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Sentencing Policy in India: Historical Perspective

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INTRODUCTION

Sentencing in India is governed by substantive criminal laws, special laws creating special offences, Constitution of India, Criminal Procedure Code, 1973 (now replaced by the Bharatiya Nagarik Suraksha Sanhita, 2023), Judicial interpretation and guidelines laid down by the superior courts, etc. There is great interplay between judiciary and other organs of the government in respect of sentencing in India. Judiciary proceeds on the parameters set for crimes by the legislature. It defines offences and prescribes the punishment for the same. It lays down the ingredients to be fulfilled before the courts ordered the sentence. However, once the ingredients of the offences are fulfilled, the courts have enough pliability to select an appropriate punishment for the crime. In the absence of sentencing guidelines, judges in India enjoy considerable discretion while awarding the sentence.

Definition of Crime

Crime denotes any unlawful act which is prohibited and punishable by a state. In modern criminal, the term crime does not have any simple and universally accepted definition. Russell has admitted that to define crime is a task which so far has not been satisfactorily accomplished by any writer.[1] JW Cecil Turner, who edited Kenny's Outlines of Criminal Law, in a similar tone, also conceded that 'the definition of crime has always been regarded as a matter of great difficulty and the truth appears to be that no satisfactory definition has yet been achieved, and that it is, indeed, not possible to discover a legal definition of crime.[2] One proposed definition of crime is that any act which is not only harmful to the individual but also to a community, society or state and such act is forbidden and punishable by law. The state has the power to restrict one's liberty for committing a crime in the interest of the society.

Crime has been defined as an anti-social, immoral or reprehensible behaviour which is contrary to the norms, beliefs, customs and traditions of a given society. It is said to be an act or omission which is forbidden by law and against the moral sentiments of the society.

According to Paul Tappan, crime is an intentional act or omission in violation of criminal law committed without defence or justification and sanctioned by the state for punishment as a felony or a misdemeanor.

According to Hall Jerome, crime is defined as legally forbidden and intentional action which has a harmful impact on social interests, which has a criminal intent and which has legally prescribed punishment for it.

Professor Goodhart has defined crime as any act which is punished by the state.

Elements of Crime

To establish criminal liability, crime can be broken down into four elements which a prosecution must prove beyond reasonable doubt. There are basically four elements of crime namely:

Human Being:

The first and foremost element of crime is that the injury must be caused by human being. The act must have been done by human being before it can constitute a crime punishable by law. A person is defined under Section 11 of Indian Penal Code, 1860[3] which includes any Company or Association or body of persons, whether incorporated or not.

Mens Rea:

Mens Rea is the guilty mind or guilty intention of a person to commit a crime. It refers to the mental element necessary for a particular crime. It is a technical term used to connate a blameworthy mental condition, the absence of which negatives the condition of crime on any particular condition. If a crime is committed with a guilty mind only then, the person will be held liable. The fundamental prerequisite of the principles of mens rea is that the accused must have known or aware of all those elements in his acts or doings which make it the wrongdoing for which he is charged. The maxim 'Actus non facit reum nisi mens sit rea' means that the act itself is not criminal unless accompanied by a guilty mind. This maxim is the well-known principle of natural justice. Mere commission of a criminal act is not sufficient to

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[1] PSA Pillai's, "Criminal Law", Lexis Nexis Butterworths Wadhwa, Nagpur, 11th ed., 2012, p.3.

[2] Ibid.

[3] Now Section 2(26) of BNS (Bharatiya Nyaya Sanhita), 2023.

constitute a crime. The element of wrongful intent is required to constitute the criminal liability. Mens rea includes intention, knowledge, negligence, recklessness.

Actus Reus:
Actus reus is the Latin phrase for guilty act and generally refers to an overt act in furtherance of crime. Requiring an overt act as part of a crime means society has chosen to punish only bad deeds, not bad thoughts.[4] A human being and a guilty intention are not enough to constitute a crime as we cannot know the intentions of a man. For the actus reus element of crime to be present, there must be voluntary physical action made by the defendant. The prosecution must prove that the defendant had made a conscious and an intentional move. According to Kenny 'actus reus' is such result of human conduct which the law seeks to prevent. An act also includes illegal omission. A man is held liable if some duty is cast upon him by law but he omits to discharge that duty. Section 43 of IPC lays down that the word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action, and a person is said to be "legally bound to do" whatever it is illegal in him to omit.

