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CONTENTS

MARITAL RAPE - EXEMPTION UNDER INDIAN PENAL CODE: QUEST FOR RECOGNITION AND LIABILITY

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Abstract

Violence is at its worst manifestation when occurs within the family – a unit which is supposedly the safest and the most protected zone in human life. The impact and consequences of family violence are most devastating when such the perpetrator of such violence is the husband – the man who is supposed to be the protector and provider of the woman. Unfortunately, the sexual violence is inflicted by the husbands in the name of irrevocability of consent to matrimonial cohabitation. The society and the legislature do not even recognize such sexual violence by the husbands, which seriously impinges upon the status of women in the society and maintains the status quo of the women's subjugated position in the family as well as the society.

I INTRODUCTION

VIOLENCE IS a coercive mechanism to assert one's will over another, in order to prove or feel a sense of power. Defined in plain terms - "Violence" is destruction, suffering or death, which is deliberately inflicted for the achievement of a purpose, which is political in nature.[1] Violence is a

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[1]Vandana, *Sexual Violence Against Women-Penal Law and Human Rights Perspectives*, 3 (2009). Lexis Nexis Butterworths Wadhwa Publishers, Delhi.

means to demonstrate power, authority or superiority in the societal structure. In essence, violence is the use or threat of use of force or coercion to establish domination and can be expressed at the individual level, between classes/communities or at the level of the state.[2]

Sexual violence

Sexual violence is one of the most extreme and effective forms of control in a male dominated society, which simultaneously damages and constraints women's lives and prompts individual and collective resistance among women thereby maintaining the *status-quo* of gender inequality, subjugation of women and their control.

Sexual violence describes the deliberate use of sex as a weapon to demonstrate power over and to inflict pain and humiliation upon, another human being.[3] Sexual violence may be defined as any violence, physical or psychological, carried out through sexual means or by targeting sexuality[4]. Sexual violence covers both physical and psychological attacks directed at a person's sexual characteristics. Sexual violence does not necessarily include direct physical contact between perpetrator and victim, threats, humiliation and intimidation may all be considered as sexually violent.

Sexual violence is a complex political phenomenon deep embedded in the socio-cultural milieu. Sexual violence is one of the most extreme and effective forms of control in a male dominated society, which simultaneously damages and constraints women's lives and prompts individual and collective resistance among women thereby maintaining the *status-quo* of gender inequality, subjugation of women and their control. Sexual violence is all pervasive and manifests itself in a number of forms, which exist in all institutions of life including the most basic unit of human *society i.e.,* the family.

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[2]Brinda Karat and InduAgnihotri, *"Violence Against Women."* Paper 53 in UGC Refresher Courses on Women's Studies (1998: Calcutta). Organised by School of Women's Studies and Centre for Women's Development Studies, Jadavpur University, Feb. 3-25, 1998 CD-635.3 *available at:* http://www.cwds.ac.in/wp-content/uploads/2016/09/3.-women-and-communalism.pdf.

[3]Peter Gordon and Kate Crehan, *Dying of Sadness: Gender, Sexual Violence and the HIV Epidemic.* SEPED Conference Paper Series at 2 *available at*: *https://childhub.org/en/system/tdf/library/.../gordon_crehan_gender_sexua.pdf* , last visited on Aug. 22, 2017.

[4]*Contemporary Forms of Slavery – Systematic Rape, Sexual Slavery and Slavery like Practices During Armed Conflict.* (Final Report submitted by Ms.GayJ.McDougall, Special Rapporteur of Commission on Human Rights, 6 (1998).

Sexual violence occurring in the family

The family has been traditionally considered as a retreat, where individuals are able to find security and shelter, a private heaven where peace and harmony prevail. However, the family may be a "cradle of violence" for the women, who are subjected to violence at home[5]. Throughout the world there are practices in the family that are violent towards women and harmful to their health. Young girls are circumcised, live under severe dress code, given in prostitution and incestuously abused in the family.

The family violence is generally hidden under the notions of intimacy of private sphere as the belief that family integrity should be protected at all costs prevent many women from seeking outside help.[6] The law and criminal justice system generally do not recognise sexual violence occurring in the family as a separate crime, hence such cases are rarely prosecuted and the women have no option, but to suffer in silence.

Violence is at its worst when occurs within the family and leads to the most serious impact and consequences when carried out by a person whom the victim trusts and is in a relationship of love and affection. In Indian society particularly, great sanctity is attached to the marriage and the husband is supposed to be the protector of the wife. When the same person becomes the perpetrator of sexual violence against the woman and the society and the legal system do not even acknowledge the phenomenon of occurrence of such violence, the misery and plight of the victims remain beyond explanation in the words.

II THE CONCEPT OF MARITAL RAPE

Rape must be understood as the gravest kind of sexual violence against women – an extreme manifestation occurring in the continuum of sexual violence which negates the human rights of the women completely. Rape stems from sexist values and beliefs and it is not simply an issue affecting individual woman. It is a social and political issue directly connected to imbalances of power between men and women. Rape is an act of aggression and violence in which the victim is denied her self-determination.

[5]*Preliminary Report submitted by UN Special Rapporteur on violence against women, its causes and consequences, RadhikaCoomaraswamy,* (1994).

[6]*Integration of the Human Rights of Women* and the Gender Perspective- Violence against Women, UN Commission on Human Rights, 9 (2003).

The definition of rape, as recognised by the majority of legal systems, does not go beyond the parameters of a patriarchal value system, reflects old notions of chastity, virginity, marital ties and emphasises the fear of female sexuality. The legal definition of rape in most countries is limited to non-consensual or forced vaginal penetrations and exempts a particular class of males – husbands, who cannot be charged with the rape of their own wives.

The definition

Marital rape can be defined as any unwanted sexual intercourse or penetration (vaginal, anal, or oral) obtained by force, threat of force, or when the wife does not consent. One of the very peculiar implications of the narrow and restricted definition of rape is that it cannot be committed against a particular set of women – a married woman cannot be raped by her own husband. Further, the implication of this loophole is that violent and unwanted sex does not necessarily define rape rather it is *illegal* sex, *i.e.*, sexual assault by a man, who has no legal rights over the woman[7]. In other words, in law's eyes, violence in a legal sexual intercourse is permissible, but sexual relations with a woman, who is not one's property is not.[8]

The irrevocable consent

The initial rationale for the marital exemption clause is based on Sir Matthew Hale's statement made in 1678 that "the husband cannot be guilty of rape committed by himself upon his lawful wife, for their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract"[9]. The premise of the statement was based upon the common law notion of marital unity that husband and wife were one and a married man could not be held liable for raping himself. In majority of the countries in the world; husbands enjoy 'criminal law immunity' for

[7]Ann Wolbert Burgess and Lynda Lytle Holmstrom, *Rape : Victims of Crisis*, 197 (1974) quoted in Dianne Herman, "The Rape Culture" in *Women – A Feminist Perspective,* ed. by Jo Freeman, 3rd edn., 20 (1984) at 22.
[8]*Ibid.*
[9] Sir Mathew Hale quoted in Rosemarie Tong, *Women, Sex and the Law*,94 (1994).

raping their wives. Wife rape has existed as long as the institution of marriage[10]. In words of Lord Mathew Hale, a seventeenth century English jurist: [11]

> The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself unto her husband, which she cannot retract.

III THE INCIDENCE AND CAUSES

According to a US Sexual Assault Information Sheet, one in seven women reported that they had been raped by their husbands.[12] Rape in marriage is vastly unrecognised by the legal systems all over the world. This legal reluctance is the product of the social notion that the wives are the properties of their husbands. To be more precise, viewing of wife as the sexual property of the husband is the inevitable heritage of the patriarchal society.[13] Apart from this, there are economic structural arrangements of the society with the man as the bread-earner of the family, thus, having massive economic control over the family and the woman as the dependent on the bread-earner, having no independent income, the one who is, therefore, left with no alternatives, but to continue even in an abusive marriage.

In majority of countries, criminal law can be invoked for assault in marriage, but not for rape. While countries, like Australia, New Zealand and the United Kingdom, have changed the law with regard to marital rape to allow a husband to be prosecuted for raping his wife, this is by way of a rare exception and not the norm.

Sexual assault within marriage is arguably the most mystified of abuses perpetrated against women.[14] Marital rape is not a contradiction in terms rather a form of violence against wives, which

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[10]Diana E.H. – Russell, *Rape in Marriage*, 2nd edn., 2 (1990).

[11]*History of the Pleas of the Crown,* Vol. I, at 629 (1736) quoted in *Rape – A Legal Study* by National Commission for Women, 39(2000).

[12]*Sexual Assault Information Sheet*, Wisconsin Coalition Against Sexual Assault, (1992) , *available at*: http://www.wcasa.org/pages/Resources-Info_Sheets-Lesbian-Gay-Bi-Sexual-Transgendered-%28LGBT%29-Populations-and-Sexual-Assault-2003.phpt last visited on Sep. 20, 20, 2017.

[13]*Supra* note 9 at 3.

[14]Arati Rao, "Right in the Home – Feminist Theoretical Perspectives on International Human Rights" in *Feminist Terrains in Legal Domains – Inter-disciplinary Essays on Women and Law in India,* ed. by RatnaKapur, 100 (1996) at 113.

is not rare, just rarely discussed. Rape is a persistent problem in a large number of marriages.[15] Sexual assaults by husbands are the most common kinds of sexual assaults reported, occurring over twice as often as sexual assault by a stranger.[16] In a study conducted by her, Diana Russell found that one in every seven married women reported being raped by the husband.[17] David Finkelhor and KrestiYllo have commented that "the marriage license is a raping license".[18]

Several policy considerations have been advanced in favour of marital exemption rule. First, if this rule is not adopted, wives would make false complaints against their husbands out of spite or in order to obtain divorce or property settlement; secondly, rape laws are designed to protect women from sexual attacks of malign strangers and not to protect headachy wives from the discomfort of having sex with their basically benign husbands and thirdly, allowing women to charge their husbands with rape will prevent reconciliation.[19]

In fact, wives raped by their husbands are often traumatized at even more basic level in their ability to trust.[20] In addition to the violation of their bodies, they are faced with a betrayal of trust and intimacy. A woman raped by her husband has to live with her rapist, not just a frightening memory of the attack by a stranger.[21] Raped wives use many self-deceptions to avoid facing the realities of an intolerable marriage because the after natives – loneliness, loss of financial security, separation from children etc., are so frightening.[22]

David Finkelhor and KerstiYello have identified four basic types of coercions involved in marital rape. First type of coercion is *social coercion* – whereby wives comply for financial and

[15] David Finkelhor and KerstiYllo, "Rape in Marriage – A Sociological View" in *The Dark Side of Families – Current Family Violence Research,* ed. by David Finkelhor, Richard J. Gelles, Gerald T. Hotaling and Murray A. Straus, 119 (1983) at 119.

[16] *Id.* at 120.

[17] Diana E.H. Russell, *Rape in Marriage,* (1990). Diana Russell interviewed over 900 randomly selected women, out of which 644 were married. She found that wife rape was the most common type of completed rape reported as 3% women had experienced completed rape by a stranger whereas 14% of married women had experienced rape by their husbands.

[18] *Id.* at 17.See also, Mother of a convicted wife rapist commented – "I don't think this should be a crime, because after all, this is what men get married for". *Id.* at 27.

[19] The social attitudes against the recognition of marital rape are so hard set that in a South Carolina case, where a man tied up, blind folded and raped his wife, a jury acquitted the husband. The injury was shown a videotape of the incident made by the husband with the woman pleading, "please don't tie me up again, I'll do anything you want me to". The jury concluded that the videotape depicted a 'sex game' rather than a rape.

[20] Nancy M. Shields and Christine R. Hanneke, "Battered Wives' Reactions to Marital Rape" in *The Dark Side of Families – Current Family Violence Research,* ed. by David Finkelhor,Richard J. Gelles, Gerald T. Hotaling and Murray A. Straus, 131 (1983) at 134, 135.

[21] *Supra* note 4 at 126.

[22] *Id.* at 121.

social security provided by the husband; second is *interpersonal coercion* – refers to non-violent threats by the husband; third is *threat of physical force* – which could be express or implied and lastly, *physical coercion* resulting in physical restraints/injuries[23]. The main reasons that inhibit women from attempts to ward off marital rape are that the victims think that the partner is stronger than them; they could get greater harm, if they resisted or they themselves were wrong by being frigid or non-cooperative with their husbands.[24] Stereotypes about women and their sexuality reinforce culturally that it is the wife's duty to have sex with her husband and she is a 'bad wife' if she does not enjoy sex with her husband against her will.

Women experience the violence by the husbands in various ways, *e.g.* some are battered during the sexual violence or the rape may follow a physically violent episode when the husband wants to "make up" and coerces his wife to have sex against her will.[25] Wife rape does not occur in a vacuum, but it is one of the consequences of the unequal power relationship between husband and the wife.[26]

Wife rape is the consequence of two very serious primarily male problems – violence and predatory sexuality.[27] Wife rape is a manifestation of a male sexuality, which is oriented to conquest and domination, to proving masculinity defined in terms of power superiority, competitiveness, control and aggression. A real man is supposed to get what he wants, when he wants, particularly with his wife and even more particularly, in his sexual relations with her[28].

The composite picture of the husband rapist reveals jealous, domineering individuals, who feel a sense of entitlement to have sex with their 'property' – wife on whom anger, depression, frustration can be taken out and dominance and coercion can be exercised – all in a permissible legal sphere. Marital rape is most likely to occur in relationships characterized by other forms of violence

[23] *Ibid.*
[24] *Supra* note 4 at 126,127.
[25] *Ibid.*
[26] The structural arrangement with husband as the bread-earner and the wife as his dependent does not make the occurrence of marital rape inevitable, but certainly does contribute a lot in encouraging it.
[27] *Supra* note 5 at 357.
[28] *Ibid.* In many countries, even the legislators have declined to take the issue seriously. As one US State senator put it – "If you cannot rape your wife, who can you rape?".

or abusive situations. This has led many researchers to argue that marital rape is "just one extension of domestic violence".[29]

IV MARITAL RAPE AS PROPERTY CRIME -THE MARXIST EXPLANATION

From the times of its rudimentary development as the Marxists explain, the political and legal theory has rested on the assumption of individual's right to own private property. Its second assumption – that men are superior to women and, thus, the legal, social and economic disparities between the two sexes, is justified being very natural – laid down the foundations of a sexist society.[30] With passage of time, ownership of private property of the man became very crucial. It required control of means and products of reproduction in order to ensure the purity of male lineage and that further required controlled sexual access to a woman by a man, to ensure paternity of their off springs. Since ownership is considered to be best form of control, women were reduced to the private property of sexual nature, owned by distinct male owners. Such notions are prevalent even till date and it is for this reason that husband's absolute ownership of the wife's body and sexuality, remains unchallenged and majority of legal systems do not recognise rape within marriage.

V THE LEGISLATIVE DEVELOPMENTS AND THE 'AGE OF CONSENT'

For thirty years, after the enactment of IPC' 1860, rape law remained the same. The later change was owing to a number of cases in Bengal in which the child wife died due to consummation of marriage. Out of these, the most notable was *Queen Empress* v. *Haree Mohan Mythee*.[31] This case tells the pathetic story of phulmonee Dassee, who was eleven years and three months old when she died as a result of rape committed on her by her husband. The medical evidence showed that Phulmonee had died of bleeding caused by ruptured vagina.[32] In this case, rape of child wife was severely condemned and it was held that the husband did not have the right to enjoy the person of his wife without regard to the question of safety to her.[33]

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[29] Johnson and Sigler, 22 (1977) quoted in Raquel Kennedy Bergen, *"Marital Rape"*, Paper by VAWO, Office of Justice Programs, U.S. Department of Justice and MINCAVA .

[30] Friedrich Engels, *The Origin of the Family, Private Property and the State* (1972).

[31] ILR 1891 Cal 49.

[32] *Id.* at 53, 54.

[33] *Id.* at 62.

In 1891, Sir Andrew Scoble introduced the Bill, which culminated into Indian Criminal Law (Amendment) Act' 1891.[34] This act raised the age of consent to 12 years both in cases of marital and extra-marital rapes. The object of Act was humanitarian, *viz*., "to protect female children from immature prostitution and from pre-mature cohabitation".[35] Pre-mature cohabitation resulted in immense suffering and sometimes even death to the girl and generally resulted in injury to her health and that of her progeny.

Beginning of the 20th Century witnessed increased public attention towards the improvement in the physique of the nation and the reduction of causes leading to abnormal mortality of younger generation. In 1922, Rai Bahadur Bakshi Sohan Lal, MLA, moved for leave to introduce a Bill in the Assembly to amend section 375, Indian Penal Code, 1860 (IPC) by raising the age of consent in both marital and extra-marital cases.[36] This attempt to legislation proved futile, but with the passing years, agitation for a modification of law steadily grew owing to a better knowledge of the evil consequences of early marriage and early consummation.

In 1924, Hari Singh Gour introduced a Bill to amend section 375, IPC, raising the age to 14 years in both marital and extra-marital cases. The Bill was referred to a Select Committee, which made a material alteration by reducing the age from 14 to 13 years in the case of marital rape.[37].On September 1, 1925 Sir Alexender Muddiman introduced the Bill fixing 14years the age in extra-marital cases and 13 years in marital cases, which culminated into Amendment Act, 1925.[38] The amendment in 1925 for the first time introduced a distinction between marital and extra-marital rape cases by providing different age of consent in marital rape cases. The distinction was further emphasised in section 376 by incorporating the words – "unless the woman raped is his own wife and is not under twelve years of age". In which case the punishment was diluted by prescribing a maximum of two years. Thus, the purpose aimed to be achieved by raising the age of consent to 13 years, stood mitigated to a large extent by the diluted punishment provided by amended section 376.

[34] Act No. X of 1891, published in Gazette of India, (1891), Pt.V.
[35] *Id.* Statement of Objects and Reasons.
[36] *Report of the Age of Consent Committee*, Calcutta, Government of India, 11 (1928-29).
[37] *Id.*at 12.
[38] Act No. XXIX of 1925, published in *Gazette of India*, (Oct 3, 1925), Pt. IV.

The question of age of consent was not considered as finally settled and Hari Singh Gaur again introduced a Bill in 1927 to raise the age to 14 and 16 years in marital and extra-marital cases respectively. It was followed by the appointment of Age of Consent Committee,[39] which reviewed the prevailing situation and suggested few amendments.

The committee was of the opinion that the amended law was ineffective due to the nature of the offence, particularly in case of marriage as consummation necessarily involves privacy.[40] The prevalent view among the awakened sections of society was that prohibiting the marriage of a girl under a particular age would be a better measure than to increase the age of consent for sexual intercourse.[41] The dissenting group among these classes felt that law was partly futile because it afforded no protection to the girls over 13 years, who need it on account of their tender age.[42] The Committee recommended the use of term 'marital misbehaviour' instead of rape in marital cases. The offence of marital misbehaviour would be committed by a husband in case of sexual intercourse with his wife below 15 years of age. The Committee recommended the inclusion of offence of marital misbehaviour in Chapter XX of IPC [43] and section 375 and section 376 of the IPC should be confined to rape outside the marital relation.[44]

The Committee also recommended maximum punishment of either description for 10 years and fine where the wife was below 12 years of age and imprisonment, which may extend upto one year or fine or both, where wife was between 12-15 years.[45]

VI THE PRESENT LEGAL POSITION

Under Indian law, exception to section 375, IPC embodies that when the woman is married and not less than fifteen years of age, sexual intercourse by the husband is not rape.[46] Prior to the amendment in IPC in 2013, when the wife was between 12 – 15 years, the drastically reduced

[39] *Supra* note 36, at 17, 18.
[40] *Ibid.*
[41] *Supra* note 36 at 16.
[42] *Id. at* 21.
[43] *Id.* at 123, Chapter XX, IPC deals with offences relating to marriage.
[44] *Ibid.*
[45] *Supra* note 36 *at* 124, 125.
[46] S. 375, IPC,exception 2: reads as - Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

quantum of punishment was provided, which *may* have extended to two years or fine[47]. It amounted to rape only when the wife was below 12 years of age.[48] The amendment in 2013[49] has done away with this clause but at the same time has not recognized the concept of marital rape and has chosen to continue with the earlier legal approach. It would be pertinent to point out that Justice Verma Committee Report[50] has recommended that marital rape exemption in the IPC should be withdrawn.

The peculiarity of Indian law is adoption of the principle of primacy and supremacy of husband's right over that of the wife, even when she is well below the legal age of marriage[51]. The legal corollary of not treating forcible intercourse with a minor wife (between 15 – 18 years) as rape would surely be not to consider such intercourse with an adult wife as marital rape at all. The only instance, which law covers is that of legally separated couples not living together under section 376-B, IPC and the vast bulk of marital rape remains out the purview of law.

The court held in *Haree Mohan Mythee* case[52] that husband does not have the absolute right to enjoy the person of his wife without regard to the question of safety of her. As per this decision, the only circumstances where the law recognises the encroachment upon husband's absolute right to sexual intercourse is when it becomes extremely dangerous to woman due to some physical illness etc. and grave consequences like death may follow.[53]

Thus, under Indian law, no effort has been made to give even a veneer of protection to the right of a married woman to her physical or sexual autonomy.[54] In the existing scenario, there is hardly any feeble hope of future changes as far as recognition of marital rape of adult women is

[47]Unamended S-376 (1), IPC. In other rape cases, the minimum mandatory punishment is 7 years, which extend upto 10 years or for life.
[48]Unamended S-376 (2) (F), IPC, 1860.
[49]The Criminal Law (Amendment) Act no. 13 of 2013.
[50]Justice Verma Committee Report, (2013).
[51] Hindu Marriage Act, 1955, s.5 (iii), prescribes 18 years and 21 years as the legal age for females and males respectively.
[52](1890) 18 Cal. 49.
[53]*Id.* at 62. In this case, when eleven years old wife was subjected to forcible sexual intercourse by the husband, she died of vaginal ruptures and profuse bleeding.
[54] Another peculiarity of Indian law is the provision for decree of restitution of conjugal right's embodied in s. 9, Hindu Marriage Act, 1955. In *T. Sareetha*v. *VenkataSubbiah* (AIR 1983 AP 356), the Andhra Pradesh High Court declared it unconstitutional and violative of the fundamental right of personal liberty and privacy. But the Apex Court upheld the validity of s. 9, Hindu Marriage Act, 1955 in *Saroj Rani* v. *Sudarshan Kumar* (AIR 1984 SC 1562) and totally ignored the effect such a decree can have on an Indian woman, who under the threat of judicial and social pressure and financial dependence may well be forced to go back to the matrimonial house and because of her vulnerable position in it, be forced to have sex and live a life of misery in an atmosphere she obviously abhors.

concerned and even in case of minor wives between 15 – 18 years of age, the offence is treated for less seriously.[55] In 156th Law Commission Report, the Commission expressed its reluctance to raise the age for wife from 15 years to 18 years in the Exception to S-375 IPC[56], without assigning any reasons in particular. In 172nd Law Commission Report, the Commission found the deletion of the exception to Section 375 IPC, unnecessary as it may amount to excessive interference with the marital relationship.[57] However, the Commission recommended that the age limit for the wife be raised to 16 years from the existing 15 years.[58]

VII THE FOREIGN LAW ON MARITAL RAPE

The United Kingdom law

In United Kingdom, the legal position is prescribed under Sexual Offences Act, 2003. Despite the elaborate provisions of the Act dealing with sexual abuse/assault etc., the legislation recognises marital exemption,[59] in its chapter on 'Familial Child Offences'. If a lawful marriage exists between the parties, the sexual activity with a child family member will be no offence in the eyes of law.

