C H A P T E R - FOUR

SENTENCING: PATTERNS AND EFFICACY

I. SENTENCING: VARIOUS SYSTEMS

The process of criminal justice reaches its logical conclusion in its third phase- the sentence based on evidence.[1] In the sentencing stage the defendant either pleads guilty to/is found guilty of the criminal offences. There after the court decides on appropriate disposition of the offender and pronounces sentence-a decision which is often complex and difficult for the Judge. Sentencing is crucial strategy of criminal law, in achieving social defence and rehabilitation of the delinquents.[2] It is a facet of the social justice and the court has a very important role in it. The personality of the sentencing judge permeates the sentencing process, to a very great extent. As a Judge, while administering justice, is influenced by the tides and currents of the human emotions and patience, like human beings. But he is enjoined by law to restrain and control such emotions, else he will not be qualified to try a criminal case and impose a sentence after conviction has been recorded.[3]

In earlier times, the imposition of the sentences were fairly standardized, Specific punishments for offences were laid down by the law, and once a verdict of guilty was returned, the Judge merely ordered the appropriate sentence to be carried out. The focus of attention was the offence and not the offender. The sentencing Judges, knew very

little, about the places to which they were consigning offenders, for varying periods upto life time. The sentencing Judge was not bound to choose penalities designed for reformation and rehabilitation of the offenders or adapt the punishment to their needs and potentialities.

In recent years the situation has now changed as a consequence of changes in societal reactions to crime and criminals. In the last half century the science of criminology has taken great strides. There has been rethinking about the crime and punishment. The process is continuing. Winds of compassion for the criminal are blowing the world over. Draconion notions and passion for retribution are yielding to "Mankind's concern for charity".[4] Now, it is believed that the sentence must be in accordance to the offender, rather than the offence, so that he can return to the fold of society as a law abiding citizen. Thus sentencing requires considerations beyond the nature of the crime and circumstances surrounding it.[5] Sentencing is a post-conviction stage, and thus involves the additional material, in order to award a proper sentence.

It is now recognized that longer the sentence of imprisonment the less are the chances of resocialization in the community. Nature and length of the sentences have direct bearing upon the future of the offender. The appropriateness of the sentence imposed by the court, will determine in large measure the effectiveness of correctional programme.

In this chapter, besides the English, American and Indian sentencing system, it is proposed to the efficacy and forms of the sentences, and their objectives.

I. SENTENCING IN ENGLAND AND U.S.A.

The sentencing power of a court in England is derived from the Crown. In form the offence is against the Queen the Judge is her agent in determining the sentences and the Queen's representatives can set aside or modify the sentence imposed. The sentence imposed by the court is a statement of the maximum length of time for which the prisoner can be detained.

No doubt, the sentencing process has been a judicial determination of the appropriate punishment for a specific crime, but extensive changes in judicial power, have taken place in the last century. In early days, when a judge sentenced an offender to 10 years in prison, there was almost a certainty that he would serve ten years to the day. But with the increased use of the administrative forms of 'sentence shortening' (such as goodtime, pardon, parole and clemency) now there is no correlation between the judge's sentence and the time offender served. Now, the sentencing courts have generally accepted the concept of the indeterminate sentence, which grants correctional administrator's discretion in individualizing programmes for the individual offenders.

The judicial power, emanating from the Court system of U.S., has its origin in the constitutional separation of powers. There are essentially five different sentencing structures,[7] which are used by the sentencing courts:

i) Maximum and minimum sentence fixed by the Court.

ii) Maximum and minimum fixed by the Court, but minimum not to exceed a certain fraction of maximum.

iii) Maximum term fixed by the statute and minimum by the Court.

iv) Maximum term fixed by the court, minimum by law.

v) Statutory maximum-minimum term to be imposed by the Court.

But, increasing use of discretionary powers of prison management and correctional authorities tends to restrict the powers of the sentencing courts. Moreover, the Criminal Justice Act 1967, has considerably decreased the powers of the Courts to deal as they wish with the offenders by its provision for mandatory suspension of certain short sentences of imprisonment.

In U.S.A. there is also constitutional prohibition against the cruel[8] and unusual punishments. However, after the revolutionary war, State Constitutions included clauses indicating that cruel and unusual punishments, should not be inflicted. Subsequently, this idea was incorporated in the Eighth Amendment of the Constitution.[9] The U.S. Supreme Court, as early as 1910, observed:

> "The Eighth Amendment, is not to be fastened to the absolute, but may acquire meaning as public opinion becomes enlightened by human justice".

Generally both in England and U.S.A. Courts, have a number of 'sentencing alternatives', and they enjoy wide discretion in selecting a proper sentence. In England, the courts have the discretion of awarding the sentence in an 'indeterminate form', whereby the administrative authorities can adjust it in accordance with the individual needs. In U.S.A. the courts can pass the sentence of imprisonment which may be either in an indefinite or indeterminate form.

Indefinite term of imprisonment means that the court prescribes the minimum and maximum terms. The prisoner cannot be released by the jail authorities till the minimum period of the sentence is served, nor can he be kept in prison beyond the maximum term allowed by the court. In New York, there are three types of indefinite sentences. The first type of indefinite sentence is in the Elmira Reformatory, where the prisoner can be detained for any period of time as the authorities at the prison think necessary for his reformation. It is subject to the maximum period prescribed for such an offence under the Code, but there is no minimum-sentence fixed under this form of imprisonment. The second type of the indefinite sentence, requires that the Law fixes a maximum and minimum period of detention. It is for the prison authorities to release the prisoner within the prescribed minimum and maximum

sentences. The third type of the indefinite sentence in New York, requires that the maximum period of detention, for all offences as three years in the case of detention in a penitentiary or reformatory and two years in the case of detention in a workhouse. The Parole Commission has, with the approval of the judge who sentenced the offender, discretion to release a prisoner on parole. In one form or the other, the system of indefinite sentence has been adopted in several states of U.S.A., such as Ohio, Michigan, Illinois, Massachusetts, Pennsylvania, Minnesota, Kansas, California, Indiana and South Dakota.[10] On the other hand in an indeterminate sentence, the court does not specify the minimum or maximum limit of the sentence, but the discretion is left with the prison authorities. In other words, the sentence is indeterminate, when the release of the prisoner, depends upon his behaviour in the prison and his aptitude towards the reformation.

2. SENTENCING IN INDIA: VARIOUS FORMS:

In India, the courts derive their sentencing power from the Criminal Procedure Code.[11] Here offences are divided into two groups: (i) Offences under the Indian Penal Code, and (ii) Offences under any other law.

Any offence under the Indian Penal Code may be tried by

a) The High Court, or
b) The Court of Sessions, or
c) Any other court by which such offence is shown in the First Schedule of Criminal Procedure Code to be triable.[12]

An offence under any other law shall be tried by the court, empowered by such other law to try it.

Here the sentencing process is totally a judicial determination and the courts have to pass definite sentences. In the matter of sentencing of offenders, law confers wide discretionary powers on the judges.[13] The law normally indicates the maximum punishment to be awarded for an offence and then leaves it to the discretion of the court to pass an appropriate sentence within that maximum limit.[14] For instance, in case of murder punishment is provided under S.302 of the Indian Penal Code, which runs as under:

> "Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine".

In this 'form of the sentence', the court can exercise its discretion only within the four corners of the relevant section and can award sentence only in the 'definite form'. The High Court can pass any sentence authorised by law.[15] Sessions Judge or Additional Sessions Judge can pass any sentence authorized by law, but death sentence shall be subject to the confirmation by the High Court.[16] Assistant Sessions Judge can pass any sentence except (i) death, (ii) imprisonment for life, (iii) imprisonment for more than 10 years.[17] Chief Judicial Magistrate/Chief Metropolitan Magistrate can pass any sentence authorized by law, except a

sentence of death or imprisonment for life or imprisonment for more than seven years.[18] Metropolitan Magistrate or First Class Magistrate can award imprisonment for not more than three years or fine not exceeding Rs. 5,000/- or both,[19] and second class Magistrate can award imprisonment for not more than 1 year or fine not exceeding Rs. 1,000/- or both.[20]

The Criminal Procedure Code has also conferred the right of appeal,[21] upon the party which is aggrieved by the judgment of the criminal court. Criminal appeals to the Supreme Court under the Criminal Procedure Code 1878, were regulated by the constitution.[22] Art. 134 of the Constitution of India provides:

> An appeal shall lie to the Supreme Court from any judgment, final order or sentence in criminal proceedings of a High Court in India, if the High Court:

(a) has an appeal reversed an order of acquittal of an accused person and sentences him to death, or any court subordinate to its authority has in such trial convicted the accused person and sentenced him to death; or

(b) certifies that the case is a fit one for appeal.

The highest appellate or revisional court, under the Criminal Procedure Code 1878, was the High Court. The law has undergone a significant change in the present Criminal Procedure Code 1973, which provides for appeals to the Supreme Court in the following circumstances:

i) Any person convicted on a trial held by a High Court in its extraordinary original criminal jurisdiction may appeal to the Supreme Court.23

ii) Where the High Court has on appeal reversed an order of acquittal of an accused and convicted him and sentenced him to death or to imprisonment for life or to imprisonment for 10 years or more, he may appeal to the Supreme Court.24

Thus, if a case is tried by the Sessions Judge who has convicted and sentenced the accused to death, an appeal shall lie to the Supreme Court under Art.134(1) of the Constitution, after the High Court has rejected the appeal to it under the provisions of the new Criminal Procedure Code. Further, the Supreme Court in Ram Kumar Pande V. The State of Madhya Pradesh.[25] observed that no certificate of the High Court is required for an appeal, where an acquittal has been converted into a conviction under Section 302/34 Indian Penal Code and the sentence of life imprisonment has been imposed on the accused. In such cases appeal lies as a matter of right to the Supreme Court under the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970.

Punishments for sentencing of the offenders are contained in more than two hundred Indian statutes. However, the bulk of the offences and punishments are to be found in the Indian Penal Code (Act XLV of 1860). S. 53 of the Code provides the following kinds of the punishments:[26]

First:-	Death;
Secondly:-	Imprisonment for life;
Thirdly:-	(Deleted)
Fourthly:-	Imprisonment which is of two descriptions, namely: 1) Rigorous, that is, with hard labour; 2) Simple;
Fifthly:-	Forfeiture of the property;
Sixthly:-	Fine.

There were also provisions for transportation, penal servitude and whipping. The draftsmen of the Indian Penal Code had also considered the punishment of dismissal from office, but being purely executive action, it was rejected being outside the purview of the judges. Pillory and display of the offender on donkey was considered to be not in keeping with refined sentiments.[27] The whipping was not originally provided for in the code. It was in 1864, that a Whipping Act was passed and sentence of flogging was introduced in certain cases. This Act was amended in 1909, which considerably modified the rigour of the previous Act and confined whipping only to convicts and juveniles with previous record. It remained in the Penal Code only upto 1955, when it was abolished by the Parliament.[29] The sentence of transportation for life was next to death in order of gravity, but it figured more largely than the death penalty. Transportation is only another name for banishment. At the time when the Indian Penal Code was originally enacted, it was thought that the ordinary man in India feared very much

the "black-waters" and going beyond the seas. In sentencing the person to transportation, the sentencing judge was not required to specify the place, to which person sentenced was to be transported. The transportation as a punishment has been abolished in 1955.[30] The penal servitude meant, keeping of an offender in confinement and compelling him to labour. The punishment of the penal servitude under Section 56 of the Indian Penal Code was meant for Europeans and Americans only and could not be awarded to the Indian Offenders. This form of the punishment was also abolished in the year 1949.[31]

It appears that in these forms of the punishment, there was no discretion with the sentencing judges to adjust the sentence, in accordance with the individual needs of the offender. Thus there was no hope for the reformation of the offenders. The whipping was a punishment which caused disgrace to the offender and exposed him to the public ridicule, thereby forcing him to do crime again. The practice of transporting criminals was defended by some criminologists, on the ground that it eliminated the hopeless and incorrigible criminals from the population, and served as a means of intimidating the prospective criminals and thus increasing the deterrent influence of the punishment. Even in the modern times we find it is suggested occasionally: "Send criminals away to get rid of them, the farther away, the better". But it is the old short-sighted policy, "out of sight, out of mind". It is

undoubtedly one of the vestiges of an outmoded correctional philosophy and one of the most repulsive phases of human activity in dealing with the criminals. Experience shows that transportation has proved a ghastly failure, wherever it has been tried.

(i) DEATH:

The sentence of death stands in the forefront in the category of punishments. The question, whether the state has the right to take away a man's life, has always been agitated and its validity has often been questioned. However, in Bachan Singh V. State of Punjab[32], the Supreme Court by a majority judgment, upheld the validity of death sentence as punishment for murder under S. 302 of the Indian Penal Code. The majority ruled that provision of death sentence, as an alternative punishment under S. 302 Indian Penal Code could not be held to be unreasonable and not in public interest. It did not violate either the letter or the spirit of Article 19 of the constitution. The court further observed:

> "...It could not be said, that the Constitution framers, considered death sentence for murder or the prescribed traditional mode of its execution as a degrading punishment which will defile 'the dignity of the individual', within the contemplation of the Preamble to the Constitution...

> It cannot be said that the death penalty for the offence of murder violated, the basic structure of the Constitution..,It did not contravene Article 21, which guarantees life and personal liberty..."

No doubt the Supreme Court has, laid down that the death sentence is constitutional but it is an issue upon which the moralist and the jurist are never likely to agree. Reformists have always been and are of the view that capital punishment is a barbarous relic of the past when life for life, eye for eye, or a tooth for a tooth was a common form of revenge. On the other hand the state authorities justify its retention in the penal laws on the ground that it deters criminal from committing most henious crimes and enables the state authorities not only to maintain law and order in the land but also tends to generally elevate its conception of and respect for human life and thus purges the society of its canker worms. Hackel regarded capital punishment as a process of artificial selection. Garofalo, went even to the extent of saying that elimination of criminals was a sort of moral war for the good of the society. According to Lombroso capital punishment, serves as a threat to the incorrigible and habitual offenders. George Ives is of the opinion that the incorrigible or hopeless criminal should be painlessly removed rather than the state should have to maintain him unnecessarily.

In India the sentence of death may be passed for the following offences under the provisions of Indian Penal Code:

= Waging or attempting to wage war or abetting the waging of war against the government of India.[34]

= Abetting mutiny by an officer, soldier, sailor or airman in Army, Navy or Air Force of the Union of India, if the mutiny is actually committed in consequence thereof.[35] Here death sentence, is an alternative punishment with imprisonment for life or imprisonment for ten years plus fine.

= Perjury as a result of which an innocent person suffers death.[36] Here also death sentence is an alternative with life imprisonment or with rigorous imprisonment for ten years plus fine.

= Murder:[37] The death sentence is an alternative with life imprisonment plus fine.

= Abetment of suicide of a minor, an insane or an intoxicated person.[38] For this offence also death sentence is an alternative with imprisonment for life or imprisonment not exceeding ten years plus fine.

