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NEED FOR SENTENCING POLICY IN INDIA: CRITICAL STUDY ON "DISCIPLINE OF JUSTICE"

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ABSTARCT

This research paper will start the discussion by clarifying the procedure for sentencing in India and its application. This is followed by a discussion of different opinions on sentencing policy – their focal points and inconveniences. The prerequisites the extent that India is concerned will be examined in the background of the Sentencing guidelines in UK and USA[2] interspersed with the opinion of the author.

INTRODUCTION

What is sentencing?

Sentencing is that phase of criminal justice system where the real punishment of the convict is chosen by the judge. It takes after the stage of conviction and the proclamation of this punishment forced on the convict is a definitive objective of any justice delivery system. This being said no further clarification is obliged to see how quite a bit of consideration needs to be paid to this stage. This stage reflects the measure of judgment the society (general public) has for a specific crime. The fundamental reason of any criminal justice delivery system can be dictated by taking a gander at the sort of punishment given for different law violations. However in a

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system like our own, with such a variety of performers included separated from the accused and victimized person, it is unrealistic to anticipate that every one of them will respond in the same way to a specific demonstration of crime. For instance the exploited person may express stronger feelings than a judge who is an aggregate more peculiar to both the opposing parties. In the same way the accused may be persuaded that his activity was truth be told right giving more criticalness to the surrounding factor. It is with a specific end goal to achieve an accord on a given episode that judges and legal players are designated. The choices are numerous. In case of an exploited person (victim) centric system the most picked arrangement would be reclamation of the victimized person to the same position as he/she was in before the wrong had been caused. This is generally utilized as a part of torts cases and by and large in economic crimes. This can't be connected in all cases in instances of physical, emotional and psychological harm where restoration is once in a while conceivable. In such cases there are two alternatives – retribution and rehabilitation. In the previous the system focuses at judgment of the crime as more essential reason for punishing than whatever other. Rehabilitation is more accused friendly and trusts in reclamation for the individual over to the standard of the society. An alternate most supported justification for punishment is prevention (deterrence) the fundamental reason of which is prevention of reoccurrence of the same scene.

This paper won't advocate any of theses system. Rather what this paper points is to advance quickly the requirement for a sentencing policy. The issue with the current system as provided for in the Criminal Procedure Code is the variety in the outcome obtained from the same or comparative set of facts. The judges are permitted to reach the decision in the wake of listening to the parties. However the factors, which ought to be considered while deciding the decision and those, which ought to be maintained a strategic distance from, is not, indicated anyplace. This is the place the judge is relied upon to utilize his/her individual optional capacity to fix the punishment. This discretion eventually gets ill used in countless because of superfluous thought and utilization of personal prejudices. This is the essential explanation behind upholding a sentencing policy or guidelines.

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that India is concerned will be examined in the background of the Sentencing guidelines in UK and USA[3] interspersed with the opinion of the author.

The sentencing procedure under Criminal Procedure Code, 1973

The Code provides wide discretionary powers to the judge once the conviction is resolved. The Code discusses sentencing essentially in S.235, S.248, S.325, S.360 and S.361. S.235 is a piece of Chapter 18 managing an undertaking in the Court of Session. It coordinates the judge to pass a judgment of absolution or conviction and in case that conviction to take after clause (2) of the section. Clause (2) of the sections gives the system to be followed in instances of sentencing an individual sentenced a wrongdoing (crime). The section gives a semi trial to guarantee that the convict is given an opportunity to represent himself and give feeling on the sentence to be forced on him. The reasons given by the convict may not be relating to the wrongdoing or be lawfully sound. It is only for the judge to get a thought of the social and individual points of interest of the convict and to check whether none of these will influence the sentence.[4] Actualities, for example, the convict being a provider may help in relieving his punishment or the conditions in which he may work.[5] This section doubtlessly gives that each individual must be given an opportunity to discuss the sort of punishment to be forced.

The section simply does not stop at permitting the convict to talk additionally permits the defence counsels to bring to the notice of the court all conceivable components, which may mitigate the sentence, and if these elements are challenged then the prosecution and defence counsels must demonstrate their contention. This trial must not be looked on as a formality however as a genuine exertion in doing equity to the persons included. A sentence not in consistence with S.235 (2) may be struck down as

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[4]R.V.Kelkar vs. K.N.ChandrasekharanPillai 2002(Rep., 2003)

[5]Case in point, if the convict is a provider then the court may give that the convict be given such work that he gets paid for it and the installment be made to his crew.

violative of natural equity (justice). However this method is not needed in situations where the sentencing is carried out as per S.360.

