SENTENCING JURISPRUDENCE OF PAKISTAN

A CRITICAL EVALUATION

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1 - Sentence punishment
2. Law --- Punishment
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Dedicated to
Zaib-un-Nisa and Rai Zulfiqar Ali
My Parents

International Islamic University Islamabad

Faculty of Shari'ah & Law

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I, **Rai Muhammad Khan**, hereby declare that this dissertation is original and has never been presented in any other institution. I, moreover, declare that any secondary information used in this dissertation has been duly acknowledged.

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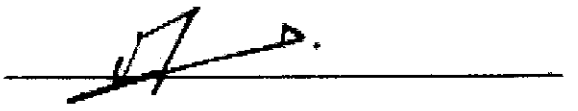
Signature: 

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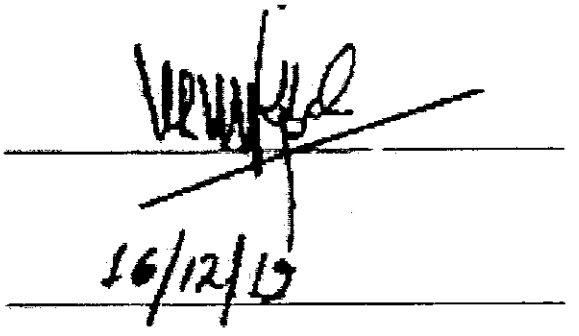
Signature: 

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ACRONYMS

AIR	All India Reporter
AJ&K	Azad Jammu and Kashmir
ATA	Anti-Terrorism Act
CLD	Corporate Law Decisions
CNSA	Control of Narcotics Substance Act
Cr.PC	Criminal Procedure Code
FSC	Federal Shari'at Court
HM	Her Majesty
ICCPR	International Covenant on Civil and Political Rights
IPC	Indian Penal Code
ISIS	Irish Sentencing Information System
JIRS	Judicial Information Research System
KAR	Karachi
LAH	Lahore
LHC	Lahore High Court
MLD	Monthly Law Digest
NAB	National Accountability Bureau
NAO	National Accountability Ordinance
NWFP	North-West Frontier Province
PBUH	Peace Be Upon Him
PC	Privy Council
PCr.LJ	Pakistan Criminal Law Journal
PCr.LJN	Pakistan Criminal Journal Notes
Pesh	Peshawar
PLD	Pakistan Legal Decisions
PLJ	Pakistan Law Journal
PPC	Pakistan Penal Code
PPR	Pakistan Prison Rules
PTD	Pakistan Tax Decisions
SAP	Sentencing Advisory Panel
SC	Supreme Court
SCMR	Supreme Court Monthly Review

SGC	Sentencing Guideline Council
SIS	Sentencing Information System
SSRN	Social Sciences Research Network
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
USA	United States of America
YLR	Yearly Law Reporter

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ABSTRACT

Since the dawn of human civilization, sentencing has remained an inescapable subject of criminal law and justice. In earlier times, the process of administration of justice was simpler and punishment of offenders, as a separate regime, was not well defined. Over time, particularly with the advent of human rights, the sentencing regime improved in terms of fairness, clarity, and transparency in the determination of sentences. Consequently, it has become part of the constitutionally guaranteed right to fair trial across the world including Pakistan.

This study focuses on the critical analysis of sentencing jurisprudence of Pakistan. To properly analyze the sentencing jurisprudence of Pakistan, certain features of a good sentencing system have been distilled by reflecting upon the various human rights documents and modern sentencing systems in different jurisdictions, particularly the English sentencing regime. This work has also reflected that the sentencing regime of Pakistan has not provided the right of separate sentence hearing which compromises the fundamental right of a fair trial. It also points out that the sentencing mechanism in Pakistan, on the legislative and the judicial fronts, does not provide a proper scope for the structuring of discretion in the determination of sentences. The lack of a comprehensive structuring of a sentencing apparatus in the judicial system of Pakistan has resulted in inconsistent sentencing and has created much space for the judge's discretion. As the study involved analysis of statutory laws and precedent law build thereupon, therefore, the qualitative methodology has been employed.

In chapter 1, the scope of the study and research methodology has been explained along with an analysis of existing literature on the subject. Chapter 2, has explored the nature and scope of the sentencing process and its place in the sentencing system. For this purpose, it has discussed the different definitions of sentencing and has analyzed different theories of sentencing. Certain features of the good sentencing system have been distilled in this chapter. In chapter 3, the historical nexus between Pakistan's sentencing regime and the English sentencing system has been established which is also a reason to analyze the English Sentencing System as model

jurisdiction. Chapter 4, discusses the legislative regime on sentencing in Pakistan and explores how far features of the good sentencing system are reflected therein as required by principles of a fair trial and structuring of discretion. In the same pattern, chapter 5, analyzes the judicial approach on sentencing. It discusses that to what extent statutory laws have been supplemented by judicial interpretations on sentencing issues. In chapter 6, the process of judicial Islamization of laws, the impact of statutory Islamic law on sentencing regime and case law developed thereupon has been analyzed. Thus in chapters 4, to six, the whole sentencing jurisprudence of Pakistan, including its domestic, English and Islamic flavour, has been analyzed. In Chapter 7, important findings and conclusions have been summarized. As a whole, this study contains an exhaustive analysis of sentencing jurisprudence of

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CHAPTER 1

INTRODUCTION

1.1. Background and Research Thesis:

From the Code of Hammurabi to the Model American Penal Code (1962) and thereafter, sentencing has remained an inescapable subject of criminal law. Paul Wiles claims that sentencing is the heart and soul of the criminal justice system.[1] Thus no one can undermine or deny the importance of the sentencing in the administration of justice. Fundamental constitutional rights of life and liberty are mere rhetoric if the sentencing process is lacking fairness, transparency and is devoid of basic principles of a fair trial.[2]

In the Sub-continent, with the rise of Muslim power, Islamic criminal law became the governing principle of sentencing jurisprudence. Islamic law entered the Indian soils even before the formal establishment of Sultanate at Delhi, by efforts of Sufis, Saints and earlier Muslim rulers.[3] However, Islamic law was gradually reduced to the status of personal law in India vis-a-vis the decay of Muslim power[4] In the year 1600, with the issuance of the first Royal Charter[5] for the establishment of British

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1. Julian V. Roberts, ed., Exploring Sentencing Practice in England and Wales (Palgrave Macmillan UK, 201 5), Preface written by Paul Wiles, xi.
2. Importance of sentencing and its place in the criminal justice system will be discussed in more detail in the next chapter.
3. Sabah Bin Muhammed PM, "E-Proceedings of the 3rd International Conference on Arabic Studies and Islamic Civilization Held on 14-15 March 2016 in Kuala Lumpur, " 2016.
4. Shahbaz Ahmad Cheema, "Mulla's Principles of Mahomedan Law in Pakistani Courts: Undoing/Unraveling the Colonial Enterprise?, " SSRN Electronic Journal, 2017, doi:10.2139/ssrn.3056572.
5. Primarily it was a private venture and stated purposes were the increase of navigation and enhancement of trade.

East India Company, [6] infiltration of English Criminal law and consequent English sentencing regime started. Latter Royal Charters[7] and Charter Acts[8] gradually enhanced the English legal flavour in the criminal justice system. This gradual transformation culminated with the promulgation of the Indian Penal Code in 1860. Thereafter, Anglicized sentencing jurisprudence continued to develop in this part of the globe.

After independence, the English Law based criminal justice system was allowed to continue without any major changes.[9] With three successive constitutions[10]and one interim constitution[11] reflecting constitutional principles of due process, fundamental rights, and Islamic values no major legislative supplement in the sentencing arena was added. Islamization of certain laws was triggered by the Constitution (Amendment) Order 1979. Thereafter different Hudood laws were enacted in the same year. The Criminal Law (Amendment) Act 1997, was enacted to incorporate principles of Islamic Criminal law in the Pakistan Penal Code, relating to hurt and homicide.

In spite of different amendments and the addition of new penal legislations, comprehensive structuring of sentencing mechanism has not been carried out. Up till now, there is no specific sentencing statute in Pakistan. Available sentencing provisions and guidelines are scattered and are not coherent. Even the Criminal Procedure Code, 1898, does not contain any specific part or chapter on sentencing. The right of hearing at the sentencing stage, which is the essence of the fair trial, is not specifically provided. There is no statutory requirement to record the reasons for

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6. Governor and Company of Merchants of London Trading into the East Indies.
7. From 1600 to 1758 at least ten Royal Charters were issued which gradually increased the English legal influence on the Indian soils.
8. Charter Acts of 1793, 1813, 1833, and 1853
9. Section18 (3) of the Indian Independence Act, 1947.
10. 1956, 1962 and1973.
11. The Interim Constitution of Pakistan 1972.

every sentence imposed. Any monitoring body to research, analyze and provide feedback on the impact of sentencing has not been established. The mechanism of sentencing guidelines is not established in proper form. The amendment in the Pakistan Penal Code in section 337-N 2, made through the Criminal law Amendment Act 2004 (Act, 1 of 2005) provides some guidelines for sentencing in hurt cases. It guides when a sentence of imprisonment in such cases is to be awarded and also spells out mandatory minimum sentences in this regard. However, even these guidelines are not self-explanatory.

Analysis of sister codes namely, the Pakistan Penal Code, 1860 (PPC) and the Code of Criminal Procedure, 1898 (Cr.P.C) reveals that the subject of sentencing has not been exclusively and separately dealt with. Even the legislative amendments in these codes did not set the compass right on sentencing. The judicial approach on sentencing is mainly developed on this focus-less legislative sentencing regime. Therefore, the sentencing process by itself failed to get its due importance in the judicial dispensation. The sentencing process remained incoherent and in search of a purpose, as purposes of sentencing were not clearly stated. These anomalies in the sentencing procedure resulted in undue disparities. Sea of sentencing discretion remained without any properly developed navigational tools for sentencers resulting in uncertainty in the sentencing outcomes.

Except for juvenile[12]cases, pre-sentence reports are also not resorted, which also impair the visibility of sentencing considerations. Due to a lack of pre-sentence hearing mechanism, convicts are deprived of the opportunity of specifically addressing the court on the issue of sentence. In this way the pivotal question of life or death, liberty or incarceration are decided without an opportunity of clear and

[12]. See Section 11 of Juvenile Justice System Ordinance 2000 which mandates probation officer to submit a report regarding juvenile to juvenile court. In the Juvenile Justice Act, 2018 which has repealed the Juvenile Justice System Ordinance 2000, section 14 deals with the subject.

focused hearing. An accused soliciting a plain and honourable acquittal remains afraid of arguing on the question of sentence, lest his case may not be considered weak. This also contributes to rule out individualized treatment in sentencing. Sentences are often camouflaged in a surprise package of life and death. The sentencer on the one side may be focusing on gallows while sentenced on the other side may be soliciting a blameless life or vice versa. This surprising nature of the sentencing mechanism in Pakistan also calls for a critical review. This is particularly important after incorporation of the right to a fair trial as a fundamental right in the constitution of Pakistan and developments on sentencing jurisprudence in the other modern jurisdictions.

In the absence of any specialized body to monitor sentences imposed, their execution and impact assessment on the convicts and victims, the sentencing regime in Pakistan continues to live in the dark corner. Darkness in the sentencing process is manifest from the fact that there is no mechanism of feedback on sentences imposed, their expert analysis and the use of such analysis in further sentencing reforms. On the other hand sentencing system in other jurisdictions like England, the United State and Australia have undergone major developments. Specific sentencing legislations have been introduced in England, [13]and Australia[14].The Canadian Criminal Code[15] also specifically deal with sentencing in a separate part. Mechanism of sentencing guidelines has been introduced.[16] Sentencing monitoring bodies have been

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13. Powers of Criminal Courts (Sentencing) Act 2000, Criminal Justice Act 2003, Coroners and Justice Act 2009.
14. New South Wales: Crimes (Sentencing Procedure) Act 1999 (NSW), Queensland: Penalties and Sentencing Act 1992 (Qld), South Australia: Criminal Law (Sentencing) Act 1988 (SA) and Tasmania: Sentencing Act 1997 (Tas).
15. Part XXIII Sections 716-751 Legislative Services Branch, "Consolidated Federal Laws of Canada, Criminal Code, " October 18, 2017, http://laws-lois.justice.gc.ca/eng/acts/C-46/index.html.
16. "2015 Guidelines Manual, " United States Sentencing Commission, August 11, 2015, https://www.ussc.gov/guidelines/guidelines-archive/2015-guidelines-manual.

established.[17] Rigorous researches on the sentencing outcome have been employed.[18] Sentences are being surveyed for a deeper understanding of sentencing decisions.[19] All this is being done to inject fairness, transparency, and predictability and to avoid undue disparities and unfair uniformities in the sentencing system. As Pakistan lags in all these developments in sentencing jurisprudence, therefore, a critical evaluation of sentencing jurisprudence of Pakistan is imperative.

Sentencing is the subject of vital importance. The sentencing mechanism in Pakistan, on the legislative and the judicial fronts, does not provide a proper scope for the structuring of discretion in the determination of sentences. The lack of a comprehensive structuring of a sentencing apparatus in the judicial system of Pakistan has resulted in inconsistent sentencing and has created much space for the judge's discretion. Pakistan's current sentencing practice thus requires scholarly research. This study argues that for establishing an efficient criminal justice system generally and ensuring an effective right to a fair trial as a constitutionally guaranteed fundamental right, particularly, Pakistan needs to develop a full-fledged sentencing regime. Using theories of punishment as a theoretical framework, the study develops certain key features of a good sentencing regime. The study then tests Pakistan's statutory law and sentencing jurisprudence of its judiciary against those features. It also examines the practice of the United Kingdom (UK) as a case of international best practice, applying the key features to the UK's current sentencing regime. Given the constitution-driven role of the Islamization of the criminal justice system, the study analyzes the Islamic law approach to sentencing in Pakistan.

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17. For example, in the United States, there is a United States Sentencing Commission. There is a Sentencing Council in England and Wales. There is also a separate Scottish Sentencing Council in Scotland. All these bodies are there in different jurisdictions to develop the sentencing guidelines and to monitor the implementation as per their allotted parameters.
18. "Crown Court Sentencing Survey, " accessed January 28, 2018, https://www.sentencingcouncil.org.uk/analysis-and-research/crown-court-sentencing-survey/.
19. Ibid.

To properly analyze the sentencing regime of Pakistan different definitions of sentencing will be studied. Nature, scope, and extent of the sentencing process need to be explored. The importance of sentencing and its place in the criminal justice system needs to be analyzed. For this purpose, different theories of sentencing will be discussed in brief so that theoretical anchoring of the sentencing regime in Pakistan may be traced. Different international human rights instruments and sentencing practices in different jurisdictions will come under focus. In this regard sentencing practices in the United States, Australia Canada and India will be referred to. Keeping in view the historical linkages, the English sentencing system will be comprehensively analyzed. In this way, the international best practices on sentencing will be explored to test the Pakistani sentencing regime. Specifically, from this analysis, certain features of a good sentencing system will be distilled and on these features sentencing regime of Pakistan will be analyzed. Feature filtering of the English sentencing system will also be made as a model jurisdiction on sentencing.

1.2 Research Methodology:

This research involves deep insight into procedural and substantive penal laws including the Constitution of Pakistan. It does require analytical focusing on provisions dealing with the sentencing process and their interpretative outcomes during judicial proceedings. This study mainly involves the analysis of existing statutory laws and case laws built thereupon. Therefore, the qualitative methodology will be employed in this study. It will highlight the existing sentencing mechanism in our jurisdiction and will also pinpoint its loophole and niceties. In this regard, different international instruments on human rights and best practices on sentencing in different jurisdictions will also be analyzed. Elements of a fair trial to ensure fair

sentencing as envisaged in the constitution of Pakistan and different international instruments will be a subject of particular focus.

This research employs the Holy Qur'an, different international instruments, the constitutions of Pakistan, different laws as enacted in Pakistan and other jurisdictions as primary sources. Secondary sources include books, articles, reports, and sentencing guidelines, case laws of Pakistan and other jurisdictions and different websites. In this work translation of the Holy Qur'an by Abdullah Yousaf Ali has been used as it has been referred to by higher courts in Pakistan.[20] While citing the Holy Qur'an, a uniform approach has been used and the first number in the citation denotes *sura* (Chapter of the Holy Qur'an) while the second number denotes ayah (verse number). In case study pertaining to Pakistan, the main focus will be on important sentencing judgments of the Supreme Court, however, if any jurisprudential development has been made by the Federal Shari'at Court and High Courts, the same will also be analyzed.

1.3 Structure of the Work:

In chapter 1, the scope of the study, research methodology and structure of the work has been explained. It also analyzes the existing literature on sentencing jurisprudence with particular reference to Pakistan. No specific work reflecting on sentencing jurisprudence of Pakistan exists and whatever work is relevant to the topic of this work has been comprehensively analyzed, highlighting its utility and pointing out research gapes.

Chapter 2, explores the different definitions of sentencing. It explains the nature, scope, and level of difficulty involved in the function of the determination of sentences. Importance of sentencing, its place in the criminal justice system, and an

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[20]. Hazoor Bakhsh vs Federation of Pakistan, PLD 1981 FSC 145.

element of imbalance in the judicial treatment of two steps of the criminal process namely, conviction and sentence have been explored. The question of the structuring of discretion at the sentencing stage has been raised and its different aspects such as the requirement of uniformity, consistency, and avoidance of disparity have been discussed and analyzed. Theoretical bases of the sentencing process have been explored by analyzing the different theories of sentencing. It determines the important features of a good sentencing system that maintain the standard of a fair trial at the sentencing stage. In the next chapters, features distilled in this chapter have been used to analyze the different aspects of the sentencing mechanism in Pakistan.

In chapter 3, the English sentencing system has been studied as a model jurisdiction. To explain the reason for choosing the English sentencing system as a model jurisdiction, historical nexus between Pakistani and the English sentencing system has been established. The development of the English sentencing system through different phases has been analyzed. The emergence of sentencing monitoring bodies and sentencing guideline mechanism has been traced. Different aspects of the English sentencing system have been analyzed on the bases of features established in chapter 2.

Chapter 4, analyzes the legislative sentencing regime in Pakistan. It explores the general constitutional principles and protections regarding sentencing in Pakistan and also points out certain features of sentencing that have been provided constitutional cover in Pakistan. It also analyzes the existing statutory sentencing procedures and protections in Pakistan in line with the sentencing features mentioned earlier. It then enlists those sentencing features which are specifically unmet in Pakistan under the existing statutory sentencing regime. It also discusses proposed sentencing legislation in Punjab. In addition to the above, the multifarious range of

penalties fixed under the substantive law has been discussed. The scope of discretion regarding sentencing provided under different penal laws has also been analyzed. In this way, this chapter has analyzed how far the existing legislative sentencing scheme cares for the structuring of discretion in sentencing in accordance with the principles of fair trial and features discussed above. On a similar pattern, analysis of the judicial approach on sentencing has been made in chapter 5. It also analyzes that to what extent statutory law on sentencing has been supplemented by judicial interpretation. It analyzes the different features of the sentencing system of Pakistan in the light of judgments of the higher courts. In this way chapter 4 and 5 supplements each other in bringing out the existing legislative and judicial approach on sentencing in Pakistan.

Though Islamic principles on sentencing have now been made part of the present constitutional and statutory domain on sentencing but keeping in view the importance of Islamic law, it has been discussed separately in chapter 6. Important judicial decisions on different aspects of the Islamic law on sentencing as enacted in Pakistan has also been discussed. Explaining the general principles of sentencing under Islamic law it analyzes the important constitutional provisions reflecting constitutional cover of Islamic law. It highlights the importance of sentencing under Islamic law by linking it to the higher objectives of Shari'ah. It also discusses the concept of Siyasah Shari'ah and how it can be used to answer different questions on sentencing in the modern age. Elements of fair trial and compatibility of different features of sentencing under Islamic law has been discussed. A brief analysis of different Islamic enactments has been made along with the analysis of case law on the basis of sentencing features reflected in chapter 2.

Chapter 7, summarizes the important findings and conclusions of this work. In the end suggestions for improvement of the sentencing system of Pakistan have also been given.

1.4 Literature Review:

The literature review regarding the present topic is an uphill task. Firstly, in Pakistan, the topic of sentencing remained unable to win the focus of elaborate jurisprudential discussion. This resulted in a lack of development of material on this particular topic of sentencing. No direct research or book particularly dealing with this topic in local settings is available. It is not the case that there is nothing on the sentencing system in Pakistani jurisprudence. However, references regarding the sentencing process are scattered and incoherent which makes them less effective. On the other hand, the wealth of literature on sentencing developed in other jurisdictions is rich and vast. Therefore, only the most important and recent developments will be examined for this study.

If we see India, our neighbouring jurisdiction, about which it is said that sentencing law is still at the infant stage, yet considerable work has been done on this topic. The discretion which is the most vital part of the sentencing process has been the subject of doctoral research in India. Das[21] in his work on the sentencing discretion has traced the historical links of sentencing and punishment system in ancient India. He pointed out the elements of unstructured discretion on sentencing in India. He after discussing sentencing under Hindu law directly came to the English settings of the present system. However, he omitted to discuss the contributions made in the sentencing system by Muslims. This gap has to some extent been plugged by

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21. Durga Pada Das, "Discretion in Sentencing Process-A Case Study of Indian Criminal Justice System (Ph.D. Thesis) " (Ph.D. Dissertation, University of Burdwan, 1999).

Basheer[22] though not in the specific context of sentencing. Madhusudan[23] has critically analyzed the prevention of crime and punishment under the Sultans' of Delhi. He has praised the justice system and the quality of justice in their respective periods. Das has given mathematical formula[24] to remove sentencing disparity but this formula has yet not received any statutory recognition or wide judicial approval and is thus yet to be tested on practical touchstones.

Basheer has discussed the judicial system under Sultans and Mughals separately. Procedures of courts, rules of evidence, tendencies in criminal administration and mechanism of prevention of crimes have been explained. He points out the ascendency of the judiciary in the state hierarchy from the practice that the king was ceremonially installed by the Chief Justice[25] and "in order of precedence chief Justice was held next to sovereign.[26] This independence and precedence of the judiciary were at that time considered one of the pillars of a fair trial in all judicial decisions including sentencing. The procedure in criminal cases was simpler[27] which ultimately resulted in early decisions with visible sentencing impacts. Early decisions also helped in achieving the objects of sentences imposed. As a matter of procedural fairness "sentences were pronounced in open court."[28] However, no detail discussion on sentencing as a separate subject has been made even in this work. Basheer has argued that the judicial system under the Muslim rulers was quite structured, which actually provided speedy justice and also cared for the principles of a fair trial.

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22. Muhammad Basheer Ahmad, The Administration of Justice in Medieval India (Aligarh: Aligarh Historical Research Institute, 1941).
23. Madhusudan Bandyopadhyay, "A Critical Study of Crime and Punishment under the Sultans of Delhi 1206 to 1526 (Ph.D. Thesis) " (Ph.D., University of Calcutta), accessed December 14, 2017, http://shodhganga.inflibnet.ac.in/handle/10603/158268.
24. Pada Das, "Discretion in Sentencing Process-A Case Study of Indian Criminal Justice System (Ph.D. Thesis), " 233.
25. Basheer Ahmad, The Administration of Justice in Medieval India, 97.
26. Ibid., 111.
27. Ibid., 182.
28. Ibid., 183.

The more detailed conceptual basis of the punishment system in ancient India has been elaborated by Kumar.[29]He referring to Manu states that in ancient India punishments were considered a sort of expiation. He states that punishments were a mode to remove impurities from sinful persons[30] and from this assertion, it can be inferred that the element of reformation was present in the ancient Indian sentencing system. The author narrates Manu's claim that "person guilty of crimes when punished becomes pure like those who performed meritorious deeds."[31] In this way, a road for roll back to society was provided which is a relatively modern sentencing concept. The author has traced the purposes of punishment in ancient India by referring to the history of Dharnwasastra by P.V. Kane. Retaliation, prevention, reformation, and deterrence were the main purposes of punishment.[32] Kumar has explained by referring to Kautilya that not only circumstances of the offense but circumstances of the offender were also to be considered while awarding punishments.[33] However, this book stands short of discussing present development in India or other jurisdictions. Moreover, this book does not deal with purely sentencing developments and approaches the process of legal developments from the historical perspective.

Stokes has discussed the English experience in India in fairly good details.[34] He points out that initially policy adopted was to keep the Company's sovereignty masked and old system was pulled along by keeping the local arrangements intact as for as possible. But later on, when the local system withered and the English power was consolidated in the English estimation, new experiments were made. The

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29. Raj Kumar, Essays on Legal Systems in India (Discovery Publishing House, 2003).
30. Ibid., 17.
31. Ibid.
32. Ibid.
33. Ibid.
34. Eric Stokes, The English Utilitarian and India (London: Oxford University Press, 1959), https://archive.org/stream/historyofcrimina01stepuoft#page/n3/mode/2up.

codification process was started in line with Jeremy Bentham's thinking and this was "echoed by Macaulay in his speech on Charter bill of 1833."[35] He stated that:

> I believe that India stands more in need of a code than any other country in the world, I believe also that there is no country on which that great benefit can more easily be conferred...perhaps it is the only blessing –which absolute governments are better fitted to confer on a nation than popular governments.[36]

Codified law in India was thus a gift of the absolute British government. However, these gifts of the absolute government in India in the forms of Indian Penal Code, 1860 and Code of Criminal Procedure, 1898 are being carried with all sincerity by popular governments in the sub-continent. The two sister codes[37] have been least amended in Pakistan. In spite of provisions of fundamental rights in successive constitutions[38] and the addition of the fundamental right of a fair trial[39] in the present constitution, penal provision-both substantive and procedural- in these codes and other penal laws have not been revisited substantially. On the other hand, popular governments in Britain have made the mute sentencing process a center point of judicial excellence[40] and a growing legislative concern.[41] But the colonial codification heritage is being carried with more sincerity than their masters would have conceived. The objection is not on continuity but is on the lack of constitutional and cultural scanning of the inherited legal legacy. As Stoke's work was much prior to most of the constitutional developments in Pakistan therefore these latter developments were not discussed.

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35. Ibid., 219.
36. Ibid.
37. The Pakistan Penal Code 1860 and the Code of Criminal Procedure 1898.
38. See Constitution of Pakistan 1956, 1962, Interim Constitution of Pakistan 1972.
39. Article 10-A added through the 18th Constitutional Amendment in 2010.
40. "Guideline Judgments Case Compendium" (Sentencing Guideline Council, 2005), https://www.sentencingcouncil.org.uk/wp-content/uploads/web_case_compendium.pdf.
41. Children and Young Persons Act 1933, Criminal Justice Act 2003, Serious Organised Crime and Police Act 2005 may see http://www.lawcom.gov.uk/wp-content/uploads/2015/10/Sentencing_law_in_England_and_Wales_Issues_Pt1-General-provisions-and-general-principles.pdf accessed on 25-03-16.

Setalvad[42] points out quite candidly that, "Sub-continent was drawn into binding networks of laws of a nation which was situated far away from it by civilizational and physical distance."[43] In this way, he questions the basis of the English legal regime and consequently sentencing system thereof in India. Osama[44]has also pointed out the lack of ownership and understanding of the legal system based on the English principles by the litigants, in his recent work.

However, this process of English legal sway was gradual rather than immediate and at once. Initially, the Company acquired Zemindari power in Mufassil from the Mughal rulers and administered justice according to the law of the Mughal realm.[45] Though the company was running affairs in Mufassil according to local arrangements yet its mandate in charters of 1600 and 1609 was not concealed. Even in the first charter[46] the Company was allowed to make reasonable laws and impose penalties in consonance with laws of England and this power grew in subsequent charters. This reflects that from the very beginning the Company was not only carrying goods to Indian soils but English laws were also among the first exports.

Charter Act of 1833, particularly its section 53 was the first step to realize the goal of codification which Lord Macaulay advocated in Parliament. Macaulay was the head of the first law commission of India. The basic principle in the codification process as explained by Macaulay was, "Uniformity when you can have it; diversity when you must have it; but in all cases certainty."[47]But unfortunately, those rosy goals were never achieved as stated. With the passage of time, certainty is becoming a

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42. M.C Setalvad, The Role of English Law in India (Jerusalem: The Magnus Press the Hebrew University, 1966).
43. Ibid., 5–6.
44. Osama Siddique, Pakistan's Experience with Formal Law: An Alien Justice, Cambridge Studies in Law and Society (New York: Cambridge University Press, 2013).
45. Setalvad, The Role of English Law in India, 11.
46. Charter Granted by Queen Elizabeth to the East India Company, 31 December 1600.
47. Setalvad, The Role of English Law in India, 14.

rare phenomenon in the sentencing process wherein wide discretion abounds and tools for structuring and regulating of this discretion are rare. Pakistan Penal Code, 1860 has been taken as an eternal code and no whole scale theoretical or statutory reconsideration has been made to align it with constitutional principles.[48] The same is the case with the Code of Criminal Procedure, 1898. India has revised the same in 1973. To achieve fair sentencing, right of hearing at the sentencing stage has been provided[49]. The benefit of pretrial custody has been ensured to accused by providing that any such period is to set off against the sentence of imprisonment imposed against accused[50]. Despite this complete revision, it is said that "the sentencing system in India does not appear to have modernized"[51] and it is suggested that India should learn from England and Wales experience.[52] In Pakistan as a comprehensive revision of sister codes has not been made, therefore, statutory repairs have even eclipsed their original shine. It is pertinent to mention that the Law Commission of England and Wales while referring to the legislation of the mid-nineteenth century in their own jurisdiction observed quite aptly that it is, "quite long enough for the language of criminal law and style of drafting to have undergone substantial changes."[53] If so, then why our penal codes-procedural and substantive- belie this reality? Even the amount of fine prescribed almost one and half-century ago has been maintained without deliberation.[54]

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48. "Indian Penal Code" (New Delhi: Law Commission of India, 1971), http://lawcommissionofindia.nic.in/1-50/Report42.pdf.
49. Section 235 (2) & 248 (2) Code of Criminal Procedure 1973 (India)
Section 428 Code of Criminal Procedure 1973 (India)
51. Julian V. Roberts, Umar Azmeh, and Kartikeya Tripathi, "Structured Sentencing in England and Wales: Recent Developments and Lessons for India, " National Law School of India Review 23, no. 1 (2011): 27–45.
52. Ibid.
53. Criminal Law A Criminal Code for England and Wales Volume 1 P 1 See also https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235826/0299.pdf accessed on 15-03-16
54. Section 65 of the Pakistan Penal Code, 1860.

In addition to the above, Izzat Ullah[55] in his dissertation has made a comparative study of different penal provisions of the Indian Penal Code and other penal statutes with the Nigerian penal laws. He has concluded that "judges alone cannot...be blamed for deficiencies in the sentencing process, for their decisions are modeled on the legislative prescription of penalties".[56] He urges that for any meaningful reforms of the sentencing process structure of the law must receive top priority.[57] The situation in Pakistan is even more demanding as we are living on statutory patchwork and the sentencing process is completely ignored. However, no such parallel work to Izzat Ullah is available in the Pakistani perspective reflecting statutory analysis of sentencing clauses. From the dissertation of Izzat Ullah and Das, it can be pointed out that in India both legislative and judicial approaches to sentencing have been subject of research studies but the same is lacking in Pakistan.

The subject of short-term sentences has been thoroughly discussed in the Indian perspective by Pillai[58] but again this aspect of sentencing has not received proper scholastic attention in Pakistan. In his work, Pillai has termed short term sentences as useless and counter-productive and has proposed an alternative for them. He referred to a report of the Jail Committee in 1920 which recommended that there should be no less than 28 days sentence of imprisonment.[59] The committee suggested that penal provisions providing lesser sentences without alternatives may be amended. Pakistan Penal Code does not reflect any such change of approach.

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55. Izzat Ullah, "Sentence Structure of Penal Laws as Applied in India and Nigeria: A Comparative Study, " University, 2003, http://shodhganga.inflibnet.ac.in:8080/jspui/handle/10603/52354.
56. Ibid.
57. Ibid., 383.
58. J.Vikraman Pillai, "Short-Term Sentences[Ph.D. Dessertation]" (Dr. Hari Singh Gour University, 1983).
59. Ibid., 16.

Linking the historical thread from past to present Stokes[60] narrates that till 1765 English approach was to carry on "with masked sovereignty and least interference with the local system."[61] However, with gradual decay of the existing judicial system and also with enhanced political power and experience greater interventions in the judicial system were made.[62]This transition ultimately allowed the codification experiment in India which at home (England) is still at the stage of commissions and reports, [63]though started contemporaneously with India.[64]

Pollock[65] in 1904 whose views were referred by Setalvad has also stated that that whole field of criminal law was covered by English law in India particularly in the last generation. He was obviously referring to the process of codification implemented after 1857 though contemplated earlier. Historically, wider and exclusive judicial discretion in sentencing may be traced from English practice stated by Pollock who narrates while explaining the extension of Common Law and stated:

> Positively, the court is there for the purpose of deciding, and has to arrive at a decision. Negatively, no other authority has any right to interfere with a court of justice acting within its competence.[66]

Lord Chancellor Halsbury also favoured judicial discretion and regarded "sentencing as sole business of judges and was hostile to any external investigation that might lead to legislative regulation."[67]

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60. Stokes, The English Utilitarian and India.
61. Ibid., 1.
62. Ibid.
63. Leon Radzinowicz and Roger Hood, "Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem, " University of Pennsylvania Law Review 127 (1979 1978): 1288--1349.
64. Ibid.
65. Sir Frederick Pollock, The Expansion of the Common Law (London: Stevens and sons, limited, 1904), https://ia902704.us.archive.org/10/items/expansioncommon00pollgoog/expansioncommon00pollgoog.pdf.
66. Ibid., 48.
67. Radzinowicz and Hood, "Judicial Discretion and Sentencing Standards."

Speaking of English influence over Indian law Setalvad is of the opinion that, "English law is the foundation of all laws in India civil or criminal"[68], therefore, development in sentencing law in the English regime must also be benefitted. However, Radzinowicz and Hood[69] explanation of Victorian-era codification and sentencing reforms attempts show that more than a century has been consumed to ensure constitutional balancing in the structuring of penal and sentencing discretion. Now a new headway has been made in the form of Sentencing Council through the evolutionary process.[70] On the other hand in Pakistan constitutional anchoring of the sentencing process has never been a subject of serious debate even after the promulgation of the constitution. About the Indian codification process of which Penal Code is a masterpiece, Radzinowicz and Hood opine that "it is based on a more remote, more intellectual, vision of things and, as such, it is doubtful whether it ever made much public impact."[71] Hood has also studied the variation of sentencing practices at Magistrate Courts in detail which reflect serious research on sentencing practices at the lowest tiers in England.[72] Pollok while speaking of Common Law has stated that "law is the sister of freedom"[73] but in our jurisdiction genetic relationship between law and freedom is lacking as laws have never been properly revisited after attaining freedom. A major part of our substantive criminal law including sentencing mechanism was handed down by colonial masters. Constitutional motherhood and

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68. Setalvad, The Role of English Law in India, 36.
69. Radzinowicz and Hood, "Judicial Discretion and Sentencing Standards."
70. **Initially Sentencing Advisory Panel then Sentencing Guidelines Council and now the Sentencing Council.**
71. Radzinowicz and Hood, "Judicial Discretion and Sentencing Standards, " 1301.
72. Roger Hood, Sentencing in Magistrates Courts:: A Study in Variations of Policy (London: Steven &Sons, 1969).
73. Sir Frederick Pollock, The Genius of the Common Law, Columbia University Lectures (New York: AMS Press, Inc., 1967), 124.

freedom sistership have rarely changed the sentencing mechanism to bring it in accord with the basic constitutional principle of freedom and fair trial.

Even in England sentencing remained a close ally and shadow of conviction, as a process of separate sentence hearing was not provided. Some sort of separation of sentencing and conviction in English Jurisdiction has been indirectly mentioned by Plucknett[74] by referring to the benefit of clergy. According to him in the reign of Henry I, "a 'criminous clerk' was charged in the King's Court, and was tried by the Church and degraded if found guilty, and returned to the king for punishment as a layman".[75] Thus the separation of conviction and sentencing process can be traced in England, though in special cases, as early as in 1100. However, this separation was not for more fairness in sentencing but to show respect for Church. The system of the jury itself separates the conviction and sentencing process. But in Pakistan, conviction and sentencing are both Bench led that further necessitates the structuring of discretion.

Barnard[76]pointed out the lack of reasoned sentencing in the English system and stated:

> When the court passes a sentence on an offender it is not generally bound to give any reasons for its decision. Quite frequently the judge will deliver a homily which indicates the matters which he has considered in determining the correct sentence. However, this is nothing like a reasoned explanation by the Court of the sentence it has imposed. It is submitted that the absence of an explanation is to be much regretted and that there is no obvious reason why a law court should not be as capable of explaining its decisions as an administrative tribunal.[77]

However, from the last few decades sentencing has received enhanced and specific focus in the English jurisdiction. On the academic side, the English

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74. Theodore Frank Thomas Plucknett, A Concise History of the Common Law (London: Butterworth&Co. Publishers Ltd., 1940).
75. Ibid., 389–90.
76. David Barnard, The Criminal Court in Action (London: Butterworths, 1974).
77. Ibid., 128.

sentencing system was dealt with precisely by Cross[78]in his first edition in 1971 and then with all improvements made at different times in his successive editions.[79] He has explained the custodial and non-custodial sentences prevalent in the English system and has also separately explained the system as being operated. He links the theories of punishment with the sentencing system and goes on to explain the process of fixing the length of prison sentences. Former Lord Chief Justice Lord Woolf in his work "the Pursuit of Justice"[80] has also stressed to create sense in the sentencing process. He has pointed out the issue of the rising prison population and has emphasized on the proper use of resources in the sentencing process. Roberts[81]has explored different aspects of sentencing in England and Wales and in this regard has compiled the writings of well-known scholars on sentencing. In line with Lord Woolf, justice Anthony Kennedy of United States Supreme Court has pointed out quite clearly and stated, "Our resources are misspent, our punishments too severe, our sentences too long."[82] Now a separate sentencing code[83] is under consideration in England and Wales and Sentencing Council has already been created.[84]Several

78. Sir Rupert Cross, The English Sentencing System (Butterworths, 1971).
79. Sir Rupert Cross, The English Sentencing System, 2nd edition (London: Butterworth, 1975) ; Sir Rupert Cross and Andrew Ashworth, The English Sentencing System, 3rd ed. (London: Butterworth & Co Publishers Ltd, 1981).
80. Harry Woolf, The Pursuit of Justice, ed. Christopher Campbell-Holt (New York: Oxford University Press, 2008).
81. V. Roberts, Exploring Sentencing Practice in England and Wales.
82. U.S. Supreme Court Justice Anthony Kennedy, Address at American Bar Association Annual Meeting (Aug.9, 2003) (transcript available at http://www.abanow.org/2003/08/speech-by-justice-anthony-kennedy-at-aba-annual-meeting/). See also https://www.usfca.edu/sites/default/files/law/cruel-and-unusual.pdf accessed on 13-04-16
83. http://www.lawcom.gov.uk/?s=sentencing accessed on 15-03-16
84. "History, " accessed January 28, 2018, https://www.sentencingcouncil.org.uk/about-us/history/. accessed on 15-03-16

enactments specifically dealing with sentencing issues have been passed.[85] In Scotland, the Scottish Sentencing Council[86] has recently been instituted.

Adding more in academic flavor Ashworth[87] has introduced the English sentencing system. This book has raised and answered constitutional issues of separation of power in the process of sentencing. It explores sentencing aims, highlights sentencing principles and discusses policies in this regard. It addresses issues of proportionality, aggravation, and mitigation in the sentencing process. It evaluates disparity issues in sentencing on the basis of race and gender and it also dilates upon custodial and non-custodial sentences. Concurrent and consecutive sentences and the effect of statutory principles on sentencing have also been discussed. It takes the help of statistical data to advance different arguments on sentencing. On the other hand, Banks[88]has given a handbook on sentencing giving short details of decided cases. This serves as a bench book and also caters to the needs of the practitioner on sentencing issues. Report of proceeding of a seminar on sentencing in Australia is also of great value.[89] In the papers of topmost experts of the subject read at this Seminar, salient features of sentencing in England and Australia were discussed and future prospects and proposals were dilated upon. In another Edited work, Tonry and Frase[90] have given a brief introduction of the sentencing system in Western Countries including Finland, Germany, and the Netherlands. In the

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85. "Sentencing Law in England and Wales Legislation Currently in Force" (Law Commission, 2015), http://www.lawcom.gov.uk/app/uploads/2015/10/Sentencing_law_in_England_and_Wales_Issues_Pt1-General-provisions-and-general-principles.pdf.
86. "Scottish Sentencing Council, " accessed January 28, 2018, https://www.scottishsentencingcouncil.org.uk/.
87. Andrew Ashworth, Sentencing and Criminal Justice, Sixth, Law in Context (UK: Cambridge University Press, 2015).
88. Roberts Banks, Banks on Sentence (Etchingham: Robert Banks, 2010).
89. Ivan Potas, ed., "Sentencing in Australia Issues, Policy and Reform" (Australian Institute of Criminology, 1986), http://www.aic.gov.au/media_library/archive/seminar-proceedings/aic-seminar-proceedings-13.pdf.
90. Michael Tonry and Richard Frase, Sentencing and Sanctions in Western Countries (Oxford University Press, 2001).

same work in his article[91]Kurki has spoken about international standards while Morgan[92] has taken about internal control on sentencing and punishment. Council of Europe Committee of Ministers in its recommendations has also formulated five key principles to improve consistency and coherence in sentencing. These points pertain to rationality, proportionality, procedural safety, increased information of sentencing and structuring of discretion by preserving individuality and discretion.[93]This report also reflects that new sentencing reforms are either in process or have been adopted in the European Countries.[94]This report recommended that for achieving consistency in sentencing, maximum sentences for offenses should be reviewed from time to time so that the relationship between maxima and actual sentences should not become too remote.[95] Albrecht[96]emphasizes that the German system of sentencing is more stable. He states that it is based on a "deeply entrenched mechanism of learning and transmitting established sentencing patterns" and is more effective than sentencing guidelines or sentencing councils system. No in-depth study of Pakistani sentencing

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91. Ibid., 331.

92. Ibid., 379.

93. **Council of Europe Committee of Ministers Explanatory Memorandum to** Recommendation No. R (92) 17 of the Committee of Ministers to member states Consistency in sentencing https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168062accessed on 25-03-16

94. It points out that major sentencing reforms have occurred in Austria, Finland, Sweden, Turkey, and the United Kingdom while at the time of report reforms were under process in France, Ireland Portugal, and Spain. See page 7 of Council of Europe Home Committee of Ministers Explanatory Memorandum to Recommendation No.R (92) 17 of the Committee of Ministers to member states Consistency in sentencing adopted by the committee of ministers on 19 October 1992 at 482nd meeting of the Ministers'Deputies https://wed.coe.int/ViewDoc.Jsp?id=615757&Site=CM

95. Council of Europe Home Committee of Ministers of Home Explanatory Memorandum to Recommendation No.R (92) 17 of the Committee of Ministers to member states Consistency in sentencing adopted by the committee of ministers on 19 October 1992 at 482nd meeting of the Ministers'Deputies p 19 https://wed.coe.int/ViewDoc.Jsp?id=615757&Site=CM

96. Hans-JorgAlbecht, "Sentencing in Germany: Explaining long-term stability in the structure of criminal sanctions and sentencing"http://lcp.law.edu/. Accessed on 22-02-16.

system on parallel footing exists which speaks of a serious research gap in the sentencing arena.

Mackenzie[97]has peeped into the thought process of sentencing judges and has tried to answer how judges pass sentences and how they reach sentencing decisions. It evaluates the difficulties of the sentencing process and shares the experience of judges while sentencing. It also explores the role of the non-statutory elements in the sentencing process and highlights the impact of public opinion and media on this process. It advocates structured discretion and a balanced approach in the sentencing process.

Fitzmaurice and Ken Pease[98] have tried to trace the psychology of the sentencing process. A psychological investigation of sentence reasoning has been made analyzing whether reasons for sentencing are actual are just partake the nature of justifications craved after passing the sentencing order. In a bit different manner and focusing on Philadelphia, Edward Green[99] has explored the judicial attitude in sentencing. Crow has analyzed the sentencing policy of Florida in the wake of sentencing guidelines.[100]This reflects that the issue of sentencing is raised and discussed quite sleeplessly in the United Kingdom and the United States and other jurisdictions but deep slumber can be observed in Pakistan on this vital issue. The literature on sentencing is singularly sterile in Pakistan. Rarely any country will have such a dearth of literature on this important subject as is in Pakistan. There are only sporadic references to sentencing in different statutes, rules and some training

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97. Geraldine Mackenzie, How Judges Sentence (Federation Press, 2005).
98. Catherine Fitzmaurice and Ken Pease, The Psychology of Judicial Sentencing (Manchester, UK; Dover, NH, USA: Manchester Univ Pr, 1986).
99. Edward Green, Judicial Attitudes in Sentencing: A Study of the Factors Underlying the Sentencing Practice of the Criminal Court of Philadelphia (Macmillan, 1961).
100. Matthew S.Crow, "Florida's Evolving Sentencing Policy: An Analysis of the Impact of Sentencing Guidelines Transformations (Ph.D. Thesis) " (Ph.D. Dissertation, The Florida State University, 2005). http://diginole.lib.fsu.edu/islandora/object/fsu:181204/datastream/PDF/view.

manuals for the judicial officers. We inherited the colonial sentencing regime at the eve of independence. In the latter half of the twentieth century, many developments were made on the front of sentencing jurisprudence but we remained captive to system left by our past masters, without daring to enter into any theoretical debate.

Rules and Orders of the Lahore High Court, Lahore Vol.3 Chapter 19, provide some instructions on the sentencing process. Authority of Rules and Orders of the Lahore High Court, Lahore can be traced from Article 202 of the Constitution. Rule 1 of the above-said chapter states that after conviction the determination of the appropriate sentence of an offender is often a question of great difficulty and always requires careful consideration.[101] It is further stated that the maximum punishment prescribed by the law for any offense is intended for the gravest of its kind and it is rarely necessary in the practice to go up to the maximum.[102] It is stated that the measure of punishment should be based on the motive of the crime, its gravity, the character of the offender, age, and antecedents and other extenuating or aggravating circumstances such as sudden temptation and previous conviction. However, as conceptual analysis and basis are lacking in legislative regime on sentencing, therefore, these rules are also devoid of material discussion on the sentencing process as provided in other jurisdictions. There is no mention of pre-sentence- hearing or pre-sentence reports and obvious reason is that the same is also not incorporated in penal statutes.

In addition to Rules and Orders of the Lahore High Court, Lahore, District Judiciary Bench Book[103] has been published for the immediate assistance of judges of the District Judiciary of Pakistan. In Part-2 Chapters 9 and 10 of this book, a comprehensive discussion on the sentencing process has been made. It discusses the

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101. High Court Rules & Orders, Vol.3 Chapter 19 Rule 1 Page 153.
102. High Court Rules & Orders, Vol.3 Chapter 19 Rule 1, Page 153.
103. Pakistan, s First Edition 2002

principle of sentencing and guidelines issued by the superior courts and lays down which principle applies to a particular case. It guides that normal sentence should be determined first, then the mitigating factor should be considered along with the totality of sentences to be passed in the trial and then to determine the proper sentence for an accused. It also states that reasons should be given where the court deviates from the normal sentence. If the court has the discretion to pass, it guides when death sentence or life imprisonment is to be awarded. It also speaks about other sentencing matters including fine, whipping, solitary confinement, probation, and conditional discharge. It also discusses sentencing under hudood laws, qisas and diyat offences as mentioned in the amended PPC. This bench book has neither been updated nor republished. Recently, Criminal Bench Book for the guidance of Judges and Magistrates[104] has been published with the assistance of the European Union Punjab Access to Justice Project by Dr. Osama Siddique, Mr. Ghauri Qurashi and Mr. Abid Hussain Iman. In this Bench Book in chapter 11, some guidance on sentencing has been provided. However, this guidance is also not comprehensive. It mentions some principles and purposes of sentencing but without referring to any source from which these principles and purposes have been derived.

Law and Justice Commission of Pakistan have occasionally dealt with sentencing issues by proposing amendments to various criminal statutes however; these efforts lack any comprehensive review of existing laws to improve the sentencing system. In a detailed report on criminal justice system sentencing was not even touched as a separate area.[105]In other reports, [106] the commission proposed

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104 Dr. Osama Siddique, Abid Hussain Iman, and Ghurai Qureshi, Criminal Bench Book for the Guidance of Judges and Magistrates, 2018th ed. (Punjab Judicial Academy and European Union, n.d.).

105. Law and Justice Commission of Pakistan report No.22 http://www.commonlii.org/pk/other/PKLJC/reports.html

enhancement of fine amount and also proposed variation in imprisonment in default of payment of fine. However, in none of these reports serious discussion on basic issues pertaining to sentencing is made and these reports are cursory as far as sentencing is concerned. In its deliberation on report No 39 it was observed:

> "The Commission, therefore, approved the proposal of rationalizing the amounts of fines prescribed under various Sections of the Penal Code under a uniform formula of two-fold enhancement of the amount of fine of 52 offences of the Penal Code to restore their deterrent effect."[107]

The above deliberations reflect that enhancement of fine is based on the deterrent concept of punishment but even the proposed enhancement of two-fold in fine amount is not based on any empirical study. This proposal was implemented by the promulgation of Ordinance No.LXXXVI of 2002. Similarly, another proposal[108] for five-time enhancement in the fine amount under different statutes has been made by the commission which is yet to be implemented. The object of these enhancements is again to restore the deterrent impact of pecuniary sentences but these proposals do not distinguish the impact of such enhanced fine on vulnerable and poor convicts nor they put forth logic of deterrence by such enhancements against financially well-off offenders.

Pakistan Journal of Criminology has produced some discussion on sentencing in Pakistani perspective in its various volumes. Mashhood has discussed juvenile sentencing issues and has specifically pointed out the need for a workable alternative to imprisonment while sentencing.[109] He maintains that alternative sanctions present a

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106. Law and Justice Commission of Pakistan reports No.39, 40, 65 25-03- 16 http://www.commonlii.org/pk/other/PKLJC/reports.html accessed on 25-03-16

107. Law and Justice Commission Report No 39 Enhancement of Punishments of Fine under the Pakistan Penal Codehttp://www.commonlii.org/pk/other/PKLJC/reports.html25-03-16

108. Law and Justice Commission Report No.70 http://www.commonlii.org/pk/other/PKLJC/reports.html25-03-16

109. Ahmad, Mirza Mashhood."Alternatives to Imprisonment for the Juveniles: A Case Study of Pakistan" Pakistan Journal of Criminology" Volume 1, No. 3, October 2009.

more feasible, solution to the detrimental effects of sentencing on children. Bhutta[110] also has, while discussing the probation system of Pakistan, advocated for rehabilitative justice and consequently made out a case for bringing forth rehabilitative purposes of sentencing. The author has argued in favour of "Community-based Alternatives to Prison and has favored sentencing as a form of soft punishment."[111] Nabi[112]has pointed out dissatisfaction of executive authorities over the inadequacy of judicial sentences since the colonial era and has given instances of judiciary executive tussle in Sindh, arising from sentencing issues in the cattle theft cases.

Cheema[113] has criticized the Supreme Court of Pakistan trend of lesser sentences in honour crimes and stated that grave and sudden provocation will continue as an excuse for lesser sentences in such cases. In this article judgments of superior court since British Era have been surveyed from this specific point of view.

On Islamization of Criminal law in Pakistan Wasti has argued that it is a patchwork of the Islamic criminal law on a system based on western principles of criminal law."[114] Criticizing the present law of qisas and diyat Wasti maintained that, "it has added to uncertainty and disbelief in law... and has increased confusion regarding the legal status of culpable homicide and murder in Pakistan."[115] He has

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110. Bhutta, Mazhar Hussain."Community-Based Rehabilitation of Offenders; An Overview of Probation and Parole System in Pakistan" Pakistan Journal of Criminology Volume 2, No. 3, July 2010, pp. 51 – 67.

111. Bhutta, Mazhar Hussain."Community-Based Rehabilitation of Offenders; An Overview of Probation and Parole System in Pakistan"Pakistan Journal of Criminology Volume 2, No. 3, July 2010, pp. 51 – 67.

112. Nabi, Aftab."The Enigma of the Crime of Cattle Theft in Colonial Sindh, 1843 – 1947."Pakistan Journal of Criminology Volume 3, No. 1, January 2011, pp. 35 – 102.

113. Cheema, Moeen H."Judicial Patronage of 'Honor Killings' in Pakistan: the Supreme Court's Persistent Adherence to the Doctrine of Grave and Sudden Provocation"2007 Buffalo Human Rights Law Review;

114. Wasti, Tahir."The Application of Islamic Criminal Law in Pakistan: Sharia in Practice Volume 2 of Brill's Arab and Islamic Laws Series" (Brill:Boston, 2009), 2.

115. Wasti, Tahir."The Application of Islamic Criminal Law in Pakistan: Sharia in Practice"39 Volume 2 of Brill's Arab and Islamic Laws SeriesBRILL, 2009 ISBN 9004172254, 9789004172258

discussed in detail the politico-legal history of developments of qisas and diyat law in Pakistan. However, this work has not discussed the hudood laws in Pakistan. It also does not study the sentencing system of Pakistan as a whole and has rather focused on qisas and diyat law only.

Aulakh[116]has also criticized the irrational adoption and thereafter un-thoughtful amalgamation of Islamic criminal Law with the English criminal law contained in the PPC and Cr.PC. He asserts that transplantation of hudood laws on the English codes which are out-moded and over-coded served no purpose. He points out that Shari'ah laws with lesser procedural elements are fair and speedy and are also in accord with aspirations of the peoples of Pakistan.[117]

He maintains that our penal system has no theoretical basis and patchwork of Islamic penal laws is unworkable.[118] Thus sentencing as a part of the penal regime, on Aulakh's analogy, is also lacking a theoretical basis in Pakistan.

Given the above-mentioned gaps in the existing research, comprehensive research on the sentencing jurisprudence of Pakistan is pertinent. The addition of Article 10-A, the right to a fair trial in the constitution of Pakistan, has further necessitated the need for such research. This work will bring out the niceties and flaws in the existing sentencing regime of Pakistan. It will thereby facilitate their redress by the relevant legislative and judicial quarters.

Research on sentencing regime specifically has not been undertaken in Pakistan. Analysis of the sentencing system of Pakistan has also become of immense importance after incorporation of Article 10-A, right to a fair trial, in the constitution

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116. Aulak.Dr. Abdul Majeed."Crime, criminology& Legal Remedies A comparative study in the context of Islamic Republic Of Pakistan" (Federal Law House: Lahore, 2014).

117. Dr. Abdul Majeed Aulakh, Crime, Criminology &Legal Remedies (Lahore: Federal Law House, 2014), 57.

118. Aulakh. Dr. Abdul Majeed."Crime, criminology & Legal Remedies A comparative study in the context of Islamic Republic Of Pakistan" (Federal Law House: Lahore, 2014), 115.

of Pakistan. This study will test, how far the present sentencing regime of Pakistan meets the standard of fair trial and structuring of discretion, in line with the newly added Article in the constitution as mentioned above.

For this purpose, it is imperative that the nature and scope of the sentencing process may be understood in light of the different definitions of sentencing. It is also necessary that the importance of sentencing and its place in the sentencing process may be analyzed in the light of theories of sentencing. Discussion on all these elements is necessary to bring out important features of a good sentencing system. These features will serve as the yardstick to critically examine the existing sentencing framework of Pakistan and its tools of structuring the sentencing discretion. Hence discussion on these theoretical bases of the sentencing process along with feature filtering for a good sentencing system is the subject of the next chapter. These features will then be used in chapter 3 to critically examine the English sentencing system which is being examined as model jurisdiction. They will also be used to analyze legislative, judicial and Islamic components of the existing sentencing system of Pakistan in chapters 4, 5 and 6 respectively.

CHAPTER 2

THEORETICAL UNDERPINNING OF SENTENCING

2.1. Introduction:

This chapter studies a theoretical framework of sentencing. It is divided into three parts. Part one looks at sentencing generally, seeking to examine a range of definitions, the nature, extent, and scope of sentencing. It explores the significance of sentencing in the criminal justice system on the one hand and highlights the difficulties faced by a court while passing a sentence on the other hand. It further studies the role of a court's discretion and the importance of uniformity and consistency in sentencing practices. Part two critically examines theories of sentencing and their cumulative impact on the effectiveness of the overall sentencing measures in the realm of a criminal justice system. Part three explores the features of a good working sentencing regime by reviewing the emerging regimes in several advanced countries. As the chapter concludes its discussion, it draws a list of key features that a sentencing regime must inevitably reflect to contribute to the efficiency of the criminal justice system. Such features will be used as benchmarks for studying Pakistan's sentencing regime, which is the main focus of this study.

Part I. Sentencing Generally

2.2. Definition:

The definition is not an easy task. To coin a definition of sentencing, it is necessary to reflect upon the view of different scholars of sentencing. Ashworth comments that "sentencing is not a simple notion."[1] Dawinder argues that it is a

1. Ashworth, Sentencing and Criminal Justice, 2015, 13.

backward as well as forward-looking enterprise.[2] Freiberg and Murry are of the view that there is no all-inclusive, single, and specific definition of sentencing.[3]They assert that sentencing is not an immutable process and its meaning, nature and functions change with changing social circumstances.[4]

It is argued that sentencing is a process of allocation of a criminal sanction.[5] It is the system envisaged by law to punish the offenders.[6] It is the post-conviction scenario where a convict is brought before the court for the imposition of a penal sanction.[7] It is the expression of formal legal consequences attached to a conviction.[8]A sentence is a punishment that is passed by a judge or a magistrate against someone who is convicted of a crime.[9] It is an art of balancing the aggravating and mitigating factors relating to an offence and an offender.[10] In criminal process, sentencing is one of the several stages, at which decisions are taken.[11]These decisions may include the decision to report the crime, to arrest the offender, to find him guilty, to determine his sentence and also to release the convict on parole.[12]

From the above definitions and explanations of sentencing, it is clear that the subject of sentencing is susceptible to different meanings. Different scholars have explained the sentencing from different shades and have, therefore, given varying

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2. Dawinder Sidhu, "Moneyball Sentencing, " SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, March 30, 2015), https://papers.ssrn.com/abstract=2463876.
3. Arie Freiberg and Sarah Murray, "Constitutional Perspectives on Sentencing: Some Challenging Issues, " Criminal Law Journal 36 (2012): 335–55.
4. R v England - [2004] SASC 254 https://jade.io/article/178066 accessed on 24-08-2017.
5. Ashworth, Sentencing and Criminal Justice, 2015, 10.
6. Mirko Bagaric, Punishment and Sentencing: A Rational Approach (Cavendish, 2001), 3.
7. The Free Dictionary, https://legal-dictionary.thefreedictionary.com/sentencingaccessed on 27-01-16.
8. Mr Ryan Strasser, "Sentencing, " LII / Legal Information Institute, July 12, 2008, https://www.law.cornell.edu/wex/sentencing.
9. "Sentencing Basics, " accessed December 6, 2017, https://www.sentencingcouncil.org.uk/about-sentencing/sentencing-basics/.
10. Pada Das, "Discretion in Sentencing Process-A Case Study of Indian Criminal Justice System (Ph.D. Thesis), " i.
11. Andrew Ashworth, Sentencing and Criminal Justice, 5th ed., Law in Context (Cambridge University Press, 2010), 15.
12. Ashworth, Sentencing and Criminal Justice, 2015, 15.

definitions. This study argues that 'the sentencing is an infliction of pain on the offender through a judicial or quasi-judicial forum, following the formal process of law'. Sentencing may be termed as a societal attempt to restore the victim's loss and take the undue benefit back from the offender restoring both to the possible pre-offence level of advantages. However, the discussion below on the nature of the sentencing process will further help to understand the concept of sentencing.

2.3. Nature, Extent, and Scope:

Explaining the nature of the sentencing process, Kaufman asserts that it is easy to narrate the sentencing problems and its causes but coming to a solution is a difficult task.[13] Crow argues that in the view of an ordinary person, the sentencing is somewhat mysterious but a solemn process in which judges, who are presumed to be wise, fair and impartial, determine the appropriate sentence for an offender. However, he explains that the position may not be the same, as all the decisions affecting the sentences are not made by the judges alone.[14] It is the victim who decides whether to report the crime or not. It is the prosecutor who decides about the prosecution of the offence. It is the parole board or another body responsible to decide about remissions or parole that has its say in the determination of real sentence to be served out. Crow, therefore, shares Ashworth's assertion[15] regarding the influence of extrajudicial elements mentioned above in the determination of sentences. Thus, the solemn nature of the sentencing process is sometimes compromised by these influences.

Das argues that moral dimensions of considerable complexity guide sentencing in any enlightened society.[16] Through the passing years, theoretical and

13. Judge Irving R. Kaufman, "Sentencing: The Judge's Problem. " accessed December 6. 2017, https://www.theatlantic.com/past/docs/unbound/flashbks/death/kaufman.htm.
14. Matthew S. Crow, "Florida's Evolving Sentencing Policy, " 2005, 3.
15. Ashworth, Sentencing and Criminal Justice, 2010, 15–24.
16. Pada Das, "Discretion in Sentencing Process-A Case Study of Indian Criminal Justice System (Ph.D. Thesis), " 2.

practical aspects of sentencing have undergone a gradual but dramatic transformation.[17] Previously, sentencing was taken as to be somewhat a mysterious process as the penal response was dependent mostly on discretionary decisions of judges.[18] However, now attempts are being made to make the sentencing process more pronounced, transparent and understandable by providing means of structuring the judicial discretion.

Sutherland, on the basis of insufficiencies of the criminal justice system, points out that in general, a judge is not able to perform the function of imposing sentences satisfactorily.[19] He holds this opinion by reflecting that court evidence revolves around guilt or innocence of the offender and not regarding question post guilt.[20] He further argues that in the absence of the entire personal history and whereabouts of a convict, a sentence is bound to be defective.[21]Therefore, great efforts are needed to reach a proper sentencing decision. Though sentencing is generally deemed a judge-oriented arena but courtroom community also influences in determining the going rate of sentences.[22] Ulmer mentions judges, prosecutors, public defenders, private attorneys, probation officers, and court administrators as members of the courtroom community.[23] Sentencing is a mixed process that is informed by an individual's past conduct and prediction by the criminal justice system regarding the future conduct of the criminal. It is, therefore, not only the circumstances of the offender and history of the case but also experience of the courtroom community

17. Irving R. Kaufman, "Sentencing: The Judge's Problem."
18. M. Tonry, Sentencing Matters, Studies in Crime & Public Policy (Oxford University Press, 1998), 3, https://books.google.com.pk/books?id=nU1NJIiL-1wC.
19. As quoted by Pada Das, "Discretion in Sentencing Process-A Case Study of Indian Criminal Justice System (Ph.D. Thesis), " 3.
20. Ibid.
21. Ibid., 4.
22. Crow, "Florida's Evolving Sentencing Policy, " 39.
23. Jeffery T. Ulmer and John H. Kramer, "Court Communities Under Sentencing Guidelines: Dilemmas of Formal Rationality and Sentencing Disparity, " Criminology 34, no. 3 (August 1, 1996): 383–408, doi:10.1111/j.1745-9125.1996.tb01212.x.

which influences the sentencing process.[24] Though fairness and justice in sentencing are always desired yet to answer the question of sentence in each individual case is not an easy task. All the above-mentioned issues make the sentencing a complex phenomenon.

A good sentencing system, however, must keep sentencing process directly under judicial control and where ever any non- judicial entity is given any say at any stage of sentencing, it must be under the supervision of the judicial eye. This will help to establish the solemnity of the sentencing process which is a hallmark of a good sentencing system. In addition to it, the judicial sentencing decision should be clear, transparent, specific and understandable not only to the legal fraternity but also to the convicts whose rights are thereby compromised. The trial process should not only focus on establishing the innocence or guilt of accused rather personal circumstances of the accused should also be brought on record for an informed sentencing decision. Similarly, the impact of the courtroom community should be used to achieve rational consistency in sentencing decisions instead of pushing for unjust uniformity and severity.

Colin Howard explains the wider spectrum of the sentencing process and states that generally in common law jurisdictions, the sentencing process is distributed among four players i:e the legislature, the courts, prison or the correctional services and parole boards or authorities.[25] Legislatures make the basic decisions regarding sentencing by fixing maximum and sometimes minimum sentences that judges can impose. Courts impose the sentences, prison as a government department administers those sentences while the parole board decides any early release of the sentenced convicts.

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24. Ibid.
25. Colin Howard, "An Analysis of Sentencing Authority, " in Reshaping the Criminal Law: Essays in Honour of Glanville William (London: Stevens and sons, Limited, 1978), 404.

However, this distribution of functions needs to be tested on constitutional parameters in a jurisdiction like Pakistan where the separation of powers, independence of the judiciary and now fair trial as fundamental right are constitutionally mandated. This exercise regarding the Pakistani sentencing system will be done in chapters 4, 5 and 6 of this dissertation. Pointing the impact of non-judicial entities on sentencing Ashworth, states that some criminal sanctions are not imposed by the courts and that some "non-judicial agencies are able to alter significantly the length and impact of a sentence."[26] As sentences result in deprivation of fundamental rights, he, therefore, argues that sentencing power on non-judicial institutions that are not independent and impartial should be sparingly bestowed.[27]As the above discussion reflects the complexity of sentencing, therefore, it is now necessary to gauge the difficulty of the sentencing process.

2.4. Difficulty:

Vasoli argues that in the criminal justice realm no other task is more difficult and enigmatic than sentencing of a convicted offender.[28] Justice McCardie compares the sentencing and conviction process and states that conviction is as easy as falling off a log but real difficulty surfaces when a court has to determine what to do with the convicted offender.[29] On the same line, Lord Lane, in his debate in the House of Lords, stated:

> Nothing is easier than to criticize a sentence imposed by a judge. ... Sentencing consists of trying to reconcile a number of totally irreconcilable facets. The judge gets very little help in this difficult matter. The judge is left to weave his way through the maze of

26. Ashworth, Sentencing and Criminal Justice, 2015, 13.
27. Ibid.
28. Robert H. Vasoli, "Growth and Consequences of Judicial Discretion in Sentencing, " Notre Dame Law Review 40, no. 4 (1965): 404–16.
29. Charles W. Webster, "Jury Sentencing - Grab-Bag Justice, " SMU Law Review 14 (1960), http://scholar.smu.edu/cgi/viewcontent.cgi?article=4083&context=smulr.

> legislation which now surrounds sentences to try to find the correct solution to the problem.[30]

Lord Irvine while participating in the same debate on Criminal Justice Bill stated the difficulty of the sentencing process as under:

> In practice, the hardest task for the judge in a criminal trial is not the law nor the conduct of the trial itself but the duty to sentence when the jury convicts. The sentence operates in a statutory framework. It is massively complex and he is not responsible for it. But it is the judge who is blamed if the sentence is thought wrong.[31]

A Queen's Land Judge symbolizes the sentencing as juggling on a rope that is being shaken at both ends.[32] Das argues that while determining a sentence, the judge should express Solomon like wisdom and insight.[33] He maintains that the best of the system and best of the men are likely to find this responsibility awesome.[34] Kaufman adds that if American judges, who sit on criminal cases, are asked that what is the most difficult aspect of their job, the majority will say "sentencing".[35]All these difficulties are because the question of sentence poses a complex problem to the sentencers.[36] Above all, in no other judicial function is the judge more alone than in determining the question of sentence.[37]

Kaufman explaining the nature of difficulty involved in the sentencing process states that balancing of severity and leniency in the sentence poses a serious difficulty to the judge.[38] The need of balancing the sentencing purposes and considering the divergent principles of sentencing also makes the sentencing process difficult. The

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30. "Criminal Justice Bill (Hansard, 27 April 1987), " accessed January 16, 2018, http://hansard.millbanksystems.com/lords/1987/apr/27/criminal-justice-bill#column_1295.
31. Ibid.
32. Mackenzie, How Judges Sentence, 14.
33. Pada Das, "Discretion in Sentencing Process-A Case Study of Indian Criminal Justice System (Ph.D. Thesis), " 6.
34. Ibid.
35. Irving R. Kaufman, "Sentencing: The Judge's Problem."
36. Ullah, "Sentence Structure of Penal Laws as Applied in India and Nigeria, " 38.
37. Irving R. Kaufman, "Sentencing: The Judge's Problem."
38. Ibid.

proper sentencing outcome also requires due consideration of mitigating and aggravating circumstances pertaining to offence and offender. On a larger plan, a good sentencing system needs to provide a balance between formal rationality which cares for uniformity in sentences and substantive rationality which cares for considering individual circumstances of the offender.[39] Above all legislative complexities and confusion also add to this problem. The difficulty in the sentencing process reflected above necessitates that judges who are tasked to perform sentencing functions must be properly trained. Determination of the appropriate sentence for the convicted person is not only difficult but also an important task.[40] It is appropriate to reflect on the importance of the sentencing process at this stage.

