Subject: **Criminology**

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Paper : **Penology and Sentencing**

Module : **Transcendental and Utilitarian Theories of Punishment**

Component I (A)- Personal Details

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Component I (B)- Description of the Module

Subject Name	Criminology
Paper Name	Penology and Sentencing
Module Name/Title	Transcendental and Utilitarian Theories of Punishment
Module Id	Criminology/Penology & Sentencing/05
Pre-requisites	Basic understanding of the concept of punishment in relation to criminal law. Basic understanding of the Theories of Punishment.
Objectives	The objectives of this unit include among others things the following— • To explain the Utilitarian and Transcendental philosophies underlying punishment. • To elaborate on the conditions influencing the effectiveness of punishment. • To pave an understanding of penal theories from mid-Eighteenth Century onwards. • To elicit the application of Utilitarian ideas in the Indian context as provided under the Code of Criminal Procedure, 1973. (Sections 235(2); 248(2) and sections 360 and 361.)
Key Words	Crime, Punishment, Justice, Morals, Retribution, Utilitarianism. Kant, Hegal, Bentham,

I. Introduction

Theories of Punishment are a controversial and frequently debated topic. It is an already understood concept that justifications to whatever degree as well as practical application of theories of punishment is amongst the most important and complex problems in ethics. In fact, punishment policies have many origins. However, the extent to which philosophical dogmas normally precede the commencing of legal policy is often an open question, mostly left unanswered. Apparently, they are more often the underlying principles which form bulk of the existing policies. Interestingly, principles of punishment can be seen to have been logically deduced out of far greater principles. For instance, according to R. N. Bonh and K. N. Haley, in their work Introduction to Criminal Justice, (2002), they mention that, punishment comes "from the concept of abstract justice or divine will. Such principles have certainly had an influence in eternalizing the existing penal policies in the face of changed" circumstances.

In the global research on theories of punishment, these can be classified into two broad philosophies: utilitarian and retributive theories of punishment. The utilitarians on the one hand, insist that punishing the guilty is "a necessary evil justified only as a means to the prevention of evils even greater than itself."[1] On the other hand, retributivism may be described in the following terms; "It is an end itself that the guilty should suffer pain... the primary justification of punishment is always to be found in the fact that offence has been committed which deserves the punishment, not in any future advantage to be gained in its infliction."[2]

As a method to reduce the incidence of criminal behaviour, the model of punishment is utilised in either of the two ways; firstly, by deterrence or by prevention i.e., deterring the potential offender from committing further crime, or by preventing him from repeating the offence or secondly, by reformation, i.e., by reforming him into a law abiding citizen. The theories on sentencing generally include the following three policies such as—

1. Retributive which makes criminals suffer for whatever wrong they have done;

[1] Joel Feinberg, "What, If Anything, Justifies Legal Punishment, The Classic Debate," in Joel Feinberg & Hyman Gross (eds.), *Philosophy of Law* (5th ed. 1995), p. 727.
[2] Ibid.

2. Deterrent, with an aim of awarding punishment is to stop others in social set-up from committing crimes;
3. Preventive, with the view to place such a restraint on the offender as to enable him unable to commit further crime; and
4. Reformative, where the main object of punishment should be the reform of the offender.

Learning Objectives

The main objectives of this unit are aimed at achieving the following—

a. To explicitly elaborate on the Utilitarian and Transcendental philosophies fundamental to the idea of punishment.
b. To explain the conditions influencing the effectiveness of punishment.
c. To pave an understanding for the penal theories since mid-Eighteenth Century and later.
d. To elicit the application of Utilitarian ideas in the Indian context as provided under the Code of Criminal Procedure, 1973, as enshrined under sections 235(2); 248(2) and sections 360 and 361.

II. Philosophical Theories of Punishment

In general, theories of punishment can be classified into two wide-ranging philosophies—utilitarian and retributive. The main objective of the utilitarian theory of punishment is that it seeks to punish offenders. Such a theory aims at discouraging, or 'deterring' future misconduct. The retributive theory tries to punish offenders with the reason that they deserve to be punished, for their misconduct. The retributive theory, thereby essentially follows a transcendental deduction, which is not seen in the utilitarian model.

