
Locating The Gender Cord in Sentencing Outcomes: Critical Account of Judicial Response in India

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Abstract

The criminal Justice System recognizes multiple factors for guiding the mind of a judge in sentencing a criminal for an offense. Unfortunately, 'gender' takes the place among such factors and infects the sentencing outcome by rendering 'her' criminality as an invisible one. This article analyses the sentencing regime in India along with such cases decided by the Supreme Court which are infected with the gender cord in sentencing. It argues that sentencing considerations in India are not limited to legal factors, such as the gravity of the offence, rather they are conditioned by an alien factor of gender. It discusses how the female criminal is seen less culpable and more repentant than the male criminal which "justifies" the differential and lenient sentencing for her. Further, it makes note of the sentencing regime in the United States of America by analyzing the regulatory framework. It suggests that gender difference can be a primary concept in gender development policy but must not be a fundamental concept in fair sentencing.

Keywords: Gender Disparity, Sentencing, Female Criminal, Punishment, Judicial Discretion, Discrimination, Justice.

Introduction

The concept of crime is multidimensional and it involves the transgression of social and legal boundaries. Criminals become the subject of 'treatment' by criminologists, law enforcement officials, legislature, and the Judiciary. Each one of them devise their own ways to deal with such criminals but female criminals are seen as alien to such circle and are treated in different manner which is coloured with gender.

Female is attributed with certain features which are essential for being a 'lady' and any kind of deviation, be it in the form of employment or crime, is 'dealt with' so as to push her back to her expected gender role. Any such conduct is seen as a shame to womanhood and an attempt to act like a man (Maniyar, 2004).

This differential attribution is discernible in daily instances also, such as, an act of any kind of negligent driving by female and the immediate reaction of the bystanders, i.e., "*Why does she need to have a car? Can't she simply ask her father or husband to drive? These 'women' are such poor drivers!!*" Had the driver been male, such reaction would have been as normal as any other activity of the day, as, "*Such accidents have become regular feature of this road. Nothing unusual in this!!*" It reveals the gendered variation in the explanation of the female behaviour which is also reflected in the treatment of female criminality by law enforcement agencies, including courts.

The breach of social and legal norms can be done by anyone regardless of the gender but the world of crime is perceived to be confined to men (Maniyar, 2004). Gender significantly influences 'who' is committing crimes and 'what' crimes can be committed by male and female. This thread of gender equally influences the stage of sentencing (Nicolson & Bibbings, 2000).

Absence of sentencing guidelines in India further adds to the thickness of this gender thread which was also highlighted by the Committee on Reforms of Criminal Justice System Government of India also called as the Malimath committee.(Committee on Reforms of Criminal Justice System Government of India, 2003) The Law Commission of India in its Forty Seventh Report on The Trial and Punishment of Social and Economic Offences, Government of India (1972) also took note of many factors for proper sentencing such as, criminal record of accused, age, social record, mental condition etc. but none refers to the 'gender' of the accused or the gender construct.

The Coloured Focus On 'Gender'

"If a man and a woman come up together, there will be a tendency, unless you were told otherwise, to assume that the man was influencing the woman, that the man was the ringleader." (Wasik et al., 1999)

Criminality was assumed to be characteristic of 'male', and therefore, explaining the male criminality explained 'all' criminality (Nicolson & Bibbings, 2000). The subject of female criminality suffered from relative criminological neglect until late twentieth century. Women and Crime caught the attention of a small group of writings, beginning with the atavist explanation by Lombroso and Ferrero in *The Female Offender* (1895). They concluded that, there is rarity of criminal type in the female as compared with the male delinquent. Other influential writers, *Thomas, Freud, Davis* and *Pollak*¹ coloured the female criminality with gender orientation and infused sexist assumptions which *reflect* and *reinforce* the inferior position of women. Sigmund Freud, for example, bolsters such sexual ideology by proposing specific characteristics of female such as, passivity, emotionalism, narcissism, and deceitfulness (McLaughlin & Muncie, 2013).

Owing to some of the most stereotypical understandings of the subject of female criminality, it is also usually disregarded as a relevant research problem (Islam, Banarjee and Khatun, 2015). This is primarily because they are affixed to the official statistics of crime (Weis, 1976). As argued in some of the scholastic works, female criminal behaviour has been stereotypically sexualized, psychologized and syllogized. If one takes an elaborated view of the Freudian perspective, a theoretical notion has developed which claims that female crime is a product of the masculinization of female behaviour. Female criminals are said to be more 'masculine' than non-criminal females, biologically, psychologically, and socially, akin to the role reversal (Weis, 1976).