= Attempt to murder, by a life convict provided, hurt is caused to any body by such attempt.[39] It may be interesting to mention here that mere attempt by a life convict on the life of a person, is punishable with death, even though only hurt is caused. However, the word "may" in the second paragraph of S.303, apparently invests the judge with the discretion in the matter of awarding this punishment. But there being no alternative punishment provided for, it seems very doubtful with what punishment will the judge alternate the sentence of death.[40] Under this section, it is obvious that the discretion of the sentencing judge is limited to one sentence only.[41]

= Dacoity accompanied with murder. Here also the sentence of death is an alternative with the imprisonment for life or rigorous imprisonment for ten years plus fine.

An analysis of the above provisions of the Penal Code shows that law vests in the judge a wide discretion in the matter of passing a sentence, and as such the award of death penalty, except in the solitary case provided under S. 303, is left to the discretion of the court.[42] The draftsmen of the Code emphasised that the sentence of death ought to be inflicted very sparingly.[43] As regards the mode of executing the sentence of death, the Code of Criminal Procedure provides that "when any person is sentenced to death, the sentencer shall direct that he be hanged by neck till he is dead".[44] When the accused is sentenced to death by the Sessions Judge, it is the duty of such a judge to inform the accused of the period within which, if he wishes, he can appeal and his appeal should be preferred.[45] Further, the sentence of death can be executed, only when it has been confirmed by the High Court. The Supreme Court in Subhash and Another V. State of U.P.[46] observed that on reference for confirmation of the sentence of death, the High Court is under obligation to proceed in accordance with the provisions of Ss 375 and 376 of the Criminal Procedure Code 1973.[47] The Supreme Court has laid down that the High Court must see whether the order passed by the Sessions Court is correct and examine the entire evidence for itself, apart from and independently of the Sessions

Court appraisal of that evidence. If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed and may, if it thinks fit, commute the sentence to imprisonment for life.[48] Similarly, in France, U.K.,U.S.S.R. Czechoslovakia Yogoslavia, Australia, Netherlands, New Gvinea, Laos, China, Cambodia, the Central African Republic, and Morocco, the pregnant women are exempted from being executed. The law provides only for the postponement of the execution for a period which varies according to whether the women sentenced to death, breast-feeds her child or not. In Iran statutory period of postponement is three months but two years in case of breast-feeding. In Greece the period is 30 days and six months in case of breast-feeding. But in practice, the postponement of execution generally leads to subsequent commutation of the death sentence. There is also statutory provision in favour of all minors for exemption from the death sentence.[49] However, the death penalty has been abolished in a number of countries, and in countries which have retained the death sentence in the statutes,it is used only in some exceptional circumstances.

In India, no doubt the death sentence has not been yet abolished, but the legislature as well as the judiciary have shown its aversion towards its execution. After the amendment of S.367 Criminal Procedure Code 1898 and enactment

of the New Criminal Procedure[50], the court has to state the special reasons, if it awards the sentence of death, in case of offences, which are also punishable with the sentence of imprisonment[51]. Sub-section 3 of S. 354 of the Code of Criminal Procedure 1973, provides as under:

> "...when the conviction is for an offence punishable with death or, in the alternative, with the imprisonment for life or imprisonment for a term of 10 years, the judgment shall state reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence..."

The above provision shows that the legislative emphasis has shifted from the death sentence to that of life imprisonment[52]. The death sentence in the over-whelming majority of the cases are reduced to life imprisonment either by the Supreme Court on appeal or through the presidental pardon. Statistics available from 16 states and 4 union territories, from 1961 to 1971, show that 6,733 persons were admitted into prison with death sentences, but ultimately, 787 persons were actually executed[53], i.e. only 11.68 percent. Further, there has been a steep fall in the rate of execution from 1971 to 1979[54]. In our study[55] we found that in majority of the cases (95%), the death sentence of the prisoners was reduced to that of life imprisonment.

The Supreme Court in Hari Har Singh V. The State of U.P.[56] laid down that the death sentence is to be awarded when the murder is committed in a brutal manner or when the nature of the crime is ghasty. Further the court in Praveen Kumar

Gupta V. State of M.P.[57], observed, that after the amendment of the Criminal Procedure Code, the Court is not obliged to record reasons for not imposing the sentence of death and the matter is left to the discretion of the court. This discretion has to be exercised in accordance with the progressive spirit of the time.

A review of the Supreme Court decisions in the recent years shows that the court has reduced the 'sentence of death' to that of imprisonment for life, or has refused to interfere with the sentence, on the following grounds:

a) Age of the accused: The Supreme Court in a number of cases, reduced the sentence of death to that of life imprisonment, on the ground that the convict was a young person. In Raghbir Singh's case[58], the court reduced the sentence of death to life imprisonment and observed that the convict was in his twenties and it was a factor relevant in considering the sentence. Similarly in the appeal cases of Mohd. Aslam[59], Ashok Laxman Sohoni[60], Bachachey Lal[61] and Attukkaran[62], the court reduced the death penalty to that of life imprisonment on the basis of young age of the convicts.

b) Long lapse of time: Where the appellant has been under the shadow of death sentence for a long interval or where the trial procedure has been unduly protracted the

Supreme Court has shown its inclination towards 'life imprisonment' rather than death sentence. In Sadhu Singh V. State of U.P.[63], where the appellant was under the spectre of the sentence of death for over 3 years and 7 months, the Supreme Court, observed, that in such circumstances they thought the sentence of imprisonment for life could be substituted in place of the death sentence. In the State of Maharashtra V. Manghva Dhavu Kongil[64], where the appellant was tried and convicted for murder with the attempt to commit rape on young woman, the Supreme Court observed, that this was pre-eminently a fit case for imposition of sentence of death, but due to long lapse of time, he would be sentenced to life imprisonment only. Similarly, in Vivian Rodrick's case[65], Neti Sreeramula's case[66] Bhagwan's case[67], Suresh's case[68] and Sahai's case[69], the Court reduced the sentence of death to life imprisonment because the appellants had undergone the agony of the long delay.

c) Emotional or any other Stress: The Supreme Court in a number of judgments has given due consideration to "the emotional or sudden impulse" of the appellant, under which the crime was committed. Such a "stage of the mind" gives negative effect to the pre-meditation or any other 'strong motive' to commit the offence. The Supreme Court in Carlose Joqnand Another V. State of Kerala[70] laid down, that where the accused persons were in the grip of

emotional stress at the time of committing the offence, it would not be a case,where death sentence would meet the ends of justice. The sentence for the imprisonment for life was held to be adequate one. The Court also in Ummihal V. State of M.P.[71] where the appellant was convicted for committing double murder, reduced the death sentence to that of life imprisonment on the ground that the offence was committed in the fit of rage. Similarly, the Court, allowed the appeals of Thangiah[72], Asgar.[73], Namu Ram Bora[74], Gajendra Singh.[75] Dhanna Ram[76], Ramu[77] and Sultan[78] on the grounds of emotional stress or the motive was not known, and reduced the sentence to that of life imprisonment.

d) Scuffle or Land Dispute: The court has also modified the death sentence to that of life imprisonment, where the facts of case revealed that the offence was committed because some scuffle or land dispute between the parties concerned. In Shidagouda Ningappa Ghandavar V. State of Karnataka[79], there was some land dispute between the father of the deceased and certain other persons, which led to murder of the young boy. The Court observed,that since the appellant was not a habitual criminal, and the circumstances which led to the crime were not likely to recur, the sentence of death could be reduced to that of life. Similarly in State of U.P. V. Ram Swarup[80], the court reduced the sentence to life imprisonment, because there was some scuffle between the parties.

In Gurswamy V. State of Tamil Nadu, where there was family dispute and the accused was convicted for the murder of his father and brother, the sentence was modified to that of life imprisonment.

e) Role of the Victim: The Supreme Court and other courts have also taken cognizance of the role played by the victim[82], at the time of commission of the offence, in order to adjust the sentence in accordance with the canons of justice. In Nika Ram V. The State of Himachal Pradesh[83], where the deceased abused the accused and in Subbash Thevar V. State of Tamil Nadu[84], where the appellants were smarting under the feeling that their community had been humiliated by the deceased, the Supreme Court laid down that, in such circumstances, the extreme penalty of death was not called for, and that the lesser sentence of imprisonment for life would meet the ends of justice. On the other hand in the cases where there was no provocation[85], the Supreme Court refused to interfere with the death sentence. In Suresh V. The State of Maharashtra[86], the accused was lying on her cot, when the appellant came and stabbed her to death. The Supreme Court refused to alter the sentence of death to that of life imprisonment.

f) Modusoperandi of the Accused: The Supreme Court in the majority of the cases has given due consideration to the mode and manner in which the offence has been committed.

The court has modified the sentence in the cases, where there was no premeditation on the part of the accused, but has refused to interfere with the sentence in the cases where the act of the accused was deliberate,[87] preplanned,[88] premeditated,[89] cruel and inhuman,[90] brutal,[91] cold blooded,[92] against the public servant,[93] against an innocent and unarmed person,[94] and against a witness.[95] The Supreme Court in Lajar Masih V. State of U.P.[96], in respect of the award of the sentence observed, that the horrendous features of the crime, the hapless and helpless state of the victim, steel the heart of the law for a sterner sentence.

An analysis, of the above decisions of the Supreme Court makes it clear that the court has shown its general tendency towards the 'life imprisonment' over that of the death sentence, except in some cases, where the act of accused was very gruesome.[97] Justice Krishna Iyer, has rightly observed:

> "... The death penalty starkly lingers on the statute book although optional human engineering by judges is still permissible..."

The Supreme Court in Ediga Anamma V. State of Andhra Pradesh[98] made the following observation against the death sentence:

> "...We assume that a better world is one without legal knifing of life, given propitious social changes. Even so, to sublimate savagery in individual or society is a long experiment in spiritual chemistry where moral values socio-economic conditions and legislative judgment have a role. Judicial activism can only be a singnpost, a weather van, no more. We think the penal direction in this jurisprudential journey points to life prison normally,as against guillotine, gas chamber,electric chair, firing squard or hangman's rope. 'Thou shalt not kill'is a slow commandment in law as in life, addressed to citizens as well as to states, in peace as in war..."

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Justice Krishna Iyer, further observed:

> "Our developmental decade must turn benignant eye on life's right to life, as the basic condition of human development and as a problem of the Third World within every nation. Do remember that the blow of the capital sentence often falls on the socially, mentally, and economically backward, on the brave revolutionaries and patriotic dissenters, on the derelicts and desparates, on the lowliest and the lost, and on those who have turned deliquent because society by its continued maltreatment, cultural perversion, and environmental pollution has made them so. The villian of the peace, in the larger view, is psychopathic society itself, the victims are socalled criminals and other sufferers of crime . And miscarriage of justice through judicial error, minimal may be, cannot be ruled out, and so the bar and the bench must professionally purge themselves of the blood the seal of justice. A narrow perspective misleads. A wider world view illumine. Right's writ must run, in the long run, even against Might's fist..."

Very recently, the Supreme Court by an extra-ordinary ex-parte order stayed the execution of Billa and Ranga, and all other condemned prisoners in the country, whose mercy petitions had been rejected by the President.

Mr. R.K. Garg, Counsel for the prisoners contended that under the Art. 72 of the Constitution, the power of the President to grant pardons, reprieves, respites, or remissions of punishment, is coupled with a duty which must be exercised fairly and reasonably. He argued,that under the Constitution the President was required to give full reasons for rejecting a mercy petition. Such reasons should be fair and be able to stand the test of judicial review.

The Court observed, that the question raised by Mr. Garg was of far-reaching importance and was to be examined with care. Chief Justice Chandrachud observed that the power of the President was to be applied equally to all condemned persons. He further observed that it was only the poor and the illiterate who failed to get reprieves. An illiterate or poverty-stricken person, facing the hangman's noose, could write only one line asking for mercy, while the rich and educated could afford lawyers who cite examples of other cases in seeking relief.[100]

Nevertheless, the Supreme Court, on January 20,1982, reversed its own blanket stay of capital punishment all over the country and cleared the way for the execution of Billa and Ranga.[101] The Supreme Court, found that no circumstances existed for interfering with the death sentences of Billa and Ranga. Further the Court held that there was

no justification in the petitioner's contention that by rejecting their mercy petitions, the President had transgressed his discretionary power under Article 72. In the case in point, the Court observed:

> "We are quite clear that not even the most liberal use of the President's mercy jurisdiction could have persuaded him to interfere with the sentence of death".

Statistics of different countries in respect of capital punishment go to show that there is no deterrent value of such punishment.[102] The inefficacy of death sentence as a deterrent is brought out with characteristic wit by Dr. Johnson, who according to Boswell, noted pick-pockets plying their trade in a crowd assembled to see one of their member executed. Further, the United Nations Committee that studied capital punishment found that there is no co-relation between the existence of capital punishment and lower rates of crime. Nearly about seventy countries, and many states in the United States have abolished the death sentence.[103] Dr. Hiranandani,[104] has also shown that death penalty is not a deterrent.

Death sentence does not provide any opportunity for the reformation and reclamation of the offender.[105] The efforts of resocialization are frustrated. Further, death sentence provides an opportunity to the dependents of the condemned prisoner to lead the life of crime, as they are deprived of their breadwinner, guardian and proctor.

(ii) IMPRISONMENT:

At present imprisonment is the main and most important 'form' of the punishment. In the primitive society, either the imprisonment was unknown or if known it was very rare. Imprisonment as a method of punishment is comparatively a modern development, getting off to a slow start in the 16th century. It became the major part of the punishment in the 19th century, and followed into the 20th century, when certain individualizing measures were introduced into the penal servitude and certain substitutes for the imprisonment were developed. Imprisonment is ordinarily confinement of a person in a penitentiary or goal by way of punishment. But such confinement must necessarily be in a place prescribed for the purpose.[106] Any place, wherein a person under lawful arrest for a supposed crime is restrained of his liberty, whether in the common goal, or in the house of a constable or private person, or the prison with ordinary walls is properly a prison within the statute, for imprisonment is nothing else but a restraint of liberty.[107] Thus a man can be imprisoned in his own house, if he is not permitted to go outside or if his liberty is curtailed. In India, besides the Indian Penal Code, the imprisonment figures almost in all other penal statutes. However, the Indian Penal Code provides the following ranges of the imprisonment:

a) Imprisonment for life;

b) Imprisonment for a period of 14 years;

c) Imprisonment which may extend to 10 years with or without fine;

d) Imprisonment of 7 years with or without fine;

e) Imprisonment of 5 years with or without fine;

f) Imprisonment upto 3 years or fine or both;

g) Imprisonment which may extend to 2 years or fine or both;

h) Imprisonment which may extend to 1 year or fine or both and

i) Imprisonment which may extend to 6 months or 3 months or 1 month or fine or both.