A plethora of judicial decisions do exist which make the situation slightly better than Indian law. Before the Court of Appeal decision in *R* v. *R*,[60] a man could not be convicted of raping his own wife during the subsistence of marriage because she was deemed to have given consent for marital intercourses under all circumstances. I n *R* v. *R* and *S* v. *H.M. Advocate*,[61] the respective courts observed that rape has always been essentially a crime of violence and aggravated assault and doubted if it was ever contemplated by the common law that that a wife consented to intercourse against her will and obtained by the force.

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[55] *Supra* note 46.

[56] Law Commission of India – 156th Report on The Indian Penal Code, Ministry of Law and Justice, Government of India,161 (August, 1997).
The NCW had recommended that the age limit in the Exception to S-375, IPC be raised from 15 years to 18 years.

[57] Law Commission of India – 172nd Report on Review of Rape Laws, Ministry of Law and Justice, Government of India, (2000), para 3.1.2.1.
However, it was recommended by Sakhi and other women organisations that the exception be deleted. Their reasoning was – where husband causes some physical injury to his wife, he is punishable under the appropriate offence and the fact that he is the husband of the victim is not an extenuating circumstance recognised by law; if so, there is no reason why concession should be made in the matter of offence of rape/sexual assault, where wife happens to be above 15/16 years.

[58] *Id.*, para 3.2.

[59] Sexual Offences Act, 2003, s. 28,

[60] (1991) 93 Cri App R 1.

[61] 1989 SLT 469.

It was further held by the court in *R.* v. *Graham L*[62] and *R.* V. *C* [63] that the man may be properly convicted of raping his own wife even though the rape incident may have occurred much earlier and it does not offend section 7 of the European Convention which bars the retrospective operation of the penal provisions. Thus, United Kingdom law has undergone judicial innovations recognising marital rape.

In United States, the Federal Criminal Code, 1986[64]makes a distinction between aggravated sexual abuse and sexual abuse, depending upon the use of force or the degree of fear generated by the offender. The Code recognises the defense of marital status in case of sexual abuse of a minor or ward,[65] whereas in case of aggravated sexual abuse, the defense marriage is not recognised. As far as States are concerned, all States have recognised marital rape as an offence by the year 1993,[66] but the classification of the offence and the punishment for it varies under different State laws. In nearly 33 states, there are still some exemptions given to husbands from rape prosecution, when the wife is most vulnerable (mentally or physically impaired, asleep, unconscious, *etc*.) and is legally unable to consent. This perpetuates marital rape by conveying the message that marital sexual violence is less reprehensible than other types of rape.

VIII THE RECENT DEBATE BEFORE JUDICIARY

Recently, a PIL[67] before the High Court of Delhi has generated a judicial debate on the constitutionality of exception 2 to section 375, IPC – the marital rape exemption clause. A division bench of acting Chief Justice Gita Mittal and C. Hari Shankar J hearing the PIL against the penal code provision noted that "marital rape is a serious issue, which has notoriously become a part of the culture."[68]

[62](2003) EWCA Crim 1512, May 7, 2004.
[63](2004) 2 Cr App R. 15.
[64]The Federal Criminal Code, 1986.
[65] Federal Criminal Code, 1986, s. 2243 (c) (2)
[66]*Marital Rape, Violence against Women Online Resources @www.vaw.edu* (last visited on Aug. 9, 2017). On July 5, 1993, marital rape became a crime in all 50 States, under at least one of the Sections of the sexual offences codes. In 17 States and District of Columbia, there are no exemptions granted to husbands.
[67]The PIL has been filed by NGO RTI Foundation challenging that IPC's s. 375 saying that it does not consider forcible sexual intercourse by a man with his wife, as rape.
[68] "Marital Rape is a Serious Issue : High Court*", Times of India,* May 16, 2017.

The RTI Foundation has filed the PIL in 2015 and other individuals and institutions[69] have also approached the High Court of Delhi challenging the exemption under section375 as well as section 376B IPC on the ground that it excludes marital rape as a criminal offence. It has been argued in the PIL that the exemption is unconstitutional and violates the right of married women under articles 14, 15, 19 and 21 of the Constitution. One of the petitioners has challenged the provisions of Cr PC, which are to be read with section 376 IPC on the ground that differential procedure as well as differential punishment is prescribed, which s arbitrary and unconstitutional.[70]

Incidentally, the hearing of the case stands intervened by another NGO called Men's Welfare Trust[71] that claims that laws have already given a special status to a married woman, wherein she is liable to get maintenance, alimony, right to residence from her husband by way of various provisions. In the light of this, men become vulnerable to victimization at the hands of women, who file false cases of sexual harassment, 498-A IPC and domestic violence etc. Men's Welfare Trust pointed out that around 62,000 married men commit suicide every year, which is more than double the suicides by women, with domestic including marital issues being the single largest reason.[72]

The Government of India has filed an affidavit before the High Court of Delhi[73] and maintained that "it has to be ensured adequately that marital rape does not become an easy tool for harassing the husbands. The affidavit further maintains that criminalizing rape could destabilize marriages and make men vulnerable to harassment by their wives."

It is a matter of fact that there is very scanty data available on domestic violence including marital rape because of conservative and patriarchal norms[74]. There are several countries, including Nepal, US, UK and South Africa, where marital rape has been criminalized, but in India, the response of Central Government, on this issue, has been extremely misogynist and obnoxious. The Central Government has also expressed its wish to implead "State Governments" as there may be a cultural variation on the issue of marital rape.[75]

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[69]The High Court of Delhi is hearing a clutch of petitions filed by All India Democratic Women's Association, RTI Foundation and some other individuals who want deletion of exception 2 to s.375, IPC.
[70]"Delhi High Court to Hear Pleas Against Criminalizing Marital rape", *Times of India*, Aug. 29, 2017.
[71] *Ibid.*
[72]"Delhi High Court to Hear NGO's Plea Opposing Marital Rape", Indian Express 28, 2017.
[73]"Men May Suffer if Marital Rape Becomes Crime, Indian Government Says", Renters Aug. 30, 2017.
[74]*Ibid.*
[75]Jibby J. Kattakayam, "What the Union Government's Submissions on Marital Rape in the Delhi High Court Reveal" at http://blogs.timesofindia.indiatimes.com

It is very disappointed to note the comments of the government, which are obnoxiously anti women at the onset. The government has assumed that 'all sexual' acts by husbands would be labelled as rapes and all wives are potential liars, who would like falsely implicate their husbands. The government's notion that the stability of marriage is ensured by preventing women from filing complaints about rape reveals the true mind set of patriarchs in a conservative society.

IX THE SUPREME COURT JUDGMENT IN *INDEPENDENT THOUGHT* V. *UNION OF INDIA* [2017]

In a writ petition filed in public interest by a society – Independent Thought, the Supreme Court has considered the scope and viability of exception 2 to section 375 IPC. The issue before the court was to consider the recognition of marital rape when the husband has sexual intercourse with the wife when she happens to be between15-18 years of age. This is a landmark decision of Supreme Court whereby the court has held: [76]

> Exception 2 to s-375 of the Indian Penal Code answers this in negative, but in our opinion sexual intercourse with a agirl below 18 years of age is rape regardless of whether she is married or not. The exception carved out in the IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and definitely not in the best interest of the girl child.

The court further held that the artificial distinction is contrary to the philosophy and ethos of articles 15(3) and 21of the Constitution as well as the International conventions. It certainly violates the bodily integrity of the girl child and her reproductive choices.

The petitioner society pointed out that any person who has sexual intercourse with a girl child below 18 years will be liable for statutory rape even if it is with the consent of the minor girl and the situation is very absurd when the offender happens to be her husband because in such case the marital exemption applies and the husband goes scott free and escapes the punishment completely. It is because of her marriage, the right of such girl child to her bodily integrity and to decline sexual

[76] Madan B. Lokur, J in 2017 SCC OnlineSC 1222 [Writ petition (C) no.382 of 2013] at 2.

intercourse with her husband is snatched away. Just because of her marriage she does not become mentally or physically fit for such decisions.

Pointing out the obligations of the Indian government under Convention on the Rights of the Child,1990 [77] to undertake all appropriate measures o prevent the sexual exploitation and sexual abuse of any person the court observed that the Indian government has persuaded the legislature to legitimize an activity which is otherwise a heinous offence when occurs without marriage. The duality of the marital exemption clause is that it comes in sharp conflict with the provisions of POCSO and JJA. The POCSO defines "penetrative sexual assault"[78] which becomes aggravated when the offender is related to the victim.[79] Since the Act has got overriding effect[80], a very complex and peculiar legal position emerges whereby the husband is exempted from any offence under IPC and he becomes liable to be punished for aggravated sexual assault under POCSO. Similarly, under JJA, a married girl child below the age of 18 years requires care and protection as she is prone to exploitation.

The Supreme Court has pointed out the legislative scheme as is deducible from various legislations that a child is a person below 18 years of age who is entitled to the protection of her human rights; unfortunately if gets married while a child. Her marriage is in violation of law and voidable at her instance[81] and the accused husband is liable to be punished under POCSO. The only jarring note is the exemption granted to him under the IPC.[82]

The court took note of the fact that the Committee on Amendments to Criminal law, headed by Justice Verma has also pointed out that the age old notion of a wife being a subservient chattel of the husband is no longer a viable proposition. The Committee has recommended the deletion of the marital rape exemption under the IPC while making the reference that a rapist is a rapist irrespective of his relationship with the victim.[83]

With a view to hormonise the provisions of the IPC, the POCSO Act, the JJA and the PCMA, the court has tried locating a resolution, which they feel, is best found in the Karnataka Amendment to

[77] Convention on Rights of the Child, Arts 1 and 34.
[78] POCSO, S-3.
[79] POCSO, S-5 penalizes the act and provides for a rigorous imprisonment of not less than 10 yrs.
[80] *Id*., s- 42-A.
[81] The Prohibition of Child Marriages Act, 2006, s.3.
[82] *Supra* note76 at 32.
[83] *Supra* note 50 at para 72.

the PCMA, 2006.[84] The state legislature has inserted a sub section (1-A) in section 3 of the PCMA[85] declaring that every marriage henceforth will be void *ab initio,* if violative of the age requirements specified. Therefore, the husband of a girl child will be held liable for the offences under POCSO if the husband and the girl child are living together in the same household.

The court has observed that "it would be wise for all state legislatures to adopt the route taken by the Karnataka legislature to void child marriage and thereby ensure that sexual intercourse between a girl child and her husband is a punishable offence under the POCSO Act and the IPC."[86]

The court has considered various options to lessen the turmoil of the girl child and observed: [87]

> …[W]e are left with absolutely no other option but to harmonise the system of laws relating to children and require exception 2 to section 375 IPC to now be meaningfully be read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of rape, is not rape." It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the framers of the Constitution can be preserved and protected and perhaps given impetus.

The *Independent thought judgment* is indeed a vivid illustration of judicial activism and craftsmenship to give a socially viable interpretation to a provision incorporating a dead concept in the legislation. But at the same time, it is a little disappointing to note that how the Supreme Court on more occasions than one, has very categorically stated that they would not like to make a comment on marital rape generally where the age of the wife is 18 or more than18 years.

X CONCLUSION

Marital rape is one of the worst types of sexual violence occurring at the level of family. Due to the nature of the activity and the associated issues of privacy of relationships, internalization of patriarchal subjugation and most of the times, because of their economic dependency, the women victims don't come forward with their sufferings. The patriarchal mind set has led the law to close

[84] Presidential assent to the amendment was obtained on April 20, 2017.
[85] The Karnataka amendment reads as follows:
(1-A) Notwithstanding anything contained in sub s. (1) of sec of PCMA, every child marriage solemnised on or after the date of coming into force of the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 shall be void *ab initio*.
[86] *Supra* note 76 at 47.
[87] *Id*. at 69.

its eyes to the plightful misery of the abused wives and the law does not even recognize marital rape as an offence leave aside providing any penalties in such cases.

Marital rape occurs in all types of marriages irrespective of age, social class, race or ethnicity. A very meagre and scanty research data is available on the issue and lack of data poses a major hindrance in the direction of making due efforts by the government and the legislature to provide effective legal forum to address the traumatized victim's concerns.

The acceptance of any spousal exemption from rape indicates an acceptance of the archaic understanding that wives are the sexual property of their husbands and the marriage contract is an entitlement to coerced sex. Moreover, by confining the offence to women, who are not married to the perpetrator, rape laws become discriminatory and deny equal protection to a class of persons – married women, on account of their status.

The Supreme Court has recognized rape of a minor wife in very loud terms and has delivered a landmark judgment suggesting the legislative formula to make child marriages void *ab initio*. But the major wives have not been able to win the judicial sympathy so as to get marital rape recognized by the apex judiciary. The narrow and restrictive definition of rape, which allows for the marital exemption make the definition of rape , a hollow statement, which provides escape-route for many perpetrators of sexual violence and the quest for justice remains unquenched.

INDIVIDUALISATION OF PUNISHMENT, JUST DESERT AND INDIAN SUPREME COURT DECISIONS: SOME REFLECTIONS

Dr. Anju Vali Tikoo[*]

Abstract

Punishment is imposed for social discipline and to do justice. And if the punishment itself becomes unjust on account of unbridled and unregulated sentencing discretion vesting in the judiciary, it would breed contempt about the justice delivery system and violate rule of law. Punishment may have retributive (just deserved) or utilitarian philosophical underpinnings depending upon the leanings of the governing class. But there is no denying the fact that it should be proportional to the crime irrespective of the underlying purpose be it in the 'just desert' model or utilitarian and individualised punishment. Proportionality is better secured in utilitarianism than in retributivism. Disproportionate sentence signifies harsh penalties for incapacitation and general deterrence. The context of this paper is to evaluate the notion of 'individualisation of punishment' and compare it with 'Just desert'. It critically examines how this concept of 'individualisation of punishment' and 'just desert' has led to uncertainties, inconsistencies, illogicality and undermined the principle of stare decisis in Supreme Court judges' sentencing discretion in India.

I INTRODUCTION

CRIME AND punishment are related as cause and effect correlatives for ensuring the peaceful and harmonious co-existence of a given human society. To every action, there is a reaction. Though there are various theories justifying punishment for wrongdoers who break the social fabric of the society, yet there is no universally applicable rationale for punishment.

Whether one follows utilitarian approach[1] or retributive[2] philosophy, the principle of proportionality[3] is the principal consideration in setting penalty levels. Principle of

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[1] Jeremy Bentham (1748-1832) propounded the philosophy of utilitarianism suggesting punishment should be proportional to the offence. That people will pursue pleasure or 'happiness' and be deterred by the imposition of 'pain' or restraint. *Available at*: http://compass.port.ac.uk/UoP/file/639aa3c6-7e3a-4f10-b9c6-a9c39a9ab257/1/Classicism_IMSLRN.zip/page_03.htm (last visited on June 30, 2017).

proportionality and perceived procedural fairness are key factors bringing about compliance with norms/ law. In contrast disproportionate sentencing arouses antipathy towards institutions or practices that condone such outcomes.

Towards the end of the last century, Andrew Von Hirsch' scholarly writings paved the way for the resurrection of 'just desert' as criminal sanctions[4].The 'Just desert' concept underlines that the punishment should fit the crime. Even within the notion of 'deserved' punishment there are varying and subtle thought currents. Generally, to individualize punishment is to find the balance between the gravity of the offence and the individuality of the offender, then find the most appropriate penalty that is commensurate to crime committed.

The purpose of this paper is to analyse how in the name of 'individualisation of punishment' and 'just desert' huge sentencing discretion vests in the judiciary, and that this discretion is not uniformly exercised but individually applied in disregard to the theory of *just deserts*. The judges often reach different conclusions (sentence) even when the facts are so similar and overall conduct of the offenders has resulted in the same crime. The paper will endeavour to present a critique of the uncertainties and proffer a workable way out of the quagmire.

II PRINCIPLE OF JUST DESERT

The principle of Just Desert has been characterised by Tim Scanlon as, "the idea that when a person has done something that is morally wrong it is morally better that he or she should suffer some loss in consequence"[5] In the context of punishment, it suggests that a person who has committed a criminal wrong deserves to suffer some loss, and it is the function of the system of punishment to impose that loss for the wrong done. That is, the –or, at least, a-function of the system of punishment is to ensure that the suffering that is deserved by a given offender for a given act is imposed on the offender[6].

There are broadly three justifications underlying 'just desert'. These are (i) morally deserved argument, (ii) Fair play argument and (iii) Censure argument. For the (i) argument, according to Moore, "we ought to punish offenders because, and only because, they deserve to be punished.

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[2] The essence of retribution (favored by Kantians and libertarians) is desert. With retribution we first say "he deserves it" and then we punish in a way that he deserved, and if that punishment serves as a deterrent then so be it…… Real justice and respect for a person's free will require punishing only those who deserve it without forcing them to change against their will or using them for our purposes, available at http://web.uncg.edu/dcl/courses/vicecrime/pdf/m7.pdf (last visited on June 27, 2017)

[3] The principle of proportionality in its simplest form means punishment should fit/equal the crime and it is the main objective of sentencing. This reflects the *lex talionis* of Old Testament reflecting an 'eye for an eye' philosophy, *available at:* https://academic.oup.com/ojls/article-abstract/28/1/57/1559023/An-Eye-for-an-Eye-Proportionality-as-a-Moral?redirectedFrom=PDF (last visited on May15,2017)

[4] Andrew Von Hirsch and Andrew Ashworth, *Proportionate Sentencing*, (Oxford University Press, 2012).

[5]T. M. Scanlon, *What We Owe Each other* 274 (Harvard University Press, US, 1998).

[6] M. Matravers, "Twenty First Century Punishment Post Desert" in M. Tonry(ed.) *Retributivism Has a Past- Has it a Future?*32 (OUP 2011).

Punishment is justified for a retributivist, solely by the fact that those receiving it, deserve it"[7], whereas 'fair play' as retributive argument is based on a core which suggests , given a just ' initial distribution of benefits and burdens' in society , a criminal offence disturbs this equilibrium and needs to be rectified. It does so because the criminal free rides on the willingness of others to constrain the pursuit of their interests in accordance with the law. Of course in some sense the free rider "deserves" punishment and yet another reasoning underlying the justification of punishment is the need, to convey 'censure'. Moral wrongdoing deserves censure, and when a society has declared some behaviour to be wrong, then censure is "owed" to the offender as "an honest response to his crime ,"to his victims" as an expression of concern for their wronged status," and to " the whole society, whose values the law claims to embody."[8]

According to Andrew Von Hirsch and Ashworth,[9] "the penal sanction should fairly reflect the …harmfulness and culpability of the actor's conduct". This treats people fairly *i.e.,* like cases alike and different cases differently. Punishments should be proportional is based on the premise that people are reasoning agents and penalties should respect citizens as persons. Proportionality doesn't provide the rationale for either having or not having a system of punishment. Rather that any system of punishment in its design and critique must respect the demands of proportionality. Since disproportionate punishment can be equated with punishment without guilt and does not result in justice. And justice should not only be done but should also seem to have been done. Also it needs to be borne in mind that followers of proportionate principle do not focus on factors underlying crime causation and hence for them every individual is a rational being and has freedom to make choices about his/ her conduct. That being so, for 'just desert' believers external socio- economic stimuli have no role in shaping the conduct of an individual. Accordingly they neither believe in reformation / rehabilitation of offenders (therapeutic jurisprudence) nor do they believe in restorative approaches in criminal justice administration.

'Just desert' as a theory of criminal punishment, proposes reduced judicial discretion in sentencing and specific sentences for criminal conducts with little or no regard to the individual offender. It simply connotes "deserved punishment" or reward. It proposes that an offender must receive as appropriate punishment on the basis of what he/she deserves. And this 'deservedness' as already observed is not always based on 'retaliation' i.e. an 'eye for an eye' and rather can have other reasons like 'equality, fair play and censure.[10]

[7] M. Moore," The Moral Worth of Retribution" in Ferdinand Shoemann (ed.) *Responsibility, Character and the Emotions"* (Cambridge University Press, NY 1987).
[8] R.A.Duff, *Trials and Punishments*50(Cambridge University Press, Cambridge 1986).
[9]*Supra* note 4 at 5.
[10]*Supra* note 7.

III JUST DESERT AND INDIVIDUALISATION OF PUNISHMENT: A JUXTAPOSITION

While the *Just desert* theory of retribution[11] looks back at the wrong committed, primarily focussing on crime and the need to assuage the victim by punishing wrongdoer, the notion of individualisation of punishment is based on utilitarianism,[12] is forward looking and considers deterrence, incapacitation and reformation as the goals of punishment. The thin line is that while deterrent approach aims to deter potential future criminal minds, the rehabilitative approach seeks to reform or rehabilitate the convict inside prison so that he will become a better and useful member of the community and can play a constructive role in society after his release from prison. The sentencing discretion vesting in the judges gives them the space to individualise punishment depending upon specific facts and circumstances of a particular case. Despite the fact that the Indian Supreme Court has, over the years, reiterated that punishment should fit the crime, this measure of proportionality is to be based exclusively on retributive or utilitarian rationale, has not been made explicit. And while deciding the quantum of punishment specifically in heinous offences, both the principles of 'just desert'[13] and 'individualisation of sentence' go hand in hand.

Due mainly to the inability of the utilitarian approach with varying dimensions of deterrence, incapacitation or rehabilitation to effectuate a reduction in crime, philosophers and scholars have re-examined retribution as a viable justification for punishment.[14] Disillusioned with Utilitarian philosophy for not being able to reduce the crime incidence in various jurisdictions across America, a regime of *'fixed penalties'* for certain offences has been adopted. Fixed penalties as the nomenclature suggests rules out judicial discretion and is implemented purely on certain pre-identifiable criteria of just deserved and proportionality of sentence.[15] Till date, the fusion and/or combined application of all of them is yet to make much needed difference of ensuring a society free from criminalities.

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[11] *Ibid.*

[12] Jeremy Bentham (1748-1832) propounded the philosophy of utilitarianism suggesting punishment should be proportional to the offence. That people will pursue pleasure or 'happiness' and be deterred by the imposition of 'pain' or restraint. For details see *Supra* note 1.

[13] *Supra* note 5 and 7

[14] C.S., Lewis. *The Humanitarian Theory of Punishment*, 287(1970). *Available at:* http://www.olena.com/edu/downloads/intro-philosophy/pchapter-7.pdf last visited on July 7, 2017).

[15] There are several states in US where 'three strike laws' have been incorporated. Also known as habitual offender laws , the essence of these statutes is to punish severely any offender convicted of a third serious offence as an adult. The period of incarceration is long say from 25 years to even life imprisonment, that without any parole. These laws were brought for having a clear and understandable sentencing practices for violent and career criminals e.g. sexual offenders, robbery, serious assault, murder etc. See Washington, California, Minnesota laws on this theme.

