INTRODUCTION

These essays are based on a working paper prepared by a few professors of law for the seminar organized by the Indian Law Institute in the year 1961, to commemorate the centenary of the Indian Penal Code. This circumstance explains why some topics were included and why others have not been included. There has been no attempt to cover all the important parts of the Indian Penal Code or to deal with those chosen from some definite point of view. The individual professors choose at very short notice a few topics of current interest. They have been picked out because of conflict of judicial decisions, or because judges and students alike had found some part of the code difficult to understand, or because the Indian Penal Code like the criminal laws of other countries has not been able to define certain offences with complete clarity, or because the advancement of knowledge which had led to reform in the criminal laws of other countries still remains unutilized in our country. As already stated the topics selected are not the only ones that could have been chosen for these reasons. Conflict of judicial decisions can provide some more subjects that would need to be considered by a body like the Law Commission. The defence of mistake of fact has many loose ends. The decisions relating to bigamy in cases where there is a mistake about the validity of marriage indicate the need of clarifying the law. There are the well known problems relating to the death sentence, corporal punishment and treatment of juvenile offenders. Our constitution has borrowed from many countries but the judicial system and the organisation of the public services have remained on the British model. This has already produced difficulties in administration which will inevitably affect criminal justice. This book of essays on the Indian Penal Code is, therefore, to be regarded as only a modest attempt to examine some of the problems of substantive criminal law. It is hoped that many more books on the Indian Penal Code and criminal law in general will be forthcoming.

We are still in our infancy in the matter of research. It is less than half a century since our universities started having research departments. Since attaining independence the need for scientific and technical advancement has led to a special effort in those departments. Fiction and drama have had a revival; music is having an increasing vogue. But the social sciences continue to be stagnant. Students are not attracted to the study of these subjects; research and academic writing are insignificant. Even among these, law occupies a low place. Those that we can call treaties are extremely few,

the rest being so called commentaries but really digests of judicial decisions. There is a prosperous trade in cram-books for law students. Our best treatises are those relating to Hindu and Muslim laws. These will continue to be useful for certain purposes even though fewer and fewer people will read them as codification of these personal laws progresses. Among other subjects, books on our Constitution are better then those on other branches of law. Since our Constitution has borrowed liberally, our writers also can benefit by writings in other countries. In most branches of basic law of absence of an Indian text book explaining fundamental principles is not keenly felt. Before studying the Indian Contract Act one may with profit read Anson on Contracts because the Indian Act is based on English principles though there are changes in minor details. We use the English law of Torts almost in its entirety. For the enormous mass of modern legislation there are few legal principles involved. The principles, if any, are transient and are political, sociological or economic. What legal principles can there be for a code of company law or income-tax law? Some political ideals and economic objectives determine these and the law changes with the change in the ideals and objectives.

The Indian Penal Code, however, is unfortunate in not falling under any of these categories. It cannot be said that there are no legal principles requiring to be understood and explained to students. But all the books that we have on the Indian Penal Code, barring a very few, are commentaries or cram-books of the type already referred to. Treatises on English criminal law are of little help because the framers of the Code attempted to eliminate all the inconsistencies and illogicalities of the English criminal law and sought to produce a new code which did not wholly follow any system of law that was contemporary. There is, therefore, great need for learned writing on the subject of criminal law.

The essays in this volume have been divided into four parts:

Part I – HISTORICAL BACKGROUND

This part deals with the law that was in operation just prior to and at the time of the enactment of the code and the stages through which the drafting of the code went. If the judiciary and the bar had been more familiar with the report of the Law Commissioners and the history of this piece of legislation some of the errors in interpretation of the code might have been avoided. Indeed some of the earlier judges like Sir Barnes Peacock and Mr. Justice Melville seemed to have had less difficulty in understanding the difference between Sec. 300 and Sec. 299 and the purpose of that difference, than the twentienth century judges. If we had a good text-book on the Indian Penal Code it would have a chapter on its history, explaining that the draftsmen did independent thinking and were not merely codifying English law even though English law was largely in their minds. In the absence of

that knowledge the later judges assumed that the code was following English law. In the late Victorial era it was easy to make such an assumption; it was a period when Englishmen thought that the English and their institutions had reached the highest perfection and it was but natural that the rest of the world and particularly the non-European part of it desired to copy them.

It is hoped that the subject-matter of Part I will be found useful to understand the code. There are parts of the code which owe their origin to the Muslim law; it is owing to a modification of a harsh rule of the old law that the maximum punishment for some offence has been fixed at seven years and for others at 14 years. Otherwise it would be difficult to know why these odd numbers were chosen.

