



PENAL POLICY ('DANDNITI') IN ANCIENT INDIA AND ITS RELEVANCE IN CONTEMPORARY TIMES

*Revati Naik**

ABSTRACT

Criminal law of any country is essentially concerned with the answers of certain questions such as to what is the essential quality of crime as distinguished from other branches, how is the crime to be combated either by applying the defensive reaction to the crime or the criminal, is the reaction to be by way of punishment or by way of measures of security for social defence and how the application of the punishment is to be individualised and on the basis of what principles and methods? The penology as a branch of criminal law is a multi-disciplinary faculty which aims to study and evaluate the application of penal sanctions to wrongdoers. It broadly explains the justification, characteristics and effectiveness of punishment in its various forms.¹ In law, crime is perceived as a wrong against the society and the offender, state victim and society are considered as the stakeholders. Punishment is the expression of social values as well as instrumental means to a clinical penological end. The judge while inflicting the sentence has to balance the conflicting interests of victim, offender and society and this requires the effective penal policy. The progress of mankind and processes such as globalisation and modernisation exercise considerable influence on the penal policies. It can also be said that the penal policy of the society can be considered as an indicator of quality of civilisation attained by it.

* Asstant Pro. MMM's Shankarrao Chavan Law College, Pune, India.

¹ N.V. Paranjape, Criminology, Penology, Victimology 293 (7th ed., 2017).

The purpose of this article is to explore the ancient penal policy and to find out as to how far ancient penal policy is relevant and can be useful in modern times in the context of current approaches in criminal law such as restorative justice and different types of punishments such as community service.

Key Words: Penal, Criminal Law, Victim, Offender, Society.

SOURCES OF PENAL LAW ANCIENT INDIA

The system of laws and punishment for the violation of the same was an integral component of ancient Hindu philosophy and it had religious and societal sanctions. The most original source from which all law in Hindu jurisprudence originates is three vedas, i.e. Rig veda, Sama Veda and Yajur Veda. The vedas are also called as 'Shrutis' as they were the heard. The Shrutis (the knowledge heard) and Smritis (body of recorded and remembered laws) constitute the another important source of law. The Dharmasutras which were given at the concluding stage of Shrutis lay down the foundation of Smritic era. The Dharmashastra where we can find the systematic exposition of topics of legal relevance have played the significant role in communicating the knowledge contained in smritis to the general people and giving directions based on the knowledge from vedas. Dharmasutras deal prominently with four subjects i.e. Dharma, Artha, Kama and Moksa. Dandaniti i.e. the penal science has been dealt under the 'Artha' part. The earliest sutra on the penal science is the Brahaspati Smriti which dates back to 5th Century. In addition to that Manu Smriti, Yajnyavalkya Smriti, Kautilya Arthashastra, Mahabharata are some of the ancient texts which deal with the penal policy extensively. Most remarkable are the Brahaspatya sutras and Dandviveka of Vardhamana which provide elaborate system of penology of the ancient civilisation²

The penal policy was considered as a part of 'Rajdharma' which mandates the duties and functions of the sovereign and the state. As in the Mahabharata while explaining the dharma of the king the Yudhishtira was guided as to the importance of 'Danda' in the governance of the state. Mahabharata has also recognised the semi divine origin of the penal

² P.K. Sen, 1929 PENOLOGY OLD AND NEW TAGORE LAW LECTURES 89 (1st ed., 1943).

science by citing the saying of brahma, the god of creation says that, “for the behoof of the world and for establishing the threefold objects of Dharma, Artha, and Kama, I have composed this science representing the very essence of Sarasvati. Helped by punishment this science will protect the world. Meting out rewards and punishments this science will do its work among men. And because men will be governed by punishment. Therefore this science will be known as ‘Dandniti’.³

One of the most cherished principle of ancient Hindu Penal law it that makes the distinction between legal and moral or religious wrong i.e. it recognised moral or religious transgression as ‘papa’ and juristic or legal transgression as ‘aparadha’ but has taken a due note of interconnection between penal law, morals and religion and while evolving the sanctions to deal with the crime uses those connections in best possible ways.

