INTRODUCTION

Sentencing is that stage of criminal justice system where the actual punishment of the convict is decided by the judge. It follows the stage of conviction and the pronouncement of this penalty imposed on the convict is the ultimate goal of any justice delivery system. This being said no further explanation is required to understand how much of attention needs to be paid to this stage. This stage reflects the amount of condemnation the society has for a particular crime. The underlying rationale of any criminal justice delivery system can be determined by looking at the kind of punishment given for various crimes. However in a system like ours, with so many actors involved apart from the accused and victim, it is not possible to expect all of them to react in the same manner to a particular act of crime. For instance the victim might express stronger emotions than a judge who is a total stranger to both the opposing parties. In the same manner the accused might be convinced that his action was in fact correct giving more importance to the surrounding factors. It is in order to reach a consensus on a given incident that judges and other legal players are appointed. The decision to be reached here is not restricted to whether there was a wrong done or not but also and more importantly what has to be done in case of a wrong being committed. The options are many. In case of a victim centric system the most opted solution would be restoration of the victim to the same position as he/she was in before the wrong had been caused. This is mostly used in torts cases and generally in economic crimes. This cannot be applied across the board in cases of physical, emotional and psychological harm where restoration is rarely possible. In such cases there are two options – retribution and rehabilitation. In the former the system focuses at condemnation of the crime as more important rationale for penalising than any other. Rehabilitation is more accused friendly and believes in reclamation of the person back to the mainstream of the society. Another most favoured justification for punishment is deterrence the basic premise of which is prevention of reoccurrence of the same scene.

SENTENCING PROCEDURE AS UNDER THE CRIMINAL PROCEDURE CODE, 1973

The Code provides for wide discretionary powers to the judge once the conviction is determined. The Code talks about sentencing chiefly in S.235, S.248, S.325, S.360 and S.361. S.235 is a part of Chapter 18 dealing with a proceeding in the Court of Session. It directs the judge to pass a judgment of acquittal or conviction and in case conviction to follow clause 2 of the section. Clause 2 of the section gives the 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.[1] Facts such as the convict being a breadwinner might help in mitigating his punishment or the conditions in which he might work. This section plainly provides that every person must be given a chance to talk about the kind of punishment to be imposed.

The section just does not stop at allowing the convict to speak but also allows the defence counsel to bring to the notice of the court all possible factors which might mitigate the sentence and if these factors are contested then the prosecution and defence counsels must prove their argument. This ordeal must not be looked on as a formality but as a serious effort in doing justice to the persons involved. A sentence not in compliance with Section 235 (2) might be struck down as violative of natural justice. However this procedure is not required in cases where the sentencing is done according to Section 360. Section 248 comes under Chapter 19 of the Code dealing with warrants case. The provisions contained in this section are very similar to the provisions under Section 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

[1] R.V.Kelkar, Criminal Procedure, K.N.Chandrasekharan Pillai (Rev.) 4thed. 2001(Rep., 2003), pp500-503.

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 relevant papers along with his opinion.[2]

The main part of judicial discretion comes in Section 360 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. If a magistrate of II class and not authorised by the High Court opines that the person tried deserves the invocation of this section then he might record his opinion and forward the case to the magistrate of I class. To enable the judge to get full facts of the case the section provides all rights to the judge for enquiry into the details of the case.

Also if the crime committed is of such nature that the punishment awardable cannot be more that 2 years or a simple fine then, having consideration to the various factors connected to the convict, the court may leave the convict without a sentence at all after mere admonition. The court also takes steps in case the person does not comply with the rules laid down at the time of release as provided under this section such as re-arrest of the person. For release under these provisions it is necessary that either the convict or the surety are residing or attend regular occupation in the jurisdiction of the court.

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[2] S.325, CrPC

The Code through Section 361 makes the application of Section 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 Section 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.[3]

Procedure in practice

The efficiency of procedure in the Criminal Procedure Code, its efficiency can be understood only by seeing its application in practice. The discretion provided for under the existing procedure is guided by vague terms such as '*circumstances of the crime*' and '*mental state and age*', but their effect on the sentence is the question left unanswered by the legislature. For instance, every crime has accompanying circumstances but which ones qualify as mitigating and which once act as aggravating circumstances is something which is left for the judge to decide. Therefore if one judge decides a particular circumstance as mitigating this would not prevent another judge from ignoring that aspect as irrelevant. This lack of consistency has encouraged a few judges to misuse the discretion on the basis of their personal prejudices and biases.