II.1 Transcendental Philosophies

Transcendental philosophies are a set of theories based upon the ideology which supposes a sacred universal validity. This 'sacredness' is of merely an assumed universality and relates to the transcend experience. The ideas of this philosophy are more based on the assumed manifestations and creations of the mind, rather than being induced from the fact based scientific and analytical research. These theories of punishment falling under the ambit of

transcendental are seen to be sub-divided into five categories, based on the rationale behind punishment itself.

Firstly, we have the theological view. This view upholds the duty to punish as a religious duty, one to be delivered by the upholder of all religious functions. It is essential that all criminals are punished because it is the call of the religion as such.

The next justification afforded to the transcendental philosophy is the reasoning rendered by the expiatory theory of punishment. According to this belief, punishment is imperative because of the nature of the mystical order of universe, a wrong-doing deserves a punishment. Here, reason is pure reason, in a "Ours not to reason why!" way. This view however, provides a very indistinct logic to the idea of punishment.

A large portion of the transcendental philosophy also follows the theory of moral law as formulated by Kant. This viewpoint believes in an insightful source of unconditional ethics and morals, in the sense of absolute morality. Immanuel Kant, in his discourse has insisted upon the existence of a "categorical imperative" to punish offenders who violate the moral law. Kant's theory of criminal law is often quoted to show that he is one of the most vigorous and absolute supporters of retribution as a reason for punishment.3 Punishment therefore is an end in itself for this ideology rather than the means of achieving any other higher goal, wherein, the finality of punishment is itself the goal.

Just as the Kantian notion of the categorical imperative plays out in the transcendental theory of punishment, the theory propounded by Hegel shows its influence in the transcendental philosophy as well. Hegel's main thrust, whereby, "punishment is necessary to" annul "the injury produced by crime" can be seen foremost in the transcendental philosophies. In the words of Hegel, "…Crime has to be punished because it postulates punishment as its necessary logical complement. Since violence or force in its very conception destroys itself, its principle is that it must be cancelled by force. Hence it is not only right but necessary that a second exercise of force should annul and supersede the first." The oft quoted statement

[3] B. Sharon Byrd, Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution (Book Review), *Law and Philosophy* 8 (2):151 - 200 (1989); also available at https://link.springer.com/article/10.1007%2FBF00160010, last visited on 24-07-2017.

wherein, the criminal act and the punishment are inseparable finds theoretical ground, "The criminal act is a negation, and punishment is the negation of a negation."[4]

Lastly, the classification of the transcendental philosophy lies in the aesthetic theory of punishment. According to which, it is the aesthetic sense which dissents in opposition to the friction produced by crime along with the verification of punishment.

5.2.2 Penal Theories of the Eighteenth Century and later

Notwithstanding the authoritative foundation of moral ideas, by the time of the eighteenth-century rationalists there was felt a drive towards "ethical principles from the more mundane" sources of morality. Jeremy Bentham, a principal thinker of the Utilitarian school held that "since men are governed in their actions by rational assessments of the pleasures and pains to be netted by various courses of actions, punishment should be allotted in amounts just sufficient to produce a net loss (i.e., pain) for a person committing criminal act." With this clinching stance, prevention of crime was seen to be the alternative the state could apply to make justice 'swift and sure.' Utilitarianism found an enormous appeal, being ably, aptly and energetically propounded by Bentham and his supporters. Particular effect in the era was seen due to the peculiar circumstances of '*burgeoisie* capitalism' which were a daily topic of discussion on the principles of profit and loss. This doctrine was the main contributor for the present day rationale of graduated penalties. In criminal jurisprudence, it is noteworthy to observe the community's reaction to a proposal for modifying punishment to appreciate the extent of its grip on popular minds.

