medicines and food should be punished with death and life imprisonment respectively, their property should be confiscated and publicity be given of their misdeeds through the mass media.[65] The Law Commission,

61. Report of the Monopolies Inquiry Commission, 1965, p. 162.
62. Santhanam Committee Report, p. 253.
63. *Swasth Hind*, Ministry of Health, Government of India, March 1963, quoted by Menon, *op. cit.*
64. Pharmaceutical Enquiry Committee, Ministry of Commerce and Industry, 1954, pp. 146-147, quoted by Menon, *op. cit.*
65. *See* Twenty-ninth Report of the Law Commission, p. 71.

however, did not consider the suggestions since the issue was not in its contemplation.

Prosecutions under the Prevention of Food Adulteration Act fail quite frequently because of defective reports of the public analysts, or delay in the examination of samples or because the procedure prescribed by the Act for taking samples is not followed.[66]

Pointing out the difficulties involved in prosecuting offenders under the Act, the Law Commission observed :

> "It should be noted that in contested cases, where the inspector of the department is pitted against a lawyer professionally skilled in the procedure of court work (and perhaps also more familiar with the particular practices and foibles of the magistrates before whom the less forensically able inspectors do incur the displeasure of the court by lack of familiarity with some of the legal refinements or by the necessary labouring of points which are not in issue). In extreme cases, this lack of legal expertise may even result in an unjustified acquittal, where, for example, the inspector is temporarily thrown off his step by a clever, if rather specious, legal point or procedural manoeuvre."[67]

The Commission concluded by observing :

> "....The most significant feature of the prosecution process is undoubtedly the difference between the departmental inspector's view of the case and that which, in the event, he is able to give to the magistrate. The inspector's view of the case is obviously coloured by his involvement in what may have been a lengthy series of visits and discussions with the accused and by his knowledge of the past history of the dealings with the accused over the previous five or six years. The magistrate, on the other hand, is only permitted to hear the details of the particular incident with which the proceedings are concerned, and in addition he must pay some attention at least to the mitigating circumstances which defence counsel will put before him."

Violations of Taxation Laws

Some of the more important and frequent tax violations which occur in India are in the areas of income tax, wealth tax, estate duty and sales tax. The loss resulting from the violations to the State exchequer is tremendous. Apart from the financial implications of the problem, there are other dimensions of the evil such as the corrupting influence of the tainted money on governmental machinery and the consequent contempt, disrespect and cynicism towards law in general.

66. Law Commission, Forty-seventh Report, *Social & Economic Offences*, p. 83.
67. *Ibid.*, p. 84.

Extent of the Problem

Tax laws in India are generally too complex and cumbersome to be administered smoothly. Those who are determined to evade taxation never fail to detect the loopholes in the relevant statutes and, therefore, manage to manipulate their affairs accordingly.

It is almost impossible to have even a rough estimate of the extent of tax evasion in the country. Tax authorities find themselves in an unenviable situation when trying to assess the incomes of businessmen, contractors, lawyers, doctors and persons connected with the film industry. Unlike many countries, professional people in India are rarely paid through cheques and this makes tax violations easier for them. Even if payment is made through cheque, the sum thus paid may represent only a small fraction of the actual amount paid and the rest is paid in what has come to be known as black money. As given in the Santhanam Committee report, an unofficial estimate of the Central Board of Revenue is that about Rs 45 crore of tax is evaded annually by assessees in the higher income groups, the evaded income being about Rs 230 crore. Obviously the figures must have risen higher since then because of the unprecedented inflation faced by the Indian economy during the last few years.

Probably the greatest menace caused by the failure to check tax evasion is the phenomenon of black money which has serious repercussions on the economy of the country. It is common knowledge that at present two parallel economies, as represented by black and white money, are in existence side by side in the country. In its inquiry on the administration of the Dalmia-Jain companies, the Vivian Bose Commission found 114 fictitious persons to whom shares worth Rs 16 lakh were fraudulently issued in order to bring the secret profits of the Dalmia-Jain group into circulation and convert it into what is known as "white money". The Commission also observed from what had happened before the Income Tax Investigation Commission that the group did have over Rs 4 crore of secret and undisclosed assets down to the year 1947. The Commission also estimated the gains made at the cost of the exchequer by just four companies of the Dalmia-Jain group by evading or avoiding taxes to be to the tune of Rs 1,45,19,790. The methods employed for the purpose of avoiding included compensation payment for termination of selling and managing agencies, under-statement of sales, suppression of profits, fictitious losses in shares, etc.[68]

The Wanchoo Committee appointed by the Government of India in 1970 to make recommendations to unearth black money and combat tax evasion identified the following direct effects of black money economy in the country :

68. Report of the Vivian Bose Commission, quoted in N.R. Menon, *White-Collar Crime in India*, (1968).

1. There is loss of revenue to the State. This and the immobility of investable funds contribute to the dearth for resources of national development.
2. It results in inequitable taxation ; the honest taxpayer suffers in the process.
3. Since the unaccounted money cannot be declared or invested through lawful channels, a good part of it is spent in lavish consumption and unproductive uses resulting in waste as well as in inflation.
4. The most disastrous aspect of the phenomenon of black money is that the general moral fibre of the society as a whole is adversely affected.

Tax Evasion and Tax Avoidance

A distinction is maintained in law between the concepts known as tax evasion and tax avoidance. While for the purpose of sociological studies, there is hardly any real distinction between the two ; in the eyes of the law, the former is a crime while the latter is regarded as perfectly legitimate. It has therefore been rightly said that the real dangerous tax offender does not evade but avoids paying taxes. The courts in India have recognised the distinction between evasion and avoidance and the following observation of a judge of the Bombay High Court sums up the matter succinctly :

> "A citizen is perfectly entitled to exercise his ingenuity so as to arrange his affairs as may make it possible for him legally and lawfully not to pay tax, and if his ingenuity succeeds, however reluctant the court may be to acknowledge the cleverness of the assessee the court must give effect to the letter of the taxation law rather than strain that letter against the assessee."[69]

The approach reflected in the judgment is in line with the basic principle of criminal law that no act can be declared a crime without an express law forbidding and punishing the particular act. Nevertheless, the fact remains that such an interpretation of tax statutes gives a long rope to those who have scant respect for taxation laws.

Corruption in Government and Politics

Corruption is one of the most talked about subjects today in the country since it is believed to have penetrated into every sphere of government and political activity. Corruption of various forms has always existed not only in India but also in countries which are materially and politically more advanced. What distinguishes India from other societies is the variety and

69. *Provident Investment Company* v. *I.T.C.*, AIR 1954 Bom 95.

degree of corruption afflicting our society. To quote James Cameron, an eminent journalist of Fleet Street :

> "In India, corruption, public or private venality, is sanctified by the oldest traditions, it is denied by nobody, indeed, the totality and pervasiveness of Indian corruption is almost a matter of national pride. Just as India's droughts are the driest, her famines the most cruel, the overpopulation the most uncontrollable, so are all aspects of India's corruption and bribery the most wholly widespread and spectacular."

Corruption in the modern context has acquired much wider connotation compared to the traditional meaning given to the term which was confined to the concept of bribes of illegal gratification taken by public servants. In its wider sense, corruption includes all forms of dishonest gains in cash, kind or position by persons in government and those associated with public and political affairs.

Corruption in Government

Various factors have been responsible for the widespread corruption among government servants. While some factors are the same as in the case of white-collar crimes in general, there are some factors which have a special bearing on the problem of corruption among government and other public servants. The two world wars gave vast powers to the government servants in matters relating to the grant of licences, permits and quotas. This was a potentially dangerous situation in view of the acute shortage of essential commodities and many government employees made good use of the opportunities to make quick money. After the Second World War, the newly-acquired independence brought many more opportunities to the corrupt officials. Not only that the governmental participation in the various economic activities created better opportunities for corrupt persons, they also benefited by the general fall in the discipline and efficiency in the public services. It is not infrequent that politicians come to the rescue of the guilty person provided he has the right connections. The constitutional protections given to government servants are meant to prevent victimisation but quite frequently those rights also create hurdles in punishing those who deserve it.

Some other factors which make public servants corrupt are connected with the economic conditions of most of the government employees. In India, though the government services have some special prestige, the salaries given to the employees, by and large, are quite low. This factor in combination with some other factors like inflation contributes a great deal towards corruption. The two government departments which have been traditionally notorious for corruption in the country are those of

police and public works. Fortunately the judiciary has been by and large free from corruption so far but lately some unhealthy trends have set in.[70]

Political Corruption

Corruption among ministers and other political personages is more dangerous than corruption in the governmental machinery in terms of the enormity of the stakes involved in public life. Corruption and indecency in political life informs all the sections of society since violations are committed by those very persons who are expected to set the norms of social and political conduct. It is common knowledge that many politicians in power and their kith and kin have reaped a good harvest in terms of money and good positions through the abuse of government machinery at their disposal. The Santhanam Committee noted that while there were elaborate rules to ensure probity among officials, there were none for ministers, legislators and political parties.[71]

The more usual forms of political corruption in India are grafts, violation of election laws and the abuse of official and political machinery because of the liaison of political forces with big business. The well-known episodes known as Mundhra Sirajuddin Tul Mohan Ram in the part affairs involving central Cabinet ministers a members of Parliament are typical examples of political corruption.[72]

White-Collar Crime in Professions

Among the many professions where opportunities for committing white-collar crimes are abendant the professions which come readily to one's mind are those of medicine and law.

The majority of the people belonging to the medical profession may not commit criminal or unethical acts in the course of their profession but still the number of those who violate the professional and legal norms is not insignificant. The most common instances are illegal abortions, false medical certificates and unnecessary prolonged treatment in many cases. Another widespread violation consists of prescribing medicines which one is not supposed to having regard to his training or the system of medicine permitted to be followed by him. For instance, some of the medicines of the allopathic system like antibiotics are freely administered by many physicians practising in the Unani or Ayurvedic system without

70. In quite a few decided cases, magistrates have been found guilty of corruption. In Delhi as many as four civil judges have been removed from their office in the recent past.

71. Santhanam Committee Report, pp. 101-102.

72. Those episodes occurring three-four decades back pale into insignificance when compared to the various scams relating to Bofors, urea and sugar imports , Sukh Ram affair and *hawala* deals allegedly taking place much later i.e. in eighties and nineties. For some more recent developments, see chapter XIII on 'Organised Crimes,' *infra.*

their having the faintest idea of the properties and the possible repercussions of those medicines.

White-collar criminality among lawyers is believed to be fairly widespread. Though such criminality is found to exist in many countries, the situation in India is further aggravated by the fact that there are too many lawyers having regard to the work available to them with the result that all sorts of unscrupulous practices have crept into the profession. It is not surprising, therefore, that the image of a typical lawyer is far from being complimentary in India.[73]

The usual legal and professional violations committed by lawyers are : advising organized criminals, aiding in preferring false claims and fabricating false evidence. Barns and Tetters make the following comment, quite apt in this context :

> "A lawyer must do his duty in defending a person accused of crime. This applies equally to those from known criminal elements. There is a distinction between a criminal lawyer and lawyer-criminal. So long as he handles his defence in a legal and ethical manner he is only dispatching his duty as an attorney. It is when he carries his defence beyond the law and the ethical standards of his profession that he may be labelled a lawyer-criminal."[74]

The incidence of white-collar crime is fairly high among some other professionals also like advertisers, property valuers, consulting and other engineers and contractors undertaking construction and other kinds of work.

With the—increasing use of newly developed technologies in the various spheres of business, commerce and industry, particularly the computers, the scope of white-collar crime is getting wider ; new crimes are emerging and the commission of certain kinds of pre-existing crimes is being greatly facilitated.

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73. See *M.V. Dabholkar* v. *State of Maharashtra*, (1975) 2 SCC 702.
74. Barnes & Tetters, *op. cit.*, p. 49.

Chapter XIII

ORGANISED CRIME

The object of organised criminals is to wrest exorbitant profits from the society by any possible means and the objective is sought to be achieved by making available illegal goods and services to the consumers, who may need such goods and services, and in a number of other ways. Organised crime is thus the product of a self-perpetuating criminal conspiracy involving the ruthless exploitation of the social, political and economic institutions of the society. The phenomenon thrives on muscle power and corruption; fear caused by the muscle power and corruption and by the illegal money generated by the organised crime itself. Very appropriately organised criminality has been described as a parasite like the tapeworm, organised crime being to the society what a tapeworm is to the alimentary canal in human beings. Just as each segment of the tapeworm parasite is an independent, viable entity and is capable of breeding independently of the parent, a similar process is discernible in the working of the criminal organisation at the various hierarchical levels.

Criminal-Politician Nexus

Quite often the base of organised crime is provided by the deadly combination of criminals and politicians; criminals themselves taking up the role of politicians is not an altogether unusual phenomenon. One area where such a nexus is most dangerous and quite prevalent is the one relating to the elections to the Parliament, State Assemblies and local bodies. Ill-gotten money is pumped into elections and booth-capturing and rigging by the Mafia are quite common. There have been many instances of well-known criminals and members of the Mafia[1] group contesting and even winning elections. Writing about the criminality in politics, a senior police officer has cited the following facts and figures:[2]

> "....In the panchayat elections held in 1984, out of 75,000 Gram Panchayats more than 50 per cent of the candidates were reported to have had a criminal history. In one Gram Panchayat, according to a police officer, the prospective candidate announced on the eve of the election that anyone contesting against him would not be found alive. The message went home and he was elected unanimously. Elected Gram Panchayats appointed 8,905 Block Pramukhs, more than 30 per cent of whom had a criminal history, according to police sources. There have

1 The word 'Mafia' is of Sicillian origin and it is difficult to assign any precise meaning to it. In the U.S.A. it was originally used to refer to organised criminals migrating from Sicily and mainland Italy. Now the word is used, almost universally, for all organised criminals.

2 P.R. Rajgopal, *Violence and Response*, p. 134.

been a number of people with criminal background who have contested and won the State Assembly elections."

Several instances have been cited by the author of close association between politicians and criminals. In one particular criminal case the interrogation report of a suspect was not made use of because the suspect had confessed that, before the commission of the crime, he had stayed in the house of a Member of Parliament. Another much-wanted criminal arrested by Delhi police revealed that he had got licences for two weapons on the recommendations of an ex-Minister, that he had been staying for months in the house of a Minister in a neighbouring State where he travelled in the Minister's official car acting as the security officer to the Minister. The police officer of U.P. trailing the offender was relieved of his posting at the instance of a Minister at the Centre. Even more shocking was the case of an MLA from U.P. who was caught red-handed with 20 kilograms of heroin in his possession.

The episodes described above may be only a few of the reported and documented instances. It is anybody's guess how many such instances, may be running into hundreds or even thousands, go unnoticed or undocumented.

In 1993, the Government of India appointed a committee under the chairmanship of N.N. Vohra, Cabinet Secretary, "to take stock of all available information about the crime syndicates/mafia organisations which had developed links with and were being protected by government functionaries and political personalities". This was apparently done in the aftermath of the serial Bombay bomb blasts, occurring shortly after the demolition of the Babri mosque in Ayodhya, for which certain dons of the underworld, both within and outside India, were believed to be responsible. The committee examined the reports of the Secretary, Research and Analysis Wing (RAW) and directors of the Central Bureau of Investigation (CBI) and the Intelligence Bureau (IB) for an appraisal of the situation and to suggest the various measures to curb the joint criminality of the mafia, politicians and bureaucrats. Though the submissions of the directors of the RAW, CBI and IB did not bring out anything not known earlier, nor any tangible or specific solutions were offered,[3] the official committee at least acknowledged the existence of a nexus between the dons of the criminal world thus:[4]

"CBI has reported that all over India, crime syndicates have become a law unto themselves. Even in the smaller towns and rural areas,

3. Full report of the Committee has not been furnished but the Supreme Court has ordered on October 13, 1995 that it must be done within 4 weeks along with the follow-up report.

4. The committee recommended the creation of a nodal agency in the Home Ministry for the collection, collation and operationalisation of all information relating to the activities of crime syndicates.

musclemen have become the order of the day. Hired assassins have become a part of these organisations. The nexus between criminal gangs, the police, bureaucracy and politicians has become evident in various parts of the country. The existing criminal justice system, which was essentially designed to deal with individual offences/crimes, is unable to deal with the activities of the mafia; the provisions of law in regard to economic offences are weak; there are insurmountable legal difficulties in attaching/confiscating the property acquired through mafia activities."

The Director of IB noted the "warning signals of sinister linkage between the underworld politicians and bureaucracy" and recommended immediate attention to:

(*i*) Identification of the nexus between the criminals/mafias and anti-national elements on the one hand and bureaucrats, politicians and other sensitively-located individuals on the other.

(*ii*) Identification of the nature and dimensions of these linkages and the modus operandi of their operations.

(*iii*) Assessment of the impact of these linkages on the various institutions, viz., the electoral, political, economic, law and order and administrative apparatus.

(*iv*) Nexus, if any, between the domestic linkage with foreign intelligence.

(*v*) Necessary action to show effective action to counteract/neutralise the mafia activities.

(*vi*) Political and legal constraints in dealing with the covert/illegal functioning of the linkages.

Characteristics of Organised Crime

Organised crime has many peculiar characteristics which distinguishes it from ordinary crime. The distinction between ordinary and professional criminals on the one hand and the organised criminal on the other hand has been explained thus:[5]

> "The ordinary criminal typically works alone or with a partner or two, or as part of a larger group temporarily assembled for a specific job. The professional often works alone but is frequently a member of a more or less cohesive team or 'troupe'— many confidence men, and most pickpockets work in highly-organised, quasi-permanent gangs. Most of these groups, however, represent the association of independent criminals on equal terms, on a share-and-share-alike basis. The organised criminal, by contrast, is usually the temporary hireling, the steady employee, or the administrator of a criminal bureaucracy."

5. Korn & McCorkle, *Criminology and Penology* (1960) pp. 152-53.

Organised crime is not only 'more' organised than ordinary or professional crime, but differently organised. The combinations used by ordinary and professional criminals tend to be voluntary, cooperative, and non-hierarchical.

Given below are some of the characteristics of organised crime:

1. In organised crime there is a group of persons of considerable size which engages itself in *continuous* crime over a long, usually indefinite period of time.
2. It has a tendency to dominate, through political clout or corruption, the law enforcement agencies.
3. The organisation is generally highly centralized; the authority is vested in one or just a few members of the group.
4. Functioning of the mafia in the U.S.A. has been likened to the working of corporations and big business houses. There is division of labour, delegation of duties and responsibility and specialisation of functions. Like any modern business, organised crimes also involve careful planning, risk insurance and have expansive and monopolistic tendencies.
5. The criminal organisations adopt measures to protect the group and to guard against the prevention of their activities. To this end, arrangements are made with doctors, lawyers, policemen, judges, politicians and government officials.

Types of Organised Crime

Organised crime is generally classified into the following three major types:

1. Organised Gang Criminality.—Bank robbery, hijacking, murder, kidnapping, automobile and jewel thefts are some of the common examples. In the U.S.A., "they live violently and expect violence"; the situation is not very different in other countries. This kind of criminality reached maximum height in the U.S.A. during the two world wars but was controlled to a great extent subsequently.

India too has witnessed the growth of organised gang criminality during the last few years, particularly murders and kidnappings for ransom. Uttar Pradesh and Bihar, especially the latter, are the two States which are conspicuous in this regard. Dhanbad, a major coal-mining area, and West Champaran are the two prominent places as regards the mafia operators in Bihar. The most disturbing aspect is the social and political acceptance of these criminals as indicated by the patronage and protection bestowed on them by politicians and policemen. One of the criminals engaged in kidnappings for ransom in Bihar was killed in the house of a close relative of a political leader, while another was arrested from the house of a Member of

the Legislative Assembly.[6] In Karachi, the biggest city of Pakistan, where conditions in terms of lawlessness, terrorism and political criminality are at least as bad as in India, if not worse, the problem of kidnappings for ransom has attained incredible dimensions. A scion of a prominent business family who has been the victim of kidnapping for ransom narrates the following:[7]

> "They treated me O.K. But then they sold me for Rs 10 lakh to another gang. This one starved me for two days and sold me to another gang for Rs 25 lakh. I was sold five times, till my price reached Rs 90 lakh. The sixth buyer collected a ransom of Rs 1.5 crore. Imagine being traded like a share certificate in the stock-market."

As very aptly observed, for a gang, the hostage is an investment; the longer one can hold on to it, the greater the appreciation.

Lawlessness has reached such a level making it appear that the Government has lost the will to enforce the laws. A criminal is reported to have terrorised the countryside in Mainpuri district in Uttar Pradesh but the law enforcement agencies including courts were not willing to take cognizance of his activities even when he fired at an advocate in the precincts of the High Court.[8]

In this state of affairs, when even the existing laws are not being applied,[9] the fate of new legislation is obvious. An example is the enactment of the Gangsters Act by the U.P. Government in 1986 to meet the challenge of the Mafia in the State. As could be expected, the law failed miserably to make any dent in Mafia criminality. The sordid picture is presented in an emperical study regarding the working of the Act:[10]

> "A study of its (Gangsters Act) implementation in 15 districts reveals that so far not even a single person has been convicted although thousands of persons were booked under the Act. In eighty per cent of cases even a charge could not be framed in the court. Where the charges were framed, the acquittal rate has been hundred per cent.
>
> Organised gang criminality, despite being dangerous and often extremely violent, does not constitute so much threat to the society as is posed by racketeering and syndicated crime. It strikes in the open and can be attacked and brought under control by courageous, alert, and vigorous police action. Racketeering and syndicated crime, on the other hand are 'insidious, subterranean, and undermining'."[11]

6. Rajgopal, *op. cit.*, p. 130.
7. India Today, June 15, 1990.
8. Rajgopal, *op. cit.*, p. 139.
9. Section 110 of the Criminal Procedure Code can be useful to a great extent.
10. Rajgopal, *op. cit.*, pp. 141-42.
11. Robert G. Caldwell, *Criminology* (1956), p. 77.

2. *Racketeering.*—Extorting money from legitimate or illegitimate business amounts to what is known as racketeering. This is achieved by intimidation or actual force. It is in this particular context that the description of organised criminals as parasites is most appropriate. Those in illegal business like prostitution, gambling and drug trafficking are especially vulnerable to racketeering since they cannot approach the police and other authorities for protection. In fact, money is demanded and paid as consideration for the 'protection' given by the criminal group to the operators of illegitimate business.

Labour and trade unions provide extremely useful channels for the racketeers to accomplish their objectives. By capturing the unions, organised criminals are in a position to exploit both employers and employees in business and industry; unions providing the criminal leverage and facade to Mafia leaders. The labour unions of Bharat Coking Coal Ltd., situated in the famous colliery town of Dhanbad, are known for their domination by the organised crime which leads to various abuses in relation to the orders, allocation and transport of the various raw materials coming out of the collieries. Members of the Mafia also indulge in pilferage, smuggling and illegal mining of coal. Inter-union rivalries are common resulting in violent clashes between the various groups. Murder and mayhem are not unusual phenomena in such circumstances.

Construction work through contracts is another area where organised criminals have taken their share by employing political clout and muscle power. In many states like Bihar, it is the Mafia which often prevails regarding terms and conditions and the eventual award of the government and public-sector tenders. It is not, therefore, surprising that police protection has been often sought by the engineers facing threats of violence and police force has to be deployed sometimes in connection with the allocation of work to contractors.

3. *Syndicate Crime.*—This is the most significant area of organised crime and consists of the supply of illegal goods and services; smuggling, bootlegging, gambling, prostitution and foreign exchange violations are examples of such crimes. The leaders of syndicated crime possess all the visible signs of respectability in such society and ordinarily they operate without resorting to violence. There are frontmen at various levels executing the works assigned to them. The 'bosses' generally function behind the scenes from their well-appointed headquarters and that makes them somewhat immune from the enforcement authorities. Giving rise to parallel economy, black money and violence, this variety of organised crime has the greatest potentiality of damaging the social, economic, political and moral fabric of the society. The worst aspect of the problem

is that the money generated through illegal means is invested in legitimate business enterprises.

4. Smuggling.—It is a highly-prevalent criminal activity in the developing countries like India where the official position is to encourage local products and industries and to conserve maximum foreign exchange. Smuggling is the direct result of the import and export policy of the government of a country. Besides the craze for foreign goods, due to their real or supposed superior quality, the gap between the prices of the indigenous and foreign products is also responsible for illegal imports. Further, the politicians and enforcement officials sharing the fruits of the illegitimate enterprises develop a vested interest in the continuation of smuggling operations.

India has a vast seashore and a large border area along with neighbouring countries and the most vulnerable areas are Gujarat, Maharashtra, the *terai* area of Uttar Pradesh, Punjab and the eastern region. The main items smuggled into the country are synthetic fabrics, watches, electronic goods, gold and narcotic drugs. Items smuggled out of the country are foreign and Indian currency and snakeskins. The magnitude of the problem can be gauged by the following comment appearing in a newspaper:[12]

> "Smuggling has assumed such dangerous proportions as to threaten the nation's social and political fabric. It is widely believed that smuggling equals India's official trade. It cannot be seriously contested that among the economic crimes smuggling has had the most deleterious effect in certain States as Maharashtra, Gujarat, Tamil Nadu, Punjab, Bihar and Bengal."

Among the items smuggled into the country, gold tops the list in terms of supply and demand. Traditionally, India has always been the 'bottomless pit for gold consumption'. Over the years a new dimension, has been added because gold is used in exchange for arms, drugs and other smuggled goods. The annual demand for gold in India is estimated to be between 250 and 300 metric tonnes, almost 10 per cent of the world's production; the supply from the Indian mines at Kolar and Hatti being a couple of tonnes only. While the international price of gold was Rs 2200 for 10 gm, the price in India for the same quantity was Rs 3500 ! In recent years the Government has intensified efforts to prevent gold smuggling. The Coastal Guards and the Customs Department have been provided with better class of weapons, speedboats, vehicles and motor-cycles for patrolling, special metal detectors, night-vision binoculars, closed-circuit TVs, walkie-talkies and even SLR and other semi-automatic guns. The scheme for rewarding informers as well as the officers responsible for detection was further liberalised in 1985 to provide payment of 20 per cent of the value of contraband seized, to them.

12. Times of India, dated July 19, 1987 quoted in Rajgopal, *op. cit.*, pp. 156-57.

Perhaps because of these measures there has been a spectacular rise in favourable results. From 524 kgs in 1984, the haul of smuggled gold has risen to 2255 kgs in 1987 and 6094 kgs in 1988. Trafficking in drugs is perhaps the most sinister of all the smuggling activities. Not only the economy and health problems of extreme gravity are involved, it has political and related aspects of far-reaching consequences. The rulers of some banana republics are known to have been connected with the international Mafia engaged in drug trafficking. In the Indian sub-continent, trafficking in drugs and terrorism have come to be intimately connected with each other. Terrorists get money for much-needed arms and ammunition by working hand in glove with smugglers. Violence by terrorists is only a part of the violence unleashed by the smuggling of drugs. The inter-gang rivalry, of which Bombay provides a typical example, generates violence of extreme severity leading to killings and counter-killings. The problem of drug trafficking is of global nature and its enormity and danger potential has been reported thus by a U.N. agency:

> "These illicit activities are financed and masterminded by criminal organisations with international links and with accomplices in financial circles. In certain regions drug trafficking is closely interconnected with major criminal activities including trafficking in weapons. They are also associated with subversions and international terrorism. The whole process undermines the economic order, spreads violence and imperils the very political stability and security of such countries."

The problem of drug traffic to and from India reached alarming dimensions during 1975-85 and afterwards. Earlier India's track record in opium control was regarded as excellent both in terms of cultivation control and law enforcement. According to one of the U.N. spokesmen in a conference held in 1987 in Vienna, 80 per cent of the heroin found in the streets of the U.K. and Western Europe passed through Bombay. A number of factors have contributed to this development; some of them being as given below:

1. While the cultivation of opium has been significantly reduced in India, the cultivation in Pakistan went up by about 25 per cent during the last few years. The situation in Afghanistan and the exodus of refugees into Pakistan also resulted in an unprecedented glut of drugs, a good part of which found its way into India.
2. For Pakistanis it became safer to push the drugs through India instead of carrying it directly to Western Europe in view of the greater vigilance on Pakistanis entering those countries. The period of the early eighties also synchronised with the beginning of terrorism in the Punjab. Around the same time, Chittagong in Bangladesh became an important place to receive drugs from the 'Golden Triangle'; drugs reaching the eastern part of India being the next logical step.

3. Silver prices in India were much lower than elsewhere before 1983 and this led to a great deal of illegal export of silver from the country. The situation, however, changed after the prices of silver crashed in the international market in 1983 leading to the replacement of silver export by illegal export of narcotics.

Responses to Organised Crime

Dealing with the issue of remedies against organised crime, one aspect to be kept in mind is that the problem is to be tackled by methods different from those employed in ordinary crimes. This was aptly put by an Attorney-General of the U.S.A. thus:

> "Innovative measures are necessary for the effective prosecution of organised crime cases because the traditional law-enforcement process is by and large designed for the control of individuals not for the control of organisations."

Two approaches are possible in dealing with the criminal organisations responsible for organised crimes.

1. The Law Enforcement Perspective.—According to this approach, organised crime is the creation of certain distinct groups in the society and the task is to deal with them by applying legal sanctions. What is required, therefore, is to enact adequate and appropriate laws and their efficient implementation. This appears to be the basis of the approach of the President's Commission on Law Enforcement and Criminal Justice in the U.S.A. The Commission identified the source of organised crime in the U.S.A. in "a society that seeks to operate outside the control of American people and their working government". According to the Commission, this society unites thousands of criminals who work together in complex organisational structures and are subject to laws and rules that are more rigidly enforced than those of legitimate government. The Commission found that organised crime in America was controlled by a national alliance of at least 24 tightly-knit gangs, or "families" whose members are of mainland Italian or Sicilian descent.[13]

2. The Social and Economic Perspective.—According to some of the sociologists who studied the problem of organised crime in the U.S.A. the phenomenon is not an alien conspiracy but is a part of the social functioning or dysfunctioning and market economy. What is needed for the eradication of the malady are effective economic strategies, e.g., sound policies regarding production and distribution, reducing the spread between profits and costs, or breaking up organised crime monopolies by creating legitimate markets through decriminalisation or legalisation.

13. The Commission identified the organisation as 'La Cosa Nostra' for which the term 'Mafia' was employed by the Kefauver Committee (the Senate Special Committee to investigate Organised Crime in Inter-States Commerce), 1950-51.

As regards the law-enforcement approach, besides the Penal Code which provides some basic principles relating to conspiracy, attempts, abetment and frauds, there are quite a few other enactments specifically designed to deal with organised criminality. The Customs Act, Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA), Smugglers and Foreign Exchange Manupulators' (Forfeiture of Property) and Foreign Exchange Regulation Act are some of these enactments. Apparently these laws have not hit their targets very effectively; the main hurdles being political interference and corruption of enforcement officials. The real task is to insulate the enforcement agencies from political influences as far as possible. To achieve this, the creation of a central task force constituted out of personnel from the police, income tax, customs and any other appropriate agency has been suggested.[14] By its nature, organised crime is not ordinarily confined to a single State in a given situation and quite often investigations cut across various States. As of now, the Centre has no powers to investigate into the crimes committed in States. Even the Central Bureau of Investigation can operate in a State only if consent is given by the State. Viewed from all these angles a central task force having all-India jurisdiction may be highly desirable.

Based on the recommendations of the Presidential Commission, two laws have been passed in the U.S.A. to deal with the problem of organised crime and they have much in their contents to commend themselves. One is the Organised Crime Control Act, 1970 and the other the Racketeers' Influence and Corrupt Organisation Act, 1970 (R.I.C.O.). As a result, it is now a crime to invest in legitimate business either the money which has been gathered through illegal activities or money on which no income tax has been paid. The distinguishing feature of R.I.C.O. is the availability of both criminal and civil remedies against the racketeers, the latter remedy not entailing the heavy degree of burden of proof which is the hallmark of criminal proceedings.

The problem of implementation of a couple of penal provisions in the Indian enactments referred to earlier may be briefly considered. Since organised crimes are committed for economic gain, the punishment should relate to offsetting the ill-gotten gains and confiscation of property of convicted criminals is, therefore, an appropriate sanction.[15] There are, however, some snags which make the effective application of the sanction somewhat difficult. Confiscation of property under the Smugglers and Foreign Exchange Manipulator (Forfeiture of Property) Act is not permissible until a valid detention is made under the COFEPOSA; the legality of

14. Rajgopal, *op. cit.*, p. 198.

15. The principle of confiscation of property is strengthened in the U.K. by the Drug Traffic Offences Act which contains a rebuttable presumption that all of the assets at the offender's disposal were the proceeds of crime.

detention is invariably contested and quite often it involves prolonged judicial proceedings. This may provide an opportunity to the alleged criminals to manipulate the property in such a way so as to make it immune from subsequent penal action. It is, therefore, absolutely necessary to devise methods and procedures to cut short the length of judicial proceedings relating to detention under the COFEPOSA or the National Security Act.

Under Section 31 of the Drug Act passed in 1985, very severe punishments are permissible in case of offenders having previous convictions to their credit. Though a sound policy in itself, again the implementation is not possible unless all-India records are carefully maintained by a central agency of the convictions under the Act all through the country.[16]

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16. The principle of confiscation of property is strengthened in the U.K. by the Drug Traffic Offences Act which contains a rebuttable presumption that all of the assets at the offender's disposal were the proceeds of crime.

Chapter XIV

SEX OFFENCES, PROSTITUTION AND ABORTION

Sex urge is a basic fact of all animal life, the expression of which in the human society has always been sought to be controlled and channelised through various social devices. Religion, morals and laws have all acted to restrict sexual activity within certain well-defined areas for the well-being of society. Laws have been particularly influenced a great deal by the religious injunctions in sexual relationships. The traditional general requirements of a legally and socially valid sexual relationship are:

1. The element of consent must be present. Violation of this requirement results in the offence of rape.
2. The two parties to the activity must be human beings of the opposite sex. Homosexuality and bestiality are offences based on this concept.
3. The nature of the sexual act must be legitimate. Thus, oral genital contact and common law sodomy, even between a consenting married couple, may be an offence.
4. The act must be in a private setting.
5. The two parties must be situate at a certain social distance in kinship terms. The crime of incest is based on this restriction.
6. The two must be married to each other; fornication is the status of the sexual act otherwise.[1]

The various laws relating to sexual behaviour are meant to enforce one or more of the above norms.

There has been some departure from some of the requirements as mentioned above due to liberalisation during the last few decades. The two discernible trends are:

(*a*) the gradual divorce of law from the religious mores,

(*b*) increasing emphasis on 'social harm' factor as the criterion for the legal policy,

(*c*) due consideration of the enforceability aspect of the law.

The present position can now be dealt with with reference to some important sexual and allied offences and deviations like homosexuality, prostitution and abortion. The offence of rape, however, belongs to a somewhat different category and must be included in any discussion of

1. This requirement is no more legally required in most societies. For example, two adult unmarried persons of the opposite sex may indulge in copulation without violating the law, provided the law of incest or adultery is not violated.

sexual offences since it is probably the most shocking and one of the more common sexual offences.

HOMOSEXUALITY

Various modes of sexual gratification in which the two sides involved are of the same sex come under the general nomenclature of 'homosexuality' which is not a legal term. Homosexual behaviour has a hoary past; it has been present in varying extents in all cultures at all times. In fact, strange as it may sound, some of the best-known civilisations, e.g., Greek and Persian, were marked by such behaviour. There are many references of homosexual characters in Greek history and mythology. It has been noted that the phenomenon increases significantly in flourishing societies. Not only among human beings, the behaviour is observable in all species of mammals as well as many non-mammalian species, but exclusive heterosexual behaviour, which is the usual phenomenon, and somewhat unusual, exclusive homosexual behaviour, is the peculiar characteristic of human beings.

Until recently the phenomenon and its significance were deliberately underplayed and minimised in all societies though the penal sanctions for such sexual behaviour, considered to be perverse and highly immoral, have been very severe and continue to be so even now in many of them.[2] The attitude of law has largely been shaped by religion, most of the major religious systems having condemned it in no uncertain terms. Tracing the early history of the offence, it was observed in *Khanu* v. *Experor*[3]:

> "And it was this vice in particular which was rendered punishable by the early Christian State, for it was par excellence the vice of the Hellene and the Saracen. By making this vice particularly punishable, therefore, the State not only protected good morals but struck at its enemies. It is this vice, therefore, which attracted severest censures of State and Church, but in medieval times all emission other than in *vas legitimum* was considered unchristian because such emission was supposed ultimately to cause conception of demons."

Equally strong abhorrence is manifested in the Islamic teachings regarding homosexual behaviour. The ancient Indian Code was very strict on 'perverse' sexual behaviour including homosexuality. Male homosexuality (*maithunam purushashu*) was strongly forbidden and so was lesbian behaviour; stringent punishments, according to Manu Smriti, were to be given for both the acts.

Homosexual behaviour, being taboo and essentially clandestine in nature, has been surrounded by disgust, fear and ignorance for a long time and it

2. Under Section 377 of the Penal Code of India, imprisonment for life is possible for committing an "unnatural offence", a term which includes buggery and other varieties of homosexual behaviour, but the section does not appear to cover 'lesbianism', i.e., female homosexuality.

3. AIR 1925 Sind 286.

is only in the recent past that greater attention has been given to it in some of the European countries and the U.S.A. The homosexuals in these countries have become not only quite candid and uninhibited about their sexual preferences but have also become quite vociferous in claiming their rights.

Homosexual : The Meaning

A problem in any discussion of the subject is that the term 'homosexual' as an adjective of a behaviour or of a person is often applied widely and indiscriminately as if it has the same fixed meaning in all the contexts. The first point to be noted is that homosexuality as a propensity is not an "all or none" condition; in other words the homosexual and heterosexual tendencies are not mutually exclusive. This may be understood with reference to the psychoanalytical theory propounded by Sigmund Freud. According to him, homosexuality is the expression of a biological bisexual predisposition common to all human beings. All persons go through a "homoerotic" phase before reaching the heterosexual stage retaining some of the 'latent homosexual' tendencies in the process. The Institute of Sex Research, founded by Alfred C. Kinsey, defines a homosexual as anyone who has had more than six sexual experiences with a member of the same gender. According to the seven-point scale developed by Kinsey, both homosexual and heterosexual tendencies may be simultaneously present in an individual in varying degrees.[4] The scale is as follows:

> " '0' on the scale denotes exclusive heterosexuality; '1' denotes predominant heterosexuality; '3' an even balance of the two; '4' greater tendency towards homosexuality; '5' predominant homosexuality with only incidental heterosexual behaviour; and '6' exclusive homosexuality."

The presence of homosexual tendencies need not be reflected in the behaviour and the tendencies, therefore, should not be equated with each other. Further, homosexual behaviour does not necessarily amount to homosexual offence, the latter depending upon the definitions of law.

Homosexuality : Whether a disease?

As has been mentioned earlier, Kinsey did not regard homosexuality as a disease, psychoneurotic or constitutional. However, there are others by whom it is regarded as a disease, though a curable one, in a good number of cases. Psychotherapeutic methods may help provided there is a strong desire on the part of the person to be cured. The Wolfendon Committee[5] found that the evidence tendered before it did not establish that homosexuality was a disease. The Committee noted that some regard homosexuality as a state of arrested development while others regard it as a natural deviation

4. Kinsey et al., *Sexual Behaviour in the Human Male*, 1948.

5. The Wolfendon Committee was appointed in England and was required to report on the issue of legal sanctions and homosexual behaviour.

due to biological factors. It is also considered to be a universal potentiality which can develop in response to a variety of factors; an explanation which appears to be quite plausible. Some persons may pursue homosexuality because of irresistible attraction for persons of their own sex while many others indulge in it just because of lack of contact with members of the opposite sex[6], e.g., armymen in barracks, inmates of prisons, or due to degenerate moral controls. For many it may be just an expression of adventure or rebellion, a kind of curiosity or a way out of boredom. These may explain the behaviour in contemporary western society. The practice may be more prevalent among pre-adolescents and adolescents, for most of whom it may mark the transitory phase, and they may switch over to heterosexual activity when an opportunity is afforded.

The Wolfendon Committee found that the behaviour was not peculiar to the members of any particular profession or calling. There was evidence that it was present at all levels of society. In the words of the Committee, homosexuals included not only people of a high degree of intelligence but also the dullest oafs.

Extent of Homosexual Behaviour

Very little can be known regarding the extent of homosexual crimes. Kinsey's report caused quite a sensation in the U.S.A. when he published his study regarding the sexual behaviour of white males in that country. According to his findings, 4 per cent of adult white males are exclusively homosexual throughout their lives after the onset of adolescence. Ten per cent are more or less exclusively homosexual for at least three years between the ages of sixteen and sixty-five, and 37 per cent of the total male population have at least some overt homosexual experience to the point of orgasm between adolescence and old age.[7] Despite the scepticism expressed about the findings, the fact remains that the study did prove that the behaviour was widespread, more than what might have been imagined in the country before the pioneering study was conducted. No such studies have been made in England but the medical witnesses before the Wolfendon Committee expressed the view that the position might not be very different from the one obtaining in the U.S.A. The Committee noted that it was widely believed that the prevalence of homosexuality in the country had greatly increased during the past fifty years. The committee also took note of the position in Sweden where one per cent of all men are believed to be exclusively homosexual and 4 per cent had both homosexual and heterosexual inclina-

6. This may be a more responsible cause in eastern societies where traditionally men and women are segregated. This is generally given as an explanation for homosexual behaviour in medieval Iran and Central Asia.

7. *Op. cit.*, pp. 650-51.

tions and that these figures were believed to be too low by the officials in that country.

