THE MANDATE OF MANDATORY MINIMUM SENTENCES IN THE APPLICATION OF PROBATION LAWS

Abstract

Recognition of the idea that not all offenders are similar has led to the awareness that a degree of flexibility is desirable in the administration of criminal justice. The rigidity of the minimum sentences prevents courts from individualising treatment by considering the special circumstances in dissonance with the current trend in sentencing policy that increasingly emphasizes on the reformation and rehabilitation of the offender. In contrast, the system of probation seeks the reformation and rehabilitation of relatively soft and young offenders from the pernicious influence of hardened criminals in the prison by releasing them on probation instead of sentencing them to imprisonment. This potential tension between the power of court to individualise treatment and the mandatory minimum sentences prescribed by the legislature is the subject of study in this paper.

I Conflict between mandatory minimum sentences and individualisation of treatment

THE SIGNIFICANCE of sentencing process is appreciated in the context of individualisation in the administration of criminal justice - sentence should fit the offender instead of the offence. The grading of various offences and prescribing corresponding sentences is typically a legislative function and the courts by exercising judicial discretion within the limit prescribed by the legislature decide what would be the appropriate sentence in the facts and circumstances of the case. Individualisation of sentences is based on the idea that not all offenders are similar. Recognition of this difference between offenders has led to the awareness that a degree of flexibility is desirable in the administration of criminal justice. The ignominy commonly associated with a jail term and the social stigma which attaches to convicts often frustrates the very purpose of punishment. The novice who strays into the path of crime therefore ought to be rehabilitated in the interest of society. The system of probation is a reformative measure that recognises the importance of environmental influence in the commission of crimes and aims to reclaim amateur offenders who can be usefully rehabilitated in society.

The large majority of offences under the Indian Penal Code, 1860, and other penal laws in our country prescribe sentences of imprisonment for varying terms. Where the sentence is of imprisonment, a wide discretion has been given to the court in fixing a suitable term of imprisonment. The judicial discretion is, however, guided by the law to the extent that the legislature has fixed a maximum sentence of imprisonment intended for the worst cases, leaving to the discretion of the courts only the determination of the extent to which the sentence in a given case should approach to or recede from the maximum limit. The exercise of this discretion is not arbitrary and

the law provides for appeals and revisions to higher courts for which appropriate provision has been made in the Code of Criminal Procedure, 1973.[1]

However, for certain offences, a mandatory[2] minimum sentence of imprisonment has also been prescribed. Mandatory minimum sentences have been a feature of Indian criminal law as early as the Penal Code came into existence and its use has only expanded over time. A number of legislations, besides the Indian Penal Code, 1860, also prescribe a mandatory minimum sentence of imprisonment. The rigidity of the minimum sentences prevents courts from individualising treatment by considering the special circumstances in dissonance with the current trend in sentencing policy that increasingly emphasizes on the reformation and rehabilitation of the offender. In contrast, the system of probation seeks the reformation and rehabilitation of relatively soft and young offenders from the pernicious influence of hardened criminals in the prison by releasing them on probation instead of sentencing them to imprisonment.

This potential tension between the power of court to individualise treatment and the mandatory minimum sentences prescribed by the legislature is the subject of study in this paper. Because mandatory minimum sentences of imprisonment are a part of our criminal justice system and are likely to persist, examining how individualisation of treatment can be encouraged by invoking probation is particularly important. This paper attempts to examine whether legislative function to determine the parameters of punishment for a crime precludes the responsibility of courts to individualise sentences. In other words, whether individualisation of treatment by extending the benefit of probation is excluded in cases where a mandatory minimum sentence of imprisonment has been prescribed by a Statute.

Following the first introductory part which sets the scene by introducing the conflict between mandatory minimum sentences of imprisonment and individualisation of treatment, Part II discusses the polemics of mandatory minimum sentences after a very precise narration of the evolution of such sentences in India. Thereafter, Part III analyses the scheme of probation in India both under the provisions of The Probation of Offenders Act, 1958, and the Code of Criminal Procedure, 1973. Next, Part IV turns to examine the legal position of mandatory minimum sentences of imprisonment in the application of probation laws through a discussion of important judicial decisions and the trends which emerge from it.