The ‘Dandniti’ consisting of definite guidelines for the imposition of penalties is elaborately dwelt upon by ancient texts, the reference of which can be found in Shanti Parva in Mahabharata, Manusmriti, Brihaspati Smriti and Yajnavalkya Smriti etc.

INDIAN VERSION OF LAW

Ancient Indian Jurists recognised the law as a mighty instrument necessary for the protection of individual rights and liberties, and whenever these rights and liberties were infringed, the protection of law can be sought with the assistance of the king. The power possessed by the king to punish the wrongdoer and inflict the punishment was the sanction instrumental in commanding the observance of the law.⁴ In addition to the divine recognition of the king, the ancient texts emphasised that the power of Danda i.e., the power of punishment was created for the sake of king as without such power it was believed that there would be exploitation and suppression of weak by strong. The power of Danda was considered so much necessary that to underline its importance, many ancient texts

³ Kisari Mohan Ganguli, *THE MAHABHARATA' TRANSLATED IN ENGLISH PROSE FROM THE ORIGINAL SANSKRIT TEXT* 76-78 (Shanti Parva Chapter LIX Verses, 1st edn. 1993).

⁴ P.V. Kane, *3 HISTORY OF DHARMASHASTRA* 387 (1st edn. 1946).

have affirmed that if the danda be not employed, it gives rise to the condition of 'matsyanyaya' means where the larger fish devours the smaller ones or the strong despoiling the weak.⁵ The word danda is derived from the root 'dam' which means to control and the King is called as 'Dandadhara'. Elaborating the importance of 'Danda', in Shanti Parva of Mahabharata, we find the Arjuna saying that the man armed with the rod of chastisement (i.e. the King, the dandadhara) governs all subjects and protects them. He says the rod of chastisement which protects Righteousness is awake when all else is sleep. While explaining why sinful men desist from similar acts the shanti parva lists the reasons which includes fear of the rod of chastisement in the king's hand. It remarks that people do not commit sins through the fear of punishment at the hands of king, through the fear of Yama and of the next world and through the fear of public opinion It says if the chastisement were abolished from the world, all creatures would be destroyed and it is only the fear of chastisement compels men to observe rules and restrains.⁶ The discourse in Mahabharata about the force of danda makes it clear that it would be inaccurate to interpret 'danda' as punishment and more accurate interpretation of it would be 'Penal Providence' or 'governance'. Further the ancient literature pertaining to Hindu Penology treats Dandaniti and king as almost synonymous and the two are used interchangeably.⁷

CONCEPT OF CRIME IN ANCIENT INDIA:-

The ancient criminal law has specified offences and provided for imposition of penalty by the state against a person when it was proved that the person has committed an offence punishable in law. The concept of offence in ancient Indian criminal law has its origin in the word 'Pataka' which means 'sin'. The concept of 'pataka' is originated in the Vedas and was further developed by 'Dharmashastras'. The smritis contained three parts i.e. 'Achara', 'Vyavahara' and 'Prayaschitta', and criminal law has been dealt with by the 'Vyavahara' Part. Many crimes and wrongs were sins and entailed the secular punishments along with the religious sanctions

⁵ *Ibid*, p.21.

⁶ Kisari Mohan Ganguli, THE MAHABHARATA, TRANSLATED IN ENGLISH PROSE FROM THE ORIGINAL SANSKRIT TEXT 27 (1stedn., 1993).

⁷ *Supra* Note no.2, p.109.

in the form of expiations and prayaschittas. Differentiating itself from contemporary western civilisations of Greece and Rome whose criminal law was essentially a law of wrongs i.e. law of torts, the ancient criminal law provided for specification of crimes, conferred the power on the King to take on his own motion the cognisance of those crimes and prescribe punishments in various forms such as fine and corporal punishment etc.⁸

OBJECTIVES OF THE PUNISHMENT:-

In ancient times we find quite rich literature as to the several purposes served by punishment for crimes however, but it does not develop the regular science of penology in the sense it prevails today.

Clear statement as to which acts constitute the crime, prescription of different methods of punishment, setting out clearly the object which ought to be sought by inflicting the punishment and prescription of definite guidelines for the imposition of penalties including prohibition on the arbitrary imposition of the punishment are some of the characteristic feature of the penal policy of ancient India. Shanti Parva of Mahabharata contains the detail discourse as to objectives which the punishment should meet while elaborating the 'Rajdharama'.