In the Indian context, one of the easiest seen public reactions to punishment came in late 2012 as a result of the most abhorable crimes against humanity. The case of a gruesome and brutal gang rape along with other unnatural acts upon a young woman and the merciless beating of her male friend, rendered by a group of six murderous men, one of whom was a juvenile, on the fateful night of 16th December, 2012. This incident played the momentous role in the enactment of the Criminal Law (Amendment) Act, 2013. The public uproar was wild and demanded a capital punishment for the offence of rape. As a result the Amendment Act, 2013 made multiple significant changes in the Procedural and Evidence laws while the

[4] G.W.F. Hegel, *Elements of the Philosophy of Right,* Allen W. Wood (Ed.), Cambridge University Press, 2003, see pp. 119-131.

substantive law was given more teeth by including certain new offences against women such as sexual harassment, voyeurism, stalking, acid attack, trafficking of persons, etc., and also by making the significant amendment of broadening the definition of rape to include all sorts of sexual assaults against women and extending the death penalty to specific offences in rape including sexual assault, such as the offence of inflicting an injury which causes the death of the person or causes the person to be in a persistent vegetative state, which may extend to imprisonment for life, which shall mean the remainder of that person's natural life, or with death.

The neoclassical school, including such philosophers like Rossi,[5] Garraud,[6] and Joly,[7] modified to some extent the rigorous doctrines of pure Classical theory. Their main method was modifying the canons of "free will." In this modified form, called "the rational actor model," adult ordinary persons of a sane disposition were considered to have complete responsibility of all their actions. Such individuals were also equally capable of criminal or non-criminal behaviour. The only exceptions were the case of little children, insane persons and individuals whose crimes were committed under extenuating circumstances, i.e., where the crime was committed by mistake of fact, accident or misfortune, under necessity, self defence, or if *'actus reus* and *mens rea'* elements of criminal responsibility are found to be missing.[8]

In this context, the basis of punishment and its consequent degree of responsibility is directly proportional to the time at which the offence was committed, i.e., at the time of the completion of the crime. Importance is attached to this school in the narration of theories punishment firstly due to the implication of causation found in this philosophy; and secondly as bulk of modern penal law and practice is based out of this ideology of punishment.

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[5] 1787-1848.
[6] 1849-1930.
[7] 1839-1925.
[8] By '*actus reus'* is meant the criminal conduct specifically, intentional or criminal negligent (reckless) action or inaction that causes harm. We can therefore say that *actus reus* is the physical element or guilty act, and it requires proof. Where there is no *actus reus*, there is no crime. *Actus reus* can also be seen to be made up of conduct, its consequences and the circumstances in which the conduct takes place. *'Mens rea'* on the other hand refers to a criminal intent or a quality state of mind. It is the mental aspect of a crime. Here, criminal conduct is limited to intentional, purposeful or premeditated action or inaction and not accidents. *Mens rea* would be absent in cases where there is incapacity in understanding nature and consequences of the acts done. This is so in terms of age of maturity (sections 82-83 IPC), unsoundness of mind (section 84 IPC), or intoxication (sections 85-86 IPC).

II.3 Utilitarianism

The utilitarian model of punishment sought punishment of offenders so as to discourage, or "deter," future wrongdoing. Whereas, the retributive model sought punishment of offenders since these convicts deserved to be punished as a consequence of their wrongdoings. This unit focuses on the various philosophies such as the transcendental and utilitarian theories underlying punishment.

The most through going and elaborate formulations of the utilitarian view of punishment is expounded in the writings of Bentham. Greatly impressed by the formulations of Bentham, J.S. Mill wrote that Bentham has brought the theory of punishment almost to perfection. The principle of utility demands, that whatever is being judged morally, is to be judged from the point of view of its utility. According to Bentham, no actions are intrinsically good or bad in themselves— it is only their consequences with regard to pleasure and pain, happiness and misery that give their moral status. "When thus interpreted, the words *ought* and *right* and *wrong,* and others of that stamp have a meaning: otherwise, they have none."[9]

Under the utilitarian philosophy, the purpose of criminal law is to maximize the happiness of society. Since crime and punishment are terms inconsistent with happiness, these should be kept to a minimum. Utilitarians do identify with the fact that society free from crime is an impossibility, yet, Utilitarians endeavour to inflict only as much quantum of punishment as is requisite to prevent crimes in the future.

In this sense of the commensuration of crime and its consequentialist punishment the Utilitarians play on a mathematical formula of sorts. They are aware that punishment has consequences for the offender as well as the society. Thus, embrace the formula that the total good produced by the punishment should exceed the total evil caused by the offence committed. Only then would punishment truly turn to be of utility.

