PUNISHMENT AND MANDATORY MINIMUMS IN THE INDIAN CONTEXT

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ABSTRACT

Crime and punishments are inseparable, a cause and effect; one devoid of the other is incongruous and noxious. Sentencing, as observed by Justice Krishna Iyer is a means to an end, a psycho-physical panacea to cure the accused of socially reprehensible behavior that caused the crime[i]. Through such punishments, people are warned that they put their own rights on the line if they infringe on those of others through harmful conduct. Common among civilized societies, is a consolidation of crimes and concretization of their resultant punishments as some form of a codex. In India, the Indian Penal Code (hereinafter "the IPC") serves this larger purpose, containing a curious amalgamation of rules on sentencing -- ranging from mandatory minimum to maximum punishments, or discretionary fines.

As we approach the quarter-21st century, it makes sense to reflect on the goals and justifications of sentencing and punishment. With neoteric shifts in theories of punishment, like an increased emphasis on victimology and discontent with the doctrine of *lex talionis*, is there a need to update the sentencing groundwork of the IPC? This paper attempts to analyze the historical and current manifestation of punishment, noting the pressure such theories exert on the criminal justice system. Although there is a vast amount of literature on the American and Canadian systems of mandatory minimum sentencing, scholarship on Indian mandatory minimums are relatively sparse. In analyzing the law on minimum sentencing in other jurisdictions, this paper will also try to elucidate the rationale behind the IPC needing supplementary guidelines or overhauling of its mandatory minimums. It concludes by elucidating that the experience of other nations can be pedagogic in function, while acquiescing that redesign remains a mammoth task.

INTRODUCTION: VALIDATING PUNISHMENT

One of the central conundrums of criminal law has always been justifying the use of authoritative power to punish autonomous individuals. But it must be emphasized that there is a difference between justifying the *act* of punishment and the *principle* of punishment. The principle makes sense – it serves to reconstruct a violated normative order in the wake of a crime[ii]. It is when one attempts to justify the act that things start to get murky, for as of yet, there has been no theory that facilitates reduction of crime while preserving the rights of the offender *and* upholding justice for the victim, all the while ensuring balance between the rights of the state and the society.

Another delicate task is classifying theories of punishment. Professor H.L.A. Hart, and his American counterpart Rawls were some of the few who ventured into suitably distinguishing theories of punishments. Perhaps the simplest and most effective way of addressing them is as forward-looking and backward-looking theories. As their names imply, forward looking theories envision the future of the participants in a crime while inflicting a punishment, whereas a backward-looking theory places pre-eminence on the events leading up to the crime. The former is sometimes chalked up to be a consequentialist stance, backed by the theory of utilitarianism and rarely imposing constraints on sentencing. Following that path, the latter would then be a deontological theory, primarily retributive and representative of the idea that no moral consideration can outweigh an offender's deserts.

With turn of centuries and societal movements, overhauling of system of punishments in the legal realm have followed as naturally as human evolution. The Egyptian and Greeks practiced more barbaric forms of punishment, although Aristotle notably argued for milder and more rational forms of discipline[iii]. With the advent of the notion of a "civilized society" however, came the need for corresponding civilized punishments. But the period of Enlightenment was perhaps the pivotal moment for legal scholarship, which nurtured the philosophical foundations of punishment theory.

Bentham's utilitarian theory served as the touchstone for theories of punishment including deterrence, rehabilitation and incapacitation. The deterrence theory functions under the notion that inducing the fear of punishment for compliance is justifiable when juxtaposed with the cost of non-compliance and successive punishment. While punishment cannot reverse the individual harm, it can capitalize on the crime to send a message instead[iv]. Rehabilitation

supports indeterminate sentencing with the ultimate goal of re-integration of an offender into the society. Incapacitation's utilitarian justification is in the fact that a crime is more abhorrent then the evil of punishment.

Philosophers like Kant, on the other hand took a retributive stance towards the essence of punishment. In light of the ineffectiveness and public discontent towards indeterminate sentencing, there soon was a shift in the tenor of punishments towards a more retributive model. The theory of just deserts in particular was (and continues) to be popular, combining retributive and incapacitating theories to conceive a more determinate sentencing system. This notion that the punishment should be "deserved" reduced judicial discretion and spoke to a more uniform system of punishment.

A concurrent development to the shift from rehabilitative to retributive models that deserves mention was Foucault's deduction of punishment. He challenged the very concept of punishment, under the justification that it stems from a perverse desire to punish that is deeply rooted in the human psyche. The idea of a just system of punishment to Foucault was not only unattainable, but also self-delusive.