Commission of the crime has multifarious impact on the society. Society may receive a shock after the commission of the crime and can doubt the capacity of state to maintain the law and order. The feeling of vengeance in the mind of victim and his near ones can also be considered as the spontaneous out come of the crime. Further the benefits of commission of crime may tempt the likely minded people to commit the crime of similar nature. These multi-layered dynamics of crime commission also involves the need to reform the guilty person who be committing the crime has deviated from the path of righteousness. That penal policy can be considered as sound which prescribes multiple methods of punishment, the combination of which takes care of all those consequences of crime in a holistic way. The ancient shastric law had evolved such penal policy,

⁸ Justice M. Rama Jois, *Legal and Constitutional History of India* 317 (1st edn., 2016).

where the punishments to be prescribed by the King served various objectives mentioned below:-

a. *Punishment To Satisfy The Feeling Of Vengeance*

Taking a proper note that the commission of crime creates the feeling of retaliation, the Yajnyavalkya and Narad Smriti state that when a person without complaining to the king sets about to correct the wrong, becomes liable to punishment and he also can not secure the object he wants. Therefore, it became incumbent on the part of state to punish the wrongdoer and ensure that the feeling of retaliation is satisfied to the certain extent.⁹

b. *Deterrent Impact Of Punishment*

Further as mentioned above the power of Danda had a deterrent effect as it set the warning to perspective criminals which might be tempted to commit the crime

c. *Prevention As A Purpose Of Punishment*

Imprisonment as a punishment prescribed in ancient India prevented or disabled the criminal from repeating the same of offence or another offence. The infliction of the death sentence permanently prohibited him from committing any crime in future.

d. *Retribution*

The earlier smritis provided for the inhuman, barbarous and cruel punishments, such as Manusmriti, prescribes that he who raises his hand or stick for assault shall have his hand cut off, he who in anger kicks his foot shall have his foot cut off. However, this drastic and server approach towards the punishment held in earlier sutras of Gautama and Manusmriti is found to be diluted and the rigour of punishment was lessened and softened by recognising fine as a ordinary punishment for majority of crimes during the period of Yajnavalkya, Narada and Brahaspati Smriti¹⁰.

e. *Reformation Or Redemption As An Impact Of Punishment*

The 'shastric' law perceived the punishment as a sort of expiation which cleansed the man of his sins and reformed his character.

⁹ *Supra* Note no. 4, p. 388.

¹⁰ *Supra* Note no. 4, p. 390.

Manusmriti prescribes those men who are guilty and punished for the crimes by the king go to heaven becoming pure like the person who has performed the meritorious acts¹¹. The punishment is also intended to make the criminal realise the crime he had committed and reform himself and live thereafter as a law abiding citizen

METHODS OF PUNISHMENT

Four methods of punishment (Danda) have been recognised by Manusmriti VIII 129, Yajnyavalkya Smriti and Brahaspati Smriti which are as follows:-

1. gentle admonition referred as 'Vakdanda'
2. by severe reproof referred as 'Dhigdanda'
3. fine referred as 'Dhandanda'
4. corporal punishment referred as 'Vadhdanda'

It further declared that these punishments may be inflicted separately or together depending upon the nature of the offence. Brihaspatismriti lays down that preceptor should be sentenced with wordy admonition and other persons who engage in disputes should be punished with reproof (expression of blame or disprove) or fines and those guilty with mahapatakas should be punished with corporal punishment. The admonition and reproof as a punishment is in accordance with the recognition on the part of smritis that for sensitive persons mere verbal condemnation would be enough to achieve the purpose of inflicting the punishment.

Fines As Punishment

The fines as punishments were either fixed or not fixed. Fixed fines were awarded in three types crimes called as 'sahasa' i.e. Prathama sahasa, madhyama sahasa and uttama sahasa. Different 'Smritis' prescribed different amount of fines for these categories, e.g. 'Manusmriti' (VIII 138) states that for first, middle and highest sahasas the fines prescribed were 250, 500 and 1000 panas while Yajnyavalkya smriti provided for 270, 540 and 1080 panas respectively¹².

