CHAPTER TWO

FORMS AND USES OF IMPRISONMENT

2.1 INTRODUCTION

Offenders undergoing short-term sentences in any case have to undergo the agony of imprisonment. This chapter is devoted to the examination of various ramifications of imprisonment as a form of punishment.

Imprisonment is the main and most extensively used form of punishment globally. It has existed from time immemorial throughout the world. Initially it was applied as a part of slave labour mainly in ancient Rome, Egypt, China, India, Assyria, and Babylon. It was firmly established in Europe after Renaissance, where it was also applied to the mass of petty offenders, vagrants, alcoholics, beggars, and the debtors\(^1\). However, imprisonment as a form of specific punishment is relatively of recent origin. It started as an interim house of detention of an offender pending his trial and punishment. Soon, it came to be realised that the process of imprisonment, involving detention in isolation from family and community, could itself be considered as convenient mode of punishment to replace old modes of punishment such as banishment and corporal punishment. Many countries readily adopted it as part of their criminal justice system.

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This chapter examines the place which imprisonment occupies in the criminal justice system. The use of imprisonment, its nature, efficacy, merits and weaknesses are explored. A perusal is also made of various forms of sentences of imprisonment which courts administer in Malaysia and India.

2.2 PURPOSES OF IMPRISONMENT

Imprisonment is used to achieve the following purposes:

(a) **Detention during trial**: Imprisonment is employed to keep a person in custody until he is tried, sentenced, or taken to the place to which he would be sent after being sentenced. This is a task which, causes inconvenience and in some cases hardship to some people who are eventually acquitted without being called to put up defence.

(b) **Substituted Punishment**: It is used to force the people into compliance with orders of the court. The common example is its use for non-payment of fines and civil detention of judgement debtors.

(c) **Protection of Society**: The Society is protected from offenders by taking them out of circulation. This purpose is achieved at least during period of detention.

(d) **Treatment of offender**: The person imprisoned is detained for long enough to make it possible for a prolonged course of treatment. This may not be possible in other modes of punishment.

(e) **Individual deterrent**: Imprisonment acts as individual deterrent\(^2\) with the hope that the pains of confinement in the prison will discourage the prisoner from taking the risk of another conviction and sentence. The assumption being that if potential offender will see the sentence likely he will be inclined to avoid breaking the law.

(f) **General deterrence:** Imprisonment acts as general deterrent. It discourages many criminal minded persons to break the law in a similar way. The effectiveness of this method of penal sanction is measured by looking at the reconviction rates. Taking reconviction as a measure, it has been seen that about three-quarters of those who serve a prison sentence for the first time do not return to prison, but it is possible that some of them would not have been re-convicted if they had been subjected to other penal measures.

(g) **Retribution and just desert:** Another goal of imprisonment as a sentence is to inflict retributive punishment. Accordingly, punishment is conceived as an end in itself quite apart from any deterrent or reformative effect. Retribution is supposed to fulfil society's desire for vengeance on behalf of the victim, its "emphatic denunciation" of the conduct prohibited by criminal law, and its reaffirmation of the moral obligation to protect people's life, property and honour. Retribution is also considered as a 'just desert' to the offender for his crime.

(h) **A safe haven:** Sometimes unofficially the imprisonment may act as a safe haven to an offender against retaliation by the victims or their relatives. Nevertheless, it is also true; not all offenders are always safe inside the prison. Their fellow inmates may subject them to attacks.

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2.3 MERITS OF IMPRISONMENT

2.3.1 Individual Deterrance

The object of imprisonment is to teach the convicted person a lesson in order to deter him from repeating his offences.\(^6\) It is hoped that experience will leave an unpleasant memory that will discourage the ex-prisoner from risking another sentence. In other words, it will act as individual deterrent. Most of the persons sent to prisons may feel humiliated, frustrated and depressed and hence may fear a repetition of the offence. However, in cases of offenders who are imprisoned the second or third time, imprisonment does not seem to have any deterrent effect on them. It is only those who are imprisoned on their first conviction who appear to be encouraged to avoid another conviction.\(^7\) The courts also seem obliged to impose another term of imprisonment, sometimes in order to maintain the credibility of prison as a general deterrent, sometimes to protect others, and at other times because it is regarded as the deserts of the offenders.\(^8\)

In *Public Prosecutor v. Wong Chak Heng*, the appellant pleaded guilty in the magistrate's court to two cases of theft. Both cases were heard on the same day and the respondent was fined $200 and $300 respectively for the first and second offence. The Public Prosecutor appealed against the inadequacy of the sentence imposed on the respondent for both offences. The appeal court allowed the appeal and held that in

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\(^7\) A study undertaken in England showed that imprisonment had no effect on those reconvicted second or third time. However it was found that those who suffered for the first time tried to avoid reconviction. See Nigel Walker supra note 5, Table 6B p.88.

\(^8\) Ibid p.145.

\(^9\) [1985] IMLJ 457
ordinary circumstances petty theft would not attract any immediate sentence of imprisonment. However, when one considers the extent to which the stealing of motor car parts and accessories is rife at the present day, then the courts inevitably must view such an offence as a serious crime. The public is entitled to be protected against such offenders and they are not likely to be protected if lenient sentences are passed.

This is because offenders are not likely to be discouraged by sentences, which do not involve loss of liberty. In the present case an immediate prison sentence consistent with the duty to protect the interests of the public and to punish and deter the criminal is necessary in the premises, a sentence of 18 months imprisonment in addition to the $200 fine is proper in respect of the first offence and in respect of the second offence, a concurrent sentence of two years imprisonment in addition to the $300 would be appropriate.

2.3.2 Retribution: 'Just Desert'

One of the universally accepted aims of imprisonment is to impart retributive justice. This is based on the fulfilment of moral justice, and restoring social equilibrium disturbed by the offender. In order to achieve this aim the offender should suffer so much pain and suffering as is inflicted by him on his victim. Justice and fairness also demands that since the offender has gained an unfair advantage over his victim, he deserves and must suffer punishment. The infliction of punishment is also justified on the ground that it is beneficial for society and the most appropriate and fitting return for a moral evil\(^\text{10}\).

The proponents of retributive theory assert that desire for vengeance is felt on two grounds: First, there is need to satisfy the victim's needs for vengeance. The state acting on behalf of the victim, his friends and relatives relieve them from the necessity of vengeance and prevents them from having to resort to private vengeance. Secondly, the aim of punishment is social defence. To attain this aim the public has a need for vengeance. Punishment by the state is socially acceptable outlet for aggressions that would otherwise be repressed and possibly breakout in an unacceptable behaviour.\(^{11}\)

The cases in which retributive justice has played a dominant role are not wanting. In *Reg. v. Sergeant*\(^{12}\), advocating retributive justice, Lawton L.J. stated:

"It is that society through the courts, must show its abhorrence of sentences they pass. The courts do not have to reflect public opinion. On the other hand, courts must not disregard it. Perhaps the main duty of the court is to lead public opinion. Anyone who surveys the criminal scene at the present time must be alive to the appalling problem of violence. Society, we are satisfied, expects the courts to deal with violence."

Similarly in *Reg. v. Davies*\(^ {13}\), justifying the retributive punishment, Lawton L.J. observed:

"...At one time it was fashionable to suggest that retribution ought not to enter into sentencing policy. That opinion, I think is not held as strongly now as it was a few years ago. The reason is manifest, the courts have to make it clear that crime does not pay and the only way they can do is by the length of sentences. Sentences show the

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courts' disapproval, on behalf of the community of particular types of criminal conduct."

The views expressed in the above cases justifying retributive ends have been accepted in the Malaysian case of Public Prosecutor v. Chung Kwong Huah\textsuperscript{14} wherein, the accused pleaded guilty to unlawful possession of a revolver contrary to Section 9 of the Firearms (Increased Penalties) Act 1971 and unlawful possession of six rounds of ammunition contrary to Section 3 and punishable under Section 9 of the Arms Act 1960. He was sentenced for two offences to concurrent terms of ten years imprisonment and six strokes, and three years imprisonment respectively. Justifying a retributive sentence, the learned judge of the High Court observed:

"As for retribution, the time has come for the courts to show their abhorrence of offences involving the possession and use of firearms. Something has to be done to curb unlawful possession and use of such weapons before the situation gets out of hand. The public is entitled to be protected and it is not likely to be so protected if lenient sentences are passed."

