CHAPTER-II

SENTENCE, SENTENCING PROCESS AND POWER OF COURTS IN AWARDING SENTENCE

2.1 General

Niger Walker\(^1\) has said:

“If the criminal law as a whole is the Cindrella of jurisprudence, then the law of sentencing is Cindrella’s illegitimate baby.”

One of the main focus of Criminal Law is to impose suitable, just, appropriate and proportionate sentence. In Mc Gautha\(^2\), it was held that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of punishment.”

In India, we do not have sentencing guidelines in material form which is provided by the legislature. Time and again need for the same has been shown and a number of committees also have recommended framing of sentencing guidelines so as to avoid the dilemma faced by the courts in awarding sentence but all in vain. What we actually have is the judicial guidelines provided by the higher courts on the basis of which the lower courts decide the fate of the accused.

In March 2003, the Committee on Reforms of Criminal Justice System\(^3\), a body established by the Ministry of Home Affairs, recommended that there is a the need to introduce sentencing rules in order to reduce indecisiveness in awarding sentences\(^4\).

2.2 Historical Background of Sentencing Concept

2.2.1 Shastras

In Shastras, emphasis was done on King’s power to punish the lawbreaker and protect the law-abider. According to Manu, the King was considered as holder of Danda (Punishment) and Chhatra(Protector). In Vashistha Samhita, Sovereign’s authority to penalize and abolish the evil and the sinful was upheld. The various factors which have to kept in mind before exercising this jurisdiction to punish are place, time, age, learning of the

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\(^2\) 402 US 183 (1971)
\(^3\) Also known as Malimath Committee
parties and the seat of injury.” For Manu, the essential characteristic of law was punishment. He justified his view by giving the reason that. Penalty preserves law and command and it guards body of a person and his belongings. The impact of sentencing i.e. the fear caused which creates a deterrent effect on the accused as well as other members of the society- is an essential characteristic of the legal phenomena. Law cannot be isolated from punishment. Apart from the provisions laid down in the uncodified Hindu Law, Kautilya, the renowned philosopher in Arthashastra also prescribes 337 types of offences in which fine could be imposed.\(^5\) Arthashastra also prescribes different types of sentences to be imposed on the offender\(^6\). In ancient India, while imposing sentence on an offender, the position of the offender in the society was considered. For instance, Brahmans were imposed lesser punishment as compared to others\(^7\).

### 2.2.2 English Laws

In England, in the reports of the judges, critical necessity of penances of a compulsory nature for the more serious offences was stressed upon. Before 1700, the tilt of the courts was to award serious punishments to the wrongdoers so as to bring down the number of increasing rate of crimes. Capital punishment or transportation was commonly awarded. But by the end of the century, need was felt to relax the punishments as people were against giving such kind of punishments for small offences. When Queen Victoria came into power the punishment of compulsory capital sentence became less. Instead of death penalty offenders were given transportation as punishment. Lord Wellesley, in 1801, made a special enquiry, and suggested the policy, of laying down certain extreme punishments like imprisonments, fines,

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6. Ibid.
7. Ibid.
transportation or death etc. for various offences. Therefore, in 1803 Regulation III provided that in cases where a person was liable to flexible punishment under the Mohammedan Law, the fatwa of the law officers was merely to declare the same in the general terms stating the grounds why the offender was subject to different punishment. In 1817, there was a move for change in punishment policy. Finally, the Regulation Act of XVII of 1817 provided the punishments for offences of adultery and rape, which was corporal punishment not exceeding 39 strips and custody with rigid labour for a term of 7 years. These punishments were given for doing the attempt of such crimes.

2.3 Nature and Evolution of Sentencing Policy

With the growth of civilization, the human kind has witnessed different kinds of punishment, which were approved by different societies. For example, Mohammedan law of crimes prescribed retaliation, blood, money as the modes of punishment. Discretionary punishment favouring Brahminas was prescribed under the Hindu law. In the English laws also, punishment by way of inhuman trials were unknown. But as the society evolved the penology was modified gradually. Penalties in numerous legal structure started becoming rationalized and it reached a stage where more emphasis was given on reforming the criminal rather than deterring him. This concept evolved on the basis of Lombroso’s theory that nobody is born criminal and it is the society which makes a person criminal. But still some countries award inhuman punishments to the criminals. No ultimate conclusion can be drawn on the basis of these theories which have been discussed in detail so many times. In India, the reform of Penal Laws during the pasteras has brought about a

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9 Mahendra Kumar Sharma, “Minimum Sentencing For Offences In India”, Deep and deep publications, p. 4
10 T.K.Banerjee, “Background to Indian Criminal Law” (1963), p.74
sweeping change in the outlook of people towards the lawbreakers. Time has changed the ancient notions about crime, criminals and convicts. Recent Anglo-American reforms of the Penal provisions have greatly affected the Indian Penal provisions. An ideal policy of punishment should focus on reforming juvenile delinquents or first-time offenders and for repeated crimes or habitual offenders it should act as a deterrent. A balance should be drawn between the strictness and leniency of these penal provisions. At the same time compensation to victims should also be provided. The justification of penal provisions may balance the sociological standards between the individual and the society itself. Summarizing the object of penalty and the sentencing rule Manu quoted\(^\text{12}\)–

“Punishment governs all mankind, punishment alone preserves them, punishment wakes while their guards are asleep, and the wise consider the punishment (danda) as the perfection of justice.”

\textbf{2.4 Aims and Objectives of Sentencing Concept}

Sentencing is the ultimate object of a criminal trial. Kautilya, a gigantic law giver, who has made valuable contribution in the field of law and order, prevention of crime, etc., while discussing the quasi-criminal activity or social and economic offences under the title “Suppression of Anti-social elements”, remarked\(^\text{13}\) that

“Punishment alone can procure safety and security of life. When the law of punishment is kept in abeyance, it gives rise to the law of jungle. He adds that punishment, if ill awarded under the influence of greed and anger owing to ignorance, is also harmful and against natural justice.”

\(^{12}\) Dr. Ravulapati Madhavi, Associate Professor of Law, MCR, HRDI, “Theories of Punishment”, p. 37

\(^{13}\) Kautilya’s \textit{Arthashastra- A manual of dandaniti (penal policy)} p. 212
Again, punishment is also one which when exercised by the ruler with impartiality and in proportion to the guilt, either over his son, family members or his enemy, maintains both this world and the next.\textsuperscript{14} Justice, through punishment, when satisfies the victim acts as trademark for contemporary and upcoming generations. Therefore, keeping a check on the crimes and punishing the offenders is the main objective of sentencing policy. It may be noted that deterrence, prevention, retribution and reformation are the ultimate goals set to be achieved by way of punishing the accused where the main focus is on deterrence.

2.5 Forms of Punishment

In many countries research has shown that punishments were tortuous, harsh and brutal in nature. Towards the end of 18\textsuperscript{th} century on humanitarian grounds it was emphasized that in any punishment brutality should be kept to a minimum. Flogging, mutilation, branding, pillories, etc., simple or rigorous imprisonment, forfeiture of property and fine were the commonly prevalent punishments given to the accused at that time.

