1. Introduction

1.1. Goa the Beautiful:

Goa is famous and internationally known for its natural and scenic beauty. Till today persons from different countries flock to Goa to bask under the glorious sun on the snow white beaches of Goa. It is not many years back that, at its height, the hippies had made Goa their capital. Wherever you had to put a step, you would find a host of hippies, so happy, so joyful and merging into the culture of Goa; the Goan people have been known for their high culture and great hospitality. They have welcomed the people from other parts of India as well as from abroad with open arms.

The above described situation has not come into existence over night. It has taken centuries to create this mixed culture of East and West like a finely blended tea powder. But then, with freedom comes license and with license comes crimes. The freedom which the people have enjoyed in Goa especially after liberation in 1961 has also made Goa encounter a number of crimes like murder, grievous hurt, rape, dacoity, robbery, etc. This trend has disturbed the peace of Goa and many people have started questioning whether Goa deserves freedom at all. They even go to the extent of stating that the Portuguese era was much better because life was safe, no thefts and robbery and major crimes were at the minimum.
This scholar has thought about this matter a great deal and discussed the same with experts. The real question is whether there should be controls over liberty or liberty should be enjoyed to the fullest extent. The experts were of one opinion and they were all of one voice that no research has been done on this important issue and that I should take up this as an academic challenge to prove or disprove that the freedom is better or dictatorship and control is better in terms of controlling crimes.

When I say that Goa is blessed with the fine mixed culture, what I mean to state legally is that, Goa is the meeting point of different theories of jurisprudence. The colonial period when Portuguese ruled over Goa from 1510 to 1961 can be said to be the reign of the influence of the Roman law system and the implementation of the European Legal system in Goa.

After its independence and the takeover by India, the Indian legal system which is largely based on the common law jurisprudence coupled with statutory laws and interpretations of the courts, came to be applicable to the then Union territory of Goa and now Goa state. As a result one can see, conflicting situations between the Portuguese system and the Indian Laws.

In view of the land tenure laws which are unique in the Portuguese system and unknown to the Indian system, it has not been possible to reconcile the two legal systems. Hence to understand this, one would have to look into the different theories of jurisprudence which have created their impact on the
European as well as the common wealth countries. Hence we will now proceed to look into the high points of these theories.¹

1.2. What is Jurisprudence?

Most of the writers and experts in countries influenced by the common law have explained that jurisprudence in its widest sense is the science of Law. This definition is peculiar to England, British Dominions and the United States. Sir John Austin defines jurisprudence a little differently in his famous treatise, “Province of Jurisprudence Determined” (1832), as an aggregate of laws and of laws as rules.

Though, many theories have accepted jurisprudence as a science of law or a philosophy of laws, it was Dean Roscoe Pound who went a little further than what the other experts said and gave a purposeful definition as jurisprudence defining the content and purpose of the law rather than the abstract content of the authoritative precepts. To understand this evolution from law as a philosophy to law as a sociological engineering, which we believe democratic India has adopted, let us now go through the different theories of jurisprudence.

1.2.1. *Theories of jurisprudence:*²

The most important school that gave birth to legislative law making process was the Analytical School of Jurisprudence.

*a. Analytical School of Jurisprudence:*

This concept involved three elements³:

1. A precept element, a body of legal precepts more or less defined—the element to which Bentham referred when he said that ‘Law’ was an aggregate of ‘Laws’.

2. A technique element, a body of traditional ideas as to how legal precepts should be interpreted and applied and causes decided and a traditional technique of findings the grounds of decision of particular cases in the authoritative legal precepts and of developing and applying legal precepts—a technique by which the body of precepts is eked out, and the several precepts are extended, restricted and adapted to the exigencies of the administration of justice.

3. An ideal element, a body of philosophical, political and ethical ideas as to the end of law and as to what legal precepts should be in view, thereof, with reference to which legal precepts and the traditional ideas

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² Lloyd’s; *Introduction to Jurisprudence*, Chapter I, Pg 22
³ Dias, *supra* note 1 at 375 to 384.
of application and decision and the traditional technique are continually reshaped and given new content or new application.

We can say that Sir John Austin and Jeremy Bentham were the two most important writers who created the groundwork for legislation to make laws come in a big way. The analytical jurists have looked to law as a body of authoritative material on judicial decisions and administrative interpretations. For them, law is something made consciously by law makers, i.e. either Judicial or Legislative. Also law is something which is obligatory not optional and the typical law is the statute. Lastly they propound the utilitarian principle which means law is essentially for the good of all and specially the good of the society.