IV INDIAN CRIMINAL JUSTICE SYSTEM

The legislative framework

In India there are two comprehensive codes dealing with the substantive and procedural aspect of criminal law. The Indian Penal Code, 1860 (IPC) defines the offences and also prescribes punishment for those offences in addition to identifying different kinds of punishments that may be awarded by the courts on trial. In addition to IPC there are some special and local laws dealing with those crimes which are not included in the IPC, e.g. Narcotic Drugs and Psychotropic Substances Act, 1985, Prevention of Food Adulteration Act,1954, Prevention of Corruption Act,1986, Sexual Harassment (prevention, protection and rehabilitation) Act,2013 to name a few. These special laws may have their independent norms with reference to arrest, bail, proof etc. Still it is primarily the IPC that contains the paramount framework for proscribing conduct as criminal. The Criminal Procedure Code, 1973 consolidates the procedural detailing of the criminal justice administration machinery and mechanism. Thus it is a combination of these two codes along with the Indian Evidence Act, 1872 that forms the framework for criminal justice administration in India.

Link Indian Penal Code, 1860

Chapter III of IPC deals with punishments. Section 53 envisages primarily five kinds of punishment. These include Death Sentence, Life Imprisonment, Imprisonment (simple or rigorous), Forfeiture of Property, and Fine. Section 73 prescribes solitary confinement. Section 54 deals with commutation of sentence of death whereas section 55 deals with commutation of sentence of life imprisonment. Section 57 clarifies that life imprisonment is to be constructed as imprisonment for a period of 20 years. After the 2013 Criminal Law Amendment Act, section 376A, 376 D, 376E have added a new dimension to the 'life imprisonment' by specifying that it shall mean imprisonment for the remainder of that person' natural life.

Criminal Procedure Code, 1973

The Cr PC empowers the high courts and sessions courts to impose any of these sentences, except that in case death sentence is awarded by the sessions court, it has to be confirmed by the high court of the state. The subordinate judiciary has clearly specified powers and authority to try cases of specific nature and award punishments accordingly.

Individualisation of punishment and the judiciary: The legislative scheme

Generally the IPC and other special laws dealing with crime provide for a discretionary paradigm of sentencing. This is so because the maximum term of punishment is specified for a specific offence and the judge has the authority to determine the quantum of sentence to be awarded in a

given case upon conviction. The Law Commission of India in its 47th Report on the question of how sentence ought to be determined observed:[16]

> A proper sentence is a composite of many factors, including the nature of offence, the circumstances-extenuating or aggravating- of the offense, the prior criminal record, if any, of the offender, the age of the offender, the professional or social record of the offender, the background of the offender with reference to the education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospect for the rehabilitation of the offender, the possibility of a return of the offender to normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by this offender, or by others, and the present community need, if any, of such a deterrent in respect to the particular type of offense involved.

And for determination of sentence post- conviction, Cr PC envisages a separate phase of sentencing process under sections 235(2),[17] 248(2) and 255(2). Generally after the pronouncement of conviction a separate date is fixed for hearing arguments on quantum of sentence where both the parties to the case are entitled to put evidence before the court relating to factors relevant for sentencing.[18] Hearing on the sentence is mandatory and a punishment pronounced without giving an opportunity of hearing on sentence, within the mandated requirements of law shall be quashed in appeal. The final judgment is always at the end of hearing on sentence signifying the conclusion of trial. The court has the power to release a person on probation of good conduct or after admonition simply under the provisions of Cr PC or Probation of Offender" Act, 1958. The court may award Fine, compensation, imprisonment or capital punishment but it has to be a reasoned order. Sections 432 and 433, Cr PC empower the appropriate government to suspend, remit or commute sentence. Even the life imprisonment can be commuted to an imprisonment for a period not exceeding 14 yrs.[19]

Legislative scheme with respect to life imprisonment versus death sentence

Section 354(3) of Cr PC, 1973 marks a significant shift in the legislative policy underlying the Cr PC of 1898, as in force immediately before April 1, 1974, according to which both the alternative sentences of death or imprisonment for life provided for murder and for certain other capital offences under the penal code, were normal sentences. Now according to this changed legislative policy it is patent on the face of section 354(3) that the normal punishment for murder

[16] *Available at*: http://www.lawcommissionofindia.nic.in/welcome.html.
[17] Law Commission of India in its 48th report had pointed out the deficiency about lack of comprehensive information as to characteristics and background of the offender that was proving to be a bottle neck for consistent and rational sentencing policy. And s. 235(2) has been incorporated accepting that recommendation to have comprehensive information about the offender at the pre-sentence stage
[18] *Allaudin Mian* v. *State of Bihar*, (1989) 3 SCC 5.
[19] Cr PC, s. 433(b).

and six other capital offences under the penal code, is imprisonment for life (or imprisonment for a number of years) and death penalty is an exception.

Section 354(3) Cr PC states that , "When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment *shall* state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence."A combined reading of the aforementioned provisions makes it abundantly clear that judiciary in India has a significant role in sentencing process and they have unbridled discretion to exercise in so doing. Hence the sentencing in India is invariably a judge- centric function rather than being a principled sentence centric exercise. And the same gets further substantiated by an analysis of the following decisions of the Supreme Court of India.

Rationale underlying punishment: Indian Supreme Court approach

A perusal of the judgments delivered by the Supreme Court of India in cases pertaining to heinous offences reflects an *ad-hoc* and fluctuating attitude with reference to award of death penalty or life imprisonment. This is despite the landmark Constitution Bench decisions emphasizing the need to exercise judicious caution while dealing with cases where death penalty as an alternative punishment is prescribed under the law. The Supreme Court has not been consistent in advising which theories (or justifications) of punishments should be applied in criminal sentencing.[20] Different sets of judges serving the apex court at the same point of time have reflected their preferred but different theories while critiquing their fellow judges for adhering to other theories than their preferred ones. Hence we find judgments delivered by a given set of judges during a time period giving paramount importance to their preferred approaches. However, the court has acknowledged that sentencing generally poses a complex problem which requires a working compromise between competing views based on reformation, deterrent and retributive theories of punishment.

The following section deals with the evolution of sentencing discretion guidelines being laid down by the Supreme Court in landmark cases. Two broad themes of individualisation of punishment and just desert are apparent in the apex court decisions under section 354(3) of the Cr PC and these attitudes are being contextualised with the help of few of the many significant judgments of the Supreme Court to understand how the court has been able to balance the competing claims of same punishment for same offence versus individualisation of punishment. Despite the parameters for the exercise of discretion being supposedly laid down various judgments delivered by the apex court still reflect an *ad-hoc* attitude with reference to relying on any single punishment policy.

[20] Mrinal Satish *Discretion , Discrimination and the Rule of Law: Reforming Rape Sentencing in India 63 (*Cambridge , 2016).

Individualisation of punishment and the Indian Supreme Court *Bachan Singh* v. *State of Punjab*[21]

Briefly, *Bachan Singh* was tried, convicted and sentenced to death under section 302, IPC for the murders of - Desa Singh, Durga Bai and Veeran Bai by the sessions judge of State of Punjab. On heated altercations between the parties, the appellant led others (acquitted) who armed themselves with spear and other dangerous weapons with which they gave several and deep cutting fatal blows to the deceased, which resulted in their deaths. The three murders were described as extremely heinous and inhuman. On appeal, the high court confirmed the death sentence pronounced on the appellant and dismissed his appeal. Being dissatisfied, he further appealed to the Supreme Court. The question before the Supreme Court Constitution bench was, *inter alia*, the sentencing procedure embodied in sub-section (3) of section 354 of the Cr PC, 1973.

In drawing up the guidelines, the Supreme Court hinged its opinion on the sentiments or feelings of the community. Therefore, the court ruled that death penalty shall be imposed for murder, if any of the following circumstances are decipherable:

- *Manner of Commission of Murder* - When the murder is committed in an extremely brutal, grotesque, diabolical. revolting, or dastardly manner so as to arouse intense and extreme indignation of the community;
- *Motive for Commission of murder* - When the murder is committed for a motive which evince total depravity and meanness)
- *Anti-Social or Socially abhorrent nature of the crime* - When murder of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. And in cases of 'bride burning' and what are known as 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.
- *Magnitude of Crime*- When the crime is enormous in proportion.
- *Personality of Victim of Murder:* When the victim of murder is (a) an innocent child; (b) helpless woman; (c) victim is a person *vis-a vis* whom the murderer is in a position of domination or trust; (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

Those steps, thereof, form the premises of any conclusion to be reached in each and every case. Reiterating *Jagmohan Singh*[22] the court observed that death penalty serves as a deterrent against

[21]AIR 1980 SC 898; 1980 SCR (1) 645; (1980) 2 SCC 684.

criminal conducts. The court further ruled that while considering the question of sentence to be imposed for the offence of murder, the court must have regard to every relevant circumstance relating to the crime as well as the criminal.[23]That, Parliament has given a broad and clear guideline under section 354(3) which is to serve the purpose of loadstar to the court in the exercise of its sentencing discretion. Further with reference to standardisation of norms for sentencing , the court again referred to *Jagmohan* case reiterating infinite, unpredictable and unforeseeable variations even within a single category offence and went on to record that,"…standardisation of the sentencing process which leaves little room for the judicial discretion …..tends to sacrifice justice at the altar of blind uniformity.[24] It went on to appreciate the silent zones designedly left open by the Parliament in its legislative planning for fair play of judicial discretion to take care of the variable, unpredictable circumstances of the individual cases, relevant to individualised sentencing.

While strongly condemning the action of the appellant and the wave of heinous criminal activities in India, the court stated: [25]

> When the disease is social, deterrence through court sentence must, perforce, operate through the individual culprit coming up before court. Social justice has many facets and Judges have a sensitive, secular and civilising role in suppressing grievous injustice to humanist values by inflicting condign punishment on dangerous deviants.

And before concluding categorically added: [26]

> …we cannot obviously feed into a judicial computer all such situations since they are astronomical imponderables in an imperfect and undulating society…… A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the *rarest of rare* cases when the alternative option is unquestionably foreclosed.

The apex court by the majority judgment rejected both grounds of challenge to the constitutionality of the sentencing procedure and death penalty provided under sections 354(3) of the Cr PC, 1973 and 302 IPC.

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[22]*Jagmohan Singh* v. *State* of U.P.(1973)1 SCC 20.It was a case that was decided on the basis of pre-1973 Code wherein 35th Report of the Law Commission of India on death penalty was discussed and observed that death penalty serves deterrent purpose.
[23]*Id.*, para 164.
[24]*Id.*, para 173.
[25]*Id*, para. 179.
[26]*Id.*, 209.

***Machhi Singh* v. *State of Punjab*[27]**

No doubt that the identification and application of the '*rarest of rare'* doctrine, enunciated in *Bachan Sigh's case* needed some kind of precision. The main guidelines to be followed in its application was one of the issues that engaged the attention of the court in *Machhi Singh's case.*

In that case, a violent dispute between two families resulted in the loss of 17 lives in five separate incidents. The appellant and his associates were tried by the sessions court. This appellant was among the four who were sentenced to death. His death penalty was confirmed by the High Court of Punjab of necessitating an appeal to the Supreme Court. While hearing the appeal, the apex court considered and laid down what would amount to normal guidelines to be followed so as to clarify the "rarest of rare" cases formula, for imposing death sentence, as spelled out in *Bachan Singh's* case.[28]

To start with, the court held that the extreme penalty of death need not be inflicted except in *gravest cases of extreme culpability*.[29] The challenge facing the lower courts, the academia and researchers is how to specifically determine the ingredients of or what amounts to gravest cases of extreme culpability. In what can be understood as the Supreme Court's response to the question, the apex court stated that before opting for the death penalty, the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

Again, from the reasoning of the justices, the Supreme Court seems to have one answer to these. It is that, "Life imprisonment is the rule and death sentence is an exception." In other words death sentence will be imposed only when life imprisonment appears to be an altogether inadequate punishment. This in addition to having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances. These lines of reasoning further intensify the impasse.

Those guidelines are governed by one word – 'discretion' of the judge(s). Being so, matters of discretion can hardly have an ABC end-to-end formula. Furthermore, strictly upholding "Life imprisonment as the rule and death sentence is an exception" is jeopardising the, retributive and deterrence theories of punishment. Will a prospective offender, fully aware and rationalises on the fact that "Life imprisonment is the rule and death sentence is an exception" be still deterred from furthering his criminal enterprise?

Murderous criminal may take advantage of that rule, by reducing the level of brutality and extremism as an escape route. If that happens, will the objective of the sentence still stand served? As if unmindful of the palpable fears, the Supreme Court went ahead to hold that a balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so

[27] (1983) 3 SCC 470.
[28] *Supra* note 19.
[29] *Id.*, para 38(i).

the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised. Probably prioritising the rehabilitative and restorative theories of criminal punishment,[30] all these go to the benefit of the offender and the offended is left out of the picture. This is individualisation not generalisation of sentencing procedure. Justice should be dispensed to all parties, be functionally backward by addressing the grievances of victim(s) and forwarding looking too in ensuring that the convict does not become a burden on the resources of the society and be able to constructively participate in social group . Otherwise, the search for solution to individualisation of sentencing is still early in the day.

In ***Santosh Kumar Singh*** **v.** ***State***,[31]the accused, a lawyer and senior of the deceased Priyadarshini Mattoo, a student of faculty of law, University of Delhi ,raped and murdered her at her home when she was all alone. It was established by the prosecution that prior to the fateful day, Santosh the accused who was the son of a high profile police officer, had been stalking the deceased for almost two years and that the deceased had been provided with a body guard on her complaint to the police of such harassment by the accused. Also, that it was the rejection of all the overtures made by the accused to the deceased over a period of time, that he wanted to ensure that if the deceased doesn't accept his advances then she should not be allowed to become someone else' too.

Despite the evidence against the accused, the trial court for some strange reasons, acquitted him. On appeal, the high court reversed the judgment of the trial court and passed comments against the trial court for error apparent on the face of the decision on the basis of available evidence. Aggrieved by the decision of the High Court of Delhi convicting the accused on both counts of rape and murder and awarding death sentence, he moved an appeal before the Supreme Court.

H. S. Bedi J of the Supreme Court speaking for the court held that sentencing part is a difficult function andwhere the option is between a life sentence and a death sentence, the options are indeed extremely limited and if the court itself feels some difficulty in awarding one or the other, it is only appropriate that the lesser sentence should be awarded. This is the underlying philosophy behind 'the rarest of the rare' principle.

Focusing on mitigating circumstances the court though upheld conviction of the accused but substituted 'death penalty' with 'life imprisonment' on the ground that: [32]

> …the High Court has reversed a judgment of acquittal based on circumstantial evidence, the appellant was a young man of 24 at the time of the incident and, after acquittal, had got married and was the father of a girl child. Undoubtedly, also the appellant would have had time for reflection over the events of the last

[30] Anju Vali Tikoo, *From Punishment to Restoration: A Quest for Real Justice* (Pragati Publications, New Delhi, 2017)
[31] (2010) 9 SCC 747.
[32] *Id*., para 37.

> fifteen years, and to ponder over the predicament that he now faces, the reality that his father died a year after his conviction and the prospect of a dismal future for his young family. On the contrary, there is nothing to suggest that he would not be capable of reform.

The court talked of aggravating circumstances in unequivocal terms and noticed the tendency of parents to be over indulgent to their progeny often resulting in the most horrendous of situations like the instant one where an accused belongs to a category with unlimited power or pelf or even more dangerously, a volatile and heady cocktail of the two.[33] Though the court put on record the alarming incidents of such class reality of the society still it held that the balance sheet tilts marginally in favor of the appellant, and the ends of justice would be met if the sentence awarded to him is commuted from death to life imprisonment.[34]

Going by the reasoning given by the court considering that the accused got married and has a girl child ,forgetting and forgiving his past conduct of stalking for almost two years despite being a lawyer, the manner and motive of crime commission and to cap it all suggesting the possibility of reform after the demise of his high profile police officer father, leaves one with utter confusion about the plight of the victim and the collective conscience of society which has otherwise been used as a justification by court in pronouncing death sentence.[35]

Yet again in the landmark decision of *Santosh Kumar Bariyar* v. *State of Maharashtra*[36] the Supreme Court overruled death penalty. It was a case of kidnapping for ransom and murder. The deceased Kartikraj, was the son of Ramraj who at the relevant time was the Manager of NABARD Bank. The accused hatched a conspiracy to kidnap him and demand Rs.10/- lakh as ransom since they wanted quick money and were unemployed. The deceased was the friend of one of the five accused and was invited by him for an evening party. It is alleged that they consumed liquor and the deceased while going to toilet fell down on account of inebriated condition, became unconscious and passed away. Scared as the accused were on account of this development, *Santosh Bariyar* suggested to dispose of the body and in a brutal manner the body of deceased Kartikraj was cut into pieces, stuffed into poly bags and then disposed of by throwing the bags at different places. The SC overruled death penalty confirmed by the high court and instead awarded life imprisonment giving weightage to the factors like *no previous crime record, not being professional killers, unemployed searching for jobs resulting in need for money etc.*[37]While commuting death sentence the court took into account the fact of conviction being proved on the evidence/testimony of an accomplice turned approver who had been granted pardon. The exercise of sentencing function being a principled exercise is very important to the

[33]*Id.*, para 38
[34]*Ibid.*
[35] See *Dhananjay Chatterjee* v. *State of West Bengal*, (1994) 2 SCC 220.The case has been discussed under the caption of 'Just Desert' in the later pages of this article.
[36] (2009) 6 SCC 498.
[37]*Id.* at 96. *Available at*: http://judis.nic.in/supremecourt/imgs1.aspx?filename=34632 (last visited on May 29,2017).

independent, objective and unpartisan image of judiciary. Quoting Von Hirsch and Andrew Ashworth,[38] the court observed: [39]

> There is a fundamental relationship between the legitimacy of sentence belonging to a particular potency and the reasons accorded by the court to justify the same. …. The reasons which are accorded by the court to justify the punishment should be able to address the questions relating to fair distribution of punishment amongst similarly situated convicts and the appropriate criteria for the punishment. The sentencing process, based on precedents around Bachan Singh, should help us to determine specific, deserved sentences in particular cases. It is important to note here that principled application of rarest of rare dictum does not come in the way of individualized sentencing. With necessary room for sentencing, consistency has to be achieved in the manner in which rarest of rare dictum has to be applied by courts. Bachan Singh expressly barred one time enunciation of minute guidelines through a judicial verdict. The court held that only executive is competent to bring in detailed guidelines to regulate discretion. On this count judicial restraint was advocated. But at the same time, it actively relied on judicial precedent in disciplining sentencing discretion to repel the argument of arbitrariness and Article 14 challenge. An embargo on introduction of judicial guidelines was put therein but organic evolution of set of principles on sentencing through judicial pronouncements was not ruled out. This is how precedent aids development of law in any branch of law and capital sentencing cannot be an exception to this. "Principled reasoning" flowing from judicial precedent or legislation is the premise from which the courts derive the power. The movement to preserve substantial judicial discretion to individualize sentences within a range of punishments also has its basis in the court's ability to give principled reasoning.

So, two considerations are crucial- the antecedents or criminal record of the offender and the circumstances leading to the crime of murder committed. This can be further clarified to mean that if the offender is a first offender or has no criminal record then he stands a good chance of being sentence to life imprisonment instead of death, irrespective of the offence committed.[40] In other words, the attention of the court goes away from the crime and the victim and leniently focuses on the personality of the offender. Is that the most appropriate and objective reasoning to be prioritised? If so, how have the interests or right of the victim/family and that of the larger society catered for? How many times should a person commit crime before he will be adjudged a

[38] Andrew Von Hirsch and Andrew Ashworth, *The Sentencing Theory Debate: Convergence in Outcomes, Divergence in Reasoning Proportionate Sentencing: Exploring The Principles*, (Oxford University Press, 2005)
[39] *Supra* note 36 at 51-52.
[40] *Ibid*. Also see *Sunil Dutt Sharma* v. *State* (Govt. of NCT of Delhi) AIR 2013 SC (Cri) 2342 is an illustrations of this notion.

'danger' to the lives of others? To restore public confidence, these need to be taken into consideration.

This is an illustrative case with reference to the evolution of death penalty since *Bachan Singh* judgment. Citing categories of cases where death penalty was commuted and the other where it was not commuted the Supreme Court bench of S.B. Sinha and Cyriac Joseph.JJ. found it to be a fit case to commute death sentence and award life imprisonment instead. It is intriguing as to how against the backdrop of facts that there was a conspiracy to kidnap none other than a friend for ransom, and the manner in which they planned and executed the entire crime how the apex court could still hold that they were not professional killers, unemployed resulting in need of money and be able to justify commutation. Character of the accused being educated, unemployed youth in need of money cannot be given so much of weightage to rule out the death sentence in the face of aggravating manner and motive of commission of crime. If this is how we are supposed to evaluate and balance aggravating and mitigating circumstances then it would result in total loss of faith in human social relations and consequent anomie which the law is bound to prevent in the name of law and order. And punishment is to ensure social discipline and social solidarity.

Sunil Dutt Sharma [41]is yet another illustrative case where the accused-appellant was tried for offences under sections 302 and 304-B of the IPC for causing the death of his wife. He was acquitted of the offence under section 302 IPC on the benefit of doubt though found guilty under section 304-B of the IPC following which the sentence of life imprisonment was imposed and affirmed by the high court. Hence, the appeal under article 136 to the Supreme Court to determine whether sentence of life imprisonment to the accused-appellant is in any way excessive or disproportionate so as to require interference by this Court.

The Supreme Court while quoting section 304-B(2) of the IPC which prescribes mandatory minimum imprisonment of seven years which may extend to imprisonment for life also mentioned other provisions of IPC which include similar expressions with reference to the quantum of sentence. Highlighting the power and authority conferred by the language in different provisions of the IPC, the apex court observed that:

> ...(It) indicates the enormous discretion vested in the Courts in sentencing an offender who has been found guilty of commission of any particular offence. Nowhere, either in the Penal Code or in any other law in force, any prescription or norm or even guidelines governing the exercise of the vast discretion in the matter of sentencing has been laid down except perhaps, Section 354(3) of the Code of Criminal Procedure, 1973 which, interalia, requires the judgment of a Court to state the reasons for the sentence awarded when the punishment prescribed is imprisonment for a term of years. In the above situation, naturally, the sentencing power has been a matter of serious academic and judicial debate to discern an

[41]*Sunil Dutt Sharma* v. *State (Govt. of NCT of Delhi)* AIR, 2013 SC (Cri.) 2342.

> objective and rational basis for the exercise of the power and to evolve sound jurisprudential principles governing the exercise thereof.

While referring to *Jagmohan Singh, Bachan Singh, Machhi Singh* as watersheds in the search for jurisprudential principles in the matter of sentencing, the court focused on *Sangeet*[42] and *Shankar Kisanrao Khade*[43]and noted that the attempt at evolution of a principle based sentencing policy as distinguished from a judge centric one has suffered some amount of derailment/erosion. In fact, the several judgments noted and referred to in *Sangeet*[44]were found to have brought in a fair amount of uncertainty in application of the principles in awarding life imprisonment or death penalty, as may be, and the varying perspective or responses of the court based on the particular facts of a given case rather than evolving standardized jurisprudential principles applicable across the board.

