Sentencing Policy in Nepal

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Abstract

Punishment in any form is inevitable end of conviction. However, mere conviction does not necessarily implies 'any' punishment. Punishment must be justified and should be based on some universally recognized principles and conform sentencing policy of the state.

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Punishment is a means of social control. It is given to offenders with the aim to prevent them from committing further crimes and to reform them for social integration. Punishment not only seeks to deter offenders but also other members of the society from committing similar acts. It also serves to extend sympathy to the victim or to his/her relatives. The concept of punishment thus, is infliction of some sort of pain on the offender for his/her violation of law.

In the past, punishment was justified mainly for the purpose of retribution. However, modern society considers crime control as one of the chief objectives of punishment. For this purpose imprisonment as a means of punishment is used to attain twin aims of reforming and treating criminals so that they will commit no further crime after their release. Furthermore as society seeks protection from criminals, prison isolates criminals from the community for a certain time serving the very purpose.

In this regard, this article aims to assess the sentencing policy prevailing in the existing law in Nepal building a comparison with Penal Draft Code 2059. It also highlights the procedural part and anomalies of existing laws.

SENTENCING POLICY: A BRIEF INTRODUCTION

Sentencing is defined as the formal pronouncement of the judgment and the punishment to the defendant following his/her conviction of crime. When the objective of criminal law is to determine whether the accused person is guilty of the offence s/he is charged with and to prescribe suitable punishment.[1] The next step is the selection of measure and fixation of quantum of that measure. This is referred as sentencing process. Few definitions of sentencing policy present in literatures and court decisions are;

a. The judgment that a court formally pronounces after finding a criminal defendant guilty, the punishment imposed on a criminal wrongdoer.[2]

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1 AHAMAD SIDDIQUE, CRIMINOLOGY, PROBLEM AND PERSPECTIVE, eastern book company, 4th ed. (1997) p.318

2 BRYAN A GARNER, BLACK'S LAW DICTIONARY 7th ed. P.1367

b. A judgment in criminal case denoting the action of the court in formally declaring to the accused the legal consequence of the guilt which s/he has confessed or of which s/he has been convicted.[3]

c. The term sentence means an order passed on an offender for an offence, which that offender has committed.[4]

COURT'S ROLE IN SENTENCING

While sentencing judge's task is to determine the type and quantum of sentence appropriate to the facts of the case and this judgment must be made in accordance with the relevant statutory provision and appellate principles. Sentencing law speaks in only general terms so that it is left to the judge to develop and apply the working rules required to give detailed effect to the provisions and principles in actual cases.[5] Hence, judges, generally enjoy wide discretion in determining the sentence to be imposed, against an accused.

JUSTIFYING PUNISHMENT

Punishing people certainly needs a justification, since it is almost always something that is harmful, painful or unpleasant to the recipient. Imprisonment, for example causes physical discomfort, psychological pain, indignity and general unhappiness along with a variety of other disadvantages (such as impaired prospects for employment, social life and so forth). Deliberately inflicting suffering on people is at least prima facie immoral and needs some special justification.[6]

THEORIES OF PUNISHMENT

Theory justifies the sentence imposed upon the offender. Since criminal law is framed in terms of imposing punishment for bad conduct rather than of granting rewards for good conduct, the emphasis is more on the prevention of the undesirable act. There are a number of theories of punishment and

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3 JAMES A. BALLENTINE, BALLENTINE'S DICTIONARY, 3rd ed. P.1160

4 *R* v *Hayden* (1975), Sentence must be legal one (*Unwin* v *Wolseley* 1 T.R 674) cf. John S. James, Stroud's Judicial Dictionary of words and phrases 5th ed. Vol. 5 (s-z) p. 2371

5 Ibid

6 See for detail, MICHAEL CARADINO & JAMES DIGNAM, THE PENAL SYSTEM 2nd ed. (1997)

each theory has or has had its enthusiastic adherents. Some of the theories are concerned primarily with the particular offender, while others focus more on the nature of the offense and the general public. These theories are discussed very briefly in the following.

Prevention: This theory is also referred as intimidation or when the deterrence theory is referred to as general deterrence, particular deterrence[7]. Criminal law aims to deter the criminal himself (rather than to deter others) from committing further crimes, by giving him an unpleasant experience he will not want to endure again.