As mentioned above the retributive philosophy has emerged in modern times in the shape of 'just deserts.' The principle evolved in this philosophy is that severity of punishment should be commensurate with the seriousness of the wrong. The grave offences merit severe punishment and minor offences deserve lighter punishments. Disproportionate punishments are undeserved. The principle is also known as the 'principle of proportionality or commensurate deserts.' The modern concept of principle of commensurate deserts can be traced in the criminal jurisprudence propounded by Cesare Beccaria in his "Of Crimes and Punishments" written in

\textsuperscript{14} [1981] I.M.L.J. 316.
1764\textsuperscript{15}. In this study he stated that punishment should be carefully graded to correspond with the gravity of offences. This principle was founded on fairness. If the penalties were not commensurate with offences, the criminals would indulge in grave offences. This concept got a legislative incarnation in the French Code of 1791\textsuperscript{16}, and the Bavarian Code of 1813\textsuperscript{17}.

The main thrust of the desert theory is on the quantum of punishment, where proportionality is the touchstone\textsuperscript{18}. In imposing penalty, this theory looks retrospectively to the seriousness of the offender's past crime or crimes. Seriousness depends on the harm done by the act and the degree of the actors' culpability. If the offender has a prior criminal record at the time of conviction, his prior crimes and gravity of the present crime is taken into consideration in awarding sentence. This theory requires that offenders should not be regarded more or less blameworthy than is warranted by the character of the offence. Punishment imparts blame. That being the case, it should be inflicted only to the degree that it is deserved\textsuperscript{19}.

The theory of 'just desert' appears to have a place in the local cases. In \textit{Loh Hock Seng & Anor. v. PP}\textsuperscript{20}, the first appellant was sentenced for life and seven strokes of whipping. The second appellant was also sentenced to life and 14 strokes of whipping. They both appealed against sentences and the Public Prosecutor crossed appealed against the inadequacy of sentence.

\textsuperscript{17} Strafgesetzbunch fur das koenigriech Bairen (1813), cited in Radzinowicz Id. p.23.
\textsuperscript{19} Hymen Gross and Andrew von Hirsch, Supra note 15 at p.244.
On appeal it was held that in the circumstances of this case imposition of term of imprisonment for life is wholly inadequate as it does not reflect the gravity of the offence, and circumstances of this case against the appellant, his record of previous conviction, and the public interest involved in respect the crime of this nature and a sufficient factor of determining of others ilk. The sentence of death should therefore be substituted for the sentence of imprisonment for life and whipping.

In *Siah Ooi Choe v. PP*\(^1\), the appellant was charged for having abetted an offence under S.406(a) of the Companies Act by inducing a bank through deceitful means to give credit to his company. In determining sentence three other charges of inducing three other banks on three separate occasions to grant credit to his company were taken into consideration. The appellant had an unblemished record before the commission of the present offence.

The court allowed the appeal and held that the extenuating circumstances in the present case were highly exceptional, and were in favour of the appellant. In the circumstances of this case and in the background of the appellants character and his contribution to the society and country the principle of the 'clang of prison gates' was applied. The principle is that in the case of a man with unblemished record the fact that he has a criminal conviction and finds himself in prison is a very grave punishment and a short term prison term would in certain circumstances suffice. A term of three months imprisonment was adequate in all the circumstances. The sentence of nine months imprisonment was set aside and a sentence of three months substituted.

2.3.2 Incapacitation

Another justification for imprisonment is the incapacitation of the offenders from committing further offences. They are restrained physically from infringing the law again as long as they remain incarcerated and thereby the society is protected against their criminality.

Being faced with the rising rates of crime in the United States, President Gerald Ford came out in support of incapacitation and said: "the core of the problem consisted of relatively few persistent criminals... a very small percentage of the whole population. The solution to the problem was to get them off the street."\(^{22}\) The remarks of President Ford appear to support the exponents of imprisonment. They believe that the crime rate will go down if persons who habitually commit crimes are taken out of circulation and are kept in prison for reasonably long periods because they will not be free to commit more crimes.

Bentham also dealt at considerable length with the subject of incapacitation in his works. According to him, one of the objects of penal justice is incapacitation "prevention of similar offences on the part of the same individual by depriving him of the power to do the like."\(^{23}\) Furthermore it is believed that if such convicted persons who are great criminal risks, are taken out of circulation for as long as good conscience and sound policy allow, the level of criminal danger in the community will be lessened\(^{24}\).


Incapacitation however suffers from some drawbacks. The effect of this incapacitation is limited: with rare exceptions, offenders are eventually released in the community. While the offender may not be able to commit crime in the community, the possibility of crime in prison is a real and continuing problem. Additionally a prison term may well enhance the skills an offender needs to commit crimes in the society\textsuperscript{25}. This is particularly true in the cases of first offenders. Moreover, some of those who commit crimes in extenuating circumstances are least likely to repeat the crime. To punish such persons so that they may not commit crime is useless.

2.3.4 General Deterrence

One of the more significant uses of imprisonment is general deterrence. The purpose of general deterrence is to protect the public from the commissions of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment.

Jeremy Bentham was the chief exponent of this object of imprisonment. He started with the proposition that all punishment is pain and should therefore be avoided. However, punishment is justified if the benefits (in terms of general deterrence) would outweigh the pain inflicted on the offender punished, and if the same benefits could not be achieved by non-punitive methods. Sentences should therefore be aimed and calculated to be sufficient to deter others from committing this kind of offence, no more, no less\textsuperscript{26}.


\textsuperscript{26} See generally, his \textit{Principles of Morals and Legislation} (1789).
The rationale behind sentencing is that those citizens are rational beings, who will adjust their behaviour according to the disincentives of penal law.

Nevertheless, deterrence like incapacitation is subject to criticism on several grounds. The main criticism is that the factual data on which the deterrent system must be based does not exist. We lack reliable findings about the relative deterrent effects of various types and penalties for various crimes. For example, various attempts to assess the deterrent efficacy of the death penalty failed to yield clear and reliable results\(^{27}\). However in one of the studies conducted in Malaysia on the efficacy of various types of punishment, it was found that most of the members of the judiciary (Magistrates, Session Courts judges and High Court judges) indicated imprisonment as most appropriate form of punishment, for all offences or offenders triable by the respective courts. Many of them were of the view that imprisonment was an effective general deterrence\(^{28}\).

The courts have always considered the deterrent aspect of imprisonment while imposing sentence. In *Ragunath v. Faria*\(^ {29}\), the petitioner, was convicted of theft of a coconut tree under section 379 of the Indian Penal Code and sentenced to R.I. for 10 days. On appeal to the session court, his sentence was reduced to three days R. Imprisonment with a fine of Rs.50. The petitioner felt aggrieved and moved to the High Court in revision under section 435 and 439 of Cr.P.C. The learned judge of the High Court allowed the petition and held that the object of punishment is prevention

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of crime and every punishment is intended to have a double effect, namely, to prevent
the person who has committed a crime from repeating the act and also to prevent
others from committing similar crimes. What will serve the ends of justice is a
deterrent sentence unless, having regard to the nature of the offence and the
circumstances in which it is committed, such a sentence is regarded as unsuitable.

In the Indian decision of Dulla v. State\textsuperscript{30}, it was held that a deterrent sentence
is wholly justifiable when the offence is the result of deliberation and pre-planning, is
committed for the sake of personal gain at the expense of the innocent, is a menace to
the safety, healthy or moral well being of the community, or is difficult to detect or
trace. Unlike those acts which are universally acknowledged to be of criminal nature,
an act that is not essentially criminal in character, deserves leniency, except in the
case of persistent offenders.

Similarly, in the Malaysian case of P.P. v. Jafa bin Daud\textsuperscript{31}, the respondent
was charged for being in possession of heroin, an offence under S.12(2) of the
Dangerous Drugs Act 1952. He pleaded guilty to the charge and was accordingly
convicted and sentenced to eight months imprisonment to take effect from the date of
his arrest. The public prosecutor appealed against the inadequacy of sentence and
argued that the magistrate had failed to appreciate the seriousness of the offence and
also failed to consider that the respondent had five previous convictions, two of which
were connected with drugs.

