FACTOR OF SENTENCING, ELEMENTS OF PROPORTIONALITY, AGGRAVATION AND MITIGATION.

INTRODUCTION

In the welfare state criminal justice system exist the main objective of the criminal justice system of any nation to curb the crime in the society and to punish the offender who commits crime and disturbed the social order in the society and thus avoid chaos in the society. Criminal justice system includes various machineries such as police, court, advocate and jail authority. The main function of police is to prevent commission of crime and to investigate and detect the commission of the crime. The function of the court is to adjudicate, uphold the justice in the society and thus avoid chaos in the society. The court play very vital role in the maintenance law and order in the state by administration of justice. The process of criminal justice system is initiated with the registration of first information report and end with the sentencing, the 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. In the present time as the human rights concept in the full swing the policy of sentencing inclined toward reformation and rehabilitation of the convict. The modern theories of sentencing give great emphasis on reformation and rehabilitation of the convicted accused person show that convict may come in the main stream of civilised world with honour and respect and contribute in the development of the nation. In the modern time accused person were given vocational training during sentencing period as well as they were given Yoga training for inner purification and moral suasion for the wrong act or omission, thus we can say sentencing is most important phase in the justice system. The sentencing is the stage in the justice system in which court decide quantum of the punishment awarded to the convicted accused for any offence which he or she has committed. There are various mitigating and aggravating factor which court take into account in the sentencing of the accused. 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 penalizing 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. The sentencing is one of the essential factor in the criminal justice system there are many factor of sentencing as well as mitigating and aggravating factor in sentencing in this paper we will discuss various factors of sentencing involve in mitigating and aggravating factors.
CHAPEL 1

FACTOR OF SENTENCING

In each and every civilized nation there is judicial system the main objective of judicial system is to maintain law and order by upholding justice in the society or nation. The judicial system in upholding law and order in the society follow certain procedure in the light of principle of natural justice for fair and just trial in the criminal cases. In the criminal justice system law start into motion as soon as information to the police under section- 154 or to the magistrate take cognizance under section-190 of the Cr.P.C after information there is process of investigation and cognizance then there is trial which may result in acquittal or conviction. In the criminal justice system if any person is declared convicted then the question arises what is duration and nature and quantum of punishment/sentencing for the crime for which the accused is convicted. Sentencing is very vital stage of criminal justice system at this stage in the criminal justice system 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. The sentencing is very essential in the administration of justice as per Austin law is command of sovereign backed by sanction, in this definition of Austin sanction means sentence/punishment. According to Manu, Danda was essential characteristic of law. He argued that “punishment keeps the people under control, protect them and it remain awake when people are asleep. So the wise have recognized punishment itself as a form of “DHARAMA”. Thus we can say that for the enforcement of law and for maintains law and order in the society sentencing is very essential attribute of law. Law without sentencing is handicapped. In any criminal justice system sentencing policies is very essential concept of sentencing is not isolated concept in the legal justice system in the civilized world in the earlier legal justice system sentencing policies are not so complex but as the society had developed to his sentencing policies become more complex because in the criminal justice system of civilized world requires to maintain balance between the interest of society as well as the interest of convicted persons. In the civilized world convicted person are not treated in barbaric manner but their Human right are well protected by law such as constitution and jail manual. The main objective of civilized legal system is to maintain law and order in the society as well as make laws for the protection of right of the accused and convicted person further law of civilized nation requires that state and government must make laws and

1 Dr.N.V. Paranjape: STUDIES IN JURISPRUDENCE AND LEGAL THEORY.
policies for rehabilitation and welfare of convicted person. In the earlier days convicted person treated with very harass punishment and the conviction and sentencing of the accused person depends on various factors such as caste, creed, race etc. which resulted in the discrimination in the sentencing of the convicted person. In the ancient time sentencing based on crime situation and crime causation as also the character and status of the offender in society. The *Kutilya’s Arthasastra* mention an exhaustive list of offence and the fines charged for committing them. The one peculiar feature of the ancient Hindu legal system was that punishment varied according to the offender’s caste or social position and it was increasingly sever if the offender belongs to the higher caste (*Varana*).  