2.5. Importance of Sentencing:

Due to political salience of sentencing, its importance has increased many folds and it now matters more than ever before.[41] Reflecting on the importance of the sentencing process, Lord Irvine opined that the success of a criminal statute depends upon the fact that how far it supports the courts to develop a rational sentencing process.[42] Green argues that the importance of the sentencing process is manifest from the trend that it has attracted the more attention of jurists and criminologists than other areas of administration of criminal justice.[43]Kaufman asserts that sentencing is important to the nation's moral health.[44] The Supreme Court of Pakistan has categorically said, "The question of sentence demands utmost care on the part of the courts dealing with the life and liberties of the accused person."[45]

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39. Ulmer and Kramer, "Court Communities Under Sentencing Guidelines."
40. Pada Das, "Discretion in Sentencing Process-A Case Study of Indian Criminal Justice System (Ph.D. Thesis), " 6.
41. Tonry, Sentencing Matters, 3.
42. "Criminal Justice Bill (Hansard, 27 April 1987)."
43. Edward Green, Judicial Attitudes in Sentencing: A Study of the Factors Underlying the Sentencing Practice of the Criminal Court of Philadelphia (Greenwood Press, 1974), 61.
44. Irving R. Kaufman, "Sentencing: The Judge's Problem."
45. Nadeem alias Nanha alias Billasher vs. The State 2010 S C M R 949.

Crow maintains that the sentencing process not only has an impact on a specific victim but it also affects society at large.[46] He asserts that sentencing decisions deal with life and liberty, which are the core ideals of any rational and good human society.[47] He further argues that public opinion regarding the criminal justice system depends upon the sentencing decisions.[48] Therefore, fairness in punishment reflects the legitimacy of the system.[49] Crow fortifies his point regarding the importance of sentencing and asserts that not only from judicial perspectives but also from a political and academic perspective, sentencing has become a high order subject.[50] Izzat Ullah warns that serious social consequences will result if the criminal justice system lacks proper sentencing mechanism.[51] He maintains that the haphazard sentencing process jeopardizes the interest of individuals and society a like[52]and benefit none. Das argues that the public image of the legal system depends upon the propriety and fairness of sentences.[53] He further asserts that it is the sentencing process where the fate of individuals and values of society are held in balance.[54] Thus, it is argued that sentencing, like death and taxes, is a material and inevitable social issue and imposition of sentences cannot be put off till resolution of philosophical debates.[55]

From the above discussion, it can be inferred that sentencing is a live social issue of vital importance. The fate of the criminal justice system hinges upon the

46. Crow, "Florida's Evolving Sentencing Policy, " 3.
47. Ibid.
48. Ibid.
49. Ibid., 4.
50. Ibid.
51. Ullah, "Sentence Structure of Penal Laws as Applied in India and Nigeria. " 3.
52. Ibid.
53. Pada Das, "Discretion in Sentencing Process-A Case Study of Indian Criminal Justice System (Ph.D. Thesis), " 6.
54. Ibid.
55. Brian Forst and Charles Wellford, "Punishment and Sentencing: Developing Sentencing Guidelines Empirically from Principles of Punishment, " Rutgers Law Review 33 (1981): 799–837.

efficiency of the sentencing mechanism provided by it. The efficacy of the sentencing regime is also important because it materially contributes to a nation's moral health. Protection of fundamental rights, including the right to life, liberty and fair trial is directly linked to the sentencing system. An efficient sentencing system not only guards the individuals but also protect the values of the society. Keeping in view the extraordinary importance of sentencing, only judges cannot be tasked to improve the sentencing system. It is not the case that independence of the judiciary should be compromised but to develop a good sentencing system legislature must also share the burden of structuring the sentencing discretion. However, reflections on the importance of the sentencing process will be incomplete, if its place in the criminal justice system is not highlighted.

2.6. Place in Criminal Justice System:

Having discussed the importance, nature, and scope of sentencing, it is now appropriate to reflect the place of sentencing in the criminal justice system. Paul Wiles says that "sentencing lies at the heart of the criminal justice process."[56] Muirhead maintains that sentencing is a vital aspect of criminal law.[57] Kaufmann explains that sentencing is a measure of society's response against its transgressor who violates its norms.[58] Crow argues that sentencing controversies often remain at the front rows in criminological and criminal justice debates.[59] He asserts that sentencing is the point where public values, criminal law, and criminal justice are translated into concrete actions.[60] It is the juncture where principles of criminal law are not only

56. V. Roberts, Exploring Sentencing Practice in England and Wales, xi.
57. James Henry Muirhead, Criminal Justice in a Changing Society (Australian Institute of Criminology, 1974).
58. Irving R. Kaufman, "Sentencing: The Judge's Problem."
59. Crow, "Florida's Evolving Sentencing Policy, " 2.
60. Ibid.

interpreted but also applied.[61] Sentencing decisions directly influence public support and respect for the whole criminal justice system as they are susceptible to the scrutiny of higher courts, academia, public, politician and media.[62] Izzat is of the view that the sentencing process may serve as a barometer to gauge the state of criminal law and its penal philosophy.[63] He asserts that a fair, rational and just sentencing system is the basis of a workable criminal justice mechanism of any state.[64] He, therefore, maintains that sentencing holds the key position in the criminal justice system.[65]

In spite of its important place in the criminal justice system, sentencing remains a mysterious process and all its riddles have yet not been resolved.[66] The most important question that what should be the appropriate quantum of punishment for an offender is still an unresolved problem.[67] In Indian and Nigerian contexts, it has been argued that sentencing is a little-explored and much-neglected branch of the criminal justice system.[68] A good criminal justice system cannot afford the neglect of sentencing from any state institution including the legislature, judiciary, and executive. The legislature should provide well-structured legislation dealing not only with the question of guilt but also with a sentence. Judicial decisions should be well explained and reasoned so that sentencing outcomes should not be put as riddles to convict and community as a whole. Every executive duty in sentencing should be under the watch of an independent judicial or quasi-judicial forum. From the above discussion, it is clear that sentencing holds a vital place in the criminal justice system.

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61. Ibid., 3.
62. Ibid.
63. Ullah, "Sentence Structure of Penal Laws as Applied in India and Nigeria, " 38.
64. Ibid., 1.
65. Ibid.
66. Ibid.
67. Pada Das, "Discretion in Sentencing Process-A Case Study of Indian Criminal Justice System (Ph.D. Thesis), " 7.
68. Ullah, "Sentence Structure of Penal Laws as Applied in India and Nigeria, " 1.

It is, therefore, appropriate to investigate the actual treatment of sentencing in contemporary criminal justice regimes.

2.7. Judicial Treatment

Two vital issues of every criminal trial are the determination of guilt and the measure of penal response to such guilt.[69] Justice and balance must prevail while adverting to these issues and no undue disparity of legislative or judicial endeavor should mar the importance of either. The mistreatment of conviction or sentencing will tell upon the performance and efficiency of the criminal justice system as a whole. However, sentencing is rarely given proper regard and its due share of attention in the administration of criminal justice. In Indian perspective, M.Z. Siddiqi has pointed out that almost whole judicial time is devoted to the fact-finding process, leaving a few minutes for consideration of sentencing.[70] Izzat points out a striking contrast between the importance given to the process of determination of guilt and the process of determination of sentence.[71] Peter W. Low points out that at the sentencing stage, the judge is only controlled by his sense of self-restraint and compares that at the sentencing stage, unlike guilt stage, the judge's discretion is not bounded by sophisticated rules of evidence or procedure.[72]

In his work "The Machinery of Justice in England" R.M. Jackson pointed out the similar state of affair in England which prevailed prior to new sentencing reforms in the 1980s and lamented as under:

> An English criminal trial, properly conducted is one of the best products of our law, provided you walk out of the court before the sentence is given; if you stay to the end, you may find that it takes far

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69 Ibid.
70 M.Z Siddiqi, Individualisation in Sentence Determination, Aligarh Law Journal (1967) p.75.
71 Ibid., 2.
72 Peter W. Low, "Reform of the Sentencing Process, " The Cambridge Law Journal 29, no. 2 (1971): 237–57.

less time and inquiry to settle a man's prospects in life than it has taken to find out whether he took a suitcase out of a parked motor car.[73]

Thus, a good criminal justice system cannot afford to neglect or over emphasize either conviction or sentencing at the cost of other. Sentencing like conviction should also be rule-based instead of solely relying on the principle of judicial restraint. The vital course to achieve proper and fair sentencing is the structuring of discretion. Thus, this discussion leads towards the question of the structuring of discretion at sentencing which will be the main focus in chapters 4, 5 and 6, in Pakistan's perspective.

2.8. Discretion and Sentencing:

The question of discretion has perplexed even the great scholars. To give human input and life to the laws and rules, the existence of discretion is necessary but at the same time, excess or misuse of discretion makes the legal principles redundant and lifeless. Cautioning against this aspect of discretion, Lord Camden observed that, "the discretion of a Judge is the law of tyrants; it is always unknown".[74] Thus, it is argued that discretion within the system result to discrimination within the system.[75] However, John Marshall of the United States Supreme Court was of the view that "courts are the mere instruments of the law, and can will nothing".[76]He argued that discretion is never exercised to implement the will of the judge rather that it is used to implement the will of the law. This reflects that even the great jurists are divided on the vices and virtues of discretion. In this scenario structuring of discretion at the sentencing stage is all the more important.

Origin of wide discretion to judges in the matter of sentencing lies in the practical impossibility of laying down the fixed standard for a wide variety of offences and

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73 R. M. Jackson, The Machinery of Justice in England (Place of publication not identified: Cambridge University Press, 2015), 211.

74. Judge Thomas A. Zonay, "Judicial Discretion: Ten Guidelines for Its Use" (National Judicial College, 2015), http://www.judges.org/judicial-discretion-ten-guidelines-for-its-use/. As quoted in Hindson and Kersey (1680) 8 How, St. Tr.57.)

75. Crow, "Florida's Evolving Sentencing Policy, " 9.

76. Osborn v. Bank of the United States, 22 U.S. 9 Wheat. 738 738 (1824).

offenders.[77] Exercise of sentencing discretion is said to be the most difficult task for a judge.[78] Criticizing the unstructured judicial discretion in the sentencing process, Justice Krishna Iyre pointed that, "lawlessness in sentencing, hidden in the euphemism of judicial discretion, must be replaced by new penal pharmacopeia".[79] He laments that "our criminal law sentencing policy is in a terrible quandary and our prison reform process is paper paralyzed."[80] Position in Pakistan is also not different as any real thought process on the sentencing issues is lacking and disparity in sentencing is abundant. This is evidenced from the observation of Justice Asif Saeed Khan Khosa that both at trial and appellate level different sentences are being passed against the convicts placed in similar circumstances.[81]

Ashworth argues that replacing discretion with inflexible rules will not only abolish the disadvantages of discretion but will also take away its advantages.[82] He suggests structuring the discretion for its exercise in line with some rational polices.[83] He points out that the judiciary has defended the sentencing discretion by asserting that sentencing is an art and not a science and that it is necessarily an exercise of judgment, rather than a mere application of rules and guidelines.[84] The observation of the Supreme Court of Pakistan that, "it is the discretion of the Court to award any sentence, which it deems fit in the facts and circumstances of a certain case"[85] also reflect the judicial trend of preserving discretion in sentencing. However, this view was passed as a dissenting opinion. In the majority judgment, an effort was made to structure the sentencing discretion by interpreting the provisions of the enactment.

77. Durga Pada Das, "Discretion in the Sentencing Process a Case Study of India Criminal Justice System" (Ph.D. Dissertation, University of Burdwan, 1999), 2.
78. Ibid., 12.
79. Ibid., 16.
80. Ibid.
81. Ghulam Murtaza v.The State PLD Lah 362.
82. Ashworth, Sentencing and Criminal Justice, 2015, 19.
83. Ibid.
84. Ibid., 19, 51.
85. Khuda Bakhsh vs The State 2015 S C M R 735.

This reflects that the superior judiciary of Pakistan is not averse to the structuring of sentencing discretion.

The Indian Supreme Court has rolled the ball to parliament to implement structuring parameters in sentencing discretion and held that standardization of discretion in sentencing is a policy matter which falls in the legislative sphere. The court held that it will not rush to occupy this field.[86] A contrary view has been taken in Pakistan in Ghulam Murtaza[87] and Ameer Zeb[88] cases by providing sentencing guidelines to the courts through judicial interpretation. In spite of incorporation right to a fair trial in the constitution of Pakistan as one of the fundamental rights, the right of separate sentence hearing has not been provided. Although separate sentence hearing is also not specifically barred by any statutory provision but affirmative legislative action to provide separate sentence hearing may serve the ends of a fair trial in a better way.In several cases, [89] only propriety or length of sentence is assailed which emphatically points towards the need of providing separate sentence hearing. The provision of separate sentence hearing will allow the accused to bring forth mitigating circumstances. It will also allow the prosecution to point out any aggravating elements regarding sentence to be imposed. In India right of separate sentence hearing has been provided by the legislature.[90] In the English context, Welch has devoted a full chapter to describe different steps to be taken between conviction and sentence.[91] Detail discussion on the subject, in Pakistani perspective, will be made in chapters 4 and 5. Thus, a good sentencing system is not one which tends to eliminate judicial

86. Swamy Shraddananda @ Murali Manohar Mishra vs. State Of Karnataka https://indiankanoon.org/doc/989335/ accessed on 20-06-16.
87. Ghulam Murtaza vs The State PLD 2009 Lah. 362.
88. Ameer Zeb vs The State PLD 2012 SC 380.
89. For example see Ahmad vs the State 2015 S C M R 993 and Safdar Ali vs The State PLD 2015 Lah. 512.
90. Section 235 Code of Criminal Procedure, 1973, India.
91. Peter Hungerford-Welch, Criminal Litigation, and Sentencing (Cavendish, 2000), 579–616.

discretion but one which provides principles for structuring the judicial sentencing discretion. Thus, ultimately sentencing needs to be a man-made product and sentencing discretion should remain under human control. Judge Cooke opposing the mechanical approach to sentencing observed:

> At the end of the day, the exercise of discretion in sentencing must remain in human hands. You cannot program a computer to register the 'feel' of a case, or the impact that a defendant makes upon the sentencer.[92]

Glueck has beautifully answered the question of discretion:

> Discretion there should certainly be, but the problem is to provide a technique whereby discretion shall be allowed ample creative scope and yet be subjected to rational external discipline or self-discipline.[93]

Use of discretion in sentencing is bound to raise the issue of uniformity, consistency, and disparity and it is, therefore, important to discuss these issues here in brief.

2.9. Uniformity, Consistency and Disparity:

Criminal courts are often criticized for lack of uniformity, consistency, and disparity in sentencing. Izzat argues that it is the irrational disparity in sentences imposed by the judges which have evoked frequent criticism in legal literature.[94] He asserts that one of the primary pre-requisites of a good sentencing system is the presence of consistency and absence of sentencing disparity.[95]To achieve the aim of the criminal justice system, irrationally unequal sentences must be eliminated.[96] It is a general agreement of rationality that offenders convicted of similar crimes under similar circumstances deserve similar sentences. Fairness in sentencing is most often associated with reducing or eliminating the unwarranted disparity. Crow explains that

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92. Donald C. Pennington and Sally M. Lloyd-Bostock, The Psychology of Sentencing: Approaches to Consistency and Disparity (Centre for Social-Legal Studies, 1987), 58.
93. Sheldon Glueck, "Predictive Devices and the Individualization of Justice. " Law and Contemporary Problem, n.d., 461–76.
94. Ullah, "Sentence Structure of Penal Laws as Applied in India and Nigeria, " 35.
95. Ibid.
96. Ibid.

unwarranted disparity is that which is based on factors not prescribed by law which may include colour, race or sex.[97]Das points out that the question of disparity in sentences has troubled the criminologists since long.[98] He mentions that capricious, un-informed, illogical and unskilled exercise of judicial discretion based on guesswork is the fundamental cause of sentencing disparity.[99]

Explaining the cross-system problem of sentencing and sentencing disparities, Judge Kaufman referred to a study of 7000 cases decided by different judges in the USA and stated that "One judge imposed prison terms in 57.7 per cent of his cases. Another judge committed only 34 per cent of the prisoners before him. One judge granted probation in 32.4 per cent of his cases; another in only 19.5 per cent"[100]The same trend of divergent sentences in Narcotic cases was observed by the Lahore High Court while surveying cases under Control of Narcotic Substances Act, 1997.[101]

Charges of illogical disparity in sentencing have encouraged the legislature to limit sentencing discretion[102]and ultimately sentencing guidelines[103] have emerged as the favored policy approach to achieve uniformity in sentencing.[104] In some jurisdictions, superior judiciaries have occasionally intervened to structure the sentencing by formulating sentencing guidelines. An example of Pakistan has been discussed above. In England, the Court of Appeal has also been laying down guideline judgments[105]In Australia, there is also a statutory scope for guideline judgments.[106]

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97. Crow, "Florida's Evolving Sentencing Policy, " 3.
98. Das, "Discretion in the Sentencing Process a Case Study of India Criminal Justice System, " i.
99. Ibid., 12.
100. Irving R. Kaufman, "Sentencing: The Judge's Problem."
101. Ghulam Murtaza Vs State PLD 2009, 362.
102. Crow, "Florida's Evolving Sentencing Policy, " 3.
103. In the United States.
104. Crow, "Florida's Evolving Sentencing Policy, " 3.
105. "Guideline Judgments Case Compendium."
106. "Crimes (Sentencing Procedure) Act 1999 NSW, " secs. 37, 37-A, 37-B, accessed January 17, 2018,

In addition to sentencing guidelines, the exchange of sentencing information among the judges is also taken as a solution to the problem of sentencing disparity[107]and to achieve rational uniformity. The purpose is that offenders should not be committed to prison for terms varying with the state of the Court's digestion or size of chancellor foot.[108] However, the solution to the disparity problem is not to take away the sentencing authority from the judges.[109]Unjust and irrational sentencing at least in part is a product of the irrational and illogical structure of the penal laws.[110]As mentioned above, Lord Irving also pointed out that it would be wrong to blame the judges for all problems in the sentencing system and sentencing outcomes. Lack of well-structured system of penal sanctions provided by the legislature adds to the complexity of the problem of sentencing disparity.[111]Perfect consistency in sentencing is neither possible nor desirable as the courts have to deal with the infinite variety of circumstances even in one kind of offences.[112]

Thus, the issue of disparity and inconsistency in sentencing is a challenge faced by several jurisdictions in the world. Countering disparity never means to tilt towards mechanistic uniformity. In the quest to deal like cases similarly one has to guard that unequal cases may not be treated equally, as treating unequal people equally is perhaps the worst form of discrimination. Thus, a good sentencing system tends to achieve rational uniformity and target disparity and inconsistency in sentencing by structuring sentencing discretion instead of eliminating the same.

Theoretical understanding of the concept of sentencing cannot be complete without discussing the theories of sentencing as they also serve to structure sentencing

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http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/nsw/consol_act/cpa1999278/.

107. Irving R. Kaufman, "Sentencing: The Judge's Problem."
108. Ibid.
109. Ibid.
110. Ullah, "Sentence Structure of Penal Laws as Applied in India and Nigeria, " 382.
111. Ibid., 148.
112. Foreword"Guideline Judgments Case Compendium."

discretion. After a detail general study of sentencing, it seems pertinent to discuss the theories of sentencing.

Part II. Understanding Theories of Sentencing

2.10. Theories of Sentencing:

Sentencing theories provide moral justification for sentencing which in turn becomes the purposes for which sentences can be imposed. Bagaric has argued that the disconnect between theories of sentencing and law has resulted in disorder in sentencing itself.[113] For building and running a just, rational and effective sentencing system, understanding the theories and purposes of sentencing is a pre-requisite.[114]The success of a sentencing system depends upon the fact that how adequately it addresses the purposes and functions of the sentencing[115]and how well it is rooted in its theoretical basis. The purposes of the sentencing act as a guidepost for the determination of an appropriate sentence.[116] The fundamental purposes of sentencing are to punish the offenders and prevent the recurrence of a crime.[117] Traditional theories or purposes of sentencing are retribution, deterrence, incapacitation, and rehabilitation.[118] These purposes, it is said, serve to achieve a single purpose of protecting the community from the crime.[119] These purposes are also called normative functions of sentencing.[120]Normative purposes actually provide theoretical criteria to decide, whether the sentence imposed on any individual offender

113. Bagaric, Punishment and Sentencing, 3.
114. Michael Tonry, "Purposes and Functions of Sentencing, " Crime and Justice 34, no. 1 (January 1, 2006): 1–52, doi:10.1086/503374.
115. Ibid.
116. Veen v The Queen (No 2) (1988) 164 CLR 465 High Court of Australia https://jade.io/article/67414 accessed on 04-08-2017.
117. Tonry, "Purposes and Functions of Sentencing."
118. Marc Miller. "Purposes at Sentencing, " Southern California Law Review 66, no. 1 (November 1992): 413–82.
119. "Sentencing Bench Book, " accessed January 17, 2018, https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/index.html.
120. Tonry, "Purposes and Functions of Sentencing."

is proper, just and fair.[121] Therefore, an analysis of the theories of sentencing seems to be necessary. It will also help to understand the latter part of this chapter regarding features of sentencing. These features, discussed in latter part of this chapter, will, in turn, be used to test the English and Pakistani sentencing system analyzed in chapters 3 to 6.

Sentencing theories can be divided into two parts:

i) Retributive, and

ii) Utilitarian

2.10.1. Retribution:

Retributive justice mainly points out that those who commit crimes deserve to suffer proportionate punishment without any reference to any good which such punishment may produce.[122] Green points out, on the strength of interviews of judges, that community demands retribution as a part of sentencing.[123] It is claimed that justice is defeated if wrongdoers don't receive what they deserve.[124]It works on the community's retaliatory sense of justice.[125] Punishment is called a fitting response to the criminal wrongdoing.[126] It is the reversal of undue advantage gained by the offender. It is the restoration of balance disturbed by the offending act by the mechanism of punishment. One of the oldest justifications of punishment is retribution which functions on the principle that wrong is made right by giving the

121. Ibid.
122. Stanford Encyclopedia of Philosophy https://plato.stanford.edu/entries/justice-retributive/ accessed on 26-08-2017.
123. Alec Walen, "Retributive Justice, " The Stanford Encyclopedia of Philosophy, 2016, https://plato.stanford.edu/archives/win2016/entries/justice-retributive/.
124. Edward W. Strong, "Justification of Juridical Punishment, " Ethics 79, no. 3 (1969): 187–98.
125. Bryan A. Garner, "Black's Law Dictionary" (West Publishing Co, 1999), 1248.
126. David Wood, "Punishment: Nonconsequentialism, " SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, August 16, 2010), https://papers.ssrn.com/abstract=1659453.

offender just deserts or his due.[127]Traces of this theory can be found in the code of Hammurabi which provides the principle of an eye for an eye and a tooth for a tooth..The Holy Quran also endorses this theory of punishment with a persuasion for clemency on behalf of the rights holders of qisas. The Holy Quran says:

> We ordained therein for them: "Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal." But if anyone remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by (the light of) what Allah hath revealed, they are (No better than) wrong-doers.[128]

The crux of retribution is to make the offender pay for his deeds.[129] Cross has given the following basic principle of retribution theory:[130]

i) Vindication of the society's claim of harm.

ii) Fairness to the law-abiding.

iii) Proportionality in the sentence to the offender with the seriousness of the crime.

In his "Two Concept of Rules, " John Rawls[131]has laid down the retributive ingredients as follow:

(i) The primary justification of punishment is that wrongdoing itself calls for punishment.

(ii) A person who commits wrong must suffer proportionate suffering.

(i) That punishment follows the guilt.

(ii) That severity of punishment follows the depravity of the wrong act.

(iii) It is morally better that a wrongdoer should suffer punishment instead of going away with impunity.

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127. Areti Krishna Kumari, "Role of Theories of Punishment in the Policy of Sentencing, " SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, January 10, 2007), https://papers.ssrn.com/abstract=956234.

128. The Holy Quran 5:45 Translation of the Holy Quran used in this work is of Abdullah Yusaf Ali http://www.islam101.com/quran/yusufAli/QURAN/5.htm

129. Cross, The English Sentencing System, 1975, 114.

130. Ibid., 114–20.

131. John Rawls, "Two Concept of Rules, " The Philosophical Law Review 64 (1955): 3–32.

Thus, retributivists consider that moral justification for punishment and sentencing is built in the wrong act itself and no foreign aid or justification is needed to justify the punishment. Therefore, it is said that punishment should follow the guilt of the wrongdoer and the bite of sentencing should be proportionate to the gravity of the wrong done. In some way, it gets support from Hegel's point of view as explained by Sir Rupert Cross that crime and punishment are both the species of an injury.[132] It is argued that by committing an offending act, an offender initiates the barter of injuries therefore, he cannot complain of its outcome in the form of sentencing. Infliction of injury creates a feeling of revenge or vengeance in the victim and his well-wishers. Desert theory in the simplest form is based on revenge[133] tempered with proportionality.[134]

Criticism:

Retributive theory is criticized for lacking in reformatory trends.[135] It is criticized for the lack of a futuristic approach. It is marked unjust in the sense that it calls humans to punish other humans without any regard to the welfare of either. It is claimed to be self-contradictory in the sense that on the one hand, it requires that only guilty be punished but on the other hand, practically excuses the punishment of the innocent dependents of the guilty offender without any utility. Thus, it is said that it sometimes cares more for retributive injustice than retributive justice.[136] Just desert which is called a modern form of retributivism is also criticized for lack of practicality. It is argued that humans with inherently limited knowledge are incapable

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132. Cross, The English Sentencing System, 1975, 118.
133. Das, "Discretion in the Sentencing Process a Case Study of India Criminal Justice System, " 34.
134. Forst and Wellford, "Punishment and Sentencing: Developing Sentencing Guidelines Empirically from Principles of Punishment."
135. Das, "Discretion in the Sentencing Process a Case Study of India Criminal Justice System, " 35.
136. Strong, "Justification of Juridical Punishment."

of determining criminal liability in exact scale for determination of punishment on the bases of desert.[137]Tonry calls it sound in theoretical aspects but defective at practical fronts.[138]

2.10.2. Utilitarian Rationales of Sentencing:

In opposition to retributive theories, utilitarian theorists claim that punishment is evil and should only be employed for some future good or to prevent some future evil.[139] Utilitarian theories are consequentialist in their spirit as they focus on future good or utility. Utilitarian concept of sentencing support punishment for specified reasons which are:

i) Punishment being evil should only be resorted to promoting the common good.

ii) Punishment should in sum total maximize future good either by adding to the overall happiness or reducing future evils.

iii) If the above two objectives are not achievable punishments for the sake of punishment should not be resorted.[140]

Mackenzie has summarized the difference between utilitarian and retributive approaches and points out that utilitarian's focus on what the good consequences will flow from the punishment in the circumstances. The retributivists are not concerned with the consequences of the punishment, whether good or bad. They consider punishment necessary because it is right and proportional to inflict the same.[141]

Keeping in view the consequentialist approach utilitarian theories can be divided into deterrence, incapacitation, and reformation.

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137. Ibid.
138. Tonry, Sentencing Matters.
139. Strong, "Justification of Juridical Punishment."
140. Ibid.
141. Geraldine Mackenzie, "A Question of Balance: A Study of Judicial Methodology, Perceptions and Attitudes in Sentencing" (University of New South Wales, 2001), 487.

2.10.3. Deterrence:

Transformation of sentencing aims from retribution to deterrence is explained by Kauffman as under:

> Theory and practice in the area of sentencing have undergone a gradual but dramatic metamorphosis through the years. Primitive man believed that a crime created an imbalance which could be rectified only by punishing the wrongdoer. Thus, sentencing was initially vengeance-oriented. Gradually, emphasis began to be placed on the deterrent value of a sentence upon future wrongdoing.[142]

It relies on the threat and fear to prevent crime. Its supporters assert that predominately justification of punishment is deterrence.[143]It is said to be the tool in the hand of society to thwart the drives toward violation of rights of others.[144] It is a barrier against the moves of violation of rights. It is a warning to the present and future wrongdoers. It is said to be the powerful component of the criminal justice administration.[145]

Deterrence theory can be divided into two parts:

i. Specific Deterrence
ii. General Deterrence

i. Specific Deterrence:

It operates against the specific offender who has committed the offence. It aims to warn the specific offender or offenders that every offending act or crime is to be paid in the currency of punishment. It also informs the offender that any future crime will be met with the same or more drastic fate. It, being directed against the specific offender, is louder in communication but limited in scope. It is the imposition

142. Irving R. Kaufman, "Sentencing: The Judge's Problem."
143. Anthony Ellis, "A Deterrence Theory of Punishment, " The Philosophical Quarterly (1950-) 53, no. 212 (2003): 337–51.
144. B. Sharon Byrd, "Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution, " Law and Philosophy 8, no. 2 (1989): 151–200, doi:10.2307/3504694.
145. Das, "Discretion in the Sentencing Process a Case Study of India Criminal Justice System, " 36.

of a penalty on an offender which is calculated to discourage him from committing any more crimes.[146] It works on the principle of repetition of penal action with the repetition of the criminal act, and thus makes the choice of criminal activity harder and difficult.[147]

ii. General Deterrence:

General deterrence advocates the principle of learning from the experiences of the other. Penology under the shade of general deterrence informs the other prospective or potential offender to reset their calculations regarding the benefit of criminal acts. By punishing the specific offender in a befitting manner, penal laws tend to declare that a criminal act is an unworthy choice. It is also futuristic in approach as it focuses on future wrongdoing and offence in hand is used to prevent future offences. It may be described as an imposition of a penalty on an offender which is sufficiently severe to serve as a warning to other prospective offender.[148] Deterrence convinces rational self-interested persons to avoid crime by meticulously setting down an example that crime does not pay.[149]

Criticism:

Deterrence theory is criticized for the reason that it tends to 'use' a specific offender to communicate with others at his cost.[150] This use of one offence of a specific offender to prevent further offending from others adds undue harshness to his punishment. Again using one offender to deter others is called an unreasonable price in the trade of injuries, whether brought by a criminal act or by punishment. It is also

146. Forst and Wellford, "Punishment and Sentencing: Developing Sentencing Guidelines Empirically from Principles of Punishment."
147. Kent Greenawalt, "Punishment, " Journal of Criminal Law and Criminology 74, no. 2 Summer (1983): 343–62.
148. Forst and Wellford, "Punishment and Sentencing: Developing Sentencing Guidelines Empirically from Principles of Punishment."
149. Greenawalt, "Punishment."
150. Ellis, "A Deterrence Theory of Punishment."

criticized for ignoring reformatory trends.[151] Aulakh argues that the relationship between crime rates and the measure of deterrence is quite less than expected by deterrence theorists.[152] He criticizes deterrence theory on the ground that deterrence could never work against addicts and it is ineffective against underclasses who have very few options except criminal acts.[153] The National Institute of Justice of the United States argues that certainty of being caught and punished is more effective deterrence than enhancement of severity of punishment.[154]

2.10.4. Reformation:

Reformation is also one of the core purposes of sentencing. Not punishment but treatment is the crux of the reformation. Alexander asserts that "true punishment considers the offender 'as a patient of society. Its primary function is to cure, not castigate; to heal rather than to hurt".[155] It focuses on the rehabilitation of criminals in society. It is clinical sentencing where the focus is on the future, and the past of the offender is considered to prescribe the best healing sentence. The purpose is the transformation of the offender into a productive citizen.[156] Criminals, in the reformation process, are equated with patients. It is argued that they deserve treatment, not punishment.[157] In reformatory approach, punishment is considered a means to an end.[158] Kaufman explains the reformatory approach as under:

> Today, each offender is viewed as a unique individual, and the sentencing judge seeks to know why he has committed the crime and

151. Das, "Discretion in the Sentencing Process a Case Study of India Criminal Justice System, " 37.
152. Majeed Aulakh, Crime, Criminology &Legal Remedies, 111.
153. Ibid.
154. "Five Thing about Deterrence" (National Institute of Justice, 2016), https://www.ncjrs.gov/pdffiles1/nij/247350.pdf.
155. Julian P. Alexander, "The Philosophy of Punishment, " Journal of the American Institute of Criminal Law and Criminology 13, no. 2 (1922): 235–50, doi:10.2307/1133492.
156. Forst and Wellford, "Punishment and Sentencing: Developing Sentencing Guidelines Empirically from Principles of Punishment."
157. Krishna Kumari, "Role of Theories of Punishment in the Policy of Sentencing."
158. Julian P. Alexander, "The Philosophy of Punishment, " Journal of the American Institute of Criminal Law and Criminology 13, no. 2 (1922): 235–50, doi:10.2307/1133492.

> what are the chances of a repetition of the offense. The judge's prime objective is not to punish but to treat.[159]

Kumari has summarized the origin of reformatory theory as under:

> The positive school ...emphasizes the importance of the "punishment fitting the criminal". It is the individual criminal, not the crime that is the focal point in positive thinking. The reformative theory emerged from such positive thinking.[160]

Reformation is based on the supposition that people are inherently good and transformation in their lives is possible if necessary support and inspiration are provided. It focuses on the personal tendencies of the offender and works to reduce one's wish to commit a crime.[161] Therefore, reformation may be simply by way of imprisonment in a correctional facility or by positive acts in the form of education and training to reform the convicts.

Criticism:

However, the reformatory theory is criticized for being soft on crime. It is said to be no solution to hardened criminals. It is also criticized for approving undeserved punishment just to ensure reformation. It is criticized to ignore the right of the victim by treating the offender as a patient. Its critics term it encouragement for further offending.

2.10.5. Incapacitation or Prevention:

Incapacitation is the prevention of similar offences on the part of the same offender by taking away his power to repeat the offending act.[162]It ensures the protection of society by the removal of the offender from circulation so that he cannot

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159. Irving R. Kaufman, "Sentencing: The Judge's Problem."
160. Krishna Kumari, "Role of Theories of Punishment in the Policy of Sentencing."
161. Guyora Binder and Ben Notterman, "Penal Incapacitation: A Situationist Critique, " American Criminal Criminal Law Review, Buffalo Legal Studies Research Paper Series, 54, no. 1 (2017): 1–57.
162. Ibid.

commit further crimes.[163] This theory of sentencing is also utilitarian and consequentialist in approach. Greenawalt explains the extent of incapacitation and states that imprisonment is temporary while the death penalty is permanent incapacitation.[164]The amputation of limbs of the thief is also a manifestation of this incapacitation approach. In contrast to deterrence and rehabilitation, incapacitation is not dependent on the conduct of the offenders. Deterrence is actually dependent on the conduct of the potential offender who is sought to be deterred that how much he is deterred. Similarly, rehabilitation or reformation is also dependent on the offender, sought to be reformed. Incapacitation, on the other hand, is not dependent on the nature of offenders, as instead of expecting from the offenders, their capacity to commit an offence is sealed.[165]

Criticism:

Incapacitation theory is criticized for ignoring the reformatory possibility and its focus on criminals instead of crime. It results in increasing the length of incarceration. It unnecessarily presumes that the offender will repeat the offence. Incapacitating measures in the form of imprisonment are financially expensive, while in the form of mutilation and capital punishment are emotionally expensive.

2.10.6. Denunciation:

Denunciation is the public condemnation of the criminal act. It is the expression of society's abhorrence and resentment against the crime.[166] Denunciation as a sentencing purpose is linked with retributivism.[167]It is also called long term

163. Forst and Wellford, "Punishment and Sentencing: Developing Sentencing Guidelines Empirically from Principles of Punishment."
164. Greenawalt, "Punishment."
165. Ibid.
166. Wood, "Punishment."
167. Canadian Sentencing Commission and J. R. Omer Archambault, "Sentencing Reform : A Canadian Approach : Report of the Canadian Sentencing Commission" ([Ottawa?] : Minister of Supply and Services Canada, 1987), 142, https://trove.nla.gov.au/version/14951953.

deterrence.[168]However, being consequential in some aspects, it cannot be completely segregated from utilitarian consideration. It is a communication between society and the offender through the auspices of the court that his conduct is unacceptable to society as a whole.[169] It is one of the most important sentencing purposes and its reflections can be seen in every sentence.[170] It is an apparatus of securing public confidence on the criminal justice system.[171] It is a manifestation of justice being seen to be done.[172] It is a mechanism of maintaining the people's standards regarding the abhorrence of crimes. It creates revulsion in people's minds regarding criminal activities and thus reduces the number of crimes and criminals in the long run.[173]

Stephen argues that the infliction of punishment is justified as an expression of detestation and denunciation of the society toward criminal acts. He maintains that such denunciation "operates upon not only on the fears of criminals but upon the habitual sentiments of those who are not criminals".[174]Thus, denunciation is the expression of the detestation of the community against criminal activities which thereby enhances the solemnity of the sentencing process. Explaining the denunciatory flavor of sentencing. Lord Denning in his statement before Royal Commission on Capital punishment stated that, "the ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the

168. Mackenzie, "A Question of Balance: A Study of Judicial Methodology, Perceptions and Attitudes in Sentencing, " 362.
169. Ibid.
170. Ibid., 366.
171. Ibid.
172. Ibid., 364.
173. Cross, The English Sentencing System, 1975, 124.
174. Sir James Fitjames Stephen, A History of the Criminal Law of England, vol. 1 (London: Macmillan and Co., 1883), 80, https://archive.org/stream/historyofcrimina01stepuoft#page/n3/mode/2up.

community of a crime.[175] Denunciation even works as a sentencing purpose where deterrence is not the focus of the court.[176]

Criticism:

Sir James even thought it desirable to hate the criminal. He said, "I think it highly desirable that criminals should be hated, that the punishment inflicted upon them should be so contrived as to give expression to that hatred".[177] However, denunciation should not cross the limits. It should not reach a level where instead of a crime even criminals are hated. It is criticized as merely being ornamental and symbolic in value.[178]The necessity of publicity attached to it is either not desirable in particular circumstances or not practicable to achieve the desired goals.

2.10.7. Reparation:

Reparation does not qualify as one of the sentencing theory, but this is an important sentencing rationale from a restorative point of view and, therefore, deserve a brief review here along with main sentencing theories. Reparation as a sentencing rationale has an element of restorative justice which is now encouraged by the international community.[179] It seeks to compensate the victim at the expense of the offender and thus not only reduces the proceeds of the offending act but also reduces the loss of victim at least in financial terms. Traces of reparation can be found even in the Code of Hammurabi.[180] The Islamic concept of Diyat, Arsh, and Daman are also reparatory and restorative in nature. The Government of Western Australia, Department of Justice states that reparation may take the form of a compensation

175. Kenya National Assembly Official Record (Hansard), 1960.
176. D. A. Thomas, "Theories of Punishment in the Court of Criminal Appeal, " The Modern Law Review 27, no. 5 (2011): 546–67.
177. Fitjames Stephen, A History of the Criminal Law of England, 1:82.
178. Mackenzie, "A Question of Balance: A Study of Judicial Methodology, Perceptions and Attitudes in Sentencing, " 366.
179. "Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders Vienna, 10-17 April 2000" (United Nations, 2000), https://www.un.org/ruleoflaw/files/4r3e.pdf.
180. The Code of Hammurabi Sections 22-24.

order in financial terms or another measure to restore the victim to pre-offence level.[181]

Reparation is a generic term that includes in it the different elements of compensation, rehabilitation, restitution, satisfaction, and assurances of non-repetition.[182] Geoffrey explains that reparation aims at making amends for the offense instead of inflicting pain.[183] He argues that reparation instead of taking the offenders as patient and resorting to clinical sentencing treats the offenders as responsible beings and, therefore, requires them to restore the victim to the pre-offense level.[184] It also involves an expression of remorse on the part of offender resulting in an assurance that victim rights will be respected in the future.[185]

Criticism:

Reparation is criticized for lacking any element of real pain and thus it is said that it does not qualify as a punishment. Reparation may not be possible due to financial condition of the offender and thus become uncollectible. It is argued on behalf of retributivist that it is not the main purpose of punishment and is only incidental to the main purpose of punishment.[186] Reparation, it is argued, is something on the top of the sentence and is not part of the sentence.[187].

2.10.8. Combination of Sentencing Theories:

Though there are different theories of sentencing but they cannot be placed in watertight compartments while determining sentences in a judicial setting. These

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181. Court and Tribunal Services, "Restitution & Reparation, " accessed January 18, 2018, http://www.courts.dotag.wa.gov.au/R/restitution_reparation.aspx?uid=8336-5958-9621-6137.
182. Kathleen Daly and Gitana Proietti-Scifoni, "Reparation and Restoration, " Oxford Handbook of Crime and Criminal Justice, 2011, 207–253.
183. Geoffrey Sayre-McCord, "Criminal Justice and Legal Reparations as an Alternative to Punishment, " Philosophical Issues 11 (2001): 502–29.
184. Ibid.
185. Lucia Zedner, "Reparation and Retribution: Are They Reconcilable, " The Modern Law Review 57, no. 2 (March 1994): 228–50.
186. Ibid.
187. Services, "Restitution & Reparation."

theories and rationales of sentencing overlap with each other and none of them can be considered in isolation from the others.[188] Therefore, any effective sentencing system cannot commit to any single sentencing theory or rationale. All these sentencing rationales have to be kept in view and justifications need to be given for employing any one or more of these rationales of sentencing while deciding the actual sentences. Neetij recommended the combined use of theories of deterrence, incapacitation, and reformation in sentences for the prevention of crimes.[189] The English Court of Criminal Appeal while sentencing the violation of the Official Secrets Act[190] made combined use of different sentencing theories and held as under:

> It is of the highest importance, particularly at present, that such conduct should not only stand condemned, should not only be held by all ordinary men and women in utter abhorrence but also should receive when brought to justice the severest possible punishment. This sentence had a threefold purpose. It was intended to be punitive, it was designed and calculated to deter others, and it was meant to be a safeguard to this country.[191]

The Supreme Court of Pakistan also referred to deterrence and reformatory approach at the same time in the perspective of Islamic jurisprudence and observed: "Islam recognizes the concept of deterrent punishment and also the theory of repentance for the purpose of reformation and preservation of society..."[192] This observation of the Supreme Court of Pakistan also shows that different theories of sentencing are used in conjunction to determine sentences. However, a deeper analysis of the judicial approach to sentencing in Pakistan will be made in Chapter 5.

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188. Veen v The Queen (No 2) (1988) 164 CLR 465 https://jade.io/article/67414 accessed on 27-08-2017.
189. Neetij Rai, "Theories of Punishment with Special Focus on Reformative Theory, " SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, May 5, 2010), https://papers.ssrn.com/abstract=1600858.
190. Official Secrets Act, 1911.
191. Regina v Blake [1961] 3 W.L.R. 744.
192. Ghulam Farid Alias Frarida v The State PLD 2006 SC 53.

Thus, these sentencing theories discussed above are the roots on which a good sentencing system must stand. In addition to these theories, the survey of other modern jurisdictions[193] and jurisprudential developments reflect some other important feature of a good sentencing system. For sound theoretical bases, a sentencing system must remain linked to the above-mentioned theories and rationales of sentencing and should also reflect the features discussed in Part III below.

Part III. Important Features of Good Sentencing System

2.11. Specific Sentencing Legislation:

Most of the developed common law countries including England, [194] The United States[195] and Australia, [196] New Zealand[197] and Canada[198] have enacted specific sentencing laws. The purpose of providing specific sentencing legislation is to properly deal with all issues pertaining to sentencing. The American Bar Association Standard of Criminal Justice proposes that the legislature should provide the legislative framework of sentencing particularly mentioning the purposes of sentencing and types of sanctions with upper limits.[199] However, in sentencing legislation, the difference between upper and lower limits should not be so wide to make it meaningless and actually serving no guidance to the courts. Sentencing legislation should address all the issues regarding the statement of purposes of sentencing, factors to be considered in sentencing, specification of important mitigating and aggravating circumstances. Sentencing legislation should not only

193. UK, Australia, Canada, USA, and New Zealand, etc.
194. Criminal Justice Act, 2003; Coroner and justice, 2009
195. Sentencing Reform Act, 1984.
196. Crimes (Sentencing Procedure) Act 1999 (NSW; Penalties and Sentencing Act 1992 (Qld) ; Criminal Law (Sentencing) Act 1988 (SA) ; Sentencing Act 1997 (Tas), Sentencing Act 1991 (Vic) ; Western Australia: Sentencing Act 1995 (WA) ;etc.
197. Sentencing Act, 2002, New Zealand.
198. Truth in Sentencing Act, 2009.
199. "Criminal Justice Section Standards: Sentencing" (American Bar Association), accessed January 19, 2018, https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_sentencing_blk.html.

provide the kinds of sanctions and their severity level but should also cater to the management and monitoring of the sentenced. It has been suggested that the legislature should review the sentencing mechanism once in every ten years.[200]The sentencing laws of the above-mentioned countries will be selectively reviewed in the next section.

2.12. Legislative Statement of Sentencing Purposes:

From the discussion made in Part II, it is clear that the purposes of sentencing lie at the heart of a sentencing regime. They serve as a guide in drafting and interpretation of criminal statutes and also in the determination of sentences in specific cases.[201] Marc argues that purposes should play a leading role in shaping the sentences in individual cases.[202]

He asserts that sentencing actually involves a judicial exercise of fitting the sentence to the purposes of sentencing.[203]Roberts and Hirsch also emphasize the need for statutory statements of sentencing purposes.[204] They argue that in the absence of a clear statement of the purposes and rationales of sentencing, judges tend to follow their individual sentencing philosophies which may vary from judge to judge and even case to case[205]. The Committee of Ministers of Council of Europe has recommended to its member states that the rationale of sentencing should be stated by the legislature and where there is more than one, priority should also be mentioned.[206]The American Bar Association in its standard on sentencing has

200. See Rule 18-2.7 Ibid.
201. Paul H. Robinson, "Hybrid Principles for the Distribution of Criminal Sanctions," February 7, 2005, https://papers.ssrn.com/abstract=662006.
202. Miller, "Purposes at Sentencing."
203. Ibid.
204. Julian V. Roberts and Andrew von Hirsch, "Statutory Sentencing Reform: The Purpose and Principles of Sentencing," Criminal Law Quarterly 37 (1995 1994): 220–42.
205. Ibid.
206. "Consistency in Sentencing: Recommendation to the Member States and Explanatory Memorandum," in Criminal Law Forum, vol. 4 (Springer, n.d.).

articulated the need for a statement of purposes of sentencing in sentencing statutes.[207] Purposes of sentencing have been specifically stated in England and Wales, Criminal Justice Act, 2003.Section 7 of the 2002 New Zealand law[208]also specifically states the purposes of sentencing. Similarly, the Canadian Criminal Code's section 718[209] also specifies purposes of sentencing. In Australia, different sentencing statutes have also mentioned the purposes of sentencing.[210]Likewise, the Sentencing Reforms Act, 1984 of the United States also provided sentencing purposes specifically.[211] Thus, an efficient sentencing system must, therefore, clearly legislate the purposes of sentencing requiring the sentencers to link and justify their sentences on the basis of these purposes. However, a mere statement of purposes of sentencing is not sufficient unless principles of sentencing are also not specified.

2.13. Aggravating, Mitigating Factors and Principles of Sentencing:

Formulation of sentencing principles to avoid sentencing inconsistencies has been encouraged in the report on the Eighth United Nations Congress.[212]Roberts and Hirsch, while highlighting the need for a statutory statement of sentencing principles and aims, stated:

> The importance of a statutory statement of sentencing purpose and principle cannot be overstated. Judges, criminal justice professionals and indeed all those with an interest in sentencing will look to such a document as a statement from Parliament about sentencing policy.[213]

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207. "Criminal Justice Section Standards:Sentencing."
208. Sentencing Act 2002.
209. Branch, "Consolidated Federal Laws of Canada, Criminal Code."
210. For Example See South Australian Criminal (Sentencing) Act 1988 Section 10, Crimes (Sentencing Procedure) Act 1999 (NSW) s 3A; Sentencing Act 1991 (Vic) s 5 (1) : Penalties and Sentences Act 1992 (Qld) s 9; Sentencing Act 1995 (NT) s 5.
211. "18 U.S. Code § 3553 - Imposition of a Sentence, " LII / Legal Information Institute, accessed January 18, 2018, https://www.law.cornell.edu/uscode/text/18/3553.
212. "Eighth United Nations Congress on the Prevention of Crime and the Treatment of the Offenders" (United Nations, 1990), 163, https://www.unodc.org/documents/congress/Previous_Congresses/8th_Congress_1990/028_ACONF.144.28.Rev.1_Report_Eighth_United_Nations_Congress_on_the_Prevention_of_Crime_and_the_Treatment_of_Offenders.pdf.
213. Roberts and von Hirsch, "Statutory Sentencing Reform."

In Australia, the Victorian Sentencing Advisory Council[214] has clearly stated the principles of sentencing without confusing them with the purposes of sentencing. These principles are:[215]

(i) Parsimony – the sentence must be no more severe than is necessary to meet the purposes of sentencing
(ii) Proportionality – the overall punishment must be proportionate to the gravity of the offending behavior
(iii) Parity – similar sentences should be imposed for similar offenses committed by offenders in similar circumstances
(iv) Totality – where an offender is to serve more than one sentence, the overall sentence must be just and appropriate in light of the overall offending behavior.

The Canadian Criminal Code lays down proportionality as a fundamental sentencing principle.[216] In addition to above, it also requires considering:

(i) Aggravating and mitigating circumstances pertaining to offence and the offender
(ii) The similarity of a sentence with other offenders in similar offences committed in similar circumstances
(iii) The totality of the sentence where consecutive sentences are imposed so that the overall sentence should not be harsh
(iv) Liberty should be preserved if a less restrictive sentence is sufficient
(v) The option of imprisonment should be used only when a court concludes that other sentencing options are not adequate because of the circumstances of the case.

214. "The Sentencing Advisory Council, " Text, accessed January 18, 2018. https://www.sentencingcouncil.vic.gov.au/.
215. "Sentencing Principles, Purposes, Factors | The Sentencing Advisory Council, " accessed January 18, 2018, https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-process/sentencing-principles-purposes-factors.
216. Branch, "Consolidated Federal Laws of Canada, Criminal Code."

Ashworth[217] has also emphasized the statement of sentencing principles in addition to sentencing purposes or aims. He has referred the following sentencing principles to be part of a good sentencing regime.

i) Respect for rule of law and fundamental rights

ii) Restrain in the use of custody

iii) Parsimony

iv) Managerialism and the policy of controlling public expenditure

v) Equality before law

vi) Principle of equal impact

Analysis of the above sentencing principles reflects that in a good sentencing system there are always checks on the undue harshness of the sentences. In this regard principles of proportionality, parsimony and totality are kept on guard. The above discussion also reflects that either these principles are laid down by the legislatures or by sentencing advisory bodies to guide the judicial discretion in the matter of sentencing. These principles promote and protect liberty as a core value and therefore, call upon to use liberty restrictive measure as a last option. Non-custodial measures, discussed in some detail in latter part of this section, may also help to make the sentencing systems financially viable. The principle of equality before the law requires eliminating all discrimination on the basis of sex, race, religion, caste or colour in the matter of sentencing. While equal impact requires that sentences should be calculated in the manner to create an equal impact upon the offenders sentenced. An obvious example of an unequal impact can be taken from the sentence of fine. The specific amount of fine may be ruinous for a poor man but maybe a matter of no concern for a rich person. Thus a good sentencing system also cares for the impact of

217. Ashworth, Sentencing and Criminal Justice, 2010, 95–100.

sentences awarded. For proper use of different sentencing principles at the sentencing stage, aggravating and mitigating circumstances should receive due consideration. Radzinowicz and Roger Hood assert that aggravating factors that would warrant greater punishment must be specified by law.[218] Keeping in view the diversity of aggravating and mitigating factors it cannot be laid down as a rule that these circumstances should be laid down by the legislature invariably. However, in some jurisdictions these factors have been indicated by legislation.[219]

Purposes and principles of sentencing are important as a skeleton of the sentencing system but proper, fair and independent hearing on sentencing may prove to be the soul of the sentencing system.

2.14. **Separate** Sentencing **Hearing:**

The Universal Declaration of Human Rights (UDHR) provides that everyone is entitled to a fair and public hearing in the determination of his rights, obligation and any of criminal charge against him.[220] International Covenant on Civil and Political Rights (ICCPR), to which Pakistan is a party, also requires fair and public hearing.[221] Article 10A of the Constitution of Pakistan also endorses the due process and fair trial which require a proper hearing. Therefore, a full and fair hearing at the sentencing stage is not only a constitutional requirement but is also a mandate of UDHR and ICCPR. The concept of full and fair hearing cannot be materialized without providing an independent and separate hearing at the sentencing stage. Horvitz argues that separate sentence hearing is also a central element of the modern adversarial trial because at the end of such trial nature and quantum of sentence is decided. He fortifies his stance by pointing out that most of the accused are interested in their

218. Radzinowicz and Hood, "Judicial Discretion and Sentencing Standards."
219. See section 143 of the Criminal Justice Act 2003 UK and its schedule 21.
220. See Article 10 of UDHR.
221. See Article 14 (1) of the ICCPR.

sentencing outcome instead of their criminal liability.[222] In a trial conducted by the judge alone, without the assistance of the jury, the importance of sentence hearing increases many folds. In a jury trial, the fact-finding process is completed by the jury until the returning of a guilty verdict. In a bench trial, all these functions are performed by the judge alone, therefore, the provision of separate sentence hearing becomes even more important in such trials.

In England sentencing hearing visibly started in the second half of eighteen century.[223] However, when codification was started in India, the major codification work namely the Indian Penal Code[224] and the Criminal Procedure Code[225] did not provide for a separate sentence hearing. It took India almost seventy-five years to incorporate a separate sentence hearing clause in its new Criminal Procedure Code, [226] introduced in 1973. Pakistan has yet not amended the law for a separate sentence hearing. After incorporation of a right of a fair trial in the constitution of Pakistan, the provision of separate sentence hearing is all the more important. To make the sentencing hearing effective and meaningful pre-sentence reports and victim impact statements are of great help.

2.14.1. Pre-Sentence Reports:

The option of pre-sentencing reports serves as a tool to inform the sentencer for determining fair sentencing. These reports further the right of a fair trial. To adjust the rigor of sentences according to circumstances of the offender, pre-sentence reports serve as eyes and ears of the sentencing authority. These reports help the court and members of the bar to perform their responsibilities qua sentencing in an informed

222. Anat Horovitz, "The Emergence of Sentencing Hearings, " Punishment & Society 9, no. 3 (July 1, 2007): 271–99, doi:10.1177/1462474507077495.
223. Ibid.
224. The Indian Penal Code, 1860.
225. The Code of Criminal Procedure, 1898.
226. The Code of Criminal Procedure, 1973.

manner.[227] The United Nations Standard Minimum Rules for non-custodial Measures also support the requisition of such pre-sentence reports. It is suggested in these rules that such reports should contain information relevant to the sentencing. It is also suggested in these rules that these reports should be unbiased, factual, and objective.[228]In the federal criminal process in the United States, the pre-sentence report is an important document serving as a basis for sentencing and correctional process.[229] However, the pre-sentence report cannot be used to prove something against the accused which was not proved at the trial. If these reports are used properly they may serve as a tool to enhance the information regarding convict to reach proper sentencing decisions.

2.14.2. Victim Impact Statement:

The UN Declaration on Basic Principles for Justice for Victims of Crime and Abuse of Power requires that victims should be treated with compassion and respect. It also asserts the requirement of adopting national and international measures to secure the effective recognition of, and respect for, the rights of victims of crime universally.[230] The Tokyo Rules[231] requires that all the member states shall try to ensure a proper balance between the rights of three players of the criminal process who are offenders, victims, and society. Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power requires endeavor on behalf of state parties

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227. See rule 18-5.1 and 18-2.7 "Criminal Justice Section Standards: Sentencing."
228. United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) Adopted by General Assembly resolution 45/110 of 14 December 1990 http://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf accessed on 08-08-2017.
229. Stephen A. Fennell and William N. Hall, "Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts, " Harvard Law Review 93, no. 8 (1980): 1613–97, doi:10.2307/1340619.
230. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power A/RES/40/34 29 November 1985 96th plenary meeting http://www.un.org/documents/ga/res/40/a40r034.htm accessed on 09-08-2017.
231. United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) See Rule 1.4.

to reduce victimization through effective detection, prosecution, sentencing, and corrections mechanism.[232]In this process victim impact statements play an active role in voicing the harm caused to victims.[233] They also work to enhance the quality of sentencing decisions and have healing elements for victims of the crime.[234]In this way, they tend to satisfy the victim who is one of the most important components of the sentencing process. With the passage of time, they have acquired an important role in the determination of proper sentences and are "popular throughout the common law world.[235]Thus victim care and consideration of victim right through the device of victim impact statement is an important component of a good sentencing system.

However, the quality of sentencing is materially reflected by sentencing judgments. It is, therefore, necessary to gauge the necessity of reasoned and understandable sentencing decisions as a sentencing feature.

2.15. Reasoned and Understandable Sentencing Decisions:

The report on Eighth United Nations Congress, while explaining the sentencing policy, stated that judges should be encouraged to explain the reasons for the sentences they impose.[236] ICCPR requires explaining to the accused the charges

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232. Article 4 of Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power http://www.victimsclearinghouse.nsw.gov.au / Documents / Draft % 20Convention.pdf accessed on 09-08-2017.
233. Mark Walters, "Victim Impact Statements in Homicide Cases: Should Recognising the Harm Done...to the Community Signify a New Direction, " International Journal of Punishment and Sentencing 2, no. 2 (2006), http://www.heinonline.org.ezproxy.lib.gla.ac.uk/HOL/Page?handle=hein.journals/punisen2&div=11&start_page=53&collection=journals&set_as_cursor=0&men_tab=srchresults.
234. Edna Erez, "Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice, " Criminal Law Review, 1999, http://login.westlaw.co.uk/maf/wluk/ext/app/document?docguid=IA83A48E0E72111DA9D198AF4F85CA028&crumb-action=reset&entityID=https://idp.brunel.ac.uk/entity.
235. Walters, "Victim Impact Statements in Homicide Cases: Should Recognising the Harm Done...to the Community Signify a New Direction."
236. Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders Havana 27 –August to -7 September 1991, https://www.unodc.org/documents/congress/Previous_Congresses/8th_Congress_1990/028_ACONF.144.28.Rev.1_Report_Eighth_United_Nations_Congress_on_the_Prevention_of_Crime_and_the_Treatment_of_Offenders.pdf accessed on 13-08-2017, p 163.

level against him, in the language which he understands.[237] On this analogy, he must also be informed of the adverse outcome in the form of a sentence to be imposed against him. Thus, the sentence imposed against the accused must not only be reasoned but must also be explained to him in the language understood by him. The American Bar Association Criminal Justice Standards also require that the court should explain with reasons its decision to select the type of sentence and level of its severity.[238] The purpose of recording reasoning is to inform the parties, the appellate court and the public at large regarding the basis of the decision reached.[239] These standards also require that not the only sentencing decision should be reasoned but should be explained to the offender in his own language. This reflects that sentencing decisions should be understandable to parties and any barrier of language should be overcome by the court. The European Convention on Human Rights also requires that domestic courts should give reasons for their decision and right of fair hearing include the right to a reasoned judgment.[240] Explaining the importance of reasoning in judicial decisions famous English judge Sir Edward Coke said, "Reason is the life of the law; nay, the common law itself is nothing else but reason."[241] Lord Denning observed that "the giving of reasons is one of the fundamentals of good administration".[242] Professor Morris stressed the need of reasoned sentencing decision as under:

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237. See Article 14 (3) ICCPR.
238. See rule, 18-5.19 "ABA Criminal Justice Section - Criminal Justice Standards - Sentencing. " accessed January 23, 2018, https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_sentencing_tocold.html.
239. American Bar Association Standard on Criminal Justice 18-5.19 https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_sentencing_blk.html accessed on 13-08-2017.
240. Mole, Nuala and Catharina Harby, " The Right to Fair Trial, A guide to the Implementation of Article 6 of the European Convention on Human Rights handbooks, No. 3 https://rm.coe.int/168007ff49 accessed on 13-08-2017, P 49.
241. Labbon, Michael, The Common Law Mind in the Age of Sir Edward Coke http://sas-space.sas.ac.uk/3766/1/1348-1484-1-SM.pdf accessed on 28-08-2017.
242. Breen v. Amalgamated Engineering Union and Ors. [1971] 2 Q.B. 175.

> It is obvious that sentencing involves a heavy responsibility and raises issues of difficulty; it thus requires reasons given, critical public consideration of those reasons, critical appellate review of those reasons.[243]

Explaining the requirement of reasoning in sentencing decisions Supreme Court of United states guided as under:

> Judicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust... The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decision making authority.[244]

Pakistan's General Clauses Act[245]also mandated the recording of reasons for any decision or directions given. The Supreme Court of Pakistan has also required the passing of speaking order by recording the reasons and even set aside the orders of High Courts for lack of reasons.[246] Detailed analysis of legislative instruments and judicial decisions in Pakistan's perspective will be made in chapters 4 to 6.

It can be said that more reasoned sentencing will lead toward more consistent sentencing. Reasons in sentencing decisions, of necessity, have to address points raised in hearing conducted in the court. Therefore, a well-reasoned sentencing decision is actually a requirement of the principle of natural justice that no one should be condemned unheard. A dumb sentencing decision practically reflects deaf sentence hearing which violates the right of hearing, one of the fundamental principles of natural justice.

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243. Norval Morris, Towards Principled Sentencing, 37 MD. L. REV. 267, 267 (1977) file:///F:/latest%20material/latest%20material/Towards%20Principled%20Sentencing%20Morris.pdf accessed on12-08-2017.

244. Rita v. the United States:: 551 U.S. 338 (2007) http://caselaw.findlaw.com/us-supreme-court/551/338.html accessed on 28-08-2017.

245. Section 24-A of the General Clauses Act, 1897.

246. Govt.of Sindh vs Muhammad Juman 2009 SCMR 1407, The State vs Sharaf-ud-Sheikh 2013 SCMR 565.

While making a comparative study of sentencing regimes of India and Nigeria, Izzat pointed out a reverse trend in respect of sentencing and mentioned that for sentences imposed, reasons are rarely given.[247] He argues that the lack of reasons in sentencing decisions is one of the reasons for lack of rationalization in the sentencing process.[248] Lack of reasoning and failure to make a comparison of similar cases while imposing sentences is said to be the cause of meager contribution made by the judges to the science of penology.[249] Therefore, reasoned sentencing decisions are an important feature of a good sentencing system. However, a mere statement of reasons is no guarantee of a fair trial if there is no mechanism to appreciate and test such reasoning. Appellate review of sentences may provide such a mechanism.

2.16. Appellate Review of Sentences:

Appellate review of sentences is a judicial function to be performed by appellate courts. An appeal against the sentence is also a device to reduce sentencing disparity.[250] The legislature should also provide the purposes, scope and powers of the appellate court in reviewing the sentences and should call upon the appellate courts to state the reason for their decisions.[251] The purpose of the right of appeal is to ensure at least two levels of judicial scrutiny, second-level being higher than the first one.[252]

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247. Ullah, Izzat." Sentence Structure of Penal Laws as Applied in India and Nigeria: A comparative Study" Ph.D. Diss. (Aligarh Muslim University Aligarh India, 2003) p 2.
248. Ullah, Izzat." Sentence Structure of Penal Laws as Applied in India and Nigeria: A comparative Study" Ph.D. Diss. (Aligarh Muslim University Aligarh India, 2003) p 2.
249. Ullah, Izzat." Sentence Structure of Penal Laws as Applied in India and Nigeria: A comparative Study" Ph.D. Diss. (Aligarh Muslim University Aligarh India, 2003) p 3.
250. Kapel, James R. A Plea for Appellate Review of Sentences Ohio State Law Journal, vol. 32, no. 2 (1971), 410-425. http://hdl.handle.net/1811/69184 http://kb.osu.edu/dspace/bitstream/handle /1811/69184/OSLJ_V32N2_0410.pdf.
251. https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_sentencing_blk.html#partviii accessed on 12-08-2017 Part VIII appellate review of sentences Standard 18-1 to 18-9 accessed on 12-08-2017.
252. WHAT IS A FAIR TRIAL? A Basic Guide to Legal Standards and Practice March 2000 Lawyers Committee for Human Rights file:///F:/latest%20material/latest%20material/Fair%20trial%20and%20right%20of%20appeal.pdf accessed on 12-08-2017.

The European Convention on Human Rights Protocol 7 Article 2 requires that there should be a right of appeal against conviction and sentence to ensure a fair trial. The American Convention on Human Rights[253] also mentions the right to appeal as a part of the guarantee of a fair trial. Similarly, the African Charter on Human and Peoples' Rights also guarantees the right to appeal as part of the fair trial. The International Covenant on Civil and Political Rights (to which Pakistan is a signatory and has also ratified the convention) also specifically requires the mechanism of review of conviction and sentence from higher forum to ensure a fair trial. Its Article 14 (5) provides as under:

> 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

As for as the scope of the appellate review of sentencing is concerned, Owen J. stated the two continuums as under:

> One point of view is that as far as sentences are concerned, a Court of Appeal should interfere rarely, that sentencing is primarily the responsibility of the trial Judge, and that Judges of the Court of Appeal should only interfere with a sentence if it shocks their sense of justice. This is a "laissez-faire" or negative attitude. It has been referred to as the "rubber-stamp" theory... Another point of view is that a Court of Appeal in carrying out its obligation to consider the fitness of the sentence appealed against must go into the matter fully and to consider each appeal from sentence with the utmost care even though the sentence on its face does not shock the Court by its excessiveness or its inadequacy.[254]

Though the scope of appellate review may be determined by local legislation but the provision of at least one appeal against sentence is a necessary ingredient of a fair trial. In Pakistan, the Peshawar High Court examined the lack of right of appeal in

253. Article 8 (2) (h) Right to Fair Trial http://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm accessed on 12-08-2017.

254. R. v. Deschennes [1963] 2 C.C.C. 295. http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/op00_3-po00_3/p7.html accessed on 28-08-2017.

the illegal dispossession law.[255] The court held that the right of at least one appeal is necessary for fair and effective justice and advised the government to amend the law accordingly[256]and the same was accordingly amended providing a right of appeal.[257] In the above referred Sharif Shah case any specific sentence was not under judicial scrutiny. Full Bench was constituted to set at rest the controversy regarding the availability of the right of appeal in conviction or acquittal cases about the Illegal Dispossession Act, 2005. Ultimately the Court decided in favour of the right of appeal. Therefore, a good sentencing system must also provide at least one appellate review against the sentence passed.

2.17. Impermissibility of Retroactive Enhancement of Sentences:

The Universal Declaration of Human Rights bars the retrospective enhancement of sentences and ordains that no heavier penalty will be imposed than what was applicable at the time of the commission of an offence.[258] The ban on the retrospective enhancement of sentences is actually the second limb of the principle which prohibits the retrospective criminalization of acts or omissions. The International Covenant on Civil and Political Rights goes even further, banning not only retrospective enhancement of punishment but also ordains that if subsequent to the commission of an offence, penalty for the said offence is reduced, then the offender should be given benefit for the same.[259] Similarly, the European Convention on Human Rights also restrains the retrospective enhancement of penalties and states that no heavier penalty shall be imposed than what was applicable at the time of the criminal offence.[260] The African Charter on Human and Peoples' Rights also requires

255. The Illegal Dispossession Act, 2005.
256. Main Sharif Shah vs Nawab Khan PLD 2011 Pesh. 86.
257. Section 8-A inserted through The Illegal Dispossession (Amendment) Act, 2017.
258. Article 11.
259. See Article 15 of the ICCPR.
260. See Article 7.

that penalties for the offence should be pre-defined and therefore, restrains the retrospective enhancement of punishments. Above all, the Constitution of Pakistan also provides protection against the retrospective enhancement of penalties.[261]In this way, a ban on retrospectively enhanced sentences is not only an international norm but also a constitutional principle. Any good system of sentences must also adhere to this rule strictly. All the above-discussed features reflect that they tend to ensure a fair trial and protect liberty. This discussion, therefore, leads to an inquiry, that in a fairly imposed sentence, how far custodial sanctions can be imposed.