\textsuperscript{31} (1981) 1 M.L.J. 315
The appeal court allowed the appeal and held that the learned magistrate had misdirected herself on the facts and the law, and the sentence of eight months imprisonment was manifestly wrong and inadequate as a deterrent for the accused as well as for would be offenders. The learned judge enhanced the sentence from eight months imprisonment to eighteen months imprisonment, to take effect from the date of arrest.

2.3.5 Rehabilitation

Rehabilitation is also regarded as one of the important objects of imprisonment. It proclaims that the principal aim of sending the offenders to prison is to achieve their rehabilitation by subjecting them to correctional treatment. To achieve this aim, sometimes emphasis is placed upon the modification of attitudes and behavioural problems. Sometimes the education and skill is provided with the avowed object that these might enable the prisoner to find occupations other than crime. Hence, the concern of the sentencer is the need of the offender, and not the seriousness of the offence committed\(^\text{32}\) alone.

Various criticisms have been levelled against imprisonment when used as rehabilitative technique. One of such criticism is directed on the efficacy of the treatment programmes launched in such institutions. It is said that treatment programmes have not been successful in preventing recidivism compared to those subjects to non-custodial measures. There had been many studies on the effectiveness of such institutional programmes particularly with regard to re-conviction rates in

\(^{32}\text{Andrew Ashworth, Sentencing & Criminal Justice, (1995), London, Butterworths, p.66.}\)
subsequent years. The conclusion of such studies was that the treatment programmes did not work well\textsuperscript{33}.

The other objection is directed towards the rehabilitative policies. These policies increase the powers of prison officials and recognise no right of the inmates of the institution. The release of the prisoners is placed in the hands of such officials usually without firm criteria, clear accountability or reasoned decision making. Even if the crime is minor, an offender may be subjected to the control of the institution for a considerable time if he is diagnosed requiring prolonged treatment. In effect, the offender is considered more as manipulable object than as a person with rights\textsuperscript{34}.

Despite these objections, it can be said that the rehabilitative approaches adopted in prisons and the like institutions have not been properly tested, and a full commitment to its treatment and re-socialisation programme would result in a more human and viable sentencing system.

2.4 WEAKNESSES

Imprisonment though intended to achieve the prisoners' rejuvenation is said to have unwanted side effects. It is said to provide a form of crude retribution and brutalising cannot be shown to rehabilitate or deter offenders and is detrimental to the re-entry of offenders into society\textsuperscript{35}. Some of the factors that have contributed to the failure of imprisonment to achieve the desired objects are given below. They effect not only the long term offenders but also short-term offenders in more than one ways.

\textsuperscript{33} Ibid.
\textsuperscript{34} Id 67
The short-term offenders undergo all the deprivations in shortest possible time. They are dehumanised more quickly than others.

2.4.1 Damage to Physical Health

Undoubtedly, prison systems effect the health of the inmates of the institution due to malnutrition, insanitary conditions, cold, heat, excessive hard work or inhuman disciplinary measures.

Malnutrition is universally labelled charge against the prison. It is said the food supplied to the prisoners is not very exciting, sometimes not even well cooked, and is not sufficiently nutritious to keep physical health. The lack of proper food gives rise to certain ailments, which go with the prisoners even after their release from prison. The Prison Medical Services of Malaysia and India have not made any effort to determine the effect of imprisonment on the physical health of the prisoners. In the United States, one such effort was made by David Jones in 1976. He compared the medical records of men on probation, on parole and in prison. He found that the per capita rate of recorded acute disorders of most kinds were higher amongst the prisoner than amongst his parolees and probationers and higher than that of the U.S male population for the comparable age groups36.

2.4.2 Mental Health

Imprisonment is believed to impair mental health. To what extent is this true of the Malaysian and Indian prison system? It is said that imprisonment causes some mental disorders in mentally healthy prisoners due to isolation from the family members. The emotional pressures generated in prison life are strong and have little

outlet. The routine is monotonous. There is total deprivation of heterosexual contact, which is enough in itself to produce serious emotional complications\textsuperscript{37}.

There is no denying the fact that prison life causes mental ailments. Nevertheless, no such study has been made in our countries. One such study undertaken in England estimated that of adult males and females, 2.4, 5.8 and 15.4 percent suffer from neurosis, 8.8 and 16.1 per cent from personality disorders and 1.0 and 2.6 percent from organic disorders.

2.4.3 Deprivation of Liberty

Of all the painful conditions imposed on the inmates of prisons, none is more obvious than deprivation of freedom. The prisoner is confined within the four walls of the institution; his freedom of movement is restricted. He remains in a cell until permitted to move out of it. In short, the prisoners' loss of liberty is double firstly, by confinement to the institution and second, by confinement within the institution\textsuperscript{38}.

What makes this pain of imprisonment worse is the fact that the confinement of the offender represents a deliberate moral rejection of the criminal by the free community where he has lived. It is the moral condemnation of the offender as a consequence of committing an offence\textsuperscript{39}.

It is claimed that many offenders are so much alienated from conforming to the rules of society and so identified with criminal subculture that the moral

condemnation, rejection or disapproval of legitimate society does not effect them; they remain indifferent to the penal sanctions of the free community, at least as far as the moral stigma of being defined as a criminal is concerned.\textsuperscript{40}

The life inside the prison contaminates the prisoner to such an extent that it is not only a constant threat to the offender's self conception but also works as a daily reminder that he should keep apart from the decent men of the society. This attitude of the society of rejection or degradation must be warded off, turned aside, rendered harmless, if the prisoner is to be readjusted in the free community.\textsuperscript{41}

\textit{2.4.4 Prisons as Schools for Crime}

The traditional criticism against prisons is that the prisons are schools for crime. The former President of the United States, Nixon, called the prisons as universities of crime. It is believed that prisons breed criminality. The detention in the company of recidivists makes offenders less abiding in their attitudes. The prisoners' constant contact with the experienced people of the underworld provide them an opportunity to acquire from each other ideas and techniques which lead them into subsequent crimes.

One important question that may be asked in this context is whether an offender who had his orientation as a law abiding citizen when he comes to prison is

\textsuperscript{40} Id p.448.
\textsuperscript{41} Ibid.
likely to lose it when he leaves the prison. Many studies have been carried out by
the sociologists of the ways in which the offenders have become adapted to the
subculture of prison. The 'subculture of prison' to some extent comes in the prison
from the outside world. Whether the prisoner has assimilated such subculture in his
life depends on his own subculture background from where he comes. It also depends
on the administration that allows the prisoner to be dominated by powerful and senior
inmates, on the frequency of contacts which prisoners are able to maintain with the
people of the outside world of their own choice, and it also depends on the period
which they spend in any particular institution.

One other question that arises in this regard is whether a person who has
served many custodial sentences is more likely to be re-convicted. It has been noticed
that there is some relationship between long or frequent periods of detention, which
increases a man's chances of re-conviction. This may be due to the fact that they
become more crime prone during their period of confinement in prison.

2.4.5 Overcrowding

Another factor related to imprisonment, which seems to be associated with
recidivism (re-conviction), is overcrowding. It has been found that those who had
spent most of their period of confinement in overcrowded prisons had re-conviction
rates higher than those who were confined in less crowded prisons.

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42 In one such study Wheeler's report showed that in the early stage of their sentence one prisoner's
value's were not different from those of their guards but later were found close to the other prison
inmates. See Nigel Walker, op. cit. p.166.
43 Ibid.
44 Ibid.
45 This was noticed in a study which was made by Farrington and Nuttal of the prisoners released in
1965 after serving medium or long sentences in 19 English prisons. For details see Nigel Walker op.cit.
This is due to many factors. The prisoner is forced to stay with many other prisoners whose attitudes and values of life may be quite different from his own. Some of such prison inmates will be the men used to violence. Slight disagreements with such prisoners may cause personal danger to him. If he has developed personal dislike against such prisoners— for example due to the violent attitude or the nature of the offender he may be harassed and attacked. The regime does not make proper segregation of the prisoners at least during the daytime. This results in numerous forms of exploitation by the powerful prisoners.