Out of the aforesaid imprisonments, only imprisonment for life needs some discussion. 'Imprisonment for life'[108] ordinarily connotes imprisonment for the whole of the life that is for the remaining period of the convicted person's natural life. The life convict is not entitled to automatic release on completion of fourteen years' imprisonment, unless the government passes an order remitting the balance of his sentence.[109] However, Dr. Gour, while commenting on Section 57 of the Indian Penal Code observed that not only for the purpose of calculating fraction of terms of imprisonment, but also for the purpose of sentence itself, 'imprisonment for life', has now come to mean imprisonment for 20 years. But Dr. Gour has cited no authority for his comments. On the contrary Mayne,[110] is of the view that S.57 of the Indian

Penal Code, strictly limited to calculations of fractions. The sentencing court must regard a sentence of imprisonment for life, as running through out the remaining period of convict's natural life.[111] Dr. Nigam, has in this connection observed, that Dr. Gour's interpretation of the 'imprisonment for life' alongwith the misreading of S.55 of the Indian Penal Code and S.35(2) of the Criminal Procedure Code,[112] gave rise to wrong impression that a sentence of 'life imprisonment' meant imprisonment for a maximum period of 20 years.

The confusion created by such a interpretation of the 'life imprisonment', was cleared up, by the judicial committee of the Privy Council in Pandit Kishori Lal V. Emperor[113] when their Lordship observed:

> "... Life convict was not entitled to be discharged after serving out 14 years' imprisonment, even assuming that sentence was regarded to be one for 20 years imprisonment and subject to remissions for good conduct..."

Their Lordships further added that they were not to be taken as meaning that life sentence must and in all cases be treated as one of not more than 20 years, or that the convict was necessarily entitled to remission. In Gopal Vinayak Godse V. State of Maharashtra[114], the Supreme Court laid down that a prisoner sentenced to life imprisonment was bound in law to serve the life term in prison, unless the said sentence was commuted or remitted by

appropriate authority under the relevant provisions of law. Recently, the Supreme Court, in State of M.P. V. Rathan Singh and others[115], observed, that from a review of the authorities and statutory provisions of the Code of Criminal Procedure, the following propositions emerge:

First, that a sentence of imprisonment for life does not automatically expire at the end of 20 years, including the remissions , because the administrative rules framed under the various Jail Manuals or under the Prisons Act, cannot supersede, the statutory provisions of the Indian Penal Code. Thus a sentence for 'imprisonment for the life' means a sentence for the entire life of the prisoner,unless the appropriate government chooses to exercise its discretion to remit either the whole or a part of the sentence under Section 401 of the Code of Criminal Procedure.

Secondly,that the appropriate government, has the undoubted discretion to remit or refuse to remit the sentence, and where it refuses to remit the sentence, no writ can be issued directing the government to release the prisoner.

Thus from the above discussion and other judgments[116] of the different courts, it is now clear that a 'sentence for life' would continue till the life time of the accused, as it is not possible to fix a particular period of the prisoner's death, so any remission given under the Rules,

could not be regarded as a substitute for a sentence of Imprisonment for life. The Rules framed under the Jail Manuals or Prisons Act, do not affect the total period which the prisoner has to suffer, but merely amount to administrative instructions regarding the various remissions to be given to the prisoner from time to time in accordance with the rules. The question of remission or a part of it lies within the exclusive domain of the appropriate government. A prisoner cannot be released automatically on the expiry of 20 years.

In the cases, where the imprisonment for life stands as an alternative with that of the death sentence, there is no option for the courts, except to award the 'life imprisonment', provided they will not go for the death sentence. The Supreme Court in Shamim Rahmani V. State of U.P.[117] observed that from the view point of common ethics, or morality, one may say that Shamim, committed no sin in shooting dead a man like Gautam, although she was contributing in the act of Gautam's lust for her. But in the eye of law, she only committed the offence of murder, punishable under S.302 of the Indian Penal Code. Further the Supreme Court in respect of the sentence of 'imprisonment for life', awarded by the trial court, observed:

> "Even if we wished we could not reduce the sentence of 'life imprisonment' imposed on her, as that is the minimum sentence provided under S.302 of the Indian Penal Code".

Thus in the cases,where the accused persons have been convicted for murder,they have to suffer imprisonment for life, even if they are in their twenties[118], because the punitive strategy of our penal code does not wish to consider these facts as they all fall outside its scope.

Further, the Penal Code has not specified the quantum of the punishment in some offences, such as abetment (S.109) and Criminal attempts (S.511). In such offences, the sentence is to be fixed in accordance with the nature and gravity of the offence, which has been abetted or attempted. Also some sections of the Indian Penal Code provide the punishment in addition to what is provided for the offence itself or in the preceeding sections. For instance. S.345, which deals with the wrongful confinement of a person, for whose liberation the writ has been issued. It provides that such a person shall be given punishment of either description, for a term which may extend to two years in addition to any other punishment to which he may be liable for such wrongful confinement. S.293, which deals with the sale etc. of obscene objects to young persons, provides punishment of imprisonment, which may be of either description and which may extend to three years and with fine which may extend to two thousand rupees. The section further provides, that in the event of second or subsequent conviction, the punishment of imprisonment, which may be of either description for a term which may extend to seven years and also with fine which may extend to five thousand rupees. In otherwords S.293,in the event of second or subsequent conviction,

provides for the enhancement of the punishment.

However, the Code except in two cases has not fixed the minimum sentence. No doubt, it was originally proposed to fix both minimum as well as maximum sentence in several cases, but the propriety of prescribing a minimum sentence in all cases was questioned by the Select Committee. Considering the general terms in which the offences had been defined, and the presence of mitigating circumstances, which may render adherence to the prescribed minimum, a matter of hardship and even injustice, it was ultimately resolved to fix only the maximum, the apportionment of sentence in each case, being left to the discretion of the judge.[119] Further, the imprisonment is of two kinds, simple and rigorous. In case of the former the convicted person is not put to any kind of work or labour. In the case of rigorous imprisonment, the convicted person was put to hard labour such as grinding corn, digging earth, drawing water and the like. But, now such hard labour has been replaced by the various correctional treatment methods, which enable the prisoner to regain a sort of self-confidence.

The Supreme Court,[120] emphasised that there is need on the part of judges to see that the sentencing ceases to be down graded to cindrella statutes. The sentence of imprisonment is followed by a number of hardships and

difficulties for the prisoner as well as his family.[121] The court, no doubt has wide discretion to fix the sentence in accordance with the particular case, but the legislature provides no guide lines for it. Consequently, it becomes very difficult for the sentencing judges, to personalize the sentence from the reformative angle. The usual trend of the trial courts, is to award the maximum possible sentence. The following table, shows the different grades of the imprisonment, to which the prisoners were sentenced by the different courts and confined in the jails, in the months of February-March 1978:

TABLE-16

(IN PERCENTAGE)

SENTENCE WISE DISTRIBUTION OF THE PRISONERS

S.No.	Name of the Jail	Total No.of convicts	No.of Lifers	Number of Convicts sentenced			
				Upto 10 Yrs.	Upto 7 Yrs.	Upto 5 Yrs.	Total
1.	Central Jail Fategarh[122]	1143	84.87	4.37	03.50	07.26	100.00
2.	Model Jail, Lucknow[123]	400	62.50	15.00	12.50	10.0	100.00
3.	District Jail,Lucknow[124]	178	13.48	22.47	30.34	33.71	100.00
4.	District Jail,Kanpur[125]	198	05.05	25.25	34.34	35-35	99.99
5.	District Jail,Fategarh[126]	98	12.24	21.43	40.82	25.51	100.00
6.	District Jail,Unnao[127]	259	10.42	34.75	35.52	19.31	100.00
7.	District Jail,Aligarh[128]	223	04.04	43.50	16.59	35.87	100.00
	Total	2499	192.60	166.77	173.61	167.01	699.99
	Mean Value	357	27.51	23.82	24.80	23.86	99.99

The table-16 shows that majority of the prisoners have been sentenced to the imprisonment which ranges upto 5 years (32.85%). It is followed by the life imprisonment (27.51%), imprisonment which ranges from 5 to 7 years (24.79%) and imprisonment which ranges from 7 to 10 years (23.82%).

It seems that sentencing judges have difficulty in adjusting the sentence in accordance with the individual needs. The Supreme Court in Mohammad Giasuddin V. State of Andhra Pradesh[129]. observed that unfortunately, the Indian Penal Code still lingers in some-what compartmentalised system of punishment simple or rigorous, fine and of course, capital sentence. There is a wide range of choice and flexible treatment which must be available to the judge, if he is to fulfil his tryst with curing the criminal in a hospital setting. In an appropriate case, actual hospital setting may have to be prescribed as a part of the sentence. In another case, liberal parole may have to be prescribed as a part of the sentence. In the third category, engaging in certain types of occupation or even going through meditational drills or other courses may be part of sentencing prescription.

Besides, the punishments, as we have discussed above, the Indian Penal Code, also provides for the 'forfeiture of property' and 'fine'.

(iii) FORFEITURE:

It is very ancient in its origin. It was meant mostly for the rich in British days in our country.[130] But this punishment has long since become obsolete and is no longer favoured by the sociologists. Sections 61 and 62 of the Indian Penal Code, which provide for absolute forfeiture of all the property of the offender, were repealed in 1921.[131] There are, however, three cases in which specific property of the offender is liable to forfeiture such as:

a) where depredation is committed on territories of any power at peace with the Government of India, such property as is used or intended to be used in committing such depredation is liable to forfeiture in addition to sentence of imprisonment and fine (S.126);

b) where the property is received knowing the same to have been taken in the commission of depredation on the territories of any power at peace with government of India or in waging war against any Asiatic power at peace with the government of India, the property so received is liable to forfeiture (Ss 125 and 127), and

c) a public servant unlawfully buying or bidding for property forfeits the property so purchased (S.169).

S.452 of the Criminal Procedure Code 1973 empowers the court to make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise,

of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

Obscene books, cards and dice seized in gambling, weapons used in assault, tools used in burglary, smuggled goods like gold, wire, opium, all are instances of articles which can be confiscated under this section. Dr. Nigam[132] has observed that this section is loosely worded and therefore requires careful construction. The penalty of forfeiture of property has also been accompanied with punishment of fine.

(iv) FINE:

The penalty of fine has been specified in a number of offences under the Indian Penal Code. It also stands as an alternative to the sentence of imprisonment, in majority of the cases. The authors of the Code state that the punishment of fine is for all offences to which men are prompted by cupidity; it is a punishment which operates directly on the very feeling which impels men to such offences. As regards the imposition of fine as sentence, the Penal Code may be divided into the following four parts:

a) Offences in which the fine is the sole punishment and its amount is limited;

b) Offences in which the fine is an alternative punishment but its amount is limited;

c) Offences in which it is an additional imperative punishment, but its amount is limited and

d) Offences in which it is both imperative punishment and its amount is unlimited.

This classification would clearly show, how the Indian Penal Code has carried out its express intention in imposing the quantum of fine.

The sentence of fine is allied to forfeiture of the property. It is,indeed, forfeiture of money by way of penalty. It was justified by the Law Commission on the ground of its universality, though they admitted that its severity should be proportionate to the means of the offender, because the fine not only affected him but also his dependants. The Supreme Court in Adamji Umar Dalal V. State,[133] laid down that in imposing fine it was necessary to have as much regard to the pecuniary circumstances of the accused as to the character and magnitude of the offence. Thus where a substantial term of imprisonment has been inflicted, excessive fine should not be inflicted to it,save in exceptional cases. The Supreme Court in the above case reduced the fine to fifteenth part of what was awarded by the trial court and laid down that the court must always bear in mind the proportion between an offence and the penalty. Further the Court,[134] observed that where a law permits a sentence of fine as an alternative, there is no need for a sentence of imprisonment at all, if it is thought that the offence

does not merit it. It is quite unnecessary to impose fines on persons who have been sentenced to death or substantial terms of imprisonment.

The courts are also empowered under S.64 of the Indian Penal Code to award the sentence of imprisonment in default of payment of the fine. However, the following four rules regulate the character and duration of period of sentence of imprisonment in default of payment of fine. First, when an offender is sentenced to the punishment of fine, the court may direct that the offender shall in default of payment suffer a term of imprisonment, which may be in excess of any other imprisonment to which he may have been sentenced for that offence or to which he may be liable under a commutation of sentence (S.64). Secondly, when the offence is punishable with imprisonment as well as fine, the imprisonment in default of payment of fine shall not exceed one-fourth of the term of imprisonment which is maximum fixed for offence (S.65). Such extra imprisonment in default of payment of fine may be of any description, that is simple or rigorous (S.66). Thirdly, where the offence is punished with fine only, the imprisonment in default of payment of fine shall be simple and in accordance with the following scale laid down by Section 67:

a) Fine of Rs.50/- or less.... Imprisonment of 2 months or less

b) Fine of Rs.100/-or less.... Imprisonment of 4 months or less

c) Fine above Rs.100/- .... Imprisonment of six months or less

However, the Supreme Court in Bashiruddin Ashraf V. State of Bihar[135] laid down that the term of imprisonment shall not in any case be in excess of the Magistrate's power under the Criminal Procedure Code.[136] Lastly, the imprisonment in default of payment shall terminate whenever, the fine is either paid or levied by the process of law (S.68). A proportional payment or levying of fine causes a proportional reduction of the term of imprisonment(S.69).

It is clear from the foregoing discussion, that the Code empowers the sentencing judge to award either a term of imprisonment or a fine or both. Where long term imprisonment is given to convicts, it is not desirable that in addition to imprisonment a sentence of fine should be passed upon them, for sentence of fine will be burden upon their family and in case of non payment of fine it will further stretch the length of imprisonment. The decision of the United States Supreme Court, in Willie E. Williams V. State of Illinois[137] is an eye-opener in this respect. In this case an indigent prisoner was convicted in Illinois Court for petty theft and was awarded the maximum sentence of one year's imprisonment and £500/- as fine. In default of the monetary payment in accordance with the provisions of the Statute, he was supposed to remain in the jail, after the expiration of the substantive term of imprisonment, in order to "work-off" the monetarily obligation at the

statutory rate of £5 per day. The trial court denied the petition in order to vacate the sentence of fine. The Supreme Court of Illinois, affirmed the decision of the trial court, holding that there was no denial of equal protection of the law by continuation of imprisonment upon the indigent's inability to pay the fine and court costs.

In appeal, the Supreme Court of the United States, vacated the judgment and remanded the case. Chief Justice Burger, expressing the view of seven members of the court, held that there was an impermissible discrimination, violative of the 14th Amendment of the constitution, when the aggregate imprisonment of an indigent state prisoner, exceeded the maximum period fixed by the statute, governing the offence involved and resulted directly from an involuntary nonpayment of a fine or court costs. In the light of this very judgment, it can be rightly said, that if a poor prisoner is imprisoned for nonpayment of fine in addition to the substantive imprisonment, it will be the violation of the spirit, underlying the Art.14 of the Indian Constitution. Further, it will undermine the modern correctional philosophy which aims at the resocialization of the prisoners.

The fine if recovered from the prisoner is to be deposited in the chest of the State. But, our Supreme Court in the recent years has shown a new trend and has given due consideration to victimology. In Mohinder Pal Jolly V. State of Punjab, the court directed that the fine

if recovered would be paid to the widow of the deceased. Similarly in other cases,[139] the Supreme Court ordered the amount of fine to be paid to the dependants of the deceased. The objective underlying these judgments is nothing but to provide some monetary help to the victims or their dependants, in order to pave the way for the resocialization of the offenders.

