

## SENTENCING POLICY: FROM UNGUIDED TO GUIDED DISCRETION

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### ABSTRACT

Punishing a wrongdoer is at the heart of the criminal justice delivery. However, in India, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the judge in meting out punishments to a convict. This unguided discretion often leads to vast inconsistencies between sentences. Similarly placed persons are awarded different sentences for the same offence. This inconsistency directly violates Article 14 and Article 21 of the Indian Constitution. In this article I highlight the need for a robust sentencing policy. I also discuss the recommendations provided by various parliamentary committees as well as the Hon'ble Supreme Court. Lastly, I enlist certain suggestions which ought to be included in India's sentencing policy.

### A. INTRODUCTION

Sentencing refers to the judicial act of prescribing punishment to a convicted person. One would imagine it to be a standard judicial exercise where the punishment always corresponds to the severity of the offence; however, in India this is not the case. Instances of massive disparity between sentences awarded to similarly placed people convicted for the same offence are common. Time and again, the Hon'ble Supreme Court and 'Committees for Reforms' have demanded for a robust sentencing policy. However, these observations and recommendations have failed to grab the attention of the government. As of date, there is no sentencing policy in India and sentencing is solely dependent on judicial discretion. In this article I discuss the need of this judicial discretion but to guide it through a policy or legislation. I will also enlist certain suggestion which ought to be included in India's sentencing system.

### B. NEED FOR A SENTENCING POLICY

Since the British era, the criminal justice system has remained more or less consistent. Despite that, there exists massive disparity between the sentences awarded for crimes. This discrepancy has been perfectly summed by the Malimath Committee on Reforms of Criminal

Justice System in 2003. Emphasizing on the need to minimize uncertainty in awarding sentences, the committee stated that,

*“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 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 options is given in the penal code and sentencing guideline laws. There is need for such law in our country to minimise uncertainty to the matter of awarding sentence.”*<sup>1460</sup>

In 2007, the Madhav Menon Committee on Draft National Policy on Criminal Justice, reiterated the need for statutory sentencing guidelines.<sup>1461</sup> The same year, the Hon’ble Supreme Court also noted the absence of judiciary-driven guidelines in India’s criminal justice system, stating, *“...in our judicial system, we have not been able to develop legal principles as regards sentencing. The superior courts, except for making observations with regard to the purport and object for which punishment is imposed upon an offender, had not issued any guidelines.”*<sup>1462</sup>

The Court further stated that the superior courts have come across a large number of cases that *“show anomalies as regards the policy of sentencing,”*<sup>1463</sup> adding, *“...whereas the quantum of punishment for commission of a similar type of offence varies from minimum to maximum, even where the same sentence is imposed, the principles applied are found to be different. Similar discrepancies have been noticed in regard to imposition of fines.”*<sup>1464</sup>

The reasons for these discrepancies are (i) complex structure of sentencing and (ii) institutional inconsistency by the Supreme Court.

### 1. Complex Structure

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<sup>1460</sup> Vol I, Committee on Reforms of Criminal Justice System Report, Government of India, Ministry of Home Affairs, March 2003

<sup>1461</sup> Draft National Policy on Criminal Justice, Government of India, Ministry of Home Affairs, July 2007

<sup>1462</sup> State of Punjab v. Prem Sagar & Ors. 7 SCC 550 (2008)

<sup>1463</sup> Supra.

<sup>1464</sup> Supra.

Sentencing in India is governed by a cobweb of laws. While sentencing, the Judges have to keep in mind substantive criminal laws, special legislation creating specific offences, procedural laws mainly the Criminal Procedure Code 1973, Constitution of India, judicial interpretations and guidelines laid down by superior courts. Adding to the complexity, the Judges also enjoy considerable discretion to select and appropriate the punishment for the crime. This discretion is not guided by any policy or guideline, it's absolute.

Therefore, even if the judge overlooks certain aspects of sentencing, such as hearing mitigation and aggravating circumstance, the discretion will still be absolute. This complex system along with an unguided discretion makes it impossible to achieve sentencing consistency. While it is trite to blame the government for its inaction in formulating a sentencing policy, we cannot ignore the part played by the Supreme Court in decaying the sentencing structure even further.

## 2. *Institution inconsistency of the Apex Court*

Despite recognizing the problems with the sentencing structure, the Supreme Court has done nothing but make it more complex and inconsistent. An example can be the “rarest of rare” doctrine. After laying down the doctrine in *Bachan Singh v. State of Punjab*<sup>1465</sup>, it completely reversed its decision (within 3 years) in *Machhi Singh*<sup>1466</sup>. Due to this confusion, courts continued to follow the *Macchi Singh* judgment despite *Bacchan Singh* being a decision of a Constitutional Bench. This lack of institutional coherence has resulted in several incorrect decisions.