¹¹ *Supra* Note no. 4, p. 390.

¹² *Supra* Note no. 4, p. 38.

Further the ancient law provided for infliction of lesser punishment for women offenders i.e. only half of the fine could be imposed on a man could be awarded to a woman or if a punishment prescribed was a death penalty for man, the punishment for a woman could be excision of limb. Further the inability of a child below the age of 5 to commit the crime or sin was well recognised and old man over eighty, a boy below 16, women and persons suffering from diseases were given half *prayaschitta*¹³.

Caste was also one of the factor taken into consideration while awarding the punishment. Gaut XII 1, Manu VIII 267-268 and Yajnyavalkya prescribe that a ksatriya, or a vaisya or a sudra abusing or defaming the brahmana was to be respectively punished with the fine of 100 panas, 150 panas and with the corporal punishment such as cutting of the tongue , while the a brahman defaming the people of other castes was to be fined with 50, 25 and 12 panas respectively¹⁴. The smritis further imposed a rule that the gravity of the offence was deemed to be higher, higher the caste of the offender. E.g. Katyana Smriti provided that if Kshatriyas or Brahmana are guilty of an offence for which they are liable to be punished according to the law, the quantum of penalty imposable on them would be twice and four times, respectively, of the penalty imposable on a Sudra for a similar offence. Manusmitri (VIII 337-338) has a similar provision¹⁵.

Corporal Punishment

As mentioned in ‘Dandviveka of Vardhmana’ Corporal punishment in during ancient times comprised of various forms such as causing only harassment or pain, or cutting of limb or the capital punishment¹⁶. The smritis also recognised the various body part for the purpose of infliction of corporal punishment, e.g. Manusmriti says that in respect to the three castes other than brahmin the punishment may fall upon any one or more of ten places i.e. the private parts, the belly, the tongue, the hands, the feet, the eyes, the nose, the ears, wealth and the whole body but the bhahmana should depart unhurt form the country. The ‘Brahmana’ were

¹³ *Supra* Note no. 4, p. 394.

¹⁴ *Supra* Note no. 4, p. 395.

¹⁵ Justice M. Rama Jois, *Legal and Constitutional History of India*, 1st ed. 2016, p. 341.

¹⁶ *Supra* Note no. 4, p. 395.

exempted from corporal punishments including the capital punishment in certain cases and for them different types of punishments such as branding, parade on an ass and banishment from the realm along with confiscation of the wealth or shaving his head and depriving him all his property etc were prescribed¹⁷.

However the exemption of Brahmana from capital punishment was not allowed in all offences, e.g. Smriti of Katyayana (806) provides that the brahmana deserves to be killed if he be guilty of causing abortion, if he be the thief of gold or if he kills the brahmana women with sharp weapon. Kautilya's Arthshastra (IV 11) prescribes the death sentence for a brahmana who commits the crime against the kingdom such as who incites wild tribes or enemies against the king or rebellion against his own country or king¹⁸. It is also pertinent to note that the differential treatment given to brahmins regarding the infliction of corporal punishment has gone in vogue from the 13th Century.

Death Sentence

The ancient literature as to the propriety of the death sentence makes it clear that the Hindu law essentially dealt with the penology from the view of social defence and for the purpose of maintenance of social order. The approach of penal laws towards the capital sentence can be considered to be the relevant parameter for understanding the essence of its penal policy. In ancient India the capital punishment was prescribed for certain category of offences such as acts of subverting the state, mahapatakas such as killing a brahmana, adultery with guru's wife (as provided in Manusmriti), or for a murder, robbery, poisoning, adultery, abetment of theft, causing abortion, or attempt to commit the murder etc (as provided in Arthshastra of Kautilya or Yajnyavalkya Smriti)¹⁹. The death sentence was prevalent during all times including the period of Buddhism when the principle of the 'ahimsa' was revered the most, however its infliction was limited to the certain kinds of crimes. The ancient texts have properly taken note of the far reaching consequences

¹⁷ *Supra* Note no. 4, p. 397.

¹⁸ *Supra* Note no. 4, p. 398.

