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SENTENCING AS A BALANCING CHORD BETWEEN THE OFFENCE COMMITTED AND THE SOCIETAL DEMAND FOR JUSTICE

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ABSTRACT

Criminal justice system is endowed with functions to be performed. These include defining the crime, adjudicating upon the guilt of the accused and prescribing punishment for crimes. The sole aim of the criminal trial is the discovery of the truth. The Courts therefore not only have to overlook that no innocent person gets punished but also no guilty person gets unpunished. It is also one of the fundamental principles of fair trial. If the appropriate sentence is not provided, it violates the principles of sentencing and there would be an expression of anguish on the part of society that law has not been upheld and therefore would shake the collective consciousness of the society as a whole.

Sentencing is not a corollary of law but of law breaking. It applies at stage when the guilt has been determined. In criminal justice system, Judges decide the amount of punishment to be inflicted on an offender. This casts a light on an expression of condemnation on the part of society for particular crime. The task of judicial pronouncements is not an easy task as it is engulfed by many difficult and perplexing questions. The present paper tries to furnish answer to some of these questions.

INTRODUCTION TO SENTENCING

Punishment is an expression where crimes are condemned by collective consciousness. The basic goals of punishments can be viewed by looking at theories of punishment and seek their feasibility if they exist under criminal justice system. Punishment is a socio-legal concept in the sense that there are certain norms which are recognized by all the members of the society and the law enables them to protect those norms by creating institutions of regulations². Punishment is not corollary of law but of law breaking³. It's here that the law exercises authority of guardian and protector of these socio-legal norms.

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² Spohn, C. (2009). *How do judges decide? The search for fairness and justice in punishment* (2nd ed.). Thousand Oaks, CA: Sage.

³ Mabbott, J.D (1939). *Punishment. Mind*, 48(190), 152-167.

According to H.L.A Hart, *there are certain essential elements of punishment: it should inflict some amount of pain to the offender, it should relate to the offense that the offender has committed, it should be responsible for breaking the social norms and be enforced by authority under the legal framework* (Spohn, 2009).

COURT SYSTEM IN INDIA

Most of the crimes in the Indian Criminal Law are created under the statute and have a statutory maximum penalty provided therein. The trials for this purpose are divided in the Criminal Procedure Code as offences Triable before Court of Session, Trial of warrant cases by Magistrate, Trial of summon cases and Summary Trials. The Supreme Court being the Apex Court having paramount importance over High Courts and other Courts in the country and whose judgements are binding on the Courts below it settles the disputes which involves question of law or of fact on which the existence or extent of legal rights depend. The Supreme Court is the guardian and the protector of the Constitution of India. The Supreme Court also has the original jurisdiction to deal with the cases where there is a violation of the fundamental rights. Offences whose gravity is high such as murder and rape are tried at the Apex Court. Although Session Court and all the Courts above it has the Jurisdiction to try these cases but in one way or the other, they finally reach to the Supreme Court. The Supreme Court then answers the questions which are involved in the particular case bearing in mind the collective cry of the society for the justice to be done as a whole. However, the point that requires specific attention is the fact that the power of the Session Court to provide death penalty needs to be confirmed by the High Court. An appeal also lies to the Supreme Court from any judgement by the High Court in any civil or criminal proceedings provided that a certificate is issued by the High Court under Article 134-A of the Constitution of India, that the case involves substantial question of law and requires interpretation by the Apex Court. The first and the foremost question that requires to be answered in all the cases that come before the Court is the fact whether defendant pleads guilty. If the defendant pleads guilty then the court have nothing to do and simply pass the sentence in the case provided that they have the sufficient jurisdiction to exercise the sentencing power. However, if the defendant intends not to plead guilty then the criminal process is set into motion and the defendant is tried at the appropriate Court having jurisdiction unless either the court decides that case be tried somewhere else or the defendant chooses to be tried at some other court if he has reasonable ground to believe that the judge has some personal interest in the case and that it requires to be tried at some other place⁴.

⁴ Constitution of India, arts. 124-147.

Below the Supreme Court lies the High Court having jurisdiction confined to the established boundaries of the state. These High Courts act as court of record and have supervisory jurisdiction over all the courts and tribunals over which the power and jurisdiction of these courts extend. The supervisory jurisdiction of the High Court extends to the transfer of the cases and control of subordinate judiciary respectively under Articles 228 and 235 of the Constitution of India. The power of the High Court to withdraw cases from subordinate Court to itself presupposes a condition that case involves substantial question of law and the determination of the question is necessary for the disposal of the case. The point substantial question of law has the same meaning as is provided under Article 131 of the Constitution of India. Further, the writ jurisdiction exercised by the High Court under Article 226 of the Constitution of India is wider than the jurisdiction exercised by the Supreme Court under Article 32 of Constitution of India for the reason that it cannot be exercised only for the enforcement of fundamental rights enshrined in part III only but “for any other purpose” as well⁵.

