PUNISHMENT

"The mood and temper of the public with regard to the treatment of crime and criminals is one of the unfailing tests of the civilization of any country. A calm, dispassionate recognition of the rights of the accused—and even of the convicted—criminal against the State; a constant heart-searching by all charged with the duty of punishment; a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment; tireless efforts towards the discovery of curative and regenerative processes; unfailing faith that there is a treasure, if you can only find it, in the heart of every man; these are the symbols which in the treatment of crime and criminal, mark and measure the stored-up strength of a nation, and are sign and proof of the living virtue in it."*

It is recognised on all hands that during the past hundred years, our views on punishment have undergone a change. Punishment is no longer retributive in the sense of satisfying the feelings of revenge of the victim, but the view is still held that it is retributive in the sense that it expresses the solemn disapprobation of the community—a reprobation not always unmixed in the popular mind with atonement and expiation.[1] As Gardiner says: ".....in the sense in which retribution implies that a criminal deserves his punishment, this feeling is connected with the notion of justice itself, of justice as an ultimate value akin to the idea of truth and closely connected with the principle of equality... 'A' deserves his punishment but 'B' if he has been harshly treated by the Courts, *does not* and it is the negative corrolary of retribution which makes public opinion rally in B's favour."[2]

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* Sir Winston Churchill quoted in C.H. Rolph "*Commonsense about Crime & Punishment.*" p. 175.

1. "The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else.....The ultimate justification of any punishment is not that it is deterrent but that it is the emphatic denunciation by the community of a crime." Lord Justice Denning quoted in the Report on the Abolition of Capital Punishment (1949-53) Cmd. 8932, para 53.

2. Gardiner: "*The Purposes of Criminal Punishment*" 21 Mod. L.R. p. 121.

The principal object of punishment today is protection of society and this is achieved partly by reforming the criminal and partly by deterrence by preventing him (and others) from committing crimes in future. There is also the view that all three elements—Justice, Deterrence and Reformation are essential. Lord Justice Asquith observed "... ...a third theory and it is the one which seems to me to come nearest to the truth is that there must be an element of retribution or expiation in punishment; but that so long as that element is there and enough of it is there, there is everything to be said for giving punishment the shape that is mostly likely to deter and reform.[3]" The Russian code explicitly declares the objects of Punishment. According to Article 20 of the Criminal Code the aims of Punishment are :

(i) Retaliation for the committed crime.

(ii) Re-education of the convicted persons.

(iii) The exercise of educational influence on the offender and other people in order to deter them from committing criminal offences.[4]

However, emphasis is now being increasingly laid on the reformative aspect[5] with the result that save in the case of incorrigible offenders who may have to be indefinitely segregated, the state is employing every means of correction and rehabilitation.[6]

The new outlook on punishment has been necessitated by the investigation into crime causation, by the research into the effects of different forms of punishment, by the development of social sciences, psychological studies and modern statistics. The change has been brought about also by the humanitarian forces, and theories of individualisation of punishment. The view has gained ground that the law should look to the criminal and not merely to the crime in fixing

3. Quoted in Hall *"Studies in Jurisprudence and Criminal Theory"* p. 244 (footnote 21).

4. See Ivo Lapenna *The New Russian Criminal Code and Code of Criminal Procedure* International and Comparative Law Quarterly, Vol. 10 part 3. 421 at p. 435.

5. "Generally speaking the increasing understanding of the social and psychological causes of the crime had led to a growing emphasis on reformation, rather than deterrence in the older sense as the best way to protect both the individual criminal from himself and society from the incidence of crime." Friedman: *Law in a Changing Society* (*1959*) p. 180.

6. "The overriding aim here is the protection of society by serious and sustained attempts to prevent further relapses into crime. But coupled with this aim, there s another personal rehabilitation of the offender *for its own sake*.....Already concern for the weak members of the society has borne fruit. In medicine where so many are now cured who previously would have died or been disabled for life; in the social services

the punishment. A notably varied system of sanctions is now applied with a view to adapt the punishment to each particular category of criminals. Correspondingly the traditional attitude regarding the extent of responsibility has undergone a change. Different sanctions are now applied to children and adolescents as opposed to adults, to mentally abnormal persons as against sane individuals, to first offenders as against the recidivists. The quantum of punishment also varies from a mere admonition to capital punishment. In all these, society is trying to utilise every scientific method for self protection against destructive elements in its midst.