In other words, punishment should not be unlimited rather it must be commensurate with the type of offence committed and the degree of guilt involved. "One illustration of consequentialism in punishment is the release of a prison inmate suffering from a debilitating

[9] Jeremy Bentham, An Introduction to the Principles of Morals and Legislations, Wilfred Harrison (Ed.) Basil Blackwell, Oxford, as seen at http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/bentham/morals.pdf

illness. If the prisoner's death is imminent, society is not served by his continued confinement because he is no longer capable of committing crimes."

Under the utilitarian theory, criminal laws which specify punishment for criminal conduct should be designed in a way which deters similar future criminal conduct. Therefore, it can be seen that deterrence as a concept also operates on two levels, specific and general. In common parlance, general deterrence implies punishment should prevent other people from committing future criminal acts. Therefore, punishment serves as an example for the rest of the social set-up, while also playing the trump card of putting others on the *caveat* that criminal behaviour of such and/or similar type shall be punished accordingly.

Specific deterrence is the opposite of general deterrence and it means punishment should prevent the same person from committing same or similar crimes. Specific deterrence works in a two way arrangement. First, an offender should be put in imprisonment to physically prevent him from committing another crime for a specified period. Secondly, this imprisonment must be aimed at being as disagreeable and horrific as an experience that it in all probability must discourage the offender from repeating his criminal behaviour for all future times to come.

Rehabilitation is an additional utilitarian justification for punishment. Rehabilitation aspires to prevent future crime by giving offenders a chance to succeed while staying within the limits of law. "Rehabilitative measures for criminal offenders usually include treatment for afflictions such as mental illness, chemical dependency, and chronic violent" behaviour. Rehabilitation also consists of the use of vocational and other professional and educational training which gives to the offender an edge from the previous life they sustained in a world of crime and wrongdoing. The new acquired knowledge and skills equip the offender to compete in the job market and break the vicious circle of joining into the world of crime.

The counterpart of the utilitarian theory is the retributive theory. "Under this theory, offenders are punished for criminal behaviour because they deserve punishment. Criminal behaviour upsets the peaceful balance of society, and punishment helps to restore the balance."

The retributive theory focuses on the acts done by the offender as the sole cause of imposing any degree of punishment. Whereas, the utilitarian theory looks towards social benefits, as

consequence of punishment, the retributive theory looks backward at transgression as the basis for punishment. Thus, no person has a scope of improvement in future life, much like the oft quoted idiom, "Once a sinner, always a sinner"

According to the retributivists, human beings have the component of free will and because of their free will are capable of making rational decisions. An offender who "is insane or otherwise incompetent should not be punished. However, a person who makes a conscious choice to upset the balance of society should be punished."

There are multiple moral foundations for retribution. Many retributivists perceive punishment to be justified as a form of vengeance. Their argument is simple—

> "wrongdoers should be forced to suffer because they have forced others to suffer. This ancient principle was expressed succinctly in the Old Testament of the Judeo-Christian Bible: "When a man causes a disfigurement in his neighbour … it shall be done to him, fracture for fracture, eye for eye, tooth for tooth…."

To other theorists, application of the tenants of retribution against a criminal is warranted to protect the legitimate rights of the society at large and the offender in specific. Society shows a sense of respect for the "free will of the wrongdoer through punishment. Punishment shows respect for the wrongdoer because it allows an offender to pay the debt to society and then return to society, theoretically free of guilt and stigma."

Lastly, another major validation for punishment is denunciation. The denunciation theory places its pinnacle on the ideology that "punishment should be an expression of societal condemnation." It can be summarised that denunciation theory is a type of amalgamation of both utilitarianism and retribution. Denunciation theory is utilitarian because the prospect of being publicly denounced serves as a deterrent from future criminal activities.