But one thing he pointed out with striking accuracy was the difficulty of arriving at a judicious system to punish crime. Evidently, a judicious criminal justice system needs to work with the possible permutations of different theories of punishment, and arrive at the best possible blend of them all. Although not an impeccable depiction of such a concept, the IPC seems to be such a hybrid of sorts.

THE INDIAN EXPERIENCE

Ancient India was famously known for its expiatory system of punishment, where repentance or expiation itself is the punishment[v]. The framework within which ancient Indian criminal justice worked tilted towards the utilitarian justification of punishment. Colonialization brought with it the winds of the Enlightenment and the realization that indeterminate sentencing no longer serves the purpose of justice[vi]. There is a noticeable juxtaposition between the popular theory of just deserts and the notion of individualization in the IPC. Most offenses are prescribed either a mix of mandatory minimum or maximum sentences—dispensing semi-mandatory punishments. Although, this combination of semi-determinate sentencing paired

with semi-mandatory punishments raises the question of whether an unwanted disparity of indeterminate sentencing laws may ensue.

The Supreme Court's stance on punishments have understandably not been consistent, in the absence of a strict sentencing framework. Punishments handed to offenders have been reflective of a judge's preferred theory of punishment, proving that the judicial system inevitably becomes subjective. In general, it seems as though they prefer a framework promoting deterrence, proportionality and rehabilitation[vii]. For instance, the *Bachan Singh v State of Punjab*[viii] case laid down the 'rarest of the rare' doctrine for awarding the death penalty. But time and again, judgements have also showed vestiges of retribution. The 2012 Nirbhaya gang rape, which culminated in the death of the offenders earlier this year is one such instance.

The courts are not ignorant of this discrepancy in sentencing, and have acknowledged that punishment is complex, requiring a compromise between competing theories. The Supreme Court has done a lot of soul searching in its approach to punishments[ix]. The 47th Law Commission Report tacitly attempted to address this problem by shedding light on proper sentencing processes. Years later, The Malimath Committee Report of 2003 emphasized the need for sentencing guidelines to accompany reforms in the IPC. Perhaps the need of the hour is such remodelling, because as of present, the code still operates with mandatory minimums for heinous crimes.

POLEMICS OF MANDATORY MINIMUMS

Mandatory minimum punishments have a contentious history. Justice Reinhart commented that mandatory minimums are "perhaps a good example of the law of unintended consequences"[x]. They have been with us from the beginning; English law prescribed the death penalty for numerous felonies[xi]. But the system interferes with two fundamental requirements of criminal law—proportionality and fair labelling. A lack of proportionality may arise when judges are forced to sentence people to punishments based on certain aggravating factors, without regard to the total mix of circumstances[xii]. Violation of fair labelling ensues when judges may be compelled to convict an offender under a provision that may not fit the crime due to the severity (or lack of severity) of the applicable provision.

Identified objectives of mandatory minimum sentences include ensuring "just punishments", increasing effectiveness of deterrence, incapacitation of serious offenders, elimination of sentencing disparities and inducement of co-offenders to cooperate in investigations[xiii]. But the goal of uniformity of sentences inevitably results in *excessive uniformity*, since statutes cannot exhaustively list all possible factors relating to an offense and criminal cases do not fall into set behavioral patterns[xiv]. They prevent judges from considering special circumstances and instead, impart excessively harsh sentences[xv]. Additionally, by removing judicial discretion, the onus of charging is shifted to the prosecution which allows for manipulation[xvi]. Evidence does not support the justification of embracing mandatory minimums, rather what it shows are increased rates of incarceration (which does not equate to effectiveness of the justice system)[xvii].

Mandatory minimums promise efficient and quick resolution of cases, but in the same breath heighten the risk of injustice[xviii]. The deterrent and severity value of the system is undercut by the notion that mandatories can be manipulated or will not be applied at all by taking a plea bargain[xix]. Cliffs—where an offender's conduct barely brings him within the terms of a minimum-- harshly cripple its perceived fairness[xx]. The process also violates the core principles of restraint and moderation of incarceration[xxi]. A counter supporting mandatory minimums is based on incapacitation, in instances like domestic abuse, where a lack of discretion becomes effective[xxii]. However, just as locking people up will not circumvent domestic violence, strict punishments will not always eliminate crime. Mandatory minimum punishments ultimately sell out individualization for uniformity[xxiii].

Through two targeted analyses, the lack of efficacy and inherent shortcomings of imposing mandatory minimums is sought to be revealed: the US drug laws, and the battered woman syndrome.