On the other hand, some critical scholarships on women and crime in the Middle East suggests that perceptions of female criminality differed widely between fiction and juristic discourses. In legal discourse, jurists tended to see women as victims of circumstance with limited agency (Takla, 2022). Ebru Aykut demonstrates that the early Ottoman penal codes granted lenient sentences to the women accused of poisoning their husbands, constructing the crime as unintentional. Judges rarely applied death penalty, seeing women as unable to understand right from wrong. Such assumptions about limits of female agency did save most female poisoners from harsh punishment but upheld the gendered tendency to attribute women's crimes to their corporeality (Takla 2022).

Female Criminality – A Dot in The Picture

'Women commit much less crime than men do' is a statement that has achieved the status of a truth universally acknowledged (Maguire, 2002).

Male sex has greater involvement in official records for crime leading to assumption of the masculine nature of delinquency (Maniyar, 2004). This phenomenon exists due to the societal notion that female is unfit to be a criminal and has to be protected than being *tackled* as an ideal criminal. (Bajpai & Bajpai, 2000).

The latest available data of Crime in India 2018, published by National Crime Record Bureau (NCRB) observed that, a total of 33,15,044 persons were arrested by the police under various Indian Penal Code crimes out of which 1,76,288 females and 31,38,756 males were arrested.

Although female criminality is seen as a dot in the whole picture, it is undergoing sudden change and the dot is encapsulating an increasing space of criminality. It exposes the 'misleading' nature of traditional theories of crime to explain it.

As per the data of *Crime in India* 2014, published by National Crime Record Bureau (NCRB) observed that, a total of 37,90,812 persons were arrested by the police under various Indian Penal Code crimes out of which female persons arrested accounted for 10.2%, which marks an increase in the share of female criminality from 6.1% for the year 2013.

Troubled Role of Female Criminals

The troubled role encompasses the 'invisible', 'weak' and 'alien' image of the offender and in this context, female criminal is seen as someone who has been entrapped in the world of crime due to some trouble or maladjustment with her gender role. Her crime will be sought to be 'explained' in terms of her irrationality, pathology, illness, mental imbalance and menstruation. On the contrary, it is rational for a man to be found in the world of criminality and without any 'trouble' to be traced in his behaviour (Wasik et al., 1999) (Morrison, 1995).

¹ William I. Thomas was an American sociologist who contributed to the study of women by his works *Sex and Society* (1907), and *The Unadjusted Girl* (1923).

Sigmund Freud was an Austrian neurologist and founder of psychoanalysis, who created an entirely new approach to the understanding of the human personality.

Kingsley Davis was an American sociologist and demographer who contributed to the study of women by his work on prostitution *The Sociology of Prostitution* (1961).

Otto Pollak was Austrian-American professor of sociology who contributed to the study of women by his work *The Criminality of Women* (1950).

The punishment for crime is reserved to be 'discussed' for male criminals who are considered worth such discussion. The efforts will be to realign him with civilized citizen and not to *norm-alize* as is being done for the female criminals as per the socio-gender role expectations of being passive and shy lady (Nicolson & Bibbings, 2000).

This troubled image of female criminal also figures in the legislative regime which focuses on females only as victims and not as the perpetrators of crime, such as, Protection of Women from Domestic Violence Act, 2005 and The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. The existence of women in such laws has largely been victim oriented and the criminality is being reserved for men. The beginning of gender impact is evident in the laws made by the legislature to such an extent that even 'Gender' is defined by Section 8 of Indian Penal Code, 1860 as, '*The pronoun "he" and its derivatives are used of any person, whether male or female.*'

Such laws condition the minds of judges to view female as incapable of committing the crime and to be 'protected' and 'adjusted' to her role of being passive and feminine (Nicolson & Bibbings, 2000). Female offenders are treated as *doubly deviant*, i.e., breaching not only the criminal law but also the sex-role expectations, and are dealt with far more harshly than male offenders. In this filtering context, those who fit the stereotypical conceptions of 'ladies' or 'nice girls' have higher chances of receiving the leniency than those who breach these expectations (Maniyar, 2004).