In India, as in other countries the extent of homosexual practices cannot be gauged and is, therefore, a matter of conjecture. There is no reference to the offence in the Government of India's bulletin *Crime in India*. A perusal of the law reports suggests that cases on the subject are scant. Traditionally India has been almost free from homosexual practices from ancient days. It may be added, however, that the introduction of the Persian and Turkish culture in the medieval period did contribute to homosexual practices to some extent in the country. From all appearances it can safely be asserted that homosexual behaviour is almost negligible in India. In any case, homosexuality has not yet become 'respectable' in India and to whatever extent it may be in vogue, it is not practised with the attendant publicity and assertion of the nights of the homosexuals not so uncommon in the U.S.A. and some other western countries.[8]

Homosexuality — Law and Morality

As mentioned before, homosexuality has always been visited with social, legal and religious disapproval and sanctions. This position was not challenged until very recent times. The theories of Sigmund Freud and the subsequent researches of Kinsey sought to eliminate the prejudices against homosexual behaviour and thus paved the way for a scientific and objective appraisal of the issue. The rationality of the relevant laws and morals was questioned. Among other things, the Wolfendon Committee appointed in England was required to report on the issue of legal sanctions and homosexual behaviour.

A number of arguments were presented before the committee in favour of retaining the existing law. It was said that homosexuality menaces the health of society. The committee was not impressed and felt that it had no evidence to reach this conclusion.

It was argued that homosexual behaviour has a damaging effect on family life. The committee said that it might well be true but there were no reasons to believe that homosexual behaviour between males inflicts any greater damage on family life than adultery, fornication or lesbian behaviour.

Next, it was contended that a man who indulges in these practices with another man may turn his attention to boys. The committee gave some anxious consideration to the issue and expressed the view that it would be more likely that a change in law permitting homosexual acts between adults only would protect boys rather than endanger them.

8. The 'gay' movement, as reported in some magazines and newspapers, has made some progress in the very recent past in big cities such as Bombay and Delhi, including publication of a magazine.

The committee did not share the apprehension expressed by some of the retentionists of the existing law that to change the law in such a way that homosexual acts between consenting adults in private ceased to be criminal offences must suggest to the average citizen a degree of toleration by the legislature of homosexual behaviour, and that such a change would "open the floodgates" and result in unbridled licence. The committee felt that though the change in law would indicate some tolerance of homosexual behaviour the decisive prohibitive role would be played not so much by law, one way or the other, but by other strong social forces against the behaviour. Concluding the report, the committee dwelt on the distinction between public and private morality and the function of law in the context in the following words:

> "Unless a deliberate attempt is to be made by society acting through the agency of the law to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this, is not to condone or encourage private immorality, on the contrary, to emphasise the personal and private nature of moral or immoral conduct is to emphasise the personal and private responsibility of the individual for his own actions, and that is a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law."

The committee, therefore, recommended that homosexual behaviour between consenting adults in private should no longer be a criminal offence. The recommended change was effected by the Sexual Offences Act, 1967.

The contemporary trend is clearly towards greater tolerance of homosexuality. Many of the American States have legalised it. In West Germany homosexuality is legally permitted with due protection afforded to minors. The tolerance is a part of a more general phenomenon of liberalisation and individual freedom affecting many other social attitudes and institutions.

RAPE

Rape being a combination of illegal sex and violence is a traumatic experience for the victim. In almost all the societies it is regarded as an extremely grave crime. In many countries it is punishable with death. The very mention of it conjures visions of a wicked and aggressive offender and of a hapless victim. The element of violence or use of force is certainly present in a good number of cases but it is not an essential element in every case of rape. This can be elaborated with reference to the definition as given in Section 375 of the Indian Penal Code, according to which a man is guilty of rape when he commits sexual intercourse with a woman in any of the five situations given below:

1. Against her will.

2. Without her consent.
3. With her consent, when her consent has been obtained by putting her in fear of death or of hurt.
4. With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
5. With or without her consent, when she is under sixteen years of age.

The section also makes it clear that sexual intercourse by a man with his own wife, the wife not being under fifteen years of age is not rape.

It is evident that those found guilty under the fourth or fifth situation or a husband exercising conjugal rights over his wife below the age of 15 years, do not conform to the stereotype image of the rapist. In the criminological discussion of the subject these are not relevant persons but only those who are the perpetrators of the crime often referred to as 'forcible rape'.

Extent of the Problem : An Analysis

The problem of rape has assumed menacing magnitude in some of the highly-developed and affluent societies of the West, particularly in the U.S.A. where a rape occurs every ten minutes. There are on an average 55,000 victims of rape and approximately 80,000 offenders every year in that country.[9]

In India, despite a steady rise in the number of rapes in recent years, the frequency of the offence has traditionally remained very low compared to many other countries. Besides the fact that it is in conformity with the general trend of low frequency of violent crimes in the country, there appear to be some special reasons for the somewhat better situation in India. The traditional regard for womanhood, especially in villages, and effective surveillance by parents or guardians of girls appears to be significant. The situations are relatively very limited where members of the opposite sex come into contact with each other or where females go out either unescorted or at odd hours or to out of the way places. In other words, some of the fertile social and cultural components of the offence of rape are missing in India.

There is, however, no doubt that the crime is on the increase of late. The higher incidence of the offence of rape is manifested in the statistics available for the decade 1978-88. While the offence claimed 7% of the aggregate crime in the country in 1978, the percentage was 1.1 in 1988; there being an increase of 6.3% in rape cases in the year 1988.

Rape statistics of India, or for that matter of any other country, must be taken with the proverbial pinch of salt. The figures may be highly misleading since the visible part of the crime as known, reported, investigated and taken

9. Varma, *op. cit.*, pp. 62-63.

to the courts may be like the tip of the floating iceberg. The victim may not disclose the incident due to fear of scandal and social stigma. The family members, in spite of their knowing about the offence, may decide not to report the same to the police. Such inhibitions as a matter of fact may operate more in India than in many other countries. Criminal proceedings are also highly annoying and embarrassing to the victim and the family. The defence lawyer generally spares no effort to 'prove' that the victim was of easy virtue. It has rightly been said that the mental torture caused by adverse publicity and the court proceedings may be even more that what might have been caused by the offence itself.[10]

While on the one hand a large number of rape incidents go unreported for various reasons as described above, there may be, on the other hand, the rare instance of a false charge of rape for an ulterior motive by the so-called 'victim' or her relatives. *The Pioneer* of Lucknow carried a report on this aspect of the problem in its issue of January 28, 1976:[11]

> "False charges of rape are not uncommon in the country. False accusations are made against individuals, innocent persons to take revenge, for extortion of money or to whitewash her character when she is seen in a compromising position...."

The report then proceeds to give the sordid details regarding concoction of the evidence of violation on the girl's clothes and her private parts.

Rape : The Setting

What kind of persons commit rapes? Are they mentally or physically different from others? There may not be a clearcut answer to these questions. It appears that just as there can be different types of rapes, there can also be different types of persons committing the offence. Generally, rapists are regarded as sadistic persons and the 'forcible rape' a manifestation of aggressive personality.[12] This may be so in many cases but not necessarily in all. Some rapists may be lacking in ethical or moral principles or a sense of social responsibility. They may be immature men who believe that sexual conquest is a sign of adulthood and virility.[13] Another psychological factor, sometimes deep-rooted in childhood experiences and deprivations, may be because the offender is harbouring a feeling of considerable hostility towards the opposite sex.

The offence may also be the result of the weakening of self-control under social circumstances, e.g., acute mental illness, influence of alcohol or drugs. Social restraints may not only disappear in situations of war and

10. For reforms in the substantive and procedural law relating to the offence of rape, *see* victims of Sex Offences in Chapter XVII. *infra.*
11. Quoted in Varma, *op. cit.*, p. 70.
12. J. Paul De River, *Crime and the Sexual Psychopathy*, Charles C. Thomas, 1958, p. 222.
13. Morris Polosiowe, *Sex and the Law*, 1951, p. 165.

communal rioting but to use the act of rape as a symbol to express conquest and domination over the victim and her people may be an additional motivating factor. There may be cases of victim-precipitated rapes as well.

That the offence is not dependent merely on the mental traits of the offender but may take hues and strains from social and cultural angles and distortions can be illustrated with some peculiar features of the crime of rape in India. A phenomenon peculiar to India is that victims in many cases happen to be from the weaker or lower classes of the community and their violators from the police force or from the higher caste groups in the villages. Some of the cases where policemen have been involved rocked the country in the very recent past. A few years ago the agitated members of the Madhya Pradesh Assembly raised the issue of frequent rapes committed by police personnel on tribal women of the State. The Inspector General of Police, it was reported in a section of the Press, discreetly conveyed the advice to the members of the State police force to be 'cautious' in future, particularly during the period when the Assembly was in session.

SEXUAL ABUSE OF CHILD

The phenomenon of sexual abuse of child cuts across all the countries and the different levels of the societies. The phenomenon can be defined as the sexual exploitation of a child by an older person; the possible modes and forms being manual, oral genital sexual contact or exposure, any sexually motivated nudity or actual sexual intercourse. The perpetrator of the abuse may be either an adult or himself a child significantly different in age or power from the victim.

The vulnerability of child to the abuse is not only because of physical defencelessness but also due to the trust and dependency relationships with older persons. Obedience and authority is also a significant factor since most of the offenders happen to be the persons closely known to the child; in many instances the abuse being of incestuous nature. Once commenced, the abuse generally continues for long durations of time. It may begin with a seemingly innocuous "affectionate" touching which may eventually rise in course of time to a much more serious level. The continuation of the abuse is primarily due to the fear of the offender; it could be even due to the emotional bond the child may have for the offender. The perception that no one might give any credence to her story if the matter was reported to the parents or others also acts as a strong deterrent from disclosing the truth.

Effects of the Abuse

Some of the usual effects on the child victim, which have been identified, are as follows:

1. "Keeping the secret" proves to be too heavy a burden affecting the healthy emotional, mental and physical development of the child.

2. A deep sense of loneliness and isolation giving rise to a feeling of "being different" from other children manifesting symptoms of depression, anxiety and withdrawal.
3. The child suffers from maladjustment and difficulties in studies in school.
4. The effects on teenagers may include drug abuse, eating disorders, suicidal feelings or suicidal attempts and running away from home.
5. Low self-esteem and problems with various relationships including parenting the children may be some of the long term negative effects.

Each child being an unique entity, the effects may be different not only in terms of the child's personal traits and circumstances, they may also vary with the nature and quality of the abuse itself. The variations in the effects may be determined by one or more of the following factors:

(*i*) the severity and frequency of the abuse
(*ii*) the age of the victim
(*iii*) duration of the abuse
(*iv*) the kind of relationship between the child and the offender
(*v*) the way the abuse was handled, if the fact was communicated by the child.

Child Rape

Legal and other measures

Child rape is obviously the most horrible kind of child abuse and such occurrences have shown significant upward trend in the country recently. A seminar organised by the Government of India made a number of recommendations to meet the disturbing situation. The recommendations relate to (*i*) the substantive and procedural laws relating to child rape (*ii*) its medico-legal aspects (*iii*) the mental health needs of the child victim and (*iv*) rehabilitative measures for the victim and to make her acceptable to the society. Some of the significant and more persuasive recommendations are as given below:

1. The offence of child rape should not be a part of general law and be separately dealt with by making a separate provision in the Code or in a special law including therein enhanced punishment for the accused of custodial rape.
2. Section 354 of the Penal Code, punishing an offender for force or criminal assault with the intention of outraging the modesty of a woman, should be amended to provide for enhanced punishment of five years where the victim is a female child.
3. Minimum punishment for child rape should be 10 years rigorous imprisonment with discretion to award lesser punishment for reasons to be recorded in writing. For custodial rape the minimum punishment should be imprisonment for life with discretion to reduce it to 10 years

rigorous imprisonment for reasons to be recorded in writing. For gang rape the minimum punishment should be imprisonment for life.

4. The procedure for interrogation of a child victim should be changed. Questioning of the child victim should be reduced to the minimum and such questioning should be done at the place of her residence in the presence of her parents or social workers of the locality. Non-compliance of this provision should be made punishable.
5. The investigation, prosecution and trial of child rape cases should be conducted by lady officers and judges and, if possible, dealt with by lady judges.
6. Investigation by police in the cases of child rape should be on priority basis to be completed within a prescribed time limit.
7. Child rape cases should be given top priority and the courts should deal with them on day-to-day basis for disposal within a prescribed time limit.

As should be evident, some of the recommendations are desirable in the context of all the rape cases irrespective of the fact whether the victim is a child or an adult.

SEX OFFENDERS AND LEGAL RESPONSES

There are, broadly speaking, two attitudes discernible in criminal law towards sex offenders. One is to deal with them like other criminals by applying penal sanctions, most of them quite severe, keeping in view the rehabilitative ideal in special cases. The second attitude is based on the belief that sexual offenders are different from other offenders, mentally or constitutionally, and they must, therefore, be treated differently.

India and many other countries have the first attitude reflected in their laws and judicial decisions. Severe punishments have been prescribed for some of the sexual offences which are zealously applied by the courts.[14] This is not to say, however, that the courts are altogether oblivious to the special nature of sexual offences and the inadequacy of ordinary punishments to deal with them or the relevance of the rehabilitative ideal in the context of sexual offences. In *Phul Singh* v. *State of Haryana*[15], Krishna Iyer, J. observed:

> "[S]entencing efficacy in cases of lust-loaded criminality cannot be simplistically assumed by award of long incarceration, for, often that remedy aggravates the malady.... A hypersexed *homo sapien* cannot be rehabilitated by humiliating or harsh treatment.... He (the appellant) is a youth barely 22 with no criminal antecedents save this offence.... Given correctional courses through meditational therapy and other measures his erotic aberration may wither away. A man like the appellant has a reasonable prospect of shaping into a balanced person, given propitious

14. *See* under the heading Sentencing in Sexual Offences.
15. (1979) 4 SCC 413 : 1980 SCC (Cri) 1.

social environs, curative and congenial work and techniques of internal stress release or of reformatory self-expression."

The other attitude, referred to above, that sex offenders are *different* and different solutions must be found in the special context, has been manifested in some other countries. It is in the form of laws which emphasise the psychotherapic treatment while the offender undergoes detention or it involves causing of disability to the offender in sexual terms in addition to any sentence of imprisonment which may be imposed. The first mode is reflected in the Psychopath Sexual Offenders laws in certain jurisdictions in the U.S.A. while the second method is followed in Norway where a sexual offender may be given an option between castration, with or without a relatively shorter prison sentence, and a longer sentence.

Sex Psychopath laws passed in some of the American jurisdictions place the sex offenders somewhere between a criminal and a mentally-ill person. They are considered to be highly disturbed or neurotic persons and psychotherapic methods are to be applied along with indefinite detention, i.e., till they are cured. This, in pure idealistic terms, appears to be quite reasonable but is amenable to a variety of objections and criticisms.

Indefinite detention is fraught with the danger that a person may either be released at a premature stage or when it is overdue. While the early release in some of the cases can come to be known by the subsequent sexual offence committed by the released offender, cases of release after unjustified delay cannot be identified. Since the offender could be kept even beyond the maximum period of imprisonment possible for the offence, these laws were objected to by lawyers on the ground of infringement of the constitutional rights of the offender.[16]

The difficulty with psychopath sex laws is that the term *psychopath* itself has no clear-cut meaning.[17] The penal laws regarding sexual behaviour have been mainly enacted to contain the aggressive sexual behaviour as manifested in rape and sexual assaults. In other words, the perpetrators of these crimes are regarded as more dangerous than passive offenders indulging in crimes like exhibitionism and non-coital sex play with children which do not involve physical harm. Yet, as pointed out by Stanton Wheeler, the available evidence suggests that, as a group, the aggressive offenders are less likely to exhibit clear-cut pathological symptoms and may have more in common with non-sexual offenders than with passive sex deviants.[18]

The belief that all, or almost all, sex offenders are highly disturbed or neurotic persons has been shaken to some extent by researches subsequent

16. Many of the States amended their statutes subsequently, providing for release in any case before the maximum period of punishment prescribed by law. Massachusetts had to reintroduce the indefinite detention law.

17. The label 'psychopath' has been dropped from the statutes by some of the States.

18. See "*Sex Offences: A Sociological Critique*," Law and Contemporary Problems (Sex Offences) 25, (Spring 1960) : 258-278.

to the enactment of laws for psychopath sex offenders in the U.S.A. A systematic study of 300 offenders committed to the diagnostic facility in New Jersey showed that on the basis of psychiatric diagnosis 43 per cent of the offenders were classified as normal or mildly neurotic.[19]

This also finds some support from studies which have demonstrated that recidivism is generally not high among sex offenders. The fact is that some of the sexual offenders are just what are termed 'situational' offenders. This may be the case in some of the 'explosive' rapes committed on the spur of the moment without much design or planning.

Psychiatric studies have also revealed the frequency with which sexual motivations underlie such non-sexual crimes as arson and certain types of burglary and it has been suggested that the reverse may also hold true for certain types of aggressive sex offenders.

PROSTITUTION

Prostitution is commercialised sex and, as such, it involves two parties—seller and buyer. It can be described as indiscriminate sexual activity without the normal motives, i.e., procreation or pleasure, but is economically motivated so far as the seller is concerned. The seller generally is a woman and a man the buyer; the reverse roles are, however, not unknown. Also there is, though much rarer, male prostitution in which gratification is provided by one male to another. In the discussion which follows, the subject is dealt with in the most usual context, the commercialised heterosexual practice.

The institution of prostitution is as old as human civilisation and the hyperbolic statement which refers to it as the oldest profession conveys substantial truth. In the report prepared by the Advisory Committee of the League of Nations the following observations were made which indicate the tenacity with which prostitution persists in civilised communities:

> "Prostitution has outlived every social, economic, ethical and political system which the West has known since the time of the Greek City States. It has had its vicissitudes; but, flourishing or languishing, public or clandestine, it has existed in large towns for the last 2500 years, thereby proving how deeply it is rooted in human social life."[20]

What has been said about western societies is true of many others. India had a system of licensing prostitutes and taxing them even before the Romans developed their system of regulating prostitution by the same tools.[21] Another point to be noted is that the denunciation of prostitution is also as old and pervasive as the practice itself. Why is prostitution of such a universal and pervasive nature? Why has it always been socially unacceptable and revolting

19. Ellis and Brancale, *The Psychology of Sex Offenders*, 1956, p. 32.
20. *Prevention of Prostitution*, League of Nations Report, Geneva, 1943, p. 8.
21. Paripurnanand Varma, *Sex Offences in India and Abroad*, 1979, p. 148.

to society? These are the questions which involve investigation of the etiology of prostitution and the resulting harms.

Causes of Prostitution

The causes are to be appreciated in the context of the needs of the seller as well as of the buyer. At the outset, two popular beliefs may be dispelled or at least qualified. Firstly, it is generally believed that consumers of commercialised sex are impelled to go to prostitutes since no alternative is available to them for the gratification of their sexual urges. The second belief is that women become prostitutes due to economic reasons or motivations.

While it is true that many persons patronise prostitutes because of lack of other means of sexual gratification, common instances being of bachelors, armymen away from their families and sailors, it does not follow that all those who visit prostitutes are sex-starved. To quote Kingsley Davis[22]:

> "The common and ignorant assumption that prostitution exists to satisfy the gross sexuality of the young unmarried man, and that if he is taught to bridle gross sexual impulse or induced to marry early the prostitute must be idle, is altogether incorrect.... The prostitute is something more than a channel to drain off superfluous sexual energy, and her attraction by no means ceases when men are married, for a large number of men who visit prostitutes, if not the majority, are married. And alike whether they are married or unmarried the motive is not one of uncomplicated lust. The craving for variety, for perverse gratification, for mysterious and provocative surroundings, for intercourse free from entangling cares and civilised pretence, all play their part."

From the beginning of civilisation, ways and means have been devised to discipline the sexual urge of human beings and marriage is the most potent and universally recognised institution devised to attain the goals. But even the institution of marriage cannot alter some of the basic truths. To appreciate the reasons for demand of extra-marital sex by men, it is essential to keep in mind the difference between males and females in terms of their sexual urge. Man tends to be more promiscuous by nature than woman.[23] This characteristic is also found among lower male mammals. Further, while a male may find it more difficult to go without sex for any substantial period of time, for a female it is generally easier to lead a discontinuous sex life. Partly, the difference in male and female sexual attitudes may also be due to social and culture determinants; according to the traditional mores no laxity is permissible so far as women are concerned but male indiscretions are not only tolerated and condoned but are also taken as signs of virility.

22. American Sociological Review, Vol. 2, October 1937, pp. 746-55.

23. The recently published "The Hite Report on Male Sexuality" in the U.S.A. informs that most men were dissatisfied with their marriage; 72 per cent of men admitted of having extra-marital sex within 2 years of marriage.

The fact, therefore, is that there are many men who need and manage sex outside wedlock. As regards procurement of sex outside marriage, the easiest and sometimes the only way to get it is to buy it from those who are willing to sell it. To quote Kingsley Davis again:

> "When all other sources of gratification fail, due to defects of person or circumstances, prostitution can be relied upon to furnish relief. None of the exacting requirements of sex attraction and courtship are necessary. All that is needed is the cash, and this can be obtained in a thousand ways. Prostitution is the most malleable, the most uninvolved form of physical release."

As regard the other common belief that women become prostitutes due to economic motivations, it is not true of at least those women who take up prostitution involuntarily; those compelled by their abductors[24] or 'buyers'[25] or even by family members including the husband. In the case of those women who opt for a life of prostitution, economic factors may be the precipitatory cause; other factors like alienation from the family or the decay of moral values could be at the root of the problem.[26] If poverty is the factor that is meant by the words 'economic reasons', then that does not, as such, explain the emergence of an elite class of prostitutes in big cities the world over. Gone are the days when prostitution was practised exclusively in brothels by hapless victims of exploitation or poverty. In contemporary society there is a wide range of varieties of prostitutes. At the highest strata in the system are expensive and somewhat exclusive call girls or party girls, highly conscious of their 'superiority' and of being 'different' from their fellow professionals. At the other end of the 'caste scale' are the professionals known as streetwalkers or common prostitutes. In London, for instance, a prostitute of a more exclusive area like Mayfair may be very different from the one operating in Soho. Researching about American call girls, Harold Greenwold found that none of the girls included in his study would dream of charging less than twenty dollars since doing so would make them feel like "common prostitutes".[27] One of the girls interviewed asserted that she was "strictly a fifty-dollar girl".[28] What distinguishes the members of this elite class is their attractiveness, financial standing, dress, manners, residence in an affluent neighbourhood and even their political connections. It is evident that prostitution at the higher level of the social scale is basically in response to the mechanism of the consumer society. A few girls even of

24. This is typically true in the Indian context where large numbers of abductions take place.
25. Shocking and surprising as it may be, the fact is that women do get 'sold' in some of the remote and small villages in India. Khushwant Singh has reported such a phenomenon in the Hindustan Times, Overseas Edition, May 28, 1981. This phenomenon has also been brought to the notice of the Supreme Court of India by means of a petition by eminent citizens in the *Kamla case*.
26. *See* generally Bilimoria Rani, *Female Criminality* (Eastern Book Co., 1983).
27. *The Call Girl : A Social and Psychoanalytical Study*, New York, 1958.
28. These remunerations must have been quite substantial in 1958.

relatively well-off families indulge in prostitution, casual or regular, in a clandestine and exclusive manner in order to achieve higher standards of living. In bigger cities of India even some girls studying in elite colleges are reported to be in the profession.

While there may be some other factors for drifting into prostitution[29] in individual case, poverty is the determining factor in most of the cases in India. Some of the causes peculiar to India which indirectly contribute towards the vice are social evils like the dowry system, child marriage and the religious and social constraints on widow remarriage.

The committee on 'Status of Women' appointed by the Government of India in its report of 1975 observed:

> "...recruitment to this profession is easy and girls from the middle class are also joining this profession and these women practise prostitution often with the connivance of their parents or husbands in order to secure huge sums of money to keep up an appearance of affluence. Educated and outwardly respectable, these women are prompted to take to prostitution because of the undue emphasis on the values of affluence....
>
> Indeed it is the cult of consumption which encourages this pattern of prostitution."

Prostitution—The Consequent Harms

Prostitution has been denunciated in almost all societies for various reasons; the most fundamental reason being that it offends the elementary norms of decency and culture and involves human debasement of the lowest order. It has been condemned as an evil, albeit inevitable, by social reformers, religious thinkers and philosophers alike. Illegitimate sex is considered to be a great sin under all the religious systems and it should be too evident that the lowest level of illegitimate sexual conduct is reached in prostitution. 'What can be called more sordid, more void of modesty, more full of shame than prostitutes, brothels and every other evil of this kind? Yet remove prostitutes from human affairs, and you will pollute all things with lust; set them among honest matrons, and you will dishonour all things with disgrace and turpitude', commented St. Augustine on prostitution. Thomas Acquinas expressed the same idea in the following words:[30]

> "Prostitution is like the filth in the sea, or a sewer in the palace. Take away the sewer, and you will fill the palace with pollution; and likewise with the filth (in the sea). Take away prostitutes from the world, and you will fill it with sodomy."

29. An abducted girl may be forced into the profession or an aspirant for a film career may eventually land up in the red-light district of Bombay.

30. Quoted by Abraham Sion, *Prostitution and the Law*, 1977, pp. 13-14.

The other adverse effects are: the creation of nuisance on the streets due to solicitation by the prostitutes or their agents, spread of venereal diseases[31] and the psychic or emotional disturbance to children and young persons belonging to the families of the prostitutes or living in the brothel areas.

The problem of soliciting became so acute in London by the early fifties that it was one of the major reasons which led to the appointment of the Wolfendon Committee in 1954. Quite often the act of soliciting on the streets was responsible for trouble between prostitutes and their agents due because of clash of business interests. A respectable non-prostitute woman could also be subjected to embarrassment when taken to be a prostitute by some prospective client in a locality of dubious nature.

Syphilis, gonorrhea, trichomoniasis and non-specific urethritis are some of the diseases which are spread through prostitution, a risk more pronounced in Africa and Asia where 80 to 97 per cent of venereal infections are contracted through prostitution.[32] In Europe the percentage of such infections through prostitution has dropped to between 15.7 per cent to 33.9 per cent. In the U.S.A. and Canada the percentage was still lower.[33] In western countries people get more infections through 'good time girls' and casual acquaintances. It appears that while a person may be more careful in taking antibiotic medicines as a precautionary measure with regard to sex with prostitutes, he may not foresee the danger in case of non-prostitute females.

Besides the harm caused to society described above, prostitution may also give rise to crimes like cheating, blackmail and breaches of peace in an indirect manner.

Combating Prostitution

Three kinds of societal responses to prostitution are discernible, i.e., suppression, regulation and abolition. Suppression refers to the efforts to be made to wipe out the institution of prostitution. Regulation, on the other hand, accepts the inevitability of prostitution and efforts are directed to prevent and minimise its evil effects. It is sought to be achieved subject to certain safeguards like licensing, registration, enforcing health directives and prescribing limits in the city or town where the profession could be carried on. The term 'abolition' for the third response is, however, somewhat misleading. It does not mean that prostitution is to be abolished but stands for just the opposite. According to this approach the inevitability of prostitution and the futility of the efforts to regulate or end it must be recognised and all restrictions and control on prostitution must, therefore, be abolished.

31. The increased use of antibiotic drugs has reduced the incidence of these diseases.
32. These diseases pale into insignificance when their consequences are compared to the lethal nature of 'AIDS' (Acquired Immune Deficiency Syndrome) now striking many countries.
33. W.H.O. Technical Report Series, 1963, 262, p. 19 (First Report).

It must, however, be noted that the approach adopted by a country does not necessarily fit neatly into one of these three responses. Strategies of suppression may not be ambitious or adequate enough for total suppression nor has regulation a universal meaning in all contexts.

Following the recommendations of the Wolfendon Committee, the Street Offences Act, 1959 was enacted in the U.K. The object of the Act is to prevent the nuisance aspect of prostitution and not to ban it. Section 1 of the Act provides:

> "It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purposes of prostitution."

Besides the Act of 1959 there are some other local and special laws like the Vagrancy Act, 1824 and the Universities Act, 1825 (enacted for the University of Oxford but subsequently extended to Cambridge University) which also takes care of the problems arising out of prostitution. The object of all this legislation is to eliminate the nuisance aspect of prostitution and to keep it away from some special areas.

The U.S.A. represents the system based on suppression. Prostitution is prohibited in most of the American jurisdictions. The only jurisdiction where prostitution may be permitted by law is the State of Nevada where counties have the option to permit it if they so desire. The Churchill county employed a referendum to decide the issue and about two-thirds of the people expressed themselves in favour of licensed brothels. In the early years of the decade beginning 1970 public opinion polls indicated that about half of the U.S. population was in favour of decriminalising prostitution, more men than women favouring it.

In India, the main legislation dealing with the problem is the Suppression of Immoral Traffic Act, 1956 (to be referred hereafter as SITA). The Act does not prohibit prostitution as such but seeks to remove some of the conditions which promote prostitution. The provisions are directed mainly towards those who either organise prostitution by running brothels or induct women into the sex trade.[34]

The only situations for which a prostitute can be punished are :

1. Where prostitution is carried on in premises which are within a distance of 200 yards of any place of public religious worship, educational institution, hotel, hospital, nursing home or such other public place of any kind as may be notified in this behalf by the commissioner of police or district magistrate.
2. Where a prostitute makes positive attempts to seduce or solicit persons for purposes of prostitution.

34. Some of the relevant provisions in the Penal Code are: Sections 366, 366-A, 372 and 373. There are some provisions in the Children's Acts also. *See* definition of a neglected child in Section 2(*iv*) of the Central Act of 1960.

One important object of the Act is to rescue girls in need of help and provision has been made for protection homes.

The need for change in SITA was continuously felt but it was only in 1986 that some significant changes were introduced. A new name the Immoral Traffic (Prevention) Act was given to the amended legislation.

Under the new Act the definition of prostitution has been widened to mean 'the sexual exploitation or abuse of persons for commercial purposes'. The word 'person' has replaced the expressions 'women' and 'girls' making it possible to include males as well in the definition of prostitution, the male customers of the prostitutes also being the victims of commercial exploitation. The Act classifies the persons into three categories, viz., children, minors, and adults; the former two being less than 18 and 16 years respectively. Under Section 5, procuring, inducing or taking for the sake of prostitution is made punishable with varying periods of imprisonment, greater punishment being prescribed for offences against minors and children. Some other changes are as given below:

1. Licensing authorities have been empowered to suspend licences of hotels where children or minors are detected to be used for prostitution.

2. Sections 10 and 12 of SITA providing for the release of convicted persons on probation of good conduct or after due admonition and on security from habitual offenders for good behaviour have been omitted from the Act.

3. Provision has been made for medical examination of persons removed from a brothel after a search has been effected under the relevant provisions of the Act.

4. Women or girls removed in pursuance of a search are to be interrogated only by women police officers and in the presence of a woman social worker if no female police officer is available.

5. The Central Government has been empowered to set up special courts with jurisdiction to try offences having inter-State ramifications.

Enforcement of Laws

The experience has almost been universal that the effective enforcement of legislation regarding prostitution is an impossible task. This is true irrespective of the fact whether the aim of law is suppression or regulation. The two main reasons for the failure of law are : the act involved is one of those violations which have been termed as 'crimes without victims' and, the corruption of the enforcement personnel. Realising the inherent difficulties in enforcement, the United Kingdom gave up regulation in 1886; Norway abolished licensed houses in 1890; Denmark and Finland abandoned regulation in 1906 and 1907 respectively.[35]

35. Abraham Flexner, *Prostitution in Europe* (New York 1914) p. 104.

A further difficulty is that the nature of the activity being what it is, it may not be possible to establish or even identify the vice in a given situation. The institution of 'singing and dancing girls' in India presents an interesting example. If genuinely so, these women are not involved in prostitution but are in a way concerned with purely cultural activities. '*Tawaif*', a woman of this kind, at some time represented a very high level of culture and often had claims to literary attainments also.[36] Since the implementation of SITA many prostitutes camouflage the true nature of their profession by adopting the label of 'dancing' or 'singing' girls.

The idea of rescue homes has not been properly implemented because of the acute shortage of such homes. For a vast country like India there are only 81 rescue homes in all; most of the homes are very ill-managed and ill-equipped, specially those under government management.[37]

There have been practical difficulties in the fulfilment of the formalities for the implementation of certain provisions of SITA. Section 15(2) of the Act empowers the special police officer, when he has reasonable grounds to believe that an offence in respect of a girl is being committed and a search with warrant will cause undue delay, to search the premises without a warrant in the presence of two or more respectable persons of the locality, of whom one at least is to be a woman, and remove the girl and produce her forthwith before the magistrate. The insistence on the presence of two respectable persons of the locality is based on sound public policy in order to prevent the harassment of innocent persons by the police. More often than not, it is however not possible to manage two respectable persons willing to associate themselves with the proceedings in connection with activities of a dubious nature.

ABORTION

Abortion is a highly-charged emotional subject which involves some highly controversial and complicated issues of law, medicine and morality. The problem of unwanted pregnancy and its termination is a perennial problem which defies clearcut answers. "It is the toughest issue I have had to deal with in 20 years of public life," said a newly-elected American Senator in the midst of the raging legislative and public controversy then going on regarding abortion in that country.[38] The chasm which exists between the abolitionists of the controls on abortion and the proponents of a ban on it is due to wide divergence in moral and policy perspectives. Those who stand for the ban do so basically for the protection of human life, at

36. It is reported that in the olden days members of the elite class of Lucknow and other cultural centres sent their sons to these women in order to be trained in fine etiquette and manners and for developing cultural appreciation pertaining to music and dance.

37. Varma, *op. cit.*, p. 153.

38. Time, April 6, 1981.

whatever stage of development it may be, and quite often also on the additional ground that legislation would lead to permissiveness in society, damage to the institution of marriage and family and laxness of morals. Religion, and law of a very long time, have been on the side of those who are for the ban. Christianity, particularly the Roman Catholic Church, and Islam prescribe very stringent injunctions against abortions. Ancient Indian (Hindu) culture and traditions were absolutely opposed to it; it was regarded as murder of the foetus (*bhrun hatya*[39]). The Catholic Churches' opposition to abortion can be gauged by the statement made by Pope Pius XI in 1930 in which he asserted that abortion is forbidden, even to save a woman's life, because the foetus is "equally sacred". This goes even beyond the legal ban in most countries where abortion is permissible to save the mother's life. The basic position of the abolitionists of the ban is that the decision to have an abortion or not is the private affair of the woman and no one has a right to restrict her choice.

Abortion Laws and their Enforceability

In a large number of countries, before the recent liberalisations, abortion was a crime except where necessary to save the woman's life. Section 312 of the Indian Penal Code provides:

> "Whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and if the woman be quick with child[40], shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
>
> *Explanation.*—A woman who causes herself to miscarry is within the meaning of this section."

Sections 313, 314, 315 and 316 relate to the more specific or special cases of abortion.

The laws of abortion are generally flouted; this in fact is one of the arguments of the abolitionists. Whatever enforcement is there is due to religious beliefs, medical ethics and the fear of social censure and no credit can therefore be given to the law-enforcement agencies. From time immemorial all kinds of ingenuities have been practised by women the world over to get undesired pregnancies terminated. It is also true that right from ancient times men have opposed abortion because of their deep concern for the

39. Varma, *op. cit.*, p. 207.

40. "Quickening" has not been defined in the Code but it probably implies advanced pregnancy. Medically it means perception of the movements of the foetus by the mother; it generally occurs in the fourth or fifth month.

foetus and the allegation is that abortion laws, in a way, represent the male values; the values of the 'inseminators' rather than of the 'bearers'.

The laws are not enforceable mainly because of the nature of the crime. Laws or no laws, a woman needing an abortion and keen to get it shall be able to get it in any case; a quack, if not a qualified person, is sure to make his services available. The crime has been treated as one 'without a victim' by some writers. It may not be correct to say that there is no victim but what is certainly true is that there is no aggrieved party to bring the violation to the notice of the enforcement authorities. In this context, abortion belongs to the class of crimes like drug addiction and homosexuality which are also described, somewhat wrongly, as 'crimes without victims'. It is hardly surprising, therefore, that prosecutions as a rule are rare for the offence of abortion.

Extent of the Problem

As should be too evident, the statistics regarding abortions, more so of the illegal variety, are inevitably wrong. Subject to this qualification the following statistics should be able to give some indication of the extent of abortions, legal and illegal.

In a study of 5000 white non-prison females, Dr Kinsey reported that by the time they were forty-five years of age 22 per cent of the married women had had one or more induced abortions. According to a report published in 1969, there were 200,000 to 1,500,000 illegal abortions each year in America.[41] In 1979 the total number of reported abortions was 1,540,000; an increase of more than 100 per cent since 1973 when the law was rendered more liberal as a result of the decision of the American Supreme Court in *Roe* v. *Wade*.[42] Japan and Hungary probably have the highest rate of abortion in the world. About 50 per cent of all the pregnancies are aborted.

In India, the number of abortions is estimated to be anywhere between four to six million every year. According to a statement made in the Lok Sabha, there were 2,24,669 legal abortions performed in India during the year 1977.

Damage Due to Illegal Abortions

Legal restrictions on abortion create a thriving market for the supply of illegal services catering to the forces of demand. Illegal abortions give rise to a number of problems and hazards which are cited by the abolitionists in support of their contentions. Some of them are as follows:

1. Many deaths are caused in the process of illegal abortions since they are frequently performed by those who are not competent to do

41. Time, October 13, 1967.

42. *See* under heading 'Liberalisation of Laws', *infra*.

the job. Compared to a married woman, a single girl is even more exposed to this kind of risk since in her case the causes may be more compelling for her to seek a non-qualified person.

Even if the operation is performed in a safe manner, after-care and emergency steps are not sometimes possible in illegal abortions since they are performed in a clandestine manner.

2. Illegal abortions give rise to the emergence of some kind of blackmarket in services which inevitably leads to inflated fees. The quality and the availability of the services depend upon one's capacity to pay.

3. Illegal services cause illegal organisation of all those who are concerned with illegal abortions. It also promotes police corruption.

Commencement of Life?

The legal ban on abortion is sought to be justified in terms of sanctity of human life. The crucial issue in the debate has quite often been regarding the point of time when life is supposed to commence. Biological life certainly commences with fertilisation and according to some biologists, that itself is the beginning of human life. This view, as can be expected, is supported by those who are against legalisation of abortion.

According to some others, life definitely begins in the eighth week when the embryo is undergoing the transition to a foetus and is definitely recognizable as a human being. Between fertilisation and this stage some other stages have also been suggested as marking the beginning of life. It is obvious, therefore, that there is no single answer to the question as to when life commences. Dr Norman Fost of the Medical School of the University of Wisconsin sums up the position thus[43]:

> "The question is unreasonable. It is not a question that doctors or religious authorities can be helpful because it is not certifiable. It is just a matter of individual opinion."

Liberalisation of Laws

Partly because of the more liberal attitudes towards sex and individual freedom and partly due to the harmful consequences of illegal abortions, laws have been greatly liberalised in many countries.

The Medical Termination of Pregnancy Act, 1972 has liberalised the position to a great extent in India. Now for a variety of reasons, a legal operation can be performed by a registered medical practitioner within the first 20 weeks of pregnancy.[44]

43. Quoted in Time, April 6, 1981.

44. Woman's health; undesired pregnancy due to failure of contraceptive; the pregnancy being the result of rape or some other unlawful intercourse; these are some of the permissible grounds under the Act.

In America liberalisation has been effected by the judicial pronouncement in *Roe* v. *Wade* (1973). The Supreme Court ruled that women had a constitutional right to an abortion for at least the first six months of pregnancy.[45]

The judgment in *Roe* v. *Wade* has been reaffirmed by the Court in 1985 and 1986 when the Reagan administration sought its reversal. The debate, however, continued unabated and President Bush was committed against liberalisation of laws. To some extent, the administrators' stand was vindicated in the judgment given by the Supreme Court in 1989 in *Webster* v. *Reproduction Health Services*[46] which provides enhanced power to the States against abortions.

In England, the Abortion Act, 1967 has changed the old law to a great extent. Now the law allows abortion in cases where pregnancy would involve risk to the life of the pregnant woman or injury to her physical or mental health or where there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

The laws in Scandinavian countries, Finland and Iceland have been so much liberalised as to permit abortions in a large number of situations including for the prevention of foetal deformity and even for such categories as "worn-out mothers" and "anticipated weaknesses".

The position in India is quite disturbing because of the fact that on the one hand, the legitimate advantage of the liberal laws is not taken or sometimes possible and on the other hand, gross abuse of the same laws is also quite prevalent. In a publication, *The Global Politics of Abortion*[47] it has been reported that most abortions in India are illegal with attendant risk to the life of women. According to the report, just 388 of the estimated four to six millions abortions in India were carried out legally in government-regulated facilities. Regarding the issue of funds involved in making government facilities available, the report says:

> "Were the Indian Government to commit funds to expanding the number of outlets for reproductive health care, literally millions of women could avoid the dangers of illegal abortions."

As regards the abuse of liberal laws it is inevitable to some extent. Given the socio-culture peculiarities of the Indian society on the one hand, and the availability of the modern medical technology on the other hand, the problem assumes diabolic and incredible dimensions. Amniocentesis, the chromosome test, makes it possible to identify the sex of an unborn foetus.

45. The advocates of the ban in the U.S.A. are also thinking in terms of constitutional rights, i.e., right to life of the unborn, a right which cannot be taken away without "due process of law".
46. 492 US 490.
47. Times of India, July 15, 1990.