III. Individual and Social Factors Influencing Effectiveness of Punishment

The conditions affecting the influence of punishment on behaviour cannot be considered to be having a worldwide range; however, they may be summed up to be rather general. The main reason for terming them as general rather than universal is that punishment ideologies

transformed with the "changes in group values and patterns of behaviour which determine status in different cultures."[10]

To effectively bring in place the deterrent effect, which dissuades from crime, punishment must "provide a pain greater than the pleasure involved in crime." Also, pain can function as a deterrent only after offence or crime which is the main *actus reus* is committed. This suggests that the deterrent effect of punishment desires to prevent crime but its success is dependent on the pain inflicted by punishment albeit after the crime is already committed and the wrong doing has caused its own set of pains.

The main drawback of this ideology of deterrence is that in all cases where the justice delivery system is slow and justice is delayed, the whole philosophy falls down much like a bridge gone under water, proving to be fruitless and mundane. Thus, delayed justice often interferes with deterrence as such. Pain per say is not deterrent "unless it appears as a fairly inevitable consequence of criminal behaviour." According to the statement, "Insistence that punishment alone cannot socialize a personality" matches the ideology of Jenkins' that "… children cannot be socialized without a discerning use of punishment and society cannot exist without penal sanctions." This statement is particularly palpable if emphasis is laid to the word "alone" also it may be extended to the concept of "punishment" and "penal sanction" such that it includes all measure of personal as well as social censure. The basic requirement of any society is a degree of conformity to its rules and laws. Every society necessitates the humane quality of members coming to the aid others. In this regard, social set-ups must incentivise compliance to the laws and co-operative behaviour of its individuals by assigning some "positive assignment of social status to those who conform or are helpful. This positive approval implies negative disapproval. Threat of such disapproval is the minimum 'penal sanction.'" This sort of disapproval fittingly takes the form of punishment in the socio-legal order.

Jenkins further adds that "punishment, in addition to controlling," behaviour, "sometimes relieves tensions, not only of injured parties but of the offenders themselves. However, a juvenile gangster may try his best to avoid capture and punishment and yet the prestige which punishment bring him among his associates will make his suffering more endurable and

[10] R. N. Bonh and K. N. Haley, *Introduction to Criminal Justice*, (2002).

perhaps pleasing in retrospect, even if he retains a certain vague sense of guilt. Not a particular punishment experiences, but the total situation, seems to determine the effect of punishment. A little child living in home where she has experienced predominantly affection and satisfying social relation may be punished for some offense. It is uncommon to find that a few minutes later she will throw her arms around the neck of the punishing parent. Because the general atmosphere of the home is constructive, the punishment appears as a minor temporary shock, acting as a reminder that those whom she loved were displease with her behaviour. In such cases punishment may be effective. In court and prison, on the other hand, the dominating experience is generally not only painful but productive of fear and hatred. In such a situation punishment may be effective in deterring from overt crime, as long as threat of punishment remains. Yet it cannot create social attitudes. Indeed, it may strengthen and crystallize existing antisocial attitudes."

In light of the above, clandestine and other anti-social activities thrive in the prison system. Almost always, it will be seen that an offender's mind-set and attitude to punishment principally determines the effect the relevant punishment has upon him. It is this same 'attitude' which in turn is chiefly organised by his peer-group relations.

Therefore, every punishment which "expresses the hatred or anger of the disciplinarian may have a deterrent effect at," a momentary level, yet, it hardly ever leads to the feeling of guilt, remorse, expiatory or a general change of attitude. In stray cases, of course, exceptions often prove the rule, where the punished have been over-come with a feeling of guilt and felt remorse for their actions and thus recognize the necessity of punishment, even to the extent of accepting the disciplinary nature of punishment. In such cases, the punishment imposing prison system and its authorities have always shared a respectable position *qua* the offender, almost to the degree of acceptance as a suitable source of authority. According to psychiatrist, "punishment need not express either hatred or blame, yet the closer one is to crime and physical punishment, the more difficult it is to inhibit one's emotions."

The ineffectiveness of punishment can be seen at play in all cases where punishment itself provides a degree of pleasure or enjoyment to the wrong-doer. This can be easily explained from the difficulties faced by all authoritarian positions whether they are the prison administration, the civil police, or even for that matter the parents or even teachers. Such

sadist individuals in criminal jurisprudence derive a high level of satisfaction merely from the fact that they were able to torment and cause annoyance to the authorities that be.