Relying heavily on the concurring opinion of Madan B. Lokur, J. in *Shankar Kisanrao Khade*[45] dealing exhaustively with the judgments rendered by this court in the last 15 years the Court quoted paragraphs 106 and 122 wherein death penalty has been converted to life imprisonment and also the cases wherein death penalty has been confirmed. However, in paragraph 123 of the report the cases where the reasons have been deviated from have also been noticed. Noting the differential interpretation of the rarest of rare doctrine from *Bachan Singh* and the principle of proportionality, the apex court in *Sunil Dutt* went on to observe,

> Are we to understand that the quest and search for a sound jurisprudential basis for imposing a particular sentence on an offender is destined to remain elusive and the sentencing parameters in this country are bound to remain judge centric? The issue though predominantly dealt with in the context of cases involving the death penalty has tremendous significance to the Criminal Jurisprudence of the country inasmuch as in addition to the numerous offences under various special laws in force, hundreds of offences are enumerated in the Penal Code, punishment for which could extend from a single day to 10 years or even for life,…
>
> The identified principles could provide *a sound objective basis* for sentencing thereby *minimizing individualized and judge centric perspectives*. Such principles bear a fair amount of affinity to the principles applied in foreign jurisdictions. *The difference is not in the identity of the principles; it lies in the realm of application thereof to individual situations*. While in India application of the principles is left to the judge hearing the case, in certain foreign jurisdictions such principles are formulated under the authority of the statute and are applied on principles of categorization of offences which approach, however, has been found by the

[42]Criminal Appeal Nos. 490-491 of 2011.
[43](2013) 5 SCC 546.
[44]*Supra* note 42.
[45]*Supra* note 43 at para10 and 14.

> Constitution Bench in *Bachan Singh* to be inappropriate to our system. *The principles being clearly evolved and securely entrenched, perhaps, the answer lies in consistency in approach.*

And the court ruled that, "We see no reason as to why the principles of sentencing evolved by this Court over the years though largely in the context of the death penalty will not be applicable to all lesser sentences so long as the sentencing judge is vested with the discretion to award a lesser or a higher sentence resembling the swing of the pendulum from the minimum to the maximum."

And finally deciding the quantum of appropriate punishment the Court ruled:[46]

> Applying the above parameters to the facts of the instant case it transpires that the death of the wife occurred within two years of marriage. The proved facts…do not disclose any extraordinary, perverse or diabolic act on the part of the accused-appellant to take an extreme view of the matter… at the time of commission of the offence, *the accused-appellant was about 21 years old and as on date he is about 42 years.* The *accused-appellant also has a son who was an infant at the time of the occurrence*. He has *no previous record of crime*. On a cumulative application of the principles that would be relevant to adjudge *the crime and the criminal test, we are of the view that the present is not a case where the maximum punishment of life imprisonment ought to have been awarded* to the accused-appellant…..*some of the injuries on the deceased*, though obviously not the fatal injuries, *are attributable to the accused-appellan*t. In fact… injuries No. 1 (Laceration 1" x ½" skin deep on the side of forehead near hair margin) and 2 (Laceration 1 ½" x 1" scalp deep over the frontal area) on the deceased had been caused by the accused-appellant with a pestle. The *said part of the order of the learned trial court has not been challenged in the appeal before the High Court.* Taking into account the said fact, we are of the view that in the present case the minimum sentence prescribed i.e. seven years would also not meet the ends of justice. *Rather we are of the view that a sentence of ten years RI would be appropriate.* Consequently, we modify the impugned order and impose the punishment of ten years RI on the accused-appellant for the commission of the offence under Section 304-B of the Penal Code.

This clearly demonstrates that the court having made up its mind on some intuitive feelings can justify the quantum of sentence on giving primacy to mitigating circumstances even in the face of aggravating circumstances for *e.g., Santosh Bariyar case.* Having analyzed few judgments of

[46]*Supra* note 38(emphasis added). See also *Ravindra Triambak Choutmal* v.*State of Maharashtra* (1996) 4 SCC 148.This again was a case of dowry death where the husband having killed the wife cut her body into pieces, put it in a gunny bag and then into a trunk. And then lowered into earth by digging a pit and burying it there to remove evidence. B. L. Hansaria J commuting death sentence to life imprisonment reasoned that since dowry deaths are too common these days so it is not a case fitting into rarest of rare category.

the Supreme Court using utilitarian principle in individualizing punishment in heinous offences, the following section deals with the deserved punishments on the basis of retributive philosophy in almost similar set of circumstances.

Just Desert and the Indian Supreme Court

In *Sushil Murmu*[47]a bench of JJ. Doraiswamy Raju and Arijit Pasayat deciding a case of human sacrifice of a 9 year old boy for appeasing the deity for personal prosperity observed: [48]

> A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment…..is the outcome of cool deliberations and the screening of the material by the informed man i.e. the Judge that leads to determination of the *lis*.
>
> *The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable*. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.
>
> The criminal law adheres in general to the principle of proportionalityin prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. *Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the traffic results of his crime.Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread*.

[47]*Sushil Murmu* v. *State of Jharkhand* (2004) 2 SCC 338.
[48]*Ibid.* emphasis added.

> Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. *Anything less than a penalty of greatest severity for any serious crime is thought to be a measure of toleration that is unwarranted and unwise.*

Rejecting the appeal and confirming the death sentence the apex court observed that: [49]

> A bare look at the fact situation of this case shows that the appellant was not possessed of the basic humanness and he completely lacks the psyche or mind set which can be amenable for any reformation. He had at the time of occurrence a child of same age as the victim and yet he diabolically designed in a most dastardly and revolting manner to sacrifice a very hapless and helpless child of another for personal gain and to promote his fortunes by pretending to appease the deity. The brutality of the act is amplified by the grotesque and revolting manner in which the helpless child's head was severed. Even if the helpless and imploring face and voice of the innocent child did not arouse any trace of kindness in the heart of the accused, *the nonchalant way in which he carried the severed head in a gunny bag and threw it in the pond unerringly shows that the act was diabolic of most superlative degree in conception and cruel in execution.* The tendency in the accused and for that matter in any one who entertains such revolting ideas cannot be placed on par with even an intention to kill some but really borders on a crime against humanity indicative of greatest depravity shocking the conscience of not only any right thinking person but of the Courts of law, as well. The socially abhorrent nature of the crime committed also ought not to be ignored in this case. If this act is not revolting or dastardly, it is beyond comprehension as to what other act can be so described is the question. Superstition is a belief or notion, not based on reason or knowledge, in or of the ominous significance of a particular thing or circumstance, occurrence or the like but mainly triggered by thoughts of self- aggrandizement and barbaric at times as in the present case. Superstition cannot and does not provide justification for any killing, much less a planned and deliberate one. No amount of superstitious color can wash away the sin and offence of an unprovoked killing, more so in the case of an innocent and defenseless child."

[49] *Ibid* at para 23. (emphasis added). Contrasting it with *Santosh Bariyar* case in the context of disposal of the dead body having cut into pieces and then disposed of in bags, one judgment (*Sushil Murmu* ,2004) rationalizes the award of death punishment while the other (*Santosh Bariyar* ,2009) safely plays it down and instead talks on reformative and rehabilitative theories pronounces lesser sentence.

Dhananjay Chatterjee* v. *State of West Bengal [50]

This is a case to be compared with Santosh Kumar[51] in almost similar circumstantial matrix but different sentencing outcome. Dhananjay, a security guard, was convicted on the charges of rape coupled with murder of an 18 year old girl, Hetal, of the apartments in which the deceased lived with her family. A. S. Anand J, delivering the judgment referred to para 14 of Bachan Singh case highlighting the increase in crime incidence. The court ruled;

> In our opinion, *the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenseless and unprotected state of the victim.* Imposition of appropriate punishment is the manner in which the courts respond to the *society's cry for justice* against the criminals. *Justice demands that courts should impose punishment fitting to the crime* so that the courts reflect public abhorrence of the crime. The courts must *not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.*
>
> The sordid episode of *the security guard, whose sacred duty was to ensure the protection* and welfare of the inhabitants of the flats in the apartments, should have subjected the deceased, a resident of one of the flats, to *gratify his lust and murder her in retaliation for his transfer on her complaint, makes the crime even more heinous*. Keeping in view *the medical evidence and the state in which the body of the deceased* was found, it is obvious that *a most heinous type of barbaric rape and murder was committed on a helpless and defenseless* school-going girl of 18 years. If the security guards behave in this manner, who will guard the guards? The faith of the society by such a barbaric act of the guard, gets totally shaken and its cry for justice becomes loud and clear. The offence was not only inhuman, and barbaric but it was a totally ruthless crime of rape followed by cold blooded murder and an affront to the human dignity of the society. The savage nature of the crime has shocked our judicial conscious. There are no extenuating or mitigating circumstances whatsoever in the case. We agree that a real and abiding concern for the dignity of human life is required to be kept in mind by the courts while considering the confirmation of the sentence of death *but a cold blooded pre-planned brutal murder, without any provocation, after committing rape on an innocent and defenseless young girl of 18 years, by the security guard certainly makes this case a 'rare of the rarest' cases which calls for no punishment other than the capital punishment and we accordingly confirm the sentence of death."*

[50] *Dhananjay Chatterjee* v *State of West Bengal* (1994) 2 SCC 220.(emphasis added)
[51] *Supra* note 29.

Dhananjay was hanged to death in Alipore Jail, Kolkata, on 14th August, 2004 (his 39th birthday)after his multiple mercy petitions were rejected by the President of India. Looking back to the case of *Santosh Singh*[52]discussed above, one finds exact similarity in the fact scenario with *Dhananjay* coupled with the distinguishing fact that accused Santosh was a lawyer from a well to do family in contrast to *Dhananjay* who was merely a security guard and obviously belonged to the marginalized section of society. Comparing the two fact situations, one can hardly find a justifiability of different sentences in the two instances. Also, it is pertinent to note that for retaining faith in the implementation of the criminal justice administration, an objective, and impartial judicial machinery is a *sine qua non*. It is because of such disparate judgments in the name of sentencing discretion that, the principled sentencing becomes Judge centric depending purely upon their individual biases and prejudices.

An illustrative case of what would be an appropriate and 'just deserved' punishment is *Swamy Shraddananda@Murali* v. *State of Karnataka.*[53] This is the case of a self-styled godman Swami Shraddananda for murdering his wife Begum Shakereh Namazi Khaleeli. Shakereh married Shraddananda in 1986 after divorcing her husband, Akbar Khaleeli, a former diplomat, in 1985. She was the granddaughter of the former Dewan of Mysore. Shraddananda had drugged Shakereh, placed her body in a coffin and buried it in a corner of the compound of her palatial bungalow on Richmond Road on April 28, 1991.When Shakereh's daughters from her earlier marriage questioned Shraddananda about their mother, he had told them that she had gone abroad.

The trial judge, B.S. Thotad, in May 2005 sentenced Swami Shraddananda, who was earlier known as Murli Manohar Mishra, to death for murdering Shakereh and for destroying evidence and the High Court of Karnataka confirmed the death sentence.

Faced with an appeal against death penalty in this case, the Supreme Court held that the court may 'feel' that the punishment more just and proper, in the facts of the case, would be imprisonment for life till the last breath without remission. That the court may be of the view that the punishment of death awarded by the trial court and confirmed by the high court needs to be substituted by life imprisonment. And that the court, in its judgment, may make its intent explicit and state clearly that the sentence handed over to the convict is imprisonment till his last breath or, life permitting, imprisonment for a term not less than twenty. The sole question that came before the court was the issue of the justness of 'sentence' not conviction *per se.*

Aftab Alam J delivered the judgment. Speaking on behalf of the bench, Aftab Alam J, distinguished the contextual setting of *Machhi Singh* and categorically highlighted the changed socio- economic scenario of 21st century. The emergence of organised crime, terrorist activities,

[52]*Supra* note 29.
[53] (2008) 13 SCC 767 paras 43- 59.

private armies, custodial deaths, fake encounters, gang rapes, parliamentary bombings, along with the professional criminals emerging on criminal scene certainly are a class apart from the categories visualised by *Machhi Singh* guidelines and hence these cannot be taken as inflexible, absolute or immutable.[54]

Referring to Aloke Nath Datta it was observed that the 'courts in the matter of sentencing act differently although the fact situation may appear to be somewhat similar' and further 'it is evident that different benches had taken different view in the matter'. The truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this court depends a good deal on the personal predilection of the judges constituting the bench. The inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the court lead to a marked imbalance in the end results. These are some of the larger issues that make us feel reluctant in confirming the death sentence of the appellant.

Commenting on the facts of the case, the court noted that: [55]

> …the appellant killed Shakereh in a planned and cold blooded manner but at least this much can be said in his favor that he devised the plan so that the victim could not know till the end and even for a moment that she was betrayed by the one she trusted most.That although the way of killing appeared quite ghastly it may be said that it did not cause any mental or physical pain to the victim. And finally as noted by Sinha J. the appellant confessed his guilt at least partially before the High Court.

Referring to seven decisions ….delivered by the apex court it said:

> …We must not be understood to mean that the crime committed by the appellant was not very grave or the motive behind the crime was not highly depraved. Nevertheless, in view of the above discussion we feel hesitant in endorsing the death penalty awarded to him by the trial court and confirmed by the High Court. The absolute irrevocability of the death penalty renders it completely incompatible to the slightest hesitation on the part of the court. The hangman's noose is thus taken off the appellant's neck.

After a detailed analysis of the practice of remission of life sentence which is mechanically exercised and results in release of convicted prisoner on completion of fourteen years of imprisonment including undertrial detention the court: [56]

> …The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an

[54] *Id*. at para 43.
[55] *Ibid.* (emphasis added).
[56] *Supra* note 53 at para 66-68.

> appellant comes to this court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal,*that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence.* But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment that subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then the Court should do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the court, i.e., the vast hiatus between 14 years' imprisonment and death. It needs to be emphasized that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years imprisonment would amount to no punishment at all.
>
> Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of the rare cases. This would only be a reassertion of the Constitution Bench decision in Bachan Singh (supra) besides being in accord with the modern trends in penology.
>
> In light of the discussions made above we are clearly of the view that there is a good and strong basis for the Court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be.

The task of sentencing function of the Indian judiciary, sometimes, is a matter of 'feelings' of the judges and may not be strictly statutory provisional pronouncement. That further attests to the fact that gravity of punishment is individualised - differs or varies from individual to individual case. It could also be a 'view' and the intent may be implicit in the minds of the arbiters.

After reviewing its previous decisions on the issue, wherein similar facts were differently, individually and not uniformly decided, the court took a stand on *Swamy Shraddananda.* The court *'felt'* that life imprisonment would serve the *end of justice* rather than death penalty. Consequently, it substituted the death sentence awarded to the appellant by the trial court and confirmed by the high court with imprisonment for life and *directed that he shall not be released from prison till the rest of his life.* And the same again came up for consideration *in Rajiv Gandhi*

assassination case. Faced with the question, 'whether imprisonment for life in terms of section 53 read with section 45 of the IPC meant imprisonment for rest of the life of a convict undergoing life imprisonment and whether as per the principles enunciated in Swamy Shraddananda a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life without any remission?' The Constitution Bench in this case of *UOI* v. *Sriharan @ Murugan* delivering the judgment F. M. I. Kalifulla J on behalf of five judge bench on December 2, 2015 ….heldquoting Justice Fazal ali *in Maru Ram;….*

> It is true that there appears to be a modern trend of giving punishment a color of reformation so that stress may be laid on the reformation of the criminal rather than his confinement in jail which is an ideal objective….reformation of the criminal is only one side of the picture, rehabilitation of the victims and granting relief from the tortures and sufferings which are caused to them as a result of the offences committed by the criminals is a factor which seems to have been completely overlooked while defending the cause of the criminals for abolishing deterrent sentences. We feel that where deterrent punishment is not resorted to, there will be complete chaos in the entire country and criminals will be let loose endangering the lives of thousands of innocent people of our country .Thus, it seems to me that while considering the problem of penology we should not overlook the plight of victimology and the sufferings of the people who die, suffer or are maimed at the hands of criminals.

Upholding the ruling in *Shraddananda* case the court held;

> …Starting from Godse (supra), Maru Ram (supra), Sambha Ji Krishan Ji (supra), Ratan Singh (supra), it has now come to stay that when in exceptional cases, death penalty isaltered as life sentence, that would only mean rest of one's life span. it can be saidwithout any scope of controversy ….having regard to the proportionality of the crime committed, it is decided that *the offender deserves to be punished with the sentence of life imprisonment (i.e.) for the end of his life or for a specific period of 20 years, or 30 years or 40 years,* such a conclusion should survive without any interruption….considering the nature of offence and the conduct ofthe offender including his *mens rea* to(we) direct that such offender does not deserve to be released early and required to be kept in confinement for a longer period, for imposition of the appropriate sentence befitting the criminal act committed by the convict.

According recognition to the ongoing debates, Supreme Court noted that it was not out of place to mention that, in all of recorded history, that there has never been a time when crime and punishment have not been the subject of debate and difference of opinion. More importantly, *the court admitted that there are no statutory guidelines to regulate punishment in India.*

Again in *Ram Naresh,*[57] a case pertaining to gang rape and murder by strangulation of the deceased by 4 accused between the age group of 21 to 31 years the Supreme Court through Swatantra Kumar J. observed *"…while determining the questions related to sentencing policy the court has to follow certain principles which are the loadstar in the imposition or otherwise of death sentence".* Underscoring the importance of balancing the aggravating and mitigating circumstances in the context of awarding death penalty it held: [58]

> The court has to strike a balance between the two and see towards which side the scale/balance of justice tilts. The principle of proportion between the crime and punishment is the principleof "*just deserts*" that serves as the foundation of every criminal sentence that is justifiable.In other words, the"doctrine of proportionality" has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, *the court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large…. Thus, the court should keep in mind the retributive and deterrent aspect of punishment while awarding the extreme penalty of death.*

Deliberating on the quantum of sentence the court while referring to other judgments of the court *in Shraddanandaand Bantu* case considered the young age of all four accused, that the deceased who being the estranged wife of Ram Naresh's brother has been noted as *only a mistress* though had two children with the man with whom she had been living without marriage, that perhaps the death was caused co- accidentally in the course of committing gangrape on account of gagging of the victim by her saree, that owing to the soured relationship between the parties this diabolical crime was committed but the accused are not a 'social menace' and hence the death sentence was commuted to life imprisonment for twenty one years without remission.

Finally, the fact remains that determining the quantum of punishment by passing the appropriate sentence is quite onerous and still a challenge to the judges in India. The need or pressure on the judges to be more determinate and consistent makes the sentencing function even more demanding. There are numerous other circumstances that do justify the passing of lighter and different sentences between similar cases in India. This is notwithstanding the fact that the end results of the criminal conducts are one and the same. For instance, in the offence of murder, the fact that death was the result in a group of similar cases would not, *ipso facto,* compel the judges to pass death penalty on each offender. As can be seen from the analysed cases above, there are intervening circumstances that do alter the course of sentencing process. For instance, the nature of the crime, the age, personality, antecedents of the offender, the mode of the committing the crime, aggravation and other factors like possibility of reform, whether the convict would be a

[57] *Ram Naresh* v. *State of Chhattisgarh* (2012) 4 SCC 257.
[58] *Ibid.*

social menace etc. indeterminate, inexact factors sway the minds of the judges one way or the other.

Majority of the Justices in *Bachan Singh's case*, acknowledged that, "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society."[59]

The court noted further that, for persons convicted of murder, life imprisonment is the rule and death sentence an exception. That a real and abiding concern for the dignity of human life postulates resistance to taking a life through the instrumentality of the law. Indeed, that shouldn't to be done save in the rarest of rare cases. That is, when the alternative option is unquestionably foreclosed.

The latest judgment in brutal gangrape, diabolic violation and murder of *Nirbhaya*[60] is a case in point wherein the Supreme Court confirmed death penalty on all four adult offenders on the charges of gangrape. "The appetite for sex, the hunger for violence, the position of the empowered *and the attitude of perversity*, to say the least, are *bound to shock the collective conscience and destroy the civilised marrows of the milieu in entirety."*Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the crime. Justice demands that the courts should impose punishments befitting the crime so that it reflects public abhorrence of the crime.[61] What is intriguing is that there is concurrent judgment of R. Banumathi J on the quantum of sentence reaching the same conclusion but with different and detailed reasoning. Though this clearly underscores the quantum of sentencing discretion vesting in the judiciary yet gives them the space to manoeuvre the demands of retribution and utility by 'balancing just desert and individualised punishment'.

As long as there is no clarity/certainty on the sentencing criteria being used by the Supreme Court, there will be no end to appeals coming to the apex court from lower court seeking to have their sentence(s) set aside or for variations or commutations. It is an undeniable fact that the statutory interpretation role is that of the judiciary to perform but there is every need to perform that role judiciously. Without dogmatically adhering to the doctrine of *stare decisis*, similar cases should be similarly decided. If there is any need to deviate from an earlier decision, to distinguish one case from another or to overrule and earlier one, there should be logical and parameters for so doing. Random and indeterminate sentencing criteria obscure the connotation of justice. Indeed, varying (increasing or decreasing, modifying or altering) the quantum/severity of punishments should be strictly logically undertaken.

It follows therefore, that in practice, there is much variance in the matter of sentencing. That, unlike several countries around the world with laws prescribing sentencing guidelines, there is no

[59]*Supra* note 19 para. 207.
[60] *Mukesh* v. *State for NCT of Delhi* (SLP decided on 5th May,2017 by three judge bench of JJ Dipak Misra, R Banumathi and Ashok Bhushan
[61]*Ibid.* para 356 of Justice Dipak Misra order

statutory sentencing policy in India till date. What the IPC prescribes is only the maximum punishments for offences and, in some cases, the minimum punishment. Consequently, Judges exercise very wide discretion within the statutory limits and the scope for arriving at sentence. The task of deciding the quantum of punishment is left to the judiciary to reach, after hearing the parties, evaluating/attaching weights to the pieces of evidence adduced. In the absence of such statutory guidelines, judges' discretions prevail. Here lies the major challenge of ensuring consistency, uniformity, regularity, logicality, stability and reliability on judgments.

Without unnecessarily over-flogging the points, the scope and concept of mitigating factors in the area of death penalty need not be given too liberal and expansive construction. Otherwise, the individualisation sentencing dilemma will be further deepened to the detriment of all the worshippers in the temple of justice and the society at large. Agreed that for persons convicted of murder, life imprisonment is the rule and death sentence an exception but the ancient *stare decisis et non quieta movere* should not be thrown overboard, less we'll be floating on the judicial ocean of uncertainties. The legislative sentencing guide under section 354(3) Cr PC may only serve as the foundation until a more narrowed down and comprehensive sentencing guideline is formulated.

V CONCLUSION

Till date, neither the legislature nor the judiciary has issued structured criminal sentencing guidelines in India. Section 235(2) Cr PC contains just a hearing procedure to be followed while deciding the quantum of sentence post- conviction. It is more of mercy plea, provisional opportunity wherein the convict should be called upon to show cause while the maximum penalty should not be imposed on him. The convict's submissions may be outside the facts in issue. The social-economic standing of the convict may mitigate the punishment and could influence the judge in deciding the sentence.