In the typical Indian family, because of the well-known social, economic and cultural factors the arrival of a female child is quite unwelcome to say the least. A test like amniocentesis, therefore, has the potential of gross criminal abuse and is currently playing havoc, unscrupulous and greedy doctors being available in plenty to provide illegal services to needy clients. Some doctors and private hospitals go even to the extent of advertising the facilities available and the message, in spite of being a bit subtle, is quite clear and unambiguous. Quite understandably, there has been a demand for a ban on the test and a legislation to this effect is urgently needed. Maharashtra has already passed a legislation and a Central legislation is on the anvil.

A controversial issue regarding the Maharashtra legislation is the criminal liability of the woman submitting herself for the test. There is a strong opinion to the effect that it is unjust to make the woman criminally liable in view of the various constraints and pressures which make it difficult for a woman to take independent decisions. The objection against the penal liability of the woman is valid but the law would become a dead letter in the absence of sanctions of some kind or the other. The appropriate action perhaps may be the compulsory sterilisation of the erring woman and to apply at the same time penal sanctions of conventional kinds against the doctors and others indulging in such barbaric practices.

Chapter XV

ALCOHOLISM AND DRUG ABUSE

The use of alcohol and other drugs is of ancient origin but their consumption and the consequent problems have assumed alarming magnitudes and dimensions in the recent past in many parts of the world. Not only has the consumption of alcohol and drugs increased in an unprecedented way but new patterns of their consumption signifying social and cultural undercurrents have also emerged. All this has caused a great deal of concern and the formidable challenge posed to sociologists, lawyers, medical men and administrators has drawn a variety of responses.

It must be understood that alcohol is but one of the drugs which are capable of being abused, yet it is more profitable and convenient to deal with alcohol and other drugs separately because of the following differences between the two[1]:

> "*1.* The use of alcohol is institutionalised and its problems have long been known, though they may be increasing, whereas the introduction of narcotics and psychotropics into many countries represents a relatively new intrusion into and disruption of their cultures.
>
> *2.* Alcohol is usually legitimately available, criminality occurs mostly because of the effect of consumption in that it lowers self-control and a sense of responsibility and often leads to accidents. Only rarely do alcoholics commit crimes in order to obtain this drug, or money to buy it, and such criminality is of a low level. The possession of narcotics and psychotropics, however, is usually illicit and especially trafficking in them is nearly always so. Therefore, the criminality associated with them is concerned more with their movement and attempts to obtain them, than acts committed under their influence."

ALCOHOLISM

Alcohol Consumption—The Need

Sociologists point out that though the basic needs of societies, whether primitive or advanced, remain the same, the difference lies in the means to fulfil them. The needs are:

(*a*) a minimum satisfaction of individual needs;

(*b*) perpetuation of the species;

(*c*) internal unity and order; and

(*d*) protection from outside groups.[2]

1. Report of the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1975, cited in R.S. Agarwal, *Prevention of Crime*, 1977.

2. Selden D. Becon, "*Alcohol and Complex Society*," in *Society, Culture and Drinking Patterns*

Complex modern society is characterised by specialisation of human activities and functions, a characteristic which gives rise to stratification of various kinds, impersonal relationships, increased mutual dependence of sub-groups and individuals on each other, availability of huge varieties of goods and services which may not always be within the reach of a large number of persons in the society. In primitive societies there were a limited number of primary needs fulfilled by alcohol which related to thirst and hunger, medicine and religious ecstasy; all of them have become practically obsolete in the complex contemporary society. There has of course been another function of alcohol, that of social jollification; a function which has become of increased importance due to the peculiar demands on the individual in modern society. This function of alcohol is described thus[3]:

> "....the stratification, individualism, intergroup ignorance and internal competitive tradition—all endangered by the complexity of society—enhance the function of alcohol. Complexity results in a need for greater integrative functioning; lessening of tension, uncertainty and suspicion is necessary for this function; alcohol has been found useful in its accomplishment."

An individual is subject to much more tensions in contemporary society as compared to anything in the past. Tensions may be due to a number of factors, e.g., problems caused by unavoidable contacts of various kinds, concern for the reactions of others in terms of recognition, respect, prestige and social standing, sense of insecurity and awareness of one's own failures and shortcomings, real or imagined. Alcohol is a depressant and as such it helps in releasing tensions.

Alcohol—The Positive and Negative Aspects

The effects of alcohol, as is generally known, are damaging to the individual as well as to society. As mentioned above, however, the use of alcohol has also some positive functions. Whether positive or negative, the effects of alcohol can be viewed from two angles—from the points of view of effect on the individual consumer and on social groups of individuals.

So far as the positive effects on the individual are concerned, alcohol can reduce tension, guilt feelings, anxiety and frustration. As regards the damaging aspect, it can impair physical, moral and mental health. It lowers sensitivity, efficiency and caution in a person. Deterioration of sense of timing and balance may also occur. Inhibitions are reduced when alcohol is consumed but revert back when the person is sober. This gives rise to irregular and erratic behaviour, a phenomenon more dangerous in a complex society since the task of integrating an individual with the group is far more

(Edited by David J. Pithman and Charles R. Synder). New York, 1962. pp. 78-93.

3. Selden D. Becon "*Alcohol and Complex Society*," in *Society, Culture and Drinking Patterns* (Edited by David J. Pithman and Charles R. Synder). New York, 1962. pp. 78-93.

formidable in a complex society than what it was in a relatively simpler society. Cirrhosis of liver, 'alcoholic jealousy', *delirium tremens* and diminition in libido are among the more specific troubles which may be caused by heavy drinking.

Perhaps the only social good with which alcohol can be credited is that it provides social opportunities, not otherwise available, for inter-personal exchange of ideas, particularly to socially frustrated individuals. Alcohol, in its negative aspect, has tremendous potentialities. It may give rise, directly or indirectly, to various crimes. An alcoholic may neglect his social and family obligations. Consumption of liquor may lead to financial problems generating a number of family sufferings in non-affluent countries like India. Worst of all, the moral fabric of the family may eventually be damaged beyond redemption.

Alcohol Addiction—The Phases

In common parlance, anyone who indulges in excessive drinking is often referred to as an 'alcohol addict' which is not an accurate expression in view of the various stages or phases one has to pass through to qualify as an addict in the medical sense. The 'disease conception' of alcohol addiction has been dealt with by a sub-committee of the World Health Organisation and the following points emerge from its report:[4]

> "There are two categories of alcoholics, namely, 'alcohol addicts' and 'habitual symptomatic excessive drinkers'. The persons belonging to the latter category, for brevity's sake may be referred to as non-addictive alcoholics. While the condition of 'alcohol addicts' is regarded as a disease, the one representing the other variety of drinkers is not a disease despite the fact that a person falling in this category may even be a harder drinker than some of the persons of the 'diseased' variety. The 'disease' connotes the loss of control of the patient over his will and for him the urge to consume alcohol is therefore irresistible. This kind of development occurs among some persons after years of hard drinking. A non-addictive alcoholic is also a sick person but his ailment is not excessive drinking, but rather the psychological or social difficulties from which alcohol intoxication gives temporary surcease."

Whatever may be the end result, drinking in the case of an individual begins as what has been termed 'symptomatic drinking'. Drinking is symptomatic of a culture as well as of an individual. What begins as a cultural symbol, and, therefore, within cultural limits, develops in the course of time into 'occasional symptomatic excessive drinking' in case of some individuals. Out of these persons there is a certain proportion of persons who, after a relatively shorter or longer period of symptomatic relief, definitely deviate into a constant alcoholic relief. Drinking becomes with them a "mode of

4. Alcoholism Sub-Committee of the W.H.O., Second Report, Annexe 2, W.H.O. Technical Report Series No. 48, August 1952.

living" and they are 'alcoholics' in the proper sense. According to the W.H.O. report, the proportion of alcoholics (addictive and non-addictive) varies from country to country, but does not exceed in any country 5 per cent or 6 per cent of all users of alcoholic beverages. The ratio of addictive to non-addictive alcoholics is unknown.

Both addictive and non-addictive alcoholics attempt to rationalise their excessive drinking though the latter do not have to in view of the absence of the inability to stop drinking. In the case of non-addictive alcoholics the social repercussions are much less marked because of their ability to avoid drunken behaviour whenever the social situation so demands.

Drunkenness Offences

Drunkenness, as such, is not a punishable offence in India, though it may sometimes lead to offences like rash or negligent driving, rioting and affray, public nuisances and even serious offences like rape and murder. In the U.S.A. drunkenness is punishable in many jurisdictions as when someone is 'drunk in a public place'; some laws include as a condition that the offender be "unable to care for his own safety". According to the report of the President's Commission on Law Enforcement and Administration of Justice, two million arrests—one out of every three arrests in America—in 1965 were for the offence of public drunkenness. According to the estimates of the correctional authorities one-half of the entire prison population of America comprises drunkenness offenders. In one city, 95 per cent of the short-term prisoners were drunkenness offenders. Obviously this kind of situation places too much of a burden on the criminal law and correctional system. The President's Commission found the conditions under which prisoners are kept and treated quite appalling and the whole system almost useless. A part of the observation of the Commission may be cited to appreciate some of the issues:

> "Following arrest, the drunk is usually placed in a barren cell called a 'tank', where he is detained for at least a few hours. The tank in some cities can hold as many as 200 people, while others hold 1 or 2. (The Commission then cities a report to give the details of terribly bad sanitary conditions and of congestion in these cells.) The chronic alcoholic offender generally suffers from a variety of ailments... but medical care is rarely provided in the tank; and it is difficult to detect or to diagnose serious illness since it often resembles intoxication. If the offender can afford bail, he usually obtains release after he sobers up. In many jurisdictions an offender is permitted to forfeit bail routinely by not appearing in court. Thus, if the arrested person has the few dollars required, he can avoid prosecution; if he has no money, as is usually the case, he must appear in the court.
>
> Drunkenness offenders are generally brought before a judge the morning after their arrest, sometimes appearing in groups of 15 or 20.

Rarely are the normal procedural or due process safeguards applied to these cases. Usually defendants are processed through the court system with haste and either released or sentenced to several days or weeks in jail. In some cities only those offenders who request it are jailed. In others chronic offenders, who are likely to be alcoholics, are generally sent to jail.

When a defendant serves a short sentence, he is fed, sheltered and given access to available recreational facilities. In most institutions there is such a lack of facilities and financial resources that it is not possible to do more... After serving a brief sentence, the chronic offender is released, more likely than not to return to his former haunts on skid row, with no money, no job and no plans. Often he is rearrested within a matter of days or hours...."

The Commission concluded that the criminal justice system was ineffective to deter drunkenness or to meet the problems of the chronic alcoholic offender.

Some of the important recommendations of the Commission were as follows:

1. Drunkenness alone (as distinguished from disorderly conduct) should not be treated as a crime. Instead of treating it as a crime, detoxification procedures must be developed. With this object in view, civil detoxification centres should be established.

2. A chronic offender cannot be expected to change within a few days. After-care programmes are necessary.

3. With over 5 million alcoholics in the country, alcoholism is the nation's fourth-largest health problem. Research aimed at developing new methods and facilities for treating alcoholics should be given the priority called for by the scope of the need.

Intoxication and Criminal Responsibility

The general principles of English common law have been incorporated in Sections 84 and 85 of the Indian Penal Code. According to these provisions, the following position exists regarding the criminal responsibility for acts committed by a person while intoxicated:

1. Intoxication may be a defence only where it is of such a high degree that the person committing an act is incapable of forming a judgment regarding the nature of the act or that what he was doing was wrong or contrary to law. In other words, there must be total impairment of the cognitive faculties of the person, as in the case of insanity.

2. In order to be a defence, the intoxication must be of involuntary nature, i.e., the intoxicant must have been administered to the person without his consent or against his will.

3. If the intoxication is of voluntary nature, law will attribute the same knowledge but not the same intention to the person which would have been

attributed to him if he was sober at the time of commission of the offence. In other words, if a particular *intention* is necessarily required for the commission of an offence, even voluntary intoxication may be a defence provided the judgment of the accused was totally clouded due to intoxication. This kind of acceptance of even voluntary intoxication as a defence in certain situations appears to be somewhat illogical and against the interests of public policy. A person becoming intoxicated voluntarily must be given to understand that he is doing so at his own peril.

Drunkenness Control—The Indian Experience

As mentioned earlier, drunkenness is, as such, not a punishable offence in India. This, however, does not imply that the State has been oblivious to the harmful consequences of alcohol. Use of liquor has never found general approval in Indian society. Traditionally its use is more pronounced either in the uppermost classes or among the socially and economically deprived masses. Another interesting aspect is that while in some classes and groups indulgence in alcohol may not be disapproved for males, the women in India, as a rule, except some in the top strata of society, do not consume alcohol. Muslims, who constitute a substantial part of the population, generally avoid the consumption of alcohol because of strict religious injunctions against it.

The use of liquor by the people of the lower economic strata who constitute the bulk of the population, presents some peculiar problems in the context of economic and health hazards which are alien to affluent societies. The masses in India use indigenous varieties, *toddy* and *tharra*, since they cannot afford the wines and liquors of the costlier variety. Some of these liquors are very hard and, coupled with the fact that most of the persons using them suffer from malnutrition and are often engaged in physically exacting jobs, *e.g.*, washermen and rickshaw-pullers, the injurious consequences can well be imagined. Mainly because of these considerations, the Government of India and the States have had total prohibition as their ultimate aim. This is one of the directive principles of State policy in the Constitution. The Prohibition Inquiry Committee in its report of 1955 recommended prohibition as an integrated part of national development planning. A Central Prohibition Committee was set up in 1960 for the implementation of prohibition programmes. Some of the States have gone in for total prohibition while others opted for partial prohibition or control by regulations.[5] Generally, prohibition programmes are regarded as failures in India; illicit distillation and bootlegging have been rampant causing tremendous losses of revenue to the Central and State Governments. Political vicissitudes have also contributed towards lack of coordination and consistency of efforts.

5. Some of the typical regulations are : declaration of certain days in a week or a month (like the pay-day in industrial establishments) as 'dry' days; ban on sale of liquor near schools and industrial establishments; serving of alcoholic drinks allowed only in licensed public places.

TABLE 20

QUANTITY-WISE SEIZURES OF NARCOTIC DRUGS
(1988 - 1993)

SL. NO.	DRUG	UNIT	1988	1989	1990	1991	1992	1993
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1.	OPIUM	KILOGRAM	3304	4855	2114	2145	1918	3011
2.	MORPHINE	,,	23	92	6	6	35	36
3.	HEROIN	,,	3039	2714	2193	622	1153	1088
4.	GANJA	,,	45,994	54,463	39,090	52,633	64,341	98,867
5.	HASHISH	,,	17,523	8179	6388	4413	6621	8238
6.	COCAINE	,,	13	3	1	0.008	0.420	2
7.	METHAQUALONE	,,	1649	887	2141	4415	7475	15,004
8.	AMPHETAMINE	,,	9	1	-	-	-	-
9.	PHENOBARBITAL	TABS	-	720	-	-	1,18,020	-
10.	L.S.D.	SQ. PAPERS	NA	NA	NA	-	50	164
11.	ACETIC ANHYDRIDE	LITRES	NA	NA	NA	NA	NA	19,758

Source : Directorate General, Narcotics Control Bureau.

Note : 1. NA stands for not available.

2. Figures are provisional.

DRUG ABUSE

Many drugs which are legitimately used for medicinal purposes are also used sometimes for purposes not really legitimate or proper. The drugs with which we are concerned here are the substances which have psychoactive or mind-altering properties. The problem of drug abuse has assumed alarming proportions in many countries in the recent past and there has been widespread concern regarding the real or even imaginary repercussions on the individual or society.

It may not be out of place to mention a few drugs of interest here and their properties in order to appreciate the issues of various kinds involved in their control.

1. Opiates.—These are found either in their natural form, e.g., smoking opium or in a chemically extracted and refined form. The best known product is morphine which is one of the most effective pain relievers. Heroin, prepared from morphine, is much stronger than the latter and has a very strong effect on the brain and possesses highly toxic qualities.

2. Stimulants.—Popularly known as 'pep pills', some of the dangerous stimulants are cocaine and drugs of the amphetamines family. Prolonged use, particularly when injected into the veins, can be both physically and psychologically damaging. It also leads to digestive disorders.

3. Sedatives.—These are the barbiturates; "goof-balls" are of this category. Physical dependence on the drug develops and withdrawal is difficult.

4. Hallucinogens.—Also known as psychotominetics or psychedelics, hallucinogens have the property to cause subjective perception of things which do not exist. Cannabis, lysergic acid diethylamide (LSD) and dimethyltriplaiene (DMT) are some of the better known drugs of this family. LSD, the most frequently used dangerous drug, may effect chromosomes resulting in the birth of deformed children.

Cannabis sativa is the name a scientist gave to Indian hemp in 1753. It is believed to be one of the oldest psychoactive plants known to man. Some scholars even assert that, excluding alcohol, hemp was the original intoxicant. In India, hemp drug is called *bhang, ganja or charas*, depending upon the kind of hemp used and the way the resin and resin-bearing parts of hemp are prepared. *Bhang*, which is the most commonly used hemp product in the United States and some European countries under the name *marijuana*, is the least potent and cheapest preparation. *Ganja*, estimated as being two or three times as strong as *bhang*, is more desirable and costlier. *Charas*, the most potent of the three, is known as *hashish* in many countries.

Drug Motivation

In India cannabis has been used since ages for medicinal and religious purposes besides for its normal function of causing intoxicating effects as

such. *Bhang* and *ganja* are frequently taken by agricultural and non-agricultural labour after a hard day's work to alleviate fatigue and to enliven things in an otherwise routine and dull life. It has been estimated that a 50 per cent increase in cannabis consumption occurs in certain parts of India in the harvest season.[6] The same drug motivation on the part of the labour class has been reported from Africa.

Motivation is also determined by cultural factors. This explains the traditional use of cannabis by persons of the priestly class in India but not by the members of the warrior castes like Rajputs who show a strong preference for alcohol but a strong aversion for cannabis. The observations of Lester Grinspoon are illuminating on the point[7]:

> "...cannabis has been accepted for centuries among those people in India where cultural background and religious teaching support introspection, meditation and bodily passivity. The West, with its cultural emphasis on achievement, activity and aggressiveness, has elected alcohol as its acceptable, semi-official euphoriant.... Clearly the more introspective meditative, non-aggressive stereotype associated with marijuana goes against the western cultural mainstream, particularly in the United States. While this stereotype view contributes to its attractiveness for some, it makes marijuana repellant for many others who consciously identify with the active, aggressive, manly stereotype; in fact, the implied or actual qualities of introspection, passivity and the surrendering of volition may be quite threatening to many...."

The fact that there has been a spurt in the use of drugs by students and other young persons in the U.S.A. and other western countries indicates the rejection of some of the traditional cultural traits outlined above. The explanation of drug use, however, with reference to one or two factors alone is subject to the risk of oversimplification. Like any other human behaviour, the use of drugs also involves multi-dimensional variables; some of them have been identified by researches in the various studies on the subject. Pressure from friends and desire to go along with them, effort to understand one's own psychological problems, superiority of marijuana over alcohol in terms of 'high' and the cost, improving the perception, release from tension and the symbolic defiance of those in authority, all these and many other explanations have been offered by marijuana users in the U.S.A.

Alienation from the society has often been referred to as the cause of drug consumption which may not always be true. There may be some users who, though not alienated from the society, do share the views of the establishment or of their parents on various social and political issues. This

6. T.C. Chopra and R.N. Chopra, "*The Use of Cannabis Drugs in India*", Bulletin on Narcotics, 9 (1957), 13, cited in Lester Grinspoon, *Marijuana Reconsidered*, 1971, p. 173.

7. *Op. cit.*, pp. 332-33.

was amply demonstrated by the American youth in their attitude towards the Vietnam war. Such persons without being truly alienated may have reservations about some of the current issues generating tension in their system. To them the use of cannabis and other drugs provide the relief from tensions and anxieties due to the various unresolved questions.

Those who are genuinely alienated from society are of a different class. They are known as "pot-heads" or just 'heads' in America and belong to the drug 'sub-culture'. For them drugs are a way of life. The 'heads' have been described as follows:

> "Their defining characteristic is their generalised rejection of prevalent American values, which they criticise largely on cultural and humanistic grounds. American society is trashy, cheap and commercial, it 'dehumanises' its members; its values of success, materialism, monetary accomplishments and achievement undercut more important spiritual values.... For alienated students, the basic societal problem is not so much political as aesthetic. Rejecting middle-class values, heads repudiate as well those conventional values and rules that deem experimentation with drugs illicit. For heads, the goal is to find a way out of the 'air-conditioned nightmare' of American society. What matters is the interior world, and, in the exploration of that world, drugs play a major role."[8]

In India, drug use by the students is of comparatively recent origin. There is nothing discernible to indicate the magnitude which the problem has assumed in some other countries and certainly the drug sub-culture has not emerged as yet. Significant trends have, however, been noted in certain segments of the student community. It has been estimated that about 12 per cent of students in Delhi University use drugs.[9] According to the findings of the Central Bureau of Narcotics not less than 5000 Delhi students were using drugs. The situation is not likely to be much different in other big cities and prestigious campuses.

Whatever reasons be there for the spread of drug use among youth in India, it can be said with a fair amount of certainty that they are not the same as in the U.S.A. and other affluent countries. Drug use is generally associated with the students of prestigious institutions where a substantial number of students come from upper middle classes, quite often with public school backgrounds. This writer, during his long association with Delhi University and its hostels, did not get the impression that drug users were being tormented by any social, cultural or political issues. No factors are discernible in terms of any 'Vietnam', rejection of materialistic culture,

8. Keniston, "*Heads and Seekers : Drugs on Campus, Counter-Cultures and American Society*", The American Scholar, 38 (1968-69), 99.

9. B.K. Bhattacharya, *Violence, Delinquency and Rehabilitation*, (1977).

alienation from the family or society or an anti-establishment motivating force. It appears that most students who take to drug abuse do so to ape the western sub-culture while for a few others, uncertainty of future personal prospects, curiosity, boredom and lack of direction could be the contributory factors.

Drugs—The Injurious Effects

The abuse of drugs has caused concern because of their possible physical repercussions on the user and his mental faculties and personality. It is also the general belief that drug use has some direct nexus with crimes and sexual activities. No general formulation in this regard is possible since various drugs not only differ from each other, but the same drug may not have the same effect on all persons.

Of all the drugs of interest here, the severe legal sanctions against marijuana have generated the maximum controversy in the U.S.A. While there is not much doubt about the effect of drugs like hashish, heroin, LSD and cocaine on the individual and the society, the same is not true of the much milder and relatively innocuous marijuana. While some of the popular myths have been dispelled by research studies, controversies and prejudices still persist to some extent with regard to marijuana. In the discussion which follows, the focus, therefore, is more on marijuana than on other drugs.

Psychosis—Degeneracy and Personality Damage

The issue whether the use of marijuana causes psychosis has aroused a lot of controversy. Writers and investigators from eastern countries, i.e., India, Egypt, Africa and Turkey have found the answer in the affirmative. Various studies in these countries have supported the connection between marijuana use and psychosis on the basis of the finding that a very high percentage of inmates in mental asylums were found to have been used to marijuana or *ganja*. J.H. Tull-Walsh in his article "*Hemp Drugs and Insanity*" has referred to a number of such reports in India.[10] In 1873 the Superintendent of Dacca Asylum wrote that "between thirty and fifty per cent of the admissions in the Indian asylums was due exclusively to the effects of hemp drugs". In a more recent work, J.E. Dhunjibhoy also confirmed the phenomenon of 'hemp insanity' in the following words:[11]

> "In India, hemp drugs, whether taken in excess or moderation, over a prolonged period, produce a special form of mental disorder which is characterised by a definite train of symptoms which is fairly uniform in character...."

The studies in the U.S.A., on the other hand, do not indicate any direct causal connection between the use of marijuana and psychosis. The well-

10. Journal of Mental Sciences, Vol. 40 (1894), pp. 21-36, cited in Grinspoon, *op. cit.*, p. 254.
11. Cited in Grinspoon, *op. cit.*, p. 256.

known La Guardia's Committee examined the problem of marijuana in New York City. In its report published in 1945, the committee stressed the relative triviality of the effects of marijuana. According to some of the studies, the apparent connection between marijuana and psychosis was due to the following factors:

1. There was sometimes predisposition to insanity in individual cases.
2. The patient had been taking some *other* drugs also.
3. The symptoms of schizophrenia may sometimes be confused with those of hemp insanity because of their apparent similarity.
4. The marijuana used in the U.S.A. is generally of lower potency than some of the hemp drugs used in other countries like India. Another relevant and distinguishing feature may be the poor nutrition of the users in the eastern countries.

The veracity of the Indian figures regarding the population of inmates suffering from hemp insanity in mental asylums has also been questioned. It has been pointed out that in routine cases it is the police report which goes a long way in deciding whether the patient is to be assigned to an asylum and nothing is easier for the police than to brand a person as suffering from hemp insanity. It has, however, been conceded by some experts that toxic psychosis may result due to the use of hemp drugs.

Regarding the point that the use of cannabis leads to degeneracy, some of the well-known studies do not support the claim. This was the conclusion reached by the Indian Hemp Commission of 1894 which examined 800 doctors, *faqirs*, yogis, coollies, superintendents of insane asylums, *bhang* patients and many others connected with hemp drugs. The La Guardia Committee of New York established that marijuana users were not inferior in intelligence to the general population and that they had suffered no mental or physical deterioration as a result of the use of the drug.

The problem of causal relationship between drug use and personality change is rather complicated. The main issue to be appreciated is that 'personality' has been defined in a number of ways. In psychodynamic terms the personality of an individual is the product of various stages of his social experiencing within the framework of genetic potentials and it is manifested through consistent attitudes, beliefs, desires, capacity for expression and adaptation. Personality is to be differentiated from lifestyle which may be reflected in values, ideology, social behaviour, mode of dress and transitory attitudes. It may be more accurate to say that what takes place due to drug use is not personality change but a change in the lifestyle. Further, what a number of studies in the U.S.A. have really revealed is not a personality change among drug users as claimed by some of their researchers but that certain kinds of personalities have a greater tendency to indulge in drugs.

Considered from various angles it can be stated that the moderate use of cannabis not of a high potency, by a normal healthy person does not produce significantly undesirable results. This realisation on the part of narcotic administrators in the U.S.A. has impelled them to effect some change in their arguments against marijuana from what were advanced earlier. Nowadays, the thrust of the argument against marijuana is that its consumption leads to the use of stronger drugs, particularly heroin. The Task Force on Narcotics and Drug Abuse of the President's Commission on Law Enforcement and Administration of Justice found in 1967 that about 50 per cent of heroin users had prior experience with marijuana. But the Task Force also noted that most of the heroin users' studies had also had previous experience with alcohol and tobacco. There may not be a necessary causal link between marijuana and stronger drugs in the 'stair-step' sense but the expansion of the interests of a user may be fairly frequent.

Criminality and Sexual Excesses

One of the prime objections to the use of drugs is because of their supposed role in causing criminality in the consumer. As regards cannabis, the conclusions of the various studies are not uniform. While some of the older studies established some relationship, the more recent studies made in the U.S.A. have not found any direct causal connection between cannabis and criminality. The La Guardia Committee reported as follows:[12]

> "In most instances they (law enforcement officers) unhesitatingly stated that there is no proof that major crimes are associated with the practice of smoking marijuana. They did state that many marijuana smokers are guilty of petty crimes, but that the criminal career usually existed prior to the time the individual smoked his first marijuana cigarette. These officers further stated that a criminal generally termed as a 'real' or 'professional' criminal will not associate with marijuana smokers. He considers such a person inferior and unreliable...."

The committee investigators also examined the records of the Children's Court of New York City and found that "marijuana is not an important factor in the development of delinquency".

As a matter of fact, some writers have pointed out an inverse correlation between cannabis consumption and certain types of criminality in India. R.N. and G.S. Chopra in a study in 1939 found that though some crimes were committed after the individual had smoked (or ingested) cannabis, the study also showed that "so far as premeditated crime is concerned, especially that of violent nature, hemp drugs...may not only not lead to it, but they actually act as deterrents...one of the important actions of these drugs is to quieten and stupefy the individual so there is no tendency to violence.... The result

12. Cited by Grinspoon, *op. cit.*, pp. 308-309.

of continued and excessive use of these drugs in our opinion is to make the individual timid rather than lead him to commit a crime of violent nature."[13]

In the recent reviews of the literature on cannabis it is generally agreed that offences and anti-social activities are generally found less associated with cannabis than alcohol. Even about stronger drugs the position is not as clear or alarming as it is generally believed to be. It is common observation that most people reveal their true nature and personality when intoxicated. According to the Task Force of the Presidential Commission, it is the person, not the drug, which is "responsible" for criminal acts. The Commission was inclined to believe that well-integrated persons under heavy drug doses will not behave contrary to their normal conduct. Consequently the Commission emphasised the prior criminal and socio-psychological history of an offender in understanding the effect of even powerful drugs like LSD.

By way of general comments, the report conceded:

> "As a best estimate one may suggest that any powerful drug produces dangerous side-effects and that any powerful mind-altering drug is likely to alter judgment and conduct, some of which alteration is likely to make trouble for someone...."

Another fear expressed about the use of drugs is that their use leads to sexual excesses and violations. Marijuana is popularly believed to have aphrodisiacal properties but the medical opinion is divided on the point. Greater sexual activity has been noticed among cannabis consumers; a phenomenon which is attributed by some researchers to the fact of inhibitions being shed due to the drug intake rather than any direct influence of the drug itself. The La Guardia Report also subscribes to the same view. If sexual violation is committed in a given case as a result of drug intake, whether due to the direct effect of the drug or due to the loss of inhibitions, drug consumption must be treated as the responsible factor. The total loss of inhibitions in a human being is not something to be commended in the social and moral context.

Release of sexual impulses leading to rape and homosexual episodes is among the risks reported in the popular articles which may well be true. The scientific sources in this regard may be reliable but samples of research studies are inevitably small and sufficient follow-up studies do not exist. The effect which has been described above by the Task Force of the Presidential Commission in the context of the effect of powerful drugs on judgment and resulting in 'trouble for someone' may also be true so far as sexual violations are concerned.

Strategies for Control

The problem of drug abuse is highly complicated and multi-dimensional and is the inevitable result of a number of social, economic and cultural

13. Cited by Grinspoon, *op. cit.*, p. 306.

determinants of contemporary society. The problems and challenges posed by a highly-competitive and impersonal society are too formidable for many to cope with; at the same time, the traditional safety-valves in the form of family and kinship ties and the religious and moral philosophies have been seriously impaired. In the absence of any directing controls, it is hardly surprising that for many persons 'there is a pill of any ill'. In view of the fact that very basic issues are involved, there cannot be any simple answer to the drug problem in the kind of society in which many of us are living at present. It is impossible to deal with the problem of drug abuse either by law, education or medical treatment alone; some results can be achieved by a judicious use of all the three techniques. It should be understood that drug abuse cannot be eradicated and the best that can be done is to try to keep the problem within the narrowest possible confines.

Law must direct its energies not so much to the drug consumer as to the producers, distributors and dealers involved in the illicit activities. The individual consumer can be better tackled by medical treatment, education about drugs and proper counselling. The legal policy must be framed having regard to the relative damage potential of the various drugs including alcohol, and legislation must be kept to a minimum optimum level. The moral of the failure of prohibition programmes in India, the U.S.A. and some other countries is quite clear. There is no good reason to expect that what law could not achieve in case of alcohol, it would be able to do regarding drugs.

Education regarding the dangers of drug abuse may prove quite useful as is evident from the American experience with regard to cigarette smoking. The education and publicity programmes against tobacco consumption were given great impetus in the 1960s and it is estimated that as a result two to three million Americans stopped smoking. There are a few vital points not to be ignored if education is to play its assigned role effectively. Undue publicity about drugs, both in their negative and positive aspects, must be shunned. The Task Force of the Presidential Commission of the U.S.A. reported:

> "...the problem of trouble over frequency of drug use remains a critical one and until the facts are at hand any extreme programs—either for the use of the drug or for the punishment of use—would appear precipitous. Indeed, the present state of publicity, whether crying alarm or claiming untold delights, is likely to be highly undesirable in itself, creating interest in the use of potent substances among a number of young people or disturbed personalities who are clearly ill-equipped to handle an intense drug experience. Similarly, this same publicity creates fear in the public and generates pressures on legislators to pass premature punitive legislation. We agree with the present plans of the National Institutes of Health... to conduct epidemiological research on expanding

American drug use and to finance further research on the hallucinogens...."

The information to be provided about drugs must be objective, otherwise the whole exercise may be counter-productive. Credibility of the educators must be maintained in any event. Lastly, the message should be more effective if formulated within the value system of the sub-cultural group to which the subject belongs.

Drugs and Legal Sanctions

The legal bans on drugs, as on alcohol, have either been futile, or, while solving one problem, have given rise to some other, often greater, problems. Legal bans have sometimes been imposed in some countries on the cultivation of drug-producing plants and sometimes on the possession, distribution and consumption of drugs. Laws relating to drugs generally prove failures and are generally criticised due to various reasons.

The laws sometimes are not based on scientific grounds; the true nature and relative potential danger of different intoxicating substances is not taken into account in the legislative policy. Such is, for instance, the policy in the U.S.A. in the context of marijuana, alcohol and other drugs, including narcotics. Equally severe penalties are prescribed regarding relatively innocuous marijuana and other drugs, potentially far more dangerous. Then, while legal sanctions are applied regarding drugs, use of alcohol, which is even more questionable, not only does not attract any penalties but is acceptable, even socially useful and desirable. It has been pointed out that the social cost of alcoholism in the U.S.A. is much higher than caused by the abuse of narcotics and other drugs.[14]

The illogicality behind this policy is attributed to the fact that alcoholism is a very well-entrenched part of the western culture while the phenomenon of drug consumption is of recent origin. It is also believed by many that legislators and administrators reflect their middle class bias against drugs like marijuana which are more frequently used by the people of the lower strata.

The ban on a drug like marijuana causes avoidable criminal stigmatisation of a large number of persons creating problems for the individual concerned and for the system of criminal law itself. The only established connection between certain drugs and criminality is that their consumption has been declared criminal. The argument that drug abuse damages the social fabric may be valid but the criminalisation of drug abuse through Draconian and repressive punishments is in itself a bigger damaging factor. To quote Prof. J. Kaplan, "it is most unhealthy for a society to turn a large percentage

14. The number of alcoholics in the U.S.A. is sometimes estimated to be around 20 million, the more conservative estimates put the number at 5 to 6 million.

of its young people into felons or even define as such."[15] As pointed out by Professor Kaplan, the unnecessary criminalisation of thousands of persons is not the only undesirable consequence of misplaced legal controls but the financial cost involved the administration and enforcement of such laws in must also not be ignored.

Many a drug user stands a good chance of reverting back to normal life after giving up drugs, but once a person gets stamped as a criminal such a return to normalcy becomes more difficult and unlikely. Worse, the convicted person, quite often very young, develops a sense of injustice committed against him and, therefore, it may generate hostility towards the legal system on his part. The hostility may contribute to the further alienation of the individual from the society and its institutions.

Branding drug users as criminals leads to the emergence of a deviant sub-culture. This is because it becomes imperative for the deviant to act in groups and a sense of comradeship is developed against the common odds faced by them. The criminality in due course may extend to many other acts besides drug consumption.

Whatever the quality of laws and their effect on the drug consumers, there is, in any case, the formidable problem of law enforcement. Drug legislation belongs to that category of laws which are primarily created to protect those who are believed to be acting against their own interests. In other words, there is no victim of the law violations other than the drug consumer himself unless the drug consumption results in some crime, e.g., negligent driving. Obviously, the detection of the violations is very unlikely in most of the violations of drug laws. The failure of the law enforcement agencies results in illicit trade boom and racketeering, giving rise to many other vices and crimes; corruption of public officials being among the worst of all the consequences.

The current situation regarding cocaine in the U.S.A. provides a good illustration of what happens to law enforcement when a drug is not only widely used but also becomes a status symbol. Cocaine, an expensive and highly dangerous drug, was considered to be a sign of decadence in the American society until the recent past and its use was confined to 'high-gloss entrepreneurs, Hollywood types and high rollers'. According to a report of a leading newsmagazine[16] the drug is the current craze[17] in the middle and upper classes of the American society; a fact which is corroborated by the following figures.

15. "*What Legislators Should Consider*" in (*Drugs and Youth*) edited by Wittenborn *et al* p. 254.
16. Time, July 6, 1981.
17. The situation appears to be pretty bad even if due allowance is given for journalistic and popular reporting.

According to the most conservative estimates, 10 million Americans use coke (cocaine) with regularity and another 5 million have probably experimented with it. (Other estimates double that figure.) According to surveys by the National Institute on Drug Abuse, about 20 per cent of young adults (18 to 25 years old) used cocaine in 1979, twice the number reported in the same agency's survey of 1977. A team of Harvard Medical School researchers has traced an "astonishing" increase in cocaine use by college students. The description of the variety of situations in which cocaine is used almost as a currency for making payment is almost hilarious" being "... readily accepted for dental work, as an accountant's fee or in exchange for a discount on a new car." Someone is reported to have paid alimony to his wife in cocaine.

The worse feature of the trend is that the drug is reaching a substantial number of children according to the information supplied by a preparatory school counsellor and a juvenile court judge. "To the kids here, cocaine means as much in terms of social approval as a car did when we were kids," commented the counsellor. An ironical note is struck in the report in the following words:

> "The confusion in law enforcement is compounded by the fact that many coke deals are arranged by lawyers, and lawyers and judges are prominent in the social circles that use the drug."

The unbearable burden on the criminal justice system in certain areas like South Florida is so much that there are more offenders than the system can handle. Corruption in the system and the farcical nature of law enforcement is described by a police officer thus:

> "Some officers are coming to the point of being totally frustrated with the court system.... Even for large amounts of cocaine, we are seeing a revolving-door kind of system where there's no fine, no sentence, no slap on the wrist....The corruptibility factor is there. The money is there to be made...."

Drug Legislation in India

A number of legislative pieces enacted by the Central and the provincial governments have been in operation for over a century, the more important being the Opium Act, 1878 and the Dangerous Drugs Act, 1930. Besides tackling the problem of loss of public revenue, the aim of the Opium Act was also to protect the health of the public at large. The drug abuse was dealt with essentially as a medical problem. Legal controls under the Opium Act were somewhat limited and mainly directed to the trafficking in drugs. The Act of 1875 did not provide any distinct and separate procedure for the investigation and trial of the offences created by it. The offences were to be investigated, inquired into and tried under the provisions of the Criminal

Procedure Code. The maximum punishment provided under the Act was only one year, enhanced to 3 years by an amending Act in 1957.

The Dangerous Drugs Act of 1930 was enacted primarily to deal with the drug problem in the international setting and covered drugs other than opium like cocaine and morphine. The need for the enactment was felt in view of the Geneva Dangerous Drugs Convention of 1925. The Act furnished substantial powers to the Central Government regarding the production, supply and control of dangerous drugs in the country. In view of the prohibition policy accepted at the national level after Independence, greater restrictions were placed on the consumption of cannabis, particularly *ganja* and opium in many parts of the country. In many States the sale of *ganja* and opium, in particular the oral use of the latter, was banned. In some States and territories *ganja* and opium could be given only to addicts on medical prescriptions.

The Narcotic Drugs and Psychotropic Substances Act, 1985

The problem of drug trafficking has posed a greater national challenge in the '80s, particularly in the later half of the decade. Some economic, political and logistical determinants made Bombay an important focal point in the international trafficking of narcotics and intoxicants such as heorin and hashish. The Indo-Pakistan border in Punjab also became a more potent entry point of the drugs; the twin problems of drug trafficking and terrorism thriving to a great extent upon each other. Under the circumstances the need was felt for a more comprehensive all-India legislation. Consequently, the Narcotic Drugs and Psychotropic Substances Act was enacted in 1985 and the earlier laws dealing with the problem were repealed. The following are some of the highlights of the Act:

1. Stringent punishments, generally not less than 10 years' imprisonment and maximum of 20 years, have been provided.[18]
2. Attempts to commit offences under the Act have been made punishable with the same quantum as provided for the actual offences.[19] Preparation to commit any offence is punishable with half the punishment provided for the actual commission of offence.[20]
3. Enhanced punishments have been laid down for certain offences committed after a previous conviction. Imprisonment from 15 to 30 years and fine from $1\frac{1}{2}$ to 3 lakh rupees is possible in such situations.[21]

   By an amendment made in 1989, even death penalty is possible in certain extreme situations.[22]

18. Sections 15 to 25.
19. Section 28, this being a departure from ordinary principles of criminal law which provide lesser punishment for an attempt.
20. Section 30, this again being a departure from ordinary criminal laws which do not punish mere preparations.
21. Section 31-A.
22. Section 31.

4. No release is possible on probation under the Criminal Procedure Code or the Probation of Offenders' Act.[23]
5. There is a presumption that the alleged offender possessed the mental condition (e.g., intention, knowledge, etc.) required for committing the particular offence.[24]
6. Companies also have been brought within the purview of the Act and made liable for the offences.[25]
7. Liberal powers have been granted to the enforcement agencies regarding search, seizure and arrest.[26]

Decline in Drug Trafficking

According to the reports of the various agencies connected with the problem of drug trafficking, including the Narcotic Control Bureau, a decline had set in the availability of hard drugs in the country during the year 1989.[27] The Interpol was also reported to have discerned a decline in drug trafficking. The phenomenon was attributed to various factors including greater public awareness as a result of education and publicity against the drugs, stringent supervision of the cultivation of licensed opium and the creation of narcotic cells in all the State police departments. The Act of 1985 strengthened by the amendment of 1989 was also credited with a considerable role in improving the situation. Increased surveillance on the borders was also reported to have paid dividends. Somewhat continued better enforcement performance may also be inferred from the figures of quantity-wise seizures of Narcotic Drugs from the year 1989 onwards, though the pattern was not consistent all through the period.[28]

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23. Section 33.
24. Section 35.
25. Section 38.
26. Sections 42, 43, 44, 45 and 49.
27. Times of India, December 30, 1989.
28. *See* Table 20 containing the figures for the period up to 1993.