Among the lesser acknowledged drawbacks of punishment is the fact that it loses its credence with the credibility of the punisher. That is to suggest that punishment is rendered ineffective if its administrators are not suitably respected by the wrong-doers. In a highly corrupt prison administration and penal system, where bailiff and jailors, even superintendents and judges are perceived as dishonest, respect for the ideology of punishment would be a rarity in itself.

Finally, punishment also fails to have the desired effect when it plays to the peer-pressures of the group mentality of wrong-doers and in a way raises their status in the group. This can be more noticeable in cases where a gang member who has undergone imprisonment achieves a higher status in the gang upon his release on the successful completion of his term.

IV. Indian Code of Criminal Procedure, 1973 and Utilitarianism

The philosophy that came to have its most powerful sway in the administration of India was the Utilitarian philosophy. English Utilitarianism was an offshoot of the western liberal ideas. The English Utilitarianism owed its genesis to the ideas of Bentham. The Utilitarianism philosophy believed in the maxim of greatest good and extrapolating it in quantifiable terms.

Several administrative and judicial reforms in India were caused by utilitarianism. From the time the British began their intervention into the legal and administrative foray, we see that "Lord Cornwallis worked mainly with the ideas and perceptions which came before utilitarianism"; on the other hand, Lord Macaulay was a liberal who grew up in an atmosphere of constant "interaction with both the missionary zeal of evangelicalism and the emerging pragmatism of 1830s and 1840s. Thus, we see him take up the codification of laws," with vigour. Macaulay, can be seen to have approved institutionalism as such, however, he was in disagreement with the goal of reforming India by means of punishment.

According to Blackstone,[11] the judge's role is almost insignificant, as they have a pre-determined sentence to impose and the question is only with regard to guilt, wherein too the judge is not an active role player more so in the criminal justice systems following the adversarial model.

[11] *Commentaries on the Law of England,* Vol. IV, p. 377.

> *"...it is moreover one of the glories of our English law, that species (though not always the quantity or degree,) of punishment is ascertained in every offence; and it is not left in the breast of any judge, nor even of a jury, to alter that judgment which the law has beforehand ordained, for every subject, alike, without respect of persons."*

It is interesting, what he further states—

> *"For, if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates; and would live in society, without knowing exactly the conditions and obligations which it lays them under. And besides, as this prevents oppression on the one hand, so on the other, it stifles all hopes of impunity or mitigation; with which an offender might flatter himself, if his punishment depended on the humour or discretion of the court. Whereas, where an established penalty is annexed to crimes, the criminal may read their certain consequences in that law, which ought to be the unvaried rule, as it is the inflexible judge, of his actions."*

Herein, Blackstone has thrown light on the important aspect which is really the basis of natural law too, that law must be uniform and must be promulgated and be known to all. If an offender commits an offence in contravention of the law, he ought to know beforehand, what his punishment shall be. This is so because law cannot individualize punishments for penal acts and uniformity is pivotal to ensure non-arbitrariness.

The Code of Criminal Procedure, 1973, which overhauled the Code of Criminal Procedure, 1889, outlines a well –articulated criminal law enforcement machinery. It carves a web of rules through which a criminal proceeding needs to move on and of procedural requirements that need to be met with at different stages of a criminal proceeding. It enumerates a set of rules of procedure to be followed during investigation and also in determining the guilt of a suspect. The consequential criminal liability too finds place within the folds of the provisions of the Code of Criminal Procedure, 1973.

However, in the Indian context, particularly post 1973, i.e., with the passing in of the new Code of Criminal Procedure, the view of Blackstone as cited above cannot be entirely

applicable as the Code of 1973 has imbibed the principles of reasoned decision[12] under sections 354 (1) (b)[13]; 354 (3)[14] and 354 (4)[15].

Under the Code of Criminal Procedure, 1973 we can easily see the reflection of the Utilitarian Model in terms of the administration and functioning of courts as well as in the punishment meted by courts.