The range of factors in deferentially deciding the criminality of female is predominantly familial in nature. Although female criminals are benefitted from the leniency offered by judges and are seen as in need of protection not punishment, it *reinforces* the gendered explanation for her criminality and *constructed* role for her.

Discrimination In Sentencing

Discrimination can take a number of forms such as, institutionalized, contextual and individual. Institutionalized discrimination results from the institutionalized policies which are apparently gender neutral but are handed down in gendered manner. Contextual and Individual discrimination is the result of gender bias or prejudice of the decision maker (Spohn, 2008).

Contextual discrimination is, as the term suggests, contextual in nature and occurs in a particular situation, such as, category of offenders. Individual discrimination nears the state of pure justice but has the thread of gender sewn by a particular individual, such as, law enforcement officer. The instances of lenient sentencing majorly fall in this category (Spohn, 2008).

Discrimination may also be *direct* or *subtle*. Direct discrimination takes place in the terms of a direct impact on the sentencing when man is more harshly punished than women ("Defining Discrimination against Women and Widows", *Advocates for Human Rights*, 2014). Subtle discrimination takes place when there is no direct involvement of the gender but due to other independent factor the result is gendered discrimination (Spohn, 2008).

Judicial Construction of Female Criminal

Judges have had high levels of discretion in sentencing the offenders where they are free to impose any conditions. Essentially, the only guidance for decision making comes from judge's own value system and belief in justice. (Mallicoat, 2012). While it allows individualized justice, it also paves way for inconsistent sentencing for the similar kind of offences and in some case, same offence.

One of the studies examined more than 500 judges from a state court system on the role of gender in decisions by the judges and found that they can be 'as biased or even more biased than the general public in deciding court cases where traditional gender roles are challenged'. It suggested that 'Judges' ideology and life experiences might influence their court decisions (Miller, 2018).

In this context, the observation made by Justice Ruma Pal is significant in emphasising the true identity of women as equal intellect being as man. She asserted that, "*Her gender is only one aspect of her identity. Like other individuals, there are other aspects of her identity, which apart from her gender, includes, most importantly, her intellect.*" ("Live Law", 2019)

The Gender Weighed Sentencing

Sentencing the female to imprisonment attracts detailed consideration of mitigating factors and it is applied in the nature of last option. There are various reasons marshalled in support of the claim that female criminal must not be normally imprisoned, such as Risk (Research and Advocacy for Reform (2007), Legitimacy of punishment (Farrington & Morris, 1983), Double regulation (Spohn, 2008) and Role Worth (Sentencing Advisory Council, Australia, 2010).

Such lenient treatment does not rule out the possibility that gender filtered female criminal may receive harsher treatment (Maguire, 2002). When the offence reveals 'inappropriate role behaviour' the penal outcome tends to be harsher (Wasik et al., 1999). The Karnataka High Court accepted the anticipatory bail application of an accused in a rape case where it observed that after being raped when a woman is feeling tired and going to sleep, "*It is*

unbecoming of an Indian woman; that is not the way our women react when they are ravished.”. (Sri Rakesh B. v. State Of Karnataka, Criminal Petition No.2427 Of 2020)

Gender And the Differential Sentencing In India

The Indian judicial history has witnessed certain cases which present the ‘gender’ thread in the construction of female criminality and the differential sentencing.

Paper Justice vs. Real Justice

The ‘real’ justice requires conditioning the punishment as per the nature of offence and condition of accused. However, the opposite was reflected in State of Himachal Pradesh v. Nirma Devi (2017).

Factual background

Respondent along with the co-accused was involved in administering the intoxicating substance to the complainant. After such intoxication, the complainant was beaten badly and dumped in gutter. He was looted of all the currency notes he was carrying and was attempted to be killed. Respondent was convicted under section 328, section 392 and section 397 read with section 34 of the Indian Penal Code (IPC) along with co-accused.

Sentencing considerations dilemma post-conviction

The case was successfully argued and proved by the prosecution in terms of her intention to commit the crime. However, the court discussed at length the dilemma of balanced sentencing in such cases where the accused is a woman having three children to look after.

