

**“Seminar on Sentencing in Criminal Cases for High Court Justices heading
Criminal Division” (P-976)**

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Introduction:

INAUGURAL SESSION

By Dr. Geeta Oberoi

Dr. Geeta Oberoi began the Conference by welcoming the guests and speakers and gave the thematic overview of the conference. She introduces about the today's program how to go about it. She spoke about the pattern of the seminar. 45 minutes for hear the speaker and 15 minutes for the question and answer. Before start the conference she suggested we should know about each other because all are from different - different jurisdictions.

Session - 1

By Prof. Dr. K. Chockalingam

Prof. Chockalingam talks about the Sentencing Philosophies. He started with the definition of Sentencing – A sentence is a decree of punishment and it forms the final explicit act of a judge-ruled process, and also the symbolic principal act connected to his judicial function. Criminal penalties are called sentences in criminal justice administration. He spoke about the stakeholders/players in criminal justice administration. Goals of sentencing basically consist of four major ingredients like Deterrence, Incapacitation, Rehabilitation and Retribution and Restoration. But in day-to-day practice most sentencing systems serve multiple goals, but sentencing officials often favour different jurisdictions for different punishment of different offenders at different times. What factors determine the choice of a sanction of sentence? He spoke about the recent trend of victim impact statements. In practice, most sentencing systems serve multiple goals, but sentencing officials often favour different jurisdictions for different punishment of different offenders at different times. Judges often employ a combination or mix of sentencing philosophies in justifying their selection of a sanction. Various factors determine the choice of a sanction. He focuses the views of United Nations on Sentencing/Punishment practices. Law reform and sentencing policies in various foreign jurisdiction like Finland etc. He spoke on need to promote community service one of the mode of sentencing. Protection of society against crime is the paramount duty of any

government. Judges now days by trial and error methods, different forms and degrees of punishment have been tried but with no success. To achieving the best practices it is need to be look the sentencing as important responsibility for the judges in deciding what punishment suits whom.

Session - 2

By Dr. Usha Ramanathan

She talks about the traditional and emerging approach towards sentencing. Started with the how to approach the idea of sentencing? Judges has excellent learner. Juvenile try to link themselves with Dada's and Roads. How do you look at the crime? Bacchan Singh Judgment how applied it? This was the landmark judgment on sentencing how to use it in the current regime. The idea of crime and criminal now days taken into consideration at the point of sentencing. Increasing the idea crime, criminal and circumstances that all three counts. When any sentence is going to be awarded to a person it's committed by certain kind of person. Crime and criminal comes when certain circumstances arose. If it's only going to punishing the person we punishing the crime not the criminal. This is one of the places where lot of the American scholars research. How do you look at the crime? She spoke about Nirbhaya's Case has taught different reason for legislature and judges. Legislature gap about mass crime (Genocide). Crime against humanity war crime. She talks about the Kasab case. Idea of crime and criminal new kind of crime coming in the society. Recent time in Juvenile Dec. 16 episode in Delhi. How public policy works in Indian criminal justice system. Rational choice by criminal judge needs to see it, and not range of choice. Need to reform the sentencing policy in criminal justice system. In modern days totally failure juvenile justice system. She also talks about the mass crime and corporate crime. Idea of crime and criminal and circumstances are the core ingredient of the criminal justice system. Context of mass crime not defined in law. International thinking was abolished the death sentencing. Death mandatory demand by public is an expression come out of frustration towards criminal justice system.