II Polemics of mandatory minimum sentence

As already stated mandatory minimum sentences have been a feature of Indian criminal law from the beginning. The draft IPC had fixed minimum as well as maximum sentence

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1 *See* Chapters XXIX and XXX, Code of Criminal Procedure, 1973.

2 The author refer to them as mandatory because most of the provisions prescribing a minimum sentence are worded as "shall not be less than."

of imprisonment for several offences but the committee considered it to be inexpedient and therefore minimum sentence of imprisonment was fixed only with respect to the offences of gravest nature.[3] In the entire Code, sections 121, 302 and 376DB are the only instances prescribing a minimum sentence of imprisonment for life, where the alternative sentence prescribed is death. There are two other sections where mandatory minimum sentence of imprisonment has been fixed: sections 397 and 398, IPC, both of which prescribe a mandatory minimum sentence of seven years imprisonment. Besides, a number of enactments like The Prevention of Food Adulteration Act, 1954, The Narcotic Drug and Psychotropic Substances Act, 1985, The Prevention of Corruption Act, 1988, Protection of Child from Sexual Offences Act, 2012, *etc.,* also prescribe a mandatory minimum sentence of imprisonment and the use of such sentences have only expanded over time. The principal reason for the increased use of such sentences is apparently rooted in the consideration that the minima would constitute an effective deterrent.[4]

A review of the scholarly literature reveals widespread scepticism in relation to mandatory minimum sentences. The system interferes with two fundamental values of law: principle of proportionality in sentencing and doctrine of separation of powers.[5] A lack of proportionality arises when courts are prevented from considering special circumstances of the case and individualising sentences accordingly.[6]As discretion is essential to judicial functioning, the doctrine of separation of powers is violated when there is a legislative attempt to deny it.[7] In the absence of judicial discretion judges forego sentencing altogether when the characteristics of offender and offence do not justify the minimum sentence in their consideration.[8]Other arguments against mandatory minimum sentences focus on the cost such sentences entail to correction systems besides their questionable deterrent effect because public is largely unaware

3 *See Jagmohan Singh* v. *State of UP*, MANU/SC/0139/1972, para 22.

4 A. Lakshminath, "Criminal Justice in India: Primitivism to Post-Modernism Criminal Justice in India", 48 *J. Ind. L. Inst.* 26, 32 (2006).

5 Thomas Gabor, "Mandatory Minimum Sentences: A Utilitarian Perspective", 43 *Canadian J. Criminology* 385, 386 (2001).

6 Benedict S. Alper and Joseph W. Weiss, "The Mandatory Sentence: Recipe for Retribution", 41 *Fed.Probation*15, 15 (1977).

7 Peter J. Uzzi, "Legislative Sentencing: California's Mandatory Minimum Sentence Statute and the Separation of Powers", 2 *Crim. Just. J.* 95, 99 (1978).

8 *See Generally* Shobita Dhar, "How Minimum Mandatory Sentence Impacts Outcome of POCSO Cases", *The Times of India* (Feb 3, 2021, 21:52 IST), *available at*: https://timesofindia.indiatimes.com/india/how-minimum-mandatory-sentence-impacts-outcome-of-pocso-cases/articleshow/80673443.cms (In the context of POCSO cases, it has been stated that when judges are reluctant to award the mandatory minimum sentence in a given case, where they don't think that kind of severe punishment is warranted, they find a way out.)

of the existence of such sentences.[9] Moreover, failure of deterrence is proven every time an offender is sentenced to imprisonment.[10]

Mandatory minimum sentences of imprisonment aim to ensure that all offenders convicted of a specific crime receive at least a minimum term of imprisonment. Thus they promise uniformity by reducing sentencing disparities. But in the same breath they raise the risk of injustice. Statutes cannot list exhaustively all possible factors relating to an offence and offender. Courts are thus prevented from considering special circumstances of the case and instead of bringing about uniformity it results in imparting excessively harsh sentences in certain cases. Mandatory minimum sentences eventually sell out individualisation for uniformity.[11]Other major objectives include protection of public and effective deterrence.[12]

While Malimath Committee recommended retention of such sentences for offences against public health and offences against the safety and well-being of society at large,[13] the Mennon Committee recommended their discontinuation as it does not serve any social purpose and instead, suggested increase in the punishment choices and invoking probation more often.[14] There has been, however, no legislative attempt at repealing mandatory minimum sentences.

