PUNISHMENT

"The mood and temper of the public with regard to the treatment of crime and criminals is one of the unfailing tests of the civilization of any country. A calm, dispassionate recognition of the rights of the accused – and even of the convicted – criminal against the State; a constant heart-searching by all charged with the duty of punishment; a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment; tireless efforts towards the discovery of curative and regenerative processes; unfailing faith that there is a treasure, if you can only find it, in the heart of every man; these are the symbols which in the treatment of crime and criminal, mark and measure the stored-up strength of a nation, and are sign and proof of the living virtue in it."*

It is recognized on all hands that during the past hundred years, our views on punishment have undergone a change. Punishment is no longer retributive in the sense of satisfying the feelings of revenge of the victim, but the view is still held that it is retributive in the sense that it expresses the solemn disapprobation of the community – a reprobation not always unmixed in the popular mind with atonement and expiation.[1] As Gardiner says: ".....in the sense in which retribution implies that a criminal deserves his punishment, this feeling is connected with the notion of justice itself, of justice as an ultimate value akin to the idea of truth and closely connected with the principle of equality ... 'A' deserves his punishment but 'B' if he has been harshly treated by the Courts, does not and it is the negative corollary of retribution which makes public opinion rally in B's favour."[2]

The principal object of punishment today is protection of society and

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* Sir Winston Churchill quoted in C.H. Rolph "*Commonsense about Crime & Punishment*" p.175.

1. "The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else ..... The ultimate justification of any punishment is not that it is deterrent but that it is the emphatic denunciation by the community of a crime." Lord Justice Denning quoted in the Report on the Abolition of Capital Punishment (1949-53) Cmd. 8932, para 53.
2. Gardiner, "The Purposes of Criminal Punishment" 21 *Mod. L.R.* p.121 (1958).

this is achieved partly by reforming the criminal and partly by deterrence by preventing him (and others) from committing crimes in future. There is also the view that all three elements – Justice, Deterrence and Reformation are essential. By inflicting punishment on the offender the society deters him as well as potential offenders from committing crimes. This is described as deterrence. The aim of criminal law can be achieved by reforming the criminals by way of rehabilitative measures-this is called theory of reformation. Punishment can also act as a preventive and in this context; it is called preventive theory of punishment. Other concepts such as expiation, atonement, just deserts *etc.* are also mentioned in the discourse on punishment. Depending upon the nature of the crime, time and the approach of the court towards different crimes, the emphasis on these purposes of punishment goes on changing from time to time. The object of the punishment in Manu's words is:

> Punishment governs all mankind; punishment alone preserves them; punishment awakes while their guards are asleep; the wise considers the punishment (*danda*) as the perfection of justice.[3]

In primitive societies punishment was mainly retributive. The principle of 'an eye for an eye', 'a tooth for a tooth', 'a nail for a nail', 'limb for limb' was the basis of criminal administration.[4] The principle which, at present, is generally applied in awarding punishment is that the sentence is imposed for the protection of the public; it should not exceed the maximum merited by the gravity of the current offence.[5] In some cases, the court appears to have departed from this principle in order to protect public from a dangerous offender.[6] However, the element of retribution seems to have been the central theme of punishment as noted by Lord Asquith observed "...a third theory and it is the one which seems to me to come nearest to the truth is that there must be an element of retribution or expiation in punishment; but that so long as that element is there and enough of it is there, there is everything to be said for giving punishment the shape that is mostly likely to deter and reform."[7] Lord D'enning said: [8]

> The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of the citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive or nothing else....The ultimate justification of any punishment is not that it

3. *Institutes of Hindu Law* (translated by Haughton, G.C.1835) Ch. 7, para 18 p.189.
4. *Shiv Ram* v. *State of U.P.*, AIR 1998 SC 49.
5. *Clarke* (1975) 61 Cr App Rep 320; *Slater* (1979)1Cr App Rep (S) 349; *Fraser* [1982] Crim LR 841.
6. *Gouws* [1982] Crim LR 187; *Gordon* [1982]Crim LR 240; *Chadbund* [1983] Crim LR 48.
7. Quoted in Hall "*Studies in Jurisprudence and Criminal Theory*" p. 244.
8. RCCP (1953) Cmd 8932, p.18.

> is deterrent, but that it is the emphatic denunciation by the community of crime....

The difficulties involved in sentencing have been brought out by Lord Reid in *Director of Public Prosecutions* v. *Ottewell* thus:[9]

> It was rather tentatively suggested by the learned Attorney General that there is a 'tariff' for each kind of offence which is varied upwards or downwards according to the circumstances of the offence and the character of the accused. Offences of a particular kind vary so vastly, however, in gravity there cannot and should not be any 'normal' sentence, and there is no workable standard by which to judge whether any particular standard is extended beyond what is 'normal'.

The traditional attitude of the common law and of Parliament towards the commission of crime has been reflected in the sentencing practice of the courts. A scale of punishment being provided, varying with the potential moral wickedness of the offence and its danger to the society, the court has generally seen its task as one of fitting the penalty to the particular degree of iniquity and dangerousness evinced by the particular defendant.[10] Where there is a statutory maximum, it should be reserved for the worst type of offence which comes before the court and a sentence which does not allow for this is wrong in principle.[11] Judges should not, however, use their imagination to conjure up unlikely worst possible kinds of cases.[12]

However, emphasis is now being increasingly laid on the reformative aspect[13] with the result that save in the case of incorrigible offenders who may have to be indefinitely segregated the state is employing every means of correction and rehabilitation.[14]

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9. [1970]AC 642, [1968]3 All ER 153 at 155.
10. J.C.Smith &Brian Hogan, *Criminal Law* (6th ed. 1988) p. 5.
11. *Da Silva* [1964] Crim LR 68; *Smith* [1975] Crim LR 468.
12. *Ambler* [1976] Crim LR 266.
13. "Generally speaking the increasing understanding of the social and psychological causes of the crime had led to a growing emphasis on reformation, rather than deterrence in the older sense as the best way to protect both the individual criminal from himself and society from the incidence of crime." *Friedman : Law in a Changing Society* (1959) p. 180.
14. "The overriding aim here is the protection of society by serious and sustained attempts to prevent further relapses into crime. But coupled with this aim, there is another personal rehabilitation of the offender *for its own sake* .... Already concern for the weak members of the society has borne fruit. In medicine where so many are now cured who previously would have died or been disabled for life; in the social services which afford some protection for the poor and the old; and now in penal reform where new methods of reformation are succeeding in turning anti-social persons into useful and effective members of society again." Gardiner, *supra* note 2 at 129.

The new outlook on punishment has been necessitated by the investigation into crime causation, by the research into the effects of different forms of punishment, by the development of social sciences, psychological studies and modern statistics. The change has been brought about also by the humanitarian forces, and theories of individualization of punishment. The view has gained ground that the law should look to the criminal and not merely to the crime in fixing the punishment. A notably varied system of sanctions is now applied with a view to adapt the punishment to each particular category of criminals. Correspondingly the traditional attitude regarding the extent of responsibility has undergone a change. Different sanctions are now applied to children and adolescents as opposed to adults, to mentally abnormal person as against sane individuals, to first offenders as against the recidivists. The quantum of punishment also varies from a mere admonition to capital punishment. In all these, society is trying to utilize every scientific method for self-protection against destructive elements in its midst.

Though the courts have the discretion to impose punishments, it must be exercised judicially and appropriate punishment should be awarded in accordance with the circumstances of the case.[15] Because of this flexibility which is facilitating the judges to prescribe the punishment in individual cases the Supreme Court of India has been giving emphasis on reformation in contra to its earlier adherence to retribution. Its approach was not uniform though. It differed from case to case depending upon the nature of the offence, offender and the statutes. It emphasized reformation in *Sunil Batra* v. *Delhi Administration.*[16] It repudiated retribution in *Rajendra Prasad* v. *State of U.P.* thus:[17]

> The retributive theory has had its day and is no longer valid deterrence and reformations are the primary social goals which make deprivation of life and liberty reasonable as penal panacea.

The court emphasized deterrence for white collar offences in *Mohammad Giasuddin* v. *State of A.P.* thus:[18]

> Modern penology regards crime and criminal as equally material when the right sentence has to be picked out. It turns the focus not only on the crime, but also on the criminal and seeks to personalize the punishments so that the reformation component is as much operative as the deterrent element. It is necessary for this purpose that facts of a social and personal nature, sometimes altogether irrelevant if not injurious at the stage of fixing the guilt

15. *State* v. *Narayan Bisoi*, 1975 Cr LJ 1399 (Ori).
16. AIR 1978 SC 1675.
17. (1979) 3 SCC 646 at 656, para 8.
18. (1977) 3 SCC 287.

may have to be brought to the notice of the court when the actual sentence is determined.

In *Paras Ram and Others* v. *State of Punjab*[19] the court observed that:[20]

> The poignantly pathological grip of macabre superstitions on some crude Indian minds in the shape of desire to do human and animal sacrifice, in defiance of the scientific ethos of our cultural heritage and the scientific impact of our technological century, shows up in crimes of primitive horror such as the one we are dealing with now, where a blood-curdling butchery of one's own beloved son was perpetrated, aided by other 'pious' criminals, to propitiate some bloodthirsty deity. Secular India, speaking through the court, must administer shock therapy to such anti-social 'piety', when the manifestation is in terms of inhuman and criminal violence. When the disease is social, deterrence through court sentence must, perforce, operate through the individual culprit coming up before court. Social justice has many facets and judges have a sensitive, secular and civilizing role in suppressing grievous injustice to humanist values by inflicting condign punishment on dangerous deviants.

The court further highlighted the various aspects to be looked into before awarding the punishment: [21]

> A proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances – extenuating or aggravating – of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment the background of the offender with reference to education, home life sobriety and social adjustment, the emotional and mental conditions of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. These factors have to be taken into account by the court in deciding upon the appropriate sentence.

The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the judge in

19. (1981) 2 SCC 508.
20. *Id.* at 509, para 2.
21. *Ibid.*

arriving at a sentence that reflects more subtle considerations of culpability that are raised by the special facts of each case.[22] Punishment ought always to fit with the crime.[23]

Regarding socio-economic offences or white-collar crimes the Supreme Court has warned against showing any leniency while awarding punishment to such offenders. In *Eknath Mukhawar* v. *State of Maharashtra*[24] the court observed:[24a]

> Courts have to give due recognition to the intent of legislature in awarding proper sentence including the minimum sentence in appropriate cases described under the Act (Prevention of Food Adulteration). Such offences cannot be treated in a light - hearted manner. Even so justice has to be done in accordance with law. The prevention of Food Adulteration Act, itself, permits for some leniency in an excepted category of cases...

While sentencing sex offenders and juvenile offenders, the court says in *Phul Singh* v. *State of Haryana*: [25]

> We must, however, direct our attention in a different penological direction. For sentencing efficacy in cases of lust loaded - criminality cannot be simplistically assumed by award of long incarceration, for often that remedy aggravates the malady. Punitive therapeutics must be more enlightened than the blind strategy of prison severity where all that happens is sex starvation, brutalization, criminal companionship, versatile vices through bio-environmental pollution, dehumanized cell drill under zoological conditions and emergence at the time of release, of an embittered enemy of society and its values with an indelible stigma as convict stamped on him - a potentially good person "successfully" processed with a hardened delinquent thanks to the penal illiteracy of the prison system. The court must restore the man.