Interpretation of statutes is an integral part of justice dispensation and in this light, it was held in the case of *State of Punjab v. Prem Sagar*[16] that—

> "In awarding the sentence although a wide discretion has been conferred upon the Court, the same must be exercised judiciously. While awarding sentence the principle to be borne in mind is that the nature of the offence said to have been committed by the accused plays an important role."

The Court went on to observe that "a sentence is a judgment on conviction of a crime. It is resorted to after a person is convicted of the offence. It is the ultimate goal of any justice delivery system." The Parliament, however, in providing for a hearing on sentence, as would appear from sub-section (2) of section 235, sub-section (2) of section 248, section 325 as also sections 360 and 361 of the Code of Criminal Procedure, has laid down certain principles. The said provisions lay down the principle that the Court in awarding the sentence must take into consideration a large number of relevant factors; the sociological backdrop of accused being one of them....age of the accused is also relevant."

IV.1 Section 235(2)

[12] *Ratio decedendi* meaning reasoned decision of the courts or speaking orders i.e. the orders speak their reasons for themselves.

[13] **S. 354 Language and contents of judgment—**
(1) Except as otherwise expressly provided by this Code, every judgment referred to in section 353,--
(b) shall contain the point or points for determination, the decision thereon and the reasons for the decision;

[14] **S. 354 (3)** When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

[15] **S. 354 (4)** When the conviction is for an offence punishable with imprisonment for a term of one year or more, but the Court imposes a sentence of imprisonment for a term of less than three months, it shall record its reasons for awarding such sentence, unless the sentence is one of imprisonment till the rising of the Court or unless the case was tried summarily under the provisions of this Code.

[16] (2008) 3 Cr. L.J. 3533 SC.

In order to facilitate information on these factors and probably as a reflection of the legislative response to the modern notions of crime causation,[17] section 235 (2) was incorporated into the Code of Criminal Procedure by an amendment in 1973. The section reads as follows—

S. 235 Judgment of acquittal or conviction— *(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.*

In trials before a court of Sessions, or in trials of warrant cases by magistrates, the court, after finding the accused guilty, is required "to hear the" convicted "accused on the question of sentence and then pass sentence on him according to law."[18]

There was no such provision in the old Code.[19] The previous Code provided for accused's statement regarding sentence only before the arguments were concluded and judgment delivered. It was the assumption that the accused would ultimately be convicted.[20] On analysis, the law was found to be unsatisfactory.[21] It led the legislature to enact the new provision realizing that "it is only when the accused is convicted that the question of sentence should come up for consideration and at that stage, an opportunity should be given to the accused to be heard with regard to the sentence,"[22] as the earlier law was found not up to par. This is in itself a reflection of the utilitarian concept seeping into the very fundamental aspects of the procedural law.

This section provides for a "quasi-trial to make certain that the convict is given a chance to speak for himself on the sentence to be imposed upon him." The reason accorded by the

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[17] Prof. Rose Varghese, "Sentence Hearing: Intent and Scope in Criminal Proceedings," (1992) 34 JILI 456, at p. 456.
[18] R. V. Kelkar, "Criminal Law and Procedure", *Annual Survey of Indian Law- Vol. 15* (1979), p. 258.
[19] Section 309 repealed Code of Criminal Procedure, 1898.
[20] Section 309: **Judgment in cases tried by the Judge himself**—
(1) When in a case, tried by the Judge himself, the case for defence and the prosecutor's reply (if any) are concluded, the Judge shall give a judgment in the case.
(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the procedures of section 562, pass sentence on him according to law.
(Section 309 repealed Code of Criminal Procedure, 1898; P. Ramakrishnan, Handbook of the Code of Criminal Procedure, 1973, The Madras Law Journal Office, Madras 1974, p. 175).
[21] *Santa Singh v State of Punjab* AIR 1976 SC 2386 per Bhagwati, J. at p. 2388.
[22] *Santa Singh v State of Punjab* AIR 1976 SC 2386 per Bhagwati, J. at p. 2388.(*ibid*)

convict may not necessarily be pertaining to the crime or even be legally sound, in fact, it may be the mere opinion of the convict. However, "it is for the Judge to get an idea of the social and personal details of the convict and to see if any of them may affect the sentence." For instance, the fact that he is the bread-winner may play a central role in mitigating his sentence or the circumstances in which he is made to work.[23] The reason for incorporating this provision is mainly to provide that every person must be given the opportunity to be heard about the punishment to be imposed on him.