Decision of the Court

The offences for which she was convicted were serious in nature and were punishable with 10 years which under certain circumstances can even be life imprisonment. However, the court reaffirmed the leniency afforded by the trial court when it passed an order of two years’ imprisonment for such crime looking into the fact that the offender is a woman and has to bear three minor children. The court did not support the substitution of the lesser punishment by High court. Justice AK Sikri observed,

“We are thus of the view that the fact that accused has three minor sons, out of them two are mentally retarded, was taken into consideration by trial court and after considering the aforesaid fact, sentence of imprisonment of only two years was ordered...There was no reason to show any further mercy by the High Court.” (State of Himachal Pradesh v. Nirma Devi, Criminal Appeal No of 2017 Arising out of SLP (Crl.) No. 8983 of 2012)

However, at the same time it observed that such mercy cannot be showered in case of woman who is a part of terrorist group. Such approach of the court clearly reflects the troubled image of the woman and goes against the non-conventional, men-like role and troublesome role of a terrorist female offender.

Blot on the Motherhood

Woman carries multiple gender identities and failure to fulfil any one of them is seen as a blot on her very identity. It was the approach of judiciary in Satni Bai v. State of M.P (2010).

Factual background

Accused was found standing beside the dead body of her son with blood filled axe in her hand. She was convicted under section 302 of Indian Penal Code and sentenced for life. The decision was upheld by the Chhattisgarh High Court. The case was purely circumstantial in nature and did rest on the testimonies of the witnesses who merely saw the accused standing and not actually committing the crime. The only clue was her *saaree* which had blood stains and the axe in her hand for which she did not give explanation.

Decision of the court

The court dismissed the appeal and allowed the conviction to stand. It considered the conduct of her in standing like a mute spectator beside the dead body of her own son as unusual and could not connect such conduct of a ‘mother’ as having innocence. Justice H.L. Dattu observed,

“This kind of reaction and lack of remorse would not have been forthcoming had she been innocent. This unusual reaction to the death of her son who was aged four at the time of his death, in no uncertain terms point towards her involvement in the crime. In our view, this is an unusual case and therefore the plea that a mother is not capable of killing her own son, in the

absence of any evidence to the contrary cannot be accepted..” (Satni Bai v. State of M.P., Satni Bai v. State of M.P., Criminal Appeal No. 212 of 2010)

No Mitigating Factor Except being a Woman

Sentencing requires the balancing of aggravating and mitigating factors wherein gender must not appear. However, it was acknowledged as the one such factor in Renuka Bai alias Rinku alias Ratan v. State of Maharashtra (2006).

Factual background

The appellants kidnapped small children below five years and use them in whatever profitable way is possible until their disposal. The appellants were convicted and the death penalty imposed on them by the Sessions Court which was confirmed by the High Court. The court was satisfied with the proof of the guilt.

Decision of the Court

The capital punishment given to appellants for the offences punishable under Section 302 read with Section 120 B of the Indian Penal Code, 1860, was confirmed by the Court.

The court observed with respect to the appropriateness of capital punishment for the appellant. Justice K.G. Balakrishnan observed,

“Going by the details of the case, we find no mitigating circumstances in favor of the appellant, except for the fact that they are women. Further, the nature of the crime and the systematic way in which each child was kidnapped and killed amply demonstrates the depravity of the mind of the appellants.” (Renuka Bai Alias Rinku Alias Ratan v. State of Maharashtra, AIR 2006 SC 2060)

Humanitarian Grounds for Woman

Female is perceived as an outsider to the world of heinous crimes, such as terrorism, and the sentencing is equally conditioned by such assumption. It was depicted in the majority opinion in the Supreme Court in State of Tamil Nadu v. Nalini (1999).

Factual Background

Rajiv Gandhi, a former Prime Minister of India was assassinated on May 21, 1991 in Tamil Nadu. An adolescent girl was made a weapon of human bomb for explosion near the visiting former Prime Minister. All the appellants were found guilty of several offences by the special judge. They were sentenced to death. On the confirmation of death sentence of Nalini, one of the appellants, Thomas, J. expressed a dissenting opinion. Justice Thomas observed,

“She was led into the conspiracy by playing on her feminine sentiments. She became an obedient participant without doing any dominating role. She was persistently brainwashed by Murugan who became her husband and then the father of her child.” (State of Tamil Nadu v. Nalini, 1999 Cri.LJ 3133 (SC))

The court considered her femininity for the purpose of awarding sentence.

