

SENTENCING POLICY IN INDIA VIS-A-VIS COMMON WEALTH OF MASSACHUSETTS.

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Introduction

“Progressive criminologists across the world will agree that the Gandhian diagnosis of offender as patients and his conception of prisons as hospitals - mental and moral - is the key to the pathology of delinquency and the therapeutic role of ‘punishment’.”

- J. Krishna Iyer²

The research student during the course of doctoral studies of the system of Probation of Offenders in India and Massachusetts was also required to study and understand the system of sentencing in India and comparatively in the May of 2015 had an opportunity to visit The Commissioner of Probation Massachusetts, Boston, Common Wealth of Massachusetts in pursuance of the Doctoral study. On further invitation the undersigned research student also had an opportunity to visit Massachusetts Sentencing Commission, John Adams Court House, 1 Pemberton Square, Boston, MA and study the sentencing policy. The Director, Linda K. Holt, Research and Planning, Sentencing Commission, MA was generous to explain the Massachusetts Sentencing report submitted to the General Court on 10th April 1996.

During this endeavour it came to light that the sentencing policy comparatively in both the societies are different and yet not any of the same are infallible and completely dependable, there is a wide scope for study and comparison of the sentencing systems followed in India and Common Wealth of Massachusetts, USA. this article does not aim at proposing any system of sentencing but aims at the comparative analysis of both the systems.

Sentencing

The Sovereign and inalienable right of a society is its inherent authority to punish for any breach of rules established for the time being in force and having sanction. The sentencing is that process of criminal justice system where the nature and quantum of punishment is determined for the convict and same is decided by the judiciary. This is the necessary outcome of any justice delivery system followed in any society. Every society has its system of social control for which it frames certain laws and also mentions the sanctions for the liabilities incurred. These sanctions are the punishments through an elaborate system of sentencing.

A clearly articulate perspective on the purpose of sentencing is necessary foundation for formulating consistent sentencing policies and practices.³

The quantum and nature of punishment defers from society to society so also nation to nation. The nature of punishment is the reflection of a society's attitude and denunciation of a particular crime or offence. The underlying validation of any criminal justice delivery system can be determined by looking at the kind of punishment given for various offenses. “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.”⁴

However in the system of sentencing, with so many variable and circumstances involved apart from the accused and victim, the outcome of sentencing is highly unpredictable in case of same crime or offence. The various actors on the stage of criminal judicial system such as the perpetrator or the accused, the victim and the judge the dispenser of the sentence may articulate different reactions to same incident. The victim may harbour strong feeling about the offences to which a judge who is a total stranger to impugned situation may not share the same feeling.

Punishment

The system of sentencing in any society can be best understood by considering the theories of punishment employed in the society. The theories of punishment can be divided into two general philosophies utilitarian and retributive. The utilitarian theory of punishment endeavours to punish offenders or to discourage, or “deter,” future crime. The retributive theory seeks to punish offenders because the offender deserves to be punished.

Under the utilitarian philosophy, laws should be used to maximize the happiness of society. Because crime and punishment are inconsistent with happiness, they should be kept to a minimum. Utilitarian understand that a crime-free society does not exist, but they endeavour to inflict only as much punishment as is required to prevent future crimes.

Further classification various theories could be made by understanding the minor sub-theories of punishment. The system of sentencing is based on various theories of Punishment during the ancient period of history punishment was more severe as fear was considered as predominant instrument in preventing crime. With change in time and development of human mind the theories punishment have become more social and forbearing to the propagators of crime. Crime to be came to be recognised as social aided disease and an offender could be reformed.

There are five major theories of punishments.

1. Deterrent Theory
2. Retributive Theory
3. Preventive Theory
4. Reformatory Theory
5. Expiatory Theory

Sentencing in India

Role of Lord Macaulay with special reference to Hindu and Mohamedan law: The making modern India – Lord Thomas Babington Macaulay (1800-1859) who drafted India Penal Code in 1860 was followed by the Criminal Procedure Code in 1872, overturning the contemporary Hindu and Mohamedan Law. The Government of India Act 1833, was enacted by the British Parliament as an aftermath of the Indian Mutiny 1887 provided for the establishment of a Law Commission or consolidation and codification of Indian laws. In 1835, Lord Macaulay was appointed as Chairman of the First Law Commission. One of the outstanding achievements of British Rule in India wa formation of a unified nation modern legal system.⁵