The changes in outlook and reforms in penal policy are reflected in several statutory provisions in our country. The Children's Acts,[7] the Abolition of Whipping Act,[8] the Probation of Offenders Act,[9] and The Repeal of Criminal Tribes Act are examples of this changing outlook. The then Home Minister observed: "The Science of penology has made a great advance in recent years and the entire outlook towards crime and criminals has changed. The old idea of punishment out of a sense of vindictiveness has disappeared and it has now to be imposed with a view to reforming and rehabilitating the criminal and making him a useful citizen.[10] The Indian Jails Committee defined the aim of prison administration as being "The prevention of further crime and the restoration of criminal to society as a reformed character." [11]

From these changes, two principles seem to emerge:

(1) The system of punishment cannot be based exclusively on the nature of the crimes committed, but must be conditioned by the personality of the offenders. The same kind of crime may be committed

which afford some protection for the poor and the old; and now in penal reform where new methods of reformation are succeeding in turning anti-social persons into useful and effective members of society again." Gardiner *op. cit.* p. 129.

7. *e.g.* Children's Acts in Madras, U.P., Bombay, Sourashtra and the latest being the Central Act IX of 1960, applicable to Union Territories.

8. Act XXIV of 1955. "Whipping is a barbarous form of punishment which has no reformative value" (Statement of Objects and Reasons—Gazette of India, May 4, 1955).

9. Act XX of 1958. "In the meantime there has been an increasing emphasis on the reformation and rehabilitation of the offender as a useful and self-reliant member of society without subjecting him to the deleterious effects of jail life". See the Statement of Objects and Reasons in the Gazette of India, 11-11-1957, Part II, Sec. 2 P. 842.

10. Rajya Sabha Debates, 25-8-1956.

11. See Barker: "*Modern Prison System of India*", p. 2.

by entirely different types of criminals. Punishment must therefore be suited to different categories of criminals.[12]

(2) Punishment must not only be a reaction against the crime itself but must also aim at preventing the offender from committing further crimes. It is therefore obvious that if in certain cases the traditional punishment does not fulfil this latter function, it must be replaced by some other means.[13]

The Indian Substantive Criminal Law, however, remains suffused with the penological thoughts of the past century. The Penal Code, as it is, reveals a graded system of punishments adapted to different categories of crime not infrequently running into minute sub-divisions.[14] The need for re-orientation of principles of substantive law is being keenly felt.[15]

II

The first criticism voiced against the punishments prescribed by the Code is that they are too severe. As Gour says [16] "It is a standing complaint against the Code that it is draconian in its severity as regarding punishments." The framers of the Code seem to have been aware

12. As Vinogradoff put it "The Judge stands to the offender in the position of the physician who selects his remedy after diagnosing the disease and the resources of the patient's organisation....."

13. See Radzinowicz "*The Present Trends of English Criminal Policy*" in The Modern Approach to Criminal Law, at p. 31.

14. *e.g.* The gradation of punishment in regard to the offence of criminal trespass (Sec. 441-460 I.P.C.) and Mischief (Sec. 425-440 I.P.C.). "The minute splitting of offences into degrees and the distinguishing of attempts from completed criminal acts with the meticulous setting down of supposedly appropriate dosages of punishments belongs to an era when punishment based upon degrees of vicious will was thought to be the only or best means of coping with anti-social behaviour." Sheldon Glueck, *Principles of a Rational Penal Code* 41. H.L.R. 453 at p. 480.

15. "The lapse of time which has elapsed since Macaulay's Code was drawn up makes it necessary that we should review its working and bring it into conformity with modern ideas. It may be that on an examination of it we shall find that it is in some places not in conformity with progressive thought of the age". P. N. Sapru on '*Prevention of Crime*'—Proceedings of the All India Penological Conference (1950) at p. 85.

16. Gour. *The Penal Law of British India* (Ed. 4) Vol. I p. 330. "No civilised country today imposes such heavy sentences as does the Penal Code. Heavy sentences have long gone out of fashion in England and the odour of sanctity and perfection attaching to the Penal Code should not deter indigenous legislatures to thoroughly revise the sentences and bring them into conformity with modern civilised standards." 59 M.L.J. (1929) p. 62.

of this apparent severity.[17] A learned writer observes[18] "The maximum punishments laid down in many places have been so liberally fixed that the actual punishments inflicted in courts almost mock at them. The punishments in many cases run conveniently by whole numbers of years. The maximum laid down is hardly ever approached even, far from anybody contemplating to outstrip it. This is a limitation that will confront all legislators at all times, but in the case of the present Penal Code it does give the look of a 'Bargain Theory' of Justice."

