A CRITICAL ANALYSIS OF LAW AND POLICY RELATING TO SENTENCING IN INDIA

DR. PRAVEEN PATIL
Principal
Shahaji Law College, Kolhapur

SHAHAJI LAW COLLEGE, KOLHAPUR PUBLICATION SERIES

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Publisher:

Shahaji Law College, Kolhapur
1090 'E' ward shahupuri, kolhapur – 416 001
www.shahajilawcollege.com
prin.shahajilawcollege@gmail.com
call: 8600664343

ISBN: 978-81-972236-9-3

PRELUDE

In the classroom, as a young teacher of criminal law, I was discussing the penal policy of India, in which Judges handout sentences to the offenders. The initial discussion was fruitful and one sided as students hardly participated to their full mood. As the discussion progressed and students started participating, more so by the way of questions, I took little time to understand that, I am drained out of my reading literature and have now nothing great to offer to students in that academic engagement. To satisfy my assumed ego, I jumped beyond the territory of that tiny syllabus and kept reading the relevant literature relating to sentencing policy in India and abroad. As the luck were to have, in the mean time vacancy for doctoral research were rolled out in the home university. Confident of getting the seat, I surmised on the topic and in a split second, the topic so close to my heart by then, became and bounced before me as "A CRITICAL ANALYSIS OF LAW AND POLICY RELATING TO SENTENCING IN INDIA"

My beloved guide Dr. C. Rajashekhar, Former Chairman, P.G. Department of Studies in Law, Dean, Faculty of Law, Karnatak University, Dharwad, and Principal, Karnatak University's Sir Siddappa Kambali Law College, Dharwad, gave me free hands with blinkers of research methodology to surf and surge in my chosen field. This research work is the product of that free hand. Except for the methodology my beloved guild allowed me to run wild so that the best of the best is collected, revisited and refined to the requirements.

Three full years and few odd months of toil and sweat of the brow, I could add up to the ocean of literature in the forms of newel drops. This is thorough academic engagement wherein Indian penal system is compared with United States of America and England in the first place and other similar jurisdictions where similar trappings of sentencing policy exist in second order. The conclusion, if one were to draw in a single sentence, is that, India needs a rehauling of entire sentencing policy, except, the indigenous developed empathy.

I cannot acknowledge people and places who immensely contributed in the development of this literature. The best way to acknowledge and honour them is to keep them anonymous. I would thank those hands who read this literature, find faults and develops it to perfection.

Dr. Praveen Patil

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CHAPTER-I

INTRODUCTION

> *"If the criminal law as a whole is the Cinderella of jurisprudence, then the law of sentencing is Cinderella's illegitimate baby."*
>
> Nigel Walker[1]

The quoted words of Nigel Walker undoubtedly evince a over pervasive truth and reality that, sentencing, if not cautiously handled, can defeat the very purpose of criminal law and brand the process of sentencing with illegitimacy. The set of institutions we refer to as the 'criminal justice system' performs three basic functions. It defines what a 'crime' is. It adjudicates guilt of crimes. It imposes punishment for crimes.[2] The criminal law, therefore, has a purpose to serve. Its object is to suppress criminal enterprise and punish the guilty.[3] The sole aim of the law is approximation of justice.[4] Every criminal trial is a voyage of discovery in which truth is the quest.[5] Thus sentencer does not preside over a criminal trial merely to see that no innocent man is punished but he also presides to see that a guilty man does not escape. One is as important as the other.[6] Both are public duties which the judge has to perform.[7]A Judge is, therefore, looked upon as an embodiment of justice and therefore, assurance of fair trial is a first imperative in the dispensation of justice.[8] If in the ultimate eventuality the proper sentence is not awarded, the fundamental grammar of sentencing is guillotined. Law cannot tolerate it; society does not withstand it; and sanctity of conscience abhors it.[9]

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[1] Nigel Walker, *Sentencing in a Rational Society*, (Harmondsworth: Penguin Books Ltd,1969), p 15.

[2] Frank O. Bowman III, "Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended", 77 *U. Chi. L. Rev*. 367 (2010)

[3] *State of Kerala v. Narayanan Bhaskaran* 1991 Crl.L.J.238

[4] *Smt.Menaka Sanjay Gandhi v. Miss.Rani Jethmalani* 1979 S.C.468

[5] *Ritesh Tewari and Another v. State of U.P. and Others* (2010) 10 SCC 677

[6] In *Maria Margadia Sequeria v. Erasmo Jack De Sequeria* (2012) 5 SCC 370 the Supreme Court observed

> "A judge in the Indian System has to be regarded as failing to exercise its jurisdiction and thereby discharging its judicial duty, if in the guise of remaining neutral, he opts to remain passive to the proceedings before him. He has to always keep in mind that "every trial is a voyage of discovery in which truth is the quest". In order to bring on record the relevant fact, he has to play an active role; no doubt within the bounds of the statutorily defined procedural law."

The Court in *Dalip Singh v. State of U.P. and Others* (2010) 2 SCC 114 observed that truth constitutes an integral part of the justice delivery system which was in vogue in pre-independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-independence period has seen drastic changes in our value system.

[7] Justice V. Ramkumar "*Sessions Trial*" available at http://kja.nic.in/article/Sessions%20Trial.pdf

[8] *Smt.Menaka Sanjay Gandhi v. Miss.Rani Jethmalani* 1979 S.C.468

[9] *Sumer Singh v. Surajbhan Singh & Ors*., 2014 (3) JCC 2282

Every criminal trial is essentially divided into two stages- the conviction and sentencing. Conviction is where the guilt of the accused is determined. The sentencing thus, comes at a stage after the person has been found guilty. [10]

Sentencing is that stage of criminal justice system where the actual punishment of the convict is decided by the judge.[11] Sentencing is about the imposition of punishment on individuals who have been found guilty of criminal behavior.[12] This being said, no further explanation is required to understand how much of attention needs to be paid to this stage. This stage reflects the amount of condemnation the society has for a particular crime.[13]

The rendering of a judicial decision, however, is not always an easy task.[14] It poses difficult and complex question.[15] Sentencing is described as 'social battleground'[16] and 'wasteland in the law'.[17] Sentencing as is "an art, very difficult art, essentially practical, and directly related to the needs of society."[18] In justice-delivery system, sentencing is indeed a difficult and complex question[19] making it a 'soft' sub-specialty of criminal law.[20]

The process of sentencing is, thus, not that easy and mechanical. The process of sentencing is vague and obscure, as are the considerations used for the imposition of punishments.[21]

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[10] Justice V.Gopal Gowada "Introduction: Sentencing Policy in India" available at http://www. nja.nic.in/ Concluded%20Programes%202015-16/P-947%20Reading%20Material/P-947%20READING%20MATERIAL %20 .pdf

[11] Austin Fagothey, *Right and Reason-Ethics, in Theory and Practice*, 6th ed., (St. Louis: C. V. Mosby, 1976), argues

> "Punishment is one of the celebrated goals of criminal law. Punishment is retributive, because it pays back the criminal for his crime, gives him his just deserts, re-establishes the equal balance of justice which has been outraged and reasserts the authority of the lawgiver which the criminal has flouted."

[12] Alfred Blumstein and David P., Farrington *Research in Criminology*, 1st ed., (New York Inc.: Springer-Verlag, 1989), p 3

[13] Nirupama "Need for Sentencing Policy in India" available at www.mcrg.ac.in/Spheres /Niruphama.doc (visited on November 23, 2013)

[14] Justice H.R. Khanna "Role of Judges" 1979 1 *SCC Jour* 17

[15] *Modi Ram v. State of U.P* (1972) 2 SCC 630

[16] Geoffrey Palmer, *Reform: A Memoir*, (Wellington : Victoria University Press, 2013), p 323

[17] See Michael Frankel, *Criminal Sentences: Law Without Order*, (New York: Hill and Wang, 1973). *See also* Jeff Smith, "Clothing the Emperor: Towards a Jurisprudence of Sentencing" (1997) 30 *Australian & New Zealand Journal of Criminology* 168, 170

[18] *R. v. Willaert* (1953) 105 C.C.C. 172.

[19] *State of Madhya Pradesh v. Babulal* AIR 2008 SC 582

[20] Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts*, (Chicago: University of Chicago Press, 1998), p 26

[21] For instance, when the court imposes a 3-year imprisonment, what exactly makes the offender deserve exactly 3 years and not 2 years and 11 months? What is the difference between 28 and 29 months of imprisonment? What exactly makes a particular punishment right and meet for a particular case? How should the suffering embodied in a particular punishment be measured? How can we measure deterrence? Can imprisonment be imposed on a corporation? What should be the difference between punishing a 35-year-old offender and a 95-year-old one? There are many similar questions that sentencing brings to mind. See Gabriel Hallevy, *The Right to Be Punished Modern Doctrinal Sentencing*, (New York: Springer-Verlag Berlin Heidelberg, 2013), Pp ix-x

Gabriel Hallevy writes[22]

> "Sharp differences in approach exist between different courts, benches, and even individual judges sitting on the same panel, regarding the degree of severity to be shown when sentencing an offender. The vagueness of sentencing damages the certainty necessary in criminal law and turns sentencing into an enigma for both the offender and the society. Uncertainty in criminal law has an extremely negative social value that prevents legal social control or at least damages its effectiveness. The phenomenon of uncertainty in sentencing is not unique to the legal process conducted in courts of law, where punishments are imposed on individuals. It is also characteristic of legislators who turn a certain act into an offense, which then carries a certain punishment. Both legislators and courts should be directed by simple, clear, and inclusive guidelines to determine punishments. The ultimate solution for achieving such a goal is by embracing a simple, clear, and inclusive doctrine for sentencing. But what would be the outlines of such a doctrine? Criminal law needs modern doctrinal sentencing consistent with the principle of legality, which requires certainty and clarity in the imposition of both criminal liability and punishments."

In the process of sentencing the judge has to travel through the muddy waters of presumptions[23] and constitutional rights[24] to find the guilt and sentence.[25] *Secondly*, the judge has to balance the criminalistic behaviors and human impulse as a matter of his judicial duty[26] which exercise puts himself on trial. It is often said that punishments handed down by judges reveal more about judges than about offenders.[27] In *Paras Ram and Others v. State of Punjab* [28] the Supreme Court observed:

> "A proper sentence is the amalgam of many factors such as the nature of the

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[22] Gabriel Hallevy, *The Right to Be Punished Modern Doctrinal Sentencing*, (New York: Springer-Verlag Berlin Heidelberg , 2013), Pp ix-x

[23] One of the cardinal principles which should always be kept in our system of administration of justice in criminal cases is that a person arraigned as an accused is presumed to be innocent unless and until proved otherwise. Similarly if two views are possible on the evidence adduced in the case- one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused is to be accepted. See *Ramji Surjiya v. State of Maharashtra* AIR 1983 SC 810, *Kaliram v. The State of H.P* AIR 1973 SC 2773, *Nishar Ali v. State of U.P.* AIR 1957 SC 366 *S.A.A.Biyabani v. State of Madras* AIR 1954 SC-645, *Ram Jog v. State of U.P.* AIR 1974 SC 606; *Rajendra Rai v. State of Bihar* AIR 1974 SC 2145, *Autar Singh v. State of Punjab* AIR 1979 SC 1188, *Babu v. State of U.P.* AIR 1983 SC 308, *Chandra Kanta Deb v. State of Tripura* AIR 1986 SC 606). *B.R.Kapur v. State of T.N.* 2001 (7) SCC 231, *State of A.P. v. Anjaneulau* AIR 1982 SC 1598, *Sheo Nandan Paswan v. State of Bihar* AIR 1983 SC 194

[24] Right to fair trial and right against self incrimination are fundamental principles of the constitution which cannot be divorced by the trial courts. Deviation from such principles is not only fundamental flaw but goes to the very root of trials. For the exposition of these principles see

[25] In *Zahira Habibullah Sheikh v. State of Gujarat* (2006) 3 SCC 374, the Supreme Court observed that "right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice".

[26] See *Jameel v. State of Uttar Pradesh* (2010) 12 SCC 532. *See also State of Uttar Pradesh v. Sanjay Kumar* (2012) 8 SCC 537

[27] Michael Tonry, *Sentencing Reform Across Boundaries*, in Chris Clarkson and Rod Morgan (eds.) *The Politics of Sentencing Reform*, (Oxford: Clarendon Press, 1995) Pp 267-268

[28] (1981) 2 SCC 508

> offence, the circumstances - extenuating or aggravating - of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment the background of the offender with reference to education, home life sobriety and social adjustment, the emotional and mental conditions of the offender, the prospects for the rehabilitation of the offender, the possibility of 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 the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. These factors have to be taken into account by the court in deciding upon the appropriate sentence."

Thirdly the sentencing has to be consistent with the purpose and function of criminal law. In the absence of stated goals [29] and purposes[30] of sentencing, a judge is left with no basis to proceed on. In India, there are no goals and purposes of punishment specifically mentioned as is done in the western countries. In *Lehna* v. *State of Haryana* [31] the Supreme Court thus lamented:

> "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 terrific results of his crime. Inevitably these considerations cause departure from a just desert as a basis of punishment and create cases of apparent injustice that are serious and widespread." [32]

Fourthly, in sentencing, the judge's task is to determine the type and quantum of sentence appropriate to the facts of the case, and this judgment must be made in accordance with the relevant statutory provisions and appellate principles.[33] However

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[29] See John Champion *Sentencing A Reference Handbook,* (California : ABC-CLIO, Inc., 2008), p 2 4 where some of the more important goals of sentencing are mentioned as follows (1) to promote respect for the law, (2) to reflect the seriousness of the offense, (3) to provide just punishment for the offense, (4) to deter the defendant from future criminal conduct, (5) to protect the public from the convicted offender, and (6) to provide the convicted offender with educational or vocational training, or other rehabilitative assistance. The purposes of sentencing include punishment or retribution, deterrence, custodial monitoring or incapacitation, and rehabilitation.

[30] *Ibid*, p 2, where the purposes of sentencing are mentioned as: (1) retribution, (2) deterrence and prevention, (3) just deserts and justice, (4) incapacitation and control, and (5) rehabilitation and reintegration.

[31] (2002) 3 SCC 76

[32] The Supreme Court in *Shailesh Jasvantbhai and another v. State of Gujarat and others* (2006) 2 SCC 359, noted the process and purpose of sentencing policy as

> "…The law regulates social interests, arbitrates conflicting claims and demands. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence… Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix…By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be…"

[33] Austin Lovegrove, *The framework of judicial sentencing*, (New York: Cambridge University Press, 1997), p1

as Mirko Bagaric argues[34]

> "[d]ue to the enormous number and range of aggravating and mitigating circumstances that have been held to be relevant to sentencing, judges …generally enjoy wide discretion in imposing punishment in any particular case. This has resulted in a large amount of disparity in sentencing. It has been argued elsewhere, that the rule of law virtues of consistency and fairness have been trumped by the idiosyncratic intuitions of sentencers, and that accordingly there is a need to restructure the breadth of the sentencing discretion.[35] The unprincipled nature of sentencing practice has led to what Andrew Ashworth labels a `cafeteria system'[36] of sentencing, which permits sentencers to pick and choose with little constraint a rationale which seems appropriate at the time."

Thus when it comes to sentencing there is in fact substantial disparity in the penalty imposed on similarly situated offenders.[37] Sean J. Mallett exactly reflects the predicament of sentencing discretion when he observes that

> "[s]entencing is a notoriously difficult component of the criminal justice system. It requires a judge to balance numerous complex and often competing considerations in order to arrive at a penalty that does justice in a particular case. To this end, judges have traditionally enjoyed considerable discretion to be able to tailor an appropriate sentence, subject to the maximum penalties prescribed by Parliament. However, this flexibility comes at the cost of another important principle of the criminal law: consistency. The more discretion a judge is allowed to exercise, the greater the risk of like offenders being treated differently. How to resolve this tension and find a suitable equilibrium is a problem faced by jurisdictions the world over."[38]

Fifthly, sentencing rules must balance individualized justice against systemic consistency and balance efficiency against procedural fairness.[39] Exactly how much punishment an offender deserves is something of a metaphysical mystery.[40] Professor Ronald Dworkin, who continues to have faith in the ability of the "Herculean judge" to distinguish between law and politics and find the correct legal answer, admits that objectivity is more of an ideal than a reality.[41] Most observers of the criminal justice

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[34] Mirko Bagaric, "Consistency and Fairness in Sentencing", 2 *Cal. Crim. L. Rev*. 1 (2000).
[35] See Mirko Bagaric, "Sentencing: The Road to Nowhere", *SYDNEY L. REV*. 597 (1999)
[36] Andrew Ashworth, *Sentencing and Criminal Justice*, 2nd ed., (Butterworths, 1995), p 331
[37] See Sean J. Mallett. "Judicial discretion in sentencing: a justice system that is no longer just?" *Victoria University of Wellington Law Review* 46.2 (2015)
[38] *Ibid.*
[39] Douglas A. Berman and Stephanos Bibas "Making Sentencing Sensible" *Ohio State Journal Of Criminal Law* Vol.4, 2006, p 40
[40] Alice Ristroph, "Desert, Democracy, and Sentencing Reform", 96 *J. Crim. L. & Criminology* 1293 (2005-2006) p1293
[41] R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), and *Law's Empire* (Cambridge: Harvard University Press, 1986). *Cf* T.R.S. Allan, "Law, Justice and Integrity: The Paradox of Wicked Laws" *Oxford Journal of Legal Studies*, Vol. 29, No. 4 (2009), Pp 705-728

system agree that there are unfair disparities in the sentences meted out in the courts.[42] A truism of sentencing research is that sentences should vary according to the seriousness of the crime and the dangerousness of the offender, but that "unwarranted disparity" is undesirable and unfair.[43]The predicament of a legal system where sentencing discretion has been enjoyed by the judges has been best described by *Shlomo Shoham*[44] where he mentions that

> "[w]e may now offer the following schematic formula: Offence, plus Offender, plus Attitude of Judge = Sentence. The first two factors may be studied without much difficulty because they crop up very frequently in the course of the trial itself and they may be surmised from the charge' or information, from the circumstances of the commission of the offence as told to the court by eve-witnesses, documentary and circumstantial evidence. The socio-economic background of the offender is sometimes brought to light after conviction and before the passing of sentence when the prosecution, probation officer and the defendant himself submit evidence on the latter's character and personality. The third factor concerning the judicial attitude of the trial judge is the "great unknown" in every act of decision. This factor is obviously the most difficult to foresee, and the possibility of successfully isolating it and stating it is still to be explored."[45]

Discretion necessarily leads to lack of consistency in sentencing and does not meet the requirements of the rule of law.[46] Judges are only human, and will analyse a case consistent with their personal beliefs and experiences.[47] The personal philosophy of the Judges also adds to the uncertainty and inconsistency in views.[48] In order to

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[42] Kevin Clancy et al, "Sentence Decision making: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity", 72 *J. Crim. L. & Criminology* 524 (1981) p 525

[43] Paul J. Hofer, Kevin R. Blackwell, R. Barry Ruback, "Effect of the Federal Sentencing Guidelines on Interjudge Sentencing Disparity", 90 *J. Crim. L. & Criminology* 239 (1999-2000), p 241

[44] Shlomo Shoham, "Sentencing Policy of Criminal Courts in Israel", 50 *J. Crim. L. & Criminology* 327 (1959-1960), p 327

[45] *Ibid.*

[46] *Ruth Kannai* "The Judge's Discretion In Sentencing: Israel's Basic Laws And Supreme Court Decisions" 30 *Isr. L. Rev*. 276 1996, p 281

[47] Hall aptly articulates this weakness:

> "Sentencing is not a rational mechanical process; it is a human process and subject to all the frailties of the human mind. A wide variety of factors, including the Judge's background, experience, social values, moral outlook, penal philosophy and views as to the merits or demerits of a particular penalty influence the sentencing decision."

See Geoff Hall, *Sentencing Law and Practice*, (Wellington: LexisNexis, 2004) at [2.1.]. See also Geoff Hall "Reducing Disparity by Judicial Self-Regulation: Sentencing Factors and Guideline Judgments" (1991) 14 *NZULR* 208.

[48] Benjamin Cardozo, *The Nature of the Judicial Process – Lecture I*, (USA: Yale University Press, 1921), put it aptly thus :

> "There is in each of us a stream of tendency, whether you choose to call it philosophy or not , which gives coherence and direct ion in thought and act ion. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions …It is often through these sub- conscious forces that Judges are kept consistent with themselves, and inconsistent with one another."

safeguard the rule of law, [therefore] discretion must be limited, structured, and controlled.[49]

In a common law country like India, where sentencing guidelines are not existing, the above observations appear more prominent. Only in terms of judicial guidelines and *ratio decidendi* that the structure of sentencing policy is found in India. Appellate courts are responsible for monitoring sentencing practices in the courts of first instance and for developing sentencing policy for those courts. These twin roles are performed by the appellate courts in the course of their determining appeals. Some reported appellate judgments and unreported decisions present comprehensive analyses of the court's deliberations and, accordingly, offer insight into the court's exercising of the sentencing discretion.[50]

Reforms in the sentencing policy are, therefore, on the cards in all the jurisdictions to which India is no exception.[51]

The title ***"Law and Policy Relating to Sentencing in India"*** has three components in it. Sentencing is not only what happens at the trial and what punishment the convict is awarded with, it is also about how the legislature deals with particular criminal phenomena.[52] The province of legislature reaches to sentencing

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[49] *Supra* note 46 at p 279

[50] Alfred Blumstein David P. Farrington, *Research in Criminology* 1st ed., (New York: Springer-Verlag, Inc, 1989), p 7

[51] See Michael Tonry, *Sentencing Matters*, (New York: Oxford University Press, 1996), at 4, where he observes

> "Penal abolitionists, humanitarians, and political liberals typically want reduced severity. Law enforcement officials, victims groups, and political conservatives want tougher penalties. Academics, civil rights advocates, and civil libertarians want them made fairer and want racial, sexual, and other unwarranted disparities reduced. Utilitarians and crime-control spokesmen want them made more effective. Nearly all want sentencing made more consistent, whether in the name of justice, efficiency, effectiveness, or economy."

[52] *Cf* Srijoni Sen, Sakshi where they observe that,

> [a]cademic approaches to criminal justice reform in India reflect a similar blind spot where legislative prescription of punishment is concerned. The existing dialogue devotes most of its time bemoaning unbridled judicial discretion instead, with the recommendations tending to move straight to sentencing standards for judges. Judicial decisions too have only pointed to the paucity of sentencing guidelines without explicitly stating, or even recognising, the need for similar guidelines to Parliament to formulate a penal policy
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> ***
>
> A responsive penal system requires one or more philosophical justifications for a punishment situated in a specific social and political context. Little or no thought, however, has gone into Parliament's role in the determination of punishments, and whether it responsibly addresses questions of proportionality, fairness in choice of punishment, and the social impact of the chosen punishment.

See Srijoni Sen, Sakshi, "Making the Punishment Fit the Crime How Do Lawmakers Decide?" *Economic & Political Weekly*, Vol.LII, No. 8, February 25, 2017

policy in two ways- criminalizing a particular conduct[53] (which includes decriminalizing also[54]) and *secondly* enhancing punishment for already criminalized conduct.[55] Generally the wisdom of legislature cannot be questioned in respect of its sentencing policy concerning crimes or criminals, unless the penal policy is arbitrarily disproportionate.[56] Once the penal policy is, therefore, decided by the legislature, the business of the judiciary starts in sentencing policy. The judge has to satisfy himself of the guilt and deliver verdict choosing punishment from the ranges fixed by the legislature.[57] In the absence of the sentencing guidelines, this exercise calls for a great skill since the punishment has to be individualized.[58] Proportionality between crime and criminal has to be struck by the presiding officer.[59] Once the judicial mind finalizes the sentences,[60] the convict is required to undergo the same. The execution of sentences, however, falls within the domain of executive, a third intermediary. Not only is the execution, the executive is also conferred with the power of interference in the judicially awarded sentences. By exercising their constitutional powers[61] and powers under the criminal law,[62] the executive may pardon, remit, reprieve commute

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[53] As for example by Criminal Law Amendment Act, 2013, new offences like, stalking, voyeurism, sexual assault etc are created to deal with rampant situation.

[54] As for example, legislature is seriously thinking of decriminalizing offences such as sections 377 and 309 of the Indian penal code on the basis of human rights concerns.

[55] As for example by Criminal Law Amendment Act, 2013 punishment for rape has been enhanced up to imprisonment for life and death depending upon the nature of crimes. Similarly outraging the modest of women is now punishable up to 3 years imprisonment which may extend up to 7 years.

[56] See *Vikram Singh @ Vicky & Anr. v. Union of India & Ors* (decided on August 21, 2015) available at http://judis.nic.in/supremecourt/imgs1.aspx?filename=42876,

[57] Preetha S observes

> The I.P.C. does not lay down the sentencing policy to be followed with respect to the offences, but leaves it to the discretion of the judge. Discretion oriented sentencing is idealistic in spirit as it enables the court to individualise the penal measures in its proper sense.

See Preetha S "A Comment on Baldev Singh & Others V. State of Punjab" *Journal of Indian Law And Society,* Vol. 2 : Monsoon, p 383 available at http://web.archive.org/web /20160116050710/ http://jils.ac.in / wp-content/uploads/2011/12/Preetha-S.pdf

[58] For the meaning of Individualisation of penal treatment see Mohammad Akram, "Individualisation of Sentencing" *Journal of Indian Law Institute*, Vol. 30: 2 , 1988, p 196.

Cf Sheldon Glueck, "Principles of a Rational Penal Code", 41 *Har. Law. Review* (1928), p.467 where he observes

> "Legislative prescription (in advance) of detailed degrees of offences is individualization of acts and not of human beings and is therefore, bound to be inefficient. Judicial individualization without adequate facilities in aid of the court is bound to deteriorate into a mechanical process of application of-certain rules of thumb or of implied or expressed prejudices".

[59] See *Earabhadrappa v. State of Karnataka* A.I.R. 1983 S.C. 446

[60] In *Lehna v. State of Haryana* ((2002) 3 SCC 76) a three-Judge Bench observed as

> "…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."

[61] See Articles 72 and 161 of the Constitution of India, 1950

[62] See sections 432, 433, 433A of Code Of Criminal Procedure, 1973

the sentences. Thus, the sentencing policy includes the interrelationship of all the three organs. For the purpose of the present research, however, the essential focus is on sentencing policy as it obtains at judicial stage and execution thereof. It is needless, however, to mention that sentencing as obtains at legislative level cannot be lost sight of.

The system of sentencing in India suffers from certain drawbacks.[63] Many of the commissions[64] have also advocated for urgent reforms in sentencing system. Each drawback is worth a sea of literature and hundreds of doctoral thesis. However, in this research endeavor, only few major academic deliberations are intended, i.e., unguided discretion in sentencing resulting is disparity of sentences for almost same offences,[65] problems of death penalty,[66] uncertain interpretation of life imprisonment,[67] clemency and concessionary sentencing,[68] alternative sentencing[69] and aftermath of progressive interpretation of compensation in criminal cases.[70]

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[63] Such drawbacks have been exposed by judiciary from time to time in the form of observations, directions to Law Commissions of India to study the situations and report, directions to government of India to take appropriate steps and in extreme cases, by interpreting the existing words of legislature to incorporate the 'judicial intent '

[64] See Law Commission of India 187th Report, (2003), Law Commission of India 237th Report, (2011), Law Commission of India 243th Report, (2012), Law Commission of India 35th Report, (1967), Law Commission of India 39th Report, (1968), Law Commission of India 42nd Report, (1971), Law Commission of India 47th Report, (1972), Law Commission of India 84th Report, (1980), Law Commission of India 156th Report, (1997) Law Commission of India 154th Report, (1996), Law Commission of India, 226th Report, (2009). government of India, Report: Committee on Reforms of Criminal Justice System (Ministry of Home Affairs, March, 2003) Government of India, Report: The Commission to review the working of the Constitution (Ministry of Home Affairs, 2002) Government of India, Report: Second Administrative Reforms Commission , (June 2007) Fifth Report; Government of India, Report: Amendment To Criminal Law under the chairmanship of Justice J.S Verma (Ministry of Home Affairs, 2013)

[65] See Chapter III *Infra* on "Sentencing Discretion in India: Arbitrary Sentencing and Modalities to Arrest Arbitrariness- A Comparative Study

[66] See Chapter IV *Infra* on "A Critical Analysis of Capital Sentencing: Riddles, Riders and Resolutions"

[67] See Chapter V *Infra* on "Life Imprisonment and Sentencing Policy: Judicial Codification of Life Imprisonment and Fallouts Thereof"

[68] See Chapter VI *Infra* on "Clemency, Concessionary and Short Sentencing: Executive Interference in Judicial Process; Two Sides of the Same Coin or Tug of War Between?"

[69] See Chapter VI *Infra* on "Alternate Sentencing and Alternatives to Imprisonment: Towards Restorative Justice and Rehabilitative Sentencing."

[70] See Chapter VI *Infra* on "Compensation in Criminal Cases- An Indispensable Exercise in Sentencing Policy- Emerging Legislative Trends and Judicial Expositions."
It may be noted that, this research does not undertake to elaborate victims' compensation from the point of constitutional commitments and tortuous liabilities. Compensation for violation of fundamental and other constitutional rights can be claimed under aegis of constitutionally developed compensatory jurisprudence under article 32 or 226 or both via article 21. The position seems to be almost settled except for academic renovation. The primary focus of this research is compensation to be paid under criminal law which redresses purely private wrongs, unless such private wrongs are sponsored by state. Recent Supreme Court pronouncements have brought economic jolts in sentencing offenders.

The IPC which is kingpin of criminal justice system in India prescribes only the maximum punishments for the offences. In few cases minimum punishment is also prescribed. The Judge, therefore, exercises wide discretion within the statutory limits. In the absence of statutory guidelines to regulate his discretion there is, eventually, much variance in the matter of sentencing.[71] In *State Government of Delhi v. Mukesh*[72] the honorable court has succinctly observed that

> "Penology and sentencing in our country has remained an underdeveloped concept. In several jurisdictions across the world, sentencing choices are guided not only by the subjective "facts of the case" but a whole variety of factors, such as social investigation of the offender, his family background, his social environment, behaviour, tendencies, etc…"

Western countries have gone miles ahead in disciplining judicial discretion by way of sentencing guidelines which may be *Voluntary sentencing guidelines, Presumptive sentencing guidelines* (*Grid sentencing*), *Mandatory minimum sentencing laws, and Guideline judgments.*[73] Therefore, there is an urgent need in India to bring sentencing guidelines on books.[74] Permanent Sentencing Councils may be constituted for the purpose of prescribing sentencing guidelines.

Death penalty has acquired a primary focus in academics and judiciary not for its retention or abolition movements but more for inconsistent, arbitrary and discriminatory awards. Death penalty is even labeled as a 'lethal lottery'[75] and product of the judge centric exercise.[76] The American Bar association even went to the extent of observing that '*Today, administration of the death penalty, far from*

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[71] Government of India, Report: Committee on Reforms of Criminal Justice System (2003), p 288

[72] Available at https://indiankanoon.org/doc/158304400/

[73] Judgments handed down by appeal courts setting out principles of sentencing and the range of penalties that may be applied to a given offence are known as guideline judgments. Indian judicial system substantially rests on this principle. Doctrine of precedent is the offshoot of this method. However, doctrine of precedent can be substantially weakened by hundred and one ways. The episode of Bachhan sigh and Macchi singh cases in respect of death penalty best speak the status of interpretation of Supreme Court judgments by the lower courts.

[74] then Law Minister of India M Veerappa Moily commentated in 2009 that "We are working on the uniform sentencing policy which is on the lines of the ones in place in the United States and the United Kingdom"

[75] Amnesty international India and PUCL "lethal lottery the death penalty in India: A study of Supreme Court judgments in death penalty cases 1950-2006" May 2008. Available at file:///C:/Users/Privin/Downloads/asa200072008eng%20(9).pdf. In this report the Supreme Court's judgments concerning death penalty were surveyed since from 1950 to 2006 and concluded that there is urgent need to abolish death penalty in India for more than one reasons, reasons being in consonance well established principle of criminal law and human rights tenets.

[76] In *Swamy Shraddhananda v. State of Karnataka,* (2008) 13 SCC 767, the Supreme Court observed that

> "[t]he confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the judges constituting the bench."

being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency.[77]

The question of arbitrariness and judicial indiscipline was further triggered of when a group of 14 judges[78] of eminence has, in an appeal to the President of India, sought his intervention to commute death penalty[79] awarded by them on the basis of *per incurium* judgment![80] Therefore, there is a pressing need to restate the law relating to death penalty in India.

The second lethal punishment proclaimed by criminal laws in India is life imprisonment. Courts have construed life imprisonment to be imprisonment till natural life. However, executive interference in the form of remission or pardon can substantially reduce the sentence.[81] The meaning of life imprisonment which was otherwise settled with the pronouncement of *Gopal Vinayak Godse*[82] became predominantly controversial with certain pronouncements[83] in which Supreme Court

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[77]Quoted in Struck by Lightning: The Continuing Arbitrariness of the Death Penalty Thirty-Five Years After Its Re-instatement in 1976 A Report of the Death Penalty Information Center by Richard C. Dieter, Executive Director Washington, DC July 2011

[78] Hon'ble judges who signed the petition are C P B Sawant, Justice A P Shah, Justice Bilani Nazaki, Justice P K Misra, Justice Hosbet Suresh, Justice Panand Jain, JusticePrabha Sridenvan, Justice K P Sivaubranamium, Justice P C Jain, Justice S N Bhargava, Justice B G Kolse-Patil , Justice Ranvir Sahai Verma, Justice B A Khan and Justice B H Malapalle. The unusual appeal does not stem from their principled opposition to the death penalty, though some of them may believe in its abolition personally. They have appealed to the President because these 13 convicts were erroneously sentenced to death according to the Supreme Court's own admission and are currently facing the threat of imminent execution. The Supreme Court, while deciding three recent cases, held that seven of its judgments awarding the death sentence were rendered per incuriam (meaning out of error or ignorance) and contrary to the binding dictum of "rarest of rare" category propounded in the Constitution Bench judgment in *Bachan Singh v. State of Punjab* (1980) 2 SCC 684. The three recent cases were *Santosh Kumar Bariyar v. State of Maharashtra* (2009) 6 SCC 498, *Dilip Tiwari v. State of Maharashtra* (2010) 1 SCC 775, and *Rajesh Kumar v. State* (2011) 13 SCC 706.

[79] V Venkatesan "A Case Against Death Penalty" *Frontline,* September 7, 2012

[80] See *Dayanidhi Bisoi v. State of Orissa* AIR 2003 SC 3915, *Mohan Anna Chavan v. State of Maharashtra* (CRIMINAL APPEAL NO. 680 OF 2007), *Shivaji @ Dadya Shankar Alhat v. The State of Maharashtra* (2008) 15 SCC 269, *Bantu v. State of U.P* (2008)11SCC 113, *State of U.P. v. Sattan @ Satyendra and Ors.* (2009) 4SCC 736, *Saibanna v. State of Karnataka* 2005 (2) ALD (Cri) 39, *Ankush Maruti Shinde and Ors. v. State of Maharashtra* AIR 2009 SC 2609. All these cases were declared *per incuriam.* All these decision based their reasoning on the *Ravji alias Ram Chandra v. State of Rajasthan* (1996) 2 SCC 175 which was later declared as *per incuriam* in *Sangeet v. State of Haryana* (2013) 2 SCC 452.

[81] On a careful study of Sections 45 and 47 of the I.P.C. and Sections 432, 433 and 433A Cr.P.C., it can be clearly seen that a prisoner sentenced to life sentence has to serve at least 14 years in prison. By way of routine remission, prisoners with less serious offences and not hazardous to societal health are released on the 'conduct report' after 14 years with all remissions earned, even though the actual sentence of imprisonment is life imprisonment.

[82] *Gopal Vinayak Godse v. State of Maharashtra & Ors*. 1961 (3) SCR 440

[83] The development of life imprisonment is indented to be discussed in four phases: PHASE 1 Jagmohan Singh v. State of U.P (1973) 1 SCC 20; PHASE 2 *Dalbir Singh & Ors v. State of Punjab* 1979 AIR 1384; PHASE 3 *Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka* (2008) 13 SCC 767; PHASE 4 *Sriharan alias Murugan v. Union of India & Ors.* (2014) 4 SCC 242

went to define the meaning, span, length and content of life imprisonment. In Number of judgments the life imprisonment with minimum length to be served in prison for 20 years,[84] 30 years[85] 35 year[86]or life imprisonment without remission has been awarded.[87] However, when it was constitutionally being doubted [88] another constitutional bench[89] sealed the observation of *Swamy Shraddananda (2)*[90] which paved the way for a new chapter of determinate life imprisonments in Indian sentencing policy.

A country would be most imperfect and deficient in its political morality [91] if the prerogative power of mercy is not made available. Articles 72[92] and 161[93] of the Constitution of India, accordingly, confer the prerogative power of mercy on the President and the Governor, respectively. Though the constitutional prerogatives have been judicially codified by the Supreme Court in number of cases,[94] the powers are

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[84] In the following judgments the court directed that the appellant shall not be released from the prison unless she had served out at least 20 years of imprisonment including the period already undergone by the appellant.
Shri Bhagwan v. State of Rajasthan (2001) 6 SCC 296, *Prakash Dhawal Khairnar (Patil) vs. State of Maharashtra* AIR 2002 SC 340 342, State of Maharashtra *v. Sandeep @ Babloo Prakash Khairnar (Patil)* (2002) 2 SCC 35, *Ram Anup Singh and Ors. v. State of Bihar* (2002) 6 SCC 686. *Nazir Khan and Ors. v. State of Delhi* (2003) 8 SCC 461, *Ramraj @ Nanhoo @ Bihnu v. State of Chhattisgarh* (2010) 1 SCC 573

[85] In the following judgments the court directed that the appellant shall not be released from the prison unless she had served out at least 30 years of imprisonment Neel Kumar @ Anil Kumar vs. The State of Haryana (2012) 5 SCC 766. *Sandeep v. State of UP* (2012) 6 SCC 107, *Gurvail Singh @ Gala and Anr. v. State of Punjab* (2013) 2 SCC 713

[86] In *Haru Ghosh v. State of West Bengal*, (2009) 15. SCC 551, the court directed that that the life imprisonment in case of the appellant/accused shall not be less than 35 years of actual jail sentence, meaning thereby, the appellant/accused would have to remain in jail for minimum 35 years.

[87] In *Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka* AIR 2008 SC 3040 directed that "he shall not be released from prison till the rest of his life"

[88] See *Sangeet and Anr. v. State of Haryana* (2013) 2 SCC 452

[89] *Union of India v. Sriharan @ Murugan & Ors.* (2014) 4 SCC 242

[90] *Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka* (2008) 13 SCC 767

[91] See *Epuru Sudhakar v. Govt. of A.P* (2006) 8 SCC 161

[92] Article 72 reads:

> "(1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence—(*a*) in all cases where the punishment or sentence is by a Court Martial; (*b*) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends; (*c*) in all cases where the sentence is a sentence of death."

[93] Article 161 reads

> "The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends."

[94] See *Maru Ram v. Union of India* 1981 (1) SCC 107, *Satpal v. State of Haryana* 2000 (5) SCC 170, *Kehar Singh v. Union of India* 1989(1) SCC 204

still plagued with number of questions. [95]

The remission powers conferred upon the executive by criminal law[96] of the land has also been in question for indiscriminate use. Benefits of remission especially for life convicts have put the remission power as centre of criticism by penologists. Though Procedural and substantive check on arbitrary remissions was imposed,[97] the efficacy of such restriction is to be tested. Short sentencing methodologies adopted by state governments are also under scanner. Jail authorities have declared a remission of 3 months a year for convicts who practice yoga in jails![98] From the standpoint of rehabilitation, such resolutions may appear sound; however, they raise a serious question of efficacy of the sentences passed by the judiciary.

Sentences of rigorous imprisonment or other are too insensitive to the highly delicate and subtle operation expected of a sentencing Judge.[99] Punishment, therefore, should only be administered if it results in an overall benefit to society.[100]

Not only the retributive requirements of the state which prosecutes, but also the needs of the victims and offenders be balanced to attain complete justice. This process is taken care of by a mechanism known as restorative justice. Restorative justice has received international recognition[101] and has been widely in practice though forms and formats differ from one jurisdiction to another. In India too the traces of Restorative justice are found albeit in non standardized forms. Alternatives to imprisonment are available at all the three stages: pre-trial,[102] sentencing[103] and

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[95] See *Shatrughan Chauhan v. Union of India and others* (2014) 3 SCC 1, for problems of mercy jurisdictions. S*ee also* Bikram Jeet Batra "'Court' of Last Resort *A Study of Constitutional Clemency for Capital Crimes in India"* WORKING PAPER SERIES, Centre for the Study of Law and Governance Jawaharlal Nehru University, New Delhi, available at http://www.jnu.ac.in /CSLG/ working Paper/11-Court%20(Bikram).pdf

[96] Sections 432, 433 and 433A of Code of criminal Procedure, 1973

[97] *Sangeet & Anr v. State of Haryana* 2013 (2) SCC 452

[98] Rashmi Rajput, "Good marks in yoga will allow prisoners three-month remission in Maharashtra", *Indian Express*, January 17, 2016

[99] Per Justice V.R. Krishna Iyer in *Mohammad Giasuddin v. State of Andhra Pradesh* 1977 AIR 1926

[100] See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation,* (London: The Athlone Press 1970)

[101] In this context, the United Nations Standard Minimum Rules For Non Custodial Measures (Referred as The Tokyo Rules) 1990; United Nations Minimum Rules For The Administration Of Juvenile Justice(Referred here as Beijing Rules), 1985, and Declaration Of Basic Principles Of Justice For Victims Of Crime And Abuse Of Power 1985, are the basic international legal Instruments constituting the legal regime for alternative sentencing at international plane as a model for variety of jurisdiction to follow.

[102] Pre trial alternatives include, interalia, bails, time-limit for detention, plea bargaining, free legal aid, compounding of offences, decriminalization of offences, diversion, administrative fines/ non penal fines, juvenile justice administration etc.

[103] Sentencing stage alternatives include, fines, admonitions, conditional discharges, compensation, probation, community based services etc.

post sentencing stage.[104]

There are several reasons why we would blame young people less than adults convicted of the same crime and therefore punish them more leniently.[105] India has, therefore on the lines of international conventions, provides for different sentencing scheme for the juveniles. Juvenile Justice Act 1986, which was amended twice before it was given a go by, provided a alternative sentencing mechanism for young delinquents which mechanism was heavily bent upon restorative justice rather than punitive aspects. However, the increasing trend of heinous crimes in which participation of young children was considerably high prompted the legislature to bring new law on statue book, namely Juvenile Justice (Care and Protection of Children) 2015, balancing the restorative justice for the children and societal cry for proportionate sentencing.

All criminals cannot be weighed in the same scale of justice when their culpability is not same. One of the purposes of the criminal law is to restore the criminal to the society with an implied guarantee that such criminal will not reoffend. This task is better discharged with Probation of Offenders Act 1958. The essential features of this Act in terms of restorative justice and just sentencing are to be noted.

The alternatives of amicable settlements through compounding and plea bargaining have also raised more doubts than the solutions. The new practice of including community service as method of correcting wrong is also questionable in the given circumstances.

Victim compensation is a social responsibility of the criminal[106] and an obligation of the State.[107] In a number of cases[108] Supreme Court has redefined the

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[104] Post sentencing stage include, parole, pardon, remission of sentences, temporary release mechanisms, open prisons, rehabilitative measures etc.

[105] Max Lowenstein *Sentencing Young Offenders* in Julian V. Roberts (eds.) *Exploring Sentencing Practice in England and Wales,*(Palgrave: Macmillan, 2015) p 251

[106] *Maru Ram & Ors. v. Union of India and Ors*. (1981) 1 SCC 107

[107] Government of India, Report: *Committee on Reforms of Criminal Justice System* (Ministry of Home Affairs, March, 2003) *See also* Law Commission of India 154th Report, (1996), Government of India, Report: *The Commission to review the working of the Constitution* (Ministry of Home Affairs, 2002) which have advocated victim-orientation to criminal justice administration and victim compensation.

[108] See the following judgments and writings touching upon the aspects of compensation although on a different note and context; *Nilbati Behara v. State of Orissa* AIR 1993 SC 1960, *Saheli, A Women's Resources Centre v. Comm. Police, Delhi* (1990) 1 SCC 422, *Peoples Union for Democratic Right v. State of Bihar* (1987)1 SCC 265, *Bhim Singh v. State of Jammu and Kashmir* AIR 1986 SC 494 see also writings on victim compensation- Shephali Yadav, "Compensation: A Developing Means of Social Defence", XXIII *C.U.L.R*., (1999); Gurpal Singh, "Compensating Victims of Crime", *Journal of the Bar Council of India,* Vol. 9, (1982); Girish, "Compensating the Victims of Human Rights Violations- Need for legislation" *The Academy Law Review*, Vol. XXII, No.1 & 2, (1998); Paras Diwan, *"Human Rights and the Law- Universal and India*", 1st ed., (New Delhi: Deep and Deep Publications, 1998); K.L.Vibute, "Compensating Victims of Crime in India; An Appraisal", 32 *J.I.L.I.,* (1990).

need for a separate Victim Compensation. However, in *Ankush Shivaji Gaikwad v. State of Maharashtra*[109] Supreme Court of India held that

> "While the award or refusal of compensation under Section 357 of Code of Criminal Procedure, in a particular case may be within the Court's discretion, *there exists a mandatory duty on the Court to apply its mind to the question in every criminal case*. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation"[110]

This case has brought a sudden progressive turn in the economics of sentencing policy in India.[111] However, lower courts are still hanging in the same chamber of ignorance and ill interpretation despite this judgment.

1.1 Problem Statement/ Research Question

The 'research question' basically surrounds the lack of sentencing policy in India. Though the judiciary has highlighted the dearth of uniform sentencing policy in sentencing, which is further underscored by the Law Commission Reports, nothing substantial appears to have been done by the legislature. Judiciary has tried its hand in bringing consistency in sentencing in the form of judicial decisions. This attempt of the judiciary has put the very institution in question, since in the process of individualisation of punishment, judiciary has bleeded disparity and inconsistency. It is this attitude that is in question for research. The death penalty regime is plagued by disparity though recent pronouncements have tried to bring transparency in it. This inconstancy and disparity is the subject matter of research. The otherwise settled meaning of life imprisonment has received different dimensions provoking judiciary to import its own meaning sidelining the executives. This dimension of tug of war between judiciary and executive in terms of clemency and concessionary sentencing is under study in this research. The emerging concepts of victim compensation and alternative sentencing which are judicial innovations supplemented by legislative response are subject matter of problem statement in this research.

All these aspects of sentencing prompted the researcher to undertake a thorough investigation in to these aspects culminating in possible solutions

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[109] (2013) 6 SCC 770

[110] *Ibid* Para 62

[111] See Praveen Patil "Power of the Court to Award Compensation in Criminal Cases- Revisited? A Critical Appraisal of Ankush Shivaji Gaikwad V. State of Maharashtra", *JSSLC-Online Journal*, Vol. II, Issue-II, 2014. See also Praveen Patil "Rehabilitative Sentencing In Rape Cases: An Appraisal of Tekan Alias Tekram V. State of Madhya Pradesh" *JSSJLSR-Online Journal*, Vol. IV, Issue-I, 2016.

1.2 Hypotheses

The following hypotheses are formed for the present research

1. That the unstructured discretion in sentencing judges has resulted in unwarranted disparity, discrimination and inconsistency in sentencing
2. That the death penalty in India has become judge centric and the rarest of rare doctrine has been a rolling snowball of bleeding disparity
3. That the judiciary has rewritten the meaning of life imprisonment with structured life sentences
4. That the clemency jurisdiction and remission and commutation powers coupled with short sentencing schemes have failed to create a uniform pattern in India brining the disparity in this jurisdiction too.
5. That the alternate sentencing and alternatives to imprisonment have been sufficiently provided in the sentencing policy in India
6. That the victim compensation in all criminal cases has become indispensible in sentencing policy in India

1.3 Objectives of the Study

The primary objective of this study is to examine the sentencing policy and law in India and abroad. The other objectives of this study are

1. To study the sentencing policy and discretion in India and other advanced countries like the United States of America and United Kingdom and suggest modalities to arrest arbitrariness by suggesting a possible experimentation of sentencing councils in India.
2. To study the problems and perspectives of death penalty and ever growing judicial misinterpretation
3. To bring out the critical analysis of inconsistent interpretation of 'life imprisonment' and the tussle between legislature and judiciary in assuming the final authority over sentencing the offenders to life imprisonment
4. To underline the interrelationship between clemency, concessionary and short sentencing on the one hand and their effect of judicial sentences on the other hand.
5. To study the developments in alternative sentencing jurisprudence at national and international conspectus and its percolation in Indian sentencing policy.

6. To analyse the provisions of victim compensation which has been legislatively enacted and judicially codified as an essential exercise in sentencing and to examine victim rehabilitation and offender rehabilitation as primary orientation of sentencing policy

1.4 Methodology

The methodology adopted for the study is purely doctrinal. The whole work involves primarily the content analysis of the provisions of Code of Criminal Procedure, 1973, Indian Penal Code, 1860, constitution of India, substantive laws, special laws and judicial pronouncements. Surveys of judicial decisions which are game changers in sentencing policy have been extensively analyzed. Substantial focus of this research being 'sentencing attitude of the courts', it goes without saying that case laws by apex courts are cynosure in this research. The researcher has taken the aid of the Law Commission of India Reports, Report of other Commissions on criminal law, leading text books, journals, bare acts, news paper, magazines, periodicals and internet sources etc.

1.5 Importance of the Study

This study will be useful to academics, administrators, policy-makers, policy-controllers, planners, legislators, lawyers, research students, social activists and others. It is expected to be useful for the judges also as the study involves critical evaluation of sentencing policy in India. The importance of the study lies in its pristine purpose viz., to make an original contribution to the discipline of law.

1.6 The Scheme of the Study

I. Introduction

The first chapter deals with general introduction, problem statement, methodology adopted for the research, importance of the study, limitation of the study etc.

Chapter II - Conceptualizing sentencing policy in India: Problems and Perspectives

This chapter explains the concept of sentencing India. The detailed procedures adopted form lower courts to Supreme Court of India are mentioned. The procedural safeguards at sentencing policy are also detailed out. The competing norms in sentencing policy are referred to. Stages of appeal and executive interference are also mentioned.

Chapter III - Sentencing Discretion in India: Arbitrary Sentencing and Modalities to Arrest Arbitrariness- A Comparative Study

The concept like sentencing discretion, sentencing disparity, arbitrary sentencing, judge centric sentencing etc. is discussed. The methods to bring sentencing discipline are explained. Reference is made to the modalities adopted in western countries to arrest sentencing disparity. Law commission reports highlighting this issue are referred to. Recent criminal law amendment Act, 2013 and other allied laws which try to discipline sentencing policy are explained and criticized.

Chapter IV- A Critical Analysis of Capital Sentencing: Riddles, Riders and Resolutions

This chapter deals with procedural disparity and judge centric approach in handling death penalties. Why death is different calling for different sentencing policy has been discussed hereunder. The case laws in which judges failed to understand the true sentencing policy in death sentences have been elaborated. Instead of arguing for abolition or retention sides, this chapter argues as to how a different sentencing policy can be adopted to eliminate disparity and seek social approval for death penalty.

Chapter V - Life Imprisonment and Sentencing Policy: Judicial Codification of Life Imprisonment and Fallouts Thereof

In this chapter, the meaning of the term life imprisonment as intended by the legislature and as perceived by the judiciary is explored. The impact of remission rules on the meaning, content and span of life is unfolded. Various case laws which have changed the dimensions of life imprisonment are discussed. The judicial codification of life imprisonment in phase wise manner is elaborated. The difficulties in working of judicially crafted life imprisonment have been analysed.

Chapter VI - Clemency, Concessionary and Short Sentencing: Executive Interference in Judicial Process; Two Sides of the Same Coin or Tug of War Between?

In this chapter the sentencing policy vested in executives and constitutional authorities have been discussed. The interrelation between constitutional powers and criminal law empowerments has been juxtapositioned. The scope of clemency and concessionary sentencing in terms of commutation and remission has been discussed. The judicial supervision over such powers is also appraised with criticism. The short sentencing schemes framed by state governments in jail manuals and executive instruction have also been referred to.

Chapter VII- Alternate Sentencing Alternatives to Imprisonment and Rehabilitative Sentencing: Towards Restorative Justice

This chapter deals with Alternate Sentencing and Alternatives to Imprisonment. Alternatives like plea bargaining, compounding of offences, probation, juvenile sentencing, admonitions, conditional releases, parole, community services etc, are discussed. The success or other sides of these aspects have been analyzed.

Chapter VIII- Compensation in Criminal Cases- An Indispensable Exercise in Sentencing Policy- Emerging Legislative Trends and Judicial Expositions

In this chapter, the fines, victim compensation, recovery of costs, economics of sentencing policy etc have been discussed. The phase wise development of victim compensation till date has been carved out. The judicial intolerance towards abuse of process of criminal courts has been noticed. The trend to heavily fine the crimes by legislature has also been detailed out.

Chapter IX- Conclusion

This chapter provides the major findings of the study and offers some pertinent suggestions for streamlining the Indian sentencing policy.

CHAPTER - II

CONCEPTUALISING SENTENCING POLICY IN INDIA: PROBLEMS AND PERSPECTIVES

> . *"....Trying a man is easy, as easy as falling off a log, compared with deciding what to do with him when he has been found guilty*[1]
>
> Henry Alfred Mc Cardie

2.1 Introduction

Sentencing in India is governed by substantive criminal laws,[2] special legislations creating special offence,[3] procedural laws, major among which is Criminal Procedure Code 1973,[4] Constitution of India[5] judicial interpretation and guidelines[6] laid down by the superior courts[7] etc.

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[1] Quoted with approval in *Jasvir Kaur v. State of Punjab* (2013) 11 SCC 401 : see also *Rekha Sharma v. Central Bureau of Investigation* 218 (2015) DLT 1

[2] As for example, Indian Penal code which prescribes various punishments ranging from fine to death penalty. See sections 53 to 75 of the IPC.

[3] As for example, Prevention of Corruption Act 1988, Protection of Children from Sexual Offences Act, 2012, Maharashtra Organized Crimes Act 1999, creates separate offences and prescribes different procedure for trial.

[4] Criminal Procedure Code 1973 is a procedural law pregnant with substantive rights, which governs almost all types trials of offences. The said code classifies the offences depending upon their nature as bailable non bailable, compoundable non compoundable, cognizable and non cognizable. The code provides for four types of trials and the procedure for the same. Further, this code establishes various categories of courts by which offences are triable. The usual provisions of appeal review and revision are provided in the code. This code is a *Magana Carta* of criminal trials in India. The provisions of this Act are applicable to all trials unless specifically excluded.

[5] By virtue of Article 72 and 161, President of India and Governors of states can interfere into judicially awarded sentences, by way of pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence, respecting each other's constitutional limitations. Further the sentence has to withstand the test of reasonableness ingrained in Article 21 of the constitution.

[6] In India we do not have sentencing guidelines issued by the courts as is prevailing in Canada and New Zealand, England, Western Australia and New South Wales etc, where apex courts issue guidelines in cases setting out principles of sentencing and the range of penalties that may be applied to a given offence. However, in some of the offences like, murder, rape, dowry death etc, Supreme Court has tried to lay down guidelines to be followed by the lower courts. However these guidelines, as the research would unfold, have been not followed for number of reasons. Further not for all offences that the courts have laid down judgment guidelines. The position is best described by S.B. Sinha, J. in *State of Punjab v. Prem Sagar & Ors*, (2008) 7 S.C.C. 550, where he observes

> "In our judicial system, we have not been able to develop legal principles as regards sentencing. The superior courts except making observations with regard to the purport and object for which punishment is imposed upon an offender, had not issued any guidelines. Other developed countries have done so…"

[7] The Constitution Bench in *Union of India v. Raghubir Singh (Dead) by L.Rs* (1989) 2 SCC 754 noted about the nature and scope of Judicial review in India as

> ".....It used to be disputed that Judges make law. Today, it is no longer a matter or doubt that a substantial volume of the law governing the lives of citizens and regulating the functions of the State flows from the decisions of the superior courts." There was a time, observed Lord Held, "when it was thought almost indecent to suggest that Judges make law--they only declare it.....But we do not believe in fairy tales anymore."

There is great interplay between judiciary and other organs in respect of sentencing in India. Judiciary proceeds on the basis of parameters set for the crimes. The legislature defines offences and prescribes the punishment for the same.[8] It lays down ingredients to be fulfilled before the courts sentence. However, once the ingredients of the offences are fulfilled, the courts have enough flexibility to- select appropriate punishment for the crime. In the absence of sentencing guidelines, judges in India enjoy considerable discretion to fix the crimes in the range of punishments provided. Judges in India enjoy sentencing discretion at two levels. *Firstly*, whether to invoke or not the benefits of welfare legislation where alternative sentencing is provided is decided by the judges. As for example the Probation of Offenders Act, 1958 should be invoked or not for certain crimes is decided by the judges.[9] The second level discretion is when the judge does not invoke the benefits of welfare legislation but proceeds to punish him with traditional punishments. There the judge has again a considerably choice between minimum to maximum punishments or to decide what punishment when only maximum is prescribed.[10] The sentencing policy in India is thus mainly based on the individualisation of punishment. In this chapter, therefore, an attempt has been made to discuss the process of sentencing, the matrix of punishments, checks and balances in punishments and sentencing safeguards etc.

2.2 The Matrix of Punishment in India

The quantum of punishment in India is essential decided by substantive laws depending upon the gravity of the crime. Indian Penal Code, 1860 is a kingpin in this

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[8] For the role of Parilament in prescribing punishments see the Constitutional bench of the Supreme Court in *Vikram Singh @ Vicky & Anr. v. Union of India & Ors* (2015) available at http://judis.nic.in/supremecourt/imgs1.aspx?filename=42876

[9] Though section 3 and 4 of the Probation of Offenders Act, 1958 impose obligation on the judge to consider the benefits of those sections at the time of sentencing, such obligation is not mandatory in view of the word 'may'. The position is different in respect of accused below 21 years. They are governed by Section 6 of the said Act. However, even section 6 confers wide discretion not to invoke the benefits in view of "it would not be desirable to deal with him under section 3 or section 4," appearing in the said section.

[10] Committee on Reforms of Criminal Justice system notes

> "The Judge has wide discretion in awarding the sentence within the statutory limits… [t]herefore each Judge exercises discretion accordingly to his own judgment. There is therefore no uniformity. Some Judges are lenient and some Judges are harsh. Exercise of unguided discretion is not good even if it is the Judge that exercises the discretion..."

See Government of India, Ministry of Home Affairs, Committee on Reforms of Criminal Justice System Report (2003), 170, available at http://www.mha.nic.in/hindi/sites/upload_files/mhahindi /files/ pdf/ criminal_justice_ system.pdf.

respect.[11] Section 53 of IPC prescribes five types of punishments namely,

1. Death penalty,
2. Imprisonment for life,
3. Imprisonment:
    a) Rigorous imprisonment
    b) Simple imprisonment
    c) Solitary imprisonment
4. Forfeiture of property
5. Fine

Death sentence is imposable in twelve offences.[12] Mandatory death sentences have been either read down[13] or declared unconstitutional.[14] Life imprisonment is imposable as highest punishment in term imprisonment[15] or as alternative to death sentence[16] with exception being section 311 of IPC, where life imprisonment is stand alone imprisonment.[17]

Imprisonment other than life imprisonment under the IPC is 20 years.[18] Imprisonment may be simple[19] or rigorous[20] or both.[21] Certain offences under the IPC

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[11] According to National Crimes Records Bureau total cases reported under IPC (Total Cognizable Crimes) were 2949400. As many as 4376699 cases were registered under special laws in 2015. See http://ncrb.gov.in/StatPublications/CII/CII2015/Table%20of%20Contents.htm

[12] Section 120B (criminal conspiracy to commit any of these offences), Section 121 (Treason, for waging war against the Government of India Section), 132 (Abetment of mutiny actually committed), Section 194 (Perjury resulting in the conviction and death of an innocent person Section), 195A (Threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent person), Section 302 (Murder), Section 305 (Abetment of a suicide by a minor, insane person or intoxicated person), Section 307(2) (Attempted murder by a serving life convict), Section 364A (Kidnapping for ransom), Section 376A (Rape and injury which causes death or leaves the woman in a persistent vegetative state), Section 376E (Certain repeat offenders in the context of rape), Section 396 (Dacoity with murder).

[13] *Indian Harm Reduction Network v. Union of India* https://indiankanoon.org/doc/993388/

[14] *Mithu* v. *State of Punjab* (1983) 2 SCC 277, similarly, Section 27(3) of the Arms Act has recently been struck down by the Supreme Court in *State of Punjab v. Dalbir Singh* (2012) 3 SCC 346. *See also* Justice S.B. Sinha "To Kill Or Not To Kill: The Unending Conundrum" *National Law School of India Review,* Vol. 24(L), 2012, Pp7-8

[15] See for example, section 376 as amended by Criminal Law Amendment Act, 2013, , sections 376D, 394, 396, 400, of IPC

[16] Under Section 302 (murder) and Section 121 (waging war against Government of India), 376-E, (punishment of repeat offenders), alternative punishments of death or imprisonment for life are available and these are the two sections, where the maximum punishments is death and the minimum is imprisonment for life.

[17] Section 311. Punishment:
" Whoever is thug shall be punished with [imprisonment for life] and shall also be liable to fine."

[18] Before the introduction of Criminal Law Amendment Act, 2013, the highest punishment in the term imprisonment was 14 years. By virtue of the said amendment, section 376 introduces 20 years as minimum term imprisonment for rape.

[19] In 22 sections of IPC the offences are punishable with simple imprisonment only. These are sections, 168,169,172,173,174,175,176,178,179,180,187,188,223,225A, 228 291,341,500,501,502,509,510.

[20] Rigorous imprisonment without the alternative of simple imprisonment is prescribed in the two sections i.e., sections 194 and 449. Life imprisonment is necessarily rigorous. See *Suresh v. State of Kerala* 2006 (1) KLT 78

[21] See section 60 of the Indian Penal Code,1860

are punishable with fine alone[22] some are punishable with fine as well as imprisonment;[23] and some are punishable with imprisonment or fine or both.[24] If fine is not so specified, the fine is unlimited, as per section 63, but it should not be excessive.[25] The age old provisions relating to fine need immediate revisions.[26] Solitary confinement is also a part of imprisonment. However, procedural safeguards have been introduced by the judiciary in the imposition of solitary confinement.[27]

The same four patterns of punishments are continued in other special laws with variations in degrees.[28] Therefore the above four punishments can be considered as set of punishments India believes in. Though suggestions were made to include other form of punishments in the existing structure,[29] no such suggestions have been

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[22] Sections 171-G, 171-H, 171-1, 278 and 283 Indian Penal Code, 1860

[23] Sections 153-A, I53-B, 302, 376, and 494 of Indian Penal Code, 1860

[24] Offences under most of the sections including sections 378, 383, 497, IPC

[25] G.Kameswari and V. Nageswara Rao "The Sentencing Process - Problems and Perspectives" *Journal of The Indian Law Institute,* Vol. 41, 1999, p 455

[26] *Supra* note 10 it was observed that

> "14.9.1 So far as sentences of fine are concerned, time has come to have a fresh look on the amounts of fine mentioned in the IPC and the mode of recovery."
>
> "14.9.3 The amount of fine as fixed in 1860 has not at all been revised. We live in an age of galloping inflation. Money value has gone down. Incomes have increased and crime has become low risk and high return adventure particularly in matters relating to economic offences and offences like misappropriation breach of trust and cheating. …"

[27] See *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1, *Dharam Pal v. State of Haryana Etc* (2015) http://indiankanoon.org/doc/153007779/

[28] The Criminal Law Amendment Act 2013 introduces a new life imprisonment with a rider that life imprisonment shall mean imprisonment till the reminder of the life. Similar rigorous imprisonment of 20 years is introduced. Mandatory compensation is also introduced.

[29] *Supra* note 10 where it is observed that

> "14.5.1 Different kinds of punishments are the need of the hour. Disqualification from holding public office, removal from the community etc. are some of the measures that should be introduced and not punishment in a prison. These punishments are not custodial in nature. Far reaching reforms have taken place in England and the year 2000 is a watershed and enactments like the Powers of the Criminal Court Sentencing Act, 2000 modifying earlier laws were enacted introducing a whole range of new and novel punishments, postponement of sentencing, suspended sentence of imprisonment, supervision during suspension, community sentences, community rehabilitation order, financial penalties and reparation orders, parenting orders for children, confiscation order, disqualification orders etc., are any of the changes that have been brought out. Even in India under the Motor Vehicle's Act a disqualification for holding a license can be a part of punishment. Dismissal of a public servant from service for criminal misappropriation and breach of trust is an additional measure of punishment. Under the Representation of the People's Act there is disqualification in the event of proved electoral mal practices or on account of conviction.
>
> 14.5.4 IPC Amendment Bill of 1978 was the first attempt made to bring about certain changes in sentencing which remained static from the time IPC was enacted. Prior to this a bill had been enacted in 1972 which suggested 3 new forms of punishment externment Section 17(A) compensation for victims-14(8) and Public Censure 74(C). However, in 1978 externment as a form of punishment was rejected. Community service [74(A)], compensation to victims [74(B)] and Public Censure [74(C)] and disqualification for holding office 74(D) were proposed. Community Service is in vogue in many countries UK., USSR, Zimbabwe uses it. Recently Government of Andhra Pradesh has initiated a move to introduce the same. However, in community sentences certain restrictions regarding age etc are suggested. The accused must be less than 18 years."

legislatively incorporated. Victim compensation, which has been conferred by the procedural law, has also now been included in substantive laws.[30]

2.3 Sentencing Powers and Procedural Limitations

Lower courts in the sentencing process work in hierarchy in terms of power to pass sentences.[31] The judicial magistrates have limited powers to sentence. Whereas judicial magistrate second class can only sentence up to one year,[32] Judicial Magistrate First Class can sentence up to three years.[33] Interestingly however, most of the cases are triable by the Judicial Magistrate First Class though his sentencing powers are limited. Power to take cognizance of offence is vested with judicial magistrates even though such crimes may be triable by the court of sessions. Chief Judicial Magistrate[34] cannot pass sentence of imprisonment exceeding seven years.[35] An Assistant Sessions Judge may pass any sentence up to ten years.[36] A Sessions Judge or Additional Sessions Judge may pass any sentence including death.[37] A High Court may pass any sentence authorised by law.[38] Every death sentence awarded by the session's court has to be confirmed by the high court.[39] The powers of the courts are however unfettered by virtue of inherent powers and therefore high courts have been trying out of the box sentence to individualise the punishments. The recent controversy of weather high courts can choose between life imprisonment and death penalty and award life imprisonment with fixed term of 20, 25, 30 or 35 years has been constitutionally settled.[40] High courts, equally with powers of Supreme Court,

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[30] Section 357 of Criminal Procedure Code, 1973 has been supplemented with various provisions by Criminal Law Amendment Act, 2013 wherein payment of fine and compensation has been made compulsory for many offences.

[31] See Code of Criminal Procedure, 1973 sections 15 and 19

[32] *Ibid,* section 29(3)

[33] *Ibid,* section 29(2)

[34] *Ibid,* section 29(4)

[35] *Ibid,* section 29(1)

[36] *Ibid,* section 28(3)

[37] *Ibid*, section 28(2)

[38] *Ibid*, section 28(1)

[39] However, sentences passed by special courts like TADA are not subject to jurisdiction of high court for their confirmation. Direct appeal lies to the Supreme Court only.

[40] For 20 years life imprisonment see *Shri Bhagwan v. State of Rajasthan* (2001) 6 SCC 296, *Prakash Dhawal Khairnar (Patil) v. State of Maharashtra* (2001) 6 SCC 296, *State of Maharashtra v. Sandeep @ Babloo Prakash Khairnar (Patil)* (2002) 2 SCC 35, *Ram Anup Singh and Ors. v. State of Bihar* (2002) 6 SCC 686, *Nazir Khan and Ors. v. State of Delhi* (2003) 8 SCC 461, *Ramraj @ Nanhoo @ Bihnu v. State of Chhattisgarh* (2010) 1 SCC 573

For 30 years of imprisonment see *Neel Kumar @ Anil Kumar v. The State of Haryana* (2012) 5 SCC 766, *Sandeep v. State of UP* (2012) 6 SCC 107, *Gurvail Singh @ Gala and Anr. v. State of Punjab* (2013) 2 SCC 713

For 35 years of actual jail sentence see *Haru Ghosh v. State of West Bengal* (2009) 15 SCC 551

For no release from prison till the rest of his life see *Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka* AIR 2008 SC 3040

can now award term life imprisonment where high courts would fix the minimum term of life imprisonment before the expiry of which executives cannot exercise remission powers. In the interest of justice high court can also quash the FIRs where amicable settlement has been reached by the parties.[41] On the appellate side, high courts can reverse, modify, enhance or reduce the sentence awarded by the lower courts[42] including enlarging the accused on bail if his confinement is otherwise not warranted for.[43] The role of the high courts in India to a greater extent has been of a 'modifier' and 'moderator' of lower court judgments. The Supreme Court plays the role of a moderator of high court as the high court checks proportionality and legality of sentences passed by the lower courts. Judicial guidelines have been issued by the Supreme Court[44] to check arbitrary sentencing by lower courts and smaller benches.

Apart from this traditional sentencing structure, few legislations establish separate courts for trial of special offences. Such special courts are also bound by criminal procedure code, 1973 unless specially so excluded.[45] Special legislations may confer jurisdictions on the courts as mentioned above.

2.4 The Sentencing Procedure under Criminal Procedure Code, 1973

The Code talks about sentencing chiefly in S.235, S.248, S.254, S.325, S.354, S.360 and S.361.

S.235 is a part of Chapter 18 dealing with a proceeding in the Court of Session. It directs the judge to pass a judgment of acquittal or conviction and in case of a conviction to follow clause 2 of the section. Clause 2 of the section gives the procedure to be followed in cases of sentencing a person convicted of a crime. The section provides a hearing to ensure that the convict is given a chance to speak for himself and give an opinion on the sentence to be imposed on him. The reasons given by the convict may not be pertaining to the crime or be legally sound. It is just for the judge to get an idea of the social and personal details of the convict and to see if any of these will affect the sentence.[46] Facts such as the convict being a breadwinner

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[41] See section 482 of the Code of Criminal Procedure, 1973
[42] *Ibid* section 386
[43] *Ibid* sections 389 and 439
[44] The Supreme Court has been instrumental in issuing directions and formulating uniform interpretation to arrest arbitrary sentencing by other courts. The rarest of rare doctrine evolved by the Supreme Court is land mark, (so much so that, other countries have adopted this formula in their legislative and judicial prescriptions to) in arresting arbitrary sentencing in murder cases.
[45] See section 26 of the Code of Criminal Procedure, 1973
[46] K.N. Chandrasekharan Pillai, *R. V. Kelkar, Criminal Procedure*, 4th ed., (Lucknow: Eastern Book Company, 2001) Pp 500-503

might help in mitigating his punishment or the conditions in which he might work. This section plainly provides that every convicted accused must be given a chance to put forth his viewpoint post conviction about the kind of punishment which deserves to be imposed. The section just does not stop at allowing the convict to speak but also allows the defence counsel to bring to the notice of the court all possible factors which might mitigate the sentence and if these factors are contested then the prosecution and defence counsel must prove their plea.[47]

Section 248 comes under Chapter 19 of the Code dealing with warrants case. The provisions contained in this section are very similar to the provisions under S.235. However this section ensures that there is no prejudice against the accused. For this purpose it provides in clause 3 that in case where the convict refuses previous conviction, then the judge can, based on the evidence provided determine if there was any previous conviction.[48]

Section 354(3) of the Code of Criminal Procedure, 1973, makes it obligatory in cases of conviction for offences punishable with death or with imprisonment for life to assign reasons in support of the sentence awarded to the convict and further ordains that in case the Judge awards death penalty, "special reasons" for such sentence shall be stated in the judgment. Thus, the Judge is under a legal obligation to explain his choice of the sentence. The legislature in its supreme wisdom thought that in some "rare cases" for "special reasons" to be recorded it will be necessary to impose the extreme penalty of death to deter others and to protect the society and in a given case even the sovereignty and security of the State or country. It, however, left the choice of sentence to the judiciary with the rider that the court may impose the extreme punishment of death for "special reasons".

The sentencing court has, therefore, to approach the question seriously and make an endeavor to see that all the relevant facts and circumstances bearing on the question of sentence are brought on record. It is only after giving due weight to the

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[47] Mr. Justice Mukul Mudgal and Nitin Mishra "Need for Sentencing Policy in India" *Nyaya Kiran* Vol. II Issue IV, 2008, p 4

[48] *Ibid.*

mitigating as well as the aggravating circumstances, that it must proceed to impose the appropriate sentence.[49]

Section 31(1) of the Code vests discretion in the Court to direct the punishment to run concurrently or consecutively when a person is convicted at one trial of two or more offences. The Court may sentence the accused for such offences to the several punishments prescribed there which such Court is competent to inflict. Such punishments would consist of imprisonment to commence the one after the expiration of the other in such order as the Court may direct subject to the limitation contained in Section 71 of the Indian Penal Code.[50]

2.5 Individualization of Punishment: The Anchor of Indian Sentencing Policy

Sentencing in the common law world has long been characterised by its discretionary nature.[51] Sentencing in India falls squarely within the tradition of common law jurisdictions: courts are provided with wide discretion to determine a fit sentence, with appellate review constituting the only institutional mechanism to promote consistency, fairness and principled sentencing.[52] The discretionary nature of Indian sentencing policy is aptly noted by Justice S B Sinha when he notes

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[49] *Jashubha Bharatsinh Gohil v. State of Gujarat* (1994) 4 SCC 353, at page 360

[50] Section 31 of Code of Criminal Procedure , 1973, provides as under

> "31. Sentence in cases of conviction of several offences at one trial
> (1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments, prescribed therefor which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently
> (2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court:
> Provided that-
> (a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years;
> (b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence
> (3) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence."

[51] *See* J.V. Roberts and E. Baker, *Sentencing in Common Law Jurisdictions,* in S. Shoham, Ori. Beck, and M. Kett (eds.,) *International Handbook of Penology and Criminal Justice*, (Florida: CRC Press LLC, 2007). *See also* Andrew Ashworth, *Sentencing*, in Maguire, M., Morgan, R. and Reiner, R. (Eds.) *The Oxford handbook of criminology* 4th ed.,(Oxford: Oxford University Press, 2007)

[52] Julian V. Roberts et al "Structured Sentencing In England And Wales: Recent Developments And Lessons For India" *National Law School of India Review,* Vol. 23(l), 2011, p 28

> " [j]ustice process in India, however, seems to be a series of discretions and decision making process through which the suspects may pass. The police, prosecution, and the courts exercise too much discretion with least accountability. Many a time, discretion is exercised in a selective and discriminatory manner prejudicial to the interests of the poor, undereducated and powerless persons. In our criminal justice system, the police officer has first to exercise discretion whether or not to arrest, investigate, search or use force if necessary. Perhaps much greater discretion is permitted to the prosecuting authority who may decide not to prosecute the offender and may ask the Court to alter, dismiss or withdraw charges leveled against the accused. Thus, in criminal cases, the prosecuting officer has greater power over the freedom and liberty of individuals who came into his contact than any other agency. He has also the power to discontinue the prosecution on the ground that the State has insufficient evidence to win the case. If the accused is found guilty, the prosecuting authority may recommend leniency in the sentence or most server sentence as the case may be."[53]

Indian courts have enjoyed immense sentencing discretion, though at times, such sentencing discretion has been frowned upon.[54] Courts in India have believed in the philosophy that '[c]riminal trial is meant for doing justice not only to the victim but also to the accused and the Society at large.'[55] The modern trend in penology and sentencing procedures is to emphasise the humanist principle of individualising punishment to suit the offender and his circumstances.[56] The principle is given effect to in the Cr.PC by providing for post conviction hearing under sections 235(2) and 248(2). Under section 235(2), if the accused is convicted, the judge shall hear the accused on the question of sentence and then pass the sentence on him according to law. Under section 248(2), opportunity is given to both parties, to bring to the notice of the court, facts and circumstances which will help individualise the sentence from a reformative angle.[57] A sentencing process without discretion may be more consistent,

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[53] Justice S B Sinha "Criminal Justice System" (2004) 4 *SCC (Jour)* 35

[54] *Supra* note 52 p 35 where it is noted

> "[t]he system of unfettered discretion leaves the sentencing system open to the vagaries of individual judges, negating nationwide or even courthouse-wide consistency - the consistency that is a cardinal aim in any sentencing model. It thus seems that the primary controlling influence on sentences that are imposed by Indian trial courts is that of appellate review, as provided for in the 1973 Code in circumstances in where a sentence passed is excessive, where a sentence is insufficient, or where there has been an error of law in the sentencing process."

In *Gopal Singh v. State of Uttarakhand* 2013 (2) SCALE 533 The Apex Court while dealing with the philosophy of just punishment a two Judge Bench has stated that

> "just punishment would depend on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play."

[55] *Ambika Pd. v. State (Delhi Administration)* 2000 SCC Crl.522

[56] G.Kameswari And V. Nageswara Raot "The Sentencing Process -Problems And Perspectives" *Journal of Indian Law Institute* Vol.41, 1999, p 455

[57] *Ibid.*

but will also be equally arbitrary for ignoring relevant differences between cases.[58] As would be unfolded in the next chapter,[59] sentencing discretion has caused more problems than the facilitation of sentencing. Courts themselves have acknowledged that sentencing discretion needs to be regulated failing which disparity in sentencing cannot be ruled out.[60]

2.6 Hearing on Sentence and Reasons for the Sentence- The Twin Safeguards

The sentencing policy in India basically rests on the procedure of hearing on the sentencing and reasons provided in the judgment by judges. In the absence of structured guidelines, these twin safeguards serve the purpose of just sentencing. Section 235 provides that

> "235. Judgment of acquittal or conviction -
> (1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case.
> (2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360 hear the accused on the question of sentence, and then pass sentence on him according to law."

Section 235 thus imposes a duty on the court to hear the accused on the sentence to be imposed.[61] It may so happen that the consideration which did not weigh in favour of accused at the time of proving guilt may play vital role in deciding quantum of punishment.[62] Section 235, therefore, serves dual purposes, namely, *(i)* it acts as the rule of natural justice inasmuch as it gives the offender an opportunity of

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[58] See The Law Commission of India, 262nd Report on "*The Death Penalty"* 2015, where it notes sentencing discretion in the context of death penalty as:

> "…A sentencing process without discretion may be more consistent, but will also be equally arbitrary for ignoring relevant differences between cases. In such a system sentencing is likely to be severely unfair and would definitely not remain a *judicial* function."

[59] See *Infra* chapter III, "Sentencing Discretion in India: Arbitrary Sentencing and Modalities to Arrest Arbitrariness- A Comparative Study", point 3.7

[60] See following judgments where the courts have underscored for the rational sentencing policy by structuring sentencing discretion. *Mohammad Giasuddin v. State of Andhra Pradesh* 1977 AIR 1926, *Shiva Prasad v. State of Kerala* 1969 Ker. L.T. 862, *Tanaji Alias Tillya Dinkar v. The State of Maharashtra And Anr* (2016) available at https://indiankanoon.org/doc/197006238/, *Narinder Singh & Ors v. State of Punjab* https://indiankanoon.org/doc/98425580/, *State of Punjab v. Prem Sagar & Ors* (2008) 7 S.C.C. 550, *Satya Prakash v. State* available at https://indiankanoon.org/doc/135464464/, *Soman v. State of Kerala*2012 (12) SCALE 719, *Rameshbhai Chhaganbhai Navapariya v. State of Gujarat,* available at https://indiankanoon.org/doc/146065626/, *State GNCT of Delhi v. Mukesh* available at https://indiankanoon.org/doc/1956456/, *State v. Raj Kumar Khandelwal* available at https://indiankanoon.org/doc/177807969/, *Sangeeta & Ors v. State of Haryana* (2013) 2 SCC 452

[61] See *Santa Singh v. State of Punjab* 1976 AIR 2386

[62] Justice Bhagwati in *Santa Singh v. State of Punjab* 1976 AIR 2386, observed,

> "[t]here may be a number of circumstances of which the Court may not be aware and which may be taken into consideration by the Court while awarding the sentence, particularly a sentence of death"

being heard on the question of sentence and *(ii)* it seeks to assist the Court in determining the appropriate sentence.[63] The section also casts additional obligations *(i)* to give the offender an opportunity to make a representation on the question of sentence and *(ii)* to take into consideration such representation while determining the appropriate sentence to be awarded to the offender.[64]

Section 354 further supplements section 235 by mentioning that the court shall record the reason for sentence awarded and, in the case of sentence of death, the special reasons for such sentence. It reads

> "(3) 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."

The reasons for the sentence unfold the choice of punishment and reasons behind it. Therefore, the judicial officer cannot wantonly sentence anyone. He has to bestow his mind to the case, assess all aggravating and mitigating factors, and then settle on a particular approach and pass the sentence. All this exercise is seen from his speaking orders and judgments. Such reasons furnish enough material to the apex courts to correct sentence if passed arbitrarily or disproportionately.[65]

2.7 Alternate Sentencing Policy

Apart from the trial and sentencing as prescribed by the Criminal Procedure Code, 1973, other welfare legislations prescribe differential sentencing policy in respect of certain crimes and criminals. To speak of such crimes, crimes committed on weaker sections of the society like crimes against women, children and schedule castes etc are dealt with differently prescribing different punishments. Crimes against the weaker sections of the society are dealt with on a higher plane with highest possible punishments. The recent enactment of Protection of Children from Sexual Offences Act, 2012[66] amendment to the Atrocity Act,[67] and Criminal Law

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[63] *Allauddin Mian & Ors. Sharif Mian v. State of Bihar* 1989 AIR 1456

[64] For detailed discussion on quality and content of hearing at the sentencing see Rose Varghese "Sentence Hearing : Intent And Scope In Criminal Proceedings", *Journal of Indian Law Institute*, Vol. 34:3, 1992, pp 456-465

[65] For further details, see *infra* chapter number IV, "A Critical Analysis of Capital Sentencing: Riddles, Riders and Resolutions" point 4.8

[66] In this Act minimum punishment is provided for offences punishable under section 4, 6, 8, 10, 12, 14, 15, 17 and 19 of the Act.

[67] See The SC And The ST (Prevention Of Atrocities) Act, 1989, as amended in 2015

Amendment Act 2013,[68] prescribe highest punishment for the offences which offences otherwise carry lighter sentences under Indian Penal Code 1860.

Conversely certain offenders are to be death with differentially. A juvenile cannot be put into the machine of ordinary laws nor can a first offender be mixed with hardened criminals. To arrange for this, therefore, Indian criminal justice provides for different sentencing policy for certain individuals as different from certain crimes mentioned above.

Children below eighteen years of age are termed 'juveniles' if they conflict with law. A separate sentencing policy for juveniles is prescribed under newly re-enacted Juvenile Justice (Care and Protection of Children) Act, 2015 wherein offences by juveniles have been classified on the basis of seriousness as petty offences,[69] serious offences[70] and heinous offences.[71] For first two offences a complete rehabilitative package is made available wherein such juveniles escape rigours laws in the process of rehabilitation.[72] However, for heinous offences, a mixture of term imprisonment[73] and rehabilitation is prescribed to take care of symptoms of recidivism and prospects of rehabilitation.