¹⁹ Justice M. Rama Jois, *Legal and Constitutional History of India* 333 (1st edn. 2016).

of the capital punishment. The significant manifestation of it can be found in Mahabharata in Shantiparva in a discourse between King Dyumatsena and his son prince Satyavan. While emphasising the importance of death sentence, the King Dyumatsena says without it, all the distinction between the virtue and vice will disappear. On the contrary, the prince Satyavan says killing the wrongdoer has an devastating impact on the innocent family members. He further points out various possibilities which may result from not inflicting the death sentence such as the wrongdoer may imbibe good conduct from pious man, or the possibility of his bearing virtuous children and he therefore advocates that the wrongdoer should not be exterminated. He says the extermination is not in conformity with the eternal law and that's why various methods such as punishing him gently, by depriving him of all his property, by punishing with imprisonment or disfiguring him should be utilised for making him to expiate his offence.

AUTHORITY TO PRONOUNCE THE PUNISHMENT

The pronouncements of first two modes of punishments was the privilege of Brahmana, appointed as a chief justice, however for the rest of the methods of punishment such as imposition of fines and corporal punishments, only King was the authority²⁰.

INDIVIDUALISATION OF PUNISHMENT:-

The Indian penal science uses individualisation of punishment as a method to realise the goal of 'Danda' i.e. its quality of desisting the offender from committing the crime again. It recognises the fact that same punishment reacts differently on different individuals and therefore it must be varied, graded or modulated with special reference not merely to the offence but also to the individuality of the offender²¹. To meet this need of individuality of the punishments the smritis have elaborately recognised various factors which should be taken in consideration while inflicting the punishment. Gautam Smriti, Manu Smriti, Yajnyavalkya Smiti, Kautilya smriti provide that the while awarding the punishment various factors such as motive and nature of the offence, the time and place, the strength, age, conduct, learning and monetary position of the

²⁰ *Supra* Note no. 4, p. 390.

²¹ *Supra* Note no. 4, p. 128.

offender and the fact that whether the offence is repeated, should be taken into consideration²². The ancient Hindu law lays down certain principles laying down the theory of individualisation of the punishment. To understand the extent to which and how the theory has to be applied and how it worked can be found in Dandaviveka written by.

It lays down that “should the administration of the prescribed punishment under each head of the offence be not calculated to deter him from repeating it, a heavier punishment would be proper. Since the prescribed punishment by the reason of its liability to deter him would fail of its purpose, such measure of punishment as would deter him is the proper measure in its first instance”. It further goes on saying that, “If however on the first offence the prescribed punishment be awarded and the offender repeats it notwithstanding, then such punishment as will deter him is the right one. In the case of one who is not fit to bear the prescribed punishment on the first offence, there is no alternative but to give him the reduced sentence. Where the prescribed penalty is to be made good by work, no question of property can arise, for the work may be extracted from all.”²³

The above verses are indicative of the discretion available to the authority imposing the to tailor the ‘just and reasonable’ punishment suited to a particular case so as to achieve its final goal of desisting the person to commit the crime in future i.e. to reform him. The recognition of various extenuating circumstance regarding the infliction of the punishment is indicative of wisdom of ancient scholars who by listing out these circumstances contributed in making the punishment ‘just’.

The recognition political implication of penal policy can also be found in ancient literature, e.g. Kautilya’s Arthashastra (I.4) lay down that the king whose control and punishments are most severe makes the subjects disgusted with him and the king who inflicts milder punishment is disregarded by the people and therefore to command the respect of his subjects, the King should award the punishments according the deserts of the offenders²⁴.

²² *Supra* Note no. 4, pp. 391- 392.

²³ *Supra* Note no. 2, p. 130.

²⁴ *Supra* Note no. 4, p. 392.