Fully aware of the absence and the need for the guidelines, what the Supreme Court has succeeded in doing is the provision of judicial guidance in the form of principles and factors that courts must take into consideration while exercising sentencing discretion. This is not enough and worrisome, as far as determining appropriate sentence is concerned. Worrisome because the ongoing individualisation of sentencing has created and still creates lots of uncertainties in the quantum of punishments being awarded by courts in almost similar sets of facts.

To ensure 'justice' in each and every case, punishment requires deliberations outside the nature of the crime committed and circumstances surrounding the commission. After conviction, it is obviously the duty of the judiciary to award appropriate sentence. The absence of statutory sentencing guidelines to assist judges in discharging this all important duty has left a wide vacuum in the machinery of justice dispensation in India. Widely leaving sentencing open to the discretion of the judges is not the most ideal criminal administration policy. The Malimath Committee Report on Criminal Law Reform (2003) recommended incorporation of sentencing guidelines for aiding the judiciary in deciding appropriate sentence. Even the Law Commission

of India in its 262nd Report on Death Penalty categorically recorded this disparity in sentencing, on account of personal leanings of judges, as one of the factors amongst others to recommend abolition of death penalty in all crimes except terrorism related offences.

Indian judiciary has come of age and deserve appropriate sentencing policy. Individualisation, non-uniform or random sentencing status in India needs to give way for certainty and logicality in the award of sentence. Having sentencing guidelines in place will enable the courts respond to the daily cry for justice and the yearnings of the community. The judges should be able to award appropriate punishment proportionate to crime committed. It is only by so doing that the retributive and just desert theories of criminal punishments can be met.

Quite a few committees set up by the government have emphasised the importance of having and/or adopting sentencing guidelines in India. That call is hereby re-iterated. Having such will definitely address individualisation of punishment and minimize the uncertainties surrounding the award sentences in India. The rights of the victim, the offender and the society should be simultaneously considered in any sentence that will pass the 'justice' test.

In the absence of or pending whenever the Parliament will do so, the Supreme Court should, as a matter of urgency, step in and salvage the situation. This apex court may be persuaded by guidelines available in other (similar) jurisdictions and lay down more precise but comprehensive guidelines for sentencing in India.

THE ARMED FORCES (SPECIAL POWERS) ACT, 1958, AND FEDERAL CONFLICTS

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Abstract

Enactment of the Armed Forces (Special Powers) Act, 1958, has led to bitter Centre-State conflicts. This paper attempts to analyse some of such conflicts by categorising them into: (1) conflict with respect to 'legislative power' under the Constitution; (2) Centre-State conflict on supremacy; (3) question with regard to the "discretion" of the Governor of a State while administering the terms of AFSPA; (4) question with regard to the scope of "disturbed areas"; (5) conflict on account of 'immunity from prosecution' granted to armed forces' personnel; (6) conflict on account of differential treatment between central and state forces working under the same conditions and performing the same tasks; and (7) conflict with respect to 'inquiry' as specified in the AFSPA.

I INTRODUCTION

ON 15 AUGUST, 2017, India shall be blessed with seventy years of independence and democracy. Concurrently, however, India shall also bear witness to the 59th year of promulgation of the Armed Forces (Special Powers) Act, 1958 (Act 28 of 1958) [hereinafter 'AFSPA'].The AFSPA was enacted in 1958, as a short term measure, vouchsafing special powers upon members of the armed forces in "disturbed areas" in the then State of Assam and Union Territory of Manipur.[1] However, it still continues to remain in force in five North-Eastern States of India.

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[1] Ramchandra Guha, *India After Gandhi: the History of World's Largest* Democracy 326 (Harper Collins), New Delhi, 2007). AFSPA was intended as an immediate response to curb the movements of Naga rebels prevalent in the southern hills of the State of Assam.

In fact, even the Indian state of Jammu and Kashmir has not been spared. In September 1990, Parliament passed the Armed Forces (Jammu and Kashmir) Special Powers Act which was deemed to have come into force retrospectively from July 05, 1990 and has remained in force since.[2]

Equipped with unbridled powers, which include powers to shoot to kill with impunity, arrest on flimsy pretext, conduct warrantless searches, and demolish structures in the name of "aiding civil power", soldiers have raped, tortured, and killed citizens for the past fifty-nine years without fear of being held accountable, consequently resulting in a fierce discourse focused on the constitutional validity of AFSPA with respect to: (i) part III (*i.e.*, Fundamental Rights) of the Constitution of India, 1950 [hereinafter 'Constitution']; and (ii) legislative competence of the Parliament to enact AFSPA.[3] However, this conflict in the centre-state relationship has often been neglected and ignored by the academia.

Before discussing centre-state conflicts ensuing from the enactment and promulgation of AFSPA it is imperative that the legislative scheme under the Constitution is briefly discussed.

II LEGISLATIVE SCHEME UNDER THE CONSTITUTION OF INDIA, 1950

The basic provisions laying down the scheme for distribution of powers between the Union and the States are found in part XI of the Constitution, entitled "Relations between the Union and the States". Part XI is divided into two chapters: (a) "Legislative Relations" – which establishes the list system; and (b) "Administrative Relations". From the territorial point of view, Parliament may legislate for the whole of India, or a part thereof while the respective state legislatures may

[2] Muzamil Jalil, "Explained: AFSPA - Disturbed Areas Debate in J&K" *The Indian Express*, *available at*: http://indianexpress.com/article/explained/explained-afspa-disturbed-areas-debate-in-jk/ (last visited on May 11, 2017).

[3] The Supreme Court of India while adjudging the dispute regarding the Armed Forces (Special Powers) Act, 1958 (Act 28 of 1958), restricting itself to an analysis of the legislative competence of the Parliament to enact AFSPA, was pleased to uphold its constitutional validity and astoundingly did not by any means allude to Article 21 of the Constitution of India, 1950 which recognises the right to life of every person (See *Naga Peoples' Movement of Human Rights* v. *Union of India*, AIR 1998 SC 431). The Supreme Court held that the Act draws its legitimacy from a combined reading of art. 355 and Entry 2A, List I (Seventh Schedule) of the Constitution. While it is admitted that the Act was not challenged as being violative of the constitutional provisions such as arts. 14, 19 and 21, but it is pertinent to note that as far back as in 1952 it had been remarked by the Supreme Court in *State of Madras* v. *V.G. Row*, (1952) SCR 597, that in so far as fundamental rights are concerned "this court has been assigned the role of a sentinel on *qui vive*" by the Constitution.

legislate for the whole or any part of the state.[4] The very basis of a federal constitution is the division of powers and functions between the centre and the states.[5]

A basic analysis activated to adjudge what subjects ought to be designated to the different levels of government in a federation is that functions of national significance ought to go to the centre, and those of local interest should remain with the states. It is a broad assessment, an array of *ad hoc* formula, and does not prompt to any uniform pattern of allocation of subjects between the two tiers of government in all federal countries. The lack of uniformity stems from the inability to decide, on any *a priori* basis, as to which subjects are of general or national importance, and which of them are of local importance:[6]

> Certain subjects like defence, foreign affairs, and currency are regarded as being of national importance *everywhere* and are thus given to the Centre. But, beyond this, what other subjects should be allocated to the Centre depends on the exigencies of the situation existing in the country, the attitudes of the people and the philosophy prevailing, at the time of constitution-making, and the future role which the Centre is envisaged to play.

There is a third area in which both the centre and the states may operate simultaneously. This unique feature, however, is subject to the overall supremacy of the centre in so far as any law enacted on any subject which falls under the concurrent list shall prevail over any law enacted by any State.

The seventh schedule to the Constitution of India

An elaborate scheme of allocation of powers and functions between the Centre and the States is expounded in the Constitution.

The members of the constituent assembly believed that India was peculiarly faced with uniquely extraordinary issues which had not "confronted other federations in history."[7] Recourse to theory was not an avenue for the solution of these problems because "federalism" lacked a "stable

[4] The Constitution of India, 1950, art. 245.
[5] In this connection see also *Dharam Dutt* v. *Union of India*, (2004) 1 SCC 712.
[6] M.P. Jain, *Indian Constitutional Law*, 531 (Lexis Nexis Butterworths Wadhwa, Gurgaon, 6th edn., 2006).
[7] See, Constituent Assembly Debates V, 1, 38, N.G. Ayyangar.

meaning" and was "not a definite concept".[8] Our Constitution-makers, therefore, pursued "the policy of pick and choose" to carefully determine as to what would "suit the genius of the nation best ...."[9] "This process produced new modifications of established ideas about the construction of federal governments and their relations with the governments of their constituent units."[10] The Constituent Assembly shaped a new variant of federalism – "cooperative federalism"[11] – whereby the framers of the Constitution apportioned functions between the Centre and the States in a way as to suit the peculiar exigencies.

The Constitution seeks to create three functional areas: (i) an exclusive area for the centre vide article 246(1); (ii) an exclusive area for the states *vide* article 246(3); and, (iii) a common or concurrent area in which both the centre and the states may operate simultaneously subject, however, to the overall supremacy of the centre vide article 246(2). These three functional areas enlisted in the seventh schedule, as: (a) list i of the seventh schedule ('union list'); (b) list ii of the seventh schedule ('state list'); and list iii of the seventh schedule ('concurrent list'), contain corresponding entries which demarcate the fields of legislation within which respective legislature can operate.[12]

The phraseology of the various clauses of article 246 is such as to secure the principle of Union supremacy. The legislative power conferred on the centre under article 246(1) [union list] and article 246(2) [concurrent list] predominates over the power conferred on the state legislature under article 246(3) [state list]. Under article 246(4), Parliament is given power to make a law on any matter in any list for any territory not included in a state.

Allocation of subjects to the lists is by way of a mere enumeration of broad categories.[13]

[8] See, Constituent Assembly Debates XI, 11, 950, T.T. Krishnamachari.
[9] See, Constituent Assembly Debates XI, 5, 654, L.K. Maitra.
[10] G. Austin, *The Indian Constitution: Cornerstone of a Nation*, 231(Oxford University Press, New Delhi, 2nd edn., 2013).
[11] A.H. Birch, *Federalism, Finance, and Social Legislation in Canada, Australia and the United States*, 305 (Oxford University Press, London, 1955).
[12] *Supra* note 4, art. 246.
[13] *Supra* note 11, at 305.

Central legislative sphere *vide* entry 2A, list I

Entry 2A, List I reads:[14] "*Deployment of any armed force of the Union or any other force subject to control of the Union or any contingent or unit thereof in any State in aid of the civil power, powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.*"

The Centre may, in order to ensure the maintenance of public order, choose to deploy its armed forces or any other force under its control "in aid of the civil power."[15] The phrase "in aid of the civil power" in this entry indicates that in order to help and supplement the efforts of the state forces in restoring public order, Centre may deploy its forces. It is required that the Central forces and the state authorities act in tandem for this purpose.

States' legislative sphere *vide* entry 1, list II

Entry 1, list II reads:[16] "Public order (but not including [the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof] in aid of the civil power)."

The term "public order" is of very wide import.[17] The Supreme Court has explained the term "public order" in *Madhu Limaye* v. *S.D.M. Monghyr* as:[18]

> 'Public order' no doubt requires absence of disturbance, of a state of serenity in society, but it goes further. It means what the French designate '*ordre publique*', defined as an absence of insurrection, riot, turbulence, or crimes of violence. The expression 'public order' includes absence of all acts which are a danger to the security of the State and also acts which are comprehended by the expression '*ordre publique*' explained above but not acts which disturb only the serenity of others.

[14] *Supra* note 4, schedule vii, list i, entry 2A.
[15] *Supra* note 6, at 534.
[16] *Supra* note 4, schedule VII, List II, entry 1.
[17] In *Re Natrajan*, AIR 1965 Mad 11.
[18] AIR 1971 SC 2486; 1970 (3) SCC 746, para 16.

The expression "public order" signifies that state of tranquillity which prevails among the members of a political society as a result of internal regulations enforced by the government. It may thus be equated with public peace and safety.[19]

Enactment of AFSPA

The Parliament enacted the AFSPA which draws legitimacy from a combined reading of Article 246(1), Entry 2A of List I and article 355 of the Constitution. The AFSPA provides for the "deployment of any armed force of the Union ... in aid of the civil power"[20] to maintain "public order."[21]

It has often been argued that towards the fulfilment of the duty cast upon the Centre *vide* article 355 of the Constitution, to protect states from internal disturbances, the Centre has aided the civil forces of the states concerned by enacting the AFSPA. Besides, it has also been insisted that the Act provides a window to the states to seek the assistance of the Centre in ensuring peace and tranquillity.

III TOWARDS UNDERSTANDING THE ARMED FORCES (SPECIAL POWERS) ACT, 1958

The AFSPA, a law in force in "disturbed areas", which includes ample locations in North-East India, has facilitated grave human rights abuses[22] by vouchsafing, across-the-board, vast powers on the armed forces deployed by the Centre in these areas. The Act violates the non-derogable provisions of the Constitution, including the right to life, the right to remedy[23] and the right to be free from arbitrary deprivation of liberty. In addition, it accords no protection from "inhuman treatment" as enshrined in article 7 of the International Covenant on Civil and Political Rights (ICCPR) to which India is a state party since 1979, besides added treaties and standards.

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[19] *Romesh Thappar* v. *State of Madras*, AIR 1950 SC 124; *Brij Bhushan* v. *Delhi*, AIR 1950 SC 129; *Supdt., Central Prison* v. *Ram Manohar Lohia*, AIR 1960 SC 633.

[20] *Supra* note 4, schedule VII, List I, entry 2A.

[21] *Id*, schedule VII, List II, Entry 1.

[22] Extrajudicial execution, disappearance, abduction, rape and torture are commonplace human rights abuses under the AFSPA regime.

[23] Armed Forces (Special Powers) Act, 1958 (Act 28 of 1958), s. 6. Prosecution cannot be initiated against any defaulting personnel while discharging his duty under the Act without express sanction from the Central Government, which in itself is a rare eventuality.

It is pertinent to note that "for purposes of legislative entries the term 'public order' is given a broad meaning."[24] The Supreme Court has, however, underscored that the state cannot violate fundamental rights of citizens in the garb of maintaining "public order." The term "public order" has been consistently "interpreted somewhat narrowly" in matters concerning violation of fundamental rights of all individuals.[25]

Section 2 of the Act sets out definitions, but leaves abundant undefined, *viz* (a) "disturbed area"; (b) material particulars for objective assessment of disturbance in an area for its proclamation as a "disturbed area"; and (c) such acts as would constitute offences by armed forces personnel acting beyond or contrary to the intent of AFSPA.

A "disturbed area" is any area declared as such under section 3 of the Act.[26] The governor of that state or the administrator of that union territory or the central government, in either case, is empowered to declare any area to be a "disturbed area".[27] Astoundingly, it falls short of describing the circumstances under which the authority would be justified in making such a declaration. Rather, the Act only evinces the fanciful and merely requires such authority to be "of the opinion"[28] that either the whole or part of the area "is in such a disturbed or dangerous condition such that the use of armed forces in aid of the civil power is necessary."[29] Still more grotesque was the judgment in *Indrajit Barua* v. *State of Assam*[30] where the Supreme Court was pleased to declare that the lack of precision in the definition of a "disturbed area" was not an issue because "the government and people of India understand its meaning." As such, since the declaration depends on the satisfaction of the Central Government or the state executive, it is only the government's understanding which classifies an area as disturbed. There is no mechanism for the people to challenge this opinion!

[24] *Supra* note 6, at 548.
[25] *Ibid.*
[26] *Supra* note 23, s. 2(b).
[27] *Id*, s. 3.
[28] Surprisingly, in the present scheme of AFSPA, formation of "opinion" as regards the concerned area being "in such a disturbed or dangerous condition such that the use of armed forces in aid of civil power is necessary" need not be premised on any material requirement.
[29] *Supra* note 23, s. 3.
[30] AIR 1983 Delhi 513.

The armed forces personnel (including non-commissioned officers), upon any such declaration under section 3 of the Act, are vested with unbridled powers extending to shoot to kill[31] any person suspected to be violating any existing law or order prohibiting assembly of more than five persons.[32] And, to justify the invocation of this provision, the officer need only be "of the opinion that it is necessary to do so for the maintenance of public order" and only give "such due warning as he may consider necessary." Further, the armed forces have the power to arrest without warrant, even on the basis of any suspicion,[33] besides employing such force as may be necessary to effect arrest.[34]

What is still worse is that the armed forces are guaranteed a virtual impunity as no person can start a legal action against any member of the armed forces for anything done or purported to be done under the Act, without the permission of the Central Government.[35] There is no mechanism to ensure checks as the Act does not define even a single offence while vouchsafing such wide discretion. Thus, at odds are each of the provisions of the Act with liberal principles and fundamental rights.[36]

None of the procedural safeguards[37], provided for under the Constitution or the Code of Criminal Procedure, 1973 (Act 2 of 1974) [hereinafter 'Cr PC.'], are afforded to an arrestee under AFSPA. Additionally, under section 5 of AFSPA it is only required that an arrested person should be handed over to the police station with "the least possible delay" while the Act is completely silent on what constitutes least possible delay. The main purpose of specifying 24 hours for

[31] The power to shoot to kill with impunity extends even in circumstances where the security personnel are not at approaching risk.
[32] *Supra* note 23, s. 4(a).
[33] *Id*, s. 4(c).
[34] *Id*, s. 4(d).
[35] *Id*, s. 6.
[36] Provisions of AFSPA are antithetical, *inter alia*, to democratic principles, constitutional rights, rule of law, right to a free and fair trial (in so far as AFSPA has been used and misused to summarily execute people even on mere suspicion), freedom from oppression.
[37] Extensive safeguards keep check, on the power to arrest, with the aim to uphold the avowed fundamental right to liberty. Safeguards on preventive and punitive detention – right to be informed of the grounds of arrest, right to consult and to be defended by a lawyer of choice, the right to be produced before the magistrate within 24 hours, and freedom from detention beyond the said period except by an order by the magistrate – are laid down by Article 22 of the Constitution. In keeping with the Constitutional guarantees, sections 50A, 54 and 176 of the Code of Criminal Procedure, 1973 (Act 2 of 1974) lay down several checks and balances in order to reduce scope for arbitrary arrests and detention by the State.

production before the Magistrate, as mandated under the Constitution and the Cr PC., was to avoid any scope of torture in police custody and bring the police power of arrest under judicial scrutiny at the earliest. In practice, therefore, AFSPA is in violation of the right to be free from torture, and cruel and degrading treatment.[38]

IV AFSPA AND FEDERAL CONFLICTS

The enactment of AFSPA has, over the years, resulted in the emergence of centre-state conflicts. However, discussions on this aspect of the consequence arising from the enactment of AFSPA failed to seize widespread attention perhaps because of two reasons: (a) with the growing individualistic approach and self realisation gaining prominence, the natural tendency is to direct focus towards the violation of human rights; and (b) calculated and deliberate attempt, by the political class, to sustain quandary which conveniently permit high-yielding rhetoric directed towards the gullible.

Various centre-state conflicts arise on account of declaration of select regions as "disturbed area" under section 3 of AFSPA. These are discussed below under separate heads.

Conflict with respect to 'Legislative Power' under the Constitution

The "use of armed forces in aid of the civil power" falls under the central legislative sphere vide entry 2A, list I and not under "public order" – a matter falling under the competence of the States under Entry 1, List II. As such, AFSPA has been enacted by the Parliament under entry 2A, list I. The States have power to legislate only with respect to "public order" under entry 1, list II:[39]

> Out of this entry [i.e., Entry 1, List II], the field encompassing the use of armed forces in aid of the civil power has been carved out and, thus, legislative power with respect to that field has been excluded from states' purview. The states have no power to legislate with respect to the use of the armed forces of the Union in aid of the civil power for the purpose of maintaining public order in the State. The

[38] See for example *Extra Judicial Execution Victim Families Association (EEVFAM) and Anr.* v. *Union of India and Anr.*, Writ Petition (Criminal) No.: 129 of 2012, on July 08, 2016. In this judgment the Hon'ble Supreme Court of India has recognized excesses by armed forces in 62 documented instances. Additionally, the Apex Court has also ordered documentation of additional 1466 cases of excesses by the armed forces.

[39] *Supra* note 6, at 590.

> legislative competence with respect to the matter vests exclusively in Parliament under Entry 2A of List I.

The above scheme of the Constitution renders centre-state conflict looming. While law and order is a state subject, and while concerned states are always in a better position to carry out proper and direct assessment of the situation on ground zero, the legislative domain of the centre under entry 2A, list I vests such vast discretionary legislative power in the Central Government so as to undermine states' autonomy even in times of peace, for example by use of legislations such as AFSPA which allow the Centre to proclaim areas as "disturbed areas". The civil forces of the concerned State are bound to work together with the central forces if the Centre chooses to deploy armed forces or any other force under its control under any law enacted under entry 2A, list I against the will, even when backed by reasoned analysis, of the state concerned.

Alternatively, there may arise situations when, in the absence of any law such as the AFSPA, concerned states may be of the opinion that an exigency exists and civil forces of the State need to be aided by the armed forces of the Centre. However, it may be noted that *there is no mechanism by which the concerned State may secure the aid of forces under the control of the Union by enacting a State law*. The discretion with regard to the deployment of central armed forces vests with the Centre.[40] The states are only left with the option to request the Centre to deploy its forces to aid the civil forces. In case the centre chooses to ignore the request and does not enact a law providing for the deployment of armed forces of the Union "in aid of the civil power," states are left to battle their own situation.

Finally, there arise many situations in which the central forces, operating under the authority of the [law][41] enacted by the centre and providing for deployment of central forces, cause violations including: (a) violations of standard operating procedures; and (b) violations of the right to life and personal liberty of citizens. Even under these circumstances the states have no power to

[40] This unjustified one-sided tilt in favour of the Centre prejudices and undermines the States which are supposedly co-equals in their own sphere. Central legislative sphere (vide entry 2A, list I) with respect to the "deployment of any armed forces of the Union" is qualified by the phrase "use of armed forces **in aid of civil power"**. This, however, is antithetical to the purport of proclamation of any area as a "disturbed area" in so far as in practice it is the civil forces which are bound to aid the armed forces of the Union at any time a proclamation of "disturbed area" is made. Only exceptionally, when the Centre accepts the request of a State to enact a law providing for deployment of armed forces of the Union "in aid of civil power", will the armed forces of the Union aid the civil forces.

[41] Read 'law' as Armed Forces (Special Powers) Act, 1958 (Act 28 of 1958).

bring such armed forces under the jurisdiction of Courts or to fix liabilities of defaulting armed forces personnel even by way of enacting a law to this effect as the same is outside the legislative domain of the states. Also, the impunity guaranteed to the personnel of the central forces under section 6 of the Act compromise with states' autonomy as States do not even have any power to initiate investigation and trial.

Centre-state conflict on supremacy

All remains well between the central and state governments except when: (a) the centre chooses to unilaterally declare an area as "disturbed area" while the state government is opposed to such moves; or (b) the governor of the concerned State, acting on the advice of the council of ministers, has proclaimed an area to be a "disturbed area" while the Centre is opposed to such proclamations.