**b. The Historical School:**

The Historical School proposed the comparative study of the origin and development of law, of different legal systems, legal doctrines and the legal institutions so as to derive some basic uniform principles for applying for the benefit of mankind. They depended more on human experience and this was slowly developed into legal precepts through the instrumentation of judicial and juristic interpretation. The main principle of justice was crystallized into human reason and this was the foundation for legal precepts.

The historical jurists confirmed themselves more to the study of the past rather than of present or future. It is reported that the historical method has created
some problems in a civil law countries, i.e. European countries regarding the interpretation of codes. This aspect has been well discussed by Dean Roscoe Pound and his analysis of the same is reproduced here below; as given in Vol II

“In the interpretation of the codes, the analytical school asks, what do the several code provisions mean as they stand, applying the canons of genuine interpretations.

They assume that the whole code and all its provisions speak from one date, and endeavor to find by analysis the proper code pigeonhole for each concrete case, to put the case in hand into it by a pure logical process, and to formulate the result in a judgment. The historical school on the other hand, assumed that the code provisions are in the main declaratory of the law as it previously existed; they regarded the code as a continuation and development of pre-existing law. With them, all exposition of the code and of any provisions thereof must begin by an elaborate inquiry into the pre-existing law and the history and development of the competing juristic theories among which the framers of the code had to choose.

One might compare the same two modes of approach in teaching the common law from cases. The difference in the practical application of a code involved in that different approach is illustrated with us in the case of the Negotiable Instrument Law. In that case, the historical mode of approach in some
jurisdictions for a time to some extent defeated or threatened to defeat the object of the Act\textsuperscript{4}.

The apparent conflict between the Civil Codes and the Historical School must have brought Portugal too under its ambit. However, in India we have not seen the historical development of Hindu Law and the enacted law in recent times. The Courts in India have so interpreted the law so as to harmonize the historical development with the legislative initiative in modern times.

\textit{c. The Sociological School:}

The greatest difference we can notice in the application of law and the evolution of jurisprudence between Portugal and India is the application of the Sociological School of thought in India. Right from the time it became independent, Free-India looked upon law as an instrument of socio-economic change.

The Constitution of India with the Chapter on Directive Principles of State Policy has clearly spoken its mind on what India must do for its people. Hence, the evolution of sociological school of jurisprudence in some countries of Europe and in USA has had a salutary effect on the evolution of jurisprudence in India. The characteristics of Sociological School of Jurisprudence can be summarized as follows:\textsuperscript{5}

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\textsuperscript{4} Roscoe Pound, \textit{Jurisprudence}, Vol. I, Part I, Pgs 81 to 86.  \\
\textsuperscript{5} Lloyd, \textit{supra} note 2 at 350 to 358.
\end{flushright}
1. Sociological jurists regard the working of the law (i.e. of the legal order, of the body of the authoritative guides to decision and of the judicial and administrative process) rather than the abstract content of the authoritative precepts. Here law is used in the sense of legal order, or to insist particularly on that sense where analytical jurist use ‘law’ in the sense of the precepts element in the body of authoritative guides to decisions and historical jurists use it in the sense of all social control.

2. Sociological jurists regard law as a social institution involving both finding by experience and conscious law making.

3. Sociological school lays stress upon the social purpose which the law has to fulfill rather than upon sanctions.

4. The sociological jurists use legal institutions and doctrines as instruments of social change.

5. Today’s sociological jurisprudence is philosophically radical empiricism. They employ a pragmatist’s method which is consistent with different metaphysical starting points.

1.3. Distinction between ‘Rule’ and ‘Law’

Dias explains the details of the fascinating development between the history of Roman Law as developed over the centuries. According to him as the Law

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6 This aspect has been discussed beautifully by Dias in Jurisprudence, Chapter III, Pg 47
developed in Rome, *Lex* (Law) meant declared Law (derived from Lego, I declare) as opposed to *Jus* which was a Customary Law crystallized out of this decision. In the course of time *Leges* became expression of popular will through enactment by the assemblies and their functions was prescriptive like modern legislation and ceased being declaratory of *Jus*. He further states the term *regula* (rule) came in via the Grammarians for whom it connoted ‘guide’ or ‘standard’.

One of the most distinguished jurists of the early Principate, Labeo, a Grammarian turned lawyer, pioneered the use of *regula* for certain legal axioms which had prescriptive function. The association of *regula* with *Lex* evolved some time during the second century AD via imperial decrees, which had taken over the role of *Lex*. During this period Rule books, *Regulae*, named after the jurists who had been commissioned to prepare them, were issued under imperial authority to subordinate officials as manuals for their guidance. These *Regulae* thus had the force of *Lex*.