Overcrowding in prison also discourages sentencers to be more selective in their use of prison sentences, and to reduce those, which they would be, obliged to impose in a particular case. It has also given rise to employing of other methods to reduce pressure on prisons such as probation and suspended sentences. The question, how best these innovations can be used as an alternative to imprisonment is a debatable one.

There are penologists who argue that we should not react to prison overcrowding by increasing the capacity in prisons because it will encourage the sentencers to increase the use of imprisonment. This was confirmed in a study made in 1980 in America by Abt. Associates. This study showed that an increase in the penitentiary capacity of the United States was followed two years later, by a corresponding increase in number of prisoners.\textsuperscript{46}

\textsuperscript{46}Nigel Walker op. cit., p.181.
To overcome the crowding in Malaysian prisons, the Prison department has taken positive steps to accommodate evenly prison inmates in some of the 21 prisons and 14 rehabilitation/correctional institutions. Some new prisons have been built. Steps are being taken to convert existing prisons only for remand prisoners (prisoners awaiting trial). This action has to a certain extent helped to redress the problem of overcrowding in Malaysian prisons. This has also made it possible to provide better amenities, facilities and improved prison conditions. In view of present facilities available it is hoped that the courts in Malaysia will not be discouraged from imposing prison sentences in deserving cases. The situation in India is not good. Almost all states in India suffer from the problem of overcrowding in penal institutions. This will be examined in another chapter of this work.

2.5 TYPES OF IMPRISONMENT

The Malaysian and Indian penal statutes divide imprisonment into imprisonment for life, fixed period which may be simple or rigorous and imprisonment in default of payment of fine.

2.5.1 Imprisonment for Life

Imprisonment for life means a sentence of imprisonment for the whole of the remaining period of convicted person's natural life. The penal statutes governing this category of imprisonment as to the period the prisoners are required to spend in prison are not uniform. Some fix it as twenty years while others regard it as the remaining

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period of convicted person's natural life. Section 57 of the Malaysian Penal Code provides that imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years.

While commenting on S. 57 of the Penal Code, Sir Hari Singh Gaur, the celebrated author of the Indian Penal Code observes:

"Not only for the purpose of calculating fractions of terms but also for the purpose of sentence itself, transportation for life (now imprisonment for life) has now come to mean transportation (imprisonment) for 20 years, the transported convict being on the expiration of that term free to remain in his abode of exile or return home at his pleasure."

However, John D. Mayne, another author of Indian Criminal law, disagrees with this view. He is of the view that this section must be strictly limited to calculations of fractions. The sentencing court must regard a sentence of transportation (imprisonment) for life as running throughout the remaining period of convicts' life.

Dr. Gour's interpretation of S. 57 gave the impression that life imprisonment meant imprisonment for twenty years. This impression was cleared by the Judicial

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48 The Indian Penal Code in Section 57 makes similar provision; S.3 of the Criminal Justice Act (U.K.) (1953) also fixes 20 years for life imprisonment.
49 It is disheartening to note that about 44 prisoners for life who have spent between 26 and 36 years (exceeding their term of life imprisonment) are behind bars languishing in Malaysian jails. Many of them would have been released after fourteen years on good behaviour. The majority of such prisoners when convicted were juveniles, and the Juvenile Court had no power to sentence them to death or life imprisonment. Hence, the courts ordered to detain them at the pleasure of the Ruler. For detail report see New Straits Times September 15th and 16th, 1997.
51 J.D. Mayne, Criminal Law of India (4th Ed.) p.22.
Committee of the Privy Council in *Kishori Lal v. Emperor*\(^52\), where the question to be determined was whether a person lawfully sentenced to transportation (imprisonment) for life and confined in a prison appointed for such person was entitled to be discharged after serving out 14 years imprisonment. Their Lordships of the Privy Council held that he was not entitled to be discharged after 14 years even assuming that sentence was to be regarded as one of 20 years and subject to the remissions for good conduct, but added that their Lordships are not to be taken as meaning that life sentence must and in all cases to be treated as one of not more than 20 years or that the convict is necessarily entitled to remission.

The term imprisonment for life has been given different meanings in some Malaysian statutes, such as The Firearms (Increased Penalties) Act 1971, The Arms Act 1960 and S. 130 of the Penal Code. In these statutes imprisonment for life means imprisonment for the remaining period of the convicted persons' natural life.

In *Che Ani bin Itam v. P.P.*\(^53\), the appellant was convicted in the Sessions Court of an offence under S.4 of the Firearms (Increased Penalty) Act 1971 and sentenced to imprisonment for life and six strokes of whipping. He appealed to the High Court and on the application of the appellant the learned judge stayed the proceedings and certified the following constitutional question for the determination of the Federal Court.

"Whether or not the sentence of life imprisonment for the duration of natural life as provided under S.4 of the Act read with S.2 definition of life imprisonment as

\(^{52}\) A.I.R. (1945) PC 64-71, I.A.1

amended is unconstitutional and violates Art. 5(1) and Art. 8(1) of the Federal Constitution."

Raja Azlan Shah LP said: "...Notwithstanding the provisions of S.3 of the Criminal Justice Ordinance 1953 which provide that a sentence of imprisonment for life shall be deemed for all purposes to be a sentence of imprisonment for 20 years and the amendments made to the Penal Code to substitute provisions for imprisonment for life with imprisonment for a term which may extend to 20 years, there are specific statutory exceptions however categorically providing for imprisonment for life to mean imprisonment for the duration of natural life in certain specified offences such as for example S.130 A of the Penal Code in relation to offences against the State under Chapter VI of the Penal Code and the Arms Act 1960. The sentence prescribed in the Firearms (Increased Penalties) Act is constitutional and valid."

In Neon Man Lee v. PP\textsuperscript{54}, the appellant was convicted of culpable homicide not amounting to murder and was sentenced to life imprisonment, an offence under S.304 of the Penal Code. He was suffering from schizophrenia and had relapses. During the second relapse, he stabbed a woman to death. During the period of his remand he had further two relapses. The trial judge had, in assessing sentence, taken into consideration the history of the accused mental illness and that he had several relapses, and was of the view that a long term imprisonment would protect the public against the accused and the accused would get proper medical care and attention. The accused appealed against his sentence to the Court of Criminal Appeal.

\textsuperscript{54} [1991] 2 MLJ 369.
The Court of Criminal Appeal dismissed the appeal and held that a sentence of imprisonment is justified where the offence is itself grave enough to require a very long sentence; or where it appears from the nature of the offence or from the defendant's history that he is a person of unstable character likely to commit such offences in the future. The conditions for sentence to imprisonment for life were clearly satisfied in the present case and justified a life sentence. The appellant was clearly a continuing danger not only to himself but also to the public. He should have been detained as long as it was permissible under the law.

It is submitted in this case their Lordships of the Court of Criminal Appeal failed to take into account the mental state of the accused at the time of commission of the offence. In view of the circumstances, it would have been in the best interest of the individual and the society to make an order for the committal to the lunatic asylum instead of awarding imprisonment.

In India, the expression "imprisonment for life" has been held to denote imprisonment for the full or complete span of life, or whole of the remaining period of the convicted person's natural life\(^\text{55}\).

In *State v. Ratan Singh*\(^\text{56}\), while defining the expression "imprisonment for life," the Indian Supreme Court stated:

"That a sentence of imprisonment for life does not automatically expire at the end of 20 years including the remission, because the administrative rules framed

\(^{55}\) In Singapore, it has been ruled by the Chief Justice of the Republic that a convict sentenced to life imprisonment will spend the rest of his life in prison instead of the 20 years that has been the norm for more than four decade—see New Straits Times, August 22\(^{\text{nd}},\) 1997.

under the various manuals or under the Prisons Act cannot supersede the statutory provisions of the Indian Penal Code. A sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or part of the sentence under Section 401 of the Code of Criminal Procedure.\textsuperscript{57}

An analysis of the Malaysian and Indian cases show that they are in line with the English Common Law where the life sentence is wholly indeterminate in the sense that, when the person on whom it is imposed is received into prison, he cannot be given the exact date of release. While a person sentenced to fixed-term imprisonment can be told, on reception, the precise date of his release, if he conducts himself properly, he will be released from prison\textsuperscript{58}.