Injury to Human Being:
As per Section 44 of IPC[5], the word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property. The injury must be illegally caused to another human being or to a body of individuals or to society at large. The provisions relating to hurt and grievous hurt has been mentioned under Section 319 and 320 of IPC, 1860[6] respectively.

Sentencing and Punishment
The concept of punishment is the byproduct of Social Contract Theory. The concept of social contract theory was evolved which urged the members of the society to surrender all their rights and liberties in the sovereign for the preservation of peace, life and prosperity of the subjects. The sovereign was the lawful administrator who would render protection to the individual. Through social contract a new form of social organization – the state was formed to assure guarantee rights, liberties, freedom and equality.[7] It is the duty of the state to make laws regarding the protection of the rights, liberties of the people and whosoever disobey the laws will be liable to be punished. Punishments are imposed with an object to prevent the crime and to protect the society. Sentences are the statements in judgments which lay out what the punishment for a particular offence will be according to the law. When the same is put in action, is operationalized, it would be called as punishment. Thus, it can be said that sentence is the predecessor to the actual inflicting of punishment.[8]

Sentencing is that phase of criminal justice system where the real punishment is announced after the stage of conviction to the convicted person by the judge. Sentencing is one of the difficult tasks that a judge may be facing as he has to consider number of factors while pronouncing it such as determining which actions or omissions are permissible, who is to be punished with what kind of punishment or to what extent punishment is required, role of offender in commission of an offence, severity of an offence, availability of evidences, injury caused to the victim and many more.

In **Paras Ram and Others vs. State of Punjab,**[9] the Supreme Court 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, if any, of the offender, the age of the offender, the record of the offenders to employment, the background of the offender with reference to education, home life sobriety and social adjustment, the emotional and mental conditions of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to normal life in the community, the possibility of the treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, f any, for such a deterrent in respect to the particular type of offence. These factors have to be taken into account by the court in deciding upon the appropriate sentence."

The term punishment is defined as pain, suffering, loss, confinement or other penalty inflicted on a convicted offender by the competent authority. The quantum of punishment will vary according to type of offence committed by an offender. Hugo Grotius defined punishment as 'the infliction of an ill suffered for an ill done'.[10] His definition of

[4] "Elements of A Crime: Mens Rea and Actus Reus" retrieved from https://law.jrank.org/pages/22506/Criminal-Law-Elements-Crime-Mens-Rea-Actus-Reus.html visited on August 26, 2024 at 9:48 a.m.
[5] Now Section 2(14) of BNS (Bharatiya Nyaya Sanhita), 2023.
[6] Now Sections 114 and 116 of BNS (Bharatiya Nyaya Sanhita), 2023 respectively.
[7] S.R. Myneni, "Jurisprudence (Legal Theory)", Asia Law House, Hyderabad, 3rd ed., 2020, p. 425.
[8] Aastha Sahay, "Sentencing and punishment policy in India" retrieved from https://www.probono-india.in/blog-detail.php?id=152 visited on August 26, 2024 at 3:20 p.m.
[9] Paras Ram and Others vs. State of Punjab (1981) 2 SCC 508 (India).
[10] Philip Bean, "Punishment", Martin Robertrson & Company Ltd.", Oxford, 1981, p.4.

punishment is not entirely adequate. But later he finally implies that punishment is a social act produced by those claiming the rights to punish and imposed on those deemed to deserve it.[11]

Benn and Flew have given some elements of punishment, which say that-

1. Punishment must involve pain and consequences must normally be considered unpleasant;
2. It must be for any legal wrong;
3. It must be given to the actual offender who has committed the offence; and
4. The pain must be inflicted by the authority which has been constituted by the legal system.[12]

Prof. H.L.A. Hart defines the punishment in terms of the following five elements[13]-

(i) It must involve pain or other consequences normally considered unpleasant.
(ii) It must be for an offence against legal rules.
(iii) It must be for an actual or supposed offender for his offence.
(iv) It must be intentionally administered by human beings other than the offender.
(v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

Robert G. Caldwell, stated that "punishment is an art which involves the balancing of retribution, deterrence and reformation in terms not only of the court and the offender but also of the values in which it takes place and in the balancing of these purposes of punishments, first one and then the other, receives emphasis as the accompanying conditions change"[14].