S.248[6] goes under Chapter 19 of the Code managing warrants case. The provisions contained in this section are very much alike to the provisions under S.235. However this section guarantees that there is no preference against the accused. For this reason it gives in clause (3) that in case that where the convict declines past conviction then the judge can taking into account the proof gave figure out whether there was any past conviction.

The judge anytime can't surpass his powers as gave under the code for the sake of watchfulness. In situations where the magistrate feels that the crime demonstrated to have been submitted is of more prominent power and must be punished seriously and on the off chance that it is outside the extent of his jurisdiction to honor the punishment then he may forward the case to the Chief Judicial Magistrate with the significant papers alongside his opinion.[7]

The principle piece of judicial discretion comes in S.360, which accommodates arrival of the convict on probation. The point of the section is to attempt and change those criminals in situations where there is no genuine risk to the general public. This is passed on by restricting the extent of the section just to situations where the accompanying conditions exist:

- Women declared guilty offence the punishment of which is not death or imprisonment for life.
- Any individual underneath 21 years old declared guilty offence the penal action of which is not death or life imprisonment.
- A male over 21 years sentenced of an offence the punishment of which is fine or detainment of not over 7 years.

In the above case when there is no history of past conviction the court can, having thought to other significant components, for example, age, circumstances while carrying out the crime, character, mental condition, and so forth utilize its prudence and discharge the convict on going into a bond with or without sureties. On the off

[6]Supra n.8, pp 532-534.

[7]Section 325 of Crpc.

chance that a magistrate of II class and not approved by the High Court opines that the individual attempted merits the summon of this section then he may record his opinion and forward the case to the magistrate of I class. To empower the judge to get full realities of the case the section gives all rights to the judge for enquiry into the points of interest of the case.

Likewise if the crime submitted is of such nature that the punishment awardable can't be more that 2 years or a straightforward fine then, having thought to the different factors joined with the convict, the court may leave the convict without a sentence at all after negligible caution. The court additionally makes strides on the off chance that the individual does not follow the principles set down at the time of discharge as gave under this area, for example, re-arrest of the person. For release under these provisions it is essential that either the convict or the surety are residing or go to regular occupation in the jurisdiction of the court.

The Code through S.361 makes the use of S.360 compulsory wherever conceivable and in situations where there is exceptional cases to state clear reasons. Wherever the punishment given is beneath the prescribed recommended under the important laws the judge must give the unique explanation behind doing as such. The oversight to record the special reason is an anomaly and can set aside the sentence passed on the ground of failure of justice. These provisions are accessible just to trials under the watchful eye of the Court of Sessions and the trials of warrants case.[8] The Probation of Offenders Act, 1958 is very much alike to S.360 of the CrPC. It is more expand as in it unequivocally accommodates conditions going with release order, a supervision request, payment of compensation to the affected party, forces and issues of the post trial supervisor and different particulars that may fall in the ambit of the field. S.360 would stop to have any power in the States or parts where the Probation of Offenders Act is brought into force.[9]

[8]Supra n.6 563-575.
[9] S. 19, Probation Offender Act, 1958.

Procedure in practice

Having comprehended the procedure in the Criminal Procedure Code, its proficiency can be seen just by seeing its application practically speaking. The discretion accommodated under the current procedure is guided by ambiguous terms, for example, 'circumstances of the crime' and 'mental state and age'. Pleasingly these can be dead set however when will they have an impact on the sentence is the inquiry left unanswered by the legislature. For instance, each crime has going hand in hand with circumstances yet which ones qualify as mitigating and which once go about as irritating circumstances is something which is left for the judge to choose. Subsequently if one judge decides a specific situation as mitigating this would not (aside from a pitiful precedential worth) keep an alternate judge from disregarding that angle as immaterial. (Suresh Chandra Bahri v. State of Bihar)[10]This absence of consistency has urged a couple of judges to abuse the discretionary on the premise of their individual prejudices and biases.