However, his release after serving a certain period (for example 14 years) is subject to the consideration of the Prison Review Board\textsuperscript{59}, or the respective state governments\textsuperscript{60}.

However, in India a special provision exists to cover the cases of persons convicted of capital offences who are required to undergo a mandatory period of imprisonment for at least 14 years. Section 433 A of the (Indian) Criminal Procedure Code\textsuperscript{61} provides that where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments

\textsuperscript{57} The case was decided under Code of Criminal Procedure 1898. Now replaced by Act II of 1973. The corresponding provision is 5.432.
\textsuperscript{59} In Malaysia the Pardon Board decides the time of release.
\textsuperscript{60} In India it is decided by the respective state governments.
\textsuperscript{61} This section was added in 1978 by Amendment Act of Cr.P.C.
provided by the law or where a sentence of death imposed on a person has been
commuted under Section 433 into one of imprisonment for life, such person shall not
be released from prison unless he had served at least 14 years imprisonment\textsuperscript{62}.

This provision acts as a restraint on the executive power of the state not to
remit the sentence of any convicted person in order to make some political gains. In
Malaysia, no such provision exists.

2.5.2. Imprisonment for a Fixed Term

Imprisonment is of two descriptions: simple and rigorous\textsuperscript{63}. In the case of
rigorous imprisonment the prisoners were put to 'hard labour' such as breaking of
metal, grinding of corn, digging earth, drawing water from the well, cutting firewood
in the past. Now this unproductive labour is replaced by correctional measures like
vocational training and working in agriculture (open jails) colonies or doing work in
jail industries. Hard labour now means correctional work in the prisons. In the case of
simple imprisonment the offender is confined in jail custody, and such a prisoner is at
liberty not to do work. However, for breaking the monotonous prison life he is offered
light work.

The penal provisions specifically prescribe whether the sentence will be
rigorous or simple for the specified offence. In most of the cases, the offender is liable
to either rigorous or simple imprisonment at the discretion of the court. On the other

\textsuperscript{62} It is to be noted here that unlike Malaysian Penal provisions, the Indian Penal Code in case of capital
offences prescribe life imprisonment as an alternative to death sentence. For example, under Section
302 of the Malaysian Penal Code, the sentence for murder is death, while under Section 302 of the
Indian Penal Code, a person convicted for murder shall be punished with death or imprisonment for
life.

\textsuperscript{63} In India, imprisonment is divided into simple and rigorous while in Malaysia no such division is
made.
hand, there are a number of offences where the sentence prescribed is only simple imprisonment\textsuperscript{64}. Most of the sentences prescribed in this category are for short term. These short-term sentences are a burden on prison, where no productive work is taken from these short-term prisoners. The presence of these short-term prisoners sentenced to simple imprisonment without any obligation to work, clogs the correctional work in the prisons. They effect the work culture inside the jail. Without contributing anything to prison industry they are parasites on the limited resources of prison funds. Short-term stay does not bring anything good to them rather, they get the status of ex-prisoner when they come out of the prison.

\textit{2.5.2.1 Date of commencement of sentence:}

The general rule as stated in the Malaysian Criminal Procedure Code (hereafter to be referred as C.P.C) and the Indian Criminal Procedure Code (hereafter to be referred as Cr.P.C)\textsuperscript{65}, is that a sentence of imprisonment ought to commence from the time the same is passed unless the court passing such sentence otherwise directs. In the light of this provision, the courts in Malaysia and India make orders for

\textsuperscript{64} The following offences are punishable with simple imprisonment only under the Indian Penal Code:

(i) Public servant unlawfully engaging in trade; or unlawfully buying or bidding property. (ss 168, 169).
(ii) A person absconding to avoid service of summons or other proceedings from a public servant or preventing service of summons or other proceedings from a public servant or preventing service of summons or proceedings (ss 172, 173, 174).
(iii) Intentional omission to produce a document to a public servant legally bound to produce such document (ss 175, 176, 187).
(iv) Refusing to take oath when duly required to take oath by a public servant (ss 178, 179, 180).
(v) Disobedience to an order duly promulgated by a public servant if such disobedience causes obstruction, annoyance or injury (s 188).
(vi) Escape from confinement negligently suffered by a public servant of escape on the part of public servant in cases not otherwise provided for (ss 223, 225A).
(vii) Interruption to judicial proceedings (s 228).
(viii) Continuance of nuisance after injunction to discontinue (s 291).
(ix) Wrongful restraint (s 341).
(x) Defamation and knowingly printing or selling defamatory matter (ss 500, 501 and 502).
(xi) Indecent behaviour (s 509).
(xii) Misconduct by a drunken person (s 510).

\textsuperscript{65} S.482 (d) of the C.P.C and S.427 of the Cr.P.C.
imprisonment either to commence from the date the offender is arrested or from the date the offender is convicted. The courts make order of imprisonment from the date of arrest where it is found that offender has been in remand for quite long before trial and has suffered pain\textsuperscript{66}. The order of imprisonment from the date of conviction is usually made where the date of conviction and sentence differs. This may happen in the case of youthful offenders, who are below the age of 21 years. Those youthful offenders, who are directed by the courts to be detained at the Henry Gurney School, require probation report before such order is made\textsuperscript{67}. Sometimes it takes two to three weeks for the preparation of such report. If after the submission of the probation report, the court decides not to send the youthful offender to Henry Gurney School, but to send him to prison, the court may pass an order to commence the sentence from the date of conviction.

These statutory provisions of Criminal Procedure Code have given rise to many questions. The first question that may be asked is what will happen in a situation where an offender is convicted and sentenced to imprisonment for more than one offence at the same trial? Will all sentences of imprisonment be concurrent or consecutive? What is the position of imprisonment in default of payment of fine? Will the imprisonment in default of payment of fine run concurrently or consecutively to the other period of imprisonment?

\textbf{2.5.2.2 Concurrent and Consecutive Sentences}

The accused may be subject to more than one sentence of imprisonment in two situations. Firstly when he is an escaped convict. Secondly when he is already

\textsuperscript{67} See Section 40 of the Juvenile Courts Act, 1947.
undergoing a sentence of imprisonment. In these circumstances if the court decides to impose sentence of imprisonment again for another offence, the subsequent imprisonment shall commence either immediately or at the expiration of the term of imprisonment the offender is already undergoing as the court awarding the sentence may direct\(^68\) the sentences so passed by the court may be made concurrent or consecutive. The word concurrent means "existing or occurring at the same time."

Whereas consecutive means following continuously, or successive. In deciding whether to order concurrent or consecutive sentences, the court considers appropriate. Since the court have the choice to order concurrent or consecutive prison sentences, the courts make such order on the principles evolved from English Common Law. These principles are known as single transaction principle or totality principle.

2.5.2.3 Single Transaction Principle

According to single transaction principle "where two or more offences are separately charged and they form part of a single transaction, the court should generally impose concurrent sentences\(^69\)." The offences are said to be part of the same transaction when a series of offences of the same type are committed against the same victim. The rationale of this rule appears to be that consecutive sentences are inappropriate when all the offences taken together constitute a single invasion of the same legally protected interest\(^70\), and therefore excessive punishments are unreasonable.

\(^{68}\) S. 292 (1) of the C.P.C and S.246(2) of the Cr.P.C.
\(^{70}\) D.A.Thomas Ibid.
The Single transaction principle is reflected in S.165 of the C.P.C, S.220 of the Cr.P.C\textsuperscript{71} and S. 71 of the Penal Code (Malaysian and Indian).

Section 71 of the Penal Code deals with the limits of punishment of offence made up of several offences. This section provides that where anything which is an offence is made-up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment for more than one of such of his offences, unless it be so expressly provided. Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.

The above mentioned section regulates the limits of punishment by distinguishing 'separate offences' from 'distinct offences'\textsuperscript{72}. This section does not contain a rule of adjective law or procedure, but a rule of substantive law regulating the measure of punishment and it cannot therefore affect the question of conviction, which relates to the province of procedure\textsuperscript{73}.

\textsuperscript{71} S. 31 of the Cr.P.C. also lays down the that when a person is convicted at one trial of two or more offences, the court may subject to the provisions of S. 71, sentence him for such offences, to several punishments prescribed therefore which such court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, unless the court directs that such punishments shall run concurrently, and in the case of consecutive sentences, it shall not be necessary for the court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher court. Provided that (a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years; and (b) the aggregate punishment shall not exceed twice the amount of punishment which the court is competent to inflict for a single offence.