Chapter XVI

VIOLENCE

The universal phenomena of escalating violence is perhaps among the greatest concerns of humanity in the contemporary world. Lately, India too has been experiencing violence of an unprecedented quality and magnitude and, therefore, a study of certain specific problems of individual and collective violence with reference to the peculiarity of the Indian conditions is highly desirable.[1]

Violence : Nature and Kinds

The commonly understood meaning of violence is in physical terms, any deliberate human activity which endangers, injures or destroys human body, property or resources. In a broader sense, creation of obstruction in public life also amounts to violence. Thus, a strike or even a call for strike by doctors and nurses in a hospital leading to casualties or an apprehension of such an eventuality may be regarded as an act of violence. When a large number of persons are involved in deliberate and premeditated violence, it amounts to 'collective violence', if spontaneous and impulsive, it is more appropriate to regard it as 'mob violence'.

Collective violence may be either expressive or instrumental. Expressive violence is the kind in which people indulge in a state of effervescence under some real or perceived grievance or provocation and leads to catharsis or outlet of emotions. Instrumental collective violence, on the other hand, is used with some ulterior motive like ousting a particular communal group from some locality or township or to eliminate rival traders or businessmen from another community. The two varieties cannot, however, be divided into watertight compartments. Communal, sectarian and caste-based riots may reflect both the kinds of collective violence depending upon the specific situation. It is not that all the persons in a group or section of the population facing collective grievance or frustration actually participate in violence or even approve of it. What usually happens is that a sub-group may identify the source of discontent and opt for violence believing that it would deliver the goals. In collective groups of industrial workers, students, cultivators, government employees, etc., only a sub-group is responsible for the promotion and management of violent activities such as arson, loot and killings.

Broadly speaking, collective violence may be viewed from two perspectives : as an undesirable propensity to be curbed and conquered in the interest of an organised and stable society or as an indispensable instrument of

1. There has also been a general spurt in ordinary crimes of violence like murder, sexual offences and property destruction but they are obviously not contemplated here.

change for the betterment of society. According to the first perspective, as expounded by Thomas Hobbes, there are no collective values and norms and everyone is at war with others in, 'state of nature'. Society, through evolution is, therefore, a 'conquest of violence'.[2] The other view, glorifying and justifying violence, regards violence as a means of redemption of the fallen and, therefore, signifies human creativity. Following the viewpoint of Georges Sarel and Sartre, the 'New Left' gets inspiration also from the famous dictum of Mao Ze-dong that power grows out of the barrel of a gun. In the words of Sartre, it is only through "irrepressible violence" and "mad fury" that the "wretched of the earth can become men". Sartre's concept of 'human creativity' is in the tradition of Hegelian and Marxian thinking though the two are based on somewhat different premises. For Hegel, the human creativity is through 'thought' while according to Marx, it is achieved through 'labour'. Violence, according to Marx, was not the *cause* of revolution but preceded it. Certain theories propounded by Marxists and others have, however, been found handy by those seeking revolutions via violence. The power, in their view, is intimately and inevitably connected with violence. Marx regarded the State as an instrument of oppression with the ruling class and in Engel's view "all politics is struggle for power, the ultimate power is violence". Evidently, power here is being equated with command and obedience which may be true only in situations where power is in the process of being lost by the rulers.

Those who abhor the use of violence credit Mahatma Gandhi's non-violent resistance with remarkable success in the struggle against the British Raj. However, doubts have also been expressed about the universal success potential of the Gandhian techniques. It has been observed, for instance, that the success might not have been achieved through the non-violent methods if Indians were facing Stalin's Russia, Hitler's Germany or even pre-war Japan. The experiences in Algeria and Vietnam led many to reject the philosophy of non-violence and opt for violence to achieve their targets.[3]

Contributory Factors

The factors responsible for collective violence may be categorised into four convenient, though not mutually exclusive, varieties, i.e., emanating from economic, political, social and psychological sources.

1. Economic Factors

The economic factors are present inevitably, directly or indirectly, in almost all kinds of stresses and strains in our national life. Certain issues may appear to be religious, regional or caste-based but the economic factors

2. Quoted in *Revolutionary Changes* (University of London Press) 1968, p. 9.
3. Hannah Arendt, *On Violence*, p. 53.

and motivations may be operating in a subtle fashion.[4] In other words, behind the superficially visible 'micro' factors, there lurked deeper and real causes, the 'macro' factors having roots in the developmental process of an economically backward society[5]. The Marxist view of communal violence as explained by Asghar Ali Engineer has been summed up thus:[6]

> "Riots are an inevitable concomitant of the development process currently in progress in the country, and it is the underdeveloped nature of Indian capitalism that facilitates the bourgeoisie to divert a class struggle into a caste/communal conflict, and thus weaken the solidarity of the proletariat."

Behind the violence sometimes unleashed on the lower-caste communities in the villages, the main issue relates to land reforms. The expectations of the deprived classes have not been fulfilled either due to the resistance of the upper-caste groups or the failure on the part of the Government to implement the laws. Similarly, unemployment, one of the most pressing national problems, is both the cause and effect of economic factors. The violence that erupted in the aftermath of acceptance of the Mandal Commission's Report on job reservations by the Government is an obvious example.

Economic changes, both slow and fast, are capable of generating violence in society. While slow economic development may lead to non-fulfilment of expectations, too fast a pace, on the other hand, may result in social dislocation and alienation. In a relatively stable society, the problems being of a routine nature can be anticipated and dealt with unlike in a fast-moving economic situation where one of the fallouts may be manifested in the form of violence.

2. Political Factors

Material goods are important for a society or an individual but the desire to wield power is even more fundamental. Political factors signify the struggle for power. The overthrow of governments through coups and rebellions are the sources of political violence. In India, political violence, pure and simple, has not generally manifested itself except as a result of frequently-held local and national *bandhs* motivated by limited and narrow political ends. The usual pattern is of politicisation of any kind of conflict, be it between tribals and non-tribals, Hindus and Muslims or higher-caste and lower-caste groups.

4. For economic motivations in communal riots, see Economic Motivations in this Chapter *infra*.
5. *Collective Violence—Genesis and Response*, Indian Institute of Public Administration (1988), p. 100.
6. *Id.*, p. 101.

3. Social Factors

Social change, though inevitable and necessary if in the right direction, has its undesirable side-effects as well. The process of modernisation is characterised by the creation of a mass society in which social bonds are loosened, giving rise to inconsistency between the normative and existing order. All this leads to widespread dissatisfaction which along with a number of other factors may be a potent source of violence.

4. Psychological Factors

The most commonly held explanation of violence in psychological terms is based on what is termed as the 'frustration-aggression theory'. According to this view, there is a perceived discrepancy between 'value expectation' and 'value capability' of an individual or group. 'Value expectation' means the perception of a person regarding his legitimate entitlements while 'value capability' represents the goods and conditions obtainable through social means. The discontent or frustration is because of the gap between 'ought' and 'is' may in certain situations lead to group violence.

In developing countries the increase in the average level of value expectations, often induced by politicians on the basis of unrealistic premises, is not in consonance with value capability. Exposure to modernisation and consumption imitation escalates the expectations regarding welfare, economic goods, personal development, status and the real or imagined pleasures of urban social life. A typical example is provided by a write-up regarding the semi-educated school drop-outs from the rural areas:[7]

> "...rural India today has about 120 million youths, aged between 15 and 24 years.... Most of them despise the life and values of their parents, and dream of a good life in the cities. A vision of cars, videos, wealth, grand homes, flashy females, violence and racuous laughter. They want to escape rural drudgery for a cushy city job... not as mechanics or for a contractor, but a respectable job in a factory or office or in the Government with regular hours and little work...."

Even if the situation, as described above, is taken as a kind of aberration developed by rustic, semi-educated and immature rural youth, the gap between expectations and realities is fairly wide among people of all sections and strata of contemporary Indian society.

Violence in India

Violence of all kinds is escalating in the country but there are certain types of collective and personal violence which deserve top priority in focusing our attention. The three such areas of collective and personal violence relate to terrorism, Hindu-Muslim conflicts and women. While

7. India Today, September 30, 1990.

terrorism is a problem which India faces like many other countries, the other two being peculiar to our country, need special understanding.

Terrorism

Terrorism is one of the greatest menaces faced by the world today, very few countries being free from it.[8] Though there has been a mind-boggling spurt in terrorism during the last few decades, the phenomenon has always been there and has had a hoary past. Among the best remembered early terrorists were the followers of Hasan bin Sabah, known as 'Assassins', who operated about 900 years ago in North Africa. They may be regarded as the pioneers in the use of 'murder' as a political institution. Towards the end of the eighteenth century, terrorism as a means of acquiring political power manifested itself in the French Revolution. Algeria, Cyprus, Kenya, Ireland, Latin American and Middle East countries and India are among the worst victims in the contemporary period.

Problem of Definition

The general and broad meaning of 'terrorism' is well understood but it has not been possible to give it a satisfactory definition. The difficulties in conceptualisation must be apparent from the fact that the expert committee of the United Nations failed to reach a consensus owing to the difference in outlook between various nations. One important criticism against the definitions given in many countries is that they do not include 'State terrorism' which may be many times more than the terrorism practiced by non-government agencies. As aptly remarked, terrorism is largely a public sector enterprise.[9] Chiang Kai-Shek, Mao Ze-dong, Stalin, Hitler and, nearer home, Yahya Khan, are just a few names which readily come to one's mind in connection with State terrorism. It is reported that about 5 million landlords were killed in order to achieve land reforms in Mao's China. It was the issue of exclusion of State terrorism from the definition which made many Third World countries lukewarm towards the European Convention on Terrorism of 1977.

The definition in the British Act of 1976 is perhaps of wider amplitude than elsewhere since it could cover even State terrorism if the expression 'political ends' is interpreted to include State violence in certain situations.[10] It is, however, evident that the scales are tilted in favour of the State since only a thin line demarcates 'maintenance of law and order' and 'political ends'. The definition of 'terrorist act' in Section 3 of the Terrorists and

8. In a recent listing, 127 countries are reported to have at least one terrorist group within them. The list contains about all the countries from Afghanistan to Zambia and includes all the major industrial powers. In some of these countries, as many as 1000 organisations have claimed responsibility for the various terrorist activities since 1981.

9. For 'State terrorism', as reflected in police torture and brutalities, see Police Torture in Chapter X.

10. In the Act, terrorism means the use of violence for the purpose of putting the public or any section of the public in fear for political ends.

Disruptive Activities (Prevention) Act, 1985 is fairly comprehensive and, quite clearly, such acts must be ones to either overawe the Government or to strike terror in the public in order to create alienation or disharmony in society.[11] Such acts involve destruction of and injury to human life, property or services and the means used are bombs, inflammable substances, chemicals and lethal weapons.[12]

Nature and Working

Perhaps more illuminating than a formal definition would be to know the nature of terrorism and how it seeks to function. The basic aspects are that terrorism is lethal by nature and has political objectives. Any method capable of destabilising the society may be employed to meet the objectives. As a psychological warfare, terrorism has two important components : frightening the adversaries and publicising the cause and achievements. The causes of terrorism may be varied, social, political, racial or religious—but the essential and basic factor is the perception on the part of a group of persons or a segment of the populace that they have been wronged or dealt with unjustly. The following are some of the general stategies, tactics and objectives of terrorism:

1. Measures are undertaken to boost the morale among the members of the group. This includes furnishing due security and protection to the members and their families.
2. Publicity of the movement and its achievement is considered to be extremely useful. It also helps to sustain the morale.
3. An important aim is to seek disorientation and psychological isolation of the community.
4. Quite understandably, the elimination of the persons in power, enforcement agencies and public figures is regarded to be extremely useful. The target of violence may be individual ministers, government officials and, occasionally, opinion-makers like teachers and journalists.
5. One very important aim of terrorism is to make the law unworkable since nothing sustains the movement better than the collapse of legal machinery.

11. The somewhat clumsy and unwieldy definition of a 'terrorist act' reads as follows: "Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or is likely to cause, death of, or injury to, any person or persons or damage to, or destruction of property or disruptions, of any supplies or services essential to the life of the community, commits a terrorist act."

12. For the definition of 'disruptive activity' in Section 4 of the Act, see The Legal Response in this Chapter, *infra*.

6. Provoking the Government to come out with the increased use of force is regarded as a paying proposition by terrorists. The escalation of hostilities makes a political solution even more different, a situation which suits the terrorists. State terrorism also makes it more difficult to win back 'marginals' and 'concessionists'. This has been the precise experience in Punjab where quite a few gestures on the part of the Government and accords not only failed to make any dent among the terrorists but led to further deterioration of the situation. Excessive use of force by the State, therefore, virtually amounts to playing into the hands of terrorists.

Locations of Terrorism

As noted earlier, most of the countries have been hit by terrorism. The areas covered include both pluralistic and dictatorial set-ups and developing as well as developed nations. The phenomenon is, however, flourishing in developing countries mainly because of the fact that disparities of various kinds among different sections have been increasing rather than decreasing.

Terrorism may be an urban as well as a rural phenomenon. While Peru, Colombia, El Salvador, Nicaragua, The Phillipines, Sri Lanka, Afghanistan and Sudan have witnessed rural terrorism, urban terrorism has hit the Middle-East, Pakistan, Ireland and West Germany. India has the dubious distinction of experiencing both the kinds. The rural population is psychologically more vulnerable and protecting it from terrorism is more difficult and expensive. In view of these advantages, the terrorists in some countries preferred rural operations but after the failure of Che Guevara in Bolivia, efforts were shifted to influence urban proletariat and intellectuals. The advantages available in urban areas are that centres of power are located in big cities and the publicity generated is of a higher magnitude. It has been observed, for instance, that the terrorism practiced by Mao Ze-dong from 1913 to 1948 in rural China was not well known in foreign countries. Urban terrorism proved highly successful in Uruguay (1972), Argentina (1976) and Turkey (1980).

The venue being located in one particular country does not of course mean that terrorists operating there are all indigenous or working on their own. Foreign powers, especially the neighbouring countries, frequently play a vital role. The well-known examples are the role played by North Vietnam in South Vietnam, the U.S.A. in Nicaragua and Afghanistan and Pakistan in Punjab and Kashmir. The State of Tamil Nadu and, to some extent the Government of India, have been accused of providing moral and logistic support to the Tamil insurgency in Sri Lanka up to 1984 which finally ended only in 1987 when an agreement was reached regarding the stationing of the Indian peace-keeping force in the Island.

Growth of Terrorism in India

Terrorism in India has a fairly long history which can easily be traced back to the early years of the present century.[13] Bengal took the lead when a violent movement was launched to protest against the partition of Bengal. The Ghadr party, with its base in North America, was launched by Lala Hardayal who sought to engage the Sikhs settled in British Columbia and the West Coast of the U.S.A. for revolutionary activities directed against the British Raj in India. Vir Savarkar, Bal Gangadhar Tilak and Aurobindo Ghosh derived inspiration from the scriptures and religious books which according to them justified violence in certain circumstances. A good number of terrorists, Chandra Shekhar Azad, Bhagat Singh, Sukhdev, Rajguru, Ashfaqullah Khan and Ram Prasad Bismil have come to be regarded as heroes and martyrs in independent India. The direct action call given by the Muslim League, just before the partition of the country, led to a kind of terrorism with far-reaching disastrous consequences in the sub-continent.

The country enjoyed political stability during the first two decades after Independence but the process suffered a set-back around the mid-sixties when the Congress party no longer remained invincible. Earlier, the crushing defeat by China in 1962 had discredited the Government of India which had an immediate and direct impact on the north-eastern part of India already used to insurgency activities for many years. An armed revolt in 1967 against the landlords in Naxalbari in north Bengal led by ultra-Leftists had a great impact in many other parts of the country, particularly in Bihar and Andhra Pradesh. Political morality and maturity have almost disappeared during the last two decades along with the worsening economic and law-and-order situation in the country, factors which also had a bearing on the growth of terrorism in the country.

Punjab and Kashmir

No timely efforts were made in the right earnest to deal with the trouble brewing in Punjab and later in Kashmir; instead political manipulations were resorted to for which the country has now to pay heavily in terms of political stability, human lives and national resources.

The basic causes of terrorism in Punjab and Kashmir are quite complex and somewhat different though one or two factors are common to the two situations. In both the States, terrorists are exploiting the surplus youth power, aided and abetted by the country across the border making good use of religious and separatist sentiments. Regarding Punjab, some of the *immediate* and peculiar causes leading to terrorism and its sustenance as identified by analysts are as follows:[14]

13. A few isolated incidents occurred earlier in the later part of the 19th century.

14. Relatively remoter causes are: strong sense of separate religious Sikh identity growing through the last 100 years ; grievance on the part of some that no homeland was granted to them like

1. A large number of Sikh migrants to the affluent countries of the West would not like to sever the umbilical cord completely from the mother country. The desire to have a foothold back home is based on economic, political and emotional determinants. As pointed out by an analyst, "a separate homeland where the effects can be safely transferred without being diluted in the general economy of the country had been their tacit ambition".
2. The growing restrictions on immigration by the traditional recipient countries, e.g., the U.K., U.S.A. and Canada, along with diminshing scope of gainful employment through the traditional avenues like army and agriculture has resulted in surplus frustrated youth power, ideal material to forment trouble in the State.[15]
3. The symbiotic relationship between terrorists and smugglers operating on either side of the border in Punjab is a contributory factor in the rise of terrorism. It is also true that people living on the border of the two Punjabs have close cultural and linguistic affinities; such affinity also works to the advantage of the terrorists.
4. Despite the separation of Punjab from Haryana, the Sikhs and Hindus continue to be evenly balanced in the communal composition of the population in the State; a fact which is disturbing to a section of the Sikh leadership. Immigrant labour from eastern U.P. and Bihar has also affected the population composition to some extent.

As regards Kashmir, despite its accession to India through responsible and acknowledged leadership, its relationship has hardly ever been normal with the Central Government and the rest of the country. As is well known that a sizeable section of the populace has not reconciled to the State's merger with India. While the Kashmiri Muslim's have made advance in education and State employment during the last three to four decades, there has been no corresponding increase in employment avenues beyond the State government due to non-emergence of any worthwhile industrial activity in the valley. Unlike Kashmiri Pandits, Muslims have failed to move beyond the valley and compete for their share in the national cake of jobs in the public and private sector. The general isolation of the Kashmiri Muslims from the national mainstream is greatly responsible for their psychological alienation. Exceptional corruption in the Government and rigging of elections have also generated a great deal of frustration and anger, especially among the impressionable youth, many of such young men are now deeply alienated and involved in terrorism.

Pakistan for Muslims, Hindu attitude towards Punjabi Suba and Punjabi language and traditional pride in the martial qualities attributed to the community.

15. One reason why no new industries are coming up in Punjab is the Government's reluctance in view of the State's proximity to Pakistan. The same reluctance is attributed vis-a-vis Jammu and Kashmir because of the Pakistan factor and political uncertainties.

The Legal Response

To meet the menace of terrorism a number of legislations were enacted in the country. Some of the important legislations are:[16]

1. The Terrorist Affected Areas (Special Courts) Act, 1984 and the amending Act of 1985.
2. The Terrorists & Disruptive Activities (Prevention) Act, 1985 and the amending Act of 1986.

The Terrorist Affected Areas (Special Courts) Act, 1984 was passed with the express object of expediting the trial of certain offences in terrorist-affected areas and to deal with related matters. An exhaustive list of the 'scheduled' offences has been provided in Section 12 of the Act which can be specially dealt with under the Act. The list has ten parts consisting mainly of offences punishable under the Penal Code (offences against State, relating to defence services, public tranquility, religion, property and criminal intimidation) and some special Acts like Explosives Act, Telegraph Act, Railways Act and Anti-Hijacking Act. An area can be notified by the Central Government to be a disturbed area if the Government is of the opinion that scheduled offences are being committed in the area. The Government may establish special courts in such disturbed areas.

The Terrorists and Disruptive Activities (Prevention) Act, 1985 was enacted to make special provisions for the prevention of and for coping with terrorism and disruptive activities. The application of the Act extends to Indian citizens and persons in the service of the Indian Government outside India. The amendment introduced in 1986 extended the application to Jammu and Kashmir. The word 'disruptive' has been explained in Section 4 as 'any action taken, whether by act or by speech or through any other media or in any other manner whatsoever,

(*i*) which questions, disrupts or intends to disrupt, whether directly or indirectly, the sovereignty and territorial integrity of India, or

(*ii*) which is intended to bring or supports any claim, whether directly or indirectly, for the cession of any part of India or secession of any part of India from the Union'.

In *Sukhdev Singh* v. *Union Territory, Chandigarh*,[17] the Punjab and Haryana High Court had the opportunity to interpret the words 'terrorist act' and 'disruptive activity' in the context of an article eulogising Bhindranwala and the role of men who occupied the Golden Temple by force, also hailing the act of assassinating Prime Minister Indira Gandhi. The appellants were held to be guilty of 'disruptive activity' and 'terrorist act'.

16. Some cognate legislations are: The Chandigarh Disturbed Areas Act, 1983, The Prevention of Damage to Public Property Act, 1984, The National Security Act, 1980, the Anti-Hijacking Act, 1982 and The National Coastal Guards Act, 1986.

17. 1986 Cri LJ 1757.

The State Governments were authorised to set up any number of 'Designated Courts' which would have the exclusive jurisdiction to try the offences under the Act.[18]

To meet the challenge of terrorism, some of the provisions in the above-mentioned Acts were given extra teeth and, in the process, some deviations from the ordinary principles of criminal jurisprudence became inevitable. Some of these departures were as follows:

1. The fundamental principle of administration of criminal law is that a trial must be in an open court to which the public may have access. Section 6 of the Terrorist-Affected Areas Act and Section 8 of the Terrorist and Disruptive Activities (Prevention) Act make it possible for the courts to conduct proceedings at any place other than the normal venue if it is expedient to do so or is desirable for the protection of the accused or witnesses in the proceedings. This would enable the court to hold the trial even in a jail. In order to protect witnesses, Section 12 of the Act of 1984 permits proceedings *in camera* and measures can be taken to ensure that the identity and addresses of the witness or witnesses are kept confidential.
2. Section 10(2) of the Act of 1984 enables the court to try any scheduled offence, punishable with a term not exceeding 3 years, in a summary manner in disregard of the ordinary provisions of the Code of Criminal Procedure.
3. Section 14 of the Act of 1984 permits a *direct* appeal, both on facts and law, to the Supreme Court from any judgment, sentence or order of the special court. On the one hand, this deprives both the convicted person and the State of the usual right to multiple appeals, it also ensures on the other hand, the right of appeal to the highest court of the country.
4. Section 167(2) of the Code of Criminal Procedure provides for remands not exceeding 15 days at a time, the total period not exceeding 90 days in cases of offences punishable with death or life imprisonment and 60 days in other offences. Under the Act of 1984 greater latitude has been given to the police regarding the duration of investigation and under Section 15(2)(*b*), the period of single remand may be up to 30 days and the total permissible period is one year. Besides allowing a longer time for the police investigation, the provision also ensures that the right to automatic bail to the alleged terrorist does not accrue before one year. In any case, the law of bail has been made quite stringent and different under Sections 15(4), (5) and (6) of the Act.

18. Sections 7 and 9.

5. Relatively severe punishments have been sanctioned under the Terrorists and Disruptive Activities (Prevention) Act, 1985. Section 4 lays down a minimum of 3 years' imprisonment, which may extend to life imprisonment, for anyone indulging in disruptive activity. The penal liability has been widened to include even preparatory acts designed for disruptive activity; ordinarily preparation to commit an offence is not punishable. Under Section 6, violations in a notified area of the Arms Act, 1959 and the Explosives Acts of 1884 and 1908 invite greater penal action, punishment for a term which may extend to ten years or, if the intention was to aid any terrorist or disruptionist, with death or imprisonment of any term not less than 3 years.

6. Confession made to a police officer, not below the rank of a Superintendent of Police, could be used as evidence.

7. No anticipatory bail was possible regarding any offence under the Act. The right to bail was also not available except on the fulfilment of the almost impossible condition that if the bail application was opposed by the public prosecutor, the accused would have to satisfy the court that he neither committed nor was likely to commit any offence under the Act.

Almost all the provisions mentioned above and some others in the Act were challenged before the Supreme Court in *Kartar Singh* v. *State of Punjab*[19] which held all of them to be constitutional except one which made it possible to establish the identity of the accused on the basis of a photograph.

There was, however, very strong public opinion against the Draconian laws under the Act and their abuse by the police, in particular against the minority communities.[20] It was also a fact that hardly any convictions resulted under the Act in spite of harsh rules of procedure and evidence[21]. The Terrorists and Disruptive Activities (Prevention) Act of 1987 eventually lapsed in May 1995 since the Government did not give it a new lease of life. However, all those booked under the Act continue to face the extraordinary criminal law process even after the expiry of the Act.

Legal Enactments—Conclusions

Enactment of stringent laws to be administered with less liberal procedural safeguards is not enough to curb terrorism. For one thing, relatively harsh enactments are perceived as something against the rule of law, and

19. 1994 SCC (Cri) 899.

20. In Rajasthan, for instance, 228 people had been detained after the communal violence in 1991 ; out of these 96 were Sikhs, 119 Muslims and only 13 Hindus (Seminar, June 1995).

21. According to the National Human Rights Commission since the inception of TADA in 1985 till the end of June 1994, there have been 76, 036 arrests leading to only 843 convictions ; *ibid.*

this perception may further alienate an already estranged and embittered section of the population. Further, the real problem pertains to the actual enforcement of the laws through the police and administrative agencies, usually quite beleaguered and demoralised, qualitatively and quantitatively inadequate and having no public support and cooperation. A sizeable part of the police and other personnel may have not only sympathy with the terrorists but also links with them. Finally, because of their anxiety to uphold the 'rule of law', the judiciary may by a liberal interpretation take away the sting from the severity of law intended by the legislature. *Sukhdev Singh* v. *State of Punjab*[22] may serve as an illustration in which the constitutional validity and legality of the Criminal Procedure Code (Punjab Amendment) Act, 1983 was challenged. The main attack was aimed at Section 4 under which exclusive powers were given to the executive magistrates regarding the cognizance and disposal of specified offences and the remand powers exercisable under Section 167 of the Code of Criminal Procedure. On behalf of the State it was submitted that the legislation was enacted to meet a very abnormal situation created due to terrorist activities. The High Court upheld the contention of the petitioner holding Section 4 to be violative of Article 21 of the Constitution. This was decided because the separation of the judiciary and executive was necessary for the judiciary to act independently. It was also pointed out that the nature of the proceedings was such that they could be dealt with better by judicial rather than executive magistrates.

In view of the enforcement problems outlined above, it is not surprising that anti-terrorist laws have, by and large, failed to curb terrorist activities in Punjab, Kashmir and elsewhere. Terrorism is not just a law-and-order problem. Within the framework of law and order, the following points may, however, be emphasised:

1. To deal with terrorism, the police force has to be different in terms of equipment, orientation and training. Provision for necessary equipment and resources must be given a high priority.
2. An extremely vital factor is the availability of a highly-efficient intelligence machinery at the disposal of the Government.
3. Law enforcement cannot be much effective without the social support which is not usually forthcoming; sense of insecurity being the main inhibiting factor. All possible efforts have, therefore, to be made to minimise the sense of insecurity among the people.
4. Timely and appropriate action before terrorism gains monstrous dimensions in any area should go a long way in containing the problem. Dilly-dallying due to political motives or showing misplaced softness can play havoc as has been the experience in the past.

22. 1985 Cri LJ 1739 (Punjab and Haryana).

Violence beyond a certain limit, in the ultimate analysis, is the manifestation of an unjust society. Only the removal of injustice, real or perceived, social, economic or political, can pave the way for the elimination of violence and terrorism from society.

HINDU-MUSLIM VIOLENCE

Among all kinds of group violence, Hindu-Muslim violence stands out conspicuously as the most endemic, vicious and explosive compared to the other forms of occasional violence in the country. Group violence such as occurs in the context of caste conflicts, trade unions and student organisations differs from Hindu-Muslim violence in a number of ways, i.e., in terms of impact on the general population, the magnitude of the areas affected, intensity and duration, the potential for wide spread conflagration and the opportunities afforded to unscrupulous politicians and lumpen groups.

The Muslim presence in India has been for about 1300 years and despite the fundamental religious differences, prejudices, and real or perceived atrocities attributed to some of the Muslim rulers, the two communities have, by and large, lived peacefully with each other. The advent of the British rule saw the simultaneous emergence of two trends; the upsurge of Hindu ethos and revivalism and the separatist and isolationist political attitude of a section of the Muslim leadership. Sir Syed Ahmad Khan, though a great liberal educationist and social and religious reformer, did not consider it to be expedient for the educationally and economically backward Muslims to join the political movement launched by the Indian National Congress. Such a situation was obviously to the liking of the British rulers though their role in creating the situation is perhaps somewhat exaggerated. The next two to three decades were marked by the growing chasm between the two communities leading to the spread of much communal venom and hatred in the national life. Though the first communal riot, for which authentic records are available occurred in 1730 in Ahmedabad,[23] the regular phenomenon of Hindu-Muslim riots commenced in the third decade of the present century. This was after an ephemeral and unprecedented national unity, forged through the efforts of Mahatma Gandhi and the Muslim leadership of the Khilafat movement, came to an abrupt end. Communal politics had earlier been strengthened under the constitutional schemes of 1909 and 1919 as a result of the efforts of the Muslim League made shortly after its inception in the year 1906. Subsequently, Hindu communal organisations, the Hindu Mahasabha and Rashtrya Swayam Sevak Sangh came into being to challenge the national role of the Congress party and advocate Hindu nationalism. One factor responsible for the riots in the twenties was the launching of *shuddhi* and *sangathan* movements by Hindu organisations countered by the *tabligh* movement of Muslims. The escalating violence witnessed in the decades

23. A.R. Syed in *Collective Violence*, *op. cit.* p. 98.

before Independence culminated in the Partition riots. The holocaust, particularly in Bengal, Bihar and Punjab, resulted in unprecedented killings, arson, loot, rape and perhaps the greatest movement of populations to and from both the sides of the border. The communal frenzy was eventually controlled by the incredible humane and secular leadership provided by Mahatma Gandhi and Jawahar Lal Nehru.

The communal forces appeared to have received a serious set-back in the wake of Mahatma Gandhi's assassination and relative peace, interrupted by occasional disturbances, prevailed during the Nehru years. From the late sixties onwards, the communal situation continuously worsened along with the deteriorating political situation and a high pitch was attained in the seventies and eighties. No riots have, however, been as diabolical and outrageous as those which occurred in various parts of the country subsequent to the devolution of the Babri Masjid in 1992-1993 ostensibly because of the Ram Janam Bhoomi-Babri Masjid dispute though regarded as a non-issue by a large number of persons. Over the years, there has been a qualitative change in the nature and genesis of communal riots. The problem is much more complex than what it was in the past when *immediate* causes like music before a mosque or a cow slaughter could explain many a riot. The Hindu-Muslim riots have never been religious in nature but even an iota of religious conflict is not involved in the post-independence riots[24] though the gullible masses may be made to perceive so.

Complex Nature

The perpetual problem of Hindu-Muslim violence is of a fairly complex nature. Communal riots occur as a result of the interplay of a number of factors in a given situation. Any vested interest, along with some other favourable factor, is good enough to generate communal strife. A number of factors are to be probed to understand the nature of the vested interests and other supporting causes.

Social and Socio-Psychological Factors

It must not be inferred that Hindu-Muslim relationship has always been marked by mutual hostility at all levels. Generally, the co-existence has not only been peaceful but has been marked by cooperation and cordiality as well. The Bhakti movement and Sufism contributed greatly in softening the rigid religious attitudes on both the sides, efforts towards working out a kind of religious synthesis were also made. Significant results of such assimilation and synthesis were achieved in the fields of music, language, literature, dress and food to represent what has been termed as the Indo-Persian culture. While this cultural synthesis had an impact on the elite, particularly in the

24. Even in an ostensibly religious Ram Janam Bhoomi-Babri Masjid dispute, the BJP leaders have themselves admitted its political nature.

northern part of the country, common cultures continued to govern the life of the general masses in various regions. However, despite all this, a genuine social cohesion could not be achieved due to the rigid caste-based, exclusive Hindu society and the aggressive monolithism displayed by some of the Islamic zealots. This resulted in not only a psychological gap but also physical barriers between the people. Most of the Hindus and Muslims have always lived in separate and exclusive localities. In spite of rapid urbanisation and the resulting mobilisation, even now it is considered to be somewhat risky, even incongruous for a Muslim to live in the 'Hindu *mohallas*' and vice-versa. Such a situation not only prevents interaction and understanding between the people but is also highly conducive to the generation and sustenance of mistrust, suspicion, fear and all kinds of prejudices and stereotypes. There are denominational institutions, community clubs and even *akharas* and gymnasiums which, besides separating the two communities, play no insignificant role in promoting communal aversion.

Historical factors, real or perceived, have been responsible to a great extent for creating the wounded Hindu psyche leading to well-entrenched bitter feelings towards Muslims. The average Hindu, at least in the northern belt, has not been able to forget the Arab conquest of Sindh by Mohammad Bin Qasim, the invasions and vandalism of Mahmood of Ghazni and the autocratic rule of Aurangzeb. It is also not possible for the average Hindu to forget the alleged persecution and forced conversion of their forefathers, destruction of temples and in some instances their replacement by mosques on the sight of destruction. The biggest blow was inflicted in the form of the Partition for which the responsibility is generally assigned exclusively to the Muslims and their leaders; the continued animosity and the hostilities between India and Pakistan only aggravating the communal sentiments. Muslims, on the other hand, perceive systematic discrimination in government and private employment and are inclined to think that they are treated as second-class citizens, potential traitors and fifth columnists. It is a fairly common belief among Muslims that the majority community is determined to destroy their religious and cultural identity.

Element of "Fear"

The efficacy and significance of the 'fear' factor in generating and sustaining communal hatred and violence is quite understandable with the 'favourable' factors as outlined above, providing the infrastructure. M.J. Akbar, the noted journalist and a former Member of Parliament observes:[25]

> "The communalists had only one really good weapon: fear. Fear was the bow, and whisper was the arrow. They told the Muslims that the Hindus would destroy their mosques, the laws, their way of life, by

25. M.J. Akbar, *Riot After Riot*.

the sheer weight of numbers and the help of a partial administration. They told the Hindus that Muslims were foreigners who would always kill and oppress, whose loyalty to this land would ever be doubtful."

As can be readily imagined, rumours serve as the ignition point in most of the communal riots. On the basis of his professional experience, a retired senior police officer has expressed his conviction that no communal riot can ever taken place without a build-up through rumours.[26] Stock rumours like the alleged rape of a Hindu woman by a Muslim or the desecration of a mosque by Hindus are sure to produce the desired consequences. The potential force of rumour mongering can be illustrated by the carnage occurring in the Purnia district of Bihar in 1979. The riots were set in motion by the rumours that some Hindu girls had been raped by certain Muslim youths. In the riots which followed the false rumour, houses were plundered, women were raped publically and a number of persons were killed.

While dealing with some subtler aspects of communalism, Asghar Ali Engineer points out certain general convictions on the part of Hindus regarding Muslim attitudes and their own self-perceptions.[27] One such assumption is that the Hindus are, by the very nature of their faith, tolerant and assimilative of other faiths whereas the Muslims are dogmatic at best and fanatic at worst.[28] Engineer maintains that a community behaves in a violent or non-violent manner not on the basis of religious dictates but behaviour is determined by a given situation. There is no empirical evidence to indicate that Hindus have through the ages acted less violently than the followers of other religions.[29] It is also believed by many that Muslims resist change and modernisation, the issue of reform of Muslim personal law being a glaring example. Engineer denies it and looks at the problem in socio-economic terms and the exploitation of such issues by motivated elements on both the sides of the communal divide.

There are some other stereotype images quite frequently employed to cause alarm in the Hindu mind. One such ploy is the vehement propaganda regarding Muslim opposition to family planning; the insinuation being that the rise of the Muslim population at an alarming rate may eventually lead

26. S.K. Ghosh, *Communal Riots in India*, p. 97.

27. *Communalism in India*, Ed., Asghar Ali Engineer, p. 58.

28. Even Mahatma Gandhi could not completely free himself from the stereotype image when in the context of communal riots he observed that Muslims tended to be bullies and Hindu cowards. Such an assessment, even if valid to some extent before the Partition, is no longer correct.

29. For a detailed study see the monograph by R.S. Sharma, *Communal History and Rama's Ayodhya* (People's Publishing House, 1990). According to Prof. Sharma, instances can be multiplied to show that when it involved power and pelf, members of both the Hindu and Muslim ruling classes proved to be equally ferocious. Pushyamitra Shunga, of a Brahamana dynasty in the second century B.C., is credited with great persecution of Buddhists, destruction of stupas and monasteries and killing of monks. Shashanka, a Shaivite ruler of Gauda in Bengal, cut the Bodhi peepul tree under which *Buddha* is said to have attained enlightenment.

to the Muslim take-over of the country! This ignores the basic principle that the acceptance level of family planning is directly related to the socio-economic level of a community. Even the issue of permissible polygamy in Islam, extremely rare in India and having no direct nexus with population increase, is often raised in this context.

There is no doubt, however, that some of the criticisms levied against the Muslim attitude are fairly valid. The Muslim community has, by and large, failed to respond to the demands of a liberal society based on secular ideals even while claiming all the fundamental rights and privileges under the Constitution. The critics may not be much off the mark when they find separatism and obscurantism inherent in the religion and culture of Islam as understood and practised by the majority of Muslims in India. This has certainly been a handicap in the movement towards a more progressive and homogeneous society and also responsible to some extent for the Hindu backlash being experienced at present.

Communalism and Historiography

The communal animosity based on stereotype images and historical factors has, to some extent, been shaped among the educated classes by the distortion and wrong interpretation of Indian history by motivated and prejudiced writers.[30] The real issues regarding the true nature of the so-called Hindu-Muslim conflict or the motivations of the rulers are either not properly understood or ignored due to ulterior motives.[31] For instance, the power struggle between Akbar and Maharana Pratap or, for that matter, even the Aurangzeb-Shivaji conflict have been wrongly portrayed as reflecting Hindu-Muslim conflicts. Similarly, it is absolutely wrong to explain or justify the loot and plunder of Mahmood of Ghazni on the basis of Islamic motivations. The point to be understood is that such actions are to be understood in the context of the particular age; twentieth century standards are not to be applied in relation to some barbaric acts peculiar to the ancient and mediaeval ages.[32]

30. *Tipu Sultan of Mysore* provides a good example of biased and falsified historical accounts; such accounts are found handy to ferment communal violence in the contemporary period. In a book written by Dr H.P. Shastri, Head of the Department of Sanskrit, Calcutta University, it was mentioned that three thousand Brahmins had committed suicide when the Sultan sought to convert them forcibly into the Islamic fold. On being questioned regarding his source of information, Dr Shastri asserted that he got it from the Mysore Gazetteer. Further inquiries revealed that no such account was given in any Mysore Gazetteer.

31. Eminent historians like R.S. Sharma, Romila Thapar, Bipan Chandra and Harbans Mukhia have made highly-commendable contributions towards the elimination of falsification and distortions introduced in the various periods of Indian history. English historians, like H.M. Elliot, because of vested interest, played a notable role in spreading the communal venom.

32. Economic motivation becomes evident by the fact that in the mediaeval period, quite often temples were destroyed and plundered by the Hindu rulers themselves. Citing the example of Harsha, an eleventh century ruler of Kashmir, Prof. Sharma points out that Hindu rulers appointed special officers for destroying the idols made of precious metals and seizing wealth from the rich temples.

Certain investigations have revealed that the history and Hindi books prescribed in schools are often based on communal ideology. Many of the books for instance, prescribed in Classes VI, VII and VIII in the schools of U.P. and approved by the Government were found to be full of communal and sectarian bias and historical prejudices.[33] Cautioning against the consequences of biased history writing and the transmission of the communal virus by parents to their children, Madan, J. observed in the report on the communal riots of 1970 in Bhiwandi, Jalgaon and Mahad in Maharashtra:[34]

> "Communalism is a disease which warps the mind. Communalism is a way of thinking, the result of perversion of religion and the distortions of history. Those who have lived for decades with communalism as their creed are beyond redemption. The tragedy is that as they think, so do their children grow to think.... In order to root out this cancer from our country, it is necessary to reorient the thinking of our country and thus save them from communal brainwashing by their parents."

Political Interests

Hindu-Muslim conflicts are an important factor in the power game played by political parties. While some parties gain Muslim support consequent to communal riots, some other parties may get an opportunity to consolidate their position among Hindus. The additional benefit accruing sometimes to the party in power is the diversion of public attention for a while from the pressing economic issues. The Madan Commission inquiring into the Bhiwandi riots described the role of politicians thus:[35]

> "The architects and builders of communal tensions are... a certain class of politicians—those all-India and local leaders out to seize every opportunity to strengthen their political positions, enhance their prestige and enrich their public image by giving a communal colour to every incident and thereby projecting themselves in the public eye as champions of their religion and the rights of their community."

