CRIME & SENTENCING

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I. INTRODUCTION

The idea of a crime is that it is something that rightly concerns the State, and not just the person(s) affected by the wrongdoings. Many crimes are civil wrongs as well, such as- torts or breaches of contract, and it is the injured party which is required to decide whether to sue for damages. However, the decision to convert a "*conduct"* into a "*crime*" implies that there is an element of public interest in ensuring that such conduct does not happen and that, when it does, there is a possibility of state punishment.[1]

Crime as a public wrong is a wrong which the community is appropriately *responsible* for punishing. That, in philosophical terms, is what is characteristic of crimes, at least of fault-based crimes. It is in public interest to provide for the punishment of serious wrongs contained in violent acts, whenever they occur and whoever inflicts them[2]. The "Manava-Dharamsatra" (*Manu's Code of Law*), explains "The Law for the King" on punishments. It says in Chapter 7 that "*the king should administer appropriate punishment on men, who behave improperly*" and that "*punishment disciplines all the subjects, punishment alone protects them and watches over them as they sleep- Punishment is the Law, the wise declare.*"[3]

To emphasize the need for punishments in order to maintain social order he adds "*if the king fails to administer punishment tirelessly on those who ought to be punished, the stronger would grill the weak like fish on a spit; crows*

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[1] ANDREW ASHWORTH & JEREMY HORDER, PRINCIPLES OF CRIMINAL LAW (6th ed. 2009).
[2] Grant Lamond, *What is a Crime?*, 27 Oxford J. Legal Studies 609, 615-20 (2007) as cited in ASHWORTH ANDREW & JEREMY HORDER, PRINCIPLES OF CRIMINAL LAW (6th ed. Oxford University Press).
[3] OLIVELLE PATRICK, MANU'S CODE OF LAW: A CRITICAL EDITION AND TRANSLATION OF THE MANAVA-DHARMSASTRA 155 (Oxford University Press 2005).

would devour the sacrificial cakes; dogs would lap up the sacrificial offerings; no one would have any right of ownership; and everything would turn topsy-turvy."[4]

Authorising the state to prosecute for crime is necessary to ensure social order and to curb vigilantism. This is in consonance with the principle engrafted in Article 21 of the Constitution. State agencies investigate and prosecute, and the Courts (*bound by the Constitution and laws*) independently adjudicate and determine (a) *innocence/guilt* and (b) *punishment*. Thus when a court passes a sentence, it authorizes the use of state coercion against a person for committing an offence[5] and is required to act within the confines of Article 21.

The 'core values of criminal law' prohibit violence and deception, and confer benefits on all persons and society. The benefits are consisted in the non-interference by others in certain protected areas of a person's life. These benefits are only possible if a burden of self-restraint is accepted, and people do not seek to satisfy their inclinations to engage in activities which interfere with the protected area of the life of others. When the criminal violates the law, he/she renounces the burden which law abiding citizens accept. At the same time the criminal continues to enjoy the benefits of the law. The criminal has therefore taken an unfair advantage of the law abiding citizens. Punishment is justified to remove the unfair advantage of the criminal and it will restore the just equilibrium of the benefits and the burdens which are disturbed by the acts of criminals.[6]

Justification of punishment is in two dimensions- as a deserved response to culpable wrongdoing, and as an institutional necessity to deter wrongdoing.[7] Justification for sentencing is that offenders deserve punishment for their offences, and it is just (*and not merely expedient*) to provide for serious wrongs culpably inflicted, to be met with censure and sanctions (*by the State*). The essential aspect of sentencing in criminal law is that it grades offences and labels them according to proportionality. The threat of punishment is not only a conditional threat of a painful sanction. It is an official expression of how negatively different kinds of actions or omissions are judged.[8]

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[4] *Id.*
[5] ANDREW ASHWORTH, SENTENCING & CRIMINAL JUSTICE (6th ed. 2015).
[6] Herbert Morris, *Persons and Punishment*, 52 The Monist 475(1968) cited in C. L. TEN, THE AMOUNT OF CRIME, GUILT AND PUNISHMENT (Oxford University Press 1987)
[7] *Supra* note at 1.
[8] N. Jareborg, *The Coherence of the Penal System*, in his Essays in Criminal Law (1988) as cited in ASHWORTH ANDREW, PRINCIPLES OF CRIMINAL LAW (6th ed. 2009).