Punishment is the direct outcome of the crime. Every crime has serious repercussions and thereby the criminal deserves to suffer the repercussions of his action. Since punishment involves suffering it has led to tough attempts to justify it. Some would justify punishment as being deserved for an offence i.e. retribution and other would regard it as a means of controlling or preventing action i.e. deterrence or prevention. Still others would see it as a means of reformation of the perpetrators.

Historical Evolution of Punishment In India

Punishment has been substantially prevalent since time immemorial to curtail crime and deter the offenders. Since the ages different societies have evolved and applied various forms of punishments such as banishment, flogging, mutilation, stoning, death, imprisonment, imprisonment for life, forfeiture and confiscation of property, fine, branding, pillory. But now punishments like imprisonment, imprisonment for life, fine, forfeiture and confiscation of property have remained the common forms of punishment inflicted for almost all offences, while the death sentence is awarded only for certain offences.

PUNISHMENT IN ANCIENT INDIA

Under Hindu Law

Punishment has been perfectly defined under Dharmashastras and in several works of esteemed Hindu saints like Manu, Narada and Vishnu. Dharmashastras were the primary source to run both the criminal and civil administration under the ancient Hindu Kings.[15] They are the written texts that lay out rules dealing with dharma. They are primarily the legal texts of ancient Hindu society. These texts were written with the object of describing the ideal behaviour of the members in the society. Manu, the ancient Hindu law giver, has finely described dandaniti (penal policy) and also said that punishment is the only weapon that will protects the individual and the society. Manu firmly stated that it was only fear that would make the human being serve their duties. Manu appears to be against unjust punishment and warns that unjust punishment destroys reputation among men, and fame (after death), and even causes a loss of heaven in the next world.[16] Manu also supports different degrees of punishment starting from admonition and intermediate with harsh order and fine and after that by corporal comeuppance. In awarding punishment, Manu says the time and place of the

[11] *Id* at p.5.
[12] S.M.A. Qadri, "Criminology", Eastern Book Company, Lucknow, 5th ed., 2015. pp.120- 121.
[13] H.L.A.Hart, "Punishment and Responsibility: Essays in the Philosophy of Law", OUP Oxford, 2nd ed., 2008, pp.4-5.
[14] Robert G. Caldwell, "Criminology", Ronald Press Company, New York, 2nd revised ed., 1965, p.403.
[15] Shreya Sahoo, "History of Punishment" retrieved from https://www.legalbites.in/history-of-punishment/ visited on Aug. 26, 2024 at 3:30 p.m.
[16] https://shodhganga.inflibnet.ac.in/bitstream/10603/286161/8/08_chapter%202.pdf, visited on Aug.28, 2024 at 11:15 a.m.

offence, the strength and knowledge of the offender, ability of the criminal to suffer, motive and the nature of the crime are the factors to be considered for inflicting the due measure of punishment.[17]

According to Manu, homicide was divided into two kinds- culpable homicide and non-culpable homicide and each into two sub categories. Culpable homicide is divided into unintentional killing and murder where as non-culpable homicide is divided into justifiable and excusable. When a Brahmin committed a crime, a death sentence was never been inflicted upon him, in fact his head was to be shaved. A severest punishment was reserved for the Shudras, especially who defamed the Brahmins. Adultery was regarded as one of the most heinous offences for which deterrent punishment was awarded to the offender so that it creates fear in the minds of the people at large. A Shudra guilty of adultery with a woman of any caste especially of Brahmin shall be sentenced to capital punishment.

