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# A CRITICAL EVALUATION OF THE INDIAN PENAL SYSTEM

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## **Abstract**

There is a saying that every saint has a past and every sinner has a future. The Penal policy of India also adopts the very philosophy of reforming the wrong doers. It can be said that the Indian Penal System is a combination of reformation and deterrence. The present paper focuses on critically evaluating the Penal Policy of India concentrating on the provisions in the Indian Penal Code, the effectiveness of the IPC and its relevance today. The various forms of punishment available under the Penal system of India, their effectiveness, and disparities in sentencing by the Courts will be discussed in the present paper. Moreover, this paper seeks to analyse the guidelines, precedents about the Penal Policy of India and suggested reforms issued by the Apex Court of the country as well as the remission and commutation of offences by the appropriate Government.

**Key Words:** Penal policy; Critical Evaluation; Reformation; Deterrence.

## **Introduction:**

Every saint has a past and every sinner has a future is a tested philosophy concerning human life and the theory of reformation through punishment is based on the sublime philosophy that everyone is born good but circumstances transform him into a criminal. Criminologists believe that administering treatments and certain reformatory measures on criminals can cure and help them in bringing back to the mainstream Society as a normal human being.

Punishment under law is the authorised imposition of deprivations of freedom or privacy or other facilities to which a person otherwise has a right, or the imposition of special burdens because he has been found guilty of some criminal violation, typically, though not invariably, involving harm to the innocent. Thus, punishment may be defined as an act of political authority having

jurisdiction in the community where harmful wrong (crime) is committed. It consists of imposition of some burden or some form of deprivation by withholding some benefit or right to which a person is legally entitled to enjoy.<sup>1</sup>

The final stage in the system of criminal jurisprudence is the stage of giving sentence. Once the court, after having evaluated the evidence presented before it, arrives at a conclusion that the accused has been proved guilty beyond a reasonable doubt, it must decide over the quantum of punishment that should be awarded to the convict. The broad principles used to determine the quantum of punishment has been dealt with under Chapter III of the Indian Penal Code (IPC). The sentencing policy across the country is not uniform and the sentences reflect the individual philosophy of the judges. In this regard it would be pertinent to mention that Justice Krishna Iyer in *Rajendra Prasad v. State of Uttar Pradesh*<sup>2</sup>, pointed out the considerations affecting the sentencing policy as under– “Law must be honest to itself. Is it not true that some judges count the number of fatal wounds, some the nature of the weapons used, others count the corpses or the degree of horror and yet others look into the age or sex of the offender and even the lapse of time between the trial court’s award of death sentence and the final disposal of the appeal? With some judges, motives, provocations, primary or constructive guilt, mental disturbance and old feuds, the savagery of the murderous moment or the plan which has preceded the killing, the social milieu, the sublimated class complex, and other odd factors enter the sentencing calculus.”

Though disparities in sentencing may be due to various factors, it must be accepted that ‘disparity in sentencing not only offends the principles of justice but also affects the rehabilitative process of offender and may create problems like indiscipline and riots inside prisons.’<sup>3</sup>

A similar view was expressed by the Apex Court in *Asgar Hussain v. State of UP*<sup>4</sup> and observed that disparity in sentencing creates hostile attitude in the mind of the offenders and reduces the chances of their re-socialisation as they react strongly against the discriminatory treatment meted out to them.

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<sup>1</sup>.J.C. Chaturvedi, *Penology and Correctional Administration* 18 (Isha Books, India, 1st edn., 2006

<sup>2</sup> .1979 AIR 916.

<sup>3</sup> . P.W. Tappan, *Crime, Justice and Correction*, 446 (McGraw-Hill Book Company, New York, 1960).

<sup>4</sup> . (1974) 2 SCC 518.

The primary motive of punishment is to prevent or deter the wrongdoer from repeating the crime. Chapter III of the IPC under its section 53 provides for the various kinds of punishments to which the offenders are liable under the Indian Penal Code. The Court has the power to reduce the quantum of punishment taking into consideration of the various aspects of the case and the mitigating as well as the aggravating circumstances if any. The IPC has for some offenses itself provided for a minimum sentence whereas, in most other crimes, the trial court has got a wide discretion in the ascertainment of the period of sentences and the choice amongst the kinds of punishments, given the nature and gravity of the crime, the manner in which it was committed, the conduct of the accused before and after the commission of the crime and other mitigating and aggravating factors.

**Punishments Under Section 53 of IPC<sup>5</sup>:** The punishments to which offenders are liable under the provisions of this Code are-

First.-Death;

Secondly.-Imprisonment for life;

Thirdly.- [ Repealed by Act XVII of 1949.]