Besides the Supreme Court and the High Court, the Bhartiya Nagrik Suraksha Sanhita 2023 provides for the following classes of criminal courts

Court of Session

Judicial Magistrate of the first class,

Judicial magistrate of the second class

*Executive magistrate*⁶

Section 10 of the Bhartiya Nagrik Suraksha Sanhita provides for the appointment of Chief Judicial Magistrate and Additional Chief Judicial Magistrate⁷.

The Chief Judicial Magistrate may pass any sentence except that of death or imprisonment for life or Imprisonment for a period exceeding 07 years. The Court of Magistrate of first class may pass a sentence not exceeding 03 years or fine not exceeding fifty thousand rupees thousand or of both or of community service. The court of Magistrate of the second class may pass a sentence of imprisonment not exceeding one year or of fine not exceeding ten thousand rupees or both or of community services⁸.

⁵ Constitution of India, arts. 216-235.

⁶ Bhartiya Nagrik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 06.

⁷ Bhartiya Nagrik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 10

⁸ Bhartiya Nagrik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 23.

THE AVAILABLE SENTENCING STRUCTURE

There has been from time to time brought changes in the available sentencing structure as India does not stick itself to one sentencing policy and different offences cannot be endowed with similar form of sentencing and that the best way to answer cry of the society for the justice to be served requires different forms of punishment for different offences

Death

Imprisonment for life

Imprisonment which is of two types namely: -

1. *Rigorous, that is, with hard labour*
2. *Simple*

Forfeiture of property

Fine

Community Services⁹

DEATH PENALTY

Death penalty is the oldest and the most gruesome of all penalties and even the framers of the penal code highlighted that it should only be resorted to when all other opportunities of providing justice failed. The supreme Court too while resorting to death penalty stated that it to be applied only in rarest of the rare cases. The applicability of the capital punishment has been brought to lime light in the case of *Jag Mohan Singh* case wherein it was stated it was not in consonance with Article 14 of the Indian Constitution. However the court rejected this argument and came to conclusion that imprisonment for life is a rule in offences where death penalty is provided and its only in exceptional circumstances and for special reasons to be recorded that death penalty would be provided¹⁰. The ICCPR disallows the state to not use death penalty and the UNHRC also sees it as a violation of fundamental human right to life however, it continues to have a validation at the international stage and its only through progress and enlightenment of the society that we may get to see a world where there is no such punishment. For now, it lies with the sovereignty of the nations to choose whether to stop it or keep an age-old tradition alive.

⁹ Bhartiya Nyaya Sanhita, 2023 (Act 23 of 2023) S. 4.

¹⁰ *Jagmohan Singh v. State of Uttar Pradesh*, (1973) 2 SCR 541.

Imprisonment for life on the other hand is an alternative for the death penalty as it is considered irreversible and once done it cannot be reverted back to its original. Imprisonment for life should not necessarily mean imprisonment for 14 years or 20 years instead for whole of the life of the offender. The fact that the offender would spend rest of his life in jail instead of getting killed at once would act as best deterrence. Death penalty reinforces the idea of retributive justice, a medieval concept which has no place in modern society. A person who is convicted of heinous offence such as murder doesn't mean that he be deprived of life. Does this mean then that the person who was convicted of rape be raped? Section 5 of the Bhartiya Nyaya Sanhita further provides that appropriate government has the power to commute a sentence of imprisonment for life to imprisonment for a term not exceeding 14 years. Convicts cannot claim as a matter of right automatic release after 14 years¹¹

IMPRISONMENT WHICH IS OF TWO TYPES: SIMPLE AND RIGOROUS WITH HARD LABOUR

Imprisonment is **simple** to the extent that the commutator of an offence has only to stay in the prison and is provided only in those offences whose gravity is least severe.

Rigorous imprisonment on the other hand mandates the offender to do hard labor during the period of imprisonment e.g; agriculture, digging the earth, carpentry etc. An offender is provided with rigorous imprisonment in order to have a deterrent effect on the other. Section 4 has to receive a humane meaning to the extent that fundamental rights of prisoners do not get detached from them as soon as they reach the prisons¹². The only right they get detached from is the right of access to outside world. However, during the period of their imprisonment their basic human rights should not get violated including the right of payment of basic wages. Although there is no provision either in the Bhartiya Nyaya Sanhita or in the Prisons Act 1894 regarding payment of wages, they should get a human treatment for making a person to do a job without getting paid amounts to beggary. Keeping in view the stated condition of the prisoner the Prison Bill 1996 on the lines of the Mulla Committee proposed that the wages should be paid to the prisoners and the payment of wages should be fair, adequate and equitable.