The *Regulae*, which had been worked out privately by certain of the great jurists during the second and third centuries AD, the classical period of Roman law, were later officially invested with the force of *Lex* by the Law of Citation in 426 AD. Finally, Justinian’s Digest, which codified much of the writings of the Classical Jurists, was itself promulgated as a *Lex* by the emperor. It is significant that the finale of this monumental work, its concluding Title, Book 50.17, consists entirely of a collection of *Regulae*. The association of ‘rule’ and
‘standard’ was thus gradually completed and has formed the basis of legal thinking ever since.

From the above discussion of different schools of jurisprudence we can see that democratic India and today’s Goa stand totally distinct from the dictatorial Portuguese regime which ruled over Goa before it became free. Hence any study on the functioning of the criminal law system in Goa must take into account the different schools of thought that prevailed when the Goa was a colony and thereafter when it gained freedom from the colonial rule.

1.4. Purpose of the study:

As we all know that Goa was under the Portuguese rule from the 25th November 1510 till 18th December 1961. By the 12th Amendment of the Constitution of India, Goa became part of Indian Union with effect from 20th December 1961. During the Portuguese rule administration of Criminal law was based on the Portuguese system which was inherited from the continental jurisprudence. This was based upon the inquisitorial system prevailing in Europe.

After liberation the criminal law applicable to the rest of India was made applicable to Goa. This was based upon the adversarial system followed under the Common Law. Here the accused is presumed to be innocent and the burden is on the prosecution to prove beyond reasonable doubt that he is guilty. The
judge acts like an umpire to see whether the prosecution has been able to prove the case beyond reasonable doubt and gives the benefit of doubt to the accused.

The study of application of Criminal Law in Goa during the colonial era and post liberation period is important for the following reasons:

1. Portuguese Criminal Law based on continental system was applied to Goa in pre liberation days and hence a study of this period will give an insight into the dynamics of criminal administration under that system.

2. Indian Criminal Law based on Common Law system was applied to Goa in post liberation period. The detailed study of this period takes us into an era of application of criminal law in a system based on democratic foundation.

3. The period 1962-1964 is particularly interesting as one really did not know which law to apply whether Portuguese or Indian. Hence meeting persons who have practiced law during this period was a very rewarding experience. Judges, lawyers, judicial officials and police officers who worked under both the system have provided useful information of the application of the criminal law in Goa.

4. Goa being a small territory, it has served as a model for application of different schools of jurisprudence in this territory. It has served as a model for the co-existence of different systems in one area.
5. It is hoped this study will provide useful information to the government as well as to the experts of the comparative law regarding the functioning of the criminal law in Goa.

1.5. Objectives of the Study

The objectives of the study are as follows:

1. To make a detailed study of the system of criminal administration in Goa during the colonial period.
2. To assess the impact of Indian legal system as introduced in Goa after the liberation.
3. To determine the problems that arose during the transition period when the Portuguese system came to an end and the democratic system came into existence.
4. To discuss the advantages and disadvantages of both the systems relating to the administration of criminal justice and the sentencing process.
5. To determine the salient policy points that can help tighten the criminal justice system so that the offenders do not escape.
6. To investigate the approach of Judges, lawyers, judicial officials and police officers in detection of crimes and the efficacy of the system during both the periods.
7. In view of changing society in Goa to investigate into the impact of the socio-legal laws on the system. This is in the context of the large number of non-Goans entering Goa i.e. persons from other parts of India and abroad who are planning to create an economic empire for themselves.

8. To suggest reforms in the criminal administration system specially keeping in minds the recent recommendations of Justice V. S. Malimath Committee.

1.6. Methodology:

The methodology used in this thesis is a combination of doctrinal as well as non doctrinal. The doctrinal methodology includes documentary sources that relate to the Portuguese criminal justice system as well as the India criminal justice. The statistical data available giving the extent of crimes reported has been analyzed. Relevant books, journals and reported cases have been referred to and cited where appropriate.

The non doctrinal methodology is related to the data collected through questionnaire and interviews with judges, lawyers and other officials who have worked in both the systems. Even litigants opinion has been taken for analysis. The questionnaire was also accompanied with interview of some eminent persons. This method has proved to be very useful for collection of original data which has greatly helped in drawing sound conclusions.
The history of courts in the judicial system in Goa occupies a very unique position which is not shared by another state in India. The following facts will prove the above statement right historically and socially.

The study of the occurrence of crime and the process of grating punishment to criminals has been quite interesting when we compare the Goa’s colonial period and what happened after it was liberated. The issues that have been critically evaluated both in the free Goa and in the colonial Goa are centered around some basic questions involving the occurrence of crime, the process of sentencing and the general attitude of the rulers with regard to them.

The thesis revolves around the historical development and application of the criminal justice system in Goa. Goa lacked democratic institutions and hence the system tended to be highly dictatorial while India has been experiencing democratic functioning even fifty years after India became free. This aspect has been kept in mind while making this study.