Restraint: The notion here, also expressed as incapacitation, isolation or disablement, is society may protect itself from persons deemed dangerous because of their past criminal conduct by isolating these persons from society. If the criminal is imprisoned or executed, he cannot commit further crimes against society.[8]

Rehabilitation: Under this theory, also referred to as correction or reformation, convicted criminals are given appropriate treatment in order to rehabilitate them and to return them to the society, so reformed that they will not commit any further crimes. The rehabilitation theory rests upon the belief that human behavior is the product of antecedent causes, and that these causes can be identified and that on this basis therapeutic measures can be employed to effect changes in the behavior of the person treated.[9]

Deterrence: Under this theory, sometimes referred to as general prevention, it is believed that sufferings of the criminal for the crime committed are supposed to deter others from committing future crimes, lest they suffer the same unfortunate fate.[10] It would deter the offender from committing the crime in future in particular. However, the extent to which punishment actually has this effect upon the general public is unclear, conclusive empirical research on the subject is lacking and it is very difficult to measure

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7 J. ANDENAES, PUNISHMENT AND DETERRENCE (1974), F. ZIMRING &G. HAWKINS, DETERRENCE 224-48 (1973)

8 But " only execution incapacitates absolutely. All manner of crimes against persons occur in prisons, and few crimes against property are literally impossible in prison, so incapacitation is largely a matter of degree." J. GIBBS, CRIME, PUNISHMENT AND DETERRENCE 58 (1975)

9 Id

10 Id

the effectiveness of fear of punishment because it is only one of several forces that restrain people from violating law.

Withstanding, presence of abovementioned theories of punishment and their respective role and advantages. For many years most of the literature on the subject of punishment was devoted to advocacy of a particular theory to the exclusion of others. Those who espoused the rehabilitation theory condemned the rest, those who favored the deterrence theory denied the validity of all others, and so on. But in recent years the "inclusive theory of punishment" has gained considerable support. There is now general agreement that all of the theories described above deserve some consideration.[11]

MODELS OF SENTENCING PROCESS[12]

There are four sentencing models in sentencing process, namely, legislative, judicial, administrative model and presumptive model.

Legislative Sentencing Model: According to this model of sentencing legislature determines, by statutes, length of the sentence for each crime and judges are not given discretionary power in mitigating or aggravating the sentence. For example, an offender of provocational homicide gets 10 years of imprisonment in Nepal. The punishment is fixed, thus judges cannot mitigate punishment in any way. This is very rigid model that ignores the reality of human behavior.

Judicial Sentencing Model: Under this model judges have discretionary power to decide the span of time of the sentence within a range as prescribed by the legislature. For instance, legislature has determined 5 to 12 years of imprisonment for the attempt to commit homicide in Nepal. So while ascertaining the sentence judges may impose a sentence on that range, after taking into account various facts that could contribute to mitigate or aggravate punishment. This model hence, seeks a separate hearing for sentencing.

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11 L. RADZINOWICZ, IDEOLOGY AND CRIME 113-27 (1966), Contemporary Punishment ch. 6 (R. Gerber & P. McAnany ed 1972), FEINBERG, PUNISHMENT, IN PHILOSOPHY OF LAW 502 (J. Feinberg & H. Gross ed 1975)

12 SUE TITUS REID, CRIME AND CRIMINOLOGY, 8 ed. P. 516

Administrative Sentencing Model: According to this model legislature first determines a wide range of imprisonment for a particular crime, which in turn is imposed by the court. However, administrative agency, like parole board, later on can release the inmate. This type of model is also known as indeterminate sentence. In Nepal this model of sentencing is not present, nevertheless, the jailer may recommend the release of disciplined and reform oriented inmates. As per this model a judge is regarded as an expert of law not punishment. The punishment is viewed and adjudicated by the penologist.

Presumptive Sentencing Model: This model has been introduced as a new trend in sentencing process. A method for determining punishment in which the legislature sets a standard sentence in the statute, but the judge may vary that sentence if the case has mitigating or aggravating circumstances. It provides a certain amount of punishment in each specific case but the court is empowered to go up and down by bearing in the mind of the specific situation of the case. So the judge has to bear responsibility through elaborate reasoning why that offender needs that amount of punishment. [13] This process is not in practice in Nepal. However, Number 188 of *Muluki Ain* Chapter on Court Management shows apparent resemblance to this model.

PROVISIONS OF SENTENCING POLICY IN *MULUKI AIN* CHAPTER ON PUNISHMENT

Muluki Ain Chapter on Punishment provides punishment provisions and procedures. However, apart from the Chapter on Punishment other Specific Acts also make provisions relating to punishment for specific crime.