It was further observed,

“Considering the fact that she belongs to the weaker sex and her helplessness in escaping from the cobweb of Sivarasan and company the mere fact that she became obedient to all the instructions of Sivarasan, need not be used for treating her conduct as amounting to "rarest of the rare cases". Another consideration which we find difficult to overlook is - she is the mother of a little female child who would not have even experienced maternal huddling as that little one was born in captivity.” (State of Tamil Nadu v. Nalini, 1999 Cri.LJ 3133 (SC))

The Court set aside the death sentence passed on her and altered it to imprisonment for life.

Reduced Sentence for ‘Lady’

Crime is considered to be a man’s play primarily and man is punished for the same without any single mention of him being a man. However, it was considered as not applicable in case of female criminality by Madras High Court in Tamilmani v. State (1997) where the sentence of accused ‘being lady’ was reduced to the one already undergone.

Factual background

The appellant along with her brother was residing at Sanappiratti Pathiyur village. One day the brother of appellant was caught hold off by few persons who were suspecting him to be the one who stole the goat of one of them.

The appellant stabbed the deceased with the knife on his stomach and stated that the hands of her brother were tied and so he could not be taken to the police station. Appellant was convicted by the Court of Session under Section 302 of the Indian Penal Code, 1860 and sentenced to imprisonment for life.

Guilt Proven Beyond Reasonable Doubt

It was made clear by the medical officer that the injury caused was sufficient in the ordinary course of nature to cause death and that a weapon like knife has caused such injury. Therefore, it is crystal clear that the appellant inflicted the injury on the deceased. However, the appellant pleaded that she had no intention of causing an injury to the deceased with the knife and requested this Court to alter the conviction from Section 302 of the Indian Penal Code to one under Section 304 and reduce the sentence of Imprisonment for Life to Rigorous Imprisonment for seven years.

Decision of the Court

The conviction of the appellant was set aside and instead, she was convicted under Section 304, Part II of the Code. Her sentence was also reduced to the period which is already undergone.

Justice A.R. Lakshmanan observed,

“The appellant being a lady aged about 22 years at the time of occurrence, has committed the offence in a spur of the moment unable to bear the bearings of her brother by the village people.” (Tamilmani v. State, 1997 Cri LJ 147 (Mad))

The Gendered Lens of Cruelty

An act of cruelty is to be punished because of the consequences it ensues for the victim and not due to the failure of the role by the accused which led to such cruelty. The punishment to the female criminal on such ground was reflected in *Mt. Paniben v. State of Gujrat* (1997).

Factual Background

The accused was mother-in-law of the deceased and pour kerosene on her while she was in sleep and lit the fire. When the victim was brought to the hospital she told some of the witnesses that accused had burnt her. Accused was acquitted by the trial court but was convicted by the High court and sentenced to life.

Decision of the court

The offence was not witnessed by anyone except the victim herself who told others that she has been burnt by the accused. The case was circumstantial in its nature and the court rested on a chain of such circumstances leading to conviction. However, it based its decision on her role as a ‘woman’ who must not involve in an act like this against another woman. The appeal was dismissed.

Justice S. Mohan observed,

“It would be a travesty of justice if sympathy is shown when such a cruel act is committed. It is rather strange that the mother-in-law who herself is a woman should resort to killing another woman. It is hard to fathom as to why even the mother in her did not make her feel.” (Paniben v. State of Gujrat, 1992 SCR (2) 197)

The court applied such gendered approach not just in the conviction but also in terms of hearing the request for release of accused after having spent a decade in the jail. It observed that undue sympathy will be frustrating the justice and just because accused has spent a decade in jail does not mean that she will be set free.

Love and the Deserving Punishment

In *Shamim Rahmani v. State* (1975), female lover entrapped herself in clutches of law and assumed the tag of murderer but was awarded life imprisonment on grounds of her young age and femininity.

Factual background

Appellant was about 22 years of age and was a college student. The love episode started between the appellant and already married doctor who was of 35 years of age and had three children. Appellant got to know from servant that doctor is being seen with other girls on his scooter. Appellant and the deceased met at her residence where an altercation took place. While he was leaving afterwards she shot him. She was convicted by the Trial court and it was affirmed by the High Court with life imprisonment.