1.1. Purposes of sentencing in the criminal justice system are as follows:

- To ensure the offender is adequately punished for the offence.
- To prevent crime by preventing (deterring) the offender and other persons from committing similar offences.
- To protect the community from the offender.
- To promote the rehabilitation of the offender.
- To make the offender responsible (accountable) for his or her actions.
- To condemn the conduct of the offender.

Section 5(1) of the *Sentencing Act 1991* sets out the only purposes of sentencing an adult in Victoria. These purposes are:

- just punishment – to punish the offender to an extent and in a way that is just in all the circumstances
- deterrence – to deter the offender (specific deterrence) or other people (general deterrence) from committing offences of the same or a similar character
- rehabilitation – to establish conditions that the court considers will enable the offender’s rehabilitation
- denunciation – to denounce, condemn, or censure the type of conduct engaged in by the offender
- community protection – to protect the community from the offender
- a combination of two or more of these purposes.

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2 The Arathashastra of Kautilya consisted of fifteen chapter, 380 and 4968 sutta and detail with a wide variety of subject like civil administration, criminal and justice system, taxation, foreign policy, war, defence, etc.
1.2. Supreme Court of India view on sentencing

Commenting on the sentencing power of the Supreme Court observed that the state of criminal law reflect upon the social consciousness of society, therefore, system of law adopted for the administration of criminal justice, be it based on corrective mechanism or deterrent approach, should ensure social security because protection of person and their property is an essential function of the state. Judges should ascertain that punishment which is awarded to the offender is befitting the gravity of crime. Thus from the above discussion we can easily understand the importance of sentencing in the criminal justice system. In the modern time sentencing policies of criminal justice system does not only aim at putting convicted accused behind the bar but sentencing depends upon various factors. Sentencing principles have developed through legislation and court decisions (common law). They form the basis of sentencing decisions. These principles include:

- parsimony – the sentence must be no more severe than is necessary to meet the purposes of sentencing
- Proportionality – the overall punishment must be proportionate to the gravity of the offending behavior.
- parity – similar sentences should be imposed for similar offences committed by offenders in similar circumstances
- Totality – where an offender is to serve more than one sentence, the overall sentence must be just and appropriate in light of the overall offending behaviour.

Following are Relevant factors determine or considered at the time of pronouncement of sentence in the criminal justice system in general.

- the maximum penalty for the offence
- current sentencing practices
- the nature and gravity of the offence
- the offender’s culpability (blameworthiness), that is, the degree to which they should be held responsible for the offence
- whether the crime was motivated by hatred or prejudice
- the impact of the offence on any victim of the offence
- the personal circumstances of any victim of the offence

any injury, loss, or damage resulting directly from the offence
whether the offender pleaded guilty to the offence
the offender’s previous character
the presence of any aggravating or mitigating factors.

When weighing up the nature and gravity of the offence, the considerations a judge or magistrate might take into account include:

- the offender’s intention
- the consequences of the offence
- the use of weapons
- any breach of trust
- the offender’s history of offending
- the offender’s response to previous court orders
- alcohol or drug addiction.

Aggravating factors increase the seriousness of the offence or the offender’s culpability. Mitigating factors reduce the seriousness of the offence or the offender’s culpability. The law allows courts to reduce a sentence if a person pleads guilty. If the court gives a discount for a plea of guilty, the judge or magistrate must state what the sentence would have been without the guilty plea.

Further at the time of sentencing young juvenile offender court may take into account following consideration with the objective of rehabilitation and reform of young offenders.

- the desirability of allowing the child to live at home
- the desirability of allowing the education, training, or employment of the child to continue without interruption or disturbance
- the need to minimize the stigma to the child resulting from a court determination
- the suitability of the sentence to the child
- if appropriate, ensuring the child is aware of the need to take responsibility for any action that is against the law
- if appropriate, the need to protect the community, or any person, from the violent or other wrongful acts of the child.
CHAPTER-02

CONCEPT OF AGGRAVATION AND MITIGATION IN THE SENTENCING SYSTEM.

