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SENTENCING LAW AND POLICY IN INDIA: A CRITICAL ANALYSIS

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ABSTRACT :

The underlying rationale of any criminal justice delivery system can be determined by looking at the kind of punishment given for various crimes. However in a system like ours, with so many actors involved apart from the accused and victim, it is not possible to expect all of them to react in the same manner to a particular act of crime. For instance the victim might express stronger emotions than a judge who is a total stranger to both the opposing parties. In the same manner the accused might be convinced that his action was in fact correct giving more importance to the surrounding factors. Sentencing is that stage of criminal justice system where the actual punishment of the convict is decided by the judge. It follows the stage of conviction and the pronouncement of this penalty imposed on the convict is the ultimate goal of any justice delivery system. This being said no further explanation is required to understand how much of attention needs to be paid to this stage. This stage reflects the amount of condemnation the society has for a particular crime.

KEYWORDS : *express stronger emotions , various crimes , stage reflects.*

INTRODUCTION

It is so as to achieve an accord on a given occurrence that judges and other legitimate players are delegated. The choice to be come to here isn't limited to whether there was a wrong done or not but rather likewise and all the more critically what must be done in the event of a wrong being submitted. The choices are many. If there should arise an occurrence of an injured individual driven framework the most picked arrangement would be rebuilding of the unfortunate casualty to a similar position as he/she was in before the wrong had been caused. This is for the most part utilized in torts cases and by and large in monetary violations. This can't be connected no matter how you look at it in instances of physical, passionate and mental mischief where rebuilding is infrequently conceivable. In such cases there are two choices – retaliation and recovery. In the previous the framework centers at judgment of the wrongdoing as more significant justification for punishing than some other. Recovery is more blamed well disposed and has faith in recovery for the individual back to the standard of the general public. Another most supported avocation for discipline is discouragement the essential reason of which is counteractive action of reoccurrence of a similar scene.

The problem with the existing system as provided for in the Criminal Procedure Code is the variation in the result obtained from the same or similar set of facts. The judges are allowed to reach the decision

after hearing the parties. However the factors which should be considered while determining the decision and those which should be avoided is not specified anywhere. This is where the judge is expected to use his/her personal discretionary capacity to fix the punishment. This discretion eventually gets abused in a large number of cases due to irrelevant consideration and application of personal prejudices. This is the primary reason for advocating a sentencing policy or guidelines.

This research paper will initiate the discussion by explaining the procedure for sentencing in India and its practical application. This will be followed by a discussion of various opinions on sentencing policy – their advantages and disadvantages. The requirements as far as India is concerned will be discussed in the backdrop of the Sentencing guidelines in UK and USA[1] interspersed with the opinion of the author.

THE SENTENCING PROCEDURE AS UNDER CRIMINAL PROCEDURE CODE, 1973

The Code accommodates wide optional forces to the judge once the conviction is resolved. The Code discusses condemning primarily in S.235, S.248, S.325, S.360 and S.361. S.235 is a piece of Chapter 18 managing a procedure in the Court of Session. It guides the judge to pass a judgment of absolution or conviction and on the off chance that conviction to pursue statement 2 of the area. Provision 2 of the area gives the method to be followed in instances of condemning an individual sentenced for a wrongdoing. The area gives a semi preliminary to guarantee that the convict is allowed to represent himself and give supposition on the sentence to be forced on him. The reasons given by the convict may not be relating to the wrongdoing or be lawfully stable. It is only for the judge to get a thought of the social and individual subtleties of the convict and to check whether none of these will influence the sentence.[2] Facts such as the convict being a breadwinner might help in mitigating his punishment or the conditions in which he might work.[3] This section plainly provides that every person must be given a chance to talk about the kind of punishment to be imposed.

The area simply does not stop at enabling the convict to talk but rather likewise permits the barrier advice to bring to the notice of the court every single imaginable factor which may relieve the sentence and on the off chance that these elements are challenged, at that point the indictment and resistance guidance must demonstrate their contention. This experience must not be looked on as a custom but rather as a genuine exertion in doing equity to the people included. A sentence not in consistence with Section 235 (2) may be struck down as violative of characteristic equity. Anyway this method isn't required in situations where the condemning is finished by Section 360.Section 248 [4] comes under Chapter 19 of the Code dealing with warrants case. The provisions contained in this section are very similar to the provisions under S.235. However this section ensures that there is no prejudice against the accused. For this purpose it provides in clause 3 that in case where the convict refuses previous conviction then the judge can based on the evidence provided determine if there was any previous conviction.