Probation of offenders Act, 1958 has a pivotal role to play in individualisation of punishment and rehabilitation of offenders. Offenders below 21 years cannot be punished unless compelling reasons weigh up with the courts.[74] Offenders who have committed offences punishable with less than 2 years cannot be punished and shall have benefits of admonition, unless of course, court is otherwise of different opinion.[75] Releasing persons under supervision of probation officers for offences punishable with less than life imprisonment is contemplated.[76] The disqualifications attached with convictions are taken care of by section 12 of the said Act.[77]

Under the Code of Criminal Procedure, 1973 also some alternate sentencing and alternatives to sentencing are prescribed. Offences of private nature are allowed to be compounded facilitating parties to avoid the legal enigma.[78] Even the

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[68] See punishments for rape and sexual harassment provisions.
[69] See section 2 (45) of Juvenile Justice (Care and Protection of Children) Act, 2015
[70] *Ibid*, section (54)
[71] *Ibid*, section 2 (33)
[72] *Ibid*, section 18
[73] *Ibid*, section 19 (1)
[74] Section 6 of the Probation of Offenders Act, 1958
[75] *Ibid*, section 3
[76] *Ibid*, section 4
[77] *Ibid,* section 12
[78] See section 320 of Code of Criminal Procedure, 1973

government is empowered to withdraw the case in circumstances warranting public interest.[79] Private complaint too can be withdrawn if a mutual disposition is arrived at. Sui generis plea bargaining is also provided wherein the parties and prosecutor can strike a mutual disposition and bargain for punishment that suits the crime.[80] Courts are sufficiently empowered to deal with first offenders under section 360 of the Criminal Procedure Code, 1973. Using powers under probation Act, 1958, lower and high courts are experimenting unstated forms of punishments such as community services etc.[81]

Victim compensation and restitution of victims had been on back foot in Indian sentencing system for a long time. This predicament is the result of two reasons. *Firstly,* legislature laid more emphasis on the retributive part of the punishment where it prescribed rigours punishment but turned blind eyes to victim compensation. *Secondly,* judiciary also did not press for rehabilitation schemes in spite of few legislations speaking for compensation and rehabilitation. However, we have a changed scenario now, where both the institutions are focusing primarily on the rehabilitation of the victims apart from sternly dealing with criminals in the form of long incarceration. Compensation is increasingly being used as alternative to imprisonment[82] and additions to imprisonment. [83]

2.8 Safeguards in Sentencing Policy

Sentences passed by the courts are safeguarded by multiple methods. Except few[84] all sentences are appealable.[85] Multiple layers of appeals are provided under the

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[79] *Ibid* section 321 *Cf* section 257 of the same Act which provides for Withdrawal of complaint.
[80] *Ibid* Chapter XXIA
[81] See Smitha Verma "Reform, New Age Style" *The Telegraph* Wednesday, July 16, 2008 available at http://www.telegraphindia.com/1080716/jsp/opinion/story_9555498.jsp.(last seen on 5 March 2017)
[82] Under the Probation of Offenders Act, 1958, courts may ask offenders to pay compensation in return for admonition as punishment or release on probation. Section 3 and 4 of the Probation of Offenders Act have to be read with section 5 which mandates
[83] Recent legislations like Protection of Children from Sexual Offences Act 2012, Criminal Law Amendment Act, 2013 etc compulsorily prescribe compensation as mandatory part of substantive sentence.
[84] See sections 372, 375,376 of Code of Criminal Procedure, 1973
[85] Appeal against conviction and acquittal are provided both to the accused and prosecutors. The victim also has a right to appeal in circumstances. By the Criminal Procedure Code (Amendment) Act, 2008 the following proviso was inserted into Section 372:-

> "Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting or a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of convict ion of such Court."

code.[86] Courts have the powers to review their own judgments also.[87] Sentences passed by the judiciary can be tempered with mercy by the executive. A unique interplay is contemplated between judiciary and executive in Indian sentencing policy. Clemency powers are vested with constitutional dignitaries i.e., President and Governors.[88] Clemency powers include power to wipe out sentences[89] or modify sentences.[90] Apart from clemency powers executives have also been empowered to cut short sentences passed by the judiciary in the form of remission and commutations. Humanity and Karuna developed in the prisoners may be hampered by the judicial sentences passed years back. To take care of such situations, section 432,[91] 433[92] of the Criminal Procedure Code 1973, provide exercise of remission powers, occasionally and or periodically, to reassess the crime, repentance and productivity of such criminals. However the remission and commutation powers are again subject matter of judicial review.[93]

2.9 Coherent Philosophy of Sentencing- A Vital Miss-Out

There are many philosophies behind sentencing justifying penal consequences. The philosophical/jurisprudential justification can be retribution, incapacitation, specific deterrence, general deterrence, rehabilitation, or restoration. Any of the above

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[86] CHAPTER XXIX of the Code of Criminal Procedure, 1973 provides for appeals in sections 372 to 394

[87] *Ibid* CHAPTER XXX sections 395 to 405

[88] See articles 72 and 161 of the Constitution of India, 1950. For detailed context specific discussion on these articles see chapter VI.

[89] Power of pardon if exercised in that way absolves the convict from all infirmities and disqualifications and makes him new man in the eyes of law.

[90] Articles 72 and 161 of the Constitution first refer to the power to grant pardons, reprieves, respites or remissions of punishments, and then to the power to suspend, remit or commute, of any person convicted of any offence. Except the power of pardon, all other exercises modify the penalty from one form to another.

[91] Section 432 of Code of Criminal Procedure, 1973 provides that

> "[w]hen any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced."

[92] Section 433 Code of Criminal Procedure, 1973 provides that

> "The appropriate Government may, without the consent of the person sentenced commute—
> (a) a sentence of death, for any other punishment provided by the Indian Penal Code
> (b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;…"

[93] See *State of Haryana and Ors. v. Jagadish* (2010) 4 SCC 216, *Kehar Singh and another v. Union of India* (1989 AIR 653), *K.M. Nanavati v. State of Bombay* 1961 AIR 112, *Union of India v. V. Sriharan @ Murugan & Ors* 2014 (11) SCC 1, *Epuru Sudhakar & Another v. Govt. of A.P. & Ors*. AIR 2006 SC 3385.

or a combination thereof can be the goal of sentencing.[94] Unlike other jurisdictions[95] as discussed elsewhere, in India, however, there is no single unifying sentencing aim that judges must give priority to when passing sentences. Instead, Indian judges may choose any of the different sentencing aims including deterrence to suit the offender.[96] This leads to the proposition that different judges can legitimately adopt different sentencing approaches when sentencing the same case.[97] In other words, they can treat like cases differently and can justify their decisions according to sentencing law.[98]

In the pursuit of justice and just desert, courts have adopted fluctuating variables of elusive aims of sentencing in India.[99] Sometimes, deterrence[100] has held

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[94] *Shiva Prasad v. State of Kerla* 1969 Ker. L.T. 862

[95] *Cf* Section 3A *Crimes (Sentencing Procedure) Act* 1999 sets out the purposes for which a court can impose a sentence.

Section 3A sets out the following seven purposes "for which a court may impose a sentence on an offender:

(a) to ensure that the offender is adequately punished for the offence,
(b) to prevent crime by deterring the offender and other persons from committing similar offences,
(c) to protect the community from the offender,
(d) to promote the rehabilitation of the offender,
(e) to make the offender accountable for his or her actions,
(f) to denounce the conduct of the offender,
(g) to recognise the harm done to the victim of the crime and to the community."

In England and Wales, The Criminal Justice Act 2003 sets out five purposes of sentencing. These are the:

1. punishment of offenders
2. reduction of crime (including its reduction by deterrence)
3. reform and rehabilitation of offenders
4. protection of the public
5. making of reparation by offenders to people affected by their offences

When dealing with an offender aged 18 or over *the court must have regard to these purposes of sentencing*.

[96] Dr. Niamh Maguire " Consistency In Sentencing" *Judicial Studies Institute Journal*, Vol.2, 2010, p19

[97] *State of U.P v. Satish* 2005 (3) SCC 114, A Pasayat J. observed

> "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 tragic results of 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."

[98] See Indian Law Institute, New Delhi *"*Punishment*"*, 1961, available at *http://hdl.handle.net /123456789/168*, Pp 244-245

[99] *Narinder Singh & Ors v. State of Punjab* (2014) 6 SCC 466*,* Justice A.K.Sikri observed in the context of rape conviction

> "There are many philosophies behind such sentencing justifying these penal consequences. The philosophical/jurisprudential justification can be retribution, incapacitation, specific deterrence, general deterrence, rehabilitation, or restoration. Any of the above or a combination thereof can be the goal of sentencing."

[100] It is interesting to note that justice Krishna Iyer who is defender of human rights and an abolitionist from the Bench once favoured the death penalty in the name of deterrence.

In *Ediga Anamma v. State of Andhra Pradesh* 1974 AIR 799, R. Krishna Iyer, J., speaking for the Bench observed that "deterrence through threat of death may still be a promising strategy in some frightful areas of murderous crime."

Similar views were expressed by him in a host of other cases like, *Shiv Mohan Singh v. State (Delhi Administration)* [1977] 3 S.C.R. 172, *Charles Sobraj v. The Superintendent, Central Jail, Tihar, New Delhi* (1978) 4 S.C.C. 104

the field whereas reformation[101] has played part in some of the cases. Society's cry for justice[102] has also held the field especially for heinous crimes. Public abhorrence,[103] preferred retributions[104] and corrections[105] "collective conscience,[106] "public abhorrence of the crime"[107] etc have all played decisive roles in sentencing policy.[108] However in the absence of stated sentencing aims judges would be "go by their own perception about the philosophy behind the prescription of certain specified penal consequences for particular nature of crime."[109] "[t]he humane art of sentencing [therefore] remains a retarded child of the Indian criminal system"[110]

2.10 Challenges in Sentencing Policy in India

Given the fact that the phrase sentencing policy covers array of sentencing dimensions ranging from legislature to executive via judiciary, hundreds of problems affront when one charts the problems of sentencing policy in India. The scope of this research is however limited to few areas of the sentencing policy only. Right from the

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[101] In *Mohammad Giasuddin v. State of Andhra Pradesh* 1977 AIR 1926 Justice V.R. Krishnaiyer, observed

> "…It is a truism, often forgotten in the hidden vendetta in human bosoms, that barbarity breeds barbarity, and injury recoils as injury, so that if healing the mentally or morally maimed or malformed man (found guilty) is the goal, awakening the inner being, more than torturing through exterior compulsions, holds out better curative hopes."

See also *Munna & Others Etc v. State of U.P.* 1982 AIR 806, State *of Madhya Pradesh & Anr. v. Bhola @ Bhairon Prasad Raghuvanshi* 2003 (3) SCC 1

[102] In *Dhananjoy Chatterjee v. State of WB* (1994) 2 SCC 220, the court observed

> "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 befitting the crime so that the courts reflect public abhorrence of the crime."

[103] *Dinesh @ Buddha v. State of Rajasthan* (2006 Cri.L.J.1679) Justice A Pasayat remarked

> "Courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years … and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court. …To show mercy in the case of such a heinous crime would be a travesty of justice and the plea for leniency is wholly misplaced."

[104] See *Smt. Vijay Shri v. Devender Kumar* available at https://indiankanoon.org/doc/60529180/

[105] In *Satto v. State of U.P* (1979) 4 SCC 413 para 3 the court observed that

> " [c]orrection informed by compassion not incarceration leading to degeneration, is the primary aim of this field of criminal justice"

[106] *Machhi Singh v. State of Punjab* (1983) 3 SCC 470, at para 32.

[107] See *Bantu v. State of U.P.* (2008) 11 SCC 113, *Mohan Anna Chavan v. State of Maharashtra* (2008) 7 SCC 561, *State of Madhya Pradesh v. Saleem* (2005) 5 SCC 554, *State of U.P. v. Sri Krishan* (2005) 10 SCC 420, *Jai Kumar v. State of Madhya Pradesh* (1999) 5 SCC 1, *Ravji v. State of Rajasthan* (1996) 2 SCC 175, *Bheru Singh v. State of Rajasthan* (1994) 2 SCC 467, *State of Madhya Pradesh v. Sheikh Shahid* (2009) 12 SCC 715, *State of U.P. v. Sattan @ Satyendra* (2009) 4 SCC 736, *State of Madhya Pradesh v. Santosh Kumar* (2006) 6 SCC 1, *Shailesh Jasvantbhai v. State of Gujarat* (2006) 2 SCC 359.

[108] See *Santa Singh v. State of Punjab* 1976 AIR 2386

[109] *Narinder Singh & Ors v. State of Punjab* https://indiankanoon.org/doc/98425580/

[110] *Mohammad Giasuddin v. State of Andhra Pradesh* 1977 AIR 1926

appointment of judges to the integrity of a judge, from legislative malice to the executive inefficiency, everything can be contributing factor in the quality of sentence dispensed. However as mentioned in the first chapter, only few areas of the border arena are intended to be covered. The choices of these areas are supported by the convincing evidence. The problem of disparity in sentencing is chosen for a reason that right from the judiciary to legislature and from the criminal to common, everybody has acknowledged that sentencing disparity is hunting the justice delivery system and therefore checks and balances should be introduced at the earliest. Other jurisdictions have done this or are in the process of. India, however, lacks coherent sentencing policy coupled with legislative or judicial regulations. Therefore this area has been chosen to explore the existing mechanism which can be conveniently adopted or at least experimented upon in India.

The problem and debate of death penalty is not basically resting on retention versus abolition stand. The real wood that is missed for the tree is: if comprehensive sentencing policy is followed in respect of death penalty, there is no need to engage in futile and unproductive exercises of retentionist versus abolitionist arguments. However, as the research would unfold, India lacks comprehensive sentencing policy in respect of death penalty in absolute sense bringing the highest impartial institution into embarrassment of highest order! Death sentences have been totally read to be Judge centric, least regard being had to its own standards of highest care laid down by the same institution.

The alternative of life imprisonment to death penalty can be assumed safe when the disparity in death sentence is so apparent. However, the shift from death penalty to life imprisonment also shifted the controversy when judiciary started fixing the meaning of life imprisonment. Traditionally, life imprisonment in India is taken to be indeterminate where executive would remit the sentence normally after 14 years on the basis of rehabilitative jurisprudence. This prerogative of executive has been circumscribed by the judiciary wherein it fixes the ‘term’ for life convicts who cannot be released before actually serving such term! This has led to a new chapter in sentencing policy being argued as ‘judicially fashioned’ but ‘executively shunned’!

The executives have a greater control over sentencing policy. This control is two sided. Weather to prosecute or not, weather to agree for plea bargaining or to bargain further is left with the prosecution in India, however, this control is not

unbridled and sufficient checks and balances are available. The bone of contention is, however, the post sentencing control the executive exercise over the convicts. Benefits of remission and short sentencing are at the command and mercy of the executive which exercise can also be subject matter of disparity in the same way the judiciary has been accused of.

Restoration and rehabilitation are the emerging facets of the sentencing policy. In the absence of stated sentencing policy, judiciary would roam wildly in perusing justice which roaming may further lead to and appear as disparity in sentencing policy. Bearing this drawback, Indian judiciaries have shed their traditional sentencing policies and experimenting milder forms of sentences such as community sentences. However, we do not find uniformity in this exercise either. Further, the sentencing policy in respect of juveniles has kept changing every decade roughly which fact is evident from the recent enactment of Juvenile Justice Act 2015. The benefits of probation also have not been made use of increasingly though that is the purpose of that legislation. Even this benefit is also judge centric which is witnessed across the judicial institutions.

The crux of the sentencing policy lies in its economics apart from the deterrence and rehabilitation. The somber interpretation of section 357 of Criminal Procedure Code 1973 in recent past has rekindled the compensatory jurisprudence in India. The problem, however, lies with the use of salutary provision. Judicial reminders and legislative supplements in the form of recent amendments have brought different dimensions to this exercise which needs to be systematically synthesized.

2.11 Conclusion

Sentencing in India is largely based on individualisation of punishment rather than stated goals of punishments. Criminal trial in our country is largely devoted only to finding out whether the man in the dock is guilty. It is a major deficiency in the Indian system of criminal trials that the complex but important sentencing factors are not given sufficient emphasis and materials are not presented before the Court to help it for a correct judgment in the proper personalised, punitive treatment suited to the offender and the crime. The words of justice V.R. Krishna Iyer better summarises the sentencing policy in India sans Indian Penal code, as

> "Unfortunately, the Indian Penal Code still lingers in the somewhat compartmentalised system of punishment viz. imprisonment, simple or

rigorous, fine and, of course, capital sentence. There is a wide range of choice and flexible treatment which must be available with the Judge if he is to fulfil [sic] his tryst with curing the criminal in a hospital setting. Maybe in an appropriate case actual hospital treatment may have to be prescribed as part of the sentence. In another case, liberal parole may have to be suggested and, yet in a third category, engaging in certain types of occupation or even going through meditational drills or other courses may be part of the sentencing prescription. The perspective having changed, the legal strategies and judicial resources, in their variety, also have to change. Rule of thumb sentences of rigorous imprisonment or other are too insensitive to the highly delicate and subtle operation expected of a sentencing Judge. Release on probation, conditional sentences, visits to healing centres, are all on the cards. We do not wish to be exhaustive. Indeed, we cannot be."[111]

[111] *Mohd. Giasuddin v. State of A.P.*, (1977) 3 SCC 287

CHAPTER - III

SENTENCING DISCRETION IN INDIA: ARBITRARY SENTENCING AND MODALITIES TO ARREST ARBITRARINESS- A COMPARATIVE STUDY

"The Judge even when he is free is still not wholly free. He is not to innovate at pleasure. He is not a knight errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in social life."

Benjamin N. Cardozo[1]

3.1 Introduction

Judges like physicians are trained minds reposed with confidence and trust.[2] Though both hold different fields, the exercise of 'choices' at given point of time makes them highly respectable, for both try to individualize the 'choices' to the persons before them.[3] Unlike physicians, the choices of judges are however, limited by legislative prescriptions. Enacted laws confer choices known as 'discretion' in employing punishments. It is this discretion that has become the bone of contention worldwide and acquired the field of prominence.[4] Sentencing cannot be a product of computer programming for there are number of human factors that invariable

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[1] Benjamin N. Cardozo *The Nature of The Judicial Process* 1st ed., (New Haven: Yale University Press, 1921) p 114

[2] For Interesting Discourse on Judges nnd Doctors See Barak D. Richman, On "Doctors and Judges", 58 *Duke Law Journal* 1731-1741 (2009), p1731

[3] Justice V. R. Krishna Iyer in his address on a National Policy

> "The soul of criminal justice is the art of recovering the soul of the man smeared by crime. This must be achieved by the sentencing process and prison treatment. This constructive objective of punishment is central to penal policy. Punishment is a sort of medicine, said Aristotle. But some medicines are iatrogenic and induce new diseases."

quoted in, *In Re: Prison Reforms Enhancement v. Unknown* AIR 1983 Ker 261

In *Mohammad Giasuddin v. State of Andhra Pradesh* 1977 AIR 1926, Justice Krishnaiyer, V.R. observed:

> "Perhaps the time has come for Indian criminologists to rely more on Patanjali sutra as a scientific curative for crimogenic factors than on the blind jail term set out in the Penal Code and that may be why western researchers are now seeking Indian yogic ways of normalising the individual and the group….It is thus plain that crime is a pathological aberration, that the criminal can ordinarily be redeemed, that the State has to rehabilitate rather than avenge. ..."

[4] See Richard L. Marcus, "Slouching toward Discretion", 78 *NOTRE DAME L. REV*. 1561 (2003). Pp 1561-1616; William W. Schwarzer "Federal Sentencing Reporter", Vol. 3 No. 6, May - Jun., 1991; (pp. 339-341); Maguire, N. (2010) "Consistency in Sentencing" *Judicial Studies Institute Journal*, Vol. 10, No. 2, p.14-54; Samaha, Joel (1989) "Fixed Sentences and Judicial Discretion in Historical Perspective," *William Mitchell Law Review*: Vol. 15 : Iss. 1, Article 14

influence the choice of punishment. The jurisdictions worldwide, therefore, confer discretion – sometimes wild, sometimes regulated, sometimes unstructured and sometimes very limited on the presiding officers. The sentencing discretion has been paradoxically debated as some treat is as 'constitutional requirement'[5] whereas others treat it as violation of rule of law.[6] Irrespective of meta-abstract discourses, it has been universally experienced that sentencing discretion has not yielded convincing results calling for disciplining and structuring it. Since sentencing process is human process disparity and inconsistency are inherent parts of it. Judges are only human, and will analyse a case consistent with their personal beliefs and experiences.[7] The personal philosophy of the Judges also adds to the uncertainty and inconsistency in views.[8] Exactly how much punishment an offender deserves is something of a metaphysical mystery.[9] Shlomo Shoham observes that[10]

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[5] In *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009 (6) SCC 498) S.B. Sinha, J. observed

> "[f]requent findings as to arbitrariness in sentencing … may violate the idea of equal protection clause implicit under Article 14 and may also fall foul of the due process requirement under Article 21.[E]qual protection clause [is] ingrained under Article 14 [and] applies to the judicial process at the sentencing stage.."

In the context of rape sentencing policy in India Prof.Mrinal Satish mentions that

> "The current sentencing regime provides unbridled discretion to sentencing judges. In the absence of guidelines or principles, this leads to discrimination and arbitrariness. When tested against the foundational principles in Article 14 and 21 of the constitution of India, the present regime does not pass the test of constitutionality."

See Mrinal Satish *Discretion, Discrimination And The Rule of Law* (Delhi: Cambridge University Press 2017), p 202

[6] In *Jagmohan Singh v. The State of U. P* 1973 AIR 947 the constitutional bench observed that

> "[t]he policy of the law in giving a very wide discretion in the matter of punishment to the Judge has its origin in the impossibility of laying down standards…. The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguard for the accused."

[7] Hall aptly articulates this weakness:

> "Sentencing is not a rational mechanical process; it is a human process and subject to all the frailties of the human mind. A wide variety of factors, including the Judge's background, experience, social values, moral outlook, penal philosophy and views as to the merits or demerits of a particular penalty influence the sentencing decision."

See Geoff Hall *Sentencing Law and Practice* (Wellington: LexisNexis, 2004) at 2.1.

[8] Benjamin Cardozo in The Nature of the Judicial Process – Lecture I , put it aptly thus :

> "There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direct ion in thought and act ion. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions …It is often through these sub- conscious forces that Judges are kept consistent with themselves, and inconsistent with one another."

See Benjamin Cardozo in "The Nature of the Judicial Process – Lecture I" *Journal of Law,* No 2 (2011) available at http://journaloflaw.us/4%20Chapter%20One/1-1/JoL1-2,%20CO1-1,%20 Cardozo.pdf

[9] Alice Ristroph, Desert, Democracy, and Sentencing Reform, 96 *J. Crim. L. & Criminology* 1293 (2005-2006), p 1293

[10] Shlomo Shoham, "Sentencing Policy of Criminal Courts in Israel", 50 *J. Crim. L. & Criminology* 327 (1959-1960), p 327

> "the sentence imposed upon an offender is influenced by three complex factors: the offence and its circumstances; the offender and his background; the third factor is most elusive and indefinite element in any sentencing policy, namely, *the attitude of the trial judge*."

Professor Ronald Dworkin, who continues to have faith in the ability of the "Herculean judge" to distinguish between law and politics and find the correct legal answer, admits that objectivity is more of an ideal than a reality.[11] Most observers of the criminal justice system agree that there are unfair disparities in the sentences meted out in the courts.[12] A truism of sentencing research is that sentences should vary according to the seriousness of the crime and the dangerousness of the offender, but that "unwarranted disparity" is undesirable and unfair.[13] The consensus worldwide has, therefore, been reached that in order to safeguard the rule of law, sentencing discretion must be limited, structured, and controlled.[14]

The aim of this chapter, therefore, is to find out what patterns of discretion exist in India. Some notable examples of arbitrary sentencing and disparity in sentences are explored. Methods to arrest arbitrariness, practices in other countries, and what India can barrow form western jurisdiction to regulate sentencing discretion is also investigated upon and tried to be explored here.

3.2 Theorizing Sentencing 'Disparity', 'Discrimination', and 'Inconsistency'

The entire debate over sentencing discretion surrounds over, disparity in sentencing, discrimination in sentencing and inconsistency in sentencing. It is apt, therefore to theorize what these three variables are. To begin with, *sentencing disparity* occurs when two similar offenders are dissimilarly punished or two dissimilar offenders are similarly punished. Cassia Spohn[15] has laboriously tried to encapsulate sentencing disparity and discrimination. He mentions

> "[a]pplied to the sentencing process, disparity exists when similar offenders are sentenced differently or when different offenders receive the same sentence. It exists when judges impose different sentences on two offenders

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[11] See R. Dworkin *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), and R. Dworkin *Law's Empire* (Cambridge: Harvard University Press, 1986). *Cf* T.R.S. Allan "Law, Justice and Integrity: The Paradox of Wicked Laws" *Oxford Journal of Legal Studies*, Vol. 29, No. 4 (2009), Pp 705–728

[12] Kevin Clancy, et al. "Sentence Decision making: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity", 72 *J. Crim. L. & Criminology* 524 (1981), p 525

[13] Paul J. Hofer, Kevin R. Blackwell, R. Barry Ruback, "Effect of the Federal Sentencing Guidelines on Interjudge Sentencing Disparity", 90 *J. Crim. L. & Criminology* 239 (1999-2000), p 241

[14] *Ruth Kannai* "The Judge's Discretion In Sentencing: Israel's Basic Laws And Supreme Court Decisions" *Isr. L. Rev*. vol. 30, 1996, p 279

[15] Cassia Spohn *How Do Judges Decide? The Search For Fairness And Justice In Punishment* 2nd ed., (California: Sage Publication, 2009)

> with identical criminal histories who are convicted of the same crime, when judges impose identical sentences on two offenders whose prior records and crimes are very different, or when the sentence depends on the judge who imposes it or the jurisdiction in which it is imposed." [16]

Mallett, Sean J. also observes that

> "[o]ne of the fundamental principles of the criminal law is consistency: like offenders must be treated alike. However, research has shown that when it comes to sentencing…there is in fact substantial…disparity in the penalty imposed on similarly situated offenders."[17]

Sentencing is inherently discretionary and that discretion leads to disparity.[18] Disparity per se is not objectionable however. Disparity at times may even be a dream of criminal![19] The distinction, therefore, needs to be made between justified and unjustified disparity, as disparity between sentences may be clearly justified on the grounds of seriousness of the offence, number of previous convictions, youth or a multitude of other considerations. Thus a differential treatment between a person who is seventeen and half and nineteen and half as far as treatment and punishment is concerned, is justified. Such justified treatment are in fact sanctioned and approved by the legislature and judiciary as well.[20] Unjustified disparity, however, is a matter of

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[16] Somewhat with similar scale and language William Rhodes describes a working definition of disparity as under

> "… a sentence is disparate when (1) two defendants who are identical in all ways that should affect the sentence nevertheless receive different sentences, or (2) two defendants who are identical except for one or more factors that should affect the sentence receive the same sentence, or (3) a sentence is imposed that is too severe or is too lenient given accepted sentencing criteria."

See William Rhodes, "Federal Criminal Sentencing: Some Measurement Issues With Application to Pre-Guideline Sentencing Disparity", 81 *J. Crim. L. & Criminology*, 1990-1991, p 1017

[17] See Mallett, Sean J. "Judicial discretion in sentencing: a justice system that is no longer just?" *Victoria University of Wellington Law Review* Vol.46.2, (2015)

[18] See Michael Tonry, *Sentencing Reform Across National Boundaries* in Chris Clarkson and Rod Morgan (eds.), *The Politics of Sentencing Reform*, (Oxford: Clarendon Press, 1995)

[19] Gabriel Hallevy notes

> "Disparity between courts in similar cases leads to a social subculture that enforcement of the law de jure is different from enforcement de facto. This difference serves as an incentive to offend. When one court panel is excessively lenient with offenders whereas another panel hands down harsh punishments, the mechanism that deters offenders from reoffending (balancing the expected values of the benefits and punishments), the identity of the panel becomes a consideration and offenders will make efforts to be sentenced by one panel and not by the other. At times this can be beneficial to the offender, at other times not."

See Gabriel Hallevy *The Right To Be Punished* (London: Springer Heidelberg, 2013), p108

[20] In the Indian context, legislations have classified offenders on the basis of their age. Thus juveniles would be treated under juvenile justice Act, 2015, first time offenders would be treated under probation of offenders Act, 1958 even though same or similar offences may have been committed. As an extension of this differential treatment courts also employ individualised punishments like probation, community services compensation etc to treat offenders differently. However such different treatments do not attract the disparity clause in the sense it is debated upon.

legitimate concern.[21] It is unjustified disparity[22] that is cause of action in every debate on structuring sentencing discretion. When all ingredients are equally fulfilled in both the case and yet sentences differ in an apparently unjustified way, unjustified disparity in sentence is said to have occurred. Thus if age or chances of reformations are seen as mitigating factor in one case and the same are denied as mitigating factor in another case, unjustified disparity is established. In the context of death penalty the young age of the accused was not taken into consideration or held irrelevant in *Dhananjoy Chatterjee* [23] aged about 27 years, *Jai Kumar* [24] aged about 22 years and *Shivu & another* [25] aged about 20 and 22 years while it was given importance in *Amit v. State of Maharashtra*,[26] *Rahul*,[27] *Santosh Kumar Singh*,[28] *Rameshbhai Chandubhai Rathod (2)*[29] and *Amit v. State of Uttar Pradesh*.[30]

The possibility of reformation or rehabilitation was ruled out, without any expert evidence, in *Jai Kumar*,[31] *B.A. Umesh* [32] and *Mohd. Mannan* [33] in much the same manner, without any expert evidence, as the benefit thereof was given in *Nirmal Singh*,[34] *Mohd. Chaman*,[35]*Raju*,[36] *Bantu*,[37] *Surendra Pal Shivbalakpal*,[38] *Rahul* [39] and

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[21] Geraldine Mackenzie "Achieving Consistency in Sentencing: Moving to Best Practice?" *University of Queensland Law Journal*, Vol. 22, 2002, pp. 74-90. Also available at http://www. austlii.e du. au/ au/ journals/UQLawJl/2002/4.html

[22] The Victorian Sentencing Committee in their 1988 report provided a definition of unjustified disparity:

> "Unjustified disparity in sentencing is the imposition of dispositions of differing severity or the same disposition but of differing severity on two or more individuals who have, or the same individual who on two or more occasions has, committed an offence of the same degree of seriousness where that difference in disposition is caused by a factor other than the one which gives a legitimate reason for differentiating the dispositions in the manner which has occurred."

See Victorian Sentencing Committee, *Sentencing: Report of the Victorian Sentencing Committee,* Attorney-General's Department, Victoria, Melbourne, 1988 p148

[23] *Dhananjoy Chatterjee v. State of West Bengal* (1994) 2 SCC 220

[24] *Jai Kumar v. State of Madhya Pradesh* (1999) 5 SCC 1

[25] *Shivu & Anr. v. Registrar General, High Court of Karnataka* (2007) 4 SCC 713

[26] (2003) 8 SCC 93

[27] *Rahul v. State of Maharashtra* (2005) 10 SCC 322

[28] *Santosh Kumar Singh v. State* (2010) 9 SCC 747

[29] *Rameshbhai Chandubhai Rathod (2) v. State of Gujarat* (2011) 2 SCC 764

[30] In *Amit v. State of Uttar Pradesh* (2012) 4 SCC 107

[31] *Jai Kumar v. State of Madhya Pradesh* (1999) 5 SCC 1

[32] *B.A. Umesh v. Registrar General, High Court of Karnataka* (2011) 3 SCC 85

[33] *Mohd. Mannan v. State of Bihar* (2011) 5 SCC 317

[34] *Nirmal Singh v. State of Haryana* (1999) 3 SCC 670

[35] In *Mohd. Chaman v. State (NCT of Delhi)* (2001) 2 SCC 28

[36] *Raju v. State of Haryana* (2001) 9 SCC 50

[37] *In Bantu v. State of Madhya Pradesh* (2001) 9 SCC 615

[38] *Surendra Pal Shivbalakpal v. State of Gujarat* (2005) 3 SCC 127

[39] *Rahul v. State of Maharashtra* (2005) 10 SCC 322

Amit v. State of Uttar Pradesh.[40] Indian death penalty jurisprudence is, therefore, full of such unjustified disparity which would be unfolded in the coming chapter[41]

Tonry in his book *Sentencing Matters* points out that unstructured discretion may have an association with unwarranted disparity.[42] The goal of sentencing uniformity -treating like defendants alike and reflecting relevant differences among defendants through proportional differences in sentences - reflects basic human instincts of fairness and justice.[43]

Disparity, therefore, simply put, is a difference in sentencing which cannot be justified. But without a single over-riding policy or approach to say what is or isn't justified, it is very difficult to say that disparity exists.[44] Disparity depends on one's theory of sentencing.[45] Disparity in sentencing leads to a breakdown of confidence in the system, particularly by the public at large.[46] The problem of disparity creates hostile attitudes in the mind of the offender and reduces the chances of his socialization as he would feel that he is being discriminated.[47]

However, in the absence of coherent yardstick to measure it is difficult to point out disparity in the sentencing.[48] There is no single policy or approach in our system, and therefore, like cases may be treated differently, and justifiably so. Two judges suggesting different sentences for an identical case might both be right (or, for that matter, wrong) if one accepts the legitimacy of different priorities being given to

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[40] In *Amit v. State of Maharashtra* (2003) 8 SCC 93

[41] See chapter IV on "A Critical Analysis Of Capital Sentencing: Riddles, Riders And Resolutions"

[42] Michael Tonry *Sentencing Matters* (New York: Oxford University Press, 1996) , 177

[43] *See* Richard S. Frase, "Punishment Purposes", *Stan. L. Rev*. Vol. 58:67, 2005, pp 67-84

[44] Ireland Law Reform Commission "Consultation Paper on Sentencing" 1993, p 65 available at http://www.lawreform.ie/_fileupload/consultation%20papers/cpSentencing.htm

[45] See Jareborg, *Introductory Report*, in the Council of Europe's *Disparities in Sentencing: Causes and Solutions*, (1987), p 8

[46] See Don Weatherburn and Bronwyn Lind, 'Sentence Disparity, Judge Shopping and Trial Court Delay' *The Australian and New Zealand Journal of Criminology* vol.29, 1996, p 147; Austin Lovegrove, *Sentencing Guidance And Judicial Training In Australia* in Colin Munro and Martin Wasik (eds), *Sentencing, Judicial Discretion And Training,* (London: Sweet and Maxwell, 1992).

[47] G. Kameswari And V. Nageswara Raot "The Sentencing Process- Problems And Perspectives" *Journal of The Indian Law Institute* Vol. 41 : 3&4 1999, p 455

[48] *Forst* comments:

> "Anyone who wants to show disparity in sentencing… must demonstrate that sentences meted out … cannot be justified by reference to some legally relevant variables…This is a tall order to fulfil, since the aims of the criminal law are rarely clearly articulated."

See Forst, ed, *Sentencing Reform: Experiments in Reducing Disparity*, (1982), p30 quoted in Irish law commission at p 65 available at http://www.lawreform.ie/_fileupload/ consultation%20papers/cp Sentencing.htm

different approaches to sentencing.[49] Disparity would be enormously difficult to detect because almost any factor can be of relevance to one of the alternative objects of sentencing.[50]

Sentencing discrimination, on the other hand, occurs when irrelevant criteria, such as race, gender, or social class are taken into consideration at the time of sentencing either as mitigating or aggravating factors. There is difference between disparity and discrimination too. As Cassia Spohn puts it [51]

> "[a]llegations of lawlessness in sentencing reflect concerns about both disparity and discrimination. Although these terms are sometimes used interchangeably, they do not mean the same thing. *Disparity* is a difference in treatment or outcome that does not necessarily result from intentional bias or prejudice. *Discrimination,* on the other hand, is differential treatment of individuals based on irrelevant criteria, such as race, gender, or social class. [52]

Mr. Niamh Maguire notes with illustration that,[53]

> [s]entencing discrimination exists when legally irrelevant characteristics of a defendant affect the sentence that is imposed after all legally relevant variables are taken into consideration. It exists when … male offenders receive more punitive sentences than comparable female offenders, and when poor offenders receive harsher sentences than middle-class or wealthy offenders." [54]

The variables like race, gender, social class, poverty[55] etc have also considerable influenced the outcome of the judgments at times. Unlike other jurisdictions no exhaustive studies have been accomplished in India to state authoritatively that variable like mentioned above have been instrumental in influencing the decisions. Poverty,[56] illiteracy, caste etc[57] have been considered as variables in sentencing policy by trial courts which have been rightly corrected by the

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[49] See generally the Canadian Sentencing Commission's Report *Sentencing: A Canadian Approach*, available at http://www.johnhoward.ca /media/(1987)%20KE%209355% 20A73%20C33% 201987% 20(J.R.%20Omer%20Archambault).pdf

[50] *Supra* note 44 p 6

[51] See Cassia Spohn, *How Do Judges Decide? The Search For Fairness And Justice In Punishment*, 2nd ed., (California: Sage publication, 2009)

[52] *Ibid*

[53] Niamh Maguire "Consistency in Sentencing" (2010) 2 *Judicial Studies Institute Journal* 14 at 39.

[54] *Ibid*

[55] See *State of Gujarat v. Jaydip Damjibhai Chavda* available at http://www.livelaw.in/poverty-is-not-a-mitigating-factor-for-lesser-punishment-gujarat-hc-read-jt/ where the courts held that poverty cannot be a mitigating factor as held by the trial courts in awarding lenient punishment in rape cases.

[56] In the context of death penalty Justice Bhagwati in his dissenting opinion found the death penalty necessarily arbitrary, discriminatory and capricious on one of the ground that " it strikes mostly against the poor and deprived sections of the community and the rich and the affluent usually escape, from its clutches." See *Bachan Singh v. State of Punjab* (1982) 3 SCC 24 (J. Bhagwati, dissenting), at para 81.

[57] In the *State of Karnataka v. Krishnappa*, (2000) 4 SCC 75, sentence of 10 years rigorous imprisonment imposed was by the Trial Court for rape of 8 years old girl. The Division Bench of the High Court, however, interfered with the sentence imposed by the Trial Court and reduced from 10 years R.I. to 4 years R.I. on the ground that "an unsophisticated *and illiterate citizen belonging to a weaker section of the society,* having committed various offences while in a state of intoxication."

Supreme Court. These variables unfortunately have also weighed with constitutional powers like pardon and remission.[58] In the absence of stated philosophy of the punishment in India, such kind of 'creeping in' of 'such variables' is bound to occur.

'Inconsistency in sentencing', on the other hand, occurs when sentencers make the choice as to the particular approach upon which to base their choice of sentence. The worst type of inconsistency is inconsistency in the way in which sentencers decide on which approach to adopt when making the sentencing decision. One sentencer may decide that a particular offender should receive a short sentence on the grounds of rehabilitation whereas another sentencer may decide that the same offender should receive a lengthy sentence on the grounds of deterrence. This eventuality leads to an unequal treatment of offenders by the criminal justice system. The existence of such inconsistency is easily determined by taking a look at the perceptions of those who sentence and the actual results of their sentencing dispositions.[59] Sean J. Mallett argues that Consistency is required at two levels:

> "[I]ndividual consistency for the particular judge dealing with like offenders who appear before them; but also consistency between judges generally in dealing with like cases within the same jurisdiction.[60] The more cases being heard in that jurisdiction, the more difficult it is to ensure that the same sentencing practices are being followed. While we can expect a judge to be personally consistent in his or her approach to sentencing, the difficulty arises when trying to achieve consistency between adjudicators."[61]

Consistency in sentencing is of fundamental importance to the criminal justice system. What is needed is parity: like offenders must be treated alike, a maxim that has

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[58] See chapter VI on "Clemency, Concessionary and Short Sentencing: Executive Interference in Judicial Process; Two Sides of the Same Coin or Tug of War Between?" for detailed discussion

[59] *Palays and Divorski* describe the results of a Canadian exercise

> "The study was conducted by furnishing over 200 Provincial Court judges with the same basic facts relating to the offence and the characteristics of the offender in five hypothetical specimen cases. The judges were individually asked to indicate the sentence they would recommend in each case and the reasons for their conclusions. In all cases there was inconsistency in the sentences recommended – in many the degree of inconsistency was quite dramatic. The study revealed the way in which sentencing judges differ in their philosophical approach to sentencing – some choosing rehabilitative approaches and others choosing retributive ones. Those sentencers who were generally more lenient tended to rely on rehabilitative reasoning while those who were more severe emphasised the seriousness of the crime."

See Palays and Divorski, *Judicial Decision Making: An Examination of Sentencing Disparity Among Canadian Provincial Court Judges* in Muller, Blackman and Chapman (eds), *Psychology and the Law*, (Chichester: Willy, 1984), summarised by the Canadian Sentencing Commission in its Report, p75. Quoted in *Supra* 44 p66

[60] *Supra* note 21

[61] *Supra* note 17 see also Sean J. Mallett "Judicial Discretion in Sentencing: A Justice System that is No Longer Just?" *VUWLR*, Vol.46, 2015

its origins in the works of Aristotle. [62] If offenders are not treated alike, it is acknowledged that the resulting disparity "*can result in injustice to an accused person and may raise doubts about the even-handed administration of justice*". Conversely, dissimilar cases should not be treated in a like fashion. Both of these situations would lead to injustice and erode public confidence in the legal system.[63] The consistency is constitutional requirement too.[64] It is to be noted however

> "that the mandate of equality clause applies to the sentencing process rather than the outcome. The comparative review must be undertaken not to channel the sentencing discretion available to the courts but to bring in consistency in identification of various relevant circumstances." [65]

States like England[66] and USA[67] have undertaken researches to measure inconsistency in sentencing either vertically or horizontally in their respective domains concluding that inconsistency did exist. They also resolved to appoint this malady with solutions like sentencing councils. However, in India no such attempts have been done till date though we find academic discourses here and there.

3.3 Patterns of Discretion

As mentioned in the second chapter, each of the four punishments provided by section 53 of IPC, confers wide discretionary powers on the sentencing judge.

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[62] See C.J. Rowe and Darah Broadie *Aristotle: Nicomachean Ethics* (Oxford: Oxford University Press, 2002).

[63] *Supra* note 53 at p 39

[64] The Supreme Court of India in *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009) 6 SCC 498 observed "equal protection clause ingrained under Article 14 applies to the judicial process at the sentencing stage."

[65] *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009) 6 SCC 498, para 78

[66] Robin Linacre "Refining The Measurement of Consistency in Sentencing" *California Law Review*, Vol.1, No.1., 2012 available at http://lawblr.com/attachments/article/14/v1n12012%20-9-14[1].pdf (compared the use of different types of sentences in 25 magistrates courts in England and Wales in 1975 and 2000)

See also Moxon, D; Corkery, J. M. and Hedderman, C. (1992) – Developments in the use of Compensation Orders in the Magistrates' Courts Since October 1988. Home Office Research Study No. 126. London: HMSO (study in the early 1990s of the use of compensation orders in the magistrates' courts in England and Wales)

See also Hough, M.; Jacobson, J. and Millie, A. (2003) – The Decision to Imprison: Sentencing and the Prison Population. Prison Reform Trust.(study of the decisions involved in sending offenders to prison) Davies, M. and Tyrer, J. (2003) – " 'Filling in the Gaps' – A Study of Judicial Culture: Views of judges in England and Wales on sentencing domestic burglars contrasted with the recommendations of the Sentencing Advisory Panel and the Court of Appeal Guidelines." *Criminal Law Review* pp. 243-265.(project with 51 judges from 12 Crown Court centres in England and Wales in which the judges were asked to give their views on an appropriate sentence in response to five domestic burglary scenarios)

[67] Judge Nancy Gertner "From Omnipotence to Impotence: American Judges and Sentencing" *Ohio State Journal of Criminal Law* Vol 4, 2007 Pp523-539. *See also* Tarling, R. (2006) "Sentencing Practice in Magistrate's Courts Revisited", *The Howard Journal* Vol. 45 (1) Pp 29-41. *See also* Ann Martin Stacey & Cassia Spohn "Gender And The Social Costs of Sentencing" *Berkeley Journal of Criminal Law,* Vol. 44, 2006

Wherever death penalty is imposable, life imprisonment has also been made available as alternative punishment.[68] Wherever, life imprisonment has been provided, lesser sentences are also provided making life imprisonment the highest.[69] In respect of other imprisonments, huge discretion is conferred upon the judges to choose from few months imprisonment to 20 years imprisonment. Judges have limited discretions in respect of fine and therefore much disparity is not talked of in respect of fines though Supreme Court has expressed its dissatisfaction for non liberal use of this salutary provision.[70]

The main accusation, therefore, against the judiciary is that sentencing judges arbitrarily sentence the accused choosing the sentence from the wide range of minimum to maximum. The disparity in sentences is widely known,[71] judicially acknowledged[72] and silently suffered.[73]

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[68] With only exception of section 303 of IPC which was declared unconstitutional. However, the Anti-Hijacking Act 2016 makes death penalty as only punishment even with the background that the mandatory death penalty is declared (being declared) as unconstitutional.

[69] Section 311 of IPC provides "Whoever is a thug, shall be punished with imprisonment for life, and shall also be liable to fine."

[70] See *Hari Singh v. Sukhbir Singh and Ors* (1988) 4 SCC 551, *Sarwan Singh and others v. State of Punjab* (1978) 4 SCC 111, *Balraj v. State of U.P.* (1994) 4 SCC 29, *Baldev Singh and Anr. v. State of Punjab* (1995) 6 SCC 593, *Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd. and Anr.* (2007) 6 SCC 528, *Ankush Shivaji Gaikwad v. State of Maharashtra* (2013) 6 SCC 770

[71] See forthcoming discussion on how non common law countries have been constrained to establish sentencing councils to discipline sentencing disparity. The 20th century has been a century of experiments in sentencing policies worldwide.

[72] *Mohammad Giasuddin v. State of Andhra Pradesh* 1977 AIR 1926, *Narinder Singh & Ors v. State of Punjab* https://indiankanoon.org/doc/98425580/ *State of Punjab v. Prem Sagar & Ors* (2008) 7 SCC 550 *Satya Prakash v. State* https://indiankanoon.org/doc/135464464/, *Soman v. State of Kerala* 2012 (12) SCALE 719, *Rameshbhai Chhaganbhai Navapariya v. State of Gujarat* https://indiankanoon. org/ doc/146065626/, *Sangeeta & Ors v. State of Haryana* (2013) 2 SCC 452 *Aloke Nath Dutta & Ors v. State of West Bengal* (2007) 12 SCC 230, *Swamy Shraddhananda v. State of Karnataka* (2008) 13 SCC 767, *Farooq Abdul Gafur v. State of Maharashtra* (2010) 14 SCC 641, *Shankar Kisanrao Khade v. State of Maharashtra* (2013) 5 SCC 546; *Bachan Singh v. State of Punjab* (1980) 2 SCC 684; *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009) 6 SCC 498

[73] A Full Bench of the Madras High Court in *Athapa Goundan's case* (AIR 1937 Mad. 695) sentenced the accused to death. He was duly executed as also several others on the ratio of that ruling. The Full Bench decision was, however, over-ruled 10 years later by the Privy Council in 1947 P.C. 67. Had it been done before Goundan was gallowed many judicial hangings could have been halted. "But dead men tell no tales and judicial 'guilt' has no temporal punishment."

By the virtue of judgment in *Ravji @ Ram Chandra v. State of Rajasthan* (1996 AIR 787), Ravji Rao was executed on May 4, 1996, for killing five people, In 2009, 13 years after his death, the Supreme Court, in the case of *Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra* (2009 (6) SCC 498), declared the Ravji case "per incuriam"

Again by virtue of *Dhananjoy Chaterjee v. State of W.B* (1994 SCC (2) 220), Dhananjoy Chatterjee was hanged for rape and murder in 2004 nearly after 14 years from the date of his conviction by a trial court. The ratio of the case held the filed for long time till 2013 when the Supreme Court in *Shankar Kisanrao Khade v. State of Maharashtra* (2013) 5 SCC 546, doubted the ratio and death sentence itself! The police investigation in the case was subsequently proved to be faulty on the basis of which he was convicted. This fact was seconded by The former Supreme Court judge, Asok Kumar Ganguly as "mostly acceptable." See staff Reporter "Execution of Dhananjoy erroneous: PUDR" *The Hindu*, July 15, 2015 available at http://www.thehindu.com/todays-paper/tp-national/execution-of-dhananjoy-erroneous-pudr/article7 422904.ece

Apart from the Indian Penal Code which is the launching pad of punishment, progressive and welfare legislations like Probation of Offenders Act, 1958, admonition provision under Code of Criminal Procedure, 1973 and Juvenile Justice Act 2015 also empower the sentencing judge to sentence the accused in concessionary way. The choice of these benefits, however, depends a lot on the personality of the judges. Orthodox and conservative judges may not use such salutary provisions though on the other hand, progressive, liberal and reformatory judges may often have recourse to such beneficial provisions.[74] Though uniformity in all forms of sentencing is expected as constitutional mandate,[75] nothing much is lost in respect of small sentences if disparity persists. However, disparity in sentences where accused is sentenced for long incarcerations, the life and liberty may be arbitrarily lost.

The power to fix sentences to run sentences concurrently or consecutively has also conferred wide discretion on the sentencing courts resulting in disparity in the sentences.[76] The powers of remissions and pardon have also been central point of attack in respect of arbitrary exercise of powers.[77] The disparity and arbitrariness in sentencing has brought a sense of dissatisfaction towards the institution of judiciary so much so that the discretion in sentencing has even been criticised as fertile ground for corruptions![78] How this sentencing discretion has been inconsistently and arbitrarily used is unfolded in the coming discussion.

3.4 Sources of Inconsistency and Disparity in the Indian Sentencing System

Following reasons can be cited as source of inconsistency and disparity in the Indian sentencing system

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[74] See *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009 (6) SCC 498)

[75] See *Jagmohan Singh v. The State of U. P* (1973 AIR 947) where it was contended that

> " the uncontrolled and unguided discretion in the Judges to impose capital punishment or imprisonment for life is hit by Article 14 of the Constitution. Because two persons found guilty of murder on similar facts are liable to be treated differently--one forfeiting his life and the other suffering merely a sentence of life imprisonment."

[76] See section 31 of IPC, 1860

[77] see Bikram Jeet Batra "'Court' of Last Resort *A Study of Constitutional Clemency for Capital Crimes in India"* WORKING PAPER SERIES, Centre for the Study of Law and Governance Jawaharlal Nehru University, New Delhi, available at http://www.jnu.ac.in/CSLG/workingPaper/11-Court% 20 (Bikram) .pdf

[78] S M Solaiman and Abu Noman Mohammad Atahar Ali argued in the context of sentencing policy in respect of The Food Safety and Standards Act 2006 and the Food Act 2003 (FA-NSW) offences that

> "[p]aying heed to numerous corruption allegations which could not be reasonably ruled out by anyone, it would be wise to limit the discretion of adjudicating officers by prescribing a minimal penalty relating to offenses specified…" (p 110)

S M Solaiman and Abu Noman Mohammad Atahar Ali "Most Serious Offenses And Penalties Concerning Unsafe Foods Under The Food Safety Laws In Bangladesh, India And Australia: A Critical Analysis" *Journal of the Indian Law Institute* ,Vol.57:1, 2015, Pp 92-122

3.4.1 Individualised Sentencing System

As mentioned elsewhere, individualized sentencing systems by their very nature always give rise to a certain degree of inconsistency and disparity. Differences in case factors means that no two cases are ever precisely the same and this results in small but often noticeable differences in sentencing outcomes between two seemingly similar cases.[79] India inherited its individualised system of sentencing on independence from British legal system though the predecessors have gone miles ahead in framing consistent sentencing policy. Rather than reject this system and replace it with a new one, the Indian courts have incrementally embraced it.[80] Though individualisation of punishment has its own advantage, taken together on the larger scale disparity and inconsistency are inherent vices in individualisation of punishment.

3.4.2 No Coherent Sentencing Aims

According to Ashworth, one of the major reasons for sentencing disparity are the different penal philosophies amongst judges and magistrates.[81] This problem would be magnified exponentially in a situation whereby sentencing judges had unlimited discretion to impose a sentence according to their subjective intuition. Intuitions will invariably differ, and can be plagued by bias, ignorance and prejudice.[82] A single, clearly defined sentencing rationale – such as rehabilitation or retribution – would ensure that judges are exercising their discretion in the pursuit of a common goal.[83]

Unlike other jurisdictions[84] as discussed elsewhere, in India, there is no single

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[79] In *Rajesh Chander Katiyal v. Rashid Ali* (available at https://indiankanoon.org/doc/91907083/) Justice Sh. Bharat Chugh observed

> "[o]nce guilt is established, punitive dilemma begins goes the saying… By deft modulation the sentencing should be stern where it should be, and tempered with mercy where it warrants to be."

Similarly in *State of Madhya Pradesh v. Sarman Baldeo* (1965 Cri.L.J 511) Justice T Naik observed

> " The view now gaining ground is that punishment is to be determined not only by the gravity of the crime but by the nature at the criminal. The purposive theory is that the main aim of punishment is the regeneration of the individual as an effective and useful member of the society. To this end, the respective claims of the individual and the society have to be suitably balanced."

[80] See 2 chapter on "Conceptualizing sentencing policy in India: Problems and Perspectives" point 3.6

[81] Andrew Ashworth *Sentencing and Criminal Justice* 4th ed., (Cambridge: Cambridge University Press, 2005) at [3.3.1].

[82] Mirko Bargaric "Sentencing: The Road to Nowhere" *Sydney L. Rev*., Vol. 21, 1999, p 609

[83] *Supra* note 17

[84] See section 3A *Crimes (Sentencing Procedure) Act* 1999 which sets out the purposes for which a court can impose a sentence. Similarly see The Criminal Justice Act 2003 (for England and Wales) for purposes of sentencing.

unifying sentencing aim that judges must give priority to when passing sentences. Instead, Indian judges may choose any of the different sentencing aims including deterrence to suit the offender.[85] This leads to the proposition that different judges can legitimately adopt different sentencing approaches when sentencing the same case.[86] In other words, they can treat like cases differently and can justify their decisions according to sentencing law.[87]

In the pursuit of justice and just desert, courts have adopted fluctuating variables of elusive aims of sentencing in India. Sometimes, deterrence has held the field whereas reformation[88] has played part in some of the cases. Society's cry for justice has also held the field especially for heinous crimes. Public abhorrence, preferred retributions, corrections "collective conscience, etc have all played decisive roles in sentencing policy. The point of debate here is in the absence of stated goal of justice and aim of sentencing [89] a wide disparity in sentencing has been witnessed. Cases like *Dhananjoy Chatterjee v. State of WB*[90] and *Ravji v. State of Rajasthan*[91] which proceeded on the premise of 'deterrence' and 'shocking the collective conscious of the society' etc have been subsequently overruled bringing enough embracement for the judiciary since enough damage has been done to the sentencing philosophy on the basis of those judgments.[92] Even intra-judicial disparity in pursuing goals of sentencing policy have also been documented whereas lowers courts based their decision on reformation or deterrence and in appeal the apex courts ruled exactly opposite of it! Disparity and inconsistency is noted so much so that even judges on the

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[85] *Supra* note 53 at p 19

[86] *State of U.P v. Satish* (2005 (3) SCC 114) A Pasayat J. observed

> "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 tragic results of 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."

[87] See "punishment" in essays on Indian penal code by *JILI*, Pp 244-245 (available at http://14.139.60.114:8080/jspui/bitstream/123456789/742/18/Punishment.pdf)

[88] While conferring the benefits of probation justice Krishna Iyer in *Dilbag Singh v. State of Punjab* (1979 AIR 680) observed:

> "The human consequences of the confinement process… will be no good to society... Our prison system, until humane and purposeful reforms pervades, surely injures, never improves."

[89] *Cf* sentencing Act 2002 of Newsland and Coroners and Justice Act 2009 of England Wales for aims of sentencing policy

[90] (1994) 2 SCC 220

[91] 1996 (2) SCC 175

[92] See *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009) 6 SCC 498 and *Shankar Kisanrao Khade v. State of Maharashtra* (2013) 5 SCC 546

same bench have differed on the quantum of sentences because of their personal belief in the varied philosophy of sentencing policy. Absence of coherent sentencing aims, therefore, has become a fertile source of disparity in sentencing.

3.4.3 Judicial Variability

Inconsistency in sentencing is likely to happen in India because of judicial variability. Judicial variability refers to the individual differences between judges in terms of their approach to sentencing that occur naturally by virtue of their own individuality. A certain amount of judicial variability will always exist in every sentencing system. Penalties like life imprisonment and death sentences have been dependent upon the prediction of judges to the greater extent. As has shown elsewhere, personal philosophies of the judges greatly reflect on the kind and quantum of sentence. In respect of life imprisonment, few judges have handed down life imprisonment of 20/21/25/30/35 years in some cases whereas in other similar cases other judges have specifically mentioned that life imprisonment shall be subject to remission! This kind of judicial variability is linked with the propensity of the judges which cannot be totally eliminated though attempt can be made to regulate it.

3.4.4 Lack of Guidance

Lack of guidance is to be understood in the context of available factors to be considered by the courts. In India neither legislative guidelines nor judicially developed guidelines are available to the judiciary to base their decisions on. In USA and England and Wales, the sentencing councils have laid down statutory aggravating and mitigating factors that need to be taken into consideration mandatorily by the courts before they proceed to sentence. As a consequence, it is fair to say that Indian judges exercise a relatively broad sentencing discretion in the context of a virtual legislative vacuum. In the absence of *specific* and *detailed* guidelines (and therefore some level of agreement) on how to apply the principle of proportionality in practice, there is a chance that the system of review may fall prey to the perils of subjectivity: the trial judge (applying the principle of proportionality) believes that a 4-year sentence is proportionate whereas the appellate (also applying the proportionality principle) believes that a 2-year sentence is proportionate. Further appeal may lead to

one year conviction again on the basis of proportionality principle. [93] The point is not that this happens all the time in practice, but that there is no mechanism (specific guidelines) through which it is apparent that this is not happening.[94]

3.5 Examples of Disparity and Arbitrary Sentencing – Routine and Exceptional!

As mentioned elsewhere, disparity cannot be eliminated from the sentencing process on the mathematical scale with baroscopic view. However it is unwarranted disparity and arbitrary sentencing that is the bone of the contention. Though all 'objectionable decisions' of Indian courts cannot be cataloged on the scale of disparity, inconsistency, and arbitrariness, few glaring examples may be noted to drive the point home.

Before cases are noted, it would be appropriate to adhere to the caveat that the examples here are confined to the disparity in sentencing approach rather than the differences in the appreciation of facts. In other words, the outcome of the case may substantially differs in all the three courts on the basis of facts appreciation. However, once the guilt is proved in the lower courts and upheld by the higher courts, question of sentencing only remains. It is this sentencing examples that are highlighted here as examples.

The example that forefronts in the arbitrary sentencing is of *OMA @ Omprakash & Anr. v. State of Tamil Nadu*.[95] Appellants, herein, were awarded death sentence by the trial court after having found them guilty under Sections 395, 396 and 397 of IPC. The trial court granted life imprisonment under Section 395 and fine of Rs. 1,000/- and they were sentenced to death for the offence under Section 396 IPC. They were also sentenced for RI for 7 years under Section397 IPC. The High Court, converted the sentence of death to life imprisonment under Section 396 IPC and rest of the sentence on other heads were confirmed. The interesting part of the judgment of trial court was the reasons forwarded for death penalty! The trial court after noticing that, the accused persons came from a State about 2000 k.m. away from

[93] In *Ramashraya Chakravarti v. State of Madhya Pradesh* (1976 AIR 392) for misappropriation of a sum of 500 and forged entries in the bills, the accused was convicted under section 409 and section 467 IPC by the Sessions Judge for four years' rigorous imprisonment and to a fine of Rs. 500/- in default to rigorous imprisonment for six months. The High Court on appeal maintained the conviction but reduced the sentence to two years' rigorous imprisonment maintaining the fine. Supreme Court opined that it will meet the ends of justice if the appellant's sentence is reduced to one year's rigorous imprisonment only

[94] *Supra* note 53 at p 26

[95] (2013)3SCC440

Tamil Nadu, held as follows:

> "Therefore, this court is of the opinion that the death sentence that would be imposed on them would create a fear amongst the criminals who commit such crime and further this case is a rarest of rare case that calls for the imposition of death sentence."

Apart from the above reasoning the learned trial court based his decision on a lecture he heard at public platform[96] and declared that only weapon in the hands of judiciary under the prevailing law to help eliminate the crime, and imposed death penalty![97] Neither the principles of *Bachan Singh*[98] nor the other ruling of the Supreme Court were referred to for imposing death![99] Only one judgment was cited

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[96] The court noted

> "21. Criminal Court while deciding criminal cases shall not be guided or influenced by the views or opinions expressed by Judges on a private platform. The views or opinions expressed by the Judges, jurists, academicians, law teachers may be food for thought. Even the discussions or deliberations made on the State Judicial Academies or National Judicial Academy at Bhopal, only update or open new vistas of knowledge of judicial officers. Criminal Courts have to decide the cases before them examining the relevant facts and evidence placed before them, applying binding precedents. Judges or academicians opinions, predilection, fondness, inclination, proclivity on any subject, however eminent they are, shall not influence a decision making process, especially when judges are called upon to decide a criminal case which rests only on the evidence adduced by the prosecution as well as by the defence and guided by settled judicial precedents. ***National Judicial Academy and State Judicial Academies should educate our judicial officers in this regard so that they will not commit such serious errors in future."***
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> [Emphasis supplied]

[97] The Supreme Court further noted thus

> "19. Learned trial judge has also opined that the imposition of death sentence under Section 396 of the IPC is the only weapon in the hands of judiciary under the prevailing law to help to eliminate the crime. *Judiciary has neither any weapon in its hands nor uses it to eliminate crimes.* Duty of the judge is to decide cases which come before him in accordance with the constitution and laws, following the settled judicial precedents. A Judge is also part of the society where he lives and also conscious of what is going on in the society. Judge has no weapon or sword. Judge's greatest strength is the trust and confidence of the eople, whom he serves. We may point out that clear reasoning and analysis are the basic requirements in a judicial decision. Judicial decision is being perceived by the parties and by the society in general as being the result of a correct application of the legal rules, proper evaluation of facts based on settled judicial precedents and judge shall not do anything which will undermine the faith of the people."

[98] *Bachan Singh v. State of Punjab* (1980) 2 SCC 684

[99] The Supreme Court expressed its frustration thus:

> "12. We are unhappy in the manner in which Sessions Court has awarded death sentence in the instant case. The tests laid down by this Court for determining the rarest of rare cases in *Bachan Singh v. State of Punjab* (1980) 2 SCC 684 and *Machhi Singh & Ors. v. State of Punjab* (1983) 3 SCC 470 and other related decisions like *Jagmohan Singh v. State of U.P.* (1973) 1 SCC 20, were completely overlooked by the Sessions Court. The Sessions Court had gone astray in referring to the views expressed by the then Chief Justice of Madras in a lecture delivered at Madurai, which advice according to the Sessions Judge was taken note of by another learned Judge in delivering a judgment in rowdy panchayat system. Sessions Judge has stated that he took into consideration that judgment and the provision in Section 396 of the Indian Penal Code to hold that the accused had committed the murder and deserved death sentence. Further, the trial court had also opined that the imposition of death sentence under Section 396 IPC is the only weapon in the hands of the judiciary under the prevailing law to help to eliminate the crime and the judgment of the trial court should be on that ground."

that too without citation![100]

Coming heavily on the judgment, Supreme Court acquitted all accused (High Court had awarded life imprisonment!) and passed pertinent remarks as under:

> " 14. We cannot countenance any of the reasons which weighed with the Sessions Judge in awarding the death sentence. *Reasons stated in para 36(b) and (e) in awarding death sentence in this case exposes the ignorance of the learned judge of the criminal jurisprudence of this country*.
>
> *We are disturbed by the casual approach made by the Sessions Court in awarding the death sentence. The 'special reasons' weighed with the trial judge to say the least, was only one's predilection or inclination to award death sentence, purely judge-centric. Learned judge has not discussed the aggravating or mitigating circumstances of this case, the approach was purely 'crimecentric'.*
>
> [Emphasis supplied]
>
> ****
>
> 16. We are really surprised to note the "special reasons" stated by the trial judge in para 36(b) of the judgment. We fail to see why we import the criminal jurisprudence of America or the Arab countries to our system. Learned trial judge speaks of sentence like "lynching" and described that it has attained legal form in America.
>
> *The judges' inclination to bring in alleged system of lynching to India and to show it as special reason is unfortunate and shows lack of exposure to criminal laws of this country.*
>
> *Learned judge lost sight of the fact that the Criminal Jurisprudence of this country or our society does not recognize those types of barbaric sentences.*
>
> [Emphasis supplied]
>
> 17. We are also not concerned with the question whether the criminals have come from 20 km away or 2000 km away. Learned judge says that they have come to "our state", *forgetting the fact that there is nothing like 'our state' or 'your state'. Such parochial attitude shall not influence or sway a judicial mind.* Learned judge has further stated, since the accused persons had come from a far away state, about 2000 km to "our state" for committing robbery and murder, death sentence would be imposed on them. *Learned judge has adopted a very strange reasoning, needs fine tuning and proper training.*"
>
> [Emphasis supplied]

In *Raj Bala*[101] for conviction under Section 306 IPC,[102] the sessions court

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[100] The Supreme Court noted

> "18. Learned trial judge in para 36(f) has also referred to a judgment of the High Court rendered by a learned Judge of the High Court on "rowdy panchayat system". Learned trial judge has stated that he has taken into consideration that judgment also in reaching the conclusion that death sentence be awarded. We are not in a position to know how that judgment is relevant or applicable in awarding death sentence. *Learned trial judge has also not given the citation of that judgment or has given any*."

[101] *Raj bala v. State of Haryana & Ors. Etc*. available at https://indiankanoon.org/doc/90671517/

[102] Section 306 of IPC reads

> 306. Abetment of suicide.
>
> "If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

sentenced the convict for rigorous imprisonment for a period of three years each with a fine of Rs.3,000/- each and in default of payment thereof to undergo R.I. for six months. On appeal the High Court gave the stamp of approval to the conviction but as regards the sentence, it held thus:-

> "As regards the quantum of sentence of imprisonment, this Court, hereby, refers to the jail custody certificates, as per which each of the appellants has undergone a period of 4 months and 20 days. They are not found to be involved in any other criminal case.
>
> In view of the totality of the circumstances, this Court is of the considered view that no useful purpose will be served by sending the appellants back to jail for remaining sentences of imprisonment. Ends of justice would be amply met if their substantive sentences of imprisonment are reduced to the one already undergone by them."

Hearing the appeal on the touchstone of sentencing policy, the Supreme Court, per justice Dipak Misra,[103] observed

> "…it is really *unfathomable how the High Court could have observed that no useful purpose would be serve[d]* by sending the accused persons to jail for undergoing their remaining sentences of imprisonment, for the High Court itself has recorded that the appellants therein had remained in custody only for a period of four months and twenty days…"
> "…*The approach of the High Court, as the reasoning would show, reflects more of a casual and fanciful one rather than just one*…"

Expressing displeasure at the appreciation of the case the Supreme Court observed that *trial Judge has miscalculated the mitigating factors*[104] and the *learned Single Judge has remained quite unmindful and unconcerned to the obvious*.[105] Commenting on the discretion and sentencing policy, the court observed,

> "… The legislature in its wisdom has conferred discretion on the Court but

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[103] Bench consisting of Dipak Misra and Prafulla C. Pant. Justice Dipak Misra writing the judgment for the bench.

[104] The Supreme Court noted

> "…The learned trial Judge has, on the basis of the appreciation of the evidence on record, come to the conclusion that the deceased was assaulted and being apprehensive of further torture, he committed suicide. The mitigating factors which have been highlighted by the learned trial Judge are absolutely non-mitigating factors and, in a way, totally inconsequential for imposing a sentence of three years…"

[105] The Supreme Court further observed

> "12. In the instant case, we are constrained to say that the learned Single Judge while dealing with the appeal preferred by the respondents has remained quite unmindful and unconcerned to the obvious and, therefore, the reduction of sentence by the High Court to the period already undergone is set aside and the sentence imposed by the learned trial Judge is restored."
>
> 13. We may hasten to add though we have commented on the approach of the learned trial Judge, we cannot change the scenario in the absence of any appeal either by the State or the persons aggrieved in that regard. Though a revision preferred by the informant has been dismissed by the High Court, the same did not pertain to the challenge to the quantum of sentence as it could not have.

> the duty of the court in such a situation becomes more difficult and complex. It has to exercise the discretion on reasonable and rational parameters. The discretion cannot be allowed to yield to fancy or notion. A Judge has to keep in mind the paramount concept of rule of law and the conscience of the collective and balance it with the principle of proportionality but when the discretion is exercised in a capricious manner, it tantamounts to relinquishment of duty and reckless abandonment of responsibility. One cannot remain a total alien to the demand of the socio-cultural milieu regard being had to the command of law and also brush aside the agony of the victim or the survivors of the victim. Society waits with patience to see that justice is done. There is a hope on the part of the society and when the criminal culpability is established and the discretion is irrationally exercised by the court, the said hope is shattered and the patience is wrecked. It is the duty of the court not to exercise the discretion in such a manner as a consequence of which the expectation inherent in patience, which is the "finest part of fortitude" is destroyed…"

In the *State of Karnataka v. Krishnappa*,[106] for a rape of a little girl, who was about 8 years of age, conviction under Section 376 IPC (repealed and recast in 2013), took place.[107] A sentence of 10 years rigorous imprisonment was imposed by the Trial Court. The Division Bench of the High Court, however, interfered with the sentence imposed by the Trial Court. The Division Bench while commenting upon the imposition of sentence by the Trial Court observed:

> "...reading that part of the judgment in which the learned Trial Judge has examined the question as to what would be the proper sentence we find that the learned Trial Judge, while considering the proper sentences to be imposed on the accused for the offence of rape was swayed and moved by the fact that rape was committed on the young girl aged about 7 or 8 years and the conduct attributed and proved against the accused, both before during and after the commission of the offences."

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[106] (2000) 4 SCC 75

[107] Both the accused and the prosecutrix belong to Scheduled Caste. On 5th of May, 1991, between 8.00 and 9.00 p.m. while the prosecutrix and her brother, Ramesh were playing in the Chavani of their house, the respondent went there and called out for Honnaiah. PW-4 father of the prosecutrix. " Parvathi, PW-5 was at that time preparing chapattis in the kitchen. She answered back to say that her husband was not in the house. On hearing this, the respondent went inside the house and asked Parvathi, PW-5 to sleep with him, since her husband was not present in the house. She protested. The respondent made obscene gestures and pulled her breasts and on her further protest, the respondent beat her up. Parvathi, PW-5 managed to somehow escape and ran out of the house and went towards the house of her mother in law, Ramaji. Both the prosecutrix and her brother, after observing the incident also made an attempt to run away. The respondent, however, caught hold of the prosecutrix by her right hand and dragged her to room no. 3 of houses in collie line. The respondent closed the door and forcibly made prosecutrix to lie on the floor. The protest of the prosecutrix and her effort to free herself from the hold of the respondent led to the respondent beating her on her upper lip which started bleeding. The prosecutrix fell on the ground. The respondent had forcible sexual intercourse with her. She sustained bleeding injuries on her private parts also and was exhausted. The respondent then left the room and locked it from outside. PW-4, father of the prosecutrix, had in the mean while returned home. He learnt that the respondent had taken the prosecutrix towards the collie line. He went to the house of PW- 12, but was assaulted and threatened with dire consequences in case he disclosed about the occurrence to anyone. In the early house of the morning, PW-4 and 5 went to room No. 3 in the coolie line and rescued the prosecutrix.

The Division Bench of the High Court, however, interfered with the sentence imposed by the Trial Court and reduced 10 years R.I. to 4 years R.I. For reducing the sentence, the High Court observed:

> "of course the question of sentence is a matter within the sound discretion of the Trial Judge, But when the discretion is not properly exercised or is exercised without taking into consideration the relevant factors or when the discretion is shown to have been exercised to express sense of disapprobation intensively, there will be a case for interference when the facts brought on record require alteration in the sentence by reduction. In this case, we find facts warranting interference.
> In our considered view having regard to the age of the accused his social status, personal circumstances and financial condition the fact alleged by the prosecution itself that the accused was a chronic addict to drinking there is a case for a substantial reduction in the extent of the sentence of imprisonment.

The Division Bench found that it was a case 'for showing leniency' to the accused in the matter of punishment because the accused was "49 year of age" and "at the time of occurrence", he had an old mother, wife and children to look after. The Division Bench took note of the fact that when questioned by the learned Trial Judge on the question of sentence, he had stated that he was deaf by one year, that all the members of his family were depending on him for their livelihood and that if he was sent to jail, his family would be ruined and observed:

> Here is a case of an unsophisticated and illiterate citizen belonging to a weaker section of the society, having committed various offences while in a state of intoxication. It is common knowledge that when a man goes in a state of intoxication whether voluntarily or involuntarily, his reason would be unseated. He would indulge in acts knowing not the consequences of his acts which he forgets soon after he returns to a normal state."

Reversing the judgment of the High Court, the Supreme Court[108] made remarkable observation on the sentencing policy adopted by the High Court. It observed

> " 12. The approach of the High Court in this case, to say the least, was most casual and inappropriate. There are no good reasons given by the High Court to reduce the sentence let alone "special or adequate reasons". The High Court exhibited lack of sensitivity towards the victim of rape and the society by reducing the substantive sentence in the established facts and circumstances of the case. The Courts are expected to properly operate the sentencing system and to impose such sentence for a proved offence, which may serve as a deterrent for the commissions of like offences by others.
> … the reasons given by the High Court are wholly unsatisfactory and even irrelevant. We are at a loss to understand how the High Court considered that the "discretion had not been properly exercised by the Trial Court". There is no warrant for such an observation. …Socio-economic status religion race caste or creed of the accused or the victim are irrelevant considerations in

[108] Constitutional bench consisting of A Anand, R Lahoti, S Variava. Justice A Anand wrote the lead judgment

> sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence."

In *State of Karnataka v. Puttaraja* [109] the accused was charged for commission of offence punishable under Section 376 of the IPC. He was found guilty by the trial Court which imposed sentence of 5 years imprisonment, (though the minimum sentence prescribed is 7 years) and fine of Rs.2000. What seems to have weighed with the trial Court for inflicting a lesser sentence was age of accused's parents his dependent sisters, wife and two young children. Accused questioned correctness of the conviction and sentence before the Karnataka High Court.

While the conviction was maintained, the sentence was reduced by a learned Single Judge to period of custody already undergone i.e. 46 days. The only reason indicated by the High Court for awarding sentence lesser than prescribed minimum was that the accused is a *cooli and agriculturists, young man aged 22 years* old and requires sympathy.

Holding the "adequate and special reasons" given by the High Court as *"insulting to ratiocination*" and restoring the sentence of trial court, the Supreme Court, commenting in detail on philosophy of sentencing policy, observed that

> " In the background … the inevitable conclusion is that the High Court was not justified in restricting the sentence to the period already undergone, which is 46 days. Leniency in matters involving sexual offences is not only undesirable but also against public interest. Such types of offences are to be dealt with severity and with iron hands. Showing leniency in such matters would be really a case of misplaced sympathy. The acts which led to the conviction of the accused are not only shocking but outrageous in their contours…"

Similar views have been expressed by the Supreme Court in number of other cases, where sentencing leniency in rape or sexual offence sentencing was disapproved.[110]

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[109] https://indiankanoon.org/doc/46627/

[110] *Sevaka Perumal etc. v. State of Tamil Naidu* (AIR 1991 SC 1463), *Dhananjoy Chatterjee v. State of W.B.* (1994 (2) SCC 220), *Ravji v. State of Rajasthan* (1996 (2) SCC 175), *State of M.P. v. Ghanshyam Singh* (2003 (8) SCC 13), *Dalwadi Govindbhai Amarshibhai v. State Of Gujarat* 2004 CriLJ 2767 (2004) 2 GLR 1285, *State of A.P. v. Bodem Sundara Rao* (1995) 6 SCC 230, *Bodhisatttwa Gautam v. Subhra Chakraborty* AIR 1996 SC 922, *State of Punjab v. Gurmit Singh* AIR 1996 SCC 1393, *State of Rajasthan v. Om Prakash* AIR 2002 SC 2235, *Karnataka v. Krishnappa* (2000) 4 SCC 75, *Dinesh @ Buddha v. State of Rajasthan* (2006) 3 SCC 771, *Bhan Singh v. State of Rajasthan* 1984 CriLJ 788, *Baldeo v. State of Rajasthan* 1977 Cri LR 131, *Dalwadi Govindbhai Amarshibhai v. State of Gujarat* 2004 CriLJ 2767, *Kamal Kishore v. State of Himachal Pradesh* AIR 2003 SC 4684, *State of Punjab v. Gurmit Singh and ors.* (1996) (2) SCC 384, *State of Andhra Pradesh v. Bodem Sundara Rao* 1996 AIR 530, *State of Andhra Pradesh v. Polamala Raju & Rajarao* AIR 2000 SC 2854, *State of A.P. v. Bedem Sundara Rao* (1995 (6) SCC 230), *kamal kishore v. State of H.P.* (2000) 4 SCC 502, *State of Karnataka v. S. Nagaraju* 2002 (2) ALD Cri 643, *State of Andhra Pradesh v. Bodem Sundara Rao* (1995) 6 S.C.C. 230, *State of Madhya Pradesh v. Babbu Barkare @ Dalap* AIR 2005 SC. 2846, *Jashubha Bharatsinh Gohil v. State of Gujarat* 1994 (4) SCC 353

In *State of Madhya Pradesh v. Surendra Singh*,[111] the JMFC, convicted the respondent-accused for the offence punishable under Sections 279, 337, 304-A of the IPC and sentenced him to undergo six months and two years rigorous imprisonment respectively with fine of Rs.2,500. The High Court was moved for Revision. The High Court allowed Revision Petition but maintained the conviction with the modification "that the jail sentence awarded to the accused is reduced to the period already undergone subject to depositing further compensation of Rs.2,000, payable to the widow/mother of the deceased Vijay Singh." On appeal the Supreme Court observed that "We are of the opinion that the trial court has not committed any illegality in passing the order of conviction and in the appeal preferred by the accused findings of the trial court were affirmed." The Supreme Court however heavily came on the High Court by observing that

> "…However, without proper appreciation of the evidence and consideration of gravity of the offence, learned Single Judge of the High Court shown undue sympathy by modifying the conviction to the period already undergone…
> …In our considered opinion, *the High Court while passing the impugned order has completely failed to follow the principles enunciated by this Court in catena of decisions…*

After surveying authorities on appropriate sentencing policy,[112] the court observed,

> "We again reiterate in this case that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed….Meagre sentence imposed solely on account of lapse of time without considering the degree of the offence will be counterproductive in the long run and against the interest of the society."

In *State of Punjab v. Prem Sagar & Ors,*[113] respondents were convicted for one year imprisonment under Section 61(1) of the Punjab Excise Act for carrying 2000 litres of rectified spirit. The High Court gave the benefits of Probation of Offenders Act, 1958 even without calling the report of probation officer.[114] Calling High Courts move as

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[111] Available at http://rajasthanjudicialacademy.nic.in/docs/juds/42080.pdf

[112] The court referred to following authorites: *Sevaka Perumal v. State of Tamil Nadu* (1991) 3 SCC 471, *Dhananjoy Chatterjee @ Dhana v. State of West Bengal* (1994) 2 SCC 220, *Mahesh and others v. State of Madhya Pradesh* (1987) 3 SCC 80, Hazara Singh versus Raj Kumar (2013) 9 SCC 516, *Shailesh Jasvantbhai v. State of Gujarat* (2006) 2 SCC 359, *Ahmed Hussein Vali Mohammed Saiyed v. State of Gujarat* (2009) 7 SCC 254, *State of Madhya Pradesh v. Bablu* (2014) available at https://indiankanoon.org/doc/26032852/

[113] Available at https://indiankanoon.org/doc/1889684/

[114] The High Court observed

> "...The accused have suffered lot of agony of protracted trial. They having joined the main stream must have expressed repentance over the misdeed done by them about 19 years back….in the absence of any of their bad antecedents, it will not be appropriate to deny them … the benefit of probation under the Probation of Offenders Act, 1958…"

"serious error" the Supreme Court set aside the judgment and ordered the respondent to undergo simple imprisonment for a period of six months and pay a fine of Rs. 5,000 and in default to undergo imprisonment for a further period of one month.

In *State of Punjab v. Bawa Singh*,[115] the trial court convicted the respondents under sections 323 and 326 IPC r/w section 34 IPC to rigorous imprisonment for 3 years with fine of Rs.1000/- for offence punishable u/s 326 IPC and rigorous imprisonment for 1 year with fine of Rs.500/- for offence punishable under section 323 IPC.

The Sessions Court set aside the conviction of the accused u/s 326 IPC but upheld their conviction u/s 323 IPC upholding other findings of the trial court. The Sessions Judge also noted that Labh Kaur was an old lady, who herself had not caused any injury to the complainant and was a first time offender and released her on probation on a bond of Rs.20,000/- after setting aside her sentence of imprisonment with fine. The respondent was however sentenced to imprisonment of one and half years with fine of Rs.1000/-.

In the Revision petition the High Court noted that "the respondent had been in jail for 4 months with remission of 15 days" the trial went for 9 years. The court therefore, "granted the prayer of the respondent subject to payment of Rs.20,000, to the complainant within two months." On further appeal to Supreme Court, the court observed that

> "… the trial court has not committed any illegality in passing the order of conviction …However, without proper appreciation of the evidence and consideration of gravity of the offence, learned Single Judge of the High Court has taken lenient stand, if not casual and shown undue sympathy by modifying the conviction to the period already undergone…In our considered opinion, *the High Court while passing the impugned order has completely failed to follow the principles enunciated by this Court in catena of decisions.*
>
> Perusal of the impugned order passed by the High Court would show that while reducing the sentence to the period already undergone, *the High Court has not considered the law time and again laid down by this Court.*"
>
> [Emphasis supplied]

In case of rape and murder of a 7 year old girl,[116] The Sessions Judge sentenced the appellant to death, which conviction and death penalty was confirmed by the Madhya Pradesh High Court. It is interesting to note that High Court denounced the judge centric approach to death penalty yet adhered to "*society centric*

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[115] *State of Punjab v. Bawa Singh* (2015) available at https://indiankanoon.org/doc/188179650/

[116] *Kamlesh @ Ghanti v. state of MP*., available at http://barandbench.com/wp-content/uploads/2016/10/Kamlesh-@-Ghanti.pdf

view" and upheld the death penalty.[117] On appeal, Supreme Court commuted the sentence to rigorous imprisonment for the remainder of his natural life and observed:

> "Time and again this court has held that the imposition of the death penalty should be the only option available to the Court and the question of any another sentence must be unquestionably foreclosed so as to justify the extreme penalty."[118]

The *State of Gujarat v. Navalkishor Damodardas Patel* [119] is a classical example of different sentences.