The sentencing procedure as under Criminal Procedure Code, 1973

The Criminal Procedure Code 1872 was majorly amended in 1973 and recently amended after the Criminal Law Amendment Act, 2013. The Code presently provides for wide discretionary powers of sentencing to a judge on finding of guilt and of conviction. The Code makes provisions of sentencing primarily in Sections 235, 248, 325, 360 and 361. The power of Session Court to sentence is dealt

in Chapter 18, Section. 235. The judge is expected to arrive at the only two possible findings one of acquittal or Conviction. Wherein Clause 2 of the section provides for 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 will affect the sentence.⁶ There are several mitigating facts and circumstances around the offence and the offender. Several facts are expected by the judge to finalise the nature and quantum of sentence. The financial dependency, minor and disabled dependency upon the convict and other factors mitigating or interfering in the nature and quantum of sentence. . The discretion provided to the judge under the existing criminal procedure is guided by principles of '*circumstances of the crime*' and '*mental state and age*'. This section empowers the judge to consider the submission of the opposing counsel on the point of quantum of sentence and the judge is expected to adjudicate the sentence based upon the submissions. This process is not a mere formality but a mandatory part of the sentencing.

The case tried as warrant trail are dealt under Chapter 19 Section 248 of the Code dealing with sentencing of the convict. The provisions contained in this section are very similar to the provisions under S.235. However this section 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 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 case papers along with his opinion.⁷

Suspended Sentence

Suspended Sentencing is majorly dealt with by the Probation of Offenders Act, 1958 and the contemporary provisions of Section 360 of the Code which provides for release of the convict on probation. The aim of the section is to try and reform those criminals in cases where there is no serious threat to the society. 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 male above 21 years convicted of an offence the punishment of which is fine or imprisonment of not above 7 years.

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. 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. These provisions are available only to trials before the Court of Sessions and the trials of warrants case.

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. S.360 would cease to have any force in the States or parts where the Probation of Offenders Act is brought into force.

Relevant Judgements

Considering the personal biases and prejudice the concept of sentence, punishment and justice will necessarily suffer from individual to individual. For instance, in the case of *Gentela Vijayavardhan Rao v. State of Andhra Pradesh*⁸, 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 relied from the judgment *Dhananjay Chatterjee v. State of West Bengal*⁹ 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 judgement reflects the principles of deterrence and retribution. Though this cannot be categorised as wrong or as right for this is a product of the belief of the judges constituting the bench. Similarly in the case of *Gurdev Singh v. State of Punjab*¹⁰ the court confirmed the death penalty imposed on the appellant keeping in mind the aggravating circumstances. Though on the face of it this might be nothing but a brutal revenge for the crime done by the convicts, on a deeper study one can realize from the judgment that the act was absolutely unforgivable for the judges. This cannot be stated to be the inability of the judges to feel sympathy. This is just a reflection of their values.

The 35th Law Commission Report on *Capital Punishment* comprehensively explains various aspects relating to sentencing focussing more closely on capital sentencing. The discussion in the report on the codification of the factors to guide the discretion vested in the judge for awarding capital punishment can be extended to the general discussion on *Certainty and Predictability versus Judicial Discretion*.¹¹

In 2008, the Supreme Court of India, in *State of Punjab v. Prem Sagar & Ors.*, 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.¹² However, in describing India’s sentencing approach the Court has also asserted that “the impossibility of laying down standards is at the very core of the Criminal law as administered in India, which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment.¹³ In the Supreme Court’s judgment in *Soman v. Kerala*, the Court cited a number of principles that it has taken into account “while exercising discretion in sentencing,” such as proportionality, deterrence, and rehabilitation. As part of the proportionality analysis, mitigating and aggravating factors should also be considered, the Court noted.¹⁴ In *State of M.P. v. Bablu Natt*, the Supreme Court stated that “the principle governing imposition of punishment would depend upon the facts and circumstances of

each case. An offence which affects the morale of the society should be severely dealt with.”¹⁵

Sentencing in Massachusetts

Sentencing in Massachusetts is Haphazard, confusing, and archaic, with a hodgepodge of options. More importantly, Massachusetts judges are given no guidance on what to consider in sentencing, except for those crimes carrying mandatory penalties. As a result there is substantial disproportionality in sentence given for the various offences and a lack of uniformity among sentences imposed for the same offences.¹⁶

The United States of America being a federal state, the Federal law originates from the Constitution, through the Congress forming Statutes, Rules and Regulations. There is a massive overlay of federal and state statutes, and not to miss the Common Law that has a major force in the US of A. Considering the polity and federalism the Commonwealth of Massachusetts has a separate sentencing system, albeit largely based upon the federal criminal jurisprudence.