From the foregoing discussion, it is clear that the sentencing judge in India is not in a position to award indefinite or indeterminate sentences. Generally the sentence under the Indian Penal Code is one of a relative indeterminateness with a high fixed maximum and with absolutely no statutory guidelines for the magistrate, except such as he may glean through judicial decisions, which themselves may be too variable to serve as precise leading strings. The Indian Penal Code, over hundred years old, is hardly conscious of the remarkable strides made in modern penology and does not articulate the current thought on sentencing policy. Justice Krishna Iyer, observed:

> "Sentencing is a means to an end, a psycho-physical panacea to cure the culprit of socially dangerous behaviour. Penal strategy, must therefore strike a sober balance between sentimental softness towards the criminal, masquerading as a progressive sociology and the terror-cum-torment oriented sadistic handling of the criminal, which is actually in many cases the sublimated expression of judicial

> severity although ostensibly imposed as deterrent to save society from further crimes. Social defence, through reformation of the criminal, a task to perform of which psychology and sociology are auxiliary tools, is what strikes one as the primary object of punishment.141

Thus the sentencing judge must give due importance to the objectives underlying the sentencing policy. In otherwords, the sentencing court must not simply confine to the letter of law, in order to award a proper sentence but must also pay a due attention to the spirit of law. Proper sentence is essential for the resocialization of the offenders and the sentencing judge for this purpose must be fully aware about the 'objectives of the sentence', which have been taken in the following part of this Chapter.

II. SENTENCING: OBJECTIVES AND THEORIES:

Modern inventions, while marking an advance in art and industry, have given rise to new forms of crime.[142] New sanctions have been devised, new punishments invented, but all in vain. Even the death penalty, where it is still applied, does not restrain murderers, and experience shows that all other threats are equally futile. In the course of centuries, sentences of punishment, have moved in a circle. The idea of doing some deliberate harm to another was no part of its original character.[143] It was simply a

defensive reaction. However, with the passage of the time, defensive reaction achieved a value of its own, and to justify it, all sorts of theories, have been put forward.

The criminologists, lawyers, sociologists and others concerned with the administration of criminal justice, continue to discuss the purpose and utility of the sentences. Is it retribution, deterrence or reformation?

Here we have attempted to analyse briefly, the purpose and utility of the sentences vis-a-vis resocialization of the prisoners, in the light of past experience and judicial pronouncements.

I. RETRIBUTIVE THEORY:

This theory is based upon revenge. In the olden times, when a man injured another, it was considered to be the right of the injured to take revenge on the person causing injury. This theory advocates an eye for an eye and a tooth for a tooth. Lee,[144] has observed, that the act which is today described as a crime, was then looked upon as a private wrong. The wronged party, not the State brought the suit. The Muslim Criminal Law too is based on the doctrine of "blood for blood", with the exception, that the injured party or next kin of the deceased can forgive the wrongdoer.[145] Prof. Gillin, quotes many instances

of the working of private vengeance. In ancient Germany, for adultry the punishment was instant and at the pleasure of the husband. He cut off the hair of the offender, striped her and in the presence of her relations, expelled her from the house and pursued her with stripes, through the whole village.

According to Salmond,[146] the retribution theory, gratifies the instinct of revenge or retaliation which exists not merely in the individual wronged, but also in the society at large. He has further observed:

> "...the emotion of retributive indignation, but in its self-regarding and sympathic forms, is even yet the mainspring of the criminal law...It is to the fact, that administration of justice owes a great part of its strength and effectiveness..."

It is also argued that the justifying reason for having a system of criminal law—a system of commands plus threats—is that the system minimizes anti-social conduct and the justifying reason for punishing some one, is that he has broken law and thus incurred the penalty.[147] As the ultimate justification for any punishment is the protection of innocent members of society from the depredations of dangerous persons.[148]

Stephen,[149] suggests that the infliction of punishment is justified by hatred and hating the criminal is morally right. He observes that criminal law stands to the passion

of revenge in much the same relation, as marriage to the sexual appetite.[150] Dr. Gour, is of the opinion that both personal and public sentiments demand that the person, who has made other to suffer unjustly, should himself be made to suffer.[151] Oppenheimer, observes that whatever be the merits or demerits of vengeance or retribution, as the purpose of punishment, one may agree with Benthan, that "there can be no doubt that revenge is sweet, even to modern man... the pleasure of vengeance call to my mind sermon's riddle... It is sweet coming out of terrible, it is the honey dripping from the lions mouth".

No doubt, various arguments have been raised for the justification of the retributive theory. But, Prof. Kenny,[152] strikes a note of caution in the following words:

> "...to elevate the moral standard of the less orderly classes of the community is undoubtedly one of the functions of the Criminal Law, but it is a function which must be discharged slowly and cautiously. The law would be only stultifying itself, if when public opinion is not ripe, it converts offences, which are lightly regarded by the community into crimes requiring grave penalties..."

The theory has been criticised on many grounds. First, the retribution as a concept of punishment, implies equation of severity of punishment with the gravity of consequences. Howard Jones,[153] has rightly pointed out,

that when we really administer a penal system, so that the amount of pain suffered is graduated in relation to any criterion, whether of guilt or otherwise, suffering is essentially subjective. Any two offenders may differ widely in their sensitivity, to various types of punishment. As a result, social opprobrium may be much painful to one than the other. Secondly, this theory does not hold good for those who turn to be offenders not on their own, but due to the socio-economic or political reasons. A third and more fundamental objection is that advanced by philosophers, from Socrates to Hobhouse, that infliction of evil upon anyone can never in itself be good. Lastly, the punishment based on retribution, results in the chain of causation of crime, and from it emerges the gang of criminal.[159]

In the rule of retaliation, injured man or his group found satisfaction in revenge.[155] Criminologists are of the opinion that this is most ancient and pre-mature approach to punishment which was based on instinctive human reactions.[156] The retributive theory has no place in the modern scientific penology. It is believed that revenge is 'personal' and cannot be regarded as the basis of punishment in any civilized society. Further there is no hope for resocialization of the offenders under this theory.

2. DETERRENT THEORY:

This theory is based on the hypothesis, that the prospective criminals will be deterred from committing the crime, when those accused of crimes are punished adequately. This theory was the basis of the punishment in the mediaeval times and consequently death or corporal punishments were inflicted even for the minor offences.

The term deterrence is used in two senses. First in the usual sense that the punishment of the offender will deter others from committing the crime for which he was convicted. Under this philosophy, if the intending criminals are to be deterred by the threat of punishment, it is essential that they should be made to realize that it will be carried out, if the offence is committed. Salmond,[157] has observed, that the chief end of the law of crimes is to make an evil doer an example and warning to all those who are like minded. Secondly, it deters the person found guilty of an offence from committing further crimes by physically preventing him from doing so. In this sense it is also some what preventive.[158]

The draftsman of the Indian Penal Code gave due importance to the deterrent theory of the punishment and even now the concept of deterrence receives a prime consideration in the sentencing process. In Dulla V. The State,[159] the court emphasised that the twin objects of the

punishment, are to prevent a person from repeating the crime and prevent others from committing it. In Khana Saday Singh V. State,[160] the court laid down, that of all the important objectives of punishment, the deterrent object is an important one. Again, in Jadu Ram alias Anand Sagar V. State of Jammu and Kashmir,[161] the High Court enhanced the sentence of seven years to that of ten years, and observed, in fact such persons did not deserve any sympathy or consideration from the court, on any ground whatsoever, and the sentence imposed on such persons should be so deterrent as to serve a living example for others to prevent them from being a grave menace to society. Similarly, the court in a number of judgments,[162] either refused to reduce the sentence or enhanced it, on the ground that the offence committed by the accused was a serious one and thus deserved a deterrent sentence.

No doubt, there is a wide acceptance of deterrence doctrine for preventing the commission of crimes. But the criminologists argue that this theory is not based on human conduct. It is a punishment not to suit the criminal, but the crime. Justice Holmes, rightly observs, that what we have better than a blind guess to show that the criminal law in its present form does more good than harm.

The deterrence theory of punishment is criticised on many grounds. First, deterrent penalty has never achieved its end. Secondly, the severity in punishment does not necessarily reduce the crime rate. As in U.S.A. the statistical research has shown that the rate of murder in the states, where death penalty for committing murder has been abolished, has not increased.[163] Eysenck, observes that one may flog people for certain type of offences, but instead of deterrence, it seems to have the opposite effect. Although, the punishment is severe, the rate of recidivism is greater, than it would have been without flogging. Thus the deterrent punishment tends in the direction of cruelty without fruitful results.

Thirdly, there is a sense of resentment about the deterrent dose of punishment, which the recipient considers to be unjust. Many prisoners seem to have a smouldering sense of injustice, which often perpetuates their anti-social tendencies.[164] The present study has also found,[165] that the prisoners, who were sentenced for long terms of imprisonment, showed a sort of resentment against the society and were hostile towards the criminal justice system. Lastly, the fear inspired by most terrifying punishments, is blinded by long familiarity with it. Beccaria, in this regard pointed out:

> "...the more cruel punishments become the more human minds harden, adjusting themselves, like fluids, to the level objects around them, and the ever living force of the passions brings it about that, after a hundred years of cruel punishments, the wheel frightens men just as much as at first did the punishment of prison..."[166]

Further, sever punishment for trivial offences, makes the people unwilling to cooperate in carrying out the punishment. The deterrent punishment also leaves no hope for the correction and resocialization of the offenders.

3. REFORMATIVE THEORY:

With the growth of criminology and penology, the retributive and deterrent theories of punishment have declined and given way to the reformative theory[167] and resocialization of offenders. According to the reformative theory, the wrong doer is not only a criminal to be punished but a patient to be treated. Therefore curative forms of punishment have to be applied to reform the character of the wrongdoer and develop his better qualities, so that, he will desire to do what is right, instead of fearing to do what is wrong.[168]

Wortley,[169] in this respect observed:

> "...No system of punishment is likely to be socially useful that regards a criminal as being of different species from his fellowmen, and which does not treat him and his personality with dignity and consideration, that his nature demands..."

It is now almost accepted,that the main objective of punishment, 'the prevention and control of the crime' cannot be achieved by the retributive or deterrent sentences, but by reformation and resocialization of the offenders. Actually, the most powerful opposition to the retributive and deterrent theories came from the positivist school. It takes the offender into consideration and insists that the treatment may be related to the offender, according to his own psychological and sociological needs. The approach asserts that the deterrent value does not lie in the severity of punishment, but in the educative,moralizing function of law.

Reformation or correction is defined as "the effort to restore a man to society as a better and a good citizen". There can be no doubt about the fact, that crime rate can be controlled, if the offenders are treated as fellow human beings and are dealt in accordance with the modern correctional philosophy, which aims at resocializations of the offenders.[170]

According to this, theory, if a criminal is morally regenerated, his criminal tendencies also become extinct or at any rate dormant.[171] That is why Oppenheimer, calls punishment "a physical measure adopted to excite in the soul of the guilty true repentance, respect for justice, sympathy for their fellow creatures and love of mankind".

Reformation or correction, is aimed at moral improvement, sharpening of intellect and developing the sense of honesty. It was in this sense that this theory was adopted by the philosophers from Plato down to our age. Victor Hugo, once remarked: "to open a school is to close a prison". By this he meant that if a person of doubtful character is given a training and education in such a manner as to make him competent to earn his livelihood honestly, he would not commit crime, and hence 'opening a school' would mean 'closing a prison'.

According to the reformative theory, the society can be protected from the offenders, only when they are encouraged to abstain from the criminal behaviour, by providing them with the social, educational or vocational training, which is necessary to enable them to conform to the social pattern, from which their delinquency is a departure. For this purpose, various correctional treatment methods are employed for the reformation of the offenders in almost all the civilized countries of the world. However, the value of reformation or correction, to a greater extent depends on the spirit behind the present "Mills of Justice", of course, from arrest to the release of the prisoner. At the same time correction of prisoners is also influenced by the sentencing patterns.

Justice Krishna Iyer,[172] in respect of the punishment and correctional substitutes observed:

> "My thesis is that punishment which inflicts injury cannot improve, that prisoners are persons and must be posited with human rights, that social defence which legitimates the penal law, is promoted by therapeutic attention to inner man, not by sadistic drills based on body conscious fear. The progressive manifestation of the divinity in man is the recognition of the dignity and worth of the human person and this creative process is the healing hope of decriminalization... not stone walls nor iron bars nor other subtle barbarities. This know how of humanization alone can dissolve the dilemma".

The Supreme Court in Modi Ram and Others V. The State of Madhya Pradesh[173] observed that keeping in view the broad object of punishment of criminals by courts, in all progressive civilized societies, true dictates of justice demand that the attending relevant circumstances should be taken into account for determining the proper, and just sentence. The sentence should bring home to the guilty party, the consciousness that the offence committed by him, was against his own interest, as also against the interests of the society, of which he happens to be a member. The Court in Parveen Kumar Gupta V. State of Madhya Pradesh[174], stressed that the purpose of punishment is protection of the society, by deterring potential offenders from committing further offence, and by reforming and turning them into law abiding citizens.

The author of the present study sought to know from the lawyers, judges, police officers, prison officers and social workers, as what should be the nature of the sentence, in order to achieve the main objective of the punishment, that is, prevention and control of the crime, by resocialization of the prisoners. Their responses are as under:

TABLE-17

(IN PERCENTAGE)

NATURE OF THE SENTENCE FOR REFORMATION OF THE OFFENDERS

S.No.	Respondents	Retri-butive	Deterrent	Reformative	Total
1.	Lawyers	-	20.0	80.0	100.0
2.	Judges	-	26.0	74.0	100.0
3.	Police Officers	16.0	64.0	20.0	100.0
4.	Prison Officers	09.0	25.0	66.0	100.0
5.	Social Workers	30.0	20.0	50.0	100.0
	Total	55.0	155.0	290.0	500.0
	Mean Value	10.00	31.00	58.00	100.00

The majority of the lawyers, judges, and to some extent prison officers as well as social workers share the opinion that the sentence must be from the reformative angle, and only a limited number of them are of the opinion that the sentence must be from the deterrent angle. However, none of the lawyers and judges have expressed their view in favour of the sentence based on the retribution. On the other hand majority of the police officers are in favour of the deterrent sentences and some of them have also shown inclination towards the retributive sentence.

The reformative theory too, has been criticised on many counts.[175] It is argued that there is a danger of carrying the theory too far. It poses certain problems. First, it is not easy to determine before hand, how an offender will behave, when he is released. Secondly, for how long can the individual liberties of the wrong doer, be curtailed by rigid fixation of the term of imprisonment? Thirdly, is punishment to be waived when a person commits serious crime, under extraordinary psychological stress and there is no danger of recurrence? Fourthly, this aspect of punishment does not provide an outlet for the gratification of that emotion of retributive indignation, which in all healthy communities is stirred up by injustice.