The political mileage derived from communal riots can be gauged by the fact that, though Muslims generally suffer more in communal riots, some communal riots are also engineered by Muslim politicians.[36]

Economic Motivations

Economic factors and motivations lurk behind a good number of communal riots. It is not just a coincidence that almost all the towns where

33. N.C. Saxena in the paper "Secularism and our Textbooks", cited in *Communalism in India*, *op. cit.*, p. 61.
34. *op. cit.*, p. 87.
35. S.K. Ghosh, *Violence in the Streets*, p. 69.
36. Riots in U.P. in Muzaffarnagar and Khatauli in 1987 were believed to be the result of rivalry between two Muslim politicians; the Gonda riots of October 1990 were also suspected of having served the interests of a Muslim politician.

Muslims have special economic stakes have been rocked by communal riots, recurrent trouble occurring in some of them. Traditionally, Muslims worked as artisans in various industries, e.g., leather in Agra, silk and zari in Varanasi, brassware in Moradabad, glasswork in Ferozabad, carpet making in Mirzapur; Hindus being generally the entrepreneurs and employers. The scenario is now changing and Muslim entrepreneurs are coming on their own offering competition to the traditional masters and employers. In the circumstances, eliminating an industrial or trading rival through an aggressive strategy is the most easy and obvious solution available to unscrupulous elements. The riots in the industrial town of Jamshedpur illustrate economic motivations in a unique setting. More than half the employees in TISCO are reported to be Muslims and a good number of Muslims have also entered the various trades in the town. Both Hindu and Muslim *goondas* have high stakes in the highly-lucrative business of illicit liquor and in the money-lending racket. In this setting, highly favourable to communal tensions, the city in 1979 witnessed one of the bloodiest communal riots in the country. The landlords, traders and other vested interests found communal riots a good camouflage for doing what they could not achieve through legitimate means.

While economic factors and motivations may contribute towards communal violence, such factors are not necessary or sufficient in themselves. Economic competition between non-Muslim groups, like the one between Sikhs and Hindus in Punjab and between Syrian Christians and Nairs, it has been pointed out, did not produce communal violence. In Godhra, Gujarat, on the other hand, the Sindhi Hindu settlers were in economic competition with the indigenous Hindu merchants and not with Muslims and yet communal riots took place between the Sindhis and Muslims. In Bombay, the ire of the Shiva Sena towards Muslims cannot be explained in terms of economic motivations; the initial fury contemplated towards South Indian business interests did not survive. Again a distinction has to be made regarding the situation where economic factors are not the cause of riots but in their wake, benefits accrue to the "victorious" violent group.

The significance of economic and political explanations notwithstanding, the more plausible explanations which can be given are in terms of a mal-integration of inter-community life due to socio-psychological factors. As put by a sociologist, an economic or a political issue is simply an exercise for the pleasurable regression into a world of fantasy where the drama of historical antagonisms finds pathological release.[37]

Legal Enactments

A large number of legal provisions, some general and some specifically meant to cover violent situations, are available to law-enforcement agencies

37. Ratna Naidu quoted in *Collective Violence: Genesis and Response*, *op. cit.*, p. 104.

in the country. Besides the Indian Penal Code and the Code of Criminal Procedure, which contain some basic substantive and procedural provisions, there are other relevant legislations such as the Police Act, 1861, National Security Act, 1980, the Arms Act, 1959 and the Explosives Act. These provisions, penal and preventive in nature, are designed to meet the challenge of actual or apprehended violence.

(*i*) *Preventive Legislation.*—The need for preventive mechanism need not be emphasised. Most of the riots, especially the Hindu-Muslim disturbances, are planned in advance and a vigilant administration does not fail to receive the signals before the actual eruption of the trouble. Rumours, movement of people to 'safer' areas and preparation and collection of combat materials provide the indications of forthcoming trouble. The most usual and effective legal support to the administration is through Section 144 of the Criminal Procedure Code which enables the administration to issue a wide variety of prohibitory orders such as a ban on assemblies and the imposition of curfew under more pressing circumstances. While Section 144 is highly useful in certain situations, the problem lies in its enforcement and the accompanying hardships in particularly to the poorer sections due to the imposition of curfew for long durations. Not infrequently, communal riots occur with some dispute regarding graveyards, mosques or temples providing the background and it becomes imperative to pass some administrative orders to prevent breach of peace pending the final settlement of the dispute. Section 145 of the Code of Criminal Procedure enables the administration to pass appropriate orders in relation to the dispute. Sections 129 and 151 are two other sections of the Criminal Code which can be invoked in preventing a riot. Under Section 129, an unlawful assembly can be commanded to be dispersed by an executive magistrate or station house officer of the police; Section 151 empowers a police officer to arrest without warrant any person designing to commit a cognizable offence. Section 3(1)(*a*)(*b*) of the National Security Act, 1980 permits the detention of any person without trial for preventing a variety of undesirable activities including those prejudicial to the maintenance of public order.

Considering the number and variety of processions, India may quite appropriately be called the land of processions. Processions of all conceivable kinds, mainly of political and religious nature, are organised day after day. In many a communal riot, processions are either the issue or the cause of conflicts, e.g., maybe regarding the route of a religious procession or playing of music by the processionists near a place of worship. The immediate cause of sectarian violence among Lucknow Muslims is related to the taking out of processions marked by the shouting of slogans considered to be offensive by the opposite group. The superficial or immediate cause in the communal riots of Hyderabad, Hazaribagh, Jamshedpur and Ranchi-Hatia related to

processions. If legitimate and peaceful, processions not only signify the exercise of the fundamental right of freedom of speech and expression and assembly but also serve as social, political and emotional outlets. It is, therefore, imperative to give ample powers to the police to regulate processions keeping in view issues of social and religious significance, public peace and traffic control. Such powers have been conferred under Sections 30 and 31 of the Police Act, 1861. The general guidelines for the police are as follows:

1. Subject to the considerations of public peace and traffic control, the public has a right to the use of public streets and thoroughfares for processions with music, notwithstanding the existence of any place of worship on such a street or thoroughfare.
2. The validity of any right or custom limiting the civil rights of others must be established in a civil court.
3. Persons may ordinarily expect that they shall, as far as possible, be not disturbed while engaged in congregational prayers or worship.

(*ii*) *Punitive Legislation.*—The provisions relevant to communal riots are to be found in Chapter VIII of the Penal Code which deals with offences against public tranquility. Sections 142-145, 150, 151, 157 and 158 deal with the liability of members of an unlawful assembly as defined in Section 141 of the Code. Five or more persons constitute an unlawful assembly if they share any one of the objects mentioned in the section. The objects relevant to communal riots are mischief, trespass and forcible posession of property and offences against the human body. The offence of rioting as defined in Section 146, is the use of force by an unlawful assembly and is punishable with up to 2 years' imprisonment and if the rioters are armed with deadly weapons with 3 years' imprisonment. Promoting enmity by words, signs or visible representations, between different religious groups is punishable under Section 153-A which was amended in 1972 to widen the liability by including the promotion of drills and physical training programmes for the purpose of the possible use of criminal force against other groups. Section 153-B, a new provision, also created by the 1972 amendment seeks to widen the scope of penal sanctions against acts prejudicial to communal amity and national integration. Under the provision, propaganda imputing that members of any particular community cannot be patriotic or asserting that members of any particular community should be denied or deprived of their rights as citizens of India, has been made punishable with 5 years' imprisonment. Sections 295 to 298 of the Code lay down the penal liability for offences relating to religion. The offences comprise acts of injury or defiling places of worship, outraging and wounding the religious feelings of any class and of trespass on any burial place.

The potential of rumours as a source of communal flare-ups has been acknowledged under Section 505 of the Penal Code by making circulation of rumours and false statements with the intent of disturbing public peace or generating communal ill-will punishable with 3 years' imprisonment.

An enactment, which can be very effectively utilised by the district administration in preventing communal riots is the Criminal and Election Laws (Amendment) Act of 1969. The Act amended certain provisions of the Penal Code, Criminal Code and Representation of the People's Act, 1951 and gives greater State control over the printing and publication of material likely to incite communal feelings.

The comprehensive provisions of criminal law dealing with the various aspects of communal violence, as noted above, have, however, not been of much consequence. It is common knowledge that there are almost no instances of convictions for murder, mayhem, rape or destruction and looting of property relating to communal riots. Relatively, preventive measures seem to be of much higher efficacy. The failure of the criminal law machinery is particularly noticeable in situations where violations consist of creating hatred, disaffection and ill feelings among various religious groups. The situation goes beyond the reach of law when the violators happen to be wielding considerable political clout or when the violations happen to be at the mass level.[38] Besides the usual handicaps inherent in the administration of criminal law, political expediency and constraints are the real obstacles.

Measures Required

Law can play only a limited role in the prevention and control of communal riots. Much more depends upon the various administrative, political and some other measures to deal with the malady.

1. Enhancement of Police Capacity

On the basis of the experience in many riot-hit areas, it is highly desirable to increase the police strength, especially in the towns and areas where the problem of communal hostility is of a chronic character and also to ensure the prompt use of the available force.

The quick escalation of communal riots in the sixties and later has been ascribed to the following reasons:[39]

(*i*) The strength available locally was so inadequate that in a number of cases all that the few constables could do was to rush to the police station to seek reinforcements.

38. Some of the inflammatory statements made by the top leadership of Shiv Sena and the slogans in connection with the Ram Janam Bhoomi-Babri Masjid issue illustrate the futility and irrelevance of criminal law machinery. The Shiv Sena supremo was reported to have said that, if made Prime Minister, he could solve the Ayodhya problem in a single day : by demolishing the Babri Mosque!

39. N.S. Saxena, *Law and Order in India*, p. 256.

(*ii*) The communications facilities even at big police stations were so poor that it sometimes took more than one hour for reinforcements to arrive from the police lines, the mob swelling to unimaginable limits in the meantime.

(*iii*) Non-availability of middle-level officers, at the crucial time on account of there being an inadequate number of them.

It is not infrequent that policemen get busy in the various arrangements to be made during the visits of V.I.Ps to the area which affords a good opportunity to the rioters to do their job. In the Meerut riots of 1973, almost all the magistrates and police officers were engaged in connection with the Governor's visit when the riot broke out in one of the poorly policed localities.

2. Operational Freedom

Operational freedom to the police and local administration, which is of utmost importance for the timely and effective control of a rioting situation, is unfortunately not available. Instead of taking decisions on their own, the magistrates and police officers quite often have to look to the State head-quarters for directions. This not only delays action but also affects the quality of decisions since no one can understand the prevailing problem better than the local administration. The operational freedom and initiative is also hampered by the political interference; directions are sometimes issued, for instance, to arrest or not to arrest some particular individuals.

3. Action Regarding Anti-Social Elements

Whatever may be the background of a communal riot, *goondas* and other anti-social elements are involved in it either right from the beginning as promoters and participants or they may join in later to strengthen and sustain the riots to enjoy the resultant benefits. In order to arrest such elements as soon as the first signs of trouble are manifested the detailed records of all the real and potential troublemakers must be readily available. A big problem is the administration's inhibitions in including in the records the names of persons having influential financial and political patrons. In any case, a pre-requisite in the identification of the troublemakers is an efficient intelligence system, proper evaluation of the intelligence furnished and proper follow-up action. Failure of the intelligence machinery has been identified as an important factor in the non-prevention of many a riot in the country.

4. Improving Local Administration

Posting of senior administrators and police officers in riot-prone districts is of considerable importance and due consideration must be given to experience and capability in assigning officers in communally-sensitive areas. In a majority of the reports of Commissions of Inquiry, administrative failure

has been cited among the chief factors in the riots. According to the Raghubir Dayal Commission's Report on the Ranchi-Hatia riots of 1967, in which 213 persons died, the handling of the situation by the district magistrate and superintendent of police was extremely poor. Similarly, in Baroda, rocked by successive communal riots during the period 1980-82, the commissioner of police, having no adequate field experience, proved to be an utter failure.

One vital issue concerns the fixation of responsibility within the district administration regarding law enforcement. Since much depends upon proper coordination and understanding between the district magistrate and the superintendent of police, the responsibility factor must be clearly and unequivocally spelled out to cover the varying situations.

5. Government and Politicians' Behaviour

The undue interference on the part of the Government and politicians in the local administration is too well known and its undesirability cannot be over-emphasised. Efforts should be made to develop an attitude which would lead to uniform and equal application of law towards all communities and to encourage the administration to crush the flare-ups with all the resources at their command. In the ultimate analysis, communal riots cannot occur or may at least be suppressed if the Government acts with firm determination. In 1970 the U.P. chief minister made an assurance that there would be no interference with the police functioning, no withdrawal of criminal cases, no preventive releases from jails, no premature releases from jails and no special treatment of political prisoners and the tough policy produced rich dividends—not a single communal riot occurred in the whole year in the State.[40]

VIOLENCE AGAINST DEPRESSED CLASSES

As is well known, a large section of the people in the country, the hapless victims of the *varna* system variously described as *atisudras*, *Harijans*, untouchables, *Dalits* and now as belonging to 'Scheduled Castes', have been compelled to lead the lives of slaves or, worse still, almost of animals. Only during the last 100 years or so, the national conscience has been aroused to some extent and efforts of varying degrees and kinds have been made to eliminate the barbaric thinking and practices which provided the basis for the uncivilised and exploitative phenomenon of perhaps the worst type ever experienced in any human society. The contributions of certain social, religious and political movements and of some individuals towards the reforms are too well known to be described here. The subsequent legislative efforts, commencing from 1938 onwards in Bombay and other parts of the

40. In the situation arising out of Ram Janam Bhoomi-Babri Masjid dispute, which has rightly been called the biggest communal challenge since Independence, the Government's tough handling in U.P., Bihar and elsewhere averted what could have been a flare-up of unprecedented magnitude.

country, were directed towards the removal of religious disabilities like entry to and worship in temples. The fundamental and the most significant change was, however, introduced by the coming into operation of the Constitution in 1950 which not only abolished 'untouchability' but also provided a large number of safeguards for the well-being of the depressed classes in terms of human dignity, freedom from exploitation and preferential treatment in employment opportunities[41]. Besides the 'untouchables' the other socially, culturally and economically vulnerable people are from the tribal areas, mostly found in the North-Eastern States, Bihar, Rajasthan, Madhya Pradesh, Orissa and certain parts of South India. Constitutional protections and educational and employment safeguards were also given to them on the same lines as the 'untouchables'.

The general constitutional provisions had to be backed by specific legislation to translate the constitutional idealism into practice which was done by enacting the Untouchability Offences Act, 1955, prior to which 21 States had their own social-disabilities' removal legislations but there was no central legislation on the subject. The Act was criticised as being ineffective due to lack of proper machinery of implementation and inadequacy of penal sanctions. The amended law, the Protection of Civil Rights Act (PCRA) came into force in 1976. The thrust of the legislation was on the removal of disabilities and the protection of the basic human dignity of the 'untouchables'; the legislation directly dealing with the problem of violence against them came much later through the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

Protection of Civil Rights Act

'Untouchability' has not been defined either in the Constitution or in the Act ; the 'Scheduled Castes' are, however, the ones designated as such by the operation of Article 341 of the Constitution[42]. Some of the acts made punishable by the Act are :

(*i*) Obstructing a person on the ground of untouchability from entering a place of worship or from using any source of water available to others for the purpose of drinking or bathing (Section 3).

(*ii*) Refusal or discrimination regarding admission to a hospital, dispensary or educational institution and selling goods or rendering services to anyone due to 'untouchability' (Section 5).

(*iii*) Insulting a person by referring to his caste or calling in derogatory terms (Section 7).

(*iv*) Forcing a person to do scavenging or sweeping, to remove a carcass or flay an animal and to cut the umbilical cord of a newly-born child (Section 7-A).

41. Articles 15, 16(4), 17, 23, 25(2)(*b*) are the notable provisions in the present context.

42. The relevant provisions for scheduled tribes is Article 342 of the Constitution.

Varying punishments of imprisonment up to 6 months and fine up to Rs 500 can be imposed for the offences mentioned above. Licences may be cancelled of the shops and service establishments violating the law. Land and money grants can be suspended or withdrawn in case of violations committed by the trustees of a place of worship. To give extra teeth to the penal machinery, the Act provides :

1. Where any act constituting an offence under the Act is committed in relation to a member of a scheduled caste, the court shall presume, unless the contrary is proved, that such act was committed on the ground of "untouchability".
2. Offences under the Act are cognizable and triable summarily except when the minimum sentence exceeds 3 months.
3. No benefit can be given to the offenders under the Probation of Offenders Act.
4. Enhanced punishments may extend to two years' imprisonment and a fine of Rs 1000 for repeated conviction under the Act.
5. Policemen showing negligence or indifference towards the enforcement of the law are to be treated as abettors of the alleged offence.

Despite the strong legislation, violent situations do arise in the context of the legitimate assertion of rights by 'untouchables' as is indicated by the somewhat representative case, *State of Karnataka* v. *Appa Balu Ingale*[43] in which the peculiar problems of evidence in proceedings are also fully manifested.

The appellant and four others were found guilty, both by the trial and district courts, of the offences punishable under Sections 4 and 7 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act for having restrained the complainant party by show of force, one of the appellants brandishing a gun, from taking water from a well on the ground that they were untouchables. The High Court re-evaluated the evidence accepted by the lower courts and acquitted the convicts disbelieving the evidence of the four witnesses, all of them Harijans. Regarding the insufficiency and quality of the evidence the High Court summed up the position :

> "Thus, not only the evidence of these witnesses regarding the actual manner in which the accused obstructed and what words they uttered is discrepant and not consistent, but what is not certain from the evidence is as to who among the accused persons obstructed and used those particular words attributed to the accused. It cannot expect (*sic*) that all the accused would use the words simultaneously in a chorus in the manner the witnesses stated before the court. Therefore, it cannot be said with any amount of certainty which among the accused was guilty of the offence."

43. 1995 Supp (4) SCC 469 : 1994 SCC (Cri) 1762.

On appeal to the Supreme Court, though the two judges disagreed with the High Court's approach to the evidence and upheld the appeal, the approaches of the two judges were different. While Kuldip Singh, J. gave a brief and direct judgment on the crucial question of evidence alone, K. Ramaswami, J. in his elaborate judgment dwelt upon the constitutional protection given to *Dalits* having regard to the well-known socio-historical facts. The judge made elaborate observations regarding the special role of the judge in the application of social legislation of the kind under the Act. "Annihilation of untouchability" being the mandate of the fraternity assured to *Dalits*, it was the duty of judges to liberate society from blind and ritualistic beliefs recognising 'untouchability', asserted the judge. Regarding the principle that conviction in criminal cases must be beyond "reasonable doubt", the judge observed that 'doubt' does not mean "the mind of a doubting Thomas, nor vacillation, nor pusillanimity nor deep-seated prejudices or predilection found in other walks of life".

Causes of Caste Violence

Various factors generating atrocities against the depressed people have been identified which may be summed up as given below :

1. Land-related issues and disputes are the most potent source of atrocities against S.C. people. Land reforms laws benefiting the 'untouchables', allotment of housing sites, water and cultivation rights and the use of pastures and common lands are usually the sources of conflicts leading to violence.
2. Indebtedness of S.C. people, generally to the people of the dominant classes, due to extreme poverty is also a major cause of violence since the repayment of loans in a large number of cases does not materialise.
3. Refusal to pay minimum legal wages to the S.C. workers and the assertion of their legal rights by them quite often leads to atrocities on them.
4. Though the attitudes and practices regarding untouchability have changed to a great extent in cities, caste prejudices are still a stark reality in the rural areas which are manifested in *chaupals* and gram panchayat affairs, in the services rendered in the tea-stalls and by barbers and washermen. The feeling of resentment among the privileged dominant class against manifestation of awareness on the part of the *Dalits* of their newly-acquired rights leads to frequent violence against them.

It was in view of the continuied atrocities that in 1981 the Commissioner for SCs/STs, recommended that all State governments and Union Territories should grant monetary relief to the victims of atrocities and quite a few States have accepted the responsibility to make such payments. The modest amounts payable are in the range

of Rs 2000 to Rs 10,000 for offences against property to serious offences of causing physical disability and murders. No payment is, however, provided for rape, a frequently-committed offence against the S C women.

5. Bonded labour, though abolished by the Bonded Labour System (Abolition) Act, 1976, has not altered the basic attitudes and practices in rural areas. An episode mentioned in the 28th report of the Commission for Scheduled Castes and Scheduled Tribes discloses that even lawmakers and the supposed protectors of the weaker sections perpetrate violence when confronted by the assertion of rights by the downtrodden people of the Scheduled Castes. In village Dipakheda in the Mandsaur district of Madhya Pradesh, the local M.L.A. engaged a Scheduled Caste woman for working under bondage system ; a system already abolished by law. When the woman demanded payment for the services rendered, she was mercilessly beaten up and worse still, she could not get treatment from a private doctor or even the Government dispensary.
6. Rape has been a traditional routine offence committed, almost as a matter of 'right', by the members of dominant classes on the SC/ST women. Any action or resistance of the victim's community may invite the wrath of the offender or his community.
7. Yet one more cause of violence emanates from the elections conducted for Parliament, State legislatures and other bodies. In many instances, the weaker sections are not allowed to exercise their franchise by the use of force and intimidation by politically-powerful groups of the upper castes. The situation may, however, now be different in view of the changed political scenario in which *Dalits* seem to be emerging as a significant political force in many parts of the country.
8. So far as the tribals are concerned, the main problems arise out of alienation of land earmarked for them and the enjoyment of forest wealth ; violence quite often erupting as a result of conflict between the tribals and forest guards.
9. Finally, inaction, indifference, and even hostility on the part of the police also contribute a great deal towards violence against the SC/ST groups.

Prevention of Atrocities Legislation

Despite the legislation, and also as a reaction to it, violence against the 'untouchables' continues unabated ; atrocities are rather on the increase so far as serious offences like murders and rapes are concerned. In the period 1981-86, while there was an overall decline of 10% in cognizable crimes in the country, the decline recorded in offences against the 'untouchables' was

only 4% along with a steep rise of 15% and 8% in murders and rapes respectively[44].

The long overdue legislation to specifically deal with the violence and atrocities against the SC/ST people was eventually enacted in 1989 and enforced from the year 1990, an inevitable course in view of the inadequacies of the earlier legislation. Under the S.C. and S.T. (Prevention of Atrocities) Act (PAA), 1989, the following offences have been delineated with severe punishments to deal with the usual varieties of atrocities[45]:

(*i*) Offences against human dignity like forcing consumption of noxious substances, dumping waste, stripping, outraging modesty, public humiliation.

(*ii*) Economic offences like *begar* or bonded labour, wrongful occupation or cultivation or interference with rights over land, premises or water.

(*iii*) Intimidating voters to abstain from voting or for voting for a particular candidate.

(*iv*) Offences endangering health ; fouling water ordinarily used by Scheduled Castes/Scheduled Tribes.

(*v*) Placing restrictions on movement or residence like denying right of passage or entry to public place or forcing to leave place of residence.

(*vi*) Giving or fabricating false evidence knowing it might lead to the conviction of an SC or ST.

(*vii*) Mischief by fire or explosive substance to property, house or temple of Scheduled Castes/Scheduled Tribes.

Penalties under PCR Act, IPC and PAA

Penalties under the PAA are more stringent than those under the PCR Act or the IPC. Most offences under the PCR Act are punishable with imprisonment from one to six months. Under the PAA, the offences mentioned at (*i*) to (*v*) carry imprisonment between six months to five years. The PCR Act limits fine to Rs 5000, whereas the PAA has no limit. Penalties under the PAA are much higher than those for similar offences under the IPC. The offences of ordinary rape or arson or grievous hurt are punishable under the IPC with imprisonment up to 10 years. Under the PAA these offences are punishable with life imprisonment. Unlawful compulsory labour is punishable under the BLSA with imprisonment up to 3 years, whereas under the PAA it may extend to 5 years. The position is similar for the offence of intimidating voters as between the Representation of the People's Act and the PAA offences under the PAA are punishable with both imprisonment and fine. The Court can order attachment of property of the offender,

44. No recent figures are available due to the fact that for the last few years, the National Commission on S. Cs. and S. Ts. has not published any reports. It is understood that a report is to be placed before the Parliament shortly.

45. Extracted from Report of National Commission for S. Cs./S. Ts. on "*Atrocities on SCs and STs : Causes and Remedies*", p. 35.

which on conviction can be forfeited to the extent required for realisation of the fine.

Offences by Public Servants

A public servant, who is not an SC/ST who wilfully neglects duties to be performed by him under the PAA may be imprisoned for six months to a year. If he commits an offence under the Act his imprisonment shall not be less than one year but may extend to the punishment provided for that offence.

Special Features

The PAA provides for externment, collective fine, and for anticipatory action in atrocity-prone areas. There are provisions for appointment of Special Courts and Special Public Prosecutors. Persons arrested under the PAA do not have the right to seek anticipatory bail.

The Commission made the following suggestions for making the Act more effective :

(*a*) To make arrangements for giving wide publicity to the Act in order to acquaint all concerned regarding the rights and obligations created by the Act. To further the objective, training programmes for magistrates, prosecutors and the police and seminars on the subject should be organised.

(*b*) Offences relating to non-payment of minimum wages, theft of cattle, fraud in maintenance of loan accounts and prevention of access to burial or cremation grounds may be brought within the ambit of the Act.

(*c*) The extension of the externment provisions (which are at present only for "Scheduled Areas" and "Tribal Areas") to areas prone to atrocities on Scheduled Castes, Scheduled Tribes through an appropriate amendment may be considered.

The National Police Commission recommended that special police cells be established to deal with the Protection of Civil Rights Act cases. All the States have accepted the recommendations and have established not only special police cells but also special police stations to improve the enforcement of the Act.

Enforcement of Legislation—Obstacles

A study was undertaken by the National Commission at Ahmedabad, Bhopal, Lucknow, Patna and Madras in 1985-86 which revealed that 80% to 85% prosecutions under the PCR Act resulted in acquittals compared to which the acquittal rate for ordinary crimes is much lower. Various causes explaining the exceptionally high rate of acquittals have been identified, among which are :

(*i*) Pendency of cases for long periods of time, the inordinate delay being fatal in many instances.

(*ii*) Atrocities cases being generally taken up by less experienced, prosecutors, some of them even playing 'dubious games'.

(*iii*) Lack of police interest in investigation work, leading to failure to provide requisite evidence on the part of prosecution.

(*iv*) Lack of protection and support to the witnesses by the police.

(*v*) Witnesses available only from the aggrieved SC/ST community.

Other factors which hamper the proper administration of justice or adversely affect the outcome of prosecution are :

(*i*) Poverty and ignorance of rights and fear of reprisals prevents reporting and prosecution of offences by the victims.

(*ii*) Delays in reporting the crime to the police, quite often due to remoteness of police stations in rural areas.

(*iii*) Delay on the part of the police in reaching the sight of crime and charge-sheeting the accused.

(*iv*) Sometimes only the Penal Code and Criminal Procedure Code are invoked and not any of the special enactments which not only take away the sting from the result-oriented procedural aspects but also lead to milder punishments even when the prosecution ends successfully.

Failure of the law is too evident though it may be somewhat early to assess the extent of the impact of the SC/ST (Prevention of Atrocities) Act, 1985 in terms of objectives achieved. During the last few years the character of violence against the depressed classes has been changing from insults and atrocities against individual victims to occasional acts of mass violence. At the same time the political power has tilted in favour of the depressed communities in some parts of the country. Given these two developments, it seems likely that the problem of mass violence shall, in the ultimate analysis, be effectively met with the newly-acquired political clout and the law and its failure shall increasingly become less relevant to contain the phenomenon of violence against the depressed people.

PERSONAL VIOLENCE AGAINST WOMEN

Women are perhaps the worst and most frequent victims of personal violence in India. Wife-beating, though described as the most common marital pastime in India by an English judge a long time ago, is nevertheless not confined to India alone. As regards sexual offences, India has traditionally enjoyed much higher immunity compared to many other countries though there has been an alarming rise in such offences in the recent past. Dowry-related violence and the practice of *sati* are, however, two criminal phenomena, peculiar to India and, therefore, require special focus in the overall context of violence in India.

Sati Practice

Despite the fact that practice of *sati* has become extremely rare in contemporary Hindu society, an appraisal of issues is warranted in view of the social values, the diabolical nature of the practice, extreme cruelty involved and some shocking incidents in the very recent past.

Sati, in Sanskrit, means a noble and dedicated wife. When applied to a widow, the word stands for a woman voluntarily sacrificing herself on the funeral-pyre of her husband, the act of self-immolation being an expression of love for the husband. The practice is believed to be based on ancient Hindu *shastras* and scriptures which prescribed it as a means to attain spiritual purity. It was also regarded as the infliction of natural punishment for the sins committed in the earlier life by the woman. Emile Durkheim and some other sociologists regarded sati as 'a religious suicide'. Whatever the original motivations, sati practice, in course of time, assumed an altogether different character. The element of voluntariness got eliminated in most of the cases of *sati*.[46] In a gruesome *sati* reported from Poona in 1823, the woman escaped from the pyre twice, and though excessively burnt, plunged herself into the river. She was caught by a number of persons including three Brahmins who hit her mercilessly with billets. After being rescued by two Englishmen, she died in hospital, the last words uttered were 'save me from death'. Personal monetary motivations of the priestly class as well as those of the relatives of the widow became the primary cause of the immolation. The highest occurrence of the practice in Bengal is attributed to the fact that the Dayalbagh school of Hindu jurisprudence granted inheritance right to widows. The other ulterior motives were provided by the ideas prevailing against widow remarriage and the cherished ideal of female chastity; these being the motivations leading to the practice among martial ethnic groups such as Sikhs and Rajputs. Even when not forced to commit sati, it could still not be a genuinely voluntary act; the real motivation being to avoid the worse alternative of leading a highly wretched and miserable life of a widow in the then Hindu society.

State Intervention and Reform Movements

The earlier instance of the State's concern regarding *sati* were Emperor Akbar's efforts to ensure the prevention of involuntary commission of sati. His father, Humayun, had also contemplated similar action but the general policy of the Muslim rulers was not to interfere with the religious practices of their Hindu subjects. The same hands-off policy was followed by the

46. A.S. Altekar cites some extremely cruel instances in *The Position of Women in Hindu Civilisation, (1962)*. In the Deccan and Western India, the funeral pyre was built in a deep pit to make the widow's escape impossible. In Gujarat and North U.P., a wooden house about 12 feet square was constructed and the widow was tied to one of its pillars. In Bengal, the widow's feet were tied to posts fixed into the ground.

English rulers in the early period of their rule. It was also due to their initial lack of understanding of Hindu society. Subsequently, a distinction was drawn between legal and illegal acts of sati; a policy which allowed only voluntary immolations. The ambivalent policy could not, however, be sustained over a long time because beside the practice being revolting to the English rulers, there was mounting pressure from the Christian missionaries to suppress it in Bengal. The practice was eventually abolished in 1829 by a regulation passed by Lord Bentick's government in the Presidency of Bengal. Raja Ram Mohan Roy played a notable role in the abolition by fighting against the movement for the annulment of Bentick's regulation. Attempt to commit and abetment of suicide were made punishable in the Penal Code of 1860 which took care of the offence regarding sati.[47]

As a result of the legislation and relatively fast social change, the practice almost ceased to exist but isolated acts of sati continued to occur. Thus, as late as 1936, Mahatma Gandhi made the well-known comment:

> "We have never heard of a husband mounting the funeral pyre of his deceased wife. The practice of the widow immolating herself on the death of her husband had its origin in superstitions, ignorance and the blind egotism of man."

According to him, purity of spirit cannot be attained by committing sati but "only through constant immolation of spirit".

Recent Developments

Sati committed by a young Rajput girl in a village of Rajasthan shocked the entire country[48] leading to the enactment of the Sati (Prevention) Act, 1987. The Act seeks to achieve more effective prevention of the sati practice. Wider definition of sati has been furnished by including in it the burning of any woman with any relative or an article or object associated with the husband whether such transaction be voluntary or otherwise. While attempt to commit sati continues to be governed by Section 309 of the Penal Code, enhanced punishment, death or life imprisonment for abetment is now provided in the new Act. Propagation or glorification of sati through any ceremony, processions and construction of memorial temples has also been made penal. Other possible actions include Government's power to remove the temples or other structures erected to glorify the practice and imposition of disqualifications under the Representation of the People's Act of 1951 for those convicted under the 1987 enactment.

It may not be possible to evaluate the efficiency of the new legislation to prevent sati because the number of occurrences, in any case, has been negligible in the last many decades and the period of a few years since the

47. Sections 306 and 309.

48. See also the Chapter on 'Victims of Crimes' *ante*.

legislation of 1987 is hardly sufficient to gauge its impact.[49] A somewhat pessimistic view, however, may be taken due to the disturbing fact that the *chunri* ceremony[50] in respect of Roop Kanwar's sati in Rajasthan was held despite the High Court's prohibitory directions. This brings into focus the persistent outmoded and cruel values certain communities still hold vis-a-vis their womenfolk and the role of politicians who seldom miss an opportunity to grab popularity and further their interests.

Dowry-Related Violence

The custom of dowry is deep rooted in Indian society but over the years, it has turned into a social menace, too entrenched and diabolical to be tackled by reformers and law-makers. Though the efforts for the eradication of the dowry practice go back to more than a century, it has perhaps become the most alarming social issue during the last two decades or so as manifested by the growing violence against women emanating from matters relating to dowry. This would be borne out from the figures relating to dowry-related deaths. The number of dowry deaths was 4215 in 1989 which jumped to 5817 in 1993, recording an increase of 38% in just 4 years. The reported cases of torture under Section 498-A of the Penal Code, mainly relating to dowry demands, rose from 11,603 to 22,064 indicating a steep rise of 90.2 per cent.

It is generally understood that dowry, in its original form, was not based on avarice and extortion as is quite often the case today but was just a token of love and regard for the bridegroom. *Varadakshina*, as it was known in the Hindu *shastras*, was *dakshina* of a purely voluntary nature without which the meritorious act of *kanyadaan* would not be complete. Religious rationalisations apart, the main motivation on the part of the bride's parents was to provide security and compensation for inheritance rights to the daughter in order to enable her to lead a dignified and harmonious relationship with her husband and his family. Gradually, the element of voluntariness disappeared and a callous, crass and commercial system came into being which was described by Mahatma Gandhi thus:

> "There is no doubt that the custom is heartless. The system has to go. Marriage must cease to be a matter of arrangement by parties for money.
>
> Any young man who made dowry a condition of marriage discredited his education and his country and dishonoured womanhood... and young men who soil their fingers with such ill-gotten gold should be ex-communicated from society."

49. The figures for the years from 1989 to 1993 disclose 36, 52, 17, 1, and 5 cases respectively and do not, therefore, reflect any consistent pattern though some reduction in the crime can be inferred.

50. It marks the finale of the 12-day-long worship and veneration of the funeral pyre which remains aflame during the period. The ceremony may be followed by the permanent erection of a memorial such as a temple to glorify the episode.

While greed may be the apparent cause for dowry demands and the connected violence in our fast-developing consumerism-ridden society, some more subtle and unconscious motivations could also be discerned in the violence-generating process. The phenomenon of violence has been, for instance, explained on the basis of the motive to harass the woman into submission, to make her insecure; a kind of psychological warfare to demoralise and dominate her completely. A noted activist in the movement for women's rights has the following explanation.[51]

> "Dowry demands are as little or as much related to greed as rape is to sexual satisfaction. Both are essentially forms of violence whose primary purpose is to degrade and victimise a woman so that she retains a desperate fear of disobeying the powerful. Just as rapists frequently beat, maim or kill their victim as a further expression of their power over her, so also the taunts and abuses of a daughter-in-law may escalate into beating, torture and even murder."

Substantiating the point that dowry in most of the cases does not financially affect the bridegroom or his family in a big way, the true nature and urge for dowry is explained thus:

> "The purpose of dowry-giving rituals is comparable to that of traditional offerings to feudal overlords. Those lower down in the feudal hierarchy were expected to acknowledge the lord's suzerainty by giving him gifts on every festive occasion and celebration in either his or their own family. Whether or not these offerings made any substantial difference to the lord's actual wealth, they had to be offered as tokens of respect, in public acknowledgment of his status. Non-compliance with the ritual would be perceived as a deliberate and unforgivable insult."

The Legal Armory

The Dowry Prohibition Act, the first national legislation to deal with the problem of dowry, was passed in 1961.[52] The Act lays down a number of preventive and punitive provisions but, as could be anticipated, the objectives have not been achieved. The failure is not primarily due to a few defects in the law or even the lack of will or capacity on the part of the Government regarding its enforcement but because of the fact that the dowry practice is too well entrenched among all the cross-sections of the society. The irrelevance and inefficacy of the law is evident from the fact that not only the action is taken on the registered cases in a negligible number of cases but most of the people are not even aware of the legislation on the subject. According to a report prepared by Ranjana Kumar for the Ministry of Welfare and Child Development entitled "A Study of dowry victims in

51. Madhu Kishwar in Manushi, May-June 1986.
52. Earlier, legislation was provided in Mysore in 1933 and the Sindh province in 1946.

Delhi", only 1% of the cases registered in Delhi were prosecuted, while a Jaipur research study revealed that 70% of the respondents were unaware even of the existence of dowry legislation. The situation does not appear to have improved much, though legislative and judicial efforts provide continued support.

The 1961 law has been amended twice, the main thrust has been regarding the widening of the definition of 'dowry', regulation of permissible 'presents' and enhancement of punishment for the various violations of the Act. The main operative part of the dowry definition as contained in Section 2 is : Any property or valuable security given or agreed to be given directly or indirectly by one party to marriage or to the other party to the marriage or by parents of either party to a marriage or by any other person to either party or to any other person at or before or any time after the marriage in connection with the marriage of the said parties.

The expression used in the original Act was "as consideration for the marriage of such parties" was interpreted by the courts to give a narrow meaning to 'dowry'.[53] In *Inder Sein* v. *State*[54], it was held that 'consideration' was restricted to motive or reason, compensation or reward to marriage and would not, therefore, include any property demanded or given subsequent to marriage. The expression 'any time after the marriage' has similarly been brought to replace 'after marriage' to eliminate a restricted interpretation of the statute.

Presents of a customary nature, and not being of excessive value, having regard to the financial status of the person giving them, given at the time of marriage without any demand having been made for them, do not constitute dowry. A list of such presents, along with the description and value, is to be prepared as soon as possible after the marriage and it must be signed by both the bride and the bridegroom.

Stringent penal provisions have been provided for giving, taking and demanding dowry. Under Section 3, a minimum of 5 years' imprisonment and a fine of Rs 15,000 or of the value of dowry, whichever is more, is prescribed for giving and taking dowry while 6 months to 2 years' imprisonment and a fine of up to Rs 10,000 is possible under Section 4 for demanding dowry. Offer of dowry, in one form or the other, through an advertisement is punishable with 6 months to 5 years' imprisonment and a fine up to Rs 15,000 under Section 4-A of the Act.

The amended Act contains a couple of provisions to achieve better enforcement of the laws. Thus Section 7 now enables quite a few categories

53. The cross-sections obviously include judges, magistrates, policemen, members of the legislatures and ministers! Some communities, e.g., Muslims, who have been traditionally free from the evil, have also lately registered a trend towards it.

54. 1981 Cri LJ 1116.

of persons and agencies to initiate proceedings under the Act. The eligible persons and agencies are (*a*) police, (*b*) aggrieved person, (*c*) parents or other relations, and (*d*) any recognised welfare institutions or organisations. Under Section 8, the offences under the Act have been declared to be cognizable and non-bailable.

Another well-intentioned provision for the enforcement of the legislation is Section 8-A which provides that in a prosecution for taking or abetting the taking of dowry, the burden of proof will be on the person who denies the commission of the offence. Finally, one innovation regarding enforcement is the provision for appointment of 'dowry prohibition officers' for the prevention of dowry offences and compliance with the laws.

A common practice connected with the evil of dowry is that articles or ornaments of the bride are immediately taken in possession by the husband or his family members. Section 6 provides that the dowry received by a person, other than the woman in connection with whose marriage it is given, is to be transferred to the woman or her heirs within a period of three months, failing which imprisonment from 6 months to 2 years and fine from five to ten thousand rupees can be imposed upon the offenders. As held by the Supreme Court in *Pratibha Rani* v. *Suraj Kumar*[55], taking into possession articles of the bride amounts to criminal breach of trust punishable under Section 405 of the Penal Code.

The Joint Parliamentary Committee examining the working of the Act in 1982 gave two reasons for the abject failure of the enactment: defective definition of dowry and lack of enforcement instrumentality. Quoting Jawaharlal Nehru on the need and limitations of social legislation, the committee recorded:

> "Legislation cannot by itself normally solve deep-rooted social problems. One has to approach them in other ways too, but legislation is necessary and essential, so that it may give that push and have that educative factor as well as legal sanctions behind it which help public opinion to be given a certain shape".

Though, as noticed earlier, the definition of dowry has been improved and enforcement provisions have been strengthened after the committee's report of 1982, there seems to be no significant change in the law's capacity to deliver the goods.

Dowry Related Violence—Legislation

Though the dowry problem as such may not be the appropriate target of criminal law, the violence connected with dowry, sometimes fatal, is certainly within the functional domain of criminal law. As a result of the galloping rate of dowry-related deaths and the failure of dowry legislation,

55. (1985) 2 SCC 370 : 1985 SCC (Cri) 180 : AIR 1985 SC 628.

Criminal Law Amendment Acts, 1983 and 1986 were passed which introduced substantial and procedural changes in the law having a bearing on the subject.