2.18. Sentencing Menu with Option of Non-custodial Sentences:

Liberty is an invaluable right. It is enshrined in the Universal Declaration of Human Rights.[262]The ICCPR also clearly protects the right to liberty.[263] It is an opening right under the Constitution of Pakistan which is provided along with the right to life.[264] Curtailment of the same through the sentencing process should be a matter of last resort. International standards on sentencing also encourage the use of non-custodial measures instead of custodial measures at all stages of criminal process including sentencing.[265] Deprivation of liberty should only be resorted to when other non-custodial measures are not sufficient.[266] The Council of Europe Committee of Minister also resolved that deprivation of liberty in the form of custodial sentences should be considered only when the seriousness of the offence renders any other

261. See Article 12 (1) (b) of the Constitution of Pakistan.
262. See Article 3.
263. The ICCPR Article, 9.
264. See Article 9 of the Constitution of Pakistan.
265. ABA Rule of Law Initiative, Handbook of international standards on sentencing procedure file:///F:/latest%20material/latest%20material/International%20Hand%20book%20on%20sentencing%20standards.pdf Accessed on 07-08-2017.
266. ABA Rule of Law Initiative, Handbook of international standards on sentencing procedure file:///F:/latest%20material/latest%20material/International%20Hand%20book%20on%20sentencing%20standards.pdf Accessed on 07-08-2017.

measure inadequate.[267] The United Nations Standard Minimum Rules on Non-Custodial Sentences also require that the member states should develop non-custodial measure within their legal system.[268] The United Nations Congress also resolved that sanction involving imprisonment should only be resorted if there are grounds to believe that other non-custodial measures are inappropriate.[269] Uniform Law Commissioner's Model Sentencing and Corrections Act drafted by the United States Department of Justice also mentioned a preference for sentences not involving confinement unless such sentences become necessary.[270] Ashworth has mentioned the use of non-custodial measures as one of the sentencing principles.[271] Analysis of sentencing legislation of the UK, USA, Australia, Canada, and New Zealand reflects that multiple non-custodial sentencing options including community sentences and electronic monitoring have been provided. Thus, a good sentencing system, except for heinous cases, must not resort to sentences involving deprivation of liberty and confinement as a matter of first resort and should provide a variety of non-custodial sentencing options.

For impact assessment and to propose a consequent improvement, all sorts of sanctions whether custodial or non-custodial, require continuous monitoring. It is,

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267. COUNCIL OF EUROPE COMMITTEE OF MINISTERS RECOMMENDATION No. R (92) 17 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES CONCERNING CONSISTENCY IN SENTENCING http://www.barobirlik.org.tr/dosyalar/duyurular/hsykkanunteklifi/recR (92) 17e.pdf accessed on 28-08-2017.
268. United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) http://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf accessed on 08-08-2017.
269. Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders https://www.unodc.org/documents/congress/Previous_Congresses/8th_Congress_1990/028_A_CONF.144.28.Rev.1_Report_Eighth_United_Nations_Congress_on_the_Prevention_of_Crime_and_the_Treatment_of_Offenders.pdf accessed on 27-08-2017 see p 163.
270. Uniform Law Commissioners' Model Sentencing and Corrections Act Drafted by the National Conference of Commissioners on Uniform State Laws, 1978 U.S. Department of Jus1ice Law Enforcement Assistance Administration \ National Institute of Law Enforcement and Criminal Justice.
271. Criminal Justice and Sentencing Ashworth, 2010 p 95 to 100.

therefore, appropriate to examine the provision of sentencing monitoring and advisory body, in a good sentencing system.

2.19. Sentencing Advisory Body:

The United Nations Standard Minimum Rules on non-Custodial Sentences[272] provide that sentencing options should be closely monitored and their use should be properly evaluated. The American Bar Association Standards on sentencing also requires the legislature to provide a mechanism to compile data regarding the efficacy of different sanctions provided under the law.[273] The United Nations Congress also resolved that the mechanism should be developed to evaluate the sentencing practices and further resolved that information regarding the impact and cost of sanctions should be shared with the judges.[274] This cannot be done without establishing a proper sentencing advisory body.

Sentencing does not end by pushing the convict out of the courtroom after passing the sentence rather proper mechanism of monitoring of the sentencing is required so that periodical assessment of sentencing machinery may be carried out. Without a sentencing monitoring body, with whatever name it may be called, improvement in the sentencing regime cannot be achieved. The functions of these sentencing monitoring bodies have been described as intermediate functions which include the development of a sentencing database for further legislative and policy decisions on the sentencing issues.[275] Sentencing advisory bodies have taken different names and forms in different jurisdictions. Popular names are sentencing

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272. See Rule 2.4.
273. American Bar Association Standard on Sentencing https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_sentencing_blk.html accessed on 07-08-2017.
274. Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.
275. See Rule 18-1.3 American Bar Association Standard on Sentencing https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_sentencing_blk.html accessed on 07-08-2017.

commissions and sentencing councils. Different functions have been allotted to these commissions and councils but ultimately they ensure structured and rational sentencing in their respective jurisdictions, restoring public confidence on sentencing system. These institutions tend to achieve these objectives by framing sentencing guidelines, conducting research, collecting and sharing data, guiding public opinion on sentencing and also by developing a sentencing information system.

Professor Freiberg explaining the importance of these sentencing bodies stated in an interview that they are the source of independent advice to all concerned institutions and public.[276] Sentencing bodies emerged initially in the United States[277] and then in England and Wales and parts of Australia.[278] Now, these bodies have become an important component of the present sentencing environment.[279] The National Association of Sentencing Commissions in the United States reflects that there are 23 sentencing commission and councils in addition to the United States Sentencing Commission at the federal level.[280] Sentencing Advisory Panel was created in England and Wales in 1998 with an objective to move towards a more structured sentencing regime. After Advisory Panel, came Sentencing Guidelines Council which has been replaced by Sentencing Council for England and Wales. In Scotland, the Scottish Sentencing Council has been established. Sentencing councils have also been established in Australia in four jurisdictions namely New South Wales,

276. Arie Freiberg, "Transcript: The Role of Sentencing Advisory Councils, " Text, accessed January 20, 2018, http://www.sentencingcouncil.qld.gov.au/education-and-resources/sentencing-matters/transcript-the-role-of-sentencing-advisory-councils.

277. The Minnesota Sentencing Guidelines Commission created in 1978 is the first sentencing commission in the United States

278. Hughe, Paul"The Origins of Sentencing Councils and Commissions" Irish Journal of Legal Studies Vol. 5 (2) http://ijls.ie/wp-content/uploads/2015/09/Vol_5_Issue_2_Article-4-Hughes-The-Origins-of-Sentencing-Councils-and-Commissions.pdf accessed on 09-08-2017.

279. Gelb, Karen, "Sentencing Councils and Commissions: Exploring the Role of Advisory Bodies in the Contemporary Punishment Environment" http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935383.001.0001/oxfordhb-9780199935383-e-102#oxfordhb-9780199935383-e-102-bibItem-1 accessed on 09-08-2017.

280. National Association of Sentencing Commission http://thenasc.org/aboutnasc.html accessed on 09-08-2017.

Victoria, Tasmania, and South Australia. Sentencing councils in New South Wales[281] and Victoria[282] have been specifically established by the legislature while sentencing councils of South Australia and Tasmania have been established by administrative action of Attorney General.

As for as, the constitutionality of such bodies is concerned Ashworth[283] has discussed this question comprehensively. He has argued that wide sentencing discretion was granted to judges by parliament and there is nothing wrong if that discretion is taken back and bestowed on an independent sentencing body. The Supreme Court of the United States dismissed the constitutional challenge to the creation of the sentencing commission and its power to issue sentencing guidelines. The court held that sentencing is a shared responsibility of different branches of government however; the court appreciated the congress feeling that sentencing is primarily a judicial function. The court rejected the challenge of excessive delegation of legislative power and also approved the placement of sentencing commission within judicial branch to avail accumulated judicial wisdom on the issue of sentencing.[284] In this way sentencing, advisory bodies with different mandate and scope have become an integral part of modern sentencing systems. One of the important functions of these bodies is to frame sentencing guidelines. This discussion, therefore, comes to a point where the examination of sentencing guidelines as a sentencing feature is necessary.

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281. **Created under Crimes (Sentencing Procedure) Act 1999 Section 100-I.**

282. Sentencing Act 1991 (Vic) Section 108-B.

283. Criminal Justice and sentencing Ashworth, 2010 p 60.

284. **Mistretta v. the United States, 488 U.S. 361 (1989).**

2.20. Sentencing Guidelines:

The concept of sentencing guidelines started in the United States. Minnesota is the first state in the United States to launch a sentencing commission that formulated sentencing guidelines in 1980. Now in the United States alone there are 23 jurisdictions at the state level having a sentencing commission or council responsible to draft sentencing guidelines or rules. Sentencing Commission at the federal level provides sentencing guidelines for federal offences. The United States Sentencing Commission also issued guidelines that were initially mandatory but were, later on, declared advisory by the Supreme Court.[285]

The jurisprudence of sentencing commission and sentencing guidelines reflected its impact in different jurisdictions across the world. Now they are becoming a necessary feature of a common-law sentencing system. The sentencing council of England and Wales has been established to devise sentencing guidelines in England and Wales. Guidelines issued by the council are to be followed and are mandatory unless the court is satisfied that it would be contrary to the interests of justice to follow these guidelines. The Scottish Sentencing Council[286] formulates sentencing guidelines for the courts; publish guideline judgment and other information about sentences passed by the courts in Scotland. Guidelines prepared by the council are submitted for approval to the High Court. Courts in Scotland are obliged to have regard to the sentencing guidelines but may depart from such guidelines with reasons to be recorded. Sentencing guidelines may relate to purposes, principles and sentencing levels that reflect the wide scope of these guidelines. In different

285. United States v. Booker, 543 US 220.
286. The Scottish Sentencing Council https://www.scottishsentencingcouncil.org.uk/about-us/ accessed on 11-08-2017.

jurisdictions of Australia, Courts of Appeal[287] have been authorized to issue guideline judgments. Thus, in Australia, though there are sentencing councils in four jurisdictions but they are not empowered to issue guidelines. The power of issuing guidelines has been reserved for courts. The American Bar Association Criminal Justice Standards also mention that if the highest appellate court is authorized to lay down criminal procedure, it should lay down rules and guidance regarding sentencing.[288] Thus, laying down of sentencing guidelines either by the independent sentencing council or commission or by the superior courts is also a well-developed norm of a good sentencing system. However, the mere existence of sentencing guidelines may not be a guarantee of the result sought from such guidelines unless there is a well-developed sentencing information system to monitor the implementation of such guidelines. It is therefore imperative to consider whether Sentencing Information System is also a necessary feature of a good system of sentencing?

2.21. Sentencing Information System:

Justice and equality are close cousins. To inject justice and equality in sentencing system provision of information regarding sentences passed in similar earlier cases is of fundamental importance. This cannot be done without formulating and devising a proper and comprehensive sentencing information system that helps the judges, lawyers, and parties to know the sentences passed in similar cases. It should also help the researcher, policymaker and legislators to make proposals and amendments based on real information on sentencing. Through the sentencing system,

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287. New South Wales Court of Criminal Appeals, New South Wales Court of Appeal, Western Australia Court of Appeal, Vitoria Court of Appeal, Queensland Court of Appeal and Supreme Court of South Australia.

288. American Bar Association, Criminal Justice Section Standards https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_sentencing_blk.html#partviii accessed on 12-08-2017.

judges can get information regarding the sentencing decision passed by their colleagues as well as the underlying reasoning of such decisions.[289] The idea of establishing a sentencing information system was formally given by Norval Morris in 1953.[290] Chris also proposed that the sentencing reporting system should be developed whereby judges would know the sentences being imposed in other similar cases which would produce sentencing consistency.[291]

In the present regime of information technology when data management and use is easier than earlier time, a proper sentencing information system must serve as a key element of a good sentencing regime. The requirement of the United Nations Standard Minimum Rules on non-custodial sentences regarding monitoring and evaluation of sentencing options can also be properly met by the development of sentencing information system. The sentencing information system also further the compliance of the United Nations Congress regarding the evaluation of sentencing practices mentioned above. The requirement of a fair trial under the UDHR, the ICCPR and Article 10-A of the constitution of Pakistan can also be better achieved if judges can maintain consistency in sentencing by keeping in view the previous sentencing outcomes reached by judge himself and by his colleagues.

Sentencing information systems have fairly developed in some other jurisdictions. Irish Sentencing Information System (ISIS) has been developed as a

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289 A Sentencing Information System Named 'NOSTRA' IntenatialJournaol f Law and Information Tnehnokly, Vol 6 No. 2 HeinOnline 6 Int'l J.L. & Info. Tech. 230 1998 file:///C:/Users/Dell/Downloads/6IntlJLInfoTech230.pdf accessed on 10-08-2017.

290 Miller, Marc L. "A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform." Columbia Law Review 105, no. 4 (2005): 1351-395. http://www.jstor.org.ezproxy.lib.gla.ac.uk/stable/4099436. Also see Morris, Sentencing convicted criminals.

291 Sentencing Guidelines: To Be Or Not To Be BY CHRIS W. ESKRIDGE, PH.D.' Department of Criminal Justice, University of Nebraska-Omaha 50 Fed. Probation 70 1986 HeinOnline accessed on 11-08-2017.

pilot project in Ireland by the Board of Court Service. It is a computerized system with the object to provide information to the judges on sentences passed in previous cases. The Judicial Commission of New South Wales has also developed the Judicial Information Research System (JIRS). This database also provides information to the judges regarding sentences passed by other judges in similar cases.[292] A system of sentencing information was launched in Scotland in 1993 and was applied to 32 judges of High Court in 2002. In Australia, the SACStat[293] is a sentencing tool developed by Sentencing Advisory Council Victoria regarding sentencing data of magisterial and higher courts.[294] This reflects that the idea of the sentencing information system has its practical utility. Marc argues that it is a compass in the hand of sentencing judge to trace his path to fair and rational sentencing.[295] A sentencing information system can easily live with and supplement the guidelines system. Any existing sentencing commission, council or advisory panel may be assigned the task of maintaining and running sentencing information system (SIS). With the sway of information technology Sentencing Information System, has become a pre-requisite of a good sentencing system.

However, even the most vibrant, independent and transparent system of sentencing will become meaningless if meticulously passed, fair and transparent sentences are altered and interfered, without observing fairness and transparency, by executive authorities. Therefore, a brief discussion on the parole and remission system is necessary to gauge the 'executive-proofing' of a sentencing regime.

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292. Judicial Commission of New South Wales https://www.judcom.nsw.gov.au/research-and-sentencing/ accessed on 28-08-2017.
293. Miller, Marc L. A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform.
294. SACStat, Sentencing Advisory Council Statistics Online https://www.sentencingcouncil.vic.gov.au/sacstat/home.html accessed on 19-10-2017.
295. Miller, Marc L. A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform Columbia Law Review, Vol. 105, No. 4 (May, 2005), pp. 1351-1395 Stable URL: http://www.jstor.org/stable/4099436.

2.22. Independent Parole and Remission System:

Most of the above features deal with creating consistency in the judicial decisions of sentencing. However, one factor which can upset the judicial determination of sentences is the system of parole and remission of sentences. Remissibility in the sentences is a factor that has been lauded by Bentham. He has mentioned it as one of the properties of punishment.[296] Remission has been a royal prerogative as well as constitutional mandate.[297] However, as sentencing is primarily a judicial function, therefore, to preserve the sanctity of this function it should not be subjected to absolute executive or administrative control. If this is permitted, the concept of separation of power and independence of the judiciary comes at stake. Keeping these principles in view the European Court of Human Rights objected to the role of Secretary of State in the decision about the release of convicts. Court observed:

> However, with the wider recognition of the need to develop and apply, in relation to mandatory life prisoners, judicial procedures reflecting standards of independence, fairness, and openness, the continuing role of the Secretary of State in fixing the tariff and in deciding on a prisoner's release following its expiry has become increasingly difficult to reconcile with the notion of separation of powers between the executive and the judiciary...[298]

The Court of Appeal of England and Wales also stressed the need for independence of parole board pointing out its judicial functions and held:

> We have tried to give guidance in relation to those areas that require attention in order to ensure that the Parole Board enjoys and is seen to enjoy the independence from the executive that its judicial role requires.[299]

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296. Bentham, Jeremy; An Introduction to the Principles of Morals and Legislation, 1781, Batoche Books Kitchener 2000 p 155.
297. See Constitution of Pakistan Article 45, Indian Constitution Article 72 of the Constitution of India.
298. Stanford v.The United Kingdom - 46295/99 [2002] ECHR 470 (28 May 2002).
299. Brooke & Ors, R (on the application of) v The Parole Board & Anor [2008] EWCA Civ 29 (01 February 2008) URL: http://www.bailii.org/ew/cases/EWCA/Civ/2008/29.html accessed on14-08-2017.

The House of Lords[300] also issued a declaration of incompatibility regarding Section 29 of the Crime (Sentences) Act 1997 with Article 6 of the European Convention on Human Rights. This Convention required that sentences should be imposed by an independent and impartial tribunal. However, the power granted to Home Secretary, who was purely an executive authority, was held not to be in consonance with provisions of the Convention.

The above judicial trend reflects the growing un-approval of executive control over the parole and remission of sentences. Composition of the parole boards in England, Canada, Australia, and other jurisdictions also reflects that they are independent bodies. The Parole Board of Canada publically states that it operates at an arm's length from the government. Thus, well-structured and independent parole and remission system is also a feature of a good sentencing system.

On the above-mentioned features, the sentencing system of Pakistan will be analyzed in chapters 4 to 6 of this dissertation.

2.23. Conclusion:

The discussion in this chapter reflects that sentencing is a complex phenomenon. It needs care and the continued attention of its managers at every stage. Responsibility of the sentencing process is shared by all the three pillars of state namely legislature judiciary and executive. However. the determination and imposition of sentences in different cases is purely a judicial process. The legislature may affect this process by a mechanism of mandatory minimum sentences and sentencing guidelines but ultimate responsibility remains with the judiciary. Execution of sentence through the prison and correction department is the responsibility of the executive branch. However, executive power with regard to the

300. Regina vs Secretary of State [2003] UKHL 36.

execution of sentences must remain subject to judicial supervision so that sentencing power remains, with the branch to which it belongs. In addition to the above three players of the sentencing process now parole boards, as independent bodies, have also emerged as of vital importance in the sentencing process. The emergence of constitutional standards and media attention has made the sentencing even more important. Sentencing being a live social issue always rubs itself with constitutional values of dignity, life, liberty, and fair trial, it, therefore, needs continued attention from the different pillars of the state.

Discussion in this chapter also establishes that unstructured judicial discretion coupled with unbridled executive power regarding early releases and parole resulted in inconsistency and disparity in sentences. These factors compromised the element of uniformity in sentences even in similar cases of similarly placed offenders. The problem of inconsistency and disparity were further enhanced by vague and confusing sentencing legislations. With the passage of time sentencing practices parted ways from the theoretical basis which distanced sentencing systems from the principles of rule of law and due process. All these anomalies lead to massive sentencing reforms in different jurisdictions including the USA, UK, New Zealand, Australia and other jurisdictions in the 1970s and thereafter.

The initiation of reforms in different jurisdictions led to various experiences in the sentencing regime. In the United States, the state of Minnesota led the change by establishing a sentencing commission with the responsibility to frame sentencing guidelines to structure the sentencing discretion. Different states in the United States and federation followed the suit. In England and Wales Court of Appeal started laying down sentencing guideline judgments. Magistrate's Association also issued sentencing guidelines. Initially, Sentencing Advisory Panel, then Sentencing Guideline Council

and ultimately Sentencing Council has been established. Regimes of sentencing councils also entered Australia in its different jurisdictions as discussed above. Specific sentencing legislations on sentencing have also been introduced. Analysis of this new pharmacopeia of sentencing regimes has been made in this chapter. The discussion in this chapter reflected multiple features of a modern sentencing system which can be summarized as under:

i) Specific legislations to deal with a variety of sentencing issues.

ii) Legislative statement of sentencing purposes with clarity.

iii) To supplement the sentencing purposes, specific legislative or quasi-legislative statement of sentencing principles such as proportionality, parity, and totality along with a broader indication of aggravating and mitigating factors.

iv) Provision of separate sentencing hearing after determination of guilt and to make this hearing effective and meaningful by the provision of the mechanism of presentence reports and victim impact statements.

v) Binding judges to give reasoned sentencing decision with the responsibility to explain their decisions to parties in the language understood by them.

vi) Provision of appellate review mechanism of sentences to maintain consistency and fairness.

vii) Meeting the constitutional standard of fair trial and ban on the retrospective enhancement of sentences.

viii) Provision of detailed sanction menu including non-custodial sentencing options of community service and victim restoration.

ix) Establishment of Sentencing Advisory Bodies for evaluation and assessment of sentencing machinery and research on sentencing issues to propose solutions.

x) Provision of sentencing guidelines to guide and structure judicial discretion on sentencing.

xi) Establishment of Sentencing Information System to ensure consistency in sentencing outcomes and their evaluation. Sentencing Advisory Bodies may be assigned the task of developing sentencing guidelines and managing Sentencing Information Systems.

xii) Establishment of independent parole and remission system and structured clemency procedure in accordance with the constitutional principle of separation of power and independence of the judiciary.

Now after laying down the theoretical basis and determining the essential features of a good sentencing system this dissertation will proceed towards testing and analyzing the sentencing system of Pakistan on these features. In the next chapter above features are applied to the English sentencing system by treating it as model jurisdiction.

CHAPTER 3

STUDY OF ENGLISH SENTENCING MODEL

3.1. Introduction:

In the previous chapter certain features of a good sentencing system have been extracted. The sentencing regime of Pakistan is to be tested on these features to assess its structuring of discretion and compliance with principles of a fair trial, in the coming chapters. Before, embarking upon this exercise, it is pertinent to test these features in some modern jurisdictions. Keeping in view the historical relationship of the English and Pakistani sentencing apparatus, the English sentencing system has been chosen as a model jurisdiction to test the aforesaid features.

This chapter briefly discusses the nexus of Pakistani and English legal system. It then discusses the development of the English legal system through its formative phase, the emergence of the bloody code, Victorian sentencing reforms, and codification efforts. Sentencing responsibilities of important courts including the Magistrate's Court, the Crown Court and the Court of Appeal, in England and Wales have also been discussed. The development and present nature of judicial guidance and guidelines on sentencing in the English jurisdiction have been traced. The emergence of Sentencing Advisory Panel, Sentencing Guideline Council, Sentencing Council and mechanism of their sentencing guidelines is analyzed. Sentencing guidelines for magistrates' and the role of the Magistrate's Association in this regard is also examined. In addition to it, important sentencing legislations have been

scrutinized to trace out the elements of fair trial and structured discretion. After discussing the contours of the English sentencing system, different features gleaned out in chapter 2, have been tested against the English sentencing system.

3.2. Nexus of English and Pakistani Legal System:

Pakistan inherited the legal regime prevalent in British India after Independence.[1] Substantive and procedural criminal laws[2] which provided the sentencing mechanism were also the part of this jurisprudential inheritance. These laws, it is argued, were mainly of English origin as they were not only drafted by English scholars but were also based on principles of English law. Opinions of legal philosophers and scholars discussed below reflect the great impact of English law, on the legal regime in British India, directly inherited by Pakistan.

Lord Wright explained the imprint of English law on the subcontinent and stated that with the exception of family law and religious law, common law has vastly regulated the relationship between individuals in India.[3] Pollock reflected the impact of English criminal law in British India and observed that the Indian Penal Code is English criminal law simplified.[4] He argues the success of English criminal law in India on the ground that only a few occasions have emerged for amendment of Indian Penal Code. Setalvad, the former Attorney General of India, has also clearly admitted that the foundation of all laws in India, civil or criminal, is English law.[5] Not only in substance, but even in the form, the penal law of India is greatly influenced by English legal thinking.[6] The Indian Penal Code, which provides the main body of

1. Section 18 (3), the Indian Independence Act 1947.
2. The Pakistan Penal Code, 1860 and The Code of Criminal Procedure, 1898.
3. Setalvad, The Role of English Law in India, 5.
4. Frederick Pollock, The Expansion of the Common Law, 17.
5. Setalvad, The Role of English Law in India, 36.
6. Whitley Stokes, The Anglo-Indian Codes, vol. 1 (Internet Archive, 2007), xxvi, https://ia902609.us.archive.org/24/items/angloindiancodes01stokuoft/angloindiancodes01stokuoft_bw.pdf.

substantive sentencing law, both in India and Pakistan, is deeply indebted to Benthamite philosophy furthered by Macauly. Bentham once claimed that he would be a dead legislative of India. Penal Code is cited as proof of the truth for this intellectual claim of Bentham.[7]

Skuy has maintained that the entire codification process represented the transplantation of English law to India.[8] He fortifies his claim by mentioning that at initial stages of English law's sway in India, even the judges and the lawyers were of English origin. He dismissed the argument of modernity of English law as a reason of its implementation in India and argued that English law was facing the same problem at home, which were intended to be addressed in India, by its implementation. Codification was originally thought to be a panacea to the maladies of English law. The introduction of the codification process in India under an autocratic regime was an effort to test codification of English law in India which could not be implemented in democratically governed England. Macaulay himself pointed towards this reality in his speech on Charter Act of 1833 and stated:

> India stands more in need of code than any other country in the world, I believe also that there is no country on which that great benefit can more easily be conferred. A code is almost the only blessing, perhaps is the only blessing, which absolute governments are better fitted to confer on a nation than popular governments.[9]

Even Whitley Stokes, the member of the Indian law Commission, [10] clearly admitted that Indian Codes in substance are based on the law of England.[11] Therefore, to understand the prevalent sentencing mechanism in Pakistan, a brief review of the

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7. Stokes, The English Utilitarian and India, 223.
8. David Skuy, "Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century," Modern Asian Studies 32, no. 3 (1998): 513–57.
9. "Government of India, by Thomas Babington Macaulay, a Speech Delivered in the House of Commons, July 10, 1833," accessed December 12, 2017, http://www.columbia.edu/itc/mealac/pritchett/00generallinks/macaulay/txt_commons_indiagovt_1833.html.
10. Skuy, "Macaulay and the Indian Penal Code of 1862."
11. Stokes, The Anglo-Indian Codes, 1:xxvi.

English legal system, a glance at the emergence of the bloody code and its decline and a reflection of codification attempts in the English legal system is necessary. This will be followed by a detailed examination of the evolution of the contemporary sentencing mechanism in English jurisdiction.

3.3. Development of the English Legal System:

3.3.1. Formative Phase:

Sentencing is an important part of the English legal system. To understand the development and present outlook of the English sentencing system it is necessary to understand the development of the English legal system in brief. English legal scholars proudly claim that what English legal system reflects today, is a result of developments of more than 1000 years.[12] Jenks argues that English law is a product of long growth of national life.[13] In this process of growth, it has relied upon different sources. The most prominent of these sources are 'Acts of Parliament' and 'case law.' However, with the passage of time, other sources of English law also developed. Sources of English law, in addition to above, are custom, equity, treaties, European law, statutory interpretations, and delegated legislations.[14] Explaining the state of English law before Norman Conquest, Elliott and Quinn explained:

> ...different areas of England were governed by different systems of law, often adapted from those of the various invaders who had settled there;...Each was based largely on local custom ...law, varied from place to place. The king had little control over the country as a whole, and there was no effective central government.[15]

12. "A Judicial System of England and Wales A Visitor's Guide" (Jidicial Office, 2016), https://www.judiciary.gov.uk/wp-content/uploads/2016/05/international-visitors-guide-10a.pdf.
13. Edward Jenks, A Short History of English Law from the Earliest Times to the End of 1911 (Boston: Little, Brown and Company, 1913), 3, https://ia601409.us.archive.org/7/items/shorthistoryofen00jenk/shorthistoryofen00jenk.pdf.
14. Catherine Elliott and Frances Quinn, English Legal System, Tenth (Harlow: Longman, 2009), https://sangu.ge/images/Englishlegal.pdf.
15. Ibid., 12.

Initially, the English legal system was community-based and government officials most often intervened for revenue purposes rather than to ensure justice.[16] Primarily, the standardization of laws started after the conquest of Norman in 1066[17] as the new regime did not countenance with haphazard state of legal affairs.[18] Having a powerful king at the center, representatives were sent to different areas to oversee the administration and to settle the disputes as per local customs. Thus with the amalgamation of customs and based on previous decisions, a body of rules emerged which was known as common law. Common law was fairly developed till 1250.A.D.[19] However, its growth continued with the passage of time.

Regarding the growth of criminal law in England, Sir James admits that owing to the scant availability of original resources, it is impossible to give a systematic account of criminal law which prevailed in England in early time.[20] However, he points out that though exact definitions of different crimes were lacking but most of the offences found in modern criminal laws were also criminalized in the old day England.[21] The Criminal law of England is not contained in a single legislative code rather it is a mass of common law rules gradually developed by judges and occasionally modified by legislature.[22] Regarding the creation of different crimes through statutes, Black Stone maintained that statutes were brought either to declare the common law or to remedy any defect therein.[23] He exemplified the statute

16. Jenks, A Short History of English Law from the Earliest Times to the End of 1911, 9.
17. Elliott and Quinn, English Legal System, 12.
18. Jenks, A Short History of English Law from the Earliest Times to the End of 1911, 3.
19. Elliott and Quinn, English Legal System, 12.
20. Fitjames Stephen, A History of the Criminal Law of England, 1:51.
21. Ibid., 1:53.
22. J W Cecil Turner, Keny's Outlines of Criminal Law, 19th ed. (Delhi: Universal Law Publishing Co., 1966), 7.
23. Sir William Blackstone, Commentaries on the Laws of England, vol. 1 (Philadelphia: J.B.Lippincott Company, 1893), 86, http://oll.libertyfund.org/titles/blackstone-commentaries-on-the-laws-of-england-in-four-books-vol-1.

of treason[24] was not enacted to create any new kind of treason but to explain the kinds of treasons at common law. Of remedial statutes, he explained that clipping of the current coin of the kingdom was not a serious offence but was made an offence of high treason through remedial statute. Thus, the English legal system continued to develop through common law decisions and promulgation of different statutes. In the seventeenth and eighteenth centuries, capital punishment was considered to be a cure for all crimes. Many enactments provided capital punishment as a sentence. The 'bloody code' emerged as a symbolic name for capital legislations prevailing in this era, in England and Wales. To understand the development of the present sentencing regime it is necessary to briefly discuss the emergence and decline of this bloody code in the English sentencing regime.

3.3.2. The emergence of the Bloody Code:

The bloody code is name attributed to laws and punishments for capital offences roughly starting from 1688 till 1815 when the number of capital offences started to be reduced.[25] Legal history reveals that till the closing years of the reign of Henry VIII, (1509 to 1547) there were just eleven capital offences which included high treason, murder, and rape, etc.[26] However, with the growth of land-owning class into power in England, concern for the protection of property grew serious in the ruling class.[27] Thus, after seventeenth-century more and more offences were subjected to severe punishments and prescription of the death penalty for different offences gradually increased. In 1660, the number of capital offences in England was about 50

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24. **The Treason Act, 1351UK.**

25. Julian B Knowles and Death Penalty Project, The Abolition of the Death Penalty in the United Kingdom: How It Happened and Why It Still Matters, 2015.
26. "The Origins of Judicial Hanging in Britain., " accessed December 12, 2017, http://www.capitalpunishmentuk.org/origins.html.
27. Public Record Office, "Crime and Punishment, " accessed December 12, 2017, http://www.nationalarchives.gov.uk/education/candp/punishment/g06/g06cs1.htm.

which swelled to 150 by 1750.[28] An increase in the number of capital offences continued and till 1815 there were about 288 offences or their sub-divisions, punishable with death.[29] The crime of every sort including offences against the state, person, property, and peace was made capitally punishable.[30] Even the offence of stealing goods worth 12 pence and cutting a tree from the road were capital offences.[31] Philips commented that even to look back upon the penal laws of the bloody code era was frightening as every leaf of the statute book smelt of blood.[32]

However, a mere increase in the number of capital offences did not result in increasing executions. King and Wards pointed out that the rate of hanging was about 25 to 30 per 1, 00, 000 which reduced to 1.3 per 1, 00, 000 in 1750 in England.[33] They also mentioned that the impact of bloody code was more severe in the capital area of London and around it, while it diluted in the peripheries as there were quite fewer executions in these areas as compared to London.[34] This view is endorsed by the national archive of the UK government which reflects that in early 17th century, number of execution in London were 150 per year which declined to 20 per year in early 18th century.[35] The above statistics reflect that in spite of a huge increase in capital offences, the number of execution did not increase. Thus, Skuy rightly pointed out that the bloody code was a killing machine[36] only in theory.

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28. Ibid.
29. Ibid.
30. "Crime and Justice - Crimes Tried at the Old Bailey - Central Criminal Court, " Crimes Tried at the Old Bailey, accessed December 14, 2017, https://www.oldbaileyonline.org/static/Crimes.jsp.
31. Knowles and Death Penalty Project, The Abolition of the Death Penalty in the United Kingdom, 9.
32. Charles Phillips, Vacation Thoughts on Capital Punishments (W. & F.G. Cash, 1857), 3.
33. Peter King and Richard Ward, "Rethinking the Bloody Code in Eighteenth-Century Britain: Capital Punishment at the Centre and on the Periphery*, " Past & Present 228, no. 1 (August 1, 2015): 159–205, doi:10.1093/pastj/gtv026.
34. Ibid.
35. Office. "Crime and Punishment."
36. Skuy, "Macaulay and the Indian Penal Code of 1862."

By different enactments till 1832, the number of capital offences was reduced to 60.[37] Peel's reforms further reduced the number of capital offences and shoplifting, cattle lifting, forgery, returning from transportation and theft in a dwelling house, were made non-capital offences.[38] Criminal Laws Consolidation Acts[39] drastically reduced the capital offences and by 1861 there were only four capital offences which were high treason, arson in the Royal Dockyards, murder and piracy with violence.[40] Capital punishment in the murder was abolished through an Act of Parliament in 1965.[41] Based on the report of a Royal Commission on Capital Punishment, 1864-1866, public hanging was already abolished in 1868.[42] The race against the death penalty ultimately succeeded in 1998, when it was abolished in United Kingdom.[43]

However, the bloody code continued to haunt the English legal reformers and the reduction of the death penalty was firmly embedded in the reform discourse of English Law in the nineteenth century.[44] Existing laws of that era were widely thought to be unsuitable for enlightened human society.[45] Thus, not only the bloody code but even the remedies brought for its cure necessitated a further reform process. As the focus was mainly on reduction of the death penalty, therefore, alternate penalty structure which grew in place of capital punishments was inconsistent and haphazard with wide and unstructured sentencing discretion to the courts.[46] This second-generation problem in the English sentencing system raised demands for a clear

37. Knowles and Death Penalty Project. The Abolition of the Death Penalty in the United Kingdom.
38. Ibid.
39. The Accessories and Abettors Act 1861, The Criminal Statutes Repeal Act 1861, The Larceny Act 1861, The Malicious Damage Act 1861, The Forgery Act 1861, The Coinage Offences Act 1861 (c. 99) and The Offences Against the Person Act 1861.
40. Knowles and Death Penalty Project, The Abolition of the Death Penalty in the United Kingdom.
41. Murder (Abolition of Death Penalty) Act 1965.
42. Capital Punishment Amendment Act 1868.
43. Schedule 1, The Human Rights Act 1998.
44. Phil Handler, "Forgery and the End of the 'Bloody Code' in Early Nineteenth-Century England," The Historical Journal 48, no. 3 (2005): 683–702.
45. Ibid.
46. Radzinowicz and Hood, "Judicial Discretion and Sentencing Standards."

statement of penal laws which triggered movement for codification and consolidation of criminal laws.

3.3.3. Victorian Sentencing Reforms and Codification:

In the editorial note on Radzinowicz and Hood's article, [47] it was argued that codification in the Victorian era was perceived as a remedy to the thorough inconsistency and irrationality in the penalty structure, haphazardly provided by the legislature.[48] Initial efforts of codification started in England in 1833 and till 1844 Royal Commission produced eight reports on codification along with draft code of criminal procedure. Proposals of the Royal Commission were still at bill stage when another commission was appointed in 1844 to revise the work already done. This commission also produced five reports untill 1849. Draft code of substantive criminal law was introduced as a bill in the House of Lords and the same was referred to the Select Committee. Later on, this effort ended up without any success particularly due to the opposing opinion of the judiciary.[49] About this failure, Kadish observed that judges hampered the whole enterprise and not only wasted fifty thousand pounds but also wasted labour of twenty years.[50] Remarks of Greaves[51] aptly pointed out that codification, at least in part, was directed to address the issue of irrationality and disproportionality in penal structure and sentencing process. He lamented:

> The truth is that whenever the punishment of any offence is considered, it is never looked at, as it always ought to be, with reference to other offences, and with a view to establishing any congruity in the punishment of them, and the consequence is that nothing can well be more unsatisfactory than the punishments assigned to different offences.[52]

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47. Ibid.
48. Ibid.
49. "Criminal Law Reform: England - The Criminal Law Commissioners, 1833â€"1849, " accessed December 12, 2017, http://law.jrank.org/pages/867/Criminal-Law-Reform-England-criminal-law-commissioners-1833-1849.html.
50. Sanford H. Kadish, "The Model Penal Code's Historical Antecedents, " Rutgers LJ 19 (1987): 521.
51. A member of statute Law Commission.
52. Radzinowicz and Hood, "Judicial Discretion and Sentencing Standards."

The next effort for codification in 1878 was made by Sir James Fitzjames Stephen who had the benefit of the experience of codification in India. A bill based upon the proposal of Sir James was also introduced in the Parliament which was referred to an expert commission.[53] Even the Attorney General and Lord Chancellor of his time were impressed by his efforts. Attorney General stated that the main aim of the bill was to make the punishment in all cases proportionate to the guilt of offenders and based on logical and reasonable principles.[54] But ultimately, efforts of Sir James also ended in smoke mainly due to judicial opposition.[55] Judges considered that the replacement of common law principles with codified law will prove counterproductive as it will take away the elasticity available in common law.[56] It seems that judges thought codification of criminal law as an encroachment on their discretion which was one of the reasons for their opposition.

Codification efforts though remained unsuccessful in the nineteenth century were again initiated in the last century. This time these efforts were spearheaded by Prof. J.C. Smith and his team in 1985. These efforts have yet not borne fruit, though the same, are still alive at least notionally.[57] Smith report[58] submitted to Law Commission of UK explained codification as a process of restatement of the given branch of law in a single, consistent, coherent, unified and comprehensive piece of legislation.[59] Aims of codification were stated as comprehensiveness, accessibility,

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53. Ibid.
54. Ibid.
55. "The Speech of the Right Hon. the Lord Thomas of Cwmgidd Lord Chief Justice of England and Wales on the Eve of Dinner for Her Majesty's Judges. " 2016. https://www.judiciary.gov.uk/wp-content/uploads/2016/07/lcj-mansion-house-july-2016.pdf.
56. Radzinowicz and Hood, "Judicial Discretion and Sentencing Standards."
57. "Criminal Law Reform."
58. Professor J. C. Smith, "Codification of the Criminal Law A Report to the Law Commission" (London: The Low Commission of England and Wales, 1985), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228596/0270.pdf.
59. Ibid.

consistency, and certainty.[60] These aims are not far beyond the objectives of a rational sentencing system. Consistency is the desired objective of a fair sentencing system. Comprehensibility, accessibility, and certainty of the penal law are also necessary to achieve fair sentencing.

Smith's report, mentioned above, rightly put that codification is different from law reform[61] but they materially influence each other. Codification requires the statement of law in a coherent manner which necessarily requires removal of uncalled for inconsistencies, which in turn is the area of law reforms. Now a renewed call for codification has been made from the Lord Chief Justice himself.[62] However, failure of codification in England in the previous two centuries has not hampered the reform of criminal law altogether which has continued from reversal of the bloody code to consolidation of laws and development of new sentencing regime in England and Wales. A major step in this regard was the creation of the Criminal Court of Appeal in 1907, and thus the introduction of the Appellate review process in the English sentencing system. However, before discussing the Appellate review process, a brief description of criminal courts will be beneficial to understand the sentencing system and its appellate review in a true perspective.

3.3.4. Criminal Courts in England and Wales:

History of criminal court in England and Wales is not less chequered than the laws of that country. The system of criminal court in England and Wales is complicated[63] one and this fact is admitted by the judicial regime itself.[64] The main

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60. Ibid.
61. Ibid.
62. "The Speech of the Right Hon. the Lord Thomas of Cwmgidd Lord Chief Justice of England and Wales on the Eve of Dinner for Her Majesty's Judges." https://www.judiciary.gov.uk/wp-content/uploads/2016/07/lcj-mansion-house-july-2016.pdf accessed on 12 December 2017.
63. "The Criminal Court Structure of England and Wales | DEDICATED, " accessed December 12, 2017, https://www.legalsecretaryjournal.com/?q=The_Criminal_Court_Structure_of_England_and_Wales.

reason for its complication is its historical evolution instead of a planned and designed building. Criminal courts in England and Wales have a history of a millennium but for this dissertation, only understanding of presently working criminal court structure will suffice. There are more than 40, 000 judges and magistrates in England and Wales.[65] The majority of sentencing in the English criminal justice system occurs in magistrates and crown courts. Court of Appeal Criminal Division is practically the highest forum to settle the sentencing jurisprudence.[66] Previously, the House of Lords and now the United Kingdom Supreme Court also have to say in final decision making but their contribution in sentencing jurisprudence is rare and ancillary.[67] For quick reference, May[68] and Green[69] can be cited as the cases decided by House of Lord while Varma[70] and Waya[71] by the Supreme Court which all pertains to confiscation orders instead of deep core sentencing jurisprudence. Thus, a brief description of the magisterial court and crown court is apt here. However, owing to the great importance of the Court of Appeal in the sentencing process, a more comprehensive discussion will be made on its role and development.

(i) Magistrates' Courts:

The criminal justice system of England and Wales is mainly shouldered by magistrates, who are more than 30, 000 in number. Magistrates deal with more than 90% of criminal cases and constitute more than 85% of the judicial community.[72] They work in honourary capacity and get only allowances for loss of earning and

64. "Structure of the Courts & Tribunal System. " accessed December 12. 2017, https://www.judiciary.gov.uk/about-the-judiciary/the-justice-system/court-structure/.
65. "History of the Judiciary, " accessed December 12, 2017. https://www.judiciary.gov.uk/about-the-judiciary/history-of-the-judiciary/.
66. Ashworth, Sentencing and Criminal Justice, 2015, 36.
67. Ibid.
68. R v May [2009] 1 Cr. App. R. (S.) 31.
69. R v Green [2009] 1 Cr. App. R. (S.) 32.
70. R v Varma [2012] UKSC 42.
71. R v Waya [2012] UKSC 51.
72. "About Magistrates |, " About Magistrates | Magistrates Association, accessed December 12, 2017, http://www.magistrates-association.org.uk.

mileage etc. Previously there were stipendiary magistrates, in addition, to lay, magistrate which are now called district judges who sit in magistrate courts.[73] Almost all criminal cases start in magistrates' courts. However, more serious indictable offences are committed to Crown Courts for a jury trial. Disposal at magistrate court is by way of a summary proceeding. As most of the offences are dealt with by magistrates, therefore, majority of sentencing also occurs in these courts. Magistracy is called the backbone of the criminal justice system.[74] Criminal jurisdiction and procedure of magistrate courts is governed by Magistrates' Court Act 1980. Powers of Criminal Courts (Sentencing) Act, 2000 provides that magistrate may pass sentence of imprisonment up to six months.[75]Convictions and sentences passed by magistrates may be assailed before Crown Court.

(ii) Crown Court:

The crown courts are responsible to deal with more serious offences such as murder rape and robbery.[76] The crown courts are manned by recorders and circuit court judges.[77] However, for more serious cases, High Court judges also sit in crown court to hear such cases.[78] In the trial of indictable offences, the court is also assisted by a jury of twelve persons. Some either way offences which may be tried summarily or on indictment are also tried by the crown court where accused claims jury trial.[79]

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73. See Schedule 11 of the Access to Justice Act 1999, UK.
74. "Speech given by Minister of State for Policing and Criminal Justice Damian Green. on the Role of Magistrates.. " 2013, https://www.gov.uk/government/speeches/the-role-of-magistrates.
75. Section 78 of the Criminal Courts (Sentencing) Act. 2000, UK.
76. The National Archives. "The National Archives - Homepage. " accessed December 12, 2017, http://www.nationalarchives.gov.uk/help-with-your-research/research-guides/criminal-courts-england-wales-from-1972/.
77. "A Judicial System of England and Wales A Visitor's Guide." https://www.judiciary.gov.uk/wp-content/uploads/2016/05/international-visitors-guide-10a.pdf accessed on 12:12:2017
78. "Criminal Justice. " accessed December 12, 2017, https://www.judiciary.gov.uk/about-the-judiciary/the-justice-system/jurisdictions/criminal-jurisdiction/.
79. "Crown Court, " accessed December 12, 2017, https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/crown-court/.

Seventy-seven crown courts are operating in England and Wales.[80] The crown court also hears the appeal against conviction and sentences passed by magistrates.[81] The procedure of appeal is also detailed in part V of the Magistrates' Court Act, 1980. Magistrates also send some cases for sentencing in crown court where the accused has been convicted by a magistrate but he cannot pass proper sentence. The scope of committal and power of the crown court to pass sentences is detailed in the Powers of Criminal Court (Sentencing) Act, 2000. In comparison to magistrate's court very less number of criminal cases are dealt with by the crown courts. Cases dealt with by the crown courts are not more than 10% of the overall number of criminal cases. However, as all serious sentences are passed at crown court, therefore, sentences passed by these courts matter significantly in the English sentencing system. Decisions of crown courts are appealed in Court of Appeal Criminal Division which actually tailors the sentencing jurisprudence in England and Wales along with the sentencing council. Thus, decisions of the crown court serve as a seed to this development and are, therefore, of primary importance.

(iii) Court of Criminal Appeal and its Successor:

Regarding sentencing milieu of the nineteenth century, Radzinowicz and Hood argued that there were only a few remedies to assail the wrongful conviction and avoid consequent illegal sentencing.[82]These include a writ of error to a superior court which was seldom used.[83] Discretionary reference by the trial judge to fellow judges for deciding any question of law was another opportunity.[84] Actually, same judges functioned as trail judges when sitting singly and then as a collegial court sitting

80. Ibid.
81. Section 108 of the Magistrates' Courts Act 1980, UK.
82. Radzinowicz and Hood, "Judicial Discretion and Sentencing Standards."
83. Phil Handler, "The Court for Crown Cases Reserved, 1848-1908, " Law and History Review 29, no. 1 (2011): 259–88.
84. Radzinowicz and Hood, "Judicial Discretion and Sentencing Standards."

collectively to decide the question of law referred by fellow judges.[85] This collegial setting was akin to the appellate court. This practice was later on regulated by the creation of the Court of Crown Cases Reserved[86]through specific legislation.[87] Lack of appeal in criminal cases was a hallmark of common law system and appeal as of right in criminal cases only came in 1907.[88]Thus, till then, practically, there was no appellate filter to check the fairness of sentences.

The creation of the court of criminal appeal remained on the reformation agenda since 1844 and about thirty-one bills on the subject were unsuccessfully brought.[89] Finally, the Court of Criminal Appeal was created in 1907.[90] It was to be manned by eight judges of King's Bench Division and was to be presided over by Lord Chief justice of England. The appeal was competent against conviction and also against the sentence, if not fixed by law.[91]Thus, the Court of Criminal Appeal came as a first major check on the fairness of sentences, to ensure a fair trial. Except for an appeal on a question of law a certificate from the trial judge regarding fitness for appeal or leave of the Criminal Court of Appeal, was required. In spite of these checks on the Court of Criminal Appeal, its work was appreciated even in other jurisdictions. Howard while comparing the criminal appellate work in England and the United States praised the Court of Criminal Appeal and stated:

> Speed of determination, the brevity of opinion, the paucity of judicial rhetoric, concentration on the outstanding issues of the fairness and

85. Renee Lerner, "How the Creation of Appellate Courts in England and the United States Limited Judicial Comment on Evidence to the Jury, " SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2016), https://papers.ssrn.com/abstract=2797310.
86. Handler, "The Court for Crown Cases Reserved, 1848-1908."
87. Crown Cases Act, 1848.
88. Lerner, "How the Creation of Appellate Courts in England and the United States Limited Judicial Comment on Evidence to the Jury."
89. Ken Whiteway, "The Origins of the English Court of the Criminal Appeal, " HeinOnline 33, No.2 (2008). http://www.heinonline.org.ezproxy.lib.gla.ac.uk/HOL/Page?handle=hein.journals/callb33&div=28&start_page=309&collection=journals&set_as_cursor=0&men_tab=srchresults.
90. Section 1 of the Criminal Appeal Act 1907.
91. Section 3 of the Criminal Appeal Act 1907.

> legality of the defendant's trial and the reasonableness of the jury's verdict-these are the salient characteristics of the work of the English Court of Criminal Appeal.[92]

Major overhaul in the Court of Criminal Appeal was introduced in 1966.[93] Separate Court of Criminal Appeal was abolished. A criminal division was created in the Court of Appeal formally known as Court of Appeal Criminal Division (hereafter Court of Appeal) along with a separate civil division. The functions of the Court of Criminal Appeal were transferred to Court of Appeal. Since its creation, the Court of Criminal Appeal and its successor Court of Appeal has a considerable impact over establishing a practical standard for sentencing in England and Wales.[94] Through its judgments, the Court of Appeal developed a sizeable sentencing jurisprudence and thus continued to guide the sentencing in other criminal courts under its appellate jurisdiction. Sentencing wisdom of the Court of Appeal and its predecessor are contained in guidance and guideline judgments. These judgments are of primary importance in the development of the English sentencing system and, therefore, deserve a comprehensive discussion here.

3.4. Appellate Guidance and Guidelines on Sentencing:

3.4.1. Establishing Initial Principles:

Since its beginning, the Court of Criminal Appeal started guiding the sentencing process in England. One of the earliest guidance from the court of appeal on the quantum of the sentence came in 1909. Adverting to the circumstances of the offence; the court held that the maximum sentence provided for an offence is to be resorted in the gravest cases.[95] This principle was further refined and it was held that maximum penalty was not to be reserved for a conceivably worst case but for

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92. Pendleton Howard, "The English Court of Criminal Appeal, " American Bar Association Journal 17, no. 3 (1931): 149–52.
93. Criminal Appeal Act, 1966,
94. Andrew Ashworth, Sentencing and Criminal Justice (Cambridge University Press, 2005), 51.
95. Harrison (1909) 2 Cr. App. R. 94.

broadband of such cases.[96] The court also guided that pre-trial detention ought to be taken into consideration while passing the sentence.[97] Settling the principle regarding the scope of interference by the appellate forum in the sentence passed by the trial court, it was held that, interference should only be in cases where there is some error in principle. The mere different opinion of the appellate court on the quantum of sentence was held not sufficient for appellate interference.[98]

3.4.2. Guidance and Guideline: Distinction:

The process of guidance from the Court of Criminal Appeal continued but took impetus after the creation of the Court of Appeal. Ashworth argues that there is a distinction between mere guidance and guideline.[99]He referred to Lord Woolf's judgment[100] providing guidance on sentencing. The judge in the said judgment summarized the ratio of previous decisions on sentencing but specifically stated that he was not intending a guideline judgment. Between 1998 to 2003, before the emergence of the Sentencing Guideline Council, the Court of Appeal was statutorily required[101] to inform Sentencing Advisory Panel[102] (For further discussion on Sentencing Advisory Panel please see 3.5.1 below) before giving guideline judgment. On receiving such information, Panel was required to initiate consultation, formulate its own view and communicate the same to the Court of Appeal. Thus, a device of simple guidance was used. Alec argued that the difference between guideline judgments and guidance judgments on sentencing is opaque.[103]Ashworth in his latest

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96. R v Amber and Hargreaves unreported cited and followed in R v Sohail Butt [2006] EWCA Crim 47.
97. R v Harrison (1909) 2 Cr. App. R. 94.
98. R v Gumbs (1927) 19 Cr. App. R. 74.
99. Ashworth, Sentencing and Criminal Justice, 2005. 38.
100. R v Attorney General's Reference No.4 and 7 of 2002 [2002] 2 Cr. App. R. (S.) 77.
101. Section 81 of the Crime and Disorder Act 1998.
102. The scope of the Sentencing Advisory Panel and its successors will be discussed hereunder separately.
103. Alec Samuels, "The Effect of the Advice of the Sentencing Advisory Panel upon the Form of Judgments. " The Journal of Criminal Law 68, no. 1 (2004): 45–49.

work has placed guidance and guideline judgment under different headings, but the distinction is not clear even there.[104] Even the Sentencing Guideline Council case compendium, being discussed below, also collected major appellate judgments on sentencing without any distinction of guideline or guidance judgments.

However, the difference between guidance and guidelines cannot be ignored altogether. It can be inferred from the fact that Coroners and Justice Act, 2009 entrust the function of framing guidelines to the Sentencing Council, but without any prejudice to the powers of Court of Appeal to provide guidance on sentencing.[105] Distinguishing guidance and guideline judgment, Ashworth tried to outline the feature of guideline judgment. He mentioned that guideline judgment includes general guidance on sentencing, mention of a starting point of a sentence for a particular offence and specific narration of mitigating and aggravating factors.[106] For these features, Ashworth calls guideline judgments as of the most innovative development of recent years[107]on which senior judiciary can rightly be proud of.[108] On the other hand, guidance judgment may contain guidance on sentencing in general terms, without specifically reflecting the above-mentioned features.

3.4.3. Compendium of Guideline Judgments:

The Court of Appeal, unlike its predecessor, started to give guideline judgments regularly. The number and scope of these guideline judgments increased gradually, which is reflected from the analysis of guideline judgments case compendium compiled by Sentencing Guideline Council. [109] further discussed in 3.5.2

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104. Ashworth, Sentencing and Criminal Justice, 2015, 38–39.
105. Section 120 and 124 (8) of the Coroners and Justice Act, 2009.
106. Andrew Ashworth, Michael Tonry Ed, and Richard S.Frace Ed, "The Decline of English Sentencing System and Other Stories, " in Sentencing and Sanctions in Western Countries (New York: Oxford University Press, 2001), 73.
107. Ibid.
108. Ibid., 74.
109. "Guideline Judgments Case Compendium."

below. This compendium incorporated sentencing guideline judgments of the Court of Appeal and its predecessor till 2005. Though all the judgments on sentencing are not incorporated[110] in this compendium but it is a very useful document to survey the gradual use and development of guideline judgments. This document mentions only two judgments in which guidance on sentencing has been provided by the Court of Criminal Appeal.[111] Both these judgments pertain to guidelines on practice to consider other offences admitted by the offender at the time of the offence. After the creation of the Court of Appeal in 1966 till 1980, the compendium mentions five judgments. In these five judgments, guidelines pertaining to imposition of discretionary life imprisonment, [112] consideration of other offences at the time of passing sentence, [113] armed robbery, [114] grievous bodily injury by glossing, [115] and on use and length of custodial sentences.[116]

The compendium reflects that after the 1980s till 2000, there are about forty-six cases in which different guidelines have been passed by the Court of Appeal. In this way, guideline judgment became a salient feature of the English sentencing system after 1980s.[117] In the next five years untill 2005, in almost the other fifty cases guideline judgments have been issued. As this compendium is not being updated therefore landmark cases like R v Goodyear[118] are now not reflected in any such compendium. In the Goodyear case bar on the judicial indication of sentence on the request of the accused has been relaxed. Goodyear has materially revisited with only

110. For Example R v Gumbs (1927) 19 Cr. App. R. 74 is not mentioned in this compendium.
111. R v McLean (1910–1911) 6 Cr.App.R. 26, Simons (1953) 37 Cr.App.R. 120.
112. R v Hodgson (1968) 52 Cr.App.R. 113.
113. R v Walsh unreported, 8 March 1973.
114. R v Turner (1975) 61 Cr.App.R.67.
115. R v Harwood (1979) 1 Cr.App.R. (S) 354.
116. R v Bibi (1980) 2 Cr.App.R. (S) 177.
117. Ashworth, Sentencing and Criminal Justice, 2005, 33.
118 [2005] EWCA Crim 888

R v Turner[119] and has issued guidelines for judges, prosecution and defence on the indication of the sentence at the request of accused to assess the impact of his guilty plea.

Guideline judgments have covered a variety of offences and their sub-categories but the compendium has divided these guidelines into eighteen main categories for the sake of convenience of reference.[120] This compendium also mentions guidelines issued on prosecution appeals which deserve a separate brief mention due to their jurisprudential importance.

3.4.4. Guideline Judgments in Prosecution Appeals:

Another dimension of guideline judgments was added by the provision of Attorney General Reference to the Court of Appeal against unduly lenient sentences. An Act of 1988[121] provided that the Attorney General may seek the review of unduly lenient sentences from the Court of Appeal. Ashworth argued that these decisions of the Court of Appeal on Attorney General References added new dimensions to sentencing precedents.[122] Originally the government estimated one dozen such sentencing references in a year[123] but the number swelled to over a hundred references per year till 2005.[124] Even in the compendium referred above, there are almost twenty guideline judgments issued in appeals initiated at Attorney General References. Term 'undue lenient sentence' was not defined in the 1988 Act, mentioned above but the gap was supplied by the Court of Appeal and observed:

> A sentence was unduly lenient where it fell outside the range of sentences in which the judge, applying his mind to all the relevant

119 [1970] 2 QB 321
120. "Guideline Judgments Case Compendium."
121. Section 36 of the Criminal Justice Act 1988, UK.
122. Ashworth, Tonry Ed, and S.Frace Ed, "The Decline of English Sentencing System and Other Stories, " 73.
123. Stephen Shute, "Prosecution Appeals against Sentence: The First Five Years, " The Modern Law Review 57, no. 5 (1994): 745–72.
124. Ashworth, Sentencing and Criminal Justice, 2005, 35.

> factors, could reasonably consider appropriate. In that connection, regard must be had to reported cases, and in particular to the guidance given by the Court in guideline cases.[125]

The Court of appeal further refined the above test in another case[126] and held that for the success of prosecution appeal an error in principle in the sentence must be shown. The sentence should be unduly lenient to an extent that in the absence of interference by the Court of Appeal public confidence in the sentencing system is bound to suffer. Guidelines issued in Attorney General References covered multiple areas including rape, [127] robbery, [128]excessive use of force in self- defense[129] etc. The above discussion reflects that there is a plethora of guidelines judgments providing guidance on the question of sentencing. The development of sentencing precedents requires investigating their binding nature.

3.4.5. Binding Nature of Guidelines:

The Court of Appeal augmented the binding nature of guideline judgments and their precedential value in *Panayioutou.*[130] The court held that it was the duty of the prosecution counsel to draw the attention of the court towards the guideline judgment instead of merely asking for any specific penalty. The conduct of defense counsel for not referring to the guideline judgment was also deprecated. The Court of Appeal even expected from the sentencing court to make an endeavour to trace such guideline judgments before rendering a sentencing decision. Thus, it is argued that guideline judgments have very strong precedent value.[131] Lord Taylor, in a speech, explained the binding nature of guideline judgment and scope of trial court sentencing

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125. AG's Ref. No 4 of 1989, (1989) 11 Cr. App. R. (S.) 517.
126. AG's Ref. No.5 of 1989, (1989) 11 Cr. App. R. (S.) 489.
127. AG's Ref. No. 104 of 2004. [2004] EWCA Crim 2672.
128. AG's Ref. Nos. 32 and 33 of 1995, [1996] 2 Cr.App.R. (S) 346.
129. AG's Ref. Nos. 59, 60 and 63 of 1998, 1999] 2 Cr.App.R. (S) 128
130. R v Andronikus Panayioutou (1989) 11 Cr. App. R. (S.) 535
131. Samuels, "The Effect of the Advice of the Sentencing Advisory Panel upon the Form of Judgments."

discretion.[132] He said that guidelines set the general tariff but to tailor the sentence according to particular circumstances of the case is the duty of the trial court. A more authoritative direction to follow the guideline judgments and to avoid application of the personal standard in preference to guidelines was given in Johnson case.[133]

The binding nature of the Court of Appeal guideline judgments considerably gave way to definitive guidelines issued by Sentencing Council. In *R v Thelwall*[134] the Court of Appeal said that our system now proceeds on sentencing council guidelines and not on case law. It is in the rare circumstances that the court needed to explain any guidelines where they are unclear. But even in such circumstances, case law is likely to be superseded by revision of guidelines by the sentencing council. The court held that decisions of the court of appeal are unlikely of any assistance where guidelines of the sentencing council are available. However, this decision has attracted criticism from sentencing scholars. Harris[135] in his case comments have referred to different decisions of the Court of Appeal. It can be inferred from his case comments that in spite of the availability of guidelines, the decision of the Court of Appeal was of particular utility for structuring sentencing. Ashworth's[136] analysis of 2016 cases of the Court of Appeal also reflects that explanation of guidelines by the Court of Appeal is not as rare as observed above in *Thelwall*.[137]

Thus, the practical importance of the Court of Appeal guidance on sentencing is still of great value though most of the field has now been occupied by sentencing guidelines issued by the sentencing council. As the guidelines issued by the Court of

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132. Right Honourable Lord Taylor Chief Justice of England, "Judges and Sentencing" 19 (1993), http://www.heinonline.org.ezproxy.lib.gla.ac.uk/HOL/Page?handle=hein.journals/commwlb19&div=34&start_page=760&collection=journals&set_as_cursor=0&men_tab=srchresults.
133. R. v David Angus Johnson (1994) 15 Cr. App. R. (S.) 827.
134. R v Thelwall [2016] EWCA Crim 1755.
135. Lyndon Harris, "Case Comment Sentencing: R. v Thelwall (Kenneth) " 3 (2017): 240–43.
136. Andrew Ashworth, "The Evolution of English Sentencing Guidance in 2016" 7 (2017): 507–20.
137. R v Thelwall [2016] EWCA Crim 1755.

Appeal were entirely a judicial product, therefore, in the legislative corners a need for more inclusive sentencing guidelines development mechanisms was felt. This thinking of inclusiveness leads to a gradual development of sentencing advisory bodies. It is pertinent to survey the development and present position of such bodies in England and Wales.

3.5. The Emergence of Sentencing Advisory Bodies:

3.5.1. Sentencing Advisory Panel:

In spite of hundreds of judgments providing a guideline on sentencing, there was a parliamentary discontentment with the mechanism of guidance on sentencing. Sentencing guidelines framed by the Court of Appeal were deemed to be built within a close judicial environment minimizing the opportunity of wider consultation. To incorporate wider consultation on building sentencing guidelines, the Sentencing Advisory Panel was created under Section 81of the Crime and Disorder Act 1998.[138] The Lord Chancellor was assigned the task of establishing this panel after consultation with the Lord Chief Justice and the Secretary of State.[139]

The Sentencing Advisory Panel (SAP) was practically established in July 1999 under the above mentioned legal cover. It had a diverse membership. Its members included judges, academics, laymen and persons having experience in policing, prison management, probation, and prosecution.[140] Duty of the Panel was to draft guidelines after vast consultation and submit the same to the Court of Appeal for laying down the guidelines. The work of framing guidelines was distributed between the Panel and the Court of Appeal. The power of the Court of Appeal to frame guidelines exclusively was abridged. After the creation of the panel, the Court of Appeal could only frame guidelines after consultation with the panel. However, the

138. The Crime and Disorder Act, 1998, UK.
139. Section 81 (1) Crime and Disorder Act 1998.
140. Ashworth, Sentencing and Criminal Justice, 2005, 54.

Court of Appeal was not bound to accept the proposal of the panel. In fact, the first advice of the panel to frame guidelines on environment offences was not accepted. With the passage of time, co-ordination between the panel and the Court of Appeal improved and, later on, all the subsequent proposals of the panel were accepted in substance.[141] During the initial five years, the panel drafted guidelines on almost a dozen of offences[142] including child pornography, [143] rape[144] and racially aggravated offences.[145] In the matter of racially aggravated offences, the court appreciated the efforts of the panel and even accepted the proposal of the panel in preference to its decision in *Saunders*.[146]

Even with the introduction of the panel, in spite of certain limitations, the authority to frame sentencing guidelines remained in judicial hands. This prompted another change and lead to the creation of the Sentencing Guideline Council. Role of Sentencing Advisory Panel continued with some change after the creation of the Sentencing Guideline Council.

3.5.2. Sentencing Guideline Council:

In a rapidly changing sentencing setting in England and Wales, Sentencing Guideline Council (SGC) came as another innovation. This institution was created by the Criminal Justice Act of 2003. Section 167 of the Criminal Justice Act provided the constitution and membership of SGC. It was predominately a judicial body having seven judicial members out of a total of eleven members. The judicial brand of the SGC was manifest as it was to be headed by the Lord Chief Justice. All the judicial members were to be appointed by the Lord Chancellor after consultation with the

141. Ashworth, Sentencing and Criminal Justice, 2010, 55.
142. Ibid.
143. R v Oliver, Hartrey and Baldwin [2003] 2 Cr App R (S) 64.
144. R v Milberry et al. [2003] 2 Cr App R (S) 142.
145. R v Kelly and Donnelly [2001] 2 Cr App R (S) 341.
146. R v Saunders [2000] 1 Cr App R 458.

Lord Chief Justice and the Secretary of State. Judicial members were to be chosen from different tires of the judiciary. Non-judicial members were to be appointed by Secretary of State after consultation with Lord Chancellor and Lord Chief Justice. These non-judicial members were to be taken with experience in policing, prosecution, defense, and victim welfare.