In Nepal, generally five forms of punishments are present.

i. Imprisonment for life with forfeiture of property[14]
i. Imprisonment for life[15]
ii. Imprisonment
iii. Fine[16]

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13 Id

14 Most serious cases like murder, assault upon royal family

15 Imprisonment for life connotes 20 years of imprisonment (*Muluki Ain* 2020, Chapter on Punishment number 6) if it is to be fragmented on smaller charge like attempt; the method of calculation is 18 months for forfeiture of property.

iv. Admonishment[17]

In addition to abovementioned forms of punishment, other procedures of punishment and sentencing are briefly discussed below:

Forfeiture and procedure of forfeiture: *Muluki Ain* Chapter on Punishment number 4 and 27 deals with the forfeiture. The relevant provision of law has stipulated that only the property, which is the convict's share in partition, is confiscated. Similarly, law further states that any obligation attached to the convict such as payment of debt, marriage expenses of subordinate must be set-aside before affecting the forfeiture. However, the new Criminal Draft Code does not include this provision.

Liability on greater offence only: When a convict committed several offences and was prosecuted simultaneously through the same charge sheet. On conviction, s/he is liable to punishment for only that offence which commands more punishment. If the offence is punishable only with fine, s/he is made liable to pay all the fines attached to each of offence. If the convict has absconded from prison or who is on bail, if commits further offence s/he can be made liable up to additional four years of imprisonment.[18]

Imprisonment in default of payment of fine: A person is liable up to four years of imprisonment in default of payment in addition to other punishment if s/he has committed offence punishable with both imprisonment and fine. If the offender has committed such offence that is punishable either by fine or by imprisonment in default of fine s/he cannot be imprisoned more than half than prescribed by the law alternatively. Similarly, if s/he has committed an offence punishable only with fine, in default of it, s/he cannot be imprisoned for more than two years.[19]

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16 Law has provided the scale of fine by mentioning minimum and maximum limit of it. Fine paid by offender is provided to the victim as compensation in only some cases, for instance, in child marriage, (*Muluki Ain* Chapter on Marriage Number 2 (8)) hurt, grievous hurt (*Muluki Ain* Chapter on Hurt) and false imprisonment (*Muluki Ain* Chapter on False Imprisonment).

17 In petty offence like possession of narcotic drug in small quantity, minor crime by child under 14, where it is punishable only with fine.

18 *Muluki Ain* Chapter on Punishment number 8, 10 & 41

19 Id. number 38

Conversion of Imprisonment into fine: Offences punishable up to three years of imprisonment has been categorized as bailable offence.[20] In case of first time offender or offence punishable up to three years of imprisonment, the court may, on its discretion, convert imprisonment term into fine and release the offender on payment of such fine.[21] However, this provision is not applicable to cases of polygamy.[22]

Remission: There are also provisions of remission in law. According to it, any person who is absent during trial if he is found guilty by the court he is entitled to 20% of remission of punishment if he appears before the court voluntarily within 60 days of adjudication.[23] Similarly, any prisoner who behaves with discipline in the prison is entitled to 50% remission of the prison term imposed upon him.[24]

Immunity from punishment: There are also provisions in law regarding immunity from punishment. A child below 10 years is held immune from all sorts of criminal liability. If the child is in between 10 and 14 and if s/he commits a crime punishable only by fine, with fine, he is admonished and released.[25]

Residual provision of punishment: There is also a residual provision in law. The law stipulates that if any act is made punishable by law but it has not provided any punishment, the court may impose up to Rs. 5000 fine on such offences.[26]

PROVISIONS ON SENTENCING POLICY IN PENAL DRAFT CODE 2059

Penal code has been drafted (though it not yet into force) with the objective of eliminating drawbacks prevailing in the existing penal policy of *Muluki Ain* and meeting needs and demands of society. The Penal Code has primarily emphasized on the proportionality between crime and punishment. Similarly, the Code has embraced, along with deterrence the notion of

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20 *Muluki Ain* Chapter on Court Management number 118

21 *Muluki Ain* Chapter on Punishment number 11

22 *Muluki Ain* Chapter on Marriage number 10

23 *Muluki Ain* Chapter on Punishment number 41(b)

24 Prison Act 2020

25 Children Act 2048 Section 10

26 *Muluki Ain* Chapter on Punishment number 12

reformation, by which forfeiture of property has been abolished and has left limitation of fine on judicial discretion. Furthermore, provisions of compulsory work labor and reform home has also been made. The penal code has tentatively proposed following policy.

Mitigating and aggravating circumstance of offence: The code has provided more discretion to judges. Consideration of gravity of crime, confession of offender, cooperation of the accused in collection of the evidence and detention of other accused and abettors are mentioned as the factors mitigating or aggravating the term of sentence.[27] Similarly, wide discretion has also been provided in determining fine,[28] which the convict is required to pay within a year in not more than three installments.

Compulsory work labor and reform home: The Code also provides that person between 25 to 45 years, sentenced to 3 years of imprisonment, can be sent for work at state-run project in place of prison. Likewise, convicts serving 1 year of imprisonment can be sent to reform home.