Dr. Tapas Kumar Banerjee, the author of Sec. 1 of Part I was a lecturer in the University of Calcutta. He was a Doctor of Philosophy of the University of London. Sri Atul Pata, author of Sec. 2 was a Law Officer in the Law Commission and a Senior Advocate in the Supreme Court.

Part II - SOME GENERAL PRINCIPLES

This part covers certain general conditions of liability in criminal law which should be dealt with adequately by a good text-book for the benefit of students of law and also perhaps for the benefit of practitioners. The choice of topics as already stated is based on what were chosen for discussion at the Seminar. In additions to the topics that were discussed it has been found necessary for the purpose of these essays to add connecting links describing the particular part in the Indian Penal Code to which they belong. For example one of the questions that was considered at the seminar was the defence of insanity; but in addition to this a few lines have been written enumerating the other defences available in the Indian Penal Code.

The contributions to this part have been made by three professors. Sri Balasubrahmanyam was a professor of law in the Madras Law College. He has contributed a great deal to give this work its present shape; he was entrusted with the responsibility of collecting all the manuscripts and getting them ready for the press. He and I have read the manuscripts several times for the necessary editorial pruning and rearranging. I am personally deeply indebted to him for deferring to my suggestions on the few occasions when we got into an argument and letting me take unfair advantage of having been his lecturer when he was a student. I hope he is satisfied with the number of occasions when I accepted his view. But the occasions for arguing at length were few. Sri Eric Banerjee was a reader in the Punjab University Law College, Chandigarh. Sri. R. B. Tiwari was a professor of law in the University of Allahabad.

The conception of a guilty mind is the result of differentiation between different kinds of law that developed in mature juristic systems and has

became the central feature of criminal law. But in recent times its importance has somewhat diminished. The problem for the jurist now is that of having to reconcile between the enormously increasing welfare obligations of the State towards the citizens and avoiding the injustice of punishing an individual unless some fault on his part exists.

Civilised man's reaction to insanity has varied curiously through the centuries. There were periods when a mad man was at least immune from punishment if he was not almost a priviledged person; at other times insanity was not an excuse but needed to be specially punished. With the development of notions of responsibility in criminal law, insanity had to be accepted as a defence. The new science of psychology has completely altered the old simple notions relating to insanity. It has sometimes been said that just as it is impossible to find in real life any one that fully corresponds to the average reasonable man imagined by law, it is equally difficult to find a person with an entirely sane mind judged according to this new science. Everyone turns out to be mentally abnormal to a larger or a smaller extent. The question, therefore, that the reformers of law have now to decide is not merely exempting from liability an insane person-difficult though it is to define insanity-but also to provide lower punishments if there is evidence of disease of mind of one of the many kinds now known to be such without actually amounting to insanity accepted by law. In many Western countries they have accepted now that in certain circumstances a person's capacity to restrain himself is diminished and so he does not deserve the full normal punishment or may even be entitled to exemption from punishment. Here again the conflict is between the obligation to protect one person against the aggression of another and the need to restrict punishment for those acts only which justify punitive action by the State.

The interpretation of the law relating to cases where more than one person is liable for a crime has resulted in considerable difference of judicial opinion. There is no dispute that it is not merely a single individual who has done all that is necessary to constitute a crime that may be punished but also that several other persons concerned in the commission of a crime in various ways are liable to punishment. But the meaning of the sections dealing with this subject in the Indian Penal Code has been differently understood by different judges. One curious circumstance is that an amendment of one of the sections effected to make the meaning clear, seems to have produced the opposite result. Two of the important sections dealing with this topic are Ss. 34 and 149; the latter of these is concerned with cases in which five or more people are involved. The difference between these two sections still remains to be clearly explained.

One of the questions discussed at the seminar was the need for continuing in the code that type of conspiracy which is punishable merely when two people agree to commit an offence without any overt act

following the agreement. Apart from other difficulties, this particular offence was considered objectionable largely because it was added to the Code to deal with political conspiracies. It is necessary to consider this question without being influenced by the purpose with which this law was first brought into existence. It has been the experience of history that where democracy weakens in maintaining order, democracy itself perishes.

Punishment at one time served the simple purpose of satisfying the outraged feeling of the person who had suffered harm by subjecting the injurer to some detriment. Since then notions of a guilty mind have considerably altered the purpose of punishment. The developments in some Western countries in this respect are such that the power of determining the punishment is practically taken away from the judges and is sought to be entrusted to a separate body of experts. This new approach is the result of the development of a subsidiary branch of psychology under the name of Penology, the science of punishments. Individualisation of punishments recommended on the basis of this science makes it impossible for the law to lay down in advance that a definite punishment should be given for any particular offence or category of offender. It is not possible for most people to accept this extreme position. Even judges are not trusted with complete discretion in the matter of punishments. In the Indian Penal Code judges have considerable discretion allowed to them but this is subject to a maximum limit. In the French system discretion can be exercised only within specified limits; there is a minimum as well as a maximum limit for the punishments fixed by the law. The Indian Penal Code unlike several modern codes has not changed much in deference to the new science of penology.