The mill-owner was charged for a offence under the Prevention of Food Adulteration Act, 1954. The Judicial Magistrate, First Class Bhavnagar, convicted the opponents-accused and sentenced each of them to suffer six months rigorous imprisonment and to pay a fine of Rs. 1000. The opponents appealed to the Sessions Court which allowed the appeal and acquitted the opponents.[120] The matter came up for hearing before a Division Bench of the High Court. High Court set aside the order of acquittal but instead of passing an order on merits directed a re-trial. The matter was retried by learned magistrate. The opponents pleaded guilty to the charge. The learned Magistrate imposed a sentence of imprisonment till rising of the Court and a fine of Rs. 1000/- on each of the opponents-accused.

On notice[121] the substantive sentence imposed on him was enhanced from that of imprisonment till rising of the Court to one of one year's rigorous imprisonment! High Court observed:

> "The learned Judicial Magistrate, First Class, Bhavnagar appears to hold the view that it is easier for a camel to pass through the eye of a needle than for an owner of an oil mill who sells adulterated oil in packed tins and pleads guilty to it to enter the gates of a jail. This view has been taken by the learned Magistrate...

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[117] Upholding the death penalty, the Madhya Pradesh High Court had observed:

> "While awarding death sentence, the Court has to apply the 'rarest of rare' test depending upon the perception of the society i.e… A society centric view has to be taken and not a judge centric view. It has to be seen as to whether society will approve awarding of the death sentence to certain type of crime and if the society centric view is applied to the 'rarest of rare' test, in the present set of circumstances, we have no hesitation in holding that this is a fit case where the capital sentence can be imposed. ...."

[118] The Court found that the young age of the accused (26 years); the conduct of the accused in custody; the absence of any previous criminal history; the social-economic strata of the accused as extenuating circumstances which would not justify the death penalty.

[119] (1974) 15 GLR 736

[120] The learned Sessions Judge, Bhavnagar, came to the conclusion that the sanction for the prosecution on the basis of which the prosecution was lodged was defective.

[121] The opponents were served with a notice in exercise of powers under Section 439 of the Code of Criminal Procedure to show cause why the sentence imposed by the learned trial Magistrate should not be enhanced.

> The sentence of imprisonment till the rising of the Court (it is my painful duty to frankly say) is an eye-wash. It is illusory and a fraud on the concept of imprisonment. The accused comfortably sits in the Court-room and usually he does not even wait till the rising of the Court either. He never sees the gates of jail. He never experiences the discomfort of jail life. Nor does he suffer the indignity or social stigma attached to jail-going which operates as a deterrent to himself and to those others who are similarly inclined. Neither their self-esteem, nor the esteem or estimation of society for them in lowered. It will not be surprising if they themselves scoff and laugh at the illusory sentence and the society also mocks at it. Does it subserve any conceivable penological purpose? None. It pleases neither the deferent, nor the reformative, nor the retributive platform…
>
> It is a part of the function of the Court to create an ethical climate by its decisions. These decisions mould the public opinion and create an appropriate ecology. What the Courts approve and disapprove, what the Courts view with indignation, and what with indulgence, shapes the contours of public opinion and public mores…
>
> They must be made to realise that the moving finger writes and having written moves on. And that the message is: "Thy days are numbered". It is difficult to comprehend why the Courts should hesitate in imposing sentence of imprisonment even though the Legislature has proclaimed its will by prescribing a minimum sentence of six months. True, a proviso has been enacted, and discretion has been conferred on Courts. That surely does not mean that whenever the proviso is attracted the Courts must always lean in favour of imposing a lesser sentence. The question must also in the same breath be asked why the maximum sentence should not be imposed if the question is asked why less than the minimum sentence should not be imposed…
>
> While the purpose of the sentencing policy is not to terrorize unwary persons, it certainly is to strike terror in the evil-eyed avaricious offenders to ensure that it has its desired deterrent effect…
>
> It requires to be considered by the Legislature whether the jurisdiction to try such offences should not be exclusively vesting the Sessions Court. It also requires to be considered whether the relevant legislation should not prescribe a minimum sentence with the rider that if a sentence lowers than the minimum is sought to be imposed, a reference must be made to the High Court seeking its prior approval. These comments hold good in cases arising out of Prevention of food Adulteration Act, Essential Commodities Act, Customs Act and in tax-evasion matters and foreign exchange violation matters. (This suggestion requires to be placed before the Law Department and the Law Commission to whom a copy of this judgment may be forwarded)…"

Similar stand have been taken by courts in many cases, speaking diagonally opposite of what lower courts have done.[122] This tendency undoubtedly underscores

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[122] In the case of *State v. Dahyabhai Desaibhai* [1977] 18 GLR 232, this Court enhanced the sentence from imprisonment till rising of the Court to rigorous imprisonment for a period of three months and strongly condemned the following reasons given by the learned Judge for imposing lenient sentence:

> "Moreover the accused is a poor man. He is repenting for this offence. He assured for not to commit such offence again. There are 12 members in his family. He has small children and except himself there is no earning member in his family. Now-a-days he is not doing well with his business. His family has to starve without his income because these days are very hard days as it is an year of famine and hence the accused has prayed for mercy. Considering the mitigating circumstance of the accused I think that the sentence of T.R.C. [till rising of the court] and heavy fine will meet the ends of justice and serve the purpose."

the fact that no uniform sentencing policy is prevalent across the hierarchy. Appeal courts have functioned like moderators of lower courts albeit facts and circumstances! Though appeal courts have made use of proviso which allow them to reduce the sentence below the minimum prescribed,[123] the exercise of the same powers by lower courts have not been allowed citing *"every cause has its martyr and Parliament and Government not the Court must be disturbed over the search for solutions of these problems"*[124]

The higher judiciary commented adversely upon the attitude of some trial courts for not punishing the offenders and for not playing the role that has been assigned to them under the Code of Criminal Procedure, 1973.[125] The higher judiciary has had occasions to criticise the role of different functionaries in the criminal justice system. For example, both the sessions judges and senior police officers were criticised by the Madhya Pradesh High Court in *State of M.P. v. Gyan*[126] wherein two accused charged with murder were granted anticipatory bail on the plea of suffering from hypertension. The court was so unhappy that it went on record, "*Indeed this court thinks that there are sufficient reasons to doubt the honesty and integrity of the... Sessions Judge*."[127] Though lowers courts are under the scanner of the higher judiciary, there is no mechanism to deal with erratic judgments of the Supreme Court. In many instances the Supreme Court judgments which held the field for considerable time were overruled by the same institution as *per incuriam*!

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[123] See A. Lakshminath "Criminal Justice In India: Primitivism To Post-Modernism" *Journal of The Indian Law Institute* Vol. 48 : 1, 2006, p 30, wherein he observes

> "The higher judiciary in particular has been exercising their power to modulate the sentences on the basis of the fact situation or on the basis of the circumstances that prompted the offender to commit the crime."

[124] *Dahyabhai Shanabhai Rathod v. Rameshchandra Sakalchand Patel* 1986 GLH 392

[125] *KN. Chandrasekharan Pillai "Annual Survey of Indian Law Criminal Procedure"* Vol. XXVIII, 1992, p 110

In *State of Karnataka* v. *Shivappa* (1992 Cri LJ 3264), the court did not punish the offender though he was found to be guilty of bribery. The Karnataka High Court warned:

> "The viewpoint of the.... Sessions Judge that a conviction was for some reason not merited despite a finding to the contrary by him, indicates a tendency to run away from responsibility and we would say, of a duty that rested on him in dealing with white collar culprits. We do hope that the... Judge will not be guilty of such remissness again."

[126] 1992CriLJ 192

[127] KN. Chandrasekharan Pillai *Annual Survey of Indian Law Criminal Procedure* Vol. XXVIII, 1992, p 109

3.6 Defending Discretion- Individualization of Punishment: Manifestation of Sentencing Discretion

Though sentencing discretion may, at times, result into arbitrary, disparity and inconsistent sentencing, in the absence of better modules, the sentencing discretions has been upheld by the courts and academia. The models adopted in western countries in respect of arresting arbitrary sentencing have their own problems to offer with no exact solutions. American grid system guidlines have been seen with too restrictive in nature. The fact that the court held such sentencing guidelines to be only voluntary and not mandatory[128] itself indicate that 'fact situations' of the case are of myriad kind requiring different solutions with combination of deterrence and mercy. Sentencing guidelines therefore have not been universally accepted as solutions to arbitrary sentencing. Prof. A. Lakshminath opines that the sentencing discretion is indispensible in the sentencing system without which the process of sentencing would be reduced to computer programming. He observes

> "…[t]he structure of the criminal law underlines the policy that when the legislature has defined an offence with sufficient clarity and prescribed the maximum punishment thereof, a wide discretion in the matter of punishment should be allowed to the judge. Any exhaustive enumeration of aggravating or mitigating circumstance is impossible. The impossibility of laying down standards is at the very core of the criminal law, as administered in India, which invests the judges with a very wide discretion in the matter of fixing the degree of punishment that discretion in the matter of sentence is liable to be controlled by superior courts. Laying down of standard to the limited extent possible, as was done in the model judicial code, would not serve the purpose. The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguard for the accused."[129]

There are several arguments that defend the individualization of punishment and advocate against standardization of sentencing[130] namely

1. There is no thermometer to fix relevant and irrelevant information regarding crime and criminal.[131]

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[128] *United States v. Booker* 543 U.S. 220 (2005)
[129] See *Supra* 123 at p 46
[130] *Ibid*
[131] *Ibid* p 46

> "[T]here is little agreement among penologists and jurists as to what information about the crime and criminal is relevant and what is not relevant for fixing the quantum of punishment for a person convicted of a particular offence. It may be argued that crimes are only to be measured by the injury done to society. But how is the degree of that culpability to be measured? Can any thermometer be devised to measure its degree? This is a very baffling, difficult and intricate problem."

2. There are no set-behaviourist patterns of criminal cases. Variables in criminal cases are beyond the anticipatory capacity of the human calculus.[132]
3. Standardization of the sentencing process tends to sacrifice justice at the altar of blind uniformity.[133]
4. Standardization of sentencing discretion is a policy matter that belongs to the sphere of legislation and only Parliament should provide for it.[134]
5. individualization of 'acts' and not of 'human beings' is possible.[135]
6. Once offences are specified with sufficient clarity wide discretion in the matter of fixing the degree of punishment should be allowed to the Judge.[136]

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[132] *Ibid* p 46

> "[C]riminal cases do not fall into set-behaviourist patterns. Even within a single category offences there are infinite, unpredictable and unforeseeable variations. No two cases are exactly identical. There are countless permutations and combinations, which are beyond the anticipatory capacity of the human calculus. Simply in terms of blame worthiness of desert, criminal cases are different from one another in ways that legislatures cannot anticipate and limitation of language prevent the precise description of differences that can be anticipated. This is particularly true of murder. There is probably no offence that varies so widely both in character and in moral guilt as that which falls within the legal definition of murder."

[133] *Ibid* p 46

> "[S]tandardization of the sentencing process, which leaves little room for judicial discretion to take account of variations in culpability within single-offence category, ceases to be judicial. It tends to sacrifice justice at the altar of blind uniformity. Indeed, there is a real danger of such mechanical standardization degenerating into a bed of procrustean cruelty."

[134] *Ibid* p 47

> "[S]tandardization or sentencing discretion is a policy matter that belongs to the sphere of legislation. Recently, for instance, there were fears in the USA that the establishment of a sentencing commission would take away the powers of the American Congress. When our Parliament as a matter of sound legislative policy, did not deliberately restrict, control or standardize the sentencing discretion any further than that is encompassed by the broad contours delineated in section 354 (3) of the Cr PC, the court ought not, by over-leaping its bounds, rush to do what Parliament, in its wisdom, warily and sensibly refused to do. At this juncture, it must be stated that the Malimath Committee has made a strong case for the statutory committee to be constituted to lay down sentencing guidelines to regulate the discretion of the court in imposing sentences for various offences under the IPC and special local laws. However, it is submitted that in light of the arguments mentioned above, standardization of sentencing policy in India would lead to a great deal of discomfiture in the operation of our judicial machinery."

[135] Sheldon Glueck " Principles of a Rational Penal Code", *Har. Law. Review*, Vol. 43, 1928 p. 467 observes thus:

> "Legislative prescription (in advance) of detailed degrees of offences is individualization of acts and not of human beings and is therefore, bound to be inefficient. Judicial individualization, without adequate facilities in aid of the court is bound to deteriorate into a mechanical process of application of-certain rules of thumb or of implied or expressed prejudices".

[136] The structure of our criminal law which is principally contained in the Indian Penal Code and the Criminal Procedure Code underlines the policy that when the Legislature has defined an offence with sufficient clarity and prescribed the maximum punishment therefore, a wide discretion in the matter of fixing the degree of punishment should be allowed to the Judge. See *Jagmohan Singh v. The State of U. P* 1973 AIR 947

7. In respect of petty offences judges shall exercise judicial discretion.[137]
8. The policy of the law in giving a very wide discretion in the matter of punishment to the Judge has its origin in the impossibility of laying down standards, and therefore, must be maintained ante quo.[138]
9. Sentences under judicial discretion are subject to corrections by upper courts.[139]
10. Only judges can tailor the sentence to the rehabilitative prospects and progress of each offender.[140]

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[137] See Ratanlal, *Law of Crimes*, 22nd ed., (Bombay: Bombay Law Reporter, 1971), p 93

> "The authors of the Code had in many cases not heinous, fixed a minimum as well as a maximum punishment. The Committee were of opinion that, considering the general terms in which offences were defined, it would be inexpedient, in most cases, to fix a minimum punishment; and they had accordingly so altered the Code as to leave the minimum punishment for all offences, except those of the gravest nature, to the discretion of the Judge who would have the means in each case of forming an opinion as to the character of the offender, and the circumstances, whether aggravating or mitigating, under which the offence had been committed. But with respect to some heinous offence-such as offences against the State, murder, attempt to commit murder, and the like-they had thought it right to fix a minimum punishment".

See *Jagmohan Singh v. The State of U. P* 1973 AIR 947

[138] In *Jagmohan Singh v. The State of U. P* 1973 AIR 947 it was observed:

> "take, for example, the offence of criminal breach of trust punishable under section 409--IPC, The maximum punishment prescribed for the offence is imprisonment for life. The minimum could be as low as one day's imprisonment and fine. It is obvious that if any standards were to be laid down with regard to several kinds of breaches of trust by the persons referred in that section, that would be an impossible task. All that could be reasonably done by the Legislature is to tell the Judges that between the maximum and minimum Prescribed for an offence. They should, on balancing the aggravating and mitigating circumstances as disclosed in the case, judicially decide what would be the appropriate sentence. Take the other case of the offence of causing hurt. Broadly, that offence is divided into two categories-simple hurt and grievous hurt. Simple hurt is again sub-divided- simple hurt caused by a lethal weapon is made punishable by a higher maximum sentence-section 324. Where grievous hurt is caused by a lethal weapon, it is punishable under section 326 and is a more aggravated form of causing grievous hurt than the one punishable under section 325. Under section 326 the maximum punishment is imprisonment for life and the minimum can be one day's imprisonment and fine. Where a person by a lethal weapon causes a slight fracture of one of the unimportant bones of the human body, he would be as much punishable under section 326-IPC as a person who with a knife scoops out the eyes of his victim. It will be absurd to say that both of them, because they are liable under the same section should be given the same punishment. Here too, any attempt to lay down standards why in one case there should be more punishment and in the other less punishment would be an impossible task."

[139] The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguard for the accused. Further, the discretion of judicial officers is not arbitrary and the law provides for revision by superior courts of orders passed by the Subordinate courts.

[140] See Andrew von Hirsch, Michael H. Tonry, Kay A. Knapp *The Sentencing Commission And Its Guidelines* (England : University Press of New England, 1987) (noting that "wide discretion was ostensibly justified for rehabilitative ends: to enable judges and parole officials familiar with the case to choose a disposition tailored to the offender's need for treatment").

Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines In The Federal Courts*, (Chicago: University of Chicago Press, 1998) p 9-12 (reviewing the early history of federal sentencing and the link between the rehabilitative ideal and discretionary sentencing practices). Douglas A. Berman, "Beyond Blakely and Booker: Pondering Modern Sentencing Process", 95 *J. Crim. L. & Criminology* Vol. 95, 2004-2005

11. A sentencing process without discretion may be more consistent, but will also be equally arbitrary for ignoring relevant differences between cases. In such a system sentencing is likely to be severely unfair and would definitely not remain a *judicial function*.[141]

Thus sentencing discretion has strongly been defended and rather, at times, advocated for. The believers in sentencing discretion argue that the sentencing is a human process and therefore should be allowed to be exerted influence over the outcomes in the given legislative parameters of 'minimum to maximum'. Disparity if any, they argue, are the natural fallouts which should be ignored in the better interest of justice.

3.7 Judicial Underscoring For Rational Sentencing Policy

Apart from the penologists who studied judiciary as institution of justice and equity, academicians have also engaged in mapping the judicial patterns of sentencing policy. Other than these two who are dispassionately keeping track of sentencing policy, Indian judiciary itself has, at times, commented on the lack of sentencing policy in India.

The courts have highlighted the failure of both legislature and judiciary in brining constancy in sentencing policy. Often times the courts have held that the legislature has not provided any guidelines to proceed on in the sentencing policy. The courts have also expressed their complacency in not developing guideline judgments with coherent principles of sentencing process. The observations are abundant some of which may be noted as below.

In *Mohammad Giasuddin*[142] Justice Krishna Iyer lamented

> "[t]he humane art of sentencing remains a retarded child of the Indian criminal system…
>
> If every saint has a past, every sinner has a future, and it is the role of law to remind both of this. The Indian legal genius of old has made a healthy contribution to the world treasury of criminology. The drawback of our criminal process is that often they are built on the bricks of impressionist opinions and dated values, ignoring empirical studies and deeper researches…"

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[141] Law commission of India, 262nd Report on "*death penalty in India*" 2015, p 170
[142] *Mohammad Giasuddin v. State of Andhra Pradesh* 1977 AIR 1926

In *Shiva Prasad*[143] the Kerala High Court observed

> "[c]riminal trial in our country is largely devoted only to finding out whether the man in the dock is guilty. It is a major deficiency in the Indian system of criminal trials that the complex but important sentencing factors are not given sufficient emphasis and materials are not presented before the court to help it for a correct judgment in the proper personalised, punitive treatment suited to the offender and the crime..."

> "Whereas in various countries, sentencing guidelines are provided, statutorily or otherwise, which may guide Judges for awarding specific sentence, in India we do not have any such sentencing policy till date. The prevalence of such guidelines may not only aim at achieving consistencies in awarding sentences in different cases, such guidelines normally prescribe the sentencing policy as well namely whether the purpose of awarding punishment in a particular case is more of a deterrence or retribution or rehabilitation etc."[144]

In *Narinder Singh & Ors v. State of Punjab* [145] Justice A.K.Sikri observed:

> "18. In the absence of … guidelines in India, Courts go by their own perception about the philosophy behind the prescription of certain specified penal consequences for particular nature of crime. For some deterrence and/or vengeance becomes more important whereas another Judge may be more influenced by rehabilitation or restoration as the goal of sentencing. Sometimes, it would be a combination of both which would weigh in the mind of the Court in awarding a particular sentence. However, that may be question of quantum."

In *State of Punjab v. Prem Sagar & Ors* [146] S.B. Sinha, J. very succinctly observed

> " In our judicial system, we have not been able to develop legal principles as regards sentencing…The superior courts except making observations with regard to the purport and object for which punishment is imposed upon an offender, had not issued any guidelines. Other developed countries have done so. At some quarters, serious concerns have been expressed in this behalf. Some Committees as for example Madhava Menon Committee and Malimath Committee have advocated introduction of sentencing guidelines…What would be the effect of the sentencing on the society is a question which has been left unanswered by the legislature. The Superior Courts have come across a large number of cases which go to show anomalies as regards the policy of sentencing. Whereas the quantum of punishment for commission of a similar type of offence varies from minimum to maximum, even where same sentence is imposed, the principles applied are found to be different. Similar discrepancies have been noticed in regard to imposition of fine."

In *Satya Prakash v. State*,[147] Justice J.R. Midha of Delhi High Court thus wrote:

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[143] 1969 Ker. L.T. 862

[144] Quoted with approval in *Tanaji Alias Tillya Dinkar v. The State Of Maharashtra And Anr* (2016) available at https://indiankanoon.org/doc/197006238/

[145] https://indiankanoon.org/doc/98425580/

[146] (2008) 7 S.C.C. 550

[147] https://indiankanoon.org/doc/135464464/

> "[i]n India, the Government has not yet evolved a sentencing policy and there is no legislation that provides guidelines in sentencing. The only guidelines available to Trial Courts are through judgments of the High Court and Supreme Court."… A uniform sentencing policy has many benefits, namely, to reduce judicial disparity in sentencing; promote more uniform and consistent sentencing; project the amount of correctional resources needed; prioritize and allocate correctional resources; increase punishments for certain categories of offenders and offenses; decrease punishment for certain categories of offenders and offenses; establish truth in sentencing; make the sentencing process more open and understandable; encourage the use of particular sanctions for particular categories of offenders; encourage increased use of non incarceration; reduce prison crowding; provide a rational basis for sentencing and increase judicial accountability. Existence of a well laid sentencing policy also proves instrumental in improving… safety and reducing … offences/ casualties…"

In *Soman v. State of Kerala*,[148] the Supreme Court laid down principles and guidelines for determination of sentence. The relevant portion of the judgment is

> " Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the trial court in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges."

In *Rameshbhai Chhaganbhai Navapariya v. State of Gujarat*[149] Justice R.M.Chhaya of Gujrat High court thus observed:

> "15. Whereas in various countries, sentencing guidelines are provided, statutorily or otherwise, which may guide Judges for awarding specific sentence, in India we do not have any such sentencing policy till date. The prevalence of such guidelines may not only aim at achieving consistencies in awarding sentences in different cases, such guidelines normally prescribe the sentencing policy as well namely whether the purpose of awarding punishment in a particular case is more of a deterrence or retribution or rehabilitation etc."

In *State GNCT of Delhi v. Mukesh*[150] Justice S.Ravindra Bhat of Delhi High Court noted:

> "Penology and sentencing in our country has remained an underdeveloped concept. In several jurisdictions across the world, sentencing choices are guided not only by the subjective "facts of the case" but a whole variety of factors, such as social investigation of the offender, his family background, his social environment, behaviour, tendencies, etc These are apart from the more "traditional" factors such as the history of previous offences or

[148] 2012 (12) SCALE 719
[149] https://indiankanoon.org/doc/146065626/
[150] https://indiankanoon.org/doc/1956456/

> convictions, subjective facts pertaining to the offender, such as age, gender, gravity of the offence, circumstances leading to the offence, etc. More often than not, these are factored into a set of codified rules or regulations, which in some cases, prescribe great details, and even mandate separate hearings, where the judge is obliged to consider evidence presented in that regard. Sadly, courts in this country do not have the benefit of such specialized assistance. As a result, courts have to fall back on judicially evolved standards and ad-hoc notions of penology and theories while exercising discretion in relation to offences where sentencing choices span a wide spectrum of penalties and prison terms…"

In *State v. Raj Kumar Khandelwal*,[151] Justice Pradeep Nandrajog of Delhi High Court observed:

> "…We find no sentencing policy in India. Much of the debate on the sentencing policy has centered around the issue as to when the extreme penalty of death has to be imposed, wherever permitted by law vis-à-vis the lesser sentence of imprisonment for life. But what about most offences punishable under the Penal Code, where the legislature has either prescribed a maximum sentence, with no lower limit prescribed, or where the legislature has provide a range between a minimum and a maximum sentence. We find no uniformity in sentences imposed by Courts in India."[152]

In *Sangeeta & Ors v. State of Haryana*[153] the Supreme Court observed in the context of death penalty that

> "[i]n the sentencing process, both the crime and the criminal are equally important. We have, unfortunately not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become judge-centric sentencing rather than principled sentencing."

In respect of death penalty cases, the Court has acknowledged[154] that the subjective and arbitrary application of the death penalty has led "*principled sentencing*" to become "*judge-centric sentencing*", based on the "*personal*

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[151] https://indiankanoon.org/doc/177807969/

[152] Observing that " sentencing policy remains a quagmire with various celebrated cases only" the court further mentioned

> "No two cases are on same pedestal in criminal law in as much as the circumstances surrounding the commission of the offence… the principle of judicial review would be rendered obsolete if compete objectivity is installed in the system. What role is of a judge if he cannot decide? The net result is that sentencing policy remains a quagmire with various celebrated cases only culling out principles but not able to provide a complete test to act as a guide to the judges for sentencing the convicts."

[153] (2013) 2 SCC 452

[154] *Aloke Nath Dutta & Ors v. State of West Bengal* (2007) 12 SCC 230, *Swamy Shraddhananda v. State of Karnataka* (2008) 13 SCC 767, *Farooq Abdul Gafur v. State of Maharashtra* (2010) 14 SCC 641, *Sangeet v. State of Haryana* (2013) 2 SCC 452, *Shankar Kisanrao Khade v. State Of Maharashtra* (2013) 5 SCC 546, *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009) 6 SCC 498

predilection of the judges constituting the Bench."[155] 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.[156]

The Committee on Reforms of the Criminal Justice System, 2003[157] recommended to the government as under:

> "It had observed that the judges were granted wide discretion in awarding the sentence within the statutory limits. It was also of the opinion that as there was no guidance in selecting the most appropriate sentence in the fact situation thereof, there was no uniformity in awarding sentence as the discretion was exercised according to the judgment of every judge. Thus, the committee emphasized the need for having sentencing guidelines to minimize uncertainty in awarding sentences. It recommended the appointment of a statutory committee to lay down the sentencing guidelines."

3.8 Modalities to Arrest Arbitrariness in Sentencing

Though sentencing disparity has equally hunted all the jurisdictions, common law countries such as Canada, Australia, New Zealand and South Africa, have not implemented a formal guidelines.[158] On the other hand, many countries have tried to regulate sentencing discretion by evolving their own standard – standards some of which have stood the test of time whereas many have withered away with passing time. Andrew Ashworth[159] is of the opinion that four techniques have been used to reduce disparity and promote consistency in judicial sentencing *namely* establishing statutory sentencing principles *secondly* establishing sentencing guidelines *thirdly* re-imposing judicial self regulation and *lastly* prescribing mandatory minimum sentencing. Of the four techniques and other which are in vogue, three techniques are relevant for our discussion as under.

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[155] *Supra* note 141

[156] See *Swamy Shraddananda@Murali v. State of Karnataka* available at https://indiankanoon. Org /doc/989335/, where the Supreme Court discussing the disparity in death sentences and the deficiencies in the criminal justice system, observed at para 34 that

> "Thus the overall larger picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal administration of justice. This situation is a matter of concern for this Court and needs to be remedied."

[157] See Committee on Reforms of Criminal Justice System 2003 (Government of India, Ministry of Home Affairs) also known as Justice V.S. Malimath committee report, available at http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf

[158] Julian V. Roberts et al "Structured Sentencing In England And Wales: Recent Developments And Lessons For India" *National Law School of India Review,* Vol. 23(l), 2011, p 28

[159] See Andrew Ashworth *'Structuring Sentencing Discretion' And 'Four Techniques For Reducing Sentence Disparity'* in Andrew Von Hirsch and Andrew Ashworth (eds.) *Principled Sentencing: Readings On Theory And Policy*, 2nd ed., (Oxford UK: Hart Publishing, 1998) 215-17, and 227

3.8.1 Sentencing guidelines

In 1972, Judge Marvin Frankel mooted the idea of sentencing commissions which would develop rules or guidelines for sentencing,[160] thus in effect vesting discretion not in the legislature or the sentencing court, but in an appointed commission.[161]

Inspired by this countries such as Sweden,[162] Finland,[163] England and Wales,[164] USA,[165] Canada [166] and Australia[167] saw the establishment of sentencing commissions, councils and panels, charged with enhancing consistency in sentencing

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[160] Marvin Frankel *Criminal Sentences: Law Without Order*, (New York: Hill and Wang, 1972). See later comment by Frankel on the operation of guidelines in Marvin Frankel and Leonard Orland, "Fourteenth Annual Review of Criminal Procedure: United States Supreme Courts and Courts of Appeals 1983-84: Sentencing Commissions and Guidelines" (1984) 73 *Georgetown Law Journal* 225; Marvin Frankel, "Sentencing Guidelines: A Need for Creative Collaboration" *Yale Law Journal* vol.101, 1992 2043; Marvin Frankel and Leonard Orland, "A Conversation About Sentencing Commissions and Guidelines" *Colorado Law Review* Vol.64., 1993 p 655; and *Infra* note 161 p 713

[161] Michael Tonry "Success of Judge Frankel's Sentencing Commission" *Colorado Law Review*, Vol. 64, 1993, p 713; Paul Robinson "The Federal Sentencing Guidelines: Ten Years Later: An Introduction and Comments" *Northwestern University Law Review***,** Vol. 91, 1997, p 1232. *See generally* on US sentencing guidelines, Richard Frase, *Sentencing Guidelines In Minnesota And Other American States: A Progress Report* in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform,* (Oxford: Clarendon Press, 1995); Anthony Doob, *The United States Sentencing Commission Guidelines: If you don't know where you are going, you might not get there* in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform*, (Oxford: Clarendon Press, 1995)

[162] Jareborg, *The Swedish Sentencing Reform* in Clarkson and Morgan, (eds.), *The Politics of Sentencing Reform* (Oxford: Oxford University Press, 2001) p. 95; von Hirsch, *Sentencing Reform in Sweden*, in Tonry and Hatlestad (eds.), *Sentencing Reform in Overcrowded Times: A Comparative Perspective* (Oxford: Oxford University Press, 1997) p. 211.

[163] Lappi-Seppälä, *Sentencing and Punishment in Finland: The Decline of the Repressive Ideal*, in Tonry and Frase (eds.), *Sentencing and Sanctions in Western Countries* (Oxford: Oxford University Press, 2001) p. 92; Tornudd, "Sentencing and Punishment in Finland", in Tonry and Hatlestad (eds.), *Sentencing Reform in Overcrowded Times* (previous note), p. 189.

[164] Ashworth, "The Decline of English Sentencing and Other Stories", in Tonry and Frase (eds.), *Sentencing and Sanctions in Western Countries*, p. 62; Ashworth, "New Sentencing Laws Take Effect in England", in Tonry and Hatlestad (eds.), *Sentencing Reform in Overcrowded Times: A Comparative Perspective* (Oxford: Oxford University Press,1997) p133; Ashworth, "English Sentencing since the Criminal Justice Act 1991", in Tonry and Hatlestad (eds.), *Sentencing Reform in Overcrowded Times: A Comparative Perspective*, (Oxford: Oxford University Press,1997), p146

[165] For example see Frase, "Sentencing Guidelines are 'Alive and Well' in the United States", in Tonry and Hatlestad, *Sentencing Reform in Overcrowded Times: A Comparative Perspective* (Oxford: Oxford University Press, 1997), p 12; Reitz, "The Disassembly and Reassembly of U.S. Sentencing Practices" in Tonry and Frase (eds.), *Sentencing and Sanctions in Western Countries* (New York: Oxford University Press, 2001), p. 222. *See generally* Robert Howell, "Sentencing Reform Lessons: From the Sentencing Reform Act of 1984 to the Feeney Amendment", *J. Crim. L. & Criminology*, Vol. 94, 2003-2004 p 1069 See *Supra* note 42

[166] Daubney and Parry, *An Overview of Bill C-41 (The Sentencing Reform Act),* in Roberts and Cole (eds.), *Making Sense of Sentencing* (Toronto Canada: University of Toronto Press, 1999) p31

[167] Freiberg, *Three Strikes and You're Out – It's Not Cricket: Colonization and Resistance in Australian Sentencing*, in Tonry and Frase (eds.), *Sentencing and Sanctions in Western Countries* (New York: Oxford University Press, 2001), p. 29; Gorta, *Truth in Sentencing in New South Wales* in Tonry and Hatlestad (eds.), *Sentencing and Reform in Overcrowded Times* (Oxford: Oxford University Press, 1997), p. 152.

by, *inter alia*, the introduction of various forms of sentencing guidelines.[168] Basically there are three types of Sentencing guidelines namely- presumptive, statutory, advisory or voluntary.

3.8.1.1 Presumptive Sentencing Guidelines[169]

Presumptive sentencing guidelines specify an appropriate or "normal" sentence for each offense to be used as a baseline for a judge when meting out a punishment. Presumptive sentencing guidelines are contained in or based on legislation, which are adopted by a legislatively created body, usually a sentencing commission.

Presumptive sentencing guidelines set a range of penalties for an offense on two measurements - the severity of the offense and the criminal history of the offender. The point on the grid where these two measurements intersect is where the presumptive (recommended) sentence can be found.

In the Presumptive sentencing guidelines the trial court may increase or decrease a presumptive term of imprisonment depending on the presence of fixed aggravating or mitigating factors. The prior criminal history of the defendant matters a lot in the Presumptive sentencing. Higher the prior convictions, higher would be the chance for higher penalties for the second conviction. However only specified categories of prior convictions are considered in the criminal history. Though courts are entitled to depart from the set Presumptive guidelines, special reasons must be stated for it. Departures under presumptive sentencing guidelines are subject to review by appellate bodies.[170]

Presumptive sentencing substantially restricts judicial sentencing discretion by specifying in advance the presumptive term of imprisonment that the typical defendant convicted of an offense should receive.[171]

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[168] *Supra* note 53 at p 15

[169] States in USA which follow Presumptive sentencing guidelines are (States and in bracket the effective date of implementation of Presumptive guidelines) Minnesota (May 1980), Pennsylvania (July 1982), Washington (July 1984), Federal Courts (November 1987) Oregon (November 1989), Tennessee (November 1989), Ohio (Presumptive narrative guidelines (no grid)) 9 February 1991), Kansas (July 1993), North Carolina (October 1994), Michigan (January 1999), Oklahoma (July 1999), Massachusetts (1994)

[170] Lisa M. Seghetti and Alison M. Smith "Federal Sentencing Guidelines: Background, Legal Analysis, and Policy Options" available at https://www.fas.org/sgp/crs/misc/RL32766.pdf

[171] Barry Jeffrey Stern "Presumptive Sentencing In Alaska" *Alaska Law Review*, Vol. 2:227, 1985, p227

Prior to the Court's ruling in *Booker*,[172] the federal sentencing guidelines were recognized as presumptive, rather than statutory, advisory or voluntary. However after *booker* case all presumptive guidelines are only voluntary.

3.8.1.2 Statutory Sentencing Guidelines.

Statutory sentencing guidelines are created by a legislative body. Statutory sentencing guidelines should not be confused with presumptive sentencing guidelines. Though both types of guidelines are ultimately authorized by a legislative body, statutory sentencing guidelines are *directly* authorized by a legislative body, whereas presumptive sentencing guidelines are established by a *sentencing commission* which is usually legislatively created.[173]

3.8.1.3 Advisory or Voluntary Sentencing Guidelines[174]

The *Booker* ruling now makes the federal sentencing guidelines advisory. Under an advisory or voluntary sentencing guideline scheme, judges are not required to follow the sentences set forth in the guidelines but can use them as a reference.[175]

3.8.2 Guideline judgments

Judgments handed down by appeal courts setting out principles of sentencing and the range of penalties that may be applied to a given offence are known as guideline judgments.[176] Guideline judgments were also described as a "mechanism for

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[172] *United States v. Booker* 543 U.S. 220 (2005)

[173] *Supra* note 170

[174] The following states of USA follow advisory or voluntary sentencing guidelines. (States and in bracket the effective date of implementation of Voluntary guidelines) Maryland (July 1983), Delaware (October 1987), Arkansas (January 1994), Virginia (January 1995), Missouri (March 1997), Utah (October 1998), Alabama (May 2000), Washington, D.C. (1997), Wisconsin (2002), South Carolina (1989)

[175] *Supra* note 170

[176] Gleeson CJ explained the concept and purpose of guidelines in *Wong v. The Queen*[(2001) 207 CLR 584 at [5]–[6]:] as

> "[t]he expressions "guidelines" and "guidelines judgments" have no precise connotation. They cover a variety of methods adopted by appellate courts for the purpose of giving guidance to primary judges charged with the exercise of judicial discretion. Those methods range from statements of general principle, to more specific indications of particular factors to be taken into account or given particular weight, and sometimes to indications of the kind of outcome that might be expected in a certain kind of case, other than in exceptional circumstances.
>
> One of the legitimate objectives of such guidance is to reduce the incidence of unnecessary and inappropriate inconsistency. All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency."

structuring discretion, rather than restricting discretion". Guideline judgments are however intended to act as a relevant indicator, rather than binding in the formal sense.[177]

Guidelines judgments have been used in a number of jurisdictions as a mechanism for guiding discretion. The English Court of Appeal has been issuing guidelines judgments since the 1970. The English guidelines normally set a tariff, and differentiate between, as well as analyzing aggravating and mitigating factors in relation to the relevant offence.[178] Canada and New Zealand[179] have also issued sentencing guideline judgments Both Western Australia and New South Wales have enacted legislative provisions for guideline judgments, in 1995[180] and l998[181] respectively[182]

Though guideline judgments may help reduce disparity, they suffer from several major flaws. The first is that such judgments only exist for the most serious offences on the criminal calendar, with the appellate courts providing no guidance on the use of discretion for the mass of less culpable offences dealt with daily in the lower courts.[183]

Furthermore, the appellate courts are inherently ill-placed to undertake the sort of systematic research required to guide meaningful sentencing policy. They do not

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[177] See Hon Brian Sully, "Trends in Guideline Judgments" (2001) 20 *Australian Bar Review* 250.

[178] For further discussion of the English guidelines, see Andrew Ashworth, "Techniques of Guidance on Sentencing" *Criminal Law Review* 1984, p 518; Martin Wasik and Ken Pease (eds), *Sentencing Reform: Guidance or Guidelines?*, (Manchester: Manchester University Press,1987); Linda Harvey and Ken Pease, "Guideline Judgments and Proportionality in Sentencing" *Criminal Law Review* 1987 p 96; Gavin Dingwell, "The Court of Appeal and "Guideline" Judgments" *Northern Ireland Legal Quarterly* Vol.48, 1997, p 143; Andrew Ashworth and Andrew von Hirsch, "Recognising Elephants: The Problem of the Custody Threshold" *Criminal Law Review,* 1997, p 187.

[179] See further Geoff Hall, "Reducing Disparity by Judicial Self-Regulation: Sentencing Factors and Guideline Judgments" *New Zealand Universities Law Review* Vol. 14, 1991, p 208

[180] Sentencing Act 1995 (WA) s 143. The Western Australian Court of Criminal Appeal has thus far declined to give guideline judgments despite requests to do so. See discussion of this in Neil Morgan and Belinda Murray, 'What's in a Name? Guideline Judgments in Australia' *Criminal Law Journal* vol.23, 1999 p 90, and Neil Morgan, "Accountability, Transparency and Justice: Do We Need a Sentencing Matrix?" *Western Australia Law Review* Vol. 28, 1999, 267-270.

[181] Originally the legislative provision enabling this was contained in the *Criminal Procedure (Sentencing Guidelines) Act 1998* (NSW), which inserted the provisions in the *Criminal Procedure Act 1986* (NSW). This was later replaced by the *Crimes (Sentencing Procedure) Act 1999* (NSW), Part 3 Division 4. See in particular s 37(1), which empowers the Court of Criminal Appeal to give a guideline judgment on the application of the Attorney- General. Note also that these provisions were amended in late 2001, adding a new definition of 'guideline proceedings' in s 36, and new sections 37A, 37B, 39A and 42A. See later discussion on the reason for these amendments. See *Supra* note 21 p 85

[182] Note also that South Australia is also in the process of introducing such legislation, see Criminal Law (Sentencing) (Sentencing Guidelines) Amendment Bill 2002 (read a first time in the SA Legislative Council 28 August 2002). The Bill amends the *Criminal Law (Sentencing) Act* 1988, and allows the Full Court to give a judgment establishing sentencing guidelines. See *Supra* note 21

[183] *Supra* note 7

have the resources or time to undertake substantive empirical research, nor can they investigate the wider impact of sentencing policy like the legislature can.[184]

Finally, guidelines judgments are predominantly obiter dicta. It is impossible for an appellate judge to make general sentencing policy without this being so, as only comments relevant to reaching a decision in the case at hand form binding precedent.[185]

3.8.3 Minimum mandatory sentences

These sentences are based on the premise that the sentencer shall not come down below the statutory limit fixed by the legislature even for good reasons in order to minimize the sentencing disparity and ensure the sufficient punishment to offenders. Not all offences carry minimum mandatory sentences. Selective incapacitation is the primary goal of the minimum mandatory sentencing.[186] These sentences suffer, however, from the drawback that they do not take into account the first time offender who may lose the chance of reformatory treatment. Since individualisation of punishment is out of place in mandatory sentencing, first time offenders profile may turn heavier on account of mandatory punishment. However, as said earlier, only serious crimes with recurrence are subject matter of mandatory sentencing. All most all countries have adopted mandatory sentencing in their statute books with varying degrees of prescriptions.[187] American states have introduced the

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[184] Law Commission *Sentencing Guidelines and Parole Reform* (NZLC R94, 2006) at 39

[185] *Ibid.*

[186] Russell Hogg in the context of US sentencing policy observes

> "In the US, the introduction of mandatory sentencing laws federally and in a majority of States are primarily justified by reference to the goal; of selective incapacitation. This philosophy rests on the assumption that the substantial majority of the crimes like robbery, burglary and assault are the work of a relatively small proportion of offenders. Accurate identification and long years of their criminal careers will, it is reasoned, harvest a significant reduction in crime. The object is not to exact retribution for wrongs done or even simply to take active offenders out of circulation."
>
> The most well known of these measures are the 'three strikes and you're out' laws that have been introduced federally and in many States (often by popular initiative). These laws treat an offender's prior criminal records as the best predictor of their future contribution to the crime rate and hence the basis for mandating long prison sentences for second and subsequent convictions. In some cases (such as California) a third felony conviction under the 'three strikes' law results in a mandatory prison sentence of 25 years of life"

See Russell Hogg "Mandatory sentencing laws and the symbolic politics of law and order" *UNSW Law Journal*, Vol. 22 (1) 1999, p 266-267

[187] For historical background of minimum mandatory sentences, arguments for and against and early development of in minimum mandatory sentences America see Craig Turner, "Kant's Categorical Imperative and Mandatory Minimum Sentencing", 8 *Wash. U. Jur. Rev*. Vol. 8, 2016, at 235 Available at: http://openscholarship.wustl.edu/law_jurisprudence/vol8/iss2/8

three strike laws and extreme variant of minimum mandatory sentences.[188] It may be noted here that India has also subscribed to the minimum mandatory sentences.

3.9 Attempted Reforms in India

Indian legal system has also tired its hand on structuring sentencing disparity by adopting few methods. Though sentencing council could not be enacted which thought is rigorously now advocated for, methods like mandatory sentencing, gradation of punishment, sue generis three strike laws, guideline judgments etc have been tried.

3.9.1 Minimum mandatory punishments

As elsewhere, the prescription of 'minimum sentence' is an important issue in the sentencing policy and legislative measures for penalties for offences in India too.[189] Though of late, increased number of minimum mandatory sentences are being prescribed, in the mid of 20th century, certain minimum mandatory sentence were prescribed with power to deviate from such minimum sentence by providing special and adequate reasons. [190] However, such powers were also inconsistently used thereby resulting in the noticeable and unwarranted disparity[191] as noted in the last discussion. To avoid such disparity now the parliament has been coming with précised categorization of punishment with limited discretion to choose between few options. The recently enacted Criminal Law Amendment Act, 2013 and Protection of Children Form Sexual Offences Act, 2012 may be noted in this respect.

3.9.2 Gravity of offence vs. gradation of punishment

Utilitarianism and just desert are the two weighing factors in the dispensation of criminal justice. The crime shall be proportionate to the guilt whereas the punishment should also be useful.[192] This twin object can be achieved by befitting gradation of crimes. Though every crime cannot be graded with mathematical

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[188] For the development of three strike laws in the states see Elsa Chen "Impact of Three Strikes and Truth in Sentencing on the Volume and Composition of Correctional Populations", March 6, 2001 available at https://pdfs.semanticscholar.org/ad0c/f4409c27a8e1dbac9a034ece227e690ffaf9.pdf

[189] See *State of Gujarat v. Natwar Harchandji Thakor* 2005 Cri LJ 2957

[190] See for example un-amended section 376 of Indian penal Code, 1860 providing for special and adequate reasons to reduce the sentence below minimum.

[191] *Supra* note 5 where Mrinal Satish, describes as to how sentencing discretion has been inconstantly used in sentencing rape offenders.

[192] *Cf* Tony Draper "An Introduction To Jeremy Bentham's Theory Of Punishment**"** *Journal Of Bentham Studies*, Vol. 5 (2002) Pp1-17; Bernard E. Harcourt, "Beccaria's 'On Crimes and Punishments': A Mirror on the History of the Foundations of Modern Criminal Law" (Coase-Sandor Institute for Law & Economics Working Paper No. 648, 2013); John P. Palmer "The Economics of Cruel and Unusual Punishment" *European Journal of Law and Economics*, Vol. 5:235–245, 1998, Pp 1-11

precision, which problems in turn advocates for sentencing discretion,[193] possibly crimes can sufficiently be graded with severity and sufferance. The recently enacted Criminal Law Amendment Act, 2013 has, to possible extent, tired to grade some of offences with extreme simplicity. Section 354A brings sufficient clarity in terms of offence and punishment to be awarded. It reads

> " 354A. (*1*) A man committing any of the following acts—
>
> (*i*) physic al contact and advances involving unwelcome and explicit sexual overtures; or
>
> (*ii*) a demand or request for sexual favours; or
>
> (*iii*) showing pornography against the will of a woman; or
>
> (*iv*) making sexually coloured remarks,
>
> shall be guilty of the offence of sexual harassment.
>
> (*2*) Any man who commits the ***offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1)*** shall be punished with ***rigorous imprisonment for a term which may extend to three years***, or with fine, or with both.
>
> (*3*) Any man who commits the offence specified in clause (*iv*) of sub-section (*1*) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

Similarly, Section 370 also sufficiently advocates for gradation as under

> " 370. (*1*) Whoever, for the purpose of exploitation, (*a*) recruits, (*b*) transports, (*c*) harbours, (*d*) transfers, or (*e*) receives, a person or persons, by—
>
> *First*.— using threats, or
>
> *Secondly*.— using force, or any other form of coercion, or
>
> *Thirdly*.— by abduction, or
>
> *Fourthly*.— by practising fraud, or deception, or
>
> *Fifthly*.— by abuse of power, or
>
> *Sixthly*.— by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.
>
> *Explanation* 1.— The expression "exploitation" shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.
>
> *Explanation* 2.— The consent of the victim is immaterial in determination of the offence of trafficking.
>
> (*2*) Whoever commits the offence of trafficking ***shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.***
>
> (*3*) Where the offence involves the ***trafficking of more than one person***, it shall be punishable with rigorous imprisonment for a term which ***shall not be less than ten years*** but which may extend to imprisonment for life, and shall also be liable to fine.
>
> (*4*) Where the offence involves the ***trafficking of a minor***, it shall be punishable with rigorous imprisonment for a term which ***shall not be less than ten years but which may extend to imprisonment for life***, and shall also be liable to fine.
>
> (*5*) Where the offence involves the ***trafficking of more than one minor***, it

[193] See *Gopal Singh v. State of Uttrakahand* (2013) 7 SCC 545

> shall be punishable with rigorous imprisonment for a term which ***shall not be less than fourteen years*** but which may extend to imprisonment for life, and shall also be liable to fine.
> (*6*) If a person is convicted of the ***offence of trafficking of minor on more than one occasion***, then such person ***shall be punished with imprisonment for life***, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.
> (*7*) When a ***public servant or a police officer is involved in the trafficking of any person*** then, such public servant or police officer ***shall be punished with imprisonment for life***, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine."

The gradation of offences in the way mentioned above simplifies the entire sentencing policy leaving less scope for disparity in sentences.

3.9.3 Second convictions- sue generis three strike laws

Indian sentencing policy is now trying the typical American 'two strike and three strikes law and you are out policies'.[194] Though not in the same fashion as exists in the USA,[195] somewhat of sue generis 'strike laws' have been introduced in India to declare its "tough on crime" policy. The theoretical justification for such three strikes and you're out, is grounded in the punitive ideologies of deterrence, incapacitation, and or just deserts. Take for example Section 354C of Criminal Law Amendment Act, 2013 which provides

> "354C. Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished ***on first conviction with imprisonment*** of either description for a term ***which shall not be less than one year***, but which may extend to three years, and shall also be liable to fine, and be punished ***on a second or subsequent conviction***, with imprisonment of either description for a term which ***shall not be less than three years***, but which may extend to seven years, and shall also be liable to fine."

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[194] If a person has one previous serious or violent felony conviction, the sentence for any new felony conviction (not just a serious or violent felony) is twice the term otherwise required under law for the new conviction. Offenders sentenced by the courts under this provision are often referred to as "second strikers."
If a person has two or more previous serious or violent felony convictions, the sentence for any new felony conviction (not just a serious or violent felony) is life imprisonment with the minimum term being 25 years. Offenders convicted under this provision are frequently referred to as "third strikers."

[195] Repetition of offences has been viewed seriously in states of United States which are either dealt with under habitual felon statute, as for example, habitual felon statute of New York, or under three-strikes laws as are existing in Twenty-eight states of the United States. The federal government enacted three-strikes laws in 1995. The first true "three-strikes" law was passed in 1993 by Washington followed by California passed in 1994. Under all the three-strike laws mandatory life imprisonment without parole is prescribed. The Supreme Court in *Ewing v. California* (2003) decided that three strikes laws are constitutional and do not violate the Eighth Amendment.

Section 376E of Criminal Law Amendment Act, 2013 provides

> "376E. Whoever has been previously convicted of an offence punishable under section 376 or section 376A or section 376D and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death."

Section 14 of the Protection of Children from Sexual Offences Act, 2012 provides as under

> **"14. Punishment for using child for pornographic purposes:** (1) Whoever, uses a child or children for pornographic purposes shall be punished with imprisonment of either description which may extend to five years and shall also be liable to fine and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also be liable to fine.
> (2) If the person using the child for pornographic purposes commits an offence referred to in section 3, by directly participating in pornographic acts, he shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine."

As in the states of United States, even in India also sue generis three strikes laws are enacted for sexual offences and other socially abhorrent crimes.

3.9.4 Guidelines judgment

In the absence of sentencing council, apex courts have tried to structure and discipline the sentencing disparity of lower courts in the form of sentencing guidelines. Not for all offences, however, that the Supreme Court has laid guideline judgment. The sentencing policy for few offences like murder,[196] dowry death,[197] rapes,[198] etc has been tried by the Supreme Court. The practice, however speaks more

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[196] See *Bachan Singh v. State of Punjab* (1982) 3 SCC 24, *Jagmohan Singh v. The State of U. P* 1973 AIR 947, *Machhi Singh v. State of Punjab* (1983) 3 SCC 470, *Swamy Shraddananda (2) v. State of Karnataka* (2008) 13 SCC 767, *Santosh Bariyar v. State of Maharashtra* (2009) 6 SCC 498, Gurvail *Singh @ Gala v. State of Punjab* https://indiankanoon.org/doc/32917452/, *Shankar Kisan Kade v. state of Maharashtra* (2013) 5 SCC 546, *Sangeet v. State of Haryana*, (2013) 2 SCC 452,

[197] See *Samar Ghosh v. Jaya Ghosh* (2007 (4) SCC 511), *Gurbachan Singh v. Satpal Singh* 1990 SCC (CR) 15, *Gurbachan Singh v. Satpal Singh* 1990 SCC (CR) 15, *Sharad v. State of Maharashtra* (2012) 5 SCC 548, *Deb Narayan Halder v. Smt. AnushreeHalder* AIR 2003 SC 3174

[198] See *State of Karnataka v. Puttaraja* https://indiankanoon.org/doc/46627/ , *Dhananjoy Chatterjee v. State of W.B.* (1994 (2) SCC 220), *Ravji v. State of Rajasthan* (1996 (2) SCC 175), *State of M.P. v. Ghanshyam Singh* (2003 (8) SCC 13), *Dalwadi Govindbhai Amarshibhai v. State Of Gujarat* 2004 CriLJ 2767, (2004) 2 GLR 1285, *State of A.P. v. Bodem Sundara Rao* (1995) 6 SCC 230, *Bodhisatttwa Gautam v. Subhra Chakraborty* AIR 1996 SC 922, *State of Punjab v. Gurmit Singh* AIR 1996 SCC 1393, *State of Rajasthan v. Om Prakash* AIR 2002 SC 2235, *Karnataka v. Krishnappa* (2000) 4 SCC 75, *Dinesh @ Buddha v. State of Rajasthan* (2006) 3 SCC 771, *Bhan Singh v. State of Rajasthan* 1984 CriLJ 788, *Baldeo v. State of Rajasthan* 1977 Cri LR 131, *Dalwadi Govindbhai Amarshibhai v. State of Gujarat* 2004 CriLJ 2767, *Kamal Kishore v. State Of Himachal Pradesh* AIR 2003 SC 4684, *State of Punjab v. Gurmit Singh and ors*. (1996) (2) SCC 384, *State of Andhra Pradesh v. Bodem Sundara Rao* 1996 AIR 530, *State of Andhra Pradesh v. Polamala Raju & Rajarao* AIR 2000 SC 2854, *State of A.P. v. Bedem Sundara Rao* (1995 (6) SCC 230), *kamal kishore v. State of H.P.* (2000) 4 SCC 502, *State of Karnataka v. S. Nagaraju* 2002 (2) ALD Cri 643, *State of Andhra Pradesh v. Bodem Sundara Rao* (1995) 6 S.C.C. 230, *State of Madhya Pradesh v. Babbu Barkare @ Dalap* AIR 2005 SC. 2846, *Jashubha Bharatsinh Gohil v. State of Gujarat* 1994 (4) SCC 353

of problems than the solution. Guideline judgments have failed India for three main reasons. *Firstly*, Guideline judgments are limited to only few cases leaving the vast array of offences unguided. In *State of Punjab v. Prem Sagar & Ors* [199] S.B. Sinha, J. very succinctly observed

> "In our judicial system, we have not been able to develop legal principles as regards sentencing. The superior courts except making observations with regard to the purport and object for which punishment is imposed upon an offender, had not issued any guidelines. Other developed countries have done so…"

Secondly lowers courts have not received the Guideline judgments in their same pristine form. The "doctrine of rarest of rare" for example has become infamous in the hands of subsequent courts under which indiscriminately death penalties are awarded.[200]

Thirdly, higher courts who issue Guideline judgments do not have any fixed pattern consistently followed for a long period of time. In other words, frequent overruling of their own judgments and 'distinguishing' their own case form their own prior judgments have considerably reduced the respect for their judgments in terms of precedential value.

Fourthly, lower courts are often unable to distinguish between *ratio decidendi* of the case from *obiter dicta*.

The Guideline judgments, therefore, have not been substantially able to reduce to disparity in sentencing in India though attempts in the periphery of the problems have been made here and there.

3.10 Sentencing Practice in Two Models

As noted earlier, sentencing disparity has hunted every jurisdiction. However, western countries were quick to respond whereas commonwealth countries have been waiting for time to ripe to introduce sentencing guidelines. Judge Marvin E. Frankel is considered to be a father of sentencing discipline in the form sentencing guidelines.[201] But for his efforts that western jurisdictions have gone for establishing sentencing

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[199] (2008) 7 S.C.C. 550

[200] See chapter IV on death penalty to understand how the 'rarest of rare doctrine' which was coined by the court did not remain in its pristine form and became a rolling snow ball of bleeding disparity.

[201] See Marvin E. Frankel, "Lawlessness in Sentencing", *U. CIN. L. Rev*. Vol.41, (1972). See also Marvin E. Frankel, *Criminal Sentences: Law Without Order* (New York: Hill and Wang, 1972) Marvin E. Frankel & Leonard Orland, "A Conversation About Sentencing Commissions and Guidelines", 64 *U. COLO. L. REV*. 655, 656 (1993)

councils and other allied methods to discipline sentencing disparity. [202] For the purpose of present study we shall refer to two jurisdictions namely United States and England and Wales as how sentencing policy in the respective jurisdiction has been tried to be structured.

3.10.1 Position in United States

The position in United States in respect of judicial sentencing, before guidelines were brought in, is best explained by *Gertner*[203] as

> [i]n fact, judges had no training in how to exercise their considerable discretion. Whatever the criminological literature, judges did not know about it. Sentencing was not taught in law schools; and to the extent there was any debate about deterrence and rehabilitation … it was not reflected in judicial training.[204] "It was as if judges were functioning as diagnosticians without authoritative texts, surgeons without Gray's Anatomy."[205]

Beginning in the early 1970s a widespread disaffection with indeterminate sentencing began which revolutionized sentencing laws in this country.[206] The wide

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[202] Douglas A. Berman, "Beyond Blakely and Booker: Pondering Modern Sentencing Process", 95 *J. Crim. L. & Criminology*, 2004-2005, p 658 notes

> "Since "lawlessness" was the fundamental problem in discretionary sentencing systems, Frankel urged the development of a "code of penal law" which would "prescribe guidelines for the application and assessment" of "the numerous factors affecting the length or severity of sentences. Moreover, Frankel suggested creating a new institution in the form of a special agency-a "Commission on Sentencing"-to help address lawlessness in sentencing. Embracing the spirit and substance of Frankel's ideas, many experts and scholars soon came to propose or endorse some form of sentencing guidelines to govern sentencing determinations, and urged the creation of specialized sentencing commissions to develop the sentencing law called for by the "guidelines model."
>
> These calls for reform were soon heeded. Through the late 1970s and early 1980s, a few states adopted a form of sentencing guidelines when legislatures passed determinate sentencing statutes which abolished parole and created presumptive sentencing ranges for various classes of offenses. Minnesota became the first state to turn Frankel's ideas into a full-fledged reality in 1978, when the Minnesota legislature established the Minnesota Sentencing Guidelines Commission to develop comprehensive sentencing guidelines."

[203] Nancy Gertner, "A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right", 100 *J. Crim. L. & Criminology* 691 (2010), p 697

[204] *Supra* note 140 at p 26 notes that

> "law faculties had long regarded sentencing as a 'soft' sub-specialty of criminal law, populated primarily by aficionados of psychiatry, sociology, social work, and other such branches of the 'social' sciences."

[205] See Judge Nancy Gertner, "From Omnipotence to Impotence: American Judges and Sentencing", *OHIO ST. J. CRIM. L.* Vol. 4, 2007 at 528.

[206] See *Supra* note 42 p 6. See also Michael Tonry, "Twenty Years of Sentencing Reform: Steps Forward, Steps Backward", 78 *Judicature* 169 (1995). See Sanford H. Kadish, "Fifty Years of Criminal Law: An Opinionated Review" *Cal. L. Rev*. Vol.87, 1999, at 943, Available at: http://scholarship.law.berkeley.edu/facpubs/1647. See also Nancy Gertner, "Sentencing Reform: When Everyone Behaves Badly", *ME. L. REV*. Vol. 57, 2005, 570 (describing the evolution of federal sentencing). As quoted in Nancy Gertner, *Supra* note 203 p 691

disparity in sentencing[207] augmented the popular will against the arbitrary sentencing which resulted in the sentencing commission, an administrative agency, entrusted with generating sentencing standards.[208] With the establishment of U.S. Sentencing Commission[209] the Federal Sentencing Guidelines were adopted after passage of the bipartisan Sentencing Reform Act of 1984 to emphasize fairness, consistency, punishment, incapacitation and deterrence in sentencing. The guidelines of the commission became effective from 1987.

Even before the federal sentencing guidelines, Minnesota was the first state to develop sentencing guidelines way back in May 1980 followed by Pennsylvania. The sentencing commission proposal was first adopted by four States; Minnesota,[210] Oregon, Washington and Pennsylvania.[211] By 1996, 25 States had created sentencing commissions, and sentencing guidelines were either in effect or development in 20 States.[212] Guidelines for the United States federal jurisdiction were introduced by the United States Sentencing Commission in 1987.[213]

Under the Guidelines established by the U.S. Sentencing Commission, criminals with similar backgrounds and similar crimes receive similar sentences, irrespective of their race, socioeconomic status, or geographic location[214]

Federal sentencing guidelines are contained in the guidelines manuals. There

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[207] See Tyler, Harold R. Jr. "Sentencing Guidelines: Control of Discretion in Federal Sentencing," *Hofstra Law Review*: Vol. 7: 1978, Available at: http://scholarlycommons.law .hofstra.du/ hlr/vol7/iss1/2

[208] See generally Kevin R. Reitz, "Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences", *NW. U. L. REV*. vol. 9, 1997, at 1441

[209] See Robert L. Boone, "Booker Defined: Examining the Application of United States v. Booker in the Nation's Most Divergent Circuit Courts", *Cal. L. Rev*. vol. 95. 2007, at 1079 Available at: http://scholarship.law.berkeley.edu/californialawreview/vol95/iss4/3

Susan R. Klein, "The Return of Federal Judicial Discretion in Criminal Sentencing," *Val. U. L. Rev*. Vol. 39, 2005, at 693 available at http://scholar.valpo.edu/vulr/vol39/iss3/4

Stith, Kate and Koh, Steve Y., "The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines" (1993) Faculty Scholarship Series. Paper 1273 available at http://digitalcommons.law.yale.edu/fss_papers/1273

[210] For a detailed description and defence of the Minnesota guidelines, see Richard Frase, "The Uncertain Future of Sentencing Guidelines" *Law and Inequality* Vol.12**,** 1993, 1; On the construction of the guidelines, see Andrew von Hirsch, "Constructing Guidelines for Sentencing: The Critical Choices for the Minnesota Sentencing Guidelines Commission" *Hamline Law Review* Vol.5, 1985 at 164. See *Supra* note 21

[211] Andrew von Hirsch *Proportionality and Parsimony in American Sentencing Guidelines: The Minnesota and Oregon Standards* in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform,* (Oxford: Clarendon Press, 1995) See *Supra* note 21 p 79

[212] See *Supra* note 42 p 10. See also Richard Frase, "State Sentencing Guidelines: Still Going Strong" (1995) 78 ***Judicature*** 173.

[213] *Supra* note 21 p 79

[214] Available at https://www.justice.gov/archive/opa/docs/United_States_v_Booker_Fact_Sheet.pdf

is difference between Minnesota model and federal guidelines model, though both are presumptive guidelines. Minnesota uses 11 levels of crimes whereas federal grid uses 43 levels. The sentencing court has to work its way through up to five different stages.

The compass of the federal sentencing Guidelines is a one-page table. The table has vertical and horizontal axis. The vertical axis provides a forty-three-point scale of offense levels, and the horizontal axis lists six categories of criminal history, and the body provides the ranges of months of imprisonment for each combination of offense and criminal history. A sentencing judge has to use the guidelines, policy statements, and commentaries contained in the Guidelines Manual to identify the relevant offense and history levels. He then has to refer to the table to identify the proper sentencing range. Though in all cases a sentence must be at or below the maximum sentence authorized by statute for the offense, in certain circumstances the Guidelines allow for both upward and downward departures from the sentence that would otherwise be recommended. The typical grid is as under.[215]

		Criminal History Category (Criminal History Points)					
Offense Level ↓		I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13+)
Zone A	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30

[215] Available at https://en.wikipedia.org/wiki/United_States_Federal_Sentencing_Guidelines https://en.wikipedia.org/wiki/United_States_Federal_Sentencing_Guidelines

	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
Zone D	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life

	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	Life	Life	Life	Life	Life	Life

After being struck in *Booker* case[216] The Guidelines are not mandatory, because they may result in a sentence based on facts not proven beyond a reasonable doubt to a jury, in violation of the Sixth Amendment [217] However, judges must consider them when determining a criminal defendant's sentence. When a judge determines within his or her discretion to depart from the Guidelines, the judge must explain what factors warranted the increased or decreased sentence. When a Court of Appeals reviews a sentence imposed through a proper application the Guidelines, it may presume the sentence is reasonable

However, within only one year of the *Booker* decision, the number of sentences imposed within the Guidelines has dropped to 62.2 percent. This is largely attributable to judges exercising their increased discretion under *Booker*, although there has been a small increase in government sponsored departures as well.[218]

Although the US guideline systems have been successful to an extent in regulating sentencing discretion, there is a perception around the world that sentence ranges are too narrow and the compliance requirement too restrictive; perhaps for this reason the US schemes have proven unpopular in other countries. Federal judges themselves have described the Guidelines as "a dismal failure," "a farce," and "out of whack;"[219] "a dark, sinister, and cynical crime management program" with "a certain Kafkaesque aura about it;"[220] and "the greatest travesty of justice in our legal system in this century."[221]

The operation of the United States federal guidelines in particular have been subject to detailed scrutiny. Much of the comment on the federal guidelines has been

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[216] *United States v. Booker* 543 U.S. 20 (2005)
[217] Supra note 209. See also Susan R. Klein, "The Return of Federal Judicial Discretion in Criminal Sentencing", 39 *Val. U. L. Rev*. 693 (2005). Available at : http://scholar.valpo.edu/vulr/vol39/iss3/4
[218] https://www.justice.gov/archive/opa/docs/United_States_v_Booker_Fact_Sheet.pdf
[219] José A. Cabranes, "Sentencing Guidelines: A Dismal Failure," *New York Law Journal*, February 11, 1992, p. 2
[220] G. Thomas Esele, "The Sentencing Guidelines System? No. Sentencing Guidelines? Yes." *Federal Probation* (December 1991): 20.
[221] *Ibid* p. 21

critical[222] Tonry has summarized the criticisms into a number of grounds, which are: policy (undue narrowing of judicial discretion and the shift of discretion to prosecutors);[223] process (they are being circumvented by prosecutors and judges)[224] ethics (forcing key decisions behind closed doors and fostering hypocrisy); technocratic grounds (too complex and hard to apply accurately); fairness (because only the offence or offence behaviour and criminal record is taken into account,[225] not other circumstances); on outcome and normative grounds, for the reasons that they have not in fact reduced sentencing disparity;[226] and they are too harsh.[227]

3.10.2 England and Wales

Guidelines in United Kingdom have traveled the test and time from 1980[228] to 2010.[229] Criminal offences in England and Wales are very broadly defined and can have different levels of seriousness. Guidelines help to ensure that courts across England and Wales are consistent in their approach to sentencing

The system of guidelines developed in England and Wales aims to assist sentencers in determining the most appropriate sentence outcome by reference to a structured decision-making process that incorporates all of the legal factors that need to be considered in each case.[230]

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[222] See *Supra* note 42 chapter 3.

[223] It can also be argued that the discretion has been largely shifted to the sentencing commission: Paul Robinson, "The Federal Sentencing Guidelines: Ten Years Later: An Introduction and Comments" *Northwestern University Law Review*, Vol. 91, 1997, at 1231. For an analysis of the use of discretion under the guidelines, see John Walker, "Loosening the Administrative Handcuffs: Discretion and Responsibility Under the Guidelines" *Brooklyn Law Review* Vol. 59, 1993, at 551. *Cf* mandatory sentencing, where it has been argued that discretion has likewise been transferred to prosecutors, and other parts of the criminal justice system: Neil Morgan, "Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?" *Criminal Law Journal,* Vol.24. 2000 164, 177-178; see *Supra* note 186 at pp 74-90

[224] See Chantale Lacasse and Abigail Payne, "Federal Sentencing Guidelines and Mandatory Minimum Sentences: Do Defendants Bargain in the Shadow of the Judge?" *Journal of Law and Economics* Vol. 42, 1999 at 245; and also Jennifer Reinganum, "Sentencing Guidelines, Judicial Discretion, and Plea Bargaining" *Rand Journal of Economics* Vol.3, 2000, at 62. See *Supra* note 21 p 79

[225] As to the use of the criminal record in sentencing guideline systems, see Julian Roberts, *The Role of the Criminal Record in the Sentencing Process* in Michael Tonry (eds), *Crime and Justice: A Review of Research,* Vol. 22, (Chicago: The University of Chicago Press, 1997). See *Supra* note 21

[226] For a discussion on disparity under the federal guidelines, see Paul Hofer, Kevin Blackwell and Bany Ruback, "The Effect of the Federal Sentencing Guidelines on Inter judge Sentencing Disparity" *Journal of Criminal Law and Criminology* Vol. 90, 1999, at 239, where it is stated that despite there being no consensus on whether the federal guidelines have reduced unwarranted disparity, the guidelines have had a modest but meaningful success at reducing disparity. See *Supra* note 21

[227] See *Supra* note 42 p 72

[228] For the origin and development of Guidelines in United Kingdom see *State of Punjab v. Prem Sagar & Ors* (2008) 7 SCC 550

[229] Justice Garrett Sheehan, "Sentencing Law And Practice (2nd Ed.)" book review, *Judicial Studies Institute Journal*, Vol. 2, 2007, p 257

[230] Pina-Sanchez, J and Linacre, R "Enhancing Consistency in sentencing: Exploring the Effects of Guidelines in England and Wales", *Journal of Quantitative Criminology*, Vol.30 (4), 2014, Pp 731-748

According to the Coroners and Justice Act 2009, when sentencing an offender for an offence committed on or after 6 April 2010, a court must follow any relevant sentencing guidelines, unless it is contrary to the interests of justice to do so. When sentencing an offender for an offence committed before 6 April 2010, the courts must have regard to any relevant sentencing guidelines. Sentencing guidelines are available for most of the significant offences sentenced in the magistrates' court and for a wide range of offences in the Crown Court.

The task of preparing sentencing guidelines is vested in the sentencing council. The Sentencing Council is an independent and non departmental body of the Ministry of Justice. It was established in 2009 by the Coroners and Justice Act and is responsible for issuing guidelines for sentencing that must be followed by the courts unless it is contrary to the interests of justice to do so. Its role includes

- developing sentencing guidelines and monitoring their use;
- assessing the impact of guidelines on sentencing practice; and
- promoting awareness amongst the public regarding the realities of sentencing and publishing information regarding sentencing practice in Magistrates' and the Crown Court.

When conducting the above functions, the Sentencing Council must take into account the impact of sentences on victims of crime, monitor how the guidelines are applied in practice, and help increase public confidence in the sentencing and criminal justice system. A sentencing guideline may be general in nature or limited to a particular offence, particular category of offence or particular category of offender.[231] Section 120 (11) of the Coroners and Justice Act 2009 provides that

> "When exercising functions under this section, the Council must have regard to the following matters—
>
> (a) the impact of sentencing decisions on victims of offences;
>
> (b) the need (a)the sentences imposed by courts in England and Wales for offences;
>
> (c) the need to promote consistency in sentencing; to promote public confidence in the criminal justice system;
>
> (d) the cost of different sentences and their relative effectiveness in preventing re-offending;
>
> (e) the results of the monitoring carried out under section 128."

[231] Section 120 (2) of Coroners and Justice Act 2009

The definitive guidelines issued by the council for Aggravated burglary under Theft Act 1968 (section 10) can be taken as example a show sentencing guidelines operate. There are nine steps provided as under

STEP ONE: Determining the offence category-

The court should determine the offence category using the table below.

Category 1: Greater harm and higher culpability

Category 2: Greater harm and lower culpability or lesser harm and higher culpability

Category 3: Lesser harm and lower culpability

Factors which should be considered by the courts are also provided by the council before hand which must be weighted by the courts.

STEP TWO: Starting point and category range-

Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability or harm in step 1, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, for burglary.

Offence Category	Starting Point (Applicable to all offenders)	Category Range (Applicable to all offenders)
Category 1	10 years' custody	9–13 years' custody
Category 2	6 years' custody	4–9 years' custody
Category 3	2 years' custody	1–4 years' custody

Statutory aggravating factors and Other aggravating factors include provided by the council should be weighted with Factors reducing seriousness or reflecting personal mitigation.

STEP THREE: Consider any factors which indicate a reduction, such as assistance to the prosecution-

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005[232] (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may

[232] Serious Organized Crime and Police Act, 2005, c. 15, §§ 73–74.

receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FOUR: Reduction for guilty pleas-

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the Guilty Plea guideline

STEP FIVE: Dangerousness-

An aggravated burglary is a serious specified offence within the meaning of chapter 5 of the Criminal Justice Act 2003 and at this stage the court should consider whether having regard to the criteria contained in that chapter it would be appropriate to award a life sentence, imprisonment for public protection or an extended sentence.[233] Where offenders meet the dangerousness criteria, the notional determinate sentence should be used as the basis for the setting of a minimum term.

STEP SIX: Totality principle[234]-

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the offending behaviour.

STEP SEVEN: Compensation and ancillary orders-

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[233] An extended sentence may given to an offender aged 18 or over when:

- the offender is guilty of a specified violent or sexual offence;
- the court assesses the offender as a significant risk to the public of committing further specified offences;
- a sentence of imprisonment for life is not available or justified; and
- the offender has a previous conviction for an offence listed in schedule 15B to the Criminal Justice Act 2003 or the current offence justifies an appropriate custodial term of at least four years.

These sentences were introduced to provide extra protection to the public in certain types of cases where the court has found that the offender is dangerous and an extended licence period is required to protect the public from risk of harm. The judge decides how long the offender should stay in prison and also fixes the extended licence period up to a maximum of eight years. The offender will either be entitled to automatic release at the two thirds point of the custodial sentence or be entitled to apply for parole at that point.

If parole is refused the offender will be released at the expiry of the prison term. Following release, the offender will be subject to the licence where he will remain under the supervision of the National Offender Management Service until the expiry of the extended period. The combined total of the prison term and extension period cannot be more than the maximum sentence for the offence committed. In 2015, a total of 668 offenders were given an extended sentence.

[234] A just and proportionate sentence is one which (a) Reflects the overall seriousness of the criminality when all the offences are considered together and (b) takes into account the overall effect of the sentence on the offender.

See Sentencing Council "Short guide to sentencing for multiple offences (Totality)" available at https://www.sentencingcouncil.org.uk/wp-content/uploads/public_guide_totality_for_web.pdf

In all cases, courts should consider whether to make compensation and/or other ancillary orders.[235]

STEP EIGHT: Reasons-

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.[236]

STEP NINE: Consideration for remand time-

Sentencers should take into consideration any remand time served in relation to the final sentence at this final step. The court should consider whether to give credit for time spent on remand in custody or on bail in accordance with sections 240 and 240A of the Criminal Justice Act 2003.

3.10.3 How binding are the English sentencing guidelines

Coroners and Justice Act, 2009, c. 25, § 125 imposes a duty on the sentencing court to follow sentencing guidelines unless the court is satisfied that it would be contrary to the interests of justice to do so.[237] In the absence of compelling reasons, therefore, courts are unlikely to deviate from the sentencing guidelines. This adherence ensures warranted consistency in sentencing.

Similarly in the federal sentencing formula of United States also departures from the set guidelines are permitted. A sentencing court must follow the three-step

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[235] See http://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/ancillary-orders/

[236] Section 174 (1) requires that the court passing sentence on an offender—

a) must state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence passed, and

(b)must explain to the offender in ordinary language—

(i)the effect of the sentence,

(ii)where the offender is required to comply with any order of the court forming part of the sentence, the effects of non-compliance with the order,

(iii)any power of the court, on the application of the offender or any other person, to vary or review any order of the court forming part of the sentence, and

(iv)where the sentence consists of or includes a fine, the effects of failure to pay the fine.

The court must—

- identify any definitive sentencing guidelines relevant to the offender's case and explain how the court discharged any duty imposed on it by section 125 of the Coroners and Justice Act 2009,
- where the court did not follow any such guidelines because it was of the opinion that it would be contrary to the interests of justice to do so, state why it was of that opinion.

[237] (1) Every court—

(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and

(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of that function,

unless the court is satisfied that it would be contrary to the interests of justice to do so…

process set forth by *Gall v. United States*. [238] *Firstly*, the court must determine the guideline range.[239] *Secondly*, the court must determine whether to apply any departure policy statements to adjust the guideline range. *Thirdly*, the court must consider all the factors set forth in 18 U.S.C. § 3553(a) as a whole, including whether a variance—a sentence outside the advisory guideline system—is warranted.

Departures from the sentencing guidelines in the federal system can take three forms: substantial assistance departures,[240] other downward departures[241] and upward departures.[242] Thus, departures are lawful tools in the hands of courts even where strict sentencing guidelines regime prevails.[243]

A number of jurisdictions are actively contemplating adopting more structured sentencing regimes, including some form of guidelines. The guidelines in England represent a useful model for consideration in this respect.[244]

3.11 What India Can Barrow

There is much to borrow from the western jurisdictions which have experimented all the methods under the sun to arrest arbitrary sentencing. Following may be tried on experimental basis.

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[238] 552 U.S. 38 (2007) (the district court should begin all sentencing proceedings by correctly calculating the applicable guideline range, and that "to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark"). See also USSG §1B1.1(a)-(c) (Application Instructions).

[239] 18 U.S.C. § 3553(a)(4).

[240] A defendant's assistance to authorities in the investigation is recognized as a mitigating sentencing factor. Downward departure from the guidelines can be had if the government states that the defendant has provided substantial assistance in the investigation or has assisted in prosecution of another person who has committed an offense.

[241] The policy statement provides that a downward departure may be warranted

> "[i]f reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." Such a departure may be warranted "if, for example, the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period."

[242] An upward departure may be warranted

> "[i]f reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes (§4A1.3(a)(1))"

[243] See Deborah E. Dezelan, "Departures from the Federal Sentencing Guidelines After Koon v. United States: More Discretion, Less Direction", *Notre Dame L. Rev*. Vol.72, 1997 at 1679. Thomas Gilson, "Federal Sentencing Guidelines--The Requirement of Notice for Upward Departure", 82 *J. Crim. L. & Criminology* 1029 (1991-1992); see also *Supra* note 170 See also United States Sentencing Commission "Alternative Sentencing in the Federal Criminal Justice System" available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf U.S. Sentencing Commission "Departure and Variance Primer" 2013 available at http://www.sado.org/content/pub/10503_Departure-and-Variance-Primer.pdf

[244] *Supra* note 158 at p 23

3.11.1 India can try sentencing councils

Jurisdictions worldwide have different experiences with sentencing councils. Some are successful, some have difficulties and others are still in the process of understanding the experience of sentencing councils. Though USA and England and Wales have sentencing councils of different models and modules, the working experience of both the jurisdiction is different. Irrespective of experiences, the common thread that runs in between all jurisdictions is that sentencing disparity is regulated to the possible extent by the establishment of sentencing councils. Furthermore, sentencing councils have been responsible for framing national policy for sentencing including the aims and objectives of the punishment and alternatives to imprisonment.

The fact that recommendations in favour of establishing sentencing councils[245] and acknowledgment by the law minister once,[246] underlies the fact that, it's time that, India should experiment sentencing councils. The apprehension of believer in the judicial discretion, that by the establishment of sentencing councils is interfered with, is unwarranted and uncalled for. Sentencing councils only lay down general guidelines from which courts are free to differ from and adopt 'context specific approach' if the needs of the case in hand requires them to do so. The sentencing disparity is, therefore minimized yet the courts have 'need based discretion' with them. The crux of the departure from the sentencing guidelines lies in the fact that, the sentencing courts have to furnish reasons for the departure from the set guidelines. It

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[245] Supreme Court advocate K.T.S. Tulsi says. "Justice should not depend on the subjective view of the judge. We need comprehensive guidelines on sentencing,"
The Committee on Reforms of Criminal Justice System stated that in order to bring

> "predictability in the matter of sentencing," a statutory committee should be first established "to lay guidelines on sentencing guidelines under the chairmanship of a former judge of the Supreme Court or a former chief justice of a High Court experienced in criminal law with other members representing the prosecution, legal profession, police, social scientist and women representative".

In 2008, the Madhava Menon Committee on "Draft National Policy on Criminal Justice" emphasized the need for statutory sentencing guidelines. The then law minister M. Veerappa Moily (2010) had also stated that the government was looking into establishing a "uniform sentencing policy" in line with the US and the UK to ensure that judges do not issue varied sentences.
Available at http://www.telegraphindia.com/1150902/jsp/opinion/story_40175.jsp

[246] "We are working on a uniform sentencing policy," Moily [then law minister] told reporters here. The proposed policy will ensure that judges do not hand down different sentences on the same crime but follow the standards laid down in it, he said. "We are working on the uniform sentencing policy which is on the lines of the ones in place in United States and the United Kingdom," Moily told reporters here on Saturday. "The draft for uniform sentencing is in its final stages and the ministry will place it before the Cabinet soon," he added. Available at http://zeenews.india.com/news/nation/centre-working-on-finalising-uniform-sentencing-policy-moily_660763.html

is here that unanimity in sentencing can be expected. The compulsory reasons for the departure from the set guidelines makes the sentencing judge to explore all the possibilities before him and then try something different which may, in his opinion individualises the punishment.

3.11.2 India needs to try mandatory pre-sentencing reports

Establishment of sentencing council, true, requires the complete overhauling of sentencing policy in India. The fact that India had enough opportunity to go for sentencing councils yet did not take any steps towards that directions itself indicate that, the water is still being tested. In the absence of this big leap small efforts can be surely made in the directions of regulating sentencing disparity. Sentencing disparity results, inter-alia, on the grounds of lack of socio- economic background of the offender. A full dressed comprehensive report would surely help the sentencing judge to individulisation the punishment.

England and Wales and States of United States have gone far ahead in eliciting the information of the criminals in the form of mandatory pre-sentencing report.[247] India however, lacks it. Though a little effort is made to elicit the information of accused in respect of extension of Probation of Offenders Act, 1958 no comprehensive jurisprudence has developed in India to that effect.[248] Courts have read, however, in a limited way and limited to cases, that pre-sentencing report may be generated as a requirement of section 354 of the Criminal Procedure Code, 1973.[249] This limited reading suffers from two major drawbacks- *firstly* the pre-sentencing reports can be generated only for warrant trials and eventually, summons

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[247] *Cf* Knowlton in "Punishment Provisions of the Penal Code" *Burma Law Institute Journal* Vol. II No.l (1960) p. 13-23. See also New York City Board of Correction, "Pre-Sentence Reports: Utility or Futility?" *Fordham Urban Law Journal*, Vol. 2, Issue 1, 1973, Pp 27- 53

[248] 48th Report the Law Commission, recommended introduction of mandatory hearing on sentence but did not press for pre- sentence report. The Commission observed

> "45. It is now being increasingly recognised that a rational and consistent sentencing policy requires the removal of several deficiencies in the present system. One such deficiency is the lack of comprehensive information as to the characteristics and background of the offender. The aims of sentencing themselves obscure - become all the more so in the absence of information on which the correctional process is to operate. The public as well as the Courts themselves are in dark about judicial approach in this regard."

The recommendations of Law Commission were incorporated in Sub-section (2) of Section 235 for trial before Court of Session and in Sub-section (2) of Section 248 for trials of warrant cases, of the Code of 1973.

On the scope of section 235 see *Santa Singh v. State of Punjab* 1976 AIR 2386, *Hazi Abdul Rehman And Anr. v. Ashok Kumar* 1991 (0) MPLJ 747, *Tarlok Singh v. State of Punjab* AIR 1977 SC 1747, *Dagdu and Ors. v. State of Maharashtra* AIR 1977 SC 1579,

[249] See *Vishal Yadav v. State Govt*, (2015) available at https://indiankanoon.org/doc/154440315/

trials and summery trials are excluded. *Secondly*, even not in every case that falls under the warrant trial that pre-sentencing report is called for.[250] Effectively, therefore, pre-sentencing report is nonexistent in India except for Probation Reports.