Emphasising correctional aspect of the punishment court observed in *Satto* v. *State of U.P.*: [26]

> Correction informed by compassion not incarceration leading to degeneration, is the primary aim of this field of criminal justice. Juvenile justice has constitutional roots in the Arts. 15(3) and 39(e) and the pervasive humanism which bespeaks the

22. *Nazir Khan* v. *State of Delhi*, (2003) 8 SCC 461.
23. *Id.* at 489, para 41.
24. (1977) 3 SCC 25.
24a. *Id.* at 31.
25. (1979) 4 SCC 413 para 3.
26. (1979) 2 SCC 628 para 4 at 629.

> super-parental concern of the state for its child citizens including juvenile delinquents. The penal pharmacopoeia of India in time with the reformatory strategy currently prevalent in civilized criminology has to approach the child offender not as a target of harsh punishment but of humane nourishment this is the central problem of sentencing policy when juveniles are found guilty of delinquency.

Judicial approach towards sentencing has undergone a change. Generally speaking, the courts have been giving more importance to the sentences to the seriousness of crime and they seem to be in favour of awarding severe punishment for serious crimes like rape.[27] It does not consider delay as a mitigating factor[28] and it appears that retribution is preferred. In *Dhananjoy Chatterjee* v. *State of WB*,[29] the Supreme Court stressed the retributive aspect of punishment. The court said; 'Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime'. The court further observed:[30]

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

The dictum laid down by the court in abovementioned case was subsequently followed in *Ravji* v. *State of Rajasthan*.[31] The social interest will suffer if strong deterrent punishment is not given. If a large number of criminals go unpunished this encourages criminals and makes justice system weak.[32] If, for an extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent will lose its relevance.[33] The court ruled that

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27. *Ainal Uddin Ahmed* v. *State of Assam*, 2004 Cri LJ 1171(Gau); *Bhupinder Sharma* v. *State of Himachal Pradesh*, 2004 Cri LJ 1(SC); *Kailash* v. *State of Haryana*, 2004 Cri LJ 310 (P & H).
28. See *State of M.P.* v. *Ganshyam Singh*, (2003) 8 SCC 13.
29. (1994) 2 SCC 220.
30. *Id.* at 239.
31. AIR 1996 SC 787; 1996 (2) SCC 175.
32. *Supra* note 29. See also *Ravji* v. *State of Rajasthan* , (1996) 2 SCC 175.
33. *State of Rajasthan* v. *Kheraji Ram*, (2003) 8 SCC 224.

there should be no leniency in punishing offenders convicted in dowry death cases.[34] In *State of Karnataka* v. *Krishnappa*,[35] the Karnataka High Court reduced the sentence from 10 years to four years, imposed on a 49-years-old man, accused of raping a 7-8-year-old girl, on the ground that he was a chronic drunkard and was an unsophisticated and illiterate citizen belonging to the weaker section. The Supreme Court while reversing the ruling reiterated that punishment in rape cases should not be based on the social status of the accused or victims, but based on the manner in which crime was committed. However, the relevance and importance of deterrence and reformation have also been kept in view by our courts looking back into our emphasis and past practices of the Supreme Court. In *Lehna* v. *State of Haryana*[36] the court reiterated the concept of *'just desist'* as the basis of punishment. The court said thus:[36a]

> Punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence; sometimes the desirability of keeping him out of circulation, and sometimes even the terrific results of his crime. Inevitably these considerations cause departure from a just desert as a basis of punishment and create cases of apparent injustice that are serious and widespread.

In this context it is interesting to note that depending on the stress one gives to the purpose of punishment the location of authority for imposition of punishment could also change. Acceptance of retributive theory makes it obligatory to fix punishment proportionate to the crime. In other words, the quantum of punishment would be subject to limitation. And the authority could be traced to the legislature. On the other hand if one accepts the theory of reformation, the authority for imposition could be located in the court and the punishment would be subject to any limitation. The court could give punishment to suit the personality of the offender. The punishment could naturally vary leading to disparate sentencing. The flexibility given to the courts in fixing the punishments whether suiting the crime or the personality of the offender has resulted in disparity in sentencing. The issue of disparity in sentencing is most apparent in death penalty cases. In fact, this was one of the issues raised before the Supreme Court in *Suresh Chandra Bahri* v. *State of Bihar*[37] wherein the court said:[37a]

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34. *State of Karnataka* v. *M.U. Manjunathagowd*, (2003) 2 SCC 188.
35. 2000 Cri LJ 1793 (SC).
36. (2002)3 SCC 76; see also *Ramashraya Chakravarti* v. *State of MP*, AIR 1976 SC 392; 1976 Cri LJ 334.

36a. *Lehna*, *id.* at 88.

37. AIR 1994 SC 2420.

37a. *Id.* at 2463, para 101.

> The criticism of judicial sentencing has raised its head in various forms—that it is inequitable as evident in disparate sentences; that it is ineffective, or that it is unfair being either inadequate or in some cases harsh. It has often been expressed that there is a considerable disparity in sentencing an accused found to be guilty of same offence.

As already noted, our courts have been stressing on one or the other theories of punishment depending upon the nature of the crime, the character of the offender, the time, the statute *etc.* Be that as it may it has to be said that the protection of society has always remained at the centrestage. The changes in outlook and reforms in penal policy are reflected in several statutory provisions in our country. The Children's Acts,[38] Section 27 of the Criminal Procedure Code, 1973[39] the Abolition of Whipping Act,[40] the Probation of Offenders Act, 1958[41] and The Repeal of Criminal Tribes Act, the Juvenile Justice (Care & Protection of Children) Act, 2000 are examples of this changing outlook.

From these changes, two principles seem to emerge:

(1) The system of punishment cannot be based exclusively on the nature of the crimes committed, but must be conditioned by the personality of the offenders. The same kind of crime may be committed by entirely different types of criminals. Punishment must, therefore, be suited to different categories of criminals.[42]

(2) Punishment must not only be a reaction against the crime itself but must also aim at preventing the offender from committing further crimes. It is, therefore, obvious that if in certain cases the traditional

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38. *E.g.* Children's Acts in Madras, U.P., Bombay, Sourashtra and the the Central Act IX of 1960, applicable to Union Territories.
39. Section 27 of Cr PC: *Jurisdiction in case of juveniles*: Any offence not punishable with death or imprisonment for life by any person who at the date when he appears or is brought before the court is under the age of sixteen years, may be tried by the court of a Chief Judicial Magistrate, or by any court specially empowered...providing for the treatment, training and rehabilitation of youthful offenders.
40. Act XXIV of 1955. "Whipping is a barbarous form of punishment which has no reformative value" (Statement of Objects and Reasons - *Gazette of India*, May 4, 1955).
41. Act XX of 1958. "In the meantime there has been an increasing emphasis on the reformation and rehabilitation of the offender as a useful and self-reliant member of society without subjecting him to the deleterious effects of jail life". See the Statement of Objects and Reasons in the *Gazette of India*, 11-11-1957, Part II, Sec.2 p. 842.
42. As Vinogradoff put it "The Judge stands to the offender in the position of the physician who selects his remedy after diagnosing the disease and the resources of the patient's organisation ....."

punishment does not fulfill this latter function, it must be replaced by some other means.[43]

The Indian Substantive Criminal Law, however, remains suffused with the penological thoughts of the past century. The Penal Code, as it is, reveals a graded system of punishments adapted to different categories of crime not infrequently running into minute sub-divisions.[44] The need for re-orientation of principles of substantive law is being keenly felt.[45] It was suggested that five new forms of punishment, namely, externment, compensation to victims of crime, public censure, community service and disqualification from holding of office should be added to deter criminals.[46]

II

Sections 53 to 75 of the IPC incorporate general provisions relating to punishment for different offences. Chapter III of IPC titled 'Of Punishments' contains Ss. 53-60 dealing with different types of punishments, including death sentence, life imprisonment and imprisonment for certain periods, whether the sentence should be served as rigorous or simple imprisonment and so on. Provisions relating to imposition of fines, including provisions for alternative sentences, if fines are not paid are incorporated in Ss. 63-70, IPC; nature of punishment for offences made up of several offences is provided for in Ss. 71 and 72. Solitary confinement as punishment and limits of its imposition are spelt out in Ss. 73 and 74. Section 75 provides for enhanced punishment for certain offences for repeat offenders.

In India, there is no uniform sentencing policy and generally it is alleged that sentences reflect the individual philosophy of the judges. The Supreme Court spoke of the sentencing in *Surja Ram* v. *State of Rajasthan*,[47] for

43. See Radzinowicz "The Present Trends of English Criminal Policy" in *The Modern Approach to Criminal Law*, at 31.
44. *E.g.* The gradation of punishment in regard to the offence of criminal trespass (Ss. 441-460 IPC) and Mischief (Ss. 425-440 IPC). "The minute splitting of offences into degrees and the distinguishing of attempts from completed criminal acts with the meticulous setting down of supposedly appropriate dosages of punishments belongs to an era when punishment based upon degrees of vicious will was thought to be the only or best means of coping with anti-social behaviour." Sheldon Glueck, "Principles of a Rational Penal Code"41, *H.L.R.* 453 at 480.
45. "The lapse of time which has elapsed since Macaulay's Code was drawn up makes it necessary that we should review its working and bring it into conformity with modern ideas. It may be that on an examination of it we shall find that it is in some places not in conformity with progressive thought of the age". P.N. Sapru on '*Prevention of Crime*' – Proceedings of the All India Penological Conference (1950) at 85.
46. The Indian Penal Code (Amendment) Bill, 1978.
47. AIR 1997 SC 18.

deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been conducted are 'to be delicately balanced . Such balancing is indeed a delicate task'.[48] The court referred to a US Court judgment, *Dennis Councle McGautha* v. *State of California*,[49] which pointed out that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment, as an infinite variety of circumstances may affect the gravity of the crime of murder. Thus, in the absence of any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime of murder, the discretionary judgment in the facts of each case, is the only way in which such judgments may be equitably distinguished.

Under S. 63 regarding amount of fine, where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive. The sentence of fine should be imposed individually and not collectively. The amount of fine imposed should not also be unduly harsh or severe.

In *Philip Bhimsent Aind* v. *State of Maharashtra*[50] the accused had been convicted and sentenced to life imprisonment for offence under Ss. 302, 307, 392/397 and 394, IPC and also ordered to pay an amount of Rs 5,000 as fine, on each count for offences under Ss. 302 and 307. The Bombay High Court considered the fact that the accused was just 19 years old, and a house servant and would not be able to pay the fine. The court thereafter reduced the fine amount from Rs. 5,000 on each count to Rs 1,000 for each count.[51]

When the court sentences an accused for a punishment, which includes an amount of fine, it can specify that in the event the convict does not pay the fine amount, he would have to suffer imprisonment for a further period as indicated by the court, which is generally referred to as default sentence. Section 65, IPC fixes the maximum period as 1/4th of the maximum period fixed for the offence the accused person is convicted of, that can be imposed as default sentence in case the convicted person does not pay the fine amount. The Supreme Court discussed it in *Ram Jas* v. *State of UP*.[52] In this case, the accused had been convicted for offences under Ss. 420/511, 367, 468 and 471 read with S. 120-B IPC, and was awarded a cumulative sentence of three years rigorous imprisonment and a fine of Rs. 3,000 and in default of payment of fine, to two years rigorous imprisonment. On appeal,

48. *Ibid.*
49. (1917) 402 US 183: 28 L Ed 2d 711.
50. 1995 Cri LJ 1694 (Bom) at para 29.
51. See also *Zunjarro Bhikaji Nagarkar* v. *Union of India*, AIR 1999 SC 2881.
52. AIR 1974 SC 1811.

Allahabad High Court convicted the accused to imprisonment, but maintained the fine amount at Rs 3,000. The default sentence was not stipulated.