Fourthly.-Imprisonment which is of two descriptions, namely:

1. Rigorous, that is, with hard labour; 2. Simple;

Fifthly.-Forfeiture of property;

Sixthly.-Fine

Now, let us discuss in detail the above stated forms of punishments.

**Death or Capital Punishment-** This form of punishment is the harshest of all punishments under the IPC which involves the killing of the convict. Under punishment of death, also known as capital punishment, a person is hanged till he dies. Numerous arguments have been raised both for stating it to be a deterrent and against the imposition of capital punishment- questioning whether the State has a right to take an individual's life, something which it cannot restore in case of an erroneous judgment.

The IPC provides the Death Penalty only as an uppermost limit to which a convict can be sentenced and has nowhere made it compulsory for the courts to award a death sentence. The Code provides capital punishment for the offences like-Treason (S.121), Abetment of mutiny (S.132),

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<sup>5</sup>.Ratanlal and Dhirajlal, *The Indian Penal Code* 89 (LexisNexis, Gurgaon, 35th edn., 2017).

Perjury leading to the death of an innocent (S.194), Murder in the rarest of rare cases (S.302), Abetment of suicide by minor/insane/intoxicated person (S.305), Attempt to murder by life convict if hurt is caused (S.307), causing hurt (S.307-part II), kidnapping for ransom etc(S.364A),causing death or resulting in persistent vegetative state of rape victim (S.376A), repeat offenders of offences punishable u/s 376 or S.376A or S.376D , S.376E) and Dacoity with murder (S.396).

In addition to this, death penalty can be imposed by virtue of Ss. 34 (Criminal acts done by several persons with a common intention); 149 (Every member of unlawful assembly is guilty of offence committed in prosecution of common object); 109 (Punishment of abetment if act committed in consequence of the abetment and where no expressed provision is made for its punishment); and 120B (Punishment for criminal conspiracy) of the IPC.

It was argued in *Jagmohan Singh v. State of Uttar Pradesh*<sup>6</sup>, that the death penalty is unconstitutional and hence invalid as a punishment. However, the Supreme Court held it as valid and constitutionally lawful if done according to the procedure set by law. For the offence provided under section 303, i.e., murder by life-convict, capital punishment was compulsory prior to *Mithu vs State of Punjab*<sup>7</sup> when the Supreme Court of India struck down s.303 as being unconstitutional for violating Articles 14 and 21 of the Constitution in the said case.. Similarly, the Supreme Court in *Bachan Singh v. the State of Punjab*<sup>8</sup> upheld the validity of Death penalty, however, the court restricted the provision of the death penalty in the rarest of rare cases only. The court did not elaborate as to what falls under the category. Still, the court has declared it from time to time that the cases like honour killings, assassination, genocide, brutal murder, etc. fall under the definition of ‘rarest of the rare case.’

Then the Supreme Court in *Machi Singh v. State of Punjab*<sup>9</sup> laid down various guidelines to be considered while granting capital punishment that include- (i) The death penalty cannot be inflicted except in gravest cases of extreme culpability; (ii) The circumstances of the offender, circumstances in which the crime was committed and the method and manner of commission of the crime need to be considered; (iii) Balance sheet of aggravating and mitigating circumstances

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<sup>6</sup> .1973 AIR 947.

<sup>7</sup> .AIR 1983 SC 473

<sup>8</sup> . AIR 1980 SC 898.

<sup>9</sup> .1983 AIR 957

should be drawn up and mitigating circumstances should be accorded full weightage to draw a just balance between the aggravating and mitigating circumstances; (iv) Death penalty may be awarded when the crime committed is extremely brutal, grotesque, diabolical, revolting, and dastardly (or) is committed for a motive which evinces total depravity and meanness (or) for the betrayal of the motherland (or) where a member of Scheduled Caste or an innocent child or a helpless woman or old or infirm person has been murdered (or) where the imposition of any punishment other than the death penalty is completely inadequate

Where the judge is of the opinion that the accused is, in fact, guilty beyond any reasonable doubt and that should be awarded capital punishment, he must give a chance to the accused as per section 235 Cr.PC<sup>10</sup> to put before the judge the facts and circumstances which in the accused's opinion would allow the judge to mitigate his sentence. Non-compliance with this sentencing procedure vitiates the sentence. As per section 54 of the Indian Penal Code, the appropriate government can commute the sentence of Death for any other punishment provided by this Code.