The court may also consider the general pattern of sentencing by criminal courts for the offence in question. Maximum penalty the maximum penalty that a judicial officer can impose for each criminal offence is set out in legislation. The maximum penalty for individual offences differs according to their seriousness. When maximum penalties are set by Parliament, it is intended that such penalties will be imposed only when the case falls within the “worst” category of cases for which the penalty is prescribed. Aggravating and mitigating factors in determining the appropriate sentence for an offence, the court must first assess the seriousness of the offence by reference to the conduct of the offender. The court must also take into account any aggravating factors and mitigating factors. An aggravating factor can increase the potential sentence, whereas a mitigating factor can reduce it. Not every aggravating and mitigating factor present in a particular case will automatically lead to an increase or reduction of a sentence. The relative importance of each factor will vary depending on the circumstances of the case. In the case of young offenders, for example, promoting a young offender’s rehabilitation may be considered more important than the principles of general deterrence (that is, the deterrent effect of a sentence on others in the community who might contemplate committing such a crime) and public condemnation.

2.1. Aggravating factors may includes following circumstances

- If the offence has been committed after previous planning and involves extreme brutality; or
- If the murder involves exceptional depravity; or
- If the murder of any of the armed forces of the Union or of a member of any police forces or of any public servant and was committed-
  (i) While such member or public servant was on duty; or
  (ii) In consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public
servant, as the case may be, or had ceased to be such member or public
servant; or

- If the murder is of a person who had acted in the lawful discharge of his duty
under section 43 of the code of Criminal Procedure, 1973 or who had rendered
assistance to a magistrate or a police officer demanding his aid or requiring his
assistance under section 37 and section 129 of the said Code.

- The victim: – was a public official exercising public or community functions,
for example, a police officer, emergency services worker, health worker, or
teacher, and the offence arose from their work; or was vulnerable (for example,
because of age or disability), or because of the victim’s occupation (such as a
taxi driver, bus driver or other public transport worker, bank teller or service
station attendant).

- The offence involved: the actual or threatened use of violence; the actual use or
threatened use of a weapon; needless (gratuitous) cruelty; or multiple victims or
a series of criminal acts.

- The offence was; committed with others in company committed without regard
for public safety committed in the home of the victim or any other person
committed in the presence of a child under 18 years of age committed while the
offender was on conditional liberty in relation to an offence (for example, if the
offender was on bail or on parole) or motivated by hatred for or prejudice
against a group of people to which the offender believed the victim belonged
(such as people of a particular religion, racial or ethnic origin, language, sexual
orientation or age, or having a particular disability); part of a planned or
organized criminal activity; involved a grave risk of death to another person or
persons; or an offence in which the injury, emotional harm, loss or damage
caused was substantial.

- If the offender has a record of previous convictions; or abused a position of trust
or authority in relation to the victim (such as a school teacher and the victim is a
pupil of the offender, or a health professional and the victim is a patient of the
health professional, and similar positions where the offender has responsibility/authority over the victim).

4 Dr. Pratap S. Malik, LAW ON SENTENCING, EDITION(2016) PAGE NO 45.
2.2. **Mitigating factors may include:**

- That the offence was committed under the influence of extreme mental or emotional disturbance.
- The age of the accused. If the accused is young or old, he shall not be sentence to death.
- The probability that the accused would not commit criminal acts of violence as would constitute threat to society.
- The probability that the accused can be reformed and rehabilitated.
- That in facts and circumstance of the case the accused believed that he was morally justified in committing the offence.
- That the accused acted under the duress or domination of another person.
- That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciated the criminality of his conduct.
- The offence was not part of a planned or organized criminal activity.
- Offender was provoked by the victim.
- Offender was acting under duress.
- Offender does not have any record of previous convictions.
- Offender was a person of good character.
- Offender has good prospects of rehabilitation.

2.3. **Following are some important Mitigating Factor discuss in detailed.**

**A. Age as a Mitigating Factor**

In the Bachan Singh hon’ble apex court had recognized that the young age of the offender is a relevant mitigating circumstance which should be given great weightage in the determination of sentence. The Court has repeatedly held that if the offender committed the crime at a young age, the possibility of reforming the offender cannot be ruled out. For example, in *Ramnaresh v. State of Chhattisgarh*,\(^5\) involving a gang rape and murder, the Court imposed a life sentence taking into account the young age of the convicts (all between 21-30 years of age), which pointed to the possibility of reform. Similarly, in *Ramesh v. State of Rajasthan*,\(^6\) a case involving a double murder for gain, the Court imposed a life sentence by holding that the young age of the convict was a mitigating factor since he could