It is therefore not surprising that 90% of the trial court decisions are overturned by the higher courts. Infact in case of death sentence only 4.9% cases are eventually confirmed by the Appellate Courts.<sup>1467</sup>

Due to decisions like these, the legislature is attempting to curb the disparity by taking away judicial discretion. Recent laws are prescribing harsher compulsory minimum punishments in order to shorten the range of sentencing discretion. For example, the POCSO (Amendment) Act, 2019, in case of aggravated penetrative sexual assault (Section 6), prescribes a minimum

<sup>1465</sup> *Bachan Singh v. State of Punjab* AIR SC 898 (1980)

<sup>1466</sup> *Macchi Singh v. State of Punjab* AIR 957 (1983)

<sup>1467</sup> Neetika Vishwanath, How India's Trial Courts Pass Death Sentences They Should Not, June 23, 2020, [www.project39a.com/blog/how-indias-trial-courts-pass-death-sentences-they-should-not](http://www.project39a.com/blog/how-indias-trial-courts-pass-death-sentences-they-should-not) (Last visited: 15.09.2020)

punishment of rigorous imprisonment for a term not less than twenty years, but which may extend to imprisonment for life. The judge while punishing under Section 6 of POSCO can only decide between rigorous imprisonment for 20 years or for life which for all practical purposes mean almost the same thing. Interestingly, the minimum prescribed punishment in Section 6 of POSCO is greater than a remitted sentence of life imprisonment (14 years).

If such a system continues then the judiciary will not be left with any discretion to be exercised. Taking away all judicial discretion is certainly an easy way out but it's not the correct way. I content that judicial discretion in sentencing must be retained within established parameters with due flexibility to dispense justice as per needs of the case in hand. Discretion as a reasoned process must be used judiciously. The discretion of the judge while pronouncing the sentence must be based on reasons and should be free from any kind of extraneous influences. As such, sentencing is a human process and cannot be imposed mechanically. Therefore, I am suggesting a few concepts that will harmoniously establish a new sentencing regime.

## C. SUGGESTIONS

### 1. Reduce Complexity

In India, the laws relating to sentencing are scattered across legislation. It makes the sentencing process burdensome for the Judges and increases chances of disparity. India must have a separate codified legislation for sentencing. The Justice Malimath Committee in 2003 also hinted at a separate codification for sentences in its recommendations. It is suggested that an act on the lines of the 'Coroners and Justice Act, 2009' of England and Wales must be legislated upon to increase the consistency in sentencing.

### 2. Trial Courts — First

The primary focus of the policy should be its implementation by trial courts. The sentencing policy should be concrete, easily understandable and simple to comprehend. As aforementioned, 90% of the trial court decisions are reversed by the higher courts. This is an abysmal record for a country already dealing with massive backlog.

The Hon'ble Supreme Court should also refrain from passing contradictory judgments which confuse the trial judges. The trial judges should be trained about principles of proportionality

and equity. They should be further be given a definite guideline to decide on what constitutes mitigating & aggravation circumstances, rarest of rare and other principles of sentencing.

### 3. Future-proof policy

Sentences should continuously be monitored and modified if need be. Especially fines which lose their deterrence over the years. A Sentencing Committee can be set up at the ground level to assess the impact of punishments awarded to different offenders for different offences. The Committee will have the power to recommend modifications in the quantum, nature and severity of the punishments to the Parliament.

### 4. From custodial to non-custodial punishments

Short term punishments under substantive laws should be substituted with other alternatives. Non-Custodial measures must be incorporated in the policy (or separate codified legislation) for compoundable offences. These measures will help to bring change in the convicted persons and reform them to be reintegrated in the society. Some courts in rare cases use non-custodial measures like fine, censure, probation, parole, plea bargaining etc. but such provisions much specifically be incorporated in the policy.

### 5. Provisions relating to mandatory death sentence

It is a settled law as laid down by the Apex Court that prescription of Death Sentence without alternative punishment is violative of Right to life as ensured under Article 21 of the Constitution. Therefore, the sentencing policy should especially state that there can be no offence punishable only by death.

### 6. Eliminate delay in disposal of Mercy Petitions

There is an inordinate delay in disposal of mercy petitions filed in cases of death sentence. The procedural aspect of disposal of Mercy Petitions needs to be fast-tracked by the government. Notably, the government has filed an Application on 22.01.2020 in Supreme Court seeking clarifications / modifications of the guidelines passed by the Supreme Court in



the case of Shatrughan Chauhan and another vs UOI & Ors.<sup>1468</sup>, to curtail delay in execution of death sentence.<sup>1469</sup>

## 7. Victim Compensation

Victim Compensation shall be made a part of the sentencing policy. In all the provisions where the fine is imposed, courts should have the power to provide adequate compensation to the victim or his/her family.

## 8. Penological Research and Study

The Ministry of Home Affairs should undertake penological research and study on the basis of the available data on sentencing. The Ministry should also hire qualified and competitive staff for evaluating and analysing disparity or deficiency in awarding of sentences as well its execution.

## D. CONCLUSION

While the sentencing policy may prima facie not appear to violate the fundamental right of individuals, a careful examination reveals how unregulated policy of sentencing affects fundamental rights. Article 14 of the Constitution states that everyone shall be treated equally before the law. However, the application of the same law over two persons under the same circumstances resulting in different consequences ostensibly violates article 14.

Undeniably, a strong and effective sentencing policy is the need of the hour. India can learn from USA, UK and Australia who have worked out detailed sentencing policies. These countries have clearly laid down guidelines whilst keeping judicial discretion intact. A sentencing policy will prove to be beneficial for the entire criminal justice system and would greatly improve our justice delivery mechanism.

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<sup>1468</sup> Shatrughan Chauhan vs Union of India, 3 SCC 1 (2014)

<sup>1469</sup> Lok Sabha, Parliament of India, Unstarred Question No. 3694, March 17, 2020