Aside from the personal biases and prejudice the thought of what constitutes justice and what is the reason for punishment differs from individual to individual. For example, on account of GentelaVijayavardhanRao v. Condition of Andhra Pradesh[11], the litigant had with the thought process to rob burnt a bus loaded with passengers, bringing about the demise of 23 passengers. The sentence gave by the judges of the lower court was capital punishment for convict An and 10 years of rigorous imprisonment for convict B. This was tested by the convict. The apex court cited from the judgment DhananjoyChatterjee v. Condition of West Bengal[12] 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.*

[10]AIR1994SC2420- this sentencing variety is sure to happen in light of the differing degrees of earnestness in the offence and/or shifting attributes of the guilty party himself. In addition, since no two offences or guilty parties can be indistinguishable the charge or name of variety as difference in sentencing essentially includes a worth based judgment. i.e., uniqueness to one individual may be a just advocated variety to an alternate. It is just when such a variety takes the type of distinctive sentences for comparable wrongdoers conferring comparative offences that it can be said to frantic sentencing.

[11]AIR, 1996 SC-2791

[12]1994, 2SCC-220

Justice demands that Courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime."

This judgment reflects the standards of deterrence and retribution. In any case this can't be classified as wrong or as ideal for this is a result of the conviction of the judges constituting the bench. Also on account of Gurdev Singh v. State of Punjab[13] the court affirmed capital punishment forced on the appellant remembering the exasperating circumstances.[14] Despite the fact that on the substance of it this may be only a brutal revenge for the crime done by the convicts, on a deeper examine one can acknowledge from the judgment that the demonstration was totally indefensible (unforgivable) for the judges. This can't be expressed to be the failure of the judges to feel sympathy. This is simply an impression of their values.

Then again, MohdChaman v. State[15] the courts have shockingly diminished the sentence of capital punishment to thorough detainment of life because of the conviction that the blamed is not a threat to the society and thus his life require not be taken. The accused in this situation had abhorrently raped and murdered a one and a half year old kid. The lower courts having seen the circumstance as the rarest of the rarest cases imposed capital punishment.[16] The apex Court switched this, as it was not persuaded that the demonstration was sufficiently meriting the death penalty.

The inquiry to be tended to here, having the powerlessness to declare the circumstances equitably, how would we choose which is the most favored

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[13]AIR, 2003 SC-4187

[14]The exasperating circumstances of the case, on the other hand, are that the appellants, having realized that on the following day a marriage was to happen in the place of the complainant and there would be parcel of relatives present in her home, came there on the night of 21.11.1991 when a banquet was going on and began terminating on the guiltless persons. Thirteen persons were executed on the spot and eight others were truly harmed. The appellants from that point went to an alternate place and slaughtered the father and sibling of PW-15. Out of the thirteen persons, one of them was seven year old youngster, three otherswere at the edge of their lives. The after death reports demonstrate their age ran between 15 to 17 years.

[15]2001, CriLJ-725

[16]The Indian Judiciary had firmly felt the need to have a sentencing rule at any rate to the degree of burden of capital punishment. In this way in the instances of Bachan Singh v. State of Punjab and along these lines for the situation Machhi Singh v. State of Punjab, the Court set out the 'rarest of the rarest test' by which capital punishment ought to be forced in just outstanding circumstances and such uncommon reasons must be recorded. This was followed in various cases both to spare the life of the blamed and to approve the burden for capital punishment.

judgment. Had the same issue be tended to in the other way around way, the previous convict would have been in the prison and the last would have died.

How supportive would a rule be to this situation? A rule if set down would chiefly have an essential reason for punishing (whatever this basis may be - retribution is the basic reason or rehabilitation and reclamation is a definitive objective).[17] This essential justification would help the judge's figure out what precisely needs to be attained to of the punishment.

Taking off from here, the mitigating and disturbing circumstances can likewise be effortlessly decided once the essential method of reasoning is clear. Representing this point, in case of Raju v. State[18] the Courts decreased the punishment beneath the base endorsed in the statute for reasons, which in the conclusion of the author are exceptionally silly. The judge considered the asserted "immoral character and loose moral of the victimized person" and lessened the sentence for the accused to the term served. Had there been an agreeable evidence of a victimized person centric penal system, a judgment which profits the accused for the issues for the exploited person (victim) won't be conveyed. In State of Karnataka v. S. Nagaraju[19] the judge indicted the accused all the more as an obstacle measure to anticipate other potential guilty parties than to punish that specific convict.

It is not claimed that in the above situations and numerous other comparable ones the judges are unreasonable or unjust. The main point set for the perception is varieties in the thought of justice and this radically influences the societal interest of what the judiciary must do in a specific state of affairs.