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\(^6\) Ramesh v. State of Rajasthan, (2011) 3 SCC 685
be reformed. In *Surendra Mahto v. State of Bihar*, 7 the primary mitigating factor considered by the Court in imposing the life sentence was that the offender was only 30 years old and hence could be reformed. However, age as a mitigating factor has been used very inconsistently. In the dissent in Bachan Singh itself, Justice Bhagwati had cited multiple examples of otherwise similar cases where the young age of the offender was or was not considered the basis for imposing a life sentence instead of death. This trend of inconsistency in considering the age of the accused as a mitigating factor continues post-Bachan Singh. To take one example, in *Dhananjay Chatterjee v. State of West Bengal*, 8 the Supreme Court had imposed the death sentence on the offender for committing the rape and murder of an 18 year old woman who lived in a building where he was a security guard. This case was noticed in *Rameshbhai Chandubhai Rathod (2) v. State of Gujarat*, 9 which according to the Court’s own assessment involved similar facts except that the rape and murder in this case was that of a child. On reference to a larger Bench because the two judge Bench could not agree on the sentence, the three-judge Bench of the Court noted the similarity of the facts to Dhananjay Chatterjee’s case, but held that offender’s age was only 28 years which left open the possibility of reform, and hence imposed the life sentence. Therefore in an admittedly similar fact situation Rameshbhai Rathod was given the life imprisonment because he was 28 years old. Dhananjay Chatterjee was given the death sentence and was executed in 2004. He was 27 years old. *Purushottam Dashrath Borate v. State of Maharashtra*, 10 a very recent case decided by the Supreme Court in May this year, involved a similar fact situation of rape and murder. The Court again pointed to the similarity of the case to that of Dhananjay Chatterjee, and following Dhananjay Chatterjee, it imposed the death penalty on both the offenders. The Court did not refer to the decision in Rameshbhai Rathod; nor to the decision in Shankar Khade which had doubted the imposition of the death penalty in Dhananjay Chatterjee on the ground that the Court had not accounted for mitigating factors. The age of the offenders in Purushottam Dashrath Borate was 26 years and 20 years respectively. 11 The Supreme Court in Shankar Khade pointed to the inconsistent use of age as a mitigating factor in otherwise similar cases of

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8 Dhananjay Chatterjee v. State of West Bengal, (1994) 2 SCC 220
11 The age of the accused is taken from the High Court judgment in this case. See State of Maharashtra v. Purushottam Dashrath Borate, Criminal Appeal No. 632/2012(Bom), 25.09.2012.
rape and murder. On the one hand the offenders in *Amit v. State of Maharashtra*, 12 (aged about 20 years), *Rahul v. State of Maharashtra*, 13 (aged 24 years), *Santosh Kumar Singh v. State*, 14 (aged 24 years), *Rameshbhai Chandubhai Rathod (2) v. State of Gujarat*, 15 (aged 28 years), and *Amit v. State of Uttar Pradesh*, 16 (aged 28 years), were not given the death sentence since their age was considered a mitigating factor, on the other in Dhananjoy Chatterjee, 17 (aged 27 years), *Jai Kumar v. State of Madhya Pradesh*, 18 (aged 22 years), and *Shivu & Anr. v. Registrar General, High Court of Karnataka*, 19 (aged about 20 and 22 years), the young age of the accused was either not considered or was deemed irrelevant.

B. **Nature of offence as an Aggravating Factor**

Since the death penalty is to be awarded only in the rarest of rare cases, Bariyar required judges to survey a pool of similar cases to determine whether the case before them was rarest of rare or not. Recently, in Shankar Khade, the Supreme Court again alluded to the need for evidence based death sentencing, and was concerned that the rarest of rare formulation is unworkable unless empirical evidence is made available which allows the Court to evaluate whether that a particular case is “rarer” than a comparative pool of rare cases. In the absence of this data, the Court felt that the application of the rarest of rare formulation becomes “extremely delicate” and “subjective.” 20 However, as the Court realised in this case, while surveying a pool of cases relating to rape and murder, the rape and murder of a young child shocks the judicial conscience in some cases, not in others. So, for example, on the one hand the Court has held that the rape and murder of a one and half year old child in one case, 21 of a 6 year old child in another, 22 and 10 year old child in a third, 23 would not attract the death penalty because though these crimes were heinous, the offenders were not a danger to society, and the possibility of reform was not closed. On the other hand, in another series of cases, the Court has held that the rape and murder of a 5 year old, 24 a 6 year old, or a 7 year old, or a 9 year old, were by their very nature extremely