Following are some of the sentencing categories:

2.5.1 Flogging

The most common method of punishment was flogging\textsuperscript{15}. Flogging means beating an individual with some tools. The tools used may be whips,
rods etc. British laws abolished it in 1948. In India, this was a recognised form of punishment under Whipping Act\textsuperscript{16}. In 1955, the Act of 1909 was abolished. In Maryland (USA) whipping was recognized as late as 1953 although its use was limited to “wife-beating”.\textsuperscript{17}

\textbf{Source}\textsuperscript{18}

Even today in Middle-East countries flogging is still being used as a punishment. The difference is only of the instruments used and methods adopted for flogging viz. straps and whips with a single lash or short pieces of rubber-hose. In Russia, the instrument used for flogging was constructed of a

\textsuperscript{16} Whipping Act, 1864, repealed in 1909
\textsuperscript{17} Available at \url{http://www.answering-islam.org/Silas/wife-beating.htm} browsed on 13th September, 2016
\textsuperscript{18} Available at \url{https://www.google.co.in/search?q=flogging+images&espv=2&biw=1440&bih=799&tbm=isch&tbo=u&source=univ&sa=X&ved=0ahUKEwj4z4bR74vPAhVUZQKHTWsCWMQsAQIGg} browsed on 13th September, 2016
number of dried and hardened thongs of raw hide, interspersed with wires having hooks in their ends which could enter and tear the flesh of criminal\textsuperscript{19}. Now it has been discontinued being barbarous and cruel in form. Researches have shown that this method is hardly effective as a method of punishment. Evidences have shown that this punishment does not have much effect on accused who have committed serious or major offences. But for offences like eve teasing, drunkenness, vagrancy, shoplifting etc., this may have an effect on the accused.

\subsection*{2.5.2 Mutilation}

‘Mutilation’ means to cut off body parts. In ancient India this punishment was known to have been in practice where, a person acquitted for the offence of theft was punished by chopping off one or both of his hands and those, by whom sex crimes were proved to have been committed, were punished by chopping of their private parts. The punishment was based on retributive theory which says “an eye for an eye, a tooth for a tooth”. In various other countries like England, Denmark etc. also this punishment was prevalent. It is justified on the ground that it serves as an effective measure of deterrence in support of retribution. In contemporary times this system stands completely discarded because of its barbaric nature.

\footnote{Available at \url{http://www.shareyouressays.com/121602/research-paper-on-different-forms-of-punishment-9349-words} browsed on 13th September, 2016}
2.5.3 Branding

Branding as punishment means writing something on the hands, shoulders etc. of the accused with a branding iron so as to avoid escape. This punishment was supported by Roman penal jurist. Convicts were used to be branded so that they could be identified and subjected to public scorn. This acted as a forceful weapon to combat criminality. England also branded its criminals till 1829 when it was finally abolished. In American penal systems also this form of punishment was common. “T” was branded on their hand who was punished for burglary and habitual offenders or accused who repeatedly use to commit crime were branded “R” on their forehead. Now this mode of punishment has been completely abolished on the ground of humanitarianism.

Available at https://www.google.co.in/search?q=mutilation+images&espv=2&biw=1440&bih=799&tbs=isch&tbo=u&source=univ&sa=X&ved=0ahUKEwiEmJ2Q1IvPAhXKF5OKHRvYBPwQsAQIGg browsed on 13th September, 2016

Available at http://criminal-lawbd.blogspot.in/2013/07/topic-capital-punishment-dilemma-forms.html browsed on 13th September, 2016
2.5.4 Banishment

One of the commonly given punishments was banishment in which the accused was sent to far-off places with a view to disregard them from the public. This form of punishment was prevalent for centuries. War criminals were usually transported to distant places. Other similar terms that were used were transportation, exile and outlawry. In Exile a person is barred from his native country whereas in Transportation the convict is sent to a penal colony. In Outlawry, the accused is considered to be beyond the protection and assistance of law. The punishment of outlawry was a concept of old English Law.

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Available at https://www.google.co.in/search?q=branding+meaning&espv=2&biw=731&bih=716&source=lnms&tbm=isch&sa=X&ved=0ahUKEwj8mYeg18rPAhWHPY8KHBQJA4Q_AUIBigB#tbm=isch&q=branding+as+punishment+meaning browsed on 8th October, 2016
In India, during the rule of Britishers the concept of transportation existed in penal system which was popularly known as ‘kalapani’. It had a physical as well as psychological effect on Indian people as going beyond the seas was seen with a disgrace. It used to hurt the religious sentiments of the accused as well as his family members. The practice came to an end during initial forties after islands came in occupation of Japanese and in 1955 was finally abolished.

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2.5.5 Stoning

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23 Available at https://www.google.co.in/search?q=branding+meaning&espv=2&biw=731&bih=716&source=lnms&tbnid=isch&sa=X&ved=0ahUKEwj8mYeg18rPAhWHPY8KHbQJAJ4Q_AUIBigB&tbm=isch&q=banishment+as+punishment+meaning&imgc=Hk0KthLaO418oM%3A browsed on 8th October 2016
Map showing the countries where public stoning is a judicial or extrajudicial form of punishment.

**Source**

Available at [https://www.google.co.in/search?q=branding+meaning&espv=2&biw=731&bih=716&source=lnms&tbm=isch&sa=X&ved=0ahUKEwj8mYeg18rPAhWHPY8KHzQJAJ4Q_AUIBigB#tbm=isch&q=stoning+as+punishment+meaning&imgrc=dbe_jzeYa3GNX0M%3A](https://www.google.co.in/search?q=branding+meaning&espv=2&biw=731&bih=716&source=lnms&tbm=isch&sa=X&ved=0ahUKEwj8mYeg18rPAhWHPY8KHzQJAJ4Q_AUIBigB#tbm=isch&q=stoning+as+punishment+meaning&imgrc=dbe_jzeYa3GNX0M%3A) browsed on 8th October, 2016

Available at [https://en.wikipedia.org/wiki/Stoning#/media/File:A_map_showing_countries_where_public_stoning_is_judicial_or_extrajudicial_form_of_punishment.SVG](https://en.wikipedia.org/wiki/Stoning#/media/File:A_map_showing_countries_where_public_stoning_is_judicial_or_extrajudicial_form_of_punishment.SVG) browsed on 8th October, 2016
During medieval period another form of marriage that was common was Stoning. This mode of sentencing is still in trend in some of the Islamic countries, particularly in Pakistan, Saudi Arabia, etc. Generally, in sexual offences the punishment of stoning to death is given. The accused is made to stand surrounded by people from all sides who throw stones on him until he dies. This is a slower form of execution which is barbaric in nature but the deterrent effect of this punishment is very high especially in case of the sex crimes. The Arabic word for stoning is ‘razm’26. This form of punishment is authorized by law in 15 countries including Iran, Nigeria, Saudi Arabia, Sudan, UAE etc.

2.5.6 Pillory

Pillory was a device made of a wooden or metal framework in which criminal was made to stand in a public place. His head and other limbs are locked. In case of serious offences the accused was even stoned. This form of punishment was cruel and barbaric in nature. Till 19th century this was in practice. This mode of punishment was aimed at causing public shaming which can result in At times, the ears of the criminal were nailed to the beams of the pillory.

Restraining physical movements of the criminal had the most tormenting consequence on him and it was believed that the deterrence involved in this mode of punishment would surely bring the offender to books. In India, this system existed during Mughal period also but in different forms like habitual offenders and dangerous criminals were pinned in walls and shot or stoned to death. The punishment undoubtedly was more cruel and brutal in form and therefore, it has no public place. Until 20th century it had been a common method of sentence in many parts of the world.

2.5.7 Security Bond

Security is the guarantee given by the accused to the court that a certain conduct will be maintained by him for a certain period. A security bond for good behavior is not a punishment in strict sense but it may serve a useful purpose in the form of restraint. The sentence imposed on the accused may be deferred by the court on the basis of his good conduct and normal behaviour. This ‘conditional disposal’ of offender is increasingly being recognised as an effective mode of corrective justice in modern penology. The maximum advantage of this mode of punishment is that it offers a chance to the wrongdoer to turn into a law-abiding person. In this case the probability of his

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improvement are more than those who are put behind bars or are given institutional punishment. Moreover, if he is the sole bread earner in his family, the kin of the delinquent are also not negatively affected by this form of penalty as they are not deprived of his presence.