In the second place, the classification of imprisonment into simple and rigorous seems to be based on the need for increased rigour of treatment in the case of particular crimes, recommended by the Jails Enquiry Committee.[19] The revision of sentences as well as the utility of retaining the distinction between simple and rigorous imprisonment may be examined in the present context.[20] The Indian Jails Committee also seems to have recognised that simple imprisonment was anamolous.[21] As Barker says "it is putting it mildly to say that this (simple imprisonment) does no physical or moral good to the prisoner; it is definitely harmful to him."[22]

Provision for solitary confinement in the punishments prescribed in the Indian Penal Code is another matter for which one fails to see a rational basis *today*. In the medieval times it was considered that

17. "We entertain a confident hope that it will shortly be found practicable generally to reduce the terms of imprisonment which we propose" See note 'A' appended to the Draft Penal Code (1837).

18. Abul Hasanat, *Crime and Criminal Justice*, Appendix B. p. 124-125.

19. This Committee of which Macaulay was a member reported in 1838 that "the prisoners in whose case the Court has exempted labour should not be made to work". The result was that two forms came into existence, *i.e.*, simple and rigorous imprisonment, See Haikerwal: *A Comparative Study of Penology* p. 28.

20. "The distinction is not recognised in many places and it does not accord with sound prison administration. Nothing can be more debilitating than imprisonment without work and on the other hand, nothing can destroy the possibility of reformation faster than forced labour at noxious or degrading work. *It is submitted that all prisoners should work to the extent that they are physically capable*". R. E. Knowlton, *Punishment Provisions in the Penal Code*. Burmah Law Institute Journal Vol. II, No. 1 (1960) p. 40.

21. The Indian Jails Committee itself seems to have been of the opinion that simple imprisonment without labour should be given only in few cases and held that simple imprisonment itself should be of two kinds: (a) simple imprisonment without liability to labour, (b) simple imprisonment with liability to light labour. This proposal was recommended but never introduced. Barker disagreeing with this, observes, "all forms of imprisonment should carry liability to do some form of labour" Barker, *op. cit.* p. 24.

22. Barker *op. cit.* p. 24.

cellular confinement was a means of promoting reflection and penitence. But it has since come to be realised that this kind of treatment leads to a morbid state of mind and not infrequently to mental derangement. It is needless to add that as a form of torture also it fails in its effect on the public[23] and it has been observed that "regarded as a rational method of treatment, cellular confinement is a curious monument of human perversity ".[24] Solitary confinement has been repealed in U.K.[25] and it would appear not to exist in Russia.[26]

The short term imprisonment also does not seem to serve any useful purpose.[27] The period is not long enough for the reformatory influence to work or for the offender learning any useful trade or occupation. On the other hand considerable harm is likely to be done, particularly to a first offender by his coming into contact with hardened criminals.[28] Several suggestions have been made for an effective replacement of short term imprisonment. Levying of fine does not seem to be suitable. Many people are given the short-term imprisonment as a punishment in lieu of not paying the fine. Letting out on parole or probation has also been suggested.[29] Rule 102 of the Criminal Rules of Practice says "The Government consider the awarding of short term imprisonments as undesirable and Magistrates before passing such sentences should consider whether imprisonments till the rising of the Court allowed by law could not appropriately be passed instead, or the provisions of Section 562, Criminal Procedure Code applied in favour of accused persons." It may perhaps be said in favour of short term imprisonment that it is an effective method of

23. Yahya Ali, J., in (1947) I.M.L.J. p. 346.

24. ".....that it should have been established shows the ignorance of criminal nature which existed at the time; that it should still persist shows the present necessity for a widespread popular knowledge of these matters. It may be possible to learn to ride on a wooden horse or to swim on a table, but the solitary cell does not provide even a wooden substitute for the harmonising influences of honest society. To suppose that cellular confinement will tend to make the criminal a reasonable human being is as rational as to suppose that it will tend to make him a soldier or a sailor, a doctor or a clergyman" Havelock Ellis "The Criminal", pp. 387, 328 quoted in Sethna, *Jurisprudence* at p. 353.

25. It was repealed by 56 & 57 Victoria (Ch. 54) 1893.

26. L. Koerber: *Soviet Russia Fights Crime*, p. 12.

27. ".....Simple imprisonment together with the *short-term sentences* of one month *or* less.....continue to be most regrettable features of Indian Penal Administration and the two combined are real obstacles to prison reform—Barker, *op. cit.* at p. 24.

28. See V. B. Raju: Commentaries on the Indian Penal Code, Appendix, J., (p. 1584) 1961 Edn. See also Bombay Probation of Offenders Act, 1938, and Bombay H.C. Circular No. P. 0906/40 of 15-9-1952.