1. Penal Code: Two new offences have been created under Sections 304-B and 498-A. The offence under Section 304-B, called dowry death, is punishable with a minimum of 7 years up to life imprisonment. 'Dowry death' is the death caused to a woman by burns or bodily injuries, or under unnatural circumstances, within 7 years of her marriage, where it is shown that, immediately before her death, she was harassed or put to cruelty by her husband or his relatives in connection with demand for dowry.

Cruelty by the husband or his relatives has been made punishable with imprisonment up to 3 years and fine under Section 498-A. Cruelty consists of any wilful conduct likely to drive the woman to commit suicide or to cause danger to her life, limb or health, mental or physical, or harassment to coerce her or any other person by making an unlawful demand for dowry such as any property or valuable security.

2. Code of Criminal Procedure: Sections 174 and 176 deal with investigations and inquiries into the causes of unnatural deaths by the police and magistracy respectively. The Amendment Act, 1983 makes it mandatory for the police officer to send the body for post-mortem examination if the death of the woman occurred within 7 years of marriage as a result of suicide or under any other dubious circumstances. The amendment of 1983 also empowers an executive magistrate to conduct an inquiry into the death of a woman in similar circumstances.
3. Evidence Act : A new provision, Section 113-B, has been created regarding the burden of proof in dowry deaths according to which the court has to presume that a dowry death was caused by the person who is shown to have subjected the woman to cruelty or harassment soon before her death.

Judicial Response

Analysis of some decisions delivered by the higher judiciary would reveal the active judicial efforts in dealing with cases of violence against women. In *Kundula Bala Subrahmaniam* v. *State of A.P.*[56], the apex court referred to the important role of the courts in dealing with cases of dowry-related violence. Such cases ought to be dealt with in a more realistic manner and criminals should not be allowed to escape on account of procedural technicalities or insignificant lacunae in the evidence ; the courts are expected to be sensitive in cases involving crime against women.

56. (1993) 2 SCC 684 : 1993 SCC (Cri) 655.

In a number of decisions the Supreme Court has shown remarkable pragmatism in dealing with bride-burning cases ; an approach not usually discernible in ordinary situations of murders. In *State (Delhi Admn.)* v. *Laxman Kumar*,[57] the Court rejected the defence of accident and found the respondent guilty of bride-burning ; the factual issue was decided by the Court having regard to the dress the deceased happened to wear at the time of receiving fatal burns. In the opinion of the Court, the woman would not have gone out clad just in a nylon *saree* to operate an oil stove in the biting cold of December in an open space. Though the Court refused to make the infirmities-loaded dying declaration the basis of conviction, it nevertheless held the dying declaration to be of material corroborative value. The Court, however, took care to state the correct position that courts cannot allow emotional or sentimental feelings to creep into judicial pronouncements and that the decisions are not to be effected from heat generated outside the court room either through news media or through a flutter in public opinion. The same active judicial approach is discernible in *State of Punjab* v. *Amarjit Singh*[58] where the Court accepted the dying declaration despite the fact that the police had not got it recorded by a magistrate.

Two cases of murders, involving 'bride-burning', which merit special mention, came up in appeal before the Supreme Court and in both the Court seems to have taken extra care to ensure that the guilty did not get away with murder by overstretching the principle of presumption of innocence of the accused in this kind of fairly frequent phenomenon of extremely wicked and avarice-based killings. The prosecution in both the cases, as is generally inevitable in bride-burning cases, was wholly based on circumstantial and medical evidence. While in one of the two appeals, *Subrahmanyam* v. *State of A.P*,[59] the conviction of the accused was held to be proper, in the other case, *Sarojini* v. *State of M.P.*[60] the Court roped in the husband also in consonance with the trial court's verdict, for murder liability besides upholding the conviction of the mother-in-law. This the judges did by drawing inference of "*particepis criminis*" vis-a-vis the husband, basing their conclusions in a remarkable manner : "...without his cooperation and participation... it was impossible for Sarojini alone to commit the crime. Except denial he offered no explanation in his Section 313 statement.... The conduct of Vinod (husband) also is inculpatory. The normal human conduct would be that on hearing the news of the death of his wife he was expected to reach and take further actions which are absent in this case...."

57. (1985) 4 SCC 476.
58. 1988 Supp SCC 704 : 1989 SCC (Cri) 58.
59. (1993) 2 SCC 684 : 1993 SCC (Cri) 655.
60. 1993 Supp (4) SCC 632 : 1993 Cri LJ 1648.

In *State of Maharashtra* v. *Vasant Shankar Mahasane*[61] the trial court acquitted the accused of the charges under Section 306 (abetment of suicide) and Section 498-A of the Code. On appeal, the Bombay High Court set aside the acquittal under Section 498-A but confirmed the acquittal under Section 306 of the Code. Some notable features of the decision-making process were as follows :

(*i*) The High Court acting under Sections 313 and 391 of the Code of Criminal Procedure examined the accused and recorded additional evidence.

(*ii*) It was held that the dying declaration absolving the husband and his relatives could not destroy the letters-based evidence going against them for conviction under Section 498-A.

(*iii*) The facts of constituting harassment and cruelty before the enactment of Section 498-A were held to be relevant.

(*iv*) The High Court rejected the contention of the defence that specific instances of cruelty and ill-treatment over a period of time, instead of general allegations, should have been made in the charge against the accused to afford them an opportunity for an effective defence.

In *State of West Bengal* v. *Orilal Jaiswal*[62], an appeal decided by the apex court, certain propositions were laid down which may go a long way to eliminate undeserved acquittals under Section 498-A of the Code. The Court held :

(*a*) Ordinarily, it is not expected that physical torture or abuses hurled on the woman should be made in such a way as to be noticed by the neighbours.

(*b*) Depositions by the close relatives of the victim need not be discarded simply because of the absence of corroboration by independent witnesses.

(*c*) The actual dates and occasions of the alleged harassment and cruelty need not be proved.

(*d*) The presumption regarding an accused's innocence, based on lingering and unreasonable doubts, must not be carried too far.

Impediments in implementation of the Law

Once again, the rich legal armory has failed to make any appreciable dent in the unfortunate situation in which dowry victims are placed. The fault and infirmities are discernable in almost all the factors involved in the implementation of laws: social aspects, police perceptions and attitudes and infirmities inherent in the functioning of the medico-legal and judicial system.

61. 1993 Cri LJ 1134.
62. (1994) 1 SCC 73.

1. Social Factors: Administration of criminal justice is normally a challenging job and it becomes even more difficult if a minimum social support is not forthcoming. Generally, there are no witnesses to the transaction leading to the unnatural death except the family members, some of whom might have been parties to the crime. More often than not, the neighbours, who might be having some clues or evidence against the culprits, are unwilling to testify because of the fear of spoiling the neighbourly relations and the hassles apprehended regarding police and court proceedings. Worse than the indifferent attitude is the partisan attitude of neighbours favouring the culprits.

Many young women can be saved from unnatural death if they are insulated from the source of violence at the appropriate time. Such a course, however, is usually not possible or undertaken due to traditional constraints. Despite the ill-treatment, the parents usually advise their daughters to keep on staying with delinquent husbands or in-laws leading to the avoidable tragedy.

2. Police and Law Enforcement: The police is often accused of attitudes, practices and perceptions which greatly diminish the likelihood of the successful implementation of the laws, particularly the kind of legislation in the present context. The usual charges are: police reaching the scene too late, distorting the events in recording the First Information Report, preferring to register most of the cases of unnatural deaths as suicides and carrying out the investigations in a lackadaisical and leisurely fashion. The police tend to treat violence against women as a 'family affair' and are often reluctant to register the case itself. A few of these police deficiencies, as pointed out by the Supreme Court in *Bhagwant Singh* v. *Commissioner of Police*[63], support the allegation that the incidence of unnatural deaths is much higher than is indicated by the police records. Police diaries relating to the registered cases are also not kept properly. Too often, the investigation officer is changed in quick succession, adversely affecting the investigation. Some of the shortcomings of the police are attributed directly to police corruption.

The police have their own explanations to offer regarding the unsatisfactory state of affairs. The first and foremost is the inadequate evidence generally available to them due to lack of independent witnesses. The dying declaration of the women, a crucial piece of evidence, is quite often contradictory and so are the statements of some connected persons, like the person taking the victim to the hospital, those made before the doctor, police officer and the magistrate. The evidence of forensic experts is also not generally very helpful in determining whether the case is of suicidal, homicidal or accidental nature. It is believed that better forensic evidence would be possible if the experts are brought to the victim at the sight of

63. (1983) 3 SCC 344 : 1983 SCC (Cri) 637.

occurrence instead of taking the victim to the experts. Inordinate delay in getting the medical report hampers the police investigation.

3. The Judiciary: On a number of occasions courts have expressed anguish and shock regarding the phenomenon of deaths of young brides under suspicious circumstances. In *Virbhan Singh* v. *State of U.P.*[64], the Supreme Court said that in view of the increasing number of bride-killings, such dastardly crimes, whenever detected and proved, invite ruthless action and severe deterrent punishment must be imposed. In quite a few cases, the Supreme Court had to express its concern regarding the acquittal of some of the alleged culprits by the High Courts but pleaded helplessness since no appeal was preferred by the State against those acquittals. In *Samunder Singh* v. *State of Rajasthan*[65], the Court opined that anticipatory bail ought not to be granted in bride-burning cases and acknowledged the validity of the widespread belief that dowry deaths are even now treated with some casualness at all the levels.

Dissatisfaction is, however, possible with certain judicial assumptions generally operating at the trial level which perhaps provide an unjustified advantage to the defence. Some of the assumptions are:

1. Contrary to medical opinion, the assumption that a person with 100% burns is not fit to make a dying declaration.
2. In case of harassment of a woman, someone on behalf of the victim ought to have reported the matter to the police or court and since no such report was lodged, there was no harassment as alleged by the prosecution.
3. Neighbours' testimony favouring the victim's husband or in-laws is more reliable than the one against them.
4. The disputes between husband and wife do not ordinarily attain the pitch that the husband may be induced to kill the wife.

Suggestions for Improvements

A few measures for better administration of the laws can be taken including some changes in the provisions of substantial penal and evidentiary nature:[66]

1. For better investigation and inquiry into the causes of unnatural deaths, the Coroners Act, as operative in Bombay, may be made applicable in other areas. This may enable an independent authority with judicial powers to probe into the cause of an unnatural death.
2. More female police personnel should be inducted so as to be available in situations relating to unnatural deaths of women. A

64. (1983) 4 SCC 197 : 1983 SCC (Cri) 781 : AIR 1983 SC 1002.
65. (1987) 1 SCC 466 : 1987 SCC (Cri) 189 : AIR 1987 SC 737.
66. Some of these suggestions emanate from the Supreme Court in *Bhagwant Singh*, (1983) 3 SCC 344 and a few from the Round Table on Social Audit of Implementation of Dowry, 1987, New Delhi.

man-woman police combination is likely to produce better results in such investigations.

3. In the interest of more responsible and efficient investigation, no officer below the rank of Assistant Commissioner or Assistant Superintendent of police should handle the case of an unnatural death.
4. Punishment for abetment of suicide may be raised to a minimum of 7 years as in the case of dowry death. This is desirable in view of the fact that the police treat most of the unnatural deaths as suicide and the accused persons are prosecuted for abetment of suicide which attracts a lesser punishment.
5. Under Section 113-B of the Evidence Act, a very heavy burden is cast on the prosecution for them to get the benefit of the presumption; a nexus is to be established between the dowry issue and the fatal violence to establish dowry death. The section may be made more liberal by dispensing with the burden of proof that the violence was in relation to dowry demand.
6. Early appointment of dowr prohibition officers, as envisaged in the Dowry Prohibition Act, is highly desirable for their likely utility in the prevention, investigation and prosecution of dowry-related crimes.
7. The Law Commission in its Ninety-first Report recommended the establishment of family lawcourts. Such courts may prove useful in relation to dowry-based offences.
8. Compulsory registration of marriages has also been suggested though it is not clear as to how exactly it is going to help in the context of offences relating to dowry.

Wife-Battering

The phenomenon of wife-battering is almost universal and has existed since time immemorial and changes have occurred only in terms of the causes, extent and quality of violence along with the socio-cultural and economic determinants in various societies at different stages of their development. Thus, it is not correct, as believed by many, that the phenomenon is, by and large, confined either to the working classes alone or to the traditional and underdeveloped countries of Asia and Africa. Certain studies carried out in the U.S.A have indicated that around 50% of women in that country have been regularly or occasionally battered by their spouses, quite seriously in at least 39% of the cases. Further, wife-beaters may belong to any class transcending all socio-economic and cultural distinctions. In India, for instance, it is not only the stereotyped *dhobi* (washerman) whose physical assaults on his wife may directly or indirectly result from his love for liquor but often a bureaucrat, a businessman or even an academician may also be eligible for being designated a 'wife-beater', though due to entirely different causative factors altogether. However, the phenomenon may be more preval-

ent in lower socio-economic groups due to the 'stress of being indigent, the relative lack of adaptive non-violent skills and increased rates of substance abuse'.

Religious precepts and sayings of ancient law-givers are also believed to be responsible for generating male attitudes unfavourable to the recognition of women as equals in terms of intelligence, dignity and human rights.[67] Almost all major religions, Christianity, Judaism, Islam and Hinduism, being patriarchal in character, have affirmed a male-dominated family structure and assigned a chastising authority to the husbands over the wives in varying degrees. As a matter of fact, women were, till recently, not regarded as having the standard human attributes but were perceived as chattels capable of being owned and of disposable nature. Even now, international charters of human rights and the national constitutions notwithstanding, a large number of people everywhere perceive and treat them as humans of the lower order due to the lingering, fixed and irrational ideas based on the supposed male supremacy.

Besides the causative factors operative at the macro level as described above, researchers have focussed their attention also on the micro level factors to find out the possible causes of violence against wives. The studies focussing on individuals have found significant factors based on individual behaviour including the 'machoistic' attitude of the victim ; sometimes missing or ignoring other factors like economic compulsions of the victim. Then there are researches where the focus is on the family as a whole to probe into violence inflicting it. It has been found, as a result of some studies, that socially isolated families are more prone to violence and so are the families where the wife-batterer in his childhood had direct or indirect exposure to violence.

Owing to its very nature, domestic violence is a private affair and hence not of the kind which would attract the attention of others and this, along with a number of other inhibiting factors on the part of the victim and her relations, leads to an abysmally low reporting to law-enforcement agencies. The following observations are in the context of the U.S.A. which happens to be a much better off society in socio-economic and administrative terms

67. The most oft-quoted saying is of Manu in whose view women, animals and rustics could be effectively dealt with by corporal sanctions alone. Though Islam, is rightly credited with having improved the lot of females (e.g., in terms of proprietary and marital rights), the overall supremacy of males remained intact. For instance, the Islamic law of evidence equating the credibility of one man with that of two women is evidently an assertion of the severe intellectual and emotional limitations 'inherent' in women. The overall past record of western civilizations, both in general attitudes and in law, has not been much better.

It would not, however, be correct to identify these as sources of the attitudes reflecting male supremacy ; it was rather the reaffirmation and further strengthening of the notions already in existence since time immemorial.

than most of the other countries like India where inhibiting factors may be much more severe :

> "We know that wives are reluctant to report assaults by their husbands on themselves to the police. There are several reasons for this. They may expect to be degraded and humiliated. They may know (or half-know) about police attitudes towards domestic disturbances. If they are frequent victims they may tend to refrain from reporting because of the burdens of such reporting and follow-up actions may be intolerably great. They may believe without a husband to support them they will be worse off. They may sense that initiating a police action is likely to cause them even greater distress, greater poverty and worse beatings."

Even if the matter is brought to the notice of the enforcement agencies, viz., the police, prosecutors and courts, they tend to be somewhat non-responsive treating the matter as a 'family affair' where outsiders have no effective role to play. Some other factors responsible for the inertia and lukewarm responses on the part of the police and courts may be :

(1) Dealing with cases of spousal violence does not offer any incentive to professional advancement or recognition since such situations are generally not as much result-oriented as cases of ordinary crimes where action by the police can produce visible, sometimes spectacular, results.

(2) For corrupt officers, another factor may be the lack of potential in terms of illegal gratification in such cases.

(3) Wife-beating, unless leading to grievous injuries, is regarded as a minor offence ; misdemeanour in the U.K. and U.S.A. and non-cognizable offence in India and, hence, not accorded much importance or priority by the police and courts.

(4) Finally, a large number of complaints are withdrawn by the victims either because the offender promises better treatment in future or the victim gets disillusioned by the lukewarm response by the enforcement agencies in the early part of the proceedings.

New Beginnings

The early seventies marked the beginning of interest in the problem of spousal violence and it was around this time that empirical researches on the subject commenced in the U.S.A. and some other countries. This led to statutory activity relating to the police, prosecutors and judicial authorities along with state funding for educating and sensitising the public and providing shelters and other kinds of assistance to the victims. In the U.K. the Domestic Violence and Matrimonial Proceeding Act 1976 was enacted. Both in the U.S.A. and U.K., grant of injunction is possible against wife-beaters. In the U.S.A. the protection orders are enforceable through criminal courts, while the English enactment provides the police with powers of arrest for

breach of an injunction. Thirty-eight States in the U.S.A. have expressly given judges the authority to grant "any constitutionally-warranted relief that is available". The courts often issue the following protective orders, the list not being exhaustive:[68]

(*i*) orders to refrain from other physical or psychological abuse or even to restrict any contact with an alleged victim ;

(*ii*) orders to vacate a domicile within a certain period or to allow the alleged victim the exclusive use of certain personal property, such as a car, even though title to the property is in the name of the restrained party ;

(*iii*) orders to enter counselling ;

(*iv*) orders to pay support, restitution, or attorney fee ;

(*v*) orders granting temporary custody of minors to the victim—available in 40 States and the District of Columbia by 1989 ; and

(*vi*) orders limiting visitation rights to minor children.

Though some of the above measures eliminated police indifference towards domestic violence to some extent, the decision in *Tracy Thurman* v. *The City of Tarrington, Connecticut*[69] has gone a long way to make the police more responsive in the U.S.A. Ms Thurman and her relatives sought help from the police against her enstranged husband who had been threatening to kill her and her son. The police, in conformity with their usual indifference and apathy in such 'family affairs', resorted to various delaying tactics for many days till the husband attacked her causing multiple grievous injuries leading to paralysis below the neck and permanent disfigurement of the body. A claim for compensation from the police for their negligence and violation of equal protection of law right under the Constitution was upheld by the court which awarded a sum of 2.3 million dollars to the victim. The allegation of the violation of constitutional right was based upon the differential treatment accorded to a man who batters his spouse versus an assault by a stranger reflecting sex discrimination since most of the victims of domestic violence happened to be women. The decision in *Thurman* has made the police more accountable by inducing in them the fear of compensation liability for any negligence in attending to cases of domestic violence. The decision has also led to the class-litigation cases coming before the courts.

"Battered Woman Syndrome"

Right of private defence of person, at least theoretically, is as much available to domestic violence victims of as to others. Realities are, however, quite different and the exercise of right of private defence, in the accepted

68. Eve S. Buzawa and Carl G. Buzawa, *Domestic Violence : The Criminal Justice Response*, pp. 113-14.

69. 595 F Supp 1521 (Dist. Conn., 1984).

sense of law, is virtually impossible. The law of private defence was developed in an entirely different context where the contemplated parties were male strangers in general. Under the law, right of private defence is available only when violence is 'imminent' at the relevant time ; a rule which does not take into account the 'cumulative' effects of persistent violence and the psychological pressure as is the usual phenomenon in domestic violence situations. Another limitation on the right of private defence is that the force or violence inflicted in the exercise of the right must be in proportion to the degree of threat posed by the offender's conduct and death caused by the battered victim of her husband would ordinarily not be covered by the immunity from criminal liability of murder. To make the right available in such situations, where the ordinary law of private defence does not serve any purpose, courts in Canada and the U.S.A. are now resorting to what has come to be known as 'Battered-Woman Syndrome'. The syndrome explains 'why a battered woman stays in a violent relationship and does not leave, why she does not call the police or get other assistance before killing her batterer, and why she believed that at the time she responded, the danger she faced was imminent, posed a threat to her life, and was therefore different and more serious than the other times when she had been beaten, had not acted and had survived'.[70] In both Canada and the U.S.A., expert testimony on the syndrome is also permissible.

In a British case, where a woman, Kiranjit Ahluwalia, killed her husband in London under similar circumstances as described above in explaining the syndrome, the plea raised by the accused was 'provocation' for converting the offence of murder into the lesser offence of manslaughter. The court refused to accept the plea by redefining the law on provocation though a retrial was ordered by the Court of Appeal on the basis of available evidence that Ahluwalia was suffering from some mental illness. At the retrial, the court decided the case as that of manslaughter on the ground of 'diminished responsibility' and sentenced her to three years and four months, the period she had already served in jail.

Position in India

The law relating to the offences comprising domestic violence and the private defence is basically the same as in the U.K. and the U.S.A.,[71] the only innovation being Section 498-A which punishes cruelties of certain kinds as referred to earlier. The restraints operating against seeking the assistance of police and other agencies are even much more severe compared to the position obtaining in many other countries. Poverty, economic depend-

70. Elizabeth Shneider, Vol. 19, Women's Rights Law Reporter 195 (1986), quoted in 'Feminism and Law', issue of National Law School Journal, 1993, p. 174.

71. The relevant offences are simple and grievous hurt, assault, and criminal force punishable under Sections 323, 326 and 353 of the Penal Code.

ence on husbands, male domination and the overall social structure place women in an extremely vulnerable position. The severe handicaps faced by women in reporting to the police the violence committed by their husbands was pointed out by the appellate court in a case[72] where it was dealing with the issue of cruelty in the context of divorce under Hindu Law. The trial court had attached much importance to the fact that the victim had failed to produce a medical certificate pertaining to the physical injuries allegedly caused by her husband. The court observed :

> "Women in our society normally submit themselves to their fate and bear ill-treatment at the hands of their husbands, and unless a climax is reached, they usually do not take the desperate step of going to a police station to lodge a report, the poor financial condition of such women and lack of proper understanding on their part would also stand in their way of securing a medical certificate."

To redeem the situation, to whatever extent possible, a few suggestions to activate the police and courts are :

1. Legislation may be enacted to make police negligence and indifference towards domestic violence an offence by treating policemen as abettors. Such a provision exists in relation to offences under the Protection of Civil Rights Act, 1955.[73]
2. Even though the existing civil and criminal law may be adequate to deal with any case of spousal violence, legislation may be passed to create a distinct offence of wife-beating ; such an enactment, it is hoped, would provide a sharper focus on the problem of spousal violence generating a greater response from the police and judiciary. Legislation creating a separate offence of 'wife-beating' has been enacted in some of the States in the U.S.A.
3. Cognizance of offences under the Dowry Prohibition Act, 1961 is also possible on the complaint of a parent or other relative of the victim or by any recognized welfare institution or organisation. A similar provision is highly desirable in any legislation to be undertaken to help battered wives.

Not many cases of 'wife-beating' *per se* come before the courts. The cases, which often come involving cruelty, are either in the context of matrimonial laws or dowry-related violence. It is only when the violence leads to the extreme consequence of death of a woman that the criminal law machinery comes into motion to deal with the possible offence of murder. In an old case[74] where the wife was killed as a result of violence and the

72. *Kaushalya* v. *Baisakhi Ram*, AIR 1961 Punj 520.

73. This and some other suggestions for legal innovations are derived from a report by Prof. B. Shivaramayya submitted to a committee ; some of these may get incorporated in the legislation to be passed by Parliament.

74. *Indramma* v. *Emperor*, 118 IC (Madras) 817.

defence sought to make it a relatively minor offence of death caused by 'rash or negligent act' (punishable only with maximum imprisonment of two years under Section 304-A of the Penal Code), the court expressed its concern and approach regarding the problem of wife-beating thus :

> "....Such intention or knowledge would entail penal consequences, whatever may be the relationship of the accused to the deceased. In this country, where wife-beating is a common marital pastime, the ordinary operation of criminal law cannot be suspended in favour of the wife-beaters merely because of their relationship. On the other hand, it should be considered as an aggravation of the offence because of the control of husband and the helplessness of the wife. Such cases cannot be disposed of by euphemistic phrases."

Social and Administrative Measures

It should be evident that a few legal changes, as proposed above, together with the judicial empathy may offer only a marginal solution to the problem of domestic violence. Some social and administrative measures, including a few which have been adopted in other countries, with a greater potential to achieve the targets are :

(*i*) Making battered women aware of their rights through various modes of legal literacy and providing necessary assistance to enforce those rights. Besides the State agencies, voluntary social organisations can also play some role in the direction.

(*ii*) A separate unit of the police, well represented by women officers, may be created.

(*iii*) Provision may be made for the shelter and maintenance of battered women.

Keeping in view the extent of the problem, including the fact that a vast number of victims happen to be village-based, and the lack of human and economic resources, no undue optimism is warranted regarding the potential of the above measures. Only the cumulative effect of the legal and social support to battered wives and the crucial change in the social structure and attitudes may produce some positive results in the long run.

Chapter XVII
VICTIMS OF CRIME

Strange and ironical as it may sound, the administration of criminal justice is not much concerned with the victims of crime except that in a few cases some marginal action is possible to render limited or token help to the sufferer. The entire focus of the criminal justice system is on the offender; to punish him or to seek his reformation and rehabilitation with all the resources and goodwill available through the courts and other governmental and non-governmental agencies. Efforts are made to understand his personality and the individual and social factors which might have contributed to his criminal behaviour; the victims of the crimes are, on the other hand, 'the forgotten people in the system'. President Gerald R. Ford sent the following message to the American Congress in 1975:

> "For too long, the law has centred its attention more on the rights of the criminal than on the victims of the crime. It is high time we reversed this trend and put the highest priority on the victims and potential victims."

Victimology : Nature and Development

Victimology is the scientific study of victims of crime, a sub-discipline of criminology. It seeks to study the relationship between victims and offenders; the persons especially vulnerable to crimes and the victim's placement in the criminal justice system. Some pioneering work in the area was done in the late thirties and forties. B. Mendelsohn is credited with being the first to study the relationship between the victim and the doer (offender) and taken together, he termed the two as the "penal couple". In his '*Victimology*' he focussed his attention on the possible role of the victim on the circumstances surrendering him in the commission of the crime. He identified four factors in the context of the crime of rape and other offences against morality which could be responsible for lessening of the resistance on the victim's part:[1]

1. The familial, authoritative or hierarchical relations existing between the accused and the victim.
2. The... temperament of the victim, which may obscure the reasoning faculty.
3. The libertive social surroundings of the victim.
4. The superiority of the social milieu of the accused in relation to that of the victim.

1. Walter C. Reckless, *The Crime Problem* (Indian Reprint, 1971), p. 138.

Dr Hans Von Hentig, a lawyer, and Dr Henry Ellenbager, a psychiatrist, happen to be the two other pioneers in the area of victimology which the former called 'victimogenesis'. These two treated victimology as a part of criminology since it relates to causation and prevention of crime while Mendelsohn though it to be a separate discipline having regard to its aim and structure. A majority of the persons involved in the subject hold that victimology ought to be treated as a part of criminology which cannot be regarded as a discipline confined to criminals only.

Role and Typology of Victims

Just as certain persons are thought to have a high probability of indulging in criminal behaviour, so also some others may have a greater likelihood of being victimised. Von Hentig made the first ever study of the role of victims in crime and found some general characteristics among them which may be summarised as follows:[2]

1. The poor and ignorant immigrants and those who are requisitive or greedy are the victims of offences involving frauds.
2. Quite often, the victims of larceny (theft) are intoxicated or sleeping persons.
3. The depressed or apathetic person is a victim because he is "deprived of warning posts" and is indifferent to harm or injury "in prospect".
4. Wanton or sensual persons may become victims due to situations precipitated by themselves.
5. A lonesome and heartbroken person may become especially vulnerable because of the loss of critical faculties in him.

Among "general classes of victims", Von Hentig includes the young, females, the old, the mentally defective and deranged, the intoxicated, immigrants, members of minority groups and the 'dull normal'.

Mendelsohn studied victims on the basis of their contribution to crimes and classified them into the following categories:[3]

1. Completely innocent victims, e.g., children, persons in sleep.
2. Victims with minor guilt and victims of ignorance such as pregnant women who go to quacks for procuring abortion.
3. Voluntary victims, such as the ones who commit suicide or are killed by euthanasia.
4. Victims who are more guilty than the offenders, such as persons who provoke others to commit crimes.
5. The criminal type of victims who commit offences against others and get killed or hurt by others in self-defence.

2. *The Criminal and His Victim*, (1948) pp. 384-88.
3. V.M. Rajan, *Victimology in India*, pp. 10-11.

Persons Needing Special Attention

The work done by the pioneers mentioned above, and some others, has gradually led to some interest and concern for the actual and potential victims of crime in many countries around the world, India being also one of such countries. Certain categories of vulnerable persons and victims need special and greater attention.

1. Elderly Victims

In Western countries elderly persons tend to be in lower income groups and have, therefore, to live in dubious and criminal neighbourhoods. Again, many of them live alone and repeated victimisation is possible in their case. These factors may not be much relevant in traditional countries like India where elderly people by and large, live with their children and they do not generally have to face any peculiar problems of physical insecurity. In the U.S.A., the problem of crimes against elderly persons is sufficiently serious to have drawn the attention of the White House Conference on Ageing held in 1973. Besides recommending quite a few specific measures, the conference suggested top priority to the protection of the elderly and recommended that a portion of federal funds for the prevention of crime allocated to the States or local communities should be earmarked for this purpose.

2. Child Victims

The problem requires attention regarding offences involving violence in general and sexual abuse in particular. They need special attention because inept handling by the law enforcement agencies may prove to be even more damaging than the crime committed against the child; a factor which may discourage the initiation of proceedings by the parents of the child victims. Some special measures are, therefore, called for which may do away with the appearance and cross-examination of the child in the lawcourt. But the problem is that such a cause may violate the ordinary principles of criminal procedure and evidence and, therefore, deny the accused his rights such as the right to cross-examine the prosecution witnesses. An innovation in this area has been introduced in Israel regarding the reception of the evidence of child victims of sex offences by the Evidence Revision (Protection of Children) Law of 1955. The purpose of the law is to protect the child from the undesirable effects of testimony in the police station or the court. Under this law, a child is examined by a young 'interrogator' who decides as to under what conditions the child should, if at all, appear before the court. Where it is not desirable for the child to appear before the court, the evidence of the child may reach the court via the youth 'interrogator' who under ideal conditions should be a combination of a lawyer and psychologist; such a combination being rare, the youth 'interrogator' is usually a graduate and

experienced in social work. The 'interrogation' or rather the examination may take place either in the child's home or in the interrogator's office and the parents of the child may or may not be allowed to be present. The system does away with some of the fundamental principles of evidence like the rule against hearsay evidence and the courts always insist on corroboration of the child's evidence tendered before the youth 'interrogator' which now is not necessary in case of ordinary witnesses.

3. Victims of Sex Offences

Offences against women, in particular serious offences such as that of rape, have been increasing everywhere including in traditional societies like India and greater attention is now being given to the problem of the victims vis-a-vis the criminal justice system. Perhaps this class of victims, irrespective of the age factor, deserves the maximum consideration in view of the emotional, psychological and human problems involved. The police and court proceedings may be as traumatic as the offence itself which led to the proceedings. The feeling is almost universal among the victims that instead of being treated as victims, they are treated by the police and law agencies as if they themselves are the culprits. The rules of criminal law and evidence, for all practical purposes, are tilted against the victim as evident by the requirements given below:

(*i*) It is for the prosecution to prove the lack of consent on the part of the victim; an element not easily provable especially when the accused is not a stranger to the victim. The courts often insist that proof be given of the resistance offered by the victim.

(*ii*) The credit of a rape victim may be impeached by showing that she was of a generally immoral character.[4] The evidence of immoral character of the accused can, however, not be given unless good character is asserted by him in his defence. Highly humiliating and scandalous questions are often put to the victim despite the legal bar against such questions[5]. Lately some legislative measures have been introduced in order to alleviate the sufferings of the rape victims. The changes have been made in the substantive penal law, procedural law and law of evidence[6].

Section 376 of the Penal Code has been amended by introducing punishments of longer duration. The minimum punishment now prescribed for the offence of rape is 7 years ; the minimum is 10 years and the maximum is life imprisonment if the offender happens to be a police officer, public servant, jail superintendent or a hospital employee in whose custody the victim was put when the offence was committed. Two new provisions have

4. Sections 146(3) and 155(4) of the Evidence Act.
5. Section 151, Evidence Act.
6. Act 43 of 1983.

also been added in the Penal Code. Disclosing the identity of the victim of the offence of rape has been made punishable.[7] Proceedings in a rape trial are to be held *in camera*.[8] A new provision has been introduced in the Evidence Act laying down the presumption that there is no consent of a victim of a rape if the offence was committed by the husband during judicial separation from the victim and in cases where the offence was committed while the victim was in the custody of the police or in a hospital or in a rehabilitation home.[9]

In the U.S.A., one significant development has been the creation of "rape crises centres". These centres have all female participants including some rape victims, whose common concern is the problem of sex crime and they aim at providing counselling and other therapeutic measures to the victims. They may operate through a telephone "hot line" or from an office maintained for the purpose. Two different kinds of centres have emerged as regards their attitude towards criminal justice administration agencies; some have cooperative while others have an antagonistic relationship with these agencies. In general, the views of the antagonistic variety have been summed up as follows:[10]

(1) The sex victim does not benefit from and only stands to suffer further degradation by reporting her victimisation to the police and cooperating with the prosecution of the case.

(2) Nothing is lost by not reporting the victimisation to the police because the criminal justice system is grossly ineffective in apprehending, successfully prosecuting, or even incarcerating dangerous sex criminals.

(3) Psychiatry, the behavioural and social sciences and the "helping" professions have nothing to offer the female victim of sex crimes. They do not know how to protect her by rehabilitating sex offenders and they do not know how to treat her as a victim.

(4) The best therapist for the female sex victim is another victim.

4. Female Victims

In Western societies, the issues regarding criminality against women generally pertain to and are confined to sexual offences but in the Indian setting, women are exposed to gang rapes by policemen and dominant caste groups, *sati*, wife-beating, prostitution and even occasional witch-hunting. Legislation exists and is reinforced from time to time to meet the challenges posed by some of the above-mentioned maladies but effective enforcement of the laws is not forthcoming; the defective legislation being only a marginal

7. Section 228-A, Penal Code.
8. Section 327(2), Code of Criminal Procedure.
9. Section 114-A, Evidence Act.
10. William MacDonald (Ed.), *Criminal Justice and the Victim* (1976), pp. 24-25.

cause in the overall socio-political milieu of the country. Crimes against women, particularly dowry deaths, are increasing at a rapid pace. According to the information furnished in Parliament, as many as 1390 cases of dowry deaths were registered in the country in the period January to October, 1988. There has been a general increase of crime against women in Delhi, the number of crimes reported was 1215 in 1985, 2660 in 1986, 2555 in 1987 and 3548 in 1988 (up to November 15). There has also been an increase in incidents of molestation of girl students in Delhi buses in the last two-three months.[11] The situation has worsened to such an extent that a central legislation against eve-teasing is on the anvil.

Most of the crimes against women in India are directly traceable to their inferior and subservient status as sanctified by social values and ideas based on religion, real or imagined. While there might have occurred a change among small sections of the élite and truly educated persons, no genuine change in perception is, however, discernible among the masses as regards their traditional attitudes towards women and their role and status in the family and society. Politicisation in certain situations only further aggravates the situation. *Sati*, for instance, may not be a common phenomenon in our contemporary society but the fairly recent sordid episode of Deorala[12] has brought into focus some very disturbing features regarding women's lot, especially the plight of Hindu widows. It also manifested the complete grip of the outmoded and, sometimes, imagined religious sanctions on substantial chunks of the population, including even the so-called educated people and the marked apathy and indifference of some of the politicians and police force regarding certain vital issues involved in such criminal situations. The virtues of sati are not extolled by villagers and illiterate persons alone but even the noted art critic Ananda Coomaraswami has expressed laudatory views about the practice of sati.[13] He considers the sacrifice of sati spiritually significant and equates her with a patriot who "must be unmoved by an appeal to self-interest or a merely utilitarian demonstration of futility". Dr P.V. Kane, the noted scholar, also has views on the same lines. Following the Deorala episode, the Shankaracharya of Kanchi expressed his appreciation and sympathy for the act of the sati. The editor of a national Hindi daily, *Jansatta* wrote a leading article supporting the 'sati practice'.

Dowry deaths caused by the husbands and in-laws of the hapless women, who are unable to fulfil their husband's or in-laws' unreasonable expectations

11. *The Hindustan Times*, December 2, 1988.
12. On 4th September, 1987, a young Rajput woman was burnt to death on the pyre of her husband in a small town in Rajasthan. It is doubtful whether it was a voluntary sati or the woman was forced to do it.
13. *The Dance of Shiva* (1945), quoted by V.N. Datta in *Sati : Widow Burning in India*, 1988, p. 231.

based on greed and avarice, are quite often given the colour of suicide. Despite some well-meaning legislation to help the prosecution,[14] it is necessary to secure conviction of the offenders in a majority of the cases.[15]

5. Minority Groups and Weaker Sections

Members of the ethnical, religious or linguistic minorities in pluralistic societies may be especially vulnerable to crimes. In conflicts resulting from socio-economic imbalances and political factors, they are generally the worst sufferers. The phenomenon is almost universal and a typical example is provided by India where communal strifes owing to a variety of causes, pose a perennial problem. A number of caste and communal riots occur each year in the country leading to the murder, rape and destruction and looting of property on a large scale in which the main sufferers obviously are those belonging to minority and weaker sections and this is irrespective of the fact as to who was responsible for the flare-up in the first instance. Hardly any administrative or legal action is possible or even tried in situations involving a large number of persons and, paradoxical as it may sound, the greater the tragedy, the lesser is the possibility of the protection of the victims and of punishment to the perpetrators of the ghastly crimes.[16]

Consumer Victims

Consumers of various goods and services are quite often the victims of unscrupulous practices of manufacturers, traders, contractors and members of other professional and occupational groups. Though there are civil and criminal laws in plenty[17], as are also the various 'warranties' and 'guarantees' given to protect the consumer, they do not serve much useful purpose in actual practice.

The Consumer Protection Act, 1986 is the most significant and recent legislation on the subject. It is very comprehensive and all kinds of goods and services are brought under it. Under the Act, advisory and adjudicating bodies known as Consumer Protection Councils are to be set up at the Central and State levels. In order to serve the purpose they have been assigned, these councils have to protect the various rights of consumers: the right to be

14. Sections 113-A and 113-B have recently been introduced in the Evidence Act. They create presumptions in favour of the prosecution in cases of suicide by a woman due to alleged cruelty by her husband or in-laws and in proceedings regarding dowry deaths.

15. For detailed discussion on sati and dowry deaths, see Personal Violence against Women in Chapter XVI, *supra.*

16. *See* Chapter IX for a discussion on the role and attitude of the police force vis-a-vis minorities. Also see the chapter on 'Violence' for the problem of communal violence.

17. Some of the more important enactments are : Drug Control Act, 1950; Industries (Development and Regulation) Act, 1951; Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954; Prevention of Food Adulteration Act, 1954; Essential Commodities Act, 1955; Trade and Merchandise Marks Act, 1958; Standard of Weights and Measures Act, 1976 ; Sale of Goods Act, 1930; Agricultural Produce (Grading and Marking) Act, 1937; Drugs and Cosmetics Act, 1940 and many provisions of the Indian Penal Code, e.g., Sections 272 to 276 ; Sections 481 to 487 and Section 491.

informed about the quality, quantity, potency, purity, standard and price of goods, right to be assured access to a variety of goods at competitive prices; right to be led at appropriate forums; right to seek redressal against unfair trade or unscrupulous exploitation of consumers; and right to consumer education.

Adjudicating bodies are to be set up at district, state and national levels with jurisdiction up to rupees one lakh, ten lakhs and above respectively.

Victim and Criminal Justice

One important and basic factor in the administration of criminal justice is the victim's decision as to whether he should invoke the judicial process. In the U.S.A. every victimisation survey conducted since 1967 has shown that total crime is 2 to 3 times higher than the amount of crime known to the police. There are a number of motives and factors responsible for the wide gap between the actual volume of the crime and the reports made to the police about it.

Crime reporting to the police, would obviously depend to a great extent on the victim's perception regarding efficiency of the police and the likely response from them. In 1966, the U.S. President's Commission on Law Enforcement and Administration of Justice sponsored the first nationwide survey of criminal victimisation. It was found that 35% of the robberies and aggravated assaults, 42% of the burglaries, 40% of the larcenies (above $ 50) and 11% of the vehicle thefts were not reported to the police. The most common reasons given were that the "police could not do anything about the matter" (58%), the victim was "not sure if the real offenders would be caught" (31%) and the "police would not want to be bothered" (28%). In India, more than the inefficiency of the police, real or perceived, it is the unlikelihood of police interest and response and corruption on their part as perceived by a majority of the citizens which makes them cynical and somewhat convinced about the futility of approaching the police. The police is rather regarded as being in league with criminals of certain varieties.

Some of the self-evident propositions which have been tested and are supported by the data in a study made in the U.S.A., are as follows:[18]

1. If the seriousness of the crime is greater, the probability of reporting is greater.
2. If the victim has more positive attitudes towards the police, is more trusting of the police, then the probability of reporting is greater.
3. If the victim believes that the police and other law enforcement institutes are effective, then the probability of reporting is greater.
4. If the victim is more involved in the community, more integrated into the community, then the probability of reporting is greater.