2.5.8 Fines

For less serious offences the common punishment given was imposition of fine e.g. breach of traffic’s rules or revenue laws. This mode of punishment still exists in almost every country’s sentencing system. In India also, in section 53 of the Penal Code, fine is provided as one of the five punishments.

2.5.9 Imprisonment for Life

“Secure prisons are essential to making our justice system an effective weapon against crime. When prisoners- convicted or awaiting trial- are entrusted to your care, they must know and the public must know that they will remain there until they are legally discharged....

The full contribution which our prisons can make towards a permanent reduction in the country’s crime –rate lies also in the way in which they treat prisoners. We cannot emphasize enough the importance of both professionalism and respect for human rights.”

- President Nelson Mandela

Speaking to prison staff in South Africa in 1998

Life imprisonment is yet another kind of punishment imposed on the offender who commits serious offences. After death penalty this mode of punishment is
considered as a serious punishment. In some countries life imprisonment means imprisonment will be there for whole life of the accused and in other countries it is for a longer period which can be 20 years or 40 years.

In Indian Penal Code, 1860, under Section 53 (as amended by Act 26 of 1955)\(^{29}\) life imprisonment is an authorized form of punishment. Various judgments have been passed to interpret the meaning of the word “life” in life imprisonment. Section 57\(^{30}\) of the Indian Penal Code clearly points out that in calculating fractions of imprisonment, imprisonment for life shall be taken as imprisonment for twenty years. Under Section 55, IPC or under Section 433(b) of Code of Criminal Procedure, the punishment of life imprisonment can be commuted to one of rigorous imprisonment not exceeding a term of 14 years. In such cases the convict will be released after completion of a period of 14 years including the period of remission earned during his confinement. But what happens in reality is that the prison authorities unlawfully keep in custody the life convicts for a maximum time of 20 years giving the reason that the nature of judgment of life imprisonment does not alter by the aforesaid provisions of IPC or Cr.P.C. There is a need to check this dichotomy by intervention of the Parliament through necessary modification in the on hand criminal law.

\(^{29}\) With effect from 1\(^{st}\) January 1956.

\(^{30}\) Section 57: Fractions of terms of Punishment: “In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years.”
Life imprisonment laws around the world:

- Life imprisonment sentence is used
- Life imprisonment may be imposed only on men
- Life imprisonment laws have been abolished
- Life imprisonment status unknown, presumed legal

The above shown figure demonstrates how the punishment of life imprisonment is awarded in different parts of the world. In most of the countries sentence of life imprisonment is awarded generally, whereas in some parts it is imposed only on men. In some of the countries, it has been abolished.

2.5.10 Solitary Confinement

Hardened criminals were confined in solitary prisons without work in medieval times. This punishment was given so as to keep them away from other criminals so that they will not repeat the crime and also that other criminals don’t get their company. This form of penalty had the most shocking

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31 Available at [https://www.google.co.in/search?q=branding+meaning&espv=2&biw=731&bih=716&source=lnms&tbm=isch&sa=X&ved=0ahUKEwj8mYeg18rPAhWHPY8KHzcJAEQ_AUIBigB#tbm=isch&q=imprisonment+for+life++meaning&imgref=QDE6I7sE6joqLM%3A](https://www.google.co.in/search?q=branding+meaning&espv=2&biw=731&bih=716&source=lnms&tbm=isch&sa=X&ved=0ahUKEwj8mYeg18rPAhWHPY8KHzcJAEQ_AUIBigB#tbm=isch&q=imprisonment+for+life++meaning&imgref=QDE6I7sE6joqLM%3A) browsed on 8th October, 2016
effect on the offender as man is known to be a social being and he cannot tolerate the shooting pain of severance and living in complete seclusion from his fellowmen. Isolation of offenders into isolated prison cells under the system of solitary confinement resulted in catastrophic effect and the criminals undergoing the punishment either died early or became insane. There is also a fear of convicts becoming more enraged and unsafe to society if, at all, they got a chance to come out of the jail alive after finishing their tenure of such solitary confinement. Keeping in mind these ill effects of solitary confinement on prisoners, this form of punishment was finally withdrawn as a measure of punishment in various societies.

In India, under Section 73 and 74 this punishment is recognised and it is the discretion of the court to award this punishment keeping in mind the seriousness and consequences of the offence. According to Section 73, the maximum period of solitary confinement can a period of 3 months.

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32 Section 73- Solitary Confinement:” whenever any person is convicted of an offence for which under this court the court has power to sentence him to rigorous imprisonment, the court may, by its sentence, order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole, according to the following scale, that is to say:
- A time not exceeding one month if the term of imprisonment shall not exceed six months;
- A time not exceeding two months if the term of imprisonment shall exceed six months and shall not exceed one year;
- A time not exceeding three months if the term of imprisonment shall exceed one year.

33 Section 74- Limit of Solitary Confinement:” in executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with such intervals between the periods of solitary confinement of not less duration than such periods; and when the imprisonment awarded shall exceed three months, the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.
2.5.11 Capital Punishment

Since ages the most debated and controversial form of punishment is Death Penalty or Capital Punishment. Those who are against the punishment of death penalty says that no one can take away the fundamental right of ‘Right to Life’ of the accused as provided by the Constitution of India. Those against this punishment are of the view that most serious offences, specifically barbaric and inhuman acts can only be stopped by this penalty. In various cases both the arguments have been dealt with in detail. Courts have tried to resolve the problem to a great extent. This complex penal issue is still discussed. Some countries have abolished this punishment. The mode of giving death penalty differs from country to country. Lethal injections, locking up of the accused in poisonous chambers, hanging till death etc. are some of the common modes in which death penalty is awarded in different countries. In India, death is given as punishment only in the rarest of the rare cases. In

Available at https://www.google.co.in/search?q=branding+meaning&espv=2&biw=731&bih=716&source=lnms&tbm=isch&q=solitary+confinement+meaning&imgrc=Em5e6aFNwRMt2M%3A,browsed on 8th October, 2016
Section 303\(^{35}\), the Penal Code made it mandatory to award death penalty to a life convict if he commits murder during his term of imprisonment. This section was however struck down in Mithu\(^{36}\) by the Supreme Court.

Besides, these penalties, other measures such as prohibition from pursuing an occupation, barring driving, and taking away of property are also being extensively used as primitive means of punishment.

2.6. **Sentencing Provisions under Indian Penal Code**

Section 53 of IPC deals with various kinds of punishment. It reads as:

The punishments to which offenders are liable under the provisions of this Code are:

First- Death;
Secondly- Imprisonment for life;
Thirdly-*Omitted by the Act 17 of 1949, Section 2*;
Fourthly- Imprisonment, which is of two description viz. Rigorous & simple;
Fifthly- Forfeiture of property;
Sixthly- Fine

Sentences which could be inflicted include imposition of fine, imprisonment-simple or rigorous, extending from imprisonment till rising of the court to 14 years, forfeiture of property, life imprisonment and death penalty.\(^{37}\) Capital Punishment and life imprisonment or any sentence imposed and upheld by courts of law can be commuted, condoned or pardoned by the Government under Articles 72\(^{38}\) and 161\(^{39}\) of the Constitution of India or under section 401\(^{40}\) or 402\(^{41}\) of the Code of Criminal procedure.

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\(^{35}\) Section 303- Punishment for murder by life convict: “whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death.

\(^{36}\) AIR 1983 SC 473.


\(^{38}\) Article 72: Power to grant pardons: “Article 72 confers power on the President “ to grant pardons, reprieves, respites or remissions of punishment, or to suspend, remit or commute the sentence of any person convicted of an offence in the following case-

- a) In all case where the punishment or sentence is by Court Martial
- b) In all cases where the punishment or sentence is for an offence against any law relating to matter to which the executive power of the Union extends;
- c) In all cases where the sentence is a sentence of death.”