29. See William C. Reckless: *The Crime Problem* (3rd Edn. 1930) at pp. 477-478.

prevention in the case of persons courting imprisonment as part of political or other agitation, *e.g.* the Satyagrahis.

III

The principle of individualization of punishment is gaining importance today. However, the acceptance of this principle raises the problem of the appropriate methods to be adopted to achieve that end.

(i) The Legislature operating before the commission of the crime obviously cannot consider the character of the offender nor the varying circumstances surrounding the doing of the criminal act. The Penal Code, no doubt, leaves a wide discretion to the Judge in the matter of fixing the punishment by prescribing the maximum alone. Alternative modes of treatment [30] are also provided. Yet the code contains a large number of sections that deal essentially with the same conduct which by the addition of certain factors raises the maximum. Gour points out [31] that though the principal offences found to have been dealt with in the code would not exceed 25 or 30 in number, the penal sections would number no less than 366. To that extent the discretion of the judge is limited.

(ii) The Judge has ordinarily considerable discretion in the matter of selecting the appropriate sentence but much of the value of this provision is lost if his knowledge of the antecedents of the offender and other circumstances surrounding the commission of the offence is limited to facts that are relevant to the issue of guilt. The imperfections of the existing machinery are pointed out thus: "Legislative prescription (in advance) of detailed degrees of offences is individualisation of acts and not of human beings and is therefore bound to be inefficient. Judicial individualisation, without adequate facilities in aid of the Court is bound to deteriorate into a mechanical process of application of certain rules of thumb or of implied or expressed prejudices".[32] It is interesting to note that while in one case [33] the Supreme Court held that in determining the quantum of punishment which should be awarded for a crime the character of the evidence on the basis of which the crime is held to have been committed can have no bearing at

30. Fine is an alternative to imprisonment. Admonition and release on probation are also alternative modes of treatment under the Probation of Offenders' Act, 1958.

31. Gour *op. cit.* The Introduction CCVII. There are about 9 aggravations of hurt, 6 aggravations of wrongful confinement, 5 aggravations of kidnapping 14 aggravations of mischief and 18 aggravations of criminal trespass.

32. Sheldon Glueck: *Principles of a Rational Penal Code.* 41 Har. Law. Review p. 453 at 467.

33. *Vadivelu Thevar* v. *The State of Madras,* A.I.R. 1957 S.C. 174.

all and cannot be taken into consideration, in some other cases[34] the Supreme Court has held that as a matter of convention the death sentence should not be imposed when the conviction for murder is confirmed only by a majority.

The following alternatives have been considered in relation to some classes of offenders in some legal systems :[35]

(a) It is suggested that "fixing the sentence" part of the criminal trial should be separated from the trial and entrusted to a board of experts. The duty of the judge should be confined to the deciding of guilt or innocence of the accused.[36] Prof. Glanville Williams explains "The judges when they sentence offenders have too little knowledge of what really goes on in the different kinds of penal establishments, too little knowledge of the real circumstances of the offenders and of the factors which really caused him to do what he did and too little knowledge of the problem to be solved which only begins when the prisoner leaves the dock. It is therefore strongly urged that whenever an offender is sentenced to imprisonment for the first or second time he should be remanded to custody in a special remand centre until (after a full enquiry into his circumstances and history including his mental and physical history) his case has been reviewed by a sentencing board consisting of one lawyer, two doctors one of whom should be a general practitioner and one a pychiatrist and neither of whom should be prison medical officers, one prison Commissioner or representative of the prison, one lay member; (at least one of the six being a woman) and if practicable the trial judge, recorder or chairman with absolute powers to confirm the sentence or to substitute any lesser penalty which the Court could

34. *Aftab Ahmed Khan* v. *State of Hyderabad.* A.I.R. 1954 S.C. 436. *Pandurang Tukia and Bhillia* v. *State of Hyderabad,* A.I.R. 1955. S.C. 216.

35. See the learned discussion by Prof. Knowlton in "*Punishment Provisions of the Penal Code*" Burma Law Institute Journal Vol. II No. 1 (1960) p. 13-23.