Apart from the punishments which the King was authorized to impose under secular laws for committing offences the Shastras and Smritis prescribed certain measures to be self- imposed by a person for the sins committed either against the secular laws or against the moral laws or those governing personal conduct, either openly or secretly.[18] The purpose of such measures was considered necessary to re-gain his status in the society and also to reduce the ominous effects of the sin committed. No punishment was awarded to the child less than five years of age, while half of the normal punishment prescribed for the offence was awarded to a male child above five years and below sixteen years, to an old man above eighty years of age, woman and persons (of any age) suffering from diseases.

Under Muslim Law

The criminal law practiced in northern and southern parts of India was the Mohammedan Law, which was introduced by Moghul conquerors whose power culminated under Akbar in the second half of the sixteenth century. The primary basis of the Islamic criminal law was the Quran, which is believed to be of divine origin. But the laws of Quran were found inadequate as it was just few of the verses which contained provisions dealing with the matter of civil or criminal nature.[19] Islamic Jurisprudence has four basic principles of punishment namely Qisas or retaliation, Diyut or the blood money, Hudhud or fixed punishment and Tazir and Siyasa or discretionary and exemplary punishmet.

Qisas or Retaliation

The Quran uses the term Qisas in the sense of 'equality'.[20] The principles of Qisas were based on the theory of a life for a life, a limb for a limb, an eye for an eye. Under this head the crimes are classified as Jinayat which meant offences against the person and was restricted to willful homicide, maiming and wounding.[21] It was confined to crimes such as wounding, willful homicide and maiming.[22] When the punishment was sought out on the basis of retaliation, no discriminatory sentence could be passed on the ground such as one party being a man and the other woman, the one being a slave and the other the free man, etc. Compensation is sometimes an alternative to retaliation at the election of victim and in some cases, is the only authorized punishment. [23]

Diyut or the Blood Money

This referred to blood money for the fine or compensation for blood in cases of offences like homicide and was usually given as an alternative to Qisas. The punishment of Qisas in all cases of willful homicide was exchangeable with that of Diyut, if the person having the right of retaliation so wished. He was given an alternate remedy either to take Diyut or Qisas as a form of compensation.[24] The fine for each kind of homicide causing the death of a man seems to have been fixed and that for causing the death of a woman was limited to half the amount. But there was no difference between the fine for the death of a Muslim and that of a non-Muslim.

Hudhud (Hadd) or Fixed Punishment

Hadd is defined in the Hidayah, which comprises fixed penalties to meet the ends of justice and maintain law and order in the society. Under Hadd the quantity and quality of punishment was fixed for certain offences and this could not be altered or modified. So, if an offence was proved, the Qadi (A Muslim Judge) could not exercise his discretion in case

[17] https://shodhganga.inflibnet.ac.in/bitstream/10603/201779/9/09_chapter%202.pdf visited on Aug.28, 2024 at 11:20 a.m.
[18] M. Rama Jois, "Ancient Indian Law Eternal values in Manu Smriti", Universal Law Publishing Co., New Delhi, India, 2015, p.87.
[19] https://shodhganga.inflibnet.ac.in/bitstream/10603/201779/9/09_chapter%202.pdf visited on Aug.23, 2021 at 11:20 a.m.
[20] *Ibid.*
[21] *Ibid.*
[22] *Supra* note 20.
[23] Mark Cammack, "Islamic Law and Crime in Contemporary Courts" retrieved from https://escholarship.org visited on August 29, 2024 at 10:11a.m.
[24] The Indian Law, "Origins and Forms of Punishment in Ancient Hindu and Mohammedan Law" retrieved from https://theindianlaw.in/punishment-in-ancient-hindu-and-mohammedan-law/ visited on Aug. 29, 2024 at 11:50 a.m.

of sentencing an accused and had to pronounce the punishment as prescribed in Hadd. The punishment of Hadd was extended to the crimes of adultery, of illicit sexual intercourse between married and unmarried person, highway robbery and theft, false accusation, drinking wine. Types of Hadd punishment given for different crimes are whipping, death penalty, amputation, stoning.