Session – 3

Mr. V. A. Ramesh Nathan

He talks about the practical aspect of sentencing particularly atrocities are on rampant level (240 million SC & ST). He focuses on geographical segregation of SC/ST. The national campaign on Dalit rights working on protection and promotion of human rights of Dalit communities with not working for more than 17 to 17 states since for

1990 we have a very systematic monitoring of Dalit human rights by trying human rights defenders and based objective fact findings of various caste and atrocity cases and provide legal support and based on our experience to the last we also being engaged looking at reviews to the SC/ST. He found there are so many gapes while implementing and we proposed amendments drafting the amendments and submitted to social justice and empowerment ministry and the amendments we all know that there has been passed by both the houses of the parliament. It has coming to be enforcement, here, we are not going to discuss about theoretical aspects of sentencing and caste based discrimination but I am going to reflect based on our experience of monitoring and implementing sometimes, we feel very frustrated because the kind of challenge we face because you know that the constitution prohibited untouchability in our constitution prohibited abolished and many welfare administration to promote the socio economic development of SC/ST but despite of all this but still the caste system exist, caste based discrimination is exist and atrocity are ramped last 15 to 20 years and in very communities which is very disturbing however, India is progressing, developing nation in science and tech. We compare our shelf as developed countries but we looked the various aspects the large section of communities SC/STs which is almost 2 hundred and 40 million of the people and day to day basis we come up many fonts of atrocities. We have similar political fundamental rights which permits as to reside anywhere with in the territory but we from non-Dalit village to Dalit village we cannot live in non-Dalit village such geographical segregation also still very strong exist in the country and a SC/STs section which a very powerful act, which had got both punishment and as well as rehabilitation and compensation font the victims but still we have lots of challenges are committed last few years how this crimes are committed and conviction rate are sentencing under the ...been implemented this is the overall statistics taken from the national crime bureau. Because I am not bringing the kind of atrocity that we are under taken from the monitoring but this government, statistics that last 2001to 2012 we can see 3 lakhs 70213 crimes committed against Dalit's out of which 15 thousands 9017 women's were raped and 7900 are murdered 49508 are brutally attack severely injured and other fonts of atrocity. When a judge is determining a sentence, is he supposed to look into effect of it on the offender? Whether offender is reformed or not, is it somehow to be looked into by the judge. Criminal tribes act has been repealed but removed by habitual offenders act. Those

who were tried under criminal tribe act are now tried and convicted under the habitual offenders act. It is kind of old wine in new bottle.

Session – 4

Justice Gyan Sudha Misra

She starts with what is the ratio of judgment? Judicial mind is trained to express to particular aspect of a problem. Academician has much wider views. She express her view on various aspect of sentencing issues related to gender atrocities. She talks about the whole dilemma of a judge to decide quantum of the sentencing in the absence of any guideline very difficult to decide. She spoke about Uphar Cinema case said to be failure of the system. These are the areas to ponder about. If trial court has imposed a sentence, then what could be reason for appellate court to interfere? Reasoning is the ground by which sentence can be reduced. Crime should be adequately punished and also see rehabilitation of victim and the accused also. If we take very liberal view, compensation may be paid like uphar case. So how to adopt the balance approach? When we collectively assemble and dedicate our time for such programme we need to come to some conclusion. Questioning on sentencing as violative of Article 14. She talks about what should be the sentencing policy. We should become forceful voice for change. She refers various case like Shakti Mills case, in this case accused were young boys, they asked the judge if they are sentenced severely, their parents will be suffering. So who is victim? Now days taken into care balance approach at the time of determining the sentencing in criminal justice system.

Session - 5

R. Basant (Advocate) Supreme Court of India

He talks about the sentencing consistency in modern days inconsistency, need to modification of system, reform in sentencing practices, Anglo – sexon system. Need to relook re visit the sentencing guidelines? Need to understand the Micro and Macro level system to understand the sentencing system better. He talks about the broad parameter of state instrumentality to understand the sentencing if all stakeholders' works honestly in the criminal justice system.

Starting the discussion the judge stated that statue book give leverage for punishment, there is no uniform punishment policy even is same set of case further he explained the level of gap or difference in sentencing by stating that “sentencing is consistently inconsistency.” The present penal provision blindly follows the Anglo sect system which would not help and there has been no attempt to improve it instead of it there

should be jurisprudence which should in quintessence or common sense of the community, as there is no periodical updation of the law.

The making of law should be according to the need of the society which is expressed as public opinion, need of the society impact the legislature which make the law which is adjudicated by the adjudicator and this could be done when one understand the macro system and perform our micro role that each one has to perform in the system.