36. See Livingston Hall: *Substantive Law of Crimes, 50,* Har. Law. Review p. 653; Sheldon Glueck *op. cit.* p. 475. The system of a separate board for fixing the sentence is tried in relation to juvenile and youthful offenders but is rejected by the American Model Penal Code and it raises problems concerning individuals' civil rights as pointed out by Knowlton, *op. cit.* p. 21; See also Friedman, *Law in a Changing Society* pp. 183-4; William C. Reckless observes "The trend seems to be in the direction of having courts operate under *blanket commitment* laws rather than under specific sentencing powers. For example instead of requiring the Court to sentence a defendant for a specific term to a specific prison, laws are now enabling courts to commit offenders to a State Authority (Department of Welfare, Department of Correction etc.), under an indeterminate sentence and the exact period is then determined by them): *The Crime Problem* p. 438-9.

have imposed and whose sole intention should be the course which is most likely to result in that offender not committing any further offence.[37]

(b) if the discretion given to the Judge in the matter of individualising punishment is to be effectively exercised, additional fact-finding processes have to be resorted to by the Judge. They may be in the shape of a judicial hearing before sentencing or an investigation by the probation department utilised by the Judge.[38] In this connection the following provisions of The Indian Probation of Offenders Act, 1958, may be referred to.

Sec. 4(2) Before making any order under sub-section (1) the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

Sec. 6(2) For the purpose of satisfying itself whether it would not be desirable to deal under Sec. 3 or 4 with an offender referred to in sub-sec. (1) the Court shall call for a report from the probation Officer and consider the report, if any, and any other information available to it relating to the character and physical and mental condition of the offender.

Sec. 7 The report of the probation Officer referred to in sub-sec. (2) of Sec. 4, of sub-sec. (2) of the Sec. 6 shall be treated as confidential. Provided that the Court may if it so thinks fit communicate the substance thereof to the offender and may give him an opportunity of producing such evidence as may be relevant to the matter stated in the report.

The American Law Institute's Model Penal Code requires a pre-sentence report when the conviction is for a felony, when the defendant is under 21, and when the defendant will be sentenced to imprisonment for an extended term.[39]

In England the fact finding system after conviction for purposes of determining the punishment consists of the testimony of a Police Officer.[40] The officer may be cross-examined. An analogous procedure is provided for in Burma.[41] The employment of police officers for this

37. *Reform of the Law* (1951) p. 207.

38. See Knowlton *op. cit.* p. 15.

39. A.L.I. Model Penal Code Draft 2. pp. 53-4.

40. See Archbold, *Criminal Pleading Evidence and Practice*, 33rd Ed. (1957). cum, supp. para 393.

41. See Knowlton *op. cit.* p. 17.

end may make the implementation of the system easy and practicable but it also raises the question whether facts favourable to the accused will always be brought out. Further, the accused should have a right and opportunity to rebut the evidence of the police officer and a provision for a bare denial is of little use. Above all, whichever type of officer may be engaged to collect and present the data to the judge, in the absence of any criteria as to the type of facts that may be presented, the danger of irrelevant matter of questionable utility and veracity being brought in is not to be overlooked.

The Indian Jails Committee however did not favour the above methods. It observed, "Mr. Justice Heaton of the Bombay High Court made the suggestion that the apportionment of punishment should be entrusted to a different body from that which tried the question of guilt or innocence. He recognises however the force of the objection to this which is that apart from the duplication of the work which it involved it would be too early to judge of the effect of conviction and of the yet unpronounced sentence on the accused. In some of the States of America an attempt has been made to get over this difficulty by appointing in every court an officer whose duty it is, after the prisoner's guilt has been established to make enquiries and to furnish the judge with information including a report on his mental condition which will enable him to award punishment wisely and equitably. The system is said to work satisfactorily in the United States although even there it was admitted that attempts had been made, though unsuccessfully to influence the court's officers in favour of or against the prisoner. In this country we do not think that such a system would have any chance of success. The many religious and social cleavages which exist in India would inevitably lead to an unevenness in the officer's reports even if direct corruption could be guarded against, and we do not think that it would be wise to attempt to imitate the American system in this respect. At the same time it does seem to be possible that more might be done especially through the instrumentality of the Public Prosecutor, generally a vakil of long standing and position to lay before the court after the question of the prisoner's guilt has been determined such reliable information as would enable the Court to adjust its sentence to the needs of the case".[42] It cannot be said that the difficulties referred to have disappeared at the present day.

42. Quoted in Ramaswami, P. N. *The Magisterial and Police Guide*, Vol. I, pp. 503-4 (2nd Edn. 1952).

(c) It may be said that in spite of the assistance provided by the post-conviction fact-finding methods and the provision of an appellate forum for correction there is still no complete protection against judicial arbitrariness in imposing sentences. The Model Penal Code (American Law Institute) purports to establish criteria for the exercise of discretion in certain cases.[43] The advisability of incorporating in the Penal Code certain directive principles that would regulate the exercise of discretion by the judge, may be examined.