The landmark judgement of *United States v. Booker*, 543 U.S. 220 (2005),¹⁷ is a United States Supreme Court decision concerning criminal sentencing. The Court ruled that the Sixth Amendment right to jury trial requires that, other than a prior conviction, only facts admitted by a defendant or proved beyond a reasonable doubt to a jury may be used to calculate a sentence exceeding the prescribed statutory maximum sentence, whether the defendant has pleaded guilty or been convicted at trial. The maximum sentence a judge may impose is a sentence based upon the facts admitted by the defendant or proved to a jury beyond a reasonable doubt.

The Massachusetts Sentencing Commission was established in 1994 as a response to the escalating concern for sentencing reform. The goal of the commission is to promote truth in sentencing by developing uniform sentencing guidelines, including guidelines for the appropriate use of intermediate sanctions.

On April 11, 1996, the commission submitted its Report to the General Court, culminating an intense two-year effort of research, debate, and deliberations. The result is a comprehensive and balanced set of guidelines that will provide greater uniformity and certainty in sentencing so that victims and offenders alike will understand the meaning and effect of the sentence imposed. The guidelines will promote fairness and reduce disparity while preserving that degree of judicial discretion necessary to fashion the sentence appropriate for the individual offender and the specific offense.

The Report to the General Court, which was unanimously adopted by commission members, presents the philosophical and policy bases for the guidelines. The recommendations of the Report have been incorporated into the sentencing guidelines legislation, which is presently before the Legislature. If passed, the policies and procedures contained in this Sentencing Guide would become effective. Until then, they should be considered proposed policies and procedures.

The purpose of this document was to provide a practical guide for the application of the guidelines in sentencing a convicted defendant. Ten specific steps are set forth and a set of attachments is included for reference. The objective is to give “hands-on” directions for making the sentencing guidelines operational. The audience is intended to be judges, prosecutors, defence counsel, probation personnel, and others concerned with the practical application of the sentencing guidelines.

The proposed sentencing guidelines and rules are categorized herein after:

A grid-type approach was adopted for sentencing guidelines, they were to be encompassing offence of felony and misdemeanour's. Over 4,000 specific offences were identified and nine levels of

were proposed. This was not a easy job considering the fact that the Common Wealth of Massachusetts was largely following the common law concept. The next step proposed for sentencing was to identify the value that would guide the ranking process of the offences.¹⁸

Values Underlying

The First task before the Sentencing Commission was to distinguish between policy level and case level. Policy Level articulates general issues such as the behaviour of the offender, injury to victim, and the vulnerability of victim. Case Level refers to more specific aggravating or mitigating factors that would affect sentencing individually. Further articulation would be:

- a. Degree of Harm to Victim
 - i. Degree of physical harm
 - ii. Degree of risk of physical harm
 - iii. Degree of psychological harm
- b. Vulnerability of Victim
- c. Culpability of Offender

The Second Task to consider the federal guidelines regarding the circumstances of the offences as against the conviction of offense of the face of the act. The Commission determined to limit consideration to offense of Conviction is assessing the seriousness in the guidelines of sentencing.

The Third determination adopted by the Commission was to focus on the typical offences, wherein the guidelines provided a sentencing range for the typical cases, leaving adequate discretion for the sentencing beyond the range in atypical offences.

Fourth determination was to maintain simplicity in developing the sentencing guidelines.

The system of sentencing was modelled on grid-type and placing the offences in 9 levels thereby stair-casing the grid. Misdemeanour's were non-person was involved were treated as Level 1 & 2, whereas in stair-casing the same the seriousness would be aggravated by employment of battery of assault making the grip of seriousness fall under Level 3 and above, particularly considering the other factors.