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19 *Shivu v. Registrar General, High Court of Karnataka*, (2007) 4 SCC 713
brutal, depraved, heinous and gruesome, and were thus deserving of the ultimate penalty. So for example, in *Jumman Khan v. State of UP*, involving the rape and murder of a 6 year old, the Court held that “the only punishment which the appellant deserves for having committed the reprehensible and gruesome murder of the innocent child to satisfy his lust, is nothing but death as a measure of social necessity and also as a means of deterring other potential offenders.” Similarly, in *Md. Mannan @ Abdul Mannan v. State of Bihar*, the convict had kidnapped, raped and murdered a seven year old. The Court awarded the death penalty since the victim was an “innocent, helpless and defence less child.” The Court held that the crime “had invited extreme indignation of the community and shocked the collective conscience of the society. Their expectation from the authority conferred with the power to adjudicate, is to inflict the death sentence which is natural and logical.” With respect, given the contrary line of cases above, it is not clear from this judgment why in this case, but not in the ones mentioned above, the collective conscience of the society had been so shocked as to invite the punishment of death. The inconsistencies highlighted here, and noticed by the Court itself in Khade, make the infliction of the death penalty in this case anything but “natural and logical.” These inconsistencies have moved the Supreme Court to itself acknowledge that “there is a very thin line on facts which separates the award of a capital sentence from a life sentence in the case of rape and murder of a young child by a young man and the subjective opinion of individual Judges as to the morality, efficacy or otherwise of a death sentence cannot entirely be ruled out.” Similarly, compare the cases of *State of Maharashtra v. Damu* against *Sushil Murmu v. State of Jharkhand*. In the former, the accused were convicted of murdering three children as human sacrifice for recovering hidden treasure. The Court did not impose the death penalty on them even though it held that “the horrendous acts” made it “an extremely rare case.” Nevertheless, the Court imposed life imprisonment on the reasoning that the crime was motivated by ignorance and superstition, which were considered to be mitigating circumstances. As against this, in Sushil Murmu, where the accused was convicted for murdering one child as human sacrifice, the Court held that given the nature of the crime, the accused “was not possessed of the basic humanness and he completely lacks the psyche or mind set which can be amenable for any reformation to be beyond reform.” Stating that the crime “borders on a crime against humanity indicative of greatest depravity shocking the conscience of not only any right thinking person but of the Courts of law, as well,” the Court refused to consider

the superstitious motivation as a mitigating factor. Instead it held that “no amount of superstitious colour can wash away the sin and offence of an unprovoked killing, more so in the case of an innocent and defenceless child.” For the Court, a case of this sort “is an illustrative and most exemplary case to be treated as the ‘rarest of rare cases’ in which death sentence is and should be the rule, with no exception whatsoever.”520 Therefore, in similar circumstances, while in one case the Court found the murder of three children for human sacrifice to not call for the imposition of the death penalty, in another case it found the murder of one child for similar reasons to require the imposition of the death penalty as a rule.