The judge anytime can't surpass his forces as gave under the code for the sake of prudence. In situations where the justice feels that the wrongdoing demonstrated to have been submitted is of more noteworthy power and should be rebuffed harshly and in the event that it is outside the extent of his ward to grant the discipline then he may advance the case to the Chief Judicial Magistrate with the pertinent papers alongside his supposition. The principle part of legal circumspection comes in S.360 which accommodates arrival of the convict on post trial supervision. The point of the segment is to attempt to

[1] However it is already clarified by the author that due to lack of sufficient exposure and experience this paper would only act as a spring board for the thought process to trigger and would not draft a complete policy in itself. This paper merely aims to bring to light the various factors that need to be looked into when sentencing policy is dealt with.

[2] R.V.Kelkar, Criminal Procedure, K.N.Chandrasekharan Pillai (Rev.)4th ed. 2001(Rep.,2003) ,pp500-503.

[3] For instance, if the convict is a bread winner then the court might provide that the convict be given such work that he gets paid for it and the payment be made to his family.

change those hoodlums in situations where there is no genuine risk to the general public. This is conveyed by limiting the scope of the section only to cases where the following conditions exist:

- A woman convicted of offence the punishment of which is not death or life imprisonment
- A person below 21 years of age convicted of offence the punishment of which is not death or life imprisonment
- A male above 21 years convicted of an offence the punishment of which is fine or imprisonment of not above 7 years.

In the above situations when there is no history of past conviction the court can, having thought to other important factors, for example, age, conditions while carrying out the wrongdoing, character, state of mind, and so on utilize its tact and discharge the convict on going into a bond with or without sureties. In the event that a justice of II class and not approved by the High Court opines that the individual attempted merits the summon of this area then he may record his assessment and forward the case to the officer of I class. To empower the judge to get full certainties of the case the segment gives all rights to the judge for enquiry into the subtleties of the case. Additionally if the wrongdoing submitted is of such nature that the discipline awardable can't be more that 2 years or a straightforward fine at that point, having thought to the different variables associated with the convict, the court may leave the convict without a sentence at all after insignificant reprobation. The court likewise makes strides on the off chance that the individual does not agree to the principles set down at the season of discharge as gave under this area, for example, re-capture of the individual. For discharge under these arrangements it is vital that either the convict or the surety are dwelling or go to ordinary occupation in the ward of the court.

The Code through Section 361 makes the utilization of Section 360 required at every possible opportunity and in situations where there is special case to state clear reasons. Any place the discipline given is beneath the base endorsed under the significant laws the judge must give the uncommon purpose behind doing as such. The exclusion to record the exceptional reason is an anomaly and can put aside the sentence passed on the ground of disappointment of equity. These arrangements are accessible just to preliminaries under the watchful eye of the Court of Sessions and the preliminaries of warrants case. The Probation of Offenders Act, 1958 is fundamentally the same as Section 360 of the CrPC. It is progressively intricate as in it unequivocally accommodates conditions going with discharge request, a supervision request, installment of pay to the influenced party, forces and quandaries of the post trial supervisor and different specifics that may fall in the ambit of the field. Section 360 would stop to have any power in the States or parts where the Probation of Offenders Act is brought into power.[5]

PROCEDURE IN PRACTICE

Having comprehended the method in the Criminal Procedure Code, its productivity can be seen distinctly by observing its application practically speaking. The circumspection accommodated under the current technique is guided by dubious terms, for example, 'conditions of the wrongdoing' and 'mental state and age'. Pleasantly these can be resolved however when will they affect the sentence is the issue left unanswered by the governing body. For example, each wrongdoing has going with conditions however which ones qualify as alleviating and which once go about as exasperating conditions is something which is left for the judge to choose. Consequently in the event that one judge chooses a specific situation as relieving this would not (with the exception of a small precedential worth) keep another judge from disregarding that viewpoint as immaterial. This absence of consistency has urged a couple of judges to abuse the attentiveness based on their own partialities and inclinations.