(d) It may not be out of place in this context to refer to the enumeration of several factors of aggravation and mitigation of punishment found in some of the continental Codes.[44]

IV

As the logical outcome of the principle of individualisation of punishment and as a necessary corollary of re-education of the offender the system of the Indeterminate Sentence has been adopted in some countries.[45] The early advocates of the indeterminate sentence had the primary object of protection of society and the reformation of the offender. The three main elements of their theory were,[46]

(a) an indeterminate sentence designed to remove the offender from society until reformed;
(b) appropriate education calculated to reform him, and
(c) conditional release to test his reformation before final discharge.

The indeterminate sentence is provided for in the cases of:

(i) habitual delinquents (*i.e.*, recidivists,[47] professionals, persistent delinquents not amenable to corrective measures) in almost all the countries that have adopted it;
(ii) abnormal offenders (*i.e.*, those suffering from mental disease, *e.g.*, Broadmoor patients in the U.K.).
(iii) alcoholic or drug addicts (Italy, Switzerland, Norway and Sweden), and

43. See Tentative Draft No. 2 Sections 7.01, 7.02, 7.03 and 7.04.

44. See Swiss Penal Code (1937) Arts. 63-66. Italian Penal Code (1930) based on the suggestion of Ferri. Regarding the merits and demerits of such enumeration, see Glueck, *Principles of a Rational Penal Code, 41, Har. L.R.* p. 453 pp. 468-7.

45. "...To shut up a man in prison longer than is really necessary is not only bad for the man himself, but also it is a useless piece of cruelty, economically wasteful and a source of loss to the community..." Burghess, J. C., in (1897), U.B.R. 330 (334). Some of the Acts which have adopted this are the English Criminal Justice Act, 1948, Swiss Penal Code, 1937, Arts. 14 and 42; Greek Penal Code. Yugoslav Penal Code, (1950), See also U.N. Doct. ST/SOA/SD/2 (1953) *Indeterminate Sentence* p. 15.

(iv) delinquents whose dangerousness results from their idleness (vagabonds, prostitutes etc.) and in the U.S. in the case of psychopathic sexual offenders.

Generally the sentence is one of relative ideterminateness with fixed minimum and maximum terms except in the case of category (ii). This principle is accepted in the case of Borstal trainees.

It is suggested by some that indeterminate sentence should be adopted in the case of all offenders. The American Law Institute proposes a procedure under which the Court would decide the time of release[48] with powers to extend the term of imprisonment as long as the offender shows no sign of improvement.

The advantages of indeterminate sentence are that it keeps the offender in detention as long as is necessary for social protection, *i.e.*, as long as he continues to be a danger to society, so that it accentuates the inherent severity of the sentence from the standpoint of the offender and also the reduction of the penalty becomes possible only through the offender's own efforts to improve.

The need for providing indeterminate sentence at least in the case of certain categories of offenders in our country may be examined.

V

The release of an offender should be effected as soon as the subjective conditions of release have been fulfilled. The purpose of punishment is to reform the offender and return him to society after rehabilitation. To find out whether this has taken place there should be periodic checks of the offender's condition[49] and the extent to which he is still dangerous to society. The progress of his readaptation has to be examined by a suitable body. Apart from the usual remission for good conduct, adequate provision for reviewing the

46. *Ibid.*, p. 12 (U.N. document).

47. Under the Indian Law an enhanced punishment is to be awarded to certain categories of persistent offenders. See Sec. 75 of the I.P.C. and Sections 110, 123 and the restrictions in Sec. 565 of the Criminal Procedure Code. See also Bombay Habitual Offenders Restraint Act, LI of 1947. Madras Restriction of Habitual Offenders Act VI of 1948.

48. See U.N. document *op. cit.*, p. 29.

49. "We are however strongly impressed by the desirability of bringing every long sentence of imprisonment under review at some period in the course of the sentence by an impartial authority which will have before it information which no sentencing court can possess as to the results of the period of imprisonment undergone by the prisoner and as to the question of his fitness for release....." Indian Jails Committee Report quoted by Ramaswami, P. N. *Magisterial and Police Guide*, Vol. I, p. 506 (2nd Edn.).

sentence may be useful. Of greater significance for the true rehabilitation of the offender is the eradication of the sentence.[50] As a recent writer observes "The true problem lies outside the buildings and the hutted camps, in the moral prison that engulfs the offender (and often makes him despise himself) when he comes back among us. It is time to start reforming that." [50a]

Eradication of the sentence should be possible.[51] The general attitude now followed seems to be 'once a convict always a convict' and the taint of conviction remains indefinitely. In some countries, the following provisions are to be found in the matter of 'unconvicting' the convicted :

(a) Lapse of a certain period automatically erases the conviction ;

(b) The offender can apply for such erasure by showing adequate grounds.[52]

The suitability of the above alternatives in the present context have to be examined.