III Scheme of probation in India

At this juncture it is pertinent to appreciate the scheme of probation both under the provisions of The Probation of Offenders Act, 1958, (hereinafter PO Act) and the Code of Criminal Procedure, 1973 (hereinafter Cr PC). At the time when PO Act was enacted section 562, Code of Criminal Procedure, 1898, was the only legislative piece dealing with probation. Later on it was replaced by the section 360, Cr PC, incorporating identical content.

Offenders with previous conviction or those convicted of offence punishable with death or imprisonment for life are beyond the purview of section 360, Cr PC sub-section 1 gives discretion to the court to release a woman, person below 21 years and male above 21 years who is not guilty of offence punishable with more than seven years imprisonment, on probation of good conduct for three years. Along the same

9 Nicole Crutcher, Mandatory Minimum Penalties of Imprisonment: An Historical Analysis, 44 *Crim. L.Q.* 279, 303 (2001).

10 Alper and Weiss, *supra* note 6, at 20.

11 Ryan King, Balancing the Goals of Determinate and Indeterminate Sentencing Systems, 28 *Fed.Sent'g.Rep.* 85, 86 (2015).

12 Crutcher, *supra* note 9, at305.

13 Government of India, Ministry of Home Affairs, Committee on Reforms of Criminal Justice System, Vol I. Report (2003)at 172, para 14.5.3.

14 Government of India, Ministry of Home Affairs, Report of the Committee on Draft National Policy on Criminal Justice (2007) at 64, para 5.5.

lines of section 3, PO Act, sub-section 3 envisages release after admonition in offences punishable with imprisonment up to two years or fine or both. The policy contained in section 360, Cr PC is fortified by section 361, Cr PC, through the requirement of special reasons for not releasing an offender on probation in certain cases. The key provision in the PO Act is section 4, which gives discretion to the court to release an offender on probation of good conduct for three years in offences not punishable with death or imprisonment for life, based on due consideration of the report of probation officer under sub-section 2.Sub-section 3 contemplates an additional order of supervision if it is expedient in the interest of the offender and the public. As distinct from section 3 or 4, PO Act, which are discretionary in nature, section 6, PO Act, is in the nature of an injunction to the court to not sentence to imprisonment offenders under 21 years for offences not punishable with imprisonment for life,[15] unless for reasons based on consideration of the report of probation officer. In exercising discretion under these provisions, court must have regard to the parameters indicated in the respective provisions.[16]

It is manifest from a plain reading of the provisions that the PO Act, is much wider in its sweep as compared to section 360, Cr PC section 4, PO Act, applies to persons of all ages in offences not punishable with death or imprisonment for life. Whereas Section 360, Cr PC. applies only to persons not under 21 years in offences punishable with fine only or with imprisonment up to seven years, to any person under 21 years or any woman in offences not punishable with death or imprisonment for life. Furthermore, section 4, PO Act, envisions a role for probation officers in assisting the courts and section 12, PO Act, removes any disqualification that maybe attached to the conviction. Considering the significant differences between the two statutes the Supreme Court has held that the two statutes cannot co-exist.[17]Indeed, a reading of section 19, PO Act, with section 8(1), General Clauses Act, 1897, makes it obvious that section 360, Cr PC does not apply to the states or areas where the PO Act, has been brought into force.

IV Domandatory minimum sentences exclude probation?

The legal position was analysed in *Ishar Das* in the context of section 7(1) read with section 16(1)(a)(i), Prevention of Food Adulteration Act, 1954.[18] Section 16(1), Prevention of Food Adulteration Act, 1954, prescribes a mandatory minimum sentence

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15 *Satyabhan Kishore* v. *State of Bihar*, MANU/SC/0232/1972, para 9.