Apart from the personal biases and prejudice the idea of what constitutes justice and what is the purpose of punishment varies from person to person. For instance, in the case of *Gentela Vijayavardhan Rao*

[5] Section 19 of the Probation of the Offenders Act, 1958

v. State of Andhra Pradesh[6], the appellant had with the motive to rob burnt a bus full of passengers, resulting in the death of 23 passengers. The sentence provided by the judges of the lower court was death penalty for convict A and 10 years of rigorous imprisonment for convict B. This was challenged by the convict. The apex court quoted from the judgment *Dhananjoy Chatterjee v. State of West Bengal*[7] to support its view to uphold the judgment:

"Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that Courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime."

This judgement reflects the principles of deterrence and retribution. But this cannot be categorised as wrong or as right for this is a product of the belief of the judges constituting the bench.[8] Similarly in the case of *Gurdev Singh v. State of Punjab*[9] the court confirmed the death penalty imposed on the appellant keeping in mind the aggravating circumstances.[10] Though on the face of it this might be nothing but a brutal revenge for the crime done by the convicts, on a deeper study one can realize from the judgment that the act was absolutely unforgivable for the judges. This cannot be stated to be the inability of the judges to feel sympathy. This is just a reflection of their values.

On the other hand**, *Mohd Chaman v. State***[11] the courts have shockingly reduced the sentence of death penalty to rigorous imprisonment of life due to the belief that the accused is not a danger to the society and hence his life need not be taken. The accused in this case had gruesomely raped and murdered a one and a half year old child. The lower courts having seen the situation as the ***rarest of the rarest***[12] cases imposed death penalty. This was reversed by the apex Court as it was not convinced that the act was sufficiently deserving of capital punishment.

The question to be addressed here, having the inability to adjudge the situations objectively, how do we decide which is the most preferred judgment. Had the same issue be addressed in a vice versa manner, the former convict would have been in the prison and the latter would have died.

How helpful would a guideline be to this scenario? A guideline if laid down would principally have a *primary rationale*[13] for punishing (whatever this rationale may be - retribution is the underlying purpose or rehabilitation and reclamation is the ultimate goal). This primary rationale would help the judges determine what exactly needs to be achieved of the punishment.

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[6] AIR1996SC2791

[7] (1994)2SCC220

[8] The rationale of the judges was that though their ultimate motive was wealth, the convicts had chosen a highly vicious means to attain it. Therefore the amount of cruelty demands such a punishment.

[9] AIR2003SC4187

[10] "The aggravating circumstances of the case, however, are that the appellants, having known that on the next day a marriage was to take place in the house of the complainant and there would be lot of relatives present in her house, came there on the evening of 21.11.1991 when a feast was going on and started firing on the innocent persons. Thirteen persons were killed on the spot and eight others were seriously injured. The appellants thereafter went to another place and killed the father and brother of PW-15. Out of the thirteen persons, one of them was seven year old child, three others were at the threshold of their lives. The post-mortem reports show their age ranged between 15 to 17 years."

[11] 2001CriLJ725

[12] The Indian Judiciary had strongly felt the need to have a sentencing guideline at least to the extent of imposition of death penalty. Therefore in the cases of Bachan Singh v. State of Punjab and subsequently in the case Machhi Singh v. State of Punjab, the Court laid down the 'rarest of the rarest test' by which death penalty should be imposed in only exceptional situations and such exceptional reasons must be recorded. This was followed in numerous cases both to save the life of the accused and to validate the imposition of the death penalty.

[13] Andrew Ashworth, *Sentencing and Criminal Justice*, 2005 4th ed.. One of the main criticism of this primary rationale principle is that it does not provided for all scenarios and results in stereotyping all situations into one. It is the opinion of the author that there can always be an exception to the rule and hence having a rule per se for the sake of guidelines and equality is not harmful. This would only reduce the arbitrariness in the system.

Taking off from here, the mitigating and aggravating circumstances can also be easily determined once the *primary rationale* is clear. Illustrating this point, in the case of *Raju v. State*[14] the Courts reduced the punishment below the minimum prescribed in the statute for reasons which in the opinion of the author are very frivolous. The judge took into account the alleged "immoral character and loose moral of the victim" and reduced the sentence for the accused to the term served. Had there been a clear indication of a victim-centric penal system, a judgment which benefits the accused for the faults of the victim will not be delivered. In *State of Karnataka v. S. Nagaraju*[15] the judge convicted the accused more as a deterrent measure to prevent other potential offenders than to penalise that particular convict.