\textsuperscript{73} R.C.Nigam, Law of Crimes in India, (1964) p.250.
Section 165 of the C.P.C and Section 220 of the Cr.P.C deal with joint trial of separate charges and reads thus:

"If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence."

The C.P.C permits trial for multiple offences committed by the accused separately or during the course of the same transaction or where the different acts each constituting minor offences when combined constitute a major or aggravated form of those minor offences. But when it comes to punishing the offender for these multiple offences section 71 of the Penal code regulates the punishment by restricting it to the maximum term provided for the major offence.

Section 71 is based on the rule that where the intention of the accused to commit an offence, and the commission of such offence involves the perpetration of various acts themselves punishable, the offender should not be punished for them separately, as his object was to commit one offence only. These provisions of the C.P.C and the Penal Code legitimise the authority of the courts to impose concurrent sentences applying the single transaction principle. The offences triable under these provisions will be those offences where the one transaction principle in sentencing may be invoked.

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74 Ibid.
The court applied the single transaction principle in *Datuk Haji Harun bin Haji Idris & Ors v. Public Prosecutor*\(^76\). In this case, the three appellants were jointly charged with the offences of forgery and criminal breach of trust. All the appellants were tried at the same trial and the two offences were tried together as they formed part of the same transaction within the meaning of S.170 of the C.P.C. The third appellant, Ismail Din was awarded one year’s imprisonment on the charge of forgery and a fine of RM15,000 or six months imprisonment on the charge of criminal breach of trust. The Federal Court substituted the sentence with one day’s imprisonment and a fine of RM10,000 in default of six months imprisonment for the first charge and a fine of RM16,000 in default of six months imprisonment for the second charge. The two six months imprisonment were ordered to run concurrently because the two offences were found by the court to be akin and intimately connected with each other. If the fines were not paid, the sentences of imprisonment were ordered to run concurrently. As for the second appellant, Mansor, the three years imprisonment awarded on both the charges were ordered to run concurrently. With regard to the first appellant Datuk Harun, who was the principal actor in this case sentence of 4 years imprisonment for the offence of forgery was ordered to run concurrently with three years imprisonment awarded for the offence of criminal breach of trust.

Similarly, the court applied the one transaction rule in *Lim Yean Yeong v. PP*\(^77\). In this case, the appellant was tried on three charges, three were for the offence of criminal breach of trust (C.B.T) all committed within twelve months and the remaining charges were subsidiary to the main charge of CBT. He was found guilty of the charges and was sentenced to six months imprisonment on each of the main

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\(^76\) [1978] 1 M.L.J 240.
\(^77\) [1940] M.L.J 272.
charges and one subsidiary charge of forgery. He was acquitted on the remaining six charges. The sentence of imprisonment was ordered to run consecutively. On appeal, the sentences of imprisonment for the third charge of CBT and the charge of forgery were directed to run concurrently as both the offences were committed in the same transaction.

The courts have a choice to decide whether to order prison sentences to run concurrently or consecutively; whichever is the choice of the court; it must be made clear. In *Mohammad Akmar bin Mansor v. PP* 78, the appellant had been convicted and sentenced to imprisonment in the first case. In the second case he pleaded guilty to the charge of committing lurking house trespass by night an offence punishable under Section 456 of the Penal Code. The appellant had also pleaded guilty to another charge under S.456 of the Penal Code (the third case). In respect of the second case, the magistrate sentenced the appellant to three years imprisonment, which was to run after he had served his imprisonment sentence for the first case. In respect of the third case, the appellant was sentenced to three years imprisonment, which was to run concurrently with the sentence for the case. The appellant appealed to the High Court against the sentences imposed in the second and third case. There was however no appeal in respect to the first case. The appellant urged the court to impose concurrent imprisonment sentences for all three cases. The prosecution argued that imprisonment sentences for the second and third cases should not run concurrently as the appellant had a string of previous convictions.

It was held that the circumstances of each case, particularly the nature of the offences and the need to serve the public interest, should be borne in mind when deciding whether to order concurrent or consecutive sentences. In this case the courts referred to the common law and agreed that where several offences are committed in the same transaction and tried together, the sentences imposed for those offences should be made concurrent. Where however two or more distinct offences had been committed, the sentences of imprisonment should not be made to run concurrently. In cases where distinct offences had been committed, sentences of imprisonment should only be made concurrent when an offender has been convicted of a principal and a subsidiary offence.

The same transaction principle is applied by using four tests namely proximity of time, unity or proximity of place, continuity of action and continuity of purpose or design. In respect of the second and third cases, there was proximity of time, unity or proximity of place, continuity of action and continuity of purpose or design. The second and third cases were therefore not distinct offences but were cases which formed the same transaction. Therefore the imprisonment sentence for the second was ordered to run concurrently with imprisonment sentence for the third case.

In the recent case of *Shafaruddin Bin Selengka v. PP*\(^{79}\), the Court of Appeal considered at great length the following two questions:

(i) When to order concurrent or consecutive sentences; and

(ii) In cases where the accused is undergoing imprisonment, when should his imprisonment begin?

This case involved three appeals against the decision of the lower courts.

In the first appeal, the appellant (Shafaruddin Bin Selengka) was sentenced to seven years imprisonment and three stokes of the rotan on each of two charges of committing robbery while armed with a deadly weapon, the offences under SS.392 and 397 read with S.35 of the Penal Code. The sentences were ordered to run concurrently. The appellant appealed against the sentence imposed by the sessions court judge of seven years for each of the first and second charges. The prosecution in appeal asked the court for the sentences to run consecutively.

In the second appeal, the appellant (Rahim Bin Baidi) was convicted of gang robbery under S.395 of the Penal Code and sentenced to 10 years imprisonment plus five strokes of the rotan. At the time of his conviction he was undergoing a previous sentence of seven years and six strokes of the rotan. The sessions court ordered that the ten year imprisonment to run concurrently with the term he was serving at the time of conviction. The appellant urged the court that he needed 'Kasih sayang dan Bantuan'.

In the third appeal, the appellant (Azhar Bin mohd. Nor) was convicted under S.377B of the Penal Code on a charge of committing carnal intercourse against the order of nature and under S.354 for assault with intent to outrage modesty. On the first charge he was sentenced to 15 years imprisonment and for the second offence five years imprisonment. The sentences imposed in the two cases were ordered to run concurrently. These concurrent sentences were ordered to start after the accused had completed his sentence in an earlier case of 12 years imprisonment for an offence of buggery with an animal under S.377 of the Penal Code. The appellant urged the court
to backdate his sentence to the date of his arrest. He further submitted that the sentence of the previous case will end on 25 March 2001 and so if this present sentence were then to begin, he will have to serve in prison until 25 March 2011. In all he would have to serve 29 years and six months which was very long.

Dismissing the appeals the court, held that if the prosecution considers a sentence insufficient and wants it increased or enhanced, the legal course would be to appeal. It was not proper for the prosecution to ask for consecutive sentence at the hearing of the appellant's appeal. In the first appeal, having considered the fact that what actually occurred was one robbery against two persons, the court confirmed and maintained the sentences on concurrent basis.

With regard to the second appeal, the learned judge ordered the prison term to start from the time his present term ends, as he believed the order to start prison term immediately would negate the provisions of S.292(ii) of the C.P.C.\(^8\) In the third appeal it was held that the court was concerned with the third appellant's claim that he has a son to take care of, and it was also concerned for the psychological effect his crime has had on the 15 year old girl he had molested. Therefore, under S.292(i) of the C.P.C, the sentence should begin at the expiration of his previous sentence. The other factors taken into consideration were the type of crimes committed and the hope that imprisonment term would enable some medical treatment to be given to him to curb his lust and help him reform.

\(^8\) S.292(i) of the C.P.C. that nothing in the last preceding section shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction.
Under Section 427 of the Indian Code of Criminal Procedure 1973, the ordinary rule is that when a person is undergoing a sentence of imprisonment and is subsequently sentenced to another term of imprisonment, such imprisonment shall commence at the expiration of the sentence of imprisonment which was imposed upon him in the previous case. It is for the court dealing with the subsequent case, if it feels called upon to do so to pass an order that sentence should run concurrently with the previous sentence. If no such order is passed, the law takes its course.