In the Halliday report of 2001, it was suggested that the responsibility of framing, implementing and revising the sentencing guidelines should be assigned to an independent judicial body.[147] In line with the report, the SGC was proposed to be exclusively a judicial body in the Criminal Justice Bill introduced in the Parliament in 2002.[148] However, due to subsequent events, particularly due to executive resentment over the Court of Appeal judgment in Mclnerney[149] structure of SGC was changed by adding nonjudicial members. However, SGC remained a body with the judicial majority. As per the Halliday report, the purpose of creating a separate body for framing guidelines was to separate the function of determining individual sentences from the framing of sentencing guidelines for general application. SGC, in addition to framing sentencing guidelines, was also assigned the task of framing allocation guidelines. Allocation guidelines were meant to guide magistrate to decide whether any offence is triable in summary way or on indictment.[150]

Role of the Sentencing Advisory Panel continued with only change that now it had to report to SGC instead of Court of Appeal.[151] SGC after preparing the guideline had to publish such guidelines in draft form and had to initiate the consultation

147. John Halliday, Cecilia French, and Christina Goodwin, "Making Punishments Work Report of A Review of the Sentencing Framework for England and Wales, " 2001, http://webarchive.nationalarchives.gov.uk/+/http:/www.homeoffice.gov.uk/documents/halliday-report-sppu/chap-1-2-halliday2835.pdf?view=Binary.
148. Ashworth, Sentencing and Criminal Justice, 2010, 56.
149. R v Mclnerney and Keating [[2003] 1 Cr. App. R. 36.
150. See Section 170, Criminal Justice Act, 2003, UK.
151. Section 171, Criminal Justice Act, 2003, UK.

process.[152] Following all this process, sentencing guidelines, prepared by SGC, were published as definitive guidelines.[153] As sentencing guidelines issued by Court of Appeal were having a precedent force which SGC guidelines were lacking. Therefore, courts were specifically required to have regard to the sentencing guidelines issued by the SGC. One of the most valuable works of SGC was the preparation of a compendium regarding guideline judgments which materially helped the criminal law practitioners.[154] SGC started its work in December 2003.[155] SGC issued different definitive guidelines. Initial definitive guidelines were on 'Overarching Principles-Seriousness'[156] while definitive guidelines on 'Attempted Murder, [157] was one of SGC's concluding work. In the volatile sentencing scenario of England and Wales, SGC could not live longer and gave way to the Sentencing Council. Both SGC and Sentencing Advisory Panel were abolished on 06 April 2010.[158]

3.5.3. Sentencing Council:

A single successor to SAP and SGC was proposed by Gage Report, 2008.[159] The report commended the work of both the institutions and recommended that for efficient functioning SAP and SGC may be combined. Important recommendations of

152. Section 170 (8), Criminal Justice Act, 2003, UK.
153. Section 170 (9), Criminal Justice Act, 2003, UK.
154. John Cooper, "The Sentencing Guidelines Council - a Practical Perspective, " Criminal Law Review 4 (2008): 277–86.
155. Ibid.
156. "Over Arching Principles: Seriousness" (Sentencing Guideline Council, 2004). https://www.sentencingcouncil.org.uk/wp-content/uploads/web_seriousness_guideline.pdf.
157. "Attempted Murder Definitive Guideline" (Sentencing Guidelines Council, 2009), https://www.sentencingcouncil.org.uk/wp-content/uploads/Attempted_Murder_-_Definitive_Guideline_webaccessible1.pdf.
158. The Coroners and Justice Act 2009 (Commencement No. 4, Transitional and Saving Provisions) Order 2010.
159. Lord Justice Gage, "Sentencing Guidelines in England and Wales:An Evolutionary Approach" (Sentencing Commission Working Group, 2008), http://webarchive.nationalarchives.gov.uk/20080727013619/http://www.justice.gov.uk/docs/sentencing-guidelines-evolutionary-approach.pdf.

the Gage report were legislated through the Coroners and Justice Act, 2009.[160] Sentencing Council (hereafter, council for this part) for England and Wales was created by Section 118 of the above said Act. The Council consists of fourteen members out of which eight are judicial and six are non-judicial members. Judicial members are appointed by Lord Chief Justice with the agreement of Lord Chancellor while non-judicial members are appointed by Lord Chancellor with the agreement of Lord Chief Justice.[161]The Act requires that the selection of judicial members should be such to give representation to different tiers of the judiciary in the council including any judicial office-bearer responsible for the training of sentencers. Similarly, selection of non-judicial members should also be such to give representation to different expertise including criminal prosecution, defense, policing, sentencing, victim welfare, academic study or research on criminal or criminology, statistics and rehabilitation of offenders. Lord Chief Justice is the president of the Council. Lord Chancellor may also appoint any person, experienced in sentencing policy to speak in the Council. Court of Appeal and Lord Chancellor may also propose to the Council to prepare and revise any guidelines.[162] In this way in the sentencing guideline world of England and Wales, the role of Court of Appeal became advisory instead of leadership.

Functions of the council are diverse and even more onerous than the functions of SAP and SGC combined. It has to submit an annual report to the Lord Chancellor who will lay the same before the Parliament. The Council is under a duty to publish its annual report once it is laid before the Parliament. The Council is required to frame

160. Ashworth, Sentencing and Criminal Justice, 2010, 58; Ministry of Justice, "Explanatory Notes to Coroners and Justice Act 2009, " accessed December 13, 2017, http://www.legislation.gov.uk/ukpga/2009/25/notes/division/3/4.
161. Schedule 15 of the Coroners and Justice Act 2009, UK.
162. Section 124 of the Coroners and Justice Act 2009, UK.

sentencing guidelines[163] and allocation guidelines[164] and also to revise them when needed. It has to follow a comprehensive consultative process before issuing definitive guidelines.[165] It has to prepare and revise the guidelines in urgent cases even without following the consultative procedure.[166] Guidelines prepared by it should also reflect sentencing ranges showing culpability of the offender, harm caused in the offence and other relevant factors.[167] Council has to monitor the operation and effect of the guidelines which it issues[168] and is also responsible for creating awareness regarding sentencing and sentencing practices. Research on sentencing issues and the collection of data is also a part of its functions. The crown court sentencing survey is one of the major works conducted by the council from a research perspective.[169] The survey was conducted by the Sentencing Council of England and Wales from 1 October 2010 to 31 March 2015. The information was collected directly from judges using different forms for different offences. Through these forms information from judges was collected regarding the factors considered while imposing the sentence.[170]

The council has a responsibility to act as a financial and social impact assessor. It is required to give an estimation of the resource implication of its guidelines.[171] It also has to assess the resource implication of any change in sentencing practice, policy or legislation, requiring prison, probation, or youth rehabilitation places.[172] It has also to report on resource implication of non-sentencing

163. Section 120 of the Coroners and Justice Act, 2009, UK.
164. Section 122 of the Coroners and Justice Act, 2009, UK.
165. Section 120 (6) of the Coroners and Justice Act, 2009, UK.
166. Section123 of the Coroners and Justice Act, 2009, UK.
167. Section121 of the Coroners and Justice Act, 2009, UK.
168. Section 128 of the Coroners and Justice Act, 2009, UK.
169. "Crown Court Sentencing Survey Annual Publication" (Sentencing Council, 2015), https://www.sentencingcouncil.org.uk/wp-content/uploads/CCSS-Annual-2014.pdf.
170. Ibid.
171. Section 127 of the Coroners and Justice Act, 2009, UK.
172. Section 130 and 132 of the Coroners and Justice Act, 2009, UK.

factors such pattern of re-offending and breach of community orders, etc.[173] Thus, resource implication reports are a big chunk of the council's functions. The council has itself devised a seven-step strategy for the performance of its guideline functions. These steps are prioritizing the area of guidelines, research, deciding approach on broad structure of guidelines, consultation, responses, publication and monitoring of the guidelines.[174]

In consonance with the Gage report, a stricter standard of compliance with sentencing guidelines has been suggested in the Coroners and Justice Act, 2009. A sentencing court is duty-bound to follow the sentencing guidelines unless it is satisfied that it would be contrary to justice to follow these guidelines.[175] Sentencing Council has published its first definitive guidelines on assault in 2011.[176] It has also published definitive guidelines on burglary, [177] drug offences, [178] offences taken into consideration and totality, [179] sexual offences, [180] and other offences. The last definitive guidelines were issued in March 2017, by the Council on reduction in sentence for a guilty plea which applied to Crown Court as well as Magistrate's

173. Section 131 of the Coroners and Justice Act, 2009, UK.
174. Sentencing Council https://www.sentencingcouncil.org.uk/about-us/our-work/ accessed on 18-09-2017.
175. Section 125 of the Coroners and Justice Act, 2009, UK.
176. "Assault-Definitive Guideline" (Sentencing Council, 2011), https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault_definitive_guideline_-_Crown_Court.pdf.
177. "Burglary Offences-Definitive Guideline" (Sentencing Council, 2011), https://www.sentencingcouncil.org.uk/wp-content/uploads/Burglary_Definitive_Guideline_web_final.pdf.
178. "Drug Offences- Definitive Guideline" (Sentencing Council, 2012), https://www.sentencingcouncil.org.uk/wp-content/uploads/Drug_Offences_Definitive_Guideline_final_web1.pdf.
179. "Offences Taken Into Consideration and Totality- Definitive Guideline" (Sentencing Council, 2012), https://www.sentencingcouncil.org.uk/wp-content/uploads/Definitive_guideline_TICs__totality_Final_web.pdf.
180. "Sexual Offences-Definitive Guideline" (Sentencing Council, 2014), https://www.sentencingcouncil.org.uk/wp-content/uploads/Sexual-Offences-Definitive-Guideline-web4.pdf.

Courts.[181] In the sentencing guidelines issued by the council, a progressive stepwise approach has been adopted which has been thoroughly explained by Ashworth.[182] There are nine steps in the sentencing guideline road map which separate each step from the other. Step one is determining the category of offence. The second step pertains to the determination of the starting point and category range. Here at this step, the court has also to determine the suitability of community or custodial sentence keeping in view the statutory test that these sentences can only be imposed if other sentences are not sufficient.[183] Step three requires determination of reduction in sentence for cooperation with prosecution and other such cooperating gestures of the offender. The next step requires the court to determine the reduction in sentence for a guilty plea. After counting these reductions then, at step five, the court is required to assess the dangerousness of the offender for the particular purpose of imposing preventive sentence, if any. This requirement is specific to physical violence and sexual offences and is therefore not required in other offences. After these enhancements and reductions at step six, the court is required to apply the totality principle, if the offender is being convicted in more than one offence or is already undergoing any sentence. At this stage, the total impact of the sentence is assessed and adjusted. Step seven is a reminder to the court to pass different ancillary orders which may include confiscation, reparation, restitution, etc. Step eight requires courts to give a reason for the sentence and to explain it to the offender.[184] The last and concluding step is a consideration to give credit for the time spent for remand. Ashworth calls these steps a useful sentencing checklist.

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181. "Reduction in Sentence for a Guilty Plea- Definitive Guideline" (Sentencing Council, 2017), https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-plea-Definitive-Guide_FINAL_WEB.pdf.
182. "Crown Court Sentencing Survey Annual Publication, " 24–27.
183. Section 148 and 152 of the Criminal Justice Act, 2003, UK.
184. Section 174 of the Criminal Justice Act, 2003, UK.

However, Houge criticized that the council has remained preoccupied with definitive sentencing guidelines and has not given proper attention to primary issues of sentencing objectives, custody threshold and weightage to be given to previous convictions.[185] Sentencing in magistrates courts is now also regulated by the guidelines issued by Sentencing Council. A brief discussion on magisterial sentencing and its regulation is pertinent here.

3.5.4. Magistrates Association and Sentencing Guide Lines:

The Court of Appeal in Newsome[186]held that it is its duty to lay down the guidelines and principles to guide the judges of all grades in exercising their sentencing discretion. However, Ashworth pointed out that most of the decisions of the Court of Appeal giving sentencing guidelines pertained to more serious cases and were, therefore, not instructive for magisterial courts.[187] To fill the gap, the Magistrate Association, in 1966 suggested starting points to calculate the sentences in traffic offences by circulating its Suggestions for Road Traffic Penalties.[188] These suggestions were updated and altered at different times and some more localized versions were also issued. In 1989, the Magistrate Association issued 'Sentencing Guide for Criminal Offences (other than Road Traffic) and Compensation Table' providing a starting point for more than twenty offences. Guidelines issued by Magistrate Association were last time revised in 2004. In spite of their utility, Ashworth argues that these guidelines issued by Association had no binding force and

185. Mike Hough, "Time to Rethink the Role of the Sentencing Council? | Westlaw UK, " accessed December 13, 2017, https://login.westlaw.co.uk/maf/wluk/app/document?&srguid=i0ad6ada700000160506490665 04453b6&docguid=I756C8ED03BA911E7B9CFF797D8A269C6&hitguid=I756C8ED03BA9 11E7B9CFF797D8A269C6&rank=1&spos=1&epos=1&td=28&crumb-action=append&context=4&resolvein=true.
186. R v Newsome and Browne [1970] 2 Q.B. 711.
187. Ashworth, Sentencing and Criminal Justice, 2010, 65.
188. Ibid.

were therefore followed at will.[189] However, in 2008, the Magistrate Courts Sentencing Guidelines were issued by Sentencing Guideline Council whose updated version is available at the Sentencing Council website.[190] Thus, sentencing in the magistrates' courts is now also regulated by the guidelines.

However, analysis of these guidelines reveals that it is a document of almost 459 pages. This is not the all material to be considered while passing sentences. In addition to it, magistrates also need to know the different legislations under which they may be passing the sentences. Majority of the magistrates are layperson though now some training is arranged. This bulk of the material on guidelines coupled with a large number of sentencing legislation may even confuse the professional judges. The state of affairs of lay magistrates may be more miserable. The purpose behind the bulk of laws and guidelines seems to bring the rule of law in the sentencing realm. However, English policymakers should also keep in mind that excessive rules, which may add confusion instead of clarity, are as bad for 'rule of law' as an absence of rules. Bentham has warned against this tendency beforehand and cautioned:

> It is to be observed, that the more various and minute any set of provisions are, the greater the chance is that any given article in them will not be borne in mind: without which, no benefit can ensue from it. Distinctions, which are more complex than what the conceptions of those whose conduct it is designed to influence can take in, will even be worse than useless.[191]

This state of affairs is manifest from the below analysis of the English sentencing legislations.

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189. Ibid., 66.
190. "Magistrates' Court Sentencing Guidelines" (Sentencing Council, 2017). https://www.sentencingcouncil.org.uk/wp-content/uploads/MCSG-April-2017-FINAL-2.pdf.
191. Jeremy Bentham, An Introduction to the Principles of Morals and Legislation (Kitchener: Batoche Books, 2000), 144, https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/bentham/morals.pdf.

3.6. Legislation in England and Wales:

3.6.1. Present State of Sentencing Legislation:

England and Wales have heavy legislation dealing with different aspects of sentencing. Gage report has mentioned as many as 56 enactments dealing with sentencing and new offences.[192] Almost sixty Acts of Parliament and subordinate legislations have been mentioned in the Law Commission Consultation Paper of 2017.[193] The total number of legislations pertaining to sentencing is even more in a compilation reflecting sentencing laws currently in force till August 2015.[194] The Law Commission of England Wales itself admitted the disarray of the current law on sentencing.[195] The above-mentioned compilation of sentencing law in force swelled to 1300 pages[196]and included enactments even from the fourteenth century.[197] For a comprehensive compilation of the sentencing law, an expert was hired to collect sentencing laws. The certainty of this well-researched sentencing laws compilation was still doubtful and the whole compilation was submitted for public consultation. Thus, sentencing legislation in England and Wales as it stands now is overwhelmingly complex.[198] It poses great difficulty of understanding not only to ordinary people but even to judges and legal practitioners. Pointing to this problem in England, Lord Taylor while addressing Law Society of Scotland said that, Scotland is fortunate to

192. Gage, "Gage Report, " 35.
193. "Consultation Paper No 232 The Sentencing Code Volume 2: Draft Legislation" (Law Commission, 2017), https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/07/The-Sentencing-Code-Volume-2-Draft-Legislation-with-origins.pdf.
194. "Sentencing Law in England and Wales Legislation Currently in Force" (Law Commission, 2015), http://www.lawcom.gov.uk/app/uploads/2015/10/Sentencing_law_in_England_and_Wales_Issues.pdf.
195. "Consultation Paper No 232 The Sentencing Code Volume 1" (Law Commission, 2017), 7, https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/07/The-Sentencing-Code-Consultation-Volume-1.pdf.
196. "Sentencing Law in England and Wales Legislation Currently in Force, " 2015.
197. Justices of Peace Act 1361, UK.
198. "Consultation Paper No 232 The Sentencing Code Volume 1."

have lesser criminal legislation.[199] Referring to the confusing nature of major sentencing legislation, [200] he sarcastically narrated an incident that:

> At one seminar, a young assistant recorder rushed up eagerly to the senior judge presiding and said, 'I re-read the Act last night and now see that the sections we looked at yesterday *do* make sense.' The judge said, 'Go and read it again; you've obviously misunderstood it.'[201]

An analysis referred by the commission reflected that in 2012, of 262 randomly selected conviction cases, in 95 cases sentences were not passed according to law. This anomaly was the result of the complexity of sentencing legislation.[202] Perplexed by the statutory maze of sentencing provisions, Lord Phillips in the United Kingdom Supreme Court said that, "hell is a fair description of the problem of statutory interpretation".[203] Justice Mitting, in a case, after consuming five judicial hours in understanding the sentencing provisions said that it is virtually impossible to explain what the sentence means in practice to the offender.[204]Referring to the sorry state of sentencing legislation, judge Goymer wrote to the Law Commission on behalf of Council of HM Circuit Judges:

> The present state of sentencing law is a disgrace to our jurisprudence. It is totally unacceptable to have so much complexity and uncertainty that results from layer upon layer of statutes that have been brought into effect in a piecemeal fashion or have never been brought into effect at all.[205]

The Law Commission also diagnosed the above problem in no less clear terms than stated above. The commission, in its 12th Programme, while selecting sentencing

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199. Taylor Chief Justice of England, "Judges and Sentencing."
200. Criminal Justice Act 1991, UK.
201. Taylor Chief Justice of England, "Judges and Sentencing."
202. "Consultation Paper No 232 The Sentencing Code Volume 1, " 7.
203. R v The Governor of HMP Drake Hall and another [2010] UKSC 30
204. **The Queen on the Application of Rebecca Noone v Governor of HMP Drake Hall, Secretary of State for Justice[2008] EWHC 207 (Admin), 2008 WL 45710.**
205. "Consultation Paper No 232 The Sentencing Code Volume 1, " 14.

procedure as one of the reform agenda, aimed to introduce a single sentencing statute as the only resort of sentencing tribunals.[206] This agenda has been put forward and after the consolidation of all the sentencing laws in a single document, now the draft of a Sentencing Code has been proposed by the law commission.[207] This reflects that though the existing legislative regime on sentencing in England and Wales does not portray a happy picture but serious efforts of its reforms are underway.

3.6.2. Draft Sentencing Code[208]:

The Law Commission has taken great pain, indeed in putting forward the draft code of sentencing legislation for consultation on 27th July 2017. The process started with a compilation of the current legislation and putting it to the public consultation on 9th October 2015, as mentioned above. After considering all the proposals received, the Law Commission has brought in the above-mentioned draft sentencing code. It consists of two volumes. Volume 1 does not contain any part of draft legislation but is actually commentary and explanation of volume 2 in which the draft sentencing code and draft pre-consolidation amendment bill are contained. Sentencing code is not the codification of common law on sentencing rather it is the consolidation of the existing law. Consolidation approach has been partly adopted to ensure an easy sail through the Parliament.

Though this code has tinkered with dozens of legislations but it mainly brings together the provisions of the Powers of Criminal Courts (Sentencing) Act 2000 and the Criminal Justice Act 2003.[209] To ensure that the new sentencing statute remains simple, clear and act as a single source of reference in sentencing procedures, a 'clean

206. "Twelfth Programme of Law Reform" (Law Commission, 2014), 11, https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc354_twelfth_programme.pdf.
207. "The Sentencing Code."
208. The theme of this part is from Sentencing code draft Vol 1 and vol 2.
209. "Consultation Paper No 232 The Sentencing Code Volume 1, " 4.

sweep' approach has been adopted. This approach suggests applying the sentencing code to all the offenders (with very few exceptions) whose conviction is announced after coming into force of this code. The sentencing code has not intended to introduce any new offence or any new kind of sentence. It neither proposed to restrict judicial sentencing discretion nor did it introduce any further mandatory minimum sentence. Sentencing code is claimed to be a living document, structured in a way to accept coherent amendments without disturbing the overall scheme. It is claimed that the code will help to avoid frequent references to historic legislations. It is expected that the code will make the sentencing process clearer, easier and more transparent. A new drafting scheme of 'signposting' has been used in this code, to make it more comprehensive. Signposting is the scheme of reference to a different statute in the body of the code.

The Law Commission has specifically excluded from the sentencing code, the confiscation process, the road traffic sentencing, and the process of administering and enforcing the sentences. Substantive criminal law is another notable exception. The main argument for the exclusion of these areas is that they constitute a body of law of their own and, therefore, cannot be made part of the sentencing code. Another reason for their exclusion is the consolidating nature of sentencing code which does not permit reforms at a larger scale. Usability and manageability may also be cited as further reasons for the above exclusions.

However, given all the reasons for exclusions of above-mentioned areas, these exclusions are bound to reflect upon the capacity of sentencing code to reflect as a single source of reference in the sentencing matter as repeatedly claimed by the Law Commission. Exclusion of substantive law from sentencing code may be attributed to historical scare and consequent failure of English reformers to codify the criminal

law. However, this exception will force the sentencing players to resort to other resources than sentencing code. The sentencing code though itself is still in the womb but is pregnant with the need to bring another sentencing code, including the above-excepted areas. For comprehensive codification, if a single sentencing code was deemed unfeasible, then a series of codes incorporating all sentencing law should have been considered. The above-mentioned lapses in the proposed sentencing code also create some doubts on the success of this new code. Consultation on the code has continued for a considerable time. Draft Bill is likely to be published in autumn 2018[210] and it is hoped that it will help to improve the sentencing code in the light of consultation.

The proposed draft sentencing code is divided into 13 parts. These parts are arranged in five 'group of parts'. Parts are further divided into chapters. There are 285 sections in this code along with 18 different schedules. Sentencing code has dealt with a different area of sentencing but more significantly it provides mechanism regarding requiring and using pre-sentence reports and other reports on the background of accused.[211] It also requires the courts to give reason regarding sentences and other penal orders.[212] Part 5 of the Code specifically provides the mechanism of structuring the sentencing discretion. It specifically mentions different sentencing purposes, aggravating and mitigating factors and duties of courts regarding sentencing guidelines. There is repeated reflection on the principle of totality[213] and proportionality[214] in the code. Use of custodial sentences is also proposed to be exhaustively regulated by its part 10 which reflects that imprisonment is not the first

210. The Sentencing Code. https://www.lawcom.gov.uk/project/sentencing-code/ accessed on 17-09-2018
211. "The Sentencing Code," 24–30.
212. Ibid., 37–40.
213. Ibid., sec. 71.
214. Ibid., pt. 4.

choice except for repeat and dangerous offenders. Even the community sentence can only be ordered if the court is of the opinion that offence is serious enough to warrant the imposition of such a sentence. This code also reflects the element of restorative justice by providing provisions for reparation and compensation. The code also states the origin of different provisions from where they are taken. In this way, except for omissions mentioned above, the code reflects a serious and comprehensive effort towards the consolidation of sentencing procedures. However, this all is the menu of the future.

The study of English model will be incomplete without a brief analysis of key sentencing legislation presently in force in the England and Wales. In the past thirty years, England and Wales have faced a flood of legislation on sentencing.[215] Ashworth argued that The Criminal Justice Act, 1991 was the first general statute on sentencing in the last forty years.[216] He claimed that proportionality which was its main element was neutralized by Court of Appeal very soon.[217] He asserted that with subsequent amendments and new legislation on sentencing, this Act soon went into the background, though its many provisions are still in force. A brief summary of the three most important sentencing legislations is hereunder to understand the legislative sentencing landscape in England and Wales.

3.6.3. Powers of Criminal Courts (Sentencing) Act, 2000:

The Powers of Criminal Courts (Sentencing) Act, 2000 (hereinafter Act in this part) is one of the major legislation in England and Wales dealing with the powers of the courts to sentence the offenders. It mainly operates in England and Wales but

215. "Consultation Paper No 232 The Sentencing Code Volume 1, " 7.
216. Andrew Ashworth and Elaine Player, "Criminal Justice Act 2003: The Sentencing Provisions. " The Modern Law Review 68, no. 5 (2005): 822–38.
217. R v Cunningham (1993) 14 Cr App R (S) 444.

some provisions also extend to Northern Ireland and Scotland.[218] The Act is divided into eight parts having 168 sections and 12 schedules. Part 1 prescribes the powers of the court to defer the sentences. This power enables the courts to observe the conduct of the offender for a specified period before passing any sentence against him and then to adjust the sentence accordingly. This is a beneficial provision for offenders as it may contribute to minimizing the sentence if during observation period an offender makes any reparation to the victim or reflect other positive conduct. This part also empowers the court to send the case to any other suitable court for proper sentencing. Part II (sections 12 to 15) confers the power on court regarding absolute and conditional discharge where the infliction of punishment is deemed inexpedient. Mechanism of passing conditional discharge order and of attaching any condition thereto, are also regulated. Part III along with schedule 1 provides for rehabilitative sentencing of youth offenders by their referral to youth offending panels constituted under this part.

A detailed mechanism of community sentencing is provided under part IV. Eight types of different community sentences have been provided. These include community rehabilitation order and order to undergo drug testing and observe drug abstinence. In addition to community sentencing, provisions for reparation order are also available in this part. A court may pass a reparation order requiring the offender to make such reparation to the offender or community as may be ordered under this Act. A community sentence cannot be ordered unless the court is of the opinion that the offence or the offences of which an offender is convicted are serious enough to

218. Section 167 of the Powers of Criminal Courts (Sentencing) Act, 2000, UK.

warrant the community sentence.[219] This reflects that the community sentence is not the first choice in sentencing the offenders.

The imposition of custodial sentences is governed by Part V. It defines the different kinds of custodial sentences. The Act requires that the use of discretionary custodial sentence can only be made if the court is of the opinion that considering the nature of the offence, the only custodial sentence is justified.[220] Regarding the length of a discretionary custodial sentence, the Act guides that it should commensurate with the seriousness of the offence. In cases involving sexual or violent offences requirement of public protection is also to be considered. The Act also provides the procedure of early release of offenders sentenced to life imprisonment. It also provides the limit of the custodial sentence which a court of magistrate and crown court may pass. The imposition of the custodial sentences in violent and sexual offences is also regulated by this Act. The procedure and the safeguards in the imposition of custodial sentences against the young offenders are provided. The Act also provides for the imposition of enhanced sentences on repeat offenders. Provisions for passing suspended custodial sentences have also been made. It is provided that a suspended sentence will only be operative if an offender is convicted of any other offence during the suspension period. The detailed analysis of the provision of Part V reflects that the Act coupled with sentencing guidelines has tried to micro-manage the custodial sentences.

Part VI has regulated the imposition of financial penalties including fine. Part VII provides regarding further powers of the court to deal with property used in the crime, suspension of driving license and restitution orders. Part VIII enlists the factors to be taken into consideration in sentencing, the commencement of sentences and

219. Section 35 of the Powers of the Criminal Courts Act, 2000, UK.
220. Section 79 of the Powers of the Criminal Courts Act, 2000, UK.

mechanism of alteration of sentences. Minutes details provided in the Act justifies the claim of the judiciary that they have to trace the sentencing path from the maze of sentencing legislation.

3.6.4. Criminal Justice Act, 2003:

Sentencing provisions of this Act were analyzed by Ashworth and Player in detail.[221] They claim that two-third of its provision pertains to sentencing. Part 12 of the Act specifically deals with sentencing. The Statement of purposes of sentencing is of vital importance for a comprehensive sentencing system. Section 142 of the Act lays down five generic purposes of sentencing which are punishments of the offender, reduction of crime including its reduction by deterrence, reform and rehabilitation, protection of the public and reparation. Thus, in this Act, the legislature has tried to meet the requirement regarding the statement of sentencing purposes. However, as such no priority of purposes has been fixed. Ashworth and Player termed these purposes confusing and inconsistent. They argued that courts have been called upon to have regards of all these purposes in a case but these purposes may point in different directions. However, objections of Ashworth and Player are not the whole truth. The duty to have regard does not require the court to comply with all sentencing purposes in one case at the same time. Therefore, conflict in sentencing purposes can be addressed by the courts without much difficulty. There may be a better mechanism of stating sentencing purposes which may the address above mentioned objections, but mere specific statutory statement of sentencing purposes is a good achievement of this Act.

This Act has also laid down the sentencing principles in addition to sentencing purposes. However, unlike sentencing purposes, sentencing principles are not

221. Ashworth and Player, "Criminal Justice Act 2003."

separately stated under a specific head. The Canadian example of a separate statement of sentencing principles has been mentioned in Chapter 2 but that has not been followed in this Act qua sentencing principles. Section 143 of the Act require to adjust the sentence based on the seriousness of the offence and, therefore, incorporates the principle of proportionality in sentencing. Early guilty plea[222] has been mentioned as a mitigating factor while previous conviction, [223] re-offending during bail, [224]racial, religious[225] and sexual motivation[226] for the offence are aggravating factors. Totality principle also finds mention under section 166 (1), and 166 (3) of the Act. This Act also changed the mechanism of sentencing guidelines and brought forth Sentencing Guideline Council which has been superseded by Sentencing Council created under Coroners and Justice Act, 2009. Various amendments in this Act have also been brought by the subsequent legislations.

3.6.5. The Coroners and Justice Act 2009:

The Coroners and Justice Act is another important legislation dealing with the subject of sentencing. On substantive law on sentencing, part II of the Act has regulated the various defenses to the offence of murder.[227] Part IV of the Act specifically deals with sentencing. It has created Sentencing Council for England and Wales detail of which has been discussed in part 3.5.3, above. It provides the mechanism of sentencing guidelines to be chalked out by the sentencing council.[228]It also specifies the new compliance standard with sentencing guidelines. The courts can only depart from the guidelines if acting in line with the guideline will be contrary to justice. Functions of the council and its duties have already been discussed above,

222. Section 144 of the Criminal Justice Act, 2003, UK.
223. Section 143 (2) of the Criminal Justice Act, 2003, UK.
224. Section 143 (3) of the Criminal Justice Act, 2003, UK.
225. Section 145 of the Criminal Justice Act, 2003, UK.
226. Section 145 of the Criminal Justice Act, 2003, UK.
227. Section 52to 55 of the Coroners and Justice Act, 2009, UK.
228. Section 120 to 124 and 127 to 132 of the Coroners and Justice Act, 2009, UK.

therefore, there is no need to further dilate upon the impact of this legislation in England and Wales.

Legislation on sentencing in England and Wales is not static and there are multiple other legislations dealing with the subject. Domestic Violence, Crime and Victim Act, 2004 made the victim representation and protection in the sentencing process more pronounced. The Legal Aid, Sentencing and Punishment of Offenders Act, 2012, Criminal Justice and Courts Act, 2015 and Modern Slavery Act, 2015 are just a few more examples which have brought changes in the sentencing atmosphere in England and Wales.

3.7. Feature Filtering of English Sentencing System:

In the detailed theoretical discussion in Chapter 2, different features of the good sentencing system were highlighted. After laying down the broad spectrum of English sentencing system, it is pertinent to test the English model based on these features. There are more than a dozen features outlined in chapter 2. Each feature is applied to English model below.

3.7.1. Specific Sentencing Legislation:

The first feature of a good sentencing system as outlined in chapter 2 is the provision of specific sentencing legislation to deal with different sentencing issues. Instead of providing single and specific sentencing legislation, English sentencing system is on other extremes. Dozens of legislations are operating in the sentencing field which has actually muddled the same instead of clarification. Even the draft sentencing code as proposed is unable to serve as a single sentencing law due to various exceptions discussed under part 3.6.2 of this chapter.

Codification efforts of Criminal law in England and Wales have proved yet unsuccessful in spite of efforts of almost two centuries. Ashworth has rightly pointed

out that the English criminal justice system of which sentencing is a part, has not been planned as a system.[229] He points out that to call the English criminal justice system, a 'system' is only an aspiration and convenience as it has developed only in piece meals instead of as a single whole.[230] However, efforts of consolidation and codification of sentencing legislation are underway in the form of sentencing code discussed above. Thus English sentencing system in this area is at the stage of reform and experimentation and cannot be presented as a model to follow.

3.7.2. Statement of Sentencing Purposes:

As mentioned earlier in part 3.6.4, the Criminal Justice Act, 2003 specifically states sentencing purposes. Initially, sentencing purposes for adult offenders were stated specifically. However, through an amendment[231] sentencing purposes regarding offenders under-eighteen years were added. The first purpose of sentencing regarding adult offenders is the 'punishment of offender'.[232] This purpose incorporates desert base approach. It points out the punishment of the offender as an aim in itself without any reference to further utility or consequences. The second purpose of sentencing is the reduction of crime.[233] However, it specifically refers to deterrence as a means of achieving this objective. Deterrence as a sentencing rationale is consequential and preventive in nature.[234] Next sentencing purpose laid down by the legislature is reform and rehabilitation.[235] This purpose not only incorporates the reformatory sentencing rationale but aims further to rehabilitate the offender in society. Next sentencing purpose provided by the legislature is the protection of the public.[236] This

229. Ashworth, Sentencing and Criminal Justice, 2015, 75.
230. Ibid.
231. Criminal Justice and Immigration Act 2008, UK.
232. Section 142 (1) (a) of the Criminal Justice Act, 2003, UK.
233. Section 142 (1) (b) of the Criminal Justice Act, 2003, UK.
234. Ashworth, Sentencing and Criminal Justice, 2015, 83.
235. Section 142 (1) (c) of the Criminal Justice Act, 2003, UK.
236. Section 142 (1) (c) of the Criminal Justice Act, 2003, UK.

purpose may be used as an instrument of justification for extended sentences imposed against violent and sexual offenders and imprisonment or detention for public protection purposes.[237] Ensuring reparation by the offenders to the victims of the offence is one of the sentencing purposes. However, sentencing purposes regarding offenders less than eighteen years are bit different. The element of deterrence as mentioned regarding adult offenders has been removed from the list of sentencing purposes. Principal aim regarding offenders less than eighteen years is to prevent offending or re-offending by them. In spite of Ashworth objections regarding lack of clarity and absence of hierarchy in sentencing purposes[238] a specific statement of sentencing purposes is a laudable phenomenon in English sentencing system.

3.7.3. Statement of Aggravating, Mitigating Factors and Sentencing Principles:

Sentencing principles has not been stated in the English sentencing system with clarity. Ashworth has argued that to expect a list of sentencing principles drawn in a coherent manner is an oversimplification of the issue.[239] He asserts that sentencing principles and policies are a 'fluctuating body' and are put in use as per exigencies of penal environment. However, he has indicated six principles to be considered at sentencing as detailed in Chapter 2. Principle of proportionality is reflected in English sentencing system. Section 143 of the Criminal Justice Act, 2003, indicate the relevant consideration to assess the seriousness of the offence. This determination of the seriousness of the offence helps to pass proportionate sentences. Definitive guidelines on community and custodial sentences specifically point out proportionality in sentencing. These guidelines mandate that in borderline cases pertaining to imprisonment, the custodial sentence should not be imposed where its

237. Section 226 A to 230 and schedule 18 of the Criminal Justice Act, 2003, UK.
238. Ashworth, Sentencing and Criminal Justice, 2015, 82.
239. Ibid., 101.

impact on the dependents of the offender is disproportionate to the aim of sentencing.[240] This consideration also helps to ensure parity and equal impact in the sentencing by considering specific circumstances of the offender. Principle of parity is also given regard by requiring financial circumstances statement of the offender before imposing fine and by adjusting the fine accordingly.

Principle of parsimony requires that minimum punishment which is sufficient to meet the purposes of sentencing should be employed.[241]Compliance with this principle is manifest from the fact that community[242] and custodial sentences[243] which are higher on the sentencing ladder can only be imposed by excluding other options. It is also required that where a discretionary custodial sentence is to be awarded it should be for the shortest period which commensurates with the seriousness of the offence.[244]This provision also supports the principle of proportionality and parsimony. Principle of totality finds a specific mention in the sentencing guidelines. Guidelines on totality require that court while sentencing in multiple offences should pass a total sentence which is just and proportionate, considering the whole offending behaviour of the offender.[245] This reflects that though sentencing principles are not listed in any specific provision but they are interwoven in the sentencing legislation and guidelines. To augment the sentencing principles, legislative statement of aggravating and mitigating factors for the imposition of sentence is also necessary. English sentencing system meets this feature by providing a legislative indication of aggravating and mitigating factors. It is specifically provided under the English law that while

240. "Imposition of Community and Custodial Sentences- Definitive Guideline" (Sentencing Council, 2016). https://www.sentencingcouncil.org.uk/wp-content/uploads/Definitive-Guideline-Imposition-of-CCS-final-web.pdf.
241. Ashworth, Sentencing and Criminal Justice, 2015, 103.
242. Section 148 of the Criminal Justice Act, 2003, UK.
243. Section 152 of the Criminal Justice Act, 2003, UK.
244. Section 153 of the Criminal Justice Act, 2003, UK.
245. "Offences Taken Into Consideration and Totality- Definitive Guideline."

assessing the seriousness of the offence court must consider the extent of harm.[246] Thus, graver harm may serve as an aggravating factor in the sentence and vice versa lesser harm may also serve as a mitigating factor in the determination of the quantum of the sentence.

In determining the seriousness of an offence previous conviction also serves as an aggravating factor.[247] Commission of another offence, while being enlarged on bail is an aggravating factor.[248] The racial or religious or sexual orientation of the offence is also an aggravating factor in measuring the quantum of the sentence.[249] For determination of minimum term in cases of mandatory life sentences different aggravating and mitigating factors are mentioned in Schedule 21 of the Criminal Justice Act, 2003.

Sentencing guidelines list thirty-one aggravating factors of general application.[250] These guidelines also list provocation, illness, disability, tender age and minor role, remorse and cooperation with the authorities and guilty plea as mitigating factors.[251] These reflections adequately show that aggravating and mitigating factors are part of legislation and sentencing guidelines in England and Wales.

3.7.4. Fair and Separate Sentence Hearing:

Clauses 39 and 40 of the *Magna Carta* incorporated the principle of access to justice, rule of law and jury trial to ensure fair trial.[252] This right was further strengthened by the English Bill of Rights 1689 which ensured the independence of

246. Section 143 (1) of the Criminal Justice Act, 2003, UK.
247. Section 143 (2) of the Criminal Justice Act, 2003, UK.
248. Section 143 (3) of the Criminal Justice Act, 2003, UK.
249. Section 145 of the Criminal Justice Act, 2003, UK.
250. "Over Arching Principles: Seriousness."
251. "Aggravating and Mitigating Factors, " Sentencing Council, accessed December 13, 2017, https://www.sentencingcouncil.org.uk/explanatory-material/item/aggravating-and-mitigating-factors/.
252. "English Translation of Magna Carta, " The British Library, accessed December 13, 2017, https://www.bl.uk/magna-carta/articles/magna-carta-english-translation.

jury.[253] The function of the jury and the judge are separate in a jury trial. The function of the jury is to declare the accused guilty or non-guilty.[254] After the return of a guilty verdict of the jury, it is the judge's function to determine the appropriate sentence.[255] In all the serious cases, there is a mechanism of a jury trial. In this way provision of separate sentence hearing is automatically secured in the serious cases. The process of sentencing hearing explained by the sentencing council also reflects a proper hearing at the sentencing stage.[256] The mechanism of pre-sentence reports[257] regarding accused and victim impact statements[258] is also provided. In this way, English sentencing system materially reflects the feature of a fair and separate sentencing hearing.

3.7.5. Reasons and Explanation for the Sentence:

To provide a reason for the sentences imposed is a feature of good sentencing system. Section 174 of the Criminal Justice Act, 2003, binds the courts passing the sentence to give reasons for its sentencing decision. It requires that the statement of reasons must be in ordinary language. These reasons must be announced in open court. Above provision mandates that the court must also explain to the offender the effect of the sentence passed against him in ordinary language. Effect of failure to comply with any order or effect of failure to pay fine is also to be explained. Court has also to

253. English Bill of Rights 1689.
254. "Role of the Judge and Jury, " Legal Services Commission of South Australia, accessed December 13, 2017, http://www.lawhandbook.sa.gov.au/ch13s03s06s01.php.
255. Ibid.
256. "What Happens at a Sentencing Hearing?, " Sentencing Council, accessed December 13, 2017, https://www.sentencingcouncil.org.uk/about-sentencing/information-for-victims/what-happens-at-a-sentencing-hearing/.
257. Section 156 of the Criminal Justice Act, 2003, UK.
258 "Code of Practice for Victims of Crime" (Ministry of Justice, 2015), https://www.cps.gov.uk/legal/assets/uploads/files/OD_000049.pdf;"Criminal Practice Directions" (The Court of Appeal (Criminal Division), 2013), https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Practice+Directions/Consolidated-criminal/criminal-practice-directions-2013.pdf.

explain that how it used sentencing guideline applicable to the case of the offender.[259] Where the court declines to follow the sentencing guidelines on the ground that it will be contrary to the interest of justice, the court must also explain this conclusion. Likewise, where a reduced sentence is imposed due to guilty plea, even then this reduction in sentence is to be specifically stated.[260] Where mandatory life sentence is imposed, and any minimum term is to be decided after which the offender becomes entitled to release, the court must also explain this decision by stating reasons.[261] Likewise while fixing any starting point for sentence determination, the court has to record the reasons.[262] These safeguards reflect that judicial decisions regarding sentencing are to be explained at every step. Thus, the duty to record reasons and explain the sentences is quite pronounced in English jurisdiction.

3.7.6. Appellate Review:

Right to appeal is a form of judges' accountability.[263] History and scope of appellate review in England and Wales have been discussed in detail in part 3.3 and 3.4 above. Correction of sentences is a major part of the work of the Court of Appeal. Lord Thomas, the Lord Chief Justice of England and Wales explained that job of Court of Appeal (Criminal Division) is that "convictions which are unsafe are set aside, and sentences which are either manifestly excessive or unduly lenient are corrected. Convictions which are safe and sentences which are appropriate must be upheld".[264] This statement of the Lord Chief Justice clearly reflects that the Court of Appeal is not restricted to filtering of convictions but the rationalization of sentences

259. Section 174 of the Criminal Justice Act, 2003, UK.
260. Section 174 (7) of the Criminal Justice Act, 2003, UK.
261. Section 270 and Schedule 21 of the Criminal Justice Act, 2003, UK.
262. Section 270 and Schedule 21 of the Criminal Justice Act, 2003UK.
263. "The Right to Appeal, " Courts and Tribunal Judiciary, accessed December 13, 2017, https://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/right-2-appeal/.
264. "Court of Appeal (Criminal Division) Annual Report 2015-16, " Courts and Tribunal Judiciary, accessed December 13, 2017, https://www.judiciary.gov.uk/publications/court-of-appeal-criminal-division-annual-report-2015-16/.

is also an important task of the appellate court. An exhaustive right of appeal has been granted against conviction and sentences by the Criminal Appeal Act 1968. Right of appeal against sentence is specifically dealt with under section 9 to 11 of the said Act. To file an appeal against sentence certificate of the sentencing judge or leave of the Court of Appeal is required.[265] An offender sentenced by the magistrate on guilty plea has a right of appeal to assail his sentence before Crown Court.[266] However, if he does not plead guilty then he can assail both conviction and sentence in appeal.[267] Initially, the right of appellate review was provided to convicts only. Now even prosecution can assail unduly lenient sentences.

3.7.7. Fair and Non-Retrospective Sentences:

In the United Kingdom, the Parliament is sovereign. The Parliament can pass any law. Thus, at least notionally, Parliament can even pass a law allowing retrospective sentences. However, the Human Rights Act 1998 which is based on the European Convention on Human Rights prohibits retrospective sentences. Schedule 1 Article 6 of this legislation incorporates the right to a fair trial and, therefore, mandates fair sentencing. Article 7 in the above-mentioned schedule incorporates a ban on the retrospective enhancement of penalty. It states that "nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed".[268] In this way, a feature of restriction on the retrospective enhancement of sentences is also reflected in the English sentencing system.

3.7.8. Sanction Menu:

Sentencing choices with English courts are quite exhaustive. It is, therefore, appropriate to discuss these sentencing options one by one in brief.

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265. Section 11 of the Criminal Appeal Act, 1968, UK.
266. Section 108 of the Magistrates' Court Act, 1980, UK.
267. Section 108 of the Magistrates' Court Act, 1980, UK.
268. Schedule 1, Article 7 (1) Human Rights Act 1998, UK.

(i) Absolute Discharge:

An absolute discharge is relieving of accused from sentencing by the court without imposing any condition.[269] It means that no further action will be taken against the offender.[270] Discharge and particularly absolute discharge is based on the premise that the rub of criminal justice system which includes being caught, investigated and brought before the court is sufficient to meet the objectives of the sentencing in that particular case.[271] The Powers of Criminal Courts (Sentencing) Act, 2000 empowers the court to absolutely discharge the offender in an offence where the sentence is not fixed by law or case does not call for mandatory sentence.[272] Ashworth maintains that absolute discharge is the most lenient option which a sentencing court can take against a convicted offender. To have recourse to this option the court has to consider the nature of the offence and the character of the offender.[273] Use of absolute discharge is rare in England and Wales. Ashworth points out that this option is invoked in less than 1% of the cases and is particularly used where an element of moral guilt is slight.[274]

(ii) Conditional Discharge:

Next to absolute discharge in the hierarchy of sentencing options is the conditional discharge[275] of the offender which is used in the majority of cases. In 2013 around 61000 adult male and female were conditionally discharged.[276] By conditional discharge, the court may require the offender not to commit any offence

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269. "Absolute Discharge | Irwin Law, " accessed December 13, 2017, https://www.irwinlaw.com/cold/absolute_discharge.
270. "Sentencing and Rehabilitation, " accessed December 13, 2017, http://open.justice.gov.uk/how-it-works/sentencing-and-rehabilitation/#aa.
271. Peter Bowal, Callbeck Sean, and Brian Lines, "Absolute and Conditional Discharges in Canadian Criminal Law - LawNow Magazine, " accessed December 13, 2017, http://www.lawnow.org/absolute-conditional-discharges-canadian-criminal-law/.
272. Section 12 of the Powers of the Criminal Courts (Sentencing) Act, 2000, UK.
273. Section 12 (1) of the Powers of the Criminal Courts (Sentencing) Act, 2000, UK.
274. Ashworth, Sentencing and Criminal Justice, 2015, 3.
275. Section 12 to 15 of the Criminal Justice Act 2003, UK.
276. Ashworth and Player, "Criminal Justice Act 2003, " 4.

for a period up to three years from the date of the conditional discharge order. If during the period of conditional discharge, the offender commits another offence, then he is liable for the original sentence for the offence in which he was conditionally discharged.[277]

(iii) Fine:

Fine is the most common sentencing option used by the courts.[278] They are largely used in summarily triable offences.[279] Fines are usually imposed in less serious offences where custodial or community sentences are not suitable.[280] The wide use of this sentencing option is reflected from the fact that in England and Wales seventy-two per cent of the offenders in 2015 received fine as a sentence.[281] Power of Crown Court to impose fine is unlimited in indictable offences.[282] From March 2015 magistrates also have the power to impose the unlimited amount of fine.[283] To ensure proper determination of fine court after convicting the accused but before sentencing him, may require the accused to submit such detail of his financial circumstance as may be necessary for the determination of the amount of fine.[284] Courts are also required to fix the period of imprisonment for default of payment of the fine. However, commitment to prison for default in payment of fine can only be ordered if the court is of the opinion that the offender has sufficient means to pay the fine instantly.[285]

277. Section 12 (4) of the Powers of the Criminal Courts (Sentencing) Act, 2000, UK.
278. "Fines, " Sentencing Council, accessed December 13, 2017, https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/fines/.
279. Ashworth, Sentencing and Criminal Justice, 2015, 4.
280. "Sentencing and Rehabilitation."
281. "Fines."
282. Ashworth, Sentencing and Criminal Justice, 2015, 4.
283. Ibid.
284. Section 162 of the Criminal Justice Act 2003, UK.
285. Section 139 (3) Powers of Criminal Courts (Sentencing) Act, 2000, UK.

(iv) Community Sentence:

In England and Wales, a variety of options regarding community sentence are available. However, a community sentence cannot be resorted unless the court is of the opinion that offence is serious enough to use this sentencing option. Provisions regarding community sentences are mainly incorporated in in sections 199 to 215 of the Criminal Justice Act, 2003. There are more than a dozen different options of community sentencing which include unpaid work, rehabilitation requirement, curfew requirement and electronic monitoring etc.

(v) Custodial Sentences:

Custodial sentences are the sanction of last resort. Court has to exclude other options of financial and community penalties before resorting to this option. Custodial options in the England and Wales are imprisonment extending to 1, 3, 6, and 12 months, 2 years, 5 years, 7 years, 10 years, 14 years and life imprisonment.[286] However, the actual bite of custodial sentences has been further curtailed by providing that all persons undergoing the determinate sentence of imprisonment will be released after serving half a period of imprisonment.[287] Instead of passing immediate custodial sentence a court may also pass a suspended sentence if the period of imprisonment is not more than two years.[288] In spite of these safeguards regarding minimal use of custody, mandatory minimum sentences of imprisonment are also retained.[289]

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286. "A Guide to Criminal Justice Statistics" (Ministry of Justice, 2011), 28, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217725/criminal-justice-statistics-guide-0811.pdf.
287. Section 243 A of the Criminal Justice Act, 2003, inserted through Section 111 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, UK.
288. Section 189 of the Criminal Justice Act of 2003, UK.
289. Section 287 of the Criminal Justice Act, 2003 and Sections 110 and 111 of the Powers of Criminal Courts (Sentencing) Act, 2000 can be cited as an example.

In addition to the above main penal disposals, the award of compensation, restitution, reparation and victim surcharge are also provided as punitive and reparative measures.[290] The offender may also be derived from the property used or intended to be used in the commission of an offence.[291] Confiscation of other assets may also be ordered under the Proceeds of Crime Act 2002. Disqualification from deriving is also a form of penal sanction.[292] Ashworth has mentioned eighteen different preventive orders which may be imposed against a convict.[293] These penal options reflect the variety of penal disposals in the English sentencing system.

3.7.9. Sentencing Advisory Body:

The emergence of the sentencing advisory body in England and Wales has been discussed in detail in part 3.5 of this chapter. Presently Sentencing Council for England and Wales is the sentencing monitoring body for England and Wales. The aims of the sentencing council as reiterated in its annual report are:[294]

i) To promote a clear, fair and consistent approach to sentencing

ii) To produce analysis and research on sentencing and

iii) To work to improve public confidence in sentencing

Thus, the English sentencing system adequately reflects the feature of a sentencing monitoring body.

3.7.10. Sentencing Guidelines:

Responsibility of issuing sentencing guidelines is on the sentencing council. It has to issue guidelines in a different category of offences. Courts are bound to follow the guidelines issued by the sentencing council unless the result of the following

290. Ashworth, Sentencing and Criminal Justice, 2015, 380–81.
291. Section 143 of the Powers of Criminal Courts (Sentencing) Act, 2000, UK.
292. Section 146, 147 of the Powers of Criminal Courts (Sentencing) Act, 2000, UK.
293. Ashworth, Sentencing and Criminal Justice, 2015, 382–91.
294. "Sentencing Council Annual Report 2015/16" (Sentencing Council, 2016), 5, https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Counci-Annual-Report-2015-16_WEB_FINAL.pdf.

guidelines will be contrary to justice. The role of the sentencing council regarding sentencing guidelines has been discussed in detail in part 3.5.3. This reflects that the mechanism of sentencing guidelines is well developed in the English jurisdiction.

3.7.11. Sentencing Information:

The Secretary of State is under a duty to publish information regarding the administration of criminal justice.[295] The purpose is to inform the operators of the system regarding the financial implications of their decisions and to help them avoid discrimination based on any unlawful ground. Now the Secretary of State is also required to publish information regarding the effectiveness of sentences.[296] The objective of this sentencing information is to promote public confidence in criminal justice and to prevent re-offending. In addition to the above arrangement, the sentencing council is under a statutory duty to monitor the operation and effect of sentencing guidelines.[297] For this purpose, it collects information, analyzes it and draws a conclusion from it. In drawing its conclusions, the council has to see the rate and extent of departure by the courts from sentencing guidelines. It also publishes information regarding sentencing in its annual[298] and other periodical reports.[299] Statistical data on sentencing published by the Ministry of Justice also reflect very useful information on sentencing.[300] These sources on sentencing information reflect that in English sentencing system, a great deal of information on sentencing is collected and analyzed. Though there is no single and specific body to collect and

295. Section 95 of the Criminal Justice Act, 1991, UK.
296. Section 95 (1) of the Criminal Justice Act, 1991 added through the Criminal Justice Act 2003, UK.
297. Section 128 of the Coroners and Justice Act, 2009, UK.
298. "Sentencing Council Annual Report 2015/16."
299. Section 129 of the Coroners and Justice Act, 2009, UK.
300. "Criminal Justice Statistics Quarterly, England and Wales, April 2016 to March 2017 (Provisional) " (Ministry of Justice, 2017), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/638225/cjs-statistics-march-2017.pdf.

analyze all these informations on sentencing but collective efforts of the sentencing council and Ministry of Justice adequately serve this purpose.

3.7.12. Independence of Parole and Remission System:

The Parole Board in England and Wales was initially established in 1967.[301] However, presently its constitution and function are detailed in section 239 and schedule 19 of the Criminal Justice Act, 2003. The Board is a body corporate which is neither servant nor agent of the Crown.[302] It is an Executive Non-Departmental Government Body.[303] Its main functions are releasing entitled prisoners on probation or license and recalling the released prisoners if there is a violation of any condition. It also advises the Secretary of State on the matter referred to it pertaining to release or recall of prisoners.[304] The Board consists of the chairman and other not less than four members one of whom must be a judicial office holder. An appointment of members of the Board and determination of their perks is in the hands of the Secretary of State.[305] Stress on conditional release and preventive sentencing has enhanced the importance of the Parole Board.[306] After the determination of a judicial sentence, in the majority of cases, actual decisions regarding liberty or incarceration are taken by the Parole Board.[307]

The issue regarding the independence of the Parole Board was summarized by its chairman Sir Duncan Nichol. He argued that the Home Office is its sponsor and is also a party before it in the majority of cases which casts doubts on its independent

301. Criminal Justice Act 1967, UK.
302. Section 1, Schedule 19 Criminal Justice Act 2003, UK.
303. Patricia Londono, "The Executive, the Parole Board and Article 5 ECHR: Progress within 'an Unhappy State of Affairs'?, " Cambridge Law Journal 67 (2) (2008): 230–33.
304. Section 239 of the Criminal Justice Act 2003, UK.
305. Section 2and 3 of schedule 19 of the Criminal Justice Act, 2003, UK.
306. Rona Epstein, "Is the Parole Board Sufficiently Independent?, " Coventry Law Journal 12 (2) (2007): 20–27.
307. Ibid.

appearance.[308] The High Court has also held that structure of the Parole Board, lack of security of tenure of its members and relationship of the Board with its sponsoring ministry are the issues which compromise the independent appearance of the Parole Board.[309] This decision of the High Court was upheld by the Court of Appeal.[310] Keeping in view these issues 'Justice' (an independent organization on law reform and human rights) has also proposed to abolish the present system of parole in England and Wales.[311] It has proposed a parole tribunal within the judicial hierarchy, subjecting its decision to appellate review. Thus, the state of affairs regarding the independence of the parole board is not ideal.

3.8. Conclusion:

The sentencing regime in England and Wales is not a planned effort rather it is a result of a long evolutionary process. To reach the present stage it has passed through many phases. Principles of the English sentencing system are deeply rooted in the sentencing regime introduced in the Sub-continent at the time of colonization. The unsuccessful codification experience in England was successfully implemented in the Sub-continent. The same sentencing regime has been inherited by Pakistan substantially.

Though the complexity of sentencing legislation is a challenge in English jurisdiction but efforts are underway to address this issue by consolidation and codification of sentencing laws. Structuring and monitoring of the sentencing process by an independent sentencing body has been introduced. Mechanism of comprehensive sentencing guidelines and information has been developed. A fair

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308. "A New Parole System for England and Wales" (Justice, 2009), 17, http://www.nuffieldfoundation.org/sites/default/files/A%20New%20Parole%20System%20for%20England%20and%20Wales.pdf.
309. Brooke v The Parole Board [2007] EWHC 2036 (Admin), 2007 WL 2573864.
310. R v Parole Board of England and Wales [2008] 1 W.L.R. 1950.
311. "A New Parole System for England and Wales."

range of non-custodial sentences is provided. Efforts of the legislative statement of sentencing purposes, aggravating and mitigating factors have been made. However, sentencing principles are not clearly stated legislatively. Elements of separate sentence hearing, reasoned sentencing and protection against retrospective sentencing are provided. After a tardy process appellate review has also been developed, though not as vast as in Pakistan. Independence of early release process and parole has been a subject of judicial criticism, as structural independence of the Parle Board is not visible.

This shows that the English sentencing system reflects substantial compliance with the features mentioned in chapter 2, however, on some fronts further improvement is needed. Thus, the English sentencing system is not a perfect model to be followed, but many lessons can be learned from this for the improvement of Pakistani sentencing system. How far the Pakistani legislative sentencing scheme complies with these features analyzed above, is the subject of the next chapter.

CHAPTER 4

ANALYSIS OF LEGISLATIVE SENTENCING SYSTEM OF PAKISTAN

4.1. Introduction:

In chapter 2, certain features of a good sentencing system have been distilled. To gauge the practical implementation of aforesaid features, the English sentencing system has been analyzed in chapter 3. This chapter analyzes the legislative sentencing scheme in Pakistan. Penal laws are the main tools to structure the sentencing judicial discretion to ensure a fair trial. After incorporation of Article 10-A in the constitution, making the fair trial a justiciable fundamental right, the responsibility of the legislature to ensure fair sentencing has multiplied. How far this responsibility is being discharged by different legislative instruments in Pakistan will be analyzed in this chapter in the light of features mentioned in chapter 2.

This chapter is divided into three parts. Part I pertain to general constitutional principles governing sentencing which supplement and enhance the element of fairness in sentencing. After discussing the origin of the sentencing system of Pakistan, fundamental guarantees pertaining to the protection of laws, protection of life, liberty, dignity under sentencing process, protection against double jeopardy, self-incrimination, community sentence and clemency have been analyzed through the lens of a fair trial. It also discusses the constitutional courts and their role in developing sentencing jurisprudence.

Part II discusses the procedural element of sentencing. The discussion under this part is further divided into three heads. Under head one, the existing procedural

mechanism has been analyzed. It discusses the hierarchy of criminal courts and their sentencing powers, execution of sentences, benefit of pre-sentence custody, concurrent or consecutive running of sentences, appellate review, victimology remission and parole. Under head two those sentencing features have been discussed which are not specifically reflected in Pakistani legislative sentencing regime. These 'unmet sentencing features' are: (i) specific sentencing legislation, (ii) separate hearing on sentence, (iii) reasons for sentence, (iv) purposes and principles of sentencing, (v) sentencing advisory body, (vi) sentencing guidelines/information and independence of early release system. Under head three, scheme, scope and structure of proposed sentencing legislation in Punjab has been analyzed. Statement of purposes of sentencing, list of aggravating and mitigating factors, the function of a proposed sentencing council, factors to be considered at sentencing and issue of legislative competence has been discussed as reflected in this proposed legislation.

Part III analyzes the substantive sentencing regime in Pakistan. Pakistan Penal Code, 1860 (PPC), being the main penal statute, is the focus of discussion under this part. However, other important penal legislations like the Anti-terrorism Act, 1997 (ATA), Anti-Narcotic Act 1997 (CNSA), National Accountability Ordinance 1999 (NAO) have also been discussed. Sentencing options under the above mentioned and other sentencing laws have been enlisted. Sentencing options of the death penalty, imprisonment, forfeiture of property, fine, disqualification and denaturalization have been discussed. Alternate non-custodial sentencing regimes of discharge and probation have also been analyzed briefly.

Part I: Constitutional Principles

4.2. General Constitutional Principles Governing Sentencing:

The Constitution of Pakistan has protected certain features of sentencing which need to be analyzed and detail. For this purpose origin of the sentencing system in Pakistan will be traced. Protection of life, liberty, fair trial and dignity will be discussed. Scope of retrospective sentencing, double jeopardy, community sentencing and constitutional clemency will be analyzed. This part will also discuss constitutional courts and their roles in sentencing jurisprudence.

4.2.1 Origin of Sentencing System of Pakistan:

Understanding the constitutional principles on sentencing will not be easy without knowing the origin and background of the sentencing system of Pakistan. Adil has raised the question regarding present nature of criminal justice system of Pakistan and has questioned that whether it is based on common law, Islamic law or mixture of both.[1] He has argued that adherence to any single jurisprudence; either Islamic or English is not clear.[2] The English imprint on criminal justice and sentencing system of Pakistan is manifest from the discussion under chapter 3. The discussion under chapter 6 will reflect the extent to which the sentencing regime and jurisprudence is inspired by Islamic principles of justice and fairness. Due to Islamic currents in the jurisprudence of Pakistan, courts on occasions, have referred Islamic principles to even to interpret English legal rules.[3] A chain of legislative instruments has been enacted to incorporate Islamic criminal law along with an array of Islamic punishments.

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1. Kamran Adil, "The Jurisprudence of the Codified Islamic Law: Determining the Nature of the Legal System in Pakistan" 2, accessed November 12, 2002, https://sahsol.lums.edu.pk/law-journal/jurisprudence-codified-islamic-law-determining-nature-legal-system-pakistan.
2. Ibid.
3. Nazeer alias Wazeer v The State PLD 2007 SC 202. In this case, the court explained the value of retracted confession recorded on oath, in violation of Oath Act 1873, by referring to the principle of Islamic Law.

It is now evident that Pakistan's sentencing regime derives guidance partially from Islamic principles and partially from English jurisprudence. Except from Islamic legislations and legislative instruments of English period, a bulk of legislation has been added after the creation of Pakistan. Such legislations are mostly inspired from the English pattern of formalism but are based on local day-to-day needs. In this way, Pakistan's legislative regime is a mix of English principles, Islamic rules and local needs. However, the main body of the substantive sentencing regime is contained the PPC while procedures governing the same are mainly incorporated in the Cr.PC. These two codes along with other important legislations will be subject of analysis under this chapter.

Along with jurisprudential influences, the criminal justice system and its sentencing regime is also bound by the constitutional principles incorporated in the Constitution of Pakistan. A brief discussion on these constitutional principles is necessary before embarking upon the analysis of above-mentioned codes and statutes regulating and governing sentencing.

4.2.2 Protection of Laws:

Pakistan is governed by a written constitution. Rights of its citizens and any other person for the time being in Pakistan can only be abridged by validly enacted laws. Clear protection in this regards is provided in Article 4 of the constitution. To enjoy the protection of the law and to be treated in accordance with law is an inalienable right of every citizen. This is the only 'inalienable' right provided in the constitution. Protection in the area of criminal law is further strengthened by laying down that no action detrimental to the life, liberty, body, reputation or property can be taken, except in accordance with the law.[4] Sentencing is the heart of criminal law[5]

4. Article 4, Constitution of Pakistan.

where life, liberty, body and reputation are most often interfered. Thus, protection of law instead of mere discretion in this area is an inalienable right of every citizen of Pakistan. Article 4 of the constitution strengthens the need for fairness, rule of law and due process in the area of sentencing.

4.2.3. Life and Liberty:

The above constitutional requirement of protection of laws is further strengthened by the provision of different fundamental rights which are justiciable.[6] Based on these fundamental rights not only executive actions but even the legislative instruments can be knocked down if found violative of such rights.[7] First fundamental right under the constitution provides protection to life and liberty. The article provides that "no person shall be deprived of life or liberty save in accordance with the law."[8] The saving clause of this article is often operated through the mechanism of criminal law and more particularly by imposing sentences calculated to take away life or liberty. The capital sentence is meant to take away life while imprisonment deprives of liberty. Thus, sentencing directly relates to the rights of life and liberty, highlighted and protected under Article 9 of the constitution. Article 10 of the constitution provides procedural safeguards regarding the protection of liberty even prior to the sentencing stage.

4.2.4. Fair Trial:

Right to a fair trial has been elevated to the status of a fundamental right in the constitution of Pakistan by incorporating Article 10-A. Zafar argues that the right to a fair trial is the mother of all other fundamental rights. He maintains that Article

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5. Soman v The State of Kerala, (2013) 11 S.C.C. 382.
6. Article 199 and 184 (3), Constitution of Pakistan.
7. Article 8, Constitution of Pakistan.
8. Article 9, Constitution of Pakistan.

10-A is a constitutional codification of the judge made law.[9] Though fair trial as a fundamental right came in the constitution in 2010, but its principle were recognized even prior to it. The Supreme Court of Pakistan held almost five decades before that "it is a fundamental principle that the trial of an accused person should be conducted with the utmost fairness."[10] The august court also held that it is the duty of the High Court to see that there was a fair trial of the accused before passing a sentence.[11] This reflects the care for a fair trial in Pakistan even prior to fundamentalization of right to a fair trial. However, after incorporation of Article 10-A in the Constitution, any statutory requirement or omission which compromises the right to a fair trial can be struck down by the superior court on the force of Article 8 of the constitution.

Right to a fair trial is not only part of the constitution but is also part of important international instruments. It is reflected in the International Covenant on Civil and Political Rights, [12] the European Convention on Human Rights, [13] the African Charter on Human and Peoples Rights[14] and the American Convention on Human Rights.[15] The ICCPR has been signed and ratified by Pakistan; therefore, ensuring the right to a fair trial is also a binding international obligation of Pakistan.

Right to a fair trial provided in the constitution of Pakistan under Article 10-A does not mention different elements of a fair trial as depicted in the above referred international instruments, particularly Article 14 of the ICCPR. These elements include the right to be presumed innocent till proved guilty, right to know the allegation immediately, right to legal assistance and right to call witnesses for

9. Syed Ali Zafar, "Fair Trial-Prospects and Implementation, " 2014, http://www.plsbeta.com/LawOnline/law/contents.asp?CaseId=2014J8.
10. Noor Ahmad v State PLD 1964 SC 120.
11. Noor Ahmad v State PLD 1964 SC 120.
12. Article 14, ICCPR.
13. Article 6, ECHR.
14. Article 7, ACHPR.
15. Article 8, ACHR.

defense.[16] This list is not exhaustive but even these elements are not specifically part of Article 10-A of the constitution of Pakistan. To support this constitutional right of fair trial no specific supporting legislation has been enacted as yet. These omissions leave space for judicial interpretation of this article to supply the different elements of a fair trial. Quite recently the Supreme Court of Pakistan held that every person arrested must be provided an earliest opportunity to inform his family member of his arrest so he may arrange legal advice of his choice.[17] This opinion of august court reflects that how the right to a fair trial is being extended in Pakistan to include all elements of a fair trial resulting in fair sentencing. Hence, on the force of Article 10-A, now fairness in sentencing is a constitutional requirement in Pakistan.

4.2.5. Dignity and Sentencing

The Constitution of Pakistan through fundamental guarantees and prohibitions provides guidelines to a sentencing regime in Pakistan. Article 11 and Article 14 of the constitution sets out the outer limits on the nature of any punishment which may be prescribed by the legislature as a sentence. Article 11 (2) bans forced labour but Article 11 (4) as an exception to the general rule permits compulsory service from any person undergoing a punishment awarded under any law. However, the proviso to this sub-article further regulates the nature of such punishment. It requires that any such compulsory service should not be of cruel nature or against human dignity. Thus, Article 11 (4) strengthens the principle laid down in Article 14 of the Constitution of Pakistan that dignity of man shall be inviolable. Even the award of a sentence from a court of law is not sufficient to lift the veil of inviolability from human dignity. Even the dignity of convicted and sentenced person is to be protected as a constitutional principle.

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16. Article 14, ICCPR.
17. Said Zaman Khan v Federation of Pakistan 2017 SCMR 1249.

4.2.6. Retrospective Punishment and Double Jeopardy:

The discussion under chapter 2, clearly reflects that the ban on retrospective punishment is one of the features of a good sentencing system. This protection in Pakistan has not been left to ordinary legislation rather it is one of the fundamental rights provided in the constitution of Pakistan. Article 12 (1) (a) of the constitution of Pakistan clearly provides that no law can render any act or omission punishable which was not punishable at the time of its commission or omission. Article 12 (1) (b) even bans the retrospective enhancement of penalty. This provision has two limbs. Firstly, it bans retrospective enhancement of the penalty. Secondly, it bans retrospective change of the kind of penalty. This second element is unique in the constitutional sentencing scheme of Pakistan. This protection regarding change of kind of penalty is not specifically provided even in the international instruments like ICCPR, [18] and the European Convention on Human Rights.[19] These two instruments only ban heavier retrospective penalty but don't ban a different kind of the penalty. In this way the constitution of Pakistan is more advance and specific than these international instruments. However, ICCPR[20] specifically grants the benefit of a subsequent change to a lighter penalty to the offenders but this is not part of the constitutional sentencing regime of Pakistan. In addition to above constitutional protections, the Constitution of Pakistan also provides clear protection against double jeopardy and self-incrimination.[21] Protection from double jeopardy is also incorporated in the Code of Criminal Procedure[22] but its incorporation in the constitution has raised its status from ordinary legislative protection to constitutional protection.

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18. Article 15, ICCPR.
19. Article 7 (1), ECHR.
20. Article 15 ICCPR.
21. Article 13, Constitution of Pakistan.
22. Section 403, Cr.PC.

4.2.7. Community Sentence and Constitution:

Article 11 (4) also points towards the use of community service in the sentencing regime. This article while banning forced labour provides that "nothing in this article shall be deemed to affect compulsory service... by any person undergoing punishment for an offence against any law." The use of the word 'service' may be taken as constitutional support to introduce 'community service' as a mode of a sentence in Pakistan. At present no statute provides for community sentencing in Pakistan specifically. This article also validates the legislative scheme of rigorous imprisonment which involves compulsory labour by the person undergoing the sentence of imprisonment. However, any such labour must not be cruel in nature nor should it trample upon human dignity. Any legislative sentencing scheme or judicial sentencing order lacking compliance with these constitutional parameters, will not withstand the test of constitutional scrutiny.