Tazir and Siyasa or Discretionary and Exemplary Punishment

Tazir and Siyasa were the discretionary and exemplary form of punishment, which depended completely upon the discretion of the Judge to decide the kind of punishment to be awarded. Under Tazir, punishment could be anything from imprisonment and banishment to public exposure. Tazir is a residual category in the sense that it serves as the basis for punishing actions which are considered sinful or destructive of public order but are not punishable as hadd or qisas.[25] An important function of tazir is to provide grounds for the punishment of those who have committed hadd crimes or crimes against person but cannot be sentenced to the appropriate punishment for procedural reasons (e.g. because of uncertainty, or pardon by the victim's next of kin, or lack of legally required evidence) or for punishment of those who have committed acts that resembles these crimes but do not fall under their legal definitions. [26]

Punishment under British Rule

With the advent of British rule in India, the rulers continued to practice the already established Muslim pattern of judicial administration in criminal matters. However, when the British gradually took over all the administrative and legal functions into their hands, then it became necessary to introduce new legislations with a view to bring forth unity of administrative control. But the British administrator did not immediately disturb the status quo, in fact they allowed the Muslim law to operate while introducing new legislations and policies into the system but were faced with much difficulties. As a result, the Mouffussil as well as the Presidency Courts gradually began to turn to the English Law for guidance and help.[27] Each of the Presidency Courts followed an independent course of its own. The regulations passed by different Presidencies differed widely in their scope and contained different provisions as a result there was chaotic mass of contradicting and conflicting decisions on similar points. For instance, in the Bengal Presidency, serious forgeries were punished with imprisonment for a term double the term fixed for perjury, whereas in the Bombay Presidency, perjury was punished with imprisonment for a term double the term fixed for the most aggravated forgeries.[28] This resulted in the confusion in the administration of justice.

In 1833 Lord Macaulay persuaded the House of Commons that the ideal moment had come for the codification of Indian Laws. The Penal Code was drafted by the first Law Commission under the Presidentship of Lord Macaulay and three commissioners named Macleod, Anderson and Millet.[29] The draft was based on the simple codification of the law of England, while at the same time borrowing elements from the Napoleanic Code and Louisiana Civil Code of 1825.[30] The first draft of the Code was presented before the Governor- General- in- council in the year 1837, returned it to the Law Commission with an order to get it printed under its superintendence. The draft was again revised and then the revised IPC was prepared and brought in by Barnes P. Peacock, Sir James William Colvile, J.P. Grant, D. Eliott and Sir Arthur Buller. The revised Penal Code was read for the first time in the legislative council on December28, 1856. The Indian Penal Code was read second time on Januray3, 1857. After its second reading, the bill was published in the Calcutta Supplementary Gazette. Finally, the IPC was passed by the Legislative Council of India, and received the assent of Governor- General on the Oct.6, 1860. It was scheduled to come into force on May1, 1861. Thus, IPC as a codified law came into existence. Under this code, offences were defined and punishments were prescribed.

Theories of Punishment

Various theories are recommended to explain the purposes of punishment

Retributive Theory:

Retributive means castigating, punitive or payback or make a return to. The origin of this theory lies in the primitive notion of revenge against the wrong doer. This theory is also known as Vengeance Theory. According to this theory, it is right that evil should be returned for evil regardless to ulterior consequences. The punishment satisfies the feeling of revenge as an injured person has the right to take revenge against the wrong doer. The harshness of the punishment is directly proportionate to the seriousness of the crime. The principle of 'eye for an eye', 'limb for a limb', tooth for a tooth', 'life for a life' was the basis for the criminal justice.

[25] *Supra* note 28.
[26] Rudolph Peters, "Crime and Punishment in Islamic Law", Cambridge University Press, New York, 2006, p.66.
[27] https://shodhganga.inflibnet.ac.in/bitstream/10603/286161/8/08_chapter%202.pdf, visited on Aug.30, 2024 at 11:15 a.m.
[28] *Ibid.*
[29] Masuma Pervin, "Enactment of Penal Code, 1860: A Historical Analysis", IOSR Journal of Humanities and Social Sciences, Vol. 21, June 2016, pp. 43-54, p. 53.
[30] "The Indian Penal Code" retrieved from https://byjus.com/free-ias-prep/indian-penal-code/ visited on August 30, 2024 at 4:20 p.m.