It can be seen that the idea of what purpose is served by the punishment has taken a central place in context of the above provisions. Thus, it is important to note, that the requirement of the Procedural Law is that every sentencing Judge, while deciding the ambit, orbit and severity of the sentence ought to take into consideration various factors, for instance, the nature of the crime, the prior criminal record of the offender, the age, the possibility of treatment and other aggravating or mitigating factors, etc.

In the more recent times, the landmark judgment of *State of Maharashtra v. Goraksha Ambaji Adsul,*[24] wherein Hon'ble Mr. Justice Swatanter Kumar has articulated upon the requirement under section 354 of the CrPC has much more to reflect on the problem, as follows—

> *"Awarding punishment is certainly an onerous function in the dispensation of criminal justice. The Court is expected to keep in mind the facts and circumstances of a case, the principles of law governing award of sentence, the legislative intent of special or general statute raised in the case and the impact of awarding punishment. These are the nuances which need to be examined by the Court with discernment and in depth."*[25]

IV.2 Section 360

Order to release on probation of good conduct or after admonition—

[23] If the convict is the sole bread winner, the court may provide that he be given such work as he is paid for and that the payment be made to the family for their support.
[24] (2011) 7 SCC 437.
[25] (2011) 7 SCC 437 at p. 446-47.

(1) When any person not under twenty- one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty- one years of age or any woman is- convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour: Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in the manner provided by sub- section (2).

(2) Where proceedings are submitted to a Magistrate of the first class as provided by sub-section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code (45 of 1860), punishable with not more than two years' imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

(4) An order under this section may be made by any Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) When an order has been made under this section in respect of any offender, the High Court or Court of Session may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law: Provided that the High Court or Court of Session shall not under this sub- section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(6) The provisions of sections 121, 124 and 373 shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

(7) The Court, before directing the release of an offender under sub- section (1), shall be satisfied that an offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(8) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(9) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence and such Court may, after hearing the case, pass sentence.

(10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders.

IV.3 Section 361

361 Special reasons to be recorded in certain cases—

Where in any case the Court could have dealt with,—

(a) an accused person under section 360 or under the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or

(b) a youthful offender under the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders, but has not done so, it shall record in its judgment the special reasons for not having done so.

IV.4 Section 248

248 Acquittal or conviction—
(1) If, in any case under this Chapter in which a charge has been framed, the Magistrate finds the accused not guilty, he shall record an order of acquittal.
(2) Where, in any case under this Chapter, the Magistrate finds the accused guilty, but does not proceed in accordance with the provisions of section 325 or section 360, he shall, after hearing the accused on the question of sentence, pass sentence upon him according to law.
(3) Where, in any case under this Chapter, a previous conviction is charged under the provisions of sub- section (7) of section 211 and the accused does not admit that he has been previously convicted as alleged in the charge, the Magistrate may, after he has convicted the said accused, take evidence in respect of the alleged previous conviction, and shall record a finding thereon: Provided that no such charge shall be read out by the Magistrate nor shall the accused be asked to plead thereto nor shall the previous conviction be referred to by the prosecution or in any evidence adduced by it, unless and until the accused has been convicted under sub- section (2).

V. Summary

From this unit, students of criminology should have garnered a better knowledge of the various sources and philosophies which underline the ideologies of punishment. Attempt was also made to look at various conditions which influenced the effectiveness of punishment. Many Sociologists as well as psychologists contributed to the conditions influencing the effectiveness of punishment and these were discussed to some extent.

In context of the Indian administration of criminal justice, the labyrinth of substantive and procedural laws has laid out a meticulous punishment profile. Schedule one of the Code of Criminal Procedure, 1973, gives at one glance the varied punishments applicable to the

diverse offences under the substantive Penal Code, 1860. It may be concluded that in the Indian context, the tussle between utilitarian and retributive ideologies, has been conquered by the utilitarians. The relevance of the utility theory far outnumbered the other philosophies of punishment.