Pre sentencing reports work wonder for they provide the social milieu to punishment intended. The importance of such report has been underlined way back in 1979 in *Dilbag Singh v. State of Punjab*.[251] This was a case where Dilbag Singh was sentenced to rigorous imprisonment for one year and a fine of Rs. 200/-. He was held vicariously guilty under ss. 324/34 I.P.C. and awarded two years' rigorous imprisonment and a fine of Rs. 1000/-. In addition he was convicted under s. 323 I.P.C. for causing hurt to the daughter of the deceased and on this count punished with R.I. for one year together with a fine of Rs. 200/-. On appeal in Supreme Court, Chief Probation Officer was assigned to study and report. Convinced by the positive report by the probation officer, the court directed release of the appellant forthwith on a bond of Rs. 1000/- to keep the peace, be of good behaviour, to abjure alcohol and not to commit offence for a period of three years and to appear and receive sentence, if called upon in the meantime. Justice Krishna Iyer in his inimitable style then observed

> "[t]he social milieu, the domestic responsibilities, the respect for the former Sarpanch he shows, the general goodwill he commands are plus points. The tragic fact of his father's murder and the running misfortune of his young daughter's paralysed limbs are sour facets of his life. The circumstance that he is gainfully employed as agriculturist and his brothers, though in diverse occupations, remain joint family members, are hopeful factors. The aggressive episode which led to his conviction was induced by the company of his cousin who serves a seven year sentence and the inebriation due to drinking habit. This simple villager responsible and gentle, sad and burdened, repentant and drained of his little wealth by the criminal case, has a long way to go in life being in his early thirtys. The drinks vice was the minus point. Many a peaceable person, on slight irritation, suffers bellicose switch-over under alcoholic consumption.

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[250] In spite no legislative mandate obligating the Court to hear the accused on the question of sentence be it a summons trial or a summary trial, the Andhra High Court went a step ahead in *Dilip Kulkarni And Ors. v. Bahadurmal Chowdary And Sons* (2005 (2) ALD Cri 171) wherein T.Ch. Surya Rao, J. observed:

> "Having due regard to the above purpose and object behind the sentencing policy, there is no reason as to why it shall be limited to Sessions cases and warrant cases alone. When it is said that the criminal but not the crime must figure prominently in shaping the sentence and that it has a beneficial purpose, I am of the considered view that the benefit shall equally be extended to the criminal who has been tried following the summons procedure and as a matter of that summary trial procedure. Therefore, it seems imperative to hear the accused on the question of sentence even in summons cases or summary trial cases since no appropriate sentence can be passed without hearing the accused and in the absence of relevant criteria which make the sentence adequate and appropriate. For the above reasons, the accused shall be heard before passing the sentence in all criminal cases notwithstanding the procedure to be adopted in trying the said cases. Therefore, the Court below has not committed any illegality in adjourning the case to hear the accused on the question of sentence."

[251] 1979 AIR 680

> How does judicial discretion operate in this skew of circumstances? To jail him is mechanical farewell to the finer sentencing sensitivity of the judge of salvaging a redeemable man by non-institutionalised treatment. The human consequences of the confinement process here will be no good to society and much injury to the miserable family and, above all, hardening a young man into bad behaviour, with prestige punctured, family injured, and society ill-served. Nor was the crime such, so far as his part was involved, as to deserve long deterrent incarceration. Our prison system, until humane and purposeful reforms pervades, surely injures, never improves. Prison justice has promises to keep, and ethological changes geared to curative goals are still alien-from dress and bed, refusal of frequent parole and insistence of mechanical chores, bonded labour, nocturnal tensions, and no scheme to reform and many traditions to repress-such is the zoological institutional realism and rehabilitative bankruptcy which inflict social and financial costs upon the State. It is wasted sadism to lug this man into counter-productive imprisonment for one year."

Delhi High Court has, of late, made pre-sentencing report compulsory in respect of death penalties.[252] Only after obtaining the pre-sentencing report that bench would decide the death penalty reference.[253] This procedure can be generalized for all offences. A suitable amendment can be carried out to Criminal Procedure Code, 1973 to that effect.[254] Pre-sentencing report can be made compulsory until comprehensive sentencing policy is brought to force in India.[255]

3.11.3 Choice of punishment – needs re-hauling

What India needs to unfold for different punishment is best described by

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[252] *Vishal Yadav v. State of U.P.* (2015) available at https://indiankanoon.org/doc/154440315/

[253] The high court has made it mandatory that the death penalty shall be confirmed only after mandatory pre-sentencing report (PRS) which report eliminates the rehabilitation of the offender and indicates that the offender needs to be physically liquidated. Though PRS is not binding on the courts, it must be given due respect. See chapter IV for further discussion

[254] Section 235 may be amended as follows (proposed amendment text in italics)

> 235. Judgment of acquittal or conviction -
> (1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case.
> (2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360 hear the accused on the question of sentence, and then pass sentence on him according to law.
> *Provided that no sentence shall be passed by the Judge, unless a pre-sentencing report generated by the Probation Officer appointed under this Act or under probation of offenders Act, 1958, is considered by the judge.*
> *Provided further that the pre-sentencing report may not be binding on the judge.*
> *Provided further that the judge shall state with reasons as to how the pre sentence report was evaluated in separate paragraphs of the judgments.*

[255] See the observations of the United States Supreme Court in *Williams v. New York* (337 U.S. 241, 249) lay the right stress on pre-sentence reports:

> "have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guess-work and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation."

Justice Krishnaiyer, V.R. when he observes[256]

> "18. Unfortunately, the Indian Penal Code still lingers in the somewhat compartmentalised system of punishment viz. imprisonment, simple or rigorous, fine and, of course, capital sentence. There is a wide range of choice and flexible treatment which must be available with the Judge if he is to fulfil his tryst with curing the criminal in a hospital setting. Maybe in an appropriate case actual hospital treatment may have to be prescribed as part of the sentence. In another case, liberal parole may have to be suggested and, yet in a third category, engaging in certain types of occupation or even going through meditational drills or other courses may be part of the sentencing prescription. The perspective having changed, the legal strategies and judicial resources, in their variety, also have to change. Rule of thumb sentences of rigorous imprisonment or other are too insensitive to the highly delicate and subtle operation expected of a sentencing Judge. Release on probation, conditional sentences, visits to healing centres, are all on the cards. We do not wish to be exhaustive. Indeed, we cannot be."

3.11.4 Stated philosophy of punishment

As mentioned elsewhere, Indian sentencing policy needs to define the stated philosophy of the punishment in the first place and then find mechanism to pursue it in its sincerity. In the absence of stated philosophy of the punishment, Indian courts have tired their own sentiments resulting in conspicuous disparity in sentencing. Other countries have defined their purposes of sentencing followed by choices of punishment.[257] This tendency brings confidence and faith in the sentencing policy of

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[256] In *Mohammad Giasuddin v. State of Andhra* 1977 AIR 1926

[257] As for example, Section 7 and 8 of Sentencing Act 2002 of New Zealand elaborately describes the Purposes and principles of sentencing as under

Section 7: Purposes of sentencing or otherwise dealing with offenders

(1) The purposes for which a court may sentence or otherwise deal with an offender are—

(a) to hold the offender accountable for harm done to the victim and the community by the offending; or

(b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or

(c) to provide for the interests of the victim of the offence; or

(d) to provide reparation for harm done by the offending; or

(e) to denounce the conduct in which the offender was involved; or

(f) to deter the offender or other persons from committing the same or a similar offence; or

(g) to protect the community from the offender; or

(h) to assist in the offender's rehabilitation and reintegration; or

(i) a combination of 2 or more of the purposes in paragraphs (a) to (h).

(2) To avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to.

8 Principles of sentencing or otherwise dealing with offenders

In sentencing or otherwise dealing with an offender the court—

(a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and

(b) must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and

any nation at any given point of time.

3.12 Conclusion

Sentencing discretion is unavoidable evil. It can only be structured, regulated and disciplined. It cannot be taken away! In the context of sentencing policy as G.Kameswari observed

> "[a]n excessive sentence defeats its own objective and tends to undermine the respect for law. On the other hand, an unconscionably lenient sentence would lead to miscarriage of justice and undermine the people's confidence in the efficacy of the administration of criminal justice."[258]

Sentencing consistency is, therefore, an indispensible element of sentencing policy. Western countries have tried sentencing councils and sentencing guidelines to structure sentencing discretion. Common law countries have also developed their own methods of disciplining sentencing discretion. India however, does not share any of these methods except mandatory sentencing for some offences. India needs sentencing councils and re-hauling of sentencing policy to match the contemporaries in the sentencing policy.

(c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
(d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
(e) must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and
(f) must take into account any information provided to the court concerning the effect of the offending on the victim; and
(g) must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in section 10A; and
(h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and
(i) must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and
(j) must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10).

[258] *Supra* note 47

CHAPTER -IV

A CRITICAL ANALYSIS OF CAPITAL SENTENCING: RIDDLES, RIDERS AND RESOLUTIONS

"I have been a judge on this Court for more than twenty-five years … After all these years, however, only one conclusion is possible: the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair."

Judge Boyce Martin, U.S. Court of Appeals, Sixth Circuit[1]

4.1 Introduction

No other penalty on this earth has ever baffled the presiding officers as death penalty does. Everybody has an appointment with death but if it is decided by human beings[2] for breaking human made laws[3] the philosophical foundation of civilization is shaken. Despite death sentences being described as *cruel and unusual in the same way that being struck by lightning,* [4] death penalties continue in practice and are being newly introduced on statute book on the 'perceived threats' and as an 'utmost security sanctions'. 'The murderer has killed. It is wrong to kill. Let us kill the murderer' [5] is probably the philosophy on which death sentences are surviving there being no other convincing rationality apart from the economic feasibility of therapeutic treatment of such killers. Though Life and death quite literally hang in

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[1] Richard C. Dieter, "Struck by Lightning: The Continuing Arbitrariness of the Death Penalty Thirty-Five Years After Its Re-instatement in 1976" Washington DC, July 2011 available at www.deathpenaltyinfo.org

[2] in *G. Krishta Goud & J. Bhoomaiah v. State of Andhra Pradesh & Ors,* ((1976) 1 SCC 157) the court quotes as under

> "The man sits in a cage of steel and concrete under a single bright light that burns around the clock. He has been tried by a jury of his peers, judged and sentenced to die. He has killed and now society, through the anonymous machinery of the state, will kill him. He has been brought here to keep that appointment with death."

See Trevor Thomas, *The Life We Take; A Case against the Death Penalty*, 3rd ed., (San Francisco: Friends Committee on Legislation, 1965) Quoted in *G. Krishta Goud & J. Bhoomaiah v. State Of Andhra Pradesh & Ors* ((1976) 1 SCC 157)

[3] In 1801 AD a boy of 13 years was hanged for stealing a spoon! Bidding good bye to such barbaric jurisprudence the supreme court of India sung adlib of new penology as "[n]ot raw ferocity but warm humanity is the real heart of law" in *G. Krishta Goud & J. Bhoomaiah v. State of Andhra Pradesh & Ors* ((1976) 1 SCC 157). However subsequently the same institution did not carry the baton the same way it sung once!

[4] Per Justice Potter Stewart (1972) quoted in Richard C. Dieter "Struck by Lightning: The Continuing Arbitrariness of the Death Penalty Thirty-Five Years After Its Re-instatement in 1976",Washington, DC , July 2011 available at www.deathpenaltyinfo.org

[5] That was how a Mr. Bonsall of Manchester (quoted by Arthur Koestler in his 'Drinkers of Infinity'), in a letter to the Press, neatly summed up the paradox and the pathology of the Death Penalty. Quoted by Justice Chinnappa Reddy, in *Bishnu Deo Shaw @ Bishnu Dayal v. State of West Bengal* 1979 AIR 964

the balance,[6] death is different.[7] May not be in the same sense as is in the western jurisdictions, death sentence in India too is different. Courts have, depending on the sensitivity of judges, equally perceived the death sentence with same sincerity as it was done in America.[8] Death sentences are not uncommon in India though the executions are.[9] Death penalty has dimensions to discuss. The abolition -vs- retention argument[10] is as common as a lecture in the classroom. The utilitarianism of death penalty also holds a strong ground for debate.[11]

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[6] Mark D. Cunningham,'*Evaluation For Capital Sentencing*, (Oxford: Oxford University Press, 2010), p 3

[7] The notion of death is different has been developed in American courts after the judgment of *Georgia* in 1972 leading to a considerable literature being developed in corridors of courts and classrooms. *See, e.g.*, *Furman v. Georgia* 408 U.S. 238, 286 (1972) (Brennan, J., concurring) (stating that "[d]eath is a unique punishment"); *id.* at 306 (Stewart, J., concurring) (stating that the "penalty of death differs from all other forms of criminal punishment not in degree but in kind"); *Gregg v. Georgia* 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (Stating that the "penalty of death is different in kind from any other punishment"); *Woodson v. North Carolina* 428 U.S. 280, 305 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (stating that the "penalty of death is qualitatively different from a sentence of imprisonment, however long"); *McCleskey v. Kemp* 481 U.S. 279, 340 (1987) (Brennan, J., dissenting) (stating that "this Court has consistently acknowledged the uniqueness of the punishment of death"); *Baze v. Rees* 553 U.S. 35, 84 (2008) (Stevens, J., concurring) (stating that "a number of our decisions [have] relied on the premise that 'death is different' from every other form of punishment to justify rules minimizing the risk of error in capital cases"). Quoted in Carol S. Steiker & Jordan M. Steiker "*Miller v. Alabama*: Is Death (Still) Different?" *Ohio State Journal of Criminal Law,* Vol. 11:1, 2013, p 38

[8] In *Bachan Singh v. State of Punjab* (1982) 3 SCC 24 Justice Bhagavati made an extensive research and observation to finally conclude that death penalty is unconstitutional on the touch stone of Articles 14 and 21. Though he fell in minority (only judge in the bench of five), his apprehensions literally came true in present context which would be elaborated in the following discourse. His minority opinion is as much respected as majority opinion. Many other judges inspired by his dissent acted slowly in imposing death penalty. Justice Geeta Mittal of delhi High court supplemented foot notes to his dissent and tried new mechanisms like compulsory probation officers report as pre-sentencing report before death is imposed! This kind of necessary legal experiments would take away judicial disparity which was frowned upon by Justice Bhagavati in *Bachan Singh v. State of Punjab* case (1982) 3 SCC 24

[9] To speak of the duration between 2000 to 2014, 1810 prisoners were sentenced to death by the trial courts in India, across 1118 cases. Out of the 1118 prisoners, 1787 prisoners were sentenced to death by ordinary trial courts in 1112 cases, additionally 23 prisoners involved in six cases were given the capital punishment by special courts constituted under the Terrorism and disruptive Activities(prevention) Act,1987. See Dr. Anup Surendranath, *Death Penalty India Report*, Vol.1 (Delhi: National Law University, 2016)

[10] See generally The Law Commission of India, 35th Report on "*Capital Punishment*" (1967) for both side arguments

[11] The "deterrent theory" on the premise of which death penalty is retained has failed to convince the average citizens of its utility. The statistics interestingly reveal the inverse relationship. See Asian Centre for Human Rights, *The case for abolition of death penalty in India*, (New Delhi: Centre for Human Rights, May 2014); *See also* Dr. Chandrika Prasad Sharma "Death Sentence: Repeal or Retention Riddle" (2004) *PL Web Jour* 22; The UN has also noted that deterrence is nothing more than a "myth." See Carolyn Hoyle and Roger Hood, *The Myth of Deterrence* in Ivan Šimonovi´ (eds.) *Moving Away From The Death Penalty: Arguments, Trends And Perspectives,*(New York: United Nations Human Rights Office of the High Commissioner 2014), Pp 74-83; *See also* Usha Ramanathan, *The Death Penalty In India: Down A Slippery Slope,* in Ivan Šimonovi´ (eds.) *Moving Away From The Death Penalty: Arguments, Trends And Perspectives,*(New York: United Nations Human Rights Office of the High Commissioner, 2014),Pp 134-152

Right from the private members bill[12] to comprehensive Law Commission reports;[13] to Ambedkar's speech in constituent assembly debate;[14] to India being signatory to international convention with its own reservation;[15] to strong dissent in capital judgments;[16] to political parties sharing the concern[17] everywhere the

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[12] On 31st July, 2015, D. Raja of the CPI introduced a Private Member's Bill asking the Government to declare a moratorium on death sentences pending the abolition of the death penalty. In August 2015, DMK Member of Parliament Kanimozhi introduced a private member's bill in the Rajya Sabha seeking abolition of capital punishment. See IANS, *Death penalty: CPI leader D Raja moves private member's resolution*, Economic Times, 31 July, 2015 and ET Bureau*, Seeking end to death penalty, DMK's Kanimozhi set to move private member's bill*, Economic Times 7 August, 2015 as quoted by Law Commission of India, 262nd Report on "*Death penalty in India*" 2015, at foot note no 44 and 47

Before independence, Shri Gaya Prasad Singh attempted to introduce a Bill abolishing the death penalty for IPC offences in 1931, which was defeated. Since independence, M.A. Cazmi's Bill to amend Section 302 IPC in 1952 and 1954, Mukund Lal Agrawal's Bill in 1956, Prithviraj Kapoor's resolution in the Rajya Sabha in 1958 and Savitri Devi Nigam's 1961 resolution had all sought to abolish the death penalty. In 1962, Shri Raghunath Singh's resolution for abolition of the death penalty was discussed in the Lok Sabha, and following this the matter was referred to the Law Commission, resulting in the 35th Commission Report. This fact is mentioned in Law Commission of India, 35th Report on "*Capital Punishment*", 1967 and reproduced in Law Commission of India, 262nd Report on "*Death penalty in India*" p 36

[13] The Law Commission of India, 35th Report on "*Capital Punishment*", 1967 observed that

> "Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population, and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment.

The Law Commission of India in its 187th Report on the "Mode of Execution" (2003) only examined the limited question on the mode of execution and did not engage with the substantial question of the constitutionality and desirability of death penalty as a punishment.

Whereas the Law Commission of India, 262nd Report on "*Death penalty in India*" 2015 recommended that

> "7.2.4. The Commission accordingly recommends that the death penalty be abolished for all crimes other than terrorism related offences and waging war.
> 7.2.5 The Commission trusts that this Report will contribute to a more rational, principled and informed debate on the abolition of the death penalty for *all* crimes.
> 7.2.6 Further, the Commission sincerely hopes that the movement towards absolute abolition will be swift and irreversible."

[14] Dr. Ambedkar was personally in favour of abolition saying:

> "I would much rather support the abolition of the death sentence itself. That, I think, is the proper course to follow, so that it will end this controversy. After all, this country by and large believe(s) in the principle of non-violence. … I think that having regard to this fact, the proper thing for this country to do is to abolish the death sentence altogether."

See Constituent Assembly Debates on 3 June, 1949 Part II, available at http://parliamentofindia.nic.in /ls/debates/vol8p15b.htm (last viewed on 26.08.2015). as quoted by the Law Commission of India *supra* note 12 at foot note no 57

India's Constituent Assembly Debates between 1947 and 1949 also raised questions around the judge-centric nature of the death penalty, arbitrariness in imposition, its discriminatory impact on people living in poverty, and the possibility of error.

[15]India has ratified The International Covenant on Civil and Political Rights ('ICCPR'), The Convention on the Rights of the Child. India is signatory to the Torture Convention but has not ratified it. India voted against a UN resolution in November 2016, to establish a moratorium on death penalty. 115 countries had voted in favour of the resolution. *See* at: http://www.livelaw.in/india-death-penalty-report-2016/

continuation or discarding of death penalty has been debated but in vein. Legislature has rather, reinforced[18] death sentences by introducing Criminal Law Amendment Act, 2013 and The Anti-Hijacking Act, 2016[19] putting all the deliberations to hang the death penalty, in cold store.[20] The reintroduction of death penalty and constant imposition of death under existing laws has raised issues of international ramifications like extradition and deportations.[21] The discussion, therefore, at this juncture is not on the retention -vs- abolition arguments. Given the fact that death penalty continues on

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[16] Justice Bhagwati in his dissenting opinion found the death penalty necessarily arbitrary, discriminatory and capricious. He reasoned that

> "the death penalty in its actual operation is discriminatory, for it strikes mostly against the poor and deprived sections of the community and the rich and the affluent usually escape, from its clutches. This circumstance also adds to the arbitrary and capricious nature of the death penalty and renders it unconstitutional as being violative of Articles 14 and 21."

See *Bachan Singh v. State of Punjab* (1982) 3 SCC 24 (J. Bhagwati, dissenting), at para 81.

[17] Demands for the abolition of the death penalty have been made by the Communist Party of India (CPI), the Communist Party of India (Marxist) [CPI (M)], the Communist Party of India (Marxist – Leninist Liberation) [CPI (M-L)] the Viduthalai Chiruthaigal Katchi (VCK), the Manithaneya Makkal Katchi (MMK), the Gandhiya Makkal Iyakkam (GMI), the Marumalarchi Dravida Munnetra Kazhagam (MDMK), and the Dravida Munnetra Kazhagam (DMK). See PTI "Left joint movement asks Centre to not hang Yakub Memon", *Economic Times*, 27 July, 2015; IANS "Death penalty: CPI leader D Raja moves private member's resolution", *Economic Times*, 31 July, 2015; ET Bureau "Seeking end to death penalty, DMK's Kanimozhi set to move private member's bill", *Economic Times*, 7 August, 2015; See also: *Repeal Death Penalty*, CPI M-L, 30 June, 2015, available at http://cpiml.in/cms/editorials/item/150-repeal-death-penalty (last viewed on 20.08.2015) as quoted by the Law Commission of India *supra* note 12 at foot note no 45

[18] Newly introduced section 376E reads

> "Whoever has been previously convicted of an offence punishable under section 376 or section 376A or section 376D and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death."

[19] The Act received the assent of the President on the 13th May, 2016. Section 4 of the Act provides that

> "4. Whoever commits the offence of hijacking shall be punished— (a) with death where such offence results in the death of a hostage or of a security personnel or of any person not involved in the offence, as a direct consequence of the office of hijacking; or (b) with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life and with fine, and the movable and immovable property of such person shall also be liable to be confiscated."

[20] Justice Verma Committee which was in favour of enhanced punishment for certain forms of sexual assault and rape, noted that

> "in the larger interests of society, and having regard to the current thinking in favour of abolition of the death penalty, and also to avoid the argument of any sentencing arbitrariness, we are not inclined to recommend the death penalty."

The Criminal Law (Amendment) Act, 2013, nevertheless expanded the scope of the death penalty.
See Justice Verma Committee Report on The Criminal Law (Amendment) Act, 2013, at page 246, available at http://www.thehindu.com/news/resources/full-text-of-justice-vermas-report-pdf/ article 4339457.ece

[21] The Asian Centre for Human Rights in its research "India: Not safe for extradition of those facing death sentences?" (August 2015) observes at p 1 as under

> "The execution of three terror convicts i.e. Ajmal Kasab, Afzal Guru and Yakub Abdul Razak Memon in the last three years is likely to seriously impact India's requests for extradition from a number of countries which have abolished death penalty…"

See The Asian Centre for Human Rights in its research, *India: Not safe for extradition of those facing death sentences?* (New Delhi : The Asian Centre for Human Rights , August 2015) also available at https://www.achrweb.org/reports/india/India-Not-Safe-for-Extradition-of-those-facing-Death-Penalty.pdf

the statute book and is reintroduced for newer offences, the discussion for the present purpose shall revolve around the disparity that exists in the imposition of death penalty and the safety valves in the form of riders, that may be introduced to keep death penalty as choice of last resort. The discussion shall also unfold how disparity in death penalty affects the other aspects of sentencing policy.

4.2 Death Penalty: Introduction, Survival and Reintroduction

Death penalty in India is provided both under the general penal law, i.e., Indian Penal Code, 1860 and special laws also. Under the Indian penal code there are twelve offences[22]- seven original and five subsequently added - which prescribe for death penalty. Some of these offences are homicidal whereas remaining are not.[23]

There are 22 special legislations[24] which provide for death penalty including homicidal and non homicidal offences. Of the 22 legislations, there are 12 legislations which prescribe death penalty for 35 offences![25]

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[22] Section 120B (criminal conspiracy to commit any of these offences), Section 121 (Treason, for waging war against the Government of India Section), 132 (Abetment of mutiny actually committed), Section 194 (Perjury resulting in the conviction and death of an innocent person Section), 195A (Threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent person), Section 302 (Murder), Section 305 (Abetment of a suicide by a minor, insane person or intoxicated person), Section 307(2) (Attempted murder by a serving life convict), Section 364A (Kidnapping for ransom), Section 376A (Rape and injury which causes death or leaves the woman in a persistent vegetative state), Section 376E (Certain repeat offenders in the context of rape), Section 396 (Dacoity with murder).

[23] Of the offences noted above seven offences are non homicidal namely, Section 120B, Section 121 (waging war), Section 132, Section 194, Section 195A, Section 364A (added by Criminal Law (Amendment) Act, 1993, Section 376E (added by Criminal Law (Amendment) Act, 2013) Offences under Sections 364A, 376A and 376E of the Indian Penal Code, 1860 have been considered as both homicide and non-homicide offences as they provide for the death sentence in situations, where loss of life may or may not be involved.

[24] The Air Force Act, 1950 (Sections 34, 37, and 38(1)) The Andhra Pradesh Control of Organised Crime Act, 2001 (Section 3(1)(i)) The Arms Act, 1959 (repealed) (Section 27(3)) The Army Act, 1950 (Section 27(3)) The Army Act, 1950 (Sections 34, 37, and 38(1)) The Bombay Prohibition (Gujarat Amendment) Act, 2009 (Section 65A(2)) The Border Security Force Act, 1968 (Sections 14, 17, 18(1)(a), and 46) The Coast Guard Act, 1978 (Sections 17 and 49) The Assam Rifles Act, 2006 (Sections 21, 24, 25(1)(a), and 55)The Commission of Sati (Prevention) Act, 1987 (Section 4(1)) The Defence of India Act, 1971 (Section 5) The Geneva Conventions Act, 1960 (Section 3) The Explosive Substances Act, 1908 (Section 3) The Explosive Substances Act, 1908 (Section 3 (b)) The Indo-Tibetan Border Police Force Act, 1992 (Sections 16, 19, 20(1)(a), and 49) The Karnataka Control of Organised Crime Act, 2000 (Section 3(1)(i)) The Maharashtra Control of Organised Crime Act, 1999 (Section 3(1)(i)) The Narcotics Drugs and Psychotropic Substances Act, 1985 (Section 31A(1)) The Navy Act, 1957 (Sections 34, 35, 36, 37, 38, 39, 43, 44, 49(2)(a), 56(2), and 59) The Petroleum and Minerals Pipelines (Acquisition of rights of user in land) Act, 1962 (Section 15(4))The Sashastra Seema Bal Act, 2007 (Sections 16, 19, 20(1)(a), and 49) The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Section 3(2)(i)) The Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 (Section 3(1)(i)) The Unlawful Activities Prevention Act, 1967 (Sections 10(b)(i) and Section 16(1)(a))

[25] The Air Force Act, 1950 (Ss 34, 37 and 38) The Army Act, 1950 (Ss 34, 37 and 38) The Assam Rifles Act, 2006 (Ss 21, 24 and 25) The Border Security Force Act, 1968 (Ss 14, 17 and 18) The Coast Guard Act, 1978 (Ss 17, 49) The Explosive Substances Act, 1908 (Section 3) Indo-Tibetan Border Police Force Act, 1992 (Ss16,19 and 20) The Narcotic Drugs and Psychotropic Substances Act, 1985 (Section 31) The Navy Act, 1957 (Ss 34, 35,26,37,38,39,43,44,49,56,59) The Petroleum and Mineral Pipelines (Acquisition of Right of User in Land) Act, 1962 (Section 15) The Sashastra Seema Bal Act, 2007 (Ss16,19 and 20) The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Section 3)

The first attack on the constitutional validly of death penalty was in *Jagmohan Singh* case.[26] The sentence of death for an offence under S. 302 of the Indian Penal Code imposed on the appellant by the Sessions Judge and confirmed by the High Court was challenged in appeal by Special Leave in the Supreme Court.[27] Dismissing the appeal, the court held section 302 constitutional.[28] Neither 'the cruel and unusual punishments' clause nor the 'unreasonable or opposed to public interest' argument convinced the court in holding section 302 IPC unconstitutional.[29] The importance of this judgment lies in the fact that it highlighted the need for noting *"special reasons"* when imposing death sentences.[30]

The second case that had a bearing on the death jurisprudence is of *Rajendra Prasad* case[31] which was delivered in the context of new Criminal Procedure Code, 1973. Though the judgment was soon overruled, it is remembered for its observation. In *Rajendra Prasad* the plurality[32] observed :

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[26] *Jagmohan Singh v. The State of U. P* 1973 AIR 947, (Bench consisting of : JJ. Sikri, S.M., Ray, A.N., Dua, I.D., Palekar, D.G., Beg, M. Hameedullah)

[27] Section 302 of Indian Penal Code, 1860 was challenged on the following grounds: (i) that the death sentence puts an end to all fundamental rights guaranteed under clauses (a) to (g) of sub-clause (ii) of Art. 19 of the Constitution and therefore the law with regard to capital sentence is unreasonable and not in the interest of the general public; (ii) that the discretion invested in the Judges to Impose capital punishment is not based on any standards or policy required by the Legislature for imposing capital punishment in preference to imprisonment for life; (iii) that the uncontrolled and unguided discretion in the Judges to impose capital punishment or imprisonment for life is hit by Art. 14 of the Constitution (iv) that the provisions of the law do not provide a procedure for trial of factors and circumstances crucial for making the choice between the capital penalty and imprisonment for life, and therefore Art. 21 is violated.

[28] The constitution bench observed:

> " Articles 72(1)(c), and 134 of the Constitution and entries 1 and 2 in List III of the Seventh Schedule to the Constitution show that the Constitution makers had recognised the death sentence as a permissible punishment and had made constitutional provisions for appeal, reprieve, and the like. But, more important than these provisions in the Constitution is Art 21, which provides that no person shall be deprived of his life except according to procedure established by law. The implication is very clear. Deprivation of life is constitutionally permissible if that is done according to procedure established by law. In the face of these indications of constitutional postulates, it will be very difficult to hold that capital sentence was regarded per se as unreasonable or not in the public interest."

The court further held that

> "The impossibility of laying down standards (in the matter of sentencing) is at the very core of criminal law as administered in India which invests the judges with a very wide discretion in the matter of fixing the degree of punishment and that this discretion in the matter of sentence is liable to be corrected by superior Courts... The exercise of judicial discretion on well recognised principles is, in the final analysis, the safest possible safeguard for the accused."

[29] See Dr S. Muralidhar, "Hang Them Now, Hang Them Not : India's Travails With The Death Penalty" *Journal of the Indian Law Institute,* Vol. 40, 1998, p 143

[30] Justice S.B. Sinha, "To Kill Or Not To Kill: The Unending Conundrum" *National Law School of India Review,* Vol. 24(1), 2012, p 11

[31] *Rajendra Prasad Etc.v. State of Uttar Pradesh* 1979 AIR 916

[32] Krishna Iyer and Desai, JJ. delivered majority opinion . SEN, J however differed and fell in minority.

> "It is constitutionally permissible to swing a criminal out of corporeal existence only if the security of State and society, public order and the interests of the general public compel that course as provided in Article 19(2) to (6)."[33]

The majority has further opined :

> "The only correct approach is to read into Section 302. I.P.C. and Section 354(3) Cr. P.C., the human rights and humane trends in the Constitution. So examined, the rights to life and the fundamental freedoms is deprived when he is hanged to death, his dignity is defiled when his neck is noosed and strangled."

Though *Rajendra Prasad* was overruled subsequently,[34] it left its impression for the remarks made by justice V.R. Krishna Iyer, J. where he said that *"special reason necessary for imposing death penalty must relate not to the crime as such, but to the criminal"*

Bachan Singh v. State of Punjab,[35](hereinafter *Bachan Singh*) which followed, was a landmark decision, which despite affirming the constitutionality of the death penalty diluted the scope of its imposition substantially by introducing the test of rarest of rarest doctrine.[36] Dr S. Muralidhar reproduces three developments, (as argued by Counsel Shri R.K. Garg before Constitutional Bench) which led to this land mark judgment as[37]

> "[t]hree developments subsequent to the judgment in Jagmohan prompted a renewed challenge in Bachan Singh v. State of Punjab [38] to the constitutional validity of the death penalty. The Cr.PC was reenacted in 1973 and section 354 (3) required that the judgment recording conviction for an offence punishable with death shall state special reasons for such sentence.[39] Thus

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[33] *Rajendra Prasad Etc.v. State of Uttar Pradesh* 1979 AIR 916 the court further observed that
> "Such extraordinary grounds alone constitutionally qualify as special reasons as leave no option to the Court but to execute the offender if State and. society are to survive. One stroke of murder hardly qualifies for this drastic 'requirement, however, gruesome the killing or pathetic the situation, unless the inherent testimony coming from that act is irresistible that the murderous appetite of the convict is too chronic and deadly that ordered life in a given locality or society or in prison itself would be gone if this man were now or later to be at large. If he is an irredeemable, like a bloodthirsty tiger, he has to quit his terrestrial tenancy."

[34] Kailasam, J. doubted the ratio of Rajendra Prasad and was of opinion that the majority view in Rajendra Prasad taken by V.R. Krishna Iyer, J., who spoke for himself and D.A. Desai, J., was contrary to the judgment of the Constitution Bench in *Jagmohan Singh v. State of Uttar Pradesh* 1973 AIR 947. Sarkaria, J., in agreement with Kailasam, J., directed the records of the case to be submitted to the Hon'ble the Chief Justice, for constituting a large Bench "to resolve the doubts, difficulties and inconsistencies pointed out by Kailasam, J. That is how, the matter has came up before the larger Bench of five Judges in *Bachan Singh v. State of Punjab* 1980 (2) SCC 684

[35] 1980 (2) SCC 684

[36] *Supra* note 30 p 11

[37] *Supra* note 29 p 143

[38] 1980 (2) SCC 684

[39] The Joint Committee of Parliament in its Report stated the object and reason of making the change, as follows: A sentence of death is the extreme penalty of law and it is but fair that when a court awards that sentence in a case where the alternative sentence of life imprisonment is also available, it should give special reasons in support of the sentence.

> death sentence became the exception and not the rule as far as punishment for murder was concerned.
> Secondly, the decision in *Maneka Gandhi v. Union of India*, [40] required that every law of punitive detention both in its procedural and substantial aspects must pass the test of reasonableness on a collective reading of articles 21, 19 and 14.
> The third development was that India had acceded to the ICCPR that came into force on December 16, 1976. By ratifying the treaty, India had committed itself to the progressive abolition of death penalty."

The constitutional validity of death penalty for murder provided in Section 302 of IPC, and the sentencing procedure embodied in sub-section (3) of Section 354 of the CrPC, 1973 was the subject of decision[41] before the constitutional bench.[42]

The Court rejected the first contention, finding instead that the death penalty met the requirement of reasonableness in Article 19 and 21, *primarily since a sizable body of opinion holds the view that the death penalty is a rational punishment*. As for the second, the Court held that the legislative policy indicated that the following principles should guide judicial discretion in determining the appropriate sentence for murder:

> 1. For the offence of murder, ***life imprisonment is the rule and death sentence an exception*.**
> 2. This exceptional penalty can be imposed "***only in gravest cases of extreme culpability*"** taking into account the ***aggravating and mitigating*** circumstances in a case, paying due regard to the "***circumstances of the offence***," as well as the "***circumstances of the offender***."
> 3. To prevent sentencing from becoming arbitrary, the Court endorsed the view that the determination of aggravating and mitigating circumstances should be based on "well recognised principles… crystallised by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases."The Court thus prescribed a process of ***principled sentencing***, and held that the determination of aggravating and mitigating factors would be based on a determinate set of standards created through the evolutionary process of judicial precedents.
> 4. Only if the analysis of aggravating and mitigating circumstances, as indicated above, provided "***exceptional reasons***" for death, would capital

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[40] 1978 (2) SCR 621

[41] *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, at para 15

> "(I) Whether death penalty provided for the offence of murder in Section 302, Indian Penal Code is unconstitutional.
> (II) If the answer to the foregoing question be in the negative, whether the sentencing procedure provided in Section 354(3) of the CrPC, 1973 (Act 2 of 1974) is unconstitutional on the ground that it invests the Court with unguided and untrammelled discretion and allows death sentence to be arbitrarily or freakishly imposed on a person found guilty of murder or any other capital offence punishable under the Indian Penal Code with death or, in the alternative, with imprisonment for life."

[42] The Bench consisted of Y Chandrachud, N Untwalia, P Bhagwati, R Sarkaria, A Gupta JJ. Justice R. Sarkaria, J. wrote for the judgment for himself and Y Chandrachud, N Untwalia, R Sarkaria, A Gupta JJ. P Bhagwati wrote dissenting judgment and held death penalty unconstitutional. It may be noted that his dissenting judgment commands equal respect as the majority judgment does!

> punishment be justified, because "[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***."[43]

The Supreme Court had called upon judges to "*discharge the onerous function (of deciding whether or not to impose the death penalty) with evermore scrupulous care and humane concern*."[44]

4.3 'Rarest Of Rare' Doctrine: A Rolling Snowball of Bleeding Disparity

In *Bachan Singh* it was repeatedly pressed that the constitutional court should lay down standards or norms restricting the area of the imposition of death penalty to a narrow the category of murders by laying down the broad guidelines. The court however rejected the contention and held that

> "175. If by "laying down standards", it is meant that 'murder' should be categorised before hand according to the degrees of its culpability and all the aggravating and mitigating circumstances should be exhaustively and rigidly enumerated so as to exclude all free-play of discretion, the argument merits rejection.
> 176. As pointed out in Jagmohan, such "standardisation" is well-nigh impossible."

In *Bachan Singh*, though the court refused to lay down standards or categorise of murders, nonetheless, *certain* aggravating factors[45] were noted that too with caution as

> "218. Stated broadly, there can be no objection to the acceptance of these

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[43] *Supra* note 12 at p108

[44] *Santosh Bariyar v. State of Maharashtra* (2009) 6 SCC 498, at para 110

[45] The court noted in para 217 as

> "217. Drawing upon the penal statutes of the States in U.S.A. framed after Furman v. Georgia, in general, and Clauses (2) (a), (b), (c) and (d) of the Indian Penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr. Chitale has suggested these "aggravating circumstances".
> Aggravating circumstances : A Court may, however, in the following cases impose the penalty of death in its discretion :
> (a) if the murder has been committed after previous planning and involves extreme brutality; or
> (b) if the murder involves exceptional depravity; or
> (c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed.
> (i) while such member or public servant was on duty; or
> (ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or
> (d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the CrPC, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."

> indicators but as we have indicated already, *we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other.*"
> "220. No exhaustive enumeration of aggravating circumstances is possible. *But this much can be said that in order to qualify for inclusion in the category of "aggravating circumstances" which may form the basis of 'special reasons' in Section 354(3), circumstances found on the facts of a particular case, must evidence aggravation of an abnormal or special degree."*

The court however went further in noting that these are 'factors simpliciter' and cannot be the 'sole criteria' to impose extreme penalty of death. The court in fact issued a caution as under:

> "As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the Court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because 'style is the man'. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water-tight compartments. In a sense, to kill is to be cruel and, therefore, all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist."

The court on the other hand noticed certain mitigating factors which were favoured with highest sanctity. The court noted that "[i]n the exercise of its discretion the Court shall take into account the following circumstances:

> (1) That the offence was committed under the influence of extreme mental or emotional disturbance.
>
> (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.
>
> (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
>
> (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.
>
> (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

> (6) That the accused acted under the duress or domination of another person,
>
> (7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

The court observed that "[w]e will do no more than to say that these are undoubtedly *relevant circumstances and must be given great weight in the determination of sentence*."

The *Bachan Singh* case*,* therefore, refused to bind the discretion of future judges in any straight jacket formula as each case presents a different set of facts. The court, however, unequivocally ruled that death penalty shall be imposed only in the *rarest of rare cases when the alternative option is unquestionably foreclosed.*

Alternative option is unquestionably foreclosed in two circumstances *namely*: the accused cannot be reformed and rehabilitated and *secondly* the accused would commit criminal acts of violence as would constitute a continuing threat to society if he is spared. The court, however, also imposed a rider that the State shall by evidence prove that the accused does satisfies the above conditions. The *Bachan Singh* case, therefore, extremely confined death penalty to few numbers of cases.

However, three years after *Bachan Singh*, a 3 judge Bench of the Supreme Court in *Machhi Singh v. State of Punjab*,[46] (herein after *Machi Singh*) listed out five categories of cases for which the death penalty was a suitable option. The Court held that the death penalty may be imposed where the "collective conscience"[47] of society is so shocked that "it will expect the holders of the judicial power centre to inflict death penalty."[48] According to the Court,

> "[t]he community may entrain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime."[49]

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[46] *Machhi Singh v. State of Punjab* (1983) 3 SCC 470
[47] *Ibid* at para 32
[48] *Ibid*
[49] *Ibid* at paras 33-37, explained these categories in detail as follows:

> I 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. For instance, (i) When the house of the victim is set aflame with the end in view to roast him alive in the house. (ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death. (iii)When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.
>
> II Motive for Commission of murder: When the murder is committed for a motive which evince total depravity and meanness. For instance when (a) a hired assassin

The judges, in *Macchi Singh* case, argued that the *Bachan Singh* guidelines would have to be read in the above context and,

> "a balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have 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."

The Bench also suggested two questions for judges to consider in awarding the death sentence:

> "a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
> b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

These two questions and the 'balance sheet' test were uncalled for in the light of *Bachan Singh* propositions.[50] As noted above the *Bachan Singh* laid down the principle of the rarest of rare cases but *Machhi Singh*, for practical application

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> commits murder for the sake of money or reward (2) a cold blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust. (c) a murder is committed in the course for betrayal of the motherland.
> III Anti Social or Socially abhorrent nature of the crime: (a) When murder of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them with a view to reverse past injustices and in order to restore the social balance.
> (b) 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.
> IV Magnitude of Crime: When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.
> V Personality of Victim of murder: When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder. (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the 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

[50] Amnesty International however questions this approach of the court in *Machhi Singh* as

> "[t]he correctness of the expansion of the Bachan Singh guidelines by the judges in Machhi Singh and Others v. State of Punjab [(1983) 3 SCC 470] is debatable given that the former were listed by a five-judge Constitutional Bench and the latter by a regular three-judge bench. Despite this, as many of the cases discussed later in this section indicate, the latter were used by many successive benches in upholding death sentences, even though they would have otherwise failed the Bachan Singh test."[50]

See Amnesty International India and People's Union for Civil Liberties "Lethal Lottery: The Death Penalty in India A study of Supreme Court judgments in death penalty cases 1950-2006" 2008 available at https://www.amnesty.org/download/Documents/52000/asa200072008eng.pdf

crystallised the principle into five definite categories of cases of murder and in doing so also considerably enlarged the scope for imposing death penalty. The 262nd Law Commission of India noted that the judgment of *Bachan Singh* saw 'considerable erosion' through subsequent interpretation. The commission notes

> "5.2.8 *Machhi Singh* thus crystallized the applicability of the rarest of rare principle into five distinct categories which *Bachan Singh* had expressly refrained from doing. As the Supreme Court noted in *Swamy Shradhhananda,* the *Machhi Singh* categories "*considerably enlarged the scope for imposing death penalty*"[51] beyond what was envisaged in *Bachan Singh*.
> 5.2.9 The *Machhi Singh* categories relate only to the circumstances of the crime. While the Court did state that the sentencing judge should accord full weightage to mitigating circumstances as well, in subsequent cases, many judges have invoked the categories in *Machhi Singh* in a manner that suggest that once a case falls within any of the 5 categories it becomes a rarest of rare case deserving the death penalty[52]
> 5.2.10 *Machhi Singh* and a subsequent line of cases have focused only on the circumstances, nature, manner and motive of the crime, without taking into account the circumstances of criminal or the possibility of reform as required under the *Bachan Singh* doctrine. *Machhi Singh*'*s* progeny include a large number of cases in which the Court has decided whether or not to award the death penalty by only examining whether the crime is so brutal, depraved or diabolic as to "shock the collective conscience of the community."[53] As the Court recognized in *Bariyar*, judges engage in "*very little objective discussion on aggravating and mitigating circumstances. In most such cases, courts have only been considering the brutality of crime index*."[54] Similarly, in *Sangeet* the Court recognized that "[d]espite Bachan Singh, primacy still seems to be given to the nature of the crime. The circumstances of the criminal, referred to in Bachan Singh appear to have taken a bit of a back seat in the sentencing process."[55]
> 5.2.16 *Machhi Singh* also introduced into the vocabulary of India's death

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[51] *Swamy Shraddananda (2) v. State of Karnataka* (2008) 13 SCC 767

[52] See example, *Prajeet Kumar Singh v. State of Bihar* (2008) 4 SCC 434, where the Court cited the Machhi Singh factors and then held that in the present case

> "[t]he enormity of the crime is writ large. The accused-appellant caused multiple murders and attacked three witnesses. … The brutality of the act is amplified by the manner in which the attacks have been made on all the inmates of the house in which the helpless victims have been murdered, which is indicative of the fact that the act was diabolic of the superlative degree in conception and cruel in execution and does not fall within any comprehension of the basic humanness which indicates the mindset which cannot be said to be amenable for any reformation."

The nature of the crime is itself held to be an indication that the person is beyond reformation.

[53] An example is *Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra* (2011) 7SCC 125, at para 22, where the accused was convicted for killing a woman and fourchildren. The Court noted that the crime was pre-meditated and held that the facts show that

> "the crime has been committed in a beastly, extremely brutal, barbaric and grotescue manner. It has resulted into intense and extreme indignation of the community and shocked the collective conscience of the society. We are of the opinion that the appellant is a menace to the society who cannot be reformed. Lesser punishment in our opinion shall be fraught with danger as it may expose the society to peril once again at the hands of the appellant."

The Court did not mention or discuss any mitigating circumstances.

[54] *Santosh Bariyar v. State of Maharashtra* (2009) 6 SCC 498, at para 71

[55] *Sangeet v. State of Haryana* (2013) 2 SCC 452, at para 34

> penalty jurisprudence, the notion of 'shock to the "collective conscience" [56] of the community' as the touchstone for deciding whether to impose the death penalty or not. Similar notions like "society's cry for justice"[57] and "public abhorrence of the crime"[58] have also been invoked by the Court in subsequent cases. *Bachan Singh* had expressly warned that:
>
> > *Judges should not take upon themselves the responsibility of becoming oracles or spokesmen of public opinion…. When Judges…take upon themselves the responsibility of setting down social norms of conduct, there is every danger, despite their effort to make a rational guess of the notions of right and wrong prevailing in the community at large … that they might write their own peculiar view or personal predilection into the law, sincerely mistaking that changeling for what they perceive to be the Community ethic. The perception of 'community' standards or ethics may vary from Judge to Judge….Judges have no divining rod to divine accurately the will of the people.* [59]"

Amnesty International made a curious and exhaustive research on how *Bachan Singh* was subsequently received by the later benches in their judgments. Whereas some benches refrained from death on the touch stone of new policy, other benches, as usual and least bothered continued with pre bent of mind. Amnesty International observes:

> "The impact of the Bachan Singh judgment was palpable and almost all cases in the following few years that came before the Supreme Court resulted in commutation due to the understanding that the 'rarest of rare' formulation restricted the sentence to be awarded to extreme cases only (see *Shidagouda Ningappa Ghandavar v. State of Karnataka* [(1981) 1 SCC 164]). In fact *Earabhadrappa alias Krishnappa v. State of Karnataka* [(1983) 2 SCC 330] is a good illustration of an otherwise 'hanging' judge "constrained to commute the sentence" as "the test laid down in Bachan Singh's case is unfortunately not fulfilled in the instant case." (emphasis added) Yet in a few other cases, some benches awarded the death sentence without following the aggravating and mitigating circumstances approach prescribed by the Constitutional Bench or even discussing what the 'special reason' for the award was. In fact in *Gayasi v. State of U.P* [(1981) 2 SCC 712] (a two paragraph judgment) and *Mehar Chand v. State of Rajasthan* [(1982) 3 SCC 373], no reference at all was made to the Bachan Singh judgment or the 'rarest of rare' formula."

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[56] *Machhi Singh v. State of Punjab* (1983) 3 SCC 470, at para 32

[57] *Jai Kumar v. State of Madhya Pradesh* (1999) 5 SCC 1, *Dhananjoy Chatterjee v. State of W.B* (1994) 2 SCC 220, *Jameel v. State of U.P.* (2010) 12 SCC 532, *State of M.P. v. Basodi* (2009) 12 SCC 318, *Bantu v. State of U.P.* (2008) 11 SCC 113, *Mohan Anna Chavan v. State of Maharashtra* (2008) 7 SCC 561, *State of U.P. v. Sri Krishan* (2005) 10 SCC 420, , *Ravji v. State of Rajasthan* (1996) 2 SCC 175, *Bheru Singh v. State of Rajasthan* (1994) 2 SCC 467, *State of Madhya Pradesh v. Sheikh Shahid* (2009) 12 SCC 715, *State of U.P. v. Sattan @ Satyendra* (2009) 4 SCC 736, *State of Madhya Pradesh v. Santosh Kumar* (2006) 6 SCC 1, *Shailesh Jasvantbhai v. State of Gujarat* (2006) 2 SCC 359 *State of Madhya Pradesh v. Saleem* (2005) 5 SCC 554,

[58] *Ibid*

[59] *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, at para 126

Had the *Bachan Singh* been followed scrupulously, kind of a disparity we are witnessing now would never have been the Indian scenario. However, as mentioned above, every case that was subsequently decided post *Bachan Singh* added its own perceptions and contour to the rarest of rare doctrine. The rarest of rare doctrine was forced to be pregnant with the perceived meanings by the subsequent benches – smaller or larger. This predicament is illustrated by the 262nd Law Commission in befitting manner when it observes:

> "5.2.20 In *Haresh Mohandas Rajput v. State of Maharashtra*,[60] the Supreme Court recognized that *Machhi Singh's* invocation of "shock to the collective conscience of the community"[61] as a standard for evaluating whether a case deserved death, had expanded the rarest of rare formulation beyond what was envisaged in *Bachan Singh*. However, as discussed below, despite this acknowledgment, the Court has continued to invoke community reactions and public opinion as a ground for awarding the death penalty.[62]"

Apart from the aggravating factors, even mitigating factors were also read by the courts in additions to what has been stated in the *Bachan Singh.* In *Sunil Damodar Gaikwad v. State of Maharashtra,*[63] it has been held that:

> "Poverty, socio-economic, psychic compulsions, undeserved adversities in life are thus some of the mitigating factors to be considered, in addition to those indicated in Bachan Singh and Machhi Singh cases."

In the post *Bachan Singh* period, there has not been a single case of death penalty which has not been justified in the name of the 'collective conscience' of the society,[64] though *Bachan Singh* itself did not speak of this!

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[60] *Haresh Mohandas Rajput v. State of Maharashtra* (2011) 12 SCC 56

[61] *Haresh Mohandas Rajput v. State of Maharashtra* (2011) 12 SCC 56, at para 20

[62] See also, *Vasanta Sampat Dupare v. State of Maharashtra* (2015) 1 SCC 253 (quoting *Haresh Rajput* on the point that Machhi Singh had expanded the rarest of rare doctrine beyond the Bachan Singh formulation by introducing the concept of "collective conscience", but invoking shock to the collective conscience in imposing the death sentence in the present case nonetheless). *Gurvail Singh @ Gala v. State of Punjab* available at https://indiankanoon.org/doc/32917452/

[63] JT (2013) SC 310

[64] See Asian Centre For Human Rights observed at p 4

> "[t]he notion of 'collective conscience' is deeply flawed and is often manufactured through scapegoating of the dispensable i.e. the poor and socially disadvantaged who are unable to defend themselves in all stages, most notably at the stage of the trial under intense local social pressure, media trial, hostile environment including those accused of terror offences etc. In addition, some crimes are so gruesome and become politically significant that it almost becomes indispensable for the State to find the guilty, even if it means tweaking justice, to assuage public anger, which is equally directed against the failure of the State and the system as much against the crimes and the criminals. In terror cases, manufacturing of the 'collective conscience' is most evident. Judges "*take upon themselves the responsibility of becoming oracles or spokesmen of public opinion*" [*Bachan Singh v. State of Punjab* AIR 1980 SC 898]"

See Asian Centre For Human Rights "India: Death in the name of conscience" (New Delhi: ACHR, May 2015) also available at http://www.achrweb.org/reports/india/deathinthenameofconscience.pdf

Courts have, therefore, only paid lip services or passing references to *Bachan Singh* without understanding the perspective and sanctity the court has attached to the sentencing policy in death penalty cases. This predicament is further aggravated when lower courts also followed the trend. In one of the cases,[65] death penalty was awarded by the trial judge without even making reference to *Bachan Singh* even once. He referred to only one Indian judgment that too without citation. He based his sentence on the jurisprudence of Taliban and lectures delivered by the high court judge![66] As the Law Commission observes[67]

> "[t]his is not an isolated instance. Many cases subsequent to *Bachan Singh,* for example*, Lok Pal Singh v. State of MP,*[68] *Darshan Singh v. State of Punjab*,[69] and *Ranjeet Singh v. State of Rajasthan,*[70] have upheld the death sentence without referring to the "rares of rare" formulation at all. In some other cases, such as *Mukund v. State of MP*,[71] *Ashok Kumar Pandey v. State of Delhi*,[72] *Farooq v. State of Keral* [73] and *Acharaparambath Pradeepan v. State of Kerala,*[74] to name a few, the Court referred to the "rarest of rare" dicta, but did not apply it in imposing/commuting the death sentence, thereby paying mere lip service to the "rarest of the rare" test."

Amnesty International also highlights number of cases where just a passing cursory reference was made or only lip service provided without exhausting the evolving jurisprudence. The Amnesty International notes

> "A number of other benches made the mandatory references to the Bachan Singh judgment but showed no real understanding either of the sentiment of 'the rarest of rare' or of the obligation placed upon judges to compare aggravating and mitigating circumstances. Thus in Suresh Chandra Bahri v. State of Bihar[75] the Court found a number of aggravating factors as described in Bachan Singh and Machhi Singh and Others v. State of Punjab, but there was no apparent attempt made to examine the mitigating circumstances and [in fact] none are mentioned in the Supreme Court judgment. Similarly, in Suresh and anr. v. State of Uttar Pradesh[76] the Supreme Court judgment… largely focussed on discussion of a particular point of law but scant on sentencing. The judgment merely records the defence counsel argument that the case did not fall within the 'rarest of rare'

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[65] *OMA @ Omprakash & Anr. v. State of Tamil Nadu* (2013) 3 SCC 440

[66] The Supreme Court in the instant case noted:

> "National Judicial Academy and State Judicial Academies should educate our judicial officers in this regard so that they will not commit such serious errors in future."

[67] *Supra* note 12 at para 5.2.30 p 122

[68] *Lok Pal Singh v. State of M.P.* A.I.R. 1985 SC 891

[69] *Darshan Singh v. State of Punjab* (1988) 1 SCC 618

[70] *Ranjeet Singh v. State of Rajasthan* (1980) 1 SCC 683

[71] *Mukund v. State of M.P.* (1997) 10 SCC 130

[72] *Ashok Kumar Pandey v. State of Delhi* (2002) 4 SCC 76

[73] *Farooq v. State of Kerala* (2002) 4 SCC 697

[74] *Acharaparambath Pradeepan v. State of Kerala* (2006) 13 SCC 643

[75] AIR 1994 SC 2420

[76] AIR 2001 SC 1344

> requirement of Bachan Singh and further states that the Court does not agree with this argument."
> "In Gentela Vijayavardhan Rao and anr. v. State of Andhra Pradesh[77] a case where a large number of persons were burnt alive in a bus in a failed robbery attempt, the Court rejected the various mitigating circumstances put forward (that the accused were young at the time of the offence; that the killings were unplanned as the prime motive was robbery; and that the accused did not try to prevent persons from escaping) finding these "too slender" and arguing that even if accepted they were "eclipsed by the many aggravating circumstances." In fact, despite evidence to the contrary, the Supreme Court appeared to go out of its way to argue that the bus was intentionally burnt, referring to the incident as a "planned pogrom … executed with extreme depravity" and a rarest of rare case due to the "inhuman manner in which they plotted the scheme and executed it."[78]

In another case, the case law on sentencing has been extensively referred to by the High Court. But without reference to the aggravating or mitigating circumstances or to the special reasons, the High Court held that the case does not fall in the category of rarest of rare cases warranting death sentence.[79]

In the absence of uniformity and consistency in the precedential judgment of the apex courts, lower courts would be lost in the choice of judgment they should base their decisions on. Though *Bachan Singh* is the key pointer, the varied interpretation of the same by subsequent benches, which is also equally applicable to the lower courts, put the lower courts in the predicament of choosing from varied interpretation. "*Although the court ordinarily would look to the precedents, but, this becomes extremely difficult, if not impossible, [since] [t]here is no uniformity of precedents, to say the least*."[80]

Though *Machhi Singh* case is accused of considerably eroding the the *Bachan Singh* case, the unfortunate reality is that in later decisions neither the rarest of rare cases principle nor the *Machhi Singh* categories were followed uniformly and consistently. In *Aloke Nath Dutta v. State of West Bengal* [81] justice Sinha gave some good illustrations from a number of decisions in which on similar facts the Supreme Court took contrary views on giving death penalty to the convict. He observed that courts in the matter of sentencing act differently although the fact situation remain somewhat similar !

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[77] AIR 1996 SC 2791
[78] A subsequent campaign for commutation led by the Andhra Pradesh Civil Liberties Committee, interestingly argued that the killings were unintentional and unplanned and was ultimately successful in obtaining a commutation of the sentences by the executive!
[79] *State of Rajasthan v. Jamil Khan* (2013) 10 SCC 721
[80] *Santosh Bariyar v. State of Maharashtra* (2009) 6 SCC 498, at para 104
[81] 2006 (13) SCALE 467

Curiously in *Ravji alias Ram Chandra v. State of Rajasthan*,[82] the Supreme Court held that it is only characteristics relating to crime (exclusion of the ones relating to criminal), which are relevant to sentencing in criminal trial.

In the case of *Sangeet & Anr v. State of Haryana,*[83] the latest admission of error was recorded by Justices Madan B. Lokur and K.S. Radhakrishnan. The bench declared *Ravji alias Ram Chandra v. State of Rajasthan* [84] as *per incuriam!* There are a number of *per incuriam* cases, including the following:

1. *Dayanidhi Bisoi v. State of Orissa* [85]
2. *Saibanna v. State of Karnataka* [86]
3. *Mohan Anna Chavan v. State of Maharashtra* [87]
4. *Shivaji @ Dadya Shankar Alhat v. State of Maharashtra* [88]
5. *Bantu v. State of U.P.*[89]
6. *State of U.P. v. Sattan @ Satyendra and Ors.*[90]
7. *Ankush Maruti Shinde and Ors. v. State of Maharashtra* [91]

Two of the 11 persons, unfortunately, including Ravji himself, were executed. Remaining 3 are still on death row, and even their mercy petitions were rejected, despite the Court having acknowledged its error 6 years ago.[92]

The judges who handed death penalties on the basis of *Ravji alias Ram Chandra* made a group of 14 judges[93] and appealed to the President of India to

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[82] (1996) 2 SCC 175
[83] *Sangeet v. State of Haryana* (2013) 2 SCC 452
[84] (1996) 2 SCC 175
[85] *Dayanidhi Bisoi v. State of Orissa* AIR 2003 SC 3915
[86] *Saibanna v. State of Karnataka* 2005 (2) ALD (Cri) 39
[87] *Mohan Anna Chavan v. State of Maharashtra* (CRIMINAL APPEAL NO. 680 OF 2007)
[88] *Shivaji @ Dadya Shankar Alhat v. The State of Maharashtra* [(2008) 15 SCC 269]
[89] *Bantu v. State of U.P* (2008)11SCC113
[90] *State of U.P. v. Sattan @ Satyendra and Ors*. (2009) 4SCC 736
[91] *Ankush Maruti Shinde and Ors. v. State of Maharashtra* AIR 2009 SC 2609
[92] The mercy petitions of Saibanna and Shivaji Alhat have been rejected. News reports indicate that the Ministry of Home Affairs has recommended the rejection of the mercy petition presented by Mohan Anna Chavan. See, Reject Mercy Pleas of 2 Convicts, Pranab Told, *The Hindu*, August 18, 2015, http://www.thehindu.com/news/national/reject-mercy-pleas-of-2-convicts-pranabtold/article7551067.ece
[93] Hon'ble judges who signed the petition are C P B Sawant, Justice A P Shah, Justice Bilani Nazaki, Justice P K Misra, Justice Hosbet Suresh, Justice Panand Jain, Justice Prabha Sridenvan, Justice K P Sivaubranamium, Justice P C Jain, Justice S N Bhargava, Justice B G Kolse-Patil , Justice Ranvir Sahai Verma, Justice B A Khan and Justice B H Malapalle. The unusual appeal does not stem from their principled opposition to the death penalty, though some of them may believe in its abolition personally. They have appealed to the President because these 13 convicts were erroneously sentenced to death according to the Supreme Court's own admission and are currently facing the threat of imminent execution. The Supreme Court, while deciding three recent cases, held that seven of its judgments awarding the death sentence were rendered per incuriam (meaning out of error or ignorance) and contrary to the binding dictum of "rarest of rare" category propounded in the Constitution Bench judgment in *Bachan Singh v. State of Punjab* (1980) (2 SCC 684). The three recent cases were *Santosh Kumar Bariyar v. State of Maharashtra* (2009) (6 SCC 498), *Dilip Tiwari v. State of Maharashtra* (2010) (1 SCC 775), and *Rajesh Kumar v. State* (2011) (13 SCC 706).

intervene and commute death penalty awarded to convict, using his powers under Article 72 of the constitution.[94] The 262nd Law Commission reports the subsequent events as under

> " 5.4.14 *Ankush Maruti Shinde v. State of Maharashtra*,[95] which was delivered about two weeks before *Bariyar*, and which imposed the death sentence on 6 persons relying on *Ravji*, was not noticed by the Court in *Bariyar*. Surprisingly, even after *Bariyar* expressly held that *Ravji* was decided *per incuriam*, the decision in that case has been followed by the Supreme Court in at least three other cases. Though these cases have not been noticed by the Supreme Court so far, in all, an additional 9 people have been given the death sentence relying on *Ravji*.[96]
> 5.4.15 Similarly, the Supreme Court in *Shankar Khade* doubted the correctness of the imposition of the death penalty in *Dhananjoy Chatterjee v. State of West Bengal,*[97] where the Court had held that "*the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless 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*."[98] In *Khade* the Court opined that prima facie the judgment had not accounted for mitigating circumstances relating to the offender. Dhananjoy Chatterjee was executed in 2004."

The Supreme Court in *Sangeeta & Ors v. State of Haryana* [99] noticed that the circumstances of the criminal referred to in *Bachan Singh* appeared to have taken a bit of back seat in the sentencing process and held that despite *Bachan Singh Ratio*, the particular crime continues to play a more important role than the crime and criminal. In conclusion, it inter alia, held as follows:

> "1. The application of aggravating and mitigating circumstances needs a fresh look. This Court has not endorsed that approach in Bachan Singh. In any event, there is little or no uniformity in the application of this approach.
> 2. Aggravating circumstances relate to the crime while mitigating circumstances relate to the criminal. A balance sheet cannot be drawn up for comparing the two. The considerations for both are distinct and unrelated. The use of the mantra of aggravating and mitigating circumstances needs a review.
> 3. In the sentencing process, both the crime and the criminal are equally important. We have, unfortunately not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become

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[94] V Venkatesan "A Case Against Death Penalty" *Frontline* , September 7, 2012
[95] *Ankush Maruti Shinde & Ors. v. State of Maharashtra* (2009) 6 SCC 667
[96] *Ajitsingh Harnamsingh Gujral v. State of Maharashtra* (2011) 14 SCC 401, *Sunder Singh v. Uttaranchal* (2010) 10 SCC 611, *Jagdish v. State of M.P* 2009 (12) SCALE 580. In these cases, the Court relied on *Ravji* as a comparator case, to state that in the facts of this case, the death penalty had been imposed (and using this fact to appreciate whether the death penalty should be imposed in their own fact situations). The Court did not note that the imposition of the death penalty in *Ravji* was based on a wrong application of the law.
[97] *Dhananjoy Chatterjee v. State of West Bengal* (1994) 2 SCC 220
[98] *Ibid* at para 15. The exclusive focus of this decision on the crime and not the criminal was questioned in *Shankar Kisanrao Khade v. State of Maharashtra* (2013) 5 SCC 546
[99] (2013) 2 SCC 452

> judge-centric sentencing rather than principled sentencing.
> 4. The Constitution Bench of this Court has not encouraged standardization and categorization of crimes and even otherwise it is not possible to standardize and categorize all crimes."

The court, thus in *Sangeet* (supra) held that there is no question of balancing the above mentioned circumstances to determine the question whether the case falls into the rarest of rare cases category because the consideration for both are distinct and unrelated. In other words, the balancing test is not the correct test in deciding whether capital punishment be awarded or not.

In *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra,*[100] the Court held the nature, motive, and impact of crime, culpability, and quality of evidence, socio economic circumstances, impossibility of rehabilitation and some of the factors, the Court may take into consideration while dealing with such cases. Bringing further climax to the rarest of rare doctrine, the Supreme Court in *Shankar Kisan Kade v. state of Maharashtra*[101] held as under:

> "28. Aggravating Circumstances as pointed out above, of course, are not exhaustive so also the Mitigating Circumstances. In my considered view that the tests that we have to apply, while awarding death sentence, are crime test, criminal test and the R-R Test and not balancing test. To award death sentence, the crime test has to be fully satisfied, that is 100% and criminal test 0% that is no Mitigating Circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society no previous track record etc., the criminal test may favour the accused to avoid the capital punishment. Even, if both the tests are satisfied that is the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the Rarest of Rare Case test (R-R Test). R-R Test depends upon the perception of the society that is society centric and not Judge centric that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the Court has to look into variety of factors like societys abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls intellectually challenged, suffering from physical disability, old and infirm women with those disabilities etc.. Examples are only illustrative and not exhaustive. Courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the judges."

The above discourse and the discussion to come hints only one factor that the rarest of rare doctrine which was coined by the court did not remain in its pristine form. It became of a rolling snow ball of bleeding disparity.

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[100] (2009) 6 SCC 498
[101] (2013) 5 SCC 546

4.4 Disparity in Death Sentence: Individual and Institutional

The misreading of *Bachan Singh* has given many misgivings both at the choice of individual judge and institutional disparities. The personal predilection of judges in choosing a 'variable' as aggravating or mitigating factor has a tremendous and profound role to play in the choice of life or death. In the absence of any scientific and comprehensive research it would be difficult to state with precision as to how an individual judge's bent of mind may influence the outcome; some random researches made here and there can, however, be taken in support of to claim that death sentence is purely judge centric. This proposition of 'death is judge centric' is also acknowledged by the Supreme Court itself! In *Swamy Shraddhananda v. State of Karnataka* [102] the court observed

> "33. 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 court further observed that

> "34. 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. On the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the Criminal Justice System. Thus the overall larger picture gets asymmetric and lop-sided and presents a poor reflection of the system of criminal administration of justice. This situation is matter of concern for this Court and needs to be remedied."

The ACHR has studied 48 cases relating to death penalty adjudicated by two former judges of the Supreme Court viz. Justice M B Shah and Justice Arijit Pasayat to reflect how 'conscience' of individual judge matters. Of the 33 death penalty cases adjudicated, Justice Arijit Pasayat (i) confirmed death sentence in 16 cases[103]

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[102] See *Swamy Shraddhananda v. State of Karnataka* (2008) 13 SCC 767

[103] *Bantu v. State of U.P* (2008) 11 SCC 113, *Devender Pal Singh v. State of National Capital Territory of Delhi and Anr.* AIR 2002 SC 1661, *Mohan Anna Chavan v. State of Maharashtra* 2008 (2) ALT (Cri) 329, *Krishna Mochi and Ors. v. State of Bihar etc*. (2002) 6 SCC 81, *Rameshbhai Chandubhai Rathod v. State of Gujarat* 2009(3)ALT(Cri) 1, *State of Rajasthan v. Kheraj Ram* AIR 2004 SC 3432, *State of U.P. v. Sattan @ Satyendra and Ors*. 2009(1) ALD(Cri)602, *State of U.P. v. Satish* AIR 2005 SC 1000, *Sushil Murmu v. State of Jharkhand* AIR 2004 SC 394, *Bani Kanta Das & Anr v. State of Assam & Ors* (2009)15 SCC 206, *M.A. Antony @ Antappan v. State of Kerala* AIR 2009 SC 2549, *Shivu and Anr. v. R.G. High Court of Karnataka and Anr*. 2007 Cri.L.J. 1806, *Bablu @ Mubarik Hussain v. State of Rajasthan* [Appeal (crl.) 1302 of 2006], *Shivaji @ Dadya Shankar Alhat v. State of Maharashtra* AIR 2009 SC 56, *Ankush Maruti Shinde and Ors. v. State of Maharashtra* (AIR 2009 SC 2609)

including 4 cases[104] in which lesser sentences were enhanced to death sentence and two cases[105] in which acquittal by the High Courts were enhanced to death sentence, (ii) upheld acquittal in 8 cases,[106] (iii) commuted death sentence in 7 cases[107] and (iv) remitted 3 cases[108] back to the High Courts to once again decide on quantum of sentence as death penalty had not been imposed by the High Courts. It is pertinent to mention that out of the 16 cases in which death penalty were confirmed by Justice Pasayat, 5 cases[109] have since been declared as *per incuriam* by the Supreme Court.

On the other hand, Justice M B Shah did not confirm death penalty in any of 15 cases of death penalty adjudicated by him. He rather commuted death sentence in 12 cases,[110] did not enhance life imprisonment into death penalty in any case, did not alter acquittal by the High Courts into death penalty in any case, did not remit back any case to the High Courts on the quantum of sentence and did not deliver a single judgement which was declared as *per incuriam.* He acquitted convicts in 3 cases[111] out of which 2 cases[112] were dissenting judgement against imposition of death penalty.

Out of these 48 cases, three cases i.e. *Devender Pal Singh v. State of National*

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[104] *Ankush Maruti Shinde and Ors. v. State of Maharashtra* AIR 2009 SC 2609

[105] *State of Rajasthan v. Kheraj Ram* AIR 2004 SC 3432 and *State of U.P. v. Satish* AIR 2005 SC 1000

[106] *State of Rajasthan v. Raja Ram* AIR 2003 SC 3601, *State of Haryana v. Jagbir Singh and Anr.* AIR 2003 SC 4377, *State of Rajasthan v. Khuma* 2004(3) ACR 2698 (SC), *State of Madhya Pradesh v. Chamru @ Bhagwandas etc.* AIR 2007 SC 2400, *State of U.P. v. Ram Balak and Anr.* (2008) 15 SCC 551, *State of Maharashtra v. Mangilal* (2009)15 SCC 418, *State of Punjab v. Respondent: Kulwant Singh @ Kanta* AIR 2008 SC 3279, *State of U.P.v. Raja @ Jalil* 2008 Cri.L.J. 4693

[107] *Lehna v. State of Haryana* 2002 (1) SCALE 273, *Nazir Khan and Ors. v. State of Delhi* AIR 2003 SC 4427, *Gopal v. State Of Maharashtra* (Appeal (crl.) 1428 of 2007), *Anil Sharma & Ors v. State of Jharkhand* (Appeal (crl) 622- 624 of 2003), *Prem Sagar v. Dharambir and Ors*. AIR 2004 SC 21, Aqeel *Ahmad v. State of U.P*. AIR 2009 SC 1271, *Liyakat v. State of Uttaranchal* 2008 Cri.L.J. 1931

[108] *Union of India and Ors. v. Devendra Nath Rai* 2006 Cri.L.J.967, *State of U.P. v. Govind Das @ Gudda andAnr*. 2007 Cri.L.J.4289, *Gobind Singh v. Krishna Singh and Ors*. 2009(1)PLJR 200

[109]*Ankush Maruti Shinde and Ors. v. State of Maharashtra* AIR 2009 SC 2609, *Bantu v. State of U.P.* (2008) 11 SCC 113, *Mohan Anna Chavan v. State of Maharashtra* 2008(2) ALT (Cri) 329, *Shivaji @ Dadya Shankar Alhat v. State of Maharashtra* AIR 2009 SC 56, *State of U.P. v. Sattan @ Satyendra and Ors*. 2009(1)ALD (Cri) 602

[110] *Ashok Kumar Pandey v. State of Delhi* (Appeal (crl.) 874 of 2001), *Bantu @ NareshGiri v. State of M.P.* AIR 2002 SC 70, *Farooq @ Karatta Farooq and Ors. v. State of Kerala* AIR 2002 SC 1826, *Jayawant Dattatray Suryarao v. State of Maharashtra* AIR 2002 SC 143, *Lehna v. State of Haryana* (2002) 3 SCC 76, *Nirmal Singh & Anr. v. State of Haryana* AIR 1999 SC 1221, *Om Prakash v. State of Haryana* 1999(1)ALD (Cri) 576, *Prakash Dhawal Khairnar (Patil) v. State of Maharashtra* AIR 2002 SC 340, *Raju v. State of Haryana* 2001(1) ALD (Cri)854, *Ram Anup Singh and Ors. v. State of Bihar* 2002Cri.L.J. 3927

Surendra Singh Rautela @ Surendra Singh Bengali v. State of Bihar (Now State of Jharkhand) 2002(1)ALD(Cri)270.

[111] *Devender Pal Singh v. State of National Capital Territory of Delhi and Anr*. AIR 2002 SC 1661, *Krishna Mochi and Ors. v. State of Bihar* (2002) 6 SCC 81, *K.V. Chacko @ Kunju v. State Of Kerala* on 7 December, 2000 (Appeal (crl.) 5-76 2000)

[112] *Ibid*

Capital Territory of Delhi and Anr.,[113] *Krishna Mochi and Ors. v. State of Bihar etc*.,[114] and *Lehna v. State of Haryana,*[115] the Supreme Court benches comprised Justice A Pasayat and Justice M B Shah along with Justice B N Agrawal. In *Devender Pal Singh* and *Krishna Mochi & Ors*, (supra) the majority view comprising Justice Pasayat and Justice Agrawal confirmed death sentence on all the accused. Justice Shah, on the other hand, acquitted Bhullar and altered the death sentence on Krishna Mochi, Nanhe Lal Mochi and Bir Kuer Paswan to life imprisonment and further acquitted Dharmendra Singh. However, there was no disagreement or dissent between Justice Shah and Justice Pasayat in commutation of death sentence of the convict in *Lehna v. State of Haryana*.[116]

Justice S.B. Sinha quotes two examples [117] where retention and reintroduction of death penalty seemed too personal to the articulator. He notes

> "[h]owever, it is not uncommon to see certain retentionist demands from the side of the judiciary as well. Recently, one of the Sessions Courts in New Delhi requested the Parliament to provide for the death sentence to be included as a punishment for certain other categories of offences too[118]
> In *Bhagwan Dass v. State (NCT of Delhi),*[119]the Apex Court opined that honour killings, for whatever reason, come within the category of the rarest of rare cases deserving death punishment, thereby indirectly hinting at the possibility of laying down a judicial *"mandatory death sentencing policy"* for such class of offenses. It opined that *"All persons who are planning to perpetrate* "honour" *killings should know that the gallows await them."* Subsequently in *Mehboob Batcha v. State"* [120] the court even went to the extent of saying that *"murder by policemen in police custody is in our opinion in the category of rarest of rare cases deserving death sentence."*

Yug Mohit Chaudhry made a comparative research[121] of disposal of cases by

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[113] AIR 2002 SC1661
[114] *Krishna Mochi and Ors. v. State of Bihar* (2002) 6 SCC 81
[115] (2002) 3 SCC 76
[116] *Ibid*
[117] *Supra* note 30 at p 10
[118] *See State v. Sunil Kumar & Another*, Sessions Case No. 56 of 2009 (April 12, 2012) Delhi Sessions Court], which held as follows:

> "This Court feels that our wise representatives in the Parliament should provide for capital punishment of death in such like cases also where senior citizens are the victims, so as to teach a lesson to the offenders and to deter others from indulging in crime against senior citizens."

There have been more instances of such innovative demands from the side of the judiciary regarding punishments. An Additional Sessions Judge in Delhi recently called on the Parliament to explore "the possibility of permitting the imposition of alternative sentences of surgical castration or chemical castration in cases involving rape of minors and serial offenders." *See State v. Dinesh Yadav*, FIR No. 138/2009 (April 30, 2011) [Sessions Court, New Delhi] and *State v. Nandan*, FIR No. 72/2011 (January 24, 2012) [Sessions Court, New Delhi].
[119] *Bhagwan Dass v. State (NCT of Delhi)* (2011) 6 SCC 396
[120] *Mehboob Batcha v. State* (2011) 7 SCC 45
[121] Yug Mohit Chaudhry "Uneven Balance" *Frontline*, September 7, 2012, p 25

Justice A Pasayat, Justice S.B. Sinha, and Justice K.G.Balakrishnan and presented that "the mere presence or absence of a particular judge gives the convict a better or worse chance of survival, statically, regardless of the evidence." He presented the following chart in support of his claim.

Yardsticks	Justice A Pasayat	Justice S.B. Sinha	Justice K.G.Balakrishnan
Percentage of total DP cases in SC	29	23	12
Upheld DP	12	0	6
Enhanced LI to DP	2	0	0
Converted acquittals to DP	2	0	0
Total DPs awarded	16 out of 22 cases	0 out of 17 cases	6 out of 13 judges
Conviction rate	73%	0%	46%
Per incuriam DPs	11 persons (5 judges)	0	0
Acquittals in DP cases	0	3	1
DP: Death Penalty LI: Life Imprisonment			

> "Justice Pasayat's conviction rate of about 73 per cent was significantly higher than the collective conviction rate (19 per cent) of other judges during his tenure. Thus, a case not allotted to Justice Pasayat's bench was about four times more likely to escape capital punishment. A death penalty case had an almost equal chance of being heard by Justice Pasayat's or Justice Sinha's Bench, but the convict's chances of living were almost 100 per cent if his case was allotted to the latter instead of the former. A prisoner's chances of living were better by more than 50 per cent if his case was allotted to Justice Balakrishnan's Bench rather than Justice Pasayat's Bench. Would a death sentence appellant not be justified in asking "Am I have or die on the basis of the constitution of the Bench and not the evidence in the case? Is that justice according to law?"

Amnesty International compares a rape and murder case of similar facts with remarkable outcomes as under on the basis of constitution of bench. It observes

> "After a prolonged period of approximately 13 years under sentence of death, Dhananjoy Chatterjee was executed on 14th August 2004. He was the first person to be hanged in India in over six years, ending an apparent de-facto moratorium on executions. Three days after his execution however, a similar case of rape and murder of a minor was heard … by the Supreme Court in Rahul alias Raosaheb v. State of Maharashtra[122] While Dhananjoy Chatterjee was 27, Rahul was 24. The victim in the former case was thirteen years old,

[122] [(2005) 10 SCC 322]

> in the latter she was four-and-a-half. Neither [of] accused had a previous criminal record and in both cases there was no report of any misconduct while in prison. Yet in the case of Dhananjoy Chatterjee he was deemed a menace to society and hanged. In Rahul's case, he was not deemed a menace and his sentence was commuted to life imprisonment by the Court.
>
> Though the Court argued in the Dhananjoy Chatterjee judgment that he had special responsibility as a guard, the Rahul judgment does not provide any information about the victim, the accused and their relationship, which would help in making a comparison. … in response to a number of last minute petitions, the Supreme Court refused to go into the issue that Dhananjoy Chatterjee had spent 13 years on death row…. Would Rahul's fate have been different had his case been heard by another bench instead of Justices Balakrishnan and Lakshmanan who chose to commute the sentence? Would Dhananjoy Chatterjee's fate have been different had these two judges heard his case?
>
> It is ironic that while upholding Chatterjee's death sentence in 1994, Justice Anand accepted that there were huge disparities in sentencing. He noted that, "Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished thereby weakening the system's credibility." Two completely contradictory events over three days show that a decade later the inconsistencies still remain and reiterate the arbitrariness of the death penalty in India."

Amnesty International quotes a case where three judges in the same case came with three different and opposite conclusions! It quotes

> "In Pandurang and others v. State of Hyderabad,[123] the Supreme Court heard a case in which five persons had been sentenced to death by the trial court. Of the two judges on the original High Court Bench, one decided to uphold the conviction of all five accused but award life imprisonment, while the second judge directed the acquittal of all five. The third judge decided to uphold the conviction of all five and further sentenced three of the accused to death. As mentioned above, the Supreme Court subsequently commuted the sentences of death. This is a classic example of how different judges see the same facts and reach different conclusions on questions literally of life and death."

In this context the words of Justice Bhagwati in his dissenting judgment appear to be vocal and inescapable when he observes that

> "[t]he question may well be asked by the accused: Am I to live or die depending upon the way in which the Benches are constituted from time to time? Is that not clearly violative of the fundamental guarantees enshrined in Articles 14 and 21?"[124]

4.5 Disparity in Assessing Variables

The 'special reasons clause' reinterpreted by the Supreme Court in *Bachan Singh* required that the act is question must be distinguished with similar act, so much so that, no alternative to death shall remain. In other words, in order to fulfill the

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[123] AIR 1955 SC 216

[124] See *Bachan Singh v. State of Punjab* AIR 1982 SC 1325

"unquestionably foreclosed test", the courts have to furnish extra-ordinary and special reasons. All deaths are inherently alarming. However every death does not deserve death penalty! Few murders, however, attract extra ordinary adverbs, adjectives and superlatives. This is the semantics of the language. In order to distinguish extra-ordinary crimes from ordinary, courts have to use certain language variables such as 'extremely brutal', 'grotesque', 'diabolical' 'revolting' 'dastardly' 'torture or cruelty' 'total depravity and meanness' 'social wrath' 'shocks collective conscience', so on and so forth as was done in *Bachan Singh* and *Macchi Singh* and subsequent cases. However these variables are personal to the judge and not to the case.[125] What may be a dastardly murder to one judge may not be the same to another. However these variables may influence the judge to subscribe to death or life imprisonment in a given case. If these variables are seen from 'public perspective' the results may altogether be different. Any rape or murder or both would be dastardly in the public eyes. If public opinion is subscribed in deciding the cases, the results would be full of disparity for the same method may not be adopted by other judge with similar facts before him.

One of the reasons given by the courts in a number of cases for imposing death penalty is that the murder is 'brutal', 'cold blooded', 'deliberate', 'unprovoked', 'fatal', 'gruesome', 'wicked', 'callous', 'heinous' or 'violent'. But the use of these labels for describing the nature of the murder is indicative only of the degree of the court's aversion for the nature or the manner of commission of the crime and it is possible that different judges may react differently to these situations and moreover, some judges may not regard this factor as having any relevance to the imposition of death penalty and may therefore decline to accord to it the status of 'special reasons'. In fact, there are numerous cases, where despite the murder being one falling within

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[125] *Ibid* at para 298 the court observed:

> "It is now recognised on all hands that judicial conscience is not a fixed conscience; it varies from judge to judge depending upon his attitudes and approaches, his predilections and prejudices, his habits of mind and thought and in short all that goes with the expression "social philosophy". We lawyers and judges like to cling to the myth that every decision which we make in the exercise of our judicial discretion is guided exclusively by legal principles and we refuse to admit the subjective element in judicial decision making. But that myth now stands exploded and it is acknowledged by jurists that the social philosophy of the judge plays a not inconsiderable part in moulding his judicial decision and particularly the exercise of judicial discretion. There is nothing like complete objectivity in the decision making process and especially so, when this process involves making of decision in the exercise of judicial discretion. Every judgment necessarily bears the impact of the attitude and approach of the judge and his social value system."

these categories, the court has refused to award death sentence.[126]

Aggravating and mitigating factors are also variables before the judge which can influence to a greater extent the outcome of the judgement. The capacity of the variable also depend to a greater extent on the personal propensity of the judge, the convincing power of the lawyer, the stage of the case and contemporary jurisprudence in the same field!