The modern criminal justice system should ensure that the mind is free from fear and should be able to prevent crime (crime means what the sovereign think that it is so objectionable that it should be visited to be crime such violation of norms off conduct should be punished with deprivation of life, deprivation of liberty or deprivation of property.)

The trial court judges have been given a strange range of discretionary power to judge (citing the punishment given under section 326) were the judge can decide whether to go for life imprisonment or shorter duration of imprisonment or fine or both depends on the judge. Quoting justice Sinha on the question of death and life (after evaluating judgment post Bachan Singh case judgement) the judge said that sentencing depends on the predilection of the judges which is found to be totally violates Article 14 of the constitution. Doing trial such principal of predilection should not be followed in order to stop these the subordinate court should be guided by clear discretionary power which state in the judgement that it can start from zero or middle or can go up or down depending on the mitigating circumstances.

Sentencing will serve when:

1. Disciplined by law
2. Informed by precedence (safe guidelines)
3. Regulated by analogy
4. Tempered with mercy
5. Sublimated by knowledge about the principal on which the punishment is imposed
6. Liberty from personal predilection
7. Always be aware of public goods

In the Swamy Shadhananda case where it was said that sentence of “DEATH” can only be awarded when the worst option of life imprisonment is also found to

unquestionably close. In his concluding remarks he said the judges know what the law is but also what the law ought to be.

Session 6

Sanjog Parab (Advocate)

The session was based on sentencing for economic crimes. He in his opening remarks said that one has to adhere to the present system and we all welcome to changes in the system but circumference oneself within the system he pointed out the things, which are inappropriate in the system.

Mentioning the modern scenario he said now the crime is done by well-educated like CA, Law Graduates and to stop it a deterrent message should be imposed by the bar and the judges so that the message should be loud and clear to such educated class who commit crime just out of averse, greed and have a devastating effect on the economy, citing the example of SATYAM. The crime should not only be punished but also the money should be brought back to the system (Uphar case) so that the people think that consciousness's are heavy and people think before committing economic crime present does not do so.

Some of latest amendment in SEBI Act, Money Laundering Act has given power for punishment and fine which ensure that the court cannot be taken for granted. Compensation which is now recognized under Cr. P. C section 357 and the right of the victim comes under section 372 of Cr. P.C. The Corporate body can be fined now with amendment of section 278B of Income Tax Act citing Standard Charter Bank case and Valliyappa Textile case.

'Mens Rea' the concept cannot be brought down to such highly qualified offenders as such offenders do the crime with full consciousness even the corporate entity can be come under it. The judge has to decide its disc reaction and to what extent it can be extended (Alistair Parera case)

The suggestions given by the speaker are:

1. Deterrent Sentencing
2. Some money should come back to the system
3. Impose fetters
4. Economic Sanction (in form of baring the company from accessing the capital market for some time, public disclosure of such corporate body)

The next speaker Justice Sengupta stated, the difference between the economic offence before independence and after independence were in the first case the revenue

goes to abroad and, in the latter case it goes to the tile of nation. Present day economic crime (white collar crime) two things should be kept in mind aggravating and mediating circumstances in mind while sentencing. He observed that in urban area the corporate offenders are more and further he stated that in case of crime were the offender is found to be least involved then he cannot be punished like the principal offender here the proportionality for punishment is exercised according to the criminal jurisprudence and also the conduct of the criminal doing the trial should be considered.