The scholar has tested the theoretical concepts with the practical application of the legal system in Goa as well as in India. Being highly influenced by the European system the administration of criminal justice in Goa depended more upon the investigative machinery set up by the state and the courts would follow their findings in order to give suitable punishment, the complete dependence on government machinery and there was no scope to correct that even in case of error or manipulations. On the other hand the Indian system
treated investigation by the state as something distinct from the investigation by the prosecution.

The Indian courts would not give much credence to the investigation as the police department was not totally believed for doing an absolute and acceptable job. So the approach of the investigating machinery in both the system differed and the burden was largely on the shoulders of judiciary to come to conclusions on its own by examining the witnesses.

The scholar has also examined senior persons who had been judges and senior advocates regarding their experience before 1961 and their after regarding the procedures followed by the criminal courts. The conclusions they draw are very interesting and are found in this thesis. Also secondary data has been collected to draw conclusions regarding criminal cases occurring both before and after 1961 and patterns of sentencing followed by the courts.

The report submitted by Justice V.S. Malimath has come very handy to discuss and debate upon the different issues involved in the thesis. Justice Malimath committee has thrown much light on the occurrence and control of crimes, much of which the author has accepted as a legitimate conclusions to be drawn from his study of this type.

A number of Supreme Court decisions have been referred to as authentic illustrations to explain different issues that have arisen in this study. Many leading legal persons in Goa have appreciated the selection of this topic for a
detailed study and analysis. The result that will arise will certainly help in trying to understand the functioning of the criminal justice system in India as well as in pre-liberated Goa. This thesis is divided into eight chapters.

1.7. Scheme of the Thesis:

Chapter I gives a bird’s eye view of the research problem. In this introduction to the thesis the scholar has discussed the basic difference between the European Law as developed under the Roman Law and English Law as developed under the Common Law. The study undertaken goes into the detailed application of European Law during the Portuguese Regime and the Indian Law after the Liberation of Goa. It also discusses the methodology and the application of the Sociological Theory to the development of the Law after Liberation.

Chapter II deals with the Evolution of the Judicial System in Goa over a period of Four Hundred years. The Portuguese had established their own system of justice delivery as prevailing in Portugal. The chapter examines the different divisions for jurisdictional purposes and also the different types of laws and procedures that were made applicable to them.

Chapter III describes the administration of Criminal Justice in Goa. It discusses the appointment of judges and the organization of the Judiciary specially dealing with the Criminal Courts, the prosecution and the Police. It also goes into the administration of prisons and the treatment of the prisoners. Lastly, it
discusses correctional services available for providing relief to certain categories of criminals.

Chapter IV discusses the system of sentencing in pre and post liberated Goa. It goes into the different theories of punishment and how punishment was rendered during the Portuguese time and after liberation. The significant aspect in this chapter is the role played by the Judiciary.

Chapter V deals with the detailed study of the occurrence of crimes in Goa. The Scholar has critically evaluated the different types of crimes committed during the Portuguese colonial era and in free democratic India. The statistical data has been examined and appropriate graphs are drawn to draw inferences. This chapter is highly mathematical/statistical and provides useful information regarding crime occurrences.

Chapter VI deals with the evaluation of the opinions expressed by different personalities who have been Judges, Advocates and Public persons and officials who have had the experience of the Portuguese Law as well as the Indian Law. They have given comparative opinions regarding both the system of Law and this show the way the Law functioned during the different regimes. Their opinions are highly instructive and useful for drawing appropriate conclusions for this thesis.

Chapter VII deals with tackling different sectors in Goa which are prone to crime occurrence. The scholar has examined the different issues, both social as
well as economic, which Goa encounters. Each of these, if property tackled can reduce or decrease the crime occurrence. The objective is to achieve a zero crime rate for Goa.

Chapter VIII lays down the conclusions arrived at and suggestions that have been made to tone up the Administrative System in Goa to ensure that the crimes are prevented and also to expedite punishment for those who commit crimes. This chapter provides the answers to the lacunae facing the Criminal Administrative System in Goa.

The scholar acknowledges that the material for this thesis was collected from the different libraries specially the Indian Law Institute Library, New Delhi; University College of Law Library, Dharwad; University Law College Library, Bangalore; National Law School of India University, Bangalore; Library of the Pune University, Pune; Library of Tata Institute of Social Sciences, Mumbai; Central Library, Goa; Archives and Archeological Library, Goa; Library of Goa Legislature Assembly, Porvorim; V. M. Salgaocar College of Law Library, Miramar, Panaji-Goa;

With the above detailed introduction, we now move on to the other chapters which discuss the issues in greater detail.