In *Kuna Maharana* v. *State of Orissa*,[53] the Orissa High Court considered the case of the appellant who had been convicted under S. 325 to two years rigorous imprisonment and to a fine of Rs 1,000 and in default, to suffer imprisonment for one year. The accused had served the two years sentence, and had also served five months of the default sentence prescribed, when he challenged the *quantum* of default sentence before the high court. The high court held that S. 65 prescribes a period of 1/4th of the maximum period that can be imposed for an offence. However, the trial was held before the first class judicial magistrate, who under S. 29 and 30, CrPC was empowered to award a maximum of three years sentence only in any offence. Since this was the maximum that the magistrate could sentence, it followed that the default period was ¼th of the three year maximum specified in law, amounting to nine months. Hence, imprisonment for the period over and above this period of nine months was held to be illegal and without jurisdiction. In view of the circumstance, where the accused had already undergone five months default sentence, the high court directed that the custodial sentence be limited to the period already undergone.[54]

Another important trend shown by the courts is the substitution of punishment with compensation. This trend became very evident in *Dr. Jacob George* v. *State of Kerala*.[55] Within one and half years of marriage of the deceased, a son was born out of the wedlock. Thereafter her husband deserted her, but there was reconciliation three months prior to her death and she had become pregnant again. As she intended to go for abortion, she got admitted by PW 1, her cousin to the clinic (hospital) of the appellant, a homeopath who used to do abortions. The appellant performed operation but she expired as a result of the operation. Police was informed and this resulted in charge-sheeting of the appellant under various sections including S. 314 IPC. The autopsy revealed that the deceased's uterus got perforated because of untrained handling of scientific gadgets by the appellant. The doctor who conducted post-mortem examination corroborated the evidence of PW 1 as to the date and time of the death. However, the trial court held that the charges had not been established beyond reasonable doubt and therefore, acquitted the appellant. The State preferred appeal before high court which also took *suo motu* cognizance against the order of acquittal. The high court found that the exercise undertaken by the appellant was 'daring, crude and criminal' as a result of which an innocent life was scarified at the

53. 1996 Cri LJ 170 (Ori).
54. *Id.* paras 7& 8, at 172. See also *Chhajulal* v. *State of Rajasthan*, AIR 1972 SC 1809.
55. (1994)3 SCC 430.

altar of a quack. Accordingly it set aside the order of acquittal, convicted the accused under S. 314 IPC and sentenced him to 4 years RI and imposed a fine of Rs. 5000 out of which Rs.4000 was directed to be paid to the deceased's child towards compensation for loss of his mother. As regards the sentence it was urged that the appellant having undergone imprisonment for about two months, the sentence may be reduced to the period already undergone. A further prayer for grant of benefit of Probation of Offenders Act was also made. In disposing of the appeal of the accused-doctor and while upholding the conviction but modifying the sentence, the court observed:[56]

> The purpose which punishment achieves or is required to achieve are four in number. First, retribution: i.e. taking of eye for eye or tooth for tooth. The object behind this is to protect the society from the depredations of dangerous persons; and so, if somebody takes an eye of another, his eye is taken in vengeance. This form of protection may not receive general approval of the society in our present state of education and understanding of human psychology. In any case, so far as the matter at hand is concerned, retribution cannot have full play, because the sentence provided by S. 314 is imprisonment of either description for a term which may extend to ten years where the miscarriage has been caused with the consent of the woman as is the case at hand. So death penalty is not provided. The retributive part of sentencing object is adequately taken care of by the adverse effect which the conviction would have on the practice of the appellant. The other purpose of sentence is preventive.
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> Deterrence is another object which punishment is required to achieve. Incarceration of about two months undergone by the appellant and upholding of his conviction by us which is likely to affect the practice adversely, would or should deter others to desist them from indulging in an illegal act like the one at hand.

The court further observed:[57]

> Reformation is also an expected outcome of undergoing sentence. We do think that two months' sojourn of the appellant behind the iron bars and stone walls must have brought home to him the need of his changing the type of practice he had been doing as a homeopath. The reformative aspect of punishment has achieved its purpose, according to us, by keeping the

56. *Id.* at 438, para 17.
57. *Ibid.* para 19-20.

> appellant inside the prison boundaries for about two months having enabled him to know during this period the trauma which one suffers in jail, and so the appellant is expected to take care to see that in future he does not indulge in such an act which would find him in prison.

The Supreme Court agreed with the Kerala High Court in the conviction recorded by it. But instead of the sentence recorded by the high court the Supreme Court ordered him to pay Rs 1,000,00/- to the dependant of the deceased and avoid the unpleasantness of going to jail. And in making the conclusion that he was financially capable to pay, the guidelines for the Court were the R.C.C. building of his clinic and the fact that he had a roaring practice. The rump part of the disposition was the condition imposed by the court that if he failed to pay the compensation, the punishment awarded by the high court would revive. Apart from the fact that the court failed to follow the statutory provisions in the Penal Code with regard to the term of imprisonment, it is not known how the court can resort to this kind of condition? The general impression one gets is that if an offender has sufficient money he can buy his freedom.[58] This is not a good trend.[59] The court's discussion on the virtue and sanctity of life could fruitfully be compared with its discussion on the social acceptance of suicide in India in *Rathinam.*[60] Another area where the court has been showing the trend of accepting compensation in the realm of punishment is in respect of offences like bigamy.[61]

Today the statutory scheme applicable to sentencing and execution of sentencing helps the judiciary and appropriate government (which includes central government and the state governments) to play active role. Section 235(2), 248(2), 255(2) of Cr PC help the accused to be heard on the question of sentence. Section 320 helps courts to compound the offences and thus to avoid punishments. Section 360 provides for the court to grant probation. Thus Chapter XXVII of CrPC make provision for the courts to grant remission and thus to temper the harshness of punishment.

Capital Punishment: The world is still debating the question as to whether to abolish or retain the capital punishment though the Human Rights Commission of the UN adopted a resolution which demands for a moratorium on death penalty and consideration of complete abolition of the

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58. K.N. Chandrashekhran Pillai, "Criminal Justice Administration: A Balance Sheet" 18 *The Academy Law Review* (1994) pp.1-25 at 7.
59. *Ibid.*
60. *Rathinam* v. *Union of India,* (1994) 3 SCC 394.
61. *Luxmi Devi* v. *Satyanarayan,* (1994) SCC (Cri.)1566.

death penalty.[62] In India the debate could be said to be on, though the Supreme Court has categorically upheld its constitutionality.[63]

The IPC provides for death sentence for the following offences:

1. Treason, as in waging war against the Government of India (S. 121) or abetment of mutiny (S. 132);
2. Perjury resulting in the conviction and death of an innocent person (S. 194);
3. Murder (Ss. 302);
4. Abetment of suicide of child or insane person (S. 305)
5. Attempted murder by a life convict (S. 307(2));
6. Dacoity with murder (S. 396).

As already noted the Supreme Court of India held capital punishment constitutionally valid in *Jagmohan Singh* v. *State of U.P.*[64] Still the movement for abolition of capital punishment was getting strong day by day and by way of caution the Supreme Court engrafted a rule to S. 302 that capital punishment would be awarded only in rarest of rare cases.In consonance with this rule the Parliament enacted a new sub-section to S. 354 CrPC which lays down:[65]

> 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.

Adverting to this provision Justice Krishna Iyer an ardent abolitionist judge in *Rajendran Prasad* v. *State of U.P.*[66] ruled that since Section 354(3) did not clearly give any guidance to the district judge to decide the serious issue as to whether death penalty or life imprisonment should be awarded in a case, there could be no award of death penalty. He held it unconstitutional.

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62. See R. Hood, "Capital Punishment" in M.Tonry (ed.) *The Handbook of Crime and Punishment*,New York, Oxford,739-776 (1998); Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989. Available at http://www.unhchr.ch/html/menu3/b/a_opt2.htm, The development of the European perspective on the death penalty is first of all in the adoption of the 6th Protocol to the European Convention on Human Rights in 1982.In 1990, American states adopted the Protocol to the American Convention on Human Rights in 1990 on the abolition of death penalty.
63. *Jagmohan* v. *State of U. P.*, AIR 1973 SC 947; *Bachan Singh* v. *State of Punjab* , 1980 SC 898.
64. *Ibid.*
65. S.354 (3), CrPC.
66. AIR 1979 SC 916.

Bachan Singh v. *State of U.P.*[67] was, therefore, referred to the Constitutional Bench to examine the constitutionality of death penalty. The court held it constitutional as S. 302 envisages alternative punishments *i.e* death or life imprisonment. The Supreme Court's ruling that death sentence ought to be imposed only in the 'rarest of rare cases' was expanded in *Machhi Singh* v. *State of Punjab*.[68] The following propositions were culled out by the Supreme Court:[68a]

i. The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;

ii. Before opting for the death penalty, the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the crime;

iii. Life imprisonment is the rule and death sentence is an exception. In other words, death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstance of the crime, and provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances;

iv. A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating circumstances has to be accorded full weightage and just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

In *Sushil Murmu* v. *State of Jharkhand*[69] the accused for his own prosperity sacrificed a child of 9 years. The child was killed in a grotesque and revolting manner. The court upholding the sentence of death, enumerated the following circumstances where death sentence may be imposed:[69a]

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

(2) when murder is committed for a motive which evinces total depravity and meanness *e.g.* murder by hired assassins for money or reward or cold blooded murder for gain or where the murderer is in

67. AIR 1980 SC 898.

68. AIR 1983 SC 957.

68a. *Id.* at 966-967.

69. 2004 Cri LJ 658 (SC); see also *Sardar Khan* v. *State of Karnataka*, 2004 Cri LJ 910(SC); *Vasant Vithu Jadhav* v. *State of Maharashtra*, 2004 Cri LJ 1786 (SC); *Sambhal Singh* v. *State of U.P.*, 2004 Cri LJ 1533 (All); *Simon* v. *State of Karnataka*, (2004) 2 SCC 694.

69a. *Sushil Murmu*, *id.* at 662, para 17.

dominating position or in a position of trust or where the murder is committed in betrayal of motherland;

(3) when murder of SC/ST, minority community *etc.*, is committed not for personal reason but in circumstances that arouse social wrath;bride burning or dowry death or when murder is committed in order to remarry for the sake of extracting more dowry or to marry other woman on account of infatuation;

(4) when multiple murder is committed; and

(5) when the victim of murder is innocent child or helpless woman or old or infirm person and the murderer is in dominating position or a public figure generally loved and respected by the community.

While awarding punishment courts are also required to follow certain procedures. In *Santa Singh* v. *State of Punjab*,[70] non-compliance with S. 235(2) CrPC [71] was held to be not just a mere irregularity, but to be an illegality which vitiates the sentence. The court noticed that there are two stages at the end of a trial. First, is when the court assesses the evidence and comes to a conclusion whether the accused is to be acquitted of the charges against him or to be convicted. Once the court comes to a conclusion that the accused should be convicted, and then the court ought to give a chance to the accused to plan mitigating facts before the trial court. For until that time, the accused was merely concentrating on defending his case during trial. It is to enable him to place other factors that support a plea for lesser sentence that the provision for hearing him in S. 235(2) CrPC was introduced.

In *Allauddin Mian* v. *State of Bihar*, the Supreme Court once again considered the issue of effect of violation of the mandatory provision of S. 235(2) in another death penalty case. The court held that the requirement to hear the accused was based on the consideration that it should satisfy the rule of natural justice. *State of Tamil Nadu* v. *Nalini*[72] involved 26 persons accused of being involved in the conspiracy to assassinate former Prime Minister of India, Rajiv Gandhi. All the 26 accused had been sentenced to death by the trial judge. Supreme Court finally confirmed the conviction under S. 120-B read with S. 302, IPC against six accused only, the rest of the accused were acquitted. Of the six persons convicted of the murder, the death sentences of only four accused were confirmed. Regarding Nalini, K T

70. AIR 1976 SC 2386.

71. Section 235 *Judgment of acquittal or conviction.* – (1) After hearing arguments and points of law (if any), 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 provisions of section 360 hear the accused on the question of sentence, and then pass sentence on him according to law.