4.2.8. Constitutional Courts and their Role in Sentencing Jurisprudence:

There are two sets of courts in Pakistan. One is the constitutional courts and other is the legislative courts.[23] Constitutional courts are those which are specifically mentioned in the constitution. These are the Supreme Court[24], High Courts and Federal Shariat Court.[25]These Constitutional courts have specific authority to adjudicate criminal cases and, therefore, have powerful say in the sentencing mechanism of Pakistan. Other courts are the creature of ordinary legislation. However, the source of creation of such other courts is also Article 175[26] in addition to the ordinary legislative power of the legislature. Appellate jurisdiction of the Supreme Court of Pakistan regarding different sentences has been provided in the

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23. Justice (R) Fazal Karim, Access to Justice in Pakistan, 1st ed. (Karachi: Pakistan Law House, 2003), 22.
24. Article 175, Constitution of Pakistan.
25. Article 203 –C, Constitution of Pakistan.
26. Karim, Access to Justice in Pakistan, 22.

constitution.[27] Likewise, revisional jurisdiction of Federal Shariat Court regarding power to check the appropriateness of sentences passed under Hudood laws is also provided by the constitution.[28]

As discussed in chapter 3, sentencing guidance and guidelines judgments of the Court of Appeal in England and Wales have precedent value. Therefore, these judgments of the Court of Appeal are followed by the subordinate courts. In Pakistan principle of precedent has a constitutional binding force. To follow the principles laid down by the superior courts is the constitutional duty of subordinate courts. Article 189 of the Constitution of Pakistan provides that any decision of the Supreme Court of Pakistan is binding on all other courts. Same principle regarding binding nature of High Court judgments upon its subordinate courts has been laid down in Article 201 of the constitution of Pakistan.

Munir has argued after discussing the chain of precedents that in criminal cases the rule of precedent is not as important as in other cases.[29] Above argument, being based on decisions of superior courts is true on its own place, but in the area of sentencing rule of precedent has shown a strong currency. In this regard *Ghulam Murtaza*[30]and *Ameer Zeb*[31] can be cited which are shaping the sentencing jurisprudence due to their precedent force. There is a constitutional scope for the superior courts to regulate and structure sentencing in Pakistan under the rule of precedent.

Another constitutional window for High Courts is the power to make rules to regulate the procedure and practice of subordinate courts as provided in Article 202 of

27. Article 185, Constitution of Pakistan.
28. Article 203 DD, Constitution of Pakistan.
29. Muhammad Munir, Precedent in Pakistani Law (Pakistan: Oxford University Press, 2014), 127.
30. Ghulam Murtaza v The State PLD 2009 Lah. 362.
31. Ameer Zeb v The State PLD 2012 SC 380.

the constitution. However, this power is subject to any law on the subject. How far this constitutional mandate of guiding through precedents and by rulemaking has been implemented qua sentencing will be discussed in detail in chapter 5.

4.2.9. Constitutional Clemency:

The final end of the sentencing process is also regulated by the Constitution of Pakistan by providing unfettered power of clemency to the head of state. Article 45 of the constitution provides unqualified power to pardon, reprieve, remit, suspend or commute any sentence passed by any court, authority or tribunal. The President is bound to act on the advice of the cabinet or prime minister under Article 48 (1). Therefore, this power of clemency actually vests in the executive branch of the government.[32] Executive nature of this power has recently been endorsed by the Supreme Court of Pakistan. This is a constitutional power and cannot be tested on the touchstone of other constitutional principles of separation of power and independence of the judiciary. Remissibility is one of the properties of punishment as mentioned by Bentham.[33] This power is also reflected in other constitutions such as the United States, [34] India[35] and Bangladesh.[36] In addition to the constitutional prerogative mechanism of remission, commutation and suspension of sentences by federal and provincial governments is also provided in Chapter XXIX of the Cr.PC[37] and section 54 and 55 of the PPC.

Above discussion of constitutional principle on sentencing reflects that several important features of a good sentencing system have been given constitutional

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32. Dr. Zahid javid v Dr.Tahir Riaz PLD 2016 SC 637.
33. Jeremy Bentham, An Introduction to the Principles of Morals and Legislation (Kitchener: Batoche Books, 2000), 157, https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/bentham/morals.pdf.
34. Article II Section 2, Constitution of the United States.
35. Article 72, Constitution of India.
36. Article 49, Constitution of Bangladesh.
37. Section 401 to 402 D, Cr.PC.

protection in Pakistan. However, the main bulk of penal and sentencing regime of Pakistan was enacted prior to constitutional age. How far the legislative apparatus has furthered the above mentioned constitutional principles and how well the sentencing mechanism has been dealt with is a subject of discussion hereunder.

Part II: Sentencing Procedures

4.3. Analysis of Legislative Sentencing Procedures:

Survey of legislative provisions cannot be completed without analyzing the substantive sentencing provisions contained in the PPC and procedural sentencing provisions in the Cr.PC. Offences under the PPC are to be investigated, inquired, tried and disposed of according to the provisions of the Cr.PC.[38] It is, therefore, imperative to analyze the important sentencing provisions of both the codes and other legislations which govern the procedure on sentencing. Analysis of the sentencing procedure is being done in three parts. In the first part, available legislative support on the sentencing procedure will be analyzed. In the second part, the vacuum in the sentencing procedure will be discussed. In the third part, a draft of sentencing legislation addressing some of these issues will be analyzed. However, substantive penal provisions of PPC and other statutes will be discussed separately.

4.3.1 Analysis of Existing Sentencing Procedure:

(i) Criminal Courts and their Sentencing Powers

Classes of criminal courts[39] in the Code of Criminal Procedure are as under:

1) Court of Sessions

2) Court of magistrates

Magistrates are further divided into four classes which are

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38. See Section 5, Cr.PC.
39. Section 6, Cr.PC.

i) Magistrate of the first class

ii) Magistrate of the second class

iii) Magistrate of the third class

iv) Special magistrates[40]

The Code of Criminal Procedure recognizes that other criminal courts may be created under different legislations.[41] Important other criminal courts which are created by other statutes are National Accountability Court, [42] Anti-Terrorism Court, [43] and Special courts under Control of Narcotic Substance Act.[44]

Powers of these courts to try offences and pass sentences are also specifically prescribed. High Courts are not a creature of the Cr.PC but their jurisdiction to try offences and power of passing sentences is also regulated by this code.[45]High Court and Court of Sessions may pass any sentence authorized by law. However, a sentence of death passed by Sessions Judge or Additional Sessions judge is subject to confirmation by the High Court.[46] This requirement is also applicable to the Anti-terrorism court[47] and Special Courts under the Control of Narcotic Substance Act.[48] Subject to the special provision contained in the laws creating these courts, procedure provided in Cr.PC is applicable to these courts. Modified application of the Cr.PC to regulate the procedure of these courts is also mentioned in these Acts.[49]

Powers of magisterial court to pass sentences are also specifically provided by the Cr.PC. Ordinarily, magistrate of the first class is empowered to pass sentence not

40. Section 14A, Cr.PC.
41. Section 29, Cr.PC.
42. Section 5 (g), NAO.
43. Section 13, ATA.
44. Section 46, CNSA.
45. Section28 and 29, Cr.PC.
46. Section 31, Cr.PC.
47. Section 30, ATA.
48. Section 47, CNSA.
49. Section 30, ATA.

exceeding three years.[50] Such magistrates are also empowered to impose daman, arsh and whipping, where penal offence so provides. Magistrates of the first class may be empowered to try all offences under PPC which are not punishable with death.[51] Enhanced sentencing power may also be conferred on such specially empowered magistrates under section-30, of Cr.PC. If so empowered, such magistrates may impose any sentence authorized by law except a sentence of death and imprisonment not exceeding seven years[52].

However, where there is a conviction under several offences at one trial then the magistrate can pass the sentence of imprisonment double than his ordinary powers.[53] In no case, such sentence of imprisonment should exceed fourteen years in a trial. In this way, a magistrate of the first class may pass sentence of six years imprisonment in a trial while magistrate empowered under section-30 of the Cr.PC may pass sentence of imprisonment not exceeding fourteen years in multiple offences at one trial against one accused, with the consecutive operation. Imprisonment in default of payment of the fine will be in addition to powers of magistrate mentioned in section-32 of the Cr.PC.[54] Magistrate of the second class may pass sentence of imprisonment not exceeding one year while magistrate of the third class may pass sentence of imprisonment not exceeding one month.[55]

There is no embargo on the powers of the High Court or Sessions Court to pass sentence of fine to any amount. However, such fine should not be excessive.[56] Powers of above mentioned special courts to impose fine is also unlimited. Powers of magistrate 1st Class, second class and third class are to impose a fine which may

50. See Section 32, Cr.PC.
51. See Section 30, Cr.PC.
52. See Section 34, Cr.PC.
53. See Section 35 (2), Cr.PC.
54. See Section 33, Cr.PC.
55. Section 32, Cr.PC.
56. Section 63, PPC.

extend to forty-five thousand rupees, fifteen thousand rupees and five thousand rupees respectively.[57]In addition to above, the power to send a reference to another competent court for proper sentencing is also available.[58]

(ii) Execution of Sentences:

Some guidelines regarding the execution of sentences are provided in Cr.PC.[59] Regarding mode of execution of the death penalty, it is specifically mentioned that sentencing order will direct that convict be hanged by the neck till death.[60] In this way, confusion has been removed in the manner of execution of the death penalty. On a reference from Session Court or special court, High Court has the power to confirm the death sentence, alter the conviction and sentence or acquit the accused.[61] However, ultimately Sessions Court or special court is responsible for the execution of the order of High Court in cases submitted for confirmation of sentence. Where death sentence is confirmed by High Court, Sessions Court issues the warrant for the execution of sentence of death.[62] To ensure the deterrent effect sentences passed under the Anti-terrorism Act are to be executed in the manner specified by the government to achieve that objective.[63]

High Court is empowered to suspend the sentence of death passed against a pregnant woman and may also commute the same to life imprisonment.[64] Commutation as per present sentencing scheme is an executive function but in case of pregnant women power of commutation has been granted to High Court. When the sentence of imprisonment imposed is less than one year, or it is imposed by the

57. Section 32, Cr.PC
58. Section 348 and 349, Cr.PC.
59. See Chapter XXVI, XVII, XXVIII, Cr.PC.
60. See Section 388, Cr.PC.
61. See Section 376, Cr.PC.
62. See Schedule V Form XXXV, Cr.PC.
63. Section 22, ATA.
64. See Section 382, Cr.PC.

following procedure under section 476 Cr.PC, then trial court may itself suspend the execution of sentence till the decision of appeal.[65] Courts have also been given a supervisory role over the execution of sentences. Executing officers are required to return the warrant of execution with an endorsement explaining the manner of execution of the sentence.[66] This provision reflects that courts have a supervisory role till the sentence is executed and terminated. The utility of this provision was also endorsed by the High Court.[67]

(iii) Consecutive and Concurrent Sentences:

Talking about the rule of the concurrent running of sentences, Ashworth argues that generally, offences committed concurrently should receive concurrent sentences.[68] He mentions that English courts generally follow this rule. However, he also admits that this is not a precise concept owing to different meanings which may be given to a single transaction.[69] This principle of the concurrent running of sentences is also recognized in Pakistan.[70] While passing sentence of imprisonment against an accused in a trial, for multiple offences, the court may order the concurrent running of sentences. In the absence of any such order of concurrent running of sentences, all the sentences will run consecutively, that means one after the expiry of the other. When accused is already undergoing a sentence of imprisonment and in a subsequent trial is again sentenced to imprisonment, such sentences will run consecutively unless the court directs their concurrent running with the previous

65. See Section 382-B, Cr.PC.
66. Section 400, Cr.PC.
67. Abdul Rauf v The State 2005 PCr.L.J. 162.
68. Ashworth, Sentencing and Criminal Justice, 2010, 265.
69. Ibid., 266.
70. Section 35 (1) Cr.PC.

sentence.[71] However, legislative guidelines on these provisions are not clear which sometimes result in prolonged custodial sentences.[72]

Above provisions impliedly incorporate the principle of the totality of punishment in the sentencing mechanism of Pakistan. This principle was judicially recognized in England in the 1970s.[73] It was held that the function of the court is not to do mere arithmetic and impose sum total of sentence for multiple offences. Court has to adjust the total sentence keeping in view the totality of criminal behaviour. Now, this principle is also recognized in 2003 Act[74] and sentencing guidelines issued by Sentencing Council of England and Wales (See chapter 3 part 3.5.3). Similar provisions recognizing this principle of totality are there in the Indian Code of Criminal Procedure, 1973.

(iv) Credit for Pre-sentence Custody:

The mechanism for credit of pre-sentence custody is provided in Pakistan.[75] Initially, it was discretionary for the court to consider the pre-sentence custody period while awarding the sentence of imprisonment. However, through an amendment, the word 'may' was substituted with 'shall' to make it mandatory for the court to consider the custody period before the sentence. This provision due to lack of clear guidance has also remained a subject of variant interpretation in a number of cases.[76] Parallel provisions in India and England provide a similar benefit but with more clarity. In India, a pre-sentence period of detention is to be set off against sentence passed.[77] In

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71. Section 397, Cr.PC.
72. For example, see Ali Fouzan v The State 2013 PCr.LJ 652. and Mst.Shahista Bibi v Superintendent, Central Jail Mach PLD 2015 SC 15.
73. Barton (1972) an unreported case as quoted in Ashworth, Sentencing and Criminal Justice, 2010, 271.
74. Section 166 (3), Criminal Justice Act 2003 UK.
75. Section 382 B, Cr.PC.
76. Shah Hussain v The State PLD 2009 SC 460. Human Rights Case No.. 4115 oF 2007, P L D 2008 SC 71 and Muhammad Rafiq v The State 1995 S C M R 1525, Rahib Ali v.The State 2018 SCMR 418.
77. Section 428 of the Code of Criminal Procedure, 1973, India.

England, a number of days of any pre-sentence custody regarding the offence is to be counted in the sentence to be served.[78] Clarity of phraseology of Indian and English provisions on the subject was also praised by the Supreme Court of Pakistan.[79]

(v) Appellate Review:

Right to appeal is not an inherent right and the Cr.PC has specifically mentioned that there will be no right of appeal unless provided by law.[80] The Cr.PC has provided a comprehensive mechanism of appellate review of sentences. Every person convicted and sentenced by a magistrate[81] or a Sessions Court[82] may appeal to the next higher forum to assail such conviction or sentence. Right to appeal against conviction and sentence awarded by High Court in its original jurisdiction has been provided where the same is not covered by appellate powers of the Supreme Court under Article 185 of the constitution.[83] Even in a case of the guilty plea, an offender can assail the extent and legality of the sentence.[84]

However, in some petty cases right to appeal has been curtailed. In cases where High Court passes sentence of imprisonment not exceeding six month or Sessions Court passes sentence not exceeding one month no appeal lies.[85] Similarly, where High Court imposes fine not exceeding two hundred or a Sessions Court or a magistrate first class impose fine not exceeding fifty rupees, no appeal will lie.[86] In summary, trial where magistrate imposes fine of rupees two thousand or special judicial magistrate imposes fine of rupees five thousand in price control cases, there

78. Section 87 of the Powers of the Criminal Courts (Sentencing) Act 2000 UK.
79. Muhammad Rafiq v The State 1995 S C M R 1525.
80. Section 404, Cr.PC.
81. Section 408, Cr.PC.
82. Section 410, Cr.PC.
83. Section 411-A, Cr.PC
84. Section 412, Cr.PC.
85. Section 41 3, Cr.PC.
86. Section 413, Cr.PC.

will be no appeal.[87]Above provision reflects that sentence of fine of rupees more than two hundred imposed by High Court is appealable while the summary sentence of fine extending to rupees five thousand by a magistrate is not appealable. This anomaly cropped up due incoherent amendment in the sentencing laws. While amending the amount of fine regarding magisterial sentences under sections 414 and 414-A, section 413 Cr.PC was not addressed.

Not only right of appeal against conviction and sentence has been provided but right to appeal against acquittal is also provided. This right to appeal against acquittal is not restricted to state but any aggrieved person from the acquittal may file an appeal.[88] Except the above process of appellate review, power of revision is also vested in High Court and Sessions Judge.[89] Through this power, both these forums can check the propriety of sentences passed by lower forums. This power is exercisable even *suo-moto*. If this power is vigilantly exercised, it may help a great deal in achieving uniformity and avoid inconsistency in sentences. As mentioned in chapter 3, the appellate review of sentences came in England after decades of efforts. However, in India and Pakistan, major existing appellate and revision mechanism came with the Cr.PC in 1898. Right to appeal has been specifically provided by special laws on anti-terrorism, [90]accountability, [91]narcotics[92] and illegal dispossession.[93] In any case, if the right of appeal is not provided against any sentence under any special law, it may be assailed in High Court through writ, in its constitutional jurisdiction.

87. Section 414 and 414-A, Cr.PC.
88. Section 417, Cr.PC.
89. Section 439, Cr.PC.
90. Section 25, ATA.
91. Section 32,, NAO.
92. Section 48, CNSA.
93. Section 8-A of the Illegal Dispossession Act, 2005.

(vi) Compensatory Justice:

Concept of compensatory justice by providing compensation to the victim was introduced initially by inserting section 544-A Cr.PC through the Code of Criminal Procedure (West Pakistan Amendment) Act, 1963. W.P. Act XI of 1963. Qisas and Diyat Law[94] (detail analysis of these provisions will be made in chapter 6) has also provided such a mechanism. Section 544-A Cr.PC provides a mechanism of compensation to the victim. It also provides the mechanism of recovery of such compensation and imprisonment for default of payment of the compensation awarded. Award of compensation under this provision is mandatory and the court can only avoid such compensation by recording the reason in writing. Death, personal injuries, mental anguish, psychological damage, loss or destruction of property has been covered by this provision. Court has to determine this compensation keeping in view the circumstances of the case. However, while incorporating this provision no mechanism to collect evidence regarding such losses was introduced. There is also no mechanism of collecting victim impact statement before imposing sentence or determining compensation. This lacuna makes the actual implementation of this provision difficult. The court can also apply fine to the payment of compensation.[95] In this way, the right of the victim has been given preference over the right of the state to collect proceeds of punishments as revenue.

(vii) Remission and Parole:

Remission system, under Pakistan Prison Rules 1978 (PPR), is a scheme whereby prisoner sentenced to more than four-month may become entitled to an early release, due to his good conduct or work.[96] Such release may occur when 1/3rd of his

94. See Chapter XVI of the PPC.
95. Section 545, Cr.PC.
96. PPR Chapter 8 Rule 199.

substantive sentence has yet to run.[97]Remissions under these rules are of two kinds, namely, ordinary and special.[98]Generally, special and ordinary remissions under PPR cannot be more than one-third of the substantive sentence but in exceptional and deserving cases, on the recommendation of Inspector General Prisons, Government may grant remission beyond one-third limit stated above.[99] In any case, ordinary and special remission cannot be more than to shorten the period of life imprisonment to less than fifteen years.[100] However, remissions granted for donating blood, [101]surgical sterilization, [102]passing examination[103] and special remissions granted under section 401 Cr.PC[104] are not covered by the above-stated limit of one-third of substantive imprisonment.[105]

In addition to above-mentioned remission system government is also empowered to release the prisoner undergoing the sentence of imprisonment on a licence issued under Good Conduct Prisoners' Probational Release Act, 1926.[106] While releasing any such prisoner, his antecedents and conduct in the prison are considered, to reach the conclusion that he is not likely to repeat the offence.[107] During the period of release, such prisoner is placed under the authority of servant of the state or secular institution or any other person professing the same religion.[108]

Above are the important regulatory procedure and safeguards on sentencing under the existing sentencing regime of Pakistan which reflect some of the sentencing features as discussed in chapter 2. Now it is pertinent to point out those sentencing

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97. PPRChapter 8 Rule 199.
98. PPR Chapter 8 Rule 200.
99. PPR Chapter 8 Rule 217.
100. PPR Chapter 8 Rule 217 (ii).
101. PPR Chapter 8 Rule 212.
102. PPR Chapter 8 Rule 213.
103. PPR Chapter 8 Rule 215.
104. PPR Chapter 8 Rule 218.
105. PPR Chapter 8 Rules 217 and 218.
106. Section 2 of the Good Conduct Prisoners' Probational Release Act, 1926.
107. Section 2 of the Good Conduct Prisoners' Probational Release Act, 1926.
108. Section 2 of the Good Conduct Prisoners' Probational Release Act, 1926.

features from the list given in chapter 2, which are specifically unmet in the legislative sentencing regime of Pakistan.

4.3.2. Unmet Sentencing Features in Pakistan:

From the analysis of sentencing procedures provided in the Cr.PC and other legislative instrument discussed above, following sentencing feature are specifically missing in the legislative sentencing regime of Pakistan.

(i) Specific Sentencing Legislation:

The main sentencing procedural provisions are contained in the Code of Criminal Procedure. However, the Code of Criminal Procedure is not specific sentencing legislation. It addresses several other issues regarding the investigation, law and order, and conduct of the trial. There are certain provisions regarding sentencing discussed above but several other issues are unaddressed as discussed below. No part or chapter is specified for sentencing provisions. Sentencing provisions are scattered throughout the Code. There is no other law in Pakistan, specifically addressing all the issues of sentencing. As discussed in chapter 3, the UK has dozens of sentencing legislations. Pakistan is on other extremes; wherein no specific sentencing statute has been promulgated to make the sentencing process coherent and structured.

(ii) Separate Hearing on Sentence:

Procedure for separate sentence hearing has not been specifically provided in the Cr.PC. As discussed in chapter 2, the provision of separate sentence hearing is an important element to ensure fair sentencing. In spite of incorporation of the right to a fair trial in the constitution, right of hearing at the sentencing stage has not been provided in Pakistan. In India, though the right to a fair trial is not one of the fundamental rights but the separate sentencing hearing has been provided in the new

Criminal Procedure Code.[109] In England, all serious cases are tried by trial through the jury. The jury determines the guilt while the judge imposes the sentence. In this way, the conviction and sentencing process are separated and the opportunity of sentence hearing is provided before the judge. Same is the position in the United States where trial through jury is a constitutional right.[110] Due to lack of separate sentencing hearing in Pakistan, there is no mechanism of summoning pre-sentence reports about the circumstances of the accused except in juvenile cases. In the absence of the pre-sentence report, individualization of sentencing becomes merely a guesswork.

(iii) Reasons for Sentencing:

Another vacuum in the sentencing process is the lack of specific requirement of recording reasons for the sentences. Reasons are the primary tool to make the sentences rational. They allow the offender to understand the rationale of the sentence imposed against him. Reasons enable society to understand the different sentences awarded to different offenders. Reasons are also tooled with the court to justify different sentences imposed against different offenders due to different circumstances of the offence or the offender. Importance of reasoned and understandable sentences has also been elaborated in chapter 2.

In England, courts are statutorily required to give reasons for the sentence imposed and also to explain the effect of sentences.[111] In Pakistan section 367 (5) require the court to specifically record the reason wherein a capital offence sentence of death is not imposed. However, there is no general statutory requirement to record the reasons for the sentence. Due to lack of requirement to provide reasons for the sentence, courts use maximum energy to justify the conviction but the sentence is rarely supported by reasons. Different judgments will be analyzed to specify the lack

109. Section 235 (2) the Code of Criminal Procedure, 1973 India.
110. Article III of the Constitution of the United States.
111. Section 174, Criminal Justice Act 2003, UK.

of reasons for sentences imposed, in chapter 5. This lacuna also tells upon the quality of the fair trial and fair sentencing in Pakistan.

(iv) Purposes and Principles of Sentencing:

Importance of legislative statement of purposes and principles of sentencing has been discussed in chapter 2. The legislative sentencing regime of Pakistan does not provide a specific statement of sentencing purposes and principles. Due to the absence of a clear legislative statement of sentencing purposes and principles superior court have supplied different purposes of sentencing. These judicially recognized purposes will be discussed in the next chapter. Reference to the principle of totality and proportionality in sentencing can be found in different provisions as discussed above but a clear statement of sentencing principle is also lacking in Pakistan. Thus, the legislative vacuum on the statement of sentencing purposes and principles is yet unfilled.

(V) Sentencing Advisory Body:

There are different players in the criminal justice system of Pakistan. Most important are courts, prosecution, police, prisons and correction services. All these bodies are dealing with the sentencing process from their own perspective. None of them is having a holistic approach of the sentencing process regarding its impact upon the offenders, victims and the society. There is no mechanism of assessing and promoting public confidence in the sentencing process. Even the Law and Justice Commission of Pakistan in its different reports has not devised any comprehensive scheme of monitoring and assessing the sentencing regime for reform purposes. To address these issues, in1980's a regime of sentencing councils and commissions were introduced in different jurisdictions. A brief discussion of this aspect has been made

in chapter 2. However, Pakistan has not yet introduced any such commission or council as a sentencing advisory body in its sentencing regime.

(vi) Sentencing Guidelines and Information:

As mentioned above there is no specialized sentencing body to assess, research and resolve sentencing issues in Pakistan. In the absence of such body, there is no mechanism of sentencing guidelines. There is also no mechanism to collect and analyze sentencing data as is being done in jurisdictions, like England and the United States. Area of sentencing guidelines has to some extent been covered by superior courts by providing guidance on sentencing in different judgments.[112] However, there is no specific law report covering such judgments. Some guidelines have also been provided under High Court Rules and Order framed under Article 202 of the constitution of Pakistan. Judicial guidelines and High Court Rules and Order will be discussed in chapter 5. Absence of sentencing guidelines issued by a specialized body and lack of sentencing data is also another vacuum in the sentencing system of Pakistan which affects the improvement process of the sentencing regime in Pakistan.

(vii) Lack of Independence of Early Release System:

The above-discussed remission system reflects that executive authorities have a major role in determining the real sentence of imprisonment. Ordinarily, executive authorities can reduce the judicial sentence to 1/3rd but in special cases, it may be even more than this limit. As the remission system is wholly in the hand of the executive authorities, therefore, independence of this process is not ensured. The discussion under chapter 3, reflects that Court of Justice of the European Union and United Kingdom House of Lords have criticized the executive role in early release decisions. In Pakistan, early releases through remission and parole are completely in the

112. For example Ghulam Murtaza v The State PLD 2009 Lah. 362 and Ameer Zeb v The State PLD 2012 SC 380.

executive hands instead of an independent body. This compromises fairness in the sentencing process.

After discussing the available legislative support on the sentencing procedure and identifying the missing features in the sentencing regime, it is now appropriate to discuss a specific legislation proposed in Punjab in 2015. The proposed legislation has yet not been tabled in the Provincial Assembly. However, it has been discussed at the government level and even assistance of the British High Commission was taken for its drafting. Therefore, a thorough analysis of this proposed legislation is necessary here.

4.3.3. Punjab Sentencing Act 2015 (Draft):

At the federal level, as yet, no manifest effort has been made to regulate the sentencing process. However, in Punjab, a draft bill has been proposed which specifically deals with sentencing issues. It is certainly, the first proposed law in Pakistan, reflecting 'sentencing' in its title.[113] Being the first law on the subject, it is understandable and appreciably brief.

(i) Scheme and Structure:

The draft legislation consists of six parts. Part I contains the title, scope and definition clauses. Part II provides general provisions about sentencing. Part III contains special sentencing provisions. Some procedural elements are mentioned in Part IV. Part V provides the establishment and functioning of the sentencing council. Part VI contains the miscellaneous provisions. A schedule is part of the bill which provides a sentencing table. This table divides all the imprisonment sentences into zone A to D. Minimum sentences are provided in zone A while maximum in zone D.

113. Punjab laws online http://www.punjablaws.gov.pk/index6.html accessed on 12-10-2017 and the Pakistan Code https://pakistancode.gov.pk/english/sHyuRiF accessed on 12-10-2017.

(ii) Scope:

This bill only addresses imprisonment sentences specifically and has left the regulation of other available sentences to the proposed Sentencing Council. It has specifically excluded capital punishment from its domain.[114] Considering the scope of discretion in the imposition of the death penalty this is a vital miss. No extension of the sentencing menu has been made and even the option of community sentences has not been added. Of course, other available sentences may be regulated by sentencing council guidelines but the provision of community sentences seems outside the scope of the sentencing council. These and other omissions and confusions mentioned below reduce the utility of this proposed legislation. However, it may be a good start and will have benefits of its own in streamlining the sentencing regime in Punjab, if enacted as a law.

(iii) Statement of Sentencing Purposes:

The bill proposes to legislate sentencing purposes in section 4. These purposes are:

(a) the punishment of offenders,

(b) the reduction of crime (including its reduction by deterrence),

(c) the reform and rehabilitation of offenders,

(d) the protection of the public, and

(e) the making of reparation by offenders to persons affected by their offences

The above purposes are borrowed from the Criminal Justice Act, 2003 UK and are the exact reproduction of section 142 of the said Act. For determination of sentence of an offence, it proposes to consider the above purposes of sentencing and

114. Section 3 (2) of the Punjab Sentencing Bill, 2015.

seriousness of an offence.[115] This approach reflects that while caring for other purposes of sentencing, the equal weight has been given to proportionality element in the determination of sentences. Sentencing purposes in the bill are not arranged in hierarchical order. This approach has been subject to criticism in England and Wales.[116] However, it is argued that lack of arrangement of sentencing purposes in preference order is not fatal to their utility. This objection qua sentencing purposes in England and Wales has been discussed in chapter 3, at part 3.6.4. Statement of sentencing purposes and guidance to determine the sentence by considering the purposes and seriousness of the offence will add rationality and consistency of approach in the sentencing outcomes.

(iv) Statement of Mitigating and Aggravating Factors:

In this bill, specific aggravating and mitigating factors of general application have been specifically stated.[117] However, if the offence is against the child, involve injury to the public, is religiously motivated or involve other terrorist activities special aggravating factors have also been mentioned.[118] It also provides the mechanism and extent of reduction of a sentence based on a guilty plea. It provides that if a guilty plea is made at an early stage then the court shall reduce the $1/4^{th}$ of the sentence.[119] Quantification of the reduction in sentence for a guilty plea is a good step in this bill.

(v) Custodial Sentences and Reasoned Sentencing:

This bill requires the court to first determine the appropriateness of custodial or any other sentence and record reasons for the same.[120] While imposing custodial sentences in zone A mitigating factors must be stated and while imposing a sentence

115. Section 5 of the Punjab Sentencing Bill, 2015
116. Ashworth and Player, "Criminal Justice Act 2003."
117. Section 7 of the Punjab Sentencing Bill, 2015.
118. Sections 8 to 12 of the Punjab Sentencing Bill, 2015.
119. Sections 12 of the Punjab Sentencing Bill, 2015.
120. Section 13 (1) of the Punjab Sentencing Bill, 2015.

in zone C and D, aggravating factors should be stated.[121] In this way, an indirect filter regarding custodial sentence has been brought. However, the use of a custodial sentence as a matter of last resort is not provided. The requirement of recording reasons to determine the appropriateness of any sentencing option is a good step to add rationality in the sentencing process.

(vi) Factor to be Considered at Sentencing:

The bill requires the court to consider medical and educational reports of the accused before imposing sentence.[122] However, no specific mechanism regarding summoning and the use of such educational or medical reports have been provided. Where court intends to impose a sentence of fine only, in an offence punishable with imprisonment option of more than 12 months, notice must be given to the prosecution.[123] However, without the mechanism of a separate sentence hearing, this may require the court to disclose its mind before the actual decision. This aspect has not been addressed in the bill. In addition to above steps, the court has also to keep in view any mandatory sentence, sentencing guidelines, the impact of crime on victim and sentences against other accused in the same case.[124]

(vii) Sentencing Council:

This bill also proposes to establish a sentencing council consisting of 5 to 7 commissioners.[125] No compulsory judicial representation has been proposed in the council. The commissioner may be serving or retired civil servants, judges and legal practitioners. Appointing authority is government and consultation with the provincial chief justice on such appointment is not proposed in this bill. Lack of judicial

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121. Section 13 (2) of the Punjab Sentencing Bill, 2015.
122. Section 14 (2) of the Punjab Sentencing Bill, 2015.
123. Section 15 of the Punjab Sentencing Bill, 2015.
124. Section 14 (1) of the Punjab Sentencing Bill, 2015.
125. Section 16 and 17 of the Punjab Sentencing Bill, 2015.

representation and failure to provide for consultation requirement with the provincial Chief Justice may also raise issues of judicial acceptability of this proposed body.

Functions of the council are to frame sentencing guidelines.[126] Council will also monitor and assess the impact of sentencing provisions and guidelines. It also has to give an impact assessment report, when desired by the government on any sentencing policy or legislation. It will publish information regarding sentencing practices of magistrates and Sessions Courts. It will also promote awareness on sentencing and will assess the impact of sentences on victims. It will endeavour to promote public confidence in sentencing and the criminal justice system. Courts are obliged to have regard to sentencing guidelines issued by the council and if the sentence of the court is beyond the guidelines, the court is obliged to give reasons for this departure.[127] Council is also obliged to publish an annual report of its functions.[128]

Functions of the proposed sentencing council are similar to the functions of Sentencing Council of England and Wales. Section 21 of the bill stating functions of the sentencing council is inspired by section 119, 120, 127 to 132 of the Coroners and Justice Act, 2009 of UK. Departure test regarding sentencing guidelines is also similar to one mentioned in the Criminal Justice Act, 2003, UK.[129] Courts are required to have regard to sentencing guidelines while sentencing. However, in England and Wales 'departure test' has been made more stringent. Now courts in England and Wales are required to follow sentencing guidelines unless the court is satisfied that it will be contrary to justice to follow such guidelines.[130]

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126. Section 21 of the Punjab Sentencing Bill, 2015.
127. Section 22 of the Punjab Sentencing Bill, 2015
128. Section 23 of the Punjab Sentencing Bill, 2015
129. Section 172 of the Criminal Justice Act, 2003, UK.
130. Section 125 of the Coroners and Justice Act, 2009, UK.

(viii) Issue of Legislative Competence:

A challenge of legislative competence is likely to be faced by any provincial legislation on sentencing. Article 142 (b) of the Constitution of Pakistan empowers Parliament and Provincial Assembly to legislate on criminal law, criminal procedure and evidence. The sentencing irrefutably falls in the domain of criminal law and procedure. However, Article 143 determines the issue of preference between federal and provincial laws in this area of the common domain. It provides that where parliament is competent to legislate then any act of provincial assembly whether enacted before or after, will be void to the extent of repugnancy. Thus, provincial legislation on sentencing and any sentencing body created under such law can only operate in an unoccupied field by the federal legislation. If any federal legislation is brought on sentencing then provincial legislation will give way in case of conflict.

The analysis of above-proposed legislation reflects that it has addressed many issues of sentencing in Pakistan as elaborated above. However, in spite of prolonged deliberation on this draft legislation, it has yet not seen corridors of the provincial legislative assembly. Even if enacted, it will address some issues of sentencing in the province of Punjab instead of the whole of Pakistan. In spite of shortcoming mentioned in the above discussion, the present draft will be a good addition in the sentencing armoury of Pakistan.

After discussing the procedural aspect, it is now appropriate to highlight niceties and problems is the substantive part of the sentencing system. This requires the analysis of sentencing options available with the court and legislative preference if any for such options.

Part III: Substantive Sentencing Laws

4.4. Analysis of Substantive Sentencing Laws:

In this discussion on the substantive aspect of sentencing, the main analysis will revolve around PPC. In addition to it, other important and frequently invoked statutes will be analyzed. These include the Control of Narcotic Substance Act, 1997 (CNSA), the Anti-terrorism Act 1997 (ATA) and the National Accountability Ordinance, 1999 (NAO). However, a reference to other penal statutes where needed will also be made.

4.4.1. Sentencing Menu:

The Pakistan Penal Code is the main penal statute in Pakistan. It provides a different kind of punishments. These kinds of punishments serve as a sentencing menu for the courts. Courts subjects to specific penal provision may choose one or more of these punishments as a penal response to the offending act of an offender. In the original PPC, the sentencing menu was bit limited. It provided the following six sentencing options:

(1) Death (2) Transportation (3) Penal Servitude (4) Imprisonment (a) igorous (b) simple (5) Forfeiture of Property (6) Fine

After several amendments now the Pakistan Penal Code provides following ten kinds of sentencing options:

> (1) Qisas (2) Diyat (3) Arsh (4) Daman (5) Tazir (6) Death (7) Imprisonment for life (8) Imprisonment which is of two descriptions namely (i) rigorous with hard labour (ii) Simple (9) Forfeiture of property (10) Fine[131]

In addition to the above sentencing options, some new options have also been added by different statutes. These include disqualification to hold public office, [132]

131. See Section 53, PPC.
132. Section 10 NAO.

disqualification to contest elections, [133] discharge and probation.[134]Under hudood offences, the punishment of whipping and stoning to death are also provided. Depriving of citizenship is provided as a kind of punishment under the Protection of Pakistan Act, 2014 (PPA). In addition to the above kinds of punishments, payment of compensation is also provided under section 544-A Cr.PC which has been discussed above. In the sentencing menu, the option of community sentencing and electronic monitoring are visibly absent. Now it is pertinent to discuss all these punishments one by one exploring their legislative reflection in different penal statutes. However, Islamic punishments enforced through different statutes will be discussed in chapter 6.

4.4.2. Death:

From discussion under chapter 3, regarding the bloody code, it transpires that almost two centuries ago, the death penalty was a societal response to most of the offensive actions. However, this trend gradually changed. The country which once treated the death penalty as a panacea to cure most of the criminal behaviour has ultimately abolished this kind of penal response. The death penalty has been abolished by all the countries who are members of the European Union. However, it is retained by the politically most influential countries like the United States and China. Pakistan, India and Bangladesh who inherited the same sentencing system have also retained the death penalty.

Presently death is the most severe form of punishment provided under the law.[135] Framer of PPC, originally Indian Penal Code, was of the considered view that

133. Section 10 NAO.
134. Section 4 and 5 of the Probation of Offenders Ordinance, 1960.
135. Lord Macauly, Speeches and Poems with the Report and Notes on the Indian Penal Code, vol. 2 (New York: Hurd and Houghton, 1867), 331, https://ia600206.us.archive.org/12/items/speechesandpoem00macagoog/speechesandpoem00macagoog.pdf.

the death penalty should be sparingly inflicted.[136] It is one of the sentencing options provided under the PPC.[137] In addition to the punishment of death as tazir, death is provided as an independent kind of punishment under sections, 121[138], 132[139], 194[140], 295 C[141], 354A[142], 364A[143], 365A[144], 367A[145], 376[146], 396[147], 402B[148] PPC. Punishment of death as tazir will be discussed in chapter 6. Except for the above-mentioned offences, the punishment of death may also be imposed for abetment and criminal conspiracy as provided under section 109 and 120 B PPC respectively.

In all of the above offences, alternate sentences of the death penalty are provided. These alternate options of death penalty vary drastically. These options include imprisonment for life and fine, [149] imprisonment for life and forfeiture of property, [150] imprisonment for life[151] or imprisonment which may extend to ten years and fine, with no minimum limit of the sentence of imprisonment.[152] The ATA provides punishment of death[153] with alternate punishment of life imprisonment[154] or life imprisonment and fine. Similarly, the death penalty is provided as punishment under CNSA wherein alternate sentences is imprisonment for life or imprisonment which may extend to fourteen years.[155]

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136. Ibid., 2:329.
137. Section 53 PPC.
138. Attempting or waging war or abetting waging of war against Pakistan.
139. Abetment of mutiny, if mutiny is committed in consequence thereof.
140. Giving or fabricating false evidence with intent to produce conviction of capital offences.
141. Use of derogatory remark etc.in respect of Holy Prophet (Peace be upon him).
142. Assault or use of criminal force to woman and stripping her of her clothes.
143. Kidnapping or abducting a person under the age of ten.
144. Kidnapping or abduction for extorting property or valuable security etc.
145. Kidnapping or abducting in order to subject the person to unnatural lust.
146. Punishment for rape.
147. Dacoity with murder.
148. Punishment for Hijacking.
149. Section 376 (IA) PPC.
150. Section 365-A and 402 B, PPC.
151. Section 132, PPC.
152. Section 194, PPC.
153. Section 7 (a), (e), (f), ATA.
154. Section 7 (e), ATA.
155. Section 9, CNSA.

Analysis:

Analysis of the above sections reveals that in none of the offences under PPC death is provided as sole punishment. In an offence under Section 295-C PPC, regarding derogatory remarks in respect of Holy Prophet (p.b.u.h.) the Federal Shariat Court has struck down the alternate punishment of life imprisonment.[156] Therefore, under this offence death is the sole punishment, although, on the statute book, alternate punishment of life imprisonment has not yet been omitted. Thus, with the aforesaid exception, the sentence of death is always coupled with alternate punishment. However, the scale of these alternative punishments is not uniform. In some offences alternate of death, punishment comprises of a mandatory minimum sentence of imprisonment[157]while in other offences there is no requirement of mandatory minimum sentences.[158] In some of the offences mentioned above alternative of death sentence is imprisonment which may be of any minimum period.[159] This lack of legislative cohesion without explained reason for such different choices makes the alternate punishments for death sentence arbitrary. Legislative tools for the structuring of discretion to impose a sentence of death or alternate punishment are not appropriately sharpen which contributes to the judicial disparity in sentences. The element of proportionality inter se different offences requires that a balance in the alternative choices of sentences may also be maintained.

The instance of regulating death penalty by prescribing aggravating factors can be found in the United States. In Federal laws, different aggravating factors have been listed and any one or more are to be proved for the imposition of the death

156. Muhammad Ismail Qureshi v Pakistan through Secretary Law and Parliamentary Affairs, PLD 1991 FSC 10.
157. Section 376 (1), PPC.
158. Section 367-A, PPC.
159. Sections 132 and 194, PPC.

penalty. These aggravating factors are different for different capital offences.[160] In different state laws, aggravating and mitigating factors for the imposition of the death penalty are also mentioned. In Arizona, there are fourteen aggravating factors, [161] in Georgia, there are eleven aggravating factor[162] while in the state of Colorado, there are seventeen aggravating factors indicating imposition of the death penalty. Anyone of such factors is to be proved for the imposition of the death penalty.[163]

There is another shift in the capital sentencing regime of Pakistan. The offences, for which capital punishment was not prescribed by the framer of PPC, have been made capital offences without any disclosed reasoning. Framers of the PPC did not prescribe the death penalty for robbery and rape on the ground that if the sentence for murder, rape, and robbery are the same, it will induce the offender to murder the victim to wipe out the evidence.[164]This prescription of lower sentences for rape and robbery was in line with Bentham's view. Bentham argued that when a man has resolved to commit an offence then the law should be so framed to induce him to do no more mischief than is necessary to serve his purpose.[165] Against this thoughtful

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160. **18 U.S. Code § 3592 - Mitigating and aggravating factors to be considered in determining whether a sentence of death is justified, https://www.law.cornell.edu/uscode/text/18/3592 accessed on 10-10-2017.**

161. Arizona Code Aggravating and mitigating factor for imposing death penalty https://www.azleg.gov/ars/13/00751.htm accessed on 10-10-2017.

162s. 2016 Georgia Code, GA Code § 17-10-30 (2016) . http://law.justia.com/codes/georgia/2016/title-17/chapter-10/article-2/section-17-10-30/ accessed on 10-10-2017.

163. 18-1.3-1201. The imposition of a sentence in class 1 felonies http://www.lpdirect.net/casb/crs/18-1_3-1201.html accessed on 10-10-2017 See also Death penalty information centre for further state-wise detail of aggravating factors https://deathpenaltyinfo.org/aggravating-factors-capital-punishment-state accessed on 10-10-2017.

164. Macauly, Speeches and Poems with the Report and Notes on the Indian Penal Code, 2:330–31.

165. Bentham, An Introduction to the Principles of Morals and Legislation, 2000, 140.

advice, PPC has been amended at different times. Now offences of rape[166] of different categories, kidnapping, [167] abduction[168] and hijacking[169] have been made capital offences. No counter-argument was presented to address the above comments of Bentham who heavily influenced the framers of the PPC/IPC.

The same anomaly runs in other important legislations which prescribe death as one of the sentencing options. Under Anti-terrorism legislation[170] the alternative of death sentence is imprisonment of life[171] or imprisonment of life and fine.[172] There is no legislative indication of cases in which death sentences is to be imposed. Same is the position under the CNSA. For possession of narcotic substance above one-kilogram offender may be punished with death or imprisonment for life or imprisonment which may extend to fourteen years.[173] However, to impose a sentence of death there is no explicit legislative guideline or indication. Likewise, under the explosive substances legislation, unguided discretion between death sentence and life imprisonment is provided.[174] This reflects that the death sentence which is the most severe form of punishment under the present sentencing regime is the least regulated penalty. It is true that a separate procedure of confirmation of death sentence from High Court is provided, but in the absence of clarity of aggravating factors requiring death penalty, the imposition of the death penalty is mainly an outcome of unguided discretion. Death penalty regime in Pakistan has been severely criticized by the Human Rights Committee in its concluding observations on the initial report of Pakistan.[175]

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166 Section 376 PPC.
167 Section 364-A PPC.
168 Ibid.
169 Section 402-B PPC.
170. The anti-terrorism Act, 1997.
171. Section 7 (e), ATA.
172. Section 7 (a) and (f) ATA.
173. Section 9 (c) CNSA.
174. Section 3 of the Explosive substances Act, 1908.
175. Human Rights Committee: Concluding observations on the initial report of Pakistan.https://docs.google.com/viewerng/viewer?url=http://hrcp-web.org/hrcpweb/wp-

However, the Committee's criticism mainly revolves around the non-compliance of the different commitments under the ICCPR. All the above-mentioned discrepancies in the administration of the death penalty are not discussed in the said observations. Execution of convicts tried by military courts is a serious issue but the mechanism of military courts has constitutional protection in Pakistan for a limited period.

4.4.3. Imprisonment:

Imprisonment is provided as an independent kind of punishment under PPC. Actually, PPC separately categorizes imprisonment for life and imprisonment.[176] Imprisonment is of two kinds namely rigorous and simple.[177] Historically, imprisonment was not an independent kind of punishment rather it was mean to keep the accused in the hands of law till the final decision was taken and the execution of actual punishment was carried out.[178] It is pertinent here to discuss sentence of imprisonment based on its length.

(i) Imprisonment for life and imprisonment for twenty-five years:

There are almost fifty-three offences[179] in PPC in which imprisonment for life is provided as one option of sentence for the courts. In all these offences, there are only two offences[180] in which imprisonment for life is provided as a sentencing option with additional punishment of fine. Life imprisonment as a sole sentencing option is provided only for the offence of defiling the copy of Holy Quran.[181] In twelve

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content/uploads/2017/07/CCPR_C_PAK_CO_1_28314_E.docx&hl=en_US accessed on 29-05-2018

176. Section 53, PPC.
177. Section 53, PPC.
178. History of Imprisonment, https://www.crimemuseum.org/crime-library/famous-prisons-incarceration//history-of-imprisonment/ accessed on 23-06-17.
179. See Section 121, 121-A, 122, 124- A, 125, 128, 130, 131, 132, 194, 195, 222, 225, 232, 238, 255, 295-B, 295-C, 302B, 311, 327, 336B, 354-A, 364, 364-A, 365-A, 365-B, 371, 376 (2), 377, 388, 389, 394, 395, 396, 400, 402 B, 402C, 409, 412, 413, 436, 438, 449, 459, 460, 467, 472, 474, 477, 489-A, 489-B, 489-D.
180. Section 327and 365-B, PPC.
181. Section 295 B, PPC.

offences, [182] imprisonment for life is provided as an alternative punishment for the punishment of death. In seven offences different period of a mandatory minimum sentence of imprisonment is provided as an alternative of imprisonment for life.[183] In one offence alternate punishment of life imprisonment may be fine only.[184] Period of imprisonment for life is also not clearly and directly stated. It has been provided that for calculation of the fraction of punishment, imprisonment for life will be treated as equal to twenty-five years.[185]

Though imprisonment for life is equal to twenty-five years but an independent category of imprisonment of twenty-five years has been provided in the PPC. Except for offences under Islamic law[186]there are five[187] offences in which imprisonment of twenty- five years has been prescribed in the PPC. In none of these offences, any mandatory minimum sentence has been provided, as is the case in life imprisonment.[188] The obvious reason for separate treatment of imprisonment for life and imprisonment for twenty-five years is that in life imprisonment discretion of the court to award lesser punishment is not available while in offence prescribing punishment extending to twenty-five years imprisonment, as such no barrier of mandatory minimum imprisonment exists, unless specifically so provided.

(ii) Other Imprisonment Offences:

In their commentary on Indian Penal Code published in 1863, Morgan and Macpherson[189] divided the offences punishable with a sentence of imprisonment into

182. Sections 121, 132, 194 (2), 295©, 302 (b), 311, 354-A, 364-A, 365-A, 367-A, 376, and 396 PPC.
183. See Section 311, 336-B, 364-A, 376, 394, 395, 396, and 436, PPC.
184. Section 124-A, PPC.
185. Section 57, PPC.
186. Section 302 (C), 303 (a), 308, 316, PPC.
187. Section, 367-A, 371-A, 371-B 376, 493-A PPC.
188. Sections 311, 336-B, 364-A, 376, 394, 395, 396, and 436 PPC mandatory minimum sentences have been provided.
189. W Morgan and A.G Macpherson, Indian Penal Code with Notes (Calcutta: G.C Hay & Co., 1863),

thirteen classes based on length of imprisonment. However, for brevity purposes, offences punishable with imprisonment are being discussed in five classes based on length of imprisonment.

(a) Offences punishable with imprisonment which may extend to fourteen years:

Afterlife imprisonment and imprisonment extending to twenty-five years, the next sentencing option provided under the PPC is imprisonment of fourteen years. It was the longest punishment provided under the original PPC as an option of twenty-five years imprisonment was introduced afterword.[190] Imprisonment of fourteen years as a sentencing option is provided in eleven[191]offences under PPC out of which two[192] are under Islamic law. In one offence it may be imposed as an alternate of death sentence or life imprisonment with a minimum barrier of seven years.[193]Two other offences in this category also provide mandatory minimum imprisonment of seven years with an additional amount of fine which may extend to rupees ten million.[194] In two offences providing a lesser sentence of imprisonment for a less aggravated form of crime, fourteen years has been provided for the most aggravated form.[195] In this way, graduation towards higher penalty has been provided within the same penal clause. It is the longest period of imprisonment provided under accountability law[196] and anti-narcotic law[197]

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https://ia601408.us.archive.org/28/items/indianpenalcode00macpgoog/indianpenalcode00macpgoog.pdf.

190. Ibid., 34.
191. Sections 115, 222, 311, 336 B, 337A VI, 364 A, 392, 457, 458, 462-B, 462 C PPC.
192. Sections 311, 337A VI PPC.
193. Section 364-A PPC.
194. Section 462-B and 462-C, PPC.
195. Section 392 and 457, PPC.
196. Section NAO.
197. Section 9 C, CNSA.

(b) Offences punishable with imprisonment which may extend to ten years:

There are more than seventy[198] offences in the PPC for which sentencing option of ten years has been prescribed. In the original PPC, there were fifty-one such offences.[199] In this category same terminology has not been used for all offences. In five offences[200] instead of the phrase 'which may extend to' phrase 'not exceeding than ten years' has been. There are three offences[201] in which ten-year imprisonment is the minimum sentence, among these, two offences fall under Islamic law, while one pertains to general law. Accountability law[202] and anti-narcotic law also provides the sentencing option of ten years imprisonment.[203]

(c) Offences punishable with imprisonment which may extend to seven years:

There are more than eighty[204] offences in PPC which provides punishment of seven years imprisonment. In five offences[205] seven years an imprisonment is a second option while imprisonment of life is the first option. In all these five offences, after providing the first option of life imprisonment, the second option is imprisonment which may extend to seven years. In this way, the gap between the first option and the second option is of eighteen years imprisonment. There are some

198. Sections 119, 121, 123, 123-A, 128, 130, 131, 132, 194 (1), 194 (2), 225, 232, 235, 238, 240, 251, 255, 295-A, 303 (a) 303 (b), 311, 324, 334, 336, 337-A (iii), 337 A (IV), 337A (V), 337D, 337J, 337K, 338 A (b), 364, 366A, 366B, 367, 371, 376 (1), 377, 382, 386, 388, 389, 392, 394, 395, 396, 399, 400, 409, 412, 413, 436, 437, 438, 439, 449, 450, 454, 455, 459, 460, 462-C, 462-E, 467, 489-A, 489-B, 489-D, 495and 489-A, PPC.
199. Morgan and Macpherson, Indian Penal Code with Notes, 34.
200. Sections 122, 225 (5), 371, 449 and 450 PPC.
201. See Section, 303 (a), 311, and 376 PPC.
202. Schedule Clause 3 (b) NAO.
203. Section 11, CNSA.
204. Sections 115, 118, 125, 126, 127, 134, 193, 195, 201 (1), 211, 213, 214, 216, 216-A, 219, 220, 221, 222, 225 (3), 225 (4) 231, 234, 243, 244, 245, 247, 249, 256, 257, 258, 259, 260, 281, 292-A, 292-C, 310, 324, 328, 337F (vi), 337 L (1), 338 C (c), 363, 364-A, 365, 369, 370, 377B, 380, 381, 381-A, 387, 393, 397, 398, 401, 402, 404, 406, 407, 408, 433, 435, 451, 452, 462-B, 462-F, 462-F, 462M, 466, 468, 472, 473, 474, 475, 476, 477, 477-A, 489-C, 489 G, 494, 496, 496-A, 498-B, 498-C, 505, and 505 (2), PPC.
205. See Sections 125, 472, 474, 475 and 477, PPC

offences with seven years imprisonment as an upper limit, which also provide a minimum sentencing barrier of not less than one year, [206] not less than two years, [207] not less than three years[208] and not less than five years.[209] The anti-narcotic law[210] and arms law[211] also reflect the option of seven years imprisonment.

(d) Offences punishable with imprisonment which may extend to five and four years:

There are more than twenty offences[212] in which option of five-year imprisonment has been used in different scenarios. Five years imprisonment is also an alternate sentence of fourteen years[213], ten years[214] and seven years[215] imprisonment. Imprisonment of five years is also provided as a minimum quantum of sentence in four offences.[216] Accountability ordinance mentioned above also provides five years imprisonment as a sentencing option in two offences mentioned in the Schedule. Presently no offence under PPC, CNSA or NAO opt four years imprisonment as upper maxima, however, it is a mandatory minimum sentence in offences pertaining to robbery and dacoity.[217]

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206. Section 292 A PPC where imprisonment option is from not less than one year up to seven years imprisonment.
207. Section 292-C and 435 PPC.
208. Sections 310, 498 B, and 498-C PPC.
209. Section 369-A PPC.
210. Section 9 b of the CNSA.
211. Section 13 of the West Pakistan Arms Ordinance, 1965.
212. Sections 153, 212, 239, 250, 253, 319, 324, 337A (iv), 337F (iv), 337 F (v), 337G, 369, 429, 430, 431, 432, 440, 457, 462-E, 496C, 498-A, and 500 PPC.
213. Section 457 PPC in case of theft.
214. Sections 324, 462 E and 498-A, PPC.
215. Section 369 PPC.
216. Section 324,, 369, 462 and 498-A, PPC.
217. Section 395 and 396, PPC.

e) Offences punishable with imprisonment which may extend to three years or below

There are more than one hundred and forty offences in which imprisonment option extending to three years[218] and two years[219] have been prescribed. In some offences imprisonment of three year is provided as alternate of seven year[220] and ten year[221] imprisonment. In two offences[222] three year imprisonment is a mandatory minimum sentence. In one offence[223] minimum imprisonment of two year is an alternate option for imprisonment for life while in other two offences[224] minimum imprisonment of two years is an alternate option of seven years imprisonment. In eighty-four offences, falling in this category option of imposing imprisonment or fine or both is available to the court. The CNSA also provide sentencing option of two years imprisonment.[225]

Other sentencing slabs in the PPC are one year for more than thirty offences, [226] six months for more than forty offences, [227] three months for twelve offences[228]

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218. Sections 117, 118 (2), 123, 124-A, 129, 133, 148, 152, 161, 162, 164, 165, 167, 171-j, 174, 181, 193, 201 (2), 205, 212, 213, 214 (2), 216 (2), 218, 221 (2), 222, 225 (2), 225-A (a), 233, 235, 237, 242, 246, 248, 252, 261, 263, 298-A, 298-B (2), 298B (1), 298-C, 310-A, 328-A, 337F (ii), 337 F (iii), 337H, 337 V, 338A (a), 344, 347, 348, 379, 384, 392, 404, 411, 414, 418, 436, 454, 456, 462, 462-H, 462-I, 462-K, 469, 484, 485, 487, 489-F, 498-C, and 509, PPC.

219. Sections 507, 506, 504, 502, 501, 500, 483, 465, 462L, 462 J, 461, 453, 451, 435, 428, 427, 424, 423, 422, 421, 403, 385, 377, 356, 355, 354, 353, 346, 345, 343, 337l (2), 337A (i), 329, 295, 292 C, 279, 270, 262, 254, 241, 229, 225A (b), 225, 224, 223, 221, 217, 215, 211, 210, 209, 208, 207, 206, 204, 203, 189, 177, 170, 169, 158, 153B, 147, 145, 144, 136, and 135 PPC.

220. Section 310-A, PPC.

221. Section 392 and 436, PPC.

222. Section 310-A, 392 and 436, PPC.

223. Section 377, PPC.

224. Sections 292-C and 435 PPC.

225. Section 9 (a), CNSA.

226 See Sections 153, 163, 166, 168, 171-E, 171-F, 190, 264, 265, 266, 267, 292-A, 296, 297, 298, 325, 328-A, 337F (i), 337 U (3), 337 V (2), 342,, 357,, 374 (i), 417, 434, 448, 482, 486, 489, 489-E and 508, PPC.

227 See section 120B (ii), 138, 143, 151, 153, 157, 158, 172, 173, 174, 176, 177, 178, 179, 183, 187, 188, 202, 225B, 228, 269, 271, 272, 273, 275, 276, 280, 282, 284, 285, 287, 288, 289, 291, 293, 294-A, 294-B and 462 D, PPC.

228 Sections 140, 171, 180, 186, 277, 292, 294, 337H (2), 452, 426, 447 and 491.

and one month for eleven offences[229]. The minimum sentencing option in the form of imprisonment is the punishment which may extend to twenty-four hours imprisonment.[230] However, an even lesser period of imprisonment may be imposed by ordering a sentence of imprisonment till rising of the court. In the majority of offences falling in this category option of imposing imprisonment or fine or both have been given without any visible parameters to structure this sentencing discretion.

(iii) Nature of Imprisonment:

It is provided in the PPC[231] that when an offender is punishable with imprisonment of either description, the court has the option to make it wholly rigorous or partially rigorous, partially simple or wholly simple. Imprisonment for non-payment of fine may be of any description[232] however, when the offence is punishable with fine only then imprisonment in default must be simple in nature.[233]

In PPC there are twenty offences[234] wherein the nature of imprisonment has not been described. In twenty-five offences[235] nature of imprisonment has been specifically made simple while in other twenty-five offences[236] imprisonment has been specifically declared rigorous. PPC empowers the courts to award solitary confinement[237] to convict where penal provision empowers the court to award rigorous imprisonment. This factor makes the legislative determination of the nature of imprisonment even more important. Under NAO all the imprisonments are

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229 Sections 160, 173, 174, 175, 176, 184, 185, 187, 188, 341and 358, PPC.
230 Section 510 PPC.
231. Section 60, PPC.
232. Section 66, PPC.
233. Section 67, PPC.
234. Sections 124-A, 153-A, 153-B, 303 (a), 303 (b), 366-A, 366B, 369-A, 371-A, 371-B, 462-D, 462-E, 462-J, 462-K, 462-L, 489-F, 496-B, 496-C, 505 and 509, PPC.
235. See Sections 129, 163, 166, 168, 169, 172, 173, 174, 175, 176, 177, 178, 179, 180, 187, 188, 223, 228, 291, 325, 341, 358, 501, 502 and 510 PPC.
236 Section 123-A, 194, 216, 364, 364-A, 367-A, 382, 392, 393, 394, 395, 396, 399, 400, 401, 402, 412, 449, 462B, 462C, 462F, 462H, 462I. 462M and 493A, PPC.
237. See Section 73 and 74, PPC.

rigorous. Under ATA some offences are punishable with imprisonment of either discerption[238] while regarding others there is no explanation of the discerption.[239]Under CNSA in none of the offences nature of punishment has been specified

Analysis:

As to nature of imprisonment, it is also quite strange that white-collar offences under NAO are punished with rigorous imprisonment while offences under ATA and CNSA which are a threat to society, may be punished with simple imprisonment. This reflects that there is no thought out legislative policy to make the selection of offences for rigorous or simple imprisonment.

The above discussion also reflects that there are some favourite numbers of the framers of the PPC which are 1, 2, 3, 5, 7, 10, 14, and 25. This choice of numbers also runs through other laws such as accountability, anti-narcotic and arms ordinance mentioned earlier. However, there are no criteria to ignore other numbers. This choice of numbers increases the magnitude of discretion without cogent reason and structuring parameters.

To regulate sentence of imprisonment there is no mechanism of sentencing guidelines. The trend of using mandatory minimum sentences has increased as a tool to regulate the sentencing discretion, however in absence of proper sentencing guidelines this device may prove counter-productive. Alternate choices of sentences, as discussed above, are so variant that they tend to render the prescribed maxima irrelevant and meaningless. The sentencing scheme is further confused by the haphazard amendment process. No comprehensive review of the PPC and other penal clauses has been made to align the above-mentioned imprisonment options. The

238. Section 7 (b), (c), (d) ATA.
239. Section 7 (g), (h), (i), ATA.

discussion under chapter 2, clearly reflects that the use of custodial sentence is now only used in most needed cases. However, in the imprisonment scheme discussed above, there is no mechanism of persuading the courts to use custodial sentences sparingly. Lack of options for community sentencing is also a factor for frequent use of custodial sentences.

4.4.4. Forfeiture of Property:

There[240] are five provisions in PPC[241] wherein forfeiture of property has been provided as a punishment. However, forfeiture of personal property of a convict is provided as a punishment only in two offences[242] which are, kidnapping or abduction[243] and hijacking[244]. For the offence of kidnapping mentioned above, the punishment of death is provided and an alternate is an imprisonment for life and forfeiture of property. Next offence for which punishment of forfeiture of property is provided is hijacking. Primary punishment provided for this offence is death but alternate punishment is imprisonment for life and forfeiture of property and fine. Thus, forfeiture of property is an additional punishment along with imprisonment for life, provided for the offence of high jacking.

In the second category of offences property acquired through the vehicle of offence or property used for commission of the offence is liable to forfeiture. Only two offences in PPC fall in this category.[245] Even knowingly receiving of such property is an offence and such property remains liable to forfeiture in the hands of such transferee. Property received by the public servant by buying or bidding where

240. Till Feb. 2017.
241. Sections 126, 127, 169, 365-A, 402 B, PPC.
242. Section 365-A PPC and 402-B, PPC.
243. Section 365-A, PPC.
244. Section 402-B, PPC.
245. Section 126 and 127, PPC.

he is prohibited by law to buy or bid is also liable to forfeiture.[246] Forfeiture of property is not a primary punishment under any provision of the PPC.

Punishment of forfeiture of property is also provided under anti-terrorism legislation.[247] Properties connected with terrorist activities may be for forfeited. Even the standard of proof for such forfeiture proceedings is satisfaction on reasonable grounds instead of beyond reasonable doubt.[248] The CNSA also provides the penalty of forfeiture of assets.[249] When any person is convicted for an offence under the CNSA and is sentenced to imprisonment exceeding three years, his all assets derivable from narcotic trafficking are forfeited.[250] The burden of proof has also been shifted upon the accused to prove that any such assets are not related to narcotics trafficking and are, therefore, exempt from penalty of forfeiture.[251] The NAO also provides forfeiture of property as part of the punishment. All assets and pecuniary resource which are beyond the known sources of income of convict or which are derived from ill-gotten money are liable to forfeiture. This sentence of forfeiture of assets is in addition to the sentence of imprisonment and fine. The above-discussed enactments reflect that forfeiture of property is a well-recognized penalty in the sentencing regime of Pakistan.

Analysis:

In offence of hijacking mentioned above, [252] the legislature has coupled the sentence of fine along with forfeiture of personal property without caring that when the property of the offender is forfeited then how the fine will be paid. Prescription of fine after forfeiture of property is a meaningless pecuniary penalty which will only

246. Section 169, PPC.
247. Section 7 (2) and 11 Q, ATA.
248. Section 11R, ATA.
249. Section 39, CNSA.
250. Section 19, CNSA.
251. Section 19 and 39, CNSA.
252. Section 402 B, PPC.

add to a custodial sentence. Though detailed guidelines to affect forfeiture are lacking but the standard of proof regarding the imposition of this penalty has been specifically provided in the enactments mentioned above. In this way, the legislative guideline to regulate this sentencing option is more visible than the death penalty discussed above.

4.4.5. Fine:

Fine is the most profusely provided kind of punishment under different provisions of PPC and other laws. It is reflected as one kind of punishment in about 410 provisions of the PPC. This requires a deeper analysis of penal provisions of the PPC where fine is provided as sole, alternate or additional punishment. The author of the Indian Penal Code, Lord Macauly observed that fine as a punishment is common in all parts of the world.[253] His romance with this sentencing option was so great that he intended to provide it in every case.

Izzat Ullah maintains that fine as a form of the sentence is adaptable and less-complicated.[254] He adds that fine as a mode of punishment is inexpensive, socially less cumbersome and carries a little stigma as compared to other sanctions.[255] Due to the above attributes, it is a popular mode of punishment in other jurisdictions as well.[256] Pat[257] summarizes Bentham's views and states that fines as a penalty are liberal, tailorable, reversible, physically un-coercive, cost-effective to administer and take away pleasure rather than inflicting pain. He states that fine is a porous sanction and should be imposed against those who are not dangerous. Kameswari and Rao, [258] also proposes that while imposing fine, nature and subject matter of the offence,

253. Macauly, Speeches and Poems with the Report and Notes on the Indian Penal Code.
254. Izzat Ullah, "Sentence Structure of Penal Laws as Applied in India and Nigeria: A Comparative Study" (PhD, Aligarh Muslim University, 2003), 224, http://shodhganga.inflibnet.ac.in/handle/10603/52354.
255. Ibid.
256. Ibid.
257. Pat O'Malley, "Theorizing Fines, " Sydney Law School Research Paper No. 09/85 II (2009): 67–83.
258. G Kameswari and Nageswara Rao, "The Sentencing Process-Problems and Perspective, " Indian Law Institute 41 (n.d.): 452–59.

nature of injury caused to the victim, financial circumstances of the offender and profit gained from the offence should be considered. In modern days when an accumulation of wealth is the major cause of crime, properly administered punishment of fine is a good sentencing technique. It on one side stigmatizes the offender and on the other side may contribute to making up the loss caused to the state.

(i) Fine as a Sole Punishment:

There are only twelve offences[259] in the PPC which are punishable with fine only. In eight offences[260] the maximum amount of fine has been mentioned. In four offences[261] amount of fine has not been fixed. In offences where no upper ceiling of the fine is fixed, the amount of fine imposed against the offender may be unlimited, but cannot be excessive.[262] In this category of offences, three slabs of fine have been mentioned which are 600, 1500 and 3000 rupees. In offences mentioned above, the amount of fine was revised through an Ordinance in 2002[263]. In fact this Ordinance was based on report No. 39 of the Law and Justice Commission of Pakistan. The fixed amount of fine was enhanced two times to meet the requirement of changing time but no mechanism was developed to regularize the amount of fine in future.