\(^{39}\) Article 161- Governor’s power to grant pardon.

\(^{40}\) Section 401-High Court’s power of revision

\(^{41}\) Section 402: power of high court to withdraw or transfer revision cases.
Percentage distribution of convicts undergoing various periods of sentences at the end of 2013

- Life imprisonment, 5 years, 4.50%
- 10-13+ years, 13.50%
- 7-9+ years, 8.80%
- 5 to 6+ years, 6.50%
- 2+ years- 4+ years, 5.80%
- 1 year- less than 2 years, 3.90%
- 6 months -less than 1 year, 2.80%
- 3 months-less than 6 months, 2.00%
- less than 3 months, 1.90%
- Capital punishment, 0.3%

Available at www.ncrb.gov.in browse on 12-01-2016
2.7 Theories of Justification for Sentence

In legal sense, ‘sentence’ may be defined as some pain or loss (of life, freedom, rights or property) deliberately imposed upon the individual, without his consent, if not against his will. Prima facie, it is morally wrong to inflict pain or loss deliberately on a person without his consent. Can such deliberate imposition of pain or loss be justified? As long as deliberate deprivation without consent is involved, issue of justification cannot be avoided merely by adopting more ‘medical’ or ‘therapeutic’ approach to the offender and throwing out sentence.

According to H.L.A. Hart⁴³ problem of justification has the following factors:

- Why should we punish at all; what is the justifying purpose of punishment?
- How and how much we justifiably punish?

The answers to these questions have been answered differently by different theories. One theory focuses on strict punishment whereas other is tilted towards the human factor. These problem of justification should not be confused with that of prison reforms. The prison reforms are concerned with how a prisoner should be dealt with when he is punished whereas theories and problems of justification of sentence deal with why an accused is punished. Providing healthy and humane environment to the prisoners, taking care of their health, counselling, job training etc. are the factors considered in prison reforms. Merciless or atrocious conduct can only be defended by inappropriately applying these theories. Legal punishment can comprise of three things:

⁴³ https://books.google.co.in/books?id=fPYiervnUJAC&pg=PA93&lpg=PA93&dq=why+should+we+punish+at+all+H+L+A+Hart&source=bl&ots=y6YznOJ2uk&sig=_Fkw0ilZOgYYn71OgAhEzwiU&hl=en&sa=X&ei=3FiVd_JO4OpuwS5yIDgCA&ved=0CCMQ6AEwAQ#v=onepage&q=why%20should%20we%20punish%20at%20all%20H%20L%20A%20Hart&f=false
• A set of commandment
• A process for deciding who should and shall be punished.
• Effective Authority which can help in imposing the punishment.

Existence of these three factors in a society results in institution of legal sentence. Different theories of punishment supports different sentencing awarded to the accused. These theories have been supported by one legal system and criticized by the other. But in actual practice, they provide a reason for punishing the accused persons for the offence that they have committed. They are:-

2.7.1 Retributive Theory

One of the oldest theories to be known is Retributive Theory. With the change in time there is no substantial change in the theory. This theory is based upon idea of vengeance or revenge. The supporters of this theory contends that while punishing, the pain or the sufferings to be inflicted on the accused, was to balance or compensate the pleasure that he has derived from the offence. He is made to suffer the pain which the victim had suffered. In other words, retributive theory suggested that punishment is an expression of society’s disapprobation for offender’s criminal act.\(^44\)

The view taken by the supporters of this theory can take either of the two foremost versions:
• Revenge theory
• Expiatory theory

Revenge as a form of explanation for punishment is deeply rooted since time immemorial. It goes back at least as far as the *lex talionis*\(^45\). The basic and important side of the retributive view is that only through the sufferings, he is

\(^{44}\) Herbert L. Packer, *The Limits of the Criminal Sanction*, (1968), p.33

\(^{45}\) The principle or law of retaliation that the punishment inflicted should correspond in degree and kind to the offence of the wrongdoer, an eye for an eye, a tooth for a tooth; retributive justice.
made to go through in his sentence, the accused can expiate his sin. Revenge can be explained by the fact that the accused is paid back and in case of expiation he pays back. Physical violence is an important factor which is considered in revenge theory whereas in expiatory theory it is the financial loss of the victim that the accused has to pay back. Expiatory theory is applied in cases of petty offences. It is just to make the accused realize that he has committed some offence which he should not have done and now he has to suffer for that.

The difference between utilitarian and retributive theories of punishment is that the former is prospective, looking to the good that punishment may accomplish, while the latter is retrospective, seeking to do justice for what a wrongdoer has done.\(^{46}\)

The theory of retribution is based on the view that punishment is a particular application of the general principle of justice, that men should give their due. The consideration underlying the revenge theory is that it is correct for sentence to be inflicted on persons who commit crimes. This well-known description of retributive position has no practical place in a theory of justification for sentence. The retributive position does not command much assent in academic circles, but there seem small explanations to presume that it does not persist to keep strong hold on the popular mind. Vengeance is rarely attacked as retribution but rather as retaliation.

Supporters of this theory were of the vision that this theory punishment is crucial to teach a lesson to the sinner. Otherwise the victim will feel more victimized and will, instead of filing a complaint against the offence committed, try to take the revenge himself which as a result, will result in failure of criminal justice system.

\(^{46}\) Plato.stanford.edu/entries/justice-retributive/ browsed on 28\(^{th}\) May, 2015
On the other hand, some jurists condemned this theory naming it as barbaric and unkind.

### 2.7.2 Deterrence Theory

“Deter” means “to stop”. This theory operates at two levels viz. individual and general. At individual level, the aim is to stop a person from committing the crime again. At general level, other people are taught a lesson and are deterred from committing a crime.

This mode of punishment find a place in English laws. Those laws were by and large deterrent in nature. The basic concept behind this theory is that with infliction of strict punishment the offender will be taught a lesson and that will stop him to commit the crime again in future. The execution of one’s revenge that emphasize on the criminal act. At the same time, this theory gives a lesson to other people of the society to not to commit that offence and to keep them away from criminality. The strictness of penal laws operate as a satisfactory caution to offenders as well as to others. Punishment is not good in itself but the justification for sentence can be supported by the fact that it gives good consequence (reduction of crime). The ultimate aim of punishing the accused is to teach him a lesson not to repeat the crime as well as to bring down the number of crimes committed in the society.

This theory is supported by those who are forward looking, because the outcome lies in the future and not when sentence is imposed whereas retributive theory focuses on the present. It does not focus upon any good consequence that might result from punishing the criminal. Amalgamation of these theories has also been proposed recently by few writers. It will be correct to say that the principle concerning deterrent sentence has been directly connected with the ancient theories of wrong and criminal liability. In earlier times, crime was attributed to the influence of evil spirit or free well of the
offender. So the society preferred severe and deterrent penalty for the offender
for his act of voluntary perversity which was believed to be challenge to God
or religion. One of the important questions which is answered by the
deterrence theory is ‘why to punish”? Retributive theory answer ‘who should
be punished”? Prime concern of the supporters of deterrent theory is general
deterrence which means that punishment to one will deter not only him but
others also which will help in reducing crime.

This is one of the most commonly followed theories in modern times
but cannot be seen to achieve results as desired. The reasons why punishments
are not having any deterrent effect on the society as well as on the individual
can be many. To name a few, delay in actual sentencing, uncertainty of
punishment etc.

2.7.3 Reformative Theory

Reformative theory aims at reforming the accused. The supporters of
this theory believes that accused might have committed the offence in such
circumstances in which such act cannot be avoided. This theory focuses on
educating the offender and keeping him in educative and healthy influences.
Reformative punishment means either that the offender is reformed while
being punished or that is reformed by punishment itself qua the punishment.