**Imprisonment for Life:** The words "imprisonment for life" was substituted for "transportation for life" by Act XXVI of 1955. In its natural meaning, imprisonment for life means imprisonment for the whole of the remaining term of the convicted person's natural life. It means rigorous imprisonment running throughout the remaining period of a convict's natural life. Imprisonment for life is not equivalent to imprisonment for 14 years or 20 years. Section 57<sup>11</sup> of the IPC makes life imprisonment equivalent to imprisonment for 20 years only for the purpose of calculating fractions of terms of punishment. In this type of punishment, an accused convicted of a crime must remain in prison until he is alive or until pardoned or otherwise commuted to a fixed period. Imprisonment for life can never be simple imprisonment; it must always be rigorous imprisonment.

The Supreme Court in *Gopal Vinayak Godse v. State of Maharashtra*<sup>12</sup> clarified that no provision of the law states that life imprisonment is for a period of 20 years. Furthermore, section 55 of the IPC read with Ss.432-433 Cr.PC state that an appropriate government may suspend or remit the life sentence of a convict. The condition attached to it is that the convict must have served at least 14 years in prison. However, if the President or the Governor (by exercising their powers under

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<sup>10</sup> . Ratanlal and Dhirajlal, *The Code of Criminal Procedure* 544 (LexisNexis, Gurgaon, 22nd edn.,2017).

<sup>11</sup> . ibid

<sup>12</sup> .1961 AIR 600.

article 72 and 161 respectively) of the Indian Constitution decide to remit or commute the life sentence of the convict, the convict shall be released immediately even if he has not served the statutory requirement of 14 years in prison. This is because Section 433A of Cr.PC, being a statutory provision, cannot override the constitutional power conferred upon the President and the Governor under articles 72 and 161, respectively.

**Imprisonment:** Imprisonment means taking away a person's freedom and putting him in prison. Black's Law Dictionary defines the term 'imprisonment' as the act of putting or confining a man in prison. According to section 53 of the IPC, there are two kinds of imprisonment: 1. Simple Imprisonment where an accused convicted of a crime is kept in prison without any hard labour. It is awarded only for lighter offences such as defamation and 2. Rigorous Imprisonment under which a prisoner or an accused convicted for a crime is kept in prison, and they must do hard labour such as agriculture, carpentry, drawing water, etc. Rigorous imprisonment is obligatory for:

- (i). Section 194 IPC: Giving or fabricating false evidence with intent to procure conviction of a capital offence under the IPC.
- (ii). Sections 376, 376A, 376C, 376D IPC: Rape.
- (iii). Section 449 IPC: House-trespass in order to commit offence punishable with death.

While discussing about the imposition of rigorous imprisonment under the Indian Penal system, it would be worth to mention here the Apex Court's observation's in the case of *State of Gujarat v. Hon'ble High Court of Gujarat*<sup>13</sup> wherein the Court clarified that the prisoners who are put to hard labour should necessarily be paid minimum wages for the work extracted. It has also been noted by the Supreme Court that Section 53 mandates the jail authorities to impose hard labour on the convict sentenced to rigorous imprisonment.

**Forfeiture of Property:** Forfeiture implies the accused's loss of property, money, or assets without consideration or compensation in return. Under this punishment, the State seizes the property of a criminal. It is the result of the wrong or default caused by the person. The property forfeited may be movable or immovable. This form of punishment involves depriving a person of his property as a penalty for the offense committed. It can be imposed under the IPC only when the crimes committed are those under Section 126 (committing or preparing to commit

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<sup>13</sup>. (1998)7SCC392

depredate on territories of power in alliance or at peace with Government of India), Section 127 (a receipt of the property taken in the commission of War or depredation), Section 169 (unlawful buying or bidding for property in own name by a public servant).

**Fine under the IPC:** The court may impose the punishment of fine as sole punishment or as an alternative for imprisonment or in addition to imprisonment. The court may decide whether either imprisonment or fine or both are to be awarded. Fine means forfeiting money as a form of penalty. This form of punishment has been considered valid on the ground of its universality; however, the fine imposed should be proportionate to the offense committed because it not only affects the convict but also his dependents. Under IPC, fine can be imposed as the sole punishment or an alternative punishment or for a limited amount or unlimited amount. Judges have a wide discretion while fixing the amount of the fine to be imposed, especially where the provision makes no stipulation as to the amount of fine. Courts being the administrators of justice, it is expected of them that the fines imposed should be fair, just, reasonable, and not excessive. Various cases of non-payment of fine and its various forms have been dealt with under Ss. 64- 69 IPC.