¹¹ *Swamy Sabradanada v. State of Karnataka*, (2008) 13 SCC 767.

¹² *Sunil Batra v. Delhi Administration*, AIR 1980 SC 1579.

FORFEITURE OF PROPERTY

Forfeiture of property generally means the confiscation of property by the Court and it was repealed by Indian Penal Code (Amendment) Act, 1921 (16 of 1921), Section 4¹³.

FINE

Fine can be defined as a price paid for a behavior. *A study was conducted on the parents in a day care school where in the initial weeks, there was no fine imposed if parents came late to take their children; however, for the next few weeks, a certain amount of fine was imposed which interestingly resulted in the hike in the number of parents coming late*¹⁴. The amount of fine imposed changes the perception of the people favorably or unfavorably who are part of the environment in which they operate.

SOLITARY CONFINEMENT

Solitary confinement has its origins in the medieval period and was used as a means of deterrence to prevent hardened criminals from committing any crimes. The logic behind solitary confinement was to detach criminals from the others for a man is lovable by nature and likes to live in connection with others in a society. The supporters of solitary confinement suggested that it enables a convicted offender to have a vast majority of time to change their mindset and be in consonance with the others in the society. The prisoners died untimely or became insane and those who came out became more furious than ever. It is a violation of fundamental human right to life. As a result, solitary confinement fell into disuse. It continued to remain in use though in limited way. Section 73 and 74 of the Indian Penal Code deals with the solitary confinement.

SENTENCING PROCESS

Sentencing process is one of the occasions where decision is taken about the future of the prisoner. Hardly we see a debate regarding prison overcrowding as a direct result of the sentencing policy followed by the particular country. There can be two justifications/ explanations for prison overcrowding. Either it may be the direct result of the sentencing policy followed by the judges to fill prisons with as many offenders as possible or it may be the direct outcome of the fact that the sentencing policy of the country has not changed for a long time and number of offenders coming before the courts kept increasing. Since judges are the guardians & protectors of the rights of the people including those who are brought before it for the commission of the offence. Its only in grave circumstances where Judge deems fit that all other means of doing justice have failed and it

¹³ Indian Penal Code (Amendment) Act, 1921 (16 of 1921), Section 4

¹⁴ Gneezy, U., & Rustichin, "A fine is a price" 29 *The journal of legal studies*, 1-17 (2000).

is necessary to send the convicted person to prison enables a reasonable and a person of sound mind to think that prison overcrowding is not in consonance with those of the judges to fill the prisons with many possible offenders which brings us to second conclusion of increase in crime rate among the offenders. With increase in crime rate sentencing processes too have to change with the change in the circumstances lest, the guardians are left with no option but to provide answers to the collective cry of the society for the just thing to do and they do so by sending more and more offenders behind the bars. Apart from the crime rates, there is a need to look into how many offences are being recorded by the police.

One way of measuring the crime rate is the crime recorded by the police. But the question arises here do the police record all crime all the times? An obvious answer to the question would be no for two reasons. Firstly, no doubt at times the police bust out the drug peddling or a sexual racketing going on at the particular place but it happens occasionally that they reach to the depth of the drug peddling or sexual racketing as such and secondly police get informed about the commission of the offence by the victims but do all the victims report the commission of the crime? Every year notification is being published regarding the number of offences being committed (Crime rate) but they are not the reliable indicators for number of offences get unnoticed to the eyes of the police.

Crime Rates sometimes called the dark figure of the crime getting unnoticed from the eyes of the police can be estimated either by calling people and asking them if they happened to have committed any criminal activity or to ask them if they have fallen the victim of any crime. It is apparent on reading the above case people would be more inclined towards the thought of victimization but the problem with this line of reasoning that no doubt more and more numbers would come forward to talk about the victimization but there would be people who would deem themselves not being victimized by some forms of crime as such.

It is evident from the face of the discussion above that police get acquainted with only those offences which are being committed at the public places than those offences committed by people at home and it is also clear that the number of reported cases are underestimated in the books of the police. we may feel anguish towards the police not performing duties assigned to them but there are cases where the victims do want the just thing to be done by means established by law such that others may deter from doing the acts contrary to the law established by collective will of the people as a whole and in such cases police are left with no other option than to act according to the whims of the victim or in other words according to the letters of the law and they do so by charging the accused .

As per Section 2(f) of the Code of Criminal Procedure Charge is defined as it includes any head of charge when the charge contains more heads than one¹⁵. For example, if by single wrongful act a person commits various other wrongs then all the wrongs fall under the heads of charge and all the wrongs committed individually or together will be considered as charge.