Decent treatment, together with moral exhortation was hopefully expected to

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47 Barnes & Teeters; New Horizon In Criminology. (1951) available at
https://books.google.co.in/books?id=brRgAYhyhsoC&pg=PA209&lpg=PA209&dq=dete
rence+theory+barnes+and+teeters+new+horizons+in+criminology&source=bl&ots=ZX
65Um9ai&sig=10p1Rb5Umrf75StsCpeaNXsEdl&hl=en&sa=X&ei=vKNmVaqMGIKb
uQS404PICA&ved=0CEIQ6AEwCA#v=onepage&q=deterrence%20theory%20barnes%2
0and%20teeters%20new%20horizons%20in%20criminology&f=false browsed on 28th
May, 2015.

induce prisoners to reform. Packer⁴⁹ calls this approach as ‘Behavioral view’. The four principle basis of this view, according to Packer is⁵⁰:

- Free will is an illusion, because forces that lie beyond the power of the individual to modify determine human conduct.
- Moral responsibility is an illusion because blame cannot be ascribed for behavior that is ineluctably conditioned.
- Human conduct, being usually determined, can and should be scientifically studied and controlled.
- The function of criminal law should be purely and simply to bring into play processes for modifying the personality and hence the behavior, of people who commit them in future or if all else fails, to refrain them from committing offence by the use of external compulsion (e.g. confinement).

The effect of this theory can be seen only on the first time offenders or juvenile delinquents. Also, in those cases where the issue involved is petty one, can the accused be reformed. Habitual offenders are rarely reformed by the punishment.

2.7.4 Preventive Theory

The philosophy behind preventive theory is ‘not to avenge, but to prevent it’. Those who propounded this theory are of the view that the requirement for punishing an accused arises out of societal necessities. While punishing an offender, the public safeguards itself against anti-social order. In

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⁴⁹ Herbert L. Packer was a distinguished Professor of Law at Stanford University. Two of his most famous works are the article “two Models of the Criminal Process” and “The limits of the Criminal Sanction”.

this way societal and individual interest both can be safeguarded. At this point it would be worth to quote Fichte\textsuperscript{51} who observed-

“The end of all penal laws is that they are not to be applied given an illustration he continued, “when a land owner puts up a notice ‘trespasser will be prosecuted’: he does not want an actual trespasser and to have the trouble and expense of setting the law in motion against him. He hopes that the threat will render any such action unnecessary, his aim is not to punish the trespasser but to prevent him. If trespass still takes place, he undertakes prosecution. Thus, the instrument or deterrence which he devised originally consisted in the general threat and not in particular convictions.”

Therefore this theory can be supported by the fact that the accused is punished not only to deter others from committing the similar acts, but to get rid of such outrageous wrongdoers from society.

\textbf{2.8 Interdependence of Theories of Punishment}

If the retributive theory of punishment means, only the social defense or vengeance i.e. an eye for an eye then we cannot accept it. Retribution means and implies that when men deviated from the path of righteousness and does a wrong. It is his over vicious act that makes him suffer. There can be an end to the suffering, brought about by an evil act only when the offender sincerely repents, gives up his bad ways, stones for his crime and compensates or agrees to compensate the aggrieved party for the harassment rendered to him. The properly explained and correctly understood theory of retributive punishment fits in, ideally with the other theories of punishment theories. The awarding of reformative treatment by detention, even for long periods with a view to bring about true retribution should be the object and justification of sentence. The interdependence prevailing with regard to the different theories of sentence is perceivable upon an understating of the true meaning of each theory. There can be no true retribution unless there is true repentance. Retribution is the

\textsuperscript{51} Fichte, "Law on Penology" (1934), p.123
bringing home to the mind of the offender, the realization that his bad act deserves punishment. But unless the offender by reformation and repentance is given the sense of understanding retribution will be sought in vain. It is the declaration of penalties for offences and the sentence of the offender that deters other persons from committing crime. Thus, these concepts go hand in hand and exist for the protection of the society and rehabilitation of the wrongdoer himself.

Deterrence as one valid punitive component has been accepted in Sunil Batra\textsuperscript{52}. The Supreme Court here observed:

“It is now well settled, as a stream of rulings of courts proves, that deterrence both specific and general, rehabilitation and institutional security are vital consideration. Compassion wherever possible and cruelty only where inevitable, is the art of correctional confinement, when prison policy advances such a valid goal, the court will not intervene officiously”\textsuperscript{53}.

In Bijaya Kumar Agarwala\textsuperscript{54}, division bench of the Apex Court observed that in interpretation of Penal Statutes, Strict Construction is the general rule which was upheld in subsequent judgements in Sanjay Dutt\textsuperscript{55}.

All these theories are not mutually exclusive. We cannot condemn one theory \textit{in toto} and support another. In modern times, democratic countries award punishments to the criminals keeping in mind various effects that such punishment will have on the individual as well as on the society.

\textbf{2.9 Power of Courts in Awarding Sentence}

In March 2003, the Malimath Committee issued a report that emphasized the need to introduce sentencing guidelines in order to minimize uncertainty in awarding sentences, stating\textsuperscript{56},

\textsuperscript{52} 1980 SCR (2) 557, (1978) 4 SCC
\textsuperscript{53} Ibid. at pg 581.
\textsuperscript{54} AIR 1996 SC 2531
\textsuperscript{55} (1994) 5 JT(SC ) 225: (1994) AIR SCW 4360
\textsuperscript{56} http://www.loc.gov/law/help/sentencing-guidelines/india.php
“The Indian Penal Code prescribed offences and punishments for the same. For many offences only the maximum punishment is prescribed and for some offences the minimum may be prescribed. The judge has wide discretion in awarding the sentence within the statutory limits. There is now no guidance to the judge in regard to selecting the most appropriate sentence given the circumstances of the case…. Therefore, each judge exercising discretion accordingly to his own judgement. There is, therefore, no uniformity. Some judges are lenient and some judges are harsh. Exercise of unguided discretion is not good even if it is the judge that exercise the discretion. In some countries guidance regarding sentencing options is given in the penal code and sentencing guideline laws. There is need for such law in our country to minimize uncertainty to the matter of awarding sentence. There are several factors which are relevant in prescribing the alternative sentences. This requires a thorough examination by an expert statutory body.”

In Indian Penal Code, which is a Penal statute, prescribing definitions of offences, punishments are prescribed. Those punishments as prescribed by statute are awarded by the courts applying their judicial discretion. One of them, e.g. Section 302, will provide an apparent image about the domain of the judicial prudence to be exercised by the courts while awarding sentence. According to Section 302 IPC, “whoever commits murder shall be punished with death or imprisonment for life and shall also be liable to fine.” This section empowers the court to give punishment of any of the following three types:-

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57 Ibid.
• Death or
• Imprisonment for life and
• Fine (amount to be determined by the judicial officer)

Therefore, we can say that the judicial officers have been given wide range of powers to exercise while giving punishment to the accused persons. In Lehna\textsuperscript{58} the Supreme Court has rightly observed that:

\begin{quote}
“Criminal justice deals with complex human problems and diverse human beings. A judge has to balance the personality of the offender with the circumstances, situations and the reactions and choose sentence to be imposed.”
\end{quote}

The exercising of discretion while awarding sentence is one of the major problems relating to sentencing process. Absence of any straight-jacket formula makes it difficult to bring a uniformity of a high degree in the sentencing process.

Taking note of this problem, Supreme Court in Rameshwar Dayal.\textsuperscript{59} observed that that though there are similarities between the two cases i.e. the case in hand and other, but the quantum of punishment awarded is different.

Though sentencing disproportionality cannot be removed in general, but the courts can at least try to trim it down to the minimum. In Santa Singh\textsuperscript{60}, the Apex Court highlighted the importance of training of the judicial officers in sentencing procedures and penology. So that a consistency in the sentencing process is there.