Apart from the personal biases and prejudice the idea of what constitutes justice and what is the purpose of punishment varies from person to person. For instance, in the case of *Gentela Vijayavardhan Rao v. State of Andhra Pradesh*[4], 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

[3] Section 19 of the Probation of the Offenders Act, 1958
[4] AIR1996SC2791

10 years of rigorous imprisonment for convict B. This was challenged by the convict. The apex court quoted from the judgment *Dhananjoy Chatterjee v. State of West Bengal*[5] 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. But 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*[6] 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.

On the other hand, *Mohd Chaman v. State*[7] the courts have shockingly reduced the sentence of death penalty to rigorous imprisonment of life due to the belief that the accused is not a danger to the society and hence his life need not be taken. The accused in this case had gruesomely raped and murdered a one and a half year old child. The lower courts having seen the situation as the *rarest of the rarest* cases imposed death penalty. This was reversed by the apex Court as it was not convinced that the act was sufficiently deserving of capital punishment.

In the case of *Raju v. State*[8] the Courts reduced the punishment below the minimum prescribed in the statute for reasons which in the opinion of the author are very frivolous. The judge took into account the alleged "immoral character and loose moral of the victim" and reduced the sentence for the accused to the term served. Had there been a clear indication of a victim-centric penal system, a judgment which benefits the accused for the faults of the victim will not be delivered. In *State of Karnataka v. S. Nagaraju*[9] the

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[5] (1994)2SCC220
[6] AIR2003SC4187
[7] 2001CriLJ725
[8] AIR1994SC222
[9] JT 2002(Suppl1)SC7

judge convicted the accused more as a deterrent measure to prevent other potential offenders than to penalise that particular convict.

It is not alleged that in the above scenarios and many other similar ones the judges are irrational or unjust. The only point placed for the observation is variations in the idea of justice and this drastically affects the societal demand of what the judiciary must do in a particular state of affairs. There have been judges like Krishna Iyer, J who have taken rehabilitation and reclamation to a different level of understanding. In the famous case of *Mohammad Giasuddin v. State of Andhra Pradesh*[10] he explained punishment as follows:

"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'."

Strongly agreeing with the above proposition it is unfair to allow some convicts reap the benefit of the sympathy of the judge and to let others bear the brunt of the wrath of the others.

PRE-SENTENCING INQUIRY

The need for making detailed information about the offender available to the court has been felt in the modern penal systems. The sentencing authority must have information regarding various personal factors of the accused if the primary and secondary decisions are to proceed in scientific premises. Courts not only receive and use the information given in the reports but they may also seek advice from experts like psychiatrists or probation officers regarding the desirability of a particular sentence keeping in view its likely impact on the offender. The information is special in case of juvenile offenders. In the absence of any pre-sentence reports, courts in India have to fix punishments on the basis of whatever inadequate information they receive about the offender in the course of the actual trial.

[10] AIR1977SC1926

In *P.K.Tejani* v. *M.R.Dange*,[11] Krishna Iyer, J observed that post conviction stage of the current legal system is weak. The Code does not provide penological facts bearing on the individuals background, the dimension of change, the social milieu etc. The intelligent hunches should be made on the basis of the materials adduced to prove guilt. In *Ramashraya Chakravarti* v. *State of M.P*[12], the Supreme Court referred to the lack of opportunities for the consideration of sentencing issues in trial courts. Under the Criminal Procedure Code, 1973, Sessions Courts and the Magistrates trying the warrant cases has to give hearing to the accused on the question of sentencing after finding him guilty of the offence.[13]

The nature and scope of the provision of the Section 235 (2) of the Criminal Procedure Code of 1973, which deals with the pre- sentencing hearing was explained by the Supreme Court in *Santa Singh* v. *State of Punjab*[14]. It was held that the provision was mandatory and the failure to give the accused before the sentence is pronounced vitiates the sentence and it is not just an irregularity curable by Section 465 of the Criminal Procedure Code. The hearing implies the opportunity to place full and adequate material before the court and if necessary, to lead evidence.

Despite the mandatory provision in Section 235 (2) of the Criminal Procedure Code, the courts usually take up the pre- sentencing exercise in a casual manner as if it was just a meaningless formality. In *D.D.Suvarna* v. *State of Maharashtra*,[15]the sentencing hearing was given after the death sentence had been pronounced by the judge; a procedure was aptly described as a farce by the court. In some rare situations it would be unnecessary to give any pre- sentencing hearing to the offender where the accused admitted his guilt before the Court and told that they are very proud of what they had done[16].