Fifthly, it encourages the habitual type of offenders. Lastly, in a law abiding community some prominence may be safely given to the reformative method, which in turbulent society, such as criminal tribes of India may be fatal to the public welfare.

Sethna suggests that while applying the theory of reformative punishment and introducing model prisons in the zeal of penal reform, we must not make punishment too cheap. For instance, the prisons should not be made comfortable hotels, which the offender may visit time and again, without any fear of hardship or hard work or without any shame.[177] Sethna, further observes:

> "...Reformation should not be like a galloping horse heading for a fall, it should be bridled up by the reins of deterrence and mixed with the idea of retribution..."[178]

Paton, has raised the issue.- Is punishment an end in itself or means to an end? As, according to prevailing view among legal writers, "theories of punishment" have to do with question of aim of the punishment. The results are achieved by means of existence and enforcement of penal laws. But there has been a fundamental opposition, between those who say, aim is retribution and those who say it is reformation.[179]

In these and other competing views, we have in practice to find a working compromise.[180] Salmond, rightly observes, that single minded pursuance of any one of these theories of punishment could lead to disaster. The present tendency to stress the reformative element is a reaction against the former tendency to neglect it altogether. Thus, the consequences of a sentence are of the highest order.[181] If it is too short, or of the wrong type, it can deprive the law of its effectiveness, and result in the premature release of a dangerous criminal. If too severe, or improperly conceived, it can reinforce the criminal tendencies of the defendant and lead to a new offence by one, who otherwise might not have offended again.

4. JUDICIAL TRENDS:

Woottan has rightly observed that the primary function of the criminal courts is to discourage crime. In order to perform this function— object of the sentence should be to take minimum action which offers an adequate prospect of preventing future offences.[182] Thus the sentence should be of such a nature and length, which will discourage the offenders from repeating the criminal behaviour.[183] The Streatfied Committee, in order to achieve

this objective, recommended the publication of a booklet covering all forms of 'the sentence' and written specifically for sentencers, " as first step towards sentencing". This recommendation has been accepted by the government. Moreover, the Committee observed:

> "Sentencing is in a sense an emergent branch of law... and the sentencer can more fully grasp what sentences involved by visiting penal institutions..."

In India, it is believed, that in imposing the sentence, the Court should set forth the end to be achieved and make clear what is intended in the imposition of the sentences.[184] Justice Fazal Ali, in Sant Singh's case, observed:

> "...It is the prime need of the hour to set up training institutes to impart the new judicial recruits or even to serving judges with the changing trends of judicial thoughts and the new ideas which the new judicial approach has imbibed over the years as a result of the influence of new circumstances that have come into existence..."

The sentencing court should be required to retain jurisdiction to ensure that the prison system responds to the purpose of the sentence. They must be aware about the possible results of the sentences passed by them, for this purpose it is obligatory on them to visit the penal institutions. However, in U.S.A. more attention

is paid to sentencing policy, than in England and India. In the United States, Congress passed a Law in 1958, for creation of the sentencing institutes in the "interest of sentencing decision".

In order to award a proper sentence, the higher courts have also shown the tendency to evolve the supplementary provisions. Justice Krishna Iyer, while delivering the judgment in Rajendra Prasad V. State of U.P.[185] observed:

> "When the legislative text is too bald to self-acting or suffers zigzag distortion in action, the primary obligation is on Parliament to enact necessary clauses by appropriate amendments to the provisions in question. But, if legislative undertaking is not in sight, judges who have to implement the code, cannot fold up their professional hands but must make the provision viable by evolution of supplementary principles, even if it may appear to possess the flavour of law-making".

In the primitive stage of society, the end of law was merely to keep peace. In this stage it has totally changed in its concept and spectrum. Similarly, the functions of sentencing judge too have changed in their nature and fabric. It has been rightly said that under the primitive system of law, a judge functioned more or less like an Umpire, whose function was to give 'out' or 'Not out', to the "How is that" of the players in the game of pleadings. But in the mature system of law, the responsibility of the judge is high and his task extensive.[186]

He has to do justice according to law, but it must be in the mind of every judge, that he has his own share of law making and has an important role to play in the process of interpretation of the provisions of the constitution or a statutory enactment, the application of a precedent and laying down of a rule, where the matter is not governed by the statutory provision or case law.[187] The sentencing judge has a very important role to play, so far as the correction of the offenders is on the cards. The sentencing judge by awarding a proper sentence of course within the limits of the penal statutes, can make maximum contribution for the resocialization of the social deviants.

The Indian Judiciary hesitates, to lay down any 'sentencing guide', as no hard and fast rule can be laid down, in order to meet the exigencies of each case. The superior courts, when faced with the problem of unjust and inadequate sentences, direct the lower courts to exercise their discretion along with the judicial line.[188] They hold that the discretion must be exercised according to principle and not according to humour of the judge, arbitrarily or fancifully.[189]

The Supreme Court in Bhagwanta V. State of Maharashtra.[190] observed:

> "It is not possible for courts to attempt on the slender evidence to explore the murky depths of a wrapted and twisted mind so as to discover whether an offender is capable of reformation or redemption, and if so, in what way. That is a subject on which only experts in that line, after a careful study of an individual's case history could hazard an opinion with any degree of confidence. Judicial psychotherapy has its obvious and inherent limitations."

Supreme Court further laid down: "Courts are generally concerned only with the nature and extent of punishment called for, once the accused's guilt is established". Nevertheless, superior courts from time to time, have indicated the broad principles that should go in determination of the sentences. As a representative case on sentencing principle, we may take note of Dulla and others V. The State[191], where James, J., after considering a number of earlier decisions, deduced certain principles that should go in determination of the punishment, and observed:

> "... in deciding the measure of punishment, the court ought to take into consideration, the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender and his age, character and antecedents..."

Justice Beg and Justice Chandrachud in respect of the sentence determination observed:

> "the common frailties and failings of ordinary human beings, to which the offender gives vent, may without affecting the criminality of the acts punished, be enough to show that a lesser sentence will meet the ends of justice, on the other hand abnormal twists of the mind or indications of an obdurate and unrelenting viciousness of mind and conduct of the offender may show the need for severe sentence".

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In Ved Prakash's case, the Supreme Court while taking into consideration, the antecedents of the offender, released him on probation. The Court further observed:

> "The trial court should collect materials necessary to help award a just punishment in the circumstances... The social background and the personal factors of the crime doer are very relevant... Even if S.360 Criminal Procedure Code is not attracted, it is the duty of the sentencing court to be activist enough to collect such facts as have a bearing on punishment with a rehabilitative slant..."

The prevalance of a particular crime in a particular area or during a particular period should also be taken into account. One's political, sentimental or religious preoccupations should be strictly disregarded. The court must bear in mind the necessity of proportion between an offence and the penalty. The modern penology leans less to wards severe penalty and winds of criminological change blow over Indian statutory thought.[194] The Supreme Court in Vivian Rodrick V. The State of West Bengal,[195] Shivappa V. The State of Mysore,[196] Chawla V. State of Haryana,[197] Ediga

Anamma V. State of Andhra Pradesh[198]. Khem Karan V. The State of U.P.[199]., Vasant Laxman More V. State of Maharashtra[200], Mohd. Aslam V. State of U.P.[201] and Ram Shankar V. The State of M.P.[202]. after taking an overall view of the antecedents, family background of the accused and circumstances in which the crime was committed, reduced the sentences to that of a lesser one. Further, the court observed that the maximum penalty for any offence is meant for only the worst cases.

No sentence should ever appear to be vindictive. An excessive sentence defeats its own objective and tends to undermine the respect for law. Jails should be reserved for the reception of those who perform criminal acts of not merely a technical nature but of a criminal character. First offenders or youthful offenders should invariably be treated leniently and in applying the provisions of law like the First Offenders Act, Probation of Offender's Act 1958, or S.360 of the Criminal Procedure Code, 1973, it would be better for the courts to be on the side of liberality. On the other hand, a person, who has taken to a life of crime or who has refused to take a lesson from previous conviction, should be meted out a severe punishment. In Uttam Singh V. The State,[203] the Supreme Court denied the benefit of probation, to the accused who sold a packet of

playing cards portraying on the reverse luridly obscene naked pictures of men and women in pornographic sexual postures. Justice Goswami and Justice Sarkara,observed:

> "...no leniency should be given in cases corrupting the internal fabric of mind... such cases have got to be treated on the same footing as the cases of food adultrators..."

A deterrent sentence is wholly justifiable when the offence is the result of deliberation and preplanning and is committed for the sake of personal gain at the expense of the innocent, is menace to the safety, health, moral well being of the community, or is difficult to detect or trace. However, Justice Bhagwati, while delivering judgment in Santa Singh V. State of Punjab[204] observed:

> "A proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances extenuating or aggravating of the offence, the prior criminal record of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of the offender to a normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as deterrent to crime by the offender or by others and the current community need, if any for such deterrent in respect to the particular type of offence".

The Court further observed,that these are factors which have to be taken into account by the sentencing judge, in deciding upon the appropriate sentence.[205] Modern penology regards crime and criminal as equally material when the

right sentence is to be picked out.

The study conducted by Dr. Siddiqui[206], reveals that lower appellate courts in general reflect the traditional approach of the criminal system, whereby the extent of sentence is tested on retributive planes. In their sentence review functions they, by and large, follow the norms established by the decisional law. In offences against person, retributive factors are emphasised. Particular deterrence finds an expression in relatively severe sentence affirmed on previous convicts. Further, Dr. Siddiqui,points out that appellate decisions on the whole have shed little on the chances of successful or unsuccessful response of various classes of offenders to different types of sentencing measures.

However, where there is no statutory obligation to give reasons, the trial courts hardly state any reason while passing a sentence. But there are several arguments in favour of an obligation to give reasons for a sentencing decision even where the law does not impose an obligation to do so. It has been pointed out by Kotwal, Chief Justice of the Bombay High Court, in a Full Bench decision, that the imposition of the particular sentence is always a judicial act, and a court acting judicially is

normally bound to give its reasons.[207] That is implicit in the judicial process itself and has always been so. But, now under the new Criminal Procedure Code, it is obligatory for the courts to give reasons, if severe sentence is to be awarded.

The review of the Supreme Court judgments, and an overall analysis of the other cases indicate that the age,[208] antecedents,[209] character and family background,[210] of the accused, nature of the crime,[211] nature of the weapon used,[212] motive of the crime,[213] criminal not the crime,[214] duration of the trial,[215] role of the victim,[216] surrounding circumstances,[217] consequences of the sentence[218] and like factors must figure prominently in shaping the sentence, where reform of the individual, rehabilitation in the society and other measures to prevent recurrence are weighty factors.

The question of sentence is normally the discretion of the trial judge. It is for the trial judge to take into account the above mentioned factors and all other relevant circumstances and to decide, what sentence would meet the ends of justice in a given case.[219] However, in order to find out inclination of the trial courts towards the above mentioned factors. The author of the present study sought to know from the judges, lawyers as well as prosecutors, as to what extent the above enumerated factors affected the sentence of the offender. Their responses are shown in the following table:

TABLE-18

(IN PERCENTAGE)

IMPACT OF DIFFERENT FACTORS UPON THE SENTENCE DETERMINATION

S.No.	Respondents	To great extent	To some extent	Not at all	Total
1.	Judges	40.0	36.0	24.0	100.0
2.	Lawyers	30.0	34.0	36.0	100.0
3.	Prosecutors	26.0	34.0	40.0	100.0
	Total	96.0	104.0	100.0	300.0
	MeanValue	32.00	34.67	33.33	100.00

The above table shows that in the trial courts, the factors, which the Supreme Court wants to be taken into consideration for determining the sentence affect the sentence to a great extent only in 32.00% cases, to some extent in 34.67% cases and do not effect at all in 33.33% cases. From the above table, it appears that the trial courts are not too much serious about the well accepted doctrines of the modern correctional penology. The Supreme Court in Ramashraya Chakravarti V. State of M.P.[220] has observed that the trial courts in this country, already overburdened with the work, have hardly any time to set apart for reflection on sentencing. This aspect is missed or deliberately ignored by the accused lest, a possible plea for reducing of sentence may be considered as weakening his defence. In a good system of administration of criminal justice, presentence investigation may be of great sociological value. Throughout the world humanitarianism is permeating into penology and courts are expected to discharge their appropriate roles. However, this attitude of the judiciary results in the 'disparity in sentencing' which has been briefly discussed in the following parts of this chapter alongwith the 'hearing on sentences'.

III. SENTENCING: RESULTANT DISPARITY:

Dr. Siddiqui[221], has rightly pointed out that the imposition of sentence is the most critical point in the administration of criminal justice. It is critical because, no where in the entire legal field the interest of the society and those of the individual offender are at stake than in the system of sentencing. The system lacks efficacy if it fails in its essential function of protecting society by deterring offenders. It lacks credibility, if it does not reflect ' the mood and temper of society' towards misconduct of offender, and thereby ratify and reinforce the values of the society. The system deserves indictment, if it fails to provide an equitable justice to the offender, for no other factor impinges most than a sense of injustice in the mind of a convicted offender.

The principle of justice gets eroded where the offender receives a particular sentence, not on consideration of the offender's background and personality, but on consideration of the personality of the particular judge, who happens to dispose of the case. Another, significant cause of disparity in sentences is lack of unanimity among judges as to the purposes of sentence[222]. The disparity not only offends principle of justice, but it also affects the rehabilitative process of offender, and may create problems like indiscipline and riots inside the prison[223]. The disparity

in sentences limits correction's ability to develop sound attitudes in offenders. The man who is serving a ten year sentence for the same act for which a fellow prisoner is serving a three year sentence is not likely to be receptive to correctional programmes. He feels that he has been unfairly treated in sentencing and may well reject all efforts to rehabilitate him. He is in fact unlikely to respect many of the society's institutions concerned with the administration of criminal justice. The author of the present study also observed, a sort of bitterness and hostility among such prisoners, who were awarded longer sentences of imprisonment, as compared to other prisoners,who were awarded shorter sentences for the similar offences, but by the different courts. Prison officers also complained that disparity in the sentences gives a difficult turn to the adjustment of the prisoners in the institution. In Asqar Hussain's case[224], Justice Khanna, Justice Krishan Iyer and Justice Sarkaria brought out these very points:

> "The differentiation in the matter of sentence cannot be justified on the ground of the status of accused. The disparity in the sentences creates hostile attitude in the mind of the offender and reduces the chances of his resocialization as the offender feels that he has been discriminated".

I. CAUSES:

The new approach with greater emphasis on individualization of sentences, is likely to increase rather than eliminate the possibility of disparity in sentence. However, the question is not that of disparity in sentences, but that of philosophy underlying the determination of nature and length of the sentence.[225] But disparity in sentences would not offend the principle of justice, if it discloses a rational basis for differentiation, namely the attitude of the offender and his potentiality for reformation or recidivism. What is therefore, desirable, is not uniform sentences but a uniform philosophy, that may produce a sentence in conformity with the enlightened legal and social policy.[226] It is not the equality in sentences, but the equality of consideration, that is desirable . The similar consideration must be taken into account, when a decision regarding sentence is made.[227] This will avoid the chances of disparity in sentences and the offender will not feel that he has been discriminated.