GENERAL RULES PERTAINING TO PUNISHMENT

a. Equality Before The Forum

The Smritis required all offenders irrespective of the caste or their relation with the king to be brought before the same forum. Manu Smriti VIII 335 and Yajnyavalkya I 358 emphasise that there is none exempt from punishments in the king's court whether the person be king's father, teacher or friend or mother etc, but they were exempted from the corporal punishment.²⁵

b. Double Punishment For Offences Committed Jointly

The Smritis have taken proper note of serious nature of offences committed jointly by prescribing double punishments for joint offenders of what it would have been if it was committed by a single person. Yajnyavalkya smriti lays down that when one is attacked by many, the punishment for each of the offender shall be doubled of what has been ordained for a similar offence by a single person. Similar provisions are contained in the Kautilayas Arthshastra and Vishnu Smriti.

c. Restriction On Confiscation Of Certain Type Of Property

We can see the human approach in inflicting the punishment specifically in case of attachment of property where Smritis provide that while confiscating the property of the offender in pursuance of the order of the king, various kinds of musical and other instruments of professional musicians and artists and implements of any vocation must not be taken²⁶. Thus the care was taken not to deprive the offender and his family of the means of D. Walsh and A. Poole(eds) (1983), A Dictionary of Criminology, London: Routledge and Kegan Paul, page 158 livelihood.

d. Karma-Vipaka And Expiation As The Method Of Rehabilitating The Offender

Apart from prescribing the punishments, the ancient penal policy provided for 'prayaschitta' as a way and means of reducing or

²⁵ *Supra* Note no. 4, p. 398.

²⁶ Narad Smriti, pp. 205, 10-11.

removing the effects of sin. Three consequences are ensued from a criminal act, first is the punishment awarded by the king, another is, in accordance with the principle of 'Karma-Vipaka' the evil consequences which the offender has to suffer in this birth and the consequences which are to be suffered in the next birth. 'Prayaschittas' were prescribed to get the rid of effects of the sin. They can be defined as the measures to be self imposed by a person for the sins or aparadhas committed by him either against the secular laws, laws of religion or those governing personal conduct and they could be performed openly or secretly. In short they were intended to achieve the self-purification through various measures such as confession and repentance, austerity, sacrifices and expiations etc. Thus it appears that there is a three layered response to every wrong or transgression i.e. if detected the penal law of the land dealt with it according to the law of the land the principles of which were clearly laid down, if undetected or undisclosed it could avoid the legal consequences but taking the note of impact which such act would have left on the character or individuality of the person, he was required to purify himself by performing the penance and for this he could seek assistance from his guru and thirdly, if he dies before purifying himself, Death i.e. Yama takes him and effects the purification by opening the door of rebirths. The period and type varied according to the gravity of sins²⁷.

e. Jail

To implement the punishment the provision of 'Bandhnagara' was made and there was also provision for separate jails for male and female inmates. Kautilya in his Arthshastra provided that the jail should be constructed in the capital providing separate accommodation for men and women and should be well guarded. Further it also provided for employing the prisoners in useful work such as engaging women prisoner in the work of cutting wool, fibre, hem etc and men prisoner in the work of sowing seeds on Crown land etc and the benefit of their work is conferred on the state²⁸.

²⁷ Justice M. Rama Jois, *Legal and Constitutional History of India* 346-347 (1st edn., 2016).

²⁸ *Ibid*, p. 343.

f. Remission Of Sentence

The provision for grant of remission on special occasions such King's birthday, coronation ceremony, victory of the King, or in consideration of the work done by the offender underlines the humanitarian consideration prevailing in the ancient period. It gave to the offenders the opportunity to reform and lead the normal life. The reference of these provisions is found in Kautilya's Arthshashtra.²⁹

Brahaspati Sutra in third Adhyaya lays down that 'there have been directly realised the fruits of right and wrong (dharma and adharma). That is the home of Dandniti. For its proper realisation, penal science should be studied with reference to its bearings on the people in the past, the present and the future, also with the reference to the four orders of society'³⁰

The brief discussion about the penal policy in India gives us the insight of how much vivid and deeply thought system was in prevalence in ancient India. The ancient jurist considered the punishment as check on repetition of crime and a means to prevent the law breaking. It utilised punishment as a means to achieve various objectives and together they all intended to achieve the ultimate aim of protection of society from crime and criminals. Thus, the ancient Hindu Jurisprudence considered the punishment as a measure of social defence and means to an end. This approach towards the punishment holds the merit in the sense of relevancy in present times. In modern penology, even though the reformation of the offender has become the more dominant consideration, necessity of punishment to protect the society still holds the ground. Rather it can be said that even though reformation of offender is much discussed in theory, however in practice, punishment as an expression of punitive power of the state and as a measure to protect the society from offender is the reality of present criminal justice administration. The number of inmates in the prison itself is the evidence of this fact.