16 The relevant aspects under the Probation of Offenders, Act, 1958, are the nature of offence, the character of the offender, and the surrounding circumstances as recorded in the probation officer's report; and the relevant aspects under the Code of Criminal Procedure, 1973, are age, character and antecedents of the offender and the circumstances in which the offence was committed.

17 *Chhanni* v. *State of UP*,MANU/SC/8838/2006, para 7.

18 *Ishar Das* v. *State of Punjab*, MANU/SC/0136/1972, para 7.

of six months imprisonment besides a minimum fine of Rs. 1000/-.However, it is followed by a proviso that gives a discretion to the court to impose a sentence of not less than three months imprisonment and minimum Rs 500/- fine in special cases. Referring to section 18, PO Act, the court stated that if the object of the legislature was that the PO Act would not apply to all cases prescribing a minimum sentence of imprisonment there was no reason to specifically make an exception for section 5(2), Prevention of Corruption Act, 1947. The fact that section 18, PO Act does not include any other such offence prescribing a minimum sentence suggests that in such cases the provisions of PO Act may be invoked.[19] The court further stated that the legislative intent that the provisions of the PO Act would prevail over section 16(1), Prevention of Food Adulteration Act, 1954,is manifest from the non-obstante clause in section 4, PO Act.[20] It may be interesting to note that while the principle laid down in *Ishar Das* was affirmed in *Jai Narain*[21] but on the facts of the case the court refused to release the offender on probation who was also convicted under section 7(1) read with section 16(1)(a)(i), Prevention of Food Adulteration Act, 1954. This suggests that while there is no legal impediment in applying the provisions of the PO Act in case of mandatory minimum sentences of imprisonment, the decision to extend the benefit of the PO Act in any particular case must depend on the circumstance of that case.

A more nuanced interpretation of the legal position was provided by the three-judge bench in *Bahubali* in the context of a claim for relief under PO Act to a person convicted under Rule 126-P (2) (ii), Defence of India Rules, 1962.[22]The Defence of India Act, 1962, which has long since expired, was a temporary measure to meet emergency arising out of the Chinese Invasion of India in 1962. Rule 126-P(2) and other rules contained in Part XIIA, Defence of India Rules, 1962, prescribed mandatory minimum sentence of imprisonment for offences specified therein. Referring to the non-obstante clause contained in section 43, the Defence of India Act, 1962, the court held that the PO Act will have no application in case of an offence under Defence of India Rules, 1962.[23] The court explained that in case of offences under a Special Act enacted after the PO Act, prescribing a minimum sentence of imprisonment, the provisions of the PO Act cannot be invoked if the Special Act embodies a non-obstante clause overriding the provisions of Statutes containing inconsistent provisions.[24]

As already stated section 18, PO Act, saves the operation of the offence under section 5(2), the Prevention of Corruption Act, 1947, which corresponds to section 13,

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19 *Id.* para 8.

20 *Id.* para7, 9.

21 *See Jai Narain* v. *The Municipal Corporation of Delhi*, MANU/SC/0140/1972

22 *Superintendent, Central Excise, Bangalore* v. *Bahubali*, MANU/SC/0185/1978, para 4.

23 *Id.* para 9.

24 *Id.* para 10.

Prevention of Corruption Act, 1988. But no corresponding change was made in the PO Act after the 1988 Act was brought into force. As a result of the absence of any embargo in the PO Act for the offence under section 13, Prevention of Corruption Act, 1988, the benefit of section 360, Code of Criminal Procedure, 1973, was extended by the high court in *Ratanlal Arora*.[25] Referring to section 8, General Clauses Act, 1897, the Supreme Court stated that when an Act is repealed and re-enacted, the reference to the repealed Act would be construed as reference to the re-enacted provisions, unless a contrary intention is expressed by the legislature. Thus the reference to section 5(2), Prevention of Corruption Act, 1947, in section 18, PO Act, was construed as a references to its corresponding provision under section 13(2) Prevention of Corruption Act, 1988. Consequently, it was held that the benefit under the PO Act cannot be extended for offences under section 13(2), Prevention of Corruption Act, 1988.[26]