Besides this provision, Section 397 of the Cr.P.C. also gives wide powers to the Sessions court or the High Court in its revisional powers to consider the propriety of sentence.

In *Jadu v. State of Orissa*\(^1\), an application under S.482 of the Cr.P.C\(^2\) was made for the release of the petitioner, who was undergoing sentences on account of conviction in different trials. In all the cases, while sentences were imposed, no orders were passed directing those sentences to run concurrently. In this case the petitioner prayed that since he has already spent nine years in jail he should be released treating the sentences as concurrent instead of consecutive. This was resisted by the additional standing council that since no directive had been made at the time of passing judgements for the sentences to run concurrently such order should not be made.

It was held that the provisions under S.427 are specific. It is undoubtedly the intention of the legislature that ordinarily the sentences imposed on a convict in different cases are to run consecutively unless direction is issued to the contrary. It is

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\(^1\) (1992) Cr.L.J. 2117.

\(^2\) The provision recognises the 'inherent powers' of the High Court to pass any appropriate order in the interest of justice.
also correct to state that a criminal court after passing the judgement having become functus officio can no more pass an order directing the sentence to run concurrently unless the same has been passed at the time of judgement. However, the power of the High Court is not in any way fettered by S.247 of the Cr.P.C. to give a suitable direction in the event the court feels that in the interest of justice, the sentences should run concurrently. In the instant case the accused has been convicted in series of dacoity cases, and from the nature of the cases it could be said that he had a propensity to commit dacoity. For such a reason, ordinarily the inherent power should not be exercised for his benefit. It was however shown that all the occurrences in respect of which the accused was convicted took place in a period of one year and two months, about eight years ago. Since a long time has elapsed in between, it may reasonably be expected that the accused, if once released would not indulge in similar offences and would rather choose a more acceptable means of livelihood. The purpose of conviction and sentence is never retaliatory but is reformative in nature. Moreover, there has been no report against the conduct of the accused during his incarceration. It would be reasonable to assume that if the accused is given a chance to return to the main stream of life, he would make an effort to adapt himself to the society in a meaningful and new possible manner. The sentences imposed on the petitioner were treated by the learned judge as concurrent to the extent of the sentences as already undergone by him and he was ordered to be released.

2.5.2.4 The Totality Principle

The totality principle applies in those cases in which an offender is subject to more than one sentence for the offences, which do not form part of the same transaction. The principle requires from the trial courts to pass sentence for all such offences according to the merits of the case. In doing this, the sentence of each of the
offences are added up to make a total and reviewed whether in totality they are appropriate. If the court finds so, it will order consecutive sentences, if it does not find so, it will order the sentence to run concurrently\(^{83}\).

Where in totality the sentences appear to be excessive and it appears necessary to make some adjustment in the sentence, it is advisable to make the adjustment by ordering sentences to run concurrently rather than reducing the length of sentences and allow them to remain consecutive\(^{84}\).

The application of the principle stated above can be seen in *Hyder v. R*\(^{85}\). In this case the District Judge had convicted the appellant on two charges and sentenced him to six months rigorous imprisonment on each charge. On record, the sentences were consecutive, but in his grounds of judgment, the learned district judge stated that he ordered the two sentences to run concurrently. On appeal, it was held that sentences should not be ordered to run consecutively unless there were good reasons for doing so.

In *Wong Yuk Ai v. PP*\(^{86}\), the appellant had previously been convicted and sentenced. Subsequently he was charged with an offence under S.182 of the Penal Code and was sentenced to six months imprisonment. The learned magistrate ordered the sentence to run concurrently with the sentence the appellant was serving.

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\(^{83}\) Thomas op. cit. p.56.
\(^{84}\) Id. at 57.
\(^{86}\) (1966) 2 M.L.J. 51.
On appeal, it was held that whether sentences imposed should run concurrently or consecutively is a matter for the discretion of the court, but such discretion must be exercised judicially. It is not unusual for a court to direct sentences for two or more offences to run concurrently when the sentences are passed at one and the same trial.

In this case, the appellant was undergoing imprisonment and the subsequent sentence should commence only on the date of conviction or on the expiry of his imprisonment. It is not possible for the court to direct the subsequent sentence to run concurrently with the same sentence which, the appellant was already serving in view of S.420 of the C.P.C.

Like the Malaysian courts, the Indian courts have also applied the English common law totality principle when imposing concurrent or consecutive terms of imprisonment. In Sooraj v. State, the accused was convicted of the offences punishable under S.302 and 201 of the Indian Penal Code. The sentences imposed by the additional sessions judge were challenged by the accused in appeal. In the revision, the accused prayed for an order to direct the above sentences to run concurrently with the sentences awarded to him under S.380 and 457 of the I.P.C. by the Judicial Magistrate. It was held on appeal that the power conferred on the courts under S.427 (1) to order concurrent summing of sentences is a discretionary power guided by judicial framework. The court has to consider the totality of sentences,

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87 S.420 of the C.P.C provides that when a person who is an escaped convict or is undergoing a sentence of imprisonment is sentenced to imprisonment, such imprisonment shall commence either immediately or at the expiration of the imprisonment to which he has been previously sentenced, as the court awarding the sentence may direct.
which the accused has to undergo if the sentences are to be consecutive or concurrent. The totality principle has been accepted by the courts as a correct principle for guidance in this matter. The maximum sentence awarded in one case against the same accused is a relevant consideration. Thus where the accused was awarded two years imprisonment in earlier case and life imprisonment in subsequent case, the principle of totality being applicable, the accused would be entitled to the relief of having both sentences run concurrently.

An analysis of the Malaysian and Indian statutory provisions show that the consecutive sentences are the rule and the current sentences are the exception. So normally the courts will order consecutive sentences but if the circumstances of the case permit, the courts have been conferred a discretion to order concurrent sentences.\(^90\)

The discretion to order concurrent sentence must depend on some sound principle and is not meant to be exercised in an arbitrary manner.\(^90\) Before exercising such discretion, the court should look into the facts of the case, the nature and character of the offences committed, the prior criminal record of the offender, his age, profession, sex, etc.\(^91\) It would be proper exercise of discretion in those cases in which, the court makes an order of sentence on a subsequent conviction to run concurrently with the previous sentence where separate trials are held for offences which constitute distinct offences, which are intimately connected with each other.\(^92\)

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90 Ibid.
91 Ibid.
The discretionary power conferred by S.427 of the C.P.C can be exercised either by the prosecution or the accused by bringing to the notice of the court imposing a subsequent conviction that the accused is already serving sentence of imprisonment. If this fact has not been brought to the notice of the court before it passes the sentence in the subsequent case the court becomes functus officio. Discretion cannot be exercised after the sentence has been imposed\(^{92A}\). If the accused applies to the court to pass an order directing that the present imprisonment be made concurrent with earlier sentence, such direction would amount to alteration of judgement which is not permitted by S.362 of the Cr.P.C\(^{93}\).

The question as to whether the court can issue directions of the type stated in S.247 of the Cr.P.C. (Corresponding to S.397(i) of the Cr.P.C 1898) after the final order of judgment was the subject for decision by the Allahabad High Court in *Mulaim Singh v. State*\(^{94}\). The High Court held that the stage for the exercising the discretion is when the court records the conviction and inflicts punishments on the accused. The discretion under S.397(i) of the Cr.P.C. can also be exercised at the stage when the court records the subsequent conviction.

On the question whether the High Court can direct a subsequent term of imprisonment to run concurrently with an earlier term under its inherent powers, the court held that it would be competent for the High Court in exercise of its inherent power to direct that the sentence under a subsequent conviction, to imprisonment may run concurrently with the previous sentence even if the stage for exercise of discretion

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\(^{93}\) S.362 of the Cr.P.C. prohibits the court to alter its final order or judgement except to correct a clerical or arithmetical error.

under S.397(i) of the Code is over in circumstances, where it would serve any of the three purposes mentioned in the section i.e. to give effect to any order under the Code or to prevent the abuse of the process of the court or otherwise to secure the ends of justice.