C. Prior Criminal Record of the Offender as an Aggravating Factor

While the Court has often taken into account the prior criminal record of the offender in determining whether the person is capable of reform, the Supreme Court in Sangeet and Shankar Khade pointed to instances where the Court had taken into account cases that were merely pending before the courts, and had not been finally decided. Holding that basing the decision to impose the death penalty on such pending cases would amount to a negation of the principle of presumption of innocence, the Supreme Court admitted that these decisions were erroneous. One such case was Sushil Murmu v. State of Jharkhand, where the offence involved murder for the purposes of human sacrifice. In imposing the death sentence, the Court took into account the “criminal propensities of the accused which are clearly spelt out from the fact that similar accusations involving human sacrifice existed at the time of trial.” Though the Court recognized that the result of the accusations against him were not brought on record, and therefore it was not clear whether the accusations resulted in a conviction, the Court held that “the fact that similar accusation was made against the accused-appellant for which he was facing trial cannot also be lost sight of.” On this basis, the Court imposed the death sentence on the accused. Similarly, in B.A. Umesh v. Registrar General, High Court of Karnataka, where the accused was convicted for rape, murder and robbery, the Supreme Court imposed the death sentence on him, inter alia, on the ground that he had engaged in similar conduct previously, and had been caught two days after the present incident, trying to commit a similar crime. The Court held that “the antecedents of the appellant and his subsequent conduct indicates that he is a menace to society and is incapable of rehabilitation.” As noted by the Supreme Court itself in Sangeet, the allegations against Umesh of having committed other offences was never proved or brought on record. Despite this, a review petition against this decision was dismissed by the Court, again referencing the allegation that “far from showing any remorse, he was caught
within two days of the incident by the local public while committing an offence of a similar type in the house of one Seeba.” So while on the one hand, in one line of cases the court has taken into account cases pending (but not decided) against the accused, in another line of cases, which includes Sangeet, as well as *Mohd. Farooq Abdul Gafur v. State of Maharashtra*, the Court has held that unless a person is proven guilty in a case, it should not be counted as an aggravating factor against him. The Possibility of Reform In Bachan Singh the Supreme Court required that the death penalty should be imposed only in those exceptional, rarest of rare cases where the “alternative option is unquestionably foreclosed.” The Supreme Court recognized in Bariyar, that under the Bachan Singh framework, the option of life is “unquestionably foreclosed” and “completely futile, only when the sentencing aim of reformation can be said to be unachievable.” Bachan Singh relied on the pre-sentence hearing requirement in Section 235(2), Cr. P. C. to provide the information necessary for courts to determine what mitigating circumstances, if any, were present in the case, and what, therefore, the appropriate punishment in the case would be. According to the Court, 130 Section 235(2) provides for a bifurcated trial and specifically gives the accused person a right of pre-sentence hearing, at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, have, consistently with the policy underlined in Section 354(3), a bearing on the choice of sentence. The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302, Penal Code, the Court should not confine its consideration principally or merely to the circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal.26 Thus, in Bachan Singh, central to the rarest of rare formulation is the assessment of the offender’s possibility of reform, which is to be determined through a distinct pre-sentence proceeding where evidence is to be led on the issue. Drawing upon the Bachan Singh endorsed standard that the state has to lead evidence to show that the convict cannot be reformed or rehabilitated and thus constitutes a continuing threat to society,27 Bariyar held that, “the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation

26 Bachan Singh v. State of Punjab, (1980) 2 SCC 684, at para 209. See also Allauddin Mian v. State of Bihar, (1989) 3 SCC 5, (“All trial courts, after pronouncing an accused guilty, must adjourn the hearing on quantum of sentence to another day to enable both the convict and the prosecution to present material in support of the quantum of sentence”).

27 In Bachan Singh, the Court endorsed the following standards: (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society. (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.
scheme.” Such an evidence based account of the possibility of reform was deemed essential by the Court for introducing an element of objectivity into the sentencing process. The requirement that the state should justify, not only through arguments, but through evidence, that the exceptional penalty of death is the only option in the case, has been reiterated by the Court in Shankar Khade. However, Bariyar has rarely been followed, which is itself a testament to the capricious nature of the death penalty jurisprudence in India. Recently, in Shankar Khade, Anil @ Anthony Arikswamy Joseph v. State of Maharashtra, and Birju v. State of M.P., amongst others, the Court has again reiterated the need for evidence based assessment of the possibility of reformation of the offender. However, as these cases have also noted, “many-a-times, while determining the sentence, the Courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation…” An example is Mohd. Mannan v. State, where the accused was convicted for rape and murder. The Court in this case opined that the accused is “a menace to the society and shall continue to be so and he cannot be reformed.” Noticing this case in Sangeet, the Supreme Court noted that the judgment did not indicate any material on the basis of which the Court concluded that the criminal was a menace to society and “shall continue to be so and he cannot be reformed.” It appeared that the only factor upon which the Court had based this conclusion was the nature of the crime. However, as noted in Shankar Khade, in otherwise similar facts, the Court has come to differing conclusions on whether the accused was capable of reform. Therefore, while on the one hand the possibility of reformation or rehabilitation was ruled out, without any expert evidence, in Jai Kumar v. State of Madhya Pradesh, and Mohd. Mannan v. State of Bihar, on the other hand, again without any expert evidence, the benefit of this possibility was given in Nirmal Singh v. State of Haryana, and Mohd. Chaman v. State (NCT of Delhi).
CHAPTER-03

DOCTRINE OF PROPORTIONALITY THEORY OF SENTENCING.