Irrational disparity in sentences imposed on the offender, and erratic behaviour of judge in sentencing have been a frequent target of criticism. The problem of disparity or inequality in sentences is not novel. Numerous studies conducted in the United States; U.K., Canada and other countries bring out a wealth of information on the

extent of disparity in sentencing of offenders.[228] In the United States the President's Commission on Law Enforcement and Administration of justice in 1967 reported that disparity is "a pervasive problem in almost all jurisdictions". Everson, was the first to make a study of the influence of the personality of judge in the administration of justice. The study disclosed that one judge imposed fine upon 84% and gave suspended sentence to 7% . Another magistrate over the same period fined 34% and gave suspended sentence to 59%. Everson came to the conclusion that justice was reflected in the temperament, personality, upbringing and surrounding of judges.[229]

Rogor Hood made a study of variations in sentencing practices of twelve urban magistrates. The study covered a period from 1951 to 1954. The study showed that imprisonment policies appeared to be related to the social characteristics of the area, the social constitution of bench, and its particular view of the crime problem.[230] Shoham, in Israel studied sentencing policy of nine judges, in three district courts during the year 1956, and concluded that variations could not be attributed to factors related to offence and offender. The variations could be attributed to the sentencing attitude and disposition of an individual judge himself.

2. PROBLEMS:

In India the problem of disparity in sentencing has not been investigated satisfactorily but it is speculated that there has been gross inequality in punishment awarded by different courts. However, Dr. Chhabra's study[231], provided insight in the problem and has proved to be of immense help for the sentencing courts. He observed that,only two factors, namely, plea of guilt and nature of crime, have bearing on the mind of sentencing judges. In the use of various disposition methods, the courts widely differed. For example as against an average use of imprisonment of 61.6% by the twelve courts, the minimum and maximum use of prison sentences varied between 20% and 10%. Imposition of fine showed a variation of 80% as against an over all average of 24.4%. The maximum use of probation by any court was 57% as against 20.1 overall percentage of all the courts. Dr. Chhabara concluded that these illogical variations in sentences given by various judges were explicable only by the personal differences of the judges. Further, the study, conducted by Dr. Siddiqui[232] consists of the analysis of the official statistics of the sentencing patterns. The study, disclosed wide variations in 'sentencing patterns of criminal courts' in different parts of the country , not only in regard to the length of prison sentences, but also in use of different disposition.

The study has also revealed that the influence of human equation in sentencing is as great as in any other human field of judgment. Closely held values can not be totally expelled from the mind of sentencing judge.[233] Blackston's observation that judgment, though pronounced or awarded by the judge, is not their determination or sentence, but the determination of sentence of law, is one of the most fallacious of legal fiction.

The problem of disparity came up before the Supreme Court in a number of cases.[234] In the Rameshwar Dayal's case[235] the applicant and another person were trainee recruits, under the Police Armed Constabulary. Both applied for leave to go their villages on the ground of illness of their wives. They were charged under S.6(c) of The U.P. Pradeshik Armed Constabulary Act 1948, and were tried by two different sessions judge in separate trials in which it was found, that they did not proceed on leave but deserted. The offence was recorded against each. It was committed absolutely in the identical circumstances, but the appellant received seven years rigorous imprisonment, while the other was sentenced by different sessions judge to four years rigorous imprisonment. Both appealed to the Allahabad High Court. Here also the appeals were heard by different judges. The sentence of the appellant was reduced from seven years to four years. While the sentence of the other accused was reduced by another judge from four years to three months only.

The Supreme Court, granted special leave to the appellant on the question of sentence. Chief Justice Hidayatullah, while delivering judgment on behalf of himself and justice Dua, observed:

> "...this shows how the question of sentence to be awarded in a crime may be viewed differently by different judges... a problem which has never been solved satisfactorily so far..."

He further observed:

> "...the two cases being identical, it looks somewhat odd that one of the accused should be sentenced to four years imprisonment while another who committed the identical offence and in the like circumstances should be sentenced to three months..."

The Supreme Court in order to achieve consistency in sentencing, reduced the sentence of appellant to the period already served, which was nearly ten months.

The disparity in sentences imposed by the different judges on offenders committing like crimes in the identical circumstances, erodes the principle of justice.[236] Justice demands like cases be treated alike.[237] Centuries ago Aristotle declared that injustice arises, when equals are treated unequally and also when unequals are treated equally.[238] If it is equitable to punish less severely a particular offender who has acted under provocation, then it is unjust to subject another to full penalty, who also acted under the same fit of passion.

The author of the present study had an informal discussion with police officers, lawyers, judges, prison officers, prisoners as well as ex-prisoners, regarding the 'disparity in sentences'. Their observations were as follows:

Respondents:	Observations:
= Police Officers:	"...it is injustice to the accused and calls upon the reputation and functioning of the criminal justice system..."
= Lawyers:	"...the determination of the sentence depends upon the personality of the judge... He may be an acquitting or convicting judge... In the latter case he may award severe or lenient sentence in the similar circumstances... the disparity in sentences is harsh for the accused and creates a sort of hatred among them..."
= Sentencing Judges:	"... the disparity in sentences should be avoided, as it creates inroads in gaining the confidence of the people in law as well as in the judiciary... It defeats the main objective of the punishment..."
= Prison Officers:	"...It creates law and order problem within the walls. Prisoners who receive comparatively severe sentences become hostile towards the society in general and prison officials in particular...It gives a negative effect to the correctional programmes..."

= Prisoners:	"...Penal laws are only for the poor. There is discrimination at every level... Every one in the society is corrupt... If one has wealth or influence, he can purchase the justice. Otherwise, one has to serve a comparatively severe sentence. ... How one can trust the judiciary in such circumstances..."
= Ex-Prisoners:	"...Sentencing is always influenced by one's resources. If one is in a position to engage a good defence counsel, he may secure the lighter penalty as compared to the person who is not in a position to engage a good defence counsel... Disparity in sentences also creates a sort of ill feeling and enemity in prison inmates. Even after release the prisoner who has received comparatively a harsher sentence does not discontinue his hostile attitude towards the society..."

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Justice Krishna Iyer, observed that the purpose of sentencing is to change or convert offender to non offender. Any method which will not cripple a man, but which will restore a man, is the purpose of sentence. He further remarked "our judiciary, is wholly ignorant about sentencing... Sentencing is an emergent branch of law. Disparity in sentences, defeats the objective of the modern correctional philosophy. However, the disparity in sentences is the world phenomenon, but in the developed countries as in U.S.A. various measures have been taken to avoid it.

In India, the elaborate system of appeal and revision, as it prevails is helpful in bringing parity in sentences. The judicial review of sentences by appellate and revisional courts mitigates to some extent, the problem of disparity in sentences. It is true that absolute uniformity is not possible, but the chances of gross inequality in the sentences can be minimized to a great extent, through the system of appellate review. The appellate courts in India are striving their best to maintain consistency in the sentence imposed on the offenders.[240] But the lack of adequate information about the offender, and the absence of statutory criteria for maintaining a proper balance in the conflicting objectives of the sentencing, have made the rule of appellate and revisional courts passive rather than active and creative. The result is that the retributional style of justice dominates not only primary sentence decision but also its appellate review. Further, the personality of sentencing judge as well his out-look of the crime and society plays a vital role in the sentence determination.

IV. SENTENCING HEARING AND PLEAS:

In order to minimise the chances of 'disparity in the sentencing' and to adjust the sentence in accordance with the individual needs of the offender, various steps have been taken almost in all the developed countries. In England the fact finding system, after conviction, for the purpose of determining appropriate punishment, has been devised. It consists of the testimony of 'investigating police officer, which is known as 'antecedent statement'.[241] This statement is placed before the court, after the conviction of the accused,[242] if a person has been awaiting trial and is in prison, there may be some prison medical report also.[243] Further, where the courts are considering, a borstal sentence, it is obligatory upon them to consider any report, made in respect of the accused on behalf of the Secretary of State.[244] Where the only information available to the court is 'antecedent statement' the accused has a right of cross examining the police officer or any witness produced by the police in this connection. In addition to the antecedent statement, they may, also receive a probation officers inquiry report.

In the 'United States' a system of 'sentence hearing' operates in a number of jurisdictions. The information about the defendant comes from two sources, namely, pre-sentence investigation report prepared by the Probation Officer, and the information available to the court from

an informal post-plea of guilt hearing, occasionally supplemented by presentence investigation report. The post plea of guilt hearing was devised by judges to assure, in felony cases, that the offenders who plead guilty, are in fact guilty of the offences of which they are charged.[245]

1. HEARING UNDER THE CRIMINAL PROCEDURE CODE:

In India S. 235(2) of the Criminal Procedure Code 1973, provides that if the accused is convicted, the judge shall, unless he proceeds in accordance with the provisions of S. 360 hear the accused on the question of sentence and then pass the sentence on him according to law. It is now incumbent on the sessions judge, delivering the judgment of conviction, to hear the accused on the question of sentence and give him an opportunity of being heard. This provision is based on a good deal of research done by several authorities. The Law Commission, in its 48th Report,[246] recommended the insertion of S. 235(2), which would enable the accused, to make a representation against the sentence to be imposed, after the judgment of conviction has been passed.[247] The Commission further observed:

> "It is now being increasingly recognised, that a rational and consistent sentencing policy requires, the removal of several deficiencies in the present system. One of the such deficiencies is the lack of information as to characteristics and background of the offender... we are of the opinion, that taking of the evidence as to the circumstances relevant to sentencing should be encouraged and both the prosecution and the accused should be allowed to cooperate in the process..."

The concept underlying S.235(2), is that the accused may have some grounds to urge for giving him consideration, in regard to the sentence, such as, that he is the bread earner of the family, and the court may not be aware of it during the trial. This is also to ensure that the accused should get a fair trial in accordance with the accepted principles of natural justice.

Justice Fazal Ali in Santa Singh V. The State of Punjab[248] observed that the provisions of S. 235(2) were very salutary and contained one of the cardinal features of natural justice, namely that the accused be given an opportunity to make a representation, against the sentence proposed to be imposed on him. He further observed, that the statute has sought to achieve a socio-economic purpose and was aimed at attaining the ideal principles of proper sentencing in a rational and progressive society. The Supreme Court in Tarlok Singh V. State of Punjab[249] observed:

> "...The object of S.235(2) is to give a fresh opportunity to the convicted person, to bring to the notice of the court, such circumstances, as may help the court in awarding an appropriate sentence having regard to the personal, social and other circumstances of the case..."

Hearing is obligatory at the sentencing stage, under the new Criminal Procedure Code. The humanist principle of individualizing punishment, to suit the person and has circumstances, is best served by hearing the

culprit, even on the nature and quantum of the punishment. Chief Justice Chandrachud and Justice Krishna Iyer in Shiv Mohan Singh's case[250], observed, that the heinousness of the crime was a relevant factor in the choice of the sentence. The circumstances of the crime, especially social pressures which induces the crime is another consideration. These and the other like factors, can be brought to the knowledge of the court, only when an opportunity of being heard is given to the convicted person. The Courts in a number of cases[251], have discussed the importance of 'the opportunity of being heard'. Further, the Supreme Court in Daqdu and others V. State of Maharashtra[252], emphasised the importance of 'hearing on the sentence' in the following words:

> "...The right to be heard on the question of sentence has a beneficial purpose, for variety of facts and considerations, hearing on the sentence can, in the exercise of that right, be placed before the court, which the accused prior to the enactment of the Code 1973, had no opportunity to do. The social compulsions, the pressure of poverty, the retributive instinct to seek an extra-legal remedy to a sense of being wronged, the lack of means to be educated in the difficult art of an honest living, the parentage, the heredity all these and similar considerations can, hopefully and legitimately, tilt the scales on the propriety of sentence. The mandate of S.235(2) must therefore be obeyed in its letter and spirit..."

Thus there are larger number of factors which go into the alchemy, which ultimately produce an appropriate

sentence. Adequate material relating to these factors is to be brought before the court, in order to enable the court to pass an appropriate sentence. This material may be placed before the court by means of the affidavits, but if either of the party disputes the correctness or veracity of the material sought to be produced by the other, an opportunity is to be given to the party concerned, to lead evidence, for the purpose of bringing such material on record.

2. SOME ISSUES:

On the interpretation of S. 235(2), the important question arises, as to the 'meaning and content' of the words "hear the accused". Does it mean merely, that the accused has to be given an opportunity to make his submissions or that he can also produce material bearing on the sentence, which so far has not come to the court? Can he lead further evidence relating to the question of sentence or is the hearing to be confined only to oral submissions? These issues have emerged as the word 'hear' has no fixed rigid connotation. It can bear either of the two rival meanings depending on the context in which it occures.

The above issues were raised in Santa Singh V. The State of Punjab[353]. and were also settled by the Supreme

Court in the following terminology:

> "The question of hearing the offender on the sentence would be devoid of all the meaning and content and it would become an idle formality, if it were confined merely to hearing oral submissions without any opportunity being given to the parties and particularly to the accused, to produce material in regard to various factors bearing on the question of sentence and if necessary, to lead evidence for the purpose of placing such material before the court".

The Supreme Court further laid down, that the hearing contemplated, by S. 235(2) is not confined merely to hearing oral submissions but it is also intended to give an opportunity to the prosecution and the accused to place before the court facts and material relating to various factors, bearing on the question of the sentence.

In Mumappan V. State of Tamil Nadu [254] the Supreme Court observed, that the obligation to hear the accused on the question of sentence, imposed by S. 235(2) was not discharged by putting a formal question to the accused, as to what he had to say on the question of sentence. Further, the Supreme Court, analysed the role of the trial court in respect of the 'sentence hearing' as under:

> "...The judge must make definite and genuine effort to elicit from the accused all information,which will eventually bear on the question of sentence... All admissible evidence

> is before the judge, but that evidence itself, seldom furnishes a clue to the genesis of the crime and the motivations of the criminal... It is the bounden duty of the judge to cast aside the formalities of the court-scene and approach the question of sentence from a broad sociological point of view. The occasion to apply the provisions of s.235(2) arises only after the conviction is recorded. What then remains, is the question of sentence, in which not only the accused but the whole society has a stake. Question which the judge can put to a accused under s.235(2) and the answers, which the accused makes to those questions are beyond the narrow constraints of the Evidence Act... The court while on the question of sentence is in an altogether different domain, in which facts and factors which operate are of an entirely different order than those which come into play on the question of conviction..."

s.235(2) of the Criminal Procedure Code is in consonance with the modern trends in penology and sentencing procedure. It has been now realized that sentencing is an important stage in the process of administration of criminal justice and should receive serious attention of the court.