It is not alleged that in the above scenarios and many other similar ones the judges are irrational or unjust. The only point placed for the observation is variations in the idea of justice and this drastically affects the societal demand of what the judiciary must do in a particular state of affairs.

There have been judges like Krishna Iyer who have taken rehabilitation and reclamation to a different level of understanding. In the famous case of *Mohammad Giasuddin v. State of Andhra Pradesh*[16] he explained punishment as follows:

"Progressive criminologists across the world will agree that the Gandhian diagnosis of offender as patients and his conception of prisons as hospitals - mental and moral - is the key to the pathology of delinquency and the therapeutic role of 'punishment'."

Strongly agreeing with the above proposition it is unfair to allow some convicts reap the benefit of the sympathy of the judge and to let others bear the brunt of the wrath of the others.

SENTENCING POLICY AND ITS CONTENTS

Having put forth a defense for the requirement for having a condemning rule and arrangement, it is currently important to investigate its substance. There have been various recommendations and juristic sentiment on what might establish and ought to comprise condemning strategy. So as to prepare oneself to talk about such a suggestion it is important to comprehend the as of now proposed approach. This would help in getting a handle on the soul of the activity and co-ordinate a progressively healthy item subsequently. The 35th Law commission report on Capital Punishment thoroughly discloses different viewpoints identifying with condemning focussing all the more intently on capital condemning. The talk in the report on the codification of the elements to direct the watchfulness vested in the judge for granting the death penalty can be stretched out to the general discourse on Certainty and Predictability versus Judicial Discretion. The reaction from a Rajya Sabha part and Inspector-General prompted the narrowing down of the affecting components to enthusiasm, opportunity, obtained propensity, madness and intrinsic intuition.[17]

As far as India is concerned, the Indian Penal Code provides us with a broad classification and gradation of punishments. This has been further carved by various judicial decisions on sentencing. However these rulings of the court suffer from the following disadvantages:

a) Facts specific: Though these guidelines are given as *Obiter Dicta*, the application of such guidelines is misleading in the subsequent judgments. Currently the well established Guideline followed by the courts is with respect to death penalty as explained above. The application of this test in the case of *A. Devendran v. State of Tamil Nadu*[18] explains this point. This was a case of triple murder. However the Court held that the trial court was not justified in awarding death sentence as the accused had no pre-meditated plan to kill any person and as the main object was to commit robbery. This case

[14] AIR1994SC222
[15] JT2002(Suppl1)SC7
[16] AIR1977SC1926
[17] It should be however remembered that this report was made in1967 and its applicability need not be complete. The author merely draws support for the argument put forth.
[18] AIR1998SC2821

should be compared with *Gentela Vijayavardhan Rao v. State of Andhra Pradesh* discussed above. The motive in both is to rob the victim. However in one case it has been used as a aggravating factor and the other it is used as a mitigating factor. This shows how the same test has been contradictorily applied.

b) Not followed by lower courts: Another side of the coin is that the lower courts do not follow these guidelines as they are not binding on them. The precedents are usually ignored or differentiated from the existing fact scenario so as to give the judge his space to rule on the case.

c) More of a legislative job: More importantly, it is the job of the legislature to make rules and of the judiciary to interpret and enforce it. It would not be fulfilling or correct to expect and allow the judges to frame the rules by themselves.

d) A final reason as to why the judiciary should not frame the rules is that it once again boils down to the whims and fancies of the judge framing it. This would only be a mere extension of the belief of one judge over all others.

One of the propositions which will be discussed here is that proposed by Andrew von Hirsch and Nils Jareborg.[19] They divided the process into stages of determining proportionality while determining a sentence. The four steps are:

- What interests are violated or threatened by the standard case of the crime – physical integrity, material support and amenity, freedom from humiliation, privacy and autonomy.
- Effect of violating those interests on the living standards of a typical victim – minimum well-being, adequate well being, significant enhancement.
- Culpability of the offender.
- Remoteness of the actual harm as seen by a reasonable man.