The basic rule of the criminal justice system is that the accused who is brought before court should have the knowledge of accusations against him such that he may prepare a defense against such accusation. Further it is one of the principles of the fair trial/procedure followed by the courts during the usual course of their dealings. The charge is the first step towards the accused being made aware of the wrongs he/she has committed. If there is an error in the framing of the charges against the accused, it should not affect the proceedings in the court unless the court feels that accused was misled by such error or there would be a failure of justice apparent on the face of it¹⁶. Court further may alter or change the charge brought before it and it feels no prejudice would be done then the court should proceed with the proceedings however if the court is of opinion that any prejudice would be done with the accused person, court may call for rehearing of the case¹⁷. The point needs to be cleared here that the magistrate can take cognizance of the matter *suo moto* if it deems fit that a crime has been committed within his jurisdiction and the cognizance of the matter is necessary for the effective delivery of the justice. Once the charge against the accused has been framed and has been convicted by the court, the court in turn provides an opportunity to the accused person to plead guilty and present himself in the mercy of the court. The two main reasons for providing an accused with an opportunity to plead guilty is firstly to bargain with the prosecution and secondly informing the accused against the probable sentence.

CONCLUSION

The law declared by the Supreme Court is binding on all courts within the territory of India under Article 141 of Constitution of India. The principle incorporated by the Indian Constitution has its traces in the common law principle of *Stare Decisis Et Non Quieta Movere* which means *do not move that which is quite*. There are no hard and fast rules to guide the judge to come up with the newer techniques of uniform sentencing guidelines and it wholly falls on the judges to apply their own judicial mind to different cases as no two different cases are the same. As Magistrates and judges deal with number of cases on daily basis and in turn gain experience in such dealing. Such dealing has to be of particular value and if cases are not comparable, they should be similar in some way.

¹⁵ Bhartiya Nagrik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 2(f).

¹⁶ Ibid, s.234.

¹⁷ Bhartiya Nagrik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 239.

This cannot be decisive in the practice of sentencing, for decisions could be reached with the help of sentencing. There are then certain observable factors which magistrates shall take into account in their consideration of the appropriate sentence.

A judge while giving sentence must pay attention to the guidance given by the apex court and sentence should be broadly in consonance with those guidelines, unless there are factors applicable to the particular case which requires or enables the judge to depart from those guidelines. In such cases the judge should clearly indicate the factor/factors which in his judgement allow departure from the limits set by the apex court. What a judge must not do is to state that he is applying some personal limits because he considers the accepted range of sentence to be too high or too low. At the end of the day, the exercise of sentencing must remain in human hands. You cannot feed the computer to register the feel of the case or the impact that the defendant makes upon the sentencer i.e, magistrate or a judge.

Sentencing process particularly in India is a colonial punishment and though a number of changes have been brought in the Penal system sentencing system remained alien to such changes and there is a dire need to bring changes in the process. The Malimath committee and the Mulla committee speaking in favorable terms find it necessary to bring changes in the sentencing policy to bring it at par with the modern sentencing regulations and society as a whole. However, a little has been done so far. Though the victim compensation scheme under Section 357-A of former Criminal Procedure Code has been introduced and the wages for the prisoners have been provided for in order to protect their basic rights, it has still been less useful for the victims as such.

There is further a wider difference between the cases which come before the court for sentencing and the real amount of crime rate happening in the society. This throws us in a grave doubt the pronouncements about having any deterrent effect on the criminals as crimes are being undervalued in the society and it only shows us the imperfect reflection of the nature of crime in the society. If the Criminal justice policy makers seek to bring a preventive function, they are looking at the wrong direction as Baldock put it in the context of reducing prison population

“Prisons stand at the end of the elaborative process of selection by the public, police, courts and judges. Consequently, relatively small changes at any point in the process can have an amplified impact on the prison system. It is a mistake to seek the causes and remedies for the growth of the prison population by looking at the very late stages of these processes, sentences of imprisonment. This is the tail end of the story and as most of the attempts to reform or counteract sentencing policy has shown, it is a tail which cannot easily be made to wag the dog”

The presumption that the crime rate and the sentence are in some kind of hydraulic relationship seems unrealistic. It is also said that discretion plays an important role particularly in country like India where no hard and fast rule relating to sentencing are provided by the law and the discretion is exercised by the Judges differently at different levels. Discretion has its own advantages and disadvantages. It brings flexibility in the cases to respond differently in different cases however discretion allows cases to be judge centric and cases may get influenced by their personal views. Discretion should be replaced by laying down the rules for exercising the discretion such that it is exercised in consonance along with the judicial lines which in turn would foster the positive attitude among the court to do the just thing within the short period of time.