Mohd. Hashim further elaborated the legal position. It was argued in that case that the proviso to section 4, Dowry Prohibition Act, 1961, which confers judicial discretion in special cases to impose a sentence lesser than the minimum six months specified in section 4, Dowry Prohibition Act, 1961, should be construed as mandatory minimum sentence. Rejecting such argument, the court elucidated that when the Statute prescribes minimum sentence without discretion, it cannot be reduced by the courts. In such cases the imposition of minimum sentence becomes mandatory.[27]But when a Statute prescribes a minimum sentence and also gives discretion to the court to award a lesser sentence or no sentence at all, such discretion would include the discretion to not send the offender to prison.[28] The court stated that a provision that gives discretion to the court to not award minimum sentence cannot be equated with a provision which prescribes minimum sentence and held that benefit of the PO Act cannot be extended where minimum sentence is provided.[29]

Following *Hashim*, *Vikram Das* refused to extend the benefit of probation to offence under section 3(1)(xi) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 which prescribed a six month minimum sentence without any judicial discretion. However, *Lakhvir* distinguished *Vikram Das* on the ground that the benefits of PO Act do not apply in case of mandatory minimum sentences prescribed

25 *State through S.P., New Delhi* v. *Ratan Lal Arora*, MANU/SC/0412/2004, para 8.

26 *Id.,* para 10-12.

27 *Mohd. Hashim* v. *State of Uttar Pradesh*, MANU/SC/1574/2016,para 19.

28 *Ibid.*

29 *Ibid.*

by special legislation enacted after the Act[30]and extended the benefit of probation to offence under section 397, IPC.[31]

Possibility of recourse to article 142, constitution of India, 1950

An interesting argument was made in *Vikram Das* that less than minimum sentence can be awarded in exercise of the powers conferred under article 142, Constitution of India, 1950. But rejecting such argument the court clarified that provisions of article 142, Constitution of India, 1950, cannot be resorted to impose sentence less than the minimum sentence. The powers under article 142, Constitution of India, 1950, cannot be controlled by any statutory provision. Neither can it be exercised in such manner as to come in direct conflict with existing statutory provisions as that would tantamount to ignoring the substantive statutory provision and supplanting its mandate. [32]

V Conclusion

The potential tension between the power of court to individualise treatment and the mandatory minimum sentence of imprisonment prescribed by the legislature has been the subject of this paper. To be particular, it delved into the question of applicability of the provisions of probation in cases where mandatory minimum sentence of imprisonment has been prescribed by a statute. An analysis of different judicial decisions suggest that in cases where mandatory minimum sentence of imprisonment has been prescribed by a statute, the benefit of probation cannot be claimed if the provisions of that statute are expressly excluded by section 18, PO Act. In the event that such Statute is repealed and re-enacted, the reference to the repealed Statute would be construed as reference to the re-enacted provision and the benefit of probation cannot be extended in such cases too, unless a contrary intention is expressed by the provisions of the re-enacted Statute.

If the statute prescribing mandatory minimum sentence of imprisonment has been enacted after the enactment of the PO Act, the provisions of the probation cannot be invoked if the Special Act embodies a non-obstante clause overriding the provisions of PO Act, or section 360, Cr PC to the extent of inconsistency. Further, if such statute prescribes mandatory minimum sentence without discretion, it cannot be reduced by the courts and no benefit of probation can be extended. Benefit of probation can however, be extended when the post-1958 Statute prescribes a minimum sentence and also gives discretion to the court to award a lesser sentence.

However, it must be noted that in every case where the benefit of probation can be extended, the ultimate decision to extend the benefit of probation case would depend on the circumstance of that particular case.Courts must have regard to the parameters

30 *Lakhvir Singh* v. *State of Punjab*, MANU/SC/0026/2021, para 13.

31 *Id.,* para 14-15.

32 *State of Madhya Pradesh* v. *Vikram Das*, MANU/SC/0159/2019, para 5, 8.

indicated by the respective legislations. Striving for uniformity by increasingly imposing mandatory minimum sentence is not a worthwhile solution. Striking right balance through individualization of sentences is crucial otherwise sentencing disparities and ineffective system of punishment would continue to plague the justice administration system.

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