There have been judges like Krishna Iyer who have taken rehabilitation and reclamation to an alternate level of comprehension. In the well-known instance of Mohammad Giasuddin v. Condition of Andhra Pradesh[20] he clarified punishment as under:

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[17]Andrew Ashworth, *Sentencing and Criminal Justice*, 2005 4th edition.
[18]AIR, 1994 SC-222
[19]JT2002 (Suppl1) SC7.
[20]AIR, 1977SC-1926.

> *"Dynamic criminologists over the world will concur that the Gandhian determination of offender as patients and his origination of prisons as healing facilities - mental and moral - is the way to the pathology of delinquency and the remedial part of punishment."*

Sentencing strategy and its contents

Having presented a case for the requirement for having a sentencing rule and policy, it is currently important to research its contents. There have been various suggestions and juristic opinion on what would constitute and ought to constitute sentencing policy. So as to prepare oneself to examine such a suggestion it is important to comprehend the effectively proposed policy. This would help in getting a handle on the soul of the activity and co-ordinate a more wholesome product as a result.

The 35th Law commission investigate Capital Punishment exhaustively discloses different angles identifying with sentencing focusing all the more nearly on capital sentencing. The examination in the report on the codification of the elements to guide the circumspection vested in the judge for granting the death penalty can be stretched out to the general discussion on *Certainty and Predictability vs. Judicial Discretion*[21]. The reaction from a RajyaSabha part and Inspector-General prompted the narrowing down of the affecting elements to energy, opportunity, obtained propensity, craziness and innate instinct.[22]

The extent that India is concerned, the Indian Penal Code furnishes us with an expansive grouping and degree of punishment. This has been further cut by different judicial decisions on sentencing. However these decisions of the court experience the ill effects of the accompanying hindrances:

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[21] 35th Law Commission Repot, 1967, pp190 - 202

[22] 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.

a) **Facts particular**: Though these rules are given as Obiter Dicta, the utilization of such rules is deceiving in the resulting judgments. At present the settled Guideline emulated by the courts is regarding capital punishment as clarified previously. The utilization of this test on account of A. Devendran v. Condition of Tamil Nadu clarifies this point.[23] This was an instance of triple homicide. However the Court held that the trial court was not defended in recompensing capital punishment as the blamed had no planned arrangement to execute any individual and as the principle item was to submit burglary. This case ought to be contrasted and GentelaVijayavardhanRao v. Condition of Andhra Pradesh examined previously. The intention in both is to loot the victimized person. However for one situation it has been utilized as an exasperatingfactor and the other it is utilized as an mitigating component. This shows how the same test has been conflictingly connected.

b) **Not took after by lower courts:** Another side of the coin is that the lower courts don't take after these rules as they are not binding on them. The points of reference are generally disregarded or separated from the current actuality situation to give the judge his space to rule on the case.

c) **More of a legislative job**: More significantly, it is the job of the legislature to make rules and of the legal to decipher and uphold it. It would not be satisfying or right to expect and permit the judges to casing the guidelines without anyone else's input.

d) A last reason in respect to why the legal ought not outline the standards is that it by and by comes down to the whims and fancies of the judge encircling it. This would just be a negligible expansion of the conviction of one judge over all others.

One of the suggestions, which will be talked about here, is that proposed by Andrew von Hirsch and Nils Jareborg.[24] They isolated the procedure into phases of deciding proportionality while deciding a sentence. The four steps are:

[23]AIR, 1998SC-2821

[24]Supra note. 18

- What diversions are abused or debilitated by the standard instance of the crime – physical respectability, material backing and pleasantry, opportunity from embarrassment, protection and independence
- Effect of abusing those investments on the living benchmarks of a commonplace victimized person – least prosperity, sufficient prosperity, critical improvement
- Culpability of the offender
- Remoteness of the genuine mischief as seen by a sensible man

Factors, which focus culpability, change relying upon which of the accompanying plans one means to take after:

1. **Determinism** – Where figures outside oneself decides the activities eg. self preservation and coercion. However the vast majority have sufficient flexibility to focus their activities so this won't hold great at all times

2. **Social and Familial foundation** – low family salary, extensive family, parental culpability, low knowledge and poor parental behavior.

3. The occupation, training and monetary arrangement have a real effect on people. They bring about outcomes, for example, deprivation and marginalization prompting advancement of criminals in the society.

The chief criticism of this system is that by and by it includes a wide tact of the judge in terms of deciding the culpability. This once maturing prompts conviction as against the discretion.