The author of the present study also sought to know from the lawyers, judges and prosecutors, about the relevance of hearing to the question of the sentence. Their responses are shown in the following table:

TABLE-19

(IN PERCENTAHE)

RELEVANCE OF HEARING ON THE QUESTION OF SENTENCE

S.No.	Respondents	Relevant	Irrelevant	Nil	Total
1.	Judges	80.0	10.0	10.0	100.0
2.	Lawyers	70.0	20.0	10.0	100.0
3.	Prosecutors	60.0	20.0	20.0	100.0
	Total	210.0	50.0	40.0	300.0
	Mean Value	70.00	16.67	13.33	100.00

The above figures show that the majority of the respondents (70%) are of the opinion, that hearing on the sentence is relevant, however only 16.67% are of the opinion that it is irrelevant, where-as 13.33% respondents did not express their opinion.

A plain meaning or interpretation of sub-section (2) of Section 235, shows that the court on convicting an accused must unquestionably hear him on the question of sentence.[255] In case the provision of S.235 is not followed, the Supreme Court in Santa Singh V. The State of Punjab,[256] has warned the courts of the implications:

> "... A non-compliance with the requirement of S. 235(2) can not be regarded as mere irregularity, in the course of trial curable under Section 465 of the Criminal Procedure Code...It is much more serious. It amounts to by passing an important stage of the trial and omitting it altogether, so that the trial cannot be said to be contemplated in the code... This deviation constitutes disobedience to an express provision of the Code, as to the mode of trial, and goes to the root of the matter and the resulting irregularity of such a character, vitiates the sentence and the failure of justice must be regarded as implicit, in such circumstances..."

Further, Justice Fazal Ali, emphasised its importance in the following words:

> "...Both the parts of S.235 are absolutely fundamental and non-compliance with any of the provisions would undoubtedly vitiate the final order passed by the Court. The two provisions do not amount merely to a ritual formula or an exercise in futility but have a very sound and definite purpose to achieve..."

The Supreme Court in Swarth Mahto V. Dharmdeo Narain[257] set aside the conviction and sentence, on the ground that fair and reasonable opportunity of being heard, was not given to the appellants. Similarly, the appeal in respect of the sentence was allowed by the Supreme Court in Narpal Singh And Others V. State of Haryana[258] on the similar grounds.

However, if the trial court, for any reason, omits to hear the accused on the question of sentence and the accused makes a grievance of it, in the higher court, it would be open to that court to remedy the breach, by giving a hearing on the question of sentence. That opportunity has to be real and effective, which means the accused must be permitted to adduce before the court all the data, which he desires to adduce on the question of sentence.[259] For this purpose, it is not necessary to send the case back to the sessions court, because in many cases, it may lead to more expenses, delay and prejudice to the cause of justice. The Supreme Court in

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Tarlok Singh V. State of Punjab observed, that in such cases it may be more appropriate for the appellant court, to give an opportunity to the parties in terms of S. 235(2) to produce the material, they wish to adduce, instead of going through the exercise of sending the case back to the trial court. This may, in many cases, help to produce prompt justice. But while hearing the accused on the question of sentence, care should be taken by the court, to ensure that S. 235(2), is not abused, and turned into an instrument for unduly protracting the proceedings. The claim of due and proper hearing is to be harmonized with the requirement of expeditious disposal of proceedings.

V. SENTENCING: SUBSEQUENT. RESOCIALIZATION:

The traditional attitude of the sentencing judges was that their responsibility ended with the imposition of the sentence. Many criminal court judges, sentenced offenders to confinement, without fully recognizing what would happen after sentence was imposed. Now, in the recent years, primarily because of the emergence, and development of the idea of resocialization of the offenders and growing number of law suits by prisoners,

the courts have become increasingly aware of the conditions of "prison confinement", and are thus called upon to participate in the activity which in the main had been a matter for administrator.[261]

However, the judge is placed in a very difficult position, when he is required to pass sentence on the convicted offender. As Mr. Justice Mc Cardle in England, phased it...any one can try a case, the difficulty comes in knowing what to do with a man, once he has been found guilty.[262]

A judge with 18 years experience remarked:

> "we take the accused, clothe him with the presumption of innocence, insist that he have an attorney to represent him, provide that he can not be compelled to testify against himself assure his right to be confronted with witnesses who appear against him, call witnesses for him. In general we guard his rights zealously all the way through the trial. Then the minute he is convicted we sheer away the safeguards and use an archaic inhumane method of deciding what to with him ".[263]

1. DURATION OF THE SENTENCE:

However, to adjust the duration of the sentence to the gravity of a particular offence, is not always an easy task. In considering the question of an appropriate sentence to be awarded, a skillful balance between the competitive claims of deterrent and reformative theories of punishment has to be adjusted,[264] in order to meet the

ends of justice. It may be pointed out here that the severe sentence defeats the objective of punishment. The more severe the sentence, the less are chances of rehabilitation of the offenders. In other words, longer the sentence of imprisonment, the longer is the period taken in resocialization of the prisoners.

Longer sentence of imprisonment is a disheartening and threatening experience for most men. The man in the prison finds his career disrupted, the relationships suspended, his aspirations and dreams gone sour. Longer imprisonment, not only breed hostility and resentment, but also makes it more difficult for the offender to avoid further law violations.[265] The experience of being incarcerated is in itself criminogenic and becomes intensified with the passage of the time in the Penal institution.

The author of the present study sought to know from the lawyers, judges, police officers, prison officers, prisoners, ex-prisoners as well as social workers whether they agreed that the long term imprisonment frustrates the resocialization process. Their responses are shown in the table-20.

TABLE-20

(IN PERCENTAGE)

LONGER THE TERM OF IMPRISONMENT LESSER THE CHANGES OF RESOCIALIZATION

S.No.	Respondents	Yes	No	Nil	Total
1.	Lawyers	60.0	16.0	24.0	100.0
2.	Judges	74.0	20.0	06.0	100.0
3.	Police Officers	16.0	74.0	10.0	100.0
4.	Prison Officers	80.0	05.0	15.0	100.0
5.	Prisoners	90.0	05.0	05.0	100.0
6.	Ex-Prisoners	89.6	04.8	05.6	100.0
7.	Social Workers	80.0	20.0	-	100.0
	Total	489.6	144.8	65.6	700.0
	Mean Value	69.94	20.69	09.37	100.00

The figures of the table-20 show that the majority of the respondents (an average of 69.94%) agreed with the proposition that longer the term of imprisonment the less are the chances of resocialization. Further, the majority of the police officers (74.0%) expressed their opinion otherwise. It appears that the police personnel believe, that deterrent punishment, can help in curbing the increasing crime rate.

2. EFFECTS OF THE IMPRISONMENT:

The purpose and justification of a sentence of imprisonment, or a similar measure, deprivative of liberty, is ultimately to protect the society against crime. This end can only be achieved if the period of imprisonment is used to ensure, that upon his return to society, the offender is not only willing but is also able to lead a law abiding and self-supporting life.[266]

The Supreme Court in Nadella Venkatakrishna Rao V. State of Andhra Pradesh,[267] observed:

> "...we think that harsh and prolonged incarceration may some times be self-defeating. The most hurtful part of imprisonment is the initial stage. Thereafter, he gets sufficiently hardened and callous with the result that by the time he is processed through the years inside the prison, he becomes more dehumanised. The whole goal of punishment being curative is thereby defeated..."

Similarly, the Supreme Court in a number of cases,[268] while reducing the sentence to lesser one, observed, that, an inordinary long prison term, was sure to turn the prisoner into an abdurate criminal or it might brutalise the offender, and blunt his finer sensibilities so that the end product could perhaps be more criminal, than one at the point of entry. Currently, it is widely accepted, that a long term of imprisonment may well be counter productive and a shorter term sufficiently deterrent.[269]

There are also various other studies which bring out the points in issue.[270] Bull, compared offenders, serving sentences of different terms, and found that longer sentences were associated with higher or identical failure rates. In the "natural experiment" carried out in Florida, when large number of prisoners were released before the termination of their sentences, following the United State's Supreme Court decision in Gideon's case. Those released early showed significantly lower recidivism rates (13.6% versus 25.4%), than the individuals who served substantially longer sentences.[271] Also, in an 'experiment study',[272] California prisoners granted parole, where divided at random into a group released six months early, and a group released at regular time. Comparison of the two groups showed them to be similar with respect to various attributes. Recidivism rates broke down by category of violations, and were

essentially identical.[273] Burgess, in his study, concluded that the longer a prisoner remains in prison, the more likely he was to violate parole, when released. For this purpose he studied the records of 1,000 cases from Illnois Penitentiary at Menard and 1,000 from the State Reformatory at Pantiac.

However,[274] Garrity, has found that parole violation rates were highest, if release on parole after less than one year in prison, they then decreased, as length of time increased in the institution. Morris and Zimring[275], studied, the question whether the length of periods of imprisonment, imposed on 302 confirmed recidivists, had any effect on the duration of their subsequent periods of freedom. They concluded that the length of each period of penal confinement had no measurable effect on the subsequent interval, between discharge and reconviction. And Mannheim and Wilkins[276], found that above average periods of detention in Borstal seemed to yield no better results than a period of about a year, for boys of all risk groups. But these studies too have shown, that the longer term of imprisonment, yield result which are different than that of normal period of imprisonment.[277] For instance, the study by Taylor, at the Prison Department in England, found that three years sentences of corrective training produced results which were slightly worse than two years sentences.

The findings of this study are, in accordance with those of Sheldon and Glueck[278]. They studied the relation of length of time in the reformatory and the post parole criminal status. They conducted the study of 422 inmates and came with co-efficient contingency of 0.18. The study concluded that those who spent shorter periods of time, had a greater proportion of their number among the success and a smaller proportion among the total failures, than those who were in the institution for longer periods. Clemmer[279] found that the continued exposure of an inmates to the influence of universal factors of the prison community, disrupt his personality, making readjustment impossible. Wheeler[280] found that the attitude of the inmates and their reaction awakened value situations, tended to vary with other measures of prisonization. But he did not investigate the post release effects of prisonization. In short longer sentences not only frustrate the rehabilitation programmes, but also present recidivism, and have deteriorating effect upon the inmate's abilities to function as a normal person. Prolonged incarceration results in greater inability to function properly within the walls, and upon release from the institution, numerous adjustment problems arise.

As the time in the prison is extended, the prisonization/desocialization increases. Consequently, with the increase in prisonization or desocialization, the probability of successful adjustment following release decreases. As with the longer term of imprisonment, personality becomes less stable, non prison contacts diminish, the person becomes involved in prison primary groups, tends to accept the norms of criminal subculture and participates in the abnormal behaviour of the institution.

CHAPTER-IV

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15. Supra note 11 S. 28(1)

16. Supra note 11 S. 28(2)

17. Supra note 11 S. 28(3)

18. Supra note 11 S.29(1)

19. Supra note 11 S.29(2)

20. Supra note 11 S.29(3)

21. Supra note 11, Chapter XXIX (Ss.372-394)

22. See Seervai,H.M: Constitutional Law of India: A Critical Commentary.Vol.II (1968) 1015

23. Criminal Procedure Code 1973 S.374(1)

24. Id. 379

25. A.I.R. 1975 S.C. 1026 See also Anandrao Tulsiram Bhawar and another V. State of Maharashtra. A.I.R. 1972 Cri.L.J. 766

26. Thirty-ninth Report of Law Commission of India on Punishment of Imprisonment for life under the Indian Penal Code (July 1968) 1

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28. Whipping Act 1909 (No.IV 1909)

29. Abolition of the Whipping Act 1955 (No.XLIV of 1955)

30. Amending Act XXVI,1955. Transportation has been substituted for life imprisonment

31. Criminal Law (Removal of Racial Discrimination)Act 1949

32. A.I.R. 1980 S.C.898. Mr. Justice Bhagwati in his dissenting opinion, said that he was unable to agree with the conclusions of the majority. He further observed,thatS. 302 Indian Penal Code, in so far as it provided for imposition of death penalty, as an alternative to life sentence, was violative of Articles 14 and 21 of the Constitution and therefore, ultra vires and void. Since the section did not provide any Legislative guidelines as to when life was permitted to be extinguished by imposition of death sentence. He struck down S.302 of the Indian Penal Code as unconstitutional and void. See also Dalbir Singh V. State of Punjab. A.I.R. 1979 S.C. 1384; Rajendra Prasad V. State A.I.R. 1979 S.C. 916 and Andley, S.N: Case Comment: on Death Sentence. The Indian Advocate.Vol.XX (Jan-Dec.1980) 74-7

33. Sethna,J.M.J: Society and the Criminal(1971)80

34. Indian Penal Code 1860 S. 121

35. Id. S. 132

36. Id. S. 194

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38. Id. S. 305

39. Id. S. 303

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41. Supra note 34 S.396

42. Tandon,M.P. and Tandon,R: The Indian Penal Code(1980) 48. See also Pillai, P.S.A: Criminal Law (1979) 21-28

43. The death sentence is to be awarded in the "rarest of rare" cases. Justice Hidayatullah, Vice-President, was critical of the "rarest of rare" doctrine. He while inaugurating the International Conference On Criminal Law, asked how did one decide which was rare than the other, and which was rarest of all.
= Data India (Jan.25-31,1982) p-4

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45. Id. S. 363(4)

46. A.I.R. 1976 S.C. 1924

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49. Bhattacharya,S.K.: Issues in Abolition of Capital Punishment. Social Defence. Vol.X No 37 (July 1974) 16

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51. Ambaram V. State of Madhya Pradesh.A.I.R. 1976 S.C. 2196

52. Ediga Anamma V. State of Andhra Pradesh. A.I.R.1974 S.C. 799

53. Bhattacharya,S.K: Supra note 49

54. According to Law Ministry Report, the number of murders committed in 1974 was 18,649 out of these only 163 were sentenced to death and the President rejected mercy petitions of only 66. In 1975, out of 17,254 murder cases, only 26 of the 98 sentenced to death were hanged. In Jan-Sept.1976, there were 12, 343 murders, 151 death sentences and 27 hangings. According to Home Ministry's annual report for 1978-79, the President had declined to interfere in 15 out of 17 cases of death sentences.