The general principle is that the punishment and the crime should be equal or equivalent. One way of ensuring equality is to repeat what the offender has done with roles reversed. But just as one can repay the borrowed sugar by returning something else deemed to be of equal value, so punishment gives offenders their "just deserts" if it inflicts upon them the degree of suffering which is judged to be equivalent to the suffering caused by their respective crimes. Interpreted in this manner, the principle resembles the utilitarian doctrine in some respects in that it reduces both the crime and the punishment to a common denominator, the suffering caused against which they may be compared. It differs from utilitarianism in insisting that punishment must equal the crime irrespective of the consequences produced by such equality. So even when a lesser punishment will serve to reduce a crime more effectively than a greater punishment, the latter is still to be meted out if it is deserved in accordance with the facts and circumstances of the case.[9]

Post the 16 December 2012-*Nirbhaya gang rape,* the Justice Verma Committee in 2013 in recommending enhancement of punishment for sexual offences noted that "*every member of the community is able to live his/her life because of the protection afforded by the community and the Rule of Law. But, when one member of the community shows ingratitude to the community by killing a fellow member of the community or when the community feels that its very existence is under threat, then for the purposes of self preservation, the community withdraws its protection. This withdrawal of protection results in imposition of death penalty."*[10]

The Criminal Justice System also distinguishes between classes of crime. Indian Courts have noted that there are acts which are private in nature (like) cheating, breach of trust etc. whereas others are public in nature. In *Gian Singh v. State of Punjab*[11], discussing the power of the Court to quash criminal proceedings, the Supreme Court held that heinous and serious offences of mental depravity or offences like murder, rape, dacoity, are not private in nature and have serious impact on society. Sentencing must reflect this distinction as well.

[9] C. L. TEN, THE AMOUNT OF CRIME, GUILT AND PUNISHMENT (Oxford University Press 1987).
[10] Justice (Redtd.) J. S. Verma, Report of the Committee on Amendments to Criminal Law 243 (2013).
[11] (2012) 10 SCC 303 at ¶ 58.

II. COLLECTIVE CONSCIENCE OF SOCIETY

Criminal courts determining sentences require judges to weigh the impact of the adequacy of a sentence on the society and in doing so, to consider the collective conscience of society which is a crucial element in awarding appropriate sentence. The role of the State is to act in ensuring public order and a balance in society. The different wings of criminal justice system i.e. prosecution, investigation etc. have to act in furtherance of this role.

This test of collective conscience was used in *Machhi Singh*[12], *Union of India v. Sriharan*[13] and *Raj Bala v. State of Haryana.*[14] In *Machhi Singh's* case while discussing this concept of collective conscience, the Supreme Court held:

> *" It may do so 'in rarest of rare cases' when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:"*[15]

Imposition of appropriate punishment is the manner in which Courts must respond to society's cry for justice against crime. A civilized society expects that the Courts should impose adequate punishment befitting the crime. Section 354(3) of the Criminal Procedure Code ("**CrPC**"), requires "special reasons" to award a death sentence. The more brutal and striking the crime, the more special and exceptional are the reasons for granting death penalty. That the use of the term "collective conscience" or "society's cry for justice" in cases where death sentence is awarded does not reflect majoritarianism, has been accepted in *Mukesh v. State.*[16]

[12] (1983) 3 SCC 470 at ¶ 32-40.
[13] (2016) 7 SCC 1 at ¶ 87-88.
[14] (2016) 1 SCC 463 at ¶ 16.
[15] *Supra* note 12 at ¶ 31-32.
[16] (2017) 6 SCC 1 at ¶ 486-509 ¶ 516.

A similar *"*collective community standards*"* test has been applied in the context of defamation and obscenity. While upholding the constitutionality of criminal defamation (S.499/500 of the Indian penal Code), the Supreme Court in *Subramanian Swamy v. Union of India*[17] held that there is a distinction between social interest and the notion of majority, and that the legislature has kept criminal defamation as it subserves the collective interest of society, since reputation of an individual is inherent in the reputation of all.