72. AIR 1999 SC 2649.

Thomas J was of the view that the death penalty should be converted to life sentence. Consequently, her sentence was altered to the life imprisonment. In *Jai Kumar* v. *State of Madhya Pradesh*[73] the accused Jai Kumar was sentenced to death by the trial court. The Supreme Court confirmed the death sentence taking it as rarest of rare cases as the facts established the depravity and criminality of the accused in no uncertain term.[74]

In *Om Prakash* v. *State of Haryana*[75] the accused Om Prakash, who was working in the army (Border Security Force) was accused of killing seven members of a rival family. While the high court confirmed the trial court conviction of death sentence, the Supreme Court noticed certain factors, which according to the court, mitigated the awarding of death sentence. The court held:[75a]

> In our view, even though this is a gruesome act on the part of the appellant, yet it is a result of human mind going astray because of constant harassment of the family members ... It can be termed as a case of retribution or act for taking revenge. No doubt, it would not be a justifiable act at all, but the accused was feeling morally justifiable on his part.

The evidence disclosed that there had been a land dispute between the accused and the deceased. On the day of occurrence, it appeared that the deceased Krishnandan had tied his buffalo in the disputed field which had infuriated the accused and thus the incident happened on the spur of the moment. The evidence did not also disclose that there was premeditation or plant to murder that deceased or that it was done in a cold-blooded manner. Hence, it was held that it did not fall in the category of rarest of rare cases. The sentence against the accused was, therefore, converted from death sentence to life imprisonment. In *Maru Ram* v. *Union of India*[76] the court observed:[77]

> [T]he fundamental principles in sentencing jurisprudence have to be grasped in the context of Indian *corpus juris*. The first is that sentencing is a judicial function and whatever may be done in the matter of executing that sentence in the shape of remitting commuting or otherwise abbreviating, the executive cannot alter the sentence itself... the remission cannot detract from the

73. AIR 1999 SC 1860.
74. See also *Suresh Chandra Bahri* v. *State of Bihar*, AIR 1994 SC 2420.
75. AIR 1999 SC 1332. *Rajendra Rai* v. *State of Bihar*, AIR 1999 SC 996, See also *Ramadhir Basu* v. *State of W.B.*, 2000 Cri LJ 1417 (SC). See also *Kishori* v. *State of Delhi*, AIR 1999 SC 382.
75a. *Om Prakash*, *id.* at 1339, para 17.
76. (1981) 1 SCC 107.
77. *Id.*, at 128, para 24.

> quantum or quality of sentence or its direct and side effects except to the extent of entitling the prisoner to premature freedom if the deduction following upon the revision has that arithmetic effect.

The court further observed:[78]

> We repulse all the thrusts on the *vires* of S. 433-A, may be penologically the prolonged term prescribed by the section is supererogative. If we had our druthers we would have negative the need for a fourteen year gestation for reformation. But ours is to construe, not construct, to decide, not to make a code.

Section 54 IPC provides for commutation of sentence of death by the government. In every case in which sentence of death shall have been passed, the appropriate Government may, without the consent of the offender, commute the punishment for any other punishment provided by this code.

The IPC itself provides the power to the State or Central government to commute death sentence for any other punishment provided in the IPC. This power of the appropriate government to commute the sentence, is co-extensive to the powers under S. 433, CrPC;[79] which similarly empowers the appropriate governments to commute a sentence of death for any other punishment provided in the IPC. It should be noted that this power of the appropriate government to commute the death sentence (under S. 54, IPC) is not curtailed by the power of the President to grant commutation of death sentences under Art. 72(3) or under Art. 161 by the Governor.

The Malimath Committee recommended that wherever imprisonment for life is one of the penalties prescribed under the IPC, the following alternative punishment be added namely "Imprisonment for life without commutation or remission".Wherever punishment of imprisonment for life without commutation or remission is awarded, the State Governments cannot commute or remit the sentence. Therefore, suitable amendment may be made to make it clear that the State Governments cannot exercise power of remission or commutation when sentence of "Imprisonment for life

78. *Id.*, at 153, para 72.
79. Section 433 CrPC. *Power to commute sentences.* The appropriate Government may, without the consent of the person sentenced, commute—
    a) A sentence of death, for any other punishment provided by the Indian Penal Code (45 of 1860);
    b) A sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;
    c) A sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

without remission or commutation" is awarded.[80]

Section 53 provides imprisonment for Life. Technically, imprisonment for life means a sentence of imprisonment running throughout the remaining period of a convict's natural life. As regards the nature of imprisonment, it has been held to be rigorous imprisonment, and not simple imprisonment. This was held in *K M Nanavati* v. *State of Maharashtra*[81] and also in *Naib Singh* v. *State of Punjab*,[82] in which it was stated that imprisonment for life meant rigorous imprisonment, that is, till the last breath of the convict.

In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years.[83] By amendment to the Cr PC in 1973, a new provision was introduced namely, S. 433-A, which provided that notwithstanding the provision of S. 432, which empowered the appropriate government to remit or commute sentences, in cases where life sentence was imposed for an offence for which death is one of the punishments provided in law, or where the death sentence is commuted under S. 433 into one of life imprisonment, such person shall not be released unless he had served at least 14 years of imprisonment. The scope of this provision was examined in *Ashok Kumar* v. *Union of India*.[84] The court held as follows:[85]

> It will thus be seen form the ratio laid down in the aforesaid two cases that where a person has been sentenced to imprisonment for life, the remissions earned by him during his incarceration during his internment in prison under the relevant remission rules have a limited scope and must be confined to the scope and ambit of the said rules and do not acquire significance until the sentence is remitted under S. 432, in which case the remission would be subject to limitation of S. 433-A of the code, or constitutional power has been exercised under Art.72/161 of the Constitution.

Different courts have since followed this ratio. Thus, in *Lakkhi* v. *State of Rajasthan*,[86] the Rajasthan High Court held that there cannot be automatic release at the end of 14 years, and that unless the State government decides to commute and release, the prisoner will have to remain imprisoned even

80. Government of India, *Committee on Reforms of Criminal Justice System* (Ministry of Home Affairs, New Delhi ,March 2003) para 14.
81. AIR 1962 SC 605.
82. AIR 1983 SC 855; 1983 CriLJ 1345.
83. Section 57 IPC.
84. AIR 1991 SC 1792; 1991 Cri LJ 2483.
85. *Id.* at 1802, para 12.
86. 1996 Cri LJ 2965 (Raj).

beyond 14 years. In another case, *Mahak Singh* v. *State of UP*,[87] the Allahabad High Court held that life imprisonment does not end at the end of 14 years, unless remitted by the State government.

The first criticism voiced against the punishments prescribed by the Code is that they are too severe. As Gour says[88] "It is a standing complaint against the Code that it is draconian in its severity as regarding punishments." The framers of the Code seem to have been aware of this apparent severity.[89] A learned writer observes[90] "The maximum punishments laid down in many places have been so liberally fixed that the actual punishments inflicted in courts almost mock at them. The punishments in many cases run conveniently by whole number of years. The maximum laid down is hardly ever approached even, far from anybody contemplating to outstrip it. This is a limitation that will confront all legislators at all times, but in the case of the present Penal Code it does give the look of a 'Bargain Theory' of Justice.

In the second place, the classification of imprisonment into simple and rigorous seems to be based on the need for increased rigour of treatment in the case of particular crimes, recommended by the Jails Enquiry Committee.[91] The revision of sentences as well as the utility of retaining the distinction between simple and rigorous imprisonment may be examined in the present context.[92] The Indian Jails Committee also seems to have recognized that simple imprisonment was anamolous.[93] As Barker says "it is

87. AIR 1999 All. 274.
88. Gour. *The Penal Law of British India* (Ed. 4) Vol. I p. 330. "No civilized country today imposes such heavy sentences as does the Penal Code. Heavy sentences have long gone out of fashion in England and the odour of sanctity and perfection attaching to the Penal Code should not deter indigenous legislature to thoroughly revise the sentences and bring them into conformity with modern civilized standards." 59 M.L.J. (1929) p.62.
89. "We entertain a confident hope that it will shortly be found practicable generally to reduce the terms of imprisonment which we propose" See note 'A' appended to the Draft Penal Code (1837).
90. Abul Hasanat, *Crime and Criminal Justice*, Appendix B. p. 124-125.
91. This Committee of which Macaulay was a member reported in 1838 that "the prisoners in whose case the Court has exempted Labour should not be made to work". The result was that two forms came into existence, *i.e.*, simple and rigorous imprisonment, See Haikerwal: *A Comparative Study of Penology* p.28.
92. "The distinction is not recognized in many places and it does not accord with sound prison administration. Nothing can be more debilitating than imprisonment without work and on the other hand, nothing can destroy the possibility of reformation faster than forced Labour at noxious or degrading work. *It is submitted that all prisoners should work to the extent that they are physically capable.*" R.E. Knowlton, "Punishment Provisions in the Penal Code" *Burmah Law Institute Journal* Vol. II, No. 1 (1960) p.40.
93. The Indian Jails Committee itself seems to have been of the opinion that simple

putting it mildly to say that this (simple imprisonment) does no physical or moral good to the prisoner; it is definitely harmful to him."[94]

Provision for solitary confinement in the punishments prescribed in the Indian Penal Code is another matter for which one fails to see a rational basis *today*. In the medieval times it was considered that cellular confinement was a means of promoting reflection and penitence. But it has since come to be realized that this kind of treatment leads to a morbid state of mind and not infrequently to mental derangement. It is needless to add that as a form of torture also it fails in its effect on the public[95] and it has been observed that "regarded as a rational method of treatment, cellular confinement is a curious monument of human perversity."[96] Solitary confinement has been repealed in U.K.[97] The Supreme Court held in *Sunil Batra* v. *Delhi Administration*,[98] and *Charles Sobraj* v. *Superintendent, Central Jail*,[99] that solitary confinement means harsh isolation of a prisoner from the society of fellow prisoners by cellular detention. Sections 29 and 30 of the Prison Act is penal in character and so must be imposed only in accordance with the procedure which follows fair procedure, in the absence of which, the confinement will be violative of Art. 21 of the Constitution. It can be used at present as a disciplinary measure for a very short period only. In view of the severity and harshness of solitary confinement, the framers of the Code have specifically provided that in no case the sentence of solitary confinement may be imposed for more than a period of 14 days at a time, and it must be imposed in intervals.

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imprisonment without Labour should be given only in few cases and held that simple imprisonment itself should be of two kinds: (a) simple imprisonment without liability to labour, (b) simple imprisonment with liability to light Labour. This proposal was recommended but never introduced. Barker disagreeing with this, observes, "all forms of imprisonment should carry liability to do some form of Labour" Barker, *Modern Prison System of India* at 24.

94. Barker, *Ibid.*
95. Yahya Ali, J., in (1947) I.M.L.J. p.346.
96. "..... that it should have been established shows the ignorance of criminal nature which existed at the time; that it should still persist shows the present necessity for a widespread popular knowledge of these matters. It may be possible to learn to ride on a wooden horse or to swim on a table, but the solitary cell does not provide even a wooden substitute for the harmonizing influences of honest society. To suppose that cellular confinement will tend to make the criminal a reasonable human being is as rational as to suppose that it will tend to make him a soldier or a sailor, a doctor or a clergyman" Havelock Ellis "The Criminal", pp. 387,328 quoted in Sethna, *Jurisprudence* at p. 353.
97. It was repealed by 56 & 57 Victoria (Ch. 54) 1893.
98. AIR 1978 SC 1675.
99. AIR 1978 SC 1514.