Censuring the offender and communicating society’s disapproval of his/her actions is a primary goal of the theory of proportionality. The society’s censure of the offender’s actions is communicated to him/her by imposing a proportionate sentence – one that is not greater than what she/he deserves. Proportionality through its communicative function aims to make the offender repent his/her actions. This is done by providing the offender the means to express remorse. Further, a core requirement of the theory of proportionality is that the punishment imposed should not be “out of proportion to the gravity of the crime involved.” Section 143(1) of the [U.K.] Criminal Justice Act, 2003 provides an illustration of this principle. It states that “In considering the seriousness of any offence, the court must consider the offender’s culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.”

The severity of the sentence is an important consideration for the theory of proportionality, since a disproportionate or severe punishment overpowers the element of censure. Consequently, the theory favours lower levels of incarceration and a pro rata reduction of existing penalty scales across jurisdictions. Proportionality respects rule of law values, and places limits on the sentencing power.

In some cases, the Supreme Court has used proportionality as a penological goal. Ruling that “[t]he criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct,” the Court has used

29 ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 84 (2005).
31 ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 84 (2005).
34 ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 84 (2005).
proportionality as a justification to impose the death penalty. The Court has also read into the principle of proportionality, the requirement of taking societal considerations into account. It observed: “the doctrine of proportionality has a valuable application to the sentencing policy under the Indian criminal jurisprudence…[T]he court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large.” It has also stated that “imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise.”

A three-judge Bench of the Supreme Court has recently provided guidance on how the doctrine of proportionality can be applied in the death penalty context. The Court held: In dealing with questions of proportionality of sentences, capital punishment is considered to be different in kind and degree from sentence of imprisonment. The result is that while there are several instances when capital punishment has been considered to be disproportionate to the offence committed, there are very few and rare cases of sentence of imprisonment being held disproportionate.

An accurate understanding and application of the theory of proportionality can be found in Bariyar, in which the Court provided a framework within which the sentencing exercise should be undertaken in a death penalty case. It said that the court should first compare the facts of the case before it with a “pool of equivalently circumstanced capital defendants.” The gravity and nature of the crime, as well as the motive of the offender may be considered in this analysis. The aggravating and mitigating circumstances should then be identified. These should also be compared with a pool of comparable cases. This would ensure that the court considers similarly placed cases together, and the exercise would inform the court of how a similar case has been dealt with earlier. The Court opined that this exercise may point out excessiveness in sentencing, if any, and at the same time reduce arbitrariness to a certain extent. It also advised that the exercise proposed by it should definitely be undertaken if the sentencing court opts to impose the death penalty on the convicted person. Importantly, the court also held that reasoning is the most important element to ensure “principled sentencing.”

40 Vikram Singh v. Union of India, Criminal Appeal No. 824 of 2013 (SC), dated 21 August, 2015, at para 49
As mentioned earlier, the core focus of proportionality is censure. The communicative aspect of punishment is also an important consideration. The censure and communicative aspect are better achieved through life imprisonment, rather than by imposing the death penalty on the offender. Incarceration provides the offender the means to express remorse and communicates the society’s disapproval for his/her actions. The death penalty, on the other hand, undermines the communicative aspect of the punishment, since the offender’s life is taken away. Hence, from this perspective, life imprisonment serves the proportionality goal more adequately than the death penalty.

The other communicative aspect of proportionality is the communication to society that the offender’s actions are not acceptable. In this context, it is pertinent to note the “brutalization effect.” Bowers and Pierce argue that when killings are carried out by a state, it undermines the communicative aspect by justifying what it seeks to condemn. It also devalues life in the eyes of the common person which further empowers offenders.

3.1. **Cumulative and concurrent sentences**

Cumulative and concurrent sentences If an offender is to be sentenced for more than one offence, then he or she may be given a separate sentence for each offence. In such a case, the court can order that the sentences be served concurrently or cumulatively, or a combination of both. Concurrent sentences commence at the same time as each other and run at the same time. This means that if an offender is given a two-year sentence for one offence and a five-year sentence for a related offence, and those sentences are directed to be served concurrently, the total period of imprisonment will be five years. Cumulative sentences run consecutively, that is, one after another. A sentence may be partly concurrent and partly cumulative upon an earlier sentence. One of the circumstances that may prompt a court to decide that sentences should be served concurrently or at least partly concurrently is if the offences have features in common or if they happened at around the same time and is connected for example, if all the offences arose in a single course of criminal conduct. Proportionality a fundamental principle in sentencing is that the court must impose a sentence that is proportional to the offence committed. That is, the sentence should not be more or less than what is appropriate, considering the seriousness of the crime.