In the vast yet critical choice of mitigating and aggravating factors "[t]he court is left free to navigate in an uncharted sea without any compass or directional guidance." [127] Justice Bhagavati in *Bacchan Singh* in his dissenting judgment observed:

> "It is left to the Judge to grope in the dark for himself and in the exercise of his unguided and unfettered discretion decide what reasons may be considered as 'special reasons' justifying award of death penalty and whether in a given case any such special reasons exist which should persuade the court to depart from the normal rule and inflict death penalty on the accused. There being no legislative policy or principle to guide. The court in exercising its discretion in this delicate and sensitive area of life and death, the exercise of discretion of the Court is bound to vary from judge to judge. What may appear as special reasons to one judge may not so appear to another and the decision in a given case whether to impose the death sentence or to let off the offender only with life imprisonment would, to a large extent, depend upon who is the judge called upon to make the decision. The reason for this uncertainty in the sentencing process is two-fold. Firstly, the nature of the sentencing process is such that it involves a highly delicate task calling for skills and talents very much different from those ordinarily expected of lawyers….[e]ven if considerations relevant to capital sentencing were provided by the legislature, it would be a difficult exercise for the judges to decide whether to impose the death penalty or to award the life sentence. But without any such guidelines given by the legislature, the task of the judges becomes much more arbitrary and the sentencing decision is bound to vary with each judge.
>
> Secondly, when unguided discretion is conferred upon the Court to choose between life and death, by providing a totally vague and indefinite criterion of 'special reasons' without laying down any principles or guidelines for determining what should be considered to be 'special reasons', the choice is bound to be influenced by the subjective philosophy of the judge called upon to pass the sentence and on his value system and social philosophy will depend whether the accused shall live or die. No doubt the judge will have to give 'special reasons' if he opts in favour of inflicting the death penalty, but that does not eliminate arbitrariness and caprice, firstly because there being no guidelines provided by the legislature, the reasons which may appeal to one judge as 'special reasons' may not appeal to another, and secondly, because reasons can always be found for a conclusion that the judge instinctively wishes to reach and the judge can bonafide and conscientiously

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[126] Dr. Raizada "Trends in sentencing; a study of the important penal statutes and judicial pronouncements of the High Courts and the Supreme Court" *(doctoral study: unpublished)* referred to by Justice Bhagavati in *Bachan Singh v. State of Punjab* AIR 1982 SC 1325 at para 301

[127] Per Justice Bhagavati, in *Bachan Singh v. State of Punjab* AIR 1982 SC 1325, at para 298

find such reason to be 'special reasons".

The young age of the accused was not taken into consideration or held irrelevant in *Dhananjoy Chatterjee*[128] aged about 27 years, *Jai Kumar*[129] aged about 22 years and *Shivu & another*[130] aged about 20 and 22 years while it was given importance in *Amit v. State of Maharashtra*,[131] *Rahul*, [132] (aged about 24) *Santosh Kumar Singh*,[133] (aged about 24) *Rameshbhai Chandubhai Rathod (2)*[134] (aged about 28) and *Amit v. State of Uttar Pradesh*[135] (aged about 28).

The possibility of reformation or rehabilitation was ruled out, without any expert evidence, in *Jai Kumar*,[136] *B.A. Umesh*[137] and *Mohd. Mannan*[138]

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[128] *Dhananjoy Chatterjee v. State of West Bengal* (1994) 2 SCC 220 confirmed the death sentence of the 27 year old married accused taking into consideration the rising crime graph, particularly violent crime against women; society's cry for justice against criminals.

[129] *Jai Kumar v. State of Madhya Pradesh* (1999) 5 SCC 1 was a case in which the death penalty was confirmed by the Supreme Court on the ground of accused being a "living danger" and incapable of rehabilitation. The crime was that of an attempted rape of a 30 year old pregnant woman followed by her murder and the murder of her 8 year old child. The fact that the accused was a young man of 22 years was held not to be a relevant factor, given the nature of the crime.

[130] *Shivu & Anr. v. Registrar General, High Court of Karnataka* (2007) 4 SCC 713 was a case in which the accused who were aged about 20 and 22 years old respectively raped and murdered an 18 year old. Death penalty was imposed on the ground that the accused had twice earlier attempted to commit rape but were not successful. Though no case was lodged against them, they were admonished by the village elders and the Panchayat and asked to mend their ways.

[131] [(2003) 8 SCC 93]

[132] *Rahul v. State of Maharashtra* (2005) 10 SCC 322 was a case of the rape and murder of a four and a half year old child by the accused. The death sentence was converted by the Supreme Court to one of life imprisonment since the accused was a young man of 24 years when the incident occurred; apparently his behavior in custody was not uncomplimentary; he had no previous criminal record; and would not be a menace to society.

[133] *Santosh Kumar Singh v. State* (2010) 9 SCC 747 (The accused was young man of 24 years; he had got married in the meanwhile and had a daughter; his father had died a year after his conviction; his family faced a dismal future; and there was nothing to suggest that he was not capable of reform).

[134] *Rameshbhai Chandubhai Rathod (2) v. State of Gujarat* (2011) 2 SCC 764 *(*was an unusual case in as much as the two learned Judges hearing the case had differed on the sentence to be awarded. Accordingly the matter was referred to a larger Bench which noted that the accused was about 28 years of age and had raped and killed a child studying in a school in Class IV. The accused was awarded a sentence of imprisonment for life subject to remissions and commutation at the instance of the Government for good and sufficient reasons.)

[135] In *Amit v. State of Uttar Pradesh* (2012) 4 SCC 107 the death penalty awarded to the accused for the rape and murder of a 3 year old child was converted to imprisonment for life since the accused was a young man of 28 years when he committed the offence; he had no prior history of any heinous offence; there was nothing to suggest that he would repeat such a crime in future; and given a chance, he may reform. The Supreme Court sentenced him to life imprisonment subject to remissions or commutation.

[136] *Jai Kumar v. State of Madhya Pradesh* (1999) 5 SCC 1

[137] *B.A. Umesh v. Registrar General, High Court of Karnataka* (2011) 3 SCC 85 was a case of the rape and murder of a lady, a mother of a 7 year old child. In the High Court, there was a difference of opinion on the sentence to be awarded – one of the learned judges confirmed the death penalty while the other learned judge was of the view that imprisonment for life should be awarded. The matter was referred to a third learned judge who agreed with the award of a death penalty. The Supreme Court confirmed the death penalty since the crime was unprovoked and committed in a depraved and merciless manner; the accused was alleged to have been earlier and subsequently involved in criminal activity; he was a menace to society and incapable of rehabilitation; the accused did not feel any remorse for what he had done.

[138] *Mohd. Mannan v. State of Bihar* (2011) 5 SCC 317 was a case which a 42 year old man had raped and killed a 7 year old child. The Supreme Court looked at the factors for awarding death sentence both in the negative as well as in the positive sense. It was held that the number of persons killed by the accused is not a decisive factor; nor is the mere brutality of the crime decisive. However if the brutality of the crime shocks the collective conscience of the community, one has to lean towards the death penalty. Additionally, it is to be seen if the accused is a menace to society and can be reformed or not. Applying these broad parameters, this Court held that the accused was a mature man of 43 years; that he held a position of trust in relation to the victim; that the crime was pre-planned; and that the crime was, pre-planned, unprovoked and gruesome against a defenceless child.

However the possibility of reformation or rehabilitation was given in other cases without any expert evidence in *Nirmal Singh*,[139]

Mohd. Chaman,[140] *Raju*,[141] *Bantu*,[142] *Surendra Pal Shivbalakpal*,[143] *Rahul*[144] and *Amit v. State of Uttar Pradesh*.[145]

Acquittal or life sentence awarded by the High Court was considered not good enough reason to convert the death sentence in *Satish*,[146] *Ankush Maruti Shinde*[147] and *B.A. Umesh*[148] but it was good enough in *State of Tamil Nadu v. Suresh*,[149] *State of*

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[139] *Nirmal Singh v. State of Haryana* (1999) 3 SCC 670 was a case in which Dharampal had raped P and was convicted for the offence. Pending an appeal the convict was granted bail. While on bail, Dharampal along with Nirmal Singh murdered five members of P's family. Death penalty was awarded to Dharampal and Nirmal Singh by the Trial Court and confirmed by the High Court. The Supreme Court converted the death sentence in the case of Nirmal Singh to imprisonment for life since he had no criminal antecedents; there was no possibility of his committing criminal acts of violence; he would not continue being a threat to society; and he was not the main perpetrator of the crime

[140] In *Mohd. Chaman v. State (NCT of Delhi)* (2001) 2 SCC 28 the accused, a 30 year old man, had raped and killed a one and a half year old child. The Supreme Court converted the death penalty to imprisonment for life since he was not such a dangerous person who would endanger the community and because it was not a case where there was no alternative but to impose the death penalty. It was also held that a humanist approach should be taken in the matter of awarding punishment

[141] *Raju v. State of Haryana* (2001) 9 SCC 50 was a case in which the Court took into account three factors for converting the death sentence of the accused to imprisonment for life for the rape and murder of an eleven year old child. Firstly, the murder was committed without any premeditation (however, there is no mention about the rape being not premeditated); secondly, the absence of any criminal record of the accused; and thirdly, there being nothing to show that the accused could be a grave danger to society.

[142] In *Bantu v. State of Madhya Pradesh* (2001) 9 SCC 615 the Court converted the death sentence awarded to the accused (22 years old) to imprisonment for life for rape and murder of a 6 year old child. Though the crime was heinous the Court took into account that the accused had no previous criminal record and that he would not be a grave danger to society at large.

[143] In *Surendra Pal Shivbalakpal v. State of Gujarat* (2005) 3 SCC 127, the Supreme Court commuted death sentence to that of life imprisonment of the accused (36 years) for rape and murder of a minor girl. The Court noticed that the accused had no previous criminal record and would not be a menace to the society in future.

[144] In *Rahul v. State of Maharashtra* (2005) 10 SCC 322 the death sentence awarded to the accused (24 years) for rape and murder of a four and a half year old child, was converted by the Supreme Court to life imprisonment on the ground that "apparently his behavior in custody was not uncomplimentary; he had no previous criminal record; and would not be a menace to society"

[145] In *Amit v. State of Maharashtra* (2003) 8 SCC 93 the death penalty awarded to the accused for the rape and murder of an eleven year old child was converted to imprisonment for life for the reason that he was a young man of 20 years when the incident occurred; he had no prior record of any heinous crime; and there was no evidence that he would be a danger to society.

[146] *State of Uttar Pradesh v. Satish* (2005) 3 SCC 114 is a remarkable case for the reason that the accused was acquitted by the High Court and yet the death penalty awarded by the Trial Court was upheld by the Supreme Court for the rape and murder of a school going child. The case was also one of circumstantial evidence. The special reasons for awarding the death penalty were the diabolic and inhuman nature of the crime

[147] In *Ankush Maruti Shinde v. State of Maharashtra* (2009) 6 SCC 667 of the six accused, three were awarded life sentence by the High Court while for the remaining three, the death sentence was confirmed. The accused were found to have committed five murders and had raped a lady (who survived) and a child of 15 years of age (who died). The Supreme Court awarded the death penalty to all the six accused holding the crime to be cruel and diabolic; the collective conscience of the community was shocked; the victims were of a tender age and defenceless; the victims had no animosity towards the accused and the attack against them was unprovoked.

[148] *B.A. Umesh v. Registrar General, High Court of Karnataka* (2011) 3 SCC 85

[149] *State of Tamil Nadu v. Suresh* (1998) 2 SCC 372 was a case of the rape and murder of a pregnant housewife. The Supreme Court took the view that though the crime was dastardly and the victim was a young pregnant housewife, it would not be appropriate to award the death penalty since the High Court had not upheld the conviction and also due to the passage of time.

Maharashtra v. Suresh,[150] *Bharat Fakira Dhiwar*[151] and *Santosh Kumar Singh*.[152]

Even though the crime was not premeditated, the death penalty was confirmed in *Molai*[153] notwithstanding the view expressed in *Akhtar*,[154] *Raju* and *Amrit Singh*.[155] Circumstantial evidence was not held as a 'mitigating' factor in *Jumman Khan*,[156] *Kamta Tewari*,[157] *Molai*[158] and *Shivaji*[159] but it was so held in *Bishnu Prasad Sinha*.[160] In cases like *Sahdeo v. State of U.P.*,[161] *Sheikh Ishaqe v. State of Bihar*[162] *Aloke Nath*

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[150] In *State of Maharashtra v. Suresh* (2000) 1 SCC 471 death penalty was not awarded to the accused since he had been acquitted by the High Court, even though the case was said to be "perilously near" to falling within the category of rarest of rare cases. The test of whether the lesser option was "unquestionably foreclosed" was adopted by the Supreme Court.

[151] In *State of Maharashtra v. Bharat Fakira Dhiwar (*2002) 1 SCC 622 the Supreme Court converted the death sentence to imprisonment for life since the accused was acquitted by the High Court and imprisonment for life was not unquestionably foreclosed

[152] *Santosh Kumar Singh v. State* (2010) 9 SCC 747 was a case in which the sentence of death was converted to life imprisonment by the Supreme Court since the accused had been acquitted by the Trial Court and the High Court had reversed the acquittal on circumstantial evidence. The accused was young man of 24 years when the incident occurred; he had got married in the meanwhile and had a daughter; his father had died a year after his conviction; his family faced a dismal future; and there was nothing to suggest that he was not capable of reform.

[153] In *Molai & Anr. v. State of M.P.* (1999) 9 SCC 581 death penalty awarded to both the accused for the rape and murder of a 16 year old was confirmed. Molai was a guard in a Central Jail and Santosh was undergoing a sentence in that jail. The victim was the daughter of the Assistant Jailor. Taking into account the manner of commission of the offence and the fact that they took advantage of the victim being alone in a house, the death penalty was confirmed by the Supreme Court although the case was one of circumstantial evidence.

[154] *Akhtar v. State of Uttar Pradesh* (1999) 6 SCC 60 was a case of rape and murder of a young girl. The sentence of death awarded to the accused was converted to one of life imprisonment since he took advantage of finding the victim alone in a lonely place and her murder was not premeditated.

[155] In *Amrit Singh v. State of Punjab* (2006) 12 SCC 79 a 6 or 7 year old child was raped and murdered by a 31 year old. The Supreme Court took the view that though the rape may be brutal and heinous, "it could have been a momentary lapse" on the part of the accused and was not premeditated.

[156] *Jumman Khan v. State of Uttar Pradesh* (1991) 1 SCC 752 was a case in which the death penalty was confirmed by the Supreme Court for the rape and murder of a 6 year old child on the basis of the brutality of the crime and case proved on circumstantial evidence.

[157] *Kamta Tiwari v. State of M.P* (1996) 6 SCC 250 The Supreme Court dealt with a case of rape and murder of a 7 year old girl. Evidence disclosed that the accused was close to the family of the father of the deceased and the deceased used to call him "uncle". The Supreme Court noticed the closeness to the accused and the accused encouraged her to go to the grocery shop where the girl was kidnapped by him and was subjected to rape and later strangulated to death throwing the dead body in a well. The the Supreme Court described the murder "as gruesome and barbaric" and held that "a person, who was in a position of a trust, had committed the crime".

[158] *Molai & Anr. v. State of M.P.* (1999) 9 SCC 581

[159] *Shivaji @ Dadya Shankar Alhat v. The State of Maharashtra* (2008) 15 SCC 269. This was a case where the accused, a married man having three children, was known to the family of the deceased. The Court noticed the horrendous manner in which the girl aged 9 years was done to death after ravishing her. The Court awarded capital punishment. The Court, in this case, took the view that mitigating and aggravating circumstances have to be balanced. Here also the test applied was the "balancing test" to award capital punishment.

[160] *Bishnu Prasad Sinha v. State of Assam* (2007) 11 SCC 467 was a case concerning the rape and murder of a child aged about 7 or 8 years by two accused persons. The death penalty awarded to them was converted to life imprisonment since the conviction was based on circumstantial evidence and appellant No.1 had expressed remorse in his statement under Section 313 of the CrPC admitted his guilt.

[161] *Sahdeo v. State of U.P* (2004) 10 SCC 682

[162] *Sheikh Ishaqe v. State of Bihar* (1995) 3 SCC 392

Dutta v. State of West Bengal,[163] *Swamy Shraddananda (2)*,[164] and *Bishnu Prasad Sinha v. State of* Assam,[165] the Court did not impose the death penalty, *inter alia*, on the consideration that the conviction was based on circumstantial evidence. However, despite this caution, in a contrary line of cases the Court has expressly refused to consider circumstantial evidence as a ground for not imposing the death penalty.[166] As noticed by the Supreme Court in *Shankar Khade*,[167] in cases like *Shivaji v. State of Maharashtra*,[168] *Molai v. State of M.P.,*[169] and *Kamta Tewari v. State of M.P.*,[170] this Court categorically rejected the view that death sentence cannot be awarded in a case where the evidence is circumstantial and has held that

> "[i]n the balance sheet of [aggravating and mitigating] circumstances, the fact that the case rests on circumstantial evidence has no role to play."[171]

4.6 Same Facts Different Appreciations: Across Institutional Disparity

A death sentence is 'comparatively excessive' if other defendants with similar characteristics generally receive sentences other than death for committing factually similar offenses in the same jurisdiction.[172] The arbitrariness found in judge centric approach is further compounded when we find a dramatic dynamics in appreciation of same facts by different courts differently! Trial courts have at their disposal both facts and law to arrive at conclusion. Appeal courts, however, confine themselves to questions of law generally. In numbers of cases, trial courts have awarded death penalty which have either been confirmed or commuted to life imprisonment or resulted in acquittals. The interesting part of this saga is the paradoxical role played by the Supreme Court. Going contrary to the generally accepted principle that courts should not be blood thirsty, the Supreme Court has restored the death penalties even though high courts have either commuted death into life imprisonment or acquitted the accused for want of evidence! The Supreme Court even has gone to the extent of asking trial courts to include certain crimes in the category of rarest of rare principles

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[163] *Aloke Nath Dutta v. State of West Bengal* (2007) 12 SCC 230
[164] *Swamy Shraddananda (2) v. State of Karnataka* (2008) 13 SCC 767
[165] *Bishnu Prasad Sinha v. State of Assam* (2007) 11 SCC 467
[166] *Supra* note 12 at Para 5.2.55
[167] *Shankar Kisanrao Khade v. State of Maharashtra* (2013) 5 SCC 546
[168] *Shivaji v. State of Maharashtra* (2008) 15 SCC 269
[169] *Molai v. State of M.P.* (1999) 9 SCC 581
[170] *Kamta Tiwari v. State of M.P*. (1996) 6 SCC 250
[171] *Shivaji v. State of Maharashtra* (2008) 15 SCC 269, at para 27
[172] See David C. Baldus, Charles Pulaski, George Woodworth, "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience", 74 *J. Crim. L. & Criminology* 661 (1983) at foot note no 1 p 663. *See also* Baldus, Pulaski, Woodworth & Kyle, "Indenting Comparatively Excessive Sentences of Death: A Quantitative Approach", 33 *STAN. L. REv*. 1 (1980).

and award death penalties![173] High courts meddling with trial court judgments is expected phenomena in Indian criminal jurisprudence for two reasons *namely*, high courts are confirmation courts of death penalties[174] and *secondly* high courts are courts of appeal on both facts and laws. However, the Supreme Court has always been 'decent modifier' of lower courts judgments. That being said, we have seen contra picture of the Supreme Court when we analyze its role in the context of death penalties. The approach of the Supreme Court in this context can be put into 5 categories as under:

(i) Supreme Court enhancing life imprisonment to death[175]

(ii) Supreme Court reversing acquittal by high court and convicting with death[176]

(iii)Supreme Court restoring death sentence awarded by the trial courts[177]

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[173] In *Bhagwan Dass v. State (NCT of Delhi)* (2011) 6 SCC 396, JJ.Markandey Katju and Gyan Sudha Misra thus declared in respect of honour killings:

> "In our opinion honour killings, for whatever reason, come within the category of rarest of rare cases deserving death punishment. It is time to stamp out these barbaric, feudal practices which are a slur on our nation. This is necessary as a deterrent for such outrageous, uncivilized behaviour. All persons who are planning to perpetrate `honour' killings should know that the gallows await them.
>
> Let a copy of this judgment be sent to the Registrar Generals/Registrars of all the High Courts who shall circulate the same to all Judges of the Courts. The Registrar General/Registrars of the High Courts will also circulate copies of the same to all the Sessions Judges/Additional Sessions Judges in the State/Union Territories. Copies of the judgment shall also be sent to all the Chief Secretaries/Home Secretaries/Director Generals of Police of all States/Union Territories in the country. The Home Secretaries and Director Generals of Police will circulate the same to all S.S.Ps/S.Ps in the States/Union Territories for information."

[174] See section 366 of Code of Criminal Procedure , 1973

[175] *Simon and Ors. v. State of Karnataka* (2004)2 SCC 694, *Ram Singh vs. Sonia & Ors.* (2007) 3 SCC 1, *Ankush Maruti Shinde and Ors. v. State of Maharashtra* (2009) 6 SCC 667, *State of U.P. Vs. Sattan @ Satyendra and Ors* (2009) 4 SCC 736, *State of U.P. v. Dharmendra Singh & Anr* (1999) 8 SCC 325, see Asian Centre For Human Rights, *INDIA: Death Without the Right to Appeal*, (New Delhi: ACHR, September 2014) also available at http://www.achrweb.org /reports/ india/ Death Without Right 2Appeal.pdf

[176] In *State of Rajasthan v. Kheraj Ram* (2003) 8 SCC 224, the trial court awarded death penalty. High court acquitted on the ground that case mainly rested on the circumstantial evidence and the extra-judicial confession made by the accused. The Supreme Court set aside High Court's judgment and restored the judgment of the trial Court. The interesting conclusion among others in restoring death sentence was that

> "The calmness with which he smoked 'chilam' was an indication of the fact that the gruesome act did not even arouse any human touch in him. On the contrary, he was satisfied with what he had done. In a given case, a person having seen a ghastly crime may act in a different way."

The mercy petition of Kheraj Ram was allowed by then President APJ Abdul Kalam (2006) and his death sentence was commuted to life imprisonment. In yet another case where death sentence awarded by trial courts were restored is *State of U.P. v. Satish* (2005)3 SCC 114. The death sentence of Satish was comuuted to life imprisonment by the President in 2012. See Asian Centre For Human Rights *Supra* note 175

[177] In *State of U.P. v. Dharmendra Singh & Anr* AIR 1999 SC 3789, the death sentence was commuted to life imprisonment by the Allahabad High Court but the Supreme Court restored the death sentence awarded by the Sessions Court. Similarly in *Sonia and Sanjeev v. Union of India* AIR 2007 SC 1218 death sentence was reduced to life imprisonment by the Punjab & Haryana High Court but the Supreme Court enhanced the same to death penalty on 15 February 2007.

In *Ankush Maruti Shinde and Ors. v. State of Maharashtra* AIR 2009 SC 2609, the Bombay High Court commuted the death sentence to life imprisonment but the Supreme Court set aside the order of the Bombay High Court and reinstated the death sentence awarded by the Sessions Court.

In the case of *State of U.P. v. Sattan @ Satyendra and Ors* (2009) 4 SCC 736, the death sentence was commuted to life imprisonment by the Allahabad High Court but the Supreme Court restored the death sentence upon Sattan and Upendra

See Asian Centre For Human Rights *Supra* note 175

(iv) Supreme Court awarding death for the first time in all the tires

(v) Supreme Court sending matters back to consider if death sentence needs to be awarded![178]

These five points are unique in the sense that death penalty appears to be 'chosen punishment' by the Supreme Courts or 'expected goal of the punishment' subscribed by the Supreme Court! The fact that one of the courts in the tier has not subscribed to the death penalty should have been sufficient cause for the Supreme Court not to impose or advocate for death penalty. However this did not happen. On the other hand there are good numbers of judgments where the death penalties are avoided on the ground that one of the courts did not impose death. In *Mohd. Farooq Abdul Gafur v. State of Maharashtra*, [179] and *Lichhamadevi v. State of Rajasthan*,[180] it was held that *"[w]here there are two opinions as to the guilt of the accused, by the two courts, ordinarily the proper sentence would be not death but imprisonment for life"* however, this position in not uniform across the tiers. The following paragraphs from the 262nd Law Commission of India[181] would drive the point home.

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[178] *Supra* note 175 where it notes

> "In fact, the Supreme Court directed for fresh consideration by the High Courts in some cases where death penalty was not imposed, in a way implying that death penalty should have been imposed. It is a clear case of influencing the lower courts. In the case of commutation of death penalty of Kunal Majumdar into life imprisonment by the High Court of Rajasthan on 11 July 2007 [Kunal Majumdar Vs. State of Rajasthan [(2012)9SCC320]], the Supreme Court in an order dated 12 September 2012 set aside the order of the High Court and remitted the matter back to the High Court for fresh order on the sentence. By the judgment dated 13 February 2013, the Division Bench of the High Court of Rajasthan at Jodhpur reconfirmed the life sentence on convict, Kunal Majumdar.[State of Rajasthan vs Kunal Majumdar, Rajasthan High Court, 13 February 2013 [Crl Murder Ref. 361, Crl Appl No.1/2007, Crl Appl No.243 of 2007 and Jail Appl No.313 of 2007] http://courtnic.nic.in/jodh/judfile.asp?ID=CRLA&nID =243&yID=2007 &doj=2%2 F13%2 F2013]
>
> However, convict Devendra Nath Rai has not been as lucky as Kunal Majumdar. Rai, an Army Jawan, was accused of murder of his colleagues on 15 October 1991 and sentenced to death by the Court Martial. The Allahabad High Court converted the death sentence to life imprisonment on the ground that the case did not fall in the "*rarest of the rare*" category. However, the Supreme Court on 10 January 2006 directed the Allahabad High Court to reconsider its judgment on the quantum of sentence while noting that the High Court without considering the balance sheet of aggravating and mitigating circumstances abruptly concluded the case as not being covered by the "rarest of rare" category.16 Following the direction of the Supreme Court, the Allahabad High Court sat on it for eight years, dismissed the Writ Petition of Rai for "want of prosecution" and restored the case vide order dated 28.01.2014 and transferred the same to the Armed Forces Tribunal, Lucknow in view of Section 13 of the Armed Forces Act, 2007.17 The trial has been going on for last 23 years!"

Also see *supra* note 175

[179] (2010) 14 SCC 641

[180] (1988) 4 SCC 456

[181] *Supra* note 12 at pp 135 136 and 137

"5.2.58 The Supreme Court endorsed this view in *Mohd. Farooq* and held that in order to remove disparity and bring about a degree of uniformity in the application of the death penalty, the "consensus approach"[182] should be adopted, whereby the death penalty should be imposed only if there is unanimity vertically across the various tiers of the court system, as well as horizontally across Benches.

5.2.59 However, as in the cases mentioned in the previous sections, on this point too, there exists a considerable diversity of precedent. Take for instance the cases of *State of Uttar Pradesh v. Satish*,[183] on the one hand, and *State of Maharashtra v. Suresh*,[184] on the other. In the former, the accused was charged with the rape and murder of a six year old, and was convicted and sentenced to death by the Trial Court but acquitted by the High Court. The Supreme Court restored the order of the Trial Court and imposed the death sentence on the basis of the brutal and depraved nature of the crime, without taking into account the doubt regarding the guilt of the accused by the High Court. *Suresh* on the other hand, also involved the rape and murder of a four year old. Here too, the Trial Court had imposed the death penalty but the High Court had acquitted. The Supreme Court restored the order of conviction of the Trial Court, and was inclined to impose the death penalty, but held that "*as the accused was once acquitted by the High Court we refrain from imposing that extreme penalty in spite of the fact that this case is perilously near the region of `rarest of rare' cases*." [185]

5.2.60 Similarly, while in *Licchamadevi v. State of Rajasthan*,[186] *State of U.P. v. Babu Ram*,[187] *State of Maharashtra v. Damu*,[188] *State of Maharashtra v. Bharat Fakira Dhiwar*,[189] *State of Tamil Nadu v. Suresh*,[190] and *Santosh Kumar Singh v. State*,[191] the Supreme Court refused to impose the death penalty since a lower court had acquitted the accused; on the other hand, in *State of Rajasthan v. Kheraj Ram*,[192] *Devender Pal Singh v. State, N.C.T. of Delhi*,[193] and *Krishna Mochi v. State of Bihar*,[194] despite judges having disagreed on the guilt of the accused, the death penalty was awarded. In *Devender Pal Singh v. State, N.C.T. of Delhi*,[195] and *Krishna Mochi v. State of Bihar*,[196] the dissent on the question of guilt was by the senior most judge of the Supreme Court itself.

5.2.61 Similar concerns arise in cases like *B.A. Umesh v. Registrar General, High Court of Karnataka,*[197] *Ankush Maruti Shinde v. State of Maharashtra*,[198] *Ram Deo Chauhan @ Raj Nath Chauhan v. State of Assam*,[199] and of three appellants in *Krishna Mochi v. State of Bihar*,[200] where

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[182] *Mohd. Farooq Abdul Gafur v. State of Maharashtra* (2010) 14 SCC 641, at para 165
[183] *State of U.P. v. Satish* (2005) 3 SCC 114
[184] *State of Maharashtra v. Suresh* (2000) 1 SCC 471
[185] *State of Maharashtra v. Suresh* (2000) 1 SCC 471, at para 29
[186] *Lichhamadevi v. State of Rajasthan* (1988) 4 SCC 456
[187] *State of U.P. v. Babu Ram* (2000) 4 SCC 515
[188] *State of Maharashtra v. Damu* (2000) 6 SCC 269
[189] *State of Maharashtra v. Bharat Fakira Dhiwar* (2002) 1 SCC 622
[190] *State of Tamil Nadu v. Suresh* (1998) 2 SCC 372
[191] *Santosh Kumar Singh v. State* (2010) 9 SCC 747
[192] State of Rajasthan v. Kheraj Ram, (2003) 8 SCC 224
[193] *Devender Pal Singh v. National Capital Territory* (2002) 5 SCC 234
[194] *Krishna Mochi v. State of Bihar* (2002) 6 SCC 81
[195] *Devender Pal Singh v. National Capital Territory* (2002) 5 SCC 234
[196] *Krishna Mochi v. State of Bihar* (2002) 6 SCC 81
[197] *B.A. Umesh v. Registrar General, High Court of Karnataka* (2011) 3 SCC 85
[198] *Ankush Maruti Shinde v. State of Maharashtra* (2009) 6 SCC 667
[199] *Ram Deo Chauhan @ Raj Nath Chauhan v. State of Assam* (2000) 7 SCC 455
[200] *Krishna Mochi v. State of Bihar* (2002) 6 SCC 81

> judges across the tiers and Benches had agreed on the guilt of the offenders, but not on whether the case belonged to the rarest of rare category. Despite this disagreement, the Supreme Court imposed the death penalty. In *Ram Deo Chauhan*, where one Supreme Court judge had himself imposed life imprisonment on the ground of the extreme young age of the accused, a judge in the majority held that this may be a ground for the offender to seek commutation from the executive, but would not affect the imposition of the death penalty by the Court. Similarly, in *Krishna Mochi*, where the senior most judge on the Bench had acquitted on appellant and imposed life imprisonment on three, all four were given the death sentence by majority. Contrast these cases with *Mayakaur Baldevsingh Sardar v. State of Maharashtra*,[201] where, while the Court found that the case met the rarest of rare standard, it refused to impose the death penalty only because the High Court had imposed life imprisonment on the accused."

The observation of the Law Commission in its 187th Report that

> "in cases where the Supreme Court Bench hearing a particular case finds that an acquittal by a High Court should be overturned and the accused be sentenced to death, or where it finds that the punishment should be enhanced from life imprisonment to death, such cases should be transferred by the Chief Justice to a Bench of at least five judges"

seems to have failed to break the ground for the courts. No such references were made though courts have adopted the strategy of restraining itself from imposing death unless cases exemplarily warranted.

4.7 Safeguards to Be Followed In Imposition of Death Penalty

4.7.1 Legal Representation

Justice Sutherland of the United States Supreme Court put it succinctly in *Powell v. Alabama (1932)*, that imposing capital punishment despite ineffective legal representation is nothing short of "judicial murder."[202]

Poor legal representation has often been cited as example for disparity in sentencing. It is often argued that rich and affluent may hire seasoned lawyers to take themselves away from the gallows, where poor and marginalized even fail to provide for their representation in proper way. In the constitutional scheme, which assures free legal aid service,[203] it would be astonishing to note that death penalty sentences suffer from lack of comprehensive legal representation by the convicts. The lawyers appointed or provided for have in majority of cases failed to represent their clients in the cannons expected of them. Many of the death penalties had to be subsequently

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[201] (2007) 12 SCC 654
[202] 287 US. 45.72 1932
[203] See Article 39A of the constitution of India, 1950 and provisions of the Legal Services Authority Act, 1987

reversed for inadequate legal representation.[204]

In one of its kind study made by the National Law School University, Delhi, which is published in the two volume book entitled 'Death Penalty India Report',[205] reveals shocking facts when it interviewed the 385 death convicts. The study reveals as under[206]

> Of the 258 prisoners who spoke about interaction with their trial court lawyers, 181 (70.2%) said that their lawyers did not discuss case details with them. Further, 76.7% of the prisoners who spoke regarding meetings with trial court lawyers said that they never met their lawyers outside court and the interaction in court was perfunctory.[207] At the High Court, 68.4% of the prisoners never interacted with or even met their High Court lawyers.**[208]**
>
> Out of the 191 prisoners who shared information regarding access to a lawyer at the time of interrogation, 185 (97%) said they did not have a lawyer. Of these 185 prisoners, 155 spoke about their experience of custodial violence, out of which 128 prisoners (82.6%) said they were tortured in police custody[209]
>
> As per the information received from the prisoners, at the trial court and High Court, a vast majority of prisoners sentenced to death had private lawyers representing them. At the trial court, 36.6% prisoners had legal aid lawyers or lawyers who agreed to fight the case *pro bono*[210] while the corresponding figure at the High Court was 32.6%.[211] However, the situation is inversed in the Supreme Court. Amongst the 77 prisoners sentenced to death who spoke about their lawyers at the Supreme Court, 55 (71.4%) had legal aid or *pro bono* lawyers.[212]
>
> At the trial court, 70.6% of the prisoners had private lawyers while this figure

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[204] See *Mohd. Hussain @ Julfikar Ali v. State* 2012 (8) SCALE 308

[205] *Supra* note 5

[206] *Ibid*, at pp129-141

[207] Of the 184 prisoners who spoke about meeting their trial court lawyers outside court, 141 never met their lawyer outside court

[208] Of the 177 prisoners who spoke about meeting their High Court lawyers, 121 never met their High Court lawyers.

[209] Out of 265 prisoners who spoke about custodial torture, 214 (80.8%) revealed that they were tortured in custody.

[210] Information relating to nature of legal representation at trial court for 12 prisoners is unavailable. 117 prisoners were allotted legal aid lawyers at the trial court while 15 prisoners were represented on a pro bono basis. Of the 117 prisoners who had legal aid lawyers at the trial court, 28 prisoners also had a private lawyer for a part of the proceedings. Two prisoners represented themselves in the trial court.

[211] Information relating to nature of legal representation at High Court for 36 prisoners is unavailable. 89 prisoners were allotted legal aid lawyers at the High Court while 15 prisoners were represented on a pro bono basis. Of the 89 prisoners who had legal aid lawyers at the High Court, six prisoners also had a private lawyer for a part of the proceedings. Lawyers at the High Court were not yet appointed for five prisoners at the time of their interview while two prisoners represented themselves in Court. The appeals for 13 prisoners convicted by designated courts under the Terrorist and Disruptive Activities (Prevention) Act, 1987 lay directly before the Supreme Court.

[212] Information relating to nature of legal representation at the Supreme Court for 25 prisoners is unavailable. 44 prisoners were allotted legal aid lawyers at the Supreme Court while 11 prisoners were represented on a pro bono basis. Of the 44 prisoners who had legal aid lawyers at the Supreme Court, one prisoner also had a private lawyer for some part of the proceedings. One prisoner did not file an appeal before the Supreme Court.

> was 68.7% in the High Courts.[213] In the Supreme Court, this figure dramatically fell to 29.9%.[214] However, it is also interesting to note the economic profile of prisoners sentenced to death accessing private lawyers. Of the prisoners represented by private lawyers in the trial courts and High Courts, 70.6% were economically vulnerable.[215]

It has been argued that "*whether one ends up in death row is usually determined not by the heinousness of the crime but by the quality of trial counsel*." Counsel with experience can better handle the trial of murder cases than the young lawyers.[216] Therefore it is the duty of the Court of Session to ensure that experienced consel is assigned to the accused.[217] As noted by Asian Centre for Human Rights[218] a division bench of the Bombay High Court[219] in 2009 ordered that senior advocates with sufficient experience on the legal issues should be appointed on behalf of the legal aid panel.[220]

The Supreme Court in the *Shatrughan Chouhan* case [221] reaffirmed that access to legal aid should not just be provided at the trial stage but at all stages even after rejection of the mercy petition by the President. The lack of proper legal

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[213] 255 prisoners had private legal representation at the trial court, of which 28 prisoners had a legal aid lawyer for a part of the proceedings. In the High Court, 219 prisoners had private lawyers, of which six prisoners had a legal aid lawyer for a part of the proceedings.

[214] 23 prisoners had private legal representation at the Supreme Court, of which one prisoner had a legal aid lawyer for a part of the proceedings.

[215] 180 out of the 255 prisoners who had private lawyers at the trial court were economically vulnerable, while the rest were economically non-vulnerable. Similarly, 154 out of the 219 prisoners who were represented by private lawyers at the High Court were economically vulnerable, while 64 were economically non-vulnerable. Information on the economic vulnerability for one of the 219 prisoners who had private lawyers at the High Court is unavailable

[216] The Supreme Court in the case of *Kishore Chand v. State of Himachal Pradesh* 1990 AIR 2140 observed that

> "Though Art. 39A of the Constitution provides fundamental rights to equal justice and free legal aid and though the State provides amicus curiae to defend the indigent accused, he would be meted out with unequal defence if, as is common knowledge the youngster from the Bar who has either a little experience or no experience is assigned to defend him. It is high time that senior counsel practicing in the court concerned, volunteer to defend such indigent accused as a part of their professional duty."

[217] In *Surendra Koli v. State of UP* (Review Petition (Crl.) No. 395 of 2014 dated October 28, 2014.) the supreme court observed that

> "[t]he learned District Judges while assigning the defence counsel, especially in cases where legal aid is sought for by the accused person, must preferably entrust the matter to a counsel who has an expertise in conducting the Sessions Trial. Such assignment of cases would not only better preserve the right to legal representation of the accused persons but also serve in the ends of ensuring efficient trial proceedings."

[218] Asian Centre for Human Rights, *Death Reserved For The Poor,* (New Delhi: ACHR, November 2014), p 4 available at http://www.achrweb.org/reports/india/DeathReserved.pdf

[219] Consisting of Justice JJ. Naresh Patil and Shrihari Davare

[220] See Shibu Thomas "Lawyers providing free legal aid should be experienced", *The Times of India*, October 12, 2009

[221] *Shatrughan Chauhan & Anr. v. Union of India & Ors*. (2014) 3 SCC 1

representation has been unfolded by all the concerned including the Supreme Court itself. Asian Centre for Human Rights notes that [222]

> "[i]n the case of Ram Deo Prasad who was sentenced to death, the Supreme Court noted that the appellant *"did not have sufficient resources to engage a lawyer of his own choice and get himself defended up to his satisfaction"*[223] while in other cases, the apex Court observed that the defence counsel appointed by the Court *"did not appear at the commencement of the trial nor at the time of recording of the evidence of the prosecution witnesses"* and in many cases defending the accused is *"rather proforma than being active"*.[224] Lawyers appointed by the Courts to defend those facing death sentence have no experience of conducting a single murder trial and in some cases, the apex Court concluded that "*accused have not been provided with effective and meaningful legal assistance,"*[225] In some cases, critical aspects such as *"the mental condition"* of the death row convicts [226] or juvenility were not brought before the Court by the lawyers.
> In the case of Ram Deo Chauhan of Assam, who was represented by *amicus curiae* in the Supreme Court,[227] while considering the Review Petition, the Supreme Court observed that the Court upheld the death sentence on 31.7.2000 as the Supreme Court *"did not advert to the question of age of the petitioner as it was possibly not argued."*[228] Similarly, in the case of Ankush Maruti Shinde of Maharashtra whose death sentence was upheld by the Supreme Court on 30 April 2009,[229] the issue of juvenility was not raised despite existence of unimpeachable documentary proof of him being a juvenile [230] and it was only in July 2012, the Additional Sessions Court in Nashik ruled that Ankush Maruti Shinde was a juvenile at the time of the commission of offence.[231]"

Denial of effective legal representation may send innocent persons to the death row. An example is *Mohd. Hussain @ Julfikar Ali v. State*,[232] where the accused was convicted and sentenced to death for a blast in a bus in Delhi which killed 4 persons. His sentence was upheld by the High Court.[233] Before the Supreme Court, a division

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[222] *Supra* note 218 at p 4
[223] *Ram Deo Prasad v. State of Bihar* (Criminal Appeal No. 1354 of 2012 decided on 11 April 2013)
[224] *Mohd Hussain @ Julfikar Ali v. The State (Govt. of NCT) Delhi* (Criminal Appeal No. 1091 of 2006 decided on 11 January 2012)
[225] See Shibu Thomas "Lawyers providing free legal aid should be experienced", *The Times of India*, October 12, 2009
[226] *Durga Domar v. State of Madhya Pradesh* (2002)10 SCC 193
[227] *Ram Deo Chauhan @ Raj Nath Chauhan v. State of Assam* AIR 2000 SC 2679
[228] Judgement dated 19 November 2010 of the Supreme Court in Review Petition (C) No.1378 OF 2009 in Writ Petition (C) No.457 OF 2005 *Remdeo Chauhan @ Rajnath Chauhan v. Bani Kant Das & Others*
[229] *Ankush Maruti Shinde and Ors. v. State of Maharashtra* [Criminal Appeal Nos. 1008-09 of 2007 and Criminal Appeal Nos. 881-882 of 2009 (Arising out of SLP (Crl.) Nos. 8457-58 of 2008 decided on 30.04.2009]
[230] See Vijay Hiremath, 'Relief for a juvenile', *Frontline*, Volume 29 - Issue 17: Aug. 25-Sep. 07, 2012, available at http:// www.frontline.in/static/html/fl2917/stories/20120907291701100.htm
[231] See Manoj Mitta 'After six years on death row, spared for being a juvenile', *The Times of India*, August 21, 2012
[232] *Mohd. Hussain @ Julfikar Ali v. State* 2012 (8) SCALE 308
[233] *State v. Mohd. Hussain @ Julfikar Ali* 140 (2007) DLT 428

Bench noted that the accused had been denied fair trial because of the denial of legal representation.[234] Castigating the trial court for its "casual manner" in conducting a capital punishment case, the division Bench split over whether to acquit the accused or to send the case for retrial.[235] The matter was referred to a three judge Bench which sent the case for retrial. In January 2013, Mohd. Hussain was found innocent and acquitted of all charges.! He was in prison for 15, out of which he was on death row for 7 years and 2 months![236]

4.7.2 Representation by amicus curie

The state provides lawyers on request or courts ensure that the accused are represented by the *amicus curie* if the accused is unable to represent himself legally. The performance of *amicus curie* on assignment has not been appreciable however. The Supreme Court in *Bariyar,*[237] *Sangeet*,[238] and *Khade*,[239] acknowledged error in 16 cases, involving death sentences imposed on 20 individuals. Disturbingly, in over half these cases in which the Court later found error, the accused were represented by *amicus curie*.[240] The Law Commission of India[241] observes that

> Data from a study titled *Hanging in the Balance: Arbitrariness in Death Penalty Adjudication in India (1950-2013)* shows that out of the 281 persons who were awarded the death sentence by at least one level of court between 2000 and 2013, and whose cases went up through all the tiers of the judicial system, 128 persons were given the death sentence only by the Trial Court.[242] Both the High Court and the Supreme Court either commuted the sentence or acquitted the person in these cases. 7.03% of such accused were represented by Amicus Curie. In the same time period, 79 persons were given the death sentence by both the Trial Court and the High Court but were either acquitted or had their sentences commuted by the Supreme Court. The Amicus Curie representation of this group was 22.8% And finally, of the 69 persons who were given the death sentence by the Supreme Court itself, 36.2% has amicus representation.[243]

Asian Centre for Human Rights examined 26 cases [pertaining to the period

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[234] *Mohd. Hussain @ Julfikar Ali v. State* 2012 (1) SCALE 145
[235] *Mohd. Hussain @ Julfikar Ali v. State* 2012 (8) SCALE 308
[236] *State v. Mohd. Hussain @ Julfikar Ali*, Sessions Case No. 79/2012, dated 04.01.2013 (Del).
[237] *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* 2009 (6) SCC 498
[238] *Sangeet & Anr v. State of Haryana* 2013 (2) SCC 452
[239] *Shankar Kisanrao Khade v. State of Maharashtra* (2013) 5 SCC 546
[240] *Supra* note 5 at Para 5.3.16 p 152
[241] *Ibid*
[242] Aparna Chandra, et al "Hanging in the Balance: Arbitrariness in Death Penalty Adjudication in India" (1950-2013) [forthcoming 2015] (on file). See https://clpgnlud.wordpress.com/2016/09/23/tinkering-with-the-machinery-of-death-what-the-data-says-about-the-death-penalty/
[243] *Ibid*

1993 and 2013] in which death row convicts were defended by *amicus curiae* because of the inability of the accused to hire their own lawyers because of poor socio-economic conditions. Out of these 26 cases, in as many as 15 cases,[244] death sentences defended by amicus curiae were confirmed by the Supreme Court whereas in 11 cases[245] death sentences defended by amicus curiae were commuted by the Supreme Court.

4.7.3 Right to Appeal

Though death is different in the sense that death is irreversible which fact implies that death should not be imposed until it is conferred by highest judiciary ruling out no sign of reformation on the part of the accused; the death penalty in India is not appealable to the Supreme Court as a matter of right! Way back on 1980 when Bachhan Singh was heard Justice Bhagavati made a exhaustive reference as to when

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[244] Sunder Singh Vs. State of Uttaranchal, (2010)10 SCC 611 (On 21 January 2014, the Supreme Court in the case of *Shatrughan Chauhan & Anr v. Union of India & Ors* (2014) 35 SCC 1 commuted the death sentence of Sundar Singh to life imprisonment on the ground of mental illness. His mercy petition was rejected by the President on 31 March 2013.) *State of U.P. v. Sattan @ Satyendra and Ors*, (2009) 4 SCC 736 (President of India commuted their death sentences to life imprisonment) *Shivaji @ Dadya Shankar Alhat v. State of Maharashtra* (2008) 15 SCC 269 (mercy petition pending with governor as on date of this research) *Bantu v. State of Uttar Pradesh* (2008) 11 SCC 113 (the death sentence commuted to life imprisonment by President on 2 June 2012) *Gurmeet Singh v. State of Uttar Pradesh* (2005) 12 SCC 107 (in 2014, the Supreme Court in the case of *Shatrughan Chauhan & Anr v. Union Of India & Ors* commuted the death sentence of Gurmeet Singh to life imprisonment on the ground of delay in disposal of his mercy petition. Earlier the President had rejected his mercy petition on 1 March 2013) *Mohan Anna Chavan v. State of Maharashtra* (2008) 7 SCC 561 (the Supreme Court held this case as *per incuriam* in *Santosh Kumar Satishbhushan v. State of Maharashtra* (2009). The mercy petition filed before the Governor of Maharashtra on 17 June 2010 was pending final disposal as on 31 March 2013.) *Prajeet Kumar Singh v. State of Bihar* (2008) 4 SCC 434 (on mercy petition and the President of India commuted his death sentence to life imprisonment) *Praveen Kumar v. State of Karnataka* 2004(1) ACR 503 (SC) (in *Shatrughan Chauhan & Anr v. Union Of India & Ors* the SC commuted the death sentence of Praveen Kumar to life imprisonment on the ground of delay in disposal of his mercy petition. The President had rejected his mercy petition on 26 March 2013) *Sushil Murmu v. State of Jharkhand* (2004) 2 SCC 338 (in 2012, the President commuted the death sentence to life Imprisonment) *Om Prakash @ Raja v. State of Uttaranchal* (2003)1 SCC 648 (In May 2012, the President commuted the death sentence to life Imprisonment) *Ram Deo Chauhan @ Raj Nath Chauhan v. State of Assam* AIR 2000 SC 2679 (mercy under consideration) *Jai Kumar v. State of Madhya Pradesh* AIR 1999 SC 1860 (The President of India commuted the death penalty to life imprisonment) *Shri Ram & Shiv Ram & Anr. Etc v. State of U.P. & Ors* 1997 AIR 1997 SC 3996 (in 2010 death penalty was converted into life imprisonment.) *Ravji alias Ram Chandra v. State of Rajasthan* 1996 AIR 787 (declared as *per incuriam* in 1999).

[245] *Haru Ghosh v. State of West Bengal* (2009) 15 SCC 551, *Purna Chandra Kusal v. State of Orissa* 2012 Cri.L.J. 615, *Bishnu Prasad Sinha and Putul Bora,* Assam Appeal (crl.) 453 of 2006 decided on 16 January 2007, *A. Deivendran v. State of T.N* (1997) 11 SCC 720, *Ram Deo Prasad v. State of Bihar* 2013 (5) SCALE 544, *Bantu v. State of Uttar Pradesh* (2008) 11 SCC 113, *Brij Mohan and others v. State of Rajasthan* (1994) 1 SCC 413, *Dharmendrasinh @ Mansing Ratansinh v. State of Gujarat* (2002) 4 SCC 679, *Durga Domar v. State of Madhya Pradesh* (2002) 10 SCC 193, *Lehna v. State of Haryana* (2002) 3 SCC 76, *Mulla and Anr. v. State of Uttar Pradesh* (2010) 3 SCC 508

appeal lies[246] and when not.[247] He noted that no appeal against death penalty lies as a matter of right.

The argument that the right of appeal does exist has been sidelined on the ground that the Special Leave Petitions (SLP) are generally granted against every death penalty.[248] However this is farce and nothing else. Since 2000 the Supreme Court has dismissed *in limine* at least 9 SLP against the imposition of the death penalty.[249] The past is testimony to the fact that the arch defender of human rights

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[246] In the following cases where the High Court passes a sentence of death, appeal to the Supreme Court can be filed as of right:-

> "i) where High Court convicts a person on a trial held by it in its extra ordinary criminal jurisdiction. (Section 374(1), Cr.PC)
> ii) where High Court has withdrawn for trial before itself any case from any court subordinate to it and in such trial convicts the accused person and sentence him to death. (Art. 134(1)(b) of the Constitution of India).
> iii) Where High Court on appeal reversed an order of acquittal of an accused person and sentence him to death. (Art.134(1)(a), of the Constitution, section 2 of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, and sec. 379 of the Cr.PC.
> iv) Right to appeal to the Supreme Court is also provided where the High Court on appeal reversed an order of acquittal of an accused person and sentences him to imprisonment for life or imprisonment for a term exceeding 10 years. (Section 379 of the Cr.PC and Sec.2 of the aforesaid Act of 1970)."

[247] However, in the following cases, a person against whom death sentence is passed or confirmed by the High Court, no appeal to the Supreme Court as of right is provided:-

> " i) where the High Court under section 368 of the Cr.PC confirms the sentence of death awarded by the Court of Session, no appeal as of right may be preferred to the Supreme Court. In this regard following finding of the full bench of the Madras High Court made in *K Govindswamy v. Govt. of India* A.I.R. Mad. 204 (1990 Cr.L.J. 1326) is also relevant,
> "Hence, as against an order of confirmation of death sentence passed under section 368 of the Code of Criminal Procedure, 1973 there is and there can be no further right of first appeal on facts to the Supreme Court, unless the High Court in exercise its power under Article 134(1)
> (c) grants leave to appeal to the Supreme Court, or, the Supreme Court grant special leave under Art.136(1) of the Constitution for an appeal being preferred".
> In *Chandra Mohan Tiwari v. State of MP* AIR 1992 SC 891, the Supreme Court has held that, in cases which are not covered by Art. 134(1)(a) and (b) or section 2(a) and (b) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 or by section 379 of the Cr.PC, appeal in the Supreme Court will lie only either on a certificate granted by the High Court under Article 134(1)(c) or by grant of Special Leave to appeal by the Supreme Court under Art. 136 of the Constitution of India. That means that a person whose sentence of death awarded by the Court of Session is confirmed by the High Court, no appeal as of right can be preferred to the Supreme Court.
> ii) As per section 377 of the Cr.PC, the State Govt. or the Central Govt. as the case may be, may direct the public prosecutor to present an appeal to the High Court against the sentence passed by a trial court on the ground of inadequacy. The High Court may enhance the sentence to a sentence of death after giving an opportunity of hearing to the convict. (Sec.386(c) (iii), Cr.PC)."

[248] *Mohd. Arif alias Ashfaq v. Registrar, Supreme Court of India and others*, 2014 (9) SCC 737, Justice chelamsewar observed

> "I may also state that apart from such a constitutional right of appeal, as a matter of practice, this Court has been granting special leave under Article 136 in almost, as a matter of course, every case where a penalty of death is awarded."

[249] *Lal Chand @ Laliya v. State of Rajasthan* (on 20.02.2004), *Jafar Ali v. State of Uttar Pradesh* (05.04.2004), *Tote Dewan @ Man Bahadur Dewan v. State of Assam* (08.08.2005), *Sanjay v. State of Uttar Pradesh* (03.07.2006), *Bandu v. State of Karnataka* (10.07.2006), *Dnyaneshwar Borkar v. State of Maharashtra* (21.07.2006), *Magan Lal v. State of Madhya Pradesh* (09.01.2012), *Jitendra @ Jeetu & Ors. v. State of Madhya Pradesh* (06.01.2015), *Babasaheb Maruti Kamble v. State of Maharashtra* (06.01.2015).

Justice Krishna Iyer also summarily rejected SLP![250]

187th Report of Law Commission of India reported that, in its survey, Approx. 88% persons[251] were in favour of granting right to appeal as a matter of right followed by 92% judges![252] Therefore Law Commission of India also suggested for statutory right to appeal.[253] However, no statutory right to appeal exists as on date.

4.7.4 Decisions by Minimum Five Judges' Bench

4.7.4.1 Bench of 5 judges

Before 2013 death penalty cases in the Supreme Court used to be heard by two judges bench. However, since 2013 in all cases in which death sentence has been awarded by the High Court and appeals are pending before the Supreme Court, only a

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[250] In *Paras Ram v. State of Punjab*, S.L.P. (Crl.) Nos. 698 & 678 of 1973, decided on October 9, 1973. Paras Ram, who was a fanatic devotee of the Devi, ceremonially beheaded his four year old boy at the crescendo of the morning bhajan. He was tried, convicted and sentenced to death for the murder. His death sentence was confirmed by the High Court. He filed a petition for grant of special leave to appeal to this Court under Article 136 of the Constitution. It was contended on behalf of Paras Ram that the very monstrosity of the crime provided proof of his insanity sufficient to exculpate the offender under Section 84, Indian Penal Code, or material for mitigation of the sentence of death. V. R. Krishna Iyer, J., speaking for the Bench, refused to grant special leave and summarily dismissed the petition.

[251] Approx. 88% persons in their responses have suggested that in Supreme Court appeal should lie as of right in cases where High Court awards or confirm death sentence passed by the Court of Sessions. See Law Commission of India, 187th Report on "*Mode of Execution of Death Sentence and Incidental Matters*" 2003.

[252] *Ibid*, at p 78 that "92% Judges have supported the view that there should be a statutory right to appeal to the Supreme Court in cases where death sentence has been confirmed by the High Court. Only one Judge of a subordinate court was not in favour of providing such right to appeal to the Supreme Court."

[253] *Ibid* the Law Commission recommends that,-

> "There should be a statutory right of appeal to the Supreme Court against the judgment of High Court confirming the death punishment awarded by the Court of Session or awarding the death punishment in exercise of its power of enhancing the sentence.
>
> In this regard a suitable amendment needs to be made in the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 by way of addition of clause (c) in section 2 of the Act as follows:-
>
> *"(c) has confirmed the death sentence passed by the Court of Session or awards the sentence of death in exercise of its power of enhancing the sentence under section 386(c) (iii) or sections 397 and 401 of the Code of Criminal Procedure, 1973".*

5. *Ibid*, it is noted as: Judge Advocates General of the Army, Navy and Air Force wrote letters to the Law Commission suggesting that there should not be a right of appeal to the Supreme Court against the Court Martial verdict of awarding that punishment. The Law Commission rejecting the demand recommended that,-

> "*Regarding providing a right of appeal to the Supreme Court under the Army Act, 1950; Air Force Act, 1950; and Navy Act, 1957 …suitable amendments be made in the above said Acts so as to provide a right to appeal to the Supreme Court against the order of confirmation of sentence of death by the Central Government or by appropriate authority.*"

bench of three Hon'ble Judges would hear the same.[254] This is for the reason that at least three judicially trained minds need to apply their minds at the final stage of the journey of a convict on death row, given the vagaries of the sentencing procedure outlined above.[255] Firmly convinced by the proposition that death shall be imposed only by a 'full bench', if at all to be imposed, Justice P N Bhagwati in his dissenting judgement in *Bachan Singh*[256] succinctly observed:

> "312. Before I part with this topic I may point out that only way in which the vice of arbitrariness in the imposition of death penalty can be removed is by the law providing that in every case where the death sentence is confirmed by the High Court there shall be an automatic review of the death sentence by the Supreme Court sitting as a whole and the death sentence shall not be affirmed or imposed by the Supreme Court unless it is approved unanimously by the entire court sitting enbanc [sic] and the only exceptional cases in which death sentence may be affirmed or imposed should be legislatively limited to those where the offender is found to be so depraved that it is not possible to reform him by any curative or rehabilitative therapy and even after his release he would be a serious menace to the society and therefore in the interest of the society he is required to be eliminated. ..."

In 187th Law Commission report it was reported that majority of the people[257]- 99% persons[258] and 92% Judges[259] demanded for concurrence by at least 5 judges of the

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[254] Supreme Court Rules, 2013, Order VI Rule 3,

> ORDER VI CONSTITUTION OF DIVISION COURTS AND POWERS OF A SINGLE JUDGE
> 3. Every cause, appeal or other proceedings arising out of a case in which death sentence has been confirmed or awarded by the High Court shall be heard by a Bench consisting of not less than three Judges.
> 4. If a Bench of less than three Judges, hearing a cause, appeal or matter, is of the opinion that the accused should be sentenced to death it shall refer the matter to the Chief Justice who shall thereupon constitute a Bench of not less than three Judges for hearing it.

[255] *Mohd. Arif alias Ashfaq v. Registrar, Supreme Court of India and others* 2014 (9) SCC 737

[256] *Bachan Singh v. State of Punjab* 1982 AIR 1325

[257] 6. (A) Majority of the persons expressed the view that in the Supreme Court, a Bench of not less than 5 Judges should hear and decide the cases where death punishment has been awarded. The Law Commission is also of the same view. The Commission further recommends that,-

> *The Supreme Court bench while hearing the case where death punishment has been awarded, should consist of at least five judges. Accordingly, the Supreme Court Rules may be amended.*

(B) The Supreme Court while hearing a case may think that the acquittal is wrong and the accused should be convicted and sentenced to death; or it may think that the sentence for a term or life sentence is to be enhanced to a death sentence; in such situations, the Bench of the Court which has heard the case, must direct the case to be placed before the Hon'ble Chief Justice of India for being heard by a Bench of at least five judges.

> *Accordingly, a provision in this regard has to be made in the Supreme Court Rules and we recommend accordingly.*

[258] *Supra* note 251 at p 80

> "5) 99% persons are of the view that in the Supreme Court, cases relating to the death sentence should be heard and decided by a bench of not less than 5 Judges. Among them 47% are in favour of applying a rule of simple majority and 33% are in favour of rule of 2/3rd majority. 20% are in favour of the rule of unanimity."

[259] *Ibid,* p 78 as

> "92% Judges have supported the view that there should be a statutory right to appeal to the Supreme Court in cases where death sentence has been confirmed by the High Court. Only one Judge of a subordinate court was not in favour of providing such right to appeal to the Supreme Court."
> "4) In the Supreme Court, the question is should there be a bench of not less than five Judges to hear and decide the cases relating to the death sentence? 51% of the Judges have given their answer in the negative, while 41% Judges are of the view that cases relating to the death sentence should be heard and decided by a bench of not less than five Judges. Among them, 33% are of the view that the rule of majority should be applicable. 6% Judges are in favour of applying the rule of 2/3rd majority. 3% Judges have suggested that the rule of unanimity should be applied."

court before death is awarded. This demand was even voiced by the same Law Commission.[260] However, as on date death penalties are being imposed by smaller benches than what had been contemplated by the Law Commission of India. Recent efforts to realize this was also turned down by the Supreme Court. [261]

4.7.4.2 Differences of opinion must compulsorily result in life imprisonment

4.7.4.2.1. Indian practice

Even though death penalty cases are heard by the bench of three judges in the Supreme Court, the ratio of difference of opinion is often as narrow as 2:1. This makes decisions on imposing death penalty extremely vulnerable to 'arbitrariness,' 'irrationality' and 'unfairness.'[262] This proposition is also true about the cases before high court where difference between two judges may result in reference to third judge. It may so happen that two judges differ between life imprisonment and death penalty whereas the third judge may confer death penalty. In some cases third judge may go for life imprisonment also taking the convict away from the gallows. In any of the above eventuality, the decision is of thin margin. Further, unreliability, unpredictability, and arbitrariness may arise when one judge acquits; second convicts with life imprisonment; and third judge imposes death penalty![263]

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[260] *Ibid* the commission observes

> (A) Majority of the persons expressed the view that in the Supreme Court, a Bench of not less than 5 Judges should hear and decide the cases where death punishment has been awarded. The Law Commission is also of the same view. The Commission further recommends that,-
> *The Supreme Court bench while hearing the case where death punishment has been awarded, should consist of at least five judges. Accordingly, the Supreme Court Rules may be amended.*
> (B) The Supreme Court while hearing a case may think that the acquittal is wrong and the accused should be convicted and sentenced to death; or it may think that the sentence for a term or life sentence is to be enhanced to a death sentence; in such situations, the Bench of the Court which has heard the case, must direct the case to be placed before the Hon'ble Chief Justice of India for being heard by a Bench of at least five judges.
> *Accordingly, a provision in this regard has to be made in the Supreme Court Rules and we recommend accordingly.*

[261] *Mohd. Arif alias Ashfaq v. Registrar, Supreme Court of India and others* 2014 (9) SCC 737

[262] Asian Centre for Human Rights, *India: Death despite dissenting Judgements*, (New Delhi: ACHR, May 2015), Pp 3-4 available at https://www.achrweb.org/reports/india/Deathdespitedissentingjudgements.pdf

[263] In the case of *Gurmeet Singh v. State of Uttar Pradesh (*AIR 2005 SC 3611) , out of the two judges of the High Court one upheld the death sentence, the other judge acquitted the accused. The matter was referred to a third judge who upheld conviction and death sentence. The Supreme Court also upheld the death sentence considering the case as 'rarest of the rare'. On 1 March 2013, President Pranab Mukherjee rejected the mercy petition and failed to comply with the guidelines of the Government of India to grant mercy in case of "*difference of opinion in a Bench of two Judges necessitating reference to the third Judge of the High Court*". Thereafter, the Supreme Court in *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1commuted the death sentence of Gurmeet Singh into life imprisonment due to delay in disposal of his mercy petition by the President of India. See *Supra* note 262 pp 3-4

Similarly in the case of *Lalit Kumar Yadav @ Kuri v. State of U.P*, 2014 AIR SCW 2655, the division bench of the Allahabad High Court differed on the quantum of the sentence. One of the judges affirmed the order of conviction recorded by the trial Court while the other judge reversed the whole judgment acquitted him. The case was referred to a third judge who upheld the judgment rendered by the trial Court confirming the death penalty. On 25 April 2014, the Supreme Court affirmed the conviction of the appellant but commuted the death sentence to life imprisonment.

There is no doubt that if the difference of opinion is as serious as acquittal versus death, death penalty ought not be imposed. However it is clear that the Supreme Court has not yet considered differences of opinion among judges of bench as a ground for not imposing death sentences,[264] though MHA has considered so to say the least on paper![265]

In *Pandurang & Ors. v. State of Hyderabad,*[266] five persons were persecuted for the murder and sentenced to death. Of the two judges on the original High Court Bench, one upheld the conviction of all five accused but awarded life imprisonment. The second judge directed the acquittal of all five. The third judge decided to uphold the conviction of all five and further sentenced three of the accused to death. The Supreme Court subsequently commuted the sentences of death.[267] This judgment indicates as to how judges can have different opinions as to the interpretation of same facts, circumstances and evidences.

In *State of Uttar Pradesh v. Deoman Upadhyay*,[268] a five judges bench of the differed by 4:1. Where majority judges restored the death sentence awarded to the accused even though High Court had acquitted him, the dissenting judge questioned the question of guilt itself! Similarly in *Tarachand Damu Sutar v. State of Maharashtra*,[269] though the five judge bench disagreed on guilt nevertheless the death sentence was awarded by a majority of 3:2.

Similarly in *Harbans Singh v. State of Uttar Pradesh & Ors*,[270]

> The case involved three accused, namely, Jeeta Singh, Kashmira Singh and Harbans Singh. These three persons were sentenced to death by the Allahabad High Court for murdering a family of four persons. Each of these three persons preferred a separate petition in the Supreme Court for special leave to appeal against the common judgment sentencing them all to death penalty. The special leave petition of Jeeta Singh came up for hearing before a bench consisting of Chandrachud, J. (as he then was) Krishna Iyer, J. and N.L. Untwalia, J. and it was dismissed on 15th April 1976. Then came the special leave petition preferred by Kashmira Singh from jail and this petition was placed for hearing before another bench consisting of Fazal Ali, J. and P N Bhagawati J. The court granted leave to Kahmira Singh and allowed his

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[264] *Ibid*
[265] Bikram Jeet Batra, "'Court' of Last Resort *A Study of Constitutional Clemency for Capital Crimes in India"* WORKING PAPER SERIES, Centre for the Study of Law and Governance Jawaharlal Nehru University, New Delhi, available at http://www.jnu.ac.in/CSLG/workingPaper/11-Court%20(Bikram).pdf
[266] AIR 1955 SC 216
[267] Nanda, Bhumika, "Death Sentence: Need for a Unanimous Decision- A Social and Legal Perspective *Cri Law Journal*, Vol. 167, 2012. Available at SSRN: https://ssrn.com/abstract=2112936
[268] AIR 1960 SC 1125
[269] AIR 1962 SC 130
[270] *Harbans Singh v. State of U.P.* (1982) 2 SCC 101

> appeal and commuted his sentence of death into one of imprisonment for life. The result was that while Kashmira Singh's death sentence was commuted to life imprisonment by one Bench, the death sentence imposed on Jeeta Singh was confirmed by another bench and he was executed on 6th October 1981, though both had played equal part in the murder of the family and there was nothing to distinguish the case of one from that of the other. The special leave petition of Harbans Singh then came up for hearing and this time, it was still another bench which heard his special leave petition. The Bench consisted of Sarkaria and Singhal, JJ. and they rejected the special leave petition of Harbans Singh. Harbans Singh applied for review of this decision, but the review petition was dismissed by Sarkaria, J. and A.P. Sen, J. on 9th May 1980. It appears that though the registry of Supreme Court had mentioned in its office report that Kashmira Singh's death sentence was already commuted, that fact was not brought to the notice of the court specifically when the special leave petition of Harbans Singh and his review petition were dismissed. Now since his special leave petition as well as his review petition were dismissed by this Court, Harbans Singh would have been executed on 6th October 1981 along with Jeeta Singh, but fortunately for him he filed a writ petition in this Court and on that writ petition, the court passed an order staying the execution of his death sentence. When this writ petition came up for hearing before a another bench consisting of Chandrachud, C.J., D.A. Desai and A.N. Sen, JJ., it was pointed out to the court that the death sentence imposed on Kashmira Singh had been commuted by a bench consisting of Fazal Ali, J. and Bhagwati J. and when this fact was pointed out, the Bench directed that the case be sent back to the President for reconsideration of the clemency petition filed by Harbans Singh[271]

The courts have, at times, previously followed the prevalent custom of not imposing the death penalty when appellate judges agree on the question of guilt but differ on the sentence unless there are compelling reasons.[272] Reasonable doubt can be said to be established where despite the evidence put forward, a member of the bench is not convinced of either the guilt of the accused or the necessity of the death sentence in that particular case.[273] In *Aftab Ahmad Khan v. The State of Hyderabad* [274] the court succinctly observed:

> "The only question which remains for consideration is whether the sentence of death is the appropriate sentence in the present case. No doubt there are no special circumstances which justify the imposition of any other but the normal sentence for the offence of murder. *We think, however, that where the two Judges of the High Court on appeal are divided in their opinion as to the guilt of the accused and the third Judge to whom reference is made agrees with one of them who is upholding the conviction and sentence, it seems to us desirable as a matter of convention though ,not as a matter of strict law that ordinarily the extreme penalty should not be imposed.* We accordingly, while maintaining the conviction of the appellant, reduce his sentence to one of

[271] *Bachan Singh v. State of Punjab* AIR 1982 SC 1325
[272] *Kalawati and Another v. State of H.P.* [1953] SCR 546 and *Pandurang, Tukia and Bhillia v. State of Hyderabad* [1955] 1 SCR 1083
[273] Batra Jeet Bikram, "Sentenced to die, non-unanimously", available at http://www.indiatogether.org /2004/jul/law-deathsent.htm
[274] 1954 AIR 436 Hasan, Ghulam JJ. Hasan J wrote judgment for the Bench

> transportation for life. In other respects the appeal stands dismissed. All the sentences will run concurrently" [emphasis in italic supplied]

In *V. Mohini Giri v. Union of India*,[275] even an unsuccessful effort was made to draw the attention of the court to lay down guidelines when one of the judges differs on the sentence or quantum of sentence.

The continuation of grant of death penalty on the basis of majority opinion, ignoring minority concerns regarding inadequacy of evidence, improper investigation procedure amidst growing international concerns regarding the abolition of death penalty clearly shows disregard to the principle of 'right to life' enunciated under Article 21 of the Constitution of India.[276] It is significant to note that Military Courts in India have higher safeguards in this respect. While the Army's general court martial do not require unanimity, they do require a two-thirds majority for the award of a death sentence (S.132 of the Army Act, 1950.)[277] A similar provision is found under S. 131 of the Air Force Act, 1950.[278] In other forms of court martial (summary court martial etc), an absolute concurrence of members trying the case is required in order to pass the death sentence. The 1950 Navy Act (Section 124)[279] requires four of

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[275] (2003) 9 SCC 158 JJ. G Pattanaik and K Balakrishnan observed

> "This petition has been filed for issuance of a guideline as to what should be the appropriate approach in the case where one of the judges in the Bench of this Court while hearing an appeal against death sentence, acquits the accused person. We do not think that the judicial discretion of the Bench hearing the appeal can be curtailed in any manner by issuing guidelines. This petition is dismissed accordingly"

[276] Nanda, Bhumika, "Death Sentence: Need for a Unanimous Decision- A Social and Legal Perspective" *Cri Law Journal*, Vol. 167, 2012. Available at SSRN: https://ssrn.com/abstract=2112936

[277] Section 132 of the Army Act, 1950 provides

> "(1) Subject to the provisions of sub- sections (2) and (3), every decision of a court-martial shall be passed by an absolute majority of votes; and where there is an equality of votes on either the finding or the sentence, the decision shall be in favour of the accused.
> (2) No sentence of death shall be passed by a general court- martial without the concurrence of at least two- thirds of the members of the court.
> (3) No sentence of death shall be passed by a summary general court- martial without the concurrence of all the members.
> (4) In matters, other than a challenge or the finding or sentence, the presiding officer shall have a casting vote."

[278] Ditto as above

[279] Section 124. Ascertaining the opinion of the court

> "(1) Subject to the provisions of sub-sections (2) and (3), every question for determination by a court-martial shall be decided by the vote of the majority:
> Provided that where there is an equality of votes, the decision most favourable to the accused shall prevail.
> (2) The sentence of death shall not be passed on any offender unless four at least of the members present at the court-martial where the number does not exceed five, and in all other cases a majority of not less than two-thirds of the members present, concur in the sentence.
> (3) Where in respect of an offence, the only punishment which may be awarded is death, a finding that a charge for such offence is proved shall not be given unless four at least of the members present at the court-martial where the number does not exceed five, and in all other cases a majority of not less than two-thirds of the members present, concur in the finding.

a five member panel to concur for a death sentence to be passed. Where the panel exceeds five members, at least two thirds must concur.

In fact demand for unanimity in opinion by full judge was raised and accepted by the law commission of India in its 187th report which itself underscores the relevancy of unanimity in opinion. However as on date death penalties have been awarded with unanimous opinion of two judges where the bench is division bench and by majority if the bench is Constitutional Bench.

4.7.4.2.2 Practice in other countries

The experiences of the United States on the need for unanimity of judges for imposing death sentence are instructive. In 2002, the United States Supreme Court in Timothy Ring (*Ring v. Arizona*)[280] ruled Arizona's death penalty statute as unconstitutional because it allowed "*a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty*." Further, the Connecticut Supreme Court ruled that Connecticut's death penalty sentencing statute does not mandate a specific outcome when the jury is not unanimous in its decision on whether to impose the death penalty. The court stated that the statute neither authorizes the death penalty nor requires imposition of a life sentence in these circumstances. The court stated that the trial court has discretion to declare a mistrial and can impanel a new jury to retry the penalty phase.

A study in the US in 2005 had shown that if there is no unanimity for imposition of death penalty, in 20 states of the United States, courts must impose a lesser penalty when the jury cannot agree on whether to impose the death penalty, in four states the jury can continue to deliberate on penalties other than the death penalty before the court imposes a sentence, in one State the judge has the option of imposing a sentence of life imprisonment without parole or impaneling a new jury, and in two states, statutes authorise the court to impanel a new jury if the first jury cannot reach a verdict.[281]

The position of Indian courts with respect to awarding non-unanimous death sentences is of particular concern since the number of cases where death sentences executions carried out have been found to be erroneous. The Liebman Report in 2000, concluding a 23-year study conducted by Columbia University, USA, found that 68%

[280] 536 U.S. 584 (2002)

[281] See Asian Centre for Human Rights, *India: Death despite dissenting Judgements*, (New Delhi: ACHR, May 2015), Pp 3-4
available at https://www.achrweb.org/reports/india/Deathdespitedissentingjudgements.pdf

of all death sentences awarded were reversed due to serious legal error.[282]Twelve percent of all persons executed in the US were later found to be innocent in light of newly uncovered evidence[283] Batra Jeet Bikram, therefore argues that

> "While there appears to be no similar study on India, it is unarguable that the risk in awarding death sentences is high and therefore caution needs to be exercised by the bench in awarding such a sentence. It is in this context that the requirement of unanimity of the judges could act as a crucial procedural safeguard in all death penalty cases."[284]

In October 2016, The Florida Supreme Court, in *Timothy Lee Hurst v. State Of Florida*, [285] declared the State's death penalty law as unconstitutional as it does not require a unanimous jury decision to impose the sentence. Florida law only required 10 out of 12 votes to approve death penalty. In the 5 to 2 ruling, the Judges concluded that

> "the Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury - not the judge - must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty."[286]

The above discussion underlines the fact that death sentence can still be continued if the case is decided by the five judges bench with total unanimity as one of the procedural safeguards.

4.7.5 Safeguards under Shatrughan Chauhan ruling

The Supreme Court laid down following guidelines in *Shatrughan Chauhan v. Union of India*,[287] to be complied with. These guidelines if followed sincerely would bring transparency in sentencing policy and sense of confidence to the convict. The guidelines are

1. Solitary or single cell confinement prior to rejection of the mercy petition by the President is unconstitutional and violates Article 21 of the Constitution.[288]
2. Legal aid should be provided to the convict at all stages (even after rejection of mercy) Accordingly, Superintendent of Jails shall intimate the rejection of mercy petitions to the nearest Legal Aid Centre apart from intimating the convicts.

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[282] *Supra* note 273
[283] Amnesty International, "Facts and figures on the death penalty", April 2004 Available at https://www.amnesty.org/download/Documents/88000/act500082004en.pdf
[284] *Supra* note 273
[285] Available at http://caselaw.findlaw.com/fl-supreme-court/1751375.html
[286] Available at http://www.livelaw.in/unanimous-jury-decision-may-approve-death-penalty-florida-sc/
[287] (2014) 3 SCC 1
[288] See *Dharam Pal v. State of Haryana Etc* (2015) available at http://indiankanoon.org/doc/153007779/ where the petitioner spent about 18 years in solitary confinement.

3. In order to ensure the disposal of mercy petition at the earliest, necessary materials such as police records, judgment of the trial court, the High Court and the Supreme Court and all other connected documents should be called at once and not in piece-meal or one by one by the Ministry of Home Affairs (MHA), fixing a time limit for the authorities for forwarding the same to the office of President. Reminders to the office of President shall be sent if no response is received at the earliest.
4. The rejection of the mercy petition by the Governor and President shall be communicated to the convict and his family in writing or through some other mode of communication available.
5. A minimum period of 14 days be stipulated between the receipt of communication of the rejection of the mercy petition and the scheduled date of execution.
6. There should be regular mental health evaluation of all death row convicts and appropriate medical care be given to those in need of.
7. Copies of their court papers, judgments, etc. are must for preparation of appeals, mercy petitions and accessing post-mercy judicial remedies which are available to the prisoner under Article 21 of the Constitution. These documents should be furnished to the prisoner within a week by the prison authorities to assist in making mercy petition and petitioning the courts.
8. Prison authorities shall provide facilitates and allow a final meeting between the prisoner and his family and friends prior to his execution.
9. compulsory *post mortem* to be conducted on death convicts after the execution

4.7.6 Review Hearing in open courts

Exhausted by all the regular remedies the death convict might wish to invoke the review jurisdiction of the Supreme Court. The Supreme Court would however, hear such petition only by circulation and not by oral arguments in the open court. This rule was framed by the court itself way back in 1978 when the Rule 3 [289] as it exists

[289] Rule 3 stipulates that an application for review shall be disposed of by circulation without any oral arguments.

> "Rule 3. Unless otherwise ordered by the Court an application for review shall be disposed of by circulation without any oral arguments, but the petitioner may supplement his petition by additional written arguments. The Court may either dismiss the petition or direct notice to the opposite party. An application for review shall as far as practicable be circulated to the same Judge or Bench of Judges that delivered the judgment or order sought to be reviewed."

today was added on 9th August, 1978 with effect from 19th August, 1978 in the Order XL of the Supreme Court Rules in 1978. This rule was constitutionally challenged but in vein in *P.N. Eswara Iyer & Others v. Registrar, Supreme Court of India*.[290] This limited hearing in private chambers of the judges which hardly provided any scope for further arguments denying the powers of words was again challenged in *Mohd. Arif @ Ashfaq v. The Registrar, Supreme Court of India & Others*.[291] The Supreme Court[292] in this case held that the death sentence review petition be head in the open court for 30 minutes to outer limit thereby breathing a fresh lease of life in the sentencing process. The court came to this conclusion by observing that[293]

(i) that there is a possibility of (given the same set of facts) two judicial minds reaching different conclusions either to award or decline to award death sentence.
(ii) that the death penalty once executed becomes irreversible and therefore every opportunity must be given to the condemned convict to establish that his life ought not to be extinguished. The obligation to give such an opportunity takes within its sweep, that an oral hearing be given in a review petition, as a part of a "reasonable procedure" flowing from the mandate of Article 21.
(iii) that even a remote chance of deviating from the original decision would justify an oral hearing in a review petition.

The court also noted that review petition which were pending since the year 2010 in which learned Judges who heard the appeal on merits have since retired, be heard afresh by a bench of three Judges, after giving counsel a maximum of 30 minutes for oral argument.

4.8 Riders and Resolutions on Death Penalty

4.8.1. Unquestionably foreclosed test- seeking unquestionable answers

Bachan Singh is more than clear that the crime is important (cruel, diabolic, brutal, depraved and gruesome) but the criminal is also important and this, unfortunately has been overlooked in several cases in the past.[294] Under the *Bachan Singh* framework, the option of life is "unquestionably foreclosed" and "completely

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[290] (1980) 4 SCC 680
[291] 2014 (9) SCC 737
[292] Constitutional bench with split opinion of 4:1. Justice Chelameswar fell in lone minority opinion. Justice Rohinton Fali Nariman wrote majority opinion for himself and R.M. Lodha, CJI, Jagdish Singh Khehar, A.K. Sikri JJ.
[293] Justice Chelameswar summarized the majority opinion in these words, but he himself did not subscribe to this opinion. He gave dissenting opinion holding that in view of *P.N. Eswara Iyer & Others v. Registrar, Supreme Court of India* (1980) 4 SCC 680, no oral hearing in open court is necessary.
[294] These cases are mentioned in *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009) 6 SCC 498

futile", only when "the sentencing aim of reformation can be said to be unachievable." [295] This test has to be satisfied by the state by leading evidence to show that the convict cannot be reformed or rehabilitated and thus constitutes a continuing threat to society.[296] However in many cases this litmus test exercise is not undertaken by the state which fact is conveniently ignored by the courts. The state can prove the viability of physical liquidation only when the reformation chances are completely ruled out. The courts however, have not taken this factor seriously. As the study reveals,[297] of the 50 prisoners in 34 judgments, issues of reformation was not addressed. For 62% of them even the HC did not consider the possibility of reformation. Trial court case is worst. In 75% of the cases trial court did not consider possibility of reformation at all. 74.1% of prisoners out of 385 belonged to economically vulnerable category[298] who could not represent themselves properly for one or other reasons. 34.9% were sole earners whereas 28.2% were primary earners among the 385 convicts.[299] Earning capacity and dependency on them was, at times, considered a mitigating factor. Age, which is a factor considered as mitigating factor, has not been considered in number of cases. Of the 385 convicts, 5.8% were in the range of less than 18, 17.4% were in the bracket of 18-21, 12.4% were in the bracket of 22-25, 45.2% were in the range of 26-40 and only 2.3% were in the range of more than 60. It is difficult to understand as to how the prisoners in the age group bracket of 18 to 40 are proved to be beyond repair with evidence by the state in the above cases. [300] The study also reveals [301] that

> "Another aspect which is often considered during sentencing is the previous criminal record of the prisoner. In *Shankar Kisanrao Khade v. State of Maharashtra*, the Supreme Court explained that mere pendency of cases is "not an aggravating circumstance to be taken note of while awarding death sentence unless the accused is found guilty and convicted in those cases."[302] Therefore, the criminal antecedents of a prisoner would be relevant for sentencing, only if they resulted in a conviction against the prisoner.

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[295] *Santosh Bariyar v. State of Maharashtra* (2009) 6 SCC 498, at para 66; *Mohinder Singh v. State of Punjab* (2013) 3 SCC 294, at para 23.