VI

The problem of providing restitution to the victim within the scope of criminal procedure has been dealt with in several systems.[53] Restitution gives emphasis to the fact that the crime constitutes a a relation not only between the criminal and society but also between the criminal and his victim. The Indian Probation of Offenders Act of 1958 accepts the principle in the case of persons who are to be let

50. See William C. Reckless *op. cit.* at p. 438.

50a. C. H. Rolph, *Commonsense about Crime & Punishment* p. 174.

51. For purposes of elections, the lapse of some years eradicates the taint of conviction. See Representation of the People's Act of 1951 Sec. 139, 143. Similarly in the case of a legal practitioner under Sec. 12 (6) of the Indian Bar Councils Act, the punishment by way of being struck off the rolls or being suspended could be reviewed and rescinded subsequently by the High Court. Also under the Companies Act, a convicted person becomes eligible to become a director if five years have elapsed since his conviction. Under the Probation of Offenders Act (1958) Sec. 12 the offender is to be deemed not to have been convicted at all, in respect of disqualification imposed by other laws when he is dealt with under S. 3 or S. 4 of the Act.

52. This procedure obtains under the Criminal Laws of Soviet Russia, Yugoslavia and Switzerland.

See Boris S. Makiforev, *Fundamental Principles of Soviet Criminal Law* (1960), 23 Mod. Law Review, p. 31 ; Richard C. Donnely, *New Yugoslav Criminal Code* (1961), Yale Law Journal, p. 510 at 523. Art. 80 of the Swiss Federal Criminal Code (1937).

53. For an exhausitive treatment of the subject, see Stephen Schafer *Restitution to Victims of Crime.* Library of Criminology (1960) ; Round Table discussion on "Compensation for victims of criminal violence". Journal of Public Law (1959) p. 191.

off with an admonition or put on probation.[54] Section 5, Probation of Offenders Act, 1958, provides,

(1) The Court directing the release of an offender under Sec. 3 or 4 may, if it thinks fit, make at the same time a further order directing him to pay

(a) such compensation as the court thinks reasonable for loss or injury caused to any person by the crime, and

(b) The amount ordered to be paid under sub-section (1) may be recovered as a fine in accordance with the provisions of Sec. 386 and 387 of the Code. Under Section 14 (c) the probation officer has a duty to advise and assist the offenders in the payment of compensation and costs ordered by the court.

The *Partie Civile* intervention in French Criminal Procedure is well known. In some countries the duty of representing the claim of the victim for reparation is included among the duties of the Public Prosecutor.[55] In India, the Criminal Procedure Code[56] provides for restitution to a limited extent from out of the fine imposed, at the discretion of the Court. But normally the victim has to seek compensation in a civil court by means of a separate action for damages. The advantages of a single tribunal familiar with the whole case, being able to view the sentence and the compensation recoverable by the victim, as a whole from the standpoint of the victim, merit consideration.

Perhaps of greater significance is the punitive concept of restitution. The offender should understand that he injured not only the community and the legal order but also the victim. Compensation cannot undo the wrong, but it will often assuage the injury and it has

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The concept of restitution to the victims is not new in Indian Law. For the several suggestions mooted in this behalf, see the second report of the Indian Law Commissioners (1847) paras 448 and 495 to 500.

54. See also the English Criminal Justice Act, 1948, Sec. 11, clauses 2 and 3; Howard. C.—*Compensation in French Criminal Procedure*, 21, Mod. L.R. (1958) p. 387; Criminal Code of Canada (1955) Art. 628 to 629 and 638.

55. Sec. C. Howard *op. cit* p. 387. The position in Austria, Sweden, Columbia and Italy are referred to.

56. (i) Sections 545-546 Code of Criminal Procedure. See also Section 517 with regard to the order as to disposal of property.

(ii) See also Art. 60, Swiss Penal Code, 1937.

(iii) The French Penal Code grants priority to the damage claim over the State's claim for payment of fine.