The retributive theory of punishment is based on the fulfillment of moral justice. A good action deserves to be crowned with the good reward and a bad action, on the other hand, meets its own fate.[31] The wrongdoer is himself responsible for the evil inflicted upon him as the result of his own wrongful act.

Many jurists and philosophers criticized this theory. In ancient India, this theory had no place. They recommended mild punishment because the Hindu philosophers believed in Karamvipak. It implies man committing certain sins was born in the next life as low or filthy beast or bird.[32] Critics of retributive theory say that retribution is not remedy in itself for an offence but an aggression of it. This theory has been highly criticized for ignoring the very purpose of the punishment, viz., to reform the criminal. Reformation is not possible by returning the evil to the wrongdoer. In modern times this theory is not justifiable as it cannot be said that the punishment is based only on vengeance.

Deterrent Theory:
Punishment is said to be deterrent when it is inflicted upon the offender with an object to deter them from committing crime in future and setting a lesson unto others. This kind of punishment presupposes infliction of severe penalties on the offenders. This theory requires that the more hardened a criminal, the more severe should be his punishment. If an offence is very grave then the highest punishment of death is justified to deter other people from committing the similar offence. Main supporter of this theory is Bentham, Plato, the Sophists, Locke, etc. In ancient times, the severe punishment and execution of the sentence before the public were meant to serve this end. Deterrent punishment creates some kind of fear of severe punishment in the mind of other people which keep them away from criminality.

The efficacy of this theory of punishment can be pointed out the reference to the Islamic law of crimes as applied in Saudi Arabia, the only country where the concept of severity with regards to punishment is being applied even now. It is reported that crimes are almost unknown in Saudi Arabia and it is common sight in towns that people leave their shops open and unattended while they are away from them from some time.[33]

This theory has been criticized on the ground of its severity. The entire history of the penal laws shows that severity of punishment does not curtail the crime rates. The severity of punishment hardly has any effect on the hardened criminals as they are not afraid of imprisonment and also on the ordinary criminals as the ordinary criminals commits the crime on the spur of the moment without any prior intention or design. Some prison authorities are of the view that there is a type of prisoners who do not learn even from the experience of punishment.

Preventive Theory:
The preventing theory says that the object of the punishment is to prevent or disable the offender from committing the offence again. Salmond says, “we hang murders not merely that it may put into the hearts of others like them the fear of a like fate, but for the same reason we kill snakes, because it is better for us that they should be out of the world than in it.”[34]

The preventive mode of punishment can be classified in the following manner:

1. By inculcating the fear of punishment in the mind of people.
2. By disabling the criminal either permanently or temporarily from committing any other crime in future.
3. By transforming the offender by way of rehabilitation or reformation so that crime is not committed again.

In the ancient times, the offenders were prevented from committing the crime in future by disabling them permanently. For example, the punishment for the theft was to cut the hands of the thief, the sexual offender was castrated, and murderer was punished with death. In modern times some other prevention methods are also applied such as forfeiture of office, suspension or cancellation of license etc.

Main critic of this theory is Kant. He says that this theory treats a man as a thing, not as a person, as a means not as an end in itself. The idea of prevention of crime is simply not possible by detaining a criminal for a long time in a jail as the wrongdoer in prison learning bad things from other criminals.[35]

Expiatory Theory:
This theory is based on morals. It had little to do with law or legal concepts. According to this theory, if the offender sincerely expiates or repents for his misdeeds or crime, he should be forgiven and let off. The sole purpose of this

[31] S.R. Myneni, “Jurisprudence (Legal Theory)”, p.139.
[32] S.R. Myneni, “Jurisprudence (Legal Theory)”, at p. 141.
[33] S.M.A. Qadri, “Criminology”, at p. 127.
[34] S.R. Myneni, “Jurisprudence (Legal Theory)”, at p.143.
[35] Id. at p. 144.

punishment is to make the offender guilty of his act and transform him into a responsible citizen of the society.[36] The ancient Hindu commentator Manu was a great admirer of expiation as a form of punishment for the rehabilitation of criminal in the society. In ancient India, this type of punishment was common where expiations were performed by way of penance which varied according to the severity of crime. But generally, the severity did not always depend either upon the degree of moral culpability or the pernicious result of the act. In some cases, the penance consisted of uttering certain mantras, fasting, amputation of a limb caused by the penitent himself, self- immolation, or burning oneself to death, etc.[37]