Session 7

Justice Sen Gupta

He spoke about the difficulty in exercising the aspect of judicial pronouncing and Discretionary before amending in 2013 to the Cr. P.C. Compare the death sentencing before 1983 were the supreme court judges pronounced keeping in mind why death sentence should not be maintained after 1983 the judge tried avoiding extreme punishment (Citing the Dhananjay Chaterjee case) The conduct of minor in such case should be consider and very careful use of the POSCO Act in such type of crime should also be done as they are asset to the nation the punishment should be granted with mind of rehabilitating such children. He talks about the sentencing in socio – economic crimes. The relationship between social economic status and the criminal justice system. In general, people pertaining to the lower class versus the white collar and the elite class are more likely to be: incarcerated, charged, convicted, sentenced to prison, and punished with longer prison terms. Economic Offences form a separate category of criminal offences. Economic Offences not only victimize individuals with pecuniary loss but can also have serious repercussions on the national economy. Economic offences, such as counterfeiting of currency, financial scams, fraud, money laundering, etc. are crimes which evoke serious concern and impact on the Nation's security and governance. He gives an overview of economic crimes and relevant legislation and the enforcing agency in India. And also deals with economic crimes covered under the Indian Penal Code. Lastly he explains the law on money laundering and focuses upon cyber-crimes, which is expanding rapidly with the growing use of the Internet.

Session 8

Dr Mrinal Satish

He started by stating that criminal law and sentencing have become static as Supreme court in various cases has stated that sentencing is not a strait jacket concept citing Santoshkumar Beriyyar case where the sentencing has been according to the judge discretion. Unwarranted Sentencing is defined in sentencing jurisprudence if one goes against what the statute permits you to do then the sentencing imposed is unwarranted disparity. The speaker also mention the importance of Disparity required in sentencing. Further his analysis of 1000 cases was told, he stated Rape Myth and Stereo Type of rape.

Citing Varvada Bogi Bai case where the Supreme court said that solely on women testimony of rape a convict can be punished further the court should lay down the reason for such sentence, the court also listed reason for believing a Indian women not lying in case of rape compared to western women. He also cited Rafeec v/s State of Uttar Pradesh. He mention in section 280 in Kamlanantha case. Modi's book of Medical jurisprudence stabiles stereotype. Gurmeet Singh case where the supreme court said since it had taken 15 year in reaching the court in this duration the girl would have got married and so the convict should be acquitted. Concluding that there is no uniform provision for sentencing.

Law commission in the 47 Report of 1972 had guideline for how to determine the right sentencing it had consider many factor to be considered before pronouncing sentence. Further the speaker cited case of Modi Ram v/s State of MP. In 1970 justice Iyer exercised on the theory of reformation while chief justice Chandrachud exercised the theory of retribution or deterrent for punishment so it can be clearly observed hear that even in the supreme there was two theories for punishment.

In the nineties the theory shifted from reformative to retributive for punishment of crime where citing the court the speaker said that the criminal law proceed on the principal that it is morally right to hate a criminal and it confirm and justify that sentiment by inflicting punishment which continued even in the case of Dhananjay Chateerjee where the society cry for justice is something that has to kept in mind. Now the court started moving towards proportionality in 2002 in the case of Rulee Ram Sentencing Guideline is about approach and not the conclusion. Sentencing should be based on the principal of

1. Principal of Equality in sentencing
2. Principal of Impact

Further explaining judicial discretion by 2004 case of Kuldeep Singh can such discretion be used for sentencing citing various case and judge's view ultimately concluded that judicial discretion applies to Article 14 in the same way as it applies to exercise of executive judicator (case Mohammed Farooq Abdul Gaffor). The speaker ended on the question whether sentencing is art or science. He discusses the sentencing in sexual offences cases: Rape is a stigma which exists in the society from a long time. The dictionary meaning of word rape is "the ravishing or violation of a woman." The rape victim i.e. a woman as woman cannot commit rape due to biological reasons. She is traumatized after the event; it is very difficult for a woman to come out of this trauma. Rape in India is a cognizable offence. There are many provisions in various Acts. The word rape is legally defined u/s 375 of Indian Penal Code, 1860. It defines the rape and also prescribes its punishment. The Judiciary in India is burdened with a lot of work and therefore judgment of the rape cases comes very late. Sometimes it comes so late that either of the parties had died. So, there should be speedy trials in rape cases so that the victim gets justice as it is rightly stated that "Justice delayed is justice denied." As every coin has two sides, in this case also there are two sides. Many a times girls also make fake complaints just to ruin the life of a boy, sometimes the parents of girl compels her to file a complaint against the boy she loves, as the law shows a lot of sympathy towards the girl. The accused is left with nothing, when the complaint is made his life is ruined irrespective of the fact that he was proved guilty or not. Rape is a crime against basic human rights and is also violative of the victim's most cherished of the fundamental rights, normally, the right to life contained in Article 21. As observed by Justice Arjit Pasayat: "While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female." Justice Krishna Iyer has observed in a very famous case of Rafiq v. State : "A murderer kills the body but a rapist kills the soul." He discusses various Case Study:-