-See Data India.(Oct.22-28,1979)512

55. Particularly in the Central Jail, Fategarh (U.P.)

56. A.I.R. 1975 S.C. 1501. The judgment was delivered by Justice Untwalia and Justice Fazal Ali

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59. Mohd. Aslam.V. State of U.P. A.I.R. 1974 S.C. 678

60. Ashok Laxman Sohoni V. State of Maharashtra.A.I.R.1977 S.C. 1319

61. Bachchey Lal V. State of U.P. A.I.R. 1977 S.C. 2094

62. Attukkaran V. State of Tamil Nadu. A.I.R. 1977 S.C.2170

63. A.I.R. 1978 S.C. 1506. See also Sabal Singh V. State of Rajasthan. A.I.R. 1978 S.C. 1538

64. A.I.R. 1972 S.C. 1797

65. Vivan Rodrick V. The State of West Bengal. A.I.R.1971 S.C. 114

66. Neti Sreeramula V. State of Andhra Pradesh.A.I.R.1973 S.C. 2251

67. Bhagwan V. State of Maharashtra. A.I.R. 1979 S.C.1120

68. Suresh V. State of U.P. A.I.R. 1981 S.C. 1122

69. The State of U.P. V. Sahai and others. A.I.R. 1981 S.C. 1442

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72. Thangiah V. The State of Tamil Nadu. A.I.R. 1977 S.C.1777

73. Asgar V. State of U.P. A.I.R. 1977 S.C. 2000

74. Namu Ram Bora V. The State of Assam and Nagaland A.I.R. 1975 S.C. 762

75. Gajendra Singh V. State of U.P. A.I.R. 1975 S.C. 1703

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78. Sultan and another V. State of Haryana.1972 Cri.L.J.527

79. A.I.R. 1981 S.C. 764

80. A.I.R. 1974 S.C. 1570

81. A.I.R. 1979 S.C. 1177

82. State of U.P. V. Singhara. A.I.R. 1964 S.C. 358; State of Madhya Pradesh V. Mubarrak Ali. A.I.R.1959 S.C. 707; H.N. Rishud V. State of Delhi. A.I.R. 1955 S.C. 196; Nazir Ahmad Khan V. King Emperor. A.I.R. 1936 (P.C.) In re Narasimha Murthy. A.I.R. 1966. Andhra Pradesh 133 and Vasant Laxman More V. State of Maharashtra.A.I.R. 1974 S.C. 1697

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90. Bishan Das V. State of Punjab A.I.R. 1975 S.C. 573 and Mangal Singh V. State of U.P. A.I.R. 1975 S.C. 76

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100. See Date India (Jan.25-31,1982) 53-4

101. Billa and Ranga were hanged to death on Jan.31,1982 morning,about three and a half years after they had abducted and brutally murdered the two teenaged Chopra children-Thus all the avenues for their correction and resocialization, were closed down.

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116. Sita Ram Borelal V. State of Madhya Pradesh A.I.R. 1969 M.P. 252 and State of Madhya Pradesh and State of Punjab V. Ajit Singh A.I.R. 1976 S.C. 1855

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121. See Chapter V

122. Figures as were on 2nd March 1979

123. Figures as were on 22nd Feb.1979

124. Figures as were on 22nd Feb. 1979

125. Figures as were on 28th 1979

126. Figures as were on 3rd March 1979

127. Figures as were on 27th Feb. 1979

128. Figures as were on 5th March 1979

129. Supra note 120

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131. Criminal Law Amendment Act (XVI of 1921)

132. Nigam, R.C: Supra note 130

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134. In re Shankarappa A.I.R. 1958 A.P. 380

135. A.I.R. 1957 S.C. See also Nigam, R.C: Supra note 130 at 247

136. Criminal Procedure Code 1898 S.29

137. A.I.R. 1971 U.S.S.C. 63

138. A.I.R. 1979 S.C. 577

139. Guruswamy V. State of Tamil Nadu A.I.R. 1979 S.C. 1177 and Bhupendra Singh V. State of Madras A.I.R. 1981 S.C. 1240

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151. Oppenheimer,H:Rationale of Punishment(1913) 129

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154. The author,interviewed a prisoner in the Central Jail Fategarh,who had pleaded guilty in about 150 cases and was awarded life sentence. He was a notorious dacoit of Chambel Valley. He started his criminal career, in order to vindicate, against the murderers of his brothers. His brothers were shot dead,by the rival group of the village in order to take revenge from them. He informed the author, that such murders, do take place in his village,just to seek blood for blood.

    Further,the Criminal career of the dacoit queen Phoolan Devi was also started with the feeling of bitterness and revenge.

    -See The Hindustan Times(Sept.23,1981) 1s8

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157. Salmond,J:Jurisprudence(1947)103

158. See generally Nigam,R.C: Law of Crimes in India. Vol.I.(1965) 242-4

159. A.I.R.1958 All.198

160. A.I.R. 1960 All.190

161. 1972 Cr.L.J. 1464 In this case accused was convicted under section 376 Indian Penal Code.

162. Abadhraj Dukharam Pande V. State of Maharashtra A.I.R. 1979 S.C. 1703 and Smt.Deuki V. State of Haryana. A.I.R. 1979 S.C. 1948

163. Eysenck,H.J:Crime and Personality(1965)141

164. The author of the present study observed,that deterrent sentence often hardens a prisoner. A prisoner with the long term imprisonment or any other deterrent sentence, emerges like a hero in the prison community and commands respect from those who have been convicted and sentenced for minor offences.

Moreover,the violation of the prison rules and even prison riots, are often outcome of the prisoners' resentment against deterrent sentences or prison hardships.

See Data India (January 26 -February 1,1981) 58 and (Jan.18-24,1982) 47

166. David,M:Jurisprudence.(1967)146-51

167. Prison Commissioner's Report (1912) 24
See generally Nigam,R.C: Supra note 158

168. David,M: Supra note 166

169. Wortley,B.A:Jurisprudence.(1967)442

170. We observed that,in the Model Prison,Lucknow majority of the prisoners who were brought within the purview of the reformative theory,showed their tendency towards reformation. Some of them were even transferred to the "Agricultural farm"of the Model Prison where they enjoyed more freedom and availed other privileges.

See Chapter-VI

We also observed that the prisoners of the Central Jail, Srinagar, who were imparted University education at the initiative of the author, were in a position to lead a law abiding life. One of them was appointed on a responsible post, in Jammu and Kashmir Jail Department-

See The Illustrated Weekly of India,Vol.XCVII No.35 August 29 Sept,4,1976 and Kashmir Today Vol.V.Nos.5 Oct. 1980

171. Oppenheimer,H: Rationale of Punishment (1913)130-32

172. Iyer,V.R.K: Perspective in Criminology,Law and Social Change (1980) 113

173. A.I.R. 1972 S.C. 2438

174. 1974 Cr.L.J. 57

175. David,M: Supra note 166

176. Sethna,M.J:Contributions to Synthetic Jurisprudence (1962) 20-21

177. Ibid

178. Paton,G.W:Jurisprudence(1972)357- See generally Vinogradoff,P:Common sense in Law(1959)

179. Ross,A:On Guilt Responsibility and Punishment.(1975)61

180. Salmond,J:Jurisprudence.(1966) 95. See also Pound,R: Jurisprudence(1959) 345-46

181. Dilbagh Singh V. State of Punjab.A.I.R. 1979 S.C.

182. See generally,Wootton,B: Crime and Criminal Law Reflections of a Magistrate and Social Scientist (1963) 91-3

183. The Streatfied Committee Report (International Committee on the Business of Criminal Courts) H.M.S.O.1961 Para 299 to 302

184. See A.I.R. 1976 S.C. 2386

185. A.I.R. 1979 S.C. 916 and Sheo Shanker Dubey V. State of U.P. A.I.R. 1979 S.C. 916. In the latter case the judges of the Supreme Court differed in their views. The majority view was given by Justice Krishna Iyer and Justice Desai and the minority view by Justice Sen.

186. Allen,C.K.: Law in The Making (1964) 397

187. Raina,S.M.N: Law, Judges and Justice (1979) 13

188. Bed Raj V. State of U.P. A.I.R. 1955 S.C. 778

189. Moti Chand V. State. A.I.R. 1953 All. 220

190. A.I.R. 1974 S.C. 2281

191. A.I.R. 1958 All.198

192. Bhagwanta V. State of Maharashtra. Supra note 190 See also Gyanoba Yaswant Yadav V. The Collector of Central Excise,Hyderabad.A.I.R.1974 A.P. 76

193. Ved Prakash V. State of Haryana.A.I.R. 1981 S.C.643

194. Raghubir Singh V. State of Haryana.A.I.R. 1974 S.C.677

195. A.I.R.1971 N.S.C. 114

196. A.I.R. 1971 S.C. 196

197. A.I.R. 1974 S.C. 1039

198. A.I.R. 1974 S.C. 799

199. A.I.R. 1974 S.C. 1567

200. A.I.R. 1974 S.C. 1697

201. A.I.R. 1974 S.C. 678

202. A.I.R. 1981 S.C. 644

203. A.I.R. 1974 S.C. 1230

204. A.I.R. 1976 S.C. 238o

205. Ibid.

206. Siddiqui,M.Z: Sentencing of Offenders:-Patterns and Policies. Ph.D. Thesis (unpublished) A.M.U. (1971) 156.

207. State V. Vali Mohd. 1969 Cri.L.J. 1107

208. Surta and others V. State of Haryana.A.I.R. 1971 S.C. 803 and Pooran Singh V. State of U.P.

209. A.I.R. 1981 S.C. 1638

209. Modi Ram and Others V. The State of Madhya Pradesh A.I.R. 1972 S.C. 2438

210. Dilbagh Singh V. State of Punjab.A.I.R. 1979 S.C.680

211. Shivappa and Others V. State of Mysore. A.I.R. 1971 S.C. 196. Rajeshwar Prasad V. The State of Bihar A.I.R. 1972 Patna 50 and Apren Joseph V. State of Kerala 1972 Cri.L.J. 1162

212. Patel Bechar Narsingh V. The State of Gujrat.A.I.R. 1970 Guj.186

213. Dharma Ram Bhagare V. State of Marashtra.A.I.R.1973 S.C.476

214. Shiv Mohan Singh V. The State (Delhi Administration) A.I.R. 1977 S.C. 949

215. Shanabhai Dhulbhai Parmar V. State of Gujrat.A.I.R.1977 S.C. 1338 and State of Maharashtra V. Natwar Lal Damodardas Soni. A.I.R. 1980 S.C. 593

216. S.Varadarajan V. State of Madras. A.I.R. S.C. 942; Brij Lal Sud V. State of Punjab (1970) 72 Punj.L.R. 999 (S.C.); Shiv Govind V. State of Madhya Pradesh A.I.R. 1972 S.C. 1823; Ram Pujan V. State of U.P. A.I.R. 1973 S.C. 2418 and Hansa Singh V. State of Punjab. A.I.R. 1977 S.C. 1801

217. Ashwin Nanbhai Vyas V. State of Maharashtra A.I.R. 1970 S.C. 1998

218. Vishnu Datta Mishra V. State of Madhya Pradesh A.I.R. 1979 S.C. 825

219. Alamgir V. State of Bihar A.I.R. 1958 S.C. 936

220. A.I.R. 1976 S.C.392

221. Siddiqui, M.Z.: "The Problem of Disparity In Sentencing". Indian Journal of Criminology. Vol.9 No.2 (July 1981) 72

222. Ibid.

223. Tappan, P.W: Crime, Justice and Correction (1960)446 See also Dawson,R.O.: The Sentencing: The Decision As the Type, Length and Conditions of Sentence(1969) 216

224. Asgar Hussain V. The State of U.P. A.I.R.1974 S.C.336

225. Siddiqui,M.Z: Supra note 221

226. Theodore,L: Towards More Enlightened Sentencing Procedure In The Task of Penology(1969)137-8

227. Hood,R: Sentencing In Magistrate's Courts- A Study in Variation Policy (1962) 8

228. See Siddiqui,M.Z: Supra note 221

229. Ibid.

230. Ibid. See also Shoham,S: The Procedure and Sentencing Powers of The Criminal Courts In Israel(1966) 166-89

231. See generally Chhabra,K.S: Quantum of Punishment in Criminal Law in India (1970) 175-86

232. See generally Siddiqui,M.Z: Sentencing of Offenders: Patterns and Policies.Ph.D.Thesis(Unpublished) A.M.U. (1971)

233. See Robinson, E.S: Law and Lawyer (1973) 10.

234. Asgar Hussain V. The State of U.P. Supra note 224 G.P.L. Narasimha Raju V. The State of Andhra Pradesh A.I.R. 1971 S.C. 1232 and Brahma Singh V. The State of U.P. A.I.R. 1972 S.C. 1229

235. (1971) 73.Punj. L.R. 29(S.C.)

236. Siddiqui,M.Z: Supra note 232 at 27

237. Hart,H.L.A: Punishment and Responsibility(1968)24

238. Id at 128

239. This observation was noted down by the writer, when Justice Krishna Iyer,addressed the gathering on the inaugural day of X-Annual Conference of the Indian Society of Criminology. 13th Feb.1981, at Nehru Bhawan, Aurangabad.

240. Siddiqui,M.Z: Supra note 232 at 134-36

241. It includes some account of the offender's home circumstances, education,employment, service record, family position and previous conviction if any.

242. Jackson,R: The Machinary of Justice In England (1960) 197. See also Siddiqui,M.Z: Supra note 232

243. Walker,N: Crime and Punishment in Britain (1965) 309

244. The Criminal Justice Act 1967 S.2

245. Siddiqui,M.Z: Sentencing of Offenders: Patterns and Policies.Ph.D.Thesis (Unpublished) A.M.U.(1971)249

246. See Santa Singh V. The State of Punjab. A.I.R.1976 S.C. 2386

Justice Fazal Ali, in order to highlight the importance of "hearing on Sentence" traced out the historical background and the social setting under which S.235(2) was inserted in the new Criminal Procedure Code. He further observed:

> "It would appear that 1973 Code was based on a good deal of research done by several authorities including the Law Commission, which made several recommendations for revolutionary changes in the provisions of the previous Code, so as to make the 1973 Code in consonance with the growing needs of the society and in order to solve the social problems of the people".

247. Ibid.

248. Ibid.

249. A.I.R.1977 S.C.1747. See also State V. Vali Mohd.1969 Cri.L.J. Bom.1107

250. Shiv Mohan Singh V. The State (Delhi Administration) A.I.R. 1977 S.C. 949

251. See Dr.P.K. Paul Choudhry V. State of Assam A.I.R. 1960 S.C.133 and Didar Singh V. Sarbjit Singh ,A.I.R.1972 Punjab and Haryana 19

252. A.I.R. 1977 S.C. 1579

253. Supra note 246

254. A.I.R. 1981 S.C. 1220

255. Sohan Singh V. State S.L.J. 1981 J & K 114

256. A.I.R. 1976 S.C. 2386

257. A.I.R. 1972 S.C. 1300

258. A.I.R. 1977 S.C. 1066

259. Dagu and others V. State of Maharashtra.Supra note 252

260. A.I.R. 1977 S.C. 1747

261. Hart,H.L.A: Punishment and Responsibility(1968)165

262. Houts,M: From Arrest to Release (1958) 111

263. Id. at 115

264. Shyam Narain V. The State of Rajasthan 1974 Cri.L.J. 1006

265. Felkeness,G.T: Constitutional Law for Criminal Law(1978)

266. Nadella Venkatakrishna Rao V. State of Andhra Pradesh A.I.R. 1978 S.C. 480

267. Ibid.

268. Kakoo V. The State of Himachal Pradesh. A.I.R. 1976 S.C. 1991; Phul Singh V. State of Haryana A.I.R. 1980 S.C. 249 and Ashok Kumar V. State (Delhi Administration) A.I.R. 1980 S.C. 636

269. Ram Prasad Sahu V. State of Bihar A.I.R. 1980 S.C. 83

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273. Burgess,E.W: "Factors determining Success or failures on Parole". Journal of Criminal Law and Criminology (1928) 241-86

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977. Hood, R. and Sparks: Key Issues in Criminology (1970) 190

978. Sheldon and Glueck, E.T: 500-Criminal Careers (1965) 259-276

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