The short-term imprisonment also does not seem to serve any useful purpose.[100] The period is not long enough for the reformatory influence to work or for the offender learning any useful trade or occupation. On the other hand considerable harm is likely to be done, particularly to a first offender by his coming into contact with hardened criminals.[101] Several suggestions have been made for an effective replacement of short term imprisonment. Levying of fine does not seem to be suitable. Many people are given the short-term imprisonment as a punishment in lieu of not paying the fine. Letting out on parole or probation has also been suggested.[102] Rule 102 of the Criminal Rules of Practice says "The Government consider the awarding of short term imprisonments as undesirable and Magistrate before passing such sentences should consider whether imprisonments till the rising of the court allowed by law could not appropriately be passed instead or the provisions of S. 562, Criminal Procedure Code applied in favour of accused persons," It may perhaps be said in favour of short term imprisonment that it is an effective method of prevention in the case of persons courting imprisonment as part of political or other agitation, *e.g.* the Satyagrahis.

III

The principle of individualization of punishment is gaining importance as a result of the acceptance of the theory of reformation today. Emergence of social determinism lead to the idea of individualization of punishment which means that punishment must suit the offender than the offence. Therefore, enhancement or reduction of punishment should be linked to the antecedents and various social factors attending the criminal along with the nature of crime.[103] However, the acceptance of this principle raises the problem of the appropriate methods to be adopted to achieve that end.

(i) The Legislature operating before the commission of the crime obviously cannot consider the character of the offender nor the

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100. "..... that it should have been established shows the ignorance of criminal nature which existed at the time; that it should still persist shows the present necessity for a widespread popular knowledge of these matters. It may be possible to learn to ride on a wooden horse or to swim on a table, but the solitary cell does not provide even a wooden substitute for the harmonizing influences of honest society. To suppose that cellular confinement will tend to make the criminal a reasonable human being is as rational as to suppose that it will tend to make him a solider or a sailor, a doctor or a clergyman" Havelock Eills "The Criminal" pp. 387, 328 quoted in Sethna, *Jurisprudence* at p. 353.

101. See V. B. Raju, *Commentaries on the Indian Penal Code*, Appendix, J., (p. 1584) 1961 Edn. See also Bombay Probation of Offenders Act, 1938, and Bombay H.C. Circular No. P. 0906/40 of 15-9-1952.

102. See William C. *Reckless : The Crime Problem*, (3rd Edn. 1930) at pp. 477-478.

103. M.P. Singh XL *ASIL* (2004) 145.

varying circumstances surrounding the doing of the criminal act. The Penal Code, no doubt, leaves a wide discretion to the Judge in the matter of fixing the punishment by prescribing the maximum alone. Alternative modes of treatment[104] are also provided. Yet the code contains a large number of sections that deal essentially with the same conduct which by the addition of certain factors raises the maximum. Gour points out[105] that though the principal offences found to have been dealt with in the Code would not exceed 25 or 30 in number, the penal sections would number no less than 366. To that extent the discretion of the judge is limited.

(ii) The judge has ordinarily considerable discretion in the matter of selecting the appropriate sentence but much of the value of this provision is lost if his knowledge of the antecedents of the offender and other circumstances surrounding the commission of the offence is limited to facts that are relevant to the issue of guilt. The imperfections of the existing machinery are pointed out thus: "Legislative prescription (in advance) of detailed degrees of offences is individualization of acts and not of human beings and is therefore, bound to be inefficient. Judicial individualization, without adequate facilities in aid of the court is bound to deteriorate into a mechanical process of application of certain rules of thumb or of implied or expressed prejudices".[106] The Kerala High Court in *Raman* v. *Froncis*[107] laid down that the antecedents of the wrong-doer including his youthful age and family background, *etc.*, may be valid considerations for prescribing leniency in certain cases, but without making them not appear to be a mockery in the scheme of criminal justice administration. It is interesting to note that while in one case[108] the Supreme Court held that in determining the quantum of punishment which should be awarded for a crime the character of the evidence on the basis of which the crime is held to have been committed can have no bearing at all and cannot be taken into consideration, in some other cases[109] the Supreme Court has held that as a matter of convention death sentence should not

104. Fine is an alternative to imprisonment. Admonition and release on probation are also alternative modes of treatment under the Probation of Offenders' Act, 1958.
105. Gour *Supra* note 88. The Introduction CCVII. There are about 9 aggravations of hurt, 6 aggravations of wrongful confinement, 5 aggravations of kidnapping 14 aggravations of mischief and 18 aggravations of criminal trespass.
106. Sheldon Glueck: *Principles of a Rational Penal Code.* 41 Har. Law. Review p. 453 at 467.
107. (1988)Cr LJ 1359 (Kerala).
108. *Vadivelu Thevar* v. *The State of Madras*, AIR 1957 S.C. 174.
109. *Aftab Ahmed Khan* v. *State of Hyderabad.* AIR 1954 S.C. 436. *Pandurang Tukia and Bhillia* v. *State of Hyderabad,* AIR 1955 SC 216.

be imposed when the conviction for murder is confirmed only by a majority. In *Dalwadi Govindbhai* v. *State of Gujarat*[110] the Gujarat High Court reiterated the principles laid down by the Supreme Court in *State of Karnataka* v. *Puttaraja*[111] and held that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. Thus, main stress is on the protection of society rather than criminal.

The following alternatives have been considered in relation to some classes of offenders in some legal systems:[112]

(a) It is suggested that in "fixing the sentence" part of the criminal trial should be separated from the trial and entrusted to a board of experts. The duty of the judge should be confined to the deciding of guilt or innocence of the accused.[113] Prof. Glanville Williams explains "The judges when they sentence offenders have too little knowledge of what really goes on in the different kinds of penal establishments, too little knowledge of the real circumstances of the offenders and of the factors which really caused him to do which only begins when the prisoner leaves the dock. It is, therefore, strongly urged that whenever an offender is sentenced to imprisonment for the first or second time he should be remanded to custody in a special remand centre until (after a full enquiry into his circumstances and history including his mental and physical history) his case has been reviewed by a sentencing board consisting of one lawyer, two doctors one of whom should be a general practitioner and one a psychiatrist and neither of whom should be prison medical officers, one prison Commissioner or representative of the prison, one lay member; (at least one of the six being a woman) and if practicable the trial judge, recorder or chairman with absolute powers to confirm the sentence or to substitute any lesser penalty which the

110. 2004 Cri LJ 2767(Guj).

111. 2004 Cri LJ 579 (SC).

112. See the learned discussion by Prof. Knowlton in "Punishment Provisions of the Penal Code" *Burma Law Institute Journal* vol. II No.1 (1960) p. 13-23.

113. See Livingston Hall, "Substantive Law of Crime" 50, Har. Law. Review p. 653; Sheldon Glueck *Supra* note 106 at 475. The system of a separate board for fixing the sentence is tried in relation to juvenile and youthful offenders but is rejected by the American Model Penal Code and it raises problems concerning individuals' civil rights as pointed out by Knowlton, *Id.* at 21; See also Friedman, *Law in a Changing Society* pp. 183-4; William C. Reckless observes "The trend seems to be in the direction of having courts operate under *blanket commitment* laws rather than under specific sentencing powers. For example instead of requiring the Court to sentence a defendant for a specific term to a specific prison, laws are now enabling courts to commit offenders to a State Authority (Department of Welfare, Depart of Correction etc.), under an indeterminate sentence and the exact period is then determined by them) : *The Crime Problem* p. 438-9.

court could have imposed and whose sole intention should be the course which is most likely to result in that offender not committing any further offence.[114]

(b) if the discretion given to the judge in the matter of individualizing punishment is to be effectively exercised, additional fact-finding processes have to be resorted to by the judge. They may be in the shape of a judicial hearing before sentencing or an investigation by the probation department utilized by the judge.[115] In this connection the following provisions of The Indian Probation of Offenders Act, 1958 may be referred to.

Sec. 4(2) Before making any order under sub-section (1) the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

Sec. 6(2) For the purpose of satisfying itself whether it would not be desirable to deal under S. 3 or 4 with an offender referred to in sub-sec. (1) the Court shall call for a report from the probation Officer and consider the report, if any, and any other information available to it relating to the character and physical and mental condition of the offender.

Sec. 7 The report of the probation Officer referred to in sub-sec. (2) of S. 4, of sub-sec. (2) of the S. 6 shall be treated as confidential. Provided that the Court may if it so thinks fit communicate the substance thereof to the offender and may give him an opportunity of producing such evidence as may be relevant to the matter stated in the report.

The American Law Institute's Model Penal Code requires a pre-sentence report when the conviction is for a felony, when the defendant is under 21, and when the defendant will be sentenced to imprisonment for an extended term.[116]

In England, the fact finding system after conviction for purposes of determining the punishment consists of the testimony of a police officer.[117] The officer may be cross-examined. An analogous procedure is provided for in Burma.[118] The employment of police officers for this end may make the implementation of the system easy and practicable but it also raises the question whether facts favourable to the accused

114. *Reform of the Law* (1951) p. 207.
115. See Knowlton, *supra* note 112 at 15.
116. A.L.I. Model Penal Code Draft 2. pp. 53-4.
117. See Archold, *Criminal Pleading Evidence and Practice*, 33rd Ed. (1957). Cum, supp. para 393.
118. See Knowlton *supra* note 112 at 17.

will always be brought out. Further, the accused should have a right and opportunity to rebut the evidence of the police officer and a provision for a bare denial is of little use. Above all, whichever type of officer may be engaged to collect and present the data to the judge, in the absence of any criteria as to the type of facts that may be presented, the danger of irrelevant matter of questionable utility and veracity being brought in is not to be overlooked.

The Indian Jails Committee however did not favour the above methods. It observed, "Mr. Justice Heaton of the Bombay High Court made the suggestion that the apportionment of punishment should be entrusted to a different body from that which tried the question of guilt or innocence. He recognizes, however, the force of the objection to this which is that apart from the duplication of the work which it involved it would be too early to judge of the effect of conviction and of the yet unpronounced sentence on the accused. In some of the States of America an attempt has been made to get over this difficulty by appointing in every court an officer whose duty it is, after the prisoner's guilt has been established to make enquiries and to furnish the judge with information including a report on his mental condition which will enable him to award punishment wisely and equitably. The system is said to work satisfactorily in the United States although even there it was admitted that attempts had been made, though unsuccessfully to influence the court's officers in favour of or against the prisoner. In this country we do not think that such a system would have any chance of success. The many religious and social cleavages which exist in India would inevitably lead to an unevenness in the officer's reports even if direct corruption could be guarded against, and we do not think that it would be wise to attempt to imitate the American system in this respect. At the same time it does seem to be possible that more might be done especially through the instrumentality of the Public Prosecutor, generally a vakil of long standing, the position to lay before the court after the question of the prisoner's guilt has been determined such reliable information as would enable the court to adjust its sentence to the needs of the case."[119] It cannot be said that the difficulties referred to have disappeared at the present day.

(c) It may be said that in spite of the assistance provided by the post-conviction fact-finding methods and the provision of an appellate forum for correction there is still no complete protection against judicial arbitrariness in imposing sentences. The Model Penal Code (American Law Institute) purports to establish criteria for the exercise of discretion

119. Quoted in Ramaswami, P.N. *The Magisterial and Police Guide*, vol. I, pp. 503-4 (2nd Edn. 1952).

in certain cases.[120] The advisability of incorporating in the Penal Code certain directive principles that would regulate the exercise of discretion by the judge may be examined.