1. Tukarram v. State of Maharashtra, in this case a young girl Mathura, she was working in the defendant's house. They decided to marry. The brother of Mathura lodged a complaint with the police that Nushi (landlord) and her brother kidnapped Mathura. The police constable Babu Rao called both the parties to the police station and obtained statements of Ashok and Mathura. It was about 10.30 p.m. and Tukaram and Ganpat, two constables, were present in the police station. While the parties were leaving the police station Tukaram

told Mathura to wait and asked the rest to leave. Where he had a sexual intercourse with Mathura. Since, Tukaram was drunk, he could not do the act but went away after doing indecent gestures. The Session Court pronounced that, there was a sexual intercourse but this was not rape. In Mathura case, the court said, she submitted herself to the police voluntarily and she had lied there after that she was raped. The High Court and Supreme Court also presume Mathura's consent so they acquitted the constables.

2. In *Bhai Singh v. State of Rajasthan*, for raping a Harijan girl of 7 by a boy of 18, the court sentenced him for 5 years imprisonment only. The decision was given on the ground that, the boy was only 18 years of age.
3. *Bijoy Kumar Mohapatra v. State of Orissa*, in this case a girl studying in S.K.D.A. Women's College, Rourkela was gang raped by 4 men. The HC of Orissa held that since the age of the girl was between 18 and 20, the question whether she had consented did not arise. "Consent must be voluntarily. A mere inevitable compulsion, consequences, non-resistance or passive giving in when volitional faculty is either crowded by fear or vitiated by duress, cannot be deemed to be consent. Consent on the part of a woman as a defence to all allegation of rape, requires voluntary participation after having fully exercised the choice between the resistance and assent".
4. *Sidheswaar Ganguly v. State of West Bengal*, In this case it was held that the consent of the victim is immaterial when she happens to be less than sixteen years of age on date of the occurrence, i.e., 20 April 1954, when the accused was alleged to have had sexual intercourse with the girl. Though the ossification test (X-ray examination) is not a sure guide to determine age, in the absence of birth certificate the conclusion as to the age could be drawn from the fact and circumstance including physique of the person and examination.

He also discusses the horrific gang rape incident in Delhi is a result of Criminal law Amendment.

Session 9

Justice A.K.Goel

The speech was started by Justice A.K. Goel referring to Section 364A and the debate surrounding it referring to Malimat Committee which stated there should be certainty in the sentencing. Referring to US conference were objectivity in sentencing should never be there, how the victim is compensated also form the part of sentencing. Referring to crime against women under section 304B of Dowry death case which is mostly on the presumption of 113B of Evidence Act as it is difficult to know what happen within the four wall of the room and it presume as soon as death happen was there demand for Dowry which can't be true for all case. The society should kept in mind while pronouncing any judgement. Sometime it is proven before the court that crime has been committed but the person in front of the court has committed the crime is not always proven which result in acquittal which result in crime goes unpunished. The court has to be conscious to the plight of the victim and the court under 357A can disburse money to victim when a case comes to them at first instance. Stating the infirmity in the system of delay of justice which makes thing difficult to give complete justice. Such issue were death sentence is given after period of time elapse or before it are the issue which create complexity.

Session 10

By Prof. Dr. K. Chockalingam

Starting with the example of Finland which has remarkable reduction prison and crime even thou some country the retributory principal is followed for severe crime learning from the mistake of other country we can improve our system of sentencing, so that we follow the best practices and avoid the mistake done by other to response to crime. The criminal principal vary from nation to nation but mostly the institution for criminal are almost the same which are:

1. Professional Police
2. Public Prosecutor
3. Independent Judiciary
4. Realization of Imprisonment for Serious crime etc.