[296] In *Bachan Singh*, the Court endorsed the following standards:

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(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated.

The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above

[297] *Supra* note 5 p 56

[298] *Ibid* Vol. 1, p 104

[299] *Ibid* 109

[300] *Ibid* p 92

[301] *Ibid* p 56

[302] (2013) 5 SCC 546, paragraph 62

> Of the 276 prisoners for whom information regarding prior criminal history is available through their accounts, 241 prisoners (87.3%) did not have any previous criminal record…Of the remaining prisoners, 21 (7.6%) had prior convictions.
>
> Amongst the 214 prisoners who did not have a prior criminal record and for whom information regarding age at the time of incident was available,[303] 75 prisoners (35%) were below the age of 25."

The facts reveled by the study simply indicate that the duty imposed on the state has not been fulfilled. Even courts have not pressed for it. In this connection the observation of 262nd Law Commission are apt when it observes[304]

> "Recently, in *Shankar Khade*, *Anil @ Anthony Arikswamy Joseph v. State of Maharashtra*,[305] and *Birju v. State of M.P*, [306] amongst others, the Court has again reiterated the need for evidence based assessment of the possibility of reformation of the offender. However, as these cases have also noted, *"[m]any-a-times, while determining the sentence, the Courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation…*"[307]

The onerous duty if carried out by the state and ensured by the courts would definitely minimize the arbitrary imposition of death penalties. The courts have sections 235(2), 354(3) and pre-sentencing report at their disposal to discharge this duty and answer the tests of "unquestionably foreclosed" and "completely futile" tests.

4.8.2 Bifurcated hearing on quantum of sentence

The courts are ill equipped with sufficient material on the quantum of sentence though they may find enough material to convict an accused. This fact is succinctly explained by Justice Krishna Iyer when he observes that

> "Criminal trial in our country is largely devoted only to finding out whether the man in the dock is guilty. .. . It is a major deficiency in the Indian system of criminal trials that the complex but important sentencing factors are not given sufficient emphasis and materials are not presented before the court to help it for a correct judgment in the proper personalised punitive treatment suited to the offender and the crime."[308]

To remedy this quandary section 235(2) of the CrPC provides that the sentencing judge shall hear the accused on the sentence. The accused must be given separate

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[303] Among the 241 prisoners who did not have a prior criminal record, information regarding age at the time of incident is unavailable for 21 prisoners.
[304] *Supra* note 5 at para 5.2.50, p 131
[305] *Anil @ Anthony Arikswamy Joseph v. State of Maharashtra* (2014) 4 SCC 69
[306] *Birju v. State of M.P.* (2014) 3 SCC 421
[307] *Anil @ Anthony Arikswamy Joseph v. State of Maharashtra* (2014) 4 SCC 69, at para 33; *Birju v. State of M.P*. (2014) 3 SCC 421
[308] *Sivaprasad v. State of Kerala* 1969 KLT 862 at 871-72

bifurcated hearing on the quantum of sentence being proposed for his guilt. The accused shall be eligible to produce and adduce evidence to prove mitigating sentences in favour of him, though such evidences might have been irrelevant from the point of proving the guilt. In *Allauddin Mian & Ors. Sharif Mian v. State of Bihar*[309] the court observed that

> "When the Court is called upon to choose between the convicts cry 'I want to live' and the prosecutor's demand 'he deserves to die' it goes without saying that the Court must show a high degree of concern and sensitiveness in the choice of sentence."

The requirement of Sub-section (2) of Section 235 of the CrPC is, therefore, mandatory and confers a right on the offender to be heard on the question of sentence. It satisfies a dual purpose, namely, (i) the rule of natural justice inasmuch as it gives the offender an opportunity of being heard on the question of sentence and (ii) it seeks to assist the Court in determining the appropriate sentence.[310] However, the opportunity, statutorily afforded by that sub-section to an offender does not absolve the Court of its obligation to apply its judicial mind on the question of sentence but casts additional obligations (i) to give the offender an opportunity to make a representation on the question of sentence and (ii) to take into consideration such representation while determining the appropriate sentence to be awarded to the offender.[311] Justice Bhagwati in *Santa Singh v. State of Punjab*[312] explained as under

> "A perusal of this section clearly reveals that the object of the 1973 Code was to split up the sessions trial or the warrant trial, where also a similar provision exists, into two integral parts--(i) the stage which culminates in the passing of the judgment of conviction or acquittal; and (ii) the stage which on conviction results in imposition of sentence on the accused. Both these parts are absolutely fundamental and non-compliance with any of the provisions would undoubtedly vitiate the final order passed by the Court. The two provisions do not amount merely to a ritual formula or an exercise in futility but have a very sound and definite purpose to achieve. Section 235 (2) of the 1973 Code enjoins on the Court that after passing a judgment of conviction the Court should stay its hands and hear the accused on the question of sentence before passing the sentence in accordance with the law. This obviously postulates that the accused must be given an opportunity of making his representation only regarding the question of sentence and for this purpose he may be allowed to place such materials as he may think fit but which may have bearing only on the question of sentence. The statute, in my view, seeks to

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[309] 1989 AIR 1456
[310] *Allauddin Mian & Ors. Sharif Mian v. State of Bihar* 1989 AIR 1456
[311] For detailed discussion on quality and content of hearing at the sentencing see Rose Varghese "Sentence Hearing : Intent And Scope In Criminal Proceedings", *Journal of The Indian Law Institute*, Vol. 34, 1992, Pp 456-465
[312] 1976 AIR 2386

> achieve a socio-economic purpose and is aimed at attaining the ideal principle of proper sentencing in a rational and progressive society. The modern concept of punishment and penology has undergone a vital transformation and the criminal is now not looked upon as a grave menace to the society which should be got rid of but is a diseased person suffering from mental malady or psychological frustration due to subconscious reactions and is, therefore, to be cured and corrected rather than to be killed or destroyed. There may be a number of circumstances of which the Court may not be aware and which may be taken into consideration by the Court while awarding the sentence, particularly a sentence of death, as in the instant case. It will be difficult to lay down any hard and fast rule, but the statement of objects and reasons of the 1973 Code itself gives a clear illustration. It refers to an instance where the accused is the sole bread-earner of the family. In such a case if the sentence of death is passed and executed it amounts not only to a physical effacement of the criminal but also a complete socio-economic destruction of the family which he leaves behind. Similarly there may be cases, where, after the offence and during the trial, the accused may have developed some virulent disease or some mental infirmity, which may be an important factor to be taken into consideration while passing the sentence of death. It was for these reasons that s. 235(2) of the 1973 Code was enshrined in the Code for the purpose of making the Court aware of these circumstances so that even if the highest penalty of"

In *Bachan Singh v. State of Punjab* [313] also the court espoused the cause as under

> "Section 235(2) provides for a bifurcated trial and specifically gives the accused person a right of pre-sentence hearing, at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, have, consistently with the policy underlined in Section 354(3), a bearing on the choice of sentence. The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302, Penal Code, the Court should not confine its consideration principally" or merely to the circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal."

The court further observed

> 170. Attuned to the legislative policy delineated in Sections 354(3) and 235(2), propositions (iv) (a)[314] and (v) (b)[315] in Jagmohan, shall have to be recast and may be stated as below:

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[313] (1980) 2 SCC 684 Para 169

[314] Proposition (iv) (a) of Jagmohan case "This discretion in the matter of sentence is to be exercised by the Judge judicially, after balancing all the aggravating and mitigating circumstances of the crime."

[315] Proposition (v) (b) of Jagmohan case "It is to be emphasised that in exercising its discretion to choose either of the two alternative sentences provided in Section 302, Penal Code,

> "the Court is principally concerned with the facts and circumstances whether aggravating or mitigating, which are contracted with the particular crime under inquiry. All such facts and circumstances are capable of being proved in accordance with the provisions of the Indian Evidence Act in a trial regulated by the Cr. P.C. The trial does not come to an end until all the relevant facts are proved and the counsel on both sides have an opportunity to address the Court. The only thing that remains is for the Judge to decide on the guilt and punishment and that is what Sections 306(2) and 309(2) Cr. P.C. purport to provide for. These provisions are part of the procedure established by law and unless it is shown that they are invalid for any other reasons they must be regarded as valid. No reasons are offered to show that they are constitutionally invalid and hence the death sentence imposed after trial in accordance with the procedure established by law is not unconstitutional under Article 21."

> (a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.
> (b) While considering the question of sentence to be imposed for the offence of murder under Section 302 Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence."

The hearing contemplated by section 235(2) is not confined merely to hearing oral submissions, but it is also intended to give an opportunity to the prosecution and the accused to place before the court facts and material relating to various factors bearing on the question of sentence and if they are contested by either side, then to produce evidence for the purpose of establishing the same. Of course, care would have to be taken by the court to see that this hearing on the question of sentence is not abused and turned into an instrument for unduly protracting the proceedings.[316]

Section 235(2) Cr.P.C. is not a mere formality and in a case when there are more than one accused, it is obligatory on the part of the learned trial Judge to hear the accused individually on the question of sentence and deal with him. in *Santa Singh v. The State of Punjab*[317] Bhagwati, J. dealt with the anatomy of Section 235 Cr.P.C., the purpose and purport behind it and, eventually, came to hold that:-

> "Law strives to give them social and economic justice and it has, therefore, necessarily to be weighted in favour of the weak and the exposed. This is the new law which judges are now called upon to administer and it is, therefore, essential that they should receive proper training which would bring about an orientation in their approach and outlook, stimulate sympathies in them for the vulnerable sections of the community and inject a new awareness and sense of public commitment in them. They should also be educated in the new trends in penology and sentencing procedures so that they may learn to use penal law as a tool for reforming and rehabilitating criminals and smoothening out the uneven texture of the social fabric and not as a weapon, fashioned by law, for protecting and perpetuating the hegemony of one class over the other. Be that as it may, it is clear that the learned Sessions Judge was not aware of the provision in section 235(2) and so also was the lawyer of the appellant in the High Court unaware of it. No inference can, therefore, be drawn from the omission of the appellant to raise this point, that he had nothing to Say in regard to the sentence and that consequently no prejudice was caused to him"[318]

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[316] See also *Rajesh Kumar v. State* (2011)13 SCC 706, *Muniappan v. State of TN* (1981) 3 SCC 11, *Malkiat Singh v. State of Punjab* (1991) 4 SCC 341, *Dagdu v. State of Maharashtra* (1977) 3 SCC 68

[317] (1976) 4 SCC 190

[318] Bhagwati, J. set aside the sentence of death and remanded the case to the court of session with a direction to pass appropriate sentence after giving an opportunity to the appellant therein to be heard in regard to the question of sentence in accordance with the provision contained in Section 235(2) Cr.P.C. as interpreted by him.

In the concurring opinion, Fazal Ali, J., ruled thus:

> "The last point to be considered is the extent and import of the word "hear" used in Section 235(2) of the 1973 Code. Does it indicate, that the accused should enter into a fresh trial by producing oral and documentary evidence on the question of the sentence which naturally will result in further delay of the trial? The Parliament does not appear to have intended that the accused should adopt dilatory tactics under the cover of this new provision but contemplated that a short and simple opportunity has to be given to the accused to place materials if necessary by leading evidence before the Court bearing on the question of sentence and a consequent opportunity to the prosecution to rebut those materials. The Law Commission was fully aware of this anomaly and it accordingly suggested thus:
>
> > "We are aware that a provision for an opportunity to give evidence in this respect may necessitate an adjournment; and to avoid delay adjournment, for the purpose should, ordinarily be for not more than 14 days. It may be so provided in the relevant clause."

Despite this educative warning, courts have hardly embraced the role of bifurcated hearing. Amnesty International notes that

> "In the Rajiv Gandhi assassination case [unreported Judgment dated 28th January 1998 by Judge Navaneetham, Designated Court – I, Poonamalee in Calendar Case no. 3 of 1992], the Special TADA Judge heard 26 accused persons on sentencing within a period of a few hours, obviously reducing the hearing to a farce. Unsurprisingly all 26 were sentenced to death for conspiracy in the murder of the former Prime Minister and a number of others, with the judge giving common 'special reasons' for all the death sentences. This unprecedented judgment has often been referred to as a 'judicial massacre' even though on appeal, the Supreme Court acquitted 19 of the accused and commuted the sentence of another three to life imprisonment."[319]

In *Vishal Yadav*,[320] the Delhi High Court set down the methodology from the judicial pronouncements that need to be followed as core and indispensible requirements of section 235(2). Those are

> (i) After returning a finding of guilt for the commission of offences with which person is charged, the trial court is required to give an opportunity to the convict under Section 235(2) Cr.P.C. to make submissions, which is a valuable right, on the question of a sentence.
> (ii) The hearing may be on the same day if the parties are ready or the case be adjourned to a next date.[321]
> (iii) The opportunity under Section 235(2) is not confined merely to hearing oral submissions. It is also intended to give an opportunity to the prosecution as well as the convict to bring facts and material relating to his circumstances as well as various factors bearing on the question of sentence on record. If

[319] *Supra* note 50 p 133
[320] *Vishal Yadav v. State Govt. of UP* (2015) https://indiankanoon.org/doc/154440315/
[321] *Sevaka Perumal, etc. v. State of Tamil Nadu* (1991) 3 SCC 471

such material and factors are contested by either side, then they are entitled to produce evidence for the purposes of establishing the same.[322]

(iv) The relevant material may be placed before the court by means of affidavits. If either party disputes the correctness or veracity of the material sought to be produced by the either side, an opportunity would have to be given to the party concerned to lead evidence for the purposes of bringing such material on record.

(v) It is for the court to ensure that the hearing on the sentence is not abused and turned into an instrument for unduly protracting the proceedings. The claim of due and proper hearing would have to be harmonised with the requirement of expeditious disposal of the proceedings.

(vi) Once the court after giving opportunity, proposes to impose an appropriate sentence, there is no need to adjourn the case any further

(ix) Some illustrative aspects of what could be guiding factors for sentencing purposes, include nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, possibility of his reformation and to lead an acceptable life in the prevalent milieu, the propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream.[323]

(x) Certain additional factors which have to be taken into account include the nature of the offence, the circumstances--extenuating or aggravating-of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, society and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to a 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 the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. [324]

(xi) The relevant information for sentencing hearing would include the aspects relating to nature, motive and impact of crime, culpability of convict, etc. The quality of evidence adduced is also relevant. [325]

(xii) In case the trial court has failed to adjourn the case to comport to the requirements of Section 235(2), the appellate court may grant such opportunity.

(xiii) If imposing the death penalty, the court must return a finding that the convict is incapable of reformation and rehabilitation and record 'special reasons' for imposing the extreme penalty.

(xiv) The failure of the trial court to record special reasons' in terms of Section 354(3) of the Cr.P.C. must not necessarily entail remand to that court for elaboration upon its conclusions in awarding the death sentence. If no such material had been placed during the trial, the same can be placed in the reference proceedings before the High Court. In case, the State fails to produce any material, the court could ascertain from the material on record, if there are any mitigating factors favouring the accused, for instance, the

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[322] *Santa Singh v. State of Punjab* (1976) 4 SCC 190

[323] *Gopal Singh v. State of Uttarakhand* (2013) 7 SCC 545 para 18

[324] *Santa Singh v. The State of Punjab* (1976) 4 SCC 190 para 3

[325] *Santosh Kumar Satish Bhushan Bariyar v. State of Maharashtra* (2009) 6 SCC 498

> nominal roll with regard to overall conduct in jail. [326]
> (xv) While weighing circumstances for imposing an adequate sentence, the court has to perform this duty with "due reverence for Rule of Law; the collective conscience on the one hand and the doctrine of proportionality, principle of reformation and other concomitant factors on the other. The task may be onerous but the same has to be done with total empirical rationality sans any kind of personal philosophy or individual experience or any a-priori notion.[327]

The cases have established that if the ingredients of section 235 are complied with sincerity and in right perspective, enough information can be generated which would guide the courts in exercising proper sentencing policy.

4.8.3 "Special reasons clause" in death sentences

In the cases of murders, since the choice is between capital punishment and life imprisonment, the legislature has provided a guideline in the form of sub-section (3) of Section 354 of the Code of Criminal Procedure, 1973 as to how sentencing procedure shall follow. Section 354(3) requires that when the conviction is for an offence punishable with death the judgment shall state the special reasons for such sentence.[328] When the law casts a duty on the judge to state reasons it follows that he is under a legal obligation to explain his choice of the sentence.[329] The wordings of section 354(3) unambiguously demonstrate the command of the legislature[330] that such reasons have to be recorded for imposing the punishment of death sentence. The expression "special reasons" in the context of the provision of Section 354(3) obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal.[331] The death penalty ought not to be imposed save in the rarest of rare cases when the alternative option is unquestionably foreclosed.[332] This is how the concept of the rarest of rare cases has emerged in law.[333] Section 354(3) was even unsuccessfully

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[326] *State v. Om Prakash* [Death Sentence Ref.5/2012] decided on 17th April, 2014 by the Division Bench of Delhi High Court
[327] *Gopal Singh v. State of Uttarakhand* (2013) 7 SCC 545 para 19
[328] See section 354 of Code of Criminal procedure, 1973
[329] In *Allauddin Mian v. State of Bihar* (1989) 3 SCC 5
[330] In *State of Maharashtra v. Goraksha Ambaji Adsul* 2011 (7) SCC 437 see also In *Jashubha Bkaratssinh Cohil v. State of Gujarat* [1994] 4 SCC 353
[331] *Swamy Shraddananda (2) v. State of Karnataka* (2008) 13 SCC 767
[332] *Bachan Singh v. State of Punjab* [1980] 2 SCC 684
[333] in *Sandesh v. State of Maharashtra* (2013) 2 SCC 479 has observed as follows:

> "2…it is not only the crime and its various facets which are the foundation for formation of special reasons as contemplated under Section 354(3) CrPC for imposing death penalty but it is also the criminal, his background, the manner in which the crime was committed and his mental condition at the relevant time, the motive of the offence and brutality with which the crime was committed are also to be examined. The doctrine of rehabilitation and doctrine of prudence are the other two guiding principles for proper exercise of judicial discretion."

challenged as conferring wide discretion on judges to choose between life and death. However, the Supreme Court in *Bachan Singh*[334] ruled that

> "[t]he procedure provided in Criminal Procedure Code for imposing capital punishment for murder and some other capital crimes under the Penal Code cannot, by any reckoning, be said to be unfair unreasonable and unjust, Nor can it be said that this sentencing discretion, with which the courts are invested, amounts to delegation of its power of legislation by Parliament."

It was also observed in the majority decision as follows:

> "There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and Figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency — a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. 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 High Court has been given very wide powers under this provision to prevent any possible miscarriage of justice. In *State of Maharashtra v. Sindhi*,[335] this Court reiterated, with emphasis, that while dealing with a reference for confirmation of a sentence of death, the High Court must consider the proceedings in all their aspects reappraise, reassess and reconsider the entire facts and law and, if necessary, after taking additional evidence, come to its own conclusions on the material on record in regard to the conviction of the accused (and the sentence) independently of the view expressed by the Sessions Judge.

Section 354(3) of CrPC, therefore, provides launching pad for the exercise contemplated by unquestionably foreclosed test. The compliance of onerous duty imposed on the state by *Bachan Singh* case can be ensured under this section.

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[334] *Bachan Singh v. State of Punjab* [1980] 2 SCC 684
[335] 1975 AIR 1665

4.8.4 Pre-sentencing report

The offender may receive appropriate punishment only when the courts know the ins and outs of the crime and the history that surrounds such crime. Though by virtue of sections 235 (2), 248, 354 of CrPC, accused is given plenty of time to present his 'case' and 'considerations' that pushed him in to crime, the accused may not be able to present 'himself' or the 'climate of the crime' before the court.[336]

The court has to struggle with law and a judge has to juggle with his personal belief if an appropriate sentence is to be coined in the absence of pre sentence report of the accused.[337] The western countries therefore, insist on Pre Sentencing Report (PRS) before any incarceration is imposed.[338] As noted by study on *Death Penalty India Report*[339]

> "In jurisdictions like the United States, a wide spectrum of biological, psychological, neurological, and social factors gathered through a broad range of experiences right from childhood, to intergenerational history of the accused and going up until their time in prison fall within the range of probable mitigating circumstances. The 2003 American Bar Association Guidelines on Death Penalty Representation strongly recommend the use of a mitigation specialist to assist defense lawyers in death penalty cases."[340]

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[336] In *Powell v. Alabama* 287 U.S. 45, 69 (1932), the court ruled

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law.. . . He lacks both the skill, and knowledge adequately to prepare his defense, even though he ha[s] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him"

As quoted in Megan E. Burns "The Presentence Interview and the Right to Counsel: A Critical Stage Under the Federal Sentencing Structure", 34 *Wm. & Mary L. Rev*. 527 (1993)

[337] In *Hiralal Mallick v. State of Bihar* 1977 AIR 2236, Justice Krishnaiyer, V.R observed

> "A vehement critic, in overzealous emphasis, once said what may be exaggerated but carries a point which needs the attention of the, Bench and the Bar. H. Barnes wrote :
> "The diagnosis and treatment of the criminal is a highly technical medical and sociological problem for which the lawyer is rarely any better fitted than a real estate agent or a plumber. We shall ultimately come to admit that society has been unfortunate in handing over criminals to lawyers and judges in the past as it once was in entrusting medicine to shamans and astrologers, and surgery to barbers. A hundred years ago we allowed lawyers and judges to have the same control of the insane classes as they still exert over the criminal groups, but we now recognize that insanity is a highly diversified and complex medical problem which we entrust to properly trained experts in the field of neurology and psychiatry. We may hope that in another hundred years the treatment of the criminal will be equally thoroughly and willingly submitted to medical and sociological experts. (p. 74, Sentencing and Probation, supra) 310"

[338] In England and Wales s.156 Criminal Justice Act 2003 requires the court to obtain a Pre-Sentence Report (PSR), or a Specific Sentence Report (SSR) prepared by the Probation Service or the Youth Offending Team before imposing a custodial or community sentence. In United States, Rule 32 of The Federal Rules of Criminal Procedure requires a probation officer to conduct a presentence investigation report for the court in almost every case. If restitution is owed by the defendant, the rules state a presentence report must always be conducted.

[339] *Supra* note 5

[340] See Craig Haney "The Social Context of Capital Murder: Social Histories and the Logic of Mitigation", 35 *Santa Clara L. Rev*. 547 (1994–1995). See also American Bar Association, "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases", 31 *Hofstra L. Rev*. 913, 1090

> In the absence of such comprehensive scheme on statutory book in India, the service of Probation officer appointed under Probation of offenders Act, 1958 can be made use of as has been done by Delhi High court.

4.8.4.1 Importance of Pre-sentencing report

Though such PRS is not mandatorily insisted in India, the importance of such report was underscored by Justice Krishna Iyer in *P. K. Tejani v. M. R. Dange* [341] on the following lines:

> "Finally comes the post-conviction stage where the current criminal system is the weakest. The Court's approach has at once to be socially informed and personalised. Unfortunately, the meaningful collection and presentation of penological facts bearing on the background of the individual, the dimension of damage, the social milieu and what not - these are not provided for in the Code and we have to make intelligent hunches on the basis of materials adduced to prove guilt."

In *Ajay Pandit alias Jagdish Dayabhai Patel and Another v. State of Maharashtra,*[342] while remanding back the case to the High Court, the Supreme Court observed

> "The state of mind of a person awaiting death sentence and the state of mind of a person who has been awarded life sentence may not be the same mentally and psychologically. The court has got a duty and obligation to elicit relevant facts even if the accused has kept totally silent in such situations. In the instant case, the High Court has not addressed the issue in the correct perspective bearing in mind those relevant factors, while questioning the accused and, therefore, committed a gross error of procedure in not properly assimilating and understanding the purpose and object behind Section 235(2) CrPC."

4.8.4.2 Probation Officer- role of in death penalties

There can neither be a strait-jacket formula nor shall a solvable theory of mathematical exactitude to find out what material and variable shall weigh the court to impose death penalty.[343] This is a herculean task the presiding officer has to perform. However, pre sentencing report generated by probation officer can become bonfire light in the search for appropriate punishment. The Bench of Delhi High court has, therefore, further raised the bar of rarest of rare case when it introduced the concept of pre sentencing report of the accused by the probation officer. The underlying idea is that the State shall convince with evidence that the accused is beyond repair and hence necessarily needs to be liquidated. In the hearing on sentence part, the above said report plays vital and decisive role in producing entire material- pre crime to post crime- before the judge on the basis of which categorization of the

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[341] (1974) 1 SCC 167
[342] (2012) 8 SCC 43
[343] See *Gopal Singh v. State of Uttarakhand* (2013) 7 SCC 545

case as rarest of rare becomes easy and convincing. Justice Geeta Mittal appointed Prof. (Dr.) Mrinal Satish, Professor, National Law University, Delhi, as an 'amicus curiae' in the matter to assist the court. Dr. Mrinal Satish prepared elaborate written submissions on the question of the death sentence as well as on the aspect of appointment of a probation officer to submit a pre-sentencing report before the court. He made oral submissions as well, rendering valuable assistance to the court.

In the elaborate judgment, the court worked on appointment of probationer officer to generate pre-sentencing report of the accused on the basis of which death penalty or life imprisonment shall be decided. The court further went on to make this statement compulsory in every reference of death penalty! The court noted:

> **"I. Appointment of Probation Officer**
> (i) To call upon the concerned authority to assign a probation officer (PO) to the case to submit a report on the following two aspects:
> (a) Is there a probability that, in the future, the accused would commit criminal acts of violence as would constitute a continuing threat to society?
> (b) Is there a probability that the accused can be reformed and rehabilitated?
> (ii) Adequate time frame should necessarily be provided to the Probation Officer to conduct the investigation.
> (iii) The concerned authority should ensure that the PO has no relationship or connection to the accused, complainant, witness or subject matter of the case.
> (iv) In case of the offender being a female, assignment may preferably be made to a female PO in a female only environment.
> (v) Expenses of the PO: The State, through the Secretary, Home Department, GNCTD will make appropriate arrangements and reimburse the expenses incurred for the PO to comply with the directions issued in this judgment.
> (vi) Expenses of the PO appointed by the court under Section 13(c) of the PO Act or any other provision shall be determined by the court and shall be paid by the State upon details being directed by the court.
>
> **1. Procedure of inquiry by the Probation Officer**
>
> (i) All PSRs must be **factual, independent and free from bias** as far as possible.
> (ii) Enquire from the jail administration and seek a report as to the conduct of the accused in the entire period spent in jail. The jail authorities will extend their full co-operation to the PO in this regard.
> (iii) Shall mandatorily hold a **private interview with the convict**.
> (iv) In light of the fundamental **right against self-incrimination** in Article 20(3) of the Constitution, the **offender must be informed of his/her right to silence**. As a result, **in no circumstance can any adverse inference be drawn** if the offender refuses to give an interview to the PO. Further, it is advisable to allow the counsel to be present during the interviews with the accused.
> (v) Shall mandatorily conduct a home investigation; meet the family of the accused and the local people even if it requires travelling to the place from where the accused hails. PO shall gather information from family, friends, relatives and associates of offender. He will seek their inputs on the behavioral traits of the accused with particular reference to the two issues

highlighted. The PO shall verify the inputs given by the convict during the home visit.

(vi) The PO shall consult and seek specific inputs from two professionals with not less than ten years' experience from the fields of Clinical Psychology and Sociology.

(vii) Meet the victim/complainant and seek his/her/their inputs in the matter. In case, the complainant/victim is not in a position to assist the probation officer, inputs may be obtained from the guardianship/caregiver/friend who is giving the requisite care.

(viii) The PO should not give undue weight to the information and ignore the presence of other aggravating or mitigating factors.

(ix) If **information received from other sources is contradictory to or inconsistent** with the **information received from the offender** in his interview, the **offender should be interviewed a second time with the contradictory information** put to him; he **should be given a chance to respond** to the same and his answers should be recorded in the PSR.

(x) All information in the PSR should be classified as verified/corroborated or unverified/alleged.

(xi) If any statement is an opinion of the PO and not based on facts, it should be so stated clearly.

(xii) More information than necessary for the purposes of making the sentencing decision should not be collected.

(xiii) The probation officer, if directed, may collect all the information on the ability of the offender and his family to pay monetary penalties/compensation.

(xiv) The PO may ascertain convictions, if any, during the trial and mention them in the PSR.

(xv) The utmost standards of **confidentiality** of PSR should be maintained. As held by this Hon'ble Court in Bharat Singh, PSRs must always be given in **sealed envelopes** to the Court, and copies made must also be put in sealed envelopes before being given to the parties. The parties must be directed to maintain complete confidentiality regarding the contents of the report.

(xvi) The copy of the report shall be given by the trial court to the convict as well as counsel for the prosecution who shall maintain confidentiality of the document.

(xvii) The **accused or his counsel must be provided with a copy of the PSR**, preferably prior to the hearing, so as to be able to formulate objections and respond to the facts, inferences and/or recommendations made in the PSR.

(xviii) The counsel for the accused/convict shall be **permitted to make submissions on this report.**

III. Ensuring Quality in PSRs

- There is a dire need for the creation of a **training and supervision body for** POs; this to not only ensure they are given adequate training, much needed in delicate cases such as these, but also to ensure accountability, monitoring and supervision of the final report and its quality.
- Until such legal framework is put in place, it is essential that the court exercise discretion in deciding who shall be the PO in any particular case, with regard to the need for skill and expertise. Towards the same, the court has the power to appoint **any person** as a PO under Section 13 of the Probation of Offenders Act, 1958, and **need not only select from pre-existing and designated POs**.

Ensuring Non-Discrimination in PSRs

It has been noted in other jurisdictions that Pre- Sentence

> Investigations and Reports often have a discriminatory and unequal impact on certain groups. To reduce or eliminate such biases in the preparation of PSRs, the court must always exercise its discretion and review the Reports carefully to exclude unverified information and opinion-based conclusions of the PO.
>
> **Weightage to be attached to the report**
>
> It is important that the sentencing court give weight to the PSR as it deems fit, without considering itself to be bound by it. The sentencing discretion ultimately vests with the court and the PSR is only a helpful tool/supporting document."

4.8.5 Sentencing for life imprisonment with term rider

The courts have, of late, developed the techniques to escape from the arbitrariness of death penalty. Two of such techniques are - *firstly* sentence the offenders to life imprisonment, instead of death with a rider that such convict shall not be released from prisons until he serves the term fixed by the court. Even remission benefits shall not be extended to such convicts. This technique is being used as via-media to the arbitrariness of death penalty. The courts leniency towards death penalty is grounded on the premise of deterrence and keeping such person out of circulation. By imposing life term with rider, both the conditions are fulfilled leaving the choice of death in really warranting and extreme case. Since 2008 when *Swamy Shraddananda (2) v. State of Karnataka*[344] was decided courts have completely leaned towards structured life imprisonment than death penalty. [345]

The second technique adopted by the court is to direct the sentences to run consecutively[346] rather than concurrently again to keep convicts out of circulation and to serve just desert. Both these techniques have been discussed in detail in next chapter. [347]

4.8.6 Mercy 'to be' and 'to be in time'

Right to seek mercy is a constitutional right. However kind of irregularities practiced in the handling of mercy petitions presents adverse climate to the convict. The chapter on clemency jurisdictions shall discuss this issue in detail. Therefore the guidelines mentioned in the *Shatrughan Chauhan & Anr v. Union of India* [348] case as discussed supra shall be rigoursly followed. The mercy petitions shall be disposed of within reasonable time limit.

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[344] (2008) 13 SCC 767

[345] See Praveen Patil "Judicial Codification of Life Imprisonment: A New Insertion in Sentencing Policy; A Critical Note On Swamy Shraddananda (2) V. State of Karnataka And Its Consequential Effects*" KLE Law Journal,* Issue No 2, 2015, pp108-116

[346] See *Shankar Kisanrao Khade v. State of Maharashtra* (2013) 5 SCC 546

[347] See Chapter V - Life Imprisonment and Sentencing Policy: Judicial Codification of Life Imprisonment and Fallouts Thereof

[348] (2014) 3 SCC 1

4.9 Why Death Penalty Jurisprudence Matters Elsewhere In Sentencing Policy

Death penalty jurisprudence as unfolded above matters in the entire sentencing policy. Death penalty being the highest punishment which is to be resorted to sparingly is plagued with such an arbitrariness and disparity that the entire process has become judge centric. The death penalties are awarded on the basis of personal beliefs and philosophies of the presiding officers. No single philosophy of the sentencing policy has prevailed for all the time except of perceived deterrence. Judges themselves have acknowledged that there is void in the sentencing policy be it death sentence or any other penalty for that matter. If no uniform sentencing policy can be followed in death penalty cases which penalties are very few as compared to other penalties, what kind of disparity must be existing in the sentencing policy for the rest of offences can only be imagined. Few judges have taken sentencing policy in its pristine sanctity whereas many have taken it as mere proforma leaving the otherwise volatile exercise into the mud of surmises and conjectures.

Punishment of international ramifications like death penalty is based in majority of the cases on faulty police investigations,[349] forced confessions,[350] non assistance in legal representations[351] etc. if death penalties can be routinely imposed in such cases with complete disregard to the basic constitutional guarantees and international conventions one could easily imagine about other punishments where the sufferance is either few year incarceration or loss of few bucks which the accused chose to silently suffer and where the academic studies hardly reach.[352]

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[349] The report on death penalty India report mentions that Out of 195 families only in 20 cases police informed the grounds of arrest. In 86 cases out of 195 families the arrest took place in front of them but police did not inform about the grounds of arrest. See *Supra* note 5 Vol. 2 p14

Out of 258, 166 were not produced within 24 hours. Police custody lasted for weeks and months together.(vol. 2, p 16). See *Supra* note 5 Vol. 2 p16

[350] Out of 188 prisoners 15 admitted to making confession before police who threatened to harm them or families. See *Supra* note 5 Vol. 2 p17

Out of 270, 260(80%) suffered custodial torture. Out of 92 who confessed in police custody, 72 (78.3%) confessed due to torture. See *Supra* note 5 Vol. 2 p26

[351] Out of 189 prisoners, 169 (89.4%) did not have not a lawyers when produced before the magistrate. See *Supra* note 5 Vol. 2 p17

Only 57 (25.3%) out of 225, were present during all hearing. Many attended only few whereas remaining were kept in court lockup without actually producing them in the court room. See *Supra* note 5 Vol. 2 p 33

Out of 286, 156 (54.6%) could not understand the proceedings. See *Supra* note 5 Vol. 2 p 35

[352] The death penalty subject has been chosen for study both by the governments,(law commission reports) NGOs, (Asian centre for human rights, amnesty international, people's union for civil liberties etc) and academia (papers published in journals by academicians and judges) to bring forth anomalies existing in sentencing policies. However no such studies exist for other punishments where similar anomalies must be existing in sentencing policy. There is a death penalty clinic established by the national law university Delhi which has made an extensive research on the demographic profile of the convicts of death penalty. As on date this report is exhaustive report depicting the story behind the bars.

The disparity in sentencing policy in India has raised the international concerns as well. As argued elsewhere, sentencing commission with stated philosophy of punishment may help reduce the disparity and bring back the confidence in sentencing policy.

4.10 Conclusion

The arbitrariness and judge centric elements in death penalties have been established from all corners. The judges acknowledged it and wished it away too and yet it is recurrent. Justice V.R Krishna Iyer aptly put it *"however much judicially screened and constitutionally legitimated, there is a factor of fallibility, a pall that falls beyond recall and a core of sublimated cruelty implied in every death penalty*."[353]

The law commission suggested keeping death penalty only to the terrorism crimes so that the vice of arbitrariness is removed. However, death continues as on date for all offences as did in the past. Only exceptional procedure for this exceptional penalty can save the courts from self embarrassment. The exceptional procedure of appointing probation officer to elicit comprehensive pre sentencing report adopted by Delhi High court coupled with other safeguards like answering the question of "life is unquestionably foreclosed test" would ensure that death is not ordinarily imposed and resorted to only in rarest of rare cases- a dictum as prefunded by *Bachan Singh* case. The bent of mind of the Supreme Court has, however, swung in favour of life imprisonment after Bariyar case. The *Swamy Shraddananda* case which vouchsafed the life imprisonment with term fixed also provided the courts to tilt the death penalty in favour of life imprisonment. The jurisprudence of death penalty is replete with bad precedents rather than good ones irrespective of how strongly we defend the institutions with newer techniques like life imprisonment with riders or consecutive sentence.

[353] *Rajendra Prasad Etc. v. State of Uttar Pradesh* 1979 AIR 916

CHAPTER -V

LIFE IMPRISONMENT AND SENTENCING POLICY: JUDICIAL CODIFICATION OF LIFE IMPRISONMENT AND FALLOUTS THEREOF

Life after all is full of questions!

Justice AftabAlam[1]

5.1 Introduction

Imprisonments weather for a limited period or for indeterminate time place restriction on the liberty of individuals.[2]The second most rigorous punishment after death penalty in India is life imprisonment. Unlike death penalty, life imprisonment serves all aims of punishment.[3] The word 'life imprisonment' has not been defined in the Indian Penal Code, 1860 which law espouses the imposition of this punishment. For a lexicographer, the word 'life imprisonment' may sound a plain meaning of life in prison till last breath- that is probably the intended meaning also- however, the remissional powers of the executive, demands of reformatory theories, movement against life without parole have questioned the meaning of life imprisonment. The remissional provisions have given the executive the power to remit the sentence of life convict after 14 years of life in prison[4] if death is one of the alternative punishment[5] and reduce life imprisonment to any other sentence or period lesser than

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[1] Justice Aftab Alam in *Swamy Shraddananda (2) v. State of Karnataka* (2008) 13 SCC 767, para 1, when he was answering the question of critical choice between life or death. He further observed that:

> "Death to a cold blooded murderer or life, albeit subject to severe restrictions of personal liberty, is the vexed question that once again arises before Supreme Court. A verdict of death would cut the matter cleanly, apart from cutting short the life of the condemned person. However, a verdict of imprisonment for life is likely to give rise to certain questions. (Life after all is full of questions!). How would the sentence of imprisonment for life work out in actuality?..."

[2]In *Ashok Kumar Alias Golu v. Union of India and Ors*.1991 SCC (3) 498 Justice Ahmadi, A.M. observed:

> "[l]iberty is the lifeline of every human being. Life without liberty is `lasting' but not `living'. Liberty is, therefore, considered as one of the most precious and cherished possessions of a human being. Any attempt to take liberties with the liberty of a human being is visited with resistance. Since no human being can tolerate fetters on his personal liberty imprisonments weather for a limited period or for indeterminate time places restriction on the liberty of individuals"

[3] The court observed:

> "Incarceration, life or otherwise, potentially serves more than one sentencing aims. Deterrence, incapacitation, rehabilitation and retribution – all ends are capable to be furthered in different degrees, by calibrating this punishment in light of the overarching penal policy. But the same does not hold true for the death penalty. It is unique in its absolute rejection of the potential of convict to rehabilitate and reform. It extinguishes life and thereby terminates the being, therefore puts an end anything to do with the life. This is the big difference between two punishments. Before imposing death penalty, therefore, it is imperative to consider the same."

[4]Section 433A of Code of Criminal Procedure, 1973

[5] Death sentence as an alternative punishment is provided in Sections 121, 132, 194, 302, 305, 307 and 396 of IPC

14, if original sentence is life imprisonment simpliciter.[6]The exercise of this power and subsequent judicial response to this has raised few controversies surrounding life imprisonment today namely,- indiscriminate remission of life imprisonment for lesser sentence, *secondly* courts favoring life imprisonment over death penalty for inherent defects in capital sentences, *thirdly* courts fixing their own terms of life imprisonment from 20 to 35 years, *fourthly* courts restricting executive from exercising the constitutional powers of remission and *fifthly* legislature coming up with defined meaning of life imprisonment in recent legislations creating ambiguity in their own intent and interpretation.

The fact that the question of life imprisonment was referred, after *Gopal Vinayak Godse,*[7]to a larger bench of five judges[8] for interpretation in 2015 (since1860!) itself is indicative of the fact that, concrete jurisprudence in this field is required. In this chapter, therefore, the meaning of life imprisonment, judicial codification of life imprisonment and difficulties in working out life imprisonment etc.areintended to be discussed.

5.2 Life Imprisonment – Meaning Of

The term "imprisonment for life" or popularly called as 'life sentence' is not the original sentence in the Indian Penal Code 1860 (herein after IPC). It was in 1956 that Section 53 of the Indian Penal Code was amended to include this form of punishment. Clause *'secondly'* of Section 53 relating to "transportation"[9] was deleted and in its place "imprisonment for life" was introduced by Act 26 of 1955 with effect from 1.1.1956.[10] Life imprisonment, thus, substituted transportation.[11]

The word life imprisonment has not been defined in any laws of India though the word 'life' and 'imprisonment' have been distributively explained. Section 45, the Indian Penal Code defines 'life' as the life of the human being unless a contrary intention appears from the context. Section 3(27) of the General Clauses Act, 1897 states that imprisonment shall mean imprisonment of either description as defined in

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[6] See section 433 of Code of Criminal Procedure, 1973

[7]*Gopal Vinayak Godse v. The State of Maharashtra* 1961 AIR 600, 1961 SCR (3) 440, (Bench consisted of JJ. Gajendragadkar, P.B., Sarkar, A.K., Subbarao, K., Wanchoo, K.N., Mudholkar, J.R.)

[8]*Union of India v. Sriharan*2015 (13) SCALE 165

[9] Prior to the commencement of Act 26 of 1955, all prisoners sentenced to "transportation" for a fixed term or for life were not invariably deported to the overseas penal settlements in the island of Andaman. The prisoners were divided into two categories and those who were found eligible for deportation were alone sent to the penal settlements. The other prisoners were confined in one of the jails within the country under Section 32 of the Prisoners Act, 1900.

[10]*Md. Munna v. Union of India &Ors* (2005), available at http://indiankanoon.org/doc/1371440/

[11]See Balwant Singh Malik, "The Law of punishments of transportation for life and imprisonment for life - a Critical appraisal" (1999) 5 *SCC (Jour)* 4

the Indian Penal Code. The expression `life imprisonment', therefore, must be read in the context of section 45 IPC. Read so, it would ordinarily mean imprisonment for the full or complete span of life.

5.3 Ordinary Misconceptions and Misinterpretations Ordinarily Made

Having said that life imprisonment is imprisonment for the natural life of the convict, a misconception in public and in certain corners of the academics is prevailing that life imprisonment is either 14 years or 20 years.[12]At times this misconception has had hunted judiciary also. This misreading is the outcome of half understanding of section 433 and 433A of Criminal Procedure Code, 1973(hereinafter Cr.PC) and section 57 of the Indian Penal Code, 1860. Under section 432 of Cr.PC, appropriate governments have the power to remit the sentence of life convict after he has served minimum 14 years in the jail. This minimum 14 years imprisonment and release is not a rule but an exception. In other words, convict cannot claim for release after 14 years as a matter of right.[13]It is one thing to say that his case may be considered for premature release after 14 years and quite another thing to say that he has a right to be realised after 14 years. If the government wishes to confer upon him the benefits of clemency, his case may be processed and he may be realised after 14 years or after any definite period of imprisonment say 20 years.[14] The government is

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[12] The Supreme Court in the case of *Naib Singh v. State of Punjab* AIR 1983 SC 855, has specifically held that "life imprisonment" means imprisonment for the whole of a convict's life and does not automatically expire on his serving a sentence of 14 years or 20 years.

[13]In *Laxman Naskar (Life Convict) v. State of W.B. and anr.* 2000 CriLJ 4017, after referring to the decision of the case of *Gopal Vinayak Godse v. State of Maharashtra* 1961CriLJ 736, the court reiterated that

> " sentence for "imprisonment for life" ordinarily means imprisonment for the whole of the remaining period of the convicted person's natural life; that a convict undergoing such sentence may earn remissions of his part of sentence under the Prison Rules but such remissions in the absence of an order of an appropriate Government remitting the entire balance of his sentence under this section does not entitled the convict to be released automatically before the full life term if served.It was observed that though under the relevant Rules a sentence for imprisonment for life is equated with the definite period of 20 years, there is no indefeasible right of such prisoner to be unconditionally released on the expiry of such particular term, including remissions and that is only for the purpose of working out the remissions that the said sentence is equated with definite period and not for any other purpose."

[14]Since prison administration is a state subject, rules regarding commutations and remissions be under constitution or CrPC are framed by the respective states. This may result in disparity in commutation and remission also. Take for example, in Maharashtra a prisoner has to put in 20 years of minimum incarceration before being considered for commutation and remission. However, in Karnataka, Andra Pradesh and Kerala it is 14 years respectively.

Even in same state, the state may prescribe different conditions for different crimes to be considered for premature release or commutation. As for example in the state of Maharashtra, guidelines for premature release of prisoners sentenced to life imprisonment or to death penalty commuted to life imprisonment after 18th December, 1978, prescribe that, a prisoner has to serve minimum 22 years if the convict is the aggrieved person and has no previous criminal history and committed the murder in an individual capacity in moment of anger and without premeditation. A convict on the other hand has to serve 30 years if Murder is committed in pursuance of a political philosophy and as a means to acquire political powers as by terrorist of extremist groups. Similarly persons sentenced to life imprisonment for offences like (a) offences against the State (Chapter-VI) IPC, (b) Abetment of Mutiny (Sec.131,132 IPC), (c) Offences against public justice (Sec.222 & 225 of IPC), (d) Offences in respect of Coinage, Stamps (Sec.252, 238, 225 of IPC) etc, have to serve minimum 30 years before their file is 'put up' for remissions and commutation.

however not under an obligation to exercise such powers.[15]In fact, the exercise of this power to a greater extent depends upon the crimes committed and rehabilitation chances. If the criminal is hardcore, governments would never exercise this power keeping such convicts in jail for reminder of their life.[16] This proposition makes crystal clear that life imprisonment is imprisonment for the reminder of the life. Thus Imprisonment for life is not confined to 14 years of imprisonment. A reading of Section 55 IPC and Section 433 and 433A Cr.P.C. would indicate that only the appropriate Government can commute the sentence for imprisonment of life for a term not exceeding fourteen years or the release for such person unless he has served at least fourteen years of imprisonment.[17]

The second reason for the misconceived life imprisonment stems from the isolated reading of section 57 IPC, which declares that*"[i]n calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years"*

Section 57 of the IPC merely relates to calculating fractions of terms of punishment by providing a numerical value of 20 years to life imprisonment.[18]

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[15] See *Subash Chander v. Krishan Lal and others* (2001) 4 SCC 458
Justice U ULalit made the following observation in the context of remission powers *Union of India v. V. Sriharan @ Murugan & Ors* (2015)
available at http://judis.nic.in/supremecourt/imgs1.aspx?filename=43153

> "The right to apply and invoke the powers under these provisions does not mean that he can claim such benefit as a matter of right based on any arithmetical calculation as ruled in Godse. All that he can claim is a right that his case be considered. The decision whether remissions be granted or not is entirely left to the discretion of the concerned authorities, which discretion ought to be exercised in a manner known to law. The convict only has right to apply to competent authority and have his case considered in a fair and reasonable manner."

[16] The State Government of Maharashtra declared that the offenders sentenced to life imprisonment in connection with the 1993 terrorist attack on Mumbai will have to serve a minimum of 60 years in prison before their plea for release is even considered. See *infra* note 162 at p 44
[17]*Duryodhan Rout v. State of Orissa* (2014) available at - http://indiankanoon.org/doc/72190090/
[18] *Ibid*

Section 65,[19] 116,[20] 120[21] and 511[22] of the IPC fix the term of imprisonment there under as a fraction of the maximum fixed for the principal offence. It is for the purpose of working out this fraction that it became necessary to provide under section 57 that imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years. If such a provision had not been there it would have been impossible to work out the fraction of an indefinite term. In order to work out the fraction of terms of punishment provided in the above sections it was imperative to lay down the equivalent term for life imprisonment.[23] Other than this calculation purpose section 57

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[19] Section 65 IPC reads

> "Section 65. Limit to imprisonment for non-payment of fine, when imprisonment and fine awardable.—The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine."

[20] Section 116 IPC reads

> "Section 116. Abetment of offence punishable with imprisonment—if offence be not committed.—Whoever abets an offence punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence for a term which may extend to one-fourth part of the longest term provided for that offence; or with such fine as is provided for that offence, or with both; If abettor or person abetted be a public servant whose duty it is to prevent offence.—and if the abettor or the person abetted is a public servant, whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment of any description provided for that offence, for a term which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both."

[21] Section 120 IPC reads

> "Section 120. Concealing design to commit offence punishable with imprisonment.—Whoever, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with imprisonment, voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design, If offence be committed—if offence be not committed.—shall, if the offence be committed, be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth, and, if the offence be not committed, to one-eighth, of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both."

[22] Section 511 IPC reads

> "Section 511. Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.—Whoever attempts to commit an offence punishable by this Code with [imprisonment for life] or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with [imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence], or with such fine as is provided for the offence, or with both."

[23] *Ashok Kumar Alias Golu v. Union of India And Ors* 1991 SCC (3) 498

confers no other right on the convict.[24] Section 57 on the other hand, is also helpful in interpreting newly added sections like section 18 of Protection of Children Form Sexual Offences Act, 2012, which provides for punishment to attempted crimes.[25]

Thus, it is clear that a prisoner sentenced to life imprisonment was bound to serve the remainder of his life in prison unless the sentence is commuted or remitted by the appropriate authority.

5.4 Judicial Reading of Life Imprisonment

The courts have held in clear terms that life imprisonment cannot be assigned any other meaning other than for the reminder of natural life of human beings. In *Gopal Vinayak Godse v. State of Maharashtra,*[26]a first Constitutional Bench of Supreme Court, in respect of life imprisonment, held that a prisoner sentenced to life imprisonment was bound to serve the remainder of his life in prison unless the sentence is commuted or remitted by the appropriate authority. Such a sentence could not be equated with a fixed term.

In *Maru Ram v. Union of India and Ors.,*[27]also the Court following *Godse's case* (*supra*) held that imprisonment for life lasts until last breath of the prisoner and whatever the length of remissions earned, the prisoner could claim release only if the remaining sentences is remitted by the Government.

Again in *State of Punjab v. Joginder Singh*,[28] the Court held that if the sentence is '*imprisonment for life'* the convict has to pass the remainder of his life under imprisonment unless of course he is granted remission by a competent authority in exercise of the powers vested in it under Sections 432 and 433 of the Cr.P.C.

In the case of *Laxman Naskar v. Union of India,*[29]the Court held that life sentence is nothing less than lifelong imprisonment although by earning remission, the life convict could pray for pre-mature release before completing 20 years of imprisonment including remissions earned.

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[24]See *Maru Ram etc. v. Union of India and another* 1981 (1) SCR 1196 at pp 1222-1223

[25] section 18 of Protection of Children Form Sexual Offences Act, 2012 reads

> "18. Punishment for attempt to commit an offence : Whoever attempts to commit any offence punishable under this Act or to cause such an offence to be committed, and in such attempt, does any act towards the commission of the offence, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both."

[26] (1961) 3 SCR 440

[27] (1981) 1 SCC 107

[28] (1992) 2 SCC 661

[29] (2000) 2 SCC 595

In *State of Madhya Pradesh v. Ratan Singh &Ors.*,[30] the Court observed that the sentence of life imprisonment does not automatically expire at the end of 20 years. In *Ashok Kumar v. Union of India &Ors.*,[31] the Court ruled that the life imprisonment must be read in the context of Section 45 of the IPC, which would mean imprisonment for the full or complete span of life.

In *Subash Chander v. Krishan Lal &Ors.*,[32] the Court held that life imprisonment means imprisonment for the whole of the remaining period of the convicted persons natural life unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence under Section 401 Cr.P.C.[of old code, corresponding to present Section 432]

In *Shri Bhagwan v. State of Rajasthan,*[33] the Court reiterated that imprisonment for life was not equivalent to imprisonment for 14 years or 20 years. In *Mohd. Munna v. Union of India &Ors.*,[34] similar views were expressed by the courts. The court further held that there is no provision either in the IPC or Cr.PC, whereby life imprisonment could be treated as either 14 years or 20 years '*without there being of formal remission by the appropriate Government'*.

Similar views were expressed by the Supreme Court in *Swamy Shraddananda v. State of Karnataka*,[35] and *Sangeet & Anr. vs. State of Haryana.*[36] Reference may also be made to the decisions of the Court in *Subash Chander v. Krishan Lal,*[37] *Shri Bhagwan v. State of Rajasthan,*[38] which too reiterate the legal position settled by the earlier mentioned decisions of the Court. A recent Constitution Bench decision of Supreme Court in *Union of India v. Sriharan,* [39] also affirmed with the stamp of approval on the same interpretation.[40] From the previously mentioned decisions

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[30] (1976) 3 SCC 470
[31] (1991) 3 SCC 498
[32] (2001) 4 SCC 458
[33] (2001) 6 SCC 296
[34] (2005) 7 SCC 417
[35] (2008) 13 SCC 767
[36] (2013) 2 SCC 452
[37] (2001) 4 SCC 458
[38] (2001) 6 SCC 296
[39] 2015 (13) SCALE 165
[40] See *Dalbir Singh v. State of Punjab* (1979) 3 SCC 745, *Ashok Kumar v. Union of India* [(1991) 3 SCC 498, *Maru Ram v. Union of India* (1981) 1 SCC 107 (Constitution Bench), *Naib Singh v. State of Punjab* (1983) 2 SCC 454, *Laxman Naskar v. State of W.B.* (2000) 7 SCC 626, *Kamalanantha v. State of T.N.* (2005) 5 SCC 194, *Mohd. Munna v. Union of India*[(2005) 7 SCC 417, *Pious v. State of Kerala* (2007) 8 SCC 312, Life Convict *Bangal alias Khoka alias PrasantaSen v. B.K. Srivastava and others*, (2013) 3 SCC 425, *Kishori Lal v. Emperor* (AIR) 32 1945 PC 64, *Shankar Kisanrao Khade v. State of Maharashtra* (2013) 5 SCC 546, *Zahid Hussein v. State of W.B.* (2001) 3 SCC 750

rendered by the Court, it is clear that a sentence of imprisonment for life means a sentence for entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence under the provisions of the Criminal Procedure Code.

The controversy does not end here. It rather gives birth to a yet another difficult question. The settled position that life imprisonment means life in jail till last breath unless remitted earlier, becomes complicated if it is remitted by the executive arbitrarily. Executive may indiscriminately remit the sentence, and it is judicially noted, which exercise may futile the judicial sentencing where the judiciary sentences a person to life imprisonment, instead of death, under the sincere impression that such person would serve his life in jail. The judiciary, of late, to check this arbitrary exercise of remission and to strike just desert with criminals, has started putting judicial breaks over the exercise of remission powers by the executive by prescribing the length of life imprisonment say 20/21/25/30/35 years before which no remission shall be granted. The executive has not welcomed this type of judicial innovation since it touches upon their core premise of exercise of powers. It is this dichotomy between legislature and executive that has opened a new era in sentencing policy in India. This dichotomy may be noted later in 5.6 of this chapter, before which let us classify the life imprisonment and theorize it for present discussion as under.

5.5 Types of Life Imprisonment

For the purposes of this academic exercise, life imprisonments can be classified as Legislative Life Imprisonments and life Imprisonment from the point of Executive. By legislative life imprisonment what we mean is – the legislature, in the forms of enactments - fixes life imprisonment of various natures in the statute book. Such life imprisonments can be further classified in to three categories *namely*, life imprisonment as standalone punishment[41]*secondly* life imprisonments with death penalty as alternative[42] and *thirdly* life imprisonment defined to mean imprisonment

[41] Sections 226 (unlawful return from transportation) and 311 (for being a thug) of Indian penal code, 1860 provide for life imprisonment as standalone punishments. Life imprisonment is alternated with lesser imprisonment in the sections like 313,314,394,409,412,413 and 460 of the Indian Penal Code, 1860

[42] For all offences punishable with death penalty under IPC, the life imprisonment as alternative is provided. There are no mandatory death penalties under IPC in view of being struck as unconstitutional or read down to life imprisonment. See Chapter IV "A Critical Analysis of Capital Sentencing: Riddles, Riders and Resolutions" for detailed discussion on this issue.

for the remainder of that person's natural life.[43] This third category is new feature introduced since 2013.[44]

Standalone life imprisonments are those imprisonments where death penalty is not alternatively sanctioned. In such classification, life imprisonment itself is the highest punishment.[45] As far as executive clemency is concerned, criminals sentenced with life imprisonment simpliciter may have the benefit of sections 432, 433 and of Code of Criminal Procedure, 1973 and get released from the jail by serving any number of years say 5 to 9 years. The executive clemency is exercised in an unfettered way in such cases.

Life imprisonments with death penalty as alternative, on the other hand are different life imprisonments. In this category, the convict has to serve at least 14 years of actual term before being released on the basis of 'good times' earned.[46] Sentences of convict cannot be reduced to a period of less than 14 years notwithstanding the remission period earned during such time.[47] Only constitutional powers under Articles 72 and 161 can be invoked to release the convict before 14 years of actual term. [48]

Of late, the legislature is coming with determinate life sentence. The Criminal Law Amendment Act, 2013 fixes the meaning of life imprisonment to be for whole reminder of that person's life. This life imprisonment comes in between the minimum

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[43] See sections 376A and 376D of Indian penal code, 1860

[44] In *State of Rajasthan v. Jamil Khan*, (2013) 10 SCC 721 the bench headed by justice C.K. Prasad and Justice Kurian Joseph observed

> "[w]e are of the view that it will do well in case a proper amendment under Section 53 of IPC is provided, introducing one more category of punishment - life imprisonment without commutation or remission. Dr. Justice V. S. Malimath in the Report on "Committee of Reforms of Criminal Justice System", submitted in 2003, had made such a suggestion but so far no serious steps have been taken in that regard. There could be a provision for imprisonment till death without remission or commutation."

Justice Verma Committee on "*Amendment to Criminal Law*", 2013 did not subscribe to death penalty for rapes but also disapproved life imprisonment as is understood in its popular parlance. It therefore recommended at p 239 that "a legislative clarification that life imprisonment must always mean imprisonment for 'the entire natural life of the convict'."

[45] See Section 313 IPC. Also see Section 14 of POSCO Act, 2012 which reads

> "14. Punishment for using child for pornographic purposes
> (3) If the person using the child for pornographic purposes commits an offence referred to in section 5, by directly participating in pornographic acts, he shall be punished with rigorous imprisonment for life and shall also be liable to fine."

[46] The amount of time deducted from time to be served in prison on a given sentence is known as 'good time'. In India it is known as remission. Remissions are of two types: routine and statutory. Routine remissions are earned by the prisoners by their labour and behaviors whereas statutory remissions are granted by the state under criminal and constitutional laws. See Chapter VI - Clemency, Concessionary and Short Sentencing: Executive Interference in Judicial Process; Two Sides of the Same Coin or Tug of War Between? For detailed discussion on this issue.

[47] See section 433A of Code of Criminal Procedure, 1973

[48] See *Maru Ram etc. v. Union of India* &Another (1981) 1 SCC 107

20 years rigorous imprisonment and death penalty. In other words, in sections 376A and 376 D the punishments with 20 years imprisonment as starting point and death penalty as highest with life imprisonment as middle punishment is provided for. Given the fact that jail manuals do not provide for remissions for offences of sexual nature, 20 years imprisonment would seem sufficient since ordinarily even life imprisonment is calculated as actual imprisonment of 20 years where after such convict is eligible to present his case before the remission board.

In *Kamlesh @Ghanti v. state of M.P*, (2016)[49] the Supreme Court exercised this power for the first time. In the present Case, the Supreme Court has commuted the death penalty imposed by the Trial Court and the High Court on *Kamlesh @Ghanti* who was found guilty of raping and murdering a seven year old girl. Three Judge Bench comprising Justice Ranjan Gogoi, Justice Prafulla C. Pant and Justice Uday Umesh Lalit upheld the conviction of the accused under Section 376A, 302, 201, 363 and 366A of the Indian Penal Code.[50] The court observed

> "[i]n the totality of the facts of the case and for the reasons stated above the present is not a case where the imposition of the extreme penalty would be justified. We have noticed that the legislature by incorporating Section 376A by the Criminal Law (Amendment) Act,2013 has provided for rigorous imprisonment of not less than 20 years which may extend to imprisonment for life which shall mean imprisonment for the remainder of that person's natural life or with death as alternative punishments for the offence under Section 376A. As the accused-appellant has been found guilty of commission of said offence along with the offence 5under Section 302 IPC we direct that the accused appellant shall suffer rigorous imprisonment for the remainder of the natural life of the accused-appellant. The sentence of death is accordingly commuted."

'Life Imprisonment from the point of Executive' on the other hand, means that category of imprisonment, where the executive by their clemency jurisdiction, commute the death sentence into life imprisonment. Section 432 and 433 of CrPC, section 55 of the IPC, Article 72 and 161 of the constitution, confer powers on the appropriate government and constitutional functionaries to commute and remit the sentence judicially handed down.[51]Life imprisonment form this angle is of two types. Life imprisonments which can be remitted even before 14 years of actual

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[49]*Available at*http://barandbench.com/wp-content/uploads/2016/10/Kamlesh-@-Ghanti.pdf

[50] See http://www.livelaw.in/four-death-row-convicts-escape-gallows-just-10-days-sc-commutes-death-another-rape-murder-case/

[51] See Bikram Jeet Batra, "Court of Last Resort A Study of Constitutional Clemency for Capital Crimes In India" WORKING PAPER SERIES Centre for the Study of Law and Governance Jawaharlal Nehru University, New Delhi, 2009, *Available at* http://www.jnu.ac.in/ CSLG/working Paper /11-Court%20(Bikram).pdf, last seen on 23 December 2016

incarceration and life imprisonment which cannot be remitted unless mandatory 14 years of incarceration is suffered. Constitutional remissions, however, are not bound by this classification.[52]

5.6 Judicial Codification of Life Imprisonment-Towards Determinate Sentencing

The aforementioned classification of life imprisonment in to two categories, i.e., remittable before 14 years and remittable after 14 years has lead to further complication in the context of heinous crimes. A particular crime may qualify for death sentence, yet the progressive penological jurisprudence, March of human rights jurisprudence, conviction based on circumstantial evidence[53] inadequate legal assistance at the trial or appeal[54]doubtful deterrent value of death penalty [55]may convince the court that the death be avoided and next highest punishment be imposed. Here comes the relevancy of life imprisonment. Instead of death if the courts impose life imprisonment as substitute to death, which may be remittable after 14 years, the very purpose of sentencing policy is defeated since the offender would escape proportional punishment.[56]

Life imprisonment may fail the retributive theory of punishment, if the grace of executive were to fall on convicts. In other words, if the life imprisonment which is intended to be jail till life is remitted by the executive, after 14 years of minimum incarceration, the convicts would enjoy double lottery, i.e., he would escape from the gallows and *secondly* he would be set free after 14 years. Precisely this was the question that hunted the judiciary since the time of *Jagmohan case*.[57] Judicial codification, for the present purpose can be discussed in four phases as under.

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[52] See *Maru Ram etc. v. Union of India & Another*(1981) 1 SCC 107)
[53] see *Ashok Debbarma v. State of Tripura* (2014) 4 SCC 747
[54] Right to get proper and competent assistance is the facet of fair trial. See *M.H. Hoskot v. State of Maharashtra* (1978) 3 SCC 544, *Ranjan Dwivedi v. Union of India* (1983) 3 SCC 307, *State of Haryana v. Darshana Devi* (1979) 2 SCC 236, *HussainaraKhatoon (4) v. State of Bihar* (1980) 1 SCC 98
[55] See *Ravindra Trimbak Chouthmal v. State of Maharashtra* (1996) 4 SCC 148
[56] see *Gopal Singh v. State of Uttarakhand* (2013) 7 SCC 545, *Siddarama v. State of Karnataka* (2006) 10 SCC 673, *Ramashraya Chakravarti v. State of Madhya Pradesh* (1976) 1 SCC 281, *State of Karnataka v. Puttaraja* (2004) 1 SCC 475, *Union of India v. Kuldeep* Singh (2004) 2 SCC 590, *Shailesh Jasvantbhai v. State of Gujarat* (2006) 2 SCC 359, *State of Madhya Pradesh v. Babulal* (2008) 1 SCC 234, *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009) 6 SCC 498), State of *Madhya Pradesh v. Ghanshyam Singh* (2003) 8 SCC 13
[57] *Jagmohan Singh v. State of U.P* (1973) 1 SCC 20

5.6.1. Phase I- *Jagamohan* Ratio

The predicament of "no death but no normal life imprisonment also" prompted the courts to craft a judicial life imprisonment which would substitute the death penalty in real sense. The fact that executive remission would cut short the rigour infused in the life imprisonment by the judiciary was noted by the judiciary way back in 1973. In *Jagamohan* [58] it was observed [59] thus:

> "In the context of our Criminal Law which punishes murder, one cannot ignore the fact that life imprisonment works out in most cases to a dozen years of imprisonment and it may be seriously questioned whether that sole alternative will be an adequate substitute for the death penalty..." [60]

Five years after the pronouncement of *Jagmohan Singh*, Section 433A was inserted by the amendment Act of 1978 with effect from 18December 1978, imposing a restriction on the powers of remission or commutation in certain cases. Section 433A of the Cr.P.C. reads as:

> "433A. Restriction on powers of remission or Commutation in certain cases.- Notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment."

Thus the apprehension of judiciary in *Jagmohan Singh* and legislative response by way of 1978 amendment may be considered as first phase towards the codification of life imprisonment.

5.6.2. Phase II - *Dalbir Singh v. State of Punjab*

The second phase of codification of life imprisonment appeared in 1979 when the judgment of Dalbir *Singh &Ors v. State of Punjab*[61]was delivered. Though the court was not convinced about the death penalty in the case in question,[62] the court was reluctant about life imprisonment also for want of proportional sentence. The court was aware of the reluctance of court to declare death penalty unconstitutional

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[58] The *Jagamohan* Ratio came in the context of capital sentence in question. The judgment was analyzing the viability of death penalty in terms of constitutionality and appropriateness.

[59] The constitutional Bench consisted of JJ. Sikri, S.M., Ray, A.N., Dua, I.D., Palekar, D.G., Beg, M. Hameedullah

[60] *Jagmohan Singh v. State of U.P* (1973) 1 SCC 20 p 9

[61] *Dalbir Singh &Ors v. State of Punjab* 1979 AIR 1384

[62] The sentences of death in the present case was reduced to life imprisonment.(Per JJ. Krishnaiyer, V.R. Desai, D.A. majority judgment) However, justice Sen, A.P. favored death penalty in this case in his minority opinion.

for want of better substitute.[63] It was in this predicament that the court ruled

> " [w]e may add a footnote to the ruling in Rajendra Prasad's case. Taking the cue from the English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the man's life, but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder. "

This observation played a role of landmark decision in the codification of life imprisonment. Taking clue from this judgment courts in many cases[64]exercised the power to convict the criminals with the condition that the sentence of imprisonment shall last as long as life lasts where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large. Though courts started awarding life imprisonments without remission or definite period of 20 years or so were fixed, the courts confined this approach to limited cases only. The courts nowhere openly advocated this type of structured sentencing as substitute for death penalty.

5.6.3. Phase III- *Swamy Shradhanada* Ratio

The real dynamics in the structured life sentencing came with the pronouncement of *Swamy Shraddananda (2) v. State of Karnataka.*[65]In this case[66] the

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[63]In *Jagmohan Singh v. The State of U.* P 1973 AIR 947, a constitutional bench (Sikri, S.M., Ray, A.N., Dua, I.D., Palekar, D.G., Beg, M. Hameedullah) was seized with the constitutional validity of death penalty. The court held death penalty to be constitutional. However, concerning life imprisonment it made a interesting remark as under:

> " In the context of our Criminal law, which punishes murder, one cannot ignore the fact that life imprisonment works out in most cases to a dozen years of imprisonment and it may be seriously questioned whether that sole alternative will be an adequate substitute for the death penalty. Proposals for its abolition have not been accepted by Parliament. In this state of affairs, it cannot be said that capital punishment, as such, is either unreasonable or not in public interest."

[64]*Subhash Chander v. Krishan La and Ors.* 2001Cri.LJ 1825; *M.P. v. Ratan Singh*1976Cri.LJ 1192; *Shri Bhagwan v. State of Rajasthan* 2001Cri.LJ 2925; *Prakash Dhawal Khairnar (Patil) v. State of Maharashtra* 2002 Cri. LJ 928; *Ram Anup Singh and Ors. v. State of Bihar* 2002 Cri.LJ 3927; *JayawantDattatrayaSuryarao v. State of Maharashtra* 2002 Cri.LJ 226; *Nazir Khan and Ors. v. State of Delhi*2003 Cri. LJ 5021

[65] (2008) 13 SCC 767

[66] For the offence of murder the conviction of *Swamy Shraddananda* under Section 302 IPC resulted in the sentence of death by the Sessions Judge as confirmed by the Karnataka High Court. On appeal to the Supreme Court, a bench of two judges earlier heard the Appeal. Both the hon'ble judges unanimously upheld the appellant's conviction for the two offences but they were unable to agree to the punishment meted out to the appellant. S. B. Sinha J. felt that in the facts and circumstances of the case the punishment of life imprisonment, rather than death would serve the ends of justice. He, however, made it clear that the appellant would not be released from prison till the end of his life. M. Katju J., on the other hand, took the view that the appellant deserved nothing but death. The matter was consequently placed before the three Judge Bench which judgment is being referred to herein.

court was seized with a question of death or life! The constitutional bench[67] extensively discussed the law, posed the question to itself and answered accordingly

Precise question

> "…a verdict of imprisonment for life is likely to give rise to certain questions. (Life after all is full of questions!). How would the sentence of imprisonment for life work out in actuality? The Court may feel that the punishment more just and proper, in the facts of the case, would be imprisonment for life with life given its normal meaning and as defined in Section 45 of the Indian Penal Code. 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, literally for life or in any case for a period far in excess of fourteen years. 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, twenty five or even thirty years. But once the judgment is signed and pronounced, the execution of the sentence passes into the hands of the executive and is governed by different provisions of law. What is the surety that the sentence awarded to the convict after painstaking and anxious deliberation would be carried out in actuality? The sentence of imprisonment for life, literally, shall not by application of different kinds of remission, turn out to be the ordinary run of the mill life term that works out to no more than fourteen years. How can the sentence of imprisonment for life (till its full natural span) given to a convict as a *substitute for the death sentence* be viewed differently and segregated from the ordinary life imprisonment given as the sentence of first choice? These are the questions that arise for consideration in this case."

The court began to answer this question with the proposition that *"[w]e think that it is time that the course suggested in Dalbir Singh* [68] *should receive a formal recognition by the Court."*

Justice Aftab Alam was seized with two predicaments namely-

1. A case may fall just falls short of the rarest of the rare category escaping death, however, not short enough to qualify for normal imprisonment with remission.[69]

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[67] B.N. Agarwal, G.S. Singhvi and Aftab Alam, JJ. Justice Aftab Alam wrote the judgment for the Bench.

[68] 1979 AIR 1384

[69] The court observed

> "The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to Supreme Court carrying a death sentence awarded by the trial court and confirmed by the High Court, the Supreme Court may find ... 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."

2. When the court sentences a convict for life imprisonment with a sincere belief that such convict would serve his term till his life, what is the surety that the sentence awarded to the convict after painstaking and anxious deliberation would be carried out in actuality?[70]

To the answer the question of 14 years life imprisonment being grossly disproportionate, the court answered that the solution lies in breaking the standardization and observed that

> "[t]he answer lies in breaking this standardization that, in practice, renders the sentence of life imprisonment equal to imprisonment for a period of no more than 14 years; in making it clear that the sentence of life imprisonment when awarded as a substitute for death penalty would be carried out strictly as directed by the Court. This Court, therefore, must lay down a good and sound legal basis for putting the punishment of imprisonment for life, awarded as substitute for death penalty, beyond any remission and to be carried out as directed by the Court so that it may be followed, in appropriate cases as a uniform policy not only by this Court but also by the High Courts, being the superior Courts in their respective States." [71]

After noting the various case laws on the issue,[72] the court noted

> 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.[73]
> "Further, the formalization of a special category of sentence, though for an

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[70] The court further noted

> "[t]he 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, literally for life or in any case for a period far in excess of fourteen years. 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, twenty five or even thirty years. But once the judgment is signed and pronounced, the execution of the sentence passes into the hands of the executive and is governed by different provisions of law. What is the surety that the sentence awarded to the convict after painstaking and anxious deliberation would be carried out in actuality? The sentence of imprisonment for life, literally, shall not by application of different kinds of remission, turn out to be the ordinary run of the mill life term that works out to no more than fourteen years. How can the sentence of imprisonment for life (till its full natural span) given to a convict as a substitute for the death sentence be viewed differently and segregated from the ordinary life imprisonment given as the sentence of first choice?" [70]

[71] *Swamy Shraddananda@Murali v. State of Karnataka* (2008) 13 SCC 767 Para 38

[72] *Dalbir Singh and Ors. v. State of Punjab* (1979) 3 SCC 745, *Bhagirath v. Delhi Administration* (1985) 2 SCC 580, *Prakash Dhawal Khairnar (Patil) v. State of Maharashtra* - (2002) 2 SCC 35, *Ram Anup Singh and Ors. v. State of Bihar* (2002) 6 SCC 686, *Jayawant Dattatraya Suryarao v. State of Maharashtra* (2001) 10 SCC 109, *Nazir Khan and others v. State of Delhi* - (2003) 8 SCC 461, *Satpal alias Sadhu v. State of Haryana and Ors.* (1992) 4 SCC 172. *Shri Bhagavan v. State of Rajasthan* (2001) 6 SCC 296, *Mohd. Munna v. Union of India and Ors.* (2005) 7 SCC 417

[73] *Swamy Shraddananda@Murali v. State of Karnataka* (2008) 13 SCC 767 Para 66

> 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*[74] besides being in accord with the modern trends in penology."[75]

This ruling finally sealed the structured life sentencing policy in India. After this pronouncement, apex courts have profusely used the ratio of this case and awarded life imprisonment with definite periods like 20,[76] 21,[77] 30,[78] and 35[79] years!

5.6.4. Phase IV- *Union of India v. Sriharan @ Murugan & Ors.*[80] -Constitutional Bench (2015)[81]

In *Union of India v. V. Sriharan @ Murugan & Ors.*,(2014)[82]learned Judges thought it fit to refer seven questions forconsideration by the Constitution Bench. Of those seven questions, the question which was asked and is pertinent for the present discussion is

> "52.1 Whether imprisonment for life in terms of Section 53read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of *Swamy Shraddananda(2),* 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 or imprisonment for a term in excess of fourteen years and to put that category beyond application ofremission?"

The court very clearly concurred with *Swamy Shraddananda (2)* ratio and held that

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[74] *Bachan Singh v. State of Punjab* (1980) 2 SCC 684

[75] *Swamy Shraddananda@Murali v. State of Karnataka* (2008) 13 SCC 767, Para 67

[76]In the following judgments the court directed that the appellant shall not be released from the prison unless he had served out at least 20 years of imprisonment including the period already undergone by the appellant.
Shri Bhagwan v. State of Rajasthan (2001) 6 SCC 296, *Ram Anup Singh and Ors. v. State of Bihar*(2002) 6 SCC 686. *Nazir Khan and Ors. v. State of Delhi* (2003) 8 SCC 461. *Ramraj v. State of Chhattisgarh* (2010) 1 SCC 573, *State of Maharashtra v.Sandeep @ Babloo Prakash Khairnar (Patil)* (2002) 2 SCC 35

[77]*Ramnaresh v. State of Chhattisgarh* (2012) 4 SCC 289; *Brajendra singh v. State of M.P*(2012) 4 SCC 257

[78]In the following judgments the court directed that the appellant shall not be released from the prison unless she had served out at least 30 years of imprisonment *Neel Kumar @ Anil Kumar v. The State of Haryana* (2012) 5 SCC 766. *Sandeep v. State of UP* (2012) 6 SCC 107.*Gurvail Singh @ Gala and Anr. v. State of Punjab* (2013) 2 SCC 713

[79]*HaruGhosh v. State of West Bengal*(2009) 15 SCC 551; *Raj Kumar v. State*2014 (2) JCC 1217

[80] (2014) 4 SCC 242

[81] Bench consisted of CJI H.L. Dattu, Pinaki Chandra Ghose, Fakkir Mohamed Ibrahim Kalifulla, Abhay Manohar Sapre, Uday Umesh Lalit. J. Fakkir Mohamed Ibrahim Kalifulla wrote the judgment on behalf of himself and JJ. H.L. Dattu, Pinaki Chandra Ghose. Abhay Manohar Sapre, J. and J. Uday Umesh Lalit differed from the majority opinion. Justice Uday Umesh Lalit wrote dissenting judgment to which Abhay Manohar Sapre, J. concurred.

[82]2014 (11) SCC 1

> "[w]e hold that the ratio laid down in *Swamy Shraddananda* (supra) that a special category of sentence; instead of death can be substituted by the punishment of imprisonment for life or for a term exceeding 14 years and put that category beyond application of remission is well-founded and we answer the said question in the affirmative."

The court surveyed the entire jurisprudence that was building before and after *Swamy Shraddananda (2)* and answered many questions as under.

5.6.4.1. *SwamyShraddananda* (2) Ratio doubted

Though *Swamy Shraddananda (2)* settled the matter of determinate life imprisonment, subsequent judgment doubted this ratio though the benches were smaller in nature. There was protest from within the court to this judgment, which curtailed the remission powers of the government. In *Sangeet & Anr v. State of Haryana*[83] the court observed[84]

> "58. A reading of some recent decisions delivered by this Court seems to suggest that the remission power of the appropriate Government has effectively been nullified by awarding sentences of 20 years, 25 years and in some cases without any remission. Is this permissible? Can this Court (or any Court for that matter) restrain the appropriate Government from granting remission of a sentence to a convict? What this Court has done in *Swamy Shraddananda* and several other cases, by giving a sentence in a capital offence of 20 years or 30 years imprisonment without remission, is to effectively injunct[sic] the appropriate Government from exercising its power of remission for the specified period. In our opinion, this issue needs further and greater discussion, but as at present advised, we are of the opinion that this is not permissible. The appropriate Government cannot be told that it is prohibited from granting remission of a sentence. Similarly, a convict cannot be told that he cannot apply for a remission in his sentence, whatever the reason."

5.6.4.2. *Swamy Shraddananda* ratio affirmed

In order to have unanimity in sentencing policy in this area the matter was ultimately referred to full bench of the Supreme Court. The court made extensive references to earlier cases and affirmed the ratio of *Swamy Shraddananda (2).* While affirming the *Swamy Shraddananda (2)* the court observed

> "[i]n such context when we consider the views expressed in *Shraddananda (supra)*in paragraphs 91 and 92, the same is fully justified and needs to be upheld. By stating so, we do not find any violation of the statutory provisions prescribing the extent of punishment provided in the Penal Code. It cannot also be said that by stating so, the Court has carved out a new punishment. What all it seeks to declare by stating so was that within the prescribed limit

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[83]2013 (2) SCC 452

[84] The Bench consisted of K.S. Radhakrishnan, Madan B. Lokur JJ. Judgment was written by Madan B. Lokur J. for the bench.

> of the punishment of life imprisonment, having regard to the nature of offence committed by imposing the life imprisonment for a specified period would be proportionate to the crime as well as the interest of the victim, whose interest is also to be taken care of by the Court, when considering the nature of punishment to be imposed."

5.6.4.3. Ray of hope argument – overruled

It was argued before the court that declining the convict of his case being considered for remission even after sufficient incarceration amounts to negating the ray of hope. Rejecting this argument the court observed:

> **"** 88**.** As far as the argument based on ray of hope is concerned, it must be stated that however much forceful, the contention may be, as was argued by Mr. Dwivedi, the learned Senior Counsel appearing for the State, it must be stated that such ray of hope was much more for the victims who were done to death and whose dependents were to suffer the aftermath with no solace left. Therefore, when the dreams of such victims in whatever manner and extent it was planned, with reference to oneself, his or her dependents and everyone surrounding him was demolished in an unmindful and in some cases in a diabolic manner in total violation of the Rule of Law which is prevailing in an organized society, they cannot be heard to say only their rays of hope should prevail and kept intact. For instance, in the case relating to the murder of the former Prime Minister, in whom the people of this country reposed great faith and confidence when he was entrusted with such great responsible office in the fond hope that he will do his best to develop this country in all trusts, all the hope of the entire people of this country was shattered by a planned murder … Therefore, we find no scope to apply the concept of ray of hope to come for the rescue of such hardened, heartless offenders, which if considered in their favour will only result in misplaced sympathy and again will be not in the interest of the society. Therefore, we reject the said argument outright."

5.6.4.4. Courts empowered to structure life sentences

It was even tried to be argued before the court that, the legislature does not vest the judiciary with the discretion to fix the sentence with term imprisonment. Courts have been conceded with the power to choose between life and death, which power does not include fixing of term life imprisonment. In response to this, the court observed:

> "97.While that be so it cannot also be lost sight of that it will be next to impossible for even the law makers to think of or prescribe in exactitude all kinds of such criminal conduct to fit into any appropriate pigeon hole for structured punishments to run in between the minimum and maximum period of imprisonment. Therefore, the law makers thought it fit to prescribe the minimum and the maximum sentence to be imposed for such diabolic nature of crimes and leave it for the adjudication authorities, namely, the Institution of Judiciary who is fully and appropriately equipped with the necessary knowledge of law, experience, talent and infrastructure to study the detailed parts of each such case based on the legally acceptable material evidence, apply the legal principles and the law on the subject, apart from the guidance

> it gets from the jurists and judicial pronouncements revealed earlier, to determine from the nature of such grave offences found proved and depending upon the facts noted what kind of punishment within the prescribed limits under the relevant provision would appropriately fit in.In other words, while the maximum extent of punishment of either death or life imprisonment is provided for under the relevant provisions noted above, it will be for the Courts to decide if in its conclusion, the imposition of death may not be warranted, what should be the number of years of imprisonment that would be judiciously and judicially more appropriate to keep the person under incarceration, by taking into account, apart from the crime itself, from the angle of the commission of such crime or crimes, the interest of the society at large or all other relevant factors which cannot be put in any straitjacket formulae."

5.6.4.5. Choice of structured life imprisonment – inherent in IPC

5.6.4.6. *Sangeet and Anr. v. State of Haryana*- overruled

By the above observation, the court consequently overruled *Sangeet and Anr.*[85] which doubted the ratio of *Swamy Shraddananda*. The court ruled:

> " 105. Viewed in that respect, we state that the ratio laid down in *Swamy Shraddananda* (supra) that a special category of sentence; instead of Death; for a term exceeding 14 years and put that category beyond application of remission is well founded and we answer the said question in the affirmative. We are, therefore, not in agreement with the opinion expressed by this Court in Sangeet and Anr. v. State of Haryana – 2013 (2) SCC 452 that the deprival of remission power of the Appropriate Government by awarding sentences of 20 or 25 years or without any remission as not permissible is not in consonance with the law and we specifically overrule the same."

Thus, the complex question of whether courts can structure life sentence was finally put to rest by constitutional benches in *Swamy Shraddananda (2008)* and *V. Sriharan @ Murugan&Ors* (2015). It may be noted that subsequently after the *SwamyShraddananda (2008)* case, courts have profusely made use of third option in sentencing convicts with determinate life sentences. It can, nonetheless, be said that the in the above cases constitutional court has put the edifice of the new structured determinate life imprisonment in the sentencing policy of India.