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CONCLUSION AND SUGGESTION

Currently India does not have structured sentencing guidelines that have been issued either by the legislature or the judiciary. In March 2003, the Committee on Reforms of Criminal Justice System (The Malimath Committee), a body established by the Ministry of Home Affairs, issued a report that emphasized the need to introduce sentencing guidelines in order to minimize uncertainty in awarding sentences.

The Indian Penal Code prescribed offences and punishments for the same. 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 minimize uncertainty to the matter of awarding sentence. There are several factors which are relevant in prescribing the alternative sentences. This requires a thorough examination by an expert statutory body\(^{45}\).

The Committee advised further that, in order to bring “predictability in the matter of sentencing,” a statutory committee should be established “to lay guidelines on sentencing guidelines under the Chairmanship of a former Judge of Supreme Court or a former Chief Justice of a High Court experienced in criminal law with other members representing the prosecution, legal profession, police, social scientist and women representative.” In 2008, the Committee on Draft National Policy on Criminal Justice (The Madhava Menon Committee), reasserted the need for statutory sentencing guidelines. In an October 2010 news report, the Law Minister is quoted as having stated that the government is looking into

establishing a “uniform sentencing policy” in line with the United States and the United Kingdom in order to ensure that judges do not issue varied sentences.\footnote{Govt for a Uniform Sentencing Policy by Courts, ZeeNews (Oct. 7, 2010), \url{http://zeenews.india.com/news/nation/govt-for-uniform-sentencing-policy-by-courts_660232.html}}

In 2008, the Supreme Court of India, in \textit{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. 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.”\footnote{State of Punjab v. Prem Sagar & Ors., (2008) 7 S.C.C. 550, para. 2, \url{http://judis.nic.in/supremecourt/imgs1.aspx?filename=31541}.} The Court stated that the superior courts have come across a large number of cases that “show anomalies as regards the policy of sentencing,” 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.” In 2013 the Supreme Court, in the case of \textit{Soman v. State of Kerala}, also observed the absence of structured guidelines:

Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the trial court in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges.\footnote{Soman v. State of Kerala, (2013) 11 S.C.C. 382, \url{http://judis.nic.in/supremecourt/imgs1.aspx?filename=39837}.}

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.”\footnote{Jagmohan Singh v. State of Uttar Pradesh, (1973) 2 S.C.R. 541, para. 26, available at \url{http://indiankanoon.org/doc/1837051/}.}

Sentencing procedure is established under the Code of Criminal Procedure, which provides broad discretionary sentencing powers to judges.\footnote{Code of Criminal Procedure, No. 2 of 1974, available at \url{http://www.oecd.org/site/abcdanti-corruptioninitiative/44814340.pdf}. Sentencing is covered under section(s) 235, 248, 325, 360 and 361 of the Code. In a 2007 paper on the need for sentencing policy in India, author R. Niruphama asserted that, in the absence of an adequate sentencing policy or guidelines, it comes down to the judges to decide which factors to take into account and which to ignore. Moreover, he considered that broad discretion opens the
sentencing process to abuse and allows personal prejudices of the judges to influence decisions.\textsuperscript{51}

In the Supreme Court’s judgment in \textit{Soman v. State of 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.”\textsuperscript{52} As part of the proportionality analysis, mitigating and aggravating factors should also be considered, the Court noted.

In \textit{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.”\textsuperscript{53} Moreover, in \textit{Alister Anthony Pareira v. State of Maharashtra}, the Court held that sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: the twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.

\textsuperscript{51} For a discussion on the deficiencies of the sentencing framework established in the Code, see R. Niruphama, Need for Sentencing Policy in India: Second Critical Studies Conference – “Spheres of Justice” Paper Presentation (Sept. 20–22, 2007), \url{http://www.mcrg.ac.in/Spheres/Niruphama.doc}


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