Before the 1990 there was rise of crime but after that there was a decline in the crime rate thou there has policy response to institution has not be good or cause of crime are:

1. Prevailing belief of greatly

2. Realization between crime and imprisonment vary greatly
3. Policy governing types and quantum of punishment vary greatly
4. Attempt to ensure use fair procedure for adjudication.

Sentencing philosophy can be divided into two basic categories

1. Retributive
2. Consequence or utilitarian

Defining the Japan sentencing policy, which has a hybrid of both the philosophy of sentencing, the act of confession and apology before the sentencing hold a key role while pronouncing punishment.

Dr. Mrinal Satish

He discusses the approaches to determining appropriate sentence particularly by the apex court of India. He quoted the opinion of Justice Chinnappa Reddy: “In most of the criminal’s appeals, the supreme court confines itself to statutory interpretation or to issue of fact determination. It seldom discusses important jurisprudential issues relating to sentencing.” Hence, criminal law and sentencing have become static. He discusses the Principles and purpose of sentencing: In cases culminating in conviction of accused, a judge has to work out his sentencing policy. Sentencing is that stage of criminal justice system where the actual punishment of the convict is decided by the Judge. But, in Indian no legislative or judicial policy. Giving punishment to the wrongdoer is at the heart of the system. Sentencing – A neglected field “If the criminal law as a whole is the Cinderella of jurisprudence, then the law of sentencing is Cinderella’s illegitimate baby”

Prevailing Scenario: Law Reform Suggestions: There is glaring absence of much required and anticipated sentencing policy neither by legislature nor by judiciary. Several committees like Madhava Menon and Mallimath have recommended the policy, but is yet to be developed in our country. Even the Law minister Mr. Veerappa Moily said that “we are working on the uniform sentencing policy which is on the lines of ones in place in United States and United Kingdom”

Supreme Court on Sentencing: Justice Chinnappa Reddy: “In most criminal appeals, the Supreme Court confines itself to statutory interpretation or to issues of fact determination. It seldom discusses important jurisprudential issues relating to

sentencing.” hence criminal law and sentencing have become static. The apex court time and again emphasized the importance of reforming the black letter law to fit the modern trends in penology and sentencing procedure.

SC in various cases evolving sentencing: Sentence should be determined according to the facts and circumstances of each case. It is not possible to prescribe a straitjacket formula for sentencing. Sentencing has become “Judge-centric.” There is a need for principled sentencing.

Determining the Appropriate Sentence: Law Commission of India (47th Report, 1972) -A proper sentence is a composite of many factors, including the nature of the offence, the circumstances- extenuating or aggravating of the offence, the prior criminal record, if any, of the offender, the age, background, education, home life, social adjustment, the emotional and mental condition of the offender etc.

Supreme Court on Determining Appropriate Sentence: Modi Ram v. State of M.P, (1972) 2 SCC 630 - Factors pertaining to both the offense and the offender need to be taken into account.

Jagmohan v. State of U.P, (1973) 1 SCC 20 – Aggravating and mitigating factors should be considered. Aggravating factors are in relation to the offence. Mitigating factors like – the minority, old age, provocation, the state of health and sex of the delinquent.

Supreme Court & Theories of Punishment- 1970s: Reformation the goal of punishment - Rajendra Prasad (1979), Sunil Batra (1978), Lingala Vijaya Kumar (1978), Charles Sobhraj (1978), Ramashraya Chakravarti (1976), Ediga Annamma (1974) 1990s: From Reformation to Retribution: -Guvula Chinna Venkatesu (AIR 1996 SC 1926), Dhananjay Chatterjee, (1994) 2 SCC 220 – The emergence of “society’s cry for justice” 2000s: “Proportionality” & Proportionality + Society’s Cry.

Lastly he Conclude with the statement of that there is a legislative need to come with effective sentencing policies and practices in our country. Judiciary and other criminal justice agencies should take pro-active steps to reframe and re-align sentencing policies.