5.7. Judicial Codification Of Life Imprisonment- Illustrations

Though some attempts were being made by the judiciary before *Swamy Shraddananda* case to structure life imprisonment with minimum terms,[86] it's only after this case that the judiciary gained momentum. Some of the cases decided by Supreme Court may be noted by way of illustration as to how courts have sentenced

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[85] 2013 (2) SCC 452

[86] High court judgments from remsion phd

the convict with structured life imprisonment. Either the courts have gone for 'no remission rule' or have subscribed to 'remission after judicial limits'.

5.7.1. Rest of life without remission

In the following cases[87] the courts have ordered that, no remission shall be granted for the rest of life.

1. *Sebastian @ Chevithiyan v. State of Kerala*[88] Rest of life for rape and murder of two year old minor.[89]
2. *Subhash Chandra v. Krishan Lal*: [90] Rest of life without remission for gunning down entire family due to enmity.[91]
3. *Jayawant Dattatraya Suryarao v. State of Maharashtra*:[92] In the case of terrorist convict committing brutal murder of two police constables who were on duty to guard person who they wanted to kill, held not entitled to any commutation or premature release.
4. *Reddy Sampath Kumar v. State of Andhra Pradesh,*[93] it was directed that the appellant shall not get the benefit of any remission either by the State or by the Government of India on any auspicious occasion.

5.7.2. Term sentences

Apart from sentencing for life as mentioned above with a rider that no release shall take place under ordinary laws, except in the exercise of constitutional clemency, courts have also tried with fixed numbers of minimum imprisonment as life imprisonment as under:

20 years/21 years/25 years

In the following cases the courts have ordered that, remission shall be granted only after certain time as fixed by the court[94]

1. *Dharam Deo Yadav v. State of Uttar Pradesh*[95] : Imprisonment of 20 years

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[87] Praveen Patil, "Judicial Codification of Life Imprisonment: A New Insertion in Sentencing Policy; A Critical note on *Swamy Shraddananda (2) v. State of Karnataka* And Its Consequential Effects*" KLE Law Journal,* Issue No 2, 2015, pp108-116, at 112

[88] (2010) 1 SCC 58

[89] The appellant had raped and murdered a two-year-old child after kidnapping her from her house. The appellant was 24 years old at that time. It was held that this was not a "rarest of rare" case and the appellant was sentenced to imprisonment for the rest of his life.

[90] (2001) 4 SCC 458

[91] The court took the apprehension of the imminent danger expressed by the witness and ordered for no remission.

[92] (2001) 10 SCC 109

[93] JT (2005) 8 SC 294

[94] *Supra* note 87 at p 113

[95] (2014) 5 SCC 509

with no remission *over and above the period already undergone* for the murder of a foreign tourist lady by the appellant who was a tourist guide.[96]

2. *Birju v. State of M.P.*[97] : 20 years imprisonment, *over and above the period already undergone* without remission for killing a child.[98]
3. *Ashok Debbarma v. State of Tripura*[99] : 20 years imprisonment without remission for setting fire to 20 houses belonging to linguistic minority leaving 15 dead.
4. *DilipPremnarayan Tiwari v. State of Maharashtra*[100] : Sentence of 20 and 25 years rigorous imprisonment respectively in the case of honour killing of husband of young sister and his family members over inter caste marriage of younger sister.[101]
5. *Ramnaresh v. State of Chhattisgarh*[102] : Imprisonment of 21 years for gang rape of his sister-in-law and murder.[103]
6. *Brajendrasingh v. State of M.P.*[104] : Sentence of 21 years for killing three young children and wife suspecting her illicit relations.
7. *Ramraj v. State of Chhattisgarh*[105] : life Imprisonment with minimum 20 years including remission for killing wife with stick.
8. *State v. Ajit Seth*[106] : life imprisonment with minimum 20 years prison term for burning of two children.
9. *Reddy Sampath Kumar v. State of Andhra Pradesh*[107] : life imprisonment of 20 years terms of Section 57 IPC without any remission.[108]

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[96] The tourist guide was convicted of murder by strangulation of a young tourist of a foreign country. The convict had no previous criminal record and the case was based on circumstantial evidence.
[97] (2014) 3 SCC 421 : 2014 (2) SCALE 293
[98] Motive was for getting money from child's grandfather for consuming liquor. Accused was involved in 24 criminal cases.
[99] (2014) 4 SCC 747 : 2014 (3) SCALE 344
[100] (2010) 1 SCC 775
[101] Over the inter- caste marriage of the sister of one of the appellants three men including the girl's brother attacked the girl's husband and his family and killed four people including the husband. The Supreme Court considered the young age of the brother as a mitigating circumstance and I sentenced him to imprisonment for 25 years.
[102] (2012) 4 SCC 257
[103]The appellant (with his friends) gang raped his sister-in-law and murdered her. The young age (being between 21 to 30 years old), absence of prior criminal record and possibility of reformation weighted in favour of accused.
[104] (2012) 4 SCC 289
[105] (2010) 1 SCC 573
[106] (2010) 9 SCC 42
[107] JT 2005 (8) SC 294
[108] With the intention to grab property, father-in-law, mother-in-law and their three minor children were poisoned and killed.

10. *Nazir Khan v. State of Delhi*[109] : life imprisonment with minimum 20 years without remission *over and above the sentence already undergone*.[110]
11. *Prakash Dhawal Khairnar v. State*[111] : life imprisonment with minimum 20 years for annihilating entire family of his brother and murder of his own mother.
12. *Ram Anup Singh v. State*[112] : rigorous imprisonment for life with the condition that they shall not be released before completing an actual term of 20 years *including the period undergone by them.*
13. *Shri Bhagwan v. State*[113] : life imprisonment with minimum of 20 years for murder of five persons of a family for robbery.

30 years/35 years

In the following cases the courts have ordered that, remission shall be granted only after minimum incarceration of 30/35 years[114]

1. *Amar Singh Yadav v. State of U.P.*[115] : life Imprisonment with minimum 30 years without remission for burning wife and four children who died subsequently.
2. *Alber Oraon v. State of Jharkhand*[116] : Sentence of 30 years imprisonment without remission in *addition to sentence already undergone* for murder of woman and two children on property/land dispute.
3. *Md. Jamuluddin Nasir v. State of West Bengal*[117] : Appellant was awarded 30 years without remission for attack at American Centre, Calcutta.[118]
4. *Rajkumar v. State*[119] : life imprisonment of 35 years without remission for rape and murder of a 14 year old girl.
5. *Gurvail Singh @ Gala v. State of Punjab*[120]: Sentence of 30 years without

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[109] (2003) 8 SCC 461 : AIR 2003 SC 4427
[110] The appellants were sentenced to death for offences under section 364-A read with Section 120-B IPC and TADA. The Supreme Court however, directed for their incarceration for a period of 20 years with no remission from the term of 20 years.
[111] (2002) 2 SCC 35
[112] (2002) 6 SCC 686
[113] (2201) 6 SCC 296
[114] *Supra* note 87 at p 115
[115] 2014 (8) SCALE 113
[116] 2014 (58) SCALE 525
[117] 2014 (7) SCALE 571
[118] The Supreme Court has given a term imprisonment of 30 years to one convict and of imprisonment till the reminder of his life to the other.
[119] 2014 (2) JCC 1217
[120] (2013) 10 SCC 631 (2013)

remission for murder of four persons.[121]

6. *Neel Kumar v. State of Haryana*[122] : Prison term of 30 years without remission for rape and murder of a four year old daughter by father.[123]
7. *Sandeep v. State of U.P.*[124] : Sentence of 30 years without remission for murder of pregnant girlfriend and unborn child.
8. *Haru Ghosh v. State of West Bengal*[125]: Imprisonment of 35 years without remission for double murder and attempt to murder.[126]
9. *Anil Anthony v. State of Maharashtra*[127] : Sentence of 30 years without remission in *addition to sentence already undergone* for strangulation of minor boy aged 10 years who was subjected to carnal intercourse by the accused.
10. In*The State of West Bengal v. Lakhikanta Adhikary*[128] the Calcutta High Court awarded life imprisonment with minimum 30 years without remission for killing his 26 year old wife and 7 year old son.
11. In *Ganesh S/o Maruti Bhutkar v. The state of Maharashtra* [129] the Bombay high court commuted the death penalty to 30 years with a rider that the state government shall not consider the case of the appellant for premature release unless the appellant undergoes minimum sentence of 30 years.

The judicial pronouncements noticed above demonstrate that the Supreme Court has expansively exercised the alternative of directing a fixed term of imprisonment before exercise of the discretion by the executive under Section 432 Cr.P.C.

5.8. Consecutive Life Sentences – As Via Media Punishment

5.8.1. Consecutive life sentences for heinous crimes as alternatives to death penalty

When the courts faced the predicament of awarding life sentences in the wake

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[121]The appellant's age (34) years and no criminal record favored for term life imprisonment instead of death penalty.
[122] 2012 (5) SCALE 766
[123] The Supreme Court sentenced the appellant to imprisonment for a period of 30 years, instructing the State not to provide the option of remission till that time.
[124] (2012) 6 SCC 107
[125] (2009) 15 SCC 551
[126] This was case where a old woman and her 12-year-old son were brutally murdered by the appellant when he was in fact serving out a sentence in another case and had been released on bail.
[127] 2014 (4) SCALE 54
[128] Decided on 10 February, 2017 Available at https://indiankanoon.org/doc/72564556/
[129] Decided on 10 August, 2016Available at https://indiankanoon.org/doc/186462118/

of inherent contours and controversies surrounding death penalty, courts went for consecutive sentences in order to do justice to the case in hand. In other words, in case of multiple offences in one incidence like rape and murder, courts have used the techniques of consecutive sentences where the offenders would be asked to undergo one punishment after the other so that proportionate sentencing takes place. Courts have used their powers under section 31 of Cr.P.C[130] wherein courts may sentence the prisoner consecutively, rather than concurrently, so that one sentence would start after the first is served.[131] Courts have in several cases directed sentences of imprisonment for life to run consecutively having regard to the gruesome and brutal nature of the offence committed by the prisoner.

Ravindra Trimbak Chouthmal v. State of Maharashtra[132] is perhaps among the earliest cases where consecutive sentences were awarded. This was not a case of rape and murder but one of causing a dowry death of his pregnant wife. It was held:

> "10. We have given considered thought to the question and we have not been able to place the case in that category which could be regarded as the rarest of the rare type. This is so because dowry death has ceased to belong to that species of killing. The increasing number of dowry deaths would bear this. To halt the rising graph, we, at one point, thought to maintain the sentence; but we entertain doubt about the deterrent effect of a death penalty. We, therefore, resist ourselves from upholding the death sentence, much though we would have desired annihilation of a despicable character like the appellant before us. We, therefore, commute the sentence of death to one of

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[130] Section 31 CrPC reads

> "31. Sentence in cases of conviction of several offences at one trial
> (1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments, prescribed therefor which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently;
> (2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court:
> Provided that—
>> (a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years;
>> (b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence
>
> (3) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence."

[131] For the scope of section 31 of Cr.PC see *Duryodhan Rout v. State of Orissa* (2015) 2 SCC 783, *O.M. Cherian @ Thankachan v. State of Kerala &Ors*., (2015) 2 SCC 501 , *Kamalanantha and Ors. v. State of Tamil Nadu*, (2005) 5 SCC 194,(overruled) *Sanaullah Khan v. State of Bihar*, (2013) 3 SCC 52 (overruled)

[132] (1996) 4 SCC 148

> RI for life.
> 11. But then, it is a fit case, according to us, where, for the offence under Sections 201/34, the sentence awarded, which is RI for seven years being the maximum for a case of the present type, should be sustained, in view of what had been done to cause disappearance of the evidence relating to the commission of murder--the atrocious way in which the head was severed and the body was cut in nine pieces. These cry for maximum sentence. Not only this, the sentence has to run consecutively, and not concurrently, to show our strong disapproval of the loathsome, revolting and dreaded device adopted to cause disappearance of the dead body.
>
> 12. The result is that the appeal stands allowed to the extent that the sentence of death is converted to one of imprisonment for life. But then, the sentence of seven years' RI for the offence under Sections 201/34 IPC would start running after the life imprisonment has run its course as per law. […] Since imprisonment for life means that the convict will remain in jail till the end of his normal life, what this decision mandates is that if the convict is to be released earlier by the competent authority for any reason, in accordance with procedure established by law, then the second sentence will commence immediately thereafter."

Ronny v. State of Maharashtra[133] is also among the earliest cases in the recent past where consecutive sentences were awarded. The three accused, aged about 35 years (two of them) and 25/27 years had committed three murders and a gang rape. The Court converted the death sentence of all three to imprisonment for life since it was not possible to identify whose case would fall in the category of the rarest of rare cases. However, after awarding a sentence of life imprisonment, the Court directed that they would all undergo punishment for the offence punishable under Section 376(2)(g) IPC *consecutively*, after serving the sentences for other offences.

In Sunil Damodar Gaikwad v. State of Maharashtra,[134] the court sentenced the appellant to life imprisonment for the offence under Section 302 IPC. He was sentenced to imprisonment of 7 years for the conviction for the offence under Section 307 IPC. It was however, clarified that

> "in case the sentence of imprisonment for life is remitted or commuted to any specified period (in any case, not less than fourteen years in view of Section 433-A Cr.P.C.), the sentence of imprisonment under Section 307 IPC shall commence thereafter."

Raja Ram Yadav &Ors. v. State of Bihar[135] wherein the Supreme Court upheld the conviction of the appellant for the offence of murder of six persons to take revenge of a carnage involving his kith and kin.The court commuted the death

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[133] (1998) 3 SCC 625
[134] (2014) 1 SCC 129
[135] (1996) 9 SCC 287

sentence of the appellants to the sentence of life imprisonment and additionally awarded the sentence of six years rigorous imprisonment to each of the appellants for the offence under Section 436 read with Section 149 as well as a composite fine of Rs.15,000/- against each of the appellants for the offences under Section 302 and 436 read with Section 149 of the IPC. It was further directed that

> "[t]he sentence of life imprisonment for the offence of murder and the sentence of six years rigorous imprisonment for the offence under Section 436 read with Section 149 IPC will run consecutively."

In *Kamalanantha & Ors. v. State of T.N.*,[136] the founder of the ashram raped 13 girls of the which rapes were methodically abetted by the co-accused. The conviction of founder under Section 376(2)(c) and sentence of life imprisonment with fine of Rs.5,10,000/- on each count to *run separately and consecutively* was upheld by the Supreme Court. In addition, the conviction of the co-accused under Section 376/106 and sentence of life imprisonment *to run separately and consecutively* was also found to be justified by the Supreme Court.

In *Sandesh @ Sainath Kailash Abhang v. State of Maharashtra*,[137] the appellant was convicted for murder and a rape of the pregnant daughter-in-law of the deceased besides committing robbery. The trial court convicted the appellant under Sections 302, 307, 394, 397 and 376(e) and awarded the death sentence for his conviction under Section 302 along with imprisonment sentences for his other crimes. The Supreme Court commuted the death sentence upon his conviction for murder to that of rigorous imprisonment of life directing that the life imprisonment *"shall be for life and the sentences shall run consecutively."*

In *Sanaullah Khan v. State of Bihar,*[138] the appellant was convicted with death for murder by trial court. The Supreme Court however, found the evidence insufficient to establish the gravest case of the extreme culpability of the appellant. It also did not have the evidence to establish the circumstances of the appellant. Therefore, for each of the murders, he was sentenced to life imprisonment with the following directions:

> "23. Considering the facts of this case, we are of the opinion that the appellant is liable under Section 302 IPC for imprisonment for life for each of the three offences of murder under Section 300 IPC and the imprisonments for life should not run concurrently but consecutively and such punishment of consecutive sentence of imprisonment for the triple murder committed by the

[136] (2005) 5 SCC 194
[137] (2013) 2 SCC 479
[138] (2013) 3 SCC 52

> appellant will serve the interest of justice.
> 24. In the result, we maintain the conviction of the appellant for three offences of murder under Section 302 IPC, but convert the sentence from death to sentence for rigorous imprisonment for life for each of the three offences of murder and direct that the sentences of *imprisonment for life for the three offences will run consecutively and not concurrently*. Thus, the appeals are allowed only on the question of sentence, and dismissed as regards conviction."

It is important to note that the court has directed not mere imprisonment sentences, but three sentences - each for life imprisonment - to run consecutively. The effect would be that upon a favorable consideration of an application for remission of one sentence, the second life sentence would commence. Given the prohibition under Section 433A, the second application could at the earliest be made after 14 years of further imprisonment. If this was favorably considered, the third life imprisonment sentence would commence.[139]

Shankar Kisanrao Khade v. State of Maharashtra[140] was a case where the appellant, a man of 52 years was found guilty of murder by strangulation after repeated rape and sodomization of a minor girl of 11 years with intellectual disability. The trial Court convicted the first accused and sentenced him to death under Section 302 IPC, and was also awarded imprisonment for life and to pay a fine of Rs 1000 in default to suffer rigorous imprisonment (for short RI) for six months for offences under Section 376 IPC, further seven years' RI and to pay a fine of Rs 500 in default to suffer RI for three months under Section 366-A IPC and five years' RI and to pay a fine of Rs 500 in default to suffer RI for one month for the offences punishable under Section 363 IPC read with Section 34 IPC. The accused preferred Criminal Appeal before the High Court. The High Court dismissed[141] the appeal the death sentence was confirmed. On appeal, the supreme court dismissed the criminal appeals and the death sentence awarded to the accused was converted to that of rigorous imprisonment for life with a direction that *all the sentences awarded will run consecutively.*

From the above illustrative cases, it can be deciphered that, though courts are slow in imposing death penalties in routine way, they are serious enough to denounce despicable crimes by imposing consecutive sentences. The technique of consecutive

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[139] *Vishal Yadav v. State Govt. of Up* (2015) available at http://indiankanoon.org/doc/154440315/para **185**
[140] (2013) 5 SCC 546
[141] *State of Maharashtra v. Shankar* (2008) 6 AIR Bom R 43

sentencing is way of showing disapproval to the crime. All said and done, consecutive sentencing is not free from errors and criticism. Consecutive sentencing is based on the premise that life sentences are for a definite period and executive interference would cut short such life sentences to sentences of few years. This calculation does not always works as can be seen in the next discourse.

5.9. No two or more consecutive life sentences be imposed- Constitutional Bench (2016): earlier position revisited.

However, once life sentence is treated as imprisonment for life, the consecutive sentencing becomes difficult, rather futile. If a life sentence is for life then inevitably, all term sentences have to run concurrent, life imprisonment being highest and longest. Inspite of this logic, courts have sentenced consecutively, as noted above, with life imprisonment on the assumption that executives will exercise their powers under section 432 and 433A of Cr.PC. The courts even went for imposing multiple life sentences consecutively to run one after the other.[142] It was this sentencing technique, which was challenged before constitutional bench.[143] In *Muthuramalingam* the constitutional bench[144] observed that

> "17. The legal position is, thus, fairly well settled that imprisonment for life is a sentence for the remainder of the life of the offender unless of course the remaining sentence is commuted or remitted by the competent authority. That being so, the provisions of Section 31 under Cr.P.C. must be so interpreted as to be consistent with the basic tenet that a life sentence requires the prisoner to spend the rest of his life in prison. Any direction that requires the offender to undergo imprisonment for life twice over would be anomalous and irrational for it will disregard the fact that humans like all other living beings have but one life to live. So understood Section 31 (1) would permit consecutive running of sentences only if such sentences do not happen to be life sentences. That is, in our opinion, the only way one can avoid an obvious impossibility of a prisoner serving two consecutive life sentences.
>
> ***
>
> 31. In conclusion our answer to the question is in the negative. We hold that while multiple sentences for imprisonment for life can be awarded for multiple murders or other offences punishable with imprisonment for life, the life sentences so awarded cannot be directed to run consecutively. Such sentences would, however, be super imposed over each other so that any remission or commutation granted by the competent authority in one does not *ipso facto* result in remission of the sentence awarded to the prisoner for the other."

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[142] See *Sanaullah Khan v. State of Bihar* (2013) 3 SCC 52, *Muthuramalingam &Ors. v. State Rep. By Insp. of Police* available at http://judis.nic.in/supremecourt/imgs1.aspx?filename=43802 (appellants were to undergo consecutive life sentences ranging between two to eight such sentences depending upon the number of murders committed by them)

[143] *Muthuramalingam&Ors. v. State Rep. By Insp. of Police* decided (2016) available at http://judis.nic.in/supremecourt/imgs1.aspx?filename=43802

[144] Bench Consisted of Chief Justice T.S. Thakur, Fakkir Mohamed Ibrahim Kalifulla, A.K. Sikri, S.A. Bobde and R. Banumathi JJ.

5.9.1. Term sentences and consecutive life sentences can be imposed

Though two or more life sentences cannot be awarded consecutively, if the term imprisonment is attached with life sentence, such term sentence can be asked to be served first before life sentence begins. To illustrate, if 7 years imprisonment and life imprisonment are awarded to run consecutively, it would be wrong to specify that, first life sentence be served and then 7 years imprisonment, since life sentence is for the reminder of the life. However, sentencing court may ask the accused to first serve the term imprisonment, i.e., 7 years in our example, where after life imprisonment would begin. The court in *Muthuramalingam*,[145] the Constitutional Bench observed that

> "32. We may, while parting, deal with yet another dimension of this case argued before us namely whether the Court can direct life sentence and term sentences to run consecutively. That aspect was argued keeping in view the fact that the appellants have been sentenced to imprisonment for different terms apart from being awarded imprisonment for life. The Trial Court's direction affirmed by the High Court is that the said term sentences shall run consecutively. It was contended on behalf of the appellants that even this part of the direction is not legally sound, for once the prisoner is sentenced to undergo imprisonment for life, the term sentence awarded to him must run concurrently. We do not, however, think so. The power of the Court to direct the order in which sentences will run is unquestionable in view of the language employed in Section 31 of the Cr.P.C. The Court can, therefore, legitimately direct that the prisoner shall first undergo the term sentence before the commencement of his life sentence. Such a direction shall be perfectly legitimate and in tune with Section 31. The converse however may not be true for if the Court directs the life sentence to start first it would necessarily imply that the term sentence would run concurrently. That is because once the prisoner spends his life in jail, there is no question of his undergoing any further sentence."

5.9.2. Subsequent life imprisonment on already life convict- consequences

A life convict may, when he is on parole or in the jail itself may commit another crime which may entail him term imprisonment or life imprisonment. Such situations are governed by section 427 of Cr.PC.[146] If a person is undergoing a term

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[145] *Muthuramalingam & Ors. v.State Rep. By Insp.of Police Available at*http://judis.nic.in/ supremecourt /imgs1 .aspx?filename=43802

[146] Section 427 of Criminal Procedure Code, 1973 reads

> "Sentence on offender already sentenced for another offence.
>
> (1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence:
>
> Provided that where a person who has been sentenced to imprisonment by an order under section 122 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.
>
> (2) When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence."

sentence and sentenced for the second crime, such sentence shall run consecutively, unless ordered to run concurrently. However, if a person who is already undergoing life imprisonment is convicted for life or term imprisonment, such sentence shall run concurrently.

In *Ranjit Singh v. Union Territory of Chandigarh*[147] The prisoner was convicted for murder and sentenced to undergo life imprisonment. He was released on parole while undergoing the life sentence when he committed a second offence of murder for which also he was convicted and sentenced to undergo imprisonment for life. In an appeal filed against the second conviction and sentence, the Court by an order dated 30th September, 1983 directed that the imprisonment for life awarded to him should not run concurrently with his earlier sentence of life imprisonment. The Court directed that in the event of remission or commutation of the earlier sentence awarded to the prisoner, the second imprisonment for life awarded for the second murder committed by him shall commence. Aggrieved by the said direction which made the second life sentence awarded to him consecutive, the prisoner filed a writ petition under Article 32 of the Constitution primarily on the ground that the Supreme Court's order dated 30th September, 1983 was contrary to Section 427 (2) of the Cr.P.C., according to which any person already undergoing sentence of imprisonment for life if sentenced to undergo imprisonment for life, the subsequent sentence so awarded to him shall run concurrently with such previous sentence. Relying upon *Godse's* [148] and *Maru Ram's*[149] cases, the Court held that imprisonment for life is a sentence for remainder of the life of the offender. There was, therefore, no question of a subsequent sentence of imprisonment for life running consecutively as per the general rule contained in sub-section (1) of Section 427. The Court observed:

> "…[T]he earlier sentence of imprisonment for life being understood to mean as a sentence to serve the remainder of life in prison unless commuted or remitted by the appropriate authority and a person having only one life span, the sentence on a subsequent conviction of imprisonment for a term or imprisonment for life can only be superimposed to the earlier life sentence and certainly not added to it since extending the life span of the offender or for that matter anyone is beyond human might. It is this obvious situation which is stated in sub-section (2) of Section 427 since the general rule enunciated in sub-section (1) thereof is that without the court's direction the subsequent sentence will not run concurrently but consecutively. The only situation in which no direction of the court is needed to make the subsequent

[147] (1991) 4 SCC 304
[148] 1961 AIR 600
[149] 1980 AIR 2147

> sentence run concurrently with the previous sentence is provided for in sub-section (2) which has been enacted to avoid any possible controversy based on sub-section (1) if there be no express direction of the court to that effect. Sub-section (2) is in the nature of an exception to the general rule enacted in sub-section (1) of Section 427 that a sentence on subsequent conviction commences on expiry of the first sentence unless the court directs it to run concurrently. The meaning and purpose of sub-sections (1) and (2) of Section 427 and the object of enacting sub-section (2) is, therefore, clear."

5.10. Legislative Reintroduction Of Determinate Life Sentence

In the mid of the controversy of judiciary fixing the life imprisonment with 20 years to 35 or till the rest of life, legislature has, of late, introduced a different and unprecedented sentences in recent legislations calling for paradoxical readings. The recent legislations and amendments like Protection of Children from Sexual Offences Act, 2012 and Criminal Law (Amendment) Act, 2013 have introduced typical term imprisonments opening a new chapter in sentencing policy. The traditional life imprisonment has been retained in some of new offences whereas, imprisonment of not less than fourteen years, but which may extend to imprisonment for life has been introduced. On the other hand, in some of the sections, life imprisonment has been explained to be imprisonment for life, "which shall mean imprisonment for the remainder of that person's natural life". Interestingly, life imprisonment as extended and alternated form of punishment to minimum term of 20 years has also been used in some of the sections. One fails to understand as to why legislature intended so many varieties of life imprisonments when judicially interpreted and widely accepted meaning of life imprisonment has been accepted. The fact that, the legislature has clarified, in some of the section that, the meaning of life imprisonment to be "imprisonment for the remainder of that person's natural life" itself indicates that, the uncalculated play of remission rules shall not play in favour of convicts of certain crimes, where convicts are let loose with lighter sentences.

The new classification of life imprisonment introduced by Protection of Children from Sexual Offences Act, 2012 and Criminal Law (Amendment) Act, 2013 may be categorized as under:

5.10.1. Life imprisonment with combination of not less than 7 years imprisonment but which may extend to imprisonment for life

Section 376 (*1*) of the Criminal Law (Amendment) Act, 2013 provides

> "Whoever, except in the cases provided for in sub-section (*2*), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall *not be less than seven years, but which may extend to imprisonment for life*, and shall also be liable to fine."

5.10.2. Life imprisonment with combination of not less than 10 years imprisonment but which may extend to imprisonment for life

Section 326A of the Criminal Law (Amendment) Act, 2013 provides

> " Whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which *shall not be less than ten years but which may extend to imprisonment for life,* and with fine:
> Provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim:
> Provided further that any fine imposed under this section shall be paid to the victim."

Section 370 (*3*) and (4) of the Criminal Law (Amendment) Act, 2013 provides

> "(*3*) Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which *shall not be less than ten years but which may extend to imprisonment for life*, and shall also be liable to fine."
> (*4*) Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which *shall not be less than ten years, but which may extend to imprisonment for life*, and shall also be liable to fine."

Section 6 of the Protection of Children from Sexual Offences Act, 2012 provides

Section 6 Punishment for aggravated penetrative sexual assault:

> "Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine."

5.10.3. Life imprisonment with combination of not less than 14 years imprisonment but which may extend to imprisonment for life

Section 370 (5) of the Criminal Law (Amendment) Act, 2013 provides

> " Where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which *shall not be less than fourteen years, but which may extend to imprisonment for life*, and shall also be liable to fine."

5.10.4. Life imprisonment with combination of not less than 20 years imprisonment but which may extend to imprisonment for reminder of life

Section 376A, 376D, 376E of the Criminal Law (Amendment) Act, 2013 provide

> "376A. whoever, commits an offence punishable under sub-section (*1*) or subsection (*2*) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, *shall be punished with rigorous imprisonment for*

> *a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life,* or with death."
>
> "376D. Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and *shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life*, and with fine:
> Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:
> Provided further that any fine imposed under this section shall be paid to the victim."
>
> "376E. Whoever has been previously convicted of an offence punishable under section 376 or section 376A or section 376D and is subsequently convicted of an offence punishable under any of the said sections *shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life*, or with death."'

5.10.5. Imprisonment for the remainder of that person's natural life

Section 370 (6) and (7) of the Criminal Law (Amendment) Act, 2013 provides

> "(*6*) If a person is convicted of the offence of trafficking of minor on more than one occasion, then such person *shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life*, and shall also be liable to fine."
> "(*7*) When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer *shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life*, and shall also be liable to fine."

5.10.6. Life imprisonment as only punishment

Interestingly section 14 (3) of the Protection of Children from Sexual Offences Act, 2012, speaks of rigorous imprisonment for life as a sole punishment without any punishment being minimum. It reads

> **"14. Punishment for using child for pornographic purposes**
> (3) If the person using the child for pornographic purposes commits an offence referred to in section 5, by directly participating in pornographic acts, he shall be punished with rigorous imprisonment for life and shall also be liable to fine."

5.11. Difficulties in Working Out Life Sentences

Having said that courts have assumed the power to structure life imprisonment to strike the "just desert", the fallouts of such exercises are not free from difficulties and hurdles. Following questions have been posed in respect of such structuring of sentences.

5.11.1. Powers only to be exercised by the apex courts

The judicially crafted determinate life sentences can only be awarded by High courts and the Supreme Court. It necessarily means that sessions court which is invariably a trial court shall have only two options i.e., death or life imprisonment simpliciter. The trial court may be convinced about the brutality of the crime, but for the short of rarest of rare case, the court may incline to impose life imprisonment with fixed term of such life sentence. However, this facility of imposing 'individualized term life imprisonment' has not been conceded to trial courts. The Supreme Court in *Union of India v. Sriharan*,[150] held that

> "104. We, therefore, reiterate that, the power derived from the Penal Code for any modified punishment within the punishment provided for in the Penal Code for such specified offences can only be exercised by the High Court and in the event of further appeal only by the Supreme Court and not by any other Court in this country. To put it differently, the power to impose a modified punishment providing for any specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not by any other inferior Court."

Interestingly, the Delhi high court in *Vishal Yadav v. State Govt. Of UP* [151] held that such modified power is available to all sentencing courts[152] including session courts. The court had observed that:

> "164. The submission as pressed by learned counsel for the defendants would require us to hold that the trial court can impose a life sentence for an ordinary murder, the death sentence for the rarest of rare case but it has no jurisdiction to consider as to whether the case falls in the intermediate 'rare' category inviting mandatory tenure imprisonment as an adequate sentence. Or

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[150] 2015 (13) SCALE 165

[151] *Available at* http://indiankanoon.org/doc/154440315/

[152] It was contended in this case that, the third sentencing option made available by supreme court in *Swamy Shraddananda(2)* is available only to the supreme court and not to the high courts. Refuting the contention, the court observed :

> "170. Thus the restriction on the power of the courts which Mr. Verma is pressing is unwarranted. It is not supported by either the statutory provisions or the judicial precedents. It is clearly permissible for the sentencing court to judicially regulate the power of the executive to remit the sentence of the convict and while imposing a life sentence, direct a minimum term of imprisonment which may be in excess of fourteen years imprisonment depriving the convict of the benefit of remissions till expiry of such period. It can also be lawfully awarded by the High Court while commuting the death sentence awarded by the trial court upon conviction for such offence. In the light of the above discussion, we also find no legal prohibition upon the high court in handing out such sentence when adjudicating upon a prayer for enhancement of the sentence by the prosecution or the complainant/victim.
>
> 163. While examining the legality, proportionality and adequacy of the sentence, the consideration by the high court as the appellate court into the sentencing, has to remain the same. It would be preposterous to thus hold that the power to hand down a fixed term sentence beyond 14 years is not available to the trial courts or the high court or that even the power of the Supreme Court to do is confined to cases of commutation of the death sentence to life imprisonment."

> that, on the same facts and evidence, the trial court (or for that matter, the high court) has no power to do so, and that only the Supreme Court has the jurisdiction to do so, which jurisdiction is also limited to when it is commuting a death sentence to life not to restrict power of the executive to remit the sentence. Such is not the legislative intent."
> "166. It is also important to note that as per *Swamy Shraddananda* (2), the third option is available to the "convicting court" (as recommended in Dalbir Singh) which is not only the Supreme Court but also the High Courts and the trial courts."
> "167. We therefore, conclude that a third sentencing option is available to the sentencing court in all cases where death penalty is one of the options. It would be exercised if the court is of the view that death sentence ought not to be imposed and that, given the power of remission of the life sentence, if exercised on completion of fourteen years of imprisonment, the imprisonment would be inadequate. The court is therefore; free to determine the length of imprisonment which would be commensurate for the offence."

In view of *Union of India v. Sriharan,*[153] the above observations of Delhi High court stand overruled. However, this creates more problem than the solutions. To name a few, *firstly*, the session's court would out rightly impose death penalty even if with some deliberations, life imprisonment with fixed term could have been imposed. *Secondly*, the trial court would be deprived of the chance to individualize the sentence. *Thirdly*, The emerging jurisprudence of 'no death penalty' is binding upon the courts because of which trial court may choose life imprisonment for death. If the accused or the state does not appeal further, the convict may get away with lighter sentence. *Fourthly*, the accused may be convinced of his crime and may anticipate that death may be imposed upon him for the crime he committed. However, the power of the sentencing court is limited only to life imprisonment simpliciter. This assures the accused that, the conviction of the trial court be accepted in toto, the appeal against which may entail him determinate life sentences. *Fifthly*, the non availability of 'third option' may encourage the sentencing judge to go for consecutive sentencing in which he may specify the term imprisonments to be undergone first before life imprisonment begins. This tendency may put the accused in further predicament and jeopardy for if he appeals against, he may likely to attract determinate life sentence form the high court and if he does not appeal, he has to undergo consecutive sentences.

[153] (2015) SCALE 165

5.11.2. Another lethal lottery

The death penalty happened to be a lethal lottery, which was proved by the extensive research.[154] Some were fortunate enough to escape the hangman's noose whereas many others were indiscriminately awarded death penalty. This indiscriminate tendency was even noted by the Supreme Court. The same situation may arise in respect of life imprisonment with fixed term. What considerations would weight which judge – nobody knows. A judge may have 20 years in mind when the case is being heard half way through and in the end he may award 35 years or with no remission at all. Though the courts have developed the third sentence on their own and handed it down in many cases, there appears to be no sentencing discipline or uniformity in choosing life term from 20 years to 35 years or no remission. Though courts may justify their choice of term from 21 to 35 years on the facts and circumstances of the cases in hand, there is no uniformity that the sentencing variables will be uniformly weighed by all courts across the institution. Interestingly judges have awarded 21 years when 20 years norm is holding the ground. What weighed the judge in awarding one more year above 20 years is unspoken. The sentencing disparity may 'creep in' in different form.

The fact that some judges do not believe in fixed life sentence also bears upon the case in hand. If the case were to go before the judges who doubted the proportion[155] that fixed life sentences may not be given, such judges may simply impose the life imprisonment simpliciter! The convict would be out once he serves the minimum mandatory of 14 years by virtue of remission rules assuming that the jail manuals provide for it. On the other hand, if the case were to go before a judge who had exercised the third option frequently, such convict may get a fixed life sentence on the higher side of 20 to 35 years! The life imprisonment, therefore, should not become another lethal lottery after death penalty.

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[154] Amnesty International India and People's Union for Civil Liberties "Lethal Lottery: The Death Penalty in India A study of Supreme Court judgments in death penalty cases 1950-2006" May 2008, *Available at*https://www.amnesty.org/download/Documents/52000/asa200072008eng.pdf

[155] As far example, Justice MadanLokur in (*Sangeet & Anr. v. State of Haryana* (2013) 2 SCC 452) case doubted the life imprisonment with determinate policy. Similarly in the constitutional bench in *Union of India v. V. Sriharan @ Murugan&Ors*, 2015 (13) SCALE 165, Abhay Manohar Sapre, J and Uday Umesh Lalit. J. did not subscribe to majority opinion, which espoused for the fixed life imprisonment proposition.

5.11.3. The purpose of indeterminate sentence[156] is out of place

In order to adjudge the suitability of a release after judicial conviction, it is left to executive and remission boards to decide whether the prisoner has sufficiently reformed himself to be prematurely released. In other words, courts fix the maxim mum sentence to be served by the prisoner leaving the scope for early release on the basis of his conduct in prison. If the life convict is however, ordered to serve minimum 20 to 35 years with a further direction to the executive not to remit his sentence, the very purpose of indeterminate sentencing is frustrated, the role of reformation ruled out and the efficacy of prison administration undermined.

5.11.4. Difficulties in counting punishment for attempts to commit crimes

Under Section 53 of the Indian Penal Code "imprisonment for life" is one of the punishment to which the offenders are liable. The term "imprisonment for life" has not been defined anywhere in the Code. Sections 376(2) and 376-A IPC, "imprisonment for life" has been defined to mean imprisonment for the remainder of that person's natural life. Thus, while in Sections 376(2) and 376-A IPC, the "life imprisonment" is defined to mean imprisonment for the remainder of that person's natural life, other sections in the Code providing life imprisonment remain unchanged. After introduction of Section 376-A in IPC in 2013 with definition of "imprisonment for life", the Trial Court would be confronted with the problem while awarding punishment under Section 511 read with Section 376A, IPC for an offence of attempting to commit rape and inflicting injury, which causes death of a woman.

Under Section 511, IPC, punishment provided is 50% of the punishment of "life imprisonment" or 50% of the "longest term of imprisonment" provided for committing any particular offence, if no express provision is made in IPC for punishment for attempting to commit such offence. Under Section 57, IPC, in

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[156] The term “indeterminate” has two meanings. The meaning highlighted here involves statutes that give judges a broad range of options, not only to choose among fines, probation conditions, and prison, but also to choose a maximum term of incarceration if prison was the punishment. See, e.g., Mistretta v. United States, 488 U.S. 361, 363 (1989); Kevin R. Reitz, “Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences”, 91 *NW. U. L. REV*. 1441, 1442-43 (1997). Another meaning of “indeterminate” applies in systems that allow parole: regardless of the maximum term announced by the court, the prisoner’s actual time in prison is set by a parole board. Based on the prisoner’s behavior inside and potential for rehabilitation outside, the parole board can release a convict far earlier than the judge had decreed. See, Douglas A. Berman, “Foreword: Beyond Blakely and Booker: Pondering Modern Sentencing Process”, 95 *J. CRIM. L. & CRIMINOLOGY* 653, 654-55 (2005) *See also* Susan F. Mandiberg, “Why Sentencing by a Judge Satisfies the Right to Jury Trial: A Comparative Law Look at Blakely and Booker”, *Mc George Law Review*, Vol. 40, 2009, p 109, foot note no 11. It is in the second sense that the present discourse proceeds on.

calculating fraction of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years. But under Section 376-A, IPC, the minimum punishment is 20 years and the longest punishment is imprisonment for life which has been defined as imprisonment for remainder of the person's natural life.

At this stage, the difficulty that would be faced by the Trial Court is to find out the terms of punishment for life imprisonment provided under Section 376-A, since the Court cannot take 20 years as provided under Section 57, IPC which is the minimum punishment provided under Section 376-A. Therefore, a clarification is required as to how many years are to be taken for calculating 50% of the term "life imprisonment" prescribed in Section 376-A, IPC.[157]

5.11.5. Term life imprisonment only when death is awarded!

Fixing of term life is possible only when death is awarded. What if only life imprisonment is imposed? Would the court in appeal fix term life instead of death? There is no answer it seems. Given the tendency that courts are very slow in enhancing the punishment, it is in conceivable that the life imprisonment awarded by the trial courts would be enhanced to term life imprisonment by the apex courts. This would clearly spell on the constitutional equality clause of article 21. In other words, if the trial courts out rightly impose death penalty, appeal court would modify it to life imprisonment with term. However, if the trial courts award life imprisonment there seems to be no eventuality of appeal courts imposing life imprisonment with term!

5.11.6. Would term life imprisonment give scope for bargain?

The possibility of accused demanding for term life imprisonment instead of death penalty is not ruled out. No doubt the courts would strike 'just desert', the element of lottery cannot be ruled out. In *Subash Chander v. Krishan Lal.,*[158] the trial Court had awarded death sentence but the High Court had commuted the same to life imprisonment. Subash Chander, a witness before the Trial Court filed the appeal praying for setting aside the order by the High Court of acquittal of some of the accused persons and sought awarding of death sentence to the convicted persons. In other words, he sought restoration qua them of the judgment of the Trial Court. In this case, counsel for the main accused made a statement that instead of depriving him of

[157] Justice B. N. Mahapatra, "Sentencing And Plea Bargaining - An Appraisal" *Vidhya News Letter*, Odisha Judicial Academy, 2013, p 20, Available at Http://Orissajudicialacademy.Nic.In/Pdf/Vidya.Pdf
[158] (2001) 4 SCC 458

his life, the court could pass appropriate orders to deprive him of his liberty throughout his life and that if sentenced to life imprisonment, he would never claim his premature release or the commutation of his release on any ground. The court had passed such sentence in view of the said statement.

5.11.7. Fixed life imprisonment in addition to already undergone sentence is devastating

Courts are not only imposing life imprisonment with terms fixed like 20/25/35 years, but are also directing in some of the cases that, the period undergone as under trial prisoners shall also not be counted in the term fixed by them! This approach is vindictive of just desert but appears disastrous form the scheme of rehabilitation. In *AlberOraon v. State of Jharkhand,*[159] sentence of 30 years imprisonment without remission in *addition to sentence already undergone* for murder of woman and two children on property/land dispute was imposed. This tendency would further complicate the structuring of life sentencing since it impinges on constitutional right of equality. If one judge in one cases awards structured life sentence in addition to sentence already undergone and other judge in another case with similar facts omits to do that, article 21 is out rightly violated, though attempts may be made to justify such sentencing on the grounds of individualisation of punishment!

5.11.8. Costing of life imprisonment

Keeping the person confined for a longer period has a huge impact on the economics of the prison administration. More the confinement more the expenses. Speaking economically, there is no agreement between the productive worthiness of the prisoner in the jail and amount spent on him for keeping him confined.

As per the NCRB annual reports, the annual expenditure per inmate on various heads like Food, Clothing, Medical, Vocational/Educational & other welfare activities has been on the rise. The average expenditure per inmate has gone up from Rs 19447 in 2010-11 to Rs 29538 in 2014-15. This is an increase of over 50% in five years. While the number of inmates in prisons has only increased by about 13%, the average expenditure has gone up by more than 50%.[160]

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[159] 2014 (58) SCALE 525

[160] Rakesh Dubbudu "Expenditure per Prison inmate increased by over 50% in 5 years " JUNE 20, 2016 Available at https://factly.in/expenditure-per-prison-inmate-increased-50-5-years/
See also RaginiBhuyan "Prison economics and the gap between different states" available at http://www.livemint.com/Opinion/Vr7bOdjTPNMwRU3NvzSCsM/Prison-economics-and-the-gap-between-different-states.html for detailed break of expense by the states and revenue generation by the prisoners.

Of all the States and UTs with more than 1000 inmates, the highest expenditure per inmate was in Delhi in the last five years. In 2014-15, the expenditure per inmate in Delhi was Rs 85193, close to three times the national average. Delhi was closely followed by Telangana with an expenditure of Rs 81550. The only exception was in 2013-14 when the expenditure per inmate was highest in Jammu & Kashmir. Of the States & UTs with more than 1000 inmates, food expenses per inmate were highest in Jammu & Kashmir followed by West Bengal & Jharkhand in 2014-15. Even in 2013-14, the food expenses per inmate were highest in Jammu & Kashmir.[161]

5.11.9. Government would have ultimate control over the sentence

If the sentences have been fixed with '*judicial length'* within which the government cannot exercise remission powers, the Government would have ultimate control over the sentence. The government may further prolong the sentence. Only last year the State Government of Maharashtra declared that the offenders sentenced to life imprisonment in connection with the 1993 terrorist attack on Mumbai will have to serve a minimum of 60 years in prison before their plea for release is even considered. Given that number of offences in India carry a maximum penalty of life imprisonment, guidance for judges from a sentencing council would be welcome.[162]

On the other hand, the *'judicial length of imprisonment'* would not be applicable to constitutional powers under Article 72 and 161. Practically speaking, unless the life imprisonment is 'commuted' to a definite period the question of remission does not arise. The commutation takes place either under section 433 or under Articles 161 and 72. Practice as on date is evident of the fact that commutations and remissions have taken place frequently under constitutional prerogatives rather than under section 433 of the Cr.PC.[163] This evidently indicates that the judicial limitation would be not applicable to majority of the cases where constitutional powers have been exercised. In other words, the government can defy the orders of the courts which have fixed the term of life imprisonment by advising the President and Governor to exercise their constitutional prerogatives which would automatically

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[161] *Supra* note 160

[162] Julian V. Roberts et al "Structured Sentencing In England And Wales: Recent Developments And Lessons For India" *National Law School of India Review,* Vol. 23(l), 2011, P 44

[163] The government is not bound by procedural formalities or by public gaze limitation in advising the governor or president to exercise their constitutional powers. If the same results were to be achieved by the government by invoking Cr.P.C, the procedural and substantive checks inherent in section 432,433 and 433A have to be complied with.

nullify the '*period fixation*' of life sentences.

5.11.10. Re-engineered calculation of life imprisonment is ill founded

The Supreme Court in *Sangeet &ors. v. State of Haryana*[164] strongly argued for itself as under

> "78. What Section 302 of the IPC provides for is only two punishments -life imprisonment and death penalty. In several cases, this Court has proceeded on the postulate that life imprisonment means fourteen years of incarceration, after remissions. The calculation of fourteen years of incarceration is based on another postulate, articulated in Swamy Shraddananda, namely that a sentence of life imprisonment is first commuted(or deemed converted) to a fixed term of twenty years on the basis of the Karnataka Prison Rules, 1974 and a similar letter issued by the Government of Bihar. Apparently, rules of this nature exist in other States as well. Thereafter, remissions earned or awarded to a convict are applied to the commuted sentence to work out the period of incarceration to fourteen years.
> 79. This re-engineered calculation can be made only after the appropriate Government artificially determines the period of incarceration. The procedure apparently being followed by the appropriate Government is that life imprisonment is artificially considered to be imprisonment for a period of twenty years. It is this arbitrary reckoning that has been prohibited in *Ratan Singh*. A failure to implement *Ratan Singh* has led this Court in some cases to carve out a special category in which sentences of twenty years or more are awarded, even after accounting for remissions. If the law is applied as we understand it, meaning thereby that life imprisonment is imprisonment for the life span of the convict, with procedural and substantive checks laid down in the Cr.P.C. for his early release we would reach a legally satisfactory result on the issue of remissions. This makes an order for incarceration for a minimum period of 20 or 25 or 30 years unnecessary."

Though the reasoning of the court was overruled in *Union of India v. V. Sriharan @ Murugan & Ors.,*[165] case, the premise of the arguments are still convincing and hold strength. Even in the above case J. Uday Umesh Lalit and J. Abhay Manohar Sapre subscribed to this opinion although they fell in minority.

5.11.11. The structured life imprisonment may violate Article 21

The court can either impose sentence of imprisonment for life or sentence of death but any other fixed term sentence is totally inconceivable in terms of the statute. In respect of an offence under Section 302, life is the minimum and the maximum is the death sentence and, therefore, the court has a choice between the two and is not entitled to follow any other path, for that would be violative of the sanctity of Article 21 of the Constitution which clearly stipulates that *"[n]o person shall be deprived of his life or personal liberty except according to the procedure established by law."*

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[164](2013) 2 SCC 452
[165]2015(13) SCALE

Imposition of sentence for a fixed term is contrary to the procedure established by law and hence, impermissible.[166]

5.11.12. Life imprisonment without possibility of early release is dangerous than Death penalty

It is argued at times that Life imprisonment without possibility of early release is dangerous than Death penalty itself! In the name of avoiding death courts impose harsher punishment of structured life imprisonment which may dampen the hope of life.[167]

5.11.13. Judicial inconsistency beyond comprehension- no different from another death penalty

The reasons for introducing structured life imprisonment was to avoid the arbitrariness in imposing death penalty thereby rescuing the accused from arbitrary sentencing. The truth however is that even the structured life imprisonment also perpetuates the inequality in sentencing. The choice of 20/21/25/30/35 years or life with no remission is also an arbitrary choice. What moved the court in imposing 21 years of compulsory life imprisonment in *Ramnaresh v. State of Chhattisgarh* [168] and *Brajendrasingh v. State of M.P*[169] is unanswered. Further what rationality prevails in the choice of 25 years or 30 years is also not discernible. Simply because in identical cases courts have imposed a fixed number of years sentence shall not be the justification for the subsequent courts to impose similar or nearing imprisonment. The death penalty was labeled as judicial lethal lottery[170] and so should be the structured life sentence!

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[166] *Vikas Yadav v. State of U.P. and Ors.* (2016), Available athttp://supremecourtofindia. nic.in/ File Server/2016-10-3_1475495470.pdf

[167] In *Maru Ram* ((1981) 1 SCC 107), Krishna Iyer, J., to appreciate the despair in custody, thought it apposite to reproduce the bitter expression, from the poem, namely, The Ballad of Reading Gaol by Oscar Wilde. The poet wrote:-

> "I know not whether Laws be right,
> Or whether Laws be wrong,
> All that we know who lie in gaol
> Is that the wall is strong;
> And that each day is like a year,
> A year whose days are long."
> "Something was dead in each of us,
> And what was dead was Hope.
> The vilest deeds like poison weeds
> Bloom well in prison air:
> It is only what is good in Man"

[168] (2012) 4 SCC 257

[169] (2012) 4 SCC 289

[170] Amnesty International India and People's Union for Civil Liberties "Lethal Lottery: The Death Penalty in India A study of Supreme Court judgments in death penalty cases 1950-2006" May 2008, available at https://www.amnesty.org/download/Documents/52000/asa200072008eng.pdf

5.11.14. Trial courts would invariably be forced to award death penalty

Having said that life sentence can be structured only by the high courts and Supreme Court, trial courts would invariably be forced to impose death penalty, which sentence would be corrected by the apex courts. If the trial courts is not sympathetic about life imprisonment yet considers death penalty too harsh, it would eventually be left with death penalty option only. The fact that trial courts should be allowed to have this option of vast hiatus between life and death holds true in the interest of sentencing policy.[171]

5.11.15. Inconsistency in new legislations

In order to avoid moist over the inconsistency in interpretation over life imprisonment, it seems, the legislature has come up with newer sections, which clearly mentions that life imprisonment shall be for the reminder of that person's life. This attempt has however immensely contributed in the existing confusion. If life imprisonment were to be taken as for the whole life, the same logic shall apply to all cases and all sections of similar crimes. This certainty is however missing from the new legislations. In some sections life imprisonment is defined as imprisonment for

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[171] See *Bachan Singh's Case Two v. Unknown* (2009) https://indiankanoon.org/doc/92890443/ Justice R.Basant, one of the Judges of the Division Bench Judges, after an elaborate discussion at paragraph 35 of the order dated 13.4.2012, summarised his conclusion as under:

> "35. One can always dream of the ideal law. When that will come into existence, we will have to wait and see. But I have no hesitation to agree that the ideal law ought to be that all courts - from the Sessions Court to the Supreme Court, have the sentencing options generated under Swami Sradhanandha (2). Ideal law must insist that all Judges from the level of the Sessions Judges must consider whether all the alternative options are unquestionably foreclosed before choosing to direct extinguishment of life by exercise of judicial discretion. To me, it appears that it is time that the law is changed by the legislature (or progressively interpreted judicially) to ensure and insist that a Sessions Judge who feels that the gravest form of life sentence permissible under Swami Sradhanandha is insufficient to meet the ends of justice in a case, must make a reference to the High Court and not proceed to choose to himself impose such harshest sentence. When it comes to the High Court for decision on the question of sentence (or confirmation), the ideal law must certainly insist that not 2 Judges, but at least a Bench of 5 Judges must consider the question of imposition of sentence. The system owes at least that to Indian and human civilization and to persons who are being deprived of their life by invocation of the State's power to extinguish life. I go a step further and observe that unless the 5 Judges Bench would unanimously come to the conclusion that the death sentence is the only alternative possible in the given circumstances, the conclusion will necessarily have to be reached that the alternative options are not unquestionably foreclosed. Unanimous conclusion of a 5 Judge Bench alone should under the ideal law justify the extinguishment of life. May be I am dreaming. May be that is not the law at the moment. But certainly I have no hesitation to dream that, that would be the ideal law in respect of the exercise of the dehumanizing power of the State to extinguish life if that power be constitutionally valid. The matter if and when referred to a larger Bench the larger Bench must, according to me, address itself to these questions."

the reminders of persons life, whereas in some sections this rider is missing.[172]Further in some sections life imprisonment is alternated punishment where minimum imprisonment is twenty years. The remission rules generally favour for executive remission after a person has served twenty years of actual imprisonment even for heinous crimes. If the minimum imprisonment for certain crimes were to be fixed as twenty years then alternated life imprisonment would never allow that criminal to avail remission benefits.

5.11.16. Structured life sentences blur the separation of powers and undermines correctional institutions

Structured life sentences by the judiciary may blur the separation between the judiciary, which hands out sentences soon after conviction, and the executive, which painstakingly calculates when a sentence has had its desired effect on the prisoner.[173]

However, if the court holds that for some life convicts there is no prospect of release, irrespective of any reformation they may have undergone, serious questions would be raised about our correctional institutions. The court would be pre-judging and completely ruling out the prospect of any reform on the date of the sentencing. It is worth pondering whether prisoners who are sent to prison for their whole life are incarcerated merely to compensate for the failure of the prison system to help prisoners meaningfully reintegrate into society.[174]

5.11.17. Life without possibility of release is contrary to international jurisprudence

Whole life sentences have been disapproved of internationally. In Germany, it has been held to attack the essence of human dignity. The European Court for Human Rights has declared such sentences as illegal if they do not provide the prisoner a right of consideration for early release. Namibia also has ruled that such sentences would amount to cruelty at state expense and reduce the prisoner to a "thing" rather than a "person". A prisoner who has been in jail for over 20 years awaiting execution of his death sentence told me that if judges who handed out these long sentences could

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[172]Section 370 (*3*) and (4) of the Criminal Law (Amendment) Act, 2013

> "(*3*) Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which *shall not be less than ten years but which may extend to imprisonment for life*, and shall also be liable to fine."
> (*4*) Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which *shall not be less than ten years, but which may extend to imprisonment for life*, and shall also be liable to fine."

[173]Nishant Gokhale, 'Granted life, but never free' *The Hindu*, September 30, 2015
[174]*Ibid*

spend even a month in prison conditions, he would be surprised.[175]

In Europe, the Grand Chamber of the European Court of Human Rights ruled in July 2013 that all persons sentenced to life imprisonment including those subject to a so-called whole life order, must have a prospect of release and that there has to be a procedure in place for reviewing whether the continued enforcement of these sentences is justified (*Vinter and others v United Kingdom* 2013). The denial of all hope of release would amount to inhuman and degrading treatment that would infringe Article 3 of the European Convention on Human Rights.

When it comes to life imprisonment, there are no set, fully developed international standards. But, international human rights law allows the imposition of life sentences only in the most serious crimes and prohibits the use of Life Imprisonment without Parole (LWOP).[176]

The International Covenant on Civil and Political Rights (ICCPR), which came into force in 1976 and was signed and ratified by 161 countries, including India, says that the "penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation". As the non-government organisation Penal Reform International noted in 2007, the purpose of reformative punishment will not be served if a convict lives his or her whole life in detention without being released on parole.

General Comment 21 of the Human Rights Committee, which is a United Nations (UN) Committee that oversees the implementation of ICCPR obligations in State parties, notes, "Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[177]

The United Nations Standard Minimum Rules for the Treatment of Prisoners lays down good practice norms for the treatment of prisoners, which are to be adhered to by prison authorities and institutions.[178]

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[175] *Ibid*
[176] Ipshita Sengupta "Life sentences: How long is enough?" *India Together*, June 29, 2008
[177] *Ibid*
[178] *Ibid*

5.12 Conclusion

Life imprisonment better serves all purposes of sentencing policy, i.e., deterrence, reformation, rehabilitation and retribution. Life imprisonment has been now a preferred sentence by the apex courts in view of inherent disparity in the death sentences. The cause of disagreement, however, is the structuring of life sentences with definite number of years. Though courts have in all benches- smaller and constitutional, retained the power to structure life imprisonment, the working of such structured sentences itself has become subject matter of arbitrary exercise. The attempted reforms by the legislature to further codify life imprisonment has only added in the mud of uncertainty as noted above. Judiciary has usurped the power to itself to define the content of life imprisonment. This usurpation though defended by constitutional bench, needs to be tested on the time line since the innovation is of recent origin. Only safeguard that must be ensured now is that whenever the courts wish to structure life sentences, such exercise must be done by a bench of three or more judges with nearing unanimity, failing which life imprisonment would become another lethal lottery as death penalty is labeled as.

CHAPTER -VI

CLEMENCY, CONCESSIONARY AND SHORT SENTENCING: EXECUTIVE INTERFERENCE IN JUDICIAL PROCESS; TWO SIDES OF THE SAME COIN OR TUG OF WAR BETWEEN?

The quality of mercy is not strain'd,
It droppeth as the gentle rain from heaven
Upon the place beneath. It is twice blest:
It blesseth him that gives, and him that takes . . . [1]

William Shakespeare

"We hand folks over to God's mercy and show none ourselves."

George Eliot [2]

6.1 Introduction

Crime pays; it should; but proportionately and at times equitably. Struck by the disease of crimes, the criminal is lost in the shallow cells of prisons where the bright light of the sun hardly promises him the release, though the repentance in him might have already served the purpose of criminal justice system.[3] It is this paradoxical reading that espouses the need for clemency[4] and concessionary

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[1] William Shakespeare, The Merchant Of Venice, act 4, sc. 1 Quoted in Heidi M. Hurd "The Morality of Mercy" *Ohio State Journal of Criminal Law*, Vol.4, 2007, p 391

[2] George Eliot, Adam Bede 430–31 (Stephen Gill ed., 1985) (1859). Quoted in Mary Sigler "Mercy, Clemency, and the Case of Karla Faye Tucker" *Ohio State Journal of Criminal Law,* Vol. 4, 2007, p 455

[3] The purpose of criminal justice system itself is in questions albeit the purpose of punishment. Oliver Wendell Holmes, Jr., makes a sarcastic statement when he says

> "If I were having a philosophical talk with a man I was going to have hanged ... I should say, I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises."

See Oliver Wendell Holmes, Jr., *The Common Law*, (Boston: Little Brown 1991) p 46

Similarly Gino Carlo Speranza wrote in 1904:

> "The conception of punishment as a defence to crime has gone into bankruptcy: it neither defends nor deters. Criminal therapeutics must take its place; that is, where a cure is possible, let the remedial agencies suggested by criminologic and sociologic science have full scope. But where juridic therapeutics fail, let there be no mistaken altruism to perpetuate the unfittest."

See Gino Carlo Speranza, "The Survival of the Weakest as Exemplified in the Criminal", 43 *Am L Reg* 159, 165-66 (1904). See also Albert Alschuler, "The Changing Purposes of Criminal Punishment: A Retrospective on the Last Century and Some Thoughts about the Next," 70 *University of Chicago Law Review* 1 (2003); Mike C. Materni "Criminal Punishment and the Pursuit of Justice", 2 *Br. J. Am. Leg. Studies* (2013), available at http://hls.harvard.edu/content/uploads/2011/09/michele-materni-criminal-punishment.pdf,; Hart, Herbert L. A., *Punishment and Responsibility: Essays in the Philosophy of Law*, (Oxford: Oxford University Press. 1968); John Rawls *A Theory of Justice*, (Cambridge: Harvard University Press, 1971); Gerald Gardine, "The Purposes Of Criminal Punishment", *The Modern Law Review*, Volume 21, No. 2, 1958

[4] Webster's Third New International Dictionary 421 (1981), defines "clemency" means mercy or leniency, a disposition to be merciful or moderate in punishment. Executive clemency is, however, a broad term, in legal parlance, that includes pardons (forgiveness of both crime and punishment), commutations (substitution of a milder punishment), and reprieves (postponement of punishment). Clemency is a presidential prerogative that is not subject to legislative control nor is bound its own precedents.

sentencing. Executive retains the control over the convicts though sentencing the criminal is basically left to the judiciary. Moved by the considerations present at the time of sentencing, the courts convict bereft of ordinary considerations which might have played extra-ordinary role in the commission of crime.[5] The courts on the other hand, face the predicament when minimum mandatory sentences[6] are prescribed or only limited alternatives are left, as for example of life imprisonment or death penalty in case of murder.[7] The legislature, on the other hand, may correct the judicial excess but has its own limitations.[8] The executive must, therefore, temper the judicial sentencing with mercy. Such exercise is in fact "an equitable 'bending' of the rules in order to achieve a morally just result, taking into consideration all morally relevant facts concerning the defendant and the commission of the offense".[9] The jurisdictions worldwide have therefore, reserved and preserved the power to remit, commute and

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[5] Age, poverty, social background, education, crimes of political ramification, orphanage that may result to survivors etc are the variables that may not move the courts but may have significant role in the clemency jurisdiction. Examples indeed declare that such consideration have been taken into consideration by the executive as mitigating factors.

[6] See Douglas A. Berman & Stephanos Bibas, "Making Sentencing Sensible", 4 *Ohio St. J. Crim. L.* 37, 61 (2006) (noting that, even in cases in which mandatory sentences applied, judges could recommend executive clemency); George Lardner, Jr. & Margaret Colgate Love, "Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases", 1790–1850, 16 *Fed. Sent'g Rep*. 212, 213 (2004) (describing methods whereby judges would petition the President for clemency). *See also* Joanna M. Huang, "Correcting Mandatory Injustice: Judicial Recommendation of Executive Clemency", *Duke Law Journal*, Vol. 60:131, 2010.

[7] In *Shamim Rahmani Etc v. State of U.P* 1975 AIR 1883, where a lady shot dead her lover, with gun, who cheated her, J. Untwalia, N.L. wrote the judgment awarding life imprisonment to her and observed helplessly that

> "[f]rom the view point of common ethics or morality one may say that Shamim committed no sin in shooting dead a man like Gautam, although she was contributory in the act of Gautam's lust for her. But in the eye of law, she surely committed the crime of murder punishable under section 302 of the Penal Code. Even if we wished, we could not reduce the sentence of life imprisonment imposed on her as that is the minimum sentence provided under section 302 of the Penal Code. Her mercy appeal for remission of any part of her sentence lies elsewhere."

[8] Joanna M. Huang, "Correcting Mandatory Injustice: Judicial Recommendation of Executive Clemency", *Duke Law Journal*, Vol. 60:131, 2010, observes at p 140 as under

> "Legislatures are an effective channel for creating lasting changes in the law to prevent future injustice on a large scale. It is important to have legislative amendments for such a purpose. Legislative action is not adequate, however, to correct injustices that have already occurred. The reasons are twofold. First, legislative action takes a long time, and an inmate may be forced to spend years in prison before a legislature acts.48 A more expedient means to restore just sentences to specific defendants in a timely manner is required. Second, most reforms are not retroactive; indeed, by overturning final judgments, retroactive legislation raises constitutional questions. adverseness to retroactivity, defendants already sentenced may be left unaided. Legislative action has an eye toward the future; a retroactive solution, however, is required to solve the problem of mandatory injustice."
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> [footnotes omitted]

[9] Samuel T. Morison, "The Politics of Grace: On the Moral Justification of Executive Clemency", 9 *Buff. Crim. L. Rev*. 1, 1 (2005)

temper and cut short the sentences passed by the judiciary.[10] Indian legal system continues the British legacy of interrelationship between judiciary and executive in terms of sentencing policy.

Factors like public policy, humanitarian impulses, popular public will might not influence the judiciary in sentencing since the judiciary proceeds on the premise of set principles of written law. These principles however must be given their dues if public confidence in the legal system were to continue. The sentencing system, therefore, requires the ordinary and extra ordinary powers to be with executive to balance the sentencing process and eliminate the irregularities in the sentencing process.[11]

In our Constitutional order the Judicature is a great instrumentality but not "a brooding omnipotence in the sky."[12] Though judicial sentencing is based on set

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[10] Jeffery Crouch, The President's Power to Commute: Is It Still Relevant?, 9 *U. St. Thomas L.J.* 681 (2012), at p 668 notes

> "…the concept of clemency has been around for a very long time: the Babylonians of eighteenth century BC added clemency language to the Code of Hammurabi, the "oldest known legal code";[] in ancient Athens, an offender could be spared if he could collect 6,000 signatures; in Rome, Pontius Pilate facilitated one of the more famous pardons in history—the crowd's decision to free Barabbas instead of Jesus Christ.[]" [footnotes omitted]

William W. Smithers, "Nature and Limits of the Pardoning Power", 1 *J. Am. Inst. Crim. L. & Criminology* 549 (May 1910 to March 1911), observes at p 550 as under

> "…While the people have delegated their, legislative power to constitutional assemblies they have also deposited a general corrective force in the courts. In matters pertaining to the life and liberty of citizens they have likewise lodged an additional power in the executive, intended to be above the law, the legislature and the judges in respect of particular instances where the generality of legislative enactment and the unyielding impersonal course of the courts would work hardship and injustice uncalled for by the general purposes of government."

See See William F. Duker, "The President's Power to Pardon: A Constitutional History", 18 *Wm. & Mary L. Rev*. 475 (1977) (describing English precedent and tracing power back to Biblical times); Stanley Grupp, "Some Historical Aspects of the Pardon in England", 7 *Am. J. Legal Htst*. 51, 55-56 (1963) 1 ; Kathleen Dean Moore, "Pardon for Good and Sufficient Reasons", 27 *U. Rich. L. Rev*. 281, 282 (1993), 3; P.S. Ruckman, Jr., "Executive Clemency in the United States: Origins, Development, and Analysis" (1900-1993), 27 *Presidential Stud. Q*. 251, 252 (1997)

[11] See William W. Smithers, *supra* note 10 at 552

> "No theory of criminal procedure will ever produce the results rationally desirable until crime is dealt with by individual study and treatment of the offender and the old, impersonal, mechanical and manifestly ineffectual method is abandoned. However, until the movement that is rapidly gaining force to this end shall have been legislatively and judicially recognized the jurisdiction of executive clemency must be maintained and exercised in the light of the traditions which have produced the existing system of criminal law. It must continue to be the ultimate resort for the administration of natural equity in exceptional cases which by reason of the generality of legislative enactments and the imperfections of human tribunals fall within the reserved discretionary power delegated to the executive by the people, a power which, by its very nature and the manner of its delegation, was intended to be and is above the law, the legislature and the courts."

[12] *G. Krishta Goud & J. Bhoomaiah v. State of Andhra Pradesh & Ors* ((1976) 1 SCC 157)

principles of law, yet judicial errors or excessive cannot be overruled.[13] This error can be corrected by the executive under their corrective jurisdictions called clemency powers.[14] History is evident of such judicial errors and excessives.[15] However, the history has in its store the arbitrary exercise of powers of pardon and remission also warranting for judicial interferences in the form of review of such executive actions.[16]

In India, the executive interference in the judicial process is contemplated at two stages, i.e., pre-condition stage and post conviction stage. In the pre-condition stage, the appropriate government is empowered to withdraw the case from being further prosecuted thereby bringing an end to the case before the court.[17] The scope of the present discussion is not inclusive of it. The second stage, i.e., interference post conviction is the focus of the present research. Once the sentence is passed by the judiciary the execution thereof of such sentence passes in to the hands of the executive. The executive, alternatively, has both the limited[18] and extra ordinary powers[19] to temper such sentences with mercy and concessionary treatment.

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[13] *Supra* note 10 at 551

> "There are also defects, some of which are inherent in every system of criminal jurisprudence, and others that are peculiar to trials by jury. Jeremy Bentham pointed out some of these: "Is there, or could there be devised, any system of penal procedure which would insure the judge from being misled by false evidence or the fallibility of his own judgment? No. * * * Judges will continue fallible,' witnesses to depose falsehood or to be deceived." After referring to the weakness of circumstantial evidence by reason of chance or arrangements, instances of even confessed guilt of crimes never committed and undoubted cases of innocent persons being convicted, he proceeds: "When the pietended crime is among the number of those that produce antipathy toward the offender, or which excite against him a party feeling, the witnesses almost unconsciously act as accusers. They are the echoes of the public clamor; the fermentation goes on and all doubt is laid aside."

[14] See Harold J. Krent, "Conditioning the President's Conditional Pardon Power", 89 *Cal. L. Rev*. 1665 (2001), p 1674, where he observes

> "… the pardon power acts as a necessary safety valve in light of Congress's inability to foresee the particularities of every crime and the circumstances of every offender."

[15] See chapter IV on "A Critical Analysis of Capital Sentencing: Riddles, Riders and Resolutions" for detailed discussion.

[16] See infra 6.5. Controversial conundrum of constitutional clemency and 6.6. judicial review of constitutional clemency

[17] See section 321 of Code of Criminal Procedure, 1973. For the scope of section 321 CrPC, see *Sheo Nandan Paswan v. State of Bihar and others* (1983) 1 SCC 438, *Subhash Chandra v. Chandigarh Administration* (1980) 2SCC 155, *Abdul Karim and others v. State of Karnataka* (2000) 8 SCC 710, *Rajender Kumar v. State through Special Police Establishment* (1980) 3SCC 435, *Rajendra Jain v. State* (1980)3 SCC 434, *Sheo Nandan Paswan v. State of Bihar* (1987) 1 SCC 288.

[18] Powers of appropriate governments under section 432, 433 and 433A of CrPC and powers under Jail Manuals to remit sentences are limited in the sense that the procedural safeguards injected there under have to be mandatorily followed failing which such executive decisions can be questioned and are necessarily under judicial review.

[19] Powers of President and Governors under constitution of India are generally termed as extra ordinary powers, in the scene that the exercise thereof cannot be ordinarily questioned in the courts. Though the courts retain the power to exercise judicial review such review is limited and rarely exercised.

Clemency and concessionary treatment of convict is also endorsed by the international instruments.[20]

At times the exercise of Clemency and concessionary treatments raises paradoxical readings.[21] The paradoxical reading has been brought out by the Supreme Court in *State of Haryana And Ors. v. Jagadish*[22]

> "[p]ower of clemency is required to be pressed in service in an appropriate case. Exceptional circumstances, e.g. suffering of a convict from an incurable disease at last stage, may warrant his release even at much early stage. *'Vana Est Illa Potentia Quae Nunquam Venit In Actum'* means-vain is that power which never comes into play.[23]
>
> Legal maxim, *"Veniae facilitas incentivum est delinquendi",* however, is a caveat to the exercise of clemency powers, as it means - "Facility of pardon is an incentive to crime." It may also prove to be a "grand farce", if granted arbitrarily, without any justification, to "privileged class deviants". Thus, no convict should be a "favoured recipient" of clemency."[24]

Controversies affront in respect of exercise or non exercise of the powers. These predicaments are unfolded in the coming analysis. This chapter, therefore, focus on the three layers of concessional treatments, i.e., mercy of highest order, power of remission and commutation, short sentencing and the inter-relationship between judicial sentencing and executive interference.

6.2 Sentencing Policy- Relationship between Judicial Sentencing and Executive Interference

Legal justice belongs to the Court but compassionate commutation belongs to the top executive.[25] Courts base their decisions on 'law' whereas executives proceed on 'equity'.[26] Justice Sutherland explains the relationship between judicial sentencing and exercise of clemency thus:

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[20] See The Universal Declaration of Human Rights, 1948 and The United Nations Covenant on Civil and Political Rights, 1966. The International Covenant on Civil and Political Rights (ICCPR), 1976

[21] In *State of Haryana And Ors. v. Jagadish* (2010) 4 SCC 216, the court observed,

> [t]wo contrary views have always prevailed on the issue of purpose of criminal justice and punishment. The punishment, if taken to be remedial and for the benefit of the convict, remission should be granted. If sentence is taken purely punitive in public interest to vindicate the authority of law and to deter others, it should not be granted

[22] *Ibid*

[23] *Ibid*

[24] *Ibid*

[25] Per J. Krishna Iyer in *Mohinder Singh v. State of Punjab* AIR 1976 SC 2299

[26] *Supra* note 10 at p 561

> "It is this higher, more refined and less formal equity that belongs to the jurisdiction of clemency, where alone it can be administered because of its elasticity and consequent susceptibility of particular application. Under it, state policy, mercy, propriety of a particular law or prosecution, kind and extent of punishment, the condition, history and future of the convict and the security of the community all become material, relevant and capable. of weight in a given case. It rises above the law."

> "To render a judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter it qua judgment."[27]

The act of pardon or remission of the State does not undo what has been done judicially. The punishment awarded through a judgment is not overruled but the convict gets benefit of a liberalised policy of State pardon.[28]

The power of pardon is extra-ordinary powers conferred on the executive to address judicial errors and assuage public demands based on the established principles of natural justice. This however does not imply that executive pardon is substituted for the judicial decisions. The Supreme Court in *Epuru Sudhakar v. Govt. of A.P.*[29] observed that

> "…Granting of pardon is in no sense an overturning of a judgment of conviction, but rather it is an executive action that mitigates or sets aside the punishment for a crime. It eliminates the effect of conviction without addressing the defendant's guilt or innocence. The controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject-matter. It can no longer be said that prerogative power is ipso facto immune from judicial review…"

Similar to the principles of pardon, remissionary powers empower the executive to reduce the period of incarceration or modify one form of punishment to another. This however, does not alter the judicial findings and conclusion. Only the methods of enforcement, in *stricto senso* undergoes a change.

When the appropriate Government commutes the sentence, it does so in exercise of its sovereign powers. The court cannot, therefore, direct the appropriate Government to exercise its sovereign powers. The Court can merely give a direction to the appropriate Government to consider the case for commutation of sentence and nothing more. This legal position is no more *res integra*.[30]

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[27] Per Justice Sutherland in *U.S. v. Benz* [75 Lawyers Ed. 354, 358] quoted in *Sarat Chandra Rabha And Others v. Khagendranath Nath And Others* 1961 AIR 334

[28] *State of Haryana and Ors. v. Jagadish* (2010) 4 SCC 216

[29] (2006) 8 SCC 161

[30] *State of Rajasthan v. Mohammad Muslim Tagala* (2014), available at https://indiankanoon.org /doc/104372600/

Though executive can temper the judicial sentence with concessionary treatments, such executive actions are again subject to judicial review.[31] Thus the cycle of sentencing policy reaches a circle where, the execution of judicial sentencing are executively modified and such modifications are themselves subject matter of judicial review.

6.3 Sources of Clemency, Concessionary and Short Sentencing

The clemency powers have their source in the Constitution. Articles 72 and 161 empower President and Governors respectively to exercise their pardoning powers. Pardon is one of the many prerogatives which have been recognized since time immemorial as being vested in the sovereign, wherever the sovereignty may lie.[32] As the court observed:

> "Historically, it is a sovereign power; politically, it is a residuary power; humanistically, it is in aid of intangible justice where imponderable factors operate for the well- being of the community, beyond the blinkered court process."[33]

These powers are extra ordinary and therefore are not subject to any restrictions or limitations not even the judicial sentencing.[34] Both Articles 72 and 161 repose the power of the people in the highest dignitaries, i.e., the President or the Governor of a State, as the case may be, and there are no words of limitation indicated in either of the two Articles.

Apart from these powers of equal footing, there exists a second layer of powers conferred upon the government in the form of substantive and procedural codes. Indian Penal Code, 1860[35] and Code of Criminal Procedure, 1973[36] also confer powers of commutation and remissions. These second layer powers are, however, subject to constitutional powers under Articles 72 and 161. These powers are also

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[31] Legal maxim, "*Veniae facilitas incentivum est delinquendi",* is a caveat to the exercise of clemency powers, as it means - "Facility of pardon is an incentive to crime." It may also prove to be a "grand farce", if granted arbitrarily, without any justification, to "privileged class deviants". Thus, no convict should be a "favoured recipient" of clemency.

[32] *K.M. Nanavati v. State of Bombay* 1961 AIR 112

[33] *G. Krishta Goud & J. Bhoomaiah v. State of A.P* (1976) 1 SCC 157

[34] In *Kehar Singh and another v. Union of India* (1989 AIR 653) the Supreme court in para no. 15 noted as under

> "It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. We are of opinion that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court."

[35] See Sections 53, 54, 55, 55A, 57, 65, IPC

[36] See Sections 2(y), 4, 432, 433, 434, 433A and 435 CrPC

subject to inherent substantive and procedural checks in built in those sections themselves.

Apart from the second layer powers, certain short sentencing provisions are provided in prisons Act and jail manuals as amended form time to time which provide for certain remission in the sentences to be undergone by the convicts. The rules framed under the Prisons Act enable such a prisoner to earn remissions classified as ordinary, special and State remissions. Convicts sentenced to term imprisonment benefit by such remissions. These third layer powers are also subject to first and second layer powers.

6.4 Constitutional Clemency – Power of Pardoning

Pardon powers are familiar features of any legal systems. No jurisdiction does without them[37] argued Adam Perry.[38] Mercy power is not new to India. Right from the Mughal Emperor[39] to the present constitution, power of mercy is documented,[40] though in different form and settings.[41]

Two provisions were introduced in the Constitution to cover the former royal prerogative relating to pardon in the form of Arts. 72 and 161. Article 72 deals with the power of the President to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence. Article 161 gives similar power to the Governor of a State with respect to offences against any law relating to a matter to which the executive power of the State extends. Articles 72 and 161 of the Constitution read as under:

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[37] Apparently only one regime has officially abolished pardons – and that was for a short time, during the French Revolution of 1789. See K Moore, Pardons: Justice, Mercy, and the Public Interest (New York: Oxford University Press, 1989), Pp 24-25

[38] Adam Perry, "Mercy And Caprice Under The Indian Constitution" available at https://adamdperry.files.wordpress.com/2015/01/mercy-and-caprice-under-the-indian-constitution.pdf

[39] See generally Bashir Ahmed, *Administration of Justice in Medieval India*, (Aligarh: Historical Research Institute, 1941)

[40] For detailed discussion on the historical perspective of the clemency jurisdiction see Bikram Jeet Batra, "Court of Last Resort *A Study of Constitutional Clemency for Capital Crimes in India"* WORKING PAPER SERIES Centre for the Study of Law and Governance Jawaharlal Nehru University, New Delhi, available at http://www.jnu.ac.in/CSLG/workingPaper/11-Court%20(Bikram).pdf

[41] Jody C. Baumgartner and Mark H. Morris, "Presidential Power Unbound: A Comparative Look at Presidential Pardon Power", *Politics And Policy*, Vol. 29, Issue 2, 2001 Pp 209–236

See also William F. Duker, The President's Power to Pardon: A Constitutional History, 18 *Wm. & Mary L. Rev.* 475 (1977); Parul Kumar, "The Executive Power To Pardon: Dilemmas Of The Constitutional Discourse" 2 *NUJS L. Rev*. (2009); Md. Minhazul Islam (2012). "Judicially Reviewing the President's Prerogative of Mercy: A Comparative Study" *Bangladesh Res. Pub. J.* 7(3): 257-266; P. S. Ruckman, Jr., "The Study of Mercy: What Political Scientists Know (and Don't Know) About the Pardon Power", 9 *U. St. Thomas L.J.* 783 (2012)

"**Article 72.- Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases .-**
(1) the President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence-

(a) In all cases where the punishment or sentence is by a Court Martial;

(b) In all cases where the punishment or sentence is for an offence against any law relating to a matter to which the Executive Power of the Union extends;

(c) In all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court martial.
(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force."

Article 161.- Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases
"The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends."