18. Schneider, Burcart and Wilson, *The Role of Attitudes* (1974).

5. In the event of property loss, if the lost items were insured, then the probability of reporting is greater.
6. If the offender is a stranger, then the probability of reporting is greater.

The police may not be the only inhibiting factor constituting obstacles to the invocation of the criminal law process by the victims. The victim continues to suffer at all the stages subsequent to the reporting to the police, during investigation and processing of the case by the police and even during the trial by the court. The suffering of a victim's witness in terms of harassment and humiliation, various kinds of inconveniences and the financial losses may be quite formidable. The convenience and interests of judges and others connected with the court (prosecution and defence lawyers, court clerks, etc.), as can be expected, are given priority over those of the victim. The delays and adjournments are inevitable, resulting in unnecessary running around and avoidable repeated and futile trips by the victim to the court. A typical example even from a country like the U.S.A., which probably has a much more efficient and enlightened system of judicial administration than many other countries, is worth citing at length. The first person account by a rape victim, a law graduate, is as given below:[19]

> "The police took me to the hospital. I was kept waiting, and the intern was very rude. A few months later I saw his report; there was no mention of my facial cuts and he had written that I appeared calm.
>
> After the hospital examination, I went down to the police station and gave my statement. I hadn't been back to sleep or even taken a shower when a detective arrived to dust for prints. A few minute later the district attorney's office called and told me to come in right away for a preliminary hearing. I told my story for the third time that morning. He was there, with his lawyer, and I was very nervous because they made me give my name and address.
>
> The next day I told the story again to the grand jury. It was easier, though, because he wasn't there. One of the cops was really nice. He knew I'd be alone, so he brought his wife along. Everyone looked bored out of their minds, and no one bothered to tell me what was going on.
>
> In September, I got a subpoena. I panicked. I didn't know what it meant. An assistant district attorney told me I had to appear before the grand jury. He wouldn't believe that I had already done that. He asked me questions like what I had been wearing on the night of the rape. When I said a nightgown, he asked, 'Was that all ?' Finally, he discovered that I had been before the grand jury and sent me home.
>
> I inquired about my case in October, but couldn't get my information. I began to think I was a lunatic. I kept telling my story over and

19. Cited in William McDonald, *op. cit.*, pp. 166-67.

over, but nobody seemed to be listening. I just wanted to drop the whole thing.

In December, I called the D.A. and told him I was going home to California for Christmas. He told me not to go because my case might come up. I didn't want to give him my parents' number because they didn't known about the rape. We wound up hanging up on each other.

Then a new assistant district attorney took over my case. This one started to collect evidence, but it had been several months since the crime and there weren't too many witnesses left in the area. He had the defendant investigated by a private detective, who discovered that he had raped and shot another woman while he was out on bail.

The trial was delayed by the defense attorney's constant excuses. He claimed he was sick or busy with another case. The judge found out that there was no such case. The lawyer had just been stalling.

I believe that a rapist has every right to be defended, but I don't believe he should win his case by not showing up. The judge has finally ordered the attorney and defendant to appear in court. After 16 months, my case will finally be heard. I hope it is over soon; my nightmares keep getting worse. If the defense attorney goes into my sexual history, I don't think I'll be able to handle it. I think I might fall apart."

The financial cost and inconvenience of the victim's participation in the administration of justice is not confined to the victim alone but may effect others also. In an American study, 37% of the victims indicated that at least one "close" associate had been 'seriously inconvenienced' as a result of victimisation. Also, 17% of the victims said that at least one person close to them had experienced "serious financial consequences" and 30% stated that at least one had known "serious mental or emotional suffering" as a consequence of the present victimisation.[20]

Victim's Characteristics: Police and Judicial Attitudes

An interesting area of recent researches is the determination of the extent to which the administrative and judicial action is influenced by the conduct and personal factors and characteristics of the victim. Some American studies have examined the police discretion in charging the alleged offenders in this context. Not surprisingly, it has been found that the police are more likely to bring charges in an assault case if the victim and offender are strangers and less likely to do so if they are related or known to each other. The greater the prestige of the victim, the lesser the chance of the case being dropped. Older victims being regarded as defenceless, it has been found that

20. Knudten *et al.*, *The Victim in the Administration of Criminal Justice* (1975).

cases in which the homicide victim was sixty or older were less likely to be dismissed by the prosecutor.

Judicial attitude, as reflected in sentencing, also appears to be amenable to the personal factors and characteristics of victims. More severe judicial action is discernible in cases of helpless victims, e.g., elderly persons, children and females. Lesser severity is reflected in the sentencing in victim precipitated crimes. Interestingly enough, the American studies also reveal that the attractiveness of the victim and defendant also affected sentences passed by the court, greater sentence passed where the victim happened to be attractive and lesser sentence in case of attractive defendants.

Emerging Trends and Policies

In the primitive societies the responsibility of protecting oneself against crime and of punishing the offenders rested with the individuals which reflected the ideas of retributive and restitutive justice. As the societies got organised in the form of States, the responsibility of protecting the members against criminals... and punishing the violators of criminal codes shifted to the political authority. The remedies, however continued to be based, by and large, on the restitutive justice which required compensation by the wrong-doer to the victim or his family members. This was the position obtaining in the old Germenic Law, Code of Hamurabi, Law of Moses and the ancient Hindu Law. Later, the same ideas of restitution, along with the elements of retribution, were followed in the Islamic legal system. The situation was aptly summed up by Sir Henry Maine:[21]

> "Penal law of ancient communities is not the law of crimes, it is the law of wrongs. The person injured proceeds against the wrong done by an ordinary civil action and recovers compensation in the shape of money damages if he succeeds.
>
> Besides restitution, the philosophy based on compensation was also believed to incorporate the concept of atonement and expiation on the one hand and that of punishment on the other.
>
> The third stage, as reflected in the contemporary world, was reached at the end of the medieval age with the idea of crime as an act against the State taking firm roots along with the vesting of more powers in the political authority. Even if theoretically not unsound as such, in practice it gave rise to the unfortunate situation, already alluded to, in which the victim of the crime became an irrelevant factor in the administration of justice; the State being merely concerned with the punishment and to a lesser extent, reformation and rehabilitation of the offender."

21. *Ancient Law* (1901), p. 370.

The concept of restitutive justice was sought to be revised in the 19th Century by some eminent criminologists like Garofalo and Ferri in Italy and Bentham in England. Though in 1926 Sweden introduced a system in which victims were paid compensation out of the fine imposed on the offender some concrete progress was made in Europe, the U.S.A. and some other countries commencing from the early sixties only. Schemes to pay the victims out of public funds were introduced in Europe, Canada, Australia and New Zealand. Switzerland, where some pioneering work commenced in 1963, even went to the extent of amending its Constitution to promote victim compensation programmes. So the system of restitutive justice is not confined now to payment out of the fines imposed on offenders but the State has also accepted responsibility for compensation in varying degrees in these countries. Because of the obvious reasons, mainly economic, almost nothing has been done so far in the Third World countries.

The interest in the victims of crime has been quite rapid in the nineteen seventies and eighties during which time many international symposia were held to focus attention on the victims of crime. In 1979, the World Society of Victimology was formed and the Seventh Congress on Prevention of Crime and Treatment of Offenders in 1985 focussed its attention on the problem. In recent years, almost all the countries of Europe and North America have passed legislation to protect the interests of crime victims. The newly-generated interest in crime victims has led to certain trends and policies ; some of them are as follows :

1. It is being increasingly realised that the victim must be accorded the dignity and respect by the criminal law agencies, viz., the police and courts. As a matter of fact, quite often secondary victimisation results because of the indifferent and callous attitude not only of the criminal law agencies but of the people in the vicinity, hospitals and the mass media as well. Understandably, the police regard the victim primarily as a 'source of information' only and for them he may even be a 'poor' or 'useless' witness. In the U.S.A. and some European countries, statutory guidelines in the form of "victims' bills of rights" are being provided. Many State-funded and voluntary victim services are also made available.
2. A victim has hardly any role in the criminal trial though there is an increasing awareness now that the victim must be given rightful participation opportunities in the trial instead of being just a helpless and passive spectator to the court proceedings. Efforts are being made to remedy the situation. In the U.S.A., for instance, under the Victim-Witness Protection Act of 1982, victims are to be consulted in the plea-bargaining process. In Germany, compensation is now payable to a victim if the charges are dropped against an offender.

3. Innovative use is being made of certain sentencing techniques like probation to provide relief to the victims. An offender, in appropriate circumstances, may be released on probation if willing to compensate the victim. In England, under the Criminal Justice Act of 1982, as amended in 1988, the court must specify the reasons for not making an order for compensation.

4. In certain kinds of situations, where the guilt of the offender is clear, efforts are made to bring the wrongdoer and victim together in order to lead them to agreements or adjustments for the restoration of losses of the victim ; there being a greater potential in this kind of approach rather than the mere punishment of the offender.

The European Committee on Crime Problems which came into being in 1956 has played a notable role in formulating policies to deal with crime. From the early seventies onwards, the Council of Europe has been focussing its attention on issues concerning victims of crimes dealing with various aspects like compensation and assistance to crime victims. The Council has also made endeavours to procure a more effective position for the victim in the criminal justice system. The central idea is to give a better deal to the victims without adversely affecting the legitimate rights and safeguards available to the offenders. Prevention of victimisation is also an important part of the overall strategy in this direction and dissemination of relevant information to the potential victims can be much useful to achieve the objectives in this regard. The public is to be provided information on the technical facilities available and appropriate action to be taken to prevent offences from being committed. Assistance to the victim may be in any of the modes given below :

(*i*) Emergency help to meet immediate needs ;

(*ii*) continuing medical, psychological, social and material help ;

(*iii*) advice to prevent further victimisation ;

(*iv*) information on victim's rights ;

(*v*) assistance during the criminal process ;

(*vi*) assistance in obtaining reparation by the offender or other agencies or compensation by the State.

Since the victim is generally in the dark regarding police and court proceedings, it is of utmost importance that he be kept informed at all stages of the process and information must be provided :

(*i*) at police level, regarding the possibility of material or legal assistance as well as regarding the outcome of police investigation ;

(*ii*) at prosection level regarding decisions concerning prosecution or refraining from it ;

(*iii*) at trial level regarding the date and place of hearings concerning the offence which caused the victim's suffering, the opportunities of

obtaining restitution and compensation within the criminal justice system and the outcome of the case.

Regarding the compensation to crime victims, the Council's Convention provides that the State should intervene when compensation cannot be made available by the offender or other sources, e.g., insurance in traffic accidents. According to the Convention, the victims to whom compensation is payable are those who have sustained serious bodily injury or impairment of health directly attributable to a *deliberate* crime of violence and the dependants of persons who have died as a result of such crime. Compensation schemes may impose both upper and lower limits ; this is in view of the limited funds which may be available and to avoid many small claims to prevent too much burden on the system.

State Compensation Programmes

Compensations are payable in the United Kingdom under the Criminal Injuries Compensation Scheme, 1964. A Criminal Injuries Compensation Board was constituted which was later transformed into a statutory body under the Criminal Justice Act of 1988. The basis of quantum of compensation is the same as that of damages in civil injuries and the money payable is for pain and suffering, loss of earning capacity and out-of-pocket expenses. Under the revised scheme of 1973, it is now possible to give compensation for injuries caused by one family member to another.

The cost involved in implementing the programme is enormous. In the U.K., a sum of approximately six million pounds sterling was paid in 1976 as compensation for 16,000 claims and there is an annual increase of 15% in the costs. Administrative expenditure itself accounts for 11% of the disbursements.

The following conditions must be satisfied for making a victim eligible to receive compensation in the United Kingdom:

(*a*) There must have been a prosecution regarding the offence against the victim; the conditions can be waived off for practical, technical and other good reasons only.

(*b*) Injury must be of such a nature as would entitle the victim to a damage of at least five hundred pounds.

(*c*) Where the victim and offender happen to be of the same family, the Board must be satisfied that there was no likelihood of their living together and that they stopped living together before the application was made for compensation.

(*d*) If the victim or the person claiming on his behalf is less than 18, compensation is to be paid only if the Board is satisfied that it would not be against the interest of the minor to make a full or reduced award.

(*e*) There is no compensation payable in property offences.

In the U.S.A., California was the first State to introduce laws to compensate victims of violent crimes in 1965 and, as of now, 45 of the 50 States have such programmes. The remedies are through private insurance, public assistance programmes and restitution. Most statutes insist on the victim's cooperation with the police to make him eligible for compensation. The crime must be reported to the police within a prescribed period after its occurrence. Apart from the persons who are injured or killed as a result of crime, those who suffer injuries while preventing a crime being committed or apprehending a criminal or helping a victim or enforcement officer are also eligible for compensation.

The compensation programmes are administered through the following offences:

(*i*) An administrative agency especially created for the purpose.

(*ii*) An existing machinery like the one dealing with workmen's compensation.

(*iii*) Courts of law.

The scheme has been extended in a majority of States to the victims of drunken driving and in a few States also to those who continue to live with the offenders after becoming victims of domestic violence. The number of eligible persons receiving the compensation is going up gradually and it is possible that in a few years perhaps as many as half of all the eligible victims will receive State compensation. Extension of eligibility even to persons who may not be victims of direct and violent crimes is the current trend in some of the European countries, viz., Sweden, Austria, Finland and France.

Sentencing Alternatives—Compensation Orders

The use of probation and suspended sentence techniques is being made in many countries of Europe and in North America to procure compensation to crime victims by the offenders through court orders. Probation or suspended sentence is granted if the offender is willing to compensate the victim. The Criminal Justice Act of the U.K. provides that if a court contemplates to impose both fine and compensation order, and the offender lacks the capacity for both the payments, the court is to issue a compensation order only. Since 1988, the law requires the court to record reasons if no order for compensation is passed. In the U.S.A., legislation has been passed by all the States to empower the courts to order compensation by the offender to the victim and reasons must be recorded when the compensation order is not passed.

The Indian Position

Section 357 of the Code of Criminal Procedure, 1973 is the main provision dealing with compensation to crime victims.[22] Section 545 of the

22. Other provisions having some bearing on the subject are Sections 237, 250 and 358 of the Code of Criminal Procedure.

old Criminal Procedure Code dealt with the same subject-matter though it was somewhat narrower in scope. Section 357(1) lays down inter alia:

> "357(1). Whenever under any law in force for the time being a criminal court imposes a fine...or a sentence of which fine forms a part, the court may, when passing judgment, order the whole or any part of the fine recovered to be applied:
>
> (*a*) in defraying expenses properly incurred in the prosecution;
>
> (*b*) in the payment to any person of compensation for any loss or injury caused by the offence when compensation is, in the opinion of the court, recoverable by such person in a civil court;
>
> (*c*) when any person is convicted of any offence for having caused the death of another person of having abetted the commission of such an offence in paying compensation to persons who are, under the Fatal Accidents Act, 1855, entitled to recover damages from the person sentenced for the loss resulting to them from such death."[23]

Sub-section (3) of Section 357 was added, as recommended by the Law Commission in its Forty-first Report, in the new Criminal Procedure Code of 1973 and it provides:

> "357(3). When a court imposes a sentence of which fine does not form a part, the court may, when passing judgment, order the accused person to pay, by way of compensation such amount as may be specified in the order, to the person who has suffered any loss or injury by reasons of the act for which the accused person has been sentenced."

The court has a very limited discretion under Section 357(1) ; it can give compensation only *out of the fine* if imposed on the offender. The court has, however, much more discretion under sub-section (3) of Section 357; though only if fine does not form a part of the sentence. Theoretically, the power of the court is unlimited, though practical considerations would prevail. A magistrate can order for higher compensation than the amount of fine he can impose.

In *Sarwan Singh* v. *State of Punjab*[24], it was said by the Court that in awarding compensation the court should not just consider what compensation ought to be awarded to the heirs of the deceased and then impose a fine which is higher than the compensation. The Court laid down that the amount of fine should be determined on the basis of various factors including the nature of crime, number of injuries, and the paying capacity of the offender. In this case the two appellants were fined Rs 3500 each along with rigorous imprisonment of 5 years in view of sufficient funds being available with them.

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23. Under Section 1-A(*b*) of the Act, husband, wife, parents and children are entitled to compensation.
24. (1978) 4 SCC 111.

The courts have generally been averse to the imposition of fine along with a severe or even substantial punishment by way of imprisonment. In *Mohammed Shah* v. *Emperor*[25], the offender was convicted under Sections 32, 149, and 148 of the Penal Code. He was awarded one year's imprisonment and a fine of Rs 500 out of which Rs 400 was awarded to the heirs of the victim. The Lahore High Court held imprisonment to be substantial and, therefore, fine to be unwarranted. The court further held that compensation in any case would not have been payable to the heirs in view of the blameworthiness on the part of the deceased. He was himself the aggressor and had encroached upon the land of the offender.

The Supreme Court has expressed its disapproval of combining the punishment of fine with a death sentence and even with life imprisonment.[26] In the instant case, the High Court had reduced the punishment of death sentence to life imprisonment awarded by the trial court and imposed a fine of Rs 20,000 on the offender payable to the heirs of the deceased. The Supreme Court reduced the fine and compensation to Rs 3000 and in doing so made the following observations:

> "Though for the offence of murder courts have the power to combine a sentence of death with a sentence of fine, that power is sparingly exercised because the sentence of death is an extreme penalty to impose and adding to that grave penalty a sentence of fine is hardly calculated to serve any social purpose..., even a sentence of life imprisonment is seldom combined with a heavy sentence of fine. Before imposing the sentence of fine, particularly a heavy fine, along with the sentence of death or life imprisonment, one must pause to consider whether the sentence of fine is at all called for and, if so, what is the proper or adequate fine to impose in the circumstances of the case."

The judicial attitude is, however, reflected somewhat differently in *Guruswami* v. *State of T.N.*[27], where it was held that in a case of murder it is only fair that proper compensation should be provided for the dependants of the deceased. It was a case where the appellant had murdered his father and brother as a result of some family feud and was sentenced to death. On appeal, the Supreme Court reduced the punishment to life imprisonment and imposed a fine of Rs 10,000 on the offender to be paid to the heirs of the deceased. A perusal of a subsequent case, *Baldev Singh* v. *State of Punjab*[28] also indicates that quite often the Supreme Court prefers to substitute a severe punishment given to the offender in award of compensation to the victim in deaths resulting due to family feud. In the instant case, the appellants were

25. AIR 1934 Lah 519.
26. *Palaniappa Gounder* v. *State*, AIR 1977 SC 1323.
27. (1979) 3 SCC 799.
28. (1995) 6 SCC 593 : 1995 SCC (Cri) 1132.

found guilty of culpable homicide of a family and awarded life imprisonment by the High Court. On appeal, the Supreme Court observed that in appropriate cases, award of compensation to the victim served better than the deterrent punishment to the offender. The two appellants were altered to pay Rs 35,000 each to the widow of the deceased and her children and the sentence of life imprisonment against the affluents was reduced to the period of imprisonment already undergone by them.

In quite a few cases of death caused by rash or negligent act, punishable under Section 304-A of the Penal Code, the courts have reduced the period of imprisonment to the one already undergone but imposed a severe fine in order to provide substantial relief to the dependants of the deceased.[29] With the same object, an innovative use of the probation technique is being made to compensate the dependants of the victim of death caused by rash or negligent act as would be evident by two cases decided by the Punjab and Haryana High Court.[30] The killer is released on probation if, besides other favourable factors, the offender is willing to pay compensation to the heirs of the victim. Though probation was denied in *Dr Jacob George* v. *State of Kerala*[31], where a homeopath attempting to procure an abortion by operating upon a woman caused her death, the Supreme Court reduced the imprisonment to the two months already undergone. The fine imposed upon the petitioner was increased from Rs 5000 to one lakh required to nurse the child of the deceased reasonably well.

It is evident that only marginal action is possible under Section 357 of the Code of Criminal Procedure to compensate the victims of crime. The various constraints and limitations may be summed up as follows:

1. Much depends upon the paying capacity of the offender and, in most cases, this acts as a bar against the victim getting any compensation.
2. There is a general reluctance on the part of the criminal courts regarding the use of the criminal law process for compensation purposes, coupled with the indifference and even ignorance on the part of lawyers and clients and many opportunities are lost because of their default.
3. The courts are reluctant to impose fine along with substantial imprisonment in serious offences and the scope of fine in any case is very limited in terms of quantum in minor offences.

29. *Sukhdeo Singh* v. *State of Punjab*, 1982 SCC (Cri) 467; *Prabhu Prasad Sah* v. *State of Bihar*, 1976 SCC (Cri) 597 : AIR 1977 SC 704.
30. *Sunder Lal* v. *State of Punjab* and *Gurmit Singh* v. *State of Punjab* ; Chandigarh Crime Cases, p. 126 and p. 335.
31. (1994) 3 SCC 430 : 1994 SCC (Cri) 774 : 1994 Cri LJ 3851 (SC).

4. Maximum fines have been laid down for various offences which were fixed a long time ago and their monetary value must now be a very small fraction of what they might have been at the time when these fines were introduced in the Penal Code.
5. Conviction is necessary for the payment of compensation. As is well known, conviction may not be possible in many cases irrespective of the merits of the case.

Besides the Code of Criminal Procedure, there are some other enactments which contain provisions for compensation to crime victims. Section 5 of the Probation of Offenders Act authorises a court releasing an offender on probation to direct him to pay such compensation as the court thinks reasonable for loss or injury caused to any person by the commission of the offence and such costs of the proceedings as the court thinks reasonable. The probation system may be quite conducive to restitutive justice and in the U.S.A. restitution is quite often the condition for release of an offender on probation. Compensation by the prisoners out of their earnings during imprisonment may also be a good strategy; an appropriate sanction in view of the fact that prisoners are given wages for the work done in prison.

Some laws provide for the imposition of punitive tax on the community as a whole in an area where riots occur or members of an unlawful assembly commit some offences. The Bombay Police Act, 1951 is such an enactment. This remedy is perhaps the only effective remedy indicated in large scale violence involving a large number of offenders and victims. This remedy is particularly useful in the context of communal riots in the country since hardly any person is convicted, not even prosecuted, regarding participation in communal disturbances due to various political and legal constraints and expediency. Similar legislation is needed for other parts of the country in view of the recurring nature of communal riots.

Compensation by the State to the victims of crime is the only proper remedy but it is very unlikely for such a scheme to materialise in India and other developing and poor countries. The fact, however, remains that ineffective means of preventing and controlling crime are the main factors leading to victimisation. There is a great need for the constant evaluation and improvement of law and enforcement procedures in order to reduce crime victimisation to the minimum level. Government and non-governmental agencies have to perform effective roles in providing to victims both emergency and prolonged medical, psychiatric, psychological and social services which are altogether lacking at present in the country. In any future set-up in India, the following issues raised in an international symposium held in Israel must also be considered:

1. Should there be a maximum and/or minimum level for compensation ?
2. What is the nature of the losses that should be recompensed, e.g., direct damage, loss of earnings, pain and suffering ?
3. Should consideration be given to the victim's conduct at the time of the offence and/or to his general character in determining the question of compensation.
4. Should payment be by right and denied only for stated reasons by the court ?
5. Should present-day schemes be extended to include crimes against property ?
6. Should the State be entitled to claim reimbursement from the criminal and/or should the State be empowered to compel criminals to give part of their earnings to the State ?
7. Should States set up compulsory insurance schemes for certain professions whose exercise relies upon an element of fidelity and trust in order to cover damage caused by one of their members to stock exchanges ?
8. Should compensation schemes contain opportunities for appeal ?
9. Should bystanders attempting to aid victims be entitled to compensation for damage or losses suffered ?
10. Should the victim be entitled to immediate partial compensation in order to tide him over initial expenses, the determination of the final sum to be made subsequently by the compensation board ?
11. Should an accused person who is found not guilty be entitled to compensation for court costs incurred and/or for other losses ?
12. Should a judge in a criminal trial be entitled to order compensation by the State concurrently with his verdict ?
13. Should the office of ombudsman be set up to provide direct focus on the needs of the victim, with special concern for mitigating immediate trauma, prevention of further stress at the hands of society, as well as offering treatment for victim-recidivists ?

APPENDIX I

The Probation of Offenders Act, 1958

[Act 20 of 1958][1]

[*16th May, 1958*]

An Act to provide for the release of offenders on probation or after due admonition and for matters connected therewith

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14. Duties of probation officer
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18. Saving of operation of certain enactments
19. Section 562 of the Code not to apply in certain areas

Statement of Objects and Reasons.—The question of release of offenders on probation of good conduct instead of sentencing them to imprisonment has been under consideration for some time. In 1931, the Government of India prepared a draft of Probation of Offenders Bill and circulated it to the then Local Government for their views. However, owing to pre-occupation with other more important matters, the Bill could not be proceeded with. Later in 1934, the Government of India informed Provincial Governments that there was no prospect of Central legislation being undertaken at the time and there would be no objection to the Provinces undertaking such legislation themselves. A few Provinces accordingly enacted their own probation laws.

2. In several States, however, there are no separate probation laws at all. Even in States where there are probation laws, they are not uniform nor are they adequate to meet the present requirements. In the meantime, there has been an increasing emphasis on the reformation and rehabilitation of the offender as a useful and self-reliant member of society without subjecting him to the deleterious effects of jail life. In view of the wide-spread interest in the probation system in the country, this question has been re-examined and it is proposed to have a Central law on the subject which should be uniformly applicable to all the States.

1. The Act has been extended to Dadra and Nagar Haveli by Regulation 6 of 1963, Section 2 and Schedule I to Goa, Daman and Diu by Regulation II of 1963, Section 3 and Schedule and to Pondicherry by Act 26 of 1958, Section 3 and Schedule.

3. It is proposed to empower Courts to release an offender after admonition in respect of certain specified offences. It is also proposed to empower Courts to release on probation, in all suitable cases, an offender found guilty of having committed an offence not punishable with death or imprisonment for life. In respect of offenders under 21 years of age, special provision has been made putting restrictions on their imprisonment. During the period of probation, offenders will remain under the supervision of the probation officers in order that they may be reformed and become useful members of society. The Bill seeks to achieve these objects. (*Vide* Gazette of India, Part II, Section 2, Extra., dated Nov. 11, 1957, p. 842).

Be it enacted by Parliament in the Ninth Year of the Republic of India as follows :—

1. Short title, extent and commencement.—(1) This Act may be called the Probation of Offenders Act, 1958.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force in a State on such date as the State Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different parts of the State.

2. Definitions.—In this Act, unless the context otherwise requires,—

(*a*) "Code" means the Code of Criminal Procedure, 1898 (5 of 1898) ;

(*b*) "probation officer" means an officer appointed to be a probation officer or recognised as such under Section 13 ;

(*c*) "prescribed" means prescribed by rules made under this Act ;

(*d*) words and expressions used but not defined in this Act and defined in the Code of Criminal Procedure, 1898 (5 of 1898), shall have the meanings respectively assigned to them in that Code.

3. Power of court to release certain offenders after admonition.—When any person is found guilty of having committed an offence punishable under Section 379 or Section 380 or Section 381 or Section 404 or Section 420 of the Indian Penal Code (45 of 1860), or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code or any other law, and no previous conviction is proved against him and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under Section 4, release him after due admonition.

Explanation.—For the purposes of this section, previous conviction against a person shall include any previous order made against him under this section or Section 4.

4. Power of court to release certain offenders on probation of good conduct.—(1) When any person is found guilty of having committed an

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

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned.

5. Power of court to require released offenders to pay compensation and costs.—(1) The court directing the release of an offender under Section 3 or Section 4, may, if it thinks fit, make at the same time a further order directing him to pay—

(*a*) such compensation as the court thinks reasonable for loss or injury caused to any person by the commission of the offence ; and

(*b*) such costs of the proceedings as the court thinks reasonable.

(2) The amount ordered to be paid under sub-section (1) may be recovered as a fine in accordance with the provisions of Sections 386 and 387 of the Code.

(3) A civil court trying any suit, arising out of the same matter for which the offender is prosecuted, shall take into account any amount paid or recovered as compensation under sub-section (1) in awarding damages.

6. Restrictions on imprisonment of offenders under twenty-one years of age.—(1) When any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under Section 3 or Section 4, and if the court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so.

(2) For the purpose of satisfying itself whether it would not be desirable to deal under Section 3 or Section 4 with an offender referred to in sub-section (1), the court shall call for a report from the probation officer and consider the report, if any, and any other information available to it relating to the character and physical and mental conditions of the offender.

7. Report of probation officer to be confidential.—The report of a probation officer referred to in sub-section (2) of Section 4 or sub-section (2) of Section 6 shall be treated as confidential :

Provided that the court may, if it so thinks fit, communicate the substance thereof to the offender and may give him an opportunity of producing such evidence as may be relevant to the matter stated in the report.

8. Variation of conditions of probation.—(1) If, on the application of a probation officer, any court which passes an order under Section 4 in respect of an offender is of opinion that in the interests of the offender and the public it is expedient or necessary to vary the conditions of any bond entered into by the offender, it may, at any time during the period when the bond is effective, vary the bond by extending or diminishing the duration thereof so, however, that it shall not exceed three years from the date of the original order or by altering the conditions thereof or by inserting additional conditions therein :

Provided that no such variation shall be made without giving the offender and the surety or sureties mentioned in the bond an opportunity of being heard.

(2) If any surety refuses to consent to any variation proposed to be made under sub-section (1), the court may require the offender to enter into

a fresh bond and if the offender refuses or fails to do so, the court may sentence him for the offence of which he was found guilty.

(3) Notwithstanding anything hereinbefore contained, the court which passes an order under Section 4 in respect of an offender may, if it is satisfied on an application made by the probation officer that the conduct of the offender has been such as to make it unnecessary that he should be kept any longer under supervision, discharge the bond or bonds entered into by him.

9. Procedure in case of offender failing to observe conditions of bond.—(1) If the court which passes an order under Section 4 in respect of an offender or any court which could have dealt with the offender in respect of his original offence has reason to believe, on the report of a probation officer or otherwise, that the offender has failed to observe any of the conditions of the bond or bonds entered into by him, it may issue a warrant for his arrest or may, if it thinks fit, issue summons to him and his sureties, if any, requiring him or them to attend before it at such time as may be specified in the summons.

(2) The court before which an offender is so brought or appears may either remand him to custody until the case is concluded or it may grant him bail, with or without surety, to appear on the date which it may fix for hearing.

(3) If the court, after hearing the case, is satisfied that the offender has failed to observe any of the conditions of the bond or bonds entered into by him, it may forthwith—

(*a*) sentence him for the original offence ; or

(*b*) where the failure is for the first time, then, without prejudice to the continuance in force of the bond, impose upon him a penalty not exceeding fifty rupees.

(4) If a penalty imposed under clause (*b*) of sub-section (3) is not paid within such period as the court may fix, the court may sentence the offender for the original offence.

10. Provision as to sureties.—The provisions of Sections 122, 126, 126-A, 406-A, 514, 514-A, 514-B and 515 of the Code shall, so far as may be, apply in the case of bonds and sureties given under this Act.

11. Courts competent to make order under the Act, appeal and revision and powers of courts in appeal and revision.—(1) Notwithstanding anything contained in the Code or any other law, an order under this Act may be made by any court empowered to try and sentence the offender to imprisonment and also by the High Court or any other court when the case comes before it on appeal or in revision.

(2) Notwithstanding anything contained in the Code, where an order under Section 3 or Section 4 is made by any court trying the offender

(other than a High Court), an appeal shall lie to the court to which appeals ordinarily lie from the sentences of the former court.

(3) In any case where any person under twenty-one years of age is found guilty of having committed an offence and the court by which he is found guilty declines to deal with him under Section 3 or Section 4, and passes against him any sentence of imprisonment with or without fine from which no appeal lies or is preferred, then, notwithstanding anything contained in the Code or any other law, the court to which appeals ordinarily lie from the sentences of the former court may, either of its own motion or on an application made to it by the convicted person or the probation officer, call for and examine the record of the case and pass such order thereon as it thinks fit.

(4) When an order has been made under Section 3 or Section 4 in respect of an offender, the appellate court or the High Court in the exercise of its power of revision may set aside such order and in lieu thereof pass sentence on such offender according to law :

Provided that the appellate court or the High Court in revision shall not inflict a greater punishment than might have been inflicted by the court by which the offender was found guilty.

12. Removal of disqualification attaching to conviction.—Notwithstanding anything contained in any other law, a person found guilty of an offence and dealt with under the provisions of Section 3 or Section 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law :

Provided that nothing in this section shall apply to a person who, after his release under Section 4, is subsequently sentenced for the original offence.

13. Probation officers.—(1) A probation officer under this Act shall be—

(*a*) a person appointed to be a probation officer by the State Government or recognised as such by the State Government ; or

(*b*) a person provided for this purpose by a society recognised in this behalf by the State Government ; or

(*c*) in any exceptional case, any other person who, in the opinion of the court, is fit to act as a probation officer in the special circumstances of the case.

(2) A court which passes an order under Section 4 or the district magistrate of the district in which the offender for the time being resides may, at any time, appoint any probation officer in the place of the person named in the supervision order.

Explanation.—For the purposes of this section, a presidency town shall be deemed to be a district and chief presidency magistrate shall be deemed to be the district magistrate of that district.

(3) A probation officer, in the exercise of his duties under this Act, shall be subject to the control of the district magistrate of the district in which the offender for the time being resides.

STATE AMENDMENTS

Gujarat

In Section 13, renumber the existing Explanation as Explanation I and *insert* thereafter the following :—

"*Explanation II.*—For the purposes of this section, the City of Ahmedabad, as defined in clause (2) of Section 2 of the Ahmedabad City Courts Act, 1961 (Guj. Act 19 of 1961), shall be deemed to be a District and the Chief Magistrate appointed under that Act shall be deemed to be District Magistrate of that District."—Guj. Act 33 of 1964, Section 2 (18-12-1964).

Maharashtra

In sub-section (1) of Section 13, in clause (*a*), after the words "Probation Officer by the State Government", *insert* the words "or by such officer as the State Government may subject to such restrictions and conditions (if any) as it may impose, by order, authorise in this behalf."—Mah. Act 31 of 1969, Section 2 (13-6-1969).

14. Duties of probation officer.—A probation officer shall, subject to such conditions and restrictions, as may be prescribed,—

(*a*) inquire, in accordance with any directions of a court, into the circumstances or home surroundings of any person accused of an offence with a view to assist the court in determining the most suitable method of dealing with him and submit reports to the court ;

(*b*) supervise probationers and other persons placed under his supervision and, where necessary, endeavour to find them suitable employment ;

(*c*) advise and assist offenders in the payment of compensation or costs ordered by the court ;

(*d*) advise and assist, in such cases and in such manner as may be prescribed, persons who have been released under Section 4 ; and

(*e*) perform such other duties as may be prescribed.

15. Probation officers to be public servants.—Every probation officer and every other officer appointed in pursuance of this Act shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code (45 of 1860).

16. Protection of action taken in good faith.—No suit or other legal proceeding shall lie against the State Government or any probation officer or any other officer appointed under this Act in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or orders made thereunder.

17. Power to make rules.—(1) The State Government may, with the approval of the Central Government, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

(*a*) appointment of probation officers, the terms and conditions of their service and the area within which they are to exercise jurisdiction ;

(*b*) duties of probation officers under this Act and the submission of reports by them ;

(*c*) the conditions on which societies may be recognised for the purposes of clause (*b*) of sub-section (1) of Section 13 ;

(*d*) the payment of remuneration and expenses to probation officers or of a subsidy to any society which provides probation officers ; and

(*e*) any other matter which is to be, or may be, prescribed.

(3) All rules made under this section shall be subject to the condition of previous publication and shall, as soon as may be after they are made, be laid before the State Legislature.

18. Saving of operation of certain enactments.—Nothing in this Act shall affect the provisions of Section 31 of the Reformatory Schools Act, 1897 (8 of 1897), or sub-section (2) of Section 5 of the Prevention of Corruption Act, 1947 (2 of 1947) [2][* * *], or of any law in force in any State relating to juvenile offenders or borstal schools.

19. Section 562 of the Code not to apply in certain areas.—Subject to the provisions of Section 18, Section 562 of the Code shall cease to apply to the States or parts thereof in which this Act is brought into force.

STATE AMENDMENTS

Gujarat

Section 20

After Section 19 *insert* the following :

"20. *Repeal of Bombay Act XIX of 1938.*—In the area in which the Act comes into force (hereinafter referred to as "the said area"),—

(1) if the said area forms part of the Bombay area of the State of Gujarat, the Bombay Probation of Offenders Act, 1938 (Bom. Act XIX of 1938) ;

(2) if the said area forms part of the Saurashtra area of the State of Gujarat, the Bombay Probation of Offenders Act, 1938 (Bom. Act XIX of 1938) as adapted and applied to the said Saurashtra area ; and

(3) if the said area forms part of the Kerala area of the State of Gujarat, the Bombay Probation of Offenders Act, 1938 (Bom. Act XIX of 1938), as applied to Kutch area.

shall stand *repealed* with effect on and from the date on which the Act comes into force in the said area :

Provided that such repeal shall not affect—

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2. Words "or the Suppression of Immoral Traffic in Women and Girls Act, 1956" *omitted* by Act 46 of 1978, S. 20 (w.e.f. 2-10-1979).

(*a*) the previous operation of any law so repealed or anything duly done or suffered thereunder,

(*b*) any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed, or

(*c*) any penalty, forfeiture or punishment incurred under any law so repealed in respect of any offence, or

(*d*) any investigation, legal proceeding or remedy in respect of such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid

and any such investigation, legal proceeding or remedy may be instituted, continued, enforced and any such penalty, forfeiture or punishment may be imposed as if this Act had not come into force :

Provided further that anything done or any action taken (including any appointment made, recognition given or rule or order made) under the provisions of any law so repealed under this section and in force immediately before the said date shall be deemed to have been done or taken under the corresponding provisions of this Act, and shall continue in force until superseded by anything done or any action taken under the provisions of this Act."—Guj. Act 33 of 1964, Section 8 (18-12-1964).

APPENDIX II

The Juvenile Justice Act, 1986[1]

[Act 53 of 1986]

[*1st December, 1986*]

An Act to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of certain matters relating to, and disposition of, delinquent juveniles

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1. Received the assent of the President on December 1, 1986 and published in the Gazette of India, Extra., Part II, Section 1, dated 3rd December, 1986, pp. 1-23.

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Be it enacted by Parliament in the Thirty-seventh Year of the Republic of India as follows :—

Prefatory Note—Statement of Objects and Reasons.—A review of the working of the existing Children Acts would indicate that much greater attention is required to be given to children who may be found in situations of social maladjustment, delinquency or neglect. The justice system as available for adults is not considered suitable for being applied to juveniles. It is also necessary that a uniform juvenile justice system should be available throughout the country which should make adequate provision for dealing with all aspects in the changing social, cultural and economic situation in the country. There is also need for larger involvement of informal systems and community based welfare agencies in the care, protection, treatment, development and rehabilitation of such juveniles.

2. In this context, the proposed legislation aims at achieving the following objectives :—

(*i*) To lay down a uniform legal framework for juvenile justice in the country so as to ensure that no child under any circumstances is lodged in jail or police lock-up. This is being ensured by establishment of Juvenile Welfare Boards and Juvenile Courts ;

(*ii*) To provide for a specialised approach towards the prevention and treatment of juvenile delinquency in its full range in keeping with the developmental needs of the child found in any situation of social maladjustment ;

(*iii*) To spell out the machinery and infrastructure required for the care, protection, treatment, development and rehabilitation of various categories of children coming

within the purview of the juvenile justice system. This is proposed to be achieved by establishing observation homes, juvenile homes for neglected juveniles and special homes for delinquent juveniles ;

(*iv*) To establish norms and standards for the administration of juvenile justice in terms of investigations and prosecution, adjudication and disposition, and care, treatment and rehabilitation ;

(*v*) To develop appropriate linkages and co-ordination between the formal system of juvenile justice and voluntary agencies engaged in the welfare of neglected or socially maladjusted children and to specifically define the areas of their responsibilities and roles ;

(*vi*) To constitute special offences in relation to juveniles and provide for punishments therefor ;

(*vii*) To bring the operation of the juvenile justice system in the country in conformity with the United Nations Standard Minimum Rule for the Administration of Juvenile Justice.

3. As its various provisions come into force in different parts of the country they would replace the corresponding laws on the subject such as the Children Act, 1960 and other State enactments on the subject.

The Bill seeks to achieve the above objects.

CHAPTER I
PRELIMINARY

1. Short title, extent and commencement.—(1) This Act may be called the Juvenile Justice Act, 1986.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and for different States.