Dr. Nigel Walker is of the view that in actual sentencing, courts tends to award punishments around a certain range more frequently than the rest of the range.

\begin{flushright}
\textsuperscript{58} (2002) 3 SCC 76
\textsuperscript{59} (1971) 3 SCC 924; 1972 SCC(Cri) 172
\textsuperscript{60} (1976) 4 SCC 190; 1976 SCC (Cri.) 546
\end{flushright}
more frequently than the rest of the range which is authorized by law for a certain offence.\textsuperscript{61}

2.10 Judicial Discretion in the Imposition of Sentences under Various Heads of Offences

2.10.1 Offences Punishable with Death Penalty

In Lehana\textsuperscript{62}, the Supreme Court noticed:

Changes, that the criminal procedure code has undergone in the last three decades clearly indicates, that the Parliament is taking note of the contemporary criminological thought and the movement from deterrence to reformation. There is a definite swing discernible in the code, in favour of life imprisonment and against death penalty consistent with the changing criminological thought.

According to Section 367(5) of the old code of Criminal Procedure Code (Amendment) Act, 1955, (before amendment) the court was required state the reasons for not awarding death penalty for an offence punishable with death, if the court sentenced the accused to any punishment other than the death. But after the amendment, discretion was given to courts regarding the same. Now the courts have to state the reasons for awarding the punishment for an offence. Also, death, which was considered to be the normal punishment for murder, is given in the rarest of the rare cases only.

Section 367(2) of the old code viz. Cr.P.C., which was also amended, was related to procedural laws only and did not affect the Penal Laws. Instead of elaborating the reasons for not awarding the death penalty the courts were directed to give reasons for sentence with lesser punishment. Further, the procedural laws got repealed and it was directed that death sentence will


\textsuperscript{62} Ibid.
ordinarily be ruled out and can only be imposed for special reasons as provided in Section 354(3) of the 1973 Code. A new provision, i.e. section 361 makes it mandatory for the court to record special reasons for not releasing an offender on probation as envisaged in Section 360 of Cr.P.C. This provision was based on reformative and rehabilitative theories of punishment. These amendments indicate that the legislature is inclined towards reformation and rehabilitation of the offenders and not merely the deterrence. Section 354(3) and 361 in the new code\textsuperscript{63} have become part of the law.

The up-coming trends in the judicial approach give a clear sign that judiciary is vigorously exercising its prudence in a very realistic way. In the past years, the scope of interpretation has been widened by the Apex Court which resulted in widening of powers of discretion awarded to the courts in cases where minimum sentence is provided in the statute for a particular offence. A linked sequence of decisions in this regard will further explicate the matter. In Ediga\textsuperscript{64}, the Supreme Court through the vision of J. Krishna Iyer observed that:

“Where the murderer is too young or too old, the clemency of penal justice helps him. Where the offender suffers from socio-economic, physic or penal compulsions insufficient to attract a legal exception or to downgrade the crime into a lesser on, judicial commutation is permissible. Other general social pressures, warranting judicial notice, with an extenuating impact may, in special cases, induce the lesser penalty. Fact that the death sentence has hung over the head of the culprit excruciatingly long, may persuade the court to be compassionate”.

\textsuperscript{63} The Code of Criminal Procedure, 1973
\textsuperscript{64} (1974) 4 SCC 443
Likewise, if others involved in the crime and similarly situated have received life imprisonment or if the offence is only constructive, being under Section 302, read with section 149, or if the accused has acted suddenly under another’s instigation, without premeditation, perhaps the court may humanly opt for life, just like where a just cause or real suspicion of wifely infidelity pushed the criminal into the crime.  

In Jag Mohan, it was held that:

“The impossibility of laying down standards (in the matter of sentencing) is, at the very core of criminal law as administered in India, which invests the judges with a very wide discretion in the matter of fixing the degree of punishment and that his discretion in the matter of sentence is liable to be corrected by superior courts. The exercise of judicial discretion on well recognized principle is, in the final analysis, the safest possible safeguard for the accused.”

In the new Cr.PC, there is an clearly identifiable change in the legislative stress that now life imprisonment for the offence of murder is the rule and death penalty is an exception.

In Bachan Singh, which is the locus classics in this regard, the Supreme Court held:

“Whether or not death penalty in actual practice acts as a deterrent, cannot be statistically proved, either way, because statistics as to how many potential murderers were deterred from committing murders but for the existence of capital punishment for murder, are difficult, if not altogether

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66 (AIR 1981 SC 241)  
impossible, to collect. Such statistics of deterred potential murderers are difficult to unravel, as they remain hidden in the innermost recesses of their mind. Retribution and deterrence are not two divergent ends of capital punishment. They are convergent goals which ultimately merge into one. To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provisions as to death penalty in Section 302, Indian Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary to express any categorical opinion, one way or the other, as to which of the two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground amongst others, for rejecting the petitioner’s argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose…… Therefore, it could be concluded that the impugned provision in Section 302, violates neither the letter nor the ethos of Art. 19.”

In one of the cases68 the court held that this sentencing discretion is to be exercised judicially on well recognized principles, after balancing all the aggravating and mitigating circumstances in the crime. These “well recognized principles” perceptibly intended those philosophies which are crystallized by

68 Supra at 24
court’s decisions. The lawmaking modification since Jag Mohan does not have the outcome of abrogating or invalidating those principles. The only result is that the application of those principles is now to be directed by the dominant encouragement of legislative strategy noticeable from Section 354(3) and 235(2) viz.

a) The severe penalty can be imposed only in the cases of severe fault.

b) While awarding sentence, in addition to other circumstances, facts related to the of the offender also should be kept in mind.

On the question of imposing death sentence following guidelines were laid down in Machhi Singh:\footnote{(1983) 3 SCC 684.}:

“The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. Before opting for the death penalty, the circumstances of the offender also require to be taken into consideration alongwith the circumstances of the ‘crime’. Life imprisonment is the rule and death sentence is an exception. In other words, death sentence must be imposed only, when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances. A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just
balance has to be struck between the aggravating and the mitigating circumstances before the option in exercise.”

In order to apply these guidelines inter alia the following questions may be asked and answered:\textsuperscript{70}:

a) Is there anything which is not common about the offence which has been committed which renders sentence of life imprisonment inappropriate and which requires for a death sentence?

b) In the given circumstances of the crime, is there any scope for an alternative other than imposing death sentence even after considering the extenuating conditions which speak in favour of the accused?

If, even after considering all the facts and circumstances aforesaid mentioned and bearing in mind the replies to the questions mentioned herein above, the court reaches to a conclusion that death sentence is warranted, it would proceed to do so.

The Apex court in Lehna\textsuperscript{71} after considering its pervious judgments and the legislative guidelines held that imprisonment for life is the rule and capital punishment an exception. Death sentence is to be imposed in the rarest of rare cases when the collective sense of right and wrong of the public is so shaken, that it will anticipate the judiciary to inflict death penalty irrespective of their private opinion as regards appeal or else of holding on to death penalty.

In Sushil Murmu\textsuperscript{72} while upholding death penalty, the Apex Court enumerated the following circumstances where death sentence may be awarded:

\textsuperscript{70} Ibid
\textsuperscript{71} Supra note at 22.
\textsuperscript{72} (2004) Cri. 658 (SC)
• When execution or death of a person is committed in atrocious, gross, horrendous and shameful manner, so as to provoke powerful and severe resentment of the society;
• When the offence of murder is proved to have been done for a reason which shows complete depravity and meanness e.g. murder by paid killers for currency or any other incentive or cold blooded murder or where the killer is in a dominating place or in disloyalty of mother country;
• When the offence of murder is committed where a person belongs to any minority community not for any personal reason but in conditions that provoked communal rage e.g. bride burning or dowry death;
• When a series of deaths have been caused, and
• When person who was killed is a child or helpless woman or old or infirm person.