Further the analysis of ancient penal law makes us realise its greatest merit which is that it does not lose the contact with the society and takes

²⁹ *Ibid*, p. 343.

³⁰ Brahaspati Sutra, Adhyaya III verse 73.

the note of constant action and reaction between the two. As pointed out by Dr. P.K. Sen, the principle of individuality of the punishment which frees the punishment from rigidity and can be made capable of modification with changing times. The individualisation of punishment is necessary as its impact varies from criminal to criminal depending upon his age, sex, intellect, mental depravity, responsive attitude and social circumstances. However, individualisation of punishments needs to be balanced with discretionary powers of judges to be utilised for judicial sentencing.

The ancient penal policy has properly taken in consideration the complexities of human mind and has assessed the impact of punishment on human mind. Kautilyas Arthshastra has mentioned that punishment if too severe alarms the man and if too mild frustrates him and if properly determined makes man conform to Dharma i.e. righteous conduct. Going one step ahead it also has addressed the need to prescribe the mechanism to cleanse the impact of wrong doing left on the mind of the person even in case of undisclosed wrong. The two fold impact of the theory of 'Karma Vipaka' and minute prescription of expiation is pertinent, firstly it secures the observance of the righteous conduct among the general people and also affords the opportunity to the transgressor to repent, cleanse his wrong and lead the path of righteousness. Societal sanction to the expiation as a means to cleanse the wrong also contributed to the absorption of wrongdoer in the society. Further many times various forms of expiations provided for doing the deeds which conferred the benefit on the society. It is in consonance with the principle that committing the crime is a wrong against the society and therefore doing something for the community was recognised as a way to expiate. Thus expiation involving community service such as gifting cows to a temple or feeding hungry people was seen to have been utilised to correct the balance disturbed by the commission of the wrong. In modern times we can find the community service has been recognised in some statutes such as Juvenile Justice (Care and Protection of Children) Act, 2003³¹ or Motor Vehicles Act 2019.³² We have seen it being imposed in few cases such as State v. Sanjeev Nanda.³³ However the potential of community service as an alternative punishment has not yet been utilised to its fullest extent and the need of the effective system

³¹ Sec 15 of *Juvenile Justice (Care and Protection of Children) Act, 2003*.

³² Sec 4 (A) of *Motor Vehicles (Amendment) Act, 2019*.

for implementation of the same has not been addressed by the present penal law. Towards that end the guidance can be sought from the ancient penal jurisprudence.

The discourse between King Dyumatsena and his son prince Satyavan still is very much relevant in the ongoing debate as to abolition or retention of the capital punishment.

We can also find the reflection of many of its principle in modern penal law. Exemption of child below certain age from the criminal liability, lenient punishment for the offenders below 16 years of age, consideration of gender while awarding the punishment, severe penalty for repeated offence, limitation on the power of confiscation of the property with respect to certain type of property are some of the provisions under the present law which are more or less the same to those prevailing in ancient law.

The experience has shown the limitations of modern penology. The inability of the punishment to provide sufficient deterrence specially in crimes such as terrorism, increasing percentage of crime against women in spite of grievous punishment and stringent laws, ever rising number of prisoners and inability to address effectively the needs of the victim are some of the areas which makes it mandatory for us to introspect present penal policy, retrospect and try to find out solutions to the existing problem by going back to our roots and take the help from the past. To meet the above mentioned challenges, alternative approaches such as restorative justice are presently being used by legal thinkers. Active involvement of all stakeholders in decision making process and making the offender to realise and recognise the harm caused by the wrong to victim are some of the distinctive features of this approach. The expiation as a means to cleanse the wrong also works towards making the wrongdoer to understand the harm caused by his act and to make him accountable for his deeds.³⁴ There is a need of scientific research so as to find out feasible ways for integration of some of the above mentioned processes in present legal system.



³³ AIR 2012 SC 3104.

³⁴ Davie J Cornwell, Doing Justice Bette, the Politics of Restorative Justice 100 (1st edn. 2007).