The War On Drugs: The US incarceration rate is over 700 inmates per 100,00 citizens -- this is over seven times the average rate for other countries, and compared 32 in India, is shockingly high[xxiv]. This disparity could be chalked up to the increase of mandatory minimum sentences and laws like the Three Strikes Rule. While mandatory minimums existed for crimes like murder and piracy in the 1700s, they gained widespread use in the 1980s[xxv]. The rise in minimum sentencing corresponded with the rise in drug abuse, and the result was a concurrent war on drugs and crime; to the effect that eventually, the two became interchangeable. The key motivation of harsher sentencing was to stop drug trafficking and reduce sentencing disparity,

although this goal remains unattained[xxvi]. What has happened instead, is a rise in maltreatment stemming from systemic racism and the cooperation paradox[xxvii]. The law acts harshly for minorities, particularly Hispanics and African Americans, only serving to stigmatize poorer communities and increase the racial divide. White defendants who enter into plea bargains are more likely to be sentenced below the minimum[xxviii]. Among offenders who deserve the prison term, non-white offenders get sentenced under minimums 20% more[xxix]. The cooperation paradox is another jarring drawback of sentencing laws. Deals are cut with offenders, but only the king-pins are able to provide valuable cooperation and assistance. The result? The top operators who were designed to be caught by mandatory minimums are unaffected, and those stuck doing time (meant for the higher members of the drug network) are the ones minimally or tangentially involved[xxx]. Even looking at the sentencing system from a utilitarian perspective, the costs of such a system are substantial, and the benefits few[xxxi].

The Battered Woman's Conundrum: Distortions owing to mandatory minimum sentences also affect the injustice directed towards battered women by the criminal justice system. In particular, the mandatory sentence of life imprisonment or the death penalty for murder leads women to plead guilty to manslaughter, which carries a lesser sentence and stigma[xxxii]. Under the Indian context, the minimum punishment as per section 302 is imprisonment for life, and the maximum is death; judicial leniency thus becomes choosing imprisonment for life over the death penalty. Often, there is little chance of achieving a light sentence when the defendant objectively and subjectively "overreacted"[xxxiii]. In the face of tenacious barriers like systemic sexism when using the self-defense claim, mandatory minimums only serve to exacerbate the lack of a fair opportunity. Mandatory minimums raise the stakes higher for vulnerable women, yet the law is not always very forgiving towards them. The pattern of guilty pleas in favor of manslaughter when faced with severe punishments for murder have been common in many jurisdictions, like the US and Australia[xxxiv]. The use of the battered woman syndrome as evidence is fraught with problems as is, since the whole case is presented as a psychological condition that has to be subjectively analyzed, rather than a rational response[xxxv]. But the risk (and fear of incarceration) is multiplied when the very real possibility of life imprisonment looms over the head of an aggrieved woman. Because it is disturbingly easy to negate the self-defense argument by proving the element of pre-planning[xxxvi]. often judges have no choice but to dismiss it. What remains is a mandatory life-sentence that disproportionately punishes a battered woman to the same extent as a cold-blooded killer.

CONCLUSION: LESSONS FOR INDIA

Evidently, striving for uniformity in sentencing by progressively imposing mandatory minimums does not seem to be a workable solution. Mandatory minimums frustrate the operation and progress of a more rational approach to sentencing[xxxvii]. But on the other hand, in a society fraught with class conflicts and disparities, leaving broad discretionary powers to judges also poses a problem.

A proposed solution resonates with the Malimath Committee Report to introduce supplementary sentencing guidelines. Rather than strict limits imposed on judges, these should be true to their meaning and simply act as suggested guidelines, which are periodically reviewed. Guidelines can guard against undue judicial leniency[xxxviii] (which was the goal of mandatory minimums to begin with) but also against issues like cliffs and excessive uniformity. Of course, they have to be reflective of mitigating factors, encompass adjustments for limited participants of an offense, accommodate acceptance of responsibility, and allow judges to depart from them when necessary. But they can serve to achieve a substantial degree of determinacy, predictability, uniformity, and deterrence, while preserving discretion and channelling it into a workable form[xxxix]. That being said, the calculus of the guidelines may pose a problem in itself. They have to dodge the stumbling blocks of mandatory minimums, and watch out for artificial mitigating factors, excessive rigidity, and overt flexibility, to name a few red flags.

The crux of the matter remains, that until we strike the right balance between the theories of punishment and figure out an optimally working method, sentencing disparities and ineffective systems of punishments will continue to plague societies. Since fundamentally, theories of punishment have epistemic gaps on *how* to punish and what forms it should take[xl], change is bound to be gradual and arduous, but nonetheless achievable.

ENDNOTES

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