Factors which determine culpability vary depending on which of the following schemes one intends to follow:

1. **Determinism** – Where factors outside oneself determines the actions eg. self defence and duress. However most people have sufficient freedom to determine their actions so this will not hold good at all times.
2. **Social and Familial background** – low family income, large family, parental criminality, low intelligence and poor parental behaviour.
3. **The employment, education and economic policies** - The employment, education and economic policy have a major impact on individuals. They result in consequences such as deprivation and marginalization leading to development of criminals in the society. The chief criticism of this procedure is that once again it involves a wide discretion of the judge when it comes to determining the culpability. This once aging leads to certainty as against the discretion. It therefore suggested looking at the UK and USA laws at this point to discover whether this conflict has been solved and if yes, how this conflict has been solved.

RELEVANT FACTORS ?

It isn't feasible for any single individual to think of all the important elements that should be considered. It must be a gathering exercise with an agent from each area of the general public adding to the Guideline. This being so what is endeavored here is an essential examination of what in the sentiment of the creator ought to be a piece of the Guidelines remembering the Indian viewpoint. Before proceeding onward a little summation of the UK and USA Policy is liked. To the extent the UK condemning strategy is thought of it as, was conceived because of the Halliday report and the resulting White Paper named 'Equity for All' which was exhibited in the British Parliament. The principle point of the condemning casing function as clarified by the White Paper is discouragement and assurance of society over all others. So as to help the

judge a Pre-sentence report is set up by a probation officer which contains "a front sheet, offense investigation, guilty party's appraisal, hazard evaluation and an end".[20]

As far as sentencing Guidelines are concerned, paragraph 5.14 explicitly states as follows:

"We need to have a consistent set of guidelines that cover all offences and should be applied whenever a Sentence is passed. We must work to eradicate the wide disparity in sentencing for the same types of offences and the public's mistrust of the system that comes partly from this inconsistent sentencing."

The answer of the Halliday report to this problem is,

"For a new framework, an Act of Parliament should set out the general principles, specify the newly designed sentences, provide for review hearings, prescribe enforcement procedures and require guidelines to be drawn up. The Act should take the form of a Penal Code, which would be kept continuously available in up to date form."

This prompted the foundation of the Sentencing Guidelines Council headed by the Lord Chief Justice. Additionally an entirely different arrangement of disciplines with reformatory reason have been presented. To put it plainly, the principle point of the strategy in security of general society and restoration. To the extent attentiveness goes, there has not been a particular limitation with the exception of guaranteeing that the judge has total learning of the considerable number of subtleties of the convict before passing the sentence. The point, as can be seen, is to advanced the case in the most ideal manner and in this way guarantee no stone is left unturned.

In the US framework, The Guidelines are the result of the United States Sentencing Commission and are a piece of a general government condemning change bundle that produced results in the mid-1980s. In the fallout of US v.Booker, the Guidelines are optional, implying that judges may think about them yet are not required to hold fast to their measures in condemning choices. That being stated, government judges perpetually utilize the Guidelines in any event as a beginning stage when condemning criminal respondents. Any sentence outside of the extent of the rules requires a composed clarification, by the judge, with regards to the purpose behind the prudence. The Guidelines decide sentences dependent on two variables: (1) the lead related with the offense and (2) the litigant's criminal history. The statutory mission as expressed in the 2005 Federal Sentencing Guideline Manual is "… stopping wrongdoing, debilitating the guilty party, giving just discipline, and restoring the wrongdoer. It representatives to the Commission expansive expert to survey and legitimize the government condemning procedure." Once again watchfulness however guided isn't totally evacuated on account of US too.

CONCLUSIONS

Proceeding onward to the India situation, what can be imagined? It is beyond the realm of imagination to expect to get rid of tact all together. Anyway what one needs to remember is on specific framework should treat a specific facto as either exasperating or relieving. This profoundly relies upon what is the point of the framework. As observed in both the purviews talked about above, there is clearness with regards to the point of rebuffing. This clearness prompts decide if a particular factor will be helping the convict or not. Including to the above communicated conclusion, it is opined that one factor which needs addressal yet has been disregarded in the two frameworks is the monetary and social strata of the blamed. This additions monstrous significance with regards to wrongdoings, for example, burglary and theft. Additionally having at the top of the priority list the broad effect of the social expansion in India this also will increase extraordinary noticeable quality to the extent India is concerned not normal for different nations. It is subsequently the closed with two suggestion. There should be a condemning arrangement plainly explaining the motivation behind the framework. To the extent India is concerned, colossal significance should be given to the social and monetary foundation of the convict as a moderating situation.

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[20] To know what each of this constitute refer the white paper, Justice for All, p. 88

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