(d) It may not be out of place in this context to refer to the enumeration of several factors of aggravation and mitigation of punishment found in some of the continental Codes.[121]

Taking note of the archaic and unhappy state of penal system Krishna Iyer, J observed in *Shivaji* v. *State of Maharashtra*[122] that when accused persons are of tender age then even in a murder case it is not desirable to send them beyond the high prison walls and forget all about their correction and eventual reformation. In *Inder Singh* v. *State*[123] the apex court issued the directions to the State Government to see that the young accused of the case are not given any degrading work and they are given the benefit of the parole every year if their behaviour shows responsibility and trustworthiness. In *Ram Chander Rai* v. *State of Bihar*[124] the Supreme Court pointed out that the sentence should neither be too lenient nor disproportionately severe. The former loses its deterrent effect and the latter has a tendency to tempt the offenders to commit a more serious offence. The object of punishment for crimes being to impress on the guilty party and other like-minded persons that the life of crime does not pay, the court has a duty to guard itself against the aforesaid two tendencies and to draw a proper balance between them. The new outlook on punishment has been necessitated by the investigation into crime causation, by the research into the effects of different forms of punishment, by the development of social sciences, psychological studies and modern statistics. The change has been brought about also by the humanitarian forces, and theories of individualization of punishment. The view has gained ground that the law should look to the criminal and not merely to the crime in fixing the punishment. A notably varied system of sanctions is now applied with a view to adapt the punishment to each particular category of criminals. Consequently, the traditional attitude regarding the extent of responsibility has undergone a change. Different sanctions are now applied to children and adolescents[125] as opposed to adults, to mentally abnormal person as against sane individuals, to first offenders as against the recidivists. The quantum of punishment also varies from a mere admonition to capital punishment. In all these, society is trying to utilize every scientific method for self-protection

120. See Tentative Draft No.2 Sections 7.01, 7.02, 7.03 and 7.04.
121. See Swiss Penal Code (1937) Arts. 63-66. Italian Penal Code (1930) based on the suggestion of Ferri. Regarding the merits and demerits of such enumeration, see Glueck, *Principles of a Rational Penal Code, 41, Har. L.R.* p.453 pp.468-7.
122. AIR 1973 SC 2622.
123. AIR 1978 SC 1091.
124. (1970) 3 SCC 786.

against destructive elements in its midst.

The Supreme Court discussed various aspects of the punishment in *Ruli Ram* v. *State of Haryana*[126] and condemned the recent trends where political battles are increasingly being fought with bullets rather than the ballots resulting in loss of innocent lives who have no role to play therein. The object of judicial discretion in selecting suitable punishment should be to protect the society and to deter the criminal in achieving the objective of criminal justice system. The study of human behaviour individually and in relation to society has shown that the behaviour and the mental attitude of one prisoner differs from those of others. An element of cruelty is inseparable from any form of punishment which frequently is an indelible stain on the convicted person.[127] The criminal is a social misfit, he is a liability on the wrong side of the social ledger and the object of modern punishment is to transform that liability into an asset. The prison sentence has the effect of herding the convicted person with miscellaneous lot of criminals and thereby diminishes, if not destroys, the chances of reforming that person. Accordingly, a system of releasing criminals especially youthful and first offenders, on suspended sentence with liberty during good behaviour, have been evolved.[128] The imposition of a sentence should be considered in relation to its effect on criminal and society.

The Malimath committee[129] has recommended that offenders also have to be classified as a casual offender, an offender who casually commits a crime, an offender who is a habitual, a professional offender like gangsters, terrorist or one who belongs to Mafia. There should be different kinds of punishments so far as the offenders are concerned. Similarly in fixing a sentence many factors are relevant, the nature of offence, the mode of commission of the offence, the utter brutality of the same, depravity of the mind of the man. Sentences contemplated by S. 53 of IPC are death, imprisonment for life, and forfeiture of property or fine. The Law Commission in its 47th report as discussed in several cases says that a proper sentence is a composite of many factors, the nature of offence, the circumstances extenuating or aggravating the offence, the prior criminal record if any of the offender, the age of the offender, the professional, social record of the offender, the background of the offender with reference to education, home life, the mental condition of the offender, the prospective rehabilitation of the offender, the possibility of treatment or training of the offender, the sentence by serving as a deterrent in the community for recurrence of the particular offence.

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125. The Juvenile Justice Act, 2000.
126. (2002) 7 SCC 691.
127. H.S.Gaur, *Penal Law of India* (11th ed.1998) p. 416.
128. *The Code of Criminal Procedure*, 1973 Ch. VIII Ss. 106 to 124.
129. *Supra* note 80.

IV

As the logical outcome of the principle of individualization of punishment and as a necessary corollary of re-education of the offender the system of the Indeterminate Sentence has been adopted in some countries.[130] The early advocates of the indeterminate sentence had the primary object of protection of society and the reformation of the offender. The three main elements of their theory were,[131]

(a) an indeterminate sentence designed to remove the offender from society until reformed;

(b) appropriate education calculated to reform him, and

(c) conditional release to test his reformation before final discharge.

The indeterminate sentence is provided for in the cases of:

(i) habitual delinquents (*i.e.* recidivists,[132] professionals, persistent delinquents not amenable to corrective measures) in almost all the countries that have adopted it;

(ii) abnormal offenders (*i.e.*, those suffering from mental disease, *e.g.*, Broadmoor patients in the U.K.).

(iii) alcoholic or drug addicts (Italy, Switzerland, Norway and Sweden), and

(iv) delinquents whose dangerous results from their idleness (vagabonds, prostitutes *etc.*) and in the U.S. in the case of psychopathic sexual offenders.

Generally the sentence is one of relative indeterminateness with fixed minimum and maximum terms except in the case of category (ii). This principle is accepted in the case of Borstal trainees.

It is suggested by some that indeterminate sentence should be adopted in the case of all offenders. The American Law Institute proposes a procedure under which the court would decide the time of release[133] with

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130. "... To shut up a man in prison longer than is really necessary is not only bad for the man himself, but also it is a useless piece of cruelty, economically wasteful and a source of loss to the community..." Burghess, J.C., in (1897), U.B.R. 330 (334). Some of the Acts which have adopted this are the English Criminal Justice Act, 1948, Swiss Penal Code, 1937, Arts. 14 and 42; Greek Penal Code. Yugoslav Penal Code, (1950), See also U.N. Doct. ST/SOA/SD/2 (1953) *Indeterminate Sentence* p. 15.

131. *Id.* at 12 (U.N. document).

132. Under the Indian Law an enhanced punishment is to be awarded to certain categories of persistent offenders. See Sec. 75 of the I.P.C. and Sections 110, 123 and the restrictions in Sec. 565 of the Criminal Procedure Code. See also Bombay Habitual, Offenders Restraint Act, LI of 1947. Madras Restriction of Habitual Offenders Act VI of 1948.

133. See U.N. document, *supra* note 130 at 29.

powers to extend the term of imprisonment as long as the offender shows no sign of improvement.

The advantages of indeterminate sentence are that it keeps the offender in detention as long as is necessary for social protection, *i.e.,* as long as he continues to be a danger to society, so that it accentuates the inherent severity of the sentence from the standpoint of the offender and also the reduction of the penalty becomes possible only through the offender's own efforts to improve.

Modern liberal criminology, based on the idea of social determinism of deviant behaviour, prefers treatment of offender instead of punishment.[134] Probation of offenders is an important instrument of social change.[135] In *Munna Khan* v. *State of M.P.* the accused caused the death of a person by crushing him under rear wheel while deceased was alighting from the truck and was convicted under S. 304-A. IPC.The court refused the benefit of probation to the accused on the ground that he was carrying the passengers in an open truck illegally which was not meant for carrying the passengers. Thus, it is not a fit case to extend the benefit of the probation. Similarly in *Bharat Pandhrinath More* v. *State of Maharashtra*[136] the high court refused to extend the benefit of probation, however, having regard to the long time passed after crime, the court reduced the sentence of imprisonment and enhanced the amount of fine.

A. S. Krishnan v. *State of Kerala* [137] is an interesting case wherein a doctor manipulated the marks-sheet of his son for admission into medical college which otherwise he would have not got. Regarding these new socio-economic crimes the court observed that this kind of instances uncalled for leniency or undue sympathy and such crimes deserve deterrent punishment in the larger interests of society. In *Ezhil* v. *State of Tamil Nadu,* [138] the court has held that a grave act of depravity, to kill an innocent person only for the purpose of enriching themselves with the fortunes brought by the deceased deserves to be dealt with an iron hand. Further, in *Ram Anup Singh* v. *State of Bihar*[139] the accused killed all members of the family and the Supreme Court though termed it as "certainly inhuman, cruel and dastardly act" but while examining the appropriateness of the death sentence imposed by the trial court the apex court said that there was no evidence to suggest that the appellants are menace to the society considering their past records which did not show their ever having indulged in such behaviour in the past or having resorted to violence and committed any offence whatsoever. There is

134. Section 360 CrPC.
135. *Supra* note 124.
136. 2004 Cri LJ 205 (Bom); *State of Karnataka* v. *B.K. Kotharkar* 2004 Cri LJ 4229 (SC).
137. 2004 Cri LJ 2833 (SC).
138. (2002) 9 SCC189.
139. (2002) 6 SCC 868.

nothing to show that they may repeat such barbarism in future so that they could constitute a continuing threat to the society. The court was of the opinion that it had no reason to believe that the appellants could not be reformed or rehabilitated and that they were likely to continue their criminal acts of violence as would constitute a continuing threat to the society. Their sentence was altered to rigorous imprisonment for life. In *Vajja Srinivasu* v. *State of A.P.* the court has held that the disability that the provisions of the Probation of Offenders Act, 1958 are inapplicable to the offence under NDPS Act cannot preclude the accused from pleading that lesser sentence be awarded in particularly in view of the age factor of the accused who was only 21 years old.

Malimath Committee[140] observed that different kinds of punishments are the need of the hour. Disqualification from holding public office, removal from the community *etc.* are some of the measures that should be introduced and not punishment in a prison. These punishments are not custodial in nature. Far reaching reforms have taken place in England and enactments like the Powers of the Criminal Court Sentencing Act, 2000 modifying earlier laws were enacted introducing a whole range of new and novel punishments, postponement of sentencing, suspended sentence of imprisonment, supervision during suspension, community sentences, community rehabilitation order, financial penalties and reparation orders, parenting orders for children, confiscation order, disqualification orders *etc.*, are many of the changes that have been brought out. Even in India under the Motor Vehicle's Act a disqualification for holding a license can be a part of punishment. Dismissal of a public servant from service for criminal misappropriation and breach of trust is an additional measure of punishment.

Under the Representation of the People's Act there is disqualification in the event of proved electoral mal practices or on account of conviction. In other words instead of conventional punishments enumerated in S. 53 of the Penal Code which was enacted in 1860 nothing has been done to reform the system of punishment. The U.K. Powers of Criminal Courts Sentencing Act of 2000 contains general provisions regarding a community orders and community sentences and a curfew order, community rehabilitation order, a community punishment order, a community punishment rehabilitation order, a drug treatment and testing order, attendance order, a supervision order, an action plan order are all covered by the definition of community order and community sentences and monitoring of orders. These orders have certain limitations. Curfew orders are those by which a person convicted of an offence is required to remain at a place specified or different places on different dates. It is not custodial in nature.

140. *Supra* note 80.