This theory has lost its relevancy in the modern system of punishment as being based on ethical consideration. According to Modern Expiation Theory, the offender has to pay the decided amount of compensation to the victim of the offence. By crimes awarding compensation from the pocket of the wrongdoer, he is punished and is prevented from doing such offences in his remaining life.[38]

This theory was criticized by the penologists, opining that this theory is efficient to meet the less serious crimes such as abuse, defamation, trespass and etc. but could not be the best solution for the serious crimes like murder, theft, dacoity, rape, kidnapping, abduction, etc. If the compensation be paid in rape cases, then the number of rapists will be increased. The rich people will be habituated to rape the poor women and can escape from the imprisonment by paying compensation to the poor victim.

Reformative Theory:
This theory is also known as rehabilitative and corrective theory. According to this theory, the main object of the punishment is to reform the criminal. It is believed that if the criminals are trained and educated, they can be transformed into law abiding citizens of the country. It is the most appreciated theory of punishment. This theory believes that nobody is born criminal; the wrongful act of the individual is the result of those circumstances which were around them.

As against the other types of punishment, the reformative approach to punishment seeks to bring about a change in the attitude of offender so as to rehabilitate him as a law-abiding member of the society. Imprisonment shouldn't be for the aim of analytic and eliminating from the society but to create a modification in their mental outlook through effective measures during the term of their sentence. [39]He must be properly trained, educated during the period of imprisonment so as to adjust themselves to free life in a society after their release from the prison. However, the prison system in India, is not that much effective in fulfilling its objective. The agencies such as a parole and probation are highly recommended as the best measures to reclaim offenders to society as reformed person.

This theory works well in case of young offenders, first time offenders but has no appreciable effect upon the habitual, hardened and professional criminals.

Salmond states three objections against the purely reformative theory. They are:

1. If criminals are sent to prison in order to be transformed into good citizens, prisons will be turned into dwelling houses far too comfortable to serve as any effectual deterrent to such class of persons;
2. There are in the world men who are incurably bad and are beyond the reach of reformative influences;
3. Crime will be a profitably industry which will flourish accordingly.[40]

Constitutional Provisions Relating To Sentencing
The Constitution of India being the fundamental law of the State has conferred the power upon both the Central and State governments to make laws concerning regulations of crime, enactment of criminal procedure including all matters included in the Code of Criminal Procedure at the commencement of the constitution and preventive detention for reasons connected with the security of the state, the maintenance of public order or the maintenance of supplies and services essential to the community.[41]

[36] H.Y.D.R.A., "Expiation Theory of Punishment" retrieved from https://hydratrust.in/expiation-theory-of-punishment/ visited on September 2, 2024 at 3:40p.m.
[37] S.R. Myneni, "Jurisprudence (Legal Theory)", at p. 145.
[38] Anand Bhusan., "The Expiation Theory of Punishment" retrieved from https://indianlegalsolution.com/the-expiatory-theory-of-punishment/ visited on September 2, 2024 at 3:50 p.m.
[39] Sonakshi Chinda, "Reformative Theory of Punishment: Analyzing the Status in India", International Journal of Law &Humanities, Vol. 4, Issue 3, 2021, pp. 1114-1119, p. 1115.
[40] S.R. Myneni, "Jurisprudence (Legal Theory)", at p.147.
[41] The Constitution of India, Schedule VII, Entries 1-3.

Article 13(2) of the Indian Constitution states that the state shall not make any law which takes away or abridges the fundamental rights conferred by part III of the Indian Constitution.

Article 14 states that the State shall not deny to any person equality before law or the equal protection of laws within the territory of India.