Level 1 & 2 was Incarceration up to and including 6 months and More than 6 months up to 2.5 years

Level 3 Minor Injuries

Level 4 Moderate Injuries

Level 6 Significant Injuries

Determining Criminal History

The criminal history of the offender also had a role to play in determining the sentencing policy for the offence. Two models, 'Numerical' and 'Type of Offender' emerged from the grid-type sentencing model. The 'Numerical' model criminal history is measured in score calculated in numbers and seriousness of prior convictions and added in the criminal record typically range between 5 to 10 category. 'Type Offender' model focus on serious, minor and recidivist record of the offender. The

Commission decided upon 'Type Offender' model. The same is as follows:

E Serious Violent Offences- Two or more prior convictions for offenses in level 7 through 9

D Violent or Repetitive Record- One prior conviction for offences at level 7 through 9; or Two or

more prior conviction for offense in levels 5 or 6; or 6 or more prior conviction in level 3 or 4.

C Serious Record - One prior conviction for offences at levels 5 or 6; or, 3 to 5 prior convictions for offense in level 3 or 4.

B Moderate Record - 1 or 2 prior conviction for offenses in 3 or 4; or 6 or more prior convictions for offenses in level 1 or 2.

A No/Minor Record - 1 to 5 prior convictions for offenses in level 1 or 2; or No prior conviction of any kind.

Determining Sentence

The sentence is to be determined based on:

1. Identifying the Offences Seriousness Level
2. Identifying the Criminal History Group
3. Locating the Appropriate Sentencing Guideline Cell on the Grid.
4. Sentencing within the Guideline Grid
5. Departing from the Guideline grid.

Non-Exhaustive list of mitigating and aggravating factors are identified established by the Commission for sentencing guidelines for the judges.

Summary and Conclusion

The process of sentencing in both the societies has remained elusive and unanswered, there is yet lack of consistency and predictability in sentencing. This probably could be largely due to the nature of the process and the variable circumstances of each individual case. However, the sentencing process is at least being addresses and being researched by both their respective Commissions. The Law Commission in it's 47th report says that a proper sentence is a composite of many factors, the nature of offence, the circumstances extenuating or aggravating the offence, the prior criminal record if any, of the offender, the age, professional, education, home life and mental condition of the offender, the possibility of treatment or training of the offender, the prospective rehabilitation, the sentence by serving as a deterrent in the community for recurrence of the particular offence.¹⁹

A new Massachusetts Sentencing Commission was appointed by the Governor in 2014. Chaired by Superior Court Judge Jack Lu, the commission is comprised of judges, prosecutors, defence attorneys, and representatives from criminal justice, public safety, and victim agencies. In order to ensure that Massachusetts has a state-of-the-art sentencing system, the commission will use data to bring a critical data-based lens to the Commonwealth's sentencing practices, make Legislative recommendations and become a useful reference for the Judiciary.²⁰

This establishes the endeavour of both the communities for continues research and experimentation in the formulating the model sentencing guidelines for their respective societies.

(Endnotes)

- 1 Doctoral Student SP Pune University, Pune
- 2 *Mohammad Giasuddin v. State of Andhra Pradesh AIR1977SC1926*
- 3 *Massachusetts Sentencing Commission Report to the General Court, April 10, 1996.*
- 4 *Suresh Chandra Bahri v. State of Bihar AIR 1994 SC 2420*
- 5 *Journal of Social Issues by Marc Galanter, Volume 24, Issue 4, The Displacement of Traditional Law in Modern India, Oct 1968.*
- 6 *R. V. Kelkar, Criminal Procedure, K. N. Chandrasekharan Pillai (Rev.) 4th ed. 2001(Rep.,2003), pp 500-503.*

- 7 S. 325, Criminal Procedure Code, 1973
- 8 *Gentela Vijayavardhan Rao v. State of Andhra Pradesh AIR 1996 SC 2791*
- 9 *Mohd Chaman v. State (1994) 2 SCC 220*
- 10 *Gurdev Singh v. State of Punjab AIR 2003 SC 4187*
- 11 *35th Law Commission Repot, 1967, pp 190 - 202*
- 12 *State of Punjab v. Prem Sagar & Ors (2008) 7 SCC 550*
- 13 *Jagmohan Singh v. State of Uttar Pradesh, (1973) 2 S.C.R. 541, para. 26,*
- 14 *Soman v. State of Kerala, (2013) 11 S.C.C. 382, para. 13.*
- 15 *State of M.P. v. Bablu Natt, (2009) 2 S.C.C. 272, para. 13*
- 16 *Report of Task Force, an joint enterprises of Boston Bar Association and Crime and Justice Foundation, February 1991.*
- 17 *United States v. Booker, 543 U.S. 220 (2005)*
- 18 *Annexure 'A' the grid propounded by the Massachusetts Sentencing Commission, April 10, 1996.*
- 19 *Report of the 47th Law Commission, Govt. of India.*
- 20 <http://www.mass.gov/courts/court-info/trial-court/sent-commission>, visited on 10/06/2016.