(ii) Fine as an Alternative Punishment:

Fixed amount of fine is provided as alternative punishment in almost Sixty-two offences[264]. Analysis of above-mentioned offences reflects that alternate punishment of fine varies drastically. For one month of imprisonment, alternate

259. Sections 137, 154, 155, 156, 171-E, 171-G, 171-H, 171-I, 263-A, 278, 283 and 290 PPC.
260. Sections 137, 154, 171-H, 171-I, 263-A, 278, 283, and 290 PPC.
261. Sections 155, 156, 171-E and 171-G PPC.
262. Section 63, PPC.
263. The Criminal Laws Reform Ordinance, Ordinance, 2002 No.LXXXVI of 2002.
264 Sections 140, 160, 171, 171-J, 172 (i), 172 (ii), 173 (i), 173 (ii), 174 (i), 174 (ii), 175 (i), 175 (ii), 176 (i), 176 (ii), 176 (iii), 177, 178, 179, 180, 183, 184, 185, 186, 187 (i), 187 (ii), 188 (i), 188 (ii), 228, 241, 272, 273, 274-, 275, 276, 277, 279, 280, 282, 284, 285, 286, 287, 288, 289, 292-A, 292-C, 341, 342, 352, 357, 358, 447, 448, 462-D, 462-E, 462H, 462-I, 462-J, 462-K, 462-L, 491, and498-A.

punishment of fine is 300[265], 600[266], and 1500[267] rupees. For three months of imprisonment, alternate punishment are 600[268] and in 1500[269] rupees of fine. Punishment of fine of rupees 1500 is available as an alternative punishment for one-month imprisonment[270] and also for three months imprisonment.[271] For twenty-five[272] offences alternate punishment of fine for the imprisonment of six months is 3000 rupees. However, in a newly added offence[273] for a sentence of six months, imprisonment alternate punishment of fine is rupees one-hundred-thousand.

Fine of rupees 3000 is alternate punishment for imprisonment of one year in three offences.[274] In another offence, rupees fifty thousand is alternate punishment of one-year imprisonment.[275] For an offence under section 279 PPC alternate punishment for two-year imprisonment is 3000 rupees. For the same period of imprisonment section, 462-J prescribes fine of one million while section 462-L prescribes fine of 2.5 million as an alternate punishment. Section 171-J provides fine of rupees five lac, section 462-I provided fine of rupees three million, section 462-K provides fine of rupees six million while section 462-H provides fine of rupees ten million as an alternate of three years imprisonment.

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265. Section 160 PPC.
266. Sections 185, 187 (ii), 188 (i), 358 PPC.
267. Sections 172 (i), 173 (i), 174 (i), 175 (i), 176 (i), 184 and 341 PPC.
268. Sections 171 and 491 PPC.
269. Sections 140, 180, 277, 352and 447 PPC.
270. Sections 172 (i), 173 (i), 174 (i), 175 (i), 176 (i), 184 and 341 PPC
271. Sections 277, 352 and 447 PPC.
272. Sections 172 (ii), 173 (ii), 174 (iii), 175 (ii), 176 (ii), 176 (iii), 177, 178, 179, 183, 187 (ii), 188 (ii), 228, 2272, 273, 274, 275, 276, 282, 284, 285, 286, 287, 288, and 289.
273. Section 462-D PPC.
274. Sections 342, 357 and 448 PPC.
275. Section 186, PPC.

(iii) Fine as an Additional Punishment:

There are a number of offences[276] in PPC in which along with the punishment of imprisonment, fine is provided as a compulsory additional punishment. From offences relating to marriage, [277] to offences against the state[278] and public justice[279] additional punishment of fine has been prescribed. Additional punishment of fine is provided in compoundable, [280] non-compoundable[281] cognizable[282] and non-cognizable[283] offences. Fine is provided as additional punishment along with rigorous imprisonment of twenty-five years, [284]with life imprisonment, [285]and also along with the imprisonment of two year.[286]

(iv) Imprisonment in Default of Payment of Fine

Imprisonment in default of payment of fine, when the offence is punishable with fine only, is provided in section 67 of PPC.[287] This section has survived in its original form since 1860.[288] It prescribes that when the offence is punishable with fine only, imprisonment in default thereof will be simple as per the following scale.

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276. Sections 115, 115 (2), 118, 118 (2), 121, 121-A, 122, 123, 123-A, 126, 127, 128, 129, 130, 131, 132, 133, 134, 181, 193, 193 (2), 194, 194 (2) 201, 201 (2), 209, 211 (2), 211 (3), 212, 212 (2), 213, 213 (2), 214, 214 (2), 216, 216-A, 225 (2), 225 (3), 225 (4), 225 (5), 231, 232, 233, 234, 235, 235 (2), 237, 238, 239, 240, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 255, 256, 257, 258, 259, 295-C, 298-B, 298-C, 310-A, 324, 327, 344, 347, 348, 354-A, 363, 364, 365, 365-B,, 366-A, 366-B, 367, 367-A, 369, 371, 371-A, 371-B, 376, 376-A, 377, 377-B, 380, 381, 381-A, 382, 386, 387, 388, 389, 392, 392-A, 393, 394, 395, 396, 399, 400, 401, 402, 404, 407, 408, 409, 412, 413, 420, 435, 436, 437, 438, 439, 440, 449, 450, 451, 451-A, 452, 453, 454, 454-A, 455, 456, 457,, 457-A, 458, 459, 460, 462-B, 462-C, 462-F, 462-M, 466, 467, 468, 469, 472, 473, 474, 474-A, 475, 476, 477, 484, 489-A, 489-B, 489-D, 489-G, 493, 493-A, 494, 495, 496, 496-A, 496-B, 496-C, 498-B, 498-C and 505 PPC.
277. Chapter XX –Offences Relating to Mariage, PPC.
278. Chapter VI-Offences against Public Justice, PPC.
279. Chapter –XI False Evidence and Offences against Public Justice, PPC.
280. For instance section 324, PPC.
281. For instance section 121, PPC.
282. For instance section 131, PPC.
283. For instance section 121, PPC.
284. For instance section 367-A and 493-A, PPC.
285. For instance section 121 and 295 C, PPC.
286. Section 209 PPC.
287 As per section 25 of the General Clauses Act, 1897 sections 63 to 70 of the PPC are applicable to levy of fine and any enactment, bye-law, regulation or rules for the time being in force until such procedure is not provided in such enactment or bye-law etc.
288. Morgan and Macpherson, Indian Penal Code with Notes.

Not exceeding two months	When the amount of fine not exceeding fifty rupees
Not exceeding four months	When the amount of fine not exceeding a hundred rupees
Not exceeding six months	In any other case

Law and Justice Commission of Pakistan in its report No. 65 issued in 2004, proposed the revisit of this section. However, this proposal has yet not been answered by the legislature.

Punishment of fine is also provided as alternate and additional punishment in CNSA.[289]Where no upper limit of the fine is fixed under CNSA court will impose the fine keeping in view the quality and quantity of narcotic substance.[290]It is also provided as an additional punishment under anti-terrorism[291] and accountability[292] laws.

Analysis:

The above discussion reflects that legislative scheme regarding the sentence of fine is lacking coherence. This is particularly visible in fixing the amount of fine and alternate period of imprisonment for such a sentence of fine. Amending statutes have further compromised the element of consistency in fixation of the amount of fine. Call of the framer of IPC to update the legislation regularly was not heeded properly.[293]Instead of comprehensive revision, piecemeal amendments were introduced without any care of the existing legislative scheme.

289. Section 9, CNSA.
290. Section 18, CNSA.
291. Section 7, ATA.
292. Section 10 and schedule of NAO.
293. Macauly, Speeches and Poems with the Report and Notes on the Indian Penal Code, 2:325–26.

There are more than two hundred provisions[294] in PPC wherein court has been provided discretion to impose a sentence of imprisonment, or fine or both. As such no guidelines have been provided legislatively to guide the courts regarding scenarios where imprisonment or fine or both are to be imposed. In spite of this three-tier discretion in sentencing, no navigational tool has been provided to the courts by the legislature. Scanning of above-referred provisions also reflects that there is no settled criterion based on which fine has been provided as a sole, additional or alternative punishment.

4.4.6. Disqualification:

Under the NAO sentence of disqualification to hold public office and to contest election has been added in the sentencing regime of Pakistan.[295]This disqualification has two parts. First part is that after conviction under section 9 of the NAO, the convict will cease to hold public office which he was holding before conviction. Secondly, he will be disqualified to seek his election as a representative of any public body, local body or local authority. He will also be disqualified to seek his appointment in service of Pakistan or any province. This disqualification will be for a period of ten years from the date when he served out his sentence and is released. There is no explanation as to why the sentence of disqualification will remain to sleep and will start operation once accused is released. This is a sort of legislative suspension of disqualification penalty against the interest of accused, without his request. Constitution of Pakistan while prescribing the disqualifies to remain a member Parliament has also laid down that conviction in specified offences will result in disqualification for a period of five years from the date of release.[296] Any person

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294. See sections 116, 177, 119, 120, 120-B, 123-B, 124-A, 125, 135, 136, 138, 140, 143, 144, 145, 147, 148, 151, 152, 153, 157etc, PPC.
295. Section 15 of NAO.
296. Article 63 (g) and (h), Constitution of Pakistan.

may be disqualified for corrupt and illegal practices in the election or on conviction for any offence under Elections Act, 2017, for a period of five years.[297]Different states in the United States also provided disqualification to hold public office as part of punishment.[298] The element of coherence in prescribing the disqualification penalties in different legislations in Pakistan is lacking.

4.4.7. Denaturalization:

The Protection of Pakistan law[299]has added revocation of citizenship acquired through naturalization as a form of a sentence. It provides that on conviction for a scheduled offence, the court may deprive the accused of citizenship acquired through naturalization. However, no parameter or standard of proof has been mentioned to impose this sentence. This is a new offence and even judicial guidelines have not developed to regulate this sentence. However, in the United Kingdom revocation of the citizen has been left at the pure executive discretion. Secretary of State may deprive a person of citizenship if he is satisfied that deprival from citizenship is conducive to public good.[300]Lavi has argued that any attempt to justify revocation is dangerous.[301] Thus proper parameters are needed to justify the imposition of this extraordinary penalty, which at present are lacking in Pakistan.

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297. Section 232 of the Elections Act, 2017.

298. **Penalties for Violations of State Ethics and Public Corruption Laws http://www.ncsl.org/research/ethics/50-state-chart-criminal-penalties-for-public-corr.aspx accessed on 14-10-2017.**

299. Section 16 of the Protection of Pakistan Act, 2014.

300. Immigration, Asylum and Nationality Act, 2006, http://www.legislation.gov.uk/ukpga/2006/13/section/56 accessed on 14-10-2017.

301. Shai Lavi, "Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel," New Criminal Law Review: An International and Interdisciplinary Journal 13, no. 2 (2010): 404–26, doi:10.1525/nclr.2010.13.2.404.

4.4.8. Discharge and Probation:

Probation of Offenders Ordinance, 1960 provides the concept of judicial probation as an alternate of sentencing. The High Court, the Court of Sessions and the magistrate of first-class are empowered to exercise powers under this Ordinance.[302] A previous non-convict offender who is involved in an offence of fewer than two years imprisonment may be discharged after admonition or by imposing condition of good behavior.[303] Female offenders may be sent on probation in all non-capital offences while male offenders can be released on probation except in cases involving capital punishment and life imprisonment.[304]

A probation order is actually an alternate of sentencing at trial stage.[305] Court after finding the accused guilty, instead of sentencing the person immediately, may for reasons to be recorded, make a probation order. This order requires the offender to be under the supervision of the probation officer for a period of 1 to 3 years[306] and subject to the conditions imposed in the bond to be executed by the accused. Bond also requires the offender to appear and receive sentence if so ordered.[307] Accused may also be required to pay cost or compensation to the aggrieved person.[308]

West Pakistan Probation of Offenders Rules, 1961 provides the procedure regarding implementation of the Ordinance. These alternatives reflect that non-custodial sentencing options have been provided in the sentencing regime of Pakistan. However, issues of the structuring of judicial discretion by legislative means for the exercise of such options are not comprehensively addressed.

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302. Section 3 of probation of Offenders Ordinance, 1960.
303. See Section 4 of probation of Offender Ordinance, 1960.
304. See Offences mentioned in section 5 of the Probation of Offender Ordinance, 1960.
305. Zakir Shuaib, "Probation and Parole System in Pakistan: Assessment and Recommendations for Reform" (Penal Reform International, 2012), https://www.penalreform.org/wp-content/uploads/2013/05/Probation-and-parole-system-in-Pakistan_English-1.pdf.
306. Section 5 (1) (b) of the Probation of Offenders Ordinance, 1960.
307. Section 7 (3) of the Probation of offenders ordinance, 1960.
308. Section 6, of the Probation of Offenders Ordinance, 1960.

4.5. Conclusion:

This chapter has established that there is no specific sentencing legislation in Pakistan. Proposed sentencing legislation pertaining to Punjab is pending for the last two years but without any progress. This draft legislation covers only one province. If enacted, it will address some of the issues pertaining to sentencing in its area of operation. However, even this proposed legislation has not addressed the vital. question of separate sentence hearing. Penal laws in Pakistan do not provide community service as a penal sanction. Purposes and principles of sentencing are not yet legislatively stated. There is no detailed indication of aggravating and mitigating factors in any law. However, sentencing principles of proportionality and totality are indirectly recognized and are part of the sentencing regime. Mechanism of separate sentence hearing and the requirement of providing reasoning for sentences are not enacted. There is no specified sentencing advisory body to issues sentencing guidelines, to manage and analyze sentencing information data. System of early release through parole and remission is entirely under executive control and no independent body has been established to run this system. Even the judiciary has no say in this process except for the constitutional judicial review.

However, there is an element of victim restoration in the sentencing scheme which is more pronounced under Islamic laws to be discussed in chapter 6. Right to a fair trial is constitutionally recognized. Retrospective enhancement of sentences is constitutionally barred. As mentioned above, indirect recognition of principles of sentencing like proportionality and totality can be found in the sentencing mechanism of Pakistan. After incorporation of the right to a fair trial as a fundamental right and after the ratification of ICPPR Pakistan need to review its sentencing system comprehensively.

Laws are given meaning by the judicial interpretations. Therefore, critical discourse on Pakistan's sentencing system will be incomplete without analyzing the judicial approach on the subject which is being undertaken in the next chapter.

CHAPTER 5

ANALYSIS OF JUDICIAL APPROACH ON SENTENCING

5.1. Introduction:

In the previous chapter legislative regime of sentencing in Pakistan is discussed. Legislative regime without supplement of judicial interpretation and decisions is just a skeleton. Judicial decisions based on legislative scheme actually shape the real structure of sentencing jurisprudence. Therefore, discussion on sentencing jurisprudence remains incomplete without an analysis of judicial approach on sentencing. Thus, the judicial approach to sentencing is the subject of this chapter.

The sentencing mechanism in Pakistan, after incorporation of the right of a fair trial as a fundamental right, needs to realign itself. Unstructured and unguided discretion at sentencing may compromise this fundamental right. Exercise of discretion at different steps of the trial including the sentencing process must reflect the elements of a fair trial. How far this reality is being materialized through judicial pronouncements in line with a feature reflected in chapter 2, will be analyzed in this chapter. For this purpose, this chapter is divided into two parts.

Part 1 analyzes the judicial approach on different sentencing features which have constitutional protection or mention. In this part judicial approach on the importance of sentencing and its impact on life and liberty have been analyzed. As sentencing is being analyzed with fair trial lenses, therefore, judicial views on the

right to fair trial and link of a fair trial with the sentencing process have been discussed. Provision of the right of appeal in the sentencing matter as a requirement of a fair trial has also been assessed. Fair trial is not a solitary standing right rather it is part of a cluster of constitutional rights which complement and augment each other. Thus, the question of protection of dignity at sentencing, protection against retrospective sentencing and double jeopardy have also been analyzed as reflected in judicial decisions of constitutional courts. State power of clemency in sentencing matters is one of the features of the good sentencing system as reflected in chapter 2. Presidential constitutional prerogative of clemency in Pakistan is also discussed in this backdrop in the light of judicial decisions. At the end of this part, Rules and Orders of the Lahore High Court, Lahore framed under Article 202 of the constitution to guide and regulate sentencing practices in the courts have been discussed. Part 2 studies certain Pakistani case law to explore how far sentencing features deduced in chapter 2 are reflected in the jurisprudence developed by the superior courts in Pakistan. In this discussion, preference has been given to recent cases in order to discuss the current trends.

Part I: Judicial Approach on Constitutional Features of Sentencing:

5.2. Sentencing: A Question of Life and Liberty?

Before analyzing different features of sentencing as reflected in the constitution, it is appropriate to gauge the importance of sentencing as reflected from judicial decisions. Importance of the sentencing process has been reflected in the number of judgments of the Supreme Court of Pakistan. In Israr's case[1] the august court pointing out the importance of sentencing process held that courts deal with the life and liberty of the people in the sentencing process. Thus, the question of the

1. Israr Ali vs The State SCMR 525.

sentence should be dealt with the utmost care. The same view was reiterated in another judgment and august court again held that question of sentence pertains to the life and liberties of the people, therefore, needs to be dealt with ultimate care.[2] In yet another case it was held that question of fixing the quantum of sentence is no less important and it also directly affects the fundamental right of life and liberty as incorporated in the Article 9 of the constitution of Pakistan.[3] These judgments establish that the sentencing process should be dealt with all possible seriousness and fairness to protect the life and liberty of an individual subject to the sentencing process. The above views of the apex court have been followed and shared by different High Courts.

The Lahore High Court, for example, observed that question of the sentence of imprisonment affects the liberty of the citizen and, therefore, penal provisions should be interpreted with due care and caution.[4] Explaining the importance of sentencing to the public and its impact upon the overall administration of justice, the Lahore High Court observed that people judge the system of administration of criminal justice from the result announced by the courts.[5] The court keeping in view the importance of sentencing process emphasized the balancing of rights of accused and victim at this stage. In another case, [6] the Lahore High Court highlighted that in a murder case the question of sentence is of very vital importance and due care and caution must be shown in this regard.

Other High Courts have also endorsed the importance of the sentencing process. Balochistan High Court highlighted the importance of the sentencing process and observed that greatest care is needed in the matter of sentencing as it directly

2. Nadeem Alias Nanha v The State 2010 SCMR 949.
3. Mir Muhammad Alias Miro v The State 2009 SCMR 1188.
4. Rafique Ahmad Awan v Additional District Judge Sialkot P L D 2016 Lah. 282.
5. Safdar Ali alias Soni v The State P L D 2015 Lah. 512.
6. Mumraiz v The State 2011 YLR 1551.

deals with life and liberties of the people.[7] The Peshawar High Court observed that sentence must be weighed in golden scale and must be properly balanced considering all the circumstances surrounding the guilt.[8] The court further observed that principal consideration in the sentencing process should be that an awarded sentence must be fair and should produce the correct result in any given case. The Sindh High Court observed that sentencing decisions without proper appreciation of evidence undermine the sense of security and confidence of the general public in the administration of justice.[9] Azad Kashmir Supreme Court also desired care, caution and balance at the sentencing stage.[10] In this way, constitutional courts of Pakistan have endorsed the importance of sentencing process categorically.

By virtue of Article 189 of the constitution of Pakistan judgments of Supreme Court of Pakistan are binding upon all the courts functioning in Pakistan. On the same analogy, by the strength of Article 201 of the constitution of Pakistan, judgments of different provincial High Courts are binding on the courts working in that very province. Therefore, keeping in view the importance of the sentencing process, care, caution and fairness in the sentencing process must also be reflected by other courts functioning in the country. Discretion at the sentencing stage must be exercised judiciously. This is particularly important after incorporation of the right to a fair trial under Article 10-A of the constitution of Pakistan. However, to proceed with the sentencing jurisprudence, a discussion on the right to fair trial seems proper.

5.3. Judicial View on Fair Trial:

The right to a fair trial has been added as one of the fundamental rights in the constitution of Pakistan through the Eighteenth Amendment in 2010. However,

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7. Dad Muhammad v The State 2012 P.Cr.L.J.1207.
8. Qasim v The State 2015 Y L R 1448.
9. Gulzar Ahmad v The State 2010 P.Cr.L.J. 1438.
10. Abdul Rehman v Muhammad Mushtaq alias Makha P L D 2007 SC (AJ&K) 77.

even in the absence of its express recognition, the right to a fair trial was one of the golden principles of the jurisprudence of Pakistan.[11] Prior to 2010, the higher courts have developed a good deal of jurisprudence on fair trial. Even before the framing of the first constitution in Pakistan, it was held that High Court can interfere in the order of acquittal in revision if there has been a denial of the right to fair trial.[12] In another case request for the joint trial was declined to ensure a fair trial.[13] Transfer of a case of accused police officers from the court of the assistant commissioner to the court of Sessions Judge was ordered as complainant feared lack of fair trial.[14] These precedents reflect that even prior to constitutionalization of right to a fair trial; courts were attending to this question.

The Supreme Court of Pakistan in Al-Jehad Trust Case[15] also held that right of access to justice is an inalienable right and it also includes the right to be treated in accordance with the law and right to have a fair and proper trial. Justice Hamoodur Rahman, speaking for Supreme Court of Pakistan held that utmost fairness is a fundamental principle to be followed in the trial of an accused.[16]In another case, the Supreme Court held that before passing the sentence, High Court must see that accused was provided a fair trial.[17] In Sharaf Faridi[18] case it was held that right of access to justice is an inviolable right incorporated in Article 9 of the constitution. It was also held in the same case that right to be treated in accordance with the law and to have fair and proper trial through an impartial tribunal is a part of the right to access to justice.

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11. Babar Hussain Shah v Mujeeb Ahmed Khan 2012 SCMR 1235.
12. Luqman v Muhammad Nawaz PLD 1952 Baghdad-Ul-Jadid 66.
13. Sarfraz v The State 1986 P.Cr.L.J.1737.
14. Liaquat Ali Butt v Ahmad Nasim, Senior Superintendent of Police, Lahore 1986 P.Cr.L.J. 2846.
15. Al-Jehad Trust v Federation of Pakistan PLD 1996 SC 324.
16. Noor Ahmad v The State PLD 1964 SC 120.
17. Alam Khan vs The State PLD 1964 SC 801.
18. Sharaf Faridi V The Federation of the Islamic Republic Of Pakistan through Prime Minister 0f Pakistan PLD1989 Kar. 404.

Noting the importance of fair trial the Supreme Court of Pakistan in contempt proceeding against Prime Minister Yousef Raza Gilani[19] held that the right to a fair trial is well entrenched in the jurisprudence of Pakistan. The court noted that after incorporation of Article 10-A in the constitution any law, usage or custom having the force of law which compromises the right to a fair trial may be declared void. However, the court declined to accept the argument that on this principle, the judges who issued a show-cause notice to the contemnor become disqualified to conduct the trial in the light of Article 10-A of the constitution.

Balochistan High Court struck down the legislations[20] investing judicial powers of conducting a trial and imposing sentences upon executive magistracy.[21] The court held that the performance of above-mentioned functions by executive authorities compromises the right to a fair trial. Similarly, the Peshawar High Court has struck down certain provisions of Nizam-e-Adl Regulation[22] as they tend to compromise the right to fair trial and independence of the judiciary by vesting judicial function upon executive authorities.[23] The Lahore High Court while explaining the impact of the addition of Article 10-A in the constitution observed that it "morphs Article 4 into a more robust fundamental right, covering both substantive and procedural due process."[24] Article 10 A has enhanced the importance of due process even further as now any order passed in violation of fair

19. Suo Motu Case No.4 of 2010 [Contempt Proceedings against Syed Yousaf Raza Gillani, the Prime Minister of Pakistan regarding non-compliance of this Court's Order dated 16-12-2009] P L D 2012 SC 553.
20. Code of Criminal Procedure (Balochistan Amendment) Act, 2010 (Act XV of 2010) and the Code of Criminal Procedure (Balochistan Amendment) Ordinance, 2010 (Ordinance III of 2010).
21. Muhammad Kamran Mullahkhail v The Government of Balochistan through Chief Secretary PLD 2012 Quetta 57.
22. Shariah Nizam-e-Adl Regulation, 2009 (NWFP Regulation No. 1 of 2009).
23. Yousaf Ayub Khan v Government through Chief Secretary, PLD 2016 Pesh. 57.
24. Shabbir Ahmad Vs Kiran Khursheed Administrator Etc. 2012 LHC 642.

trial and due process can be considered void.[25] Right to a fair trial has been held to be the essence of criminal justice process.[26] Instead of being satisfied with overall fairness at the end of adjudication process it has been held that procedural fairness and propriety must be ensured at every step to ensure fair trial.[27] Right to a fair trial is said to be a living organism rather than being a vague concept therefore, technicalities are to be avoided to ensure the provision of this right.[28]

As Article 10-A of the constitution does not mention the detail ingredients of right to a fair trial, therefore, through judicial interpretation; its ingredients are being supplied. Supreme Court of Pakistan after referring to different previous cases, [29] has drawn an interlink between the right of due process enshrined in Article 4, access to justice derived from Article 9 and right of a fair trial under Article 10 A of the constitution of Pakistan.[30] The cluster of these rights provides that:

(i) The person likely to be effected must have notice of such proceeding against him.

(ii) He must have a reasonable opportunity to defend himself.

(iii) The adjudicatory forum should be competent to adjudicate the *lis* and should be impartial.

(iv) That justice should not only be done but seen to be done.

In addition to above, the Supreme Court has also held that disclosure of arrest of accused to the family members to ensure proper legal advice, [31] right to cross-examine

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25. Babar Hussain Shah v Mujeeb Ahmed Khan 2012 SCMR 1235.
26. Nisar Ahmed v The State 2015 MLD 742.
27. Shabbir Ahmad v Kiran Khursheed Administrator Etc 2012 LHC 642.
28. Yaqoob alias Qobi 2014 MLD 69 Lah.
29. New Jubilee Insurance Company v. National Bank of Pakistan PLD 1999 SC 1126, Suo Motu Case No.4 of 2010 PLD 2012 SC 553, Benazir Bhutto v Federation of Pakistan PLD 1988 SC 416, Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324, and Liaquat Hussain v. Federation of Pakistan PLD 1999 SC 405.
30. Ishtiaq Ahmed v Honble Competent Authority 2016 SCMR 943.
31. Said Zaman Khan v Federation of Pakistan through Secretary Ministry of Defence 2017 SCMR 1249.

a witness, [32] presumption of innocence till proved guilty, proof of guilt of accused beyond a reasonable doubt[33] and right of due process[34]are part of a fair trial. Likewise, right of hearing[35] right of proper representation, [36] the expeditious trial, [37] providing every document to the accused which prosecution intends to produce at trial, [38]right to produce defense evidence, [39] recording of the reason for every order[40]are held to be part of the right to a fair trial. The Lahore High Court has listed the ingredients of a fair trial as under:[41]

(i) The Court/Tribunal be independent, impartial and established under the law,

(ii) All persons shall be equal before the courts and Tribunal in the determination of their right and obligations;

(iii) Everyone shall be entitled to a fair hearing within a reasonable time;

(iv) Everyone shall have a right of counsel;

(v) Right of the public hearing if not prohibited by law;

(vi) The procedure of trial as provided by the statute to be followed and

(vii) The statute must provide a remedy of appeal.

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32. M.C.B. Bank Limited, Karachi v Abdul Waheed Abro 2016 SCMR 108.
33. Muhammad Asghar Alias Nannah v State 2010 SCMR 1706.
34. Suo Motu Action regarding the allegation of a business deal between Malik Riaz Hussain and Dr. Arsalan Iftikhar attempting to influence the judicial process, PLD 2012 SC664.
35. Asgher Ali v State 2017 MLD 535 Lah.
36. Pakistan Defence Officers Housing Authority v Creek Marina (pvt.) Limited (Pakistan) 2016 CLD 1453 Kar.
37. Karamat Ali v State 2017 P.Cr.L.J. Note 12 Lah. Pervez Zaki v State 2017 P.Cr.L.J. 747 Quetta. Khadim Hussain v State 2012 P.Cr.L.J. 1847, Saqib Raza v State 2015 MLD 515 Kar.
38. Muhammad Zafar v State 2015 YLR 1446.
39. Asif v State 2017 M L D 1611 Lah.
40. Ali Adnan Dar V Judge Family Court PLD 2016 Lah. 73.
41. Bilal Akbar Bhatti v Election Tribunal, Multan PLD 2015 Lah. 272.

Ingredients reflected above have not covered all the attributes of a fair trial, as enumerated in Article 14 of the ICCPR. However, the above analyzed judicial pronouncements reflect that the right to a fair trial is substantially growing in Pakistan. But does the right to fair trial actually cover the sentencing process? This need to be answered which is being discussed in the next section.

5.4. Fair Trial and Sentencing:

Nexus between fair trial and sentencing came under discussion in a judgment of Lahore High Court.[42] Interpreting Article 10-A of the constitution, in the said judgment, Justice Shah held that fairness is to be ensured at all stages including pre-trial stages and at the sentencing stage. His lordship noted that by linking the sentence of fine to the amount of tax evaded the legislature[43] has departed from traditional sentencing purposes of deterrence and retribution and has actually focused on the recovery of tax evaded as the main sentencing purpose. Keeping this sentencing purpose in view, the court held that before initiating criminal proceedings, fair and independent assessment of the amount of tax is mandatory. It has been observed that the lack of such assessment clogs the sentencing power of the court to determine the amount of fine. The court declared that any such impediment on the sentencing powers of the trial court at any stage of the trial violates the dictates of a fair trial as incorporated in the Article 10-A of the constitution.

This jurisprudential analysis of Justice Shah clearly reflects that elements of a fair trial are now fully applicable to the sentencing stage in Pakistan. However, judicial pronouncements on this specific aspect are quite rare. The element of a fair trial has been exhaustively discussed and elaborated in different judgments of constitutional courts but such discussion has not particularly focused on the element

42. Taj International Pvt Limited Etc v The Federal Board of Revenue Etc. 2013 LHC 4817.
43. Sales Tax Act, 1990.

of a fair trial at the sentencing stage. Long before framing of UDHR, ICCPR and recognition of fair trial as a fundamental principle therein, it was held by the Privy Council that "trial means the whole of the proceedings, including sentence."[44] Therefore, the element of the fair trial also needs to be taken care of at the sentencing stage.

Award of the sentence by the trial court does not end the whole process. It can be assailed in appeal. The appeal is also a window to ensure that discretion while sentencing is properly exercised. Process of appeal is said to be the continuation of trial.[45] Therefore, the ingredients of a fair trial should also accompany the appeal process. Discussion in chapter 2, on appellate review of sentences, reflects that provision of at least one right of appeal against a sentence is a part of a fair trial. Analysis of judicial opinion on this aspect of a fair trial is necessary and is, therefore, being discussed in the next section.

5.5. Fair Trial and Right of Appeal in Sentencing:

The Supreme Court has endorsed the view that any legislation which provides the right of appeal against first order is more beneficial in nature than one which does not provide such right.[46] In-State v Naeem Ullah Khan, [47] the court held that negating the right of appeal will amount to harsh and narrow interpretation. In this case, the court went on to hold that denial of the right of appeal through narrow interpretation will not only be unconstitutional but also un-Islamic. The Supreme Court of Pakistan upheld the two different judgments of Federal Shariat Court by holding that right of appeal is in accordance with the Injunctions of Islam pertaining to Qist, Adal and

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44. Basil Ranger Lawrence v. Emperor AIR 1933 PC 218.
45. Pakistan Defence Officers' Housing Authority v Lt. Col. Syed Jawaid Ahmed 2013 SCMR 1707. Liaqat Ali Mir v Additional Sessions Judge 2017 P.Cr.L.J. 1026.
46. Aley Nabi and others v Chairman Sindh Labour Court and others 1993 SCMR 322.
47. The State through Advocate-General N.W.F.P., Peshawar v Naeemullah Khan 2001 SCMR 1461.

Ihsan.[48] The Supreme Court even held that Supreme Court Rules which provide no right of appeal against an order of Honourable Chief Justice of Pakistan passed against an employee should be suitably amended to provide at least one right of appeal.[49]

The Sindh High Court held that provision of one right of appeal is the requirement of justice.[50] The court further held that the absence of even a single right of appeal will result in a miscarriage of justice. However, even in this matter, the court instead of striking down the rules due to lack of right of Appeal referred the matter back to the concerned authority to meet the ends of natural justice. The Peshawar High Court in its full bench decision held that provision of one right of appeal against the decision of a trial court in criminal matters is a centuries-old principle.[51] The court held that due to lack of even a single right of appeal dangerous consequences are likely to come out. However, the court did not knock down the statute on this ground and only advised the government to suitably amend the Illegal Dispossession Act, 2005, to provide one right of appeal.

In Pakistan in most of the statutes right of appeal against conviction and sentence is provided, either independently or by application of Cr.PC. Even the constitution itself provides such right of appeal in different scenarios against conviction and sentence.[52] Recently, right of appeal has been declared an ingredient of the right to fair trial.[53] However, it has not yet been recognized as an enforceable part

48. Federation of Pakistan and others v Public at Large and others P L D 1988 SC 202, Pakistan through Secretary, Ministry of Defence v The General Public PLD 1989 SC 6.
49. Registrar, Supreme Court of Pakistan, Islamabad v Qazi Wali Muhammad 1997 PLC (C.S) 137.
50. Pacific Exim (Pvt.) Ltd. v Pakistan Steel Mills Corporation PLD 2016 Sindh 398.
51. Mian Sharif Shah V Nawab Khan PLD 2011 Pesh. 86.
52. Article 185 of the Constitution of Pakistan.
53. Bilal Akbar Bhatti v Election Tribunal, Multan PLD 2015 Lah.272.

of the fundamental right of a fair trial in Pakistan. Courts have yet desisted from striking down any legislation due to lack of provision of the right of appeal.

In spite of appreciating the right of appeal as mentioned above, the Supreme Court has not yet read it as a part of every statute in line with its decisions on the principle of *audi alteram partem*. On the question of the right of hearing the august court has held that right of hearing "is to be read into as a part of every statute if the right of hearing has not been expressly provided therein."[54] Right of hearing and right of appeal are both ingredients of a fair trial. However, the right of appeal has yet not been accorded similar treatment as given to the right of hearing. Regarding the right of appeal, it has been a consistent view of the Supreme Court of Pakistan that there is no inherent right of appeal and right of appeal is a creation of statute.[55] The court also held that theory of appeal being the continuation of trial alone is not sufficient to vest the right of appeal unless so vested by statute specifically.[56] The Supreme Court of Pakistan, while disqualifying two Prime Ministers in two different cases, dismissed the arguments that lack of right of appeal in proceedings conducted under Article 184 (3) of the constitution will abridge the fundamental right of fair trial.[57] These mixed judicial trends reflect that with few exceptions, courts in Pakistan are anchoring the jurisprudence regarding the right of fair trial and particularly right of appeal as its enforceable ingredient, to a period prior to incorporation of Article 10-A in the constitution.

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54. Mrs. Anisa Rehman v P.I.A.C. and others 1994 SCMR 2232. See also Messrs Dewan Salman Fiber Ltd. and others v Government of N.-W.F.P. PLD 2004 SC 411. WAPDA vs Zulfiqar Ali 2002 PLC (CS) 128
55. State Life Insurance Corporation of Pakistan v Mst. Sardar Begum 2017 CLD 1080 SC, Pakistan v Abdul Hayee Khan PLD 1995 SC 418.
56. Muzaffar Ali v Muhammad Shafi P L D 1981 SC 94.
57. Imran Ahmad Khan Niazi v Mian Muhammad Nawaz Sharif, Prime Minister Of Pakistan/Member National Assembly, Prime Minister's House, Islamabad PLD 2017 SC 265 and Muhammad Azhar Siddiqui and others v Federation of Pakistan and others P L D 2012 SC 774.

Right to a fair trial is accompanied by other constitutional rights which reasonably protected fairness at sentencing even prior to incorporation of Article 10-A in the constitution. These fundamental protections regarding the dignity of man, ban on retrospective sentencing and double jeopardy and their judicial interpretation must be reflected to further the discourse on judicial approach on sentencing.

5.6. Dignity at Sentencing:

The dignity of a man is an inviolable right.[58] This right is not even subject to the law. The Supreme Court of Pakistan interpreting this article *suo motu* took up the case against public hanging.[59] The apex court held that execution in public of even the worst criminal offends Article 14 of the constitution. The august court, in this case, referred to the Universal Declaration of Human Rights in Islam. However, the court instead of disposing of the case on merit dispose of this action on the statement of the Deputy Attorney General that despite the power of the government to order public hanging government as a matter of policy has decided to not carry out public hanging. The case was disposed of on this statement without specifically declaring the section 10 of the Special Courts for Speedy Trials Act, 1992 as unconstitutional. Lack of specific and authoritative declaration of the apex court has encouraged the legislature to incorporate similar provision[60] in Anti-terrorism Act 1997. The Supreme Court of Pakistan approvingly referred[61] a judgment from the Indian Supreme Court[62] where it was held that the prison walls cannot keep fundamental rights out. Peshawar High Court recently observed that keeping a man behind the bar after serving out substantive punishment merely for his failure to pay Arsh, Daman or Diyat is

58. Article 14 of the Constitution.
59. SUO MOTU CONSTITUTIONAL PETITION: IN RE 1994 SCMR 1028.
60. Section 22 of the Anti-terrorism Act 1997.
61. Shah Hussain v State PLD 2009 SC 460.
62. T.V. Vatheeswaran v State of Tamil Nadu [AIR 1983 SC 361 (2)]

against human dignity.[63] On the similar proposition, Lahore High Court held that keeping a human being, the best creature of Allah behind the bar for his inability to pay the Arsh, Daman or Diyat is an offence to the concept of dignity.[64] These judgments reflect that even at the sentencing stage right of human dignity cannot be ignored and no unfair treatment beyond the law can be meted out to the convicts. Right of the dignity of the convict is protected by a combined effect of Article 11 and 14 of the constitution of Pakistan. Article 12 of the constitution, of Pakistan bars retrospective sentencing which needs to be briefly analyzed in the light of judgments of constitutional courts.

5.7. Retrospective Sentencing:

Ban on retrospective punishment is one of the features of a good sentencing system as mentioned in Chapter 2. Without this protection right of fair trial and efforts of structuring, discretion may be reduced to a farce. Legislative support on this aspect has been discussed in chapter 4. How far it is reflected in the judicial decisions of constitutional courts having precedent value will be discussed in this section.

The Supreme Court of Pakistan in Khizer Hayat[65] case invoked Article 12 of the constitution which bans retrospective enhancement of sentences. In this case, at the time of occurrence, the offence of attempt to commit qatl-i-amd was punishable with imprisonment which may extend to ten years and fine. Through an amendment, it was provided that in addition to the above punishment offender will also be liable for the hurt he caused. The offence was committed on 3-12-1992, while the amendment was brought on 25-10-1994. When an offender was convicted and sentenced on 23-12-2000, he was also convicted under section 337-D PPC, for the hurt he caused during the commission of the offence. His sentence was maintained

63. Lal Habib Khan v The State 2016 YLR 513.
64. Abid Hussain and another v Chairman, Pakistan Bait Ul Mal and others P L D 2002 Lah. 482.
65. Khizar Hayat v State 2012 SCMR 1066.

by Sessions Court, and High Court. However, the Supreme Court of Pakistan set aside the sentence under Section 337-D PPC, being violative of Article 12 of the constitution.

In Rahim Tahir, [66]a two-member bench of august Supreme court of Pakistan took up the matter regarding the retrospective application of the Illegal Dispossession Act, 2005. The court observed that cases of all illegal possessors who took the possession even prior to the promulgation of above law will be covered by this Act except those cases which were pending adjudication before any forum at the time of enforcement of the Act. In this way retrospective application of the Act was enforced through judicial interpretation. However, this judicial opinion validating retrospective penalization and sentencing of an act done prior to the coming into force of the above-mentioned dispossession law did not hold the field for a longer period. In Dr. Muhammd Safdar case[67] it was categorically held by a three-member bench of the Supreme Court that Rahim Tahir case mentioned above does not lay down the correct law as Article 12 of the constitution of Pakistan clearly bars retrospective punishment. This view has again been endorsed in Fazal case.[68]

In Abdul Rehman case, [69] the punishment of the offence at the time of its commission was death or transportation for life. During the pendency of appeal through Law Reforms Ordinance 1972, the punishment of life imprisonment in a murder case was substituted with imprisonment for life. In 1975, hearing the appeal in the above case the Supreme Court converted the death sentence of accused to life imprisonment. However, on review, the same was converted to

66. Rahim Tahir v Ahmad Jan etc, P L D 2007 SC 423.
67. Dr. Muhammd Safdar v Edward Henry Louis PLD 2009 SC 404
68. Muhammad Fazal v Saeedullah Khan 2011 SCMR 1137.
69. Abdul Rehman v State 1978 SCMR 292.

transportation for life as life imprisonment was found to be hit by Article 12 of the constitution being a retrospective change of kind of punishment.

In Asfandyar case[70] retrospective application of National Accountability Ordinance was validated by the court with a specific direction that no prosecution for the newly created offence of willful default will be launched without giving thirty-seven days' notice. The Supreme Court held that though transaction out of which willful default arises may be prior to the promulgation of the ordinance, but such continuing breach of duty was being criminalized and penalized prospectively. Court noted that opportunity has been given to the accused to come out of this liability by payment of the defaulted amount. Thus, the court held that criminalization of willful default by a law promulgated in the year 1999 from a retrospective date of 1st January 1985 was not actually retrospective. Based on this interpretation, given in a Martial Law period, this law was saved from the mischief of Article 12 of the constitution.

The line of reasoning taken in the above judgment has ignored the observation in Nabi Ahmad case[71] wherein discussing the question of retrospectivity of laws, it was observed that law-abiding citizen regulate and weigh their conduct as per existing law. That they feel cheated if law retrospectively reduces their rights or increases their burdens.[72] In Asfandyar case, there is a rich discussion on the jurisprudence of retrospectivity, but the legislative action has been validated by sidetracking the jurisprudence discussed in this judgment. The notice of thirty-seven days' to initiate the proceeding against the accused has been used as justification to hold that the ordinance, in essence, is not retrospective in

70. Khan Asfandyar Wali and other v Federation of Pakistan PLD 2001 SC 607.
71. Nabi Ahmed and another v Home Secretary, Government of West Pakistan Etc PLD 1969 SC 599.
72. Nabi Ahmed and another v Home Secretary, Government of West Pakistan Etc PLD 1969 SC 599.

operation. However, mere deferment of criminal proceedings which are actually retrospective in operation is hardly any ground to call them prospective in nature. The argument of the court if accepted in generality, actually postulates that any law can be enacted retrospectively from any date and can be termed perspective by merely giving notice to accused before initiating the proceeding. Provision of notice is a requirement of natural justice and is not a justification or device to make retrospective legislation prospective. Thus *Asfandyar* has seriously compromised a well-established constitutional principle regarding ban on retrospective punishments. Likewise in Nabi Ahmad case after, rich discussion on retrospectivity, executive action of referral of a case to a special tribunal, was upheld on the ground that law itself mentioned its retrospective application. In this way retrospective change of forum of the trial was allowed. Still, Nabi Ahmad case stands on better footing than Asfandyar case as it only allowed retrospective change of forum while the latter in fact allowed the retrospective application of penal law.

The constitutional principle regarding the ban on retrospective sentences has also been upheld by different High Courts. The Peshawar High Court set aside the sentence in a defamation case based on retrospectivity.[73] The Sind High Court also upheld the order of a trial court for dismissing the complaint under the Illegal Dispassion Act, 2005 by holding that the aforesaid law cannot be given retrospective application.[74] Likewise, the Lahore High Court quashed the proceeding of a case as the act of issuing cheque was not an offence at the relevant time.[75] However, in Mohtarama Benazir Bhutto case[76]the Lahore High Court

73. Mirza Ali Khan v Hidayat Ullah Khan 2014 P.Cr.L.J. 78.
74. Captain S.M. Aslam v The State PLD 2006 Kar. 221.
75. Sayed Safdar Ali Razvi v Station House Officer, Police Station Civil Lines, Lahore, 2006 P.Cr.L.J. 187.

ducked the question of retrospectivity. The court observed that the acts of the accused were an offence under an earlier law (Presidential Orders Nos.16 and 17 of 1977). Therefore, a trial of accused under a law promulgated in 1997 for acts committed in 1994 was not hit by Article 12 of the constitution. In the judgment, there is no reference to the penal clauses and sentence provided in the referred Presidential Orders. Thus, accused were sentenced by retrospective application of the Ehtesab Act, 1997. However, this judgment was later on set aside by the Supreme Court, being based on bias, without discussing the question of retrospectivity.[77]Retrospective application of National Accountability Ordinance was upheld by Lahore High Court by holding that offence of willful default is a continuing offence.[78] Though minority judgment did not agree with this conclusion but this majority view was upheld latter on by the Supreme Court in Khan Asfandyar case discussed above.

Above discussion reflects that generally, the bar on retrospective punishment has been taken by judicial pronouncement very seriously. However, dint created by Asfandyar case is still persisting which has compromised this constitutional protection to some extent in Pakistan. The prosecution and conviction of former Prime Minister Muhammad Nawaz Sharif in the Avenfield case based on a law enacted in 1999, for alleged actions of the year 1993, 1995 and 1996 was only possible as Asfnad Yar Case was holding the field. This reflects that constitutional protection against retrospective sentencing is materially diluted in Pakistan.

5.8. Double Jeopardy:

The bar against retrospective punishment and ban on double punishment are sister constitutional principles. Article 13 (a) of the constitution of Pakistan

76. The State v Mohtarama Benazir Bhutto and another, PLD 1999 Lah.535.
77. Asif Ali Zardari v The State PLD 2001 SC 568.
78. Shahida Faisal v Federation of Pakistan PLD 2000 Lah.508.

provides that 'No person shall be prosecuted or punished for the same offence more than once". It is also incorporated in the Code of Criminal Procedure, 1898.[79] This principle has been repeatedly recognized, interpreted and its limitation has also been crafted in different judgments. In Muhammad Nadeem Anwar case, [80] Supreme Court held that the bar of double punishment does not attract if the offending action of the accused attracted different penal enactments. Therefore, if accused is convicted under one enactment his trial and punishment under different enactment though for the same chain of facts, does not offend Article 13 (a) of the constitution. In Hassan case, [81] protection of Article 13 (a) of the constitution regarding double punishment has been elaborated. The court held that where prosecution sought enhancement of sentence from life imprisonment to death and during the pendency of such appeal accused served out his sentence of life imprisonment, then along with other factors, the spirit of Article 13 (a) of the constitution may be invoked to decline such enhancement. The imposition of double punishment was also disapproved in Dilawar case.[82]Court held that imposition of death sentence after keeping the accused in prison for eighteen years will amount to double punishment which is against the principle of natural justice. The Hassan case, after discussing Dilawar and other cases, has a bit restricted the scope of Article 13 (a) of the constitution prohibiting double punishment. Now the need is to read Article 13 (a) along with Article 10-A of the constitution on fair trial. Article 10-A does not envisage a tardy system of administration of justice. It does not envisage a justice system where the principle of double punishment and

79 Section 403 Cr.PC.
80. Muhammad Nadeem Anwar v Securities and Exchange Commission of Pakistan 2014 SCMR 1376.
81. Hassan and others v The State and others PLD 2013 SC 793.
82. Dilawar Hussain v The State 2013 SCMR 1582.

expectancy of life need to be given limited application to accommodate judicial delays of decades.

Sometimes a fair sentence imposed in a fairly conducted trial become unpalatable due to subsequent change of circumstances. To accommodate such situations element of clemency and remission emerge as a necessary feature of a good sentencing system. Contours of clemency element as harnessed by process of judicial review are the next point of discussion.

5.9. Clemency and Remissions:

Explaining the nature of the presidential power of pardon under Article 45 of the constitution Supreme Court of Pakistan held that this power is neither judicial nor quasi-judicial and is ultimately executive in nature.[83] The court held that the President has to exercise this power of commuting or pardoning any sentence on the advice of the government.

In Nazar Hussain case, [84] the Supreme Court specifically framed a question regarding the extent of the Presidential power under Article 45 of the constitution along with other questions regarding remission of sentences. The court observed that similar power is granted in most of the other constitutions of the world. After referring to the Corpus Juris Secundum and other authorities, the court observed that such power of clemency is necessary to inject mercy in the system and to achieve political morality. The court held that this power exists for the public good and is to be exercised for public welfare. This power was held to be a safety valve against undue and unjust rigours of criminal law. The court observed that this power also helps to achieve the reformative purpose of sentencing. The court endorsed the earlier

83. Dr. Zahid Javed v Dr. Tahir Riaz Chaudhary PLD 2016 SC 637.
84. Nazar Hussain v The State PLD 2010 SC 1021.

view expressed in Shah Hussain case[85] and Abdul Malik's case[86] that that power of clemency under Article 45 of the constitution, being constitutional in nature, is unfettered by any ordinary or subordinate legislation. The court also approved the reasonable classification of offenders and offences based on intelligible criteria for grant of remissions.

In Bhai Khan case[87] higher objective and occasions for the exercise of this power of clemency were stated. The court held that this power exists to meet the requirement of justice and mercy at the highest level. It prevents the miscarriage of justice. It is an expression of state honour to reduce the sentence based on mercy. This power may be exercised to celebrate an event (like Eid or Independence Day) or holding of office by the new Prime Minister or President.

Power of clemency also remained under clouds due to judicial interpretation given to different constitutional provisions. In Skina Bibi case, [88] it was held by Lahore High Court that after incorporation of Article 2-A in the constitution, presidential powers of pardon, commute or reprive etc are not available in cases of Qisas, Diyat and Hadd offences. However, this view could not found favour with the Supreme Court of Pakistan and clog on the presidential power of clemency imposed in Skina Bibi case was removed in Hakim Khan Case.[89] In this case, the court expressed its inability to resolve the incompatibility between Article 2-A and Article 45 of the constitution and held that this is the domain of the parliament. However, practically Article 2-A was subordinated to Article 45 of the constitution by the interpretative process.

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85. Shah Hussain v The State PLD 2009 SC 460.
86. Abdul Malik and others v The State PLD 2006 SC 365.
87. Bhai Khan v The State PLD 1992 SC 14.
88. Sakina Bibi v Federation of Pakistan PLD 1992 Lah. 99.
89. Hakim Khan v Govt of Pakistan PLD 1992 SC 595.

Powers under Article 45 of the constitution are not absolutely immune from judicial review. Interpreting Article 45 of the constitution it has been recently held that powers under the said article are not to be used in an omnibus manner rather individual cases are to be considered under this article.[90] Comparing the powers of remission etc. under Section 401 to 402 B Cr.PC with the powers of President under Article 45 of the constitution, it was held that powers of President under Article 45 are wider in scope than those provided under Cr.PC.[91] It was held that disposal of the petition filed for commutation or remission under Cr.PC does not bar the power of the president to grant pardon, remission or reprieve under the constitutional power. It was also held that powers granted by Article 45 of the constitution are to be exercised by the president personally and secretarial disposal of such application is not sufficient to meet the requirement of Article 45 mentioned above. Following the same chain of judicial reasoning, in Shafqat case, [92] Islamabad High Court observed that the President's powers of clemency are unfettered and are subject to a limited judicial review.[93] Court held that the president cannot be compelled to exercise discretion under Article 45 of the constitution. However, the Supreme Court held that the President has power to pardon, reprieve, respite, remit or commute any sentence but does not possess the power to reduce the sentence as the power of determination; reduction and enhancement of sentences are purely judicial functions.[94]

Question regarding grant of benefit of remission when accused was an undertrial prisoner, and conviction and sentence were not recoded against him was taken up by the Supreme Court in Haji Adul Ali case.[95] It was held that conviction

90. Jamshed Nawaz v Sessions Judge Rawalpindi PLD 2015 Lah. 391.
91. Amir Bakhsh v Secretary-General ministry of Interior Govt. of Pakistan PLD 1985 Kar.610.
92. Shafqat Hussain v President of the Islamic Republic of Pakistan PLD 2016 Islamabad 1.
93. Shafqat Hussain v President of the Islamic Republic of Pakistan PLD 2016 Islamabad 1.
94. Lt.Col. G. L. Battacharya v The State etc PLD 1964 SC 503.
95. Haji Abdul Ali v Haji Bismillah etc. PLD 2005 SC 163.

and sentence cannot be antedated. Thus, accused cannot avail the benefit of remission granted prior to his conviction but during his custody as an undertrial prisoner. Abdul Ali and another case, [96] following it were revisited by the supreme court of Pakistan in Shah Hussain case.[97] Court held that accused who are granted the benefit of section 382-B, Cr.PC will be entitled to any remission granted by any authority during their pre-sentence detention connected to the offence. However, the court held that such benefit of remissions will not be granted to accused convicted in those cases where such concession has been specifically withheld by the relevant legislation e;g National Accountability Ordinance and 1999, Anti-terrorism Act 1997. Shah Hussain case was partially revisited in Nazar Hussain case[98] and it was held that clause barring the benefit of remission to the NAB offender was declared ultra vires the constitution by the Sindh High Court.[99] That said judgment of the Sindh High Court was not brought to the notice of the court in Shah Hussain case. Therefore, bar regarding grant of remission to NAB offender was held to be *per incurium*.[100] This view has been again endorsed in Mazar Iftikhar case.[101] Now even an accused convicted under NAB law is entitled to remissions granted during his pre-sentence detention in the relevant case.

The survey and analysis of different cases mentioned above dealing with the constitutional power of clemency and remissions etc of sentences reflect that features of clemency and remission regarding sentences are adequately reflected in Pakistan. The process of clemency remained under eclipse regarding offences under Islamic law but this was soon cleared by the highest court of the country. Variation of judicial opinions on the subject also compromised this feature to some extent but continued

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96. Human Rights case No.4115 of 2007 PLD 2008 SC 71.
97. Shah Hussain v The State PLD 2009 SC 460.
98. Nazar Hussain v The State PLD 2010 SC 1021.
99. Saleem Raza v The State PLD 2007 Kar. 139.
100. Nazar Hussain v State PLD 2010 SC 1021.
101. Mazar Iftikhar etc v Shahbaz Latif etc. PLD 2015 SC 1.

judicial scrutiny to ensure the benefit of remission mechanism incorporated in the constitution and ordinary legislation has put the law on track. Chain of judgments discussed in Shah Hussain case and its progeny reflect that efforts of structuring the discretion are continuously being made.

5.10. Guidance under Article 202 of the Constitution:

Rules and Order are framed by the High Court under article 202 of the constitution of Pakistan.[102] These rules contain practice guidelines for the functioning of the High Court itself and its subordinate courts. These rules have been framed by Lahore High Court but have been adopted by other High Courts till framing of their own rules.[103] Volume III of these Rules and Orders deal with practice guidelines to criminal Courts. Chapter 19 of Vol.III specifically deals with guidelines on sentencing. It specifically warns the courts that the question of sentencing is of great difficulty.[104] It guides the courts that maximum punishment provided for an offence is for the most serious offence[105] and it is not necessary in each case to go up to the maximum sentence.[106] This principle seems to have been borrowed from the Harrison case decided by the Court of Appeal.[107]These Rules also guide the court to take into consideration different factors including the character of the offender, his age and antecedents, motive, the gravity of the offence, mitigating and aggravating circumstances including previous convictions and elements of the grave and sudden provocation. Regarding the kind of punishment these rules simply state that it should be chosen with due care[108] and simple imprisonment should be imposed where fine is

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102. Muhammad Boota v Basharat Ali 2014 CLD 63 Lahore.
103. Roshni Television, Messrs Direct Media Corporation (Private) Ltd. through Chief Executive Officer v Pakistan Electronic Media Regulatory Authority through Chairman, PLD 2011 Karachi 1.
104. High Court Rules and Orders Vol. III Chapter 19 Part A Rule 1.
105. The High Court Rules and Orders Vol. III Chapter 19 Part A Rule 1.
106. The High Court Rules and Orders Vol. III Chapter 19 Part A Rule 1.
107 Harrison (1909) 2 Cr. App.R.94.
108. The High Court Rules and Orders Vol. III Chapter 19 Part C Rule 1.

not appropriate and term of imprisonment is short.[109] These Rules states that solitary confinement is reserved for most heinous offenders and this kind of imprisonment is only permissible under PPC.[110] Comparatively detailed guidelines are available to award enhanced punishment under section 75 PPC for previous convictions.[111] The enhanced punishment is not necessary in every case and it should not be resorted in old convictions and petty offences.[112] The device of enhanced punishment must be used as a matter of deterrence where the criminal habit is indicated from the conduct of the convict.[113]

In this way, these Rules and Orders, to some extent, have formalized and consolidated the guidelines on sentencing practices. However, mainly these rules are a recapitulation of the legislative provisions contained in different enactments. Comprehensive guidelines on sentencing have not been provided through these rules by the High Courts.Vol.3 was last time revised in 1996 and thereafter no proper revision has been carried out. After this revision, many new penal laws have been enacted and many important judgments concerning sentencing issues have been delivered which are not incorporated in these Rules and Orders. District Judiciary Bench Book also provides some guidance on the sentencing process.[114] It asks the sentencer to first determine the normal sentence for an offence and then measure the proper sentence for it considering the aggravating and mitigating circumstances. However, these guidelines given in the previous Bench Book are missing in the new Bench Book.[115]

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109. The High Court Rules and Orders Vol. III Chapter 19 Part C Rule 2.
110. The High Court Rules and Orders Vol. III Chapter 19 Part C Rule 3.
111. The High Court Rules and Orders Vol. III Chapter 21 Part B.
112. The High Court Rules and Orders Vol. III Chapter 21 Part B Rule 5.
113. The High Court Rules and Orders Vol. III Chapter 21 Part B Rule 5.
114. District Judiciary Bench Book.
115 Siddique, Hussain Iman, and Qureshi, Criminal Bench Book For the Guidance of Judges and Magistrates.

Part II: Judicial Approach on other Sentencing Features:

5.11. Purposes of Sentencing:

From discussion under chapter 4, it is clear that sentencing purposes in Pakistan have not been specifically stated legislatively. Chapter 2 and 3, reflect the importance of a legislative statement of sentencing purposes. How far this gap has been covered by judicial endeavours and interpretation will be discussed in this section.

The Supreme Court of Pakistan in Dadullah case[116] specifically recognized the different purposes of sentencing. The court held that punishments are generally imposed to achieve the objective of retribution, deterrence and reformation. In this case, the Supreme Court has endorsed deterrent sentencing as a reformative tool for the whole society instead of merely focusing on individual reformation. From the above judgment, it can be inferred that in serious cases deterrence is the rule while reformation can be focused in minor offences having short sentences.

Concept of retribution, deterrence and reformation as purposes of sentencing has also been recognized in Hamdani case.[117] Disapproving the imposition of extreme penalty in minor offences, the Supreme Court held that such a trend is against the reformative concept of sentencing.[118] In Aslam case, [119] again the Supreme Court of Pakistan has considered deterrence as an element of reformation of society while leniency in sentencing as a chance for individual accused to reform himself. In this case, in addition to judicial recognition of traditional purposes of sentencing, the Supreme Court also pointed out that the nature and circumstances of the offence, gravity and degree of deliberation are to be considered while imposing sentence.

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116. Dadullah v The State 2015 SCMR 856.
117. Secretary, Government of Punjab v Khalid Hussain Hamdani 2013 SCMR 817.
118. Secretary, Ministry of Finance v Kazim Raza PLD 2008 SC 397.
119. Muhammad Aslam v The State PLD 2006 SC 465.

While deliberating on the constitutionality of the contempt law, the Supreme Court specified the limit of deterrence. The court held that deterrent sentencing is not meant to be used as a weapon of aggression.[120] In Hamid case, [121] Supreme Court held that deterrence is one of the considerations in the award of the death sentence. Above surveyed case law reflects that all traditional purposes of sentencing have been acknowledged by the Supreme Court of Pakistan. However, the Supreme Court of Pakistan has also traced an element of reformation of society in sentences having the impact of general deterrence.

Recognition of sentencing purposes is also reflected from judgments of different High Courts. The Sindh High Court observed that law recognizes three sentencing purposes which are retribution, deterrence and reformation.[122] However, the High Court has not specifically mentioned any statutory law which recognizes such purposes. Reflecting the importance of sentencing purposes, the Sindh High Court observed that sentencing must be purposeful. The court observed that purposeless sentencing will not satisfy anyone concerned about sentencing. The Sindh High Court stressing the need for a balance in the use of deterrence and reformation observed that reformation could not be used as a pretext to let the hardened criminal go unpunished.[123] However, the court favoured the use of reformation for young offenders who are not hardened and are involved in minor offences. Court called successful reformation of the offenders a fruit for the society. Use of non-custodial sentence was approved and to meet reformatory ends of sentencing accused were sent on probation in a case pertaining to hurt and attempt to commit qatl-i-amd.[124]

120. Baz Muhammad Kakar v Federation of Pakistan through Ministry of Law and Justice PLD 2012 SC 923.
121. Hamid Mahmood and another v The State 2013 SCMR 1314.
122. Mujeeb-ur-Rehman v The State 2014 P.Cr.L.J. 1761.
123. Amjad Ali v The State 2017 YLR 594.
124. Nidoo Alias Nizamuddin v The State PLD 2007 Kar. 123.

Recognition of sentencing purposes and their use has also been discussed in Saud case.[125] Change in the character of the offender has also been stated as a sentencing purpose for which preventive and reformatory sentencing options may be employed.[126] Balochistan High Court has also dilated upon the use of different sentencing purposes.[127] Explaining the use of deterrence as a sentencing purposes court held that one purpose of the sentence is to create an atmosphere where a person having criminal inclination may stay away from crime out of fear and deterrence. The court held in the above-mentioned case that sentences should not be as severe as to make an ordinary person a hardened and desperate criminal nor should it be as lenient to serve as an encouragement for re-offending.

The Lahore High Court also resorted to three different purposes of sentencing and held that purposes of punishment are retribution, prevention and reformation.[128] The court held that in a rational society, sentencing is delicate as well as a difficult task. The court pointed out that difficulty of the sentencing process is reflected from the fact that competing demands of victim, society and state are to be met. In this way protection of victim has also been recognized as a sentencing purpose. The court held that deterrence encourages would-be offenders to desist from choosing a criminal activity as an option. The Court also held that while passing sentences elements of social morality should also be kept in view. The Lahore High Court referring to Islamic punishment also held that the object of imposing sentences is not vengeance but reformation.[129] The court pointed out that purpose of penal provisions in tax

125. Saud Nasir Qureshi V Federation of Pakistan through Secretary 2012 PLC (CS) 192 KARACHI.
126. Mushtaque Ahmad v The State 2010 YLR 234.
127. Faqeer Muhammad v The State 2016 P.Cr.L.J. 1854.
128. Nadeem Alias Deema v The State 1998 P.Cr.L.J. 1946.
129. Muhammad Jehangir v The State 1999 MLD 2450 Lahore.

law[130] in addition to the traditional purpose of retribution, deterrence, incapacitation, rehabilitation, and restitution is the recovery of evaded tax.[131] In another case, the Lahore High Court referred to four sentencing purposes and also reduced the sentence keeping in view the principle of proportionality.[132]The Peshawar High Court has also recognized the element of deterrent punishment under Illegal Dispossession Act, 2005[133] and in narcotic offences.[134] Recognizing the element of reformative sentencing in the Juvenile Justice System Ordinance, 2000, the court held that such aspiration for reformation cannot be used "as a ploy to dupe the course of justice".[135]

Different judgments of constitutional courts on the purposes of sentencing reflect that at least traditional purposes of sentencing such as retribution, deterrence, reformation and incapacitation are manifestly and consistently recognized. Victim protection and restorative justice are also reflected as sentencing purposes. However, no compact guidelines even on the judicial side have been laid down to follow the sentencing purposes. No requirement of employing all or any one of the sentencing purposes in any sentencing decision has been imposed. This reflects that legislative gap regarding the statement of sentencing purposes has not been properly filled even by judicial decisions. Sentencing purposes are supplemented by sentencing principles which now need to be analyzed in judicial parlance.

5.12. Principles of Sentencing:

Importance of sentencing principles in a sentencing regime is manifest from discussion under chapter 2 and 3. As discussed in Chapter 4, there is no specific and clear statement of sentencing principles under the legislative sentencing regime of

130. Sales Tax Act, 1990.
131. Taj International (Pvt.) Ltd. V Federal Board of Revenue 2014 PTD 1807 Lahore.
132. Dr. Agha Ijaz Ali Pathan v The State 2004 P.Cr.L.J. 1586.
133. Yafas v State PLD 2007 Pesh, 123.
134. Muhammad Fayaz v State PLD 2017 Pesh. 74.
135. Naseebullah v State PLD 2014 Pesh. 69 and Meem Bahadar v State 2013 P.Cr.L.J. 1490.

Pakistan. However, principles of totality, parsimony and parity can be found functioning indirectly through different provisions pertaining to the concurrent running of sentences and grant of benefit for pre-sentence custody. Principle of proportionality is also recognized judicially. These principles are also reflected in different judgments of superior courts. Analysis of important judgments reflecting these principles will be made in this section. As principles of parsimony parity and totality are most often given effect in judgments pertaining to the question of the concurrent running of sentences and grant of pre-sentence custody, therefore, these principles are being discussed under these heads.

5.12.1. Concurrent and Consecutive Sentences:

The Supreme Court of Pakistan has given effect to the principle of totality and parsimony in different judgments. In Ishfaq case, [136] accused committed the murder of two persons and also injured two others. The trial court awarded death sentence on two counts which were converted to life imprisonment by High Court on two counts. However, the concurrent running of sentences was not ordered. The Supreme Court of Pakistan on appeal ordered the concurrent running of sentences and held that ordinarily, more than one sentences of life imprisonment against an accused are to run concurrently. In this way, though the accused took the life of two persons but keeping in view the overall impact of sentences, they were ordered to run concurrently. This is an implicit recognition of the principle of totality. Conversion of death sentence to life imprisonment of two counts and order regarding there concurrent running also point out that august court opted the least sentence to meet the purpose which is in consonance with the principle of parsimony.[137] This judgment also impliedly invoked Australian principle regarding avoidance of crushing sentences. The crushing

136. Ishfaq Ahmad v State 2017 SCMR 307.
137. Victorian Sentencing Manual, Parsimony http://www.judicialcollege.vic.edu.au/eManuals/VSM/14953.htm accessed on 14-11-2017.

sentence is one which destroys any hope of a useful life after serving the sentence of imprisonment.[138] However, meeting these principles at the apex court level also indicate that lack of a legislative statement of sentencing principles may result in ignoring these principles in many cases which do not reach the highest level.

Shahista Bibi case[139] is another example of the application of the principles of totality and parsimony. In this case, accused were initially awarded death sentence in four cases along with sentences of imprisonment for different offences. However, the sentence of death was commuted to life imprisonment. After commutation, a total sentence of imprisonment, including a sentence for default in payment of fine, became 225 years. The Supreme Court taking up the matter in the second review ordered the concurrent running of sentences. In this case, one petitioner was a woman while other was a man. However, by maintaining parity, relief was granted to both the accused. However, this judgment does not indicate that relief of concurrent running of sentences was also extended to other accused on a parity basis, to whom same was declined in the first review.[140]

In Muhammad Anwar case, [141] the Supreme Court ordered the consecutive running of sentences of imprisonment for fourteen years for five counts awarded in one trial, the total being seventy years. Apex court held that accused committed murder of his wife and four children; therefore, consecutive running was an appropriate order. This judgment indicates that instead of making the different sentences of imprisonment concurrent invariably in every case, the Supreme Court considers the total impact of the sentence with reference to the gravity of the offence.

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138. Meaning of 'crushing sentence, http://www.judicialcollege.vic.edu.au/eManuals/VSM/14995.htm accessed on 14-11-2015.
139. Mst.Shahista Bibi and another v Superintendent, Central Jail, Mach and 2 others P L D 2015 SC 15.
140. Ali Khan Kakar Etc v Hammad Abbasi 2012 SCMR 334.
141. Muhammad Anwar v Muhammad Akram Etc. PLD 2016 SC 65.

Question regarding the benefit of concurrency of sentences passed in a single trial remained subject of debate in several cases. The important Supreme Court cases are Javed Shaikh, [142]Juma Khan, [143]Muhammad Itteaq, [144] and Khan Zaman.[145] It was held in these cases that sentence of imprisonment cannot be more than 25 years in a single trial. Thus, if sentences of imprisonment more than this limit are passed in a single trial they must be ordered to run concurrently to avoid violation of Section 35 (2) Cr.PC. However, this question was revisited in Bashir case[146] by a five-member bench. It was held that proviso to section 35 (2) does not apply to courts with unlimited sentencing powers. The court held that above proviso is only applicable in cases tried by magistrates or Assistant Sessions Judges who have limited sentencing powers. Thus, Sessions Courts are not bound to order concurrent running of different sentences of imprisonment or life imprisonment awarded at one trial if they exceed twenty-five years limit. In light of this dictum, an order regarding the concurrent running of sentences in sessions trials remains a discretion of the court to be exercised as per fact and circumstances of each case. If this discretion is properly exercised, it gives an opportunity to the court to properly adjust the total impact of sentences imposed in multiple offences.

