DETERMINATION OF APPROPRIATE PUNISHMENT AND THE NEED FOR SENTENCING GUIDELINES

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It is a common knowledge that even though a convict has an option to appeal, sentencing is decidedly the final and important stage of the Criminal justice system. It is gives a psychological effect of closure of having justice served properly. But the fact that the determination of appropriate punishment in our country rests mainly on certain vague terms such as aggravating or extenuating circumstances or on its gravity does not serve the purpose of administration of Criminal Justice system. It is called vague because what is aggravating or extenuating for one judge need not/ will not be the same for the other. In order to overcome this difficulty, few Committee Reports have suggested for the laying of a structured guidelines. The whole idea behind this paper is to point out the present system of determination of suitable punishment and to point out the need for structured sentencing guidelines with the help of judicial precedents and Committee Reports. The outcome of the research is that in order to avoid this disparity in sentencing a clarified set of guidelines with regard to sentencing policies must be put forward by the judiciary; and "imprisonment for life without commutation or remission" for specific offences which do not require death sentence but a relatively stronger punishment must be given for.

Key Words: *Punishment, Convict, Criminal, Justice, Commutation, Remission, Precedents, Vague, Gravity, Aggravating, Extenuating, Psychological.*

INTRODUCTION

Sentencing of a convict basically denotes the culmination of judicial process which begins with the detection, enforcement of the law, prosecution and adjudication. Thus the importance of Sentencing lies in the fact that it becomes the face of Justice and a future deterrent for the prospective offender of law.

The determination of appropriate punishment after the conviction of an offender is often a question of great difficulty as it always requires a careful consideration. Though the law prescribes the nature and the limit of the punishment permissible for an offence, it is the Court which has to determine in each case a sentence suited to the offence and the offender. The maximum punishment prescribed by the law of any offence is intended for the gravest of its kind and it is rarely necessary in practice to go up to the maximum. The measure of punishment in any particular instance depends upon a variety of considerations such as the motive for the crime, its gravity, character of the offender, his age, antecedents and other extenuating or aggravating circumstances.

Currently India does not have structured sentencing guidelines that have been issued either by the legislature nor the judiciary[1]. There have been few Committee Reports that has recommended for framing of uniform sentencing guidelines so that the offenders of like kind of offences do not go with different sentences. This paper has been designed in such a way that it points out the present procedure for sentencing and the need for judicial sentencing guidelines citing the drawbacks of the present system.

[1] The Law Library of Congress, Global Legal Research Center, "*Sentencing Guidelines*" (Available At:- https://www.loc.gov/law/help/sentencing-guidelines/sentencing-guidelines.pdf) (Accessed On:- 02.08.2016)

HISTORICAL EVOLUTION OF THE CONCEPT OF PENOLOGY

The traces of Indian history shows that the concept of Penology was embedded in it, right from the beginning. It developed under the connotation of ***"danda-niti"*** which literally means principle of punishment[2]. ***Manu***, the greatest law-giver of India, emphasised that *Danda(punishment)* was created as a derivative of *Dharma*. Though Criminology is a modern growth in the West but in reality it was a fully developed subject in our country before the dawn of Christian era. We have an abundance of literature on *danda-niti* or criminology contained in our *Dharmashastras* such as *Vedas, Smritisastras, Kautilya's Arthasastras, etc.*

SENTENCING PROCEDURE UNDER CrPC

Section 53 of IPC[3] deals with the kinds of punishments which can be inflicted on the offenders. The punishments dealt under it are as follows:-

1. Death penalty,

2. Imprisonment for life,

3. Imprisonment,

4. Forfeiture of property and

5. Fine.

The **main objectives of the criminal justice system** can be categorized as follows: To prevent the occurrence of crime.

- To punish the transgressors and the criminals.
- To rehabilitate the transgressors and the criminals.
- To compensate the victims as far as possible.
- To maintain law and order in the society.

  To deter the offenders from committing any criminal act in the future.

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[2] *Anupam*, Rajeev Gandhi School of Intellectual Property Law, IIT Kharagpur; "*Public Opinion in Sentencing Policy: The Need of the Hour* (Available At:- Public Opinion in Sentencing Policy: The Need of the Hour) (Accessed On:- 02.08.2016)

[3] Chapter III of IPC containing Sections 53-75.

Chapter III of the CrPC contains provisions relating to the ***Power of Courts.*** It sets out the maximum range of punishments that can be imposed by the judges based on their categories. [4] Here it is important to note that under many categories of offences punishment prescribed is more than the above prescribed limit, however while passing sentence in such cases magistrate cannot exceed the sentencing limits but he has an option under S.325 CrPC to forward accused to the CJM. A sentence of imprisonment in default, as per S.30 CrPC, should not be in excess of power under S. 29 of CrPC and should not exceed 1/4th of the term of imprisonment which the Magistrate is empowered to inflict. However, it may be in addition to substantive sentence of imprisonment for the maximum term awarded by the Magistrate under S. 29. In case of conviction of several offences at one trial, S.31 of CrPC, the Court may pass separate sentences. However, it is subject to S.71[5] of the IPC. These are the powers of the Courts with respect to sentencing which has to be adhered strictly. But, this is not the end of it, as the Code has provided for some discretionary powers to the judges in deciding the quantum of sentence once the conviction is determined.

The Code provides for wide discretionary powers to the judge once the conviction is determined. The Code talks about sentencing chiefly in **Sections 235,248, 325, 360 and 361.** *S.235 is a part of Chapter 18 dealing with the procedure of trial before the Court of Session.* It directs the judge to pass a judgment of acquittal or conviction and in case conviction to follow clause 2 of the section. Clause 2 of the section gives the procedure to be followed in cases of sentencing a person convicted of a crime.

The section provides a quasi trial to ensure that the convict is given a chance to speak for himself and give opinion on the sentence to be imposed on him. The reasons given by the convict may not be pertaining to the crime or be legally sound. It is just for the judge to get an idea of the social and personal details of the convict and to see if none of these

[4] Section 28 states that a HC may pass any sentence authorized by law. And a SESSIONS JUDGE or ADDITIONAL SESSIONS JUDGE may pass nay sentence but death alone is subject to the confirmation of the HC. Likewise, a ASSISTANT SESSIONS JUDGE may pass sentence of imprisonment not exceeding a term of 10 years. Section 29 says that a CJM can pass sentence of imprisonment not exceeding 7 years; a JM of I class an imprisonment not exceeding 3 years and fine not exceeding 10,000 rupees and finally it says that a JM of II class can pass sentence of imprisonment for a term not exceeding 1 year and fine not exceeding 5,000 rupees.

[5] S. 71 I.P.C. provides (1) that where an offence is made up of parts each of which parts is itself an offence the offender can be punished only for one of such offences. (2) That where an offence falls under two or more definitions of offences or where several acts, each of which is an offence, when combined constitutes a different offence, then the punishment could be awarded only for any one of such offence.

will affect the sentence.[6] For example, facts such as the convict being a breadwinner might help in mitigating his punishment or the conditions in which he might work.

It is worth-noting that, the section just does not stop at allowing the convict to speak but also allows the defence counsel to bring to the notice of the court all possible factors which might mitigate the sentence and if these factors are contested then the prosecution and defence counsels must prove their argument. A sentence not in compliance with S.235 (2) might be struck down as violative of natural justice. However this procedure is not required in cases where the sentencing is done according to S.360.

S.248 coming under Chapter 19 of the Code dealing with trial of warrants case by magistrates, 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 here, at any point cannot exceed his powers as provided under the code in the name of discretion. In cases where the magistrate feels that the crime proved to have been committed is of greater intensity and must be punished severely and if it is outside the scope of his jurisdiction to award the punishment then he may forward the case to the Chief Judicial Magistrate with the relevant papers along with his opinion.[7]

The main part of judicial discretion comes in S.360 which provides for release of the convict on probation of good conduct or after admonition. The aim of the section is to try and reform those criminals in cases where there is no serious threat to the society is caused by them. 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 person above 21 years convicted of an offence the punishment of which is fine or imprisonment of not above 7 years.

[6] R.V.Kelkar, Criminal Procedure, K.N.Chandrasekharan Pillai (Rev.) 4thed. 2001(Rep.,2003) ,pp500-503.
[7] S.325, CrPC. It deals with the procedure when Magistrate cannot pass sentence sufficiently severe.

In the above cases when there is no history of previous conviction the court can, having consideration to other relevant factors such as age, circumstances while committing the crime, character, mental condition, etc. use its discretion and release the convict on entering into a bond with or without sureties. If a magistrate of II class and not authorised by the High Court opines that the person tried deserves the invocation of this section then he might record his opinion and forward the case to the magistrate of I class. Also if the crime committed is of such nature that the punishment awardable cannot be more that 2 years or a simple fine then, having consideration to the various factors connected to the convict, the court may leave the convict without a sentence at all after mere admonition. The court also takes steps in case the person does not comply with the rules laid down at the time of release as provided under this section such as re-arrest of the person. For release under these provisions it is necessary that either the convict or the surety are residing or attend regular occupation in the jurisdiction of the court.