The centre may unilaterally proclaim any area as "disturbed or dangerous",[42] to deploy its armed forces while the State concerned may be of the contrary opinion, thereby compelling compliance and assistance resulting in central supremacy. It has often been argued by the states concerned that "the very existence of AFSPA is making a mockery of the federal structure of the country."[43] "The agenda of the Central Government is unearthed by the declaration of certain areas to be disturbed which has effectively come to mean bringing such areas, as the centre may want according to its whims, effectively under central rule without declaring the same publicly or under the Constitution of India."[44]

The legislative scheme provided for by the Constitution, as discussed above, is an instrument which has been exploited to this end and to undermine states' autonomy even in times of peace. AFSPA is an apt example.

There may arise situations where, irrespective of the centre's unwillingness to deploy its forces in "disturbed areas" (for considerations political or otherwise), the Governor, acting on the aid and advice of the Council of Ministers, proclaims certain areas as "disturbed" and thereby

[42] *Supra* note 23, s. 3.
[43] See "Political slugfest over AFSPA" *The Arunachal Times*, Jul. 06, 2015.
[44] Suhas Chakma, "Acts that don't meet an end" *Tehelka, available at*: http://archive.tehelka.com/story_main51.asp?filename=Ws301111Actsthat.asp (last visited on May 20, 2015).

compels deployment of central forces under the Act. Such a situation may well see the centre in the eye.

Much bitterness develops in centre-state relationship on account of the enactment and promulgation of laws like the AFSPA and the same have been well evident is very recent times.[45]

Conflict with regard to the "discretion" of the governor of a state under the provisions of AFSPA

As a general rule the governor acts on the aid and advice of the council of ministers and not independently or contrary to it. As such, any proclamation, by the governor of any state, of any area as "disturbed area", would generally mean that such proclamation has been done in accordance with the will of the state cabinet.

However, there are exceptions under which the governor may act in his discretion. And whether a function falls within his "discretion" or not is the subject matter of governor's discretion. If any question arises on whether a matter falls within the governor's discretion or not, the decision of the governor in his discretion is final, and the validity of anything done by the governor in his discretion cannot be called in question on the ground that he ought or ought not to have acted in his discretion.[46]

[45] Much tension has been witnessed between the state of Jammu and Kashmir and the Centre during the tenure of Mr. Omar Abdullah as the chief minister. The central and the state governments were at loggerheads. See, Nitin Gokhale, "Defence Ministry opposed to withdrawal of Armed Forces Special Powers Act: Sources" *NDTV, available at*: http://www.ndtv.com/india-news/defence-ministry-opposed-to-withdrawal-of-armed-forces-special-powers-act-sources-565683 (Last Modified Oct. 22, 2011); "Decision on Armed Forces Special Powers Act: Omar sets deadline" *NDTV, available at*: http://www.ndtv.com/india-news/decision-on-armed-forces-special-powers-act-omar-sets-deadline-571942 (Last Modified Oct. 25, 2011); Nazir Masood, "Tension between Omar, Congress over Armed Forces Special Powers Act (AFSPA)" *NDTV, available at*: http://www.ndtv.com/india-news/tension-between-omar-congress-over-armed-forces-special-powers-act-afspa-569902 (Last Modified Oct. 27, 2011); Nitin Gokhale, "AFSPA meet inconclusive; Omar Army talk tough" *NDTV, available at*: http://www.ndtv.com/india-news/afspa-meet-inconclusive-omar-army-talk-tough-572043 (Last Modified Nov. 09, 2011); "AFSPA revocation: Govt, Army in no mood to relent; deadlock continues" *NDTV, available at*: http://www.ndtv.com/india-news/afspa-revocation-govt-army-in-no-mood-to-relent-deadlock-continues-566193 (Last Modified Nov. 12, 2011).

[46] See, *Supra* note 4, Art. 163(2); See also, *Jaykar Motilal C.R. Das* v. *Union of India*, AIR 1999 Pat 221.

Vesting the governor with discretionary powers was justified in the constituent assembly on the ground that:[47]

> The provincial governments are required to work in subordination to the Central Government ... the Governor will reserve certain things in order to give the President opportunity to see that the rules under which the provincial governments are supposed to act according to the Constitution or in subordination to the Central Government are observed.

Be that as it may, the governors being political appointee have, in many instances, acted in their discretion either fancifully or to further the agenda of the centre. Such circumstances evidently give rise to centre-state conflicts.

If the governor of any state proclaims any area as "disturbed area" while acting either fancifully or in furtherance of the agenda of the centre and shielding such proclamation by the rath of "Governor's discretion", then there certainly shall emerge a centre-state conflict.

Conflict with regard to the scope of "disturbed areas"

Neither AFSPA nor any other law defines what constitutes "disturbed areas." It is thus left to the discretion of the executive (central as well as state) to decide that the law and order situation in an area in a State has become disturbed or dangerous enough to call for the deployment of the army.[48] The vested discretionary power, however, tends to be arbitrarily exercised in absence of any guideline or requirement of fulfilment of material particulars for intelligible proclamation of a "disturbed area".[49] This leaves ample scope for variation in opinion of the centre as well as the States with regard to the classification, recognition and proclamation of "disturbed areas".

This discretionary power vested in the executive may keep the central and provincial governments at loggerheads in case either is of the opinion contrary to the others', as regards the scope of "disturbed areas" which is the premise of force deployment.

[47] See, Constituent Assembly Debates VIII, 502, Dr. B. R. Ambedkar.

[48] As a matter of general rule, Governors of States and the President act on the advice of the Council of Ministers of the concerned State and the Union Cabinet respectively.

[49] See also, *Supra* note 28.

Conflict on account of 'immunity from prosecution' granted to armed forces' personnel

Among the most controversial clauses of AFSPA is the one that requires "previous sanction of the Central government" for prosecution, suit or other legal proceeding "against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act."[50] Its roots lie in the common law doctrine of sovereign immunity and the idea that public officials are entitled to the presumption of good faith *vis-à-vis* acts performed in the course of their official duties.[51] This immunity provision stands in the way of the prosecution of security officials for human rights abuses.

The immunity granted to armed forces' personnel working under the Act provides that no prosecution can be launched against them without sanction from the Central government. Section 6 of the Act prohibits even the State governments from initiating legal proceedings against the armed forces on behalf of their aggrieved population without sanction from the Central Government. This requirement confers *de facto* as well as *de jure* impunity on all transgressors.[52] Thus, any agency (such as the CBI) may indict army officers for the murder of innocent civilians but their trial cannot take place because the Central Government refuses to give sanction. What is worse, the minister concerned does not even have to give any reasons.[53] In such circumstances, the state concerned is reduced to a position of helplessness which leads to discontentment and conflict in the centre-state relationship. The States concerned are over-powered by the centre.

However, the Supreme Court was pleased to hold in *Extra Judicial Execution Victim Families Association (EEVFAM)* v. *Union of India,*[54] that excesses by forces cannot be countenanced in the name of maintaining discipline or dealing with anti-national elements in a society governed by rule of law. Further, the Supreme Court categorically noted that *a fortiori* allegations of excesses must be inquired into:[55]

> It must be held, and there can be no doubt about it, that in view of the consistent opinion expressed by this Court, that an allegation or complaint of absence of a

[50] *Supra* note 23, s. 6.
[51] Aparna Sundar and Nandini Sundar (eds.), *Civil Wars in South Asia: State, Sovereignty, Development* 189-211 (SAGE Publications India Pvt. Ltd., 2014).
[52] Siddharth Vardarajan, "A modest proposal on AFSPA" *The Hindu*, Sept. 06, 2010.
[53] *Ibid.*
[54] Writ Petition (Criminal) No.: 129 of 2012, on July 08, 2016.
[55] *Id*, para 135.

> reasonable connection between an official act and use of excessive force or retaliatory force will not be countenanced and an allegation of this nature would always require to be met regardless of whether the State is concerned with a dreaded criminal or a militant, terrorist or insurgent. ... such an allegation must be thoroughly enquired into . This is the requirement of a democracy and the requirement of preservation of the rule of law and the preservation of individual liberties.

The court went on to further observe that:[56]

> ... it is not possible to accept the contention of the learned Attorney General that a person carrying weapons in violation of prohibitory orders in the disturbed area ... is *ipso facto* an enemy .... Each instance of an alleged extra-judicial killing of even such a person would have to be examined or thoroughly enquired into to ascertain and determine the facts. In the enquiry, it might turn out that the victim was in fact an enemy and an unprovoked aggressor and was killed in an exchange of fire. But the question for enquiry would still remain whether excessive or retaliatory force was used to kill that enemy.

Thus, the Supreme Court has attempted to show the way forward which will most certainly yield justice to the victims and reduce federal conflicts if proper cue is taken by the concerned government.

Conflict on account of differential treatment between central and State forces working under the same conditions and performing the same tasks

Section 6 of the Act reinforces and perpetuates a differential treatment between the central and state forces. While both the State police force and the armed forces of the Union work in the same area, the former do not get the powers and protection that AFSPA provides to the central forces. The central forces work under impunity whereas the civil forces of the State do not enjoy any such protection irrespective of the fact that they work under same conditions and threat (if any). This causes widespread disenchantment among the personnel of civil forces of the State while also leading to centre-state conflicts.

[56] *Id*, para 144.

Conflict with respect to 'inquiry'

Section 6 of AFSPA, which mandates that any legal proceeding, against any defaulting armed forces' personnel, can be instituted only after a previous sanction from the Central Government, acts as a hurdle in the conduct of an inquiry. In effect, without a previous sanction, no agency can even inquire or interrogate any armed personnel deployed and functioning under the Act. Thus, any agency of the concerned State may indict any public official under the AFSPA for the murder of innocent civilians with no effect at all for want of the previous sanction by the Central Government.

V CONCLUSION

AFSPA compromises and restricts the rights of people. This in turn affects the interest of states and the centre thereby dawning a rift between them. Alternatively, actions and conduct of the state parties (centre and the states concerned), tainted with political considerations and motivations, tend to lead towards a collision course between them resulting in politically motivated implementation of AFSPA. Ultimately, sufferers are the innocent citizens who live in the areas affected. As such exigency demands immediate formulation of a mechanism to at least minimise, if not eliminate, such federal-conflicts.

Mechanism[57] to ensure organic functioning of the Centre and the States (*viz.*, co-operative federalism) should be worked out so that the concerns of populace are placed at the highest pedestal and are not eclipsed by federal conflicts and tensions.

It must, at any cost, be ensured that the people do not end up as victims of the centre-state conflicts and that their non-derogable rights remain preserved under all circumstances.

It is imperative that the lack of precision in the definition of a "disturbed area" under the AFSPA, which is the matter of highest concern, is addressed immediately. This would prevent arbitrary proclamation of any area as "disturbed area" while keeping a check on politically motivated actions. Further, the circumstances and material particulars which would justify formation "of the opinion" as regards the concerned area being "in such a disturbed or dangerous condition

[57] The functioning of the mechanism should keep in line with the minimum standards necessary to protect the safety and integrity of individuals.

such that the use of armed forces in aid of civil power is necessary" and subsequent proclamation of "disturbed area" should be enlisted to ensure curbing misuse of AFSPA.

Finally, a review of the impunity clause as contained in section 6 of AFSPA, to hold accountable reckless and errant officers, could help rebuild confidence of the people in the armed forces besides ensuring a check on the excesses committed by the armed forces on its own people.

All these would also go a long way in upholding the non-derogable human right, *i.e.,* the right to life while instilling a sense of responsibility in the officers acting under the Act besides narrowing down the space for centre-state conflicts to colossal extents.

JOHN DOE ORDERS: PREVENTION OF COPYRIGHT INFRINGEMENT OF CINEMATOGRAPH FILMS

Aadhya Chawla[*]

Abstract

Section 55 of the Copyright Act, 1957 entitles the owner of a copyright to obtain civil remedies for infringement of their copyright. While interim orders are granted very often under Order 39 Rules 1 and 2 of CPC, 1908, the Indian judiciary has in the past decade or so granted several John Doe/Ashok Kumar orders to protect copyright holders against unidentified or possible future infringers. This paper aims to study the need and legal basis for such orders as well as the jurisprudence that has evolved around them over the years. In light of Bombay High Court's recent order criticizing the liberal usage of John Doe Orders by Indian courts for cinematograph films[1], the debate between competing goals of preventing piracy on the one hand and protecting Internet freedom on the other has come back to the forefront. This paper will therefore also analyze the several judicially developed safeguards that limit the broad sweep of John Doe orders to prevent arbitrary blocking of legitimate content.

I RISING COPYRIGHT PIRACY IN THE FILM INDUSTRY

THE INDIAN film industry is the largest producer of feature films.[2] Every year, there is a production of more than six hundred movies in the prominently spoken languages including Hindi, Tamil, Kannada *etc*.[3]In a 2010 study, it was found that the film sector in India was approximately 2 billion USD strong with the entire media and entertainment industry crossing

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[1]*Eros International Media Limited* v. *Bharat Sanchar Nigam Limited,* NMSL 2147 of 2016 in Suit (L) No. 755 of 2016.

[2]Government of India, Report on Study on Copyright Piracy in India (Ministry of Human Resource and Development, 1999).

[3]*Ibid.*

even 14 billion USD.[4]The revenues earned by the industry have multiplied furthermore since then.[5]

However, the industry is also one of the worst-hit victims of piracy in cinematograph films in the world. Due to a massive increase in sales of pirated CDs and more importantly, in the portals providing online downloading of films, India has become one of the top-five countries worldwide for piracy, statistically.[6] The number of users downloading pirated cinematograph films in India is the 4th highest, and is only exceeded by the number of users in United States, United Kingdom and Canada.[7] Moreover, if these numbers are seen in relation to the number of broadband users, India is on the top in terms of piracy in English-speaking countries.[8] The diversification and advancement of digital technology and information sharing portals have broken geographical boundaries. This coupled with the internet's USP of anonymity has brought piracy to every household.[9]

Recent times have therefore seen the film industry making the transition from the more traditional social arrangements and informal dispute resolution methods to written agreements and intellectual property rights litigation.[10] This rise was also due to the attribution of 'industry status' to the film sector by the Indian government and the change in its funding sources from the mafia to corporates.[11] Besides legal protection, other measures are also being explored by the

[4] India in Business, Ministry of External Affairs, Economic Diplomacy Mission Website, *available at:* http://www.indiainbusiness.nic.in/industry-infrastructure/service-sectors/media-entertainment.htm (last visited on May, 10, 2017).

[5] Binoy Prabhakar, "Bollywood No Longer Talks of Piracy; But Ignoring Dangers of Online Can Be Costly", *Economic Times* (Feb. 3, 2013, 11:03 AM IST), *available at:* http://articles.economictimes.indiatimes.com/2013-02-03/news/36704530_1_piracy-box-office-alliance-against-copyright-theft (Last visited on June 8, 2017).

[6] PricewaterhouseCoopers, Report on India Entertainment and Media Outlook, July 2011, *available at* https://www.pwc.in/assets/pdfs/publications-2011/india_entertainment_and_media_outlook_2011.pdf at 68 (Last visited on June 15, 2017).

[7] Motion Picture Association, "Online Piracy a Genuine Threat to the Indian Film & Television Industry", (Dec. 15, 2009), *available* at: http://mpa-i.org/index.php/news/online_piracy_a_genuine_threat_to_the_indian_film_television_industry/%20 (last visited on June 8, 2017).

[8] *Ibid.*

[9] Tanushree Sehgal, "Piracy in the Media & Entertainment Industry in India: Stemming the Menace", 20 *ELR* 82-83 (2009).

[10] Nishith Desai Associates, Report on Indian Film Industry: Tackling Litigations (Sep., 2014), *available at: at* http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Indian_Film_Industry.pdf ((last visited on May11, 2017).

[11] *Ibid.*

industry such as the creation of Alliance Against Copyright Theft (AACT), which conducts several raids as a response by a conglomerate of the big studio names in the industry including Reliance Big, UTV, Moser Baer, along with the Movie Producers& Distributors Association.[12]

II COPYRIGHT REGIME

India's copyright regime is considered both progressive and robust and provides a host of remedies against piracy.[13] Section 13 of the Copyright Act 1957 (the governing law for copyright and related rights in India) provides the scope of the subject matter of copyright protection in India and includes cinematograph films.[14] Under section 2(f) of the Act, 'cinematograph film' is defined as any work of visual recording and considered inclusive of works that are produced by other analogous processes.[15] The copyright for the cinematograph film subsists for 60 years after being published.[16] A bundle of rights is given to the copyright owner or the 'author', which for a cinematograph film is the producer of such film under the Act.[17]

The Act provides both civil remedies and criminal penalties for infringement of a copyright. The meaning of infringement is provided under section 51 of the Act as, when any person, without a license granted by the owner of the copyright or the registrar of the copyright, does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright.[18] It is also considered infringement if a person, unauthorised to do so, allows a place to be used for public infringing communication of a work.[19] Infringing acts include unauthorized reproductions, performances, a creation of derivative works, issue of copies of a work not in circulation, distribution or import of infringing work and what is really required to be seen is whether a person viewing such work would have an unmistakable impression that the later work is copying the first.[20] Section 14(d) of the Act entitles the owner of the copyright to the exclusive right of communication of the film.

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[12] *Ibid.*
[13] Alka Chawla, *Law of Copyright- Comparative Perspectives* 238 (Lexis Nexis, Delhi, 2013).
[14] The Copyright Act, 2012 (Act 27 of 2012), s. 13(1)(b).
[15] The Copyright Act, 2012 (Act 27 of 2012), s. 2(f).
[16] The Copyright Act, 2012 (Act 27 of 2012), s. 26.
[17] The Copyright Act, 2012 (Act 27 of 2012), s. 2(d)(v).
[18] The Copyright Act, 2012 (Act 27 of 2012), s. 51(a)(i).
[19] The Copyright Act, 2012 (Act 27 of 2012), s. 51(a)(ii).
[20] Nida Zainab Naqvi and Syed Ahtisham Raza Naqvi, "Remedies Against Breach of Copyright" in Priya Rai, R.K. Sharma *et al* (eds.)*Transforming Dimensions of IPR: Challenges for New Age Libraries* 139 (2015), *available at* :

Section 55 of the Copyright Act gives owners (including exclusive licensees[21]), whose copyright has been infringed, the right to obtain all civil remedies, through injunctions, damages and disgorgement, that are otherwise available for the infringement of any right.[22] Sections 63 to 70 of the Act prescribe criminal penalties by way of imprisonment and fines. The Act also provides for administrative remedies in the form of applying to the Registrar for a ban on importing infringing copies into the country as well as then delivering the copies that are confiscated to the copyright owner.[23]

III LEGAL BASIS FOR JOHN DOE ORDERS

One of the prominent civil remedies utilized by film producers to tackle piracy is John Doe Orders, also known as Rolling Anton Pillar Orders[24] or more familiarly as Ashok Kumar orders in India.[25] They are *ex parte* temporary injunctions, which copyright owners seek, to refrain those infringers whose identity is not known.[26]John Doe orders are helpful tools in the hands of copyright owners of cinematograph films, where large-scale anonymous piracy on the Internet is a massive concern. It acts as a 'shield', by aiding the owner to obtain a timely remedy and sidestepping any postponement caused by the anonymity of the infringer.[27]John Doe Orders arise out of *quia timet* actions, which are actions by a party seeking the help of the Court to prevent a possible future injury to the party's interests or rights.[28]

John Doe Orders are granted under order 39 rule 1, 2 read with section 151 of CPC. Thus, the same principles that come into the picture on the grant of an interim injunction under order 39, CPC apply to John Doe Orders too. The three-pronged test to determine whether the order should be granted is applied *i.e;* .[29]

i) an existing prima facie case

2) balance of convenience in the favour of the plaintiff and

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http://www.nludelhi.ac.in/download/publication/2015/transforming%20dimension%20of%20ipr%20-%20challenges%20for%20new%20age%20libraries.pdf (last visited on July 30, 2017).

[21] The Copyright Act, 2012 (Act 27 of 2012), s. 54.

[22] The Copyright Act, 2012 (Act 27 of 2012), s. 55.

[23]*Supra* note 20 at 145.

[24] David Barron, "Roving Anton Piller Orders: Yet to be Born, Dead or Alive", 18 *EIPR* 183, (1996).

[25]*ESPN Software India Pvt. Ltd. v. Tudu Enterprise,* C.S.(OS)No.384 of 2011 (18 February 2011).

[26]Quenten Cregàn, "Roving Injunctions and John Doe Orders against unidentifiable Defendants in IP Infringement Proceedings", 6 *Journal of IP Law and Practice* 623-631 (2011).

[27]Juhi Gupta, "John Doe Copyright Injunctions in India",18 *Journal of Intellectual Property Rights* 351-359, (2013).

[28]*Ibid.*

[29]*J.K. Rowling and Bloomsbury Publication* v. *Newspapers Newsgroup Limited,* 2003 F.S.R. 45.

3) irreparable loss being caused to the plaintiff because of the infringement of his/her copyright by the (in this case unidentified) defendant

The order is considered anticipatory and 'shield'-like because once it has been obtained, the owner of the copyright can simply serve the order to those who are found to be infringing and they then must comply with the order, as failure to do so would constitute contempt.

IV INDIAN JURISPRUDENCE

While the John Doe jurisprudence is imported from American case law and is widely used in Australia, Canada, and Britain as well,[30] the first time it was used by the Indian courts was in the case of *Taj Television* v. *Rajan Mandal.*[31] In this case, the plaintiff being the exclusive owner of broadcast reproduction rights for FIFA World Cup 2002, sought an injunction against six known and fourteen unknown cable-operators, some of whom were transmitting the tournament without authorization from the plaintiff and thereby infringing the plaintiff's copyright under section37 of the Act.[32] The plaintiff contended that since the finals of the tournament, which were at the most risk of infringement, were approaching, and since the cable industry is unstructured and makes it easy to erase any evidence of infringement, it was impossible to identify the infringers in a timely manner without causing irreparable loss to the plaintiff.[33] Owing to the contingencies of the case and in order to prevent heavy revenue losses to the plaintiff, the court by relying on the Supreme Court's decision in *Manohar Lal*[34] case invoked its inherent powers to meet the ends of justice[35] and authorized a commissioner to enter premises where infringement may be taking place and record evidence of unauthorized transmission by the operators.[36] The Court clarified that Indian courts do have the power to give John Doe orders.[37]

Post *Taj Television,* Indian courts were far more liberal in pronouncing John Doe orders and several orders were given out in subsequent cases. In *ESPN Software*[38], the Court held that since judicial systems in countries where John Doe orders are prevalent such as UK, Australia,

[30] *UTV Software Communications* v. *Home Cable Network Ltd.*,. I.A. No. 5383/2011 in CS(OS) No. 821 of 2011.
[31] *Taj Television* v. *Rajan Mandal,* I.A NO. 5628/2002 in CS (OS) 1072 of 2002.
[32] *Supra* note 31 at 3.
[33] *Supra* note 31 at 4.
[34] *Manohar Lal Chopra* v *Rai Bahadur Rao Raja Seth Hiralal*, AIR 1962 SC 527.
[35] The Civil Procedure Code 1908, s. 151.
[36] *Supra* note 31.
[37] *Ibid.*
[38] *Supra* note 25.

Canada, US share a basic similarity with the Indian system, it is reasonable to imply that the latter has the power to pass such orders as well.[39] The orders were/are considered particularly fitting for piracy in cinematograph films especially because of the shift of piracy in these films from physical sales to online downloading portals. Thus, studios and film producers file anticipatory suits against ISPs and cable operators who provide access to Internet asking them to block access to specific websites and URLs, where the infringing copy is accessible.[40]

The first case to grant protection by way of John Doe orders in case of online piracy was *Reliance Entertainment* case for the cinematograph film Singham (2011).[41] Further, in *RK Production* v *BSNL*[42] the High Court of Madras gave an order preventing anyone from illegal download or sale of DVDs of the movie '3'.[43] The order also puts a burden on the Internet Service Providers (ISPs) to block access to the websites, on which infringing copies are uploaded.[44] In an article published in June 2016, it was noted that within a month, 4 John Doe orders had been granted to producers of Azhar (2016), Housefull 3 (2016), Waiting (2016) and Veerappan (2016) to block websites which were hosting dormant or dead links to pirated copies of the films, which could be activated later when the film would be released.[45] It was found that in all these cases, one of the defendants was an ISP.[46]

V A SHIFT WITHIN COMPETING POLICY GOALS

Rampant John Doe orders being meted out by courts resulted in 2,162 URLs being blocked by courts, most of which were for copyright piracy cases, between January and early December of 2014.[47] Increasingly academicians and researchers were criticizing the liberal practice of courts in giving blanket orders to address potential infringement of copyright by ignoring the plight of the internet service providers, whose content was being over blocked, despite being legitimate.

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[39] *Ibid.*
[40] Kian Ganz, "The Messy Battle Against Online Piracy", *Livemint*, (Aug 2, 2017. 02 12 AM IST), *available at*: http://www.livemint.com/Consumer/YtbRN9fv6ZgZCZOexcsWMI/The-messy-battle-against-online-piracy.html (last visited on Feb. 12, 2017).
[41] *Reliance Big Entertainments v. Multivision Networks.*, CS(OS) 3207/2011 (Delhi HC).
[42] *R.K. Productions* v. *BSNL Ltd.,*. O.A.No.230 of 2012 (Mad HC).
[43] *Ibid.*
[44] *Ibid.*
[45] Nikhil Pahwa, "Four John Doe Orders for Blocking Websites in the Last Month Alone", *Medianama*, (June 13, 2016), *available at:* http://www.medianama.com/2016/06/223-john-doe-orders-india/ (last visited on May 10, 2017).
[46] *Ibid.*
[47] *Supra* note 40.

A paradigm shift came about recently in July 2016 when in an application for a John Doe order to prevent infringement of the cinematographic film Dishoom (2016) was rejected by the High Court of Bombay.[48] The court dismissed the application and held that blocking of websites was not permitted unless it can be shown that the whole website contained only pirated content.[49] The judge was very firm in his ruling that although copyright protection for the plaintiffs is important, it cannot be at the cost of other public law rights and thus there must be a balance created to protect the constitutional rights and freedoms of innocent ISPs as well.[50] Several safeguards were also created into the order, with the judge laying down that when a sweeping request is made for the purpose of blocking potential online infringers of copyright, the courts must in some manner test the authenticity of the information that is provided by the Claimant so that any legitimate content such as trailers of the film does not get blocked.[51] In the order delivered on the 30th of August in the same case, the court further suggested that the ISPs must join hands to institute the position of an ombudsman, who would check the legitimacy of a plaintiff's claim at first– thereby easing the extensive burden of such cases being brought to courts.

VI CONCLUSION

Procedurally, although, John Doe orders override Order VII of the Civil Procedure Code, 1908 which mandates identification of the defendant's name and address, it has repeatedly been held by Indian courts that where such identification is impossible, a John Doe order may be given.[52] However, John Doe orders are problematic since the invocation of inherent powers of the court is meant to supplement the regular procedure without affecting the parties' substantive rights[53], an element which is absent in online piracy cases since they threaten to destroy Internet freedom if they continue to be broad or unscrupulous in their nature. However, John Doe orders as a measure need to be controlled and reserved for extraordinary situations, where the balance of convenience suggests that the loss caused to plaintiff will be far greater than the compromise to the larger public goal of protecting Internet freedom and constitutional rights of the ISPs.

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[48] *Supra* note 1.
[49] *Ibid.*
[50] *Ibid.*
[51] *Ibid.*
[52] *Super Cassetes Industries Ltd.* v. *Myspace Inc.*., 2011 (47) P.T.C. 49 (Del. HC); *Indian Performing Right Society Ltd.* v. *Badal Dhar Chowdhry.*, 2012 (50) P.T.C. 376 (Del. HC).
[53] *Padam Sen* v *State of U.P.*, AIR 1961 SC 218.

A study reveals that when a film is transmitted online without authorization, more than 3500 other links get replicated which are spread all over the globe and these URLs manage to get more than 2 lakh views in a month and about 45000 downloads in a single day.[54] Thus every time someone opens a link, it results in a loss of about twenty rupees to the producer totaling the month's aggregate to more than 3 crores.[55] That's a massive revenue loss for film producers, who invest substantial amounts of capital in their films. In such situations, John Doe orders are an effective remedy and must be granted to ensure the industry's trust and faith in the protection granted by the copyright regime to them.

Thus the need of the hour is to balance the protection rights of film producers and copyright owners from widespread piracy as well as resolve the problems of over-blocking of non-infringing content that trouble the ISPs. It is widely known that Internet piracy is reaching new levels every day, causing an uproar in producers of cinematograph films. In this light, it becomes important to review our copyright protection regime and provide other measures as well.

The 2012 amendment of the Copyright Act introduced certain solutions by way of section 55A, which makes circumvention of a technological protection measure i.e. a TPM with the intention to infringe upon the owner's rights, a criminal offence.[56] This can be of immense value to copyright holders as it would tackle privacy at its nascent stages instead of bringing a claim for a John Doe Order. Section 65B also provides for protection by way of making it a criminal offence to remove the digital rights management information from a work.[57]

Furthermore, it is essential to reduce the burden on courts by creating more number of cyber cells along with separate tribunals or specialized dispute resolution mechanisms for tackling media and entertainment related piracy disputes, as such measures will help in handling online piracy more effectively and in a timely manner.

[54] Aditya Mishra, "Recent Inclination of Indian Judiciary to Pass "John Doe" Orders – A Critical Analysis on the Perspective of Copyright Infringement of Film Productions", 2 *Law Mantra*, (2015).
[55] *Ibid.*
[56] The Copyright Act, 2012 (Act 27 of 2012), s. 55A.
[57] The Copyright Act, 2012 (Act 27 of 2012), s. 65B.

A CRITIQUE ON PRISONS IN INDIA IN THE LIGHT OF RE - INHUMAN CONDITIONS IN 1382 PRISONS

Ananth Kini[*]

Abstract

The advent of Human Rights activism and a growing need for an integrated criminal justice system has added fuel to the already burning issue of prisons reforms in the backdrop of which the apex court has issued several directives. In Re-Inhuman Conditions in 1382 Prisons. In the Past, there have been many attempts to improve the condition of Prisons in India but unfortunately nothing appears to have changed on the ground. The paper has a two-pronged approach; firstly the paper will critically examine the present case in the light of reformative schemes and issues prevailing in India's prison management system and then progress to conduct a reality check with respect to the implementations of these directivesand other recent steps undertaken in this direction. Finally, the paper concludes with the suggestionsandconclusion of the author drawn from the analysis made in the article along with the recommendations of various governmental and non- governmental organizations.

I INTRODUCTION

"*If people get sick, we take them to the hospital and give them the right medicine to get better. If people's behaviour is sick, we bring them to the prison, but we forget the medicines.*" – Sri Sri Ravi Shankar[1]

Prison reforms have been a subject of intense debate and discussion for several decades in India but even today little appears to have changed on the grass-roots level. The Indian Judiciary has played a proactive role for the improvement of prisons but still the issues relating to prisons in the country and their reform continue topose a big hurdle in criminal justice system.

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II HISTORICAL BACKGROUND OF PRISONS IN INDIA

Prisons have existed in India for time immemorial, however, with the due passage of time, the conditions of prisons and their administration have undergone a significant change, notable a shift from deterrence theory of punishment to reformative theory.

Prisons during the ancient times were governed mainly by Manu, Yagnavalkya and Kautilya. The punishments awarded at that time were quite different from those todays *viz.*, by shaving off head, ride on donkeys, garland of shoes on neck etc. These were mostly focused on humiliationof accused and also as such there were no proper record or maintenance of prisons. The current prison system in India owes its legacy to British rule, Lord Macauly being the pioneer of this change; he was the member of the Prison Discipline Committee which acted as a catalyst in suggesting several prisons reforms some of them even existing today. This committee was followed by constitution of various others such as Mysore Jails Committee (1941), Kerala Jails Committee (1953), All India Jail Manual Committee (1957), Justice Krishna Iyer Committee (1987) etc. all these somehow contributing towards better prison management.

After India's independence, various central and state legislations were enacted and consequently several rules were farmed under them, with Indian Judiciary playing the front role, some these legislations are –

- Transfer of Prisoners Act, 1950[2] - The Act deals with transfer of prisoner from state to another state.
- Delhi Prisons Act, 2000[3] - Extends only to National Capital of Delhi, prescribes the composition, power and duties of Jail authorities and establishes Tihar Jail.
- The Prisons Act, 1894[4] - One of the most important legislation, contains various provisions relating to health, employment, duties of jail officers, medical examination of prisoners, prison offences etc.
- Prisoners [Attendance in Courts] Act, 1955[5]- Empowers Court to summon prisoners to appear in Court for giving evidence or answering criminal charge.

III CASE COMMENT ON RE-INHUMAN CONDITIONS IN 1382 PRISONS

The Supreme Court of India recently on March 14, 2016 delivered a landmark judgement which regard to the legal and constitutional rights of prisoners in India especially the under trial prisoners. The present paper is an attempt to critically analyse theaforesaid case and for that purpose divides the article into several parts where each part will focus precisely on the issue in

[2] Act No. 29 of 1950.
[3] Act No. 2 of 2002.
[4] Act No. 9 of 1894.
[5] Act No. 32 of 1955.

hand. The present petition, *In Re-Inhuman Conditions in 1382 Prisons*[6] is filed before the Supreme Court of India under article 32 of the Constitution by the counsel for the petitioner to address the status of prison[7] reforms in India and to issue directions, if necessary for prison reforms.

R.C. Lahoti J, former Chief Justice of India, wrote a letter dated June 13, 2013 to the Chief Justice of India relating to the disturbing conditions of 1382 prisons[8] in India relying on story which had appeared in *Dainik Bhaskar* (National Edition) on March 24, 2013. R.C Lahoti J pointed out in his letter the inadequacy of reformative schemes for offenders and other prominent issues which were covered by the newspaper in its story *viz.*, overcrowding[9] of prisons; unnatural death of prisoners; inadequacy of prison staff and present staff not being adequately or properly trained. He argued in his letter that the state cannot disown its liability towards the prisoners and have to ensure their safety and life.[10]

On July 5, 2013, the registrar registered the letter as Public Interest Litigation ('PIL') and subsequently issued notice to appropriate authorities. The reply by these authorities supported the proposition made by R.C Lahoti J. Thus, the social justice bench on March 13, 2015 passed an order[11] requiring the Union of India to furnish details regarding over-crowding[12] in prisons and steps taken for improving the living conditions of prisoners.

[6]AIR 2016 SC 993, 2016 (2) SCALE 185; *available at:* http://judis.nic.in/supremecourt/imgs1.aspx?filename=43347,(last visited on May 15, 2017).

[7]Delhi Prisons Act, s. 2 (r) 2000, Act no. 2 of 2002, defines Prison as "means any jail or place used permanently or temporarily under the general or special orders of the government for the detention of prisoners, and includes all ands, buildings and appurtenances thereto, but does not include; (i) any place for the confinement of prisoners who are exclusively in the custody of police;(ii) any place specially appointed by government under s. 417 of the Code of Criminal Procedure, 1973(2of 1974); (iii) any place which has been declared by the government by general of special order to be a special prison."

[8]According to Prison Statistics India, 2014 (PSI, 2014) (Published by National Crime Records Bureau (NCRB), Ministry of Home Affairs, Government Of India) there are 1,387 Jails in India (Central jails : 131 , District Jails: 364, Sub Jails: 758, Women Jails: 19, Open Jails: 54, Borstal Schools: 20, Special Jails: 37, Other Jails: 4. It is pertinent to note that the NCRB has released Prison Statistics India, 2015 in November, 2016, however for the purpose of this paper statistics of 2014 has been referred, as case was decided prior to the publication of PSI, 2015. The PSI, 2015 can is *available at*: http://ncrb.nic.in/StatPublications/PSI/Prison2015/PrisonStat2015.htm , last visited on May 28, 2017.

[9]*Ibid.*, defines Overcrowding as "The Occupancy rate of more than 100 percent results in overcrowding in the jail"

[10]*Supra* note 6 at 6 and See also, *Sunil Batra (II*) v. *Delhi Administration*, (1980) 3 SCC 488, where the Supreme Court held that "A convict is entitled to precious right guaranteed by Article 21." and *T.K. Gopal* v. State *of Karnataka* (2000) 6 SCC 168, where the court held that the "Prisoner is required to be treated as a human being and is entitled to all the basic human rights, human dignity and human sympathy."

[11]The order primarily related to furnishing of information regarding to utilization of funds and implementation of various Acts.

[12]PSI, 2014, *supra* note 5 states the definition of overcrowding as, 'The occupancy rate of more than 100 percent results in overcrowding in Jail'

Subsequently following the order of the Court the Ministry of Home Affairs (hereinafter, 'MHA') filed an affidavit[13] requesting all the states and union territories to follow the court's order and provide the information as requested, however some states and union territories did not furnish the information.[14] It was stated that it was due to the improper management information systems that the information could not be aggregated.

Issues and directions

Addressing the various issues raised by the court by order dated March 13, 2015 additional solicitor general submitted the following reply by way of affidavit:

Issue I– The utilization of Rs. 609 Croresgrant allotted under the 13th Finance Commission for the improvement of conditions in prisons.

In response to the first issue, it was stated that even though 13th Finance Commission had provided for allotment of funds but in reality these funds were not allotted and even if they were allotted they were not fully utilized by the states, except for the state of Tripura.

Issue II -The grant allotted to states for prisons under the 14th Finance Commission.

It was stated that states have sufficient funds for the maintaining prisons and thus no additional funds were required by them, thus the 14th Finance commission did not allocate any fund to the central or state government. As regard to union territories, none of them made individual projection of funds as provided by the commission except for Delhi and Pondicherry.

Issue III -Steps taken by the Central and State Government for the effective implementation of section 436A[15] of the Code of Criminal Procedure, 1973(hereinafter, 'Code')

The Ministry of Home Affairs (MHA) stated in its affidavit that it had issued an advisory to all the states and union territories on January17, 2013 to implement aforesaid mentioned section to

[13]Black Law Dictionary, 8th edn. , defines affidavit at 84 as a, 'A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as notary public'

[14]State of Uttarakhand and Union Territories of Daman and Diu, Dadra and Nagar Haveli and Lakshadweep.

[15]Code of Criminal Procedure, 1973, s. 436A: Maximum period for which an under trial can be detained- "Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties: Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties: Provided further that no such person shall in any case be detained during the period of investigation inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

Explanation – In computing the period of detention under this section for granting bail the period of detention passed due to delay in proceeding caused by the accused shall be excluded." (Inserted by Criminal Procedure Code (Amendment) Act, 2005).

reduce overcrowding in the prisons. It has also suggested several measures for its implementation such as constitution of review committee which would be constituted of district judge, district magistrate and the superintendent of police. The committee would meet regularly at interval of every three months and review the cases of undertrial prisoners[16] along with this the Jail Superintendent would also conduct survey of prisoners and send the report to the District Legal Services Committee (hereinafter, 'DLSC') constituted under The Legal Services Authorities Act, 1987[17]and the review committee.

MHA further suggested the following key points in its reply *viz.,*

- DLSC should provide free legal aid to undertrail prisoners;
- Use of Management Information System to ascertain progress made jail wise;
- Plea bargaining;
- Establishment of fast track court;
- Frequent Lok Adalat;
- Production of accused through video conferencing.

Issue IV -Steps taken by the central and the state government for the effective implementation of section 436[18] of the Code and the number of people still in custody due to their inability to pay for adequate surety for their release on bail. The Ministry had issued advisory on 9th May 2011 has stating that inhabitable conditions of prisons are unacceptable especially due to overcrowding as India is a signatory to United Nations Standard Minimum Rules for Treatment of Offenders.

Thus, it was several measureswere suggested to counter this problem such as release of under trial prisoner sunder Probation of Offenders Act, 1958[19] and called for wider participations of

[16] *Supra* note 8 defines Under trial prisoner as 'A person kept in prison (judicial custody) while the charges against him are being tried'

[17] Act no.39 of 1987.

[18]*Supra* note 15, s. 436 reads: "In what cases bail to be taken.

(1) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail: Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided: Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of section 116 or section 446A.

(2) Notwithstanding anything contained in sub-section (1), where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under section 446 "

[19] Act no. 20 of 1958.

District Legal Committee and NGOs to implement the guidelines issued by the High Court of Bombay in *Rajendra Bidkar* v. *State of Maharashtra.*[20]

Issue V- The number of persons in custody who have committed compoundable offences[21] and are languishing in custody. A chart was annexed to the affidavit stating statistics of people languishing in Jail under compoundable offences, numbers were alarming in most of the states *viz.*, Andhra Pradesh, Assam, Chhattisgarh, Haryana, Kerala, Mizoram, Nagaland, Odisha, Punjab, Rajasthan, Telangana, Tripura and Uttar Pradesh, mainly due to their inability to pay for their bail bond.

Issue VI-Steps taken for the implementation of the Repatriation of Prisoners Act, 2003.[22]

In reply it was stated that India has signed bilateral agreement for transfer of prisoners with 25 countries out of which 18 countries have already ratified the agreement. Based on the affidavits and replies by the counsel, the court passed the following directions on April 24, 2015:

- MHA is directed to study Prisoners Management System installed in Tihar Jail and suggest suitable modification/suggestion to the system and so that the software can also be used in other Jails in India.

- National Legal Services Authority[23] (hereinafter, 'NALSA') is directed to appoint a senior officer as Nodal officer who would help in the Court in dealing with the present matter.

- Member Secretary of NALSA in coordination of with MHA and State Legal Service Authority (Hereinafter, 'SLSA') are directed to establish an under trial review committee in all the district of the Country for seeking an effective of section 436A of the Code.

- Till the next scheduled meeting that is around June 30, 2015, the committee should have released those under trial prisoners who are entitled to benefit under Section 436A of the Code and also those under trial prisoners who have undergone their period of incarceration should be released even if half of their sentence is not completed.

[20]In *Rajendra Bidkar* v. *State of Maharashtra* CWO No.386 of 2004, (Supreme Court of India) (Unreported), the Supreme Court has laid down guidelines for production of under trial prisoners through video conferencing facility in courts.
[21]The West Bengal Correctional Services Act, 1992, Act no.32 of 1992, 2(i) : defines Offence as 'means an act punishable under any law for the time being in force with imprisonment, whether substantive or in default of a fine or in default of furnishing security'
[22]The Repatriation of Prisoners Act, 2003, no. 49 of 2003.
[23]NALSA is constituted under section 3 Legal Service Authority Act,1987 to provide legal aid service and organize LokAdalats

- Bureau of Police Research and Development (hereinafter, 'BPR & D'), Attached office of MHA, is hereby directed that it should undertake review Model Prison Manual within three months as the present Model Prison Manual, 2003 has become out-dated in the light of technology advancement and circumstances.

- Member Secretary of NALSA is to coordinate with SLSA to provide legal aid to under trial prisoners and seek release of those who have either committed compoundable offences or unable to furnish bail bond.[24]

Pursuant to the aforesaid order and directions, Rajesh Kumar Goel, Director and Nodal officer, NALSAsubmitted a compliance report dated 4thAugust, 2015 to the Court regarding the work done by it for seeking the release of under trial prisoners. The report further stated the progress made on Prisoners Management System which would be evaluated consequently by Director General (Prisons)/Inspector General (Prisons) on their meeting scheduled to be held on August 20, 2015.

On the analysis of this report, the court came to following conclusion –

- The Under Trail Review Committee shall include secretary of the DLSC as one of its members,[25]
- MHA is suggested to draft a comprehension Model Prison Manual, which would also have the provision of crèche for the children of prisoners. The Ministry may prepare this manual with the help of Civil Society, NGOs concerned with under trial prisoners and other with experts on other disciplines including academia.

- Lastly, the court emphasized on the establishment of under trial review committees in all the districts of the country along with the evaluation of existing application software[26] regarding prison management.

The Additional Solicitor General, N. K. Kaul, informed the bench that the Ministry has written to all Director Generals (DGs) of states and union territories to include Secretary of District Legal Service Authority (DLSA) as a member of under trial committee, Further, they also have been asked to select a Prison Management system which would be acceptable to them.

[24]*Supra* 6 at 32, states as "With regard to the cases of undertrial prisoners who were unable to furnish bail bonds it was stated that as many as 3470 such persons were in custody due to their inability to furnish bail bonds and a maximum number of such undertrial prisoners were in the State of Maharashtra, that is, 797 undertrial prisoners. It was stated that as many as 3278 undertrial prisoners were those who were involved in compoundable offences and efforts were being made to expedite the disposal of their cases."

[25] *Supra* note 6 at 33.

[26]At present there are main four major prison software application which are as:

- National Informatics Centre;
- Goa Electronic Ltd.;
- Gujarat Government through TCS and;
- Phoenix for Prison Management System in Haryana.

As to the Model Prison Manual of 2003, the Additional Solicitor General informs the Court that the New Model Prison Manual would be made available before December, 2015 which would be having a provision for crèche facility for children of women prisoners and the same is being made with the help of NGOs and people of belonging to other disciplines.
Rajesh Kumar Goel, Director, NALSA drew the attention of the court towards the appointment of legal aid lawyers for the under trial prisoners especially those in the State of Maharashtra and Uttar Pradesh.[27]

Pursuant to the aforesaid orders, NALSA filed another compliance report dated October 14, 2015 stating that under trial review committee has been set up successfully in all the districts of India and secretary of DLSC has also been appointed as a member of the under trial review committee.

However, the court expressed distress as no information was made available regarding the establishment under trial committee for the State of Jammu and Kashmir nor the Secretary of DLSC was a member of the committee in all the states,[28] the counsel assured the bench that this matter would be brought to the notice of the state government and status report on the same would be filed before the court in January, 2016.

Following the court's order dated October 16, 2015, the MHA filed an affidavit on January 22,2016 stating that fund for Crime and Criminal Tracking Network and System[29] (CCTNS) and e - Prisons Projecthas been approved.

As to the implementation of sections 436A of the Code, it was stated that many under trial prisoners have been successfully released in many states[30] and union territories.[31]

The court lastly pointed out that the under trial prisoners being tried for compoundable offences should be released to avoid overcrowding in Jails and also a provision for payment of bail should also be made by the SLSA/DLSC, as India being signatory to International Covenant on Civil and Political Rights, 1966[32] (ICCPR) and the Universal Declaration of Human Rights, 1948 (UDHR)[33] must also respect the rights of prisoners.

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[27]*Supra* note 6 at 40 states that States of Uttar Pradesh and Maharashtra are expected to have maximum number of cases pertaining to compoundable offences and also PSI,2014 at page XII which estimates under trial prisoners in State of Maharashtra to be 19,895 and State of Uttar Pradesh to be 62,515 (As on Dec. 31, 2014).
[28]Such as the State of Gujarat and Uttar Pradesh and the Union Territory of Andaman and Nicobar Islands
[29]National Crime Records Bureau (NCRB) is the primary organization responsible for the implementation of CCTNS, CCTNS is an e- integrated system which aims at e- governance and e- policing it seeks to make most of the work of Police personnels like registration of FIRs, tracking and registration stolen vehicles etc online, On Sep. 19, 2009, the Cabinet Committee on Economic Affairs (CCEA) approved the project with a budget of Rs 2000 crores.
[30]Read with States of Assam, Bihar, Chhattisgarh, Goa, Karnataka, Meghalaya, West Bengal,
[31]Read with Union Territories of Dadra and Nagar Haveli and Lakshadweep
[32] Art.10 states that: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."
[33]Art.5 provides that: "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment."

Judgement

The sum and substance of the aforesaid discussionsis that the prisoners are no less human than others and therefore must be treated with dignity. In view of this, court passed the following the directions;

The under trial review committee should work along with the Secretary of the DLSC to take appropriate steps to seek release of eligible under trial prisoners and the meeting of the committee should take place every quarter starting March 31, 2016.

- Under Trial Review Committee should ensure effective implementation of Probation of Offenders Act, 1958[34] and Code of Criminal Procedure, 1973 especially section 436 and section 436A. First time offenders should be released so that they have a chance of rehabilitation in the society. Secretary of the DLSC will also look into the release of under trial prisoners alleged to have committed compoundable offences.

- The Member Secretary of SLSA should work in coordination in Secretary of DLSC of the district to ensure that an adequate number of competent lawyers are empanelled to assist under trial prisoners and convicts, particularly the poor and indigent, and for that purpose assure that the legal aid for the poor does not become poor legal aid.[35]

- The Director General of Police/Inspector General of Police in-charge of Prisons will ensue proper utilization of funds so that conditions of the prisoners isin commensurate with human dignity which includes health, hygiene, food, clothing, rehabilitation etc.

- The MHA will ensure that Management Information System is implemented in all central, district and women jails for better management of prison and prisoners. Further the Ministry will also review the Model Prison Manual 2016 annually so that it does not become another dead document.

- The undertrial committee will look into the issues raised in the Model Prison Manual 2016[36] and for that purpose will visit jails regularly.

- MHA is also directed to prepare a similar manual for Juveniles in custody in Observation Homes or Special Homes or Places of Safety established under Juvenile Justice (Care and

[34] *Id*. at 20.
[35] *Supra* note 6 at 25.
[36] *Supra* note 6 at 57, "It is a detailed document consisting of as many as 32 chapters that deal with a variety of issues including custodial management, medical care, education of prisoners, vocational training and skill development programmes, legal aid, welfare of prisoners, after care and rehabilitation, Board of Visitors, prison computerization and so on and so forth"

Protection of Children) Act, 2015[37]. Accordingly, Secretary, Ministry of Women and Child Development (hereinafter, 'MWCD') is issued a notice to help the MHA to prepare the Model.

Subsequently in *Re: Re-Inhuman Conditions in 1382 Prisons,*[38] counsel appearing for the MWCD informed the Court that a Committee has been set up on February 24, 2016 for drafting a manual similar to the prison manual for juveniles who are either in custody or observation homes or special homes or place of safety in terms of the Juvenile Justice (Care and Protection of Children) Act, 2015.[39]

Shama Parveen Khan, informed the Court that the manual is expected to be prepared by 31st May, 2016 and for this purpose Jyoti Dogra Sood,[40] has co-opted. The committee should take assistance of the *amicus curiae* and representative of Commonwealth Human Rights Initiative (CHRI) for the purpose of data collection on prisons. With respect to directions given by the court dated February 5, 2016, the *amicus curiae* and additional solicitor general replied that the progress has been made in the implementation of aforesaid directions and seek time for the compilation of the needed information.

Practical applicability of the judgement

In view of the court's direction, the MHA prepared a New Model Prison Manual, 2016 which is available now; the manual has been prepared by the help of various expertswhich include senior police officers, member from NALSA, NHRC *etc.*

The New Model Prison Manual, 2016 is divided into XXXII Chapters[41]which deal with the various right and duties for prisoners.Further, as directed by the court, the Manual has a separate chapter dedicated especially to under trial prisoners, women prisoners and prison computerization respectively.

It is also to be noted that in compliance of the court's directions dated August 7, 2015, the Model Prison Manual, 2016 provides for establishment of under trial review committee consisting of secretary, district service legal authority along with the district judge, as chairperson, the district

[37] Act no. 2 of 2016.
[38]2016 (3) SCALE 389
[39]*Id.* at 38.
[40] Associate Professor, ILI Indian Law Institute Deemed University, New Delhi
[41]Chapter I – Definitions; Chapter II- Institutional Framework; Chapter III – Headquarters Organization; Chapter IV – Institutional Personnel; Chapter V – Custodial Management;Chapter VI – Maintenance of Prisoners; Chapter VII – Medical Care; Chapter VIII – Contact with Outside World; Chapter IX – Transfer of Prisoners; Chapter X – Repatriation of Prisoners; Chapter XI – Execution of Sentences; Chapter XII – prisoners sentenced to Death; Chapter XIII – Emergencies; Chapter XIV – Education of Prisoners; Chapter XV – Vocational training and Skill development; Chapter XVI – Legal aid; Chapter XVII – Welfare of Prisoners; Chapter XVIII –Remissions; Chapter XIX – Parole and Furlough; Chapter XX – Premature Release; Chapter XXI – Prison Discipline; Chapter XXII – After- Care and Rehabilitation; Chapter XXIII – Open Institution; Chapter XXIV – under trial Prisoners; Chapter XXV – High Risk Offenders and Detenues; Chapter XXVI – Women Prisoners; Chapter XXVII – Young Offender; Chapter XXVIII – Inspection of Prisons; Chapter XXIX – Board of Visitors; Chapter XXX - Staff Development; Chapter XXXI – Prison Computerisation; Chapter XXXII - Miscellaneous

magistrate and the district superintendent of police.[42] However, since the Model Prison Manual has been recently prepared, it is difficult to comment on the implementation aspect.

However, the effect of the aforesaid directions in the present case can be studied with respect to the Prison Statistics, 2015 which was released in November, 2016 by MHA, the following are key changes observed in the report –

- Occupancy rate[43] has fallen from 117.4% in 2014 to 114.4 % in 2015.
- There has been marginal decrease in undertrail prisoners of 0.3% in 2015 (2, 82,076) over 2014 (2, 82,879).
- Undertrail prisoners charged for the offence of murder amounts to 26.5% of the total numbers of crime under IPC, 1860, this number has also come down by 3.2 % from Prison Statistic India, 2014.
- The Detention period of undertrail prisoners staying in jail for 3 months or below has also increased to 35.2% from 34.8%.

From these figures, it is evident that the number of undertrail prisoners in jail has come down compared to year 2014, the change may not be significant but it is definitely depicts a trend.

IV PRESENT STATUS OF PRISONS IN INDIA

For the purpose of convenience, the section is divided into various parts;

Reformative schemes

Fortunately, India as a nation as has come a long way and the present reformative schemes are to some extent quite adequate and do help in the reshaping the character and curing the diseased mind of the prisoner. Crime is outcome of diseased mind which can be cured, this being based on reformative theory. As there are several different reformative schemes,[44] the present paper will focus mainly on reformative schemes adopted by Tihar Jail, Delhi and the Prison Department of the State of Andhra Pradesh.

[42] Model Prison Manual, 2016 ,Ministry of Home Affairs, Government of India at 176.

[43] *Supra* note 8 (PSI, 2014) defines; Occupancy rate as 'The Number of inmates accommodated in Jail against the authorised capacity of 100 inmates'

[44]The Yerwada Central Jail in Pune has also a history of introducing innovative rehabilitation programmes recently introduced another scheme whereby a prisoner is released early if they earn top marks in yoga exams.

Tihar Jail, Delhi

Tihar Jail[45] has the reputation of being a correctional institution with a pragmatic approach and has to its credit several innovative reformative schemes. The jail has several reformative schemes; some of them are as follows:[46]

- Prisoner's participation in various sports[47] and cultural activities
- Education both formal and adult with Library facility
- Vocational classes in English/Hindi typing and Commercial Arts
- Yoga and Meditation[48]
- Legal aid
- Special Courts/LokAdalats
- Societal Participation in Reformation
- Ventilation of grievances[49]

Prison department of Andhra Pradesh

The official website of the Andhra Pradesh Prison Department[50] states that many facilities like Television, Radio, Newspapers and indoor games are provided in all the prisons of the State.Further, Septic toilets and bathroom are provided in the ratio of 1:06 and 1:10 respectively in all prisons. Apart from these facilities, degrees and certificate courses are provided through correspondence from universities at government cost. Also, there are no restriction on writing and receiving letters by prisoners.

V RECENT TRENDS IN PRISON REFORMS

In the past few months many significant steps have been undertaken, some of them are as follows –

- The High Court of Delhi has directed the prison authorities of Tihar Jail to offer meditational therapy, counselling, sports facilities to convicts.[51]

[45] It is Central prison located in Tihar Village, New Delhi and is one of the largest complexes of prisons in South Asia with over nine central prisons.

[46]Tihar Jail, *Available at* : http://www.delhi.gov.in/wps/wcm/connect/lib_centraljail/Central+Jail/Home/Reformation, last visited on Feb. 23, 2017.

[47] Such as Cricket, Volley Ball, Power Lifting

[48] It has permanent 'Vipassanacenter' and Meditation groups like Brahma KumariIshwariyaVishvavidyalaya, Divya Jyoti Jagriti Sansthan, Sahaj Yoga Kendra *etc*.

[49]Frequent meetings with senior prison officers and Petition box where prisoners can submit their grievances.

[50] Andhra Pradesh Prison Department, available at http://apprisons.gov.in/ , last visited on May 23, 2017.

[51]See Sanjay V. State, CRL.A.600 of 2000, (Delhi H.C.) (Unreported)

- The High Court Calcutta rules that even prisoners are entitled to the right to trade, occupation and profession guaranteed under article 19(1)(g) of the Indian Constitution.[52]

- Tamil Nadu government in its budget allocated Rs 282 crore for Prisons; these funds will be mainly used for digitalization and improving Court infrastructure.

- Kerala State Legal Services Authority has recently launched a new scheme titled 'Legal Aid for Socio Economically Challenged Dependants of Convicts Scheme, 2017' wherein the dependents of the convicts will be provided with legal aid.

- The Andhra Pradesh Police in a unconventional way and first-of-its-kind initiative in India to tackle crime rate has decided to DNA – tag convicts, the DNA sample of convicts will be stored in the database and later these samples will be matched with sample found at the crime scene, this will make tracking of criminals easier, it is proposed that for this purpose the Rapid HIT DNA system software will be used. The Andhra Pradesh government plans to bring and enact a new legislation to give a statutory backing to this initiative.[53]

- The MHA has advised the Secretaries of all States and Union Territories to implement the following suggestions for better prison administration viz. –

a) Video Conferencing facility in all prisons
b) All vacancies in the prison department to be filled up expeditiously
c) Prisons to have Welfare wing, correctional and probation services
d) Adopting the provisions of Prison Manual, 2016[54]

- The High Court of Bombay in Ganesh Shankar Pawar and Ors. V. State of Maharashtra and Yervada Central Prison[55]has issued landmark directives on prion reforms, prominent ones being:

    a) Guidelines for communication between advocates and their client in Yervada Prison
    b) Construction of separate bathrooms for women prisoners
    c) Construction of new prisons within the free area with the vicinity of existing jails and on government land lying vacant in cities of Mumbai and Pune
    d) State Government to constitute committee for every district of the state who shall inspect the cleanliness, quantity and quality of food being served to prisoners.

[52] See *Soma Saha Sen* v. *State of West Bengal*, W.P. 5455 (W) of 2017, (Calcutta HC) (Unreported)
[53]See Sreenivas Janyala,First DNA index system to tackle crime introduced by Andhra Pradesh Police, Indian Express (Hyderabad) Aug. 31 2017.
[54] These suggestions are an outcome of the 5th National Conference of Prisons of States/Union Territories on Prison Reforms held at New Delhi on September 29-30, 2016.
[55]Criminal PIL ST. No. 46 of 2015, (Bombay H.C.) (Unreported)

e) Crèches and schools to be opened near the precincts of Jail for children of prisoners serving sentence.

VI ISSUES IN THE PRESENT PRISON SYSTEM

Unfortunately the ground reality of prisons and under trial prisoners is far from being satisfactory. Recently, in a reply to Congress legislator Naresh Kumar Gupta's query reads that there are 2,364 prisoners lodged in 14 government jails in Jammu and Kashmir, Out of these 2,364 prisoners, 1929 are undertrials in various jails of the state—including 347 convicts and 118 detainees.[56]

Some other major problem include overcrowding in prisons (Occupancy rate is 118.4%) and shortage of jails officialswhich is estimated to be 65.8% of actual to sanctioned strength which often results in low attention per inmate (8 inmates :1 prison Staff)[57].
Some of the other prominent issues are as follows –
Differential treatment between prisoners belonging to the same category;[58] Custodial deaths;[59] Fake Police encounter; Lack of innovative reformative schemes;[60] Inhuman and barbaric treatment by Police;[61] Political pressure; Lack of knowledge of legal rights[62] and education;[63] Insufficient legal aid programmes;[64] Inability to pay bail bond due to poverty; Delay in Judicial pronouncement;[65] Lack of coordination between the prison department, police and judiciary.[66]

[56]Mukeet Akmali,"1900 under-trials in JK jails",Greater Kashmir, June 18, 2016.
[57] *Supra* note 8 at 139 and 141. (All statistics are inclusive of all states and union territories of India (All-India))
[58]The Constitution of India, 1950, art.14lays down the principle of equality, it emphasis on the rule that 'like should be treated alike' and concept of reasonable classification.
[59] See generally *Nilabati Behera alieas Lalita Behera* v.*State of Orissa*; AIR 1993 SC 1960; 1st Case of Custodial Death ; the Supreme Court awarded compensation by way of exemplary damages.
[60]It took Supreme Court almost 60 years after independence to introduce community service in India; See *State Tr. P.S. Lodhi Colony New Delhi* v. *Sanjeev Nanda*; AIR 2012 SC 3104.
[61]See *Khatri* v. *State of Bihar* (Popularly known as Bhagalpur Blinding case)**;** [1981] 2 SCR 408.
[62] See Constitution of India, 1950, art 14, 21, 20, 22, 32.
[63] See *e.g.*, Rudul Shah v. State of Bihar, AIR 1983 SC 1086; Case of illegal detention for 15 years though acquittal order passed by court; See also Prison Statistics India, 2014 (NCRB) which estimates that almost 68 percent inmates are under trials and over 70 per cent of convicts being illiterate.
[64] Right to free Legal aid is a Fundamental Right under Article 21 of the Indian Constitution; See Khatri and Ors.Vs. State of Bihar and Ors)**;** [1981]2 SCR 408; See also *Madhav Hayawadan Rao Hosket* v. *State of Maharashtra*; AIR 1978 SC 1548 and Mohd. Ajmal Amir Kasab V. State of Maharashtra; (2012) 9 SCC 1
[65]Right to Speedy Trial is a fundamental right under Article 21 of the Indian Constitution; See *e.g., Hussainara Khatoon* v. *Home Secretary, State of Bihar, Patna*; (1980) 1 SCC 91; also See *Kadra Pehadiya* v. *State of Bihar*; Writ Petition No.5943 of 1980
[66] For e.g. Police is responsible for transportation of Prisoners from Jail to Court and Vice versa, but if the prisoners are not takenin time to the court for hearing, the case is adjourned for another day which results in delay in disposal of case.

VII SUGGESTIONS/ RECOMMENDATIONS

The Law Commission of India[67] headed by H.R. Khanna J,[68] has recommended several possible remedies to the problem of overcrowding in Jails such as guiding principles to be followed for release on bail in case of non-bailable offences and a need to liberalise provisions for release on bond, strengthening of machinery and equipment, suggested amendments to Code of Criminal Procedure, 1973 and Indian Penal Code, 1860, separate places for detention of under trial prisoners *etc.*

On similar lines, The Law Commission in its239th Report[69] has suggested further more steps such as that there should be standardized design of the Criminal Court complex as prescribed which shallinter alia have separate rooms for witnesses, under trial prisoners, police personnel, advocates and prosecutors. Further, all communication of bail orders should be sent to the Jail through e-mail and sufficient number of washrooms and filtered drinking water facilities should be constructed in these complexes.

The Human Rights Law Network[70] has suggested several prisons reforms *viz.*, providing educational facilities to prisoners, introduction of Non-discriminatory provisions for minority groups in jail, computerization of prisons, social audit *etc.* The All India Committee Jail Reforms[71]suggested that better transport arrangement should be made for taking undertrail to courts, proper record of release of prisoners on leave and special leave should be properly maintained, district level review committee to appraise under trial cases and recommend their release on bail, facilities of food, clothing, medicare, etc. to undertrials at par with convicts.

BPR and D has suggested several reforms[72] *viz.*,-

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- That the principles of management of prisons and treatment of offenders may be incorporated in the directive principle of the state policy embodied in part IV of the Constitution of India;

[67]Law Commission of India, *Congestion of Under-Trial Prisoners In Jail*, Report No.78 (February, 1979)
[68]Retired Judge, Supreme Court of India
[69]Law Commission of India, *Expeditious Investigation and Trial of Criminal Cases Against Influential Public Personalities*, Report No. 239th (March 2012)
[70] Report on the National Consultation on Prison Reforms, Human Rights Law Network, 3th-4th April 2010, New Delhi, available at http://www.hrln.org/hrln/images/stories/pdf/prision%20reform_report.pdf , (last visited on Aug. 25, 2017).
[71]All India Committee Jail Reforms (1980-83) headed by Justice A. N. Mulla ('Mulla Committee') ,*Available at:* http://mha1.nic.in/PrisonReforms/pdf/Mulla%20Committee%20implementation%20of%20recommendations%20-Vol%20I.pdf (last visited on July 20, 2017).
[72] National Policy on Prison Reforms and Correctional administration, 2007, Organized by BPR&D , available at http://www.bprd.nic.in/WriteReadData/userfiles/file/5261991522-Part%20I.pdf (ast visited on June 28, 2017).

- The State shall evolve a mechanism to ensure that no under trial prisoner is detained unnecessarily which can be achieved by regular periodic review of their cases on timely bases and simplification of bail procedure, also the under trial hall be confined in separate institution if possible;

- State government may establish Research & Development Wing in the Directorate of Prisons and Correctional Services of all the States and Union Territories which shall analysis and research on improving the functioning and performance of prisons in India.

VIII PERSONAL OPINION

I agree with the court's decision that is of utmost importance and urgency that the Under trial Review Committee should be established in all the districts of the country and also that a new Model Manual Prison should be prepared both for juveniles and adult prisoners. However, being little sceptical with respect to the functioning of these committees and effective implementation of the prison manual. It is evident from the past that these manuals have ended up becoming only a dead document and are not seriouslyimplemented by the prison authorities.

As a citizen of India, and being avery much concerned for the under trial prisoners and other inmates as to in which conditions they are living in prisons and whether proper sanitation and medical facilities are available to them. The figures by NCRB are very alarming with over 70 per cent of prison inmates being Undertrials who are either unaware of their legal rights or are poor to pay bail bond. It is such a pity that though their offence has not been proved in the court of law, subject to the right of appeal, they are undergoing their sentence; it seems that only the rich and powerful can get a bail in India.

There is thus without any doubt an urgent need to revamp the prison system in India which would a more humanistic approach as Mahatma Gandhi rightly said "Crime is the outcome of a diseased mind and jail must have an environment of hospital for treatment and care"

The author proposes the following recommendations for prison reforms:[73]

- Prisons (Entry 4, State List II) are a state subject under the Constitution which is one of the reasons why it is neglected by the States and are starved of funds. Thus, Prisons and allied institutionsshould be deleted from state list and inserted in the Concurrent List of the Seventh Schedule of the Constitution.
- For modernization of Prisons, Government of India must start Prison Modernization Scheme IIwhich is overdue for a decade now. Phase I of the scheme has successfully

[73]The author is in debt to officers at BPR&D and NCRB for their valuable inputs in suggesting these recommendations.

reduced overcrowding in jails barracks, jail official quarters and resulted in better security of the jails form high hazard such as –drug addicts, terrorists, naxals& dangerous criminals and high risk offenders.

- General view by Courts should be togrant **'**Bail as a right and Jail as an exception' in bail applications.
- Women jails must be set up in every state. Further, the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules)should be implemented to maintain dignity of Undertrials and Convicts particularly women.
- BPR&D may sponsor official training programmes in security, reformation, rehabilitation and attitudinal change for prison authorities.
- Training institutes are required to be opened in every state which would train prison officials especially on how to deal with high risk offenders. Currently there are only three dedicated prison training institutes which are in Chandigarh, Kolkata and Vellore respectively.
- Vigilance committeesshould be constitutedwhich would include well-behaved convictsas members to check the quality of food served to the inmates. Many riots in jails are reported especially in eastern Indiadue to the poor quality of food being served in jail.
- The concept of Private Prisons may be tried in India wherein the State does not play a major role. Under trial prisoners who have committed petty offences may be sent to these jails under the overall supervision of district superintendent of jail.
- The number of open prisons[74] should be increased, presently there are 63[75] open prisons in India, these prisons unlike all other prisons allows a prisoners more freedom and dignity by allowing them to roam in and around the jail vicinity, taking up employment outside jail and also have less security personnel. The concept of open prison owes its origin to United Nations Congress on Prevention of Crime and Treatment of Offenders, held in Geneva in 1955.

XI CONCLUSION

There are several legislations[76] and judicial pronouncements which seek to protect the rights of prisoners in India, but still a lot more is required to be done in this direction.Implementation of these rights continues to be one of major hurdle in prison reforms in India. The judiciary has

[74]Rajasthan government has framed the Rajasthan Prisoner Release on Parole Rules, 1958 wherein a prisoner who has served one-third of his/her sentence and has a good conduct is eligible for permanent parole.

[75]Prison Statistics of India, 2015, National Crime Records Bureau (NCRB), Government of India. *Available at*: http://ncrb.nic.in/StatPublications/PSI/Prison2015/Snapshots-2015_18.11.2016.pdf, last visited on July 4, 2017.

[76]There are various other legislations such as Delhi Prisons Act, 2000 (No.2 of 2002), The Probation of Offenders Act, 1948 (No.20 of 1958), The West Bengal Correctional Services Act, 1992 (West Bengal Act XXXII of 1992) etc.

played a vital role for the improvement of the prison system in the past[77] and hopefully the decision given by the apex court in the present case would further help in reducing further some of the existing problems in the current prison system. Thus, it can be concluded that it is just the beginning of a long journey, a small step towards better prison system management and administration.

[77]See for e.g., Rama Murthy V. State of Karnataka; AIR 1997 SC 1739; *Prem Shankar Shukla* v. Delhi *Administration*; AIR 1980 SC 1535; *Sunil Batra* v. *Delhi Administration*.; AIR 1980 SC 1579