5.12.2. The Benefit of Pre-Sentence Custody:

Principle of totality also requires the consideration of pre-sentence loss of liberty while determining the sentence. Shah Hussain case[147] has considered a number of cases[148] of local and foreign jurisdictions and other material[149] on the subject of

142. Javed Shaikh v The State 1985 SCMR 153.
143. Juma Khan and another v. The State 1986 SCMR 1573.
144. Muhammad Ittefaq v The State 1986 SCMR 1627.
145. Khan Zaman and others v The State 1987 SCMR 1382.
146. Bashir Etc v The State PLD 1991 SC 1145.
147. Shah Hussain v The State PLD 2009 SC 460.
148. Haji Abdul Ali v Haji Bismillah PLD 2005 SC 163, Ghulam Murtaza v The State PLD 1998 SC 152, Human Rights Case No.4115 of 2007 PLD 2008 SC 71. Javed Iqbal v The State 1998 SCMR 1539, Muhammad Saleem v The State 1996P.Cr.LJ. 1598, Ramzan v The State PLD

adjusting the pre-sentence custody period in the final sentence and has laid down the following rules:

I) The trial court is bound to take into consideration the pre-sentence period.

II) Refusal to take into consideration the pre-sentence custody period is illegal as it may result in enhancing the sentence beyond maximum limit permissible under law.

III) Where accused is granted the benefit of section 382-B Cr.PC and his pre-sentence period is considered in the sentence awarded, he will also be entitled to remissions for such pre-sentence custody period unless the benefit of remissions is excluded by the law itself.

The grant of benefit of the concurrent running of sentences and weight to be given to pre-sentence custody have engaged the attention of the Supreme Court for a considerable time and in a number of cases. These questions also affected the fate of many convicts in many cases. Varying judicial interpretations have also contributed to this confusion. However, legislative ambiguities pointed out by the Supreme Court of Pakistan regarding both these aspects touching principles of totality and parsimony remained unaddressed even today.

1992 SC 11, Mukhtiar-ud-Din v The State 1997 SCMR 55, Muhammad Rafiq v The State 1995 SCMR 1525, Aamir Ali v The State 2002 YLR 1902, R. Wust (2001) 1 SCR 455 2000 SCC 18, Muhammad Rafiq v The State 1995 SCMR 1525, Qadir v The State PLD 1991 SC 1065, Ramzan v The State PLD 1992 SC 11, Liaqat Hussain v The State PLD 1995 SC 185, Mukhtiar-ud-Din v The State 1997 SCMR 55, Javed Iqbal v The State 1998 SCMR 1539 and Ehsan Ellahi v Muhammad Arif 2001 SCMR 416, T.V. Vatheeswaran v The State of Tamil Nadu [AIR 1983 SC 361 (2)], Ghulam Sarwar v The State PLD 1984 SC 218, Ahmed Yar v The State 1985 SCMR 1167, Liaqat Hussain v The State PLD 1995 SC 485, Noor Muhammad v The State 1995 SCMR 671, Al-Jehad Trust v. Federation of Pakistan 1999 SCMR 1379, Ramzan v State PLD 1992 SC 11, Liaqat Hussain v The State PLD 1995 SC 485, Mukhtiar-ud-Din v State 1997 SCMR 55, Ghulam Murtaza v The State PLD 1998 SC 152, Javed Iqbal v The State 1998 SCMR 1539, Ehsan Ellahi v Muhammad Arif 2001 SCMR 416, Thake v. Attorney General (CACLB-033-07) [2008J BWCA 23 (25 etc.

149. Pre-sentence custody and the determination of sentence: a framework for discussion" by Allan Manson of the Faculty of Law, Queen's University, Kingston, Ontario

The Supreme Court of Pakistan approvingly referred[150] section 397 (2) of the Indian Criminal Procedure Code 1898 which answered the question regarding the concurrent running of sentences awarded in different trials. The aforesaid provision is part of the new Indian Criminal Procedure Code, 1973 with almost similar words.[151] However, no such clarification has been added in section 397 of the Code of Criminal Procedure of Pakistan. Thus, the point regarding the concurrent running of sentences awarded in one trial or multiple trials purely remains a question of discretion. This discretion sometimes requires the intervention of the apex court for regulation in individual cases. Similarly on the point of benefit for pre-sentence period Supreme Court of Pakistan[152] praised corresponding provisions in English law[153] and the Indian Code of Criminal Procedure.[154] However, no change in legislative phraseology has been made in section 382-B Cr.PC. after said observation of the Supreme Court. This legislative procrastination necessitated interpretation process in multiple cases discussed above. This has also affected the proper structuring of discretion on important issues pertaining to sentencing.

In spite of these lapses, jurisprudence on principles of sentencing has not ceased to develop. The Sindh High Court recently ordered the concurrent running of the sentence in three cases.[155] Invoking the principle of parity in the above case, the court observed that co-accused has already been granted such benefit, therefore, same was also extended to the petitioner. The Lahore High Court has even maintained the principle of parity and consistency for the enhancement of sentence.[156] In this case, the sentence of an accused was enhanced from life imprisonment to death as his co-

150. Bashir Etc v The State PLD 1991 SC 1145.
151. Section 427 (2) the Indian Code of Criminal Procedure, 1973.
152. Muhammad Rafiq v The State 1995 SCMR 1525.
153. Section 67 of the Criminal Justice Act 1967 England and Wales.
154. Section 428 of the Indian Code of Criminal Procedure, 1973.
155. Naeem T.T Alias Kashif v The State 2017 P.Cr.L.J.N. 30 KAR.
156. Javid Ali v The State 2007 YLR 2013.

accused with a similar role was awarded the death sentence. An effort to bring consistency and parity of treatment in the matter of sentencing has also been made in Ghulam Murtaza case[157] by providing sentencing guidelines. Court held in this case that needs for uniformity of judicial response to similar legal questions cannot be overemphasized.

5.12.3. Proportionality:

The Supreme Court of Pakistan held that great virtue of a judge is that he applies rules of proportionality and balancing in the discharge of his duties.[158] Sentencing is a judicial duty, therefore, compliance with the principle of proportionality is a mandate of the above dictum of the apex court of Pakistan. Supreme Court enhanced the sentence of accused from life imprisonment to death keeping in view the principle of proportionality as accused was involved in the murder of two persons on a very minor pretext.[159] Peshawar High Court held that where murder does not result of premeditation then the principle of proportionality requires avoidance of capital punishment.[160] Sindh High Court held that punishment must be proportionate to the wrong committed and where punishment imposed for violation is out of proportion the same is liable to be quashed.[161] Lahore High Court confirmed the death sentence in a double murder case by holding that no mitigating circumstances exist in favour of accused and the principle of proportionality cannot be ignored.[162] This reflects that principle of proportionality which is one of the fundamental sentencing principles is also recognized by Pakistan's constitutional courts.

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157. Ghulam Murtaza v The State PLD 2009 Lah 362.
158. Messrs Memy Industries Ltd Etc v Federation Of Pakistan Etc, 2015 SCMR 1550.
159. Asad Mehmood v Akhlaq Ahmad Etc. 2010 SCMR 868.
160. Main Gul Rahim v The State 2016 MLD 2043.
161. Rimsha Shaikhani v Nixor College Etc.PLD 2016 SINDH 405.
162. Mumraiz V State 2011 YLR 1551. See also on the same point Haq Nawaz v The State PLD 2011 Lah.284.

The Supreme Court of Pakistan approvingly quoted Justice Holmes of United States who said, "The prophecies of what the Courts will do in fact, and nothing more pretentious, are what I mean by the law."[163] Thus, principles of predictability, parity, uniformity and consistency in the sentencing of similarly placed accused can be inferred from the judicial pronouncement of the superior courts of Pakistan. Above all, parity and equality of treatment are also mandated by Article 25 of the constitution and sentencing is no exception to this constitutional mandate. However, judicial recognition of these principles does not obviate the need for a legislative statement of these principles in sentencing legislation.

5.13. Need for Sentence Hearing:

In chapter 2 provision of proper sentence hearing has been reflected as a feature of a good modern sentencing system. Chapter 3, discussed the importance of sentence hearing in English sentencing regime. In chapter 4, the lack of sentence hearing in Pakistan has been discussed. Here in this section, some important judgments of superior courts will be analyzed to reflect the importance and scope of sentence hearing. Judgments wherein only a question of the sentence has been raised and discussed will be analyzed to reflect the importance of sentence hearing. Some other important judgment where the question of the sentence was not properly discussed untill the last forum will also be analyzed to reflect the need for a sentence hearing.

In Sajjad Ikram case, [164] the Supreme Court of Pakistan granted leave only to the extent of the question of sentence. In this case, the trial court for commission of triple murder awarded death sentences for three counts to three accused. Same sentences were reduced to life imprisonment for three counts by the High Court.

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163. Nabi Ahmad Etc. v Home Secretary Govt. of West Pakistan Etc. PLD 1969 SC 599.
164. Sajjad Ikram and others v Sikandar Hayat and others 2016 SCMR 467.

However, no order regarding the concurrent running of sentences was passed nor was the benefit of Section 382-B Cr.PC granted. Supreme Court accepted the appeal to this extent and ordered concurrent running of sentences and also granted the benefit of section 382-B Cr.PC. Leave granting order clearly reflects that conviction was not assailed by appellant side and the only question of the sentence was raised. This reflects that before the trial court and first appellate court accused persons remained occupied in avoiding the conviction and therefore were unable to raise and appraise on the question of sentence properly.

In Irfan case, [165] two accused of the murder of a lady were convicted under section 302 (b) PPC read with Section 7 (a) ATA 1997 and were sentenced to death for one count. High Court converted this to life imprisonment and the same order was upheld by Supreme Court. Afterwords prayer for acquittal based on compromise was declined by the trial court as well as by High Court on the ground that conviction and sentence also stand under section 7 ATA. However, the Supreme Court accepted its own omission in the previous round of litigation and held that sentence under section 7 ATA cannot be presumed by implication until specifically so awarded. The case was remanded to the trial court for recording and giving effect to compromise. Khuda Bukhsh[166] Ajja[167], Babu, [168]Needu, [169] and Waqas[170] are some of the recent cases wherein the main stress of the arguments and main consideration of the Supreme Court was the only question of sentence. Omissions mentioned above could be avoided and minimized by providing separate sentence hearing at the trial stage as has

165. Irfan and another v Muhammad Yousaf and another 2016 SCMR 1190.
166. Sohrab Khan Marri Khuda Bakhsh v The State 2017 SCMR 669.
167. Muhammad Azhar Alias Ajja v The State 2016 SCMR 1928.
168. Ghulam Mohy-Ud-Din Alias Haji Babu And Others v The State 2014 SCMR 1034.
169. Needu And others v State 2014 SCMR 1464.
170. Muhammad Nadeem Waqas And Another v The State 2014 SCMR 1658.

been provided in India and other jurisdictions. In Irfan case[171] mentioned above, the Supreme Court held that sentencing is the integral and inseparable part of the conviction. These observations reflect that sentencing is treated as a part of the conviction. It also points out lack of judicial initiative to provide the separate sentencing hearing to materialize Article 10-A of the constitution in its true spirit.

At appeal level in different High Courts in some cases, the question of sentence only is raised and discussed. In Goga Butt case, [172] main contention taken by the defense counsel and discussed by the Lahore High Court was the reduction of sentence in the light of Ameer Zeb case. This plea was accepted and conviction was converted from section 9 C, CNSA to section 9 B CNSA and sentence was accordingly reduced. In Javid case, [173] the contention of the defense was that case falls under section 302-C instead of 302-B. This plea in the reduction of sentence was accepted by converting the conviction under section 302 C and reducing the sentence. In Shoaib case[174] also, the main plea was the reduction of the sentence, though the conviction was also assailed. In Jaffar case[175] the matter was taken to the High Court to seek an order of instalment of Diyat and Arsh amount. Payment of Diyat and Arsh was ordered in instalments with the consent of victim/injured by the Lahore High Court. Before the Sindh High Court, in Amjad Ali case, [176] the main contention was a reduction in sentence. In this case, a teen-aged accused was convicted and sentenced under the Anti-terrorism Act, 1997, the Sindh Arms Act, 2013 and other provisions. Council for the accused did not challenge the conviction and prayed for a reduction in sentences. The High Court after considering the mitigating circumstances reduced the

171. Irfan and another v Muhammad Yousaf and another 2016 SCMR 1190.
172. Muhammad Shabbir alias Goga Butt v The State 2017 MLD 1529.
173. Javed v The State 2017 YLRN 24 Lah.
174. Shoaib Khan v The State 2016 YLR 2385.
175. Muhammad Jaffar v The State 2016 YLR 2085.
176. Amjad Ali v State 2017 YLR 594.

sentence of imprisonment to one already undergone. In Noor Muhammad[177]and Najjebullah[178] cases before the Balochistan High Court main plea was again a reduction in sentence and same was accepted in both the above-mentioned cases. The Peshawar High Court in Faqir Khan case, [179] reduced the sentence of the convict. In this case, defense challenged the conviction and in alternately prayed for reduction of the sentence which was accordingly reduced.

The above-discussed cases reflect that the question of sentence is repeatedly raised at appellate forums as the concern of a party remains propriety of the sentence. Fear that discussing mitigating circumstance before a conviction may prejudice the case of accused. Accused remains under an apprehension that from the argument on mitigation of sentence courts may infer weakness of the defense or tacit admission of guilt. These factors keep the defense silent on sentencing issue. Due to above fear even at appellate level convictions are challenged in routine even in those cases where the major concern of accused is sentenced and he does not seriously challenge the conviction. Above discussed cases raising the question of the adequacy of sentences before the Supreme Court of Pakistan and the High Courts also reflects that the question of sentences is not properly exhausted at trial court level.

5.14. Reasons for Sentence:

As mentioned in chapter 2, recoding of reasons for the sentence is a primary feature of good sentencing system. Chapter 3, reflects that on English courts, there is a statutory duty to record reasons for the sentence awarded. Analysis under chapter 4, reflects that in cases of capital charge, where court instead of the normal penalty of death award any other sentence then the court is required to record reasons. Speaking otherwise, recording of reasons is not compulsory for awarding death sentence but it

177. Noor Muhammad v The State PLD 2017 Quetta 52.
178. Najeebullah v The State 2017 MLD 1508 Quetta.
179. Faqir Khan v The State 2017 MLD 35 Pesh.

is mandatory to record reasons where a death sentence is not imposed in a capital offence. Except for the above requirement, recording of reasons is not a statutory compulsion. This has resulted in some judgments even of apex court where reasons for the quantum of the sentence are not recorded. To reflect this lapse three judgments of the apex court are being briefly discussed where the court passed sentence in a different offence not discussed by the lower forums.

In Muhammad Zafar case[180] the apex court converted the sentence of accused from section 302 (b) to 302 (c) PPC. Under section 302 (c) PPC sentence of imprisonment of either description which may extend to twenty-five years may be imposed. The apex court imposed the sentence of twenty years on the convict but not a single reason for choosing this quantum was recorded.

In Qadir Shah and others, [181] conviction of offenders was converted from Section 354-A PPC to 354 PPC. In the entire judgment, a detailed analysis of the factual controversy and evidence was made. However, the question of sentence under section 354 was not discussed in the judgment at all and was only mentioned in the short order that, "The conviction of the appellants, ...is altered from 354-A to 354, P.P.C. and sentenced to two years R.I... however, the sentence of fine is maintained." As for as imprisonment is concerned, maximum sentence provided under section 354 PPC has been imposed but while imposing this sentence there is no mention of aggravating or extenuating circumstance regarding the question of the sentence which makes sentencing a silent phenomenon vis-a-vis a speaking conviction decision.

In Faisal Noman, detailed discussion on the issue of conviction of accused under different penal sections was made. The Supreme Court did not agree with the conviction recorded by the lower forums and, therefore, set aside the conviction and

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180 Muhammad Zafar v. Rustam Ali 2017 SCMR 1639.
181. Qadir Shah and others v The State 2009 SCMR 913.

sentence. However, accused were convicted by the august court under section 337 H (1) for which conviction was not recorded by the trial court or by the High Court. The Supreme Court of Pakistan passed the following sentencing remarks:

> Consequently, we set aside the convictions of the policemen-appellants under sections 148, 149, 324, 333-L (2), 452, P.P.C. and 7 (h) of the Anti-Terrorism Act, 1997 and instead convict each of the policemen-appellants in Criminal Appeal No. 4 of 2015 under section 337-H (1), P.P.C. and sentence them to simple imprisonment for a period of two years each and each of them shall also be liable to pay daman of an amount of fifty thousand rupees which shall be disbursed amongst all the injured victims in equal shares.[182]

As the Supreme Court first time recorded the conviction and sentence under a new offence which was not discussed by initial forums, therefore, it should have recorded reasons to justify the quantum of sentence. However, no such effort was made in the sentencing remarks quoted above. Section 337 N 2, PPC provides that court may award tazir to an offender who is previous convict, habitual, hardened, desperate, and dangerous or committed the offence in the name or pretext of honour. In this case, all the accused are police officials. In the entire judgment, there is no finding regarding the accused being habitual, hardened, desperate or dangerous. The court has called the act of police officials 'extremely rash'. However, rashness is the element of the offence under Section 33H (1) PPC. It is not a particular aggravating factor requiring the imposition of tazir under section 337 N2 PPC. In a nutshell, the Supreme Court has not given the reasons to measure out the quantum of the sentence which is imposed.

The Lahore High Court Ehtesab Bench conducted the trial of former Prime Minister Mohtarama Benazir Bhutto and her spouse Mr. Asif Ali Zardari. Both were convicted under the Ehtesab Act 1997 with the following sentencing remarks:

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182. Faisal Noman Etc. v Javed Hussain Shah Etc. 2015 SCMR 1265.

> They are accordingly convicted and sentenced to undergo 5 years imprisonment each and to pay a fine of US$ 8.6 million each or equivalent amount in the Pakistani currency. They are further disqualified from holding any public office under section 9 of the Ehtesab Act. 1997. The amount of 8:6. Millions USS as aforesaid or the properties acquired from the aforesaid amount as also the necklace shall stand confiscated to the State.

The above judgment consists of 113 paras. There is detail discussion in the judgment to declare the accused guilty but the sentencing part is silent on the determination of sentence imposed against the accused. This judgment was later on set aside by the Supreme Court[183] on the question of bias in the trial judges but the silence of sentencing part was not specifically discussed by the apex court. In the Avenfield judgment of the Accountability Court whereby former Prime Minister Main Muhammad Nawaz Sharif, his daughter Maryam Safdar and his son-in-law Muhammad Safdar were convicted, no reasoning has been given for specifying the quantum of sentence.

The above-analyzed judgments reflect that recording of reasons for the sentence imposed has not developed as a judicial norm in Pakistan. This practice necessitates either legislative mandate to compel separate recording of reasons for the sentence imposed or detail judicial guideline to the same end. The requirement of recording reasons for sentences imposed is a tool of structuring sentencing discretion which is not properly developed in Pakistan. Lack of reasons for a sentence also compromises the right to a fair trial.

5.15. Community Sentencing and Probation:

In chapter 4, it has been discussed that Article 11 (4) of the Constitution of Pakistan impliedly indicates community sentencing. Chapters 2 and 3 also reflect the importance of community sentencing as a sentencing tool. As such, there is no

183. Asif Ali Zardari Etc v The State PLD 2001 SC 568.

express legislative recognition of community sentencing in Pakistan. However, Ghulam Dastagir case, [184] is an important judgment delivered by the Balochistan High Court which is likely to have a far-reaching effect in synchronizing the Pakistani sentencing regime with other modern sentencing systems in the matter of community sentencing. In this case after referring the international jurisprudence on community sentencing, provisions of Probation of Offenders Ordinance, 1960 and its rules[185] has been interpreted beneficially to incorporate community sentencing as one of the sentencing options. Community sentence of planting trees was imposed with the consent of the accused. In this case for damage to the environment by killing wildlife, was tried to be restored with plantation of trees by community sentencing

This judgment has been recently followed by the Sindh High Court.[186] The Sindh High Court ordered accused to perform voluntary work for arrangements of Juma prayer as a community sentence in an offence for possessing illicit arms. However, without proper legislative guidance on permissible types of community sentences and limits on their duration such practices may lead to unchartered waters.

The use of community sentencing under Probation of Offenders Ordinance, 1960 is a recent phenomenon, but courts have been using probation and discharge as an alternate of custodial sentences for several decades. The Lahore High Court observed that provisions of the above Ordinance can be invoked in narcotic cases registered under CNSA where deemed appropriate.[187] However, the court has to record the reason for extending the benefit of probation.[188] The Sindh High Court appreciated the reformatory element of this ordinance and also clarified that this

184. Ghulam Dastagir and 3 others v The State PLD 2014 Balochistan 100.
185. The Probation of Offenders Rules, 1961.
186. Saeed Ahmed Kalhoro v The State PLD 2017 Sindh 592.
187. Anti-Narcotics Force through Assistant Director, ANF, Multan v The State 2016 P.Cr.L.J.953.
188. Zahoor Din v The State 1993 P.Cr.L.J. 388.

cannot be invoked in favour of accused involved in heinous crimes.[189] The Balochistan High Court observed that powers under this ordinance cannot be used when the court becomes *functus officio* after passing the sentence or disposing of the appeal or revision.[190] This reflects that option of non-custodial sentencing options has been explored by the courts themselves. However, electronic monitoring as a non-custodial sentencing option has yet not been introduced in Pakistan.

5.16. Compensation and Victimology:

As discussed in chapter 4, there are two streams of victim care and compensation under the criminal law and sentencing scheme in Pakistan. One, under Islamic law regarding Diyat, Arsh and Daman deal with offences under Islamic Law which will be discussed in chapter 6. While another scheme of compensation and victim care is available under section 544-A and 545 Cr.PC.Section 544-A Cr.PC, in its present form[191] has been added in 1972 and has attracted considerable judicial attention. In-State v Rab Nawaz, [192] the Supreme Court laid down the operational mechanism of this provision. The court held that Section 544-A Cr.P.C:

(i) Is salutary and mandatory.

(ii) Its application can only be avoided by the court by recording reasons for its non-attraction.

(iii) Is applicable in cases involving death, hurt, injury, loss, destruction or theft of property.

(iv) Is aimed at minimizing the suffering of the family of the deceased or of the injured or sufferer of the loss in person or property.

(v) Serves as deterrence against violent crime and crimes against property.

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189. Zulfiqar Abbas v The State 2007 P.Cr.L.J. 306.
190. Farmoz v The State 1992 P.Cr.L.J. 119.
191. Previously almost similar provision was added by West Pakistan Act XI of 1963.
192. The State v Rab Nawaz PLD 1974 SC 87.

(vi) Determines the compensation that should be commensurate with the loss suffered and should also take into account the financial position of the convict.

(vii) Should be applied by the court at the penultimate stage to conduct inquiry and receive evidence for the proper determination of the compensation.

However, the last guideline is rarely implemented by the trial courts and compensation is determined merely by guesswork. The Lahore High Court has ordered the investigation agencies to collect evidence regarding the financial position of accused for the proper exercise of power under section 544-A Cr.PC and the Chief Secretary was directed to issue a necessary circular in this regard.[193] The determination of compensation has not always ended with the trial court and the Lahore High Court in one of its earlier decisions enhanced the compensation from 5000 to 100000 to be paid to the family of murdered lawyer.[194]

Even the apex court on occasions has stepped into award compensation. In a judgment where the trial court failed to invoke this provision, compensation was awarded by invoking section 545 Cr.PC and making the fine imposed to be adjusted towards the payment of compensation.[195] Even serving out the sentence of imprisonment for failure to pay compensation does not absolve from the liability and the same is still recoverable as an arrear of land revenue.[196] Compensation under section 544-A is in addition to Diyat which is imposed as punishment in appropriate cases and not as compensation.[197]

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193. Muhammad Yunis v The State PLD 1978 Lah. 82.
194. Muhammad Nazeer Etc. v The State 1983 P.Cr.L.J. 72.
195. Muhammad Hanif v Abdur Rahman Etc. PLD 1977 SC 471.
196. Muhammad Tufail v Sessions Judge, Attock Etc PLD 2004 SC 89.
197. Shehzad Ahmad Alias Mithu Etc v The State 2005 P.Cr.L.J 1316 FSC.

However, as such, there is no coherent formula for determination of compensation amount. Pakistan Legal Decisions in 2016, have reported nine[198] cases of the Supreme Court of Pakistan wherein compensation was imposed or upheld. Amount of compensation was 25000 in one case which pertained to the occurrence in 1995[199], 50000 in seven cases pertaining to occurrences committed in the different year between 1994 to 2007[200] and 1, 00, 000 in one case which occurred in 2011.[201]This shows that there is no coherent formula to determine the compensation amount. These judgments did not reflect any specific comments of the apex court regarding the adequacy of the compensation amount. Except in one case wherein apex court, the first time determined the compensation, [202] in all other cases, compensation determined by the trial court was maintained. However, the impact of passing years between the decision of the trial court and the decision of the apex court on the adequacy of compensation has not been considered. The compensation which is penal in nature for accused and restorative in nature for the victim or his family cannot serve both these purposes unless it is based on sound grounds which presently are lacking.

198. Khawaja Farooq Ahmed Etc v Tufail Ahmed 2016 SCMR 171, Muhammad Sarwar @ Saru v The State, 2016 SCMR 210, Sajjad Ikram Etc v Sikandar Hayat etc 2016 SCMR 467, Muhammad Mansha v The State 2016 SCMR 958, Rafaqat Ali Etc. v The State 2016 SCMR 1766, Muhammad Azhar Alias Ajja v The State 2016 SCMR 1928, Muhammad Asif v Muhammad Akhtar Etc. 2016 SCMR 2035, Nasir Iqbal @ Nasra Etc. v The State 2016 SCMR 2152. Malik Muhammad Mumtaz Qadri v The State Etc. PLD 2016 SC 17.

199. Muhammad Sarwar @ Saru v The State, 2016 SCMR 210.

200. Khawaja Farooq Ahmed Etc. v Tufail Ahmed 2016 SCMR 171, Sajjad Ikram Etc. v Sikandar Hayat etc. 2016 SCMR 467, Muhammad Mansha v The State 2016 SCMR 958, Rafaqat Ali Etc. v The State 2016 SCMR 1766, Muhammad Azhar alias Ajja v The State 2016 SCMR 1928, Muhammad Asif v Muhammad Akhtar Etc. 2016 SCMR 2035, Nasir Iqbal @ Nasra Etc. v The State 2016 SCMR 2152.

201. Malik Muhammad Mumtaz Qadri v The State Etc. PLD 2016 SC.17.

202. Muhammad Asif v Muhammad Akhtar Etc. 2016 SCMR 2035.

5.17. Sentencing Guidelines:

The important judgment in Pakistani jurisdiction which can be compared with the modern trend of sentencing guidelines is Ghulam Murtaza Case.[203] In this judgment, a categorical recognition for a need of standardization of sentencing policy in narcotic cases was made. The court observed:

> ...sentences are quite often hideously variable as they oscillate and fluctuate between unduly lenient and grossly oppressive. Such discrepant and vacillating judicial responses to similar situations not only give rise to confusion and uncertainty but they also encourage unscrupulous litigants and lawyers to try to shop for a suitable Judge...Such variable approaches clearly underscore the importance of uniformity and standardization in the matter of sentencing in this area and, thus, the efficacy and necessity of adopting a sentencing policy in that regard cannot be overstated.

To streamline the above anomalies, a full bench of the Lahore High Court formulated a sentencing table to be followed while sentencing in the narcotic cases. This judgment has been approvingly referred and its sentencing policy has been adopted by a five-member bench of the Supreme Court of Pakistan in Ameer Zeb case.[204]

The sentencing table in the judgment deserves an appreciation for the reasons that it has tried to plug the legislative lack to formulate the sentencing policy. The High Court itself performed the functions of a sentencing body to survey, research and analyze sentencing information and judgments to formulate sentencing guidelines. However, these niceties are also ground of attack on this judgment. The nature of 'sentencing jackets' proposed by the court eliminates the discretion vested by the legislature. Instead of proposing sentencing ranges within which courts are to exercise discretion a more stringent mechanism has been proposed with few permissible adjustments for females, children and accused with previous convictions.

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203. Ghulam Murtaza v The State PLD 2009 Lah. 362.
204. Ameer Zeb v The State PLD 2012 SC 380.

Section 9 (a) CNSA clearly provides the option of fine as an alternate punishment but in the sentencing table that option has been taken away. The upper limit of imprisonment under section 9 (a) CNSA is two years which has been limited to thirteen months. Under section 9 (b) CNSA upper limit of imprisonment is seven years which has been limited to one year and ten months.

There are some issues of coherence in the table regarding imprisonment for default in the payment of the fine. For example, in the case of charas weighing more than ten-kilogram imprisonment for default of payment of a fine of rupees 1, 00, 000, is one year. However, in case of heroin weighing 7 to 8 kilograms for default of fine amounting to rupees 150000, imprisonment in default is also one year. In this way for default of different amounts imprisonment of one year has been fixed. Similarly for default of payment of a fine of rupees 13, 000 imposed due to recovery of different narcotic substances, the period of imprisonment is four months fifteen days, six months fifteen days and seven months. Imprisonment in default of payment of fine can hardly be linked to the nature of the narcotic substance. Therefore, as a matter of principle, for a failure to pay a fine of a specified amount, imprisonment for default should have been the same. However, different default sentences have been proposed for the same amount as mentioned above. Amount of fine regarding different steps in the table has been fixed without any mechanism to adjust the amount of fine depending upon devaluation of currency or other circumstances in future. There is no indication of revolving review of this judgment on this point by the High Court itself.

In spite of the endorsement of Gulam Murtaza's guidelines in Ameer Zeb, by a five-member bench, a bit different view has been taken by a three-member bench in Khuda Bakhsh case.[205] In this case, the court held that in narcotics cases, the quantum

205. Khuda Bakhsh v The State 2016 SCMR 806.

of sentence is linked to the quantity of the recovered contraband. The court also held that while sentencing the nature of recovered substance should be considered. Both these observations actually endorsed the view in Ghulam Murtaza case. However, after discussing combined effect of section 9 (b) and 9 (c), the apex court held that "the sentence for a quantity of two kilograms of charas could range from the imprisonment of over seven years and up to fourteen years". In this case, the court imposed the sentence "of rigorous imprisonment to eight years with a fine of one hundred thousand rupees and in default of payment of fine to undergo simple imprisonment for six months".[206] However, this judgment does not guide on the quantum of the sentence regarding other contraband substances specifically. The quantum of sentence in this judgment is also different from the sentencing table in Ghulam Murtaza case. In Ghulam Murtaza case proposed sentence for this quantity of charas is rigorous imprisonment for 4 years 6 months and fine of rupees 20, 000 or in default simple imprisonment for 5 months. This reflects that the Supreme Court in spite of endorsing Ghulam Murtaza in Ameer Zeb has on occasions deviated from its guidelines.

It is reflected from the above-highlighted issues in the available sentencing guidelines that even if constitutional courts are to formulate sentencing guidelines they should have a more specialized body at their disposal to assist them and monitor the impact of such guidelines. It is also reflected that the need for sentencing guidelines is being felt in Pakistan by the constitutional courts. Sentencing guidelines in narcotic cases are the forerunner in this regard.

206. Khuda Bakhsh v The State 2016 SCMR 806.

5.18. Conclusion:

The above discussion reveals that different sentencing features as discussed in chapter 2 find a mention to various extents in the judicial pronouncement of constitutional courts. On the judicial side, efforts have been made to sharpen the tools of structuring the discretion regarding sentencing. The Judicial pronouncements of superior courts have highlighted the importance of sentencing in categorical terms. Precedent law on this area has called upon all the courts to exercise care and caution in the matter of sentencing. Courts have also interpreted the right to a fair trial which also covers the sentencing process. Analysis of scope of a fair trial with respect to the right of appeal against sentencing has reflected that judicial trend is still mainly anchored to the position before the incorporation of Article 10-A in the constitution. However, some progressive judgments discussed in this chapter have started supplying ingredients of right to a fair trial as enacted in Article 10-A of the constitution.[207]

Dignity at the sentencing process by banning public hanging has been infused by judicial decisions. Judicial opinion on the question of a ban on retrospective sentencing and double jeopardy also need to be revisited in the light of the right to a fair trial as incorporated in the Article 10-A of the constitution. Asfandyar case which has allowed the retrospective application of National Accountability Ordinance has not been revisited yet. Similarly, the question of double punishment and expectancy of life arising out of long incarcerations before completion of the appeal process against sentences are not receiving liberal interpretation as per the spirit of right to a fair trial. Scope of remission and clemency regarding sentencing has been structured to some extent. However, the proper resolution of the tension between Article 2-A

207. Bilal Akbar Bhatti v Election Tribunal, Multan PLD 2015 Lah. 272.

and Article 45 of the constitution was held to be the domain of the parliament. Some guidelines have also been provided to subordinate courts on sentencing through the Rules and Orders of the Lahore High Court, Lahore formulated under the umbrella of Article 202 of the constitution and other judgment. Even in the areas untouched by the legislature, like purposes of sentencing and sentencing guidelines etc, gaps have been supplied by the mechanism of judicial interpretations. However, the proper mechanism of guidelines on sentencing has not developed, except for narcotics cases. Judicial innovations and interpretations have yet not been able to provide the separate right of hearing at the sentencing stage. Similarly, recording of reasons for sentence awarded has yet not been developed as a judicial norm in Pakistan.

Judicial endeavours have their limits, exceeding which, attract criticism of passing legislative judgments. However, in some areas sentencing features have constitutional protection. Limit of these protections has been defined by judgments of superior courts. In nutshell, the whole sentencing regime should now progressively anchor itself on the principle of a fair trial to avoid redundancy to Article 10-A of the constitution.

CHAPTER 6

ANALYSIS OF ISLAMIC LAW IN SENTENCING SYSTEM OF PAKISTAN

6.1. Introduction:

In chapter 2, after discussing the theoretical underpinning of the sentencing system some parameters have been extracted regarding a good sentencing system. These parameters have been tested against English sentencing system in chapter 3. Analysis of legislative and judicial sentencing regime in Pakistan based on these parameters in the light of fair trial has been made in chapter 4 and 5. However, keeping in view the importance of Islamic provisions in the sentencing system of Pakistan, they are being discussed under this chapter separately.

This chapter in part 1 reflects upon the importance of Islamic penal law. It then makes a survey of the constitution of Pakistan to bring out an element of Islamic law therefrom. It analyzes the preamble and other articles which reiterate the Islamic shade of the constitution. It then explains the importance of sentencing under Islamic law by linking the main Islamic penal regime to Higher Objectives of Shari'ah and the concept of maslahah. It then proceeds to explain the kinds of rights under Shari'ah and different classification of remedies to protect these rights. It depicts that hadd penalties are there to protect the right of Allah. Punishments of qisas, diyat and tazir are for the protection of rights of the individual. Siyasah, a generally ignored but the most important category, is meant to protect the rights of the community. Concept of siyasah shari'ah is, therefore, briefly explained. It also analyzes the scope of the right to a fair trial under Islamic law. It also discusses the scope of retrospective sentencing,

bar against double jeopardy and concept of clemency and remission in sentences under Islamic law. It then traces the purposes and principles of sentencing under Islamic law and also surveys the different sentencing options under it. It then discusses the incorporation of different tools of the structuring of discretion in the Islamic sentencing system under the umbrella of siyasah. Part II pertains to the analysis of sentencing provisions of different Islamic laws as enacted by the Parliament. Initially, analysis of four hudood laws including the prohibition of drinking, Zina, Qazf and offences against property has been made. A brief analysis of the Execution of Punishment of Whipping Ordinance, 1979 has also been made. In the end, Qisas and Diyat law as incorporated in the PPC has been analyzed. In this way not only the theoretical basis of Islamic sentencing system has been highlighted but also an analysis of its current operational scheme has also been made. Availability of different features of sentencing as extracted in chapter 2 has also been highlighted in the course of the discussion.

Part I. Sentencing under Islamic Law:

6.2. Importance of Islamic Penal Law:

Schacht while explaining the importance of Islamic Criminal law in the overall teachings of Islam, claims that it is the 'core and kernel' of Islam.[1] Zafar in his foreword on Nyazees book points out an element of exaggeration in Schacht's claim.[2] However, he admits that Islam is one of those religions in the world wherein 'law' occupies an important position. Iqbal explaining the scope of *Shari'ah* opines that it is a body of laws which encompasses spiritual and mundane affairs and no aspect of

1. Joseph Schacht, An Introduction to Islamic Law (Clarendon Press, 1964), 1.
2. I.A.K. Nyazee, Theories of Islamic Law: The Methodology of Ijtihād, Opposing Viewpoints (International Institute of Islamic Thought and Islamic Research Institute, 1994), v, https://books.google.com.pk/books?id=OackAQAAIAAJ.

Muslim life is outside its scope.[3] Muhairi asserts that Islamic law, as Muslims believe, is the expression of the will of God which regulates human behaviour in this world as well as in the eternal world.[4] Peter argues that enforcement of Islamic penal laws in other countries[5]after Saudi Arabia reflected that Islamic law is not a story of the past rather it is a living system operating in many countries.[6] Wasti argues that penal law of Islam is not anachronistic though he pointed out different lacunas in the actual process of Islamization of laws in Pakistan.[7] Bassiouni points out that to understand Islam and Islamic criminal justice system, one needs to understand the evolutionary process of Islamic thoughts and their practice in different cultures.[8] These opinions of the jurists have brought out the importance of penal laws in the overall domain of the *Shari'ah*. A considerable portion of Islamic penal regime has been incorporated in the legal system of Pakistan through different enactments. Thus, analysis of sentencing jurisprudence of Pakistan cannot be complete without analyzing the elements of Islamic law in its sentencing system.

Khalafallah argues that the 'Islamic Law' is a term of late origin and till the nineteenth century an all-inclusive term of *Shari'ah* was used.[9] However, *Shari'ah* is not a mere compilation or collection of penal laws. It is the wider system which orders

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3. Khurshid Iqbal, The Right to Development in International Law: The Case of Pakistan (Routledge, 2009), 172.
4. Butti Sultan Butti Ali Al-Muhairi, "Islamisation and Modernisation within the UAE Penal Law: Shari'ah in the Pre-Modern Period, " Arab Law Quarterly 10, no. 4 (1995): 287–309, doi:10.2307/3381684.
5. Rudolph Peters, Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century (Cambridge: Cambridge University, 2005), 142, http://dx.doi.org/10.1017/CBO9780511610677.
6. For example Iran, Pakistan and Egypt.
7. Tahir Wasti, The Application of Islamic Criminal Law in Pakistan: Sharia in Practice (BRILL, 2009), 1.
8. M. Cherif Bassiouni, The Islamic Criminal Justice System (Oceana Publications, 1982), x.
9. Haifaa Khalafallah, "The Elusive Islamic Law: Rethinking the Focus of Modern Scholarship, " Islam and Christian-Muslim Relations, accessed December 18, 2017, http://www.academia.edu/12840108/The_Elusive_Islamic_Law_Rethinking_the_focus_of_modern_scholarship.

the lives of Muslim in all respects.[10] Its penal portion is restricted to the enforcement of different penalties. The penal law is only a small portion of the whole corpus of Islamic law constituting not more than ten per cent of it.[11] Verses of the Holy Qur'an about the criminal law are not more than thirty.[12] However, the penal portion of *Shari'ah* has attracted the significant interest of modern researchers. Thus, keeping in view the importance of penal law in the broader set of *Shari'ah* it is pertinent to study the element of Islamic law (*Shari'ah*) in the sentencing system of Pakistan. Ghassemi argued that normative elements of Islamic sentencing, being derived from divine sources are not subject to same worldly tests like individual autonomy, happiness and public welfare.[13]

6.3. Constitutional Cover for Islamic Law:

6.3.1. Preamble:

Pakistan is an Islamic republic. Its constitution opens, "in the name of Allah, the Most Beneficent, and the Most Merciful". It declares that not only in Pakistan but in the entire universe sovereignty belongs to Allah Almighty alone. It also lay down the limits within which chosen representative of the peoples of Pakistan will exercise their authority as a trust. The preamble of the constitution of Pakistan declares that principles of social justice, democracy, equality, freedom and tolerance as enunciated by Islam shall be observed. It holds the state responsible to enable the Muslims to order their individual and collective lives in accordance with Islamic principles as laid down in the Holy Qur'an and the Sunnah. However, the protection of minorities is

10. Ahmed Zaki Yamani, "The Eternal Sharia, " New York University Journal of International Law and Politics 12, no. 2 (Fall 1979): 205–12.
11. Asrar Ahmed, "ERISA and Sharia Law, " Journal of Pension Benefits 20, no. 4 (July 1, 2013): 5.
12. Silvia Tellenbach, "Fair Trial Guarantees in Criminal Proceedings under Islamic, Afghan Constitutional and International Law, " HEIDELBERG J. OF INT'L L. 64 (2004): 929.
13. Ghassem Ghassemi, "Criminal Punishment in Islamic Societies: Empirical Study of Attitudes to Criminal Sentencing in Iran, " European Journal on Criminal Policy and Research 15, no. 1–2 (June 2009): 159–80, doi:10.1007/s10610-008-9095-2.

also one of the principles incorporated in the preamble. The preamble also indorses the faithfulness to the declaration made by the founder of Pakistan that it will be a democratic state based on principles of social justice as enunciated by Islam.

6.3.2. Islam in the Body of the Constitution:

The Constitution specifically declares Islam as the state religion of Pakistan.[14] Principles and provisions set out in the Objectives Resolution are also a substantive part of the constitution.[15] The principles and provisions of Objectives Resolution are not only reflected in the preamble and Article 2-A but are now a part of the constitution as a first annexure. In this way, above-mentioned provisions pertaining to the observance of Islamic principles are embedded in the constitution of Pakistan from three angles.

As per the principles of policy[16] the state is responsible to enable the Muslims to order their lives in accordance with the principles of Islam as ordained in the Holy Qur'an and the Sunnah.[17]Other steps to ensure the Islamic way of life are also mentioned in these principles. President and the Prime Minister must be a Muslim.[18]For Islamization of laws, a Council of Islamic Ideology has been created.[19]In addition to this council, Federal Shariat Court[20] and Shariat Appellate Bench of the Supreme Court has also been created for Islamic pruning of existing laws and for decisions of cases arising out of hudood laws. Decisions of these courts serve as binding precedent on sentencing issues under Islamic laws. Lau argued that prior to the constitution of Federal Shariat Court only forum for the introduction of

14. Article 2 of the Constitution of Pakistan.
15. Article 2-A of the Constitution of Pakistan.
16. Articles 29-40 of the Constitution of Pakistan.
17. Article 31 of the Constitution of Pakistan.
18. Article 41 of the Constitution of Pakistan.
19. Article 228 of the Constitution of Pakistan.
20. Article 203 C of the Constitution of Pakistan.

Islamic law was the parliament.[21] Creation of Federal Shariat Court has provided a judicial forum for initiating Islamization process. Term Muslim has also been constitutionally defined to ensure the purity of faith.[22]Redding has also summarized the Islamic provisions in the Constitutions of Pakistan reflecting almost all above discussed provisions.[23] In this way, Islamic spirit runs through the veins and arteries of the constitution and, must also reflect in the sentencing system of Pakistan. The Constitution, as argued by Nyazee, is the main source of criminal law and is, therefore, the fountain of sentencing powers.[24] Islamic laws in Pakistan are not self-executory and are legislated by the legislature based on powers emanating from the constitution. Therefore, recognition of principles of the Holy Qur'an and the Sunnah in the constitution of Pakistan is of vital importance for the polity of Pakistan.

6.4. Importance of Sentencing in Islam and Higher Objectives of *Shari'ah:*

Importance of sentencing under Islamic system can be assessed from the facts that the basic penal regime under Sharia is directly linked to Higher Objectives of *Shari'ah* (Maqasid Al-*Shari'ah*). Thajudeen quotes Imam Gazali on Higher Objectives of *Shari'ah* as under:

> The very objective of the *Shari'ah* is to promote the well-being of the people, which lies in safeguarding their faith (deen), their lives (nafs), their intellect (aql), their posterity (nasl), and their wealth (mal). Whatever ensures the safeguarding of these five serves the public interest and is desirable, and whatever hurts them is against public interest and its removal is desirable.[25]

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21. Martin Lau, The Role of Islam in the Legal System of Pakistan (BRILL, 2006), 6.
22. Article 260 of the Constitution of Pakistan.
23. Jeffrey A. Redding, "Constitutionalizing Islam: Theory and Pakistan, " Virginia Journal of International Law 44, no. 3 (Spring 2004): 759–828.
24. Imran Ahsan Nyazee, General Principles of Criminal Law (Islamic and Western), 2016th ed. (Islamabad: Sharia'ah Academy International Islamic University Islamabad, 2016), 11.
25. Kulsanofer Thajudeen, "Maqasid Al Shariah Is an Important Shariah Aspect in Finance, " accessed December 19, 2017, http://www.academia.edu/1984175/Maqasid_Al_Shariah_is_an_important_Shariah_aspect_in_Finance.

From the above narration of Imam Gazali, it seems that Iqbal has inferred that the single purpose of *Shari'ah* is *maslahah,* [26] which promotion of public good and prevention of public harm. However, *maslahah* is wider in scope than the principle of the utility of Bentham's which is meant to achieve the sole objective of achieving the greatest happiness of the greatest number. *Maslahah*, on the other hand, is linked to the centripetal force of above-mentioned objectives of Shari'ah and whatever advances these objectives is deemed to advance the public good. Thus, public good under Shari'ah is not a self-standing notion rather it takes its meaning and contours from the above objectives. Worldly purposes of *Shari'ah* are four which include preservation of life (*nafs*), preservation of progeny (*nasl),* preservation of intellect (*aql)* and preservation of wealth (*mal).*[27] For the protection of life, there are the punishments of Qisas and Diyat, for protection of family life, Zina and Qazf are penalized.[28] For the protection of intellect consumption of alcohol is punished. While for protection property, theft and haraabah are severely punished. These sentences are actually tools of protection of above-mentioned objectives. Importance of objectives of *Shari'ah* is manifest from the fact that actions touching these objectives are directly penalized by the dictates of Qur'an and Sunnah, the most important sources of *Shari'ah*. This also reflects that matter of sentencing under Islamic law has not been left entirely in the hands of human authorities and most important aspects have been covered by the divine law itself.

However, *Shari'ah* does not rely merely on the penalties to achieve these objectives. Affirmative actions for protection and promotion of these objectives are even a more important aspect.[29] The affirmatory aspect of these objectives binds the

26. Iqbal, The Right to Development in International Law, 171.
27. Nyazee, Theories of Islamic Law: The Methodology of Ijtihād, 208.
28. Ibid., 240–41.
29. Ibid., 235.

state to create reasonable conditions for existence and continuation of life, protection of family and circulation and growth of wealth. Even the standard of proof prescribed in *Shari'ah* regarding different hadd penalties reflects that these are of the rare resort. Thus, penalties are not the favourite tool of *Shari'ah* to achieve these objectives. Rather these are only means to a greater end. Penalties under Islamic law are enforced to protect three kinds of rights. These are rights of God, rights of community or state and right of individuals.[30]To understand this distribution of rights in *Shari'ah* and respective penalties to protect these rights, it is important to discuss briefly these categories of rights.

6.5. Categories of Rights under *Shari'ah:*

Nyazee[31]has divided the rights and there remedies into five categories which may be tabulated as under for convenience of understanding:

Nature of Right	**Dominance of right**	**Remedy**
Right of Allah	Exclusive	Huddud except Qazf
Mixed Right	Allah	Hadd of Qazf
Mixed Right	Individual	Qisas
Right of Individual	Exclusive	Diyat and Tazir[32]
Right of State	Exclusive	Siyasah

Thus, three kinds of penalties are meant to protect different kinds of rights. Punishments of hadd are meant for protection of the right of Allah which are only a few in the penal domain. Some rights of individuals are protected through the modus

30. Muhammad Ahmad Mushtaq, "The Doctrine of Siyasah in the Hanafi Criminal Law and Its Relevance for the Pakistani Legal System, " 2013, https://papers.ssrn.com/abstract=2238520.
31. Ahsan Nyazee, General Principles of Criminal Law (Islamic and Western), 64.
32. Here Nyazee refers tazir in a very limited scope.

of tazir, but this also attracts the requirement of the standard of proof and may not be sufficient to tackle a multitude of offences of new origin. However, *Shari'ah* is not limited to these two kinds. Third and the most wider category is siyasah which deals with the mass of the offences and requirement of the standard of proof and sentences under siyasah offences are adjustable provided they don't violate any principle of *Shari'ah.*

6.6. Siyasah *Shari'ah*:

Siyasah *Shari'ah* is 'administration of justice according to *Shari'ah.*[33] Kamali points out that siyasah encapsulate the discretion of the ruler to take measures for good governance which are not against any basic principle of *Shari'ah.*[34] He maintains that in the domain of criminal law it empowers the head of the state or *ulu-al-amr* to define any new offence and also to prescribe punishment for it. Reflecting the importance of siyasah Masud argues that siyasah is the law in practice in contradiction to fiqh which is claimed to be a mere juristic law.[35] Mushtaq argues that these are the discretionary acts of the ruler in line with the objectives of *Shari'ah* but without any clear supporting text from the Holy Qur'an and the Sunnah.[36] The above-mentioned opinions of the jurists reflect that though siyasah works under the umbrella of *Shari'ah* but it is not restricted in scope as is the case of hadd or strictly speaking tazir. If siyasah remains anchored with Shari'ah it is called siyasah adilah and if it is detached from the principles of *Shari'ah* it is called siyasah zalimah.[37]

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33. Ahsan Nyazee, General Principles of Criminal Law (Islamic and Western), 70.
34. Muhammad Hashim Kamali, "Siyasah Shar'iyah or the Polices of Islamic Government, " The American Journal of Islamic Social Sciences 6, no. 1 (1989): 59–80.
35. Muhammad Khalid Masud, "The Doctrine of Siyasah in Islamic Law, " Recht van de Islam 18 (2001): 1–29.
36. Mushtaq, "The Doctrine of Siyasah in the Hanafi Criminal Law and Its Relevance for the Pakistani Legal System."
37. Ahsan Nyazee, General Principles of Criminal Law (Islamic and Western), 70.

Mushtaq opines that siyasah is an ignored area in the post-colonial developments of Islamic criminal law. His argument is strengthened by the fact that not only in the statutory Islamic law as introduced in Pakistan but even some renowned modern writers on Islamic law have also ignored this category.[38] He argues that the doctrine of siysah can provide a better answer to the issues of punishment in rape and blasphemy cases. Siyasah, in his view, can cater to the undesirable 'murderers laundering' pardons in murder cases. It can also tackle the issue of competency of a woman to stand as a full witness. Explaining the impact of classification of offences on the bases of corresponding rights, Nyazee points out that evidence of women is not admissible in the huddud cases which pertain to right of Allah.[39] He argues that in cases falling strictly under tazir, pertaining to right of individuals, evidence of two women are required to substitute one male witness. However, this issue of competency of woman witness can be plugged under siyasah where incompetent authority not only prescribes the substantive offence, its punishment but can also fix the mode and standard of proof. Thus, siyasah is the most effective tool to streamline the sentencing in newly created offences. If sentencing under new offences meets the standards of fair trial and proper structuring of discretion then they may come under the category of siyasah adilah.

6.7. Fair Trial and Islamic Law:

The right to a fair trial and due process are of vital importance to ensure the protection of human rights.[40] How *Shari'ah*, which is earlier in origin, has taken care

38. Tellenbach, "Fair Trial Guarantees in Criminal Proceedings under Islamic, Afghan Constitutional and International Law."Also See Islam Ka FOjdari Qanoon Abdul Qadir Awdah, and The Criminal Law of Islam by Prof. Dr. Anwarullah.
39. Ahsan Nyazee, General Principles of Criminal Law (Islamic and Western), 66.
40. Mashood A. Baderin, "A Comparative Analysis of the Right to a Fair Trial and Due Process under International Human Rights Law and Saudi Arabian Domestic Law," The International Journal of Human Rights 10, no. 3 (September 1, 2006): 241–84, doi:10.1080/13642980600828586.

of these modern rights emanating from UDHR, ICCPR and other international instruments of later age? Basic principles of Shari'ah are incorporated in the Qur'an and the Sunnah which are not legal codes in the strict sense. Therefore, at the very outset, a question arises that how the principle of legality and other elements of the right to a fair trial are meted out by Islamic law?

To answer this question Awdah argued that to treat any action or omission a crime under Islamic law, there must be a specific *nus* (text) [41] Such *nus* should not only declare the criminal nature of any act or omission but should also state the punishment for it. Awdah has stated two main principles of legality under Islamic law, which go to the roots of the right to a fair trial. These are[42]:

i) There is no crime nor there can be a punishment without *nus*.[43]

ii) Every act and omission is primarily permitted unless specifically prohibited.

Elements of both these principles can be abundantly found in Article 4 of the constitution of Pakistan. Laying down the divine principle of notice before penalizing any act, it is stated in the Qur'an:

> "nor would We visit with Our Wrath until We had sent an apostle (to give warning) ".[44]

At another place, the Qur'an conveys the same divine principle in a bit different words:

> Nor was thy Lord the one to destroy a population until He had sent to its centre an apostle, rehearsing to them Our Signs; nor are We going to destroy a population except when its members practise iniquity.[45]

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41. Abdul Qadir Awdah, Al-Tashri'Al-Jina-Islami [Islam Ka Fojdari Qanoon], trans. Sajid-ur-Rehman Kandhalvi, vol. 2, 3 (Lahore: Islamic Publications Limited, 1979), 139.
42. Ibid., 2, 3:145.
43. Ahsan Nyazee, General Principles of Criminal Law (Islamic and Western), 78.
44. The Holy Qur'an 17:15 Translated by Abdullah Yusufali http://www.islam101.com/quran/yusufAli/QURAN/17.htm accessed on 22-12-2017. In this work, Abdullah Yusufali translation has been used throughout.
45. The Holy Qur'an 28:59.

In the opinion of the jurists, both these verses of the Qur'an lay down the principle of legality in *Shari'ah*.[46] Anwarullah[47] also argues that under Islamic law an accused can only be convicted if three elements of the crime are established which include:

i) A clear prohibitory provision with specific punishment

ii) Action or omission violating such prohibition

iii) Maturity of offender i.e. lunatic or minor are not liable

Based on above-mentioned verses of the Holy Qur'an, Nyazee even insists that Islamic law requires the statutory statement of offences and their sentences.[48] These principles of a fair trial are recognized by the Cairo Declaration on Human Rights in Islam. Article 19 provides as under:

(a) All individuals are equal before the law, without distinction between the ruler and the ruled.

(b) The right to resort to justice is guaranteed to everyone.

(c) Liability is in essence personal.

(d) There shall be no crime or punishment except as provided for in the Shari'ah.

(e) A defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence.[49]

Article 6 of the Arab Charter on Human Rights also provides that there can be no punishment without prior promulgation of law.[50] Malekian speaking in the

46. Ahsan Nyazee, General Principles of Criminal Law (Islamic and Western), 78; Tellenbach, "Fair Trial Guarantees in Criminal Proceedings under Islamic, Afghan Constitutional and International Law."
47. Anwarullah, The Criminal Law of Islam (Islamabad: Sharia'ah Academy International Islamic University Islamabad, 2005), 5–7.
48. Ahsan Nyazee, General Principles of Criminal Law (Islamic and Western), 79.
49. The Cairo Declaration on Human Rights in Islam. http://www.bahaistudies.net/neurelitism/library/Cairo_Declaration_on_Human_Rights_in_Islam.pdf accessed on 22-12-2017.

international perspective of Islamic criminal justice argues that principles of *de lege lata* (the law as it exists), *nullum crimen sine lege* (no crime without law) and *nulla poena sine lege* (no penalty without law) are recognized under Islamic criminal law.[51] Baderin maintains that the Qur'an and the Sunnah only lay down the basic aspect of substantive fair trial and its procedural insights are to be determined by the competent authority based on Siyasah Shari'ah.[52] Shari'ah has not only provided basic guidelines on right to a fair trial but has also provided liberty to inject procedural fairness as the civilization advances. It is reflected from the above discussion that the basic principle of a fair trial at penal law is well entrenched in the Islamic criminal law. Principle of siyasah shari'ah allows to further build these principles subject to the only limitation that no such measure should be against the basic norms of *shari'ah*. Above discussion reflects that under Islamic law there is ample scope to meet the sentencing feature regarding compliance with standards of a fair trial. Even otherwise, the constitution being superior law of the land has provided guarantees regarding fair trial which are equally applicable to Islamic sentencing regime enacted through different legislations, discussed in the latter part of this chapter.

6.8. Retrospective Sentencing under Islamic Law:

Except for a few exceptions, Islamic law clearly bans retrospective sentencing. The Qur'an passes a clear message regarding the non-retroactivity of the penal actions in the following words:

> Say to the Unbelievers, if (now) they desist (from Unbelief), their past would be forgiven them; but if they persist, the punishment of those before them is already (a matter of warning for them).[53]

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50. Arab Charter of Human Rights http://www.humanrights.se/wp-content/uploads/2012/01/Arab-Charter-on-Human-Rights.pdf accessed on 22-12-2017.
51. Farhad Malekian, Principles of Islamic International Criminal Law, vol. 5., Brill's Arab and Islamic Laws Series (Brill, 2011).
52. Baderin, "A Comparative Analysis of the Right to a Fair Trial and Due Process under International Human Rights Law and Saudi Arabian Domestic Law."
53. The Holy Qur'an, 8:38.

Nyazee argues that the above verse is a clear indication that retrospective sentences are not to be awarded. Awdah has stated two principles regarding retrospective sentencing under Islamic law.

i) Dangerous crimes affecting the general fibre and peace of the community can be penalized retrospectively at the option of legislative authority.

ii) Beneficial legislation will be retrospective in operation unless legislative authority restricts it in the public interest.

Awdah has augmented his point by referring to another verse from the Holy Qur'an which says:

> And marry not women whom your fathers married, - except what is past: It was shameful and odious, - an abominable custom indeed.[54]

Based on the above verse Awdah[55] argued that Nikah with the previous wives of fathers was annulled but no penalty was imposed for such unlawful marriages. Thus, he argues that retrospectivity in the hadd offences was not permitted. Similarly Gilani[56]has referred another verse of the Holy Quran specifically excluding retrospective application which says:

> And two sisters in wedlock at one and the same time, except for what is past; for Allah is Oft-forgiving, Most Merciful;-[57]

Regarding the retrospective application of beneficial legislation Awdah has relied upon another verse of the Holy Qur'an which states:

> O ye who believe! the law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome

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54. The Holy Qur'an 4:22.
55. Awdah, Al-Tashri'Al-Jina-Islami [Islam Ka Fojdari Qanoon], 2, 3:353.
56. Dr.Riaz-ul-Hassan Gilani, The Reconstruction of Legal Thoughts in Islam (Lahore: Irfan Law Book House, 1975), 376.
57. The Holy Qur'an 4:23.

gratitude, this is a concession and a Mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty.[58]

Even the offences committed prior to the revelation of this verse were dealt with under the principle enunciated in this verse.[59] Thus, a beneficial provision for the accused was allowed to operate retrospectively. The Cairo Declaration of Human Rights in Islam though require a specific law for any punishment but does not specifically lay down the bar on retrospective sentencing. However, the crux of the matter is that under the principle of siyasah *Shari'ah* legislative authority of Islamic state may lay down any specific rule to ban any retrospective sentencing. Article 13 of the constitution of Pakistan is the manifestation of this power under siyasah. From the above discussion, it is manifest that Islamic law, as a rule, does not allow retrospective sentencing. Hence Islamic part of a sentencing regime of Pakistan also complies with sentencing feature regarding the ban on retrospective sentencing.

6.9. Double Jeopardy under Islamic Law:

Awdah in his treatise on Islamic law has discussed the issue of double jeopardy under *Shari'ah*. He argued without referring to any text, that under sharia no one can be sentenced twice for the same act.[60] Supporting the above assertion he reasoned that under *Shari'ah* penalties under hudood and qisas are sufficient to reprimand the accused and, therefore, there is no scope of double punishment. On this ground, Awdah even disputed the validity of disciplinary penalties in a service matter for any tazir offence and argued that removal from service on the ground of commission of any offence is itself a tazir and constitute a sufficient punishment. In a fair trial context in Saudi Arabia, Baderin also argues that protection against double jeopardy can be pleaded under general principles of Islamic law, though no such

58. The Holy Qur'an 2:178.
59. Awdah, Al-Tashri'Al-Jina-Islami [Islam Ka Fojdari Qanoon], 2, 3:365.
60. Ibid., 2, 3:90.

specific protection is provided in domestic legislation.[61] Thus, *Shari'ah* as rule does not approve double jeopardy. Different enactments including hudood, qisas and diyat laws, being subject to general constitutional principles do not admit double jeopardy and, therefore, comply with sentencing features in this regard.

6.10. Clemency and Remissions:

As discussed above, offences under Islamic law are divided into different groups which are hadd, qisas, tazir and siyasah.[62] This classification is based on the nature of the right violated. In case of violation of the right of Allah, the applicable penal apparatus is hadd and qisas. Hadd being pure right of Allah, no authority including the head of state has the right to compromise or pardon. It being right of Allah, cannot be equated with the right of the community.[63] Right of Allah under hadd penalty is independent of right of state and that of individuals collectively as a community. However, in qisas there is an element of the right of Allah but the right of the individual is dominant, therefore, victim or his legal heirs have the right of pardoning or compromising with the accused.[64] In qisas even the head of state or any other authority has no right to pardon the accused except with the consent of the victim or his legal heir. Nyazee argues that penalty for offending against the right of Allah cannot be waived or pardoned when accused has been apprehended or convicted.[65] Gilani has also mentioned that the head of state has no authority to pardon the sentence in cases involving hadd, qisas and diyat.[66] He argues that enforcement of such punishments is obligatory on the state. Without mentioning

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61. Baderin, "A Comparative Analysis of the Right to a Fair Trial and Due Process under International Human Rights Law and Saudi Arabian Domestic Law."
62. Ahsan Nyazee, General Principles of Criminal Law (Islamic and Western), 57.
63. Nyazee, Theories of Islamic Law: The Methodology of Ijtihād, 115.
64. Abdullah Saad Alarefi, "Overview of Islamic Law, " International Criminal Law Review 9, no. 4 (2009): 707–32.
65. Ahsan Nyazee, General Principles of Criminal Law (Islamic and Western), 65.
66. Gilani, The Reconstruction of Legal Thoughts in Islam, 375.

siyasah offences, he accepts, the pardoning right of the state in cases involving tazir. Thus, it can be inferred that under Islamic law, right of clemency or pardoning right vests in the head of state where offence actually affects the right of the community and does not fall in the category of hadd, qisas, or diyat offences. However, even in hadd offences affecting personal rights such as theft, the tradition of the Holy Prophet (P.B.U.H) reflects that an affected person may settle the issue with the accused prior to informing the authorities. The Holy Prophet (P.B.U.H) said, "Pardon in hudud among yourselves, for the legal penalty for any wrongdoing, reported to me will imperatively be applied".[67]

Repenting over criminal behaviour is considered one of the conditions of clemency if such repenting occurs before the apprehension. Guidance in this regard is provided in the Holy Qur'an as under:

> The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter; Except for those who repent before they fall into your power: in that case, know that Allah is Oft-forgiving, Most Merciful.[68]

Above referred verses also reflect an element of clemency subject to the condition of repenting. However, Awdah has argued that the majority opinion of the jurists' claims that the above verses only apply to offences of haraabah and are not applicable to other offences.[69] Even if the opinion of the jurists put forth by Awdah is accepted that the above verse is not meant to grant scope of clemency in other offences, siyasah regime may provide for the same. Under siyasah *Shari'ah*, for

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67. Quoted in "Hudud: Crime and Punishment, " Perennial, accessed January 16, 2018, http://perennialvision.org/hudud-crime-and-punishment/. See also Abu Dawud in the chapter 'Legal Penalties, ' no. 4376.
68. The Holy Qur'an 5:33, 34. .
69. Awdah, Al-Tashri'Al-Jina-Islami [Islam Ka Fojdari Qanoon], 2, 3:440-444, 559, 560.

offences created under siyasah, head of state has the power to grant pardon, subject to the only limitation that such exercise of power should be in line with objectives of sharia. Sections 55 and 55-A of the PPC have been amended. They now provide that where a sentence has been passed under qisas and diyat law as contained in chapter XVI of the PPC, then pardon will not be granted without the consent of the victim or his legal heirs. Sentences under Islamic laws are subject to the same remission and parole process which is applicable to other offences. The only difference is that in cases of qisas and diyat law as contained in Chapter XVI of the PPC, for pardon or reprieve consent of the victim or his legal heir is required. Discussion regarding the application of this sentencing feature has also been made under chapter 4 and 5. Same principles of remission and parole also govern the sentencing under Islamic laws with the above-mentioned exception of the consent of the victim or legal heirs.

6.11. Purposes and Principles of Sentencing:

Referring different purposes of sentencing in Model Penal Code, Nyazee argues that Islamic law agrees with most of these purposes of sentencing.[70] These purposes include prevention of crimes, reformation and rehabilitation of offenders, individualization of sentencing, providing safeguards against disproportionate, excessive and arbitrary sentences. However, among these sentencing purposes and principles, the claim of Islamic sentences being excessive or disproportionate is not accepted. It is argued that Islamic sentences are in consonance with the welfare objectives of humanity settled by divine Lawgiver.[71]

Reflection of traditional purposes of sentencing can also be found under Islamic law. The retributive theory with the element of proportionality is directly linked with a Quranic *nus* which ordains:

70.. Ahsan Nyazee, General Principles of Criminal Law (Islamic and Western), 32.
71. Ibid., 35.

> O ye who believe! the law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude, this is a concession and a Mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty.[72]

The above verse of the Holy Quran firstly points towards that element of retribution with proportionality. It imposes the responsibility for the wrong act upon the offender and penalizes it for that very reason. However, an element of reparation and restorative justice is also seen in the latter part of the verse where for the ultimate settlement of the feuds, settlement through compensation is permitted. An element of reformation of attitude is also pointed out in the closing words that, "whoever exceeds the limits shall be in grave penalty". These words depict that results reached in the light of the above verse are not only to be accepted as a command of law as enforced by authority but are also to accepted at heart to avoid divine displeasure. Elements of deterrence and vengeance are also available in the penalty prescribed in the above verse. It may be argued that if an offender in case of murder is executed in qisas, then an element of deterrence to his extent vanishes and makes the penalty useless on this ground. However, execution of a deserved penalty on the murderer serves the element of general and long term deterrence to prevent the commission of offence from like-minded offenders. The imposition of excessive penalty upon the offender to merely deter the others is not favoured by Islamic law.[73] Therefore, an element of proportionality cannot be compromised for the sake of deterrence. Instead, a balance needs to be struck in achieving both the objectives. From the above-quoted verse, the principle of equality, proportionality and parity are also reflected. Though *Shari'ah* is not bound to match or seek its justification by matching with modern sentencing

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72. The Holy Qur'an 2:178.
73. Ahsan Nyazee, General Principles of Criminal Law (Islamic and Western), 72.

purposes and principles but the majority of these purposes and principles can be traced in *Shari'ah*. Above all, any purpose or principle of sentencing can be injected in Islamic law under the doctrine of siyasah if it is not against the fundamentals of *Shari'ah*. However, Islamic laws as enacted in Pakistan have not specifically stated purposes and principles of sentencing. Therefore, silence regarding the statement of sentencing purposes and principles prevail in the Islamic enactment. Thus, the status of sentencing feature regarding the statement of sentencing purposes and principles is the same as discussed in chapter 4 and 5.