Although, the Highest Court could not stick on to its principles relating to awarding of death sentence in case of multiple murders. Taking protection under procedural doubts, it was decided by the Apex Court that where eight people were assassinated by an unlawful gathering, though it was a frightening occurrence yet due to some vagueness in prosecution’s evidence (such as doubt over acts of all members; failure to examine the doctor who gave the evidence etc.), the court converted the death penalty into life imprisonment.73

Any type and quantum of penalty must have a rationalization with some public orientation.

In Sardar Khan74, the accused was convicted under Section 302 and 498-A for killing and harassing wife. He was convicted for rigorous

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73 Ibid.
74 (2001) 6 SCC 433
imprisonment for life. In appeal to Supreme Court, the court maintained the sentence imposed by the trial court, but observed that:

“Brutality in taking away the life of the victim is only one of the factors which is required to be taken into consideration for coming to the conclusion, that the case in hand is one of the rarest case warranting imposition of death penalty.”

In Sambhal Singh\textsuperscript{75} the appellant along with his three sons was convicted under section 302/32 IPC and sentenced to death. It was found that there was close relationship between all accused, deceased and eye witnesses. The accused had killed her kith and kin on a spur of moment without preplanning. In fact, it was a result of a trivial issue. The Allahabad High Court rejected the confirmation of death sentence and converted it to a sentence of life imprisonment on the ground that the petitioner accused was an old man and had been in military and served the nation while the other accused were very young and participated in the incident under the moral influence of their father.”

In Simon\textsuperscript{76} the Apex Court declined to believe coercion as a extenuating circumstance and enhanced the sentence from life imprisonment to a death penalty. The court was of the view that the question for enhancement of sentence to award any punishment less than the maximum would shock the conscience of the court. The House of Lords\textsuperscript{77} had observed:

“It is a further consideration, not without importance perhaps, the sentence is at large and the court, can tailor the sentence to the degree of culpability which the evidence discloses.”

\textsuperscript{75} (2004) Cr.L.J. 1533 (All.)
\textsuperscript{76} (2004) 2 SCC 694
\textsuperscript{77} ( 2004 US 987)
Various theories justifies the act of punishments. From retribution to deterrence to reformation the purpose to be achieved by punishing the accused may vary. This movement is a contradiction of the social purpose of behaviour of the offender and the rehabilitative cure of criminals. The tilt of the judiciary may not be towards any particular theory but the purpose sought to be achieved is the same and i.e. to bring down the rate of crime in the society.

2.10.2 Offence of Cruelty by the Husband

Section 498A was added in the statutory laws by way of a distinct chapter in terms of the provisions of the Criminal Law Second (Amendment) Act, 1983. The said amendments were added when the need was felt to deal with the present inclination and trend in the society to effect brutality in its varied form against women to pressurize them and their relatives to fulfill the greed of dowry of the in laws..

Recently, a reported case of murder of a lady magistrate who was harassed several times before actual killing, in UP has shown that it is not only the illiterate and poor people of rural areas who are the victim of such crimes but also educated, financially sound people or urban areas against whom such offences are committed.

In Kailash Kaur, the Apex court held that

"Deterrent sentence is called for in cases of dowry deaths and harassment of women by husband or the relatives of the husband. It must be an eye opener to the offender and he must realize that he cannot get away merely by paying some amount as fine or by remaining in jail for some time."

In Nand Kishore, the Bombay High Court observed that:

78 AIR 1987 SC 1368
79 1995 Cr. L.J. 3706 (Bom.)
“Where the wife was subjected to cruelty from the very inception of marriage and died within three years, the punishment was rightly enhanced from two years rigorous imprisonment to three years i.e. the maximum punishable under the section.”

In Vasant\textsuperscript{80} it was held that the mere fact that the accused is neither a habitual offender nor does he have any criminal antecedents is hardly an argument available while dealing with matrimonial cruelty.

In Siddharaju\textsuperscript{81} it was held by the Apex Court that in a case where the wife ended her life, when her husband contracted second marriage and she was being ill-treated by her husband and the second wife, is a class of offence which can only be categorized as atrocious as the mental torture undergone by the wife is far more painful than even the worst forms of physical torture. Therefore, it is essential to award a sentence that is proportionate with the ends of justice\textsuperscript{82}.

In Mahadeo Ganga Patti\textsuperscript{83} it was held that in conviction of mother-in-law for the offence of cruelty, considering her age, the sentence was reduced to the period already undergone provided she deposited a sum of Rs. 5000 in addition to the fine already imposed.

In Narsingh\textsuperscript{84}, the court modified the sentence reducing it to the period that the accused had been in jail, without recording any reasons and without considering the crime prevalent in the society for unjustified demand of dowry. The Supreme Court emphasized that it is the duty of the court to pass appropriate order of sentence and where counsel for the accused did not raise

\textsuperscript{80} 1994 (1) Bom CR 84; 1993 Cri. LJ 1134
\textsuperscript{81} 2000 Cri.LJ 1134 (Bom.)
\textsuperscript{82} Ibid. at 38
\textsuperscript{83} 2001 Cr.LJ 1375 (Bom.)
\textsuperscript{84} (2001) 4 SCC 522
argument for acquittal, then it is hardly any ground for reduction of sentence in
exercise of revisional jurisdiction.

In Gananath\(^{85}\) the court held that the concept of cruelty and its effects
varies from individual to individual and depends upon the social and economic
status to which such person belongs. Further for the purpose of the constituting
of the offence under Section 498A, cruelty need not be physical, even mental
torture or abnormal behaviour may amount to cruelty and harassment in a
given case.

In Mohd. Hoshan\(^{86}\) the Supreme Court held that the High Court having
regard to the facts and circumstances of the case, had rightly concluded that
continuous taunting and teasing of the deceased by the appellants on the
ground or the other amounted to mental cruelty drawing her to end her.

2.11 Judicial Discretion in Awarding Concurrent or Consecutive
Sentences

It is the discretion of the court to decide whether the sentence awarded
for different offences will run concurrently or consecutively. Section 427,
Cr.PC\(^{87}\), incorporates the principles of sentencing an offender who is already
undergoing a sentence of imprisonment. The relevant portion of the Section\(^{88}\)
reads as under:-

(i) When a person already undergoing a sentence of imprisonment is
sentenced on a subsequent conviction to imprisonment or imprisonment for
life, such imprisonment or imprisonment for life shall commence at the
expiration of the imprisonment to which he has been previously sentenced,
unless the court directs that the subsequent sentence shall run concurrently
with such previous sentence.

\(^{85}\) (2002) 2 SCC 619
\(^{86}\) AIR 2002 SC 3270
\(^{87}\) Code of Criminal Procedure 1973
\(^{88}\) Ibid.
Section 427\textsuperscript{89} is related to the administration of criminal justice which provides procedure for sentencing given to an accused. The court is, before sentencing is required to take into consideration and then give a suitable order as to how the punishment given in the case, is to run. Whether it should run simultaneously or consecutively?

The above chart depicts the percentage distribution of various types of prison inmates at the end of 2014 which shows 67.60\% prisoners are under trials and only 2 \% prison inmates are actually convicted by the courts for some offence.

In Sarfuddin\textsuperscript{91} the Gujarat High Court held that –

“The basic rule of thumb over the years has been the so-called Single Transaction rule for concurrent sentences. If a given

\textsuperscript{89} Ibid.

\textsuperscript{90} Available at www.ncrb.gov.in browsed on 12-01-2016

\textsuperscript{91} 2004 Cr.LJ 725
transaction constitutes two offences under two enactments generally, it is wrong to have consecutive sentences. It is proper and legitimate to have concurrent sentences. But this rule has no application if the transaction relating to offences is not the same or the facts constituting the two offences are quite different.”