It thusly proposed to take a gander at the UK and USA laws as of right now to find whether this contention has been fathomed and if yes, how this contention has been settled.

Relevant Factors

It is unrealistic for any single individual to think of all the relevant factors that needs to be considered. It must be a gathering activity with a delegate from each section of the society adding to the Guideline. This being so what is endeavored here is an essential investigation of what in the conclusion 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 favored.

The extent that the UK sentencing policy is thought of it as, was conceived as an aftereffect of the Halliday report and the resulting White Paper named Justice for All which was exhibited in the British Parliament. The fundamental point of the sentencing casing fill in as clarified by the White Paper is prevention and assurance of society most importantly others.[25] With a specific end goal to support the judge a Pre-sentence report is arranged by a probation officer, which contains "a front sheet, offense investigation, wrongdoer's appraisal, hazard evaluation and a conclusion".[26] The extent that sentencing Guidelines are concerned, section 5.14 expressly states as tails: "We have to have a steady set of rules that cover all offenses and ought to be connected at whatever point an sentence is passed. We must work to annihilate the wide uniqueness in sentencing for the same sorts of offenses and the general population's question of the system that comes part of the way from this conflicting sentencing." The answer of the Halliday report to this issue is, "For another structure, an Act of Parliament ought to set out the general standards, define the recently outlined sentences, accommodate survey hearings, recommend authorization systems and oblige rules to be drawn up. The Act ought to take the manifestation of aPenal Code, which would be stayed up

[25]As according to the Halliday Report a few of the important recommendations are:
The principles governing severity of sentence should be as follows:
• severity of punishment should reflect the seriousness of the offence (or offences as a whole) and the offender's relevant criminal history;
• the seriousness of the offence should reflect its degree of harmfulness, or risked harmfulness, and the offender's culpability in committing the offence;
• in considering criminal history, the severity of sentence should increase to reflect a persistent course of criminal conduct, as shown by previous convictions and sentences.

[26]Justice for All, p. 88.

with the latest structure." This prompted the foundation of the Sentencing Guidelines Council headed by the Lord Chief Justice. Likewise an entire new set of disciplines with reformatory reason has been presented. To put it plainly, the fundamental point of the arrangement in insurance of people in general and recovery. The extent that tact goes, there has not been any particular confinement with the exception of guaranteeing that the judge has complete information of every last one of points of interest of the convict before passing the sentence. The point, as can be seen, is to advance the case in the best conceivable way and along these lines guarantee that no stone is left unturned.

In the US system, The Guidelines are the result of the United States Sentencing Commission and are a piece of a general federal sentencing change bundle that produced results in the mid-1980s. In the outcome of US v.Booker, the Guidelines are optional, implying that judges may think of them as yet are not needed to stick to their norms in sentencing decisions. That being said, government judges pretty much constantly utilize the Guidelines in any event as a beginning stage when sentencing criminal defendants. Any sentence outside of the extent of the rules obliges a composed clarification, by the judge, as to the purpose behind the attentiveness. The Guidelines focus sentences built essentially in light of two components: (1) the behavior connected with the offense and (2) the respondent's criminal history. The statutory mission as expressed in the 2005 Federal Sentencing Guideline Manual is "… preventing wrongdoing, debilitating the wrongdoer, giving simply discipline, and restoring the guilty party. [27] It delegates to the Commission expansive power to audit and vindicate the government sentencing procedure." Once again prudence however guided is not totally uprooted on account of US moreover.

Proceeding onward to the India situation, what can be conceived? It is unrealistic to get rid of watchfulness all together. However what one needs to remember is on specific system ought to treat a specific facto as either irritating or mitigating. This profoundly relies on upon what is the point of the

[27] www.ussc.gov/2005guid/tabcon05

framework. As seen in both the locales talked about above, there is clarity as to the point of rebuffing. This clarity prompts figure out if a particular component will be helping the convict or not.

Including to the above communicated feeling, it is opined that one element which needs addressal yet has been disregarded in both frameworks is the monetary and social strata of the blamed. This increases enormous pertinence in the connection of wrongdoings, for example, robbery and burglary. Likewise having as a primary concern the far reaching effect of the social enhancement in India this excessively will increase compelling unmistakable quality the extent that India is concerned not at all like alternate nations.

It is consequently the closed with two suggestion:

1. There needs to be a sentencing arrangement plainly explaining the reason for the framework
2. As far as India is concerned, colossal significance needs to be given to the social and financial foundation of the convict as moderating circumstances.