Decision of the Court

The Supreme Court endorsed the views of High Court on appropriate sentence for appellant being life imprisonment and not capital punishment. It agreed with the views of High Court that the appellant being ‘young

lady and having developed true love feelings for the doctor who cheated her', deserve not to be hanged till death but must be imprisoned for life. (Shamim Rahmani v. State, AIR 1975 SC 1883)

Gender Justifying the Lesser Sentence

The punishment for crime is measured against variety of factors, such as, manner of crime, heinous feature of crime, state of victim etc. However, in Ediga Annamma v. State of Andhra Pradesh (1974), despite the presence of these factors the lesser sentence was awarded due to the gender of accused.

Factual background

The accused was a young woman who was living with her parents with her child. She was thrown out of her matrimonial house by father-in-law. She had an extra-marital relation with another person in her locality and murdered the woman and her child because such woman was also involved in an illicit relation with the same person. She was convicted and sentenced to death which was confirmed by the High Court.

Aggravating Factors for Higher Sentence

There were various aggravating factors which reflected on her criminality and the brutal killing, such as, manner of stabbing, disfiguring of the face of the victim, changing the clothes of victim's dead body to hide the identity, wrapping the body of victim's child and burying in river sand.

Decision of the Court

Death sentence was changed to life sentence on account of her extra social *cum* gender features. Justice Krishna Iyer observed,

“It may also be worth mentioning that, apart from her youth and womanhood, she has a young boy to look after. The criminal's social and personal factors are less harsh, her femininity and youth, her unbalanced sex and expulsion from the conjugal home and being the mother of a young boy; these individually inconclusive and cumulatively marginal facts and circumstances tend towards award of life imprisonment.” (Ediga Anamma v. State of Andhra Pradesh, 1974 SCC (4) 448)

In addition to such cases, it will be appropriate to refer to another case Shantabai and Others v. State of Maharashtra (2006) in which the court looked into the familial ideology and the need to preserve the social fabric. The case surrounded the mix of illicit relationship between the accused and the deceased, and the vengeance on part of co-accused. Accused was convicted by the trial court but was acquitted by the appellate court on the ground that there was no proof beyond reasonable doubt that the accused had illicit affair with the deceased and he visited her house on the day of crime. It noted that the High court was not right in upholding the conviction given by the trial court on the basis of surmises and hypothesis. (Shantabai & Ors v. State of Maharashtra, Appeal (crl.) 372 of 2006) It indirectly gave weightage to the continuance of the happy married life of the accused along with her children rather than putting them behind bars and destroy everything.

Gender And Sentencing Pattern in Usa

During the early 1980s, the criminal sentencing system in the U.S.A. underwent some significant changes. After the introduction of the Sentencing Reform Act, 1984 (SRA) the era of the indeterminate sentence came to an end. It was enacted to cater to the judicial discretion aspect involved in sentencing process so as to bring uniformity and equality in terms of its imparting. Through this act, the United States Sentencing Commission was set-up which was required to develop some sentencing guidelines to lead the criminal justice system towards a more specific and determinate sentencing system.

The SRA was an outcome of the need to regulate judicial discretion in sentencing. The federal judges enjoyed unguided discretion in sentencing criminals upon the finding of their guilt as the only statutory stipulations governing them were the minimum and maximum punishment thresholds. The United States Supreme Court also took cognizance of the disparity caused due to the lack of proper sentencing regime and including guidelines which results in differentiated treatment of the similarly situated offenders. (Peugh v. United States, 133 S.Ct. 2072, 2079 (2013))

In response to such needs, the United States Sentencing Commission, a bipartisan expert agency, was created and located in the judicial branch. SRA provides for the development of guidelines which will fulfil the basic objectives of punishment, i.e., deterrence, incapacitation and just punishment. It further provides for delegation of authority to the Commission to review and rationalize the sentencing procedure.

The SRA mentions following 7 principles which must be considered by the courts while deciding on the sentencing of an offender.²

These guidelines are as follows,

“A) Factors to Be Considered in Imposing a Sentence –

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.

The court, in determining the particular sentence to be imposed, shall consider-

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;*
- (2) the need for the sentence imposed- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;*
- (3) the kinds of sentences available;*
- (4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. § 994 (a) (1) and that are in effect on the date the defendant is sentenced;*
- (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. § 994 (a) (2) that is in effect on the date the defendant is sentenced;*
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and*
- (7) the need to provide restitution to any victims of the offense.”*

The SRA requires that these guidelines be followed by the courts while imposition of sentences. Only permissible exception whereby court may divert from the sentence range imposed by the commission is when it believes that, the commission has failed to take due regard of the existing aggravating or mitigating circumstances while framing the guidelines.