In view of the above stated legal position, the aforesaid rule has no application if the transaction relating to offences is not the same or the facts constituting the two offences are quite different\(^{92}\). That is to say that if the wrongdoer is convicted in two diverse cases for two unlike acts, then he will not get the benefit under Section 427, Cr.PC.

2.12 Pragmatic Approach of the Judiciary in Sentencing

A difficult question as to what should be the appropriate sentence in a particular case, is often faced by the courts while exercising their discretionary powers to punish the accused. How should the court decide the sentence and use their discretion in justified way? And this task is not as simple as it appears. Everyone in the society is keen to know as to what punishment is awarded to a wrongdoer and what reasons have been given to support the judgement. And at the same time the judges cannot turn their back towards such decision making. Avoiding the sentencing part of the criminal justice system will not serve any purpose and therefore the courts have to deal with it and that too in a rationale manner. Therefore, the point that crops up to be settled down is how the courts deal with the problem of awarding sentence to the accused?

In the previous chapter and headings the various aspects related to sentencing have been already discussed, starting from the meaning and concept of sentencing. After discussing all those aspects the conclusion has to

\(^{92}\text{Ibid.}\)
be drawn. Such conclusion cannot be exclusively on the basis of the individual interpretations. The interpretations of the courts in the form of precedents cannot be ignored as the doctrine of *stare decisis* is an important part of the country’s rule of law. Therefore, what we conclude will be based upon two viewpoints.

- The opinion of the Supreme Court and High Courts on the problem in hand?
- The observations of the writer of this thesis who has evaluated the problem after researching the material available on sentencing with her own viewpoint.

First of all, the precedents set by the Higher Courts of the country regarding the problem of sentence awarding by the judicial officers, will be seen and therefore, it is required to make a reference to some of the recent decisions of the Higher Courts.

In *Shyam Narain*\(^{93}\), the Apex Court observed that the imposition of sentence is done for the purpose of making the accused realized that he has committed a crime which has created a dent in the society and the society does not suffer because of such crimes.

In *ShaileshJawantbhai*\(^{94}\), the Supreme Court observed, “In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix.”

### 2.13 Judicial Decisions

In *Munna*\(^{95}\), the court reiterated the observation of the Supreme Court as held in *B.G.Goswami*\(^{96}\) in the following words-

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\(^{93}\) AIR 2013 SC 2209  
\(^{94}\) (2006) 2 SCC 359  
\(^{95}\) (2000) DLT 764 (DVB)  
\(^{96}\) AIR 1973 SC 1457
“Now the question of sentence is always a difficult question requiring as it does proper adjustment and balancing of various considerations which weigh with a judicial mind in determining its appropriate quantum in a given case. The main purpose of the sentence broadly stated is that the accused must realize that he has committed an act which is not only harmful to the society but is also harmful to his own future, both as an individual and as a member of the society. Punishment is designed to protect society by deterring potential offenders as also by preventing the guilty party from repeating the offence, it is also to reform the offender and reclaim him as a law abiding citizen for the good of the society as a whole. Reformatory, deterrence and punitive aspect of punishment, thus play their due part in judicial thinking while determining the question. In modern civilized societies, however, reformatory aspect is being given somewhat greater importance. Too lenient as well as too harsh sentence lose their efficaciousness. One does not deter by making the offender a hardened criminal.

To a greater extent, this study emphasizes the considerations which are to be kept in mind by the judges while exercising their discretion in giving sentence on the accused persons.

In Ratiram97, Justice ArijitPasayat observed:

“The sentence has to be always proportionate to the crime. Punishment serves a purpose in as much as it acts as deterrent for those who have the propensity to take law into their own hands. The principle of proportion between crime and

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punishment is a *principle of 'just desserts'* that serves as the foundation of every criminal sentence. This is justifiable. Judges in essence affirm that punishment ought always to fit the crime, yet in practice, sentences are determined largely by other considerations; sometimes it is correctional needs that are offered to justify a sentence; sometimes the desirability to keep him out of circulation and sometimes to traffic results of his crime proportion between crime and punishment is a goal respected in principle and in spite of errant notions; it remain a strong influence in the determination of sentence.”

In Ghanshyam\(^98\), it was observed by the Supreme Court that-

In view of the purpose for which a sentence is imposed, it cannot be laid down as a rule of universal application that long passage of time in all cases would justify minimal sentence. Undue sympathy to impose inadequate sentence would do more harm to justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of the court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc.”

Balancing is what is required to be made while awarding sentence to an accused. That balancing is between the rights of the accused and the interests of the society at large. Indeed it will be a difficult task to maintain the faith of the society while exercising the judicial power to sentence or punish. To assess the guilt of the accused and then to punish with appropriate punishment without any foolproof formula is indeed a difficult task. The sentence awarded to the convict should be appropriate and not inconsistent with the brutality

\(^{98}\) AIR 2003 SC 191, 2003 AIR SCW 4547.
with which the crime has been committed. If death penalty is not given even in the case of cold blooded murders then the theories of punishment, be it deterrent, preventive or retributive, will lose its relevance.

In Kishan\textsuperscript{99} the Supreme Court observed –

“The object should be to protect the society and to deter the criminal in achieving the vowed object of law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result wise counter-productive in the long run and against social interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong.”\textsuperscript{100}

\textsuperscript{99} AIR 2005 SC 1250, 2004 AIR SCW 6566
\textsuperscript{100} Ibid
Whatever is the punishment given to the accused; it should not be inapt and should fit in to and be constant with the immoral and inhumane conduct of the accused. The sheer size of the offence warranting communal hatred should also be considered and the sentence should react to the society’s cry for justice.

2.14 Review

It is not as simple as it appears. Theories on one hand and justice on the other hand make the job of the court to give punishment a lot more difficult. As there is no straight jacket method in deciding as to which theory can completely validate the sentencing method. It all depends on numerous factors, which fluctuate from time to time and also from society to society. Each theory has its own pros and cons. At a particular period of time one theory might have shown the justification more as compared to the other competing theories, but at other point of time, there can be a reversal of the situation. All these theories are fundamentally the product of human perception and human intelligence revolves around the pivot of reasonable facts. Therefore, it is only the reasons assigned to a particular theory that distinguishes that theory and puts it above the other theories. All the theories are the guiding torch for the evolution of the penal policy.

An ideal penal policy should resort to reformation in case of juveniles or first offenders and deterrence for recidivists and hardened criminals. It is for this reason that modern penologists lay greater emphasis on institutional methods of treating the offender rather than the traditional methods of punishment, which have now become obsolete and outdated. The penal system should be so devised, as to cause minimum of suffering to offenders and at the same time develop social morals and social discipline among citizens. In short, it should neither be intolerably severe nor unrealistically lenient. It must be stated penal policy reflects the societal reaction to crime and therefore the motive for punishment should largely depend on the social structure and
accepted norms and values of a given society. The need of the days is for rehabilitation programme for all inmates with a substantial diminution in use of imprisonment and incarceration.

The punishment to be awarded to an offender had always been a point of discussion since time immemorial, among various sectors of legal fraternity. But a single and satisfying answer has not been found to meet out the debate. Courts and various jurists have time and again laid down various yardsticks to answer the question of quantity and the quality of awarding of sentence on the offenders. From those guidelines it is clear that one has look at various factors to be see in the light of facts of the case varying from case to case. What those facts are is a matter of question of fact. So no pigeon hole theory can be laid down to answer the question of sentencing of an offender.

In the words of Mahatma Gandhi\(^\text{101}\),

“There is no doubt that the custom is heartless. The system has to go. Marriage must cease to be a matter of arrangement by parties for money. Any young man who made dowry a condition of marriage discredited his education and his country and dishonoured womanhood… and young men who soil their fingers with such ill-gotten gold should be excommunicated from society.”