Article 20(1) incorporates the principle that a person can be punished for an offence committed by him only in accordance with the law as it existed on the date on which an offence was committed. In **Kedar Nath vs. State of West Bengal**,[42] the Prevention of Corruption Act, 1947 provided the punishment of imprisonment as well as fine for offences committed under the Act. The accused committed an offence in 1947. Subsequently in 1949, the Criminal Law (Special Courts) Amendment Act, 1949, amends the Prevention of Corruption Act, 1947, enhancing the penalty for the offences committed under the Act by an additional fine to be equivalent to the amount of money found to have been procured by the offender through the offence committed by him. It was held that the enhanced punishment prescribed by the amended law could not be imposed on the accused for the offence committed in 1947 because of the prohibition contained under Article 20(1) of the Indian Constitution.

Article 20(2) states that a person cannot be prosecuted and punished for the same offence more than once. The protection against "double jeopardy" contained under this article would be available only when the accused has been not only prosecuted but also punished after such prosecution.[43] The provision of Article 20(2) is identical with the English doctrine of autrefois convict which is also embodied in Section 300 of the Criminal Procedure Code, 1974.

The Supreme Court of India in **Kolla Veera Raghav Rao vs. Gorantla Venkateswara Rao and others**,[44] had affirmed that Section 300(1) of CrPC is wider in its scope than Article 20(2) of the Indian Constitution. While Article 20(2) of the Indian Constitution only says that "no person shall be prosecuted and punished for the same offence more than once" whereas Section 300(1) of CrPC states that no one can be tried and convicted for the same offence or even for the different offence but on the same facts.

In **Venkataraman vs. Union of India**,[45] an enquiry was made before an enquiry commissioner on an appellant under the Public Service Enquiry Act, 1960 and as result he was dismissed from the service. He was later on charge for committing an offence under IPC and The Prevention of Corruption Act. The court held that the proceedings held by the enquiry commissioner was only a mere enquiry and did not amount to prosecution for an offence. Hence, the second prosecution did not attract the doctrine of double jeopardy or the protection guaranteed under Article 20(2).
Article 20 (3) sates that a person accused of any offence shall not be compelled to be a witness against himself. The characteristics feature of Criminal Justice system is that an accused must be presumed to be innocent until proven guilty.

Article 21 states that a person shall not be deprived of his life or personal liberty except according to the procedure established by law. Thus, it can be said that penal laws must be clear and certain besides being reasonable, just and fair.
Articles 72 and 161 of the Indian Constitution confer power upon President and Governor respectively to grant pardons, reprieves, respites or remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. The judiciary has the power to pass the sentence but it must be exercised in accordance with the law. The legality and correctness of the sentence passed by the lower court may be challenged before the higher courts as recognized by the penal laws.

CONCLUSION

Sentencing is largely based on individualization of punishment rather than stated goals of punishment. With the development of the society the criminal laws had undergone tremendous change. The King was looked upon social and moral order for the purpose of punishment. A drastic change underwent after Muslim invasion. They imposed their own laws on a large part of this country. During this period criminal law was administered according to Mohammedan law. The western colonialism overpowered the whole territory and come to influence all the aspects of social life of Indian. For sometimes, Britishers did not disturb the Mohammedan Law of crime but later on the English Government modified and reshaped the criminal laws in India. The Indian criminal justice system urgently needs an appropriate sentencing policy given the rising crime rates in the country. The goal of introducing such a policy is to reduce the subjectivity that judges use to a minimum while still allowing them the necessary discretion needed in the interest of justice, hence it must not be a strict one. The courts in India currently have to rely on precedents, which also vary

[42] Kedar Nath vs. State of West Bengal AIR 1953 SC 404 (India).
[43] Narendra Kumar, "Constitutional Law of India", Allahabad Law Agency, Faridabad (Haryana), 9th ed., Reprinted, 2016, p.306.
[44] Kolla Veera Raghav Rao vs. Gorantla Venkateswara Rao and others (2011) 2 SCC 703 (India).
[45] Venkataraman vs. Union of India AIR 1954 SC 375 (India).

depending on the judge's discretion and the existence of additional aggravating and mitigating circumstances surrounding the offence. If these rules are applied, this will prove to be very helpful. The intention of the sentencing guidelines is to create a just and equitable society in which the rights of victims and criminal defendants, who are now being weakened by the sentencing system, are protected.