However in case of juvenile delinquents[29], provision for partial punishment for life imprisonment[30], and punishment when more than one crime has been committed in the same incidence[31] the Code is similar to the existing law**.**

JUDICIAL TREND ON SENTENCING

Number 188 of *Muluki Ain* Chapter on Court Management has conferred to the judge a wide and comprehensive discretion in mitigating punishment. This provision provides that if the judge after adjudication feels that imprisonment for life for the accused is harsh and that the circumstances of the case show grounds of mitigation. S/he may reduce the amount of punishment to any extent, as s/he thinks fit and refer the case to higher court for final approval.[32] This law has made the punishment in intentional homicide discretionary not mandatory.

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27 Penal Draft Code 2059 Section 39

28 Id. Section 32

29 Id. Section 32

30 Id. Section 31

31 Id. Section 34

32 *Muluki Ain* 2020 Chapter on Court Management Number 188

In *Shanti BK* v *HMG*[33] the defendant was charged with murder of a newly born baby, which was conceived by her under illicit relationship. The division bench of Supreme Court confirmed the decision of lower courts to convict the defendant. But it laid down guidelines for the judges while exercising their discretionary power under Number 188 of the Chapter on Punishment. Age of the offender, victim's perception towards the crime, past record of the offender, the magnitude of suffering sustained by the victim or by the society and cooperation of the offender to the court by speaking truth and so forth were pointed out as possible grounds of mitigation of punishment.

The fact shows that there is no uniformity in sentencing of the court except infanticide cases. In such type of cases the court is seen very lenient to inflict the punishment. Social disgrace is taken as a mitigating factor of punishment.

EVALUATION OF SENTENCING POLICY

The penal code has emphasized on the principle of proportionality of crime and punishment**.** The major positive aspects of the penal code are as follows;

- It has introduced new concept for aggravating and mitigating the length of punishment on the basis of gravity of crime
- It has emphasized confession of offender as mitigating factor
- More discretionary power to the judges
- Abolishment of forfeiture of property
- Provision of open prison, work release, and reform home

In spite of all these, there are some shortcomings they are stated very briefly as follows;

- More emphasis on imprisonment than compensation to victim so it is more oriented towards deterrence and retributive theory of punishment
- Administration of upper punishment, The same defect is repeated as exists in prevailing law

[33] NKP 2061 vol. 6, pg 769

It seems sentencing policy in Nepal is not govern by any particular principle. Although different forms of punishment methods have been tried, reformative approach is clearly lacking in the existing legal system. This with the absence of general overarching principle of sentencing has meant judges pass the sentence not because the offender is dangerous to the society, but because law requires so.

Similarly, number of questionable provisions exist that are absurd and unreasonable. For instance, liability on only greater offence is very defective. According to the provision any person who has committed several offences at one instance is punished for that offence which commands greater punishment. However, if the offence is punishable only with fine the offender has to pay fines attached to offence. This shows that the government is more concerned in raising revenue through fine than punishing criminals. Furthermore, in case of insanity, referral of insane offender to hospital treatment is absent in the law, which is very absurd since an insane person who has once committed crime could well commit it again.

Another such absurd provision on sentencing lies in case when offender dies before or pending the trial or before the completion of punishment term, where that person is absolved from criminal liability and the case is dropped immediately. To drop a case before adjudication is a matter of criticism and suggests presumption of guilt, where neither victim gets remedy nor, in case of innocent accused, the person's name is cleared from the offence.

CONCLUSION

Administration of justice in Nepal still is very traditional. Hence its reform on the basis of our experiment and social set up is very essential. Alternative to prison system has to be searched and only offenders who are serious threat to the society and who have committed grave offences must remain in custodial sentence. The rest may be treated with other measures under alternative system. Presumptive sentencing model should be introduced in our system to bring objectivity in adjudication. Similarly parole and probation should be introduced along with appropriate provision to ensure restitution of victims.

Justification of sentencing is lacking in the judgment of the court. So the Judges should also give reasons for the sentence. Similarly, there should be a separate hearing of sentencing to ensure proper and proportionate punishment to the convict.

Even though, Penal Code has been introduced to address shortcomings of the existing law and it has indeed brought some new concepts in administration of criminal justice system regarding sentencing policy. The Code, however, has not reformed all the problems that affect existing system. The Code has not helped to remove confusion regarding some anomalies of existing system like liability on greater offence. Moreover, Code is more oriented towards deterrence and retributive theory of punishment. However, newly introduced open prison and community service is yet to be evaluated in practice.[34] However, traces of reformative approach can be seen in such provision.

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[34] Prison Act 2019 (Amendment) Nepal Rajpatra, Khanda 54, Atiritank, Part 2, 2061/6/20