**Solitary Confinement:** It is being defined under section 73 of the IPC as keeping the prisoner thoroughly isolated from any kind of intercourse with the outside world on the belief that a feeling of loneliness may exert wholesome influence and reform the criminal. Solitary confinement shall in no case exceed three months in total. The scale, as given in section 73, is as follows:

- (i) If the term of imprisonment is less than or up to six months then the period of solitary confinement shall not exceed one month.
- (ii) If the term of imprisonment is more than six months but less than one year then the period of solitary confinement shall not exceed two months.
- (iii) If the term of imprisonment is of more than one year, then the period of solitary confinement may be up to three months but not beyond that.

The Supreme Court of India in the case of *Charles Sobraj v. The Superintendent, Central Jail, Tihar*<sup>14</sup>, has observed that solitary confinement means harsh isolation of a prisoner from the society of fellow prisoners by cellular detention. It should be imposed following a fair procedure and only in exceptional cases.

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<sup>14</sup> . 1978 AIR 1514.

The Penal reforms in India during the past few decades have brought about a remarkable change in the attitude of people towards the offenders. The old concepts about crime, criminal and convicts have radically changed. It is evident from the above discussion that the emphasis has now been shifted from deterrence to reformation of the offenders. The age old discriminatory and draconian punishments no longer find place in the modern penal system. It must, however, be stated that the Indian penal system seems to be less effective as a control mechanism because it leaves many a criminal to enjoy the ill-gotten gains of their criminal acts. Undoubtedly, the Indian penal policy is based on individualised system but it seems to be working unjustly in favour of advantaged groups, particularly the political highups and those who are in power, and hence, the result the deterrent effect of punishment is considerably diminished. This is more true with punishment in bribery and corruption cases and big financial scams where influential persons are dealt with leniently because they are more articulate and are capable of influencing things in their favour.

Even though the penal system of India is mostly inclined towards reformative approach, however, at times it has acted in a deterrent way as well. The Apex Court has in the case of *Adu Ram v. Mukna and Others*<sup>15</sup>, highlighted the proportionality between crime and punishment and held that social impact of crime cannot be lost sight of and the offence of murderous assault under Section 300 read with Sections 149, 304, Part I of the IPC per se requires exemplary treatment. The Court also noted that imposition of sentence without considering its effect on the social order leads to some undesirable practical consequences. It is to be noted that grave offences like crimes against women and children, Dacoity, Treason, Misappropriation of public money and offences involving moral turpitude have great impact on social order, and per se require exemplary punishment in public interest. One of the most effective deterrents is not the fear of pain and incarceration but the fear of social exclusion undoubtedly; the various kinds of punishments reiterated under the Indian Penal System have definitely acted as a deterrent on some types of offenders. Deterrence theory of punishment along with the reformative theory continues to be the cornerstone of the Indian Penal System. However, the extent of deterrence must be decided and modulated depending on the individualised needs of the criminal after taking into consideration the gravity and impact of the crime on the society.

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<sup>15</sup> . AIR 2004 SC 5064.

The Supreme Court expressing concern over rising violent crimes against women has observed in *Purushottam Dashrath Borate & Another v. State of Maharashtra*<sup>16</sup> that the sentencing policy adopted by the Courts, in such cases, ought to have a stricter yardstick to act as a sufficient deterrent. In the Indian Penal System, injustice to accused owing to miscalculated sentencing is remedied by the provision of appeal to higher courts like the High Courts and the Supreme Court who also formulates precedents the subordinate courts are bound to follow.

### **Conclusion:**

Be it any form of punishment that is to be meted out to offenders in accordance with the kinds of offence they have committed, it is always to be borne in mind that no one is born a criminal. Nobody wants to be excluded from the society and that Man is a social animal and man needs the company and approval of society. There may be a number of both aggravating and mitigating factors- be it physical, environmental, social, economic, or psychological/emotional, that had contributed to the actions of the offender. The actual factors leading to the state of mind that existed at the time of commission of an offence or crime can never be fully understood and determined by anyone, not even by the offender or criminal himself in some cases. It should be understood that any normal human can become a criminal or an offender provided he is backed into a corner with no other avenue of escape as the 'survival instinct' inherent in all living beings will automatically kick in. Hence an accused must not be always looked as a guilty person before proving its guilty beyond any reasonable doubt which is considered very beautiful philosophy of criminal law. Whatever changes or reforms in the penal policy that is to be implemented should be best carried out for the best interest of our society by keeping in mind this basic instinct of all humans. To conclude it would be worth to reaffirm that 'Every saint has a past and every sinner has a future' and that nobody is born a criminal and hence, there is also a scope of reforming and rehabilitating them in our society.

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<sup>16</sup>. AIR 2015 SC 2170.