References:

- R. V. Kelkar, *Criminal Procedure*, 2001 4th ed., Eastern Book Company, Lucknow
- 35th Report of Law Commission of India, 1967
- Massachusetts Sentencing Commission Report to the General Court, April 10, 1996.
- *Justice for All*, 2002
- Silvia D'Ascoli, *EUI Working Group on International Criminal Law*, 2005
- Report of Task Force, an joint enterprises of Boston Bar Association and Crime and Justice Foundation, February 199.
- Committee on Reforms of Criminal Justice System, Govt. of India, Ministry of Home Affairs 2003

ANNEXURE A

Sentencing Guidelines Grid

Level	Illustrative Offense	Sentence Range				
		Life	Life	Life	Life	Life
9	Murder					
8	Manslaughter (Voluntary) Rape of Child with Force Aggravated Rape Armed Burglary	96 - 144 Mos.	108 - 162 Mos.	120 - 180 Mos.	144 - 216 Mos.	204 - 306 Mos.
7	Armed Robbery (Gun) Rape Mayhem	60 - 90 Mos.	68 - 102 Mos.	84 - 126 Mos.	108 - 162 Mos.	160 - 240 Mos.
6	Manslaughter (Involuntary) Armed Robbery (No gun) A&B DW (Significant injury)	40 - 60 Mos.	45 - 67 Mos.	50 - 75 Mos.	60 - 90 Mos.	80 - 120 Mos.
5	Unarmed Robbery Stalking in Violation of Order Unarmed Burglary Larceny (\$50,000 and over)	12 - 36 Mos. IS-IV IS-III IS-II	24 - 36 Mos. IS-IV IS-III IS-II	36 - 54 Mos.	48 - 72 Mos.	60 - 90 Mos.
4	Larceny From a Person A&B DW (Moderate injury) B&E (Dwelling) Larceny (\$10,000 to \$50,000)	0 - 24 Mos. IS-IV IS-III IS-II	3 - 30 Mos. IS-IV IS-III IS-II	6 - 30 Mos. IS-IV IS-III IS-II	20 - 30 Mos.	24 - 36 Mos.
3	A&B DW (No or minor injury) B&E (Not dwelling) Larceny (\$250 to \$10,000)	0 - 12 Mos. IS-IV IS-III IS-II IS-I	0 - 15 Mos. IS-IV IS-III IS-II IS-I	0 - 18 Mos. IS-IV IS-III IS-II IS-I	0 - 24 Mos. IS-IV IS-III IS-II IS-I	6 - 24 Mos. IS-IV IS-III IS-II IS-I
2	Assault Larceny Under \$250		0 - 6 Mos. IS-III IS-II IS-I	0 - 6 Mos. IS-III IS-II IS-I	0 - 9 Mos. IS-IV IS-III IS-II IS-I	0 - 12 Mos. IS-IV IS-III IS-II IS-I
1	Operating Alt Suspended Lic Disorderly Conduct Vandalism				0 - 3 Mos. IS-IV IS-III IS-II IS-I	0 - 6 Mos. IS-IV IS-III IS-II IS-I
Criminal History Scale		A No/Minor Record	B Moderate Record	C Serious Record	D Violent or Repetitive	E Serious Violent

Sentencing Zones

Incarceration Zone
 Discretionary Zone (incarceration/intermediate sanction)
 Intermediate Sanction Zone

Intermediate Sanctions Levels

IS-IV 24-Hour Restriction
 IS-III Daily Accountability
 IS-II Standard Supervision
 IS-I Financial Accountability

The numbers in each cell represent the range from which the judge selects the maximum sentence (Not More Than);
 The minimum sentence (Not Less Than) is 2/3rds of the maximum sentence and constitutes the initial parole eligibility date.