In several Western countries a development in the opposite direction is simultaneously going on because of the recognition of the obligation of the State to protect society against harm irrespective of the old view that each offence should be punished only in proportion to its gravity. According to this view, a person who commits an offence for the second time, loses the benefit of all the leniency the reformatory philosophy may indicate; the offender should be kept in conditions in which he cannot repeat the offence until the experts-in-charge are satisfied that he can be safely released.

The chief problem in Jurisdiction is the necessity to have comprehensive Indian legislation that would replace the Acts of the English Parliament.

Part III – SOME SPECIFIC OFFENCES

Two specific offences have been included in this part – Homicide and Sedition. Reference has already been made to the judicial interpretation of the two sections defining murder and culpable homicide. Two early

judgments in *Gorachand Gopee's*[1] case and *Govinda's*[2] case have long been the bases of appreciating the difference between the two offences. It was clear to the judges in these cases that the draftsmen of the Code had not undertaken merely to codify English law. In fact the attempt of the draftsmen to reform the uncertainities and indefiniteness of English law with regard to an offence that involves capital punishment had received high praise. This, however, was forgotten later and the belief that the Indian Penal Code must have followed English law, has led to many difficulties. First of all there are pronouncements which say that there is no difference between the two offences defined in S. 299 the Indian Penal Code did not attract to frame criminal codes for some Asiatic and African countries, the Indian Penal Code, was studied by those commissioned to draft those codes. One obvious simplification of the law is first to define murder and then to provide for extenuation in order that various human weaknesses may be taken notice of for giving lower punishments. The question that most people cannot help asking is that if the death penalty is retained at all, should there not be a kind of homicide less serious than another which apart from extenuating circumstances does not deserve the death penalty. The question would be much simpler if the death penalty is abolished.

Sedition like conspiracy arouses emotional difficulties in this country. Agitation against the British Government was a nationalist activity and was not condemned wholly even in cases where violence was involved, whether one approved of getting rid of the British Government by violent means or not; it was difficult to disapprove of the activities by those who adopted such means. The question, therefore, that some ask is whether we need after independence, a law of sedition formerly condemned by all. While there should never have been any doubt about it, more and more people are beginning to understand that the security of the State has to be protected by law even in a democracy: it is not merely the violence or oppression of an autocrat that arouses rebellion. However, good a democratic government may be there are always a section of people adopting unconstitutional and violent methods of opposition. Democracies however, are not always good and they are susceptible to a certain kind of degeneration. The old Greek political thinkers were of the view that there was a cycle of autocratic kingship, oligarchy and democracy; democracy is again followed by a Tyranny-another name for dictatorship which now prevails in some parts of the world.

Part IV – REFORM

This part is devoted to reform. There are two aspects from which this question can be discussed. The first is legislation since 1860 providing for

1 (1866) 5 W.R. (Cr.) 45.
2 I.L.R. 1 Bom. 342.

new offences and also amending the code in certain respects. The draftsmen of the code contemplated that at periodic intervals, the difficulties arising in the interpretation of the code, should be examined and legislation should remove those difficulties. But no such periodic attempt has been made during the last 100 years except for dealing with new situations. The second reason for reform is the one that has led to either fresh codifications or reforming of existing codes in many countries in the West during the last few decades. The first of these was the Indian Penal Code of 1930. Criminal law reformers flourished in Italy and it may be the reason for a modern code appearing in that country first. Since then several other countries have published new codes. A comparative study of these codes in detail will necessary be one of the preparatory works to be done before reforming the Indian Penal Code. The Indian Law Institute which has given assistance for the present project may well undertake this comparative study at an early date.

Criminal Law was always occupying a second rank in the legal profession. The esteem in which it was held at the bar was reflected in academic writing. It was even supposed that success at the bar can come on the criminal side without any deep knowledge of the intricacies of substantive criminal law; this in its turn has resulted in an inadequate treatment of these intricacies by the judiciary. Those interested in criminal law must be deeply indebted to Sri B. Jagannadhadas, executive chairman of the Indian Law Institute for the interest he has shown and the personal trouble he has taken in arranging the seminar on criminal judicial administration and the publication of this volume. I am grateful to Dr. A. T. Markose for all the assistance that he gave at different stages. The responsibility for what is stated and expressed in these essays is that of the gentlemen who have contributed them.

S. GOVINADARAJULU
EDITOR
Vice-Chancellor, Sri Venkateshwara
University and formerly Principal,
Madras Law College.