(iv) See also, G. Williams (Ed.) *Reform of the Law*, p. 200.

a real educative value for the offender whether an adult or a child.[57] Restitutive penalty has thus a reformative side also, besides retribution in the modern sense (which has been mentioned already) and deterrence.[58] Punitive restitution may be one of the penal instruments through which guilt can be felt, understood and alleviated.[59] It ties up with the rehabilitation technique in which an offender is directed to find some way to make amends to those he has hurt by his offence. Ferri made the suggestion that the State should compensate the victims of crime[60] The proposal to set up a compensation fund from which victims of crime may be paid compensation has also been advocated.[61] Referring to the ancient Hindu System a learned author observes: " It has been the Law even from the days of Gautama that

57. Fry: Arms of the Law, p. 126 quoted in Schafer *op. cit.* p. 125. The compensation paid by the accused would better help in bringing the offender to a sense of reformation and sincere repentance. "How can a person be expected to have reformed and to have become penitent, if he makes no thought of compensating the victim or his dependants? Compensation therefore is the essence of true reformation and a necessary condition of retribution". Sethna *Jurisprudence* (1960) at p. 328. This is done in Russia—*Ibid*, p. 330.

58. (i) "What is required is an evaluation in terms of the deterrent and reformative potentialities of the requirements of restitution". Sutherland, quoted by Schafer, *op. cit.* p. 125.

(ii) "In many cases payment to the injured party will have a stronger inner punishment value than the payment of a sum to the neutral state". Hentig quoted in Schafer *op. cit.* p. 125.

59. Schafer, *Restitution to Victims of Crime* p. 126. The Swiss Penal Code provides for the grant of discretionary compensation. The suspension of execution of punishment (Art. 41) conditional release (Art. 64) and erasure of conviction (Art. 80) are to be granted on condition that the convicted person, to the extent that this could be expected from him, has repaired the damage fixed judicially or by agreement with the injured person.

60. "In principle compensation for damage caused is the duty of the State. The State should prevent wrong doing. When it fails in its duty, as whenever a crime is omitted, it should repair the damage caused by its fault and be subrogated to any rights of the injured party against the offender". Quoted by C. Howard: *Compensation in French Criminal Procedure* 21. Mod. L.R. 387.

61. (i) See Schafer—*Restitution to Victims of Crime* p. 129.

(ii) Miss Margaret Fry quoted Bentham in this context. Bentham held that the satisfaction should be drawn from the offender's property but "if the offender is without property.....it ought to be furnished out of public treasury, because it is an object of public good and the security of all is interested in it". *Compensation for Victims of Criminal Violence*—A Round Table—(Journal of Public Law, Vol. 8 p. 191 at p. 192).

(iii) A draft penal law of France (1934) in Art. 104 suggested a special indemnity fund composed of part of the product of the work of the prisioners from which injured parties may be indemnified (See Journal of Public Law,

in default of the king or his officers recovering the stolen properties from the thief, he should compensate the owner from his own treasury." [62]

It is desirable that the deterrent and reformative potentialities of restitution be examined further.

VII

The change in the outlook in the matter of punishments with the emphasis being shifted from the offence to the offender will naturally lead to recasting of the provisions of substantive law relating to definitions of offences as well as responsibility.[63] The Penal Code today provides for a gradation of punishments according to specific criminal acts and the criminal intent demonstrated by them. The meticulous setting down of supposedly appropriate dosage of punishments[64] based upon degrees of vicious will loses most of its significance. The new approach to punishments would necessitate a re-examination of the splitting up of offences into degrees. This will have the added advantage of the reduction of the size of the Penal Code.[65]

Vol. 8, p. 246). The problem of State compensation to victims of crime is under consideration in England (*Ibid.* p. 195).

62. Varadachariar, *The Hindu Judicial System* p. 88.

63. On the question of responsibility, Friedman observes "Clearly the development of modern psychiatry which between the fully normal and the fully abnormal person recognises an infinite variety of shades of disturbances lessening to a varying degree the emotional powers and capacities of self-control rather than intellectual discernment calls for a corresponding elasticity in the legal approach to and problem of responsibility. But this very development makes it obviously very difficult to devise precise legal formulae by either statutory or judicial legislation". Friedman, *Law in a Changing Society* (1959) p. 171.

64. See footnote, 14, *supra.*

65. "Over elaboration has been the besetting sin of the entire Code. Sections have been multiplied beyond necessity. Different circumstances of the commission of a single offence have been considered for new sections although they are really to be considered in each case by the trying court for apportioning the punishment under the original offences". Abul Hasanat: *"Crime and Criminal Justice"* (Appendix B) p. 124. The revision of two codes recently, the Canadian Criminal Code (1955) and the Criminal Code of Louisiana (1942) proceeded chiefly on the principle of reduction of the size of the Code by eliminating such distinctions. See A. J. McLeod and J. C. Martin *" The Revision of the Criminal Code "* 33 Canadian Bar Review, p. 3 (1955); J. Denton Smith *" How Louisana prepared and Adopted a Criminal Code "* 41 Journal of Criminal Law and Criminology p. 125.