Under Article 72, there is all pervasive power[42] with the President as the Executive Head of the Union as per Article 53 of the constitution of India, to grant pardons, reprieves, respite and remission of punishments apart from the power to

[42] Articles 72 and 161 of the Constitution first refer to the power to grant pardons, reprieves, respites or remissions of punishments, and then to the power to suspend, remit or commute, of any person convicted of any offence. "Reprieve" means to take back or withdraw a sentence for a time, the effect being simply to suspend the sentence. It is no more than a temporary postponement and, in England, is used as the first step in commuting a death sentence. The term "respite" means delaying the punishment, specially in the case of a death sentence, and means much the same as reprieve. It would seem that granting a respite or reprieve of punishment is practically indistinguishable from suspending the execution of the sentence awarded by a Court for a temporary period. "Remission" originally meant a pardon under the great seal and release but latterly it came to mean the same as a reduction of the quantum of punishment (e.g. amount of the fine imposed or term of imprisonment awarded) without changing its character.
"Commutation" means the alteration of a sentence of one kind into a sentence of a less severe kind, as indicated in Section 432 and 433 of the Code. See *D. Rajasekhar v. Govt. Of Andhra Pradesh*, (2004) http://indiankanoon.org/doc/1536425/

Pardon is to be distinguished from "amnesty" which is defined as "general pardon of political prisoners; an act of oblivion." As understood in common parlance, the word "amnesty" is appropriate only where political prisoners are released and not in cases where those who have committed felonies and murders are pardoned. Reprieve means a stay of execution of sentence, a postponement of capital sentence. Respite means awarding a lesser sentence instead of the penalty prescribed in view of the fact that the accused has had no previous conviction. It is some thing like a release on probation of good conduct under Section 360 of the Code. In Remission there is no change in the character of sentence, only amount of sentence changes. In the case of a remission, the guilt of the offender is not affected, nor is the sentence of the Court, except in the sense that the person concerned does not suffer incarceration for the entire period of the sentence, but is relieved from serving out a part of it. Commutation is a change of a sentence to a lighter sentence of a different kind (Section 433-A empowers the appropriate Government to suspend or remit sentences).

suspend, remit or commute the sentence of any person convicted of any offence. Therefore, the substantive part of clause (1), when read, shows the enormous Constitutional power vested with the President to do away with the conviction imposed on any person of any offence apart from granting the lesser relief of reprieve, respite or remission of punishment. The power also includes power to suspend, remit or commute the sentence of any person convicted of any offence. Clause (1), therefore, discloses that the power of the President can go to the extent of wiping out the conviction of the person of any offence by granting a pardon apart from the power to remit the punishment or to suspend or commute the sentence.[43] Further, Article 72(2) also allows the military hierarchy to exercise similar powers with respect to those sentenced by a court martial.[44] This responsibility was cast upon the Executive through a Constitutional mandate to ensure that some public purpose may require fulfillment by grant of remission in appropriate cases.[45]

The subtle difference between Articles 72 and 161 is brought by Justice U.U. Lalit[46] as under

> "16. The power conferred upon the President under Article 72 is under three heads. The Governor on the other hand is conferred power under a sole head i.e. in respect of sentence for an offence against any law relating to the matter to which the executive power of the State extends. Apart from similar such power in favour of the President in relation to matter to which the executive power of the Union extends, the President is additionally empowered on two counts. He is given exclusive power in all cases where punishment or sentence is by a Court Martial. He is also conferred power in all cases where the sentence is a sentence of death. Thus, in respect of cases of sentence of death, the power in favour of the President is regardless whether it is a matter to which the executive power of the Union extends. Therefore a person convicted of any offence and sentenced to death sentence under any law relating to a matter to which the executive power of the State extends, can approach either the Governor by virtue of Article 161 or the President in terms of Article 72(1)(c) or both. To this limited extent there is definitely an overlap and powers stand conferred concurrently upon the President and the Governor."[47]

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[43] See *Union of India v. V. Sriharan @ Murugan & Ors* 2014 (11) SCC 1

[44] This power was recently exercised by the Minister of Defence in a case apparently on the recommendation of the Chief of Army Staff. See 'Antony commutes death penalty of jawan', *Sify news*, 31 October 2008 at http://sify.com/news/fullstory. php?id=14788210 (last accessed 31 March 2009) quoted in Bikram Jeet Batra *supra* note 40 at foot note no 56

[45] *State of Haryana And Ors v. Jagdish* (2010) 4 SCC 21

[46] Minority opinion in *Union of India v. V. Sriharan @ Murugan & Ors* 2014 (11) SCC 1

[47] See *Union of India v. V. Sriharan @ Murugan & Ors* 2014 (11) SCC 1, p 190

The purpose and the ideological base of the pardoning powers have changed with the passage of the time. Mercy as benevolent disposition of omnipotent ruler is substituted by constitutional prerogative to be exercised by the elected rather than by the republican. This is partly because of the subsequent developments of the legal system taking away the powers of the prerogative and largely because of the commensurating developments in the sentencing policy both in the enactments and execution of the sentence.[48]

6.4.1 Need for mercy

The power to pardon is not about punishment as it is about redemption.[49] It has been noted that the philosophy underlying the pardon power is that

> "[e]very civilized country recognizes, and has therefore provided for, the pardoning power to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency, to be exercised by some department or functionary of a government, a country would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tempered with mercy."[50]

The desirability for retention of mercy powers in constitutional context has succinctly been observed by the Supreme Court[51] as under:

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[48] See Leslie Sebba, "The Pardoning Power - A World Survey", 68 J. *Crim. L. & Criminology* 83 (1977) p 83 where she notes

> "If the ideological reasons for doing away with the pardoning power are rooted in constitutional theory, the practical reasons are related to the development of modern penal systems. The pardoning power has historically served a number of functions, most of which are adequately provided for today by other legal institutions which have been developed to meet these needs. For example, the avoidance of imposing criminal liability on persons lacking in mental capacity or acting in self-defense is now governed by the penal code itself. The need to assuage doubts regarding the possibility of a miscarriage of justice is now commonly met by a system of appeals and rehearings before the courts. The individualization of punishment is provided for within the framework of the sentencing discretion now generally bestowed upon the courts, and subsequent developments can be taken into consideration by parole boards. Even the most dramatic use of clemency powers, viz., the commutation of capital sentences, has lost much of its importance in view of the sparse use of the death penalty in contemporary times. Finally, the use of pardons to secure rehabilitation, by removing the stigma of a criminal conviction, has widely been superseded by special laws providing for judicial or statutory rehabilitation, or for the expungement of the criminal record."

[49] Gopalkrishna Gandhi "The Power To Pardon" *The Hindu*, April 18, 2013

[50] *Epuru Sudhakar & Anr. v. Govt. of A.P. & Ors.,* (2006) 8 SCC 161, originally appearing in *59 American Jurisprudence 2d, page 5*, quoted in written submissions of senior counsel Soli Sorabjee in *Epuru Sudhakar and Anr.* v. *Govt. of A.P. and Ors*. WP (Crl.) No. 284-285/2006. Available at http://www.ebc-ndia.com/downloads/written_submissions_of_mr_soli_sorabjee_in_power_to _pardon _case.pdf

[51] *Kehar Singh* v. *Union of India & Anr.,* (1989) 1 SCC 204, see also *Shatrughan Chauhan & Anr v. Union of India & Ors*. (2014) 3 SCC 1, where the said paragraph was quoted with approval .

> "But, the fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened denial of life or the threatened or continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State."

Judicial errors, sentencing disparity,[52] development of new facts, change in sentencing policy,[53] political expediencies,[54] extra-ordinary humanitarian considerations,[55] non unanimity in judicial opinion,[56] judgments being declared per incurium[57] etc for the exercise of clemency jurisdiction. Judicial trials proceed on set of principles. Errors and misapplications are not infrequent in such sentencing. Intervention, therefore, in such cases becomes the requirement of conscience and humanity. Therefore extra ordinary powers of clemency in the form of pardon are vested in the highest executive. The number of petitions pending, the call from judiciary[58] and other organs like NHRC[59] to exercise such powers itself underlines and seals the necessity of this extra judicial remedy.

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[52] *Harbans Singh* v. *State of Uttar Pradesh,* (1982) 2 SCC 101, is a unique case where three prisoners convicted for similar roles in a murder and condemned to death suffered varied fates. Jeeta Singh's special leave petition (SLP) to the Supreme Court was rejected while Kashmira Singh's SLP was admitted and his sentence reduced by a different bench. The third accused Harbans Singh's SLP and review petition were also rejected even though the Supreme Court registry had mentioned in its office report that Kashmira's death sentence was commuted. Mercy petitions of Harbans and Jeeta were rejected and both accused were to be executed on 6 October 1981. Harbans Singh however filed the writ petition and had his execution stayed while Jeeta who did not file a writ was executed.

[53] See *Ravindra Trimbak Chouthmal v. State of Maharashtra* (1996) 4 SCC 148

[54] See *Devender Pal Singh Bhullar v. State (NCT of Delhi)* (2013) 6 SCC 195

[55] In another case in the same month, the bench again argued, 'that the execution of the death sentence will render extinction of the immediate progeny of Prem Raj and will throw the family of the condemned prisoner orphaned and resourceless on the scrap-heap of society, are matters extraneous to the judicial computer. Nevertheless these are compassionate matters which can be, and we are sure, will be considered by the Executive Government while exercising its powers of clemency'. See *Shanker* v. *State of U.P.*, AIR 1975 SC 757

[56] *Ram Deo Chauhan @ Raj Nath v. State of Assam* (AIR 2001 SC 2231) S*ee also Devender Pal Singh Bhullar v. State* (2013) 6 SCC 195

[57] In *Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra*, 2009 (6) SCC 498 a bench of the Supreme Court comprising Justice S.B. Sinha and Justice Cyriac Joseph had declared the decisions of *Shivaji @ Dadya Shankar Alhat v. State of Maharashtra* AIR 2009 SC 56, *Mohan Anna Chavan v. State of Maharashtra* (2008)11 SCC 113, *Bantu v. The State of U.*P., (2008) 11 SCC 113, *Surja Ram v. State of Rajasthan*, (1996) 6 SCC 271, *Dayanidhi Bisoi v. State of Orissa*, (2003) 9 SCC 310, *State of U.P. v. Sattan @ Satyendra and Ors*., 2009 (3) SCALE 394, as *per incuriam.* In all these cases death penalties were awarded.

[58] To stay the execution of Govindasami, soon after they recommended rejection of his petition to the president, Appeals were sent by former Supreme Court judge V R Krishna Iyer, former Chief Justice of India PN Bhagwati, social activist Baba Amte, Rajya Sabha member Kuldip Nayar and others. See 'People in the Erode dist send mercy petitions for Govindasamy', *Indian Express*, 21 March 2000 at http://www.expressindia.com/ news/ie/daily/20000322/ina22022.html. (last accessed 31 March 2009)

[59] See http://indianewsdiary.com/achr-demands-death-sentence-of-four-convicts-of-the-bara-massacre/

The examples of investigative errors are also not uncommon. In Rajiv Gandhi assassination case, the accused was convicted on the basis of confessional statement made to the police officer. However, after a long gap of two decades, Mr. Thyagarajan, Superintendent of Police, CBI as he then was, publicly admitted that he played with the confessional statement by supplying the words to make the story complete and believable even though such confessional statements were not made before him. On the basis of this statement and other grounds, petition under Article 161 of the Constitution of India was preferred for seeking Pardons or Reprieves or Respites or Remissions of punishment or to Suspend, Remit or Commute the sentence of Life Imprisonment.[60]

On a number of occasions even the judiciary itself has called for the exercise of such clemency powers. The judges who had convicted the applicant are also sometimes petitioners for his pardon.[61] Despite showing no mercy on Bhullar by themselves, Justice Arijit Pasayat and Justice B.N. Agrawal directed that the President should consider his mercy petition after seeking a report from the Presiding Judge of the Supreme Court, which confirmed his conviction and death sentence. The Presiding Judge was Justice M.B. Shah, who had differed with his brother judges on the Bench not just on the death sentence but on the very question of guilt. In his dissenting opinion, he had actually voted to acquit Bhullar.[62]

It is also interesting to note that judiciary while sentencing did not show leniency in given choices and rather asked the convicts to seek the benefits of the clemency.[63] In *Ram Deo Chauhan @ Raj Nath v. State of Assam* [64] two judges took opposing views as to the accused was a juvenile or not and to commute his sentence or not. The third judge rejected the petition, arguing that the accused had the remedy of executive clemency.

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[60] *G. Krishta Goud & J. Bhoomaiah v. State Of Andhra Pradesh & Ors* ((1976) 1 SCC 157)

[61] See William W. Smithers, "Nature and Limits of the Pardoning Power", 1 J. *Am. Inst. Crim. L. & Criminology* 549 (May 1910 to March 1911), p 559

[62] V. Venkatesan "Judges Wanted Bhullar Sentence Commuted" *The Hindu*, New Delhi, April 16, 2013

[63] Justice Krishnaiyer, V.R. in *Shiv Mohan Singh v. State (Delhi Administration)* (1977 AIR 949) observed as under:

> "The judicial fate notwithstanding, there are some circumstances suggestive of a claim to residential clemency. The two jurisdictions are different, although some considerations may overlap. We particularly mention this because it may still be open to the petitioner to invoke the mercy power of the President and his success or failure in that endeavour may decide the arrival or otherwise of his dooms- day. With these observations we leave the 'death penalty' Judicially 'untouched."

[64] AIR 2001 SC 2231

In *Devender Pal Singh v. State, N.C.T. of Delhi and anr,*[65] the majority bench also relied on the safety-net of executive clemency when upholding the death sentence after the bench was divided on conviction and sentence. In *Bissu Mahgoo v. State of Uttar Pradesh*[66] the Court 'suggested' that the appellant should file an application for clemency to the central government since he stands 'good grounds' for consideration. In *Bhagwan Swarup v. The State of U.P.*[67] the Court noted that the appellant's young age of 19 is not sufficient to be judicially considered for awarding lesser punishment but could be taken into consideration in a mercy petition.

It had been exemplary example in India where retired judges accepted judicial errors and appealed to the President to exercise pardoning power in favour of convicts. A group of 14 judges[68] of eminence has, in an appeal to the President of India, sought his intervention to commute death penalty awarded to convicts,[69] using his powers under Article 72 of the constitution.[70] Alternatively, Judges after their retirements, in their personal capacity also have advocated for the mercy in certain cases.[71]

Apart from judges and judiciary, even the NHRC has also jumped into seeking the benefits of clemency. In January 2002, the then Governor of Assam commuted Chauhan's death sentence to life imprisonment on the intervention of National Human Rights Commission. In May 2009, the Supreme Court struck down the commutation

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[65] AIR 2003 SC 886
[66] AIR 1954 SC 714
[67] AIR 1971 SC 429
[68] Ho'ble judges who signed the petition are C P B Sawant, Justice A P Shah, Justice Bilani Nazaki, Justice P K Misra, Justice Hosbet Suresh, Justice Panand Jain, JusticePrabha Sridenvan, Justice K P Sivaubranamium, Justice P C Jain, Justice S N Bhargava, Justice B G Kolse-Patil , Justice Ranvir Sahai Verma, Justice B A Khan and Justice B H Malapalle. The unusual appeal does not stem from their principled opposition to the death penalty, though some of them may believe in its abolition personally. They have appealed to the Presidentbecause these 13 convicts were erroneously sentenced to death according to the Supreme Court's own admission and are currently facing the threat of imminent execution. The Supreme Court, while deciding three recent cases, held that seven of its judgments awarding the death sentence were rendered per incuriam (meaning out of error or ignorance) and contrary to the binding dictum of "rarest of rare" category propounded in the Constitution Bench judgment in *Bachan Singh v. State of Punjab* (1980) (2 SCC 684). The three recent cases were *Santosh Kumar Bariyar vs. State of Maharashtra* (2009) (6 SCC 498), *Dilip Tiwari v. State of Maharashtra* (2010) (1 SCC 775), *Rajesh Kumar v. State* (2011) (13 SCC 706).
[69] Even after appeal to the President by such judges, the MHA failed to consider their appeal and continued with death penalty. However, in *Shatrughan Chauhan & Anr v. Union of India & Ors.* (2014) 3 SCC 1, the Supreme Court commuted sentences of many of them.
[70] V Venkatesan "a case against death penalty" *Frontline,* September 7, 2012
[71] Press Council of India Chairman Markandey Katju has appealed to the President to pardon Devender Pal Singh Bhullar or commute to life imprisonment the death sentence awarded him in the 1993 Delhi bomb blast case. Late Justice Krishna Iyer sought for release of A. G Perarivalan , (death row convictee who was subsequently commuted to life imprisonment,) involved in Rajeev Gandhi Assassination case on the ground of prolonged solitary and death row confinement.

of Chauhan's death sentence saying the Governor's order was not reasoned, and that the NHRC had no locus to intervene in the matter. However, in a judgment delivered on November 19, 2010, the Supreme Court reversed its ruling, and found that the NHRC was well within its mandate to intervene even after the Supreme Court had confirmed the death penalty, and upheld the Governor's decision to commute Chauhan's death sentence to life imprisonment.[72]

Political expediencies have always underlined the powers of pardon. Every now and then, on the basis of political expediencies, powers have either been exercised or not exercised. A popular will of the people may influence the exercise of powers. Example of Tamilnadu State assembly may be cited where it was unanimously resolved, showing the collective will of the people of Tamil Nadu, to release the accused of Late Prime Minister Rajeev Gandhi Assassinates in three days![73] The death penalty of Bhullar also saw many political upheavals resulting in party delegation to request President to exercise his extra ordinary powers.[74]

6.4.2 Nature of Mercy

Mercy, contrary to its understanding,[75] is generally not exercised to exonerate convicts from everything in India though the words are capable of that import. It is rather exercised to commute sentences from death to life or remit sentences to be undergone.[76]

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[72] V. Venkatesan "Judges Wanted Bhullar Sentence Commuted" *The Hindu*, New Delhi, April 16, 2013

[73] Tamil Nadu state assemble resolutions dated 30/08/2011 and 19/02/2014

[74] It is learnt that "The core committee of the Shiromani Akali Dal (SAD) met here on Saturday to deliberate on the Supreme Court's rejection of Devinderpal Bhullar's petition to commute his death sentence, decided that Chief Minister Parkash Singh Badal and party Presidentand Deputy Chief Minister Sardar Sukhbir Singh Badal will meet Prime Minister Manmohan Singh and Union Home Minister Sushil Kumar Shinde to urge them "to operationalise the post-judicial mechanism of statesmanship in order to avoid, even at this stage, any steps that may pose a threat to peace and communal harmony in the country in general and Punjab in particular."
"Describing the development as "deeply painful, unfortunate and worrying," the SAD core committee has also decided that the two leaders would separately request the President, Pranab Mukherjee in this regard."
In a resolution, the committee appealed to "all peace loving citizens of the country and eminent public figures to work towards a solution to the issue in a manner that strengthens emotional bonds among different segments and communities of the people in the country and to pre-empt any decision based only on litigatory technicalities or stubbornness." See " Special Correspondent "Punjab CM To Plead Bhullar's Case" *The Hindu*, Chandigarh, April 14, 2013 see also V. Venkatesan "Judges Wanted Bhullar Sentence Commuted" *The Hindu*, New Delhi, April 16, 2013

[75] Now it is not disputed that in England and India the effect of a pardon or what is sometimes called a free pardon is to clear the person from all infamy and from all consequences of the offence for which it is granted and from all statutory or other disqualifications following upon conviction. It makes him, as it were, a new man (See Halsbury's Laws of England, Vol. VII, Third Edition, p. 244, para 529) quoted in Sarat Chandra Rabha And Others vs Khagendranath Nath And Others 1961 AIR 334

[76] No mercy power as on date has been exercised in independent India to exonerate from all crimes. However, the powers have been exercised to commute sentence from one form to another specially death to life. Powers of remission have also been exercised under this extra-ordinary prerogative.

The mercy petition can be filed at any stage after the conviction. However, there are no such examples in India. Mercy petition is generally invoked only after the judicial determination of guilt is over. Two situations are contemplated in India when mercy is generally invoked. When the matter is judicially adjudicated up to highest legal hierarchy i.e., Supreme Court[77] and secondly where the condemned prisoner is unable/has not preferred an appeal[78] to the Supreme Court;[79] or where the court either refuses to hear the appeal.[80]

Noting the nature of mercy powers, Gopalkrishna Gandhi observes that "[t]his power is not a penthouse provision for the President to luxuriate in, arbitrarily or in a moment of operational surplus"[81] rather

> "Article 72 is about a very old but creatively renewed principle of a sovereign's prerogative to adjudge capital crime against the backdrop of its circumstances, not legalistically but civilisationally. It is an opportunity for the sovereign, now our elected President, the First Citizen of India, to view a crime committed by one fellow citizen against another, which has invited the ultimate punishment, the legal taking away of the right to life, to see if that punishment than which there can be no greater punishment, is merited, deserved, fair, just and, above all, free from any error of judgment by those tasked to judge it."

Unlike other jurisdictions[82] President and Governors exercise their clemency powers on the advise of the council of ministers.[83] Articles 72 and 161 confer power

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[77] In respect of offences tried under Indian penal code and other ordinary laws, a three tier judicial remedy is available where other than the trial court appeal to high court and further appeal to supreme court lies and final judicial remedy is obtained. However, there are few legislations which do not provide the appeal remedy to high court. In such cases appeal directly lies to Supreme Court from the trial court. Judicially speaking the the aggrieved is deprived of the chance of second stage hearing before the high court.

[78] See such cases in Anup Surendranath, *Death Penalty India Report*, Vol.1 and 2, (New Delhi: National Law University, 2016)

[79] Two situation can be contemplated where the accused can lose the remedy before the Supreme Court. One is the limitation period within which the appeal has to be filed. Though courts may condone the delay to avoid thee miscarriage of justice, cases have been noted where the courts have refused to entertain appeal after the statutory time limit. Further the right of appeal to Supreme Court is not routine (elaborate) The second situation is where the courts have refused to entertain SLP or dismissed the same. See *Swaran Singh v. State of U.P.* [1998 (4) SCC 75]

[80] *Supra* note 40

[81] Gopalkrishna Gandhi "The Power To Pardon" *The Hindu*, April 18, 2013

[82] The Zambian Constitution provides that the President acts "in his own deliberate judgement and shall not be obliged to follow the advice tendered by any other person or authority." It is, indeed, most frequently the executive arm which is designated as the "recommending" body. This is the case under the constitutions of Austria, Greece, the Irish Republic, Japan, New Zealand, Niger, Rhodesia, Singapore, South Africa and Sri Lanka. In these cases it seems clear that the "secondary" authority has been granted the effective decision-making power. See Leslie Sebba, "The Pardoning Power--A World Survey", 68 *J. Crim. L. & Criminology* 83 (1977) p 144

[83] In *Maru Ram v. Union of India* [1981 (1) SCC 107] ruled that the President and the Governors in discharging the functions under Article 72 and Article 161 respectively must act not on their own judgment but in accordance with the aid and advice of the ministers. See also *Kehar Singh v. Union of India* [1989 (1) SCC 207 at 211]. In *Devender Pal Singh Bhullar v. State (NCT of Delhi)* (2013) 6 SCC 195 the supreme court noted

> " The propositions which can be culled out from the ratio of the above noted judgments are:
> "(i) the power vested in the President under Article 72 and the Governor under Article 161 of the Constitution is manifestation of prerogative of the State. It is neither a matter of grace nor a matter of privilege, but is an important constitutional responsibility to be discharged by the highest executive keeping in view the considerations of larger public interest and welfare of the people.
> (ii) while exercising power under Article 72, the President is required to act on the aid and advice of the Council of Ministers. In tendering its advice to the President, the Central

or discretion coupled with duty and obligation.[84] It is a power which the sovereign exercises against its own judicial mandate. The act of remission of the State does not undo what has been done judicially. The punishment awarded through a judgment is not overruled but the convict gets benefit of a liberalised policy of State pardon.[85]

The available jurisprudence suggests that neither the parliament[86] nor the courts[87] has the ability to infringe on the President's power to pardon, as the "the pardoning power is an enumerated power of the Constitution and that its limitations, if any, must be found in the Constitution itself.[88]

Since mercy power is independent and extra ordinary, no restrictions including the number of applications can be imposed. In other words, the same person may prefer mercy petition even if is rejected in the first instance. On the other hand, mercy petition may be preferred by the relatives of the accused also. There is nothing to

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> Government is duty bound to objectively place the case of the convict with a clear indication about the nature and magnitude of the crime committed by him, its impact on the society and all incriminating and extenuating circumstances. The same is true about the State Government, which is required to give advice to the Governor to enable him to exercise power under Article 161 of the Constitution. On receipt of the advice of the Government, the President or the Governor, as the case may be, has to take a final decision in the matter. Although, he/she cannot overturn the final verdict of the Court, but in appropriate case, the President or the Governor, as the case may be, can after scanning the record of the case, form his/her independent opinion whether a case is made out for grant of pardon, reprieve, etc.. In any case, the President or the Governor, as the case may be, has to take cognizance of the relevant facts and then decide whether a case is made out for exercise of power under Article 72 or 161 of the Constitution."

[84] For ratio on powers coupled with duty see *Alcock Ashdown and Company Limited v. The Chief Revenue Authority* AIR 1923 PC 138*, The Chief Controlling Revenue Authority v. The Maharashtra Sugar Mills Limited* AIR 1950 SC 218, the exercise of the power in arbitrary way or non exercise of the power therof is questionalble as violation of fundamental rights and hence can be challenged in courts. *See T.V. Vatheeswaran v. State of Tamil Nadu* (1983) 2 SCC 68*, Sher Singh and Ors. v. State of Punjab* (1983) 2 SCC 344*, Triveniben v. State of Gujarat* (1988) 4 SCC 574

[85] *State of Haryana And Ors. v. Jagadish* (2010) 4 SCC 216

[86] Jonathan T. Menitove, "The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency" *Harvard Law & Policy Review*, Vol. 3, 2009, p 451

> "With regard to the legislative branch, the Supreme Court has consistently held that Congress is powerless to infringe upon the executive's prerogative when it comes to clemency. In Ex parte Garland, Justice Field delivered the opinion of the Court: "This [pardon] power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders."[] Similarly, in United States v. Klein, the Court noted "that the legislature cannot change the effect of such a pardon any more than the executive can change a law[]" [footnotes omitted]

[87] Jonathan T. Menitove, *Ibid*, notes

> "The presidential pardon is similarly sacrosanct when it comes to the judiciary. In Ex parte Grossman, [] the Supreme Court rejected the argument that the President cannot pardon offenders convicted of criminal contempt of court on the grounds that allowing the President to do so would infringe on the powers of the judiciary. Instead, Chief Justice Taft adopted an expansive view of the President's clemency power, noting that "[o]ur Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it."[]. [footnotes omitted]

[88] *Ibid*

debar the concerned authority to exercise such power, even after rejection of one clemency petition, if the changed circumstances warrant so.[89]

6.5 Controversial Conundrum Of Constitutional Clemency

6.5.1 Absence of guidelines

It is understandable that there are can be no guidelines for the exercise of clemency powers for the simple reasons that the powers to be exercised is sovereign in nature and therefore such power cannot be confined to few known instances ignoring myriad kinds of eventualities.[90] However, the exercise of this power has failed to create a pattern in India in the sense that the said powers have been so arbitrarily exercised that there appears to be 'a complete void' in the field.[91] Judicial attempts were failed by the judiciary itself to lay down indicative guidelines.[92] The

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[89] See *G. Krishta Goud & J. Bhoomaiah v. State of Andhra Pradesh & Ors*. (1976) 1 SCC 157. In the landmark judgment in the *Kehar Singh* case (AIR 1989 SC 653) the Supreme Court noted that

> "[the] power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case in which the merits and reasons of state may be profoundly assisted by prevailing occasion and passing time."

[90] In RTI application the MHA responded that no specific guidelines can be framed for examining the mercy petitions

Bikram Jeet Batra see *supra* note 40

> "…the power of the executive to grant pardon under Article 72/161 is a Constitutional power and this Court, on numerous occasions, has declined to frame guidelines for the exercise of power under the said Articles for two reasons. Firstly, it is a settled proposition that there is always a presumption that the constitutional authority acts with application of mind as has been reiterated in Bik as *Chatterjee v. Union of India* (2004) 7 SCC 634. Secondly, this Court, over the span of years, unanimously took the view that considering the nature of power enshrined in Article 72/161, it is unnecessary to spell out specific guidelines."

In Keher Sing AIR 1989 SC 653 pp. 217- 18, para 16 the court observed

> "It seems to us that there is sufficient indication in the terms of Article 72 and in the history of the power enshrined in that provision as well as existing case-law, and specific guidelines need not be spelled out. Indeed, it may not be possible to lay down any precise, clearly defined and sufficiently channelized guidelines, for we must remember that the power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of case with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme."

[91] *Cf* observation in *Epuru Sudhakar & Another v. Govt. of A.P. & Ors.* AIR 2006 SC 3385 where it was observed (per Kapadia, J) in his concurring opinion that:

> "Exercise of Executive clemency is a matter of discretion and yet subject to certain standards. It is not a matter of privilege. It is a matter of performance of official duty. It is vested in the President or the Governor, as the case may be, not for the benefit of the convict only, but for the welfare of the people who may insist on the performance of the duty…"

[92] In *Shatrughan Chauhan & Anr v. Union of India & Ors*. (2014) 3 SCC 1 the court observed thus

> "No doubt in Maru Ram case the Constitution Bench did recommend the framing of guidelines for the exercise of power under Articles 72 /161 of the Constitution. But that was a mere recommendation and not a ratio decidendi having a binding effect on the Constitution Bench which decided Kehar Singh case. Therefore, the observation made by the Constitution Bench in Kehar Singh case does not upturn any ratio laid down in Maru Ram case."

predicament is further augmented when the ministry of home affairs set certain guidelines only to disregard which were eventually not followed even in most deserving cases.

The Government of India has laid down certain guidelines in the form of circulars/ instructions to define the contours of the power under Article 72/161 for deciding mercy petitions. While preparing advice to the President on the mercy pleas, the MHA is required to examine the following:[93]

1. Personality of the accused (such as age, sex or mental deficiency) or circumstances of the case (such as provocation or similar justification);
2. Cases in which the appellate Court expressed doubt as to the reliability of evidence but has nevertheless decided on conviction;
3. Cases where it is alleged that fresh evidence is obtainable mainly with a view to see whether fresh enquiry is justified;
4. Where the High Court on appeal reversed acquittal or on an appeal enhanced the sentence;
5. Is there any difference of opinion in the Bench of High Court Judges necessitating reference to a larger Bench;
6. Consideration of evidence in fixation of responsibility in gang murder case;
7. Long delays in investigation and trial etc.

Apart from the so called guidelines[94] framed by the MHA, President Dr. APJ Abdul Kalam is reported to have framed[95] certain additional guidelines for his consideration.[96] The validity of such self framed guidelines may be doubted in the light of President being bound by the advise of council of ministers. Bikram Jeet

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[93] See V. Venkatesan, "Mercy guidelines", *Frontline*, Vol. 26, Issue 07, 2009 available at http://www.frontline.in/static/html/fl2607/stories/20090410260703400.htm

[94] the MHA itself has responded that "no specific guidelines can be framed for examining the mercy petitions…" See Bikram Jeet Batra *supra* note 40 at p 25

[95] The President Dr. APJ Abdul Kalam, who in 2005 requested consideration of the following:

1. The Home Ministry, before recommending any action on a petition, should consider the sociological aspect of the cases;
2. Besides the legal aspects, the Ministry should examine the humanist and compassionate grounds in each case; these grounds include the age of the convict and his physical and mental condition;
3. The Ministry should examine the scope for recidivism in case a death sentence is commuted to life imprisonment through the President's action; and
4. The Ministry should examine the financial liabilities of the convict's family

[96] V. Venkatesan, "Death Penalty: The Presidential Dilemma", *Frontline*, Vol. 22(23), Nov. 5–18, 2005

Batra has made a detailed study on how other consideration have played significant role in commutation or rejection of mercy petitions.[97]

Legal defense was considered for commutation in some cases.[98] In addition to the defence, commutations have also been granted where the role of other institutions including the prosecution and the high court has been suspect.[99] Political considerations are also factors in determining mercy cases. As an example - soon after the formation of Gujarat, the petitioner who had killed his wife over a dowry dispute had his sentence commuted by the President. Although officially this was done citing concerns about the lack of proof of the motive, the factor that appeared to have influenced the decision was nearly 1,500 petitions sent by persons across Gujarat pleading for mercy in the case. Most of the petitioners saw the death sentence as an affront to the new Gujarat state and identity! In another high-profile case relating to the assassination of Indira Gandhi, the then Prime Minister, the initial remarks in the mercy petitions noted that given the circumstances of the case, 'the question of grant of clemency in this case hardly arises.[100] This was a case where the broader political circumstances completely swept aside serious concerns of inadequate evidence with respect to *Kehar Singh*.[101]

Continuation of 'family line' is one a curious factors that has influenced the executive to commute death sentences. This appears to have come in as early as 1956 when the sentence of one Angrez Singh was commuted 'with a view to saving the family from virtual extinction'.[102] In another case, where one brother murdered his

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[97] *Supra* note 40. Bikram Jeet Batra exhaustively and illustratively discusses the clemency powers, their exercises, abuses, irregularities, inconsistencies and individual practices of the presidents.

[98] Mercy petition of *Haridas Ramdas @ Abdul Rashid Abdul Rehman*, File no. MHA (Judicial–1) 32/96/58, NAI: Mercy petition of *Hazara Singh s/o Sunder Singh*, File no. MHA (Judicial–1) 32/66/58, NAI; Mercy petition of *Anthoni Vannan*, File no. MHA (Judicial–1) 32/49/58, NAI; Mercy petition of *Sita Ram s/o Dhara Singh*, File no. MHA (Judicial–1) 32/36/56, NAI; Mercy petition of *Parthasarathy Chettiar*, File no. MHA (Judicial–1) 32/111/53, NAI: See Bikram Jeet Batra *supra* note 40

[99] 'Evidence of Prosecution suffers from manipulation' in Mercy petition of Raja Ram, File no. MHA (Judicial 1) 32/102/57, NAI*;* High Court judgment was effectively 'special pleading' in Mercy Petition of Banshi Munda, File no. MHA (Judicial) 32/80/54 , See Bikram Jeet Batra, *supra* note 40

[100] See Note by PS Ananthanarayanan, US (Judl) dated 15 October 1988, Mercy petition of Satwant Singh and Kehar Singh, File. no. 9/4/88—Judl, MHA. There was hardly any real discussion on clemency in the Government and virtually none on the (lack of) evidence against Kehar Singh. Even in the second round of decision making (required as per the direction of the Supreme Court) despite the involvement of the Solicitor General the summary prepared by the MHA did not enter into issues of evidence.

[101] For a sharp and detailed analysis of the inadequate evidence and the case in general, see HM Seervai, *Constitutional Law in India*, *supra*, pp 1206—1233. After the full analysis, he agrees with former Justice Tarkunde's statement that even a dog could not be hanged on such evidence. Quoted in Bikram Jeet Batra, *supra* note 40

[102] Mercy petition of Bagh Singh. *ibid*.

parents, the executive commuted the sentence to avoid 'magnifying the loss' of the remaining brothers,[103] while in yet another, a husband who killed his wife had his death sentence commuted to prevent the children from becoming guardian-less.[104] The eventuality of an old man becoming 'sonless' was sufficient to commute the sentence in another case.[105] Although it is arguable that these cases are instances of clemency proceedings being able to gather and appreciate the ground situation, where two brothers were sentenced to death, such rationale effectively became a lottery since despite identical roles in the murder; one brother was sentenced to life while the other was hanged.[106]

A rare exception was a case where the Home Minister of then Madras State sought the rejection of a mercy petition as the victim was the mother of one of the Deputy Directors of Education in the State 'and the case had created a lot of excitement locally.[107]

In two other cases, victims' family members officially played a vital role. In the petition filed by one Parmatma Saran, a letter from the father of the victim in favour of mercy played a major role in the government's decision to commute the sentence.[108] While in proceedings relating to *Dhananjoy Chatterjee* (1994), a letter from the father of the victim asking for the rejection of the petition and the execution of the accused was relied upon by the MHA in recommending rejection in its summary for the Home Minister.[109]

6.5.2 Personal views and errors

This is evident in a large number of cases in the 1950s, the then Minister of State for Home Affairs BN Datar commuted the sentence of many men sentenced to

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[103] Mercy petition of Koola Boyan, File no. MHA (Judicial-1) 32/87/61, NAI, see Bikram Jeet Batra *supra* note 40

[104] Mercy petition of Pukhrambam Jugeshwar Singh, Bikram Jeet Batra *Ibid*

[105] Mercy petition of *Nasib Chand s/o Jai Ram*, File no. MHA (Judicial-1) 32/121/58, NAI, See Bikram Jeet Batra, *supra* note 40

[106] Mercy Petition of *Bharwad Mepa Dana*, File no. MHA (Judicial-1) 32/7/60, NAI; and Mercy petition of *Abdul Hafiz s/o Salimullah*, File no. MHA (Judicial-1) 32/18/62, NAI, See Bikram Jeet Batra, *supra* note 40

[107] See Mercy petition of Subramanian. The petition was rejected by the Governor of Madras, but it was commuted by the President largely on grounds of insufficient evidence., See Bikram Jeet Batra, *supra* note 40

[108] Mercy petition of *Parmatma Saran s/o Kailash Chandra*, File no. MHA (Judicial-1) 32/183/61, NAI

[109] See for instance the minute dated 28 June 2004 by YK Baweja, Deputy Secretary in Mercy petition of Dhananjoy Chatterjee, MHA*, supra,* See Bikram Jeet Batra, *supra* note 40

death for the murder of their wives on the presumption that for a man to have taken such an extreme step, he *must* have been wronged.[110]

The role of the individual views of the Minister or other officials are also evident in the cases where due to a change in personnel midway in the decision-making process, the previous recommendation is invariably reversed![111]

In fact in a large number of cases, prisoners have been able to get their 'rejected mercy petition' reviewed in second mercy petition when a new official comes into that chair.[112]

Given that as per current practice, all mercy petitions pending before the President at the time of installation of a new government are sent back for re-examination to the MHA[113] Batra observes:

> "Yet despite a variety of standard operating rules to assist decision making, in a number of cases clear errors are visible. For instance, although there is a general practice of not executing old persons, a condemned prisoner aged 75 was refused clemency. In another case where a 65 year old was executed in 1991, the issue of age was not even discussed during the deliberations on clemency.[114] The vice of arbitrariness remains a large question mark over decision-making in clemency petitions. This is perhaps best illustrated with two cases in the same year: although both were heinous murders with quite similar facts, the executive presumed some mental disturbance in the former and refused to even consider it in the latter." [115]

In *Rajendra Prasad* v. *State of Uttar Pradesh*,[116] an alert bench of the Supreme Court had observed that courts could not be complacent and rely on

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[110] See Mercy petition of *Pannady*, File no. MHA (Judicial 1) 32/6/56, NAI; Mercy petition of *Kiran Singh*, File no. MHA (Judicial 1) 32/29/58, NAI*;* Mercy petition of *Sadhu Singh*, File no. MHA (Judicial 1) 32/157/61, NAI; Mercy petition of *Chiraunji Lal*, File no. MHA (Judicial 1) 32/41/61, NAI; Mercy petition of *Eswaran*, File no. MHA (Judicial 1) 32/53/61, NAI, See Bikram Jeet Batra, *supra* note 40

[111] Mercy petition of *Ram Charan*, File no. MHA (Judicial 1) 32/70/62, NAI; Mercy petition of *Randhir Singh*, File no. MHA (Judicial 1) 32/154/63, NAI, See Bikram Jeet Batra, *supra* note 40

[112] See for instance Mercy petition of *Ramsahai*, File no. MHA (Judicial 1) 32/27/66, NAI. This is one of 14 similar petitions over various years., See Bikram Jeet Batra, *supra* note 40

[113] See Ritu Sarin, "Beg your pardon, Mr. President?", *Indian Express*, 23 October 2005

[114] Mercy petition of *Ajodhya*, File no. MHA (Judicial 1) 32/16/61, NAI; Mercy petition of *Nataraya Gounder and Nattuthurai @ Natarayan*, File no. 9/2/88—Judl (MP), MHA, See Bikram Jeet Batra, *supra* note 40

[115] In *Shiv Dayal's* case (File no. MHA (Judicial 1), 32/25/56, NAI) the petitioner was a 50–year-old man who had killed his own cousin and his infant son. While the Minister agreed that petitioner was not technically of unsound mind, he observed 'I am constrained to believe that the petitioner's mind had not been working in a normal order. It is impossible to believe that that a person would act in the manner that the petitioner did even towards his own kith and kin except on the assumption that he was working under the strain of a great excitation or perturbance that made his cease to be a human being.' However in the case of Sukhbir (File no. MHA (Judicial 1) 32/31/56, NAI*)* where the petitioner had killed his own two children, the Minister did not even enter the domain on his mental health noting instead; ''A man who, in a gust of rage and emotion murders his own children, is not entitled to any clemency'., See Bikram Jeet Batra, *supra* note 40

[116] (1979) 3 SCC 646

executive clemency powers to prevent errors since discrimination was inherent in such a process.[117]

Subsequent benches have however ignored such a warning and failed to hold the executive accountable. Some have gone further and even relied on executive clemency to sort out their disagreements.[118]

6.5.3 Utmost disregard for its own policy

Asian Centre for Human Rights[119] has come up with independent research to prove that, in spite of the available guidelines (which are not sufficient and clear of course!) the MHA has failed to consider them in some cases,[120] making the entire process *"Arbitrary On All Counts"* This report shows that the advices given by the MHA have no respect for its own broad guidelines, laws based on *stare decisis*, natural justice and precedents set by the former Presidents with respect to cases having similar facts and circumstances.[121] The Asian Centre for Human Rights, therefore, demanded that in the following cases, (out of 10 the researcher agrees with seven) mercy powers be exercised as matter of right and exigency:

1. Inordinate and unexplained delay[122]
2. Possibility of reform of the condemned prisoner[123]
3. A dissenting judgement at any stage of the proceedings[124]

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[117] AIR 1979 SC 916. The Court noted:

> "For one thing, the uneven politics of executive clemency is not an unreality when we remember it is often the violent dissenters, patriotic terrorists, desperadoes nurtured by the sub-culture of poverty and neurotics hardened by social neglect and not the members of the establishment or conformist class, who get executed through judicial and clemency processes."

See also *Ram Deo Chauhan @ Raj Nath v. State of Assam* (AIR 2001 SC 2231) and *Devender Pal Singh v. State, N.C.T. of Delhi and anr,* AIR 2003 SC 886

[118] In *Ram Deo Chauhan @ Raj Nath v. State of Assam* (AIR 2001 SC 2231), two judges took opposing views on whether to accept the claims that the accused was a juvenile or not and commute his sentence. The third judge rejected the petition arguing that the accused had the remedy of executive clemency. In *Devender Pal Singh v. State, N.C.T. of Delhi and anr,* (AIR 2003 SC 886), the majority bench also relied on the safety-net of executive clemency upholding the death sentence after the bench was divided on conviction and sentence.

[119] Asian Centre for Human Rights, *Arbitrary On All Counts: Consideration of Mercy Pleas by Presidentof India*, (New Delhi: ACHR, December 2014) also available at https://www.achrweb.org/reports/india/arbitraryonallcounts.pdf

[120] *Ibid*, ACHR examined 41 cases involving 65 condemned prisoners whose mercy petitions were considered by successive Presidents of India.

[121] *Ibid* p 3

[122] *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1

[123] *Bachan Singh v. State of Punjab* AIR 1980 SC 898

[124] See *Devender Pal Singh Bhullar v. State National Capital Territory of Delhi and Anr* (2013) 6 SCC 195,*Gurmeet Singh v. State of Uttar Pradesh* (2005) 12 SCC 107, *Saibanna Natikar v. State of Karnataka* https://indiankanoon.org/doc/1632997/, *Krishna Mochi & Ors v. State of Bihar* https://indiankanoon.org/doc/439549/

4. Denial of the right to appeal because of the enhancement of punishment by the Supreme Court in the form of death penalty[125]
5. Inability to defend oneself by hiring own lawyer or by the amicus curiae or lawyers from legal aid services by the Courts in all stages of the proceedings[126]
6. Conviction based on judgements which have been held as *per incuriam* by the Supreme Court[127]
7. Death penalty imposed solely based on circumstantial evidence[128]

6.5.4 ill equipped machinery for clemency exercise

A final check by the President becomes is important given the fact that the initial proceedings on mercy petitions in the MHA is undertaken by junior and legally inexperienced staff and the Additional/Joint secretaries as also the Home Minister who recommend a final decision to the President may not have the skills or training to analyze complicated criminal law questions[129]

Presently the initial note on the case is prepared by the Section Officer/ Adhoc dealing assistant. This is then seen by the Director (Judicial)—an officer of the Central Secretariat Service not necessarily legally qualified. The file is then seen by the Joint Secretary (Judicial) and the Additional Secretary (CS) before going to the Home Secretary. All these officials are likely to be members of the Indian Administrative Service and, therefore, may not be able to appreciate the finer points of criminal law. Personal conversation of the author with officials in the MHA dealing with mercy petitions[130]The President is assisted by a single IAS officer who serves him as, all in one, constitutional, legal and procedural advisor.[131]

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[125] See *State of Rajasthan v. Kheraj Ram* (Criminal Appeal No. 830 of 1996 decided on 22.08.2003) https://indiankanoon.org/doc/1388203/ *State of U.P. v. Satish* [Criminal Appeal Nos. 256-257 of 2005 (Arising out of S.L.P. (Crl.) Nos. 1666-1667 of 2004 decided on 08.02.2005] https://indiankanoon.org /doc/1789800/ *Sonia and Sanjeev v. Union of India*, AIR 2007 SC 1218

[126] *Mohd. Farooq Abdul Gafur and Anr. v. State of Maharashtra* (2010) 14 SCC 641

[127] *Mohan Anna Chavan v. State of Maharashtra* (2008)11 SCC 113, *Shivaji @ Dadya Shankar Alhat v. State of Maharashtra* AIR 2009 SC 56, *Bantu v. The State of U.P*., (2008) 11 SCC 113, *Dayanidhi Bisoi v. State of Orissa* (2003) 9 SCC 310, *State of U.P. v. Sattan @ Satyendra and Ors.*2009 (3) SCALE 394, *Surja Ram v. State of Rajasthan* (1996) 6 SCC 271

[128] *Bishnu Prasad Sinha & Anr v. State of Assam* http://indiankanoon.org/doc/1589218/

[129] *Supra* note 40 at p 79

[130] *Ibid* foot note no 265

[131] See James Manor, *The Presidency*, in Devesh Kapur and Pratap Bhanu Mehta, (ed.,) *Public Institutions in India*, (New Delhi: Oxford University Press, 2007)

6.5.5 Delay in execution: constitutional complications and answers thereof

The undue, unreasonable and prolonged delay in the disposal of mercy petition has put the 'institution of power' into questions. A petition pending for three months in the MHA was considered as 'delayed' by the President in 1956. Subsequently the office of clemency scuttles into infamous for prolonged delays.[132] It is exactly at this point of time that, the cases like *Vatheeswaran*[133] and *Triveniben* [134] were decided which gave way for developing the jurisprudence of commuting the death sentence based on undue delay.

The inordinate delay in disposal of mercy cases have been challenged in the courts basically on three grounds. *Firstly* such delays violate the principles of international conventions[135] which are part of the constitutional schemes[136] providing for outlawing cruel and degrading treatment and /or punishment. *Secondly* the delay in execution of sentences of death after it has become final at the end of the judicial process is wholly unconstitutional as it constitutes torture, deprivation of liberty and detention in custody not authorized by law within the meaning of Article 21 of the constitution.[137] *Thirdly* Article 21 of the Constitution does not end with the pronouncement of sentence but extends to the stage of execution of that sentence.[138]

The government had and has tried to justify the inordinate delay on the grounds that *firstly* "the power of the President under Article 72 is discretionary which cannot be taken away by any statutory provision and cannot be altered, modified or interfered with, in any manner, by any statutory provision or authority. The powers conferred on the President are special powers overriding all other laws, rules and regulations in force. Delay by itself does not entail the person under sentence of death to request for commutation of sentence into life imprisonment."

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[132] Mostly until 1980 the mercy petitions were decided in minimum of 15 days and in the maximum of 10-11 months. Thereafter, from 1980 to 1988, the time taken in disposal of mercy petitions was gradually increased to an average of 4 years.
[133] *T.V. Vatheeswaran v. State of Tamil Nadu* 1983 AIR 361
[134] *Smt. Triveniben & Ors v. State of Gujarat & Ors* 1989 AIR 1335
[135] India is signatory to Universal Declaration of Human Rights, 1948 as well as to the United Nations Covenant on Civil and Political Rights, 1966. Both these conventions contain provisions outlawing cruel and degrading treatment and/or punishment.
[136] Pursuant to the judgment of this Court in *Vishaka v. State of Rajasthan* (1997) 6 SCC 241, international covenants to which India is a party are a part of domestic law unless they are contrary to a specific law in force.
[137] *Shatrughan Chauhan & Anr v. Union of India & Ors.* (2014) 3 SCC 1para 45
[138] *Ibid* para 43

Secondly even if the delay caused seems to be undue, the matter must be referred back to the executive and a decision must not be taken in the judicial side.

As early as 1983 when the delay in disposal of mercy petition reached the time limit of four and odd years, the supreme court held in *T.V. Vatheeswaran v. State of Tamil Nadu*[139] that the inordinate delay is the ground for commutation. *Secondly* two years delay may be sufficient to commute death penalty into life imprisonment.[140] Subsequently, in *Sher Singh*,[141] which was a decision of a Bench of three Judges, it was held that a condemned prisoner has a right of fair procedure at all stages, trial, sentence and incarceration but delay alone is not good enough for commutation and two years' rule could not be laid down in cases of delay. Owing to the conflict in the two decisions, the matter was referred to a Constitution Bench in *Smt. Triveniben v. State of Gujarat*.[142] Though the court in this case approved that the delay may be a ground for commutation,[143] it refused to accept any fixed period as sufficient period for commutation. The law, therefore, that stands as on date is (a) prolonged delay may be one of the grounds for commutation (b) only the delay caused by the executive after submission of the mercy petition will be taken into account and will not include delays caused by the prisoners themselves; and (c) there can be no fixed time frame for the President or Governor to decide on a mercy plea.[144]

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[139] (1983) 2 SCC 68

[140] Chinnappa Reddy, J. in *T.V. Vatheeswaran v. State of Tamil Nadu* (1983) 2 SCC 68, observed that prolonged delay in execution of a sentence of death had a dehumanizing effect and this had the constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way offending the fundamental right under Article 21 of the Constitution.

[141] *Sher Singh & Others v. The State of Punjab* 1983 AIR 465

[142] (1988) 4 SCC 574

[143] The court observed that

> "...Undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32 but this Court will only examine the nature of delay caused and circumstances that ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to re-open the conclusions reached by the court while finally maintaining the sentence of death. This Court, however, may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay could be held to make the sentence of death inexecutable and to this extent the decision in Vatheeswaran case cannot be said to lay down the correct law and therefore to that extent stands overruled."

[144] K. Venkataramanan "At the mercy of the Executive" *The Hindu*, April 16, 2013

The Supreme Court of India has taken into account, *inter alia,* the delay in execution of death sentence for its substitution into imprisonment for life.[145] However, a cursory glance at the judicial pronouncements un-equivocally exposes inconsistent and incoherent approach of the Supreme Court to the delay as a mitigating factor. Delay in execution of death sentence as an extenuating factor has received uncertain and varied treatment from the apex court to meet the so called "ends of justice". There is no slightest indication as to what constitutes "prolonged" delay which may favour a condemned prisoner and enable the court to make a choice between "life" and "death" of a convict. It is entirely left to the court's discretion to decide as to what delay constitutes "prolonged" delay and its role as a mitigating factor.

In *Shatrughan Chauhan v. Union of India*,[146] the Court held that the prolonged delay in implementing the death sentence had a dehumanizing effect, which in turn has the constitutional implication of depriving a person of his/her life in an unjust, unfair and unreasonable way so as to offend the fundamental right to life under article 21 of the Constitution. In this case, the Court commuted the death penalty to life imprisonment for 15 death row inmates. The Court further held that mental illness

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[145] Dr K I. Vibhute in his article "Delay In Execution of Death Sentence As An Extenuating Factor" *Journal of The Indian Law Institute,* Vol. 35, 1993, mentions in foot no 28, the following cases in which how delay played a decisive role in commutation was brought out. The cases are *Vivian Rodrick v. State of West Bengal* A.I.R. 1971 S.C. 1584 (6 years delay); *State of UP. v. Paras Nath Singh* A.I.R. 1973 S.C. 1973 (undergoing death sentence till he was acquitted by the High Court), *N. Sreeramlu v. State of U.P.* A.I.R, 1973 S.C. 2551 (about 2 years delay), *S. Parthasarathi v. State of A.P.* A.I.R. 1973 S.C. 2699 (death sentence and consequential mental agony till acquittal by the High Court), *Ragubir Singh v. State of Haryana* A.I.R. 1974 S.C. 677 (20 months delay), *Ediga Anamma v. State of Andhra Pradesh* 1974 AIR 799 (2 years delay); *Cliawala v. State of Haryana* A.I.R. 1974 S.C. 1039 (1 year 10 months delay), *Joseph Peter v. Goa Daman and Diu* A.I.R. 1977 S.C. 1812 (around 6 years delay), *State of UP. v. Sugher Singh* A.I.R. 1978 S.C. 191 (lapse of considerable time since date of occurrence of the offence), *State of U.P. v. Lalla Singh* A.I.R. 1978 S.C. 368 (more than 6 years delay from the judgment), *Sadhu Singh v. State of Uttar Pradesh* A.I.R. 1978 S.C. 1506 (3 years and 7 months delay), *Bhagwati Bux Singh v. State of Uttar Pradesh,* A.I.R. 1978 S.C. M (2 years and 6 months delay), *Rajendra Prasad v. State of Uttar Pradesh* (1979) 3 SCC 646. (6 years after the commission of the offence), *State of U.P. v. Sahai* A.I.R. 1982 S.C. 1076 (7 years after occurrence of the crime), *T V. Vatheeswaran v. State of Tamil Nadu* A.I.R. 1983 S.C. 361 (2 years delay in execution), *Javed Ahmed v. State of Maharashtra* A.I.R. 1985 S.C. 231 (2 years and 9 months delay in execution).

However, in the following cases the death sentence was not reduced to imprisonment for life even though there was delay in execution as the Supreme Court, in the context of the facts and circumstances of the respective cases, refused to consider the delay as a mitigating factor : *Rishideo* v. *State of U.P.,* A.I.R. 1955 S.C. 331; *Bharawad Mepadana v. State of Bombay* A.I.R. 1960 S.C. 289, *Nachhitar Singh v. State of Punjab* A.I.R. 1975 S.C. 118, *Maghar Singh v. State of Punjab* A.I.R. 1975 S.C. 1320, *Lajar Mashi v. State of U.P.,* A.I.R. 1976 S.C. 653, *State of Maharashtra v. Champalal* A.I.R. 1981 S.C. 1675.

[146] 2014 3 SCC 1

was one of the supervening circumstances[147] that warranted commutation of a death sentence to life imprisonment.[148]

It is interesting to note that time taken in court proceedings cannot be taken into account to claim that there is a delay which would convert a death sentence into one for life.[149] The spirit of article 21, thus, requires that the clemency applications need to be disposed of in statutory frame of time for which popular demands are already being made.[150]

6.6 Judicial Review of Constitutional Clemency

The powers of clemency are exclusive and inviolable[151] and independent from the judiciary.[152] Though the power of judicial review is retained by the courts of such mercy exercises[153] every mercy matter cannot be discussed on merits in the court of

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[147] Other supervening circumstances may include i) Delay ii) Insanity iii) Solitary Confinement iv) Judgments declared per incuriam v) Procedural Lapses

[148] Christof Heyns " Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions" United Nation, General Assembly, Human Rights Council , Twenty-ninth session available at http://www.ohchr.org/EN/Issues/Executions/Pages/SRExecutionsIndex.aspx

[149] See *Triveniben v. State of Gujarat* (1989) 1 SCC 678, at paras 16, 23, 72. See also *Mohd. Arif @ Ashfaq v. The Reg. Supreme Court of India* (2014) 9 SCC 737

[150] The Standing Committee on Home said mercy petitions to the President should be disposed of within three months, and reasons for granting clemency should be made public. See Sandeep Joshi, "Don't delay mercy pleas, says parliamentary panel" *The Hindu*, New Delhi, March 1, 2013

The committee, in its report on the Criminal Law (Amendment) Bill, 2012 said: "Application for clemency should not be considered in rape and murder cases." The report, tabled in the Rajya Sabha, also recommended publicizing the names of sex offenders after conviction. It, however, did not recommend reducing the age of juveniles.

Committee Chairman M. Venkaiah Naidu told journalists that the panel wanted to know the reasons behind the former President (Pratibha Patil) commuting the death sentence of four persons convicted of rape and murder. But the Home Ministry refused to share the details with the panel, citing privilege. "Hence the suggestion to make reasons public."

See Sandeep Joshi, "Don't delay mercy pleas, says parliamentary panel" *The Hindu*, New Delhi, March 1, 2013

[151] Independent in the sense that in neither of articles, i.e., 72 or 161 any restrictions whatsoever are imposed on the powers of the President or Governor respectively. The President or the Governor, as the case may be, May examine, the evidence afresh/ fresh evidence and even declare innocent an accused of the of the crime and this exercise of power is clearly independent of the judiciary.

[152] *Kehar Singh v. Union of India* [1989 (1) SCC 204] at 213, the court observed

> "The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power… which is entirely different from the judicial power and cannot be regarded as an extension of it".

In *G. Krishta Goud & J. Bhoomaiah v. State of Andhra Pradesh*, (1976 (1) SCC 157) it was observed that

> "…In the contingency of the petitioners invoking the merciful jurisdiction of the President or Governor as the case may be, setting out various factors with which the Court may not be concerned while imposing judicial sentence but may still have persuasive value before the concerned Executive. The rejection of one clemency petition does not exhaust the power of the President or the Governor…"

[153] see also *Swaran Singh v. State of U.P.* 1998 (4) SCC 75, *Bikas Chatterjee v. Union of India* 2004 (7) SCC 634 at 637

law.[154] The observation of Supreme Court in *G. Krishta Goud & J. Bhoomaiah v. State of Andhra Pradesh & Ors*[155] aptly describe the position thus:

> "The Court cannot intervene everywhere as an omniscient, omnipotent or omnipresent being. And when the Constitution, as here, has empowered the nation's highest Executive, excluding, by Implication, Judicial review, it is officious encroachment, at once procedurally ultra vires and upsetting comity of high instrumentalities, for this Court to be a super power unlimited."

Thus there is no dispute to the settled legal proposition that the power exercised under Articles 72/161 could be the subject matter of limited judicial review.[156] In *State of Haryana And Ors.v. Jagdish*[157] the court observed

> "This responsibility was cast upon the Executive through a Constitutional mandate to ensure that some public purpose may require fulfillment by grant of remission in appropriate cases. This power was never intended to be used or utilised by the Executive as an unbridled power of reprieve. Power of clemency is to be exercised cautiously and in appropriate cases, which in effect, mitigates the sentence of punishment awarded and which does not, in any way, wipe out the conviction. It is a power which the sovereign exercises against its own judicial mandate." [158]

In *Maru Ram and Ors. v. Union of India*,[159] a Constitution Bench of the Supreme Court held that

> "… Wide as the power of pardon, commutation and release (Article 171 and 161) is, it cannot run riot; for no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course…. From this angle, even the power to pardon, commute or remit is subject to the wholesome creed that guidelines should govern the exercise even of Presidential power."[160]

In *Epuru Sudhakar*[161] the Court held that the orders U/A 72/161 could be challenged on the grounds that the order

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[154] Hon'ble Court in *Kehar Singh v Union of India* (1989) 1 SCC 204, ruled that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined in *Maru Ram v. Union of India*. In *Shatrughan Chauhan & Anr v. Union of India & Ors* (2014) 3 SCC 1 para 19 the court held

> "…the executive orders under Article 72/161 should be subject to limited judicial review based on the rationale that the power under Article 72/161 is *per se* above judicial review but the manner of exercise of power is certainly subject to judicial review…"

see also *Kehar Singh v Union of India* (1989) 1 SCC 204, *Swaran Singh v. State of U.P* AIR 1998 SC 2026, *Satpal and Anr. v. State of Haryana and Ors.* AIR 2000 SC 1702

[155] (1976) 1 SCC 157

[156] *Kehar Singh v Union of India* (1989) 1 SCC 204, *Swaran Singh v. State of U.P*. AIR 1998 SC 2026. *Satpal & Anr. v. State of Haryana & Ors*. AIR 2000 SC 1702, *Bikas Chatterjee v. Union of India* (2004) 7 SCC 634, *Epuru Sudhakar v. Government of A.P*. (2006) 8 SCC 161 *Narayan Dutt v. State of Punjab* (2011) 4 SCC 353

[157] *State of Haryana And Ors v. Jagdish* (2010) 4 SCC 21para 27

[158] *Ibid*

[159] AIR 1980 SC 2147

[160] *Maru Ram and Ors. v. Union of India* AIR 1980 SC 2147 para 63

[161] *Epuru Sudhakar & Another v. Govt. of A.P. & Ors*. AIR 2006 SC 3385

(a) has been passed without application of mind
(b) is mala fide
(c) has been passed on extraneous or wholly irrelevant considerations
(d) not considered the relevant materials
(e) suffers from arbitrariness.

In *Epuru Sudhakar (supra)* the Court held that reasons had to be indicated while exercising power under Articles 72/161. It was further observed (per Kapadia, J) in his concurring opinion:

> "…[e]xercise of executive clemency is a matter of discretion and yet subject to certain standards. It is not a matter of privilege. It is a matter of performance of official duty. It is vested in the President or the Governor, as the case may be, not for the benefit of the convict only, but for the welfare of the people who may insist on the performance of the duty…"

Thus judicial review of clemency jurisdiction is always open on limited grounds.

6.7 Remission and Commutation under substantive and Procedural codes

The remission powers under sections 432 and 433 of CrPC are extension of same mercy powers, though on a lesser scale, as is exercised by the President and Governor under their constitutional powers. Apart from articles 72 and 161, the sentence softening schemes have been provided under sections 432, 433,433A, 434 and 435 of CrPC. The Remission policy manifests a process of reshaping a person who, under certain circumstances, has indulged in criminal activity and is required to be rehabilitated.[162]

6.7.1 Power to suspend and remit sentences

"**Section 432**.- **Power to suspend or remit sentences** –

(1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, *suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.*

(2) whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require *the presiding Judge* of the Court before or by which the conviction was had or confirmed, *to state his opinion as to whether the application should be granted or refused,* together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, *the appropriate Government may cancel the suspension or remission*, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

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[162] *State of Haryana And Ors v. Jagdish* (2010) 4 SCC 21

> (4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.
> (5) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:
>
> Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and,-
>
> (a) Where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or
> (b) Where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.
>
> (6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.
> (7) In this section and in Section 433, the expression "appropriate Government" means,-
>
> (a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government:
> (b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

Sub-section (1) of Section 432 empowers the Appropriate Government either to suspend the execution of a sentence or remit the whole or any part of the punishment to which he has been sentenced. While passing such orders, it can impose any conditions or without any condition. In the event of imposing any condition such condition must be acceptable to the person convicted. Such order can be passed at any time.[163]

In terms of section 432(1), the power to suspend or remit any sentence will have to be considered and ordered with much more care and caution, in particular the interest of the public at large. In this background, section 432(1), it only refers to the nature of power available to the Appropriate Government as regards the suspension of sentence or remission to be granted at any length.

By exercise of power of remission, the appropriate Government is enabled to wipe out that part of the sentence which has not been served out and over-ride a judicially pronounced sentence. The decision to grant remission must, therefore, be well informed, reasonable and fair to all concerned. The procedure prescribed in Section 432(2) is designed to achieve this purpose. The power exercisable under

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[163] *Union of India and others v. V. Sriharan @ Murugan & Ors* 2015 (13) SCALE 165, p 137

Section 432(1) is an enabling provision and must be in accord with the procedure under Section 432(2).

Remission can be granted under section 432 of the CrPC in the case of a definite term of sentence. The power under this Section is available only for granting "additional" remission, i.e. for a period over and above the remission granted or awarded to a convict under the Jail Manual or other statutory rules. If the term of sentence is indefinite (as in life imprisonment), the power under section 432 of the CrPC can certainly be exercised but not on the basis that life imprisonment is an arbitrary or notional figure of twenty years of imprisonment.[164]

Before actually exercising the power of remission under Section 432 of the CrPC the appropriated Government must obtain the opinion (with reasons) of the presiding judge of the convicting or confirming Court. Remission can, therefore, be given only on a case-by-case basis and not in a wholesale manner.

Section 433 of the Code pertains to power of the appropriate Government to commute the sentence without the consent of the person sentenced. It reads thus:

433. Power to commute sentence.

The appropriate Government may, without the consent of the person sentenced commute—

(a) a sentence of death, for any other punishment provided by the Indian Penal Code (45 of 1860);

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) a sentence of rigorous imprisonment for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) a sentence of simple imprisonment, for fine.

The exercise of power under Section 433 of the Code was an executive discretion.[165] The mandate of Section 433 CrPC enables the Government in an appropriate case to commute the sentence of a convict and to prematurely order his release before expiry of the sentence as imposed by the courts.[166]

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[164] Advisory issued by Government of India Ministry of Home Affairs to all states dt. 1st February 2013. Available at http://mha1.nic.in/PrisonReforms/pdf/Advisory%20on%20433A_0.pdf

[165] *Delhi Administration (now NCT of Delhi) v. Manohar Lal* (2002) 7 SCC 222

[166] *State of Punjab v. Kesar Singh* (1996) 5 SCC 495

There is however a difference between commutation u/s 432 and remission u/s433. Commutation in its fundamental nature is alteration of a sentence of one kind into a sentence of less severe kind. The powers of commutation completely vest with the appropriate Government.[167] Thus, commutation of sentence is not same as remission of sentence inasmuch as commutation is conversion or alteration of a sentence into another form of sentence, such as, a sentence of death into a sentence of imprisonment for life as prescribed by the IPC or conversion or alteration of a sentence of imprisonment for life into a sentence of imprisonment for any other term.[168]

The difference between remission and commutation is that remission is reduction of the quantum of a sentence without changing its character. In the remission, the guilt of the offender is not affected nor does the remission alter the sentence of the court. The convicted person is relieved from serving out a part of the sentence instead of suffering the incarceration for the entire period.

When the power of remission is exercised the Government does not revise the judgment of the Court; it only remits the sentence, i.e., reduction of the quantum of sentence without changing its character. Remission of punishment underscores the correctness of the conviction and only reduces the punishment in part or whole.

On a different plane, the distinction between remission and commutation becomes relevant from the point of life imprisonment. Life imprisonment being life in prison till death, it cannot be remitted. In order to extend the benefit of remission the life sentence has to be first commuted to definite sentence of fixed term. Then and then alone can the benefits of remission- either earned by himself or extended by the government - be conferred. If a person, for example, has earned two years remission by his good conduct when he is serving life imprisonment, such remission is of no use since he would never be released for his life sentence. Suppose the government commutes his sentence to 20 years of life imprisonment, then, he can claim his two years remission to be counted towards 20 years calculation. In the example, he would be effectively released after 18 years assuming that there are no further remissions earned by him or routinely conferred by the government.

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[167] *State (Govt. of NCT of Delhi) v. Prem Raj* (2003) 7 SCC 121

[168] *Tarachand Kapari @ Taranand v. The State of Bihar* (2016) https://indiankanoon.org/doc/27922435/

6.7.2 Nature of remission

The exercise of power in granting remission under Section 432 is done in a particular or specific case whereby the execution of the sentence is suspended or the whole or any part of the punishment itself is remitted.[169] The effect of exercise of such power was succinctly put by this Court in *Maru Ram etc. v. Union of India & Another*[170] in following words:

> "… In the first place, an order of remission does not wipe out the offence it also does not wipe out the conviction. All that it does is to have an effect on the execution of the sentence; though ordinarily a convicted person would have to serve out the full sentence imposed by a court, he need not do so with respect to that part of the sentence which has been ordered to be remitted. An order of remission thus does not in any way interfere with the order of the court; it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the court, though the order of conviction and sentence passed by the court still stands as it was. The power of grant remission is executive power and cannot have the effect of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by the appellate or revisional court…
>
> **...** Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched."

It was held in *State of Haryana v. Mohinder Singh,*[171] that the power of remission cannot be exercised arbitrarily. The decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432 Cr.PC does provide this check on the possible misuse of power by the appropriate Government. Power under Section 432 of the Cr.PC, therefore, cannot be exercised *Suo Motu*. It has to be applied for by fulfilling certain conditions.[172]

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[169] *Union of India and others v. V. Sriharan @ Murugan & Ors* 2015 (13) SCALE 165, para 31
[170] (1981) 1 SCC 107
[171] https://indiankanoon.org/doc/1260547/
[172] In *Sangeet & Anr. v. State of Haryana* (2013) 2 SCC 452, the court observed

> The exercise of power by the appropriate Government under sub-section (1) of Section 432 of the CrPC cannot be *suo motu.* The appropriate Government is enabled to override a judicially pronounced sentence, subject to the fulfillment of certain conditions. In order to check all arbitrary remissions, the Code itself provides several conditions. Sub-sections (2) to (5) of Section 432 of the Code lay down basic procedure for making an application to the appropriate Government for suspension or remission of sentence either by the convict or someone on his behalf. Therefore, exercise of power by the appropriate Government under sub-section (1) of Section 432 of the Code cannot be automatic or claimed as a right for the simple reason, that this is only an enabling provision and the same would be possible subject to fulfillment of certain conditions.

6.7.2.1 Remission does not override judicial sentencing

A remission of sentence does not mean acquittal. Section 432 of Cr.PC gives no power to the Government to revise the judgment of the Court. It only provides power of remitting the sentence. Remission of punishment assumes the correctness of the conviction and only reduces punishment in part or whole.[173] Remission schemes are introduced to ensure prison discipline and good behaviour and not to upset sentences.[174]

Consequently, the disqualifications, incurred by the convict under any other laws, such as, Election Laws etc., remain unchanged even if such a convicted person's sentence is remitted by the appropriate Government.[175] The law does not empower the Government to sit over a judgment of conviction or sentence passed by court.[176]

6.7.2.2 Difference between constitutional clemency and statutory remissions

The powers of President and Governor under Article 72 and 161 are exercised on the advise of the council of ministers.[177] The powers under section 432 and 433 are also exercised by the government headed by ministers' vis-à-vis President and Governors. In the first impression it may appear that exercise of such power under Sections 432 and 433 is nothing but the one exercisable by the same authority as the Executive Head. However, the real position is different. Though the expression 'remission' or 'commutation' of sentences finds mention in sections 432 and 433 of CrPC, such power of remission or commutation is different from the sovereign power conferred by the Constitution and contained in Articles 72/161 of the Constitution.

The power u/s 432 is restricted to either suspend the execution of sentence or remit the whole or any part of the punishment. Further, u/s 432 (2) it is stipulated that exercise of power of suspension or remission requires the opinion of the presiding Judge of the Court before or by which the conviction was held or confirmed. Additionally, there is a provision for imposing conditions while deciding to suspend or remit any sentence or punishment. There are other stipulations contained in Section 432.

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[173] *Ramdeo Chauhan v. State of Assam* (2001)5 SCC 714
[174] (1990) 2 SCC 661
[175] *Bachan Singh's Case Two v. Unknown* (2009) https://indiankanoon.org/doc/92890443/
[176] See *State (Govt. of NCT) of Delhi v. Prem Raj* (2003) 7 SCC 121). See J P Rai, "Exercise of Pardoning Power in India: Emerging Legal and Ethical Issues" *Indian Bar Review,* Vol.XLI, 2014 Pp 25-50
[177] See Articles 74 (2) and 53. Similar provisions relating to the powers of Governor of the State are contained in Articles 154, 161 and 163 of the Constitution.

Similarly, u/s 433 it is provided that the Government may without the consent of the persons sentenced commute any of the sentence to any other sentence which ranges from Death sentence to fine. The remission under Section 433 of the Code has to be applied by a convict. Such remission is granted subject to conditions contained in the order granting remission. In the event of violation of any condition, the convict can be called upon to undergo the remaining sentence. Therefore, a convict sentenced to undergo life imprisonment even though released after granting remission is still bound by the conditions granting remission.

The clemency power of the Executive under Art.72 or 161, on the other hand, is absolute and is unfettered for the reason that the said powers cannot be restricted by the provisions of section 432, section 433 and section 433A CrPC. The said powers are on a higher plane and are 'untouchable' and 'unapproachable'.

The argument that Sections 432 and 433 are modus operandi of the constitutional power was not accepted in *Maru Ram*[178] In fact the Court observed that though these two powers, one constitutional and the other statutory, are co-extensive, the source is different, the substance is different and the strength is different. The Court saw the two powers as far from being identical. The conclusion in *Maru Ram* was as under:

> "**72.** (*4*) We hold that Section 432 and Section 433 are not a manifestation of Articles 72 and 161 of the Constitution but a separate, though similar power, and Section 433-A, by nullifying wholly or partially these prior provisions does not violate or detract from the full operation of the constitutional power to pardon, commute and the like."

It is thus well settled that though similar, the powers under Sections 432/433 CrPC on one hand and those under Article 72 and 161 on the other, are distinct and different. Though they flow along the same bed and in the same direction, the source and substance is different.

Section 433-A cannot affect even a wee bit the pardon power of the Governor or the President. Consequentially, notwithstanding Section 433-A the President and the Governor continue to exercise the power of commutation and release under the aforesaid articles.[179]

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[178] *Maru Ram and Ors. v. Union of India* AIR 1980 SC 2147

[179] *Tara Singh and Ors v. Union of India & Ors* (2016) http://indiankanoon.org/doc/103373643/. In *Suo Motu Proceedings v. State of Kerala* https://indiankanoon.org/doc/1384222/ the court held

> "There should be application of mind. At present, it is stated that there are no guidelines. Until guidelines are made, Section 433-A of the Code alone can be the guideline coupled with good behaviour in the prison."

6.7.2.3 Remission and Pardon -Parallel Powers

Whether the "Appropriate Government" is permitted to exercise the power of remission under Section 432/433 of the Code after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or by the Supreme Court in its Constitutional power under Article 32 was raised in *Union of India v. Sriharan*.[180] Answering the question in positive the court held that

> "[t]herefore, it must be held that there is every scope and ambit for the Appropriate Government to consider and grant remission under Sections 432 and 433 of the Code of Criminal Procedure even if such consideration was earlier made and exercised under Article 72 by the President and under Article 161 by the Governor.[181]
>
> ***
>
> "To say that clemency power under Articles 72/161 of the Constitution cannot be exercised by the President or the Governor, as the case may be, before a convict completes the incarceration period provided in the short sentencing policy, even in an exceptional case, would be mutually inconsistent with the theory that clemency power is unfettered."

There is no embargo, therefore, on the powers under Articles 72/161 to be exercised. Powers under Sections 432 and 433 of the CrPC and the above said powers operate in different field with first powers overriding the second. In other words even after the benefits of powers Sections 432 and 433 are availed, the benefits under Articles 72/161 are not foreclosed which can still be exercised at any point of time.

6.7.2.4 Statutory Exclusion of Remission Powers

Suspension, remission or commutation in any sentence is a statutory right. That being said so, a subsequent law or amendment in the existing law may preclude certain offenders from the benefit of remission of sentences. By way of example section 32A[182] of Narcotic Drugs & Psychotropic Substances Act, 1985 may be noted. It reads

> "32A. No suspension, remission or commutation in any sentence awarded under this Act: Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force but subject to the provisions of Section 33, no sentence awarded under this Act (other than Section 27) shall be suspended or remitted or commuted."

It is mandate of the aforesaid section that notwithstanding anything contained in the CrPC or any law for the time being in force no sentence under this Act shall be suspended, remitted or commuted. The language of Section 32A is clear and admits of

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[180] *Union of India and others v. V. Sriharan @ Murugan & Ors* 2015 (13) SCALE 165
[181] *Ibid* para 111
[182] This Section came into force with effect from 29th May, 1989.

no ambiguity. Therefore, once a person is convicted under the Narcotics Act, his sentence cannot be suspended or remitted.[183] This provision clearly spells that remission is not a right inherent. It is only statutory. It can be statutorily withdrawn in select cases. Unless, however, otherwise provided remission is continued to be claimed and enjoyed by the convict either under general schemes framed by the government or under the jail manuals.

6.8 Section 433A- Special And Overriding Restriction On Power Of Remission

For exercising the power of remission to a life convict, the CrPC places not only a procedural check as mentioned above in sections 432 and 433, but also a substantive check. This check is through Section 433-A of the CrPC which provides that when the remission of a sentence is granted in a capital offence, the convict must serve at least fourteen years of imprisonment.[184] It reads

433A. Restriction on powers of remission or Commutation in certain cases.

> "Notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment."

Section 433A is extra ordinary measure to take care of certain heinous crimes which though fall in the bag of serious crimes yet escape with lighter punishments.[185]

The dominant purpose and the avowed object of Section 433-A was explained by Justice Fazal Ali in Maru Ram as under:

> "The dominant purpose and the avowed object of the legislature in introducing Section 433-A in the Code of Criminal Procedure unmistakably seems to be to secure a deterrent punishment for heinous offences committed in a dastardly, brutal or cruel fashion or offences committed against the defence or security of the country.[186]

Thus section 433A of the Cr.PC has imposed a restriction with regard to the period of remission or commutation. It is specifically provided that when a sentence of imprisonment of life, where death is also one of the punishments provided by law, is remitted or commuted, such person shall not be released unless he has served at least fourteen years of imprisonment. The same restriction is applicable where death is commuted into life imprisonment.

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[183] *Ishwarsinh M. Rajput v. State of Gujarat* (1990) 2 GLR 1365
[184] See *State of Haryana v. Nauratta Singh & Ors*. AIR 2000 SC 1179
[185] See *Ashok Kumar Alias Golu v. Union of India* http://indiankanoon.org/doc/290765/
[186] See *Maru Ram and Ors. v. Union of India* AIR 1980 SC 2147, pp 1251, 1252 and 1256

6.8.1 Relationship between 433 and 433A

Section 433-A of the Cr.PC restricts the power of the Government to commute a sentence of imprisonment for life for a period of less than fourteen years in stated cases. This apart, the restriction, which Section 433-A of the CrPC imposes on the power of the commutation, operates only after the power of commutation under Section 433 of the CrPC is exercised meaning thereby that if the sentence of imprisonment for life is commuted to a sentence of imprisonment for a term, or for fine, the convict cannot be released until he undergoes the minimum prescribed period of 14 years of imprisonment. However, if the imprisonment for life is not commuted, the imprisonment continues till the end of natural life.[187] Of course, the requirement of a minimum of fourteen years incarceration may perhaps be relaxed in exercising power under Article 72 and Article 161 of the Constitution.[188]

6.8.2 Overriding effects of section 433A

Section 433A overrides any special or local law and itself declares that if any specific provision contrary to the special or local law is made in the Court, it will prevail over the former.[189] Therefore, remission rules and like provisions stand excluded so far as persons governed by Section 433A are concerned. For the purpose of calculating fourteen years' imprisonment, remission under Jail Manual cannot be taken into account. For persons governed by Section 433A actual imprisonment in jail for fourteen years is mandatory.[190] In *Ashok Kumar @ Golu v. Union of India & Ors.*,[191] the Supreme Court came to the following conclusions:

1. Section 433-A Cr.PC denied pre-mature release before actual completion of 14 years of incarceration to only those limited convicts convicted of a capital offence i.e. exceptionally heinous crime;
2. Section 433-A Cr.PC cannot in any way affect the constitutional power conferred on the President/Governor under Articles 72 and 161 of the Constitution;

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[187] *Tara Singh and Ors v. Union of India & Ors* (2016) http://indiankanoon.org/doc/103373643/
[188] *Sangeet & Anr. v. State of Haryana* (2013) 2 SCC 452
[189] *Cf* Balwant Singh Malik "Parliament Impairs Federalism : A Critique of Maruram Versus Union of India" *Journal of The Indian Law Institute*, Vol. 36 : 4, 1994, Pp 512 to 521 where the pertinent question of whether Parliament by enacting section 433A in the Code of Criminal Procedure 1973, has encroached upon the state legislative field and thereby damaged the federal or dual structure erected by the Constitution? is tried to be answered.
[190] *Rabi Prakash Awasthi v. State of Orissa And Ors*., 1998 Cri.L.J 3268
[191] AIR 1991 SC 1792

3. Rules of Remission have a limited scope and in case of a convict undergoing life imprisonment, it acquires significance only if the sentence is commuted or remitted subject to Section 433-A Cr.PC or in exercise of constitutional power under Article 72/161 of the Constitution.

6.9 Abuse of Mandatory Restrictions: Instances and Intrusions

Though no limitation of any nature can be imposed on the powers under articles 72 and 161, in the absence of any guidelines, courts have read the mandatory requirement of 14 years actual incarceration as guidelines for the executive to follow when exercising the powers under articles 72 and 161.

The instances are not rare where the governments have advised the governors to exercise his power under article 161 in respect of criminals who have not served even seven years actual incarceration in respect of crimes under section 302 and allied sections of IPC! In *Suo Motu Proceedings v. State of Kerala*,[192] the Kerala High Court noted so many examples of abuse of powers. As one instance the court noted

> " Convict Babu…was admitted to the prison on 29.7.1996 was granted parole for 515 days and he was released on the basis of constitutional powers on 17.7.2001… Including parole he had undergone only less than five years of imprisonment. Even according to the Government Orders, Prison Committee can consider only persons with eight years of imprisonment. Here, this prisoner was released prematurely even though he was convicted for imprisonment for life under Section 302, 324, 506(ii) read with Section 34 of the IPC and inclusive of parole, he has undergone less than five years of imprisonment and he was granted 515 days of parole. After taking into account the parole days and sentence and earning of various holidays remissions, *virtually, he has not suffered any imprisonment at all.* We direct the Home Secretary to conduct an enquiry in the matter under what circumstances he was released and who were responsible for his release and whether there was political influence for his parole."

The court in this case also noted that there exists no consistency in the release of prisoner on parole. Whereas 'there are large number of people who were given more than 1000 days parole', 'paroles are not granted for genuine reasons for those convicts who were unable to make any political or financial influence over the authorities.'

The State Prison Review Committee did not apply their mind in granting commutation or remission or parole. The Minutes of the State Prison Review Committee, revealed that, by sitting from 2.00 p.m. to 5.30 p.m. on 6th March, 1998 and from 9.00 a.m. to 12.30 p.m. on 7th March, 1998, the Committee considered the

[192] https://indiankanoon.org/doc/1384222/

case of 168 persons with the remarks some 'recommended' and some 'not recommended' that too with no speaking orders. The court observed

> "The list produced by the Government shows that 164 persons who were released cannot be considered for remission at all as many of them have not completed eight years of imprisonment as per the directions of the Government even including the paroles granted. How Government issued such an order ignoring the provisions in Section 433-A and Prison Rules is not explained. Certain persons in the above said list were on parole for more than two years. It shows that there is mockery of justice and people are released without any guidelines."
>
> "It is very difficult to understand how in the guise of exercising constitutional function large number of life convicts, who were accused of crimes of murder under Section 302, were released without any application of mind at all. Documents produced by the Prosecution regarding release of 377 convicts indicates that 142 out of 377 convicts have not suffered actual eight and ten years imprisonment even as per the Government guidelines. Government did not verify whether the Committee has recommended as per the guidelines and whether the Committee has recommended any release of convicts under the seven prohibited categories. While passing orders of release Government has no document except this report saying 'recommended' or 'nor recommended' and not saying anything else."
>
> "14. The State Prison Review Committee, while recommending premature release, should abide by the provisions in the Code of Criminal Procedure as well as the Prison Rules and the Committee should consider every case before them after considering the criminal court judgment, nature of the crime committed, period of imprisonment the convict has undergone, their conduct, effect of premature release on the society and relatives of the victims etc. Government should provide time for enabling them to reach just and fair decision. Social requirement of Article 161 of the Constitution mandates that Section 433-A of the Code shall not be forgotten by the State especially when hired and political killings are on the increase in the State. We have already noted that Prison Committee considered the case of life convicts who have not even completed 8 years of imprisonment continuously and did not consider the matters required by the Government while recommending premature release. Government while passing order, no material other than report of the Prison Committee (not speaking) stating 'recommended' or 'not recommended' alone was considered by the Government. That should not happen in future. If possible, the Committee should get the views of the relatives of the victims also while recommending premature release."
>
> "Since most of the convicts were released under Article 161 of the Constitution of India and relatives of victims have not approached us, we are not going to reopen the cases further. But, we make it clear that in view of Ss. 433 and 433-A and in view of the Prison Rules mentioned, Government cannot act arbitrarily violating the law laid down by the Supreme Court in Maru Ram's case without objectively considering the facts of the case. Each of the cases of the prisoners should be considered while granting premature release under Article 161 of the Constitution. … At present…there are no guidelines. Until guidelines are made, Section 433-A of the Code alone can be the guideline coupled with good behaviour in the prison. The nature of the crime committed and all the circumstances relevant should be considered while ordering premature release under Article 161 of the Constitution of India. Therefore, no convicts who were sentenced for life for offences which

are punishable with death penalty can be released by using the constitutional power unless they have undergone 14 years of imprisonment including the period of parole; but, excluding the period of bail except for very valid reasons. Even though no restrictions are placed under Article 161 of the Constitution, Government cannot act arbitrarily. Periodical remissions have no effect on a life convict unless their imprisonment is commuted under Section 433 subject to Section 433-A of the Code. There are no guidelines now and while exercising the powers under Article 161 of the Constitution, Government should consider the cases objectively."

6.10 Overlap of Remissionary Powers Between centre and State: Section 434 and 435

Powers of remission and commutation have been equitable distributed between centre and state as under

"434. Concurrent power of Central Government in case of death sentences.

The powers conferred by sections 432 and 433 upon the State Government may, in the case of sentences of death, also be exercised by the Central Government."

"435. State Government to act after consultation with Central Government in certain cases.

(1) The powers conferred by sections 432 and 433 upon the State Government to remit or commute a sentence, in any case where the sentence is for an offence-

(a) which was investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, or

(b) which involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(c) which was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, shall not be exercised by the State Government except after consultation with the Central Government.

(2) No order of suspension, remission or commutation of sentences passed by the State Government in relation to a person, who has been convicