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SENTENCING POLICY IS THE NEED OF THE HOUR TO ELIMINATE ARBITRARINESS IN THE EXERCISE OF SENTENCING DISCRETION

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ABSTRACT

"Patrice Mersault killed an Arab 'provoked' by the sun's glare. The prosecuting attorney finds Mersault's remorselessness so offensive that throughout the trial they concentrate more upon his inability or unwillingness to cry at his mother's funeral , than on his having murdered an Arab man in cold blood. Mersault is convicted and sentenced to death, principally for not feeling his mother's death- rather than for killing a man. Criminal system would have spared his life had he displayed some expressions of remorse, but Camus 'existential hero refused to lie. Remorselessness was a sufficient aggravating factor to 'shake the collective conscience of the society'.... and judge's justice demanded sentencing the 'outsider' to death…..''

The criminal law machinery can deliver justice only if it can perform the twin functions of correctly determining whether the accused person is guilty of the offence she is charged with and thereafter prescribing suitable action(both quantitatively and qualitatively) against her, if she is found guilty. The latter of the two objectives is the sentencing process of the judiciary machinery.

Sentence is a judgment on conviction for crime; the pronouncement by the judge of the penalty or punishment as the consequence to the defendant of the fact of her guilt. The sentencing process involves 'individualization in the administration of criminal justice'. Individualization, which means that instead of fitting the offence, the criminal sanction should fit the offender, necessitates vesting of discretion in the judges who can do justice in each case by differentiating the personality of offender from other offenders in character, socio-cultural backgrounds, motivation of crime, etc.

Sentencing is probably the "most public face of the criminal justice process. It is the test to determine whether justice has been done both to victim and to the defendant. To appreciate the rationale for sentencing its inherent tensions and difficulties, it is important to understand the penal theories- retributive or just desert theory, deterrent theory, incapacitative sentencing, reformative theory and restorative theory. These

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theories do not operate in a mutually exclusive sentencing milieu. A just and effective sentencing policy resorts to a balanced and meaningful combination of the above theories

Background

The criminal law machinery can deliver justice only if it can perform the twin functions of correctly determining whether the accused person is guilty of the offence she is charged with and thereafter prescribing suitable action (both quantitatively and qualitatively) against her, if she is found guilty. The latter of the two objectives is the sentencing process of the judiciary machinery.

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[2]. P. RamanathaAiyar, *The Law Lexicon* 1745(1st ed. Lexis Nexis Butterworths Wadhwa Co, Nagpur1999)

[3]. Ahmad Siddique, *Criminology & Penology*350 (5th ed. Eastern Book Company, Lucknow 2005)

[4]The first movement towards rational sentencing was launched by the English classical school as a reaction against the arbitrary nature of punishments which neither fit the offence nor the offender. Jeremy Bentham advocated for a penal policy in which magnitude differed kinds of offence and quantum varied according to the offender's capacity to suffer.

[5]Andrew Ashworth, "*Sentencing" in Mike Maguire* et.al (eds.), The Oxford Handbook of Criminology, 1077(Oxford University Press, 2011).

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Sentencing in India

The criminal justice system in India-substantive and procedural –is a fine blend of these theories of penology as a principles of reformation, deterrence and retribution are equally reflected. While on one like Probation of Offenders Act, 1958, Juvenile Justice (Care and Protection of Children) Act, 2015, s. 354(3) Cr.Pc[6] and s. 361[7] which highlight the reformatory ideology, on the other hand are provisions like s.75 IPC[8], incorporation of the concept of mandatory minimum punishment, strict punishments in socio-economic offences etc., which have retribution and deterrence weaved integrally in them.

Sentencing is not the exclusive prerogative of the judiciary (though prima facie it may seem so) as legislature/statute law i.e. IPC and other local and special laws lay down the terms under which a criminal code may pass sentence after conviction. IPC provides various means of penal sanctions.[9] The offences under the IPC have been defined with sufficient clarity and the maximum punishment that can be imposed for an offence has been fixed in most cases.[10] The offence of grave nature[11] are provided with a mandatory minimum punishment , and in some cases the minimum punishment can be avoided when the judge feels that there are "adequate and special reasons"[12] for the same. Under two sections -302 and s. 121-the maximum punishment is death and the minimum is imprisonment for life.

The sections which prescribe imprisonment as punishment in most cases state that imprisonment of either description may be imposed. There are few offences, for which rigorous imprisonment without the alternative of simple imprisonment is

[6] It states that in cases of the sentence of death, special reason should be given.
[7]The provision is concerned with probation.
[8] It speaks of enhanced punishment for certain offences after previous conviction.
[9] s. 53, IPC lists various punishments that can be inflicted under this code –death, imprisonment for life, rigorous imprisonment, simple imprisonment, forfeiture of property and fine.
[10] The lucid account presented in this paper is drawn from G. Kameswari& V. Nageshwara Rao, *The Sentencing Process Problems and Perspective*, 41 JILI 452 (1999).
[11] ss. 304-B, 397 and 398IPC (mandatory minimum sentence).
[12] In case of s.376IPC(minimum sentence).

prescribed,[13] and a few offences for which simple imprisonment is to be imposed.[14] Forfeiture of property is prescribed as a punishment in three cases.[15] Certain offences under the IPC are punishable with fine alone;[16] some are punishable with fine as well as imprisonment;[17] and some are punishable with imprisonment or fine or both. In a certain case, the maximum amount of fine that can be imposed is specified by the section. If it is not specified, the fine is unlimited, but it should not be excessive.

The judiciary not only has to confine itself to the above drawn legislative limits but is also required to exercise the sentencing discretion in such a way that it conforms to the Pena logical jurisprudence. Sentencing discretion is a further regulated by statutory procedural mandates-ss. 235(2) and 248(2) CrPc which mandate hearing of parties on question of sentence makes the process of sentencing not only individualized but also fair, reasoned and transparent.

Despite the above statutory guidelines, judicial discretion has turned into one of the most contentious concepts troubling the legal scholars.[18] There is arbitrariness visible in judicial exercise of discretion as is pointed out in the following sections of this paper, which has come under severe scrutiny resulting in justifiable demands of putting fetters on the sentencing discretion by a sentencing policy.

Unchecked Tentacles of Discretion-Devil

"Punishment is institutionalized violence and it can be justified only when it is aimed at protecting the society by preventing crime. No sentence should ever appear to be vindictive. An excessive sentence defeats its own objective and tends to undermine the respect for law .On the other hand , an unconscionably lenient sentence would

[13] e.g., ss. 194, 400 and 449 IPC.
[14] ss. 341, 500 & 509.
[15] ss. 126, 127 & 169.
[16] ss. 171G, 171H, 171I, 278 & 283.
[17] ss. 153A, 153B, 302, 376 & 494.
[18] The discretion-devil has tormented the legal system across the world. Time and again steps are taken to tame this devil but to no avail. In UK, the Halliday Report (2001) argued that the system of sentencing and punishment was not working in line with policy objectives, that seriousness is not measured properly and that there should be a limited retributivism.

lead to miscarriage of justice and undermine the people's confidence in the efficacy of the administration of criminal justice.[19]

The argument that 'discretion is bad' is not without qualified reasons. This paper has identified the following troubled areas.

1. Inconsistency of Sentencing- This criticism is not new found but finds due acknowledgement in legal writing across the globe. The Indian Supreme Court in Rameshwar Dayal v State of Uttar Pradesh[20] itself noticed two different cases on identical facts, the punishment in one case was 4 years and in the other 3 months. The 'judicial gamble' of the 'rarest of 'rare' case doctrine for death penalty is another, and perhaps the most glaring, example to substantiate and elucidate the point.

Even after the Apex Court in Bachan Singh[21] and Macchi Singh[22] laid down the guidelines for identifying 'rarest of rare' cases for inflicting death penalty, the chaos in this area of law has not settled. It would not be wrong say that "the personal philosophy of the judges rather than any sound policy of 'to be' or 'not to be' that governs this area of judicial discretion.[23]

2. Discretion Diminishes the Possibility of accurately predicting Sentence Outcomes - When too wide discretion is available to judges 'the sanctions cannot give a clear deterrent message to past or potential offenders and solicitors as well as barristers are unable to advise their clients effectively.[24] If judges tend to sentence at the top end of what is legally permissible, 'over-sentencing occurs that can lead to crisis of governmental resources[25]. Unfettered discretion can also impede a democratically elected government from imposing its desired sentencing policy.

2.1 Unruly discretion when maximum punishment provided- The penal code in various cases provide the maximum term of sentence and leaves the actual imposition

[19]*Supra* note 9 at 459.
[20] (1971) 3 SCC 924.
[21]AIR 1980 SC 893.
[22] AIR 1983 SC 957.
[23]Dr. N.S Sonam & Dr. K.N. Chandrasekharan Pillai, "*Rarest of Rare Cases-A Myth*", 25 (Academy Law Review 1572001).
[24]Sushan Easton and Christine Piper, *Sentencing and Punishment*: *The Quest for Justice* 33(2005).
[25].*Id.* at 36.

of sentence in individual cases to judicial discretion. When fairly high maximum penalties are given, inconsistencies in sentences are bound to rise as it 'leave(s) decision making open to irrelevant influences'.[26]

The judicial tend of going much below the maximum is well found in India. In Bankat& others v State of Maharashtra[27], the Supreme Court agreed to reduce the ten years for grievous hurt to one year already undergone in view of the fact that it was an over ten year old incident. In Venketesh v State of Karnataka[28]the Karnataka High Court accepted to reduce the sentence for an offence under 307 in view of the failed plea of insanity to sentence already undergone. In State of Maharashtra v Dinkar Balkrishna[29] the High Court went too far in exercising discretion as it reduced a charge under s. 302 to s.323 and reduced the sentence to already undergone(16day imprisonment).

2.2 Unwarranted leniency in socio-economic offence- In the case of socio-economic offence also, when imprisonment is awarded, the term awarded is so small that disproportion to the crime committed is manifest. It is disturbing to find that the vested "discretion to award fine only or to award imprisonment below the minimum is improperly exercised so that, in a large number of cases, the offenders are let off or a short term of imprisonment.[30]

Taming Judicial Arbitrarines:Hopes with Sentencing Policy

In the wake of complete misuse and abuse of discretion by the judiciary in the matters of sentencing there has been a demand to put a sentencing policy in place to regulate, guide and check exercise of discretion by the judiciary.

The expression' sentencing policy' can be construed in two ways. The wider definition of sentencing policy would be a policy laid down by the legislature to

[26]*Supra* note 4 at 831. The English legal system faces similar problems with operation of discretion in case of high maximum penalties. Studies which reveal that at some courts black offenders are significantly more likely to receive custody than similarity situated white offenders.
[27] (2005) Cri L.J 646(SC).
[28] (2005) Cri L.J.1112 (Karnataka).
[29](2005) Cri L.J. 1280(Bombay).
[30]*Supra* note 9 at 458.

regulate the judicial discretion by establishing prescriptive standards and enumerating aggravating and mitigating circumstances.

Having such a binding sentencing policy is impossible as there cannot be an exhaustive enumeration of the aggravating and mitigating circumstances. It is humanly impossible to lay down a rule to meet every situation that might arise in future is impossible as 'there are countless permutations and combinations, which are beyond the anticipatory capacity of the human calculus'.[31] Moreover, 'criminal cases are different from one another in ways that legislatures cannot anticipate and limitation of language prevents the precise description of differences that cannot be anticipated'. Further standardization of sentencing would sacrifice justice at the altar of blind uniformity and it might result in 'degenerating into a bed of procrustean cruelty.

Standardization also becomes problematic as there is very little agreement among jurists and penologists as to what information about the crime and criminal is relevant to fix the quantum of sentence. The sentencing dilemma cannot be resolved by a strict policy as the 'entire issue of sentencing and the ancillary questions are too subjective in nature, for there to be complete coherence in the system'.[32]

Another important argument against standardization is that it cannot successfully inflict alternative forms of punishment. Though punishments like community service are unknown in India (save Juvenile Justice Act, 2000). the idea is not unknown in the juristic circle of the country. Only judicial discretion can do full justice in determining the cases fit for alternatively /non-custodial forms of punishments like disqualification from holding public office, community service orders, attendance orders etc.

The second construction of the term 'sentencing policy' would be much narrower. This policy merely articulates different type of punishments for different types of offences, varying with the gravity and seriousness of each. By providing statutory minimum levels of punishments in some cases and maximum outer limits in other, the policy confers little/no discretion on judges in the former cases and a much wider

[31] A. Lakshminath, *Criminal Justice in India: Primitivism to Post-Modernism*, 48 *JILI* 47(2006).
[32] Joie Chowdhary, '*Sentencing –An analysis'*, 2004 Cri L.J. 262(ALL)

discretion in the latter ones. Sentencing policy if understood in this restricted sense is very necessary to guide the judges and thus forms an integral part of the IPC and other penal laws.

However even this restricted policy has come under severe criticism by the defenders of judicial discretion (especially the mandatory minimum punishments), but this policy is in place it is for judges to abides by it. Though there is a well-founded threat of injustice happening in some cases, but it cannot be checked by the courts by acting with discretion which they have not been vested with. The courts intervention is bound to add to the already existing confusion as the judiciary has proved itself sufficient incapable of handling even the discretion actually vested in them.

Structuring Judicial Discretion

In the wake of above stated drawbacks of having a sentencing policy that clips and curtails discretion, an immense responsibility in cast on the judiciary to exercise self-restraint in sentencing process i.e. by conforming to the 'legislative sentencing policy' as it is reflected in the substantive law and evolving consistency in judicial decisions in such a way that the justice delivery system weighs prince and the pauper on the same scales. Judicial self-regulation offers an excellent solution to check the arbitrariness that has crept in sentencing by structuring discretion.

1. Pre-Sentence Inquiry- A pre-sentence report, covering the whole expense ranging from surrounding circumstances of the crime, factors of constitution, personality, character and socio-cultural background of the offender can be extremely desirable basis for structuring and guiding sentencing discretion. In the pre-sentence inquiry, the courts, in addition to the pre-sentence report, also seek advice from experts like psychiatrists or probation officers regarding the desirability of a particular sentence keeping in view its likely impact on the offender.

2. Guidelines Judgments to Regulate Discretion when Maximum Limits are Imposed- Guidelines suggest certain principles which ought to apply to sentences for various categories of crime. The promulgation of guidelines provides with both consistency and individualized justice. English legal system has a well-

developedsystem of guideline judgments through Court of Appeal decisions 'which consider sentences for a whole category of offences or particular sentencing factors, rather than one individual or individual case'.

R v Billiam[33] is one example of guideline judgment. Lord Lane set out the length of sentence in terms of years.

(a) If the rape is committed by an adult without any aggravating or mitigating features, five years' sentence should be taken as a starting point.

(b) If the rape is committed by two or more men acting together or by a man who has broken into victim's house the starting point should be 8 years.

(c) Where the accused who had committed a series of rape on a number of women, sentence of 15 years or more.

(d) Where the defendant behavior has manifested, perverted or having psychopathic tendencies or gross personality disorder and if he is likely to remain danger to the women for an indefinite period, life sentence can be awarded.

3. Training of Sentencers- Sentencing disparities and inconsistencies can be reduced by training the judicial personnel in latest trends in penological thought and practice, acquainting with them with the recent legislative developments and the objectives behind them and bringing to their knowledge the decisions of Apex Courts which lay down guidelines. This training should mandatorily include gender sensitization of judges across the judicial hierarchy to check unruly reasoning awarded in cases of sexual violation.

4. Sentencing information system- This system is not a reform of the discretionary process per se but likely to generate mutual awareness among Sentencers and a much greater consistency in approach. It is database consisting of all Apex Court sentences passed in recent years. A judge simply enters into a computer certain few features of a case to be sentenced and the computer then gives of sentences passed in previous cases with similar features.

[33]. (1986) 1 ALLER 985.

5. Sentencing Councils and Sentencing Commission- The sentencing council is an integral part to the criminal justice system of USA. The sentencing council consists of several judges of a multi-judge court who meet periodically to discuss sentences to be imposed in pending cases. From such a discussion a consensus on the sentencing standards may emerge. However, the responsibility for determining a sentence rests with the judge to whom the case is assigned, although the discussion and the need to state reasons for a sentence tend to restrain the imposition of unreasonably severe or lenient sentences.

Conclusion

If the discretion is presumed to be operating of a continuum from complete to a non-discretion, the outcomes at both the ends would emerge as unjust. While the former would turn justice into a playing of Sentencers personal whims and fancies, the latter would make the Sentencers pay the price of uniformity in the form of distorted justice. 'Best Justice' lies somewhere in between these extremes and can also be discovered by structuring discretion with rules and guidelines that ensure consistency in the sentencing process.

The onus is entirely on the judges who need to strictly adhere to the present statutory framework of minimum punishments, structure discretion in cases of maximum punishments by guidelines judgments and inculcate institutional discipline in sentencing matters. Training programs, computerized sentencing information system can perform the much desired function of evolving basic standards by enumerating relevant factors (which can be revised from time to time) that would guide the exercise of discretion.

Now we come back to Mersault who became a victim of the values of remorse and repentance that played upon the judge who had the discretion to write his life or death. It is considered that people who are remorseful and repentant are less dangerous, less to do wrong again. But this needs to be rethought as Jeffrie points out.[34]

[34].Jeffrie G. Murphy "*Well Excuse Me! Remorse, Apology and Criminal Sentencing*", lecture delivered on Nov 4, 2005, at the Arizona State Law Journal Symposium on Criminal Punishment & Sentencing.

"*The wrongdoer can be self-deceptive or just honest mistaken about the sincerity of his own repentance and even the sincerely repentant wrongdoer can suffer from weak will…. Surely Jesus' disciples were sincere when they promised to stay awake and keep watch while he prayed at Gethsemane, but he found them asleep and could only observe "the spirit is willing but the flesh is weak".*