The Code through S.361 makes the application of S.360 mandatory wherever possible and in cases where there is exception to state clear reasons. Wherever the punishment given is below the minimum prescribed under the relevant laws the judge must give the special reason for doing so. The omission to record the special reason is an irregularity and can set aside the sentence passed on the ground of failure of justice. ***The Probation of Offenders Act, 1958 is very similar to S.360 of the CrPC.*** It is more elaborate in the sense that it explicitly provides for conditions accompanying release order, a supervision order, payment of compensation to the affected party, powers and predicaments of the probation officer and other particulars that might fall in the ambit of the field. It should be noted that, S.360 would cease to have force in the States or parts where the Probation of Offenders Act is brought into force.[8]

DRAWBACKS OF THE CURRENT PROCEDURE

A glance at the procedure pointed out above will show that the discretion provided for under the existing procedure is guided by vague terms such as ***'circumstances of the crime'*** and ***'mental state and age'*.** Though these can be determined, the point at which they will have an effect on the sentence is the question left unanswered by the legislature. For

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

instance, every crime has accompanying circumstances but which ones qualify as mitigating and aggravating circumstances is something which is left for the judge(s) to decide. Therefore if one judge decides a particular circumstance as mitigating this would not prevent another judge from ignoring that aspect as irrelevant.[9]

This lack of consistency has encouraged a few judges to misuse the discretion on the basis of their personal prejudices and biases. For instance, in the case of ***Gentela Vijayavardhan Rao v. State of Andhra Pradesh***[10], 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***[11] 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 judgment reflects the principles of deterrence and retribution. But this cannot be categorized as wrong or as right for this is a product of the belief of the judges constituting the bench.

On the other hand, in ***Mohd Chaman v. State***[12] 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**[13] cases imposed death penalty.

[9] **Suresh Chandra Bahri v. State of Bihar (AIR1994SC2420) -** "This sentencing variation is bound to occur because of the varying degrees of seriousness in the offence and/or varying characteristics of the offender himself. Moreover, since no two offences or offenders can be identical the charge or label of variation as disparity in sentencing necessarily involves a value based judgment. i.e., disparity to one person may be a simply justified variation to another. It is only when such a variation takes the form of different sentences for similar offenders committing similar offences that it can be said to desperate sentencing."

[10] AIR1996SC2791

[11] (1994)2SCC220

[12] 2001CriLJ725

[13] 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

This was reversed by the apex Court as it was not convinced that the act was sufficiently deserving of capital punishment.

However, recently the Court in ***Sangeet & Anr. v. State of Haryana***[14], noted that the approach in ***Bachan Singh's Case*** has not been fully adopted subsequently, that "primacy still seems to be given to the nature of the crime".The Court in this Case pointed out few important points that are worth-noting:-

1. This Court has not endorsed the approach of aggravating and mitigating circumstances in Bachan Singh's Case. However, this approach needs a fresh look as in any event, there is little or no uniformity in the application of this approach.

2. Aggravating circumstances relate to the crime while mitigating circumstances relate to the criminal. A balance sheet cannot be drawn up for comparing the two. The considerations for both are distinct and unrelated. The use of the aggravating and mitigating circumstances needs a review.

3. In the sentencing process, both the crime and the criminal are equally important. We have, unfortunately, not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become judge-centric sentencing rather than principled sentencing.

4. The grant of remissions is statutory. However, to prevent its arbitrary exercise, the legislature has built in some procedural and substantive checks in the statute. These need to be faithfully enforced.

NEED FOR SENTENCING GUIDELINES

The need for a standard and fixed sentencing guidelines proves to be the need of the hour as the present procedure as pointed out by J Krishna Iyer is based on the concept that ***"Every saint has a past, every sinner has a future."***

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.

[14] (2013) 2 S.C.C. 452.

It is evident from few pronouncements that the judiciary in itself has felt the need for standard sentencing guidelines. For instance, in ***Rameshwar Dayal v. State of U.P***[15], the SC observed that, "One complex problem relating to the sentencing process is the lack of uniformity in the quantum of punishment given by different courts for the same or similar offences" and it also pointed out that the problem of disparity had not been solved satisfactorily so far.