III. ROLE OF VICTIM IN SENTENCING

Justice Malimath Committee in 2003 found that no substantial rights to victims existed in the Criminal Procedure Code and hence made recommendations in regard to the right of the victim to participate in serious crimes cases and for adequate compensation to victims.[18] In 2009, a proviso was inserted to Section 372 through the Criminal Procedure Code (Amendment) Act, 2008 (Act 5 of 2009), to confer a substantial right of appeal on victims and not limit them to challenging an acquittal through revision power (S.397 to 401 CrPC).[19]

Pro-victim initiatives and restorative justice, have also raised questions about the categorization of crimes 'as offence against the State' and the involvement of victims in decision-making in criminal justice system[20]. Courts have held that the punishment should be corresponding to the crime and should act as a soothing balm to the suffering of the victim and their family. Reference maybe made to *Mohfil Khan v State of Jharkhand*[21]; *Purshottam Dashrath Borate v State of Maharashtra*[22].

[17] (2016) 7 SCC 221 at ¶ 196.
[18] Dr. Justice V. S. Malimath, Committee on Reforms of Criminal Justice System (2003).
[19]"Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court." Code of Criminal Procedure, 1973, § 372, No.2, Acts of Parliament, 1974 (India).
[20] *Supra* note at 1.
[21] (2015) 1 SCC 67 at ¶ 63-65.
[22] (2015) 6 SCC 652 at ¶ 26-45.

IV. PARAMETERS OF SENTENCING

Sentences must be imposed in a way that it reflects the philosophical rationale and purpose behind its imposition. In India sentence is based on seriousness of the crime and not only to provide just punishment for the crime but also to act as a deterrent to criminal conduct and protect the community. Punishment in India seeks to serve three fold purposes i.e. punitive, deterrent and protective. Courts must see that the public does not lose confidence in the judicial system, and imposing inadequate sentences would do more harm to the justice system and may lead to a state where the victim loses confidence in the judicial system and resorts to private vengeance.

In any sentencing process and even in awarding the death penalty, there is a subjective element involved and that subjectivity is tasked to the Courts by the Parliament. The element of subjectivity makes it impossible for Courts to lay down a straight-jacket judicial formula for imposition of a particular sentence, but the object of sentencing should be such that the crime does not go unpunished and the victim of the crime as also the society has the satisfaction that justice has been done.

Disparity in sentencing adversely impacts both the victim and convict and creates doubts as to the efficacy of the Criminal justice system. In *State of Punjab v. Prem Sagar*[23], the Court noted a number of cases which "*show anomalies as regards the policy of sentencing*". In *Soman v. State of Kerala*[24], it said *"giving punishment … is the weakest part of the administration of criminal justice."* The Malimath Committee (2003) expressed desirability of sentencing guidelines in order to minimize uncertainty in awarding sentences. The Committee on Draft National Policy on Criminal Justice (*Madhava Menon Committee*) reasserted the need for statutory sentencing guidelines.[25] Professor Mrinal Satish too, in his book, "Discretion, Discrimination and the Rule of Law; Reforming Rape Sentencing in India"[26] proposes a Sentencing Commission and a Sentencing Information system.

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[23] (2008) 7 SCC 550.
[24] (2013) 11 SCC 382.
[25] Pallab Das & Paras Padhi, *Sentencing Disparity in India: Need for Comprehensive Sentencing Guidelines*, LIBERTATEM MAGAZINE (Aug. 7, 2017, 9:20 PM), http://libertatemmagazine.com/articles/sentencing-disparity-in-india-need-for-comprehensive-sentencing-guidelines/.
[26] MRINAL SATISH, DISCRETION, DISCRIMINATION AND THE RULE OF LAW: REFORMING RAPE SENTENCING IN INDIA (Cambridge University Press 2016).

V. CONCLUSION

So far neither the Parliament nor the judiciary has issued structured sentencing guidelines. The need to adopt such guidelines in order to minimize uncertainty in awarding sentences is crucial for a well ordered society. While higher courts provided judicial guidance in the form of principles and factors that courts must take into account while exercising discretion in sentencing, judges have wide discretion in awarding sentence within statutory limits. Each judge exercises discretion according to his own judgment and there is therefore, no uniformity. This discretion in the sentencing process results in ambiguity, and two persons, similarly or identically placed are sentenced differently. The need of the hour is to do away such ambiguity which breaches both Article 14 & Article 21 of the Constitution.

There is a need to introduce legislation for ascertaining parameters and a sentencing policy to provide a framework within the existing range of sentences while leaving discretion to the Courts to act within those legislatively drafted parameters. Till such legislative change happens, such parameters can be engrafted in each High Court's Rules which have legislative backing and provide guidance to subordinate Courts.