In community rehabilitation order a convicted person may be kept under the supervision of a named authority to secure his rehabilitation or protecting the public from such an individual or to prevent further crime. In respect of sexual offenders or persons who have a mental condition or those who are drug addicts or addicted to alcohol various provisions have been enacted with a view to rehabilitate the individual, take him off the drugs or alcohol and enable him to live as a decent human being. Supervision orders and sentence orders are also treated as forms of punishments in addition to fines. The Power of Criminal Courts Sentencing Act, 2000 provides for a compensation order.

The need for providing indeterminate sentence at least in the case of certain categories of offenders in our country may be examined.

V

The release of an offender should be effected as soon as the subjective conditions of release have been fulfilled. In spite of the recognition of the speedy trial right[141] there is still delay and thus violation of rights of the accused.[142] The purpose of punishment is to reform the offender and return him to society after rehabilitation. To find out whether this has taken place there should be periodic checks of the offender's condition[143] and the extend to which he is still dangerous to society. The progress of his re-adaptation has to be examined by a suitable body. Apart from the usual remission for good conduct, adequate provision for reviewing the sentence may be useful. Of greater significance for the true re-habilitation of the offender is the eradication of the sentence.[144] As a writer observes "The true problem lies outside the buildings and the hutted camps, in the moral prison that engulfs the offender (and often makes him despite himself) when he comes back among us. It is time to start reforming that."[145] The need for giving rehabilitative treatment to the offender as mentioned in two

141. *Hussainara khatoon* v. *State of Bihar*, (1980); *Kadra Pandiya* v. *State of Bihar*, (1981) 3 SCC 671; *P. Ramchandra Rao* v. *State of Karnataka* 2002 Cri LJ 2547; *Raj Deo Sahrma (II)* v. *State of Bihar*, 1994 SCC (Cri) 604.
142. See *Heera Ram* v. *State of Rajasthan*, 1999 Cri LJ 877(Raj); *Jagdishchandra* v. *State of Rajasthan*,1999 Cri LJ 1090 (Raj).
143. "We are, however, strongly impressed by the desirability of bringing every long sentence of imprisonment under review at some period in the course of the sentence by an impartial authority which will have before it information which no sentencing court can possess as to the results of the period of imprisonment undergone by the prisoner and as to the question of his fitness for release ...." Indian Jails Committee Report quoted by Ramaswami, *P.N. Magisterial and Police Guide*, Vol. I, p. 506 (2nd Edn.).
144. See William C. Reckless *Supra* note 102 at 438.
145. C.H. Rolph, *Commonsense about Crime & Punishment* p. 174.

international covenants[146] was recognized by Supreme Court.[147]

Eradication of the sentence should be possible.[148] The general attitude now followed seems to be 'once a convict always a convict and the taint of conviction remains indefinitely. In some countries the following provisions are to be found in the matter of 'unconvicting' the convicted:

(a) Lapse of a certain period automatically erases the conviction;

(b) The offender can apply for such erasure by showing adequate grounds.[149]

The suitability of the above alternatives in the present context have to be examined.

Indian penal system is prison oriented. In the judicial discourse on punishment the courts have not taken into account the criminogenic milieu of prisons, which may have a long term effect on the psyche of the offender.[150] Modern legislation and criminal jurisprudence is directed to the rehabilitation of the offender. There are writers who maintain that reformation should be the main object of punishment or sentencing but this is not the general view of judges.[151] Lord Goddard CJ is reported to have said that:

> The function of criminal law is deterrence, not reform. As law, it was not concerned with the reform of the criminal. That was a

146. International Covenant on Civil and Political Rights, 1966 and International Covenant on Social, Economic and Cultural Rights 1966.

147. *Santa Singh* v. *State of Punjab* (1976) 4 SCC 190.

148. For purposes of elections, the lapse of some years eradicates the taint of conviction. See Representation of the People's Act of 1951 Sec. 139, 143. Similarly in the case of a legal practitioner under Sec. 12(6) of the Indian Bar Councils Act, the punishment by way of being struck off the rolls or being suspended could be reviewed and rescinded subsequently by the High Court. Also under the Companies Act, a convicted person becomes eligible to become a director if five years have elapsed since his conviction. Under the Probation of Offenders Act (1958) Sec. 12 the offender is to be deemed not to have been convicted at all, in respect of disqualification imposed by other laws when he is dealt with under S. 3 or S. 4 of the Act.

149. This procedure obtains under the Criminal Laws of Soviet Russia, Yugoslavia and Switzerland.
See Boris S. Makiforev, "Fundamental Principles of Soviet Criminal Law" (1960), 23 *Mod. Law Review*, p. 31; Richard C. Donnely, "New Yugoslav Criminal Code" (1961), *Yale Law Journal*, p. 510 at 523. Art. 80 of the Swiss Federal Criminal Code (1937).

150. *Ramamurthy* v. *State of Karnataka*, (1997) 2 SCC 642; *Mohd Giasuddin* v. *State of A.P.*, AIR 1977 SC 1926; *D.Bhuvan Mohan Patnaik* v. *State of A.P.*, AIR1974 SC 2092; *Sunil Batra* (II) v. *Delhi Administration*, AIR 1980 SC 1579; *Charles Sobraj* v. *Supdt. Central Jail*, AIR 1978 SC 1514.

151. *Supra* note 10.

> matter for those persons and societies who, to their honour, were trying to do something about it.

Reformative theory is certainly important but too much stress cannot be laid on it so that basic tenets of punishment altogether vanish.[152] The pre-eminence given by the courts to their duty to protect the public necessarily implies that, whenever there is a conflict between deterrence and reform, it is probably reform that will have to give way. Corrective training in England, a sentence which was intended to be reformatory, has been abolished by the Criminal Justice Act 1967. But the courts were unwilling to impose it unless the offence which brought the accused before the court merited the period of detention involved.[153] The courts remain reluctant to extend a sentence of imprisonment beyond what they think to be deserved, so that the offender may be reformed. The Streatfeild Committee said:[154]

> [T]he courts have always had in mind the need to protect society from the persistent offender, to deter potential offenders or to deter or reform the individual offender. But in general it was thought that the 'tariff system' (giving a sentence proportionate to the offender's culpability) took these objectives in its stride. Giving an offender the punishment he deserved was thought to be the best way of deterring him and others and of protecting society.
>
> Over the last few decades, these other objectives have received increased attention. The development has been most obvious in the increased weight which the courts give to the needs of the offender as a person. It is realized that whatever punishment is imposed, he will eventually return to society, and sentences are increasingly passed with the deterrence or reform of the offender as the principal objective; and in assessing the offender's culpability his social and domestic background is more closely examined.

Malimath Committee[155] recommended that it should be decided whether for each of the offences the accused should be inflicted punishment of fine or imprisonment, whether the accused should be arrested or not, whether the arrest should be with or without the order of the court, or whether the offence should be bailable or not and whether the offence should be compoundable or not and if compoundable, whether with or

152. D.P. Wadhwa J in *State of Gujarat* v.*Hon'ble High Court of Gujarat*, AIR 1998 SC 3164.
153. *McCarthy* [1955]2 All ER 927.
154. 4th February,1983. Available at http://www.knowledgenetwork.gov.uk/HO/CircularsOld2.nsf/0/D09.
155. *Supra* note 80.

without the order of the court. As is done in some countries it may be considered to classify the offences into three Codes namely (1) The Social Welfare Offence Code (2) The Correctional Offence Code, (3) The Criminal Offences Code and (4) The Economic and other Offences Code.[156] Reformation of the offender is sought so far as it is compatible with protecting the public.

VI

The problem of providing restitution to the victim within the scope of criminal procedure has been dealt with in several systems.[157] Restitution gives emphasis to the fact that the crime constitutes a relation not only between the criminal and society but also between the criminal and his victim. There is an emergence of the new concept of justice in the West called 'restorative justice' or 'transformative justice'.[158] This provides for pacification of victims or some kind of satisfaction. The Indian Probation of Offenders Act of 1958 accepts the principles in the case of persons who are to be left off with an admonition or put on probation.[159] Section 5, Probation of Offenders Act, 1958, provides,

(1) The court directing the release of an offender under S. 3 or 4 may, if it thinks fit, make at the same time a further order directing him to pay

   (a) such compensation as the court thinks reasonable for loss or injury caused to any person by the crime, and

   (b) The amount ordered to be paid under sub-section (1) may be recovered as a fine in accordance with the provisions of Ss. 386 and 387 of the code. Under S. 14(c) the probation officer has a duty to advise and assist the offenders in the payment of compensation and costs ordered by the court.

The *Partie Civile* intervention in French Criminal Procedure is well known. In some countries the duty of representing the claim of the victim

156. *Id.* para 15.6.11.

157. For an exhaustive treatment of the subject, see Stephen Schafter *Restitution to Victims of Crime.* Library of Criminology (1960); Round Table discussion on "Compensation for victims of criminal violence" *Journal of Public Law* (1959) p.191.
The concept of restitution to the victims is not new in Indian Law. For the several suggestions mooted in this behalf see the *Second Report of the Indian Law Commissioners* (1847) paras 448 and 495 to 500.

158. See *Reconciliation in Post -Aparthied South Africa: Experiences of the Truth Commission,*5 November,1998.

159. See also the English Criminal Justice Act, 1948, Sec. 11, clauses 2 and 3; Howard. C. - *Compensation in French Criminal Procedure,* 21, Mod. L.R. (1958) p. 387; Criminal Code of Canada (1955) Art. 628 to 629 and 638.

for reparation is included among the duties of the Public Prosecutor.[160] In India, the Criminal Procedure Code[161] provides for restitution to a limited extent from out of the fine imposed, at the discretion of the court. But normally the victim has to seek compensation in a civil court by means of a separate action for damages. The advantages of a single tribunal familiar with the whole case, being able to view the sentence and the compensation recoverable by the victim, as a whole from the stand point of the victim, merit consideration.

In Indian criminal jurisprudence victims of crime do not attract much attention. Krishna Iyer, J in *Rattan Singh* v. *State of Punjab*[162] highlighting the apathy of criminal justice system to a victim of crime, observed:

> It is a weakness of our jurisprudence that victims of crime and the distress of the dependents of the victim do not attract the attention of law. In fact, the victim reparation is still the vanishing point of our criminal law. This is the deficiency in the system, which must be rectified by the legislature.

Having regard to the plight of victim, the General Assembly of UN adopted a Declaration of the Basic Principles of Justice for the Victims of Crime and Abuse of Power.[163] The declaration envisages the basic norms to be adhered to for the recognition of victims'right to information; treatment, restitution and compensation. Besides this declaration the Code of Criminal Procedure, 1973 under S. 357[164] provides compensation to the victims of

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160. Sec. C. Howard *id.* at 387. The position in Austria, Sweden, Columbia and Italy are referred to.

161. (i) Sections 545-546 Code of Criminal Procedure. See also Section 517 with regard to the order as to disposal of property.
(ii) See also Art.60, Swiss Penal Code, 1937.
(iii) The French Penal Code grants priority to the damage claim over the State's claim for payment of fine.
(iv) See also, G. Williams (Ed.) *Reform of the Law*, p. 200.

162. (1979)4 SCC 719.