2. Definitions.—In this Act, unless the context otherwise requires,—

(*a*) "begging" means—

(*i*) soliciting or receiving alms in a public place or entering into any private premises for the purpose of soliciting or receiving alms, whether under the pretence of singing, dancing, fortune-telling, performing tricks or selling articles or otherwise ;

(*ii*) exposing or exhibiting, with the object of obtaining or extorting alms, any sore, wound, injury, deformity or disease, whether of himself or of any other person or of an animal ;

(*iii*) allowing oneself to be used as an exhibit for the purpose of soliciting or receiving alms ;

(*b*) "Board" means a Juvenile Welfare Board constituted under Section 4;

(*c*) "brothel", "prostitute", "prostitution" and "public place" shall have the meanings respectively assigned to them in the Suppression of Immoral Traffic in Women and Girls Act, 1956 (104 of 1956) ;

(*d*) "competent authority" means, in relation to neglected juveniles, a Board and, in relation to delinquent juveniles, a Juvenile Court and where no such Board or Juvenile Court has been constituted, includes any Court empowered under sub-section (2) of Section 7 to exercise the powers conferred on a Board or Juvenile Court ;

(*e*) "delinquent juvenile" means a juvenile who has been found to have committed an offence ;

(*f*) "fit person" or "fit institution" means any person or institution (not being a police station or jail) found fit by the competent authority to receive and take care of a juvenile entrusted to his or its care and protection on the terms and conditions specified by the competent authority ;

(*g*) "guardian" in relation to a juvenile, includes any person who, in the opinion of the competent authority, having cognizance of any proceeding in relation to a juvenile, has, for the time being, the actual charge of, or control over, that juvenile ;

(*h*) "juvenile" means a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years ;

(*i*) "Juvenile Court" means a Court constituted under Section 5 ;

(*j*) "juvenile home" means an institution established or certified by the State Government under Section 9 as a juvenile home ;

(*k*) "narcotic drug" and "psychotropic substance" shall have the meanings respectively assigned to them in the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) ;

(*l*) "neglected juvenile" means a juvenile who—

(*i*) is found begging ; or

(*ii*) is found without having any home or settled place of abode and without any ostensible means of subsistence and is destitute ;

(*iii*) has a parent or guardian who is unfit or incapacitated to exercise control over the juvenile ; or

(*iv*) lives in a brothel or with a prostitute or frequently goes to any place used for the purpose of prostitution, or is found to associate with any prostitute or any other person who leads an immoral, drunken or depraved life ; .

(*v*) who is being or is likely to be abused or exploited for immoral or illegal purposes or unconscionable gain ;

(*m*) "observation home" means any institution or place established or recognised by the State Government under Section 11 as an observation home ;

(*n*) "offence" means an offence punishable under any law for the time being in force ;

(*o*) "place of safety" means any place or institution (not being a police station or jail), the person in charge of which is willing temporarily to receive and take care of a juvenile and which, in the opinion of the competent authority may be a place of safety for the juvenile ;

(*p*) "prescribed" means prescribed by rules made under this Act ;

(*q*) "probation officer" means an officer appointed as a probation officer under this Act or under the Probation of Offenders Act, 1958 (20 of 1958).

(*r*) "special home" means an institution established or certified by the State Government under Section 10 ;

(*s*) "supervision", in relation to a juvenile placed under the care of any parent, guardian or other fit person or fit institution under this Act, means the supervision of that juvenile by a probation officer for the purpose of ensuring that the juvenile is properly looked after and that the conditions imposed by the competent authority are complied with ;

(*t*) all words and expressions used but not defined in this Act and defined in the Code of Criminal Procedure, 1973 (2 of 1974), shall have the meanings respectively assigned to them in that Code.

3. Continuation of inquiry in respect of juvenile who has ceased to be a juvenile.—Where an inquiry has been initiated against a juvenile and during the course of such inquiry the juvenile ceases to be such, then, notwithstanding anything contained in this Act or in any other law for the time being in force, the inquiry may be continued and orders may be made in respect of such person as if such person had continued to be a juvenile.

CHAPTER II
COMPETENT AUTHORITIES AND INSTITUTIONS FOR JUVENILES

4. Juvenile Welfare Boards.—(1) The State Government may, by notification in the Official Gazette, constitute for any area specified in the notification, one or more Juvenile Welfare Boards for exercising the powers and discharging the duties conferred or imposed on such Board in relation to neglected juveniles under this Act.

(2) A Board shall consist of a Chairman and such other members as the State Government thinks fit to appoint, of whom not less than one shall be a woman ; and every such member shall be vested with the powers of a Magistrate under the Code of Criminal Procedure, 1973 (2 of 1974).

(3) The Board shall function as a Bench of Magistrates and shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974), on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of the first class.

5. Juvenile Courts.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the State Government may, by notification in the Official Gazette, constitute for any area specified in the notification, one or more Juvenile Courts for exercising the powers and discharging the duties conferred or imposed on such Court in relation to delinquent juveniles under this Act.

(2) A Juvenile Court shall consist of such number of Metropolitan Magistrates or Judicial Magistrates of the first class, as the case may be, forming a Bench as the State Government thinks fit to appoint, of whom one shall be designated as the Principal Magistrate; and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974), on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of the first class.

(3) Every Juvenile Court shall be assisted by a panel of two honorary social workers possessing such qualifications as may be prescribed, of whom at least one shall be a woman, and such panel shall be appointed by the State Government.

6. Procedure, etc., in relation to Boards and Juvenile Courts.—(1) In the event of any difference of opinion among the members of a Board or among the Magistrates of a Juvenile Court, the opinion of the majority shall prevail, but where there is no such majority, the opinion of the Chairman or of the Principal Magistrate, as the case may be, shall prevail.

(2) A Board or Juvenile Court may act notwithstanding the absence of any member of the Board or, as the case may be, any Magistrate of the Juvenile Court, and no order made by the Board or Juvenile Court shall be invalid by reason only of the absence of any member or Magistrate, as the case may be, during any stage of the proceeding.

(3) No person shall be appointed as a member of the Board or as a Magistrate in the Juvenile Court unless he has, in the opinion of the State Government, special knowledge of child psychology and child welfare.

7. Powers of Board and Juvenile Court.—(1) Where a Board or a Juvenile Court has been constituted for any area, such Board or Court, shall, notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act have power to deal exclusively with all proceedings under this Act relating to neglected juveniles or delinquent juveniles, as the case may be :

Provided that a Board or a Juvenile Court may, if it is of opinion that it is necessary so to do having regard to the circumstances of the case, transfer any proceedings to any Juvenile Court or Board, as the case may be :

Provided further that where there is any difference of opinion between a Board and a Juvenile Court regarding the transfer of any proceedings under

the first proviso, it shall be referred to the Chief Metropolitan Magistrate or, as the case may be, the Chief Judicial Magistrate for decision, and in a case where the District Magistrate is functioning as a Board or a Juvenile Court, such difference of opinion shall be referred to the Court of Session, and the decision of the Chief Metropolitan Magistrate or Chief Judicial Magistrate or, as the case may be, the Court of Session on such reference shall be final.

(2) Where no Board or Juvenile Court has been constituted for any area, the powers conferred on the Board or the Juvenile Court by or under this Act shall be exercised in that area, only by the following, namely:

(*a*) The District Magistrate ; or

(*b*) the Sub-Divisional Magistrate ; or

(*c*) any Metropolitan Magistrate or Judicial Magistrate of the first class, as the case may be.

(3) The powers conferred on the Board or Juvenile Court by or under this Act may also be exercised by the High Court and the Court of Session, when the proceeding comes before them in appeal, revision or otherwise.

8. Procedure to be followed by a Magistrate not empowered under the Act.—(1) When any Magistrate not empowered to exercise the powers of a Board or a Juvenile Court under this Act is of opinion that a person brought before him under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile, he shall record such opinion and forward the juvenile and the record of the proceeding to the competent authority having jurisdiction over the proceeding.

(2) The competent authority to which the proceeding is forwarded under sub-section (1) shall hold the inquiry as if the juvenile had originally been brought before it.

9. Juvenile homes.—(1) The State Government may establish and maintain as many juvenile homes as may be necessary for the reception of neglected juveniles under this Act.

(2) Where the State Government is of opinion that any institution other than a home established or maintained under sub-section (1) is fit for the reception of the neglected juveniles to be sent there under this Act, it may certify such institution as a juvenile home for the purposes of this Act.

(3) Every juvenile home to which a neglected juvenile is sent under this Act shall not only provide the juvenile with accommodation, maintenance and facilities for education, vocational training and rehabilitation, but also provide him with facilities for the development of his character and abilities and give him necessary training for protecting himself against moral danger or exploitation and shall also perform such other functions as may be prescribed to ensure all-round growth and development of his personality.

(4) The State Government may, by rules made under this Act, provide for the management of juvenile homes, including the standards and the nature of services to be maintained by them and the circumstances under which, and the manner in which, the certification of a juvenile home may be granted or withdrawn.

10. Special homes.—(1) The State Government may establish and maintain as many special homes as may be necessary for the reception of delinquent juveniles under this Act.

(2) Where the State Government is of opinion that any institution other than a home established or maintained under sub-section (1), is fit for the reception of the delinquent juveniles to be sent there under this Act, it may certify such institution as a special home for the purposes of this Act.

(3) Every special home to which a delinquent juvenile is sent under this Act shall not only provide the juvenile with accommodation, maintenance and facilities for education, vocational training and rehabilitation, but also provide him with facilities for the development of his character and abilities and give him necessary training for his reformation and shall also perform such other functions as may be prescribed to ensure all-round growth and development of his personality.

(4) The State Government may, by rules made under this Act, provide for the management of special homes, including the standards and the nature of services to be maintained by them, and the circumstances under which, and the manner in which, the certification of a special home may be granted or withdrawn.

(5) The rules made under sub-section (4) may also provide for the classification and separation of delinquent juveniles on the basis of age and nature of offences committed by them.

11. Observation homes.—(1) The State Government may establish and maintain as many observation homes as may be necessary for the temporary reception of juveniles during the pendency of any inquiry regarding them under this Act.

(2) Where the State Government is of opinion that any institution other than a home established or maintained under sub-section (1), is fit for the temporary reception of juveniles during the pendency of any inquiry regarding them under this Act, it may recognise such institution as an observation home for the purposes of this Act.

(3) Every observation home to which a juvenile is sent under this Act shall not only provide the juvenile with accommodation, maintenance and facilities for medical examination and treatment, but also provide him with facilities for useful occupation.

(4) The State Government may, by rules made under this Act, provide for the management of observation homes, including the standards and the

nature of services to be maintained by them, and the circumstances under which, and the manner in which, an institution may be recognised as an observation home or the recognition may be withdrawn.

12. After-care organisations.—The State Government may, by rules made under this Act, provide—

(*a*) for the establishment or recognition of after-care organisations and the powers that may be exercised by them for effectively carrying out their functions under this Act ;

(*b*) for a scheme of after-care programme to be followed by such after-care organisation for the purpose of taking care of juveniles after they leave juvenile homes or special homes and for the purpose of enabling them to lead an honest, industrious and useful life ;

(*c*) for the preparation or submission of a report by the probation officer in respect of each juvenile prior to his discharge from a juvenile home or special home, as the case may be, regarding the necessity and nature of after-care of such juvenile, the period of such after-care, supervision thereof and for the submission of a report by the probation officer on the progress of each such juvenile ;

(*d*) for the standards and the nature of services to be maintained by such after-care organisations ;

(*e*) for such other matters as may be necessary for the purpose of effectively carrying out the scheme of after-care programme of juveniles.

CHAPTER III
NEGLECTED JUVENILES

13. Production of neglected juveniles before Boards.—(1) If any police officer or any other person or organisation authorised by the State Government in this behalf, by general or special order, is of opinion that a person is apparently a neglected juvenile, such police officer or other person or organisation may take charge of that person for bringing him before a Board.

(2) When information is given to an officer-in-charge of a police station about any neglected juvenile found within the limits of such station, he shall enter in a book to be kept for the purpose the substance of such information and take such action thereon as he deems fit and if such officer does not propose to take charge of the juvenile, he shall forward a copy of the entry made to the Board.

(3) Every juvenile taken charge of under sub-section (1) shall be brought before the Board without any loss of time but within a period of twenty-four hours of such charge taken excluding the time necessary for the journey from the place where the juvenile had been taken charge of to the Board.

(4) Every juvenile taken charge of under sub-section (1) shall, unless he is kept with his parent or guardian, be sent to an observation home (but not to a police station or jail) until he can be brought before a Board.

14. Special procedure to be followed when neglected juvenile has parents.—(1) If a person, who in the opinion of the police officer or the authorised person or organisation is a neglected juvenile, has a parent or guardian who has the actual charge of, or control over, the juvenile, the police officer or the authorised person or the organisation may, instead of taking charge of the juvenile, make a report to the Board for initiating an inquiry regarding that juvenile.

(2) On receipt of a report under sub-section (1), the Board may call upon the parent or guardian to produce the juvenile before it and to show cause why the juvenile should not be dealt with as a neglected juvenile under the provisions of this Act and if it appears to the Board that the juvenile is likely to be removed from its jurisdiction or to be concealed, it may immediately order his removal (if necessary by issuing a search warrant for the immediate production of the juvenile) to an observation home or a place of safety.

15. Inquiry by Board regarding neglected juveniles.—(1) When a person alleged to be a neglected juvenile is produced before a Board, it shall examine the police officer or the authorised person or the organisation who brought the juvenile or made the report and record the substance of such examination and hold the inquiry in the prescribed manner and may make such orders in relation to the juvenile as it may deem fit.

(2) Where a Board is satisfied on inquiry that a juvenile is a neglected juvenile and that it is expedient so to deal with him, the Board may make an order directing the juvenile to be sent to a juvenile home for the period until he ceases to be a juvenile :

Provided that the Board may, for reasons to be recorded, extend the period of such stay, but in no case the period of stay shall extend beyond the time when the juvenile attains the age of eighteen years, in the case of a boy, or twenty years, in the case of a girl :

Provided further that the Board may, if it is satisfied that having regard to the circumstances of the case it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit.

(3) During the pendency of any inquiry regarding a juvenile, the juvenile shall, unless he is kept with his parent or guardian, be sent to an observation home or a place of safety for such period as may be specified in the order of the Board :

Provided that no juvenile shall be kept with his parents or guardian if, in the opinion of the Board, such parent or guardian is unfit or unable to exercise or does not exercise proper care and control over the juvenile.

16. Power to commit neglected juvenile to suitable custody.—(1) If the Board so thinks fit, it may, instead of making an order under sub-section (2) of Section 15, for sending the juvenile to a juvenile home, make an order placing the juvenile under the care of a parent, guardian or other fit person, on such parent, guardian or fit person executing a bond with or without surety to be responsible for the good behaviour and well-being of the juvenile and for the observance of such conditions as the Board may think fit to impose.

(2) At the time of making an order under sub-section (1) or at any time subsequently, the Board may, in addition, make an order that the juvenile be placed under supervision for any period not exceeding three years in the first instance.

(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), if at any time it appears to the Board, on receiving a report from the probation officer or otherwise, that there has been a breach of any of the conditions imposed by it in respect of the juvenile, it may, after making such inquiry as it deems fit, order the juvenile to be sent to a juvenile home.

17. Uncontrollable juveniles.—Where a parent or guardian of a juvenile complains to the Board that he is not able to exercise proper care and control over the juvenile and the Board is satisfied on inquiry that proceedings under this Act should be initiated regarding the juvenile, it may send the juvenile to an observation home or a place of safety and make such further inquiry as it may deem fit and the provisions of Section 15 and Section 16 shall, as far as may be, apply to such proceedings.

CHAPTER IV
DELINQUENT JUVENILES

18. Bail and custody of juveniles.—(1) When any person accused of a bailable or non-bailable offence and apparently a juvenile is arrested or detained or appears or is brought before a Juvenile Court, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law for the time being in force, be released on bail with or without surety but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral danger or that his release would defeat the ends of justice.

(2) When such person having been arrested is not released on bail under sub-section (1) by the officer-in-charge of the police station, such officer shall cause him to be kept in an observation home or a place of safety in the prescribed manner (but not in a police station or jail) until he can be brought before a Juvenile Court.

(3) When such person is not released on bail under sub-section (1) by the Juvenile Court it shall, instead of committing him to prison, make an

order sending him to an observation home or a place of safety for such period during the pendency of the inquiry regarding him as may be specified in the order.

19. Information to parent or guardian or probation officer.—Where a juvenile is arrested, the officer-in-charge of the police station to which the juvenile is brought shall, as soon as may be after the arrest, inform—

(*a*) the parent or guardian of the juvenile, if he can be found, of such arrest and direct him to be present at the Juvenile Court before which the juvenile will appear ; and

(*b*) the probation officer of such arrest in order to enable him to obtain information regarding the antecedents and family history of the juvenile and other material circumstances likely to be of assistance to the Juvenile Court for making the inquiry.

20. Inquiry by Juvenile Court regarding delinquent juveniles.—Where a juvenile having been charged with an offence appears or is produced before a Juvenile Court, the Juvenile Court shall hold the inquiry in accordance with the provisions of Section 39 and may, subject to the provisions of this Act, make such order in relation to the juvenile as it deems fit.

21. Orders that may be passed regarding delinquent juveniles.—(1) Where a Juvenile Court is satisfied on inquiry that a juvenile has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, the Juvenile Court may, if it so thinks fit,—

(*a*) allow the juvenile to go home after advice or admonition ;

(*b*) direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety as that Court may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years ;

(*c*) direct the juvenile to be released on probation of good conduct and placed under the care of any fit institution for the good behaviour and well-being of the juvenile for any period not exceeding three years ;

(*d*) make an order directing the juvenile to be sent to a special home,—

(*i*) in the case of a boy over fourteen years of age or of a girl over sixteen years of age, for a period of not less than three years ;

(*ii*) in the case of any other juvenile, for the period until he ceases to be a juvenile :

Provided that the Juvenile Court may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case it is expedient

so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit :

Provided further that the Juvenile Court may, for reasons to be recorded, extend the period of such stay, but in no case the period of stay shall extend beyond the time when the juvenile attains the age of eighteen years, in the case of a boy, or twenty years, in the case of a girl ;

(*e*) order the juvenile to pay a fine if he is over fourteen years of age and earns money.

(2) Where an order under clause (*b*), clause (*c*) or clause (*e*) of sub-section (1) is made, the Juvenile Court may, if it is of opinion that in the interests of the juvenile and of the public it is expedient so to do, in addition make an order that the delinquent juvenile shall remain under the supervision of a probation officer named in the order during such period, not exceeding three years, as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the delinquent juvenile :

Provided that if at any time afterwards it appears to the Juvenile Court on receiving a report from the probation officer or otherwise, that the delinquent juvenile has not been of good behaviour during the period of supervision or that the fit institution under whose care the juvenile was placed is no longer able or willing to ensure the good behaviour and well-being of the juvenile it may, after making such inquiry as it deems fit, order the delinquent juvenile to be sent to a special home.

(3) The Juvenile Court making a supervision order under sub-section (2), shall explain to the juvenile and the parent, guardian or other fit person or fit institution, as the case may be, under whose care the juvenile has been placed, the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to the juvenile, the parent, guardian or other fit person or fit institution, as the case may be, the sureties, if any, and the probation officer.

(4) In determining the special home, or any person or institution to whose custody a juvenile is to be committed or entrusted under this Act, the Court shall pay due regard to the religious denomination of the juvenile to ensure that religious instruction contrary to the religious persuasion of the juvenile is not imparted to him.

22. Orders that may not be passed against delinquent juveniles.— (1) Notwithstanding anything to the contrary contained in any other law for the time being in force, no delinquent juvenile shall be sentenced to death or imprisonment, or committed to prison in default of payment of fine or in default of furnishing security :

Provided that where a juvenile who has attained the age of fourteen years has committed an offence and the Juvenile Court is satisfied that the

offence committed is of so serious a nature or that his conduct and behaviour have been such that it would not be in his interest or in the interest of other juvenile in a special home to sent him to such special home and that none of the other measures provided under this Act is suitable or sufficient, the Juvenile Court, may order the delinquent juvenile to be kept in safe custody in such place and manner as it thinks fit and shall report the case for the orders of the State Government.

(2) On receipt of a report from a Juvenile Court under sub-section (1), the State Government may make such arrangement in respect of the juvenile as it deems proper and may order such delinquent juvenile to be detained at such place and on such conditions as it thinks fit :

Provided that the period of detention so ordered shall not exceed the maximum period of imprisonment to which the juvenile could have been sentenced for the offence committed.

23. Proceeding under Chapter VIII of the Code of Criminal Procedure not competent against juvenile.—Notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1973 (2 of 1974), no proceeding shall be instituted and no order shall be passed against a juvenile under Chapter VIII of the said Code.

24. No joint trial of juvenile and person not a juvenile.—(1) Notwithstanding anything contained in Section 223 of the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law for the time being in force, no juvenile shall be charged with or tried for, any offence together with a person who is not a juvenile.

(2) If a juvenile is accused of an offence for which under Section 223 of the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force, such juvenile and any person who is not a juvenile would, but for the prohibition contained in sub-section (1), have been charged and tried together, the court taking cognizance of that offence shall direct separate trials of the juvenile and the other person.

25. Removal of disqualification attaching to conviction.—Notwithstanding anything contained in any other law, a juvenile who has committed an offence and has been dealt with under the provisions of this Act shall not suffer disqualification, if any, attaching to a conviction of an offence under such law.

26. Special provision in respect of pending cases.—Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Juvenile Court which shall pass

orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that the juvenile has committed the offence.

CHAPTER V
PROCEDURE OF COMPETENT AUTHORITIES GENERALLY AND APPEALS AND REVISION FROM ORDERS OF SUCH AUTHORITIES

27. Sittings, etc., of Boards and Juvenile Courts.—(1) A Board or a Juvenile Court shall hold its sittings at such place, on such day and in such manner, as may be prescribed.

(2) A Magistrate empowered to exercise the powers of a Board, or, as the case may be, a Juvenile Court under sub-section (2) of Section 7 shall, while holding any inquiry regarding a juvenile under this Act, as far as practicable, sit in a building or room different from that in which the ordinary sittings of Civil and Criminal Courts are held, or on different days or at times different from those at which the ordinary sittings of such Courts are held.

(3) An inquiry regarding a juvenile under this Act shall be held expeditiously and shall ordinarily be completed within a period of three months from the date of its commencement, unless, for special reasons to be recorded in writing, the competent authority otherwise directs.

28. Persons who may be present before competent authority.—(1) Save as provided in this Act, no person shall be present at any sitting of a competent authority, except—

(*a*) any officer of the competent authority, or

(*b*) the parties to the inquiry before the competent authority, the parent or guardian of the juvenile and other persons directly concerned in the inquiry including police officers and legal practitioners, and

(*c*) such other persons as the competent authority may permit to be present.

(2) Notwithstanding anything contained in sub-section (1), if at any stage during an inquiry, a competent authority considers it to be expedient in the interest of the juvenile or on grounds of decency or morality that any person including the police officers, legal practitioners, the parent, guardian or the juvenile himself should withdraw, the competent authority may give such direction, and if any person refuses to comply with such direction, the competent authority may have him removed and may, for this purpose, cause to be used such force as may be necessary.

(3) No legal practitioner shall be entitled to appear before a Board in any case or proceeding before it, except with the special permission of that Board.

29. Attendance of parent or guardian of juvenile.—Any competent authority before which a juvenile is brought under any of the provisions of this Act may, whenever it so thinks fit, require any parent or guardian having the actual charge of, or control over, the juvenile to be present at any proceeding in respect of the juvenile.

30. Dispensing with attendance of juvenile.—If, at any stage during the course of an inquiry, a competent authority is satisfied that the attendance of the juvenile is not essential for the purpose of the inquiry, the competent authority may dispense with his attendance and proceed with the inquiry in the absence of the juvenile.

31. Committal to approved place of juvenile suffering from dangerous disease and his future disposal.—(1) When a juvenile who has been brought before a competent authority under this Act is found to be suffering from a disease requiring prolonged medical treatment or physical or mental complaint that will respond to treatment, the competent authority may send the juvenile to any place recognised to be an approved place in accordance with the rules made under this Act for such period as it may think necessary for the required treatment.

(2) Where a juvenile is found to be suffering from leprosy or is of unsound mind, he shall be dealt with under the provisions of the Lepers Act, 1898 (3 of 1898) or the Indian Lunacy Act, 1912 (4 of 1912), as the case may be.

(3) Where a competent authority has taken action under sub-section (1) in the case of a juvenile suffering from an infectious or contagious disease, the competent authority before restoring the said juvenile to his partner in marriage, if there has been such, or to the guardian, as the case may be, shall, where it is satisfied that such action will be in the interest of the said juvenile call upon his partner in marriage or the guardian, as the case may be, to satisfy the competent authority by submitting to medical examination that such partner or guardian will not re-infect the juvenile in respect of whom the order has been passed.

32. Presumption and determination of age.—(1) Where it appears to a competent authority that a person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile, the competent authority shall make due inquiry as to the age of that person and for that purpose shall take such evidence as may be necessary and shall record a finding whether the person is a juvenile or not, stating his age as nearly as may be.

(2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile, and the age recorded by the

competent authority to be the age of the person so brought before it shall, for the purposes of this Act, be deemed to be the true age of that person.

33. Circumstances to be taken into consideration in making orders under the Act.—In making any order in respect of a juvenile under this Act, a competent authority shall take into consideration the following circumstances, namely :

(*a*) the age of the juvenile ;

(*b*) the state of physical and mental health of the juvenile ;

(*c*) the circumstances in which the juvenile was and is living ;

(*d*) the reports made by the probation officer ;

(*e*) the religious persuasion of the juvenile ;

(*f*) such other circumstances as may, in the opinion of the competent authority, require to be taken into consideration in the interest of the welfare of the juvenile :

Provided that in the case of a delinquent juvenile, the above circumstances shall be taken into consideration after the Juvenile Court has recorded a finding against the juvenile that he has committed the offence :

Provided further that if no report of the probation officer is received within ten weeks of his being informed under Section 19, it shall be open to the Juvenile Court to proceed without it.

34. Sending a juvenile outside jurisdiction.—In the case of a neglected or delinquent juvenile whose ordinary place of residence lies outside the jurisdiction of the competent authority before which he is brought, the competent authority may, if satisfied after due inquiry that it is expedient so to do, send the juvenile back to a relative or other person who is fit and willing to receive him at his ordinary place of residence and exercise proper care and control over him, notwithstanding that such place of residence is outside the jurisdiction of the competent authority; and the competent authority exercising jurisdiction over the place to which the juvenile is sent shall in respect of any matter arising subsequently have the same powers in relation to the juvenile as if the original order had been passed by itself.

35. Reports to be treated as confidential.—The report of the probation officer or any circumstance considered by the competent authority under Section 33 shall be treated as confidential :

Provided that the competent authority may, if it so thinks fit, communicate the substance thereof to the juvenile or his parent or guardian and may give such juvenile, parent or guardian an opportunity of producing such evidence as may be relevant to the matter stated in the report.

36. Prohibition of publication of names, etc., of juveniles involved in any proceeding under the Act.—(1) No report in any newspaper, magazine or news-sheet of any inquiry regarding a juvenile under this Act

shall disclose the name, address or school or any other particulars calculated to lead to the identification of the juvenile nor shall any picture of any such juvenile be published :

Provided that for reasons to be recorded in writing, the authority holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the interest of the juvenile.

(2) Any person contravening the provisions of sub-section (1) shall be punishable with fine which may extend to one thousand rupees.

37. Appeals.—(1) Subject to the provisions of this section, any person aggrieved by an order made by a competent authority under this Act may, within thirty days from the date of such order, prefer an appeal to the Court of Session :

Provided that the Court of Session may entertain the appeal after the expiry of the said period of thirty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) No appeal shall lie from—

(*a*) any order of acquittal made by the Juvenile Court in respect of a juvenile alleged to have committed an offence ; or

(*b*) any order made by a Board in respect of a finding that a person is not a neglected juvenile.

(3) No second appeal shall lie from any order of the Court of Session passed in appeal under this section.

38. Revision.—The High Court may, at any time, either of its own motion or on an application received in this behalf, call for the record of any proceeding in which any competent authority or Court of Session has passed an order for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit :

Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard.

39. Procedure in inquiries, appeals and revision proceedings.—(1) Save as otherwise expressly provided by this Act, a competent authority while holding any inquiry under any of the provisions of this Act, shall follow such procedure as may be prescribed and subject thereto, shall follow, as far as may be, the procedure laid down in the Code of Criminal Procedure, 1973 (2 of 1974), for trials in summons cases.

(2) Save as otherwise expressly provided by or under this Act, the procedure to be followed in hearing appeals or revision proceedings under this Act shall be, as far as practicable, in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).

40. Power to amend orders.—(1) Without prejudice to the provisions for appeal and revision under this Act, any competent authority may, either on its own motion or on an application received in this behalf, amend any order as to the institution to which a juvenile is to be sent or as to the person under whose care or supervision a juvenile is to be placed under this Act.

(2) Clerical mistakes in orders passed by a competent authority or errors arising therein from any accidental slip or omission may, at any time, be corrected by the competent authority either on its own motion or on an application received in this behalf.

CHAPTER VI
SPECIAL OFFENCES IN RESPECT OF JUVENILES

41. Punishment for cruelty to juvenile.—(1) Whoever, having the actual charge of, or control over, a juvenile, assaults, abandons, exposes or wilfully neglects the juvenile or causes or procures him to be assaulted, abandoned, exposed or neglected in a manner likely to cause such juvenile unnecessary mental or physical suffering shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

(2) No court shall take cognizance of an offence punishable under sub-section (1) unless the complaint is filed with the previous sanction of the State Government or an officer authorised by it in this behalf.

42. Employment of juveniles for begging.—(1) Whoever employs or uses any juvenile for the purposes of begging or causes any juvenile to beg shall be punishable with imprisonment for a term which may extend to three years and shall be liable to fine.

(2) Whoever, having the actual charge of, or control over, a juvenile abets the commission of the offence punishable under sub-section (1), shall be punishable with imprisonment for a term which may extend to one year and shall also be liable to fine.

(3) The offence punishable under this section shall be cognizable.

43. Penalty for giving intoxicating liquor or narcotic drug or psychotropic substance to a juvenile.—Whoever gives, or causes to be given, to any juvenile any intoxicating liquor in a public place or any narcotic drug or psychotropic substance except upon the order of a duly qualified medical practitioner or in case of sickness shall be punishable with imprisonment for a term which may extend to three years, and shall also be liable to fine.

44. Exploitation of juvenile employees.—Whoever ostensibly procures a juvenile for the purpose of any employment and withholds the earnings of the juvenile or uses such earnings for his own purposes shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.

45. Alternative punishment.—Where an act or omission constitutes an offence punishable under this Act and also under any other Central or State Act, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under such Act as provides for punishment which is greater in degree.

CHAPTER VII
MISCELLANEOUS

46. Power of State Government to discharge and transfer juveniles.—(1) The State Government may, notwithstanding anything contained in this Act, at any time, order a neglected or delinquent juvenile to be discharged from the juvenile home or special home, either absolutely or on such conditions as it may think fit to impose.

(2) The State Government may, notwithstanding anything contained in this Act, order—

(*a*) a neglected juvenile to be transferred from one juvenile home to another ;

(*b*) a delinquent juvenile to be transferred from one special home to another or from a special home to a borstal school where such school exists or from a special home to a juvenile home ;

(*c*) a neglected juvenile or a delinquent juvenile to be transferred from a juvenile home or a special home to a fit person or a fit institution ;

(*d*) a juvenile who has been released on licence which has been revoked or forfeited, to be sent to the special home or juvenile home from which he was released or to any other juvenile home or special home or borstal school :

Provided that the total period of the stay of the juvenile in a juvenile home or a special home or a fit institution or under a fit person shall not be increased by such transfer.

(3) The State Government may, notwithstanding anything contained in this Act, at any time, discharge a juvenile from the care of any person under whom he was placed under this Act either absolutely or on such conditions as it may think fit to impose.

47. Transfers between juvenile homes, etc., under the Act and juvenile homes, etc., of like nature in different parts of India.—(1) The Government of a State may direct any neglected juvenile or delinquent juvenile to be transferred from any juvenile home or special home within the State to any other juvenile home, special home or institution of a like nature in any other State with the consent of the Government of that State.

(2) The Government of a State may, by general or special order, provide for the reception in a juvenile home or special home within the State of a

neglected juvenile or delinquent juvenile detained in a juvenile home or special home or institution of a like nature in any other State where the Government of that State makes an order for such transfer, and upon such transfer the provisions of this Act shall apply to such juvenile as if he had been originally ordered to be sent to such juvenile home or special home under this Act.

48. Transfer of juveniles of unsound mind or suffering from leprosy or addicted to drugs.—(1) Where it appears to the State Government that any juvenile kept in a special home or juvenile home or institution in pursuance of this Act is suffering from leprosy or is of unsound mind, or is addicted to any narcotic drug or psychotropic substance, the State Government may order his removal to a leper asylum or mental hospital or treatment centre for drug addicts or other place of safe custody for being kept there for such period not exceeding the period for which he is required to be kept in custody under the orders of the competent authority or for such further period as may be certified by the medical officer to be necessary for the proper treatment of the juvenile.

(2) Where it appears to the State Government that the juvenile is cured of leprosy or of unsoundness of mind or drug addiction it may, if the juvenile is still liable to be kept in custody, order the person having charge of the juvenile to send him to the special home or juvenile home or institution from which he was removed or, if the juvenile is no longer liable to be kept in custody, order him to be discharged.

49. Placing out on licence.—(1) When a juvenile is kept in a juvenile home or special home, the State Government may, if it so thinks fit, release the juvenile from the juvenile home or special home and grant him a written licence for such period and on such conditions as may be specified in the licence permitting him to live with, or under the supervision of, any responsible person named in the licence willing to receive and take charge of him with a view to educate him and train him for some useful trade or calling.

(2) Any licence so granted under sub-section (1) shall be in force for the period specified in the licence or until revoked or forfeited by the breach of any of the conditions on which it was granted.

(3) The State Government may, at any time, by order in writing, revoke any such licence and order the juvenile to return to the juvenile home or special home from which he was released or to any other juvenile home or special home, and shall do so at the desire of the person with whom or under whose supervision the juvenile has been permitted to live in accordance with a licence granted under sub-section (1).

(4) When a licence has been revoked or forfeited and the juvenile refuses or fails to return to the special home or juvenile home to which he was

directed so to return, the State Government may, if necessary, cause him to be taken charge of and to be taken back to the special home or juvenile home.

(5) The time during which a juvenile is absent from a special home or juvenile home in pursuance of a licence granted under this section shall be deemed to be part of the time for which he is liable to be kept in custody in the special home or juvenile home :

Provided that when a juvenile has failed to return to the special home or juvenile home on the licence being revoked or forfeited, the time which elapses after his failure so to return shall be excluded in computing the time during which he is liable to be kept in custody.

50. Provision in respect of escaped juveniles.—Notwithstanding anything to the contrary contained in any other law for the time being in force, any police officer may take charge without warrant of a juvenile who has escaped from a special home or a juvenile home or from the care of a person under whom he was placed under this Act and shall send the juvenile back to the special home or the juvenile home or that person, as the case may be; and no proceeding shall be instituted in respect of the juvenile by reason of such escape but the special home, juvenile home or the person may, after giving the information to the competent authority which passed the order in respect of the juvenile, take such steps against the juvenile as may be deemed necessary.

51. Contribution by parents.—(1) The competent authority which makes an order for sending a neglected juvenile or a delinquent juvenile to a juvenile home or a special home or placing the juvenile under the care of a fit person or fit institution may make an order requiring the parent or other person liable to maintain the juvenile to contribute to his maintenance, if able to do so, in the prescribed manner.

(2) The competent authority before making any order under sub-section (1) shall inquire into the circumstances of the parent or other person liable to maintain the juvenile and shall record evidence, if any, in the presence of the parent or such other person, as the case may be.

(3) The person liable to maintain a juvenile shall, for the purposes of sub-section (1), include in the case of illegitimacy, his putative father :

Provided that where the juvenile is illegitimate and an order for his maintenance has been made under Section 125 of the Code of Criminal Procedure, 1973 (2 of 1974), the competent authority shall not ordinarily make an order for contribution against the putative father, but may order the whole or any part of the sums accruing due under the said order for maintenance to be paid to such person as may be named by the competent authority and such sum shall be paid by him towards the maintenance of the juvenile.

(4) Any order made under this section may be enforced in the same manner as an order under Section 125 of the Code of Criminal Procedure, 1973 (2 of 1974).

52. Fund.—(1) The State Government may create a Fund under such name as it thinks fit for the welfare and rehabilitation of the juveniles dealt with under this Act.

(2) There shall be credited to the Fund such voluntary donations, contributions or subscriptions as may be made by any individual or organisation.

(3) The Fund created under sub-section (1) shall be administered by such officers as authority, in such manner and for such purposes as may be prescribed.

53. Advisory Board.—(1) The State Government may constitute an Advisory Board to advise it on matters relating to the establishment and maintenance of homes, mobilisation of resources, provision of facilities for education, training and rehabilitation of neglected and delinquent juveniles and coordination among the various official and non-official agencies concerned.

(2) The Advisory Board shall consist of such number of officers and other persons as the State Government thinks fit and may also include experts and the representatives of voluntary organisations engaged in the relevant areas.

54. Visitors.—(1) The State Government may nominate not more than three non-officials to be Visitors for each of the homes established under this Act.

(2) A Visitor nominated for a home under sub-section (1) shall periodically visit such home and make a report to the State Government.

55. Control of custodian over juvenile.—Any person in whose custody a juvenile is placed in pursuance of this Act shall, while the order is in force, have the like control over the juvenile as he would have if he were his parent, and shall be responsible for his maintenance, and the juvenile shall continue in his custody for the period stated by the competent authority, notwithstanding that he is claimed by his parent or any other person :

Provided that no juvenile while in such custody shall be carried except with the permission of the competent authority.

56. Delinquent juvenile undergoing sentence at commencement of the Act.—In any area in which this Act is brought into force, the State Government may direct that a delinquent juvenile who is undergoing any sentence of imprisonment at the commencement of this Act shall, in lieu of undergoing such sentence, be sent to a special home or be kept in safe custody in such place and manner as the State Government thinks fit for the

remainder of the period of the sentence; and the provisions of this Act shall apply to the juvenile as if he had been ordered by a Juvenile Court to be sent to such special home or, as the case may be, ordered to be detained under sub-section (2) of Section 22.

57. Appointment of officers.—(1) The State Government may appoint as many probation officers, officers for the inspection of special homes, juvenile homes, observation homes or after-care organisations and such other officers as it may deem necessary for carrying out the purposes of this Act.

(2) It shall be the duty of the probation officer—

(*a*) to inquire, in accordance with the direction of a competent authority, into the antecedents and family history of any juvenile accused of an offence, with a view to assist the authority in making the inquiry ;

(*b*) to visit neglected and delinquent juveniles at such intervals as the probation officer may think fit ;

(*c*) to report to the competent authority as to the behaviour of any neglected or delinquent juvenile ;

(*d*) to advise and assist neglected or delinquent juveniles and, if necessary, endeavour to find them suitable employment ;

(*e*) where a neglected or delinquent juvenile is placed under the care of any person or institution on certain conditions, to see whether such conditions are being complied with ; and

(*f*) to perform such other duties as may be prescribed.

(3) Any officer empowered in this behalf by the State Government may enter any special home, juvenile home, observation home or after-care organisation and make a complete inspection thereof in all its departments and of the papers, registers and accounts relating thereto and shall submit the report of such inspection to the State Government.

58. Officers appointed under the Act to be public servants.—Probation officers and other officers appointed in pursuance of this Act shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code (45 of 1860).

59. Procedure in respect of bonds.—The provisions of Chapter XXXIII of the Code of Criminal Procedure, 1973 (2 of 1974), shall, as far as may be, apply to bonds taken under this Act.

60. Delegation of powers.—The State Government may, by general or special order, direct that any power exercisable by it under this Act shall, in such circumstances and under such conditions, if any, as may be specified in the order, be exercisable also by an officer subordinate to that Government.

61. Protection of action taken in good faith.—No suit or other legal proceeding shall lie against the State Government or any probation officer or other officer appointed under this Act in respect of anything which is in

good faith done or intended to be done in pursuance of this Act or of any rules or orders made thereunder.

62. Power to make rules.—(1) The State Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

(*a*) the places at which, the days on which, the time at which, and the manner in which, a competent authority may hold its sittings ;

(*b*) the procedure to be followed by a competent authority in holding inquiries under this Act, and the mode of dealing with juveniles suffering from dangerous diseases or mental complaints ;

(*c*) the circumstances in which and the conditions subject to which, an institution may be certified as a special home or a juvenile's home or recognised as an observation home, and the certification or recognition withdrawn ;

(*d*) the internal management of special homes, juvenile homes and observation homes and the standards and the nature of services to be maintained by them ;

(*e*) the functions and responsibilities of special homes, juvenile homes and observation homes ;

(*f*) the inspection of special homes, juvenile homes, observation homes and after-care organisations ;

(*g*) the establishment, management and functions of after-care organisations; the circumstances in which, and the conditions subject to which an institution may be recognised as an after-care organisation and such other matters as are referred to in Section 12 ;

(*h*) the qualifications and duties of probation officers ;

(*i*) the recruitment and training of persons appointed to carry out the purposes of this Act and the terms and conditions of their service ;

(*j*) the conditions subject to which a girl who is a neglected or delinquent juvenile may be escorted from one place to another, and the manner in which a juvenile may be sent outside the jurisdiction of a competent authority ;

(*k*) the manner in which contribution for the maintenance of a juvenile may be ordered to be paid by a parent or guardian ;

(*l*) the officers or authorities by whom, the manner in which and the purpose for which the Fund created under Section 52 shall be administered ;

(*m*) the conditions under which a juvenile may be placed out on licence and the form and conditions of such licence ;

(*n*) the conditions subject to which juveniles may be placed under the care of any parent, guardian or other fit person or fit institution under this Act and the obligations of such persons or institutions towards the juveniles so placed ;

(*o*) any other matter which has to be, or may be, prescribed.

(3) Every rule made by a State Government under this Act shall be laid, as soon as may be after it is made, before the Legislature of that State.

63. Repeal and savings.—If, immediately before the date on which this Act comes into force in any State, there is in force in that State, any law corresponding to this Act, that law shall stand repealed on the said date :

Provided that the repeal shall not affect—

(*a*) the previous operation of any law so repealed or anything duly done or suffered thereunder ; or

(*b*) any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed ; or

(*c*) any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed ; or

(*d*) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid ;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed.

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