Later, the Supreme Court in ***Mohd. Chaman v. State***[16] taking note on a decision of the Supreme Court of USA in ***Gregg V. Gorgia,*** observed that it is neither practicable nor desirable to imprison the sentencing discretion of a judge or jury in the strait-jacket of exhaustive and rigid standards. Nevertheless, these decisions do show that it is not impossible to lay down broad guidelines as distinguished from iron – cased standards, which will minimize the risk of arbitrary imposition of death penalty for murder and some other offences under the penal code.

In 2013 the Supreme Court, in the case of ***Soman v. State of Kerala***[17], also observed the absence of structured guidelines: Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the trial court in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges.

Apart from the judicial pronouncements there are also few Committees that have suggested for having uniform sentencing guidelines. In March 2003, the ***Malimath Committee,*** issued a report that emphasized the need to introduce sentencing guidelines in order to minimize uncertainty in awarding sentences, stating that,

"[t]he Indian Penal Code prescribed offences and punishments for the same. For many offences only the maximum punishment is prescribed and for some offences the minimum may be prescribed. The Judge has wide discretion in awarding the sentence within the statutory limits. There is now no guidance to the Judge in regard to selecting the most appropriate sentence given the circumstances of the case. Therefore each Judge exercises discretion accordingly to his own judgment. There is therefore no uniformity. Some Judges are lenient

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[15] (1 971) SCC 924.
[16] 2001 CrLJ -725.
[17] (2013) 11 S.C.C. 382.

and some Judges are harsh. Exercise of unguided discretion is not good even if it is the Judge that exercises the discretion. In some countries guidance regarding sentencing option[s] is given in the penal code and sentencing guideline laws. There is need for such law in our country to minimize uncertainty to the matter of awarding sentence. There are several factors which are relevant in prescribing the alternative sentences. This requires a thorough examination by an expert statutory body."[18]

The Committee advised further that, in order to bring "predictability in the matter of sentencing," a statutory committee should be established "to lay guidelines on sentencing guidelines under the Chairmanship of a former Judge of Supreme Court or a former Chief Justice of a High Court experienced in criminal law with other members representing the prosecution, legal profession, police, social scientist and women representative."

Subsequently in 2007 the ***N. R. Madhava Menon Committee*** reasserted the need for sentencing guidelines in the following words:-

"In short, sentences and sentencing require urgent attention of policy planners if criminal justice is to retain its credibility in the public mind."[19]

It also elaborated that a national policy on sentencing shall seek to address the following issues:

(i) The need for criminal law to offer more alternatives in the matter of punishments instead of limiting the option merely to fines and imprisonment

(ii) In respect of the quantum of punishments, the need for constant review to ensure that it meets the ends of justice and disparity is reduced in similar situations.

(iii) A policy to avoid short-term imprisonments and to prevent overcrowding of jails and other custodial institutions, to be rigorously pursued at all levels.

(iv) The need for specific sentencing guidelines to be evolved in respect of each punishment.

(v) Also the need for institutional machinery involving correctional experts for fixing proper punishment.

[18] GOVERNMENT OF INDIA, MINISTRY OF HOME AFFAIRS, Committee on Reforms of Criminal Justice System Report 170 (March 2003).
[19] GOVERNMENT OF INDIA, MINISTRY OF HOME AFFAIRS, Report of the Committee on Draft National Policy on Criminal Justice (July 2007).

CONCLUSION

Striking a fair balance between uniformity and judicial discretion of sentencing is of utmost importance in imposing the most suitable degree of punishment on an offender for a crime. The wide disparities of sentencing for similar offences reveal that the criminal justice system of India has failed in this regard. Sentencing policy, which is the most vital link in Criminal Justice system and which signifies the rule of Law in a State must be put forward by the Legislature or Judiciary. This is because, it is not just that there is disparity in sentencing, or in cases of death penalty or rape but there are other offences in the IPC which clearly brings similar disparities into light. It is time that we should imbibe the finer aspects of the successful Justice System in various parts of the world and make our Criminal Justice System stronger and more efficient. As a part of conclusion, it is stated that, *(i) a clarified set of guidelines with regard to sentencing policies must be put forward by the judiciary;* and *(ii) "imprisonment for life without commutation or remission" for specific offences which do not require death sentence but a relatively stronger punishment must be given for.*