6.12. Sentencing Options:

Awdah has mentioned that in addition to hadd, qisas, diyat, daman and arsh Shari'ah has provided multiple other sentencing options. These include sensitizing or threatening with punishment, boycott, admonishing, fine, shaming, whipping, beating with a stick, imprisonment, banishment and death.[74] However, Awdah argues that the death sentence is meant for most serious offences. On the duration of imprisonment, Nyazee[75] has mentioned the difference of opinion among Hanfies, Malkies, Hanbalies and Shafies. According to Hanfies view, determination of the period of imprisonment is the discretion of state while some other schools argue that imprisonment cannot be more than one year. Thus custodial sentence in the form of imprisonment is not a preferred choice under Sharia. Though there is no *nus* on community sentencing but as discussed above all invocation in the sentencing system can be adopted under the doctrine of siyasah *Shari'ah*. Thus, community sentencing options which are not against the objectives of *Shari'ah* may be validly incorporated in an Islamic sentencing system. The discussion under part 2 of this chapter also reflects that

74. Awdah, Al-Tashri'Al-Jina-Islami [Islam Ka Fojdari Qanoon], 2, 3:200, 201.
75. Ahsan Nyazee, General Principles of Criminal Law (Islamic and Western), 36.

custodial sentences are not the choice of the first resort under Islamic laws as enacted in Pakistan.

6.13. Structuring of Sentencing Discretion:

Important tools to structure the sentencing discretion at the sentencing stage are sentencing guidelines, separate sentencing hearing and recording of reasoning for sentences awarded. On these points, as such no direct *nus* guide. However, sentences of hudood and qisas are mainly fixed sentences with almost no discretionary powers. However, the doctrine of siyasah sharia allows including all these modern devices in the *Shari'ah* oriented sentencing system. Thus, statutes legislating Islamic penalties may provide a mechanism of separate sentence hearing and demands reasoning for a particular discretionary sentence. Such laws may also provide a mechanism of sentencing guidelines. All these steps and any other modern sentencing device may be incorporated in the sentencing system under the umbrella of siyasah, subject to the limitation that any such step should not violate the basic tenant of *Shari'ah*.

It is manifest from the discussion under part 2 of this chapter that guidance regarding the imposition of a sentence of imprisonment is more pronounced in hurt offences. Aggravating factors for the imposition of a sentence of imprisonment have been stated under section 337 N (2) PPC. However, Islamic laws as enacted in Pakistan do not provide a mechanism of detailed sentencing guidelines. In Islamic laws enacted in Pakistan, there is no specific sentencing legislation. There is no mechanism of separate sentence hearing under Islamic laws. Mechanism of summoning pre-sentence reports and victim impact reports is also not provided even under Islamic sentencing regime. However, in murder and hurt cases, on the bases of principles of Shari'ah, victim say and care is more visible. Mechanism of appeal in Islamic offences is similar to the other offence in the PPC, however, in hudood

offence appeal lies to the Federal Shariat Court. There is no specific requirement of passing reasoned sentencing order under Islamic enactments in Pakistan. No concept of sentencing advisory body or sentencing information system has been introduced by enactments based on Islamic laws. It is manifest that the principles of Shari'ah have not barred compliance with different modern sentencing features. Failure to reflect different sentencing features which also advance the principle of Maslahah is attributable to the legislature which enacted Islamic statutory law.

Part 2: Analysis of Statutory Provisions of Islamic Law:

6.14. Hudood Ordinances:

For Islamization of laws in Pakistan, initially, five laws were promulgated in 1979. These include the Prohibition (Enforcement of Hadd) Order 1979, Offences against Property (Enforcement of Hudood) Ordinance, 1979, the Offence of Qazf (Enforcement of Hadd) Ordinance 1979, the Offence of Zina (Enforcement of *Hudood*) *Ordinance*, 1979, the Execution of Punishment of Whipping Ordinance, 1979. To complete the survey of Pakistani sentencing jurisprudence, it is imperative to analyze the sentencing provisions of these enactments. As for as, the consonance of these laws with Shari'ah is concerned, the Council of Islamic Ideology has raised some important points in this regard in its report[76] on hudood laws.

The Council pointed that definition of hadd is not derived from the Qur'an and the Sunnah. The report also objected that the definition of hadd is not even in full accord with the opinion of jurists. Council bravely pointed out that identification and classification of hudood given in these laws is arbitrary and selective which has added to the confusion between hadd and tazir. In this report, in addition to hadd and tazir, siyasah is also mentioned as another classification of offences under Shari'ah.

76. Council of Islamic Ideology http://cii.gov.pk/publications/h.report.pdf accessed on 28-12-2017.

Recognition of siyasah allows keeping the hudood laws in a limited domain and general category of offences can be dealt with under this class. In its report, the Council also opined that existing hudood laws are not in accord with the Quran and the Sunnah and a thorough revision is required. In this report, a detailed analysis of literature developed in supporting and criticizing hudood laws as they stand has also been made. Proper Islamization of laws is not subject of this dissertation rather Islamic laws are being discussed in the context of analyzing the sentencing regime of Pakistan. At this stage, it is necessary to analyze the sentencing provisions of hudood laws one by one.

6.14.1. Prohibition (Enforcement of Hadd) Order, 1979:

In this enactment, there is only one hadd offence with a fixed penalty. In all other offences element of discretion is provided. Section 8 of the law provides the definition and punishment of drinking liable to hadd. Punishment of drinking liable to hadd is whipping eighty stripes. In this hadd offence, the sentence being fixed, there is no question of the structuring of the discretion.

Other offences included in this enactment are tazir[77] offences with discretionary sentences of whipping and imprisonment extendable to different terms. Section 3 (1) [78] of this law provides punishment of imprisonment of either description which may extend to five years. The sentence of imprisonment is to be combined with a sentence of whipping not more than thirty stripes and a fine of an unspecified amount. The second clause of above-mentioned provision provides sentencing options which include imprisonment which may extend to two years or imprisonment for life. In this way anomaly of a huge gap between two sentencing options is similar to one

77. Tazir means any punishment other than hadd, Section 2 (o) of Prohibition (Enforcement of Hadd) Order, 1979.
78. Prohibition of manufacturing etc. of intoxicants Section 3 (1) Prohibition (Enforcement of Hadd) Order 1979.

mentioned in the PPC which has been analyzed in chapter 4. This clause also provides whipping which may be up to thirty stripes and fine. Similar sentencing option with the same gape is also provided for possessing heroin, cocaine etc.[79] and for the breach of conditions of the license issued under this Order.[80]

For drinking liable to tazir[81] sentencing options include imprisonment of either description which may extend to three years with the alternate sentencing option of thirty stripes or both. However, in the same enactment under section 4, thirty stripes are the alternate option of two years imprisonment while under section 11, it is the alternate option of three years imprisonment. For contravening the provisions regarding arrest, sentencing options include imprisonment up to six months or fine up to five hundred rupees or both. For vexatious delay in forwarding the arrested person or article to prohibition, the officer is one thousand rupees.[82]

There is no criterion in this law to adjust the amount of fine based on inflation or other factors. Amounts of fine mentioned in these sections are the same as enacted thirty-eight years ago. Keeping in view the amount of fine of rupees five hundred under section 12 of the Prohibition Order, one-month imprisonment is equated with a financial penalty of rupees 83.33. There is no disclosed rationale in this law to keep this equivalence of imprisonment for such a meagre amount of fine.

There is an element of enhanced punishment for previous conviction under this law.[83]For previous conviction, imprisonment is to be added as a compulsory additional sentence. However, there is no specific guidance to measure the quantum of this additional sentence of imprisonment. Certain provisions of the PPC and the Cr.PC have been made applicable which to some extent regulate the penalty of a fine.

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79. Section 4 Proviso Prohibition (Enforcement of Hadd) Order 1979.
80. Section 20 of the Prohibition (Enforcement of Hadd) Order 1979.
81. Section 11 of the Prohibition (Enforcement of Hadd) Order 1979.
82. Section 13 of the Prohibition (Enforcement of Hadd) Order 1979.
83. Section 24 of the Prohibition (Enforcement of Hadd) Order 1979.

However, the discussion under chapter 4 reflected that guidance on sentencing under the above codes is not up to the modern standard. Therefore, this enactment failed to provide guidelines or guidance mechanism of its own to structure the sentencing discretion.

Another element of surprise is provided in the proviso of section 27 of this enactment. This proviso provides that during the trial of offences under this enactment, if a court finds that offender has committed a different offence under any other law, then trial court if competent to try such different offence, will convict and punish the offender for such different offence. However, this arrangement puts the accused in a strange predicament. He may not be known till the conclusion of the trial that what specific offence he is defending.

This enactment though, enacted during the suspension of the constitution has respected the principle of the bar on retrospective application.[84] This Order has made the Cr.PC applicable to the cases under this Order. However, there is no clear guideline regarding the scope of executive clemency under the Cr.PC. Strictly speaking, sharia does not provide any scope of clemency under hadd offences. As mentioned above, though this whole Order contains several penal clauses but there is only one hadd offence. The offence of drinking alcohol is clearly mentioned as a hadd offence, but no specific guidance regarding the scope of clemency under this law has been mentioned. In the Cr.PC, an embargo has been imposed on the Provincial government to grant any reprieve or remission in offences committed under chapter XVI of the PPC without consent of the legal heirs of the deceased.[85] However, there is

84. Section 32 of the Prohibition (Enforcement of Hadd) Order 1979.
85. Section 402-B Cr.PC.

no mention of hadd offences in this Order[86] or other hudood laws in section 402 Cr.PC.

Provisions of this enactment have been interpreted by different judgments of the higher courts. The Federal Shariat Court while considering the question of simultaneous conviction and sentencing under section 3 and 4 of the Prohibition Order, held that element of possession is also included in section 3 of the Prohibition Order. Therefore, separate conviction and sentence under section 4, was set aside.[87] Application of Prohibition Order to non-Muslims was assailed in the Federal Shariat Court. By the majority of three to one, it was held that Prohibition Order is equally applicable to non-Muslims and petitions were dismissed to this extent.[88]

6.14.2. The Offence against Property (Enforcement of Hudood) Ordinance 1979:

Penal clauses under this law are section 9, 13, 17, 20, 21 and 22. Section 9 provides the punishment of theft liable to hadd. To constitute theft liable to hadd, it must have been made from hirz.[89] Value of stolen amount must not be less than nisab[90] which is 4.457 grams of gold. Proof of this offence requires a plea of guilty from the accused regarding the commission of theft liable to hadd. Alternatively, to prove the offence of theft liable to hadd, the testimony of two adult, male, Muslim witnesses other than victim are required. Regarding these witnesses, the court must be satisfied based on Tazkiah-al-Shahood that they are truthful and abstain from major sins. The sentence for theft liable to hadd is primarily fixed. For the first offence of theft liable to hadd, punishment is amputation of the right hand from the joint of the

86. The Prohibition (Enforcement of Hadd) Order 1979.
87. Ghulam Shabbir Khan vs The State 2004 PCRLJ 1474.
88. Nosher Rustam Sidhwa v The Federation of Pakistan PLD 1981 FSC 245.
89. Section 2 (d) of the Offences against Property (Enforcement of Hudood) Ordinance, Hirz means an arrangement made for the custody of property.
90. Nisab is the minimum value of the property to attract the hadd offence of theft or haraabah.

wrist. Punishment of theft liable to hadd for the second time is amputation of left foot from the ankle. Punishment for offence liable to hadd for the third time or any further time is imprisonment for life. However, the appellate court may release such repeat offender, subject to conditions it may impose if it is satisfied that the accused is sincerely repentant.

No mechanism for monitoring by the appellate court of such convicts, to decide their fate has been provided. Therefore, on this point, this enactment has created a judicial duty to regulate an unspecified sentence of incarceration but has not provided any mechanism or guidance to discharge this duty. Objecting to this interpretation of the Qur'an and the Sunnah and consequent legislation, former Chief Justice Muhammad Munir, stated that after losing hand and foot in first two thefts, a person will hardly be able to commit any further theft.[91] He also opined that if a chance of repentance is to be given after third theft, why not it should be given at initial offences of theft. Punishment for theft liable to tazir, has been borrowed from the Pakistan Penal Code. [92]

The offence of haraabah, [93] is not specifically named as a hadd offence. However, the standard of proof for haraabah is that of theft liable to hadd. Sentence of death for an aggravated form of haraabah is death as hadd. In this way, haraabah is also a hadd offence along with theft liable to hadd in this enactment. Punishment for haraabah in which there is no murder nor any property is taken is whipping up to thirty stripes and with rigorous imprisonment of the unspecified period to a time when the court is satisfied regarding repentance of the convict. However, a minimum period of imprisonment is three years. In haraabah with hurt, punishment for hurt will be

91. Muhammad Munir, From Jinnah to Zia (Lahore: Vanguard Books Ltd, 1979), 130.
92. Section 14 of the Offence Against Property (Enforcement of Hudood) Ordinance, 1979.
930 Section 15 of the Offence against Property (Enforcement of Hudood) Ordinance, 1979.

imposed in addition to above-mentioned punishment of haraabah.[94] Haraabah in which, the property equal to the value of nisab has been taken away, is punishable with amputation of the right hand from the wrist and left foot from the ankle.[95]Where an adult accused murders during the course of haraabah, such accused shall be liable to sentence of death as hadd.[96] Punishment of haraabah liable to tazir, is again borrowed from the PPC.[97]

Other non-hadd offences include Rassagiri or Patharidari[98] which is punishable with rigorous imprisonment which may extend to fourteen years or with whipping up to seventy stripes and with confiscation of all immovable property of convict and fine. Rassagiri or Patharidari is actually facilitation of the crime of cattle theft with the object to receive a share in such stolen cattle. For gain of moveable property through cattle theft, confiscation of the immovable property has been prescribed as a sentence without any disclosed legislative rationale. Along with confiscation of immovable property, the addition of sentence of fine seems also inconceivable. After the confiscation of immoveable property and sentence of imprisonment, there remain hardly any sources with the accused to pay the fine. Simultaneous proposal of two different kinds of penalties where one exclude the possibility of execution of others is also illogical. Punishment for attempt to commit any offence where no express provision is available for such attempt shall be punishable with imprisonment which may extend to ten years. Thus, sentencing

94. Section 17 (2) the offence against Property (Enforcement of Huddod) Ordinance 1979.
95. Section 17 (2) the offence against Property (Enforcement of Huddod) Ordinance 1979.
96. Section 17 (4) the offence against Property (Enforcement of Huddod) Ordinance 1979.
97. Section 20 the offence against Property (Enforcement of Huddod) Ordinance 1979.
98. Rassagiri or Patheridari is the action or practice of extending patronage, protection or assistance or harbouring the persons or groups involved in cattle theft on the understanding that accused will receive one or more stolen cattle or share their proceeds. Section 21 of the Offence against Property (Enforcement of Hudood Ordinance) 1979.

discretion oscillates from no minimum limit to a deprival from liberty for ten years and that too without any structuring parameters for exercise of this discretion.

This law is specifically retroactive.[99] It provides sentencing discretion to impose whipping up to seventy strips and different period of imprisonment as mentioned above, but no mechanism to guide the sentencing judge to structure the sentencing discretion has been provided. This enactment is also silent regarding the scope of clemency particularly regarding hadd offences. It is objected that such like punishment cannot be imposed unless the state has fulfilled its obligations of providing necessary means of living to every citizen.[100]

6.14.3. The Offence of Zina (Enforcement of Hudood) Ordinance 1979:

This Ordinance has been materially amended by the Protection of Women (Criminal Laws Amendment) Act 2006. Several of its provisions have been deleted or made part of the PPC. After major trimming by the Protection of Woman Act 2006, now there is only one penal clause in this law which is Zina liable to hadd. Punishment for this hadd offence is stoning to death. Section 17 of this enactment provides the mode of execution of stoning to death. It is provided that available witnesses, who deposed against the accused, will start stoning and during the course of stoning, convict may be shot dead. First major authoritative objection to the sentence of stoning to death came from the Federal Sharia Court.

In Hazoor Buksh case[101] Hadd-e- Rajam was declared un-Islamic by the Federal Shariat Court by a majority of four to one. It was held that only hadd punishment for Zina is whipping numbering hundred stripes. One member of Hazoor Buksh bench, Justice Zakaullah Lodhi held in its additional note that punishment of

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99. Section 26 the offence against Property (Enforcement of Huddod) Ordinance 1979.
100. S. Iftikhar Murshed, "The Hudood Ordinances of Pakistan and the Denial of Justice, " Criterion Quarterly 5, no. 1 (February 14, 2012), http://www.criterion-quarterly.com/the-hudood-ordinances-of-pakistan-and-the-denial-of-justice/.
101. Hazoor Bakhsh vs Federation of Pakistan, PLD 1981 FSC 145.

Rajam has no nexus with Islam and cannot be awarded even as a tazir. However, this decision was reviewed and declaration regarding repugnancy of hadd-e-Rajam was reversed in the very next year.

In a case of Zina-bil-Jabr, august Supreme Court of Pakistan thoroughly scanned the evidence and reached to the conclusion that prosecutrix was not taken forcibly to the place of commission of offence.[102] Thus, charge regarding commission of Zina-bil-Jabr was dropped, one co-accused was acquitted and the main accused was convicted under section 10 (2) of the Offence of Zina (Enforcement of huddud) Ordinance, 1979. The relevant penal provision which was later on deleted by the Protection of Woman Act 2006 ran as under:

> Whoever commits Zina liable to tazir shall be punished with rigorous imprisonment for a term which shall not be less than four years nor more than ten years and with whipping numbering thirty stripes, and shall also be liable to fine.

After setting aside the sentence passed by the High Court under a different penal provision, august Supreme Court passed conviction under section 10 (2) and sentenced to ten years rigorous imprisonment with whipping numbering 30 stripes. Fine of rupees fifty-thousands was also imposed and for default of this amount of fine convict was to further undergo two years six months simple imprisonment. The benefit of section 382-B Cr.PC was also accorded. However, in spite of detailed justification regarding conviction under a different offence, reasons for sentence awarded were not expressly recorded. Thus, the trend of silent sentencing observed under chapter 5, is also manifest in sentencing under Islamic provisions. The practice of not recording proper reasons for sentence awarded has actually compromised the feature of reasoned sentencing as mentioned in chapter 2.

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102. Muhammad Abbas vs The State PLD 2003 SC 863.

6.14.4. The Offence of Qazf (Enforcement of Hadd) Ordinance 1979:

This enactment which is one of the four hudood laws has only one penal clause at present. It provides a sentence for Qazf liable to hadd which is whipping numbering eighty stripes. This is a fixed penalty without an element of discretion and, therefore, there is no need for the structuring of discretion in the sentencing area. It has also been materially amended by the Protection of Women Act, 2006. Like other hudood laws discussed above, this law is not retrospective in operation. The Federal Shariat Court held that mere failure of the prosecution to establish the case of Zina does not establish the charge of Zina against the complainant and witnesses of Zina case. Court held that to establish the charge of Qazf it is also to be proved that allegation of Zina was made with the intention to harm the reputation or hurt the feeling of the person against whom the unproved allegation was levelled. Court also held that the case of Qazf can be initiated by the person against whom the allegation of Zina was levelled or his legal heir after his death.[103] In another case, it was held that narration of allegation of committing a un-natural offence, in para wise comments submitted to High Court in an official capacity, did not amount to Qazf and proceeding against official were thus quashed.[104] Commenting upon the standard of proof for Qazf liable to hadd court held that either the accused should make confession before the competent court of the commission of the offence of Qazf, or two witnesses should depose against him after satisfying the test of Tazkiah-al-Shahood.[105] In 2011, the Federal Shariat Court declared that deletion of clauses in the Zina and Qazf ordinances giving them overriding effect upon other legislations is against the injunction of Islam and, therefore, annulled amending clauses of the

103. Muhammad Abdullah vs The State 1987 PCr.LJ 1976.
104. Noor Elahi Vs The State 1987 PCr.LJ 1990.
105. Mst Rubi Akhter vs The State 1992 PCr.LJ 2403.

Women Protection Act 2006.[106] In this judgment, the Federal Shariat Court enhanced its jurisdiction to civil matters and held that hudood on the civil side include disputes as to marital relations, Haq-Mehar, divorce, custody of children and inheritance etc. Court even declared that offences arising out of Control of Narcotic Substances Act 1997, are within the category of hudood and are, therefore, in the exclusive jurisdiction of Federal Shariat Court.

In addition to the above discussed four hudood laws, the Execution of Punishment of Whipping Ordinance, 1979 regulates the execution of sentence of whipping under these hudood laws. However, this ordinance does not deal with guidelines on determination of a number of whipping stripes, rather it regulates the actual execution of the sentence of whipping, its mode and manner. On this point, guidelines are quite comprehensive, but overall sentence guidance or guidelines to measure the quantum of a sentence has not been provided regarding all these hudood laws.

Another important aspect of Islamic criminal law pertains to the punishment of injuries and the murder of different kinds. This aspect has been dealt with by Qisas and Diyat law which need a separate analysis here to understand its sentencing provisions.

6.15. Qisas and Diyat Law:

Hudood laws discussed above were brought by Martial law regime with great fervour and publicity. Islamization of legal system, by the promulgation of above enactments, was announced by the military government on the birthday of Holy Prophet (PBUH), as a gift to the nation. However, the same regime postponed the Islamization of penal law relating to homicide and hurt for a long period. Islamization

106. Main Abur Razaq Aamir vs The Federal Government of Islamic Republic of Pakistan PLD 2011 FSC 1.

on this front was spearheaded by the judiciary. Jurisdiction to test the Islamic character of laws was vested in the higher courts by the Constitution (Amendment) Order 1979. Under this order, any citizen, provincial or federal government could petition the High Court to decide the question regarding any law being repugnant to the Injunction of Islam. However, from the definition of 'law' constitution, Muslim personal law, and any law relating to the procedure of court or tribunal were excluded. Similarly, for a period of three years fiscal, tax, insurance and banking laws were exempted from the challenge on the touchstone of Islamic Injunctions.

Question regarding the Islamic nature of homicide and hurt law, as contained in the PPC, was taken up by the Peshawar High Court in Gul Hassan Khan case.[107] Operating through the window provided by the Constitution (Amendment) Order 1979, Gul Hassan, a death convict challenged the certain provisions of the PPC and the Cr.PC, being repugnant to the Islamic injunctions. He assailed that sections 302 PPC, part of the schedule of the Cr.PC, section 401, 402, 403, Cr.PC are against the injunction of Islam. He asserted that under Islamic law right of qisas can be completely remitted or compounded by legal heirs but section 302 PPC or its schedule in the Cr.PC did not provide such right. He also assailed the power of government to remit or reprieve or pardon the sentence in murder cases without the consent of legal heirs. Even Article 45 of the constitution of Pakistan was assailed on the ground that absolute pardoning power of the head of the state, without consent of legal heirs, is against the injunctions of Islam. Another ground of challenge was that section 302 PPC provided death sentence even for minor, which violated the injunctions of Islam.

Peshawar High Court declared that provisions of Chapter XVI of the PPC pertaining to offences against the human body need to be amended to provide the

107. Gul Hassan Khan vs The Government of Pakistan PLD 1980 Peshawar 1.

scope of pardon by legal heirs by payment of diyat or otherwise. Court also held that a minor cannot be subjected to qisas, though any other punishment may be imposed as tazir. The court required that law should be amended to provide this safeguard. Court held that exclusive powers of the federal government and provincial government to pardon are against the injunction of Islam and need to be amended. Court also held that in spite of pardon by legal heir, in case of recidivist, the punishment of death or imprisonment may be imposed in murder cases.

In Muhammad Riaz case[108] almost similar questions were taken up by the Federal Shariat Court. The Shariat Court rejected the preliminary objections that Peshawar High Court being its predecessor court has already decided the question. The court held that territorial jurisdiction of Peshawar High Court is limited to a province while that of the Federal Shariat Court is extended to the whole of Pakistan. The court, therefore, held that decision of the Peshawar High Court is no bar on the adjudication of the issue by the Federal Shariat Court. The court recognized the general conformity of laws enacted prior to independence and after independence with the injunction of Islam. It observed that these laws are based on the principle of the common good, equity and a good conscience which are akin to Islamic concepts of Masalah Mursila and Istahsan. Thus, in the opinion of the court existing laws tend to comply with the injunctions of Islam. The court observed that alternate punishment of blood money should be added to section 302 PPC. However, the Federal Shariat Court did not agree with the Peshawar High Court to declare certain provision and schedule of the Cr.PC against the injunction of Islam. The court held that these provisions relating to the procedure of court are exempted from the scrutiny, by the Constitution (Amendment) Order 1979, as discussed above. Regarding some

108. Muhammad Riaz vs The Federal Government PLD 1980 FSC 1.

provisions of the Cr.PC, the Federal Shariat Court agreed with the finding of the Peshawar High Court and held that sections 401, 402-A and 402-B, Cr.PC are against the injunctions of Islam. These provisions vested the right of condonation in the federal and provincial government without considering the consent of legal heirs of the deceased. Thus, these provisions were also held to be in conflict with the injunctions of Islam. Regarding offences of bodily injuries, the court held that these provisions can be brought in conformity with *Shari'ah* by adding provisions of qisas and arsh in them. Court held that:

> The only fault one can find is in sections 302, 304, 304-A and provisions about hurts and that only to the extent that they do not provide for Diyat or blood money or compoundability. For this only necessary amendment is required.[109]

However, the Shariat Appellate Bench of the Supreme Court, while hearing the appeal against the above judgments of the Federal Shariat Court and the Peshawar High Court, mainly upheld the judgment of the Federal Shariat Court.[110] Sections 299 to 338 PPC were declared repugnant to injunctions of Islam. The Supreme Court, instead of approving the amendment of existing provisions, recommended the restructuring to give the primary position to Islamic punishment in the sentencing regime. The Supreme Court held that if the punishment of diyat is added by amendment, then the impression will remain that primary sentences are those mentioned already in the PPC and Islamic sentences are only of secondary nature. Therefore, the Supreme Court approved the restructuring of different provisions regarding homicide and bodily injuries with the scope of compoundability. The Supreme Court also held that sections 345, 401, 402, 402-A, 402-B Cr.PC. are against the injunctions of Islam. The above-discussed judgment of the Shariat Appellate

109. Muhammad Riaz vs Federal Government PLD 180 FSC1 para 136.
110. Federal Government of Pakistan vs Gul Muhammad PLD 1989 SC 633.

Bench of Supreme Court was announced on 5th July 1989. It was held that provisions declared to be repugnant to the injunctions of Islam will cease to have effect from 23 March 1990. The above said three judgments actually steered the process of introduction of qisas and diyat law in Pakistan. However, these judgments have not discussed the concept of siyasah in detail and discussion mainly revolved around qisas, diyat and tazir.

In compliance with the above judgment of the Shariat Appellate Bench, Criminal Law (Second Amendment) Ordinance, 1990 was promulgated on 5th September 1990 by the interim Government. This law continued through successive ordinances till 1997. Wasti has mentioned opposition to this bill from the different quarters in detail.[111]However, ignoring all this opposition, the Ordinance was promulgated as an Act of Parliament on 7th April 1997, without even allowing the detail scrutiny and discussion. With some amendments, the same law is continuing in force as a part of the PPC. Wasti argues that in the process of Islamic filtering of laws in Pakistan, qisas and diyat law hold an important position.[112]However, he opined that the main driving force was political expediency instead of thirst of establishing a penal regime as per Shari'ah.

In line with the directions of the Shariat Appellate Bench sections, 299 to 338 PPC, were substituted. Long-standing law relating to homicide and bodily injuries was replaced with the law mainly based on Islamic principles as enunciated by the court. However, in the sentencing arena, a major change in the law relating to murder is the addition of punishment of qisas and diyat. Execution of death sentence in qisas is rare. Wasti refers to one judgment of trial court wherein sentence of qisas was passed against the accused but that to could not be executed as convict committed

111. Wasti, The Application of Islamic Criminal Law in Pakistan, 143-63.
112. Ibid., 99.

suicide before the execution of sentence.[113] In another case, the Supreme Appellate Court converted the sentence from section 302 (c) to one under section 302 (a) PPC.[114]

Under the new law, there are four kinds of murder which are qatl-i-amd, [115] qatl shabh-i-amd, [116]qatl-i-khata[117] and qatl-bis-sabab.[118]Qatl-i-khata is again of two types namely, by rash and negligent act[119] and by rash and negligent driving.[120] For qatl-i-amd, there are three ranges of sentences which include death as qisas under section 302 (a), death as tazir or life imprisonment under section 302 (b) PPC. The third range of sentence prescribed for qat-i-amd under section 302 (c) PPC is imprisonment which may extend to twenty-five years imprisonment. Regarding the scope of section 302 (c) PPC the Supreme Court has laid down that it covers those scenarios which were previously depicted in exceptions to old section 302 PPC. The Court observed:

> keeping in mind the majority view in Gul Hassan case PLD 1989 SC 633, there should be no doubt that the cases covered by the Exceptions to the old section 300, P.P.C. read with the old section 304 thereof, are cases which were intended to be dealt with under clause (c) of the new section 302 of the P.P.C. [121]

Punishment of imprisonment provided under section 302© PPC for qatl-i-amd and section 316 PPC for qatl shibh-i-amd, is the same. Under both the offences, the prescribed sentence of imprisonment is extendable to twenty-five years. However, under section 302 © PPC, imprisonment is the sole sentencing option while under section 316 PPC diyat is the primary punishment and imprisonment is a discretionary

113. Ibid., 175.
114. The State vs Abdul Waleed 1992 PCr.LJ 1596.
115. Section 302 PPC.
116. Section 316 PPC.
117. Sections 319 and 320 PPC.
118. Section 322 PPC.
119. Section 319 PPC.
120. Section 320 PPC.
121. Ali Muhammad vs Ali Muhammad PLD 1996 SC 274.

tazir punishment. Punishment for cases in which qatl-i-amd is not liable to qisas or qisas is not enforceable is provided under section 308 PPC. Primary punishment in such cases is diyat but the additional option of imprisonment extendable to twenty-five years as tazir is also provided. Mere waiver or compounding in cases of qatl-i-amd is not sufficient to give clean chit to accused. In cases where all legal heirs do not compound or principle of fasad-fil-arz is attracted, then sentencing option includes death, life imprisonment, or imprisonment which may extend to fourteen years. In addition to the sentences mentioned above, convict of qatl-amd or qatl-i-shibh-i-amd will also be debarred from inheriting from the estate of the deceased as a legal heir or as a beneficiary of the will.[122] This nature of the punishment was not provided in the previous law. This is an additional pecuniary penalty and can also work as a check against those accused who intend to take the life of their relative from whom they are likely to inherit property.

For qatl-i-khata under section 319 PPC punishment is only diyat.If qatl-i-khata is committed by rash and negligent act, other than rash and negligent driving, imprisonment extendable to five years may be imposed as a tazir. For qatl-i-khata by rash and negligent driving, in addition to diyat, imprisonment extendable to ten years is also provided. For qatl-bis-sabab, the only punishment is diyat without any additional sentencing option.

In all the offences pertaining to murder, there are no statutory parameters or guidelines to navigate the sentencing discretion. Under section 302 PPC presently enforce, the sentencing option of death as a qisas, death as tazir, life imprisonment and imprisonment up to twenty-five years have been provided under the same penal section. Under the old law, scenarios covered by exceptions to section 302 PPC were

122. Section 317 PPC.

punishable under section 304 and 304-A PPC. Once a case attracted exceptions, fear of accused regarding death sentence was subsided. Now as per Ali Muhammad case[123] mentioned above, cases previously covered by exceptions to section 302 PPC are now covered by section 302 (C) PPC. However, section 302 (C) is not an independent penal clause like section 304 PPC (Old).

Under the present law charge is framed under section 302 PPC which covers it's part (a), (b) and (c). Till final judgment accused charged under section 302 PPC is kept guessing about his sentence which may be a sentence of imprisonment with no minimum limit or sentence of death as qisas or tazir. The combination of the death sentence with an alternate sentence of imprisonment with no minimum limit enhances the element of surprise for the accused. Under old law once accused was charged under section 304 PPC, he was at least assured that he could not be visited with death sentence unless the charge is amended. Now an accused whose case is covered by exceptions to section 302 PPC (old) is also charged under section 302 PPC and remains under fear of death sentence. The same element of wide discretion is provided under section 311 PPC. Under this section first sentencing option is death, then life imprisonment and then is imprisonment which may extend to fourteen years with no minimum limit. In this way, under qisas and diyat law an element of uncertainty and surprise in the sentencing outcome has crept in.

Islamic law does not prohibit structuring of discretion. Rather qisas and hudood laws have fixed penalties with no element of discretion. Concept of siyasah further enhances the scope of the structuring of the discretion under Islamic law. There is no bar under Islamic law to provide an independent offence to cover scenarios under section 302 (C) by separating it from section 302 (a) and (b) PPC.

123. Ali Muhammad vs Ali Muhammad PLD 1996 SC 274.

Likewise, serious cases of fasad-fil-arz requiring death penalty or life imprisonment may be provided under separate penal section while cases of lesser gravity may be covered under an independent penal section. This arrangement will minimize the accumulation of long-range of penalty under a single penal section. This will help to structure the judicial discretion and will also reduce an element of surprise for the accused in the matter of sentence.

As for as, the value of diyat is concerned, its minimum value is equal to thirty thousand six hundred and thirty grams of silver.[124] However, this is not the upper limit. Amount of diyat, above the minimum fixed level, may be fixed by the court keeping in view the financial position of the convict and legal heirs of the victim. In the PPC as such, there is no guidance that whether the rate of diyat is to be determined based on the value of silver when occurrence was committed or based on the rate of silver when the order was made. The Supreme Court of Pakistan after considering the previous pronouncements held that rate is to be determined when compromise was affected.[125]

Along with murder, offences pertaining to bodily injuries were also Islamized by qisas and diyat law. In hurt offences, primary punishments are qisas, arsh or daman. In addition to above Islamic penalties, an option of the sentence of imprisonment has been provided in most of the hurt offences as tazir. The main difference regarding sentencing aspect between general offences in the PPC and the Islamic offences of hurt is that under Islamic offences sentence of imprisonment is of secondary nature while in other offences it is most often an option of the first or routine resort. In this way Islamic offences pertaining to hurt tend to meet the sentencing feature that sentence of imprisonment should be the choice of lost resort.

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124. Section 323 PPC.
125. Muhammad Anwar vs The State PLD 2012 SC 769.

However, the range of discretionary sentences of imprisonment as tazir is on the same pattern as is in other offences of the PPC. Guidance regarding the imposition of tazir penalty of imprisonment is more pronounced for hurt cases.[126]For the imposition of imprisonment as tazir factors to be considered are previous conviction, habitual, hardened, desperate or dangerous nature of the offender. Commission of offence in the name or pretext of honour is also a factor to be considered for the imposition of imprisonment as tazir. The Lahore High Court while explaining this provision held that Section 337 N (2) clearly has an overriding effect over other provision on the subject of determination of sentence in hurt cases.[127] Court held that normal punishment for hurt is arsh or daman and imprisonment as tazir is to be imposed only where above mentioned aggravating factors are attracted. If above aggravating factors are available then imprisonment as tazir shall not be less than one-third of the maximum sentence of imprisonment provided for the offence. The Supreme Court of Pakistan commenting upon section 337 N (2) PPC held that for awarding tazir punishment of imprisonment, facts and circumstances of the case, manner of the offence, nature of the injury, impact upon the public harmony, weapon used and mode of the offence being shocking or outrageous is to be considered.[128] Above discussed judgments reflect that guidance regarding sentencing in hurt cases has also received considerable judicial recognition.

Qisas is a fixed penalty having no element of discretion. Arsh is also a structured sentence as its value is dependent upon the value of diyat. However, the amount of diyat is to be determined on the bases of financial position of the convict and injured which reflect the element of discretion. Guidance regarding arsh of different organs is provided in sections 337 Q to 337-X PPC. Three parameters have been provided for

126. Section 337N (2) PPC.
127. Ali Muhammad vs The State PLD 2009 Lah 312.
128. Haji Maa Din vs The State 1998 SCMR 1528.

determination of daman. These are expenses on the treatment of the victim, quantum of loss or functioning disability of any organ and anguish suffered by the victim.[129] From the above discussion it is clear that though a comprehensive scheme of the structuring of sentencing discretion is not provided in qisas and diyat law as incorporated in the PPC, but for hurt cases, guidance on sentencing is more pronounced and visible than other offences in the same code.

6.16. Conclusion:

Basic principles of Shari'ah are based on divine guidance. After providing the basic guidance on the principles, Shari'ah has given liberty to chalk out details in accordance with the requirement of the time. This has made Shari'ah a nice blend of mutable and immutable principles. After the fall of colonial regimes in different jurisdictions with a majority Muslim population, an effort to re-introduce Islamic laws has been made. This process of Islamization of laws was also started in Pakistan. For this purpose initially, five laws were enacted which covered different hudood offences and mechanism of execution of sentence of whipping. A constitutional amendment was also brought to allow the citizen to challenge any law which is against the injunction of Isalm. This amendment allowed a judicially steered Islamization of laws. Through different judgments, existing laws pertaining to homicide and hurt were declared un-Islamic and in compliance with judicial decisions, Islamic law of qisas and diyat was introduced. However, these hudood, qisas and diyat laws as enacted, remained subject of serious criticism. Critics have called these efforts, a matter of political expediency rather than true spirited Islamization of laws. These laws are called grafting of Islamic laws on an English penal regime. Riaz-ul-Hasan Gilani who remained associated with the promulgation process of qisas and diyat law,

129. Section 337-Y PPC.

argued before the High Court[130] that this law has been injected into existing criminal law system hurriedly under the compulsion of the judgment of the Shariat Appellate Bench of the Supreme Court.[131] This reflects that even the people associated with the promulgation process of this law are of the view that improvements are needed in this legislated brand of qisas and diyat law.

Hudood laws as enacted were not limited to Hudood offences and many tazir offences were also made part of these laws. However, hudood laws in many respects reduced judicial discretion by providing fixed sentences. In these laws concept of siyasah Shari'ah was not employed which rendered them more rigid. However, hudood, qisas and diyat laws revolved around the higher objective of Shari'ah. Under qisas and diyat law, an element of victim care and compensation has been added. Offences affecting individual rights have been made compoundable with or without compensation at the option of the victim or his legal heirs. In hurt offences, primary punishment is qisas, arsh or daman and a custodial sentence of imprisonment has been reserved for aggravated offences. However, most of the procedural aspects for Islamic offences were the same as for other offences in the PPC. Instead of introducing a single Islamic sentencing statute, different laws have been enacted to cover different offences under Islamic law. Thus, many features of the modern sentencing regime which were missing from the existing system were not incorporated through these laws.

130. Abid Hussain vs The State Lah 482.
131. Federal Government of Pakistan vs Gul Muhammad PLD 1989 SC 633.

CHAPTER 7

CONCLUSION

In the last chapter of this work, it is pertinent to summarize the important findings and conclusions for the convenience of the readers. For this purpose, the crux of each chapter will be summarized. This work has mainly explored and analyzed the sentencing jurisprudence of Pakistan. For this purpose, at the beginning of the work, important sentencing features of a good sentencing system has been traced. These features have been applied to the English Sentencing System, treating it as a model jurisdiction. Then these features have also been applied to the sentencing system of Pakistan. The legislative and judicial approach to sentencing in Pakistan has been tested separately. Sentencing provisions and judicial decisions pertaining to Islamic laws as enacted in Pakistan have also been analyzed.

To understand the sentencing system as being practised, it is important to understand its theoretical bases. Different definitions of sentencing reflect that the phenomenon of 'sentencing' is susceptible to different meanings. In nutshell, it is the administration of pain on the wrongdoer channelled through the judicial process. Traditionally, sentencing has remained a mysterious process with a hall of judicial solemnity surrounding it. However, different steps leading towards sentencing decisions are not judicially controlled. Decisive steps, such as victim to report the crime, prosecutor to prosecute and parole board decisions of early release, also contribute to shaping the sentencing outcomes. This makes the sentencing process a complex phenomenon. However, to lessen the complexity of the sentencing process

firstly, overall judicial control of the sentencing process is to be ensured and secondly, transparency in the judicial decisions is to be secured. Despite the difficulty inherent in the sentencing process, proper balancing of different circumstances of the offence and offender need to be made. Mitigating and aggravating factors are to be properly weighed and balanced. Proper balancing exercise of different factors at the sentencing stage is also important because the sentencing outcomes, not only determines the questions of life and liberty of the offenders but peace of society also depends upon such decisions. Therefore, sentencing occupies a central place in the criminal justice system. However, rules of procedure for sentencing are not as developed and sophisticated as are for guilt determination. Sentencing is the least principled stage of the legal process.[1]Discretion at sentencing is not only a necessary evil but also an obligatory virtue. Therefore, to exclude it is not the solution. The proper course is to structure it, allowing its creative elements to work and subjecting its capricious components to discipline. This will help to address the questions of disparity and lack of uniformity and consistency at the sentencing stage.

The sentence, which is specie of an injury, cannot be inflicted without moral justification. Theories of sentencing provide these justifications. The retributive theory claims that the infliction of a sentence is a reversal of the wrong act. It claims that commission of the offence or wrong by the accused itself justifies the imposition of proportionate sentence and no further justification is needed. It advances the imposition of the sentence as an end in itself. Utilitarian justification of punishment, on the other hand, focuses on the consequences of the sentence to be imposed. Under the utilitarian conception, the sentence can be justified if it is going to produce some good consequences or will avert some evil outcomes. In this way, utilitarian treats the

1. Bagaric, Punishment and Sentencing, 3.

sentence only as a means to achieve some good or avoid some bad consequences. Deterrence, reformation, and denunciation are the different aspects of utilitarian sentencing justifications. Independent of these two sentencing rationales, reparation focuses on restorative justice as an object in itself. However, different sentencing rationales don't work in watertight compartments and inter-play of different sentencing justifications can be found in a single sentencing decision.

Theoretical analysis of sentencing jurisprudence reveals that certain features must be reflected by a workable sentencing system. Non-compliance with these features may offend against the rights of the accused and victim and may also result in compromising the constitutional principles and international norms. These features require that there should be specific legislation or legislations to deal with sentencing issues. This will help to address all the sentencing issues in a structured and proper manner. Such legislation should enlist the sentencing purposes, principles, aggravating and mitigating factors. Specification of each and every aggravating and mitigating factor is not possible but the broader statement will help the sentencers to trace their path in the thorny desert of the sentencing arena. The provision of separate sentence hearing after conviction helps to give meaning to a fair trial and lack of the same belittles this constitutional right. For effective sentence hearing, the mechanism of pre-sentence reports regarding accused and the victim is important. To give meaning to sentence hearing and to ensure fairness at 'fair trial', sentencing decisions must be reasoned. This ensures rationality in the sentencing outcomes and compels similar treatment of similar cases. Reasons should be communicated to the accused; so that he may know for what reason he is being punished and may also know the justification of the quantum of the sentence imposed against him. For an independent test of sentencing decision, there should a mechanism of an appellate review. A good

sentencing system also bans retrospective enhancement of sentences. The use of custodial sentences should not be the first option. For continuous monitoring of the impact of sentencing decisions and for improvement of the sentencing system there should be a sentencing monitoring body. For coherent working of the sentencing system, the mechanism of sentencing guidelines and sentencing information system, have developed as modern features. These tools of guidelines and information systems can be adjusted according to local requirements. The instrument of remissibility of sentences needs to be there in order to address the deserving cases of hardship and injustice. However, this process of clemency, remissibility and early release should be properly structured, independent and in accordance with constitutional principles of separation of power and independence of the judiciary.

Pakistani and English sentencing systems have historical linkages. England is also the parent jurisdiction of the common law regimes. Pakistan still has a bulk of laws having Anglo-Indian origin.[2] Therefore, English jurisdiction has been chosen as model jurisdiction to test the features traced in chapter 2. Analysis of the English legal regime reveals that it has developed through an evolutionary process. Ashworth has argued that it is only an aspiration and convenience to call the English criminal justice system a 'system'. He points out that the English sentencing system, being part of the criminal justice regime, has not developed as a single whole. It passed through different evolutionary phases. Prescription of the death penalty for multiples offences earned it the name of the bloody code. The Victorian sentencing reforms harnessed it to some extent but failed to achieve the codification aim. However, the hierarchy of court with their sentencing powers has been provided. Initially, the function of providing guidance on sentencing issues was performed by the Court of Appeal. It

2. Munir, Precedent in Pakistani Law, 248.

issued different guidance and guideline judgments to structure the sentencing outcomes in English jurisdiction. However, with the passage of time, the need was felt to separate the guideline function from the appellate function. Therefore, Sentencing Advisory Panel, Sentencing Guideline Council and presently Sentencing Council have been established. Multiple sentencing legislations have been promulgated and now the process of developing sentencing code is underway.

Feature filtering of the English sentencing system reflects that it provides dozens of sentencing legislation. This practice is counter-productive and instead of adding clarity and transparency it adds to the confusion. However, the process of reforms on this front is in progress in the English system itself. The statement of sentencing purposes is specifically provided in the English system though there is a lack of hierarchy in these purposes which adds to the confusion regarding the precedence of one sentencing purpose over the other. Specific enlistment of sentencing principles is not available in the English sentencing system but they are entwined in the different legislations and guidelines. Similarly, the English sentencing system also indicates some of the aggravating and mitigating factors legislatively. It is the statutory duty of the court to give reasons for the sentence imposed and also to explain the effect of the sentence to the offender. Mechanism of appellate review of sentences has also developed in England and not only accused but even the prosecution can assail the unduly lenient sentences. Ban on retrospective sentencing in England has been fortified by the European Convention on Human Rights and Human Rights Act, 1998. Mechanism of sentencing advisory bodies, sentencing guidelines, and sentencing information system is also fairly developed. The parole system is well developed in English jurisdiction but some public voices and judicial opinions have expressed doubts regarding the independence of the parole board. The

establishment of parole tribunal within the judicial hierarchy has been proposed.[3] Thus, the English sentencing system mainly complies with the sentencing features except for having multifarious sentencing legislation and a lack of independence of the parole board.

Analysis of the legislative sentencing scheme of Pakistan requires analysis of the constitution, being the fundamental law of the land. Certain constitutional principles directly relate to the sentencing process. Rule of law clause in the constitution provides protection of laws to the citizens.[4] This compulsorily requires a legally structured exercise of discretion at every stage of public action including sentencing. Constitutional protection of life and liberty cannot be materialized without infusing rule of law in the sentencing process. The right to a fair trial will be meaningless without ensuring fair sentencing. Different elements of the right to a fair trial as explained by judicial interpretation also require fair and transparent sentencing. The constitution also limits the legislative discretion to propose a mode of execution of sentences as even the convict cannot be deprived of human dignity at the time of execution of the sentence. On this principle, public hanging was disapproved in Pakistan by the apex court. Retrospective sentencing and double jeopardy are constitutionally barred. Prerogative of the head of state to award clemency in the sentences awarded by the judicial forum is constitutionally recognized. Constitution has provided ample scope to the constitutional courts to regulate and structure the sentencing discretion. Thus, it is manifest that the constitution of Pakistan has taken ample care for the protection of the fundamental rights of citizens at the sentencing stage.

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3. "A New Parole System for England and Wales," 17.
4. Article 4 of the Constitution.

An ordinary legislative scheme on sentencing provides a hierarchy of criminal courts with their sentencing powers. The mechanism of execution of sentences is provided. There is a judicial discretion of the court to order consecutive or concurrent running of sentences of imprisonment and a period of pre-sentence custody is also to be considered while imposing sentence. However, legislative guidelines on these beneficial issues of sentencing are not clear which sometimes results in undue incarceration or prolonged litigation. The right to appeal against sentences is amply provided in the statutory mechanism. An arrangement of compensatory victim restoration is also provided but the same is not exhaustive. There is no clear statutory mechanism to collect reports regarding the financial conditions of the accused and victim at the sentencing stage to appropriately determine the amount of compensation. In addition to constitutional clemency, a scheme of remission of sentences is also provided under prison rules and Cr.PC. However, all this process is purely in executive control without any shade of independence. In addition to shortcomings pointed out in the existing sentencing safeguards, some of the important sentencing features are visibly absent in the legislative sentencing scheme of Pakistan. There is no specific sentencing legislation nor is there any statutory statement of sentencing purposes and principles. The mechanism of separate sentence hearing is not provided. There is no specific statutory requirement to provide reasons for all sentencing decisions. Sentencing advisory bodies, sentencing guidelines, and sentencing information systems as established in the English and other modern jurisdictions are specifically absent.

Proposed legislation on sentencing in Punjab has addressed some of the shortcomings mentioned above, but this proposal is in the executive corridors for the last many years. Even if enacted, this proposed legislation will only operate in Punjab,

as criminal law, criminal procedure, and evidence fall within the shared domain of the federal and provincial legislature, with a clear preference to federal legislation in case of conflict. In this constitutional scenario, it is appropriate that the federal legislature should take steps to streamline the sentencing mechanism, which will benefit the whole country.

The PPC which mainly contains the substantive sentencing provisions has mentioned ten different sentencing options. These are qisas, diyat, arsh, daman, tazir, death, imprisonment for life, imprisonment, forfeiture of property and fine. Other sentencing options include whipping, disqualification to hold office, denaturalization, discharge and probation. In this sentencing menu, community sentencing and electronic monitoring are visibly absent. As per statutory law, in none of the offences, death is provided as a sole sentencing option. Different alternatives to death sentence are provided which vary drastically. Similarly, different sentencing options of life imprisonment and imprisonment for the same offence also reflect huge gapes that allow the wide swing of discretion to the sentencer. For prescribing imprisonment, some favorite numbers have been opted by the legislature without any cogent reason. Liking of the legislature for these favourite numbers such as 1, 2, 3, 5, 7, 10, 14, and 25 have contributed to enhancing the unstructured discretion in the matter of sentencing. Sentencing options regarding forfeiture of property and fine also reflect incoherence. The softer option of discharge and probation has been provided which allows the court to opt for non-custodial sentencing however, proper guidelines on these areas are also lacking. Despite some visible niceties, the overall analysis reflects that the legislative sentencing scheme of Pakistan needs a major repair to comply with the standards of fair trial and fair sentencing.

Constitutional and legislative provisions pertaining to sentencing have received judicial interpretation in different cases. These interpretations have covered different gapes in the legislative scheme. They also reflect the judicial approach on different sentencing issues. Judicial pronouncements have declared the sentencing an issue of life and liberty and have, therefore, adequately highlighted the importance of sentencing. The right to a fair trial was ensured by the higher courts even prior to its incorporation in the constitution. However, some decisions have shown judicial reluctance to go beyond the limits set on fair trial jurisprudence. The judicial insistence that the right to a fair trial is already well entrenched in the jurisprudence of Pakistan tends to limit the scope of Article 10-A of the constitution. On the other hand, some progressive judgments have not only provided different ingredients of right to a fair trial but have also categorically held that cover of the fair trial starts from pre-trial proceeding and lasts till the conclusion of the case including sentencing. Courts have praised the provision of the right of appeal against the sentence but have yet not treated it as an integral part of article 10-A of the constitution of Pakistan. Thus, no penal statute has been knocked down solely for its failure to provide a right of appeal against sentence. Courts have not read the right of appeal in every statute which failed to provide the same. The constitutional right of protection of dignity has also been extended to the sentencing stage by judicial dictums. The constitutional provision imposing a ban on retrospective sentences has been squeezed through judicial interpretation. Judicial decisions have tried to silence the objections regarding double punishment and expectancy of life arising due to long delays in the conclusion of the trial and appeal process. This has been done by giving narrow interpretation to article 10-A, of the constitution, on right to a fair trial. To some extent, the presidential power of clemency has been structured by different judicial decisions by

stating the objectives and occasions for the exercise of clemency. However, judicial decisions have not infused independence in the remission and early release system through the parole process, which is exclusively in the executive hands. In addition to judicial decisions, some guidance on sentencing for sub-ordinate courts has been provided under Rules and Orders of the Lahore High Court, Lahore and district judiciary bench book.

Though there is silence regarding sentencing purposes on the statutory front, constitutional courts have recognized the different purposes of sentences including retribution, deterrence, reformation, incapacitation, and reparation. However, comprehensive judicial guidelines even on this front are lacking. Different principles of sentencing such as totality, parsimony, parity, and proportionality are reflected in different judgments. These principles are employed while interpreting provisions regarding the benefit of the concurrent running of sentences and grant of benefit regarding pre-sentence custody. Need for separate sentence hearing is augmented from the fact that at the appellate level in many cases only question argued is the propriety of the sentence. Omissions in different sentencing decisions to grant the benefit of the concurrent running of sentences and pre-sentence custody also point out the need for a separate sentence hearing. However, this mechanism of separate sentence hearing has not been provided even through judicial interpretation. The requirement for providing reasons for the sentence imposed has not been addressed properly even on the judicial side. There are many judgments of superior courts where in spite of imposing a sentence in a new offence for the first time proper reasons for the imposed sentence were not recorded. This reflects the magnitude of the issue regarding the lack of reasons for sentencing decisions. Though penal statutes and procedures are silent on community sentencing, courts have used probation law to

incorporate community sentencing in the sentencing menu. Some guidance has also been provided by the Supreme Court of Pakistan to determine the compensation under section 544-A Cr.PC. For narcotic cases mechanism of sentencing guidelines has also been introduced through judicial interpretation. Analysis of judicial decisions reflects that several gaps left by the statutory sentencing regime have been plugged through judicial interpretation. However, in some areas, narrow judicial interpretations have limited scope of constitutional or statutory rights.

Islamic laws now constitute a considerable part of the penal realm of Pakistan. These laws have received judicial interpretation in different cases. The importance of sentencing under Islamic law is manifest from the fact that several sentencing issues have been dealt with by the primary sources of Islam namely the Holy Quran and the Sunnah. There are several provisions in the constitution relating to Islamic features. Sentencing is also directly linked to the higher objective of shari'ah. For the protection of different rights, different remedies in the form of sentences have been provided under Islamic law. For the protection of a right of Allah remedy is the sentence of hadd. The rights of the individual are protected by diyat and tazir. The rights of the community are protected by siyasah. Qisas is there to protect the mixed right of Allah and individual, though individual right in the matters of qisas has dominance. Siyasah is the wider concept which pertains to the discretion of the ruler to take steps for good governance which are not against the principles of shari'ah. Siyasah being outside the strict rule of shria'ah but in accord with its spirit provides answers to many complicated issues of the modern age. However, siyasah has remained an ignored area since the colonial era. Shari'ah also protects the right to a fair trial and due process. Islamic law does not favour retrospective sentencing nor does it allow double jeopardy. There is tension between Islamic law and constitutional law regarding the

right of pardon in cases pertaining to hadd and qisas. Under Islamic law, the ruler has no right to grant pardon in hadd cases while Article 45 of the constitution grants such right to the ruler. Similarly, in qisas cases, the President under Article 45 mentioned above, can grant pardon without the consent of legal heirs which is against the principles of Islamic law. Judicial interpretations have not solved this mystery and have held that to remove any inconsistency between Article 2-A and Article 45 of the constitution is the job of the parliament.

Islamic law enacted in Pakistan does not specify sentencing purposes. However, purposes of sentencing may be stated regarding Islamic statutes by invoking the doctrine of siyasah. Islamic law also provides a range of sentencing options. Mechanism of sentencing guidelines, separate sentence hearing and recording reasons for sentences imposed can be installed in the Islamic statues on the basis of siyasah. Even the present law on hurts provides some mechanism to structure the sentencing discretion and also provide aggravating factors for the imposition of tazir punishment in addition to arsh or daman. Islamic law does not bar compliance with modern sentencing features unless any step is taken directly against the principles of shari'ah.

Hudood laws as they exist have been criticized by the Council of Islamic Ideology. Council claimed that the definition of hadd is not proper and hudood law requires thorough revision. Punishment of hadd provided in the different hudood offences is a fixed one with no element of discretion. However, these hudood laws also contain certain provisions regarding tazir offences which provide different sentencing options with wide sentencing discretion. Qisas and diyat law, introduced through the judicial Islamization process, has instead of regulating the discretion has even widened it. The scope of section 302 PPC has been extended, as the scenarios

covered by section 304 PPC (old) has also been incorporated in section 302 C PPC. This has added an element of surprise to the accused, as the sentencing options under section 302 PPC extend from death as a qisas to imprisonment with no minimum limit. In other murder and hurt offences, the compass of discretion is quite vast with very little guidance to structure the same. However, lacunas pointed out in Islamic law enacted in Pakistan are not attributable to Shari'ah itself. Thus, even the Islamic laws as enacted have not structured the sentencing discretion in the best manner.

In light of the analysis in previous chapters, it can be concluded that a proper and comprehensive sentencing statute dealing with all the procedural issues of sentencing should be promulgated. Such statute should come from federal legislation as it will be wider in operation and will have supremacy over provincial legislation on the subject ensuring similar sentencing regime throughout Pakistan. In any such legislation purposes of sentencing should be clearly defined and principles of sentencing should be stated. The requirement of recording reasons for sentences should be a statutory compulsion for the courts. To ensure a fair trial, a mechanism of separate sentence hearing must be provided. The sentencing regime should not be content only with the imposition of the sentence rather a mechanism of monitoring of such sentences should be ensured. For this purpose, a sentencing advisory body should be established to propose further reforms on the basis of the monitoring and evaluation process based on research. To supplement the legislative regime on sentencing, the mechanism of sentencing guidelines may be introduced. To further streamline the sentencing system, the sentencing database may be established. Such a database may be used as a sentencing information system to ensure consistency in sentences. In addition to the above, the independence of the remission and parole

system should be ensured. Last but not least Islamic sentencing regime should not be used as residual in nature rather it should be implemented in true spirits.

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ANNEX-I

PUNJAB SENTENCING ACT, 2015

Preamble: Whereas it is expedient to lay down factors to be considered by courts while passing sentences and improve consistency in sentencing it is hereby enacted as follows:

Part – I
INTRODUCTION

1. **Short title, extent and commencement:**
   (1). This Act may be cited as the Punjab Sentencing Act, 2015.
   (2) It shall extend to the whole of Punjab
   (3) It shall come into force at once.

2. **Definitions:** In this Act unless there is anything repugnant in the subject or the context,
   (a) 'Act' means the Punjab Sentencing Act, 2015
   (b) 'Aggravating factors' mean factors mentioned in section 7 (2) of this Act.
   (c) 'Council' means the sentencing council established under section 14 of the Act.
   (d) 'Custodial Sentence' means sentence curtailing the liberty of an offender by means of imprisonment.
   (e) 'Government' means the Government of Punjab.
   (f) 'Mitigating factors' mean factors mentioned in section 7 (1) of this Act.
   (g) 'Prosecutor' means a public prosecutor appointed under the criminal prosecution service Act, 2005 but does not include a private prosecutor whether appearing with permission of the public prosecutor or otherwise
   (h) 'Public order offence' means any offence, which may lead to public disorder or a breach of the public peace, nuisance, affray or rioting,
   (i) 'Sentence' means punishment a judge or magistrate decides should be given to someone who has been convicted of a crime.
   (j) 'Terrorist offence' means an offence under the Anti-Terrorism Act, 1997
   (k) 'Time range of Imprisonment' means the time-range of imprisonment that the relevant statute provides for conviction of an offence.
   (l) 'Regulatory offence' means an offence under a provincial law, which prescribes the manner of doing a thing, or prohibits the doing of a thing in a manner not approved or prescribed by law.

Part II:
GENERAL PROVISIONS ABOUT SENTENCING

3. **Scope and Application of the Act:** (1) The provisions of this Act shall be applicable to offenses where a time range of imprisonment is a punishment.

(2). The provisions of this Act shall not be applicable to offences where Capital punishment is provided within the range of punishments.

4. **Purpose of sentencing:** A court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing

(a) the punishment of offenders,
(b) the reduction of crime (including its reduction by deterrence),
(c) the reform and rehabilitation of offenders,
(d) the protection of the public, and
(e) the making of reparation by offenders to persons affected by their offences.

5. **Determining the sentence:** In determining a sentence the court must take into account,

a. The purpose of sentencing as defined in section 4 of this Act.
b. Seriousness of an offence under the provisions of this Act.

6. **Determining the seriousness of an offence:** (1) In considering the seriousness of any offence, the court must consider the aggravating and mitigating factors proved during trial

7. **Aggravating and mitigating factors:**

(1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:

(a) that the offence involved actual or threatened violence or the actual or threatened use of a weapon:
(b) that the offence involved unlawful entry into, or unlawful presence in, a dwelling place:
(c) that the offence was committed while the offender was on bail or still subject to a sentence:
(d) the extent of any loss, damage, or harm resulting from the offence:

(e) Marked cruelty in the commission of the offence:

(f) that the offender was abusing a position of trust or authority in relation to the victim:

(g) that the victim was a police officer, a prosecutor or a judge acting in the course of his or her duty:

(h) that the victim was particularly vulnerable because of his or her age or health or because of any other factor known to the offender:

(i) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and

(i) the hostility is because of the common characteristic; and

(ii) the offender believed that the victim has that characteristic:

(j) the nature and extent of any connection between the offending and the offender's—

(i) participation in an proscribed organization (as defined under Anti Terrorism Act, 1997);

(ii) involvement in any other form of organized criminal association:

(k) premeditation on the part of the offender and, if so, the level of premeditation involved:

(l) the number, seriousness, date, relevance, and nature of any previous convictions of the offender and of any convictions for which the offender is being sentenced or otherwise dealt with at the same time:

(m) any failure by the offender personally (or failure by the offender's lawyer arising out of the offender's instructions to, or failure or refusal to co-operate with, his or her lawyer) to comply with a procedural requirement that, in the court's opinion, has done either or both of the following:

(i) caused a delay in the disposition of the proceedings:

(ii) had an adverse effect on a victim or witness.

(2) In sentencing or otherwise dealing with an offender the court must take into account the following mitigating factors to the extent that they are applicable in the case:

(a) the age of the offender:

(b) whether and when the offender pleaded guilty:

(c) the conduct of the victim:

(d) that there was a limited involvement in the offence on the offender's part:

(e) that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding:

(f) any remorse shown by the offender,

(g) any actions taken by the offender to undo the loss or injury caused by him

(h) that the offender has taken steps during the proceedings (other than steps to comply with procedural requirements) to shorten the proceedings or reduce their cost:

(i) any adverse effects on the offender of a delay in the disposition of the proceedings caused by a failure by the prosecutor/law enforcement agencies and any other agency associated with the trial, to comply with a procedural requirement:

(j) any evidence of the offender's previous good character:

(3) Nothing in subsection (1) or subsection (2) —

(a) prevents the court from taking into account any other aggravating or mitigating factor that the court thinks fit; or

(b) implies that a factor referred to in those subsections must be given greater weight than any other factor that the court might take into account.

(4) The court must take into account the mutual exclusivity of the mitigating and aggravating factors and only in special circumstances to be explicitly mentioned in the judgment may treat them concurrently.

Part III

SPECIAL PROVISIONS ABOUT SENTENCING

8. Sentences for Cases involving violence against, or neglect of, child under 14 years:

(1) This section applies if the court is sentencing or otherwise dealing with an offender in a case involving serious violence against a child under the age of 14 years.

(2) The court must take into account the following aggravating factors to the extent that they are applicable in the case:

(a) the defenselessness of the victim:

(b) in relation to any harm resulting from the offence, any serious or long-term physical or psychological effect on the victim:

(c) the magnitude of the breach of any relationship of trust between the victim and the offender:

(d) threats by the offender to prevent the victim reporting the offending:

(e) deliberate concealment of the offending from authorities.

(3) In case the Court establishes the aggravating factors under the provisions of this section the court must not pass a sentence below Zone B provided in the Schedule.

9. Sentences for cases involving religious aggravation

(1) This section applies where a court is determining the sentence of an offence pertaining to any of the provisions envisaged under any law relating to death, serious injury, criminal damage, public order offences and harassment.

(2) If the offence was religiously aggravated, the court

(a) must treat that fact as an aggravating factor

(b) must state in the judgment that the offence was so aggravated.

(3) The Court must treat these facts as aggravating factors, and where such factors are proved shall not pass a sentence below Zone B provided in the Schedule.

10. Sentences for aggravation related to terrorist activities:

(1) This section applies where the court is determining the sentence of a terrorist offence committed in any of the circumstances mentioned in subsection

(2) Those circumstances are that at the time of committing the offence or immediately before or after doing so, the offender demonstrated hostility towards the victim or intended victim because of his or her

a) Religious beliefs
b) Political ideology
c) Cultural outlook

(3) The Court must treat these facts as aggravating factors, and where such factors are proved shall not pass a sentence below Zone C provided in the Schedule

11. Sentencing under laws designed to protect the public from injury:

(1) This section applies where the court is determining the sentence of a regulatory offence committed in any of the circumstances mentioned in subsection 2.

(2) Those circumstances are that

i. a serious injury was caused to one or more persons as a consequence of the offense

ii. the offender had been warned to take remedial action but had omitted to do so.

iii. The offender had taken action to thwart a law enforcement agency from inspecting or otherwise dealing with the offence in accordance with law

(3) The Court must treat these facts as aggravating factors, and where such factors are proved shall not pass a sentence below Zone B provided in the Schedule

12. Reduction in sentences for guilty pleas

(1) In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before the court, the court shall take into account—

(a) the stage in the proceedings at which the offender indicated his intention to plead guilty, and if such plea is made at the outset or substantially saves the time of the court, the court shall reduce by one fourth the custodial period calculated for the offence on the basis of section 6 of the Act

(b) the circumstances in which this indication was given, and if such circumstances renders the possibility of sufficing the purposes of sentencing, the court shall not pass a sentence above Zone C provided in the Schedule.

(2) Nothing in this section shall bind a court to pass a lower sentence in which Sentencing factor pertaining to marked cruelty is proved against the offender.

Part IV:

PROCEDURE

13. Issues to be stated in judgment:

(1) A judgment shall indicate whether a custodial sentence or other sentence is the most appropriate and reasons for the same

(2) Where the court imposes a custodial sentence it shall indicate the mitigating factors in existence if it imposes a sentence in Zone A and aggravating factors if it imposes a sentence in Zone C or D.

14. Procedure to be followed in arriving at sentence:

(1) A sentencing court shall assess the following things before deciding the sentence

a) Whether there is a statutory minimum sentence or mandatory sentence that must be imposed in case of a guilty verdict

made by the Council, be assisted by the other Commissioners in carrying out the functions of the Council.

19. **eTerm of the office:** Each Commissioner shall be appointed for a term not exceeding 3 years from the day of his/her appointment as a Commissioner.

20. **Appointment of employees of the Commission:** The Government may, from time to time, employ persons to be employees of the Commission who shall be paid such remuneration and allowances and shall hold their employment on such terms and conditions as may be determined by the Government

21. **Functions of the Council:** the Commission shall perform following functions,
    a) Develop and issue sentencing guidelines which are in consonance with the provisions of this Act
    b) Monitor and assess the impact of sentencing provisions and guidelines on Sentencing practice
    c) Consider the impact of policy and legislative proposals relating to sentencing, when requested by the Government
    d) Promote awareness amongst the public regarding the realities of sentencing and publishing information regarding sentencing practice in Magistrates' and Sessions Court.
    e) Consider the impact of sentencing decisions on victims;
    f) Play a greater part in promoting understanding of, and increasing public confidence in, sentencing and the criminal justice system.

22. **Court to consider sentencing guidelines:**
    (1) Every court shall have regard to any relevant sentencing guideline while sentencing an offender
    (2) Where a court imposes a sentence of a different kind or outside the range indicated in a council guideline it shall state its reason for doing so.

23. **Publication of annual reports:** At the conclusion of each calendar year the Council shall publish an annual report regarding the performance of its functions during the year.

Part VI:

MISCELLANEOUS

24. **Power to make rules:** The Government may make Rules for carrying out the purposes of this Act.

Schedule – I

SENTENCING TABLE

Sentencing Zones				
Range of Punishment	Zone A	Zone B	Zone C	Zone D
up to 6 months	< 1.5 months	1.5-3 months	3-4.5 months	4.5- 6 months
up to 1 year	< 3 months	3-6 months	6-9 months	9-12 months
up to 3 years	< 6 months	0.5-1 Year	1 - 2 Years	2-3 Years
up to 7 years	< 2 years	2-3.5 Years	3.5-5.5 Years	5.5-7 Years
up to 10 years	< 2.5 years	2.5-5 Years	5-7.5 Years	7.5-10 Years
up to 14 years	< 3.5 years	3.5-7 Years	7-10.5 Years	10.5-14 Years
up to 25 years	< 10 years	10-15 years	15-20 years	20-25 years