163. Adopted by General Assembly resolution 40/34 of 29 November 1985.Available at http://www.unhchr.ch/html/menu3/b/h_comp49.htm

164. Section 357 of Cr PC Order to pay compensation. - (1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment order the whole or any part of the fine recovered to be applied. -
(a) in defraying the expenses properly incurred in the prosecution;
(b) in the payment of any person of compensation for any loss or injury caused by the offence, when compensation is in the opinion of the Court, recoverable by such person in a Civil Court;
(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act,

crime.The Supreme Coourt recognized this power of trial courts in *Palaniappa Gounder* v. *State of Tamil Nadu*[165] wherein it ruled that there is no scope to invoke inherent powers of the court under S. 482 as court is empowered to grant compensation under S. 357 CrPC. However, in *Bodhisattva Gautam* v. *Subhra Chakraborti*[166] the apex court awarded interim compensation to the victim under S. 482 exercising its inherent power.[167] It is important to note that trial courts hardly resort to exercise these powers and were directed to exercise these provisions by the Supreme Court.[168]

Perhaps of greater significance is the punitive content of restitution. The offender should understand that he injured not only the community and the legal order but also the victim. Compensation cannot undo the wrong, but it will often assuage the injury and it has a real educative value for the offender whether an adult or a child.[169] In murder cases, courts are of the view that the true justice will be rendered only when proper compensation is provided to the dependents of the deceased.[170] *Sarwan Singh* v. *State of Punjab*[171] is an instance wherein the Supreme Court awarded compensation to the extent of Rs. 10,000 payable to the family of the deceased.[172] Compensation to victim is paid under other statutes also namely, the Fatal Accidents Act, 1855, Motor Vehicles Act, 1988[173], Probation of Offenders

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1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen in compensating any *bona fide* purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

165. (1977) 2 SCC 634.
166. (1996) 1 SCC 490.
167. See also *Delhi Domestic Working Womens'forum* v. *Union of India,* (1995) 1 SCC 14.
168. *Hari Kishan* v. *Sukhbir Singh,* (1988) 4 SCC 551.
169. Fry: Arms of the Law, p. 126 quoted in Schafer *Infra* note 177 p. 125. The compensation paid by the accused would better help in bringing the offender to a sense of reformation and sincere repentance. "How can a person be expected to have reformed and to have become penitent, if he makes no thought of compensating the victim or his dependants? Compensation therefore is the essence of true reformation and a necessary condition of retribution". Sethna *Jurisprudence* (1960) at p. 328. This is done in Russia *id.* at 330.
170. K.I.Vibhute, "Justice to Victims of Crime: A Human Rights Approach" in K.I.Vibhute, (ed.) *Criminal Justice* (2004) p. 355.
171. (1978) 4 SCC 111.
172. See also *Palaniappa Gounder* v. *State of Tamil Nadu,* (1977) 2 SCC 634; *Swaran Singh* v. *State of U.P.,*(1998) 4 SCC 75.
173. Sections 140-142 of the Act.

Act, 1958. The Supreme Court has also awarded compensation to victims in cases of sexual assault[174] and human rights violation.[175]

Restitutive penalty has, thus, a reformative side also, besides retribution in the modern sense (which has been mentioned already) and deterrence.[176] Punitive restitution may be one of the penal instruments through which guilt can be felt, understood and alleviated.[177] It ties up with the rehabilitation technique in which an offender is directed to find some way to make amends to those he has hurt by his offence. Ferri made the suggestion that the State should compensate the victims of crime.[178] The proposal to set up a compensation fund from which victims of crime may be paid compensation has also been advocated.[179] Referring to the ancient Hindu System a learned author observes: "It has been the Law even from the days of Gautama that in default of the king or his officers recovering the stolen

174. *Bodhisattwa Gautam* v. *Subhra Chakraborti*, (1996)1 SCC 490; *Kunhimon* v.*State* 1988 Cri LJ 493; *Delhi Domestic Working Women's Forum* v.*Union of India Supra* note 169.

175. *A.K.Singh* v. *Uttrakhand Jan Morcha*, (1999) 4 SCC 476; *Chairman, Railway Board* v. *Chandrima Dass* (2000)1 SCC 465; *Saheli* v. *Commissioner of Police* (1990) 1 SCC 420; *Rudal Shah* v. *State of Bihar* (1983) 4 SCC141.

176. (i) "What is required is an evaluation in terms of the deterrent and reformative potentialities of the requirements of restitution". Sutherland, quoted by Schafer, *Infra* note 177 at 125.
(ii) "In many cases payment to the injured party will have a stronger inner punishment value than the payment of a sum to the neutral state". Henting quoted in *Ibid.*

177. Schafer, *Restitution to Victims of Crime* p. 126. The Swiss Penal Code provides for the grant of discretionary compensation. The suspension of execution of punishment (Art.41) conditional release (Art. 64) and erasure of conviction (Art. 80) are to be granted on condition that the convicted person, to the extent that this could be expected from him, has repaired the damage fixed judicially or by agreement with the injured person.

178. "In principle compensation for damage caused is the duty of the State. The State should prevent wrong doing. When it fails in its duty, as whenever a crime is omitted, it should repair the damage caused by its fault and be subrogated to any rights of the injured party against the offender". Quoted by C. Howard: "Compensation in French Criminal Procedure" 21 *Mod. L.R.* 387.

179. (i) See Schafer - *Restitution to Victims of Crime* p. 129.
(ii) Miss Margaret Fry quoted Bentham in this context. Bentham held that the satisfaction should be drawn from the offender's property but "if the offender is without property..... it ought to be furnished out of public treasury because it is an object of public good and the security of all is interested in it". *Compensation for Victims of Criminal Violence* - A Round Table – (*Journal of Public Law*, Vol.8 p. 191 at p. 192).
(iii) A draft penal law of France (1934) in Art. 104 suggested a special indemnity fund composed of part of the product of the work of the prisoners from which injured parties may be indemnified (see Journal of Public Law, Vol. 8, p.246) The problem of State compensation to victims of crime is under consideration in England (*Id.* at 195).

properties from the thief, he should compensate the owner from his own treasury."[180] In *Ainal Uddin Ahmad* v. *State of Assam*[181] the trial court imposed a sentence of fine along with imprisonment and half of this amount was to be paid to the victim. There is no substantial provision to award compensation to the victims of crime. Section 357 of Cr PC has empowered the court to award compensation to the victims of crime in very limited cases at the time of passing the judgment.[182] However, the Supreme Court in *Sarwan Singh* v. *State of Punjab*[183] and *Harkishan* v. *Sukhbir Singh*[184] ruled that the power to grant compensation is in addition to other sentences and courts should exercise this power liberally. The apex court has invariably been awarding compensation for not only torture and custodial deaths but also for delaying execution.[185] This is public law remedy that is to be brought out. The court has placed reliance on international instruments in weaving out a new basis for compensation.[186] On the other hand there are some draconian laws[187] 'where the usual protection of accused is taken away.

Assessment of compensation in adjudication is ordinarily based on principles followed for common law damages. Awards are meant to reimburse financial losses and expenses in full and reasonably compensate a part of the pain and suffering. It is intended only to alleviate the victim's financial burden and to enable him to maintain his dignity at a critical period.[188] The state must consider a setting up of a compensation fund or should also consider enacting a comprehensive 'Victims Rights Bill'.

Malimath Committee[189] perceived that justice to victims is one of the inseparable imperatives of the criminal justice system in India. Further it is universally accepted that victims rights should not be ignored for the victim, he or she, pays a heavy price. Therefore from out of the fine imposed victim, is also to be compensated. Another aspect to be taken into account is the cost of living. The provisions of Minimum Wages Act are applicable to many wage earners. Therefore, in the organised sector or even in un-organised sector wages have gone up and then even the earning capacity of

180. Varadachariar, *The Hindu Judicial System* p. 88.
181. 2004 Cri LJ 1171.
182. Sub-section (1) of Section 357 CrPC, *supra* note 164.
183. AIR 1978 SC 1525.
184. AIR 1988 SC 2131.
185. K.N.Chandrasekharan Pillai, "Human Rights and the Criminal Justice System" in *supra* note 170 at 97.
186. *Nilabati Behera* v. *State of Orissa*, (1993) 2 SCC 746.
187. Terrorist and Disruptive Activities (Prevention) Act, 1987 and Prevention of Terrorist Activities (now stand repealed).
188. N.R. Madhav Menon, "Victim Compensation Law and Criminal Justice: A Plea for a Victim- Orientation in Criminal Justice" in *supra* note 170 at 362.
189. *Supra* note 80.

individuals has increased. Hence time has come when attention should be focussed on increasing the amount of fine in many cases. There are certain sections where Penal Code authorises the imposition of fine but the amount of fine is not mentioned. In such cases Section 63 of the IPC says where the sum is not indicated then the amount of fine may be unlimited but should not be excessive. When a fine is imposed and is not paid the court can prescribe default sentence of imprisonment. This may act harshly in some cases of genuine incapacity to pay. Therefore, the Committee suggests that community service may be prescribed as an alternative to default sentence. The amount of fine as fixed in 1860 has not at all been revised. We live in an age of galloping inflation. Money value has gone down. Incomes have increased and crime has become low risk and high return adventure particularly in matters relating to economic offences and offences like misappropriation, breach of trust and cheating. Time has come when the amount of fine statutorily fixed under the Penal Code also should be revised by 50 times.

It is desirable that the deterrent and reformative potentialities of restitution be examined.

VII

The change in the outlook in the matter of punishments with the emphasis being shifted from the offence to the offender will naturally lead to recasting of the provisions of substantive law relating to definitions of offences as well as responsibility.[190] The Penal Code today provides for a gradation of punishments according to specific criminal acts and the criminal intent demonstrated by them. The meticulous setting down of supposedly appropriate dosage of punishments[191] based upon degrees of vicious will lose most of its significance. The new approach to punishments would necessitate a re-examination of the splitting up of offences into degrees. This will have the added advantage of the reduction of the size of the Penal Code.[192]

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190. On the question of responsibility, Friedman observes "Clearly the development of modern psychiatry which between the fully normal and the fully abnormal person recognizes an infinite variety of shades of disturbances lessening to a varying degree the emotional powers and capacities of self-control rather than intellectual discernment calls for a corresponding elasticity in the legal approach to and problem of responsibility. But this very development makes it obviously very difficult to devise precise legal formulate by either statutory or judicial legislation." Friedman, *Law in a changing Society* (1959) p. 171.

191. See *supra* note 44.

192. "Over elaboration has been the besetting sin of the entire Code. Section have been multiplied beyond necessity. Different circumstances of the commission of a single offence have been considered for new sections although they are really to be considered in each case by the trying court for apportioning the punishment under

Malimath Committee recommends a statutory committee to lay guidelines on sentencing guidelines under the chairmanship of a former judge of Supreme Court or a former chief justice of a high court experienced in criminal law with other members representing the prosecution, legal profession, police, social scientist and women representative. The changes and the emerging pattern in sentencing and several other facts the aim of all of which is to bring about a psychological change in the accused, to have an impact on the mind so that the same may bring about certain reformation of the individual. It is time that with the advancement of science, medicine and human psychology we try to find out the etiology of the crime in our country and to bring about legislation which introduces a whole range of new and innovative punishments. The challenges and the tasks that we face, the sentencing criteria in vogue till now require to be remedied and rectified as they are inadequate sometimes ineffective and do not take into account the human rights angle and do not provide adequate preventive and deterrent sentences to the new forms of crimes that have exploded consequent on the advancement of science and technology and the use of the same by criminals having ramifications which have cross-border implications. Though some new laws have been passed every endeavour should be made to tackle and punish perpetrators of such crimes adequately.

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the original offences". Abul Hasanat: "*Crime and Criminal Justice*" (Appendix B) p.124. The revision of two codes recently, the Canadian Criminal Code (1955) and the Criminal Code of Louisiana (1942) proceed chiefly on the principle of reduction of the size of the code by eliminating such distinctions. See A.J. McLeod and J.C. Martin, "The Revision of the Criminal Code" 33 *Canadian Bar Review*, p.3 (1955); J. Denton Smith, "How Louisana prepared and Adopted a Criminal Code" 41 *Journal of Criminal Law and Criminology* p. 125.