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[11] (1974) 1 SCC 167.
[12] (1976) 1 SCC 281.
[13] Sections 235 and 248.
[14] (1976) 4 SCC 190.
[15] 1994 Cri LJ. 3602.
[16] *State of Maharashtra* v. *Sukhdev Singh*, (1992) 3 SCC 700.

DISPARITY IN SENTENCE

Sentencing is the most crucial point in administration of criminal justice. It is critical be cause no where in the entire legal field the interest of the society and those of the individual offender are at stake than in the system of sentencing. The principles of justice get eroded where the offender receives a particular sentence not on consideration of the offender's personality guilt but on consideration of the judge's personality and ideology. Another significant cause of disparity in sentences is the lack of unanimity among sentencing judges as to the purpose of the sentences. The disparity not only offends principles of justice, but it also effects the rehabilitative process of the offender ad may create problem like indiscipline and riots inside the prison. The disparity in the sentences limits the correctional efforts to develop sound attitudes of the offenders. In *Asgar Hussain* v. *The State of UP*,[17] the Supreme Court observed that the disparity in sentencing creates hostile attitude in the minds of offenders and reduces their chances of resocialization as the offenders feel that they have been discriminated.

Disparity in sentences defeats the objective of modern correctional philosophy. However, the disparity in sentence is a world phenomenon, but the developed countries have adopted various phenomenon to avoid it. In India, the elaborate system of appeal and revision as well as hearing on the sentence to some extent helpful in curbing the disparity in sentences.

DISPARITY REDUCTION

Though sentencing disparity cannot be eliminated altogether, yet efforts can be made for reducing it to the minimum level. The strategies indicated are better training of judicial personnel and coordination of sentencing policies through sentencing councils. It has also been suggested that the job of sentencing should be taken away either wholly or partly from judicial personnel and the same should be entrusted to boards consisting of experts trained in disciplines like social work, psychiatry and allied disciplines. Provision for appellate review of sentence is also made in criminal laws which go a long way in reducing the disparities. Improving the sentencing skills should be an important part of the scheme which aims to make sentencing practices more consistent. The trial judge

[17] (1974) 2 SCC 518.

should be made well conversant with alternative sentences and their application in appropriate situations. He should be trained to evaluate pre sentence and psychiatric reports in cases where they are made available to him. In *Santa Singh* v. *State of Punjab*,[18]the Supreme Court emphasized the importance of training of judicial personnel in penology and sentencing procedures. Such training, the Court observed, would enable judges to keep abreast with the latest trends in penological thought and practice.

Another alternative is to try a combination of judiciary and the board of experts by employing the technique of indeterminate sentence. The sentencing judge my award a sentence indicating maximum and minimum limits and the board then decides the actual time of release on the basis of the performance and promise of the convict in the institution. A sentence is absolutely indeterminate when no limits are laid down by the judge. Indeterminate sentences are best means to achieve the rehabilitative and reformative ideals. Some of the steps have taken to reduce sentencing disparity aim at the reduction of sentencing discretion both of judges and parole boards. It marks a shift towards harm –based penology in which situational and offender characteristics are bound to be excluded to a great extent compared to the earlier position.

IMPACT OF SENTENCING:

The main objective of the punishment is prevention and control of crime. Justice Krishna Iyer has rightly pointed out that the purpose of sentencing is to change or convert offender into non- offender. [19]Any method which will not cripple a man, but which will restore a man, is the purpose of sentence. The sentence should bring home to the offender, the consciousness that the offence committed by him was against his own interest, as also against the interest of the society of which he happens to be a member. The purpose of sentence is the protection of the society, by deterring potential offenders from committing further offences and by reforming and turning them to law abiding citizens.

In order to achieve goals underlying the modern correctional philosophy, the sentence should not be fixed only in accordance with the nature and gravity of the offence but all

[18] (1976) SCC 190.

[19] Observations made by Krishna Iyer, J while delivering the lecture in the Xth Annual Conference of the Indian Society of Criminology, Aurangabad, Feb.13 1981.

circumstance surrounding it should be taken in to consideration. The factors like nature of crime, circumstances under which it has been committed. Antecedents, age, family and educational background of the offender should be taken into consideration in order to select a proper sentence. It is also essential that for the selection of a proper sentence, wide range of penalties should be made available to the sentencing courts, provision should be made for the award of indeterminate sentence. In order to avoid disparity and ensure uniformity in sentencing judges, lawyers and prosecutors should be given for the determination of proper sentences. They should also see the impact and consequence of sentences by paying periodical visits to penal institutions in their jurisdictions. A proper sentence conceived in the light of the relevant circumstances can be helpful to curb the increasing crime rate.