2.6 IMPRISONMENT IN DEFAULT OF FINE

The criminal laws of Malaysia and India confer general powers on the courts to award the sentence of imprisonment in default of payment of fine. Such sentence of imprisonment shall be in addition to any other imprisonment to which the offender may be liable to be imposed\(^5\). The term for which the court may order the offender to be imprisoned in default of payment is stated in the C.P.C and Indian Penal Code\(^6\). Thus if the offence is punishable with imprisonment and where the maximum term of imprisonment does not exceed six months, the period shall not exceed the maximum term of imprisonment. Where the maximum term exceeds six months but does not exceed two years, the period shall not exceed six months, whereas if the maximum term exceeds two years then the period shall not be more than one quarter of the maximum term of imprisonment.

If the offence is not punishable with imprisonment and it is punishable with fine only, the term the court shall direct, in default of payment of fine shall be in accordance with the following scale. - For a term not exceeding two months, the fine is twenty-five ringgits in Malaysia, and fifty rupees in India; while, for a term not exceeding four months, the maximum amount of fine shall be fifty ringgits in

\(^5\) S.283 (i)(b)(4) of the C.P.C and S.64 of the Indian Penal Code

\(^6\) S.283 (i)(c) of the C.P.C and Ss.65 and 67 of the Indian Penal Code
Malaysia and one hundred rupees in India; whereas, if the term does not exceed six months, the minimum amount imposed is fifty ringgits\(^7\).

The order of imprisonment in lieu of fine stated above shall not under on C.P.C be made where time is allowed for the payment of such fine or unless it appears to the court that such person has no property or insufficient property to satisfy the fine payable or that the levy of distress will be more injurious to him or his family than imprisonment\(^8\). No corresponding provision exists under Indian law.

The sentence of imprisonment in default of payment of fine is in excess of any other imprisonment to which the offender may be sentenced. However, it is not clear whether the sentence of imprisonment should run concurrently or consecutively with the main prison sentence, if it is imposed. Section 102 provise (c) of the Subordinate Court Act guides us in this regard. According to this provise, when sentence or imprisonment is imposed in default of payment of fine or compensation or costs are ordered in any authority of law for the time being in force, the imprisonment shall be consecutive to any term or terms of imprisonment so and to other sentence of imprisonment that may be imposed by the court. Section 283(i)(b)(4) of the C.P.C and S.64 of the Indian Penal Code empower the court to order that imprisonment shall be in excess of any other imprisonment, which term of imprisonment shall be in excess of any other imprisonment that may be imposed. In this regard when an offender is directed to undergo a sentence of imprisonment in default of payment of fine, the rule of consecutive enforcement of sentence shall apply. Section 31 of the Cr.P.C also provides that when a person is convicted at one trial of two or more offences and is

\(^7\) S.282 of the C.P.C and S.67 of the Indian Penal Code
\(^8\) S.283 (i)(b) (4) of the C.P.C
sentenced to a term of imprisonment of each of the offences, the normal rule is that
the sentences should run consecutively. However, the court has the power, while
passing sentence to direct that sentences should run concurrently. But, this does not
apply to a sentence of imprisonment in default of the payment of fine and such
sentence cannot be ordered to run concurrently with a substantive sentence of
imprisonment. In the light of a statutory provisions the courts are of the view that
even though it is not mentioned whether the sentences were to be concurrent or
consecutive, the sentences are consecutive. It is submitted that it is a clear from the
bare reading of the provisions of the C.P.C and Indian Penal Code, dealing with
imprisonment and punishment of fine that these types of punishments are two distinct
punishments. Where the court imposes a sentence of imprisonment in default of fine,
such a prison term will be consecutive to the other prison term which the accused has
been ordered to undergo.

A relevant Malaysian case relating to imprisonment in default of fine is Public
Prosecutor v. Pontian Bas Berhad. In this case the respondent was charged in the
Magistrate's court for an offence under 16(i)(c) of the Employees Provident Fund Act
1951 for the failing as an employer to remit contributions in respect of four of its
employees. The manager of the company who was present in the court, pleaded guilty
to the charge and a fine totalling $4,320 was imposed. This fine was paid. The
magistrate also made an order under S.16A (4) of the Act for the respondent company
to pay the arrears of contributions to the E.P.F. Board amounting to $28,325. The
respondent company failed to pay the arrears. A grace period of two months was

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99 (1967) Cr. L.J.1180
100 See Behari & Ors v. State, (1953) Cr.L.J. p.1222
M.L.J.116
allowed, but the respondent company failed to pay such arrears. Thereupon, the magistrate acting under 16A(4) of the Act committed the manager to ten months imprisonment for default of payment of arrears. He imposed this sentence by invoking S.283 (i)(b) (4) of the C.P.C.

The respondent appealed against this decision of the magistrate to the High Court which allowed the appeal and set aside the order of the committal by the learned Magistrate.

The Public Prosecutor then applied for the following question of law to be referred to the Supreme Court: Whether the learned judge was right in law holding that S.283(i)(b)(4) of the C.P.C can have no application in the enforcement of an order made by the court for payment of arrears contribution pursuant to S.16A(4) of the Employees Provident Fund Act 1951.

The Supreme court referred to S.16A(4) of the Act and held that this section states in clear terms that the arrears of contribution "shall be recoverable in the same manner as a fine." For the purposes of recovery, arrears of contribution are to be treated in the same manner as any fine imposed as punishment for a particular offence.

Imprisonment in default of payment of fine does not release the offender from his liability to pay the fine imposed on him. Such imprisonment is not to be
considered as a discharge of the fine but is to be regarded as a punishment for non-payment or contempt to the due execution of the process of the court\textsuperscript{102}.

The imprisonment in default will cease to exist when either the fine is paid or levied by the process of law; and if a portion of the fine be paid during imprisonment, a proportional abatement of the imprisonment will take place\textsuperscript{103}. The fine or any part thereof which remains unpaid, may be levied at any time, within six years after the passing of sentence, and if, the offender is under sentence, since he is liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period. In both these cases the death of the offender does not discharge from the liability any property which would after his death be legally liable for his debts\textsuperscript{104}.

The limitation of six years may only save the property of the accused and not his personal arrest. The liability for any sentence of imprisonment imposed in default of fine continues after the expiry of six years\textsuperscript{105}.

\begin{footnotesize}
\begin{enumerate}
\item[104] S.283 (i)(5)(g) of the C.P.C and S.70 of the I.P.C
\item[105] Harnam Singh v. State, A.I.R 1975 SC 236
\end{enumerate}
\end{footnotesize}
2.6 CONCLUSION

In all modes of punishments imprisonment occupies an important place as it is the only punishment which is used against a large number of criminal population of the country.

As it has been observed from the decided cases that the sentence of imprisonment is and will continue to be an important part of the system of punishment for most of the offences in Malaysia and India. Justice require that the seriousness of some offences be matched by a severe punishment. For some serious offences, it is the only just punishment. To remove imprisonment as a sanction would leave the criminal justice system without a punishment of the degree of severity appropriate to some crimes. However, to achieve desired goals of criminal justice such as deterrence, retribution and rehabilitation, it should be properly used and selectively applied.

The sentence of imprisonment takes effect from the time it is passed by the court. However, the courts have been given discretion to impose sentence of imprisonment either to commence from the date of arrest or date of conviction. The courts are also confronted with the issue of sentencing when an accused is charged with more than one offence and the courts decide to impose sentence of imprisonment for all such offences likely to have been given a choice either to order concurrent or consecutive sentence makes a lot of difference on the future prospects or reformation and rehabilitation of the offender. The courts should keep in view the nature of the
offences and the need to serve the public interest when making an order of concurrent or consecutive prison sentences.

Imprisonment in default of fine is awarded when fine is not paid. It is submitted that the courts should be slow in sending the defaulters to prisons. The persons who are genuinely unable to pay the fine should not be sent to prison; sufficient time should be allowed for the payment of the fines, say by instalment.

Short-term sentences do not serve useful purpose in the society. Short stay in prison with consequent stigma and unhealthy association with hard core prisoners reinforce his criminal tendencies and impede the possibility of his successful integration after his release in the community. It is, therefore submitted that short term sentences should be replaced with some non-custodial measures such as probation, suspended sentences, community services programmes and the like.