The Virginia Court of Appeals recently observed that the influence of gender is “not limited to conscious, intentional discrimination... more often than not [it is] unconscious or subconscious discrimination that occurs because we look at the individual based on stereotypes that we have accurately or inaccurately assigned to one gender or the other.” (Sam W. Coleman, 2001). These observations underscore the importance of identifying and addressing the influence of gender and gender stereotypes in the implementation of the law.

As per the data collected by the U.S. Department of Justice, “In 2006, 112,498 females and 1,458,363 males were incarcerated in state and federal prisons. Stated another way, there were 13 times as many men as women in our nation’s prisons. This clearly is evidence of disparity. There is a striking difference between the number of men and women who are incarcerated.” (Bureau of Justice Statistics, 2007)

A study was conducted to test the assumption that male teachers are judged more severely than female counterpart for involvement in heterosexual intercourse with a student. It was found that situations involving male teachers were treated more severely than female teachers when such conduct was initiated by the teacher. It also referred to the case where a female teacher (Pamela Diehl-Moore, aged 43 years) was convicted of such sexual conduct with male student who was only 13 years old. Despite her behavior being punishable as statutory rape and subjected to imprisonment ranging from five to ten years, she was awarded with the sentence of only five years (Howell et. al., 2011). This case clearly indicated the dubious scale of punishment for male and female teachers for the similar sexual conduct.

The widening gap between male and female offenders in terms of average prison terms was highlighted by the Commission in its report published on completion of fifteen years of federal sentencing guidelines. Women are substantially less likely than men to be sentenced to prison. Moreover, incarcerated women are likely to obtain relatively shorter prison terms in comparison to men and further, women constitute less than two percent of the death row prisoners (Spohn, 2008, p.166).

Conclusion

Criminal law is the mirror of society and the present Indian framework tends to portray the identity of women as passive victims and hardly as a voluntary criminal. Such image of the female can be further traced to the criminological explanations given for the female criminality. They are seen as ‘troubled’ than the ‘troublesome’ offenders and sought to be adjusted back to their expected gender role after the phase of unfeminine irrationality. For example, law related to sexual violence including rape, domestic violence and sexual harassment assumes female to be victim and male as the perpetrator of crime.

² These guidelines were developed in consonance with the United States Code: United States Sentencing Commission, 18 U.S.C. § 3553 and 28 U.S.C. § 994, § 991.

After knitting the cord of gender in explaining criminality, such cord is extended to other another crucial dimension of criminal justice system gendered tracing of criminality, i.e., the process of determination of punishment, called 'Sentencing'. The requirement of justice delivery continues and the courts are required to follow the rule of law at this stage as well. However, while there are number of pages written for establishing the guilt or innocence of the accused, there will be number of few paragraphs in which sentencing will be concluded. Indian sentencing regime under the Code of Criminal Procedure, 1973 provides broader discretionary sentencing powers to the judge.

Unlike her male counterpart, the female offender is rarely considered in her social context as her criminality is considered a less significant social problem to be dealt with (Maniyar, 2004) Ostensibly, such bias works in favour of female offender by awarding lesser punishment but a closer and conscious eye would be able to see the adverse reinforcement of gender constructions.

Indian framework enables wider discretion in sentencing process which extends to ranging the aggravating and mitigating factors as well. However, the developments in USA in the form of SRA and the creation of the Sentencing Commission has contributed in toning down the darker shade of such discretion and thereby reducing the apparent cases of gendered sentencing. However, slew of researches suggests the invisible thread of gender which still exists in the sentencing due to the personal bias and belief in stereotypical images of male and female. Nevertheless, the cogent guidelines have contributed to determinative sentencing system which substantially reduces the scope of perilous discretion in importing the gender factor.

Such guiding principles help the judiciary immensely and contribute towards knitting of gender cord free atmosphere of sentencing. With the benefits of determinative sentencing and an experience of American regime, India can learn the major lessons.

It can replace its current approach with the one, which, even though looks at gender, is not reinforcing the discrimination and perpetuating the troubled image of female criminal. Such an approach will not construct the criminality within reasons of irrationality and pathological state of female but in the situation of crime and the criminal behaviour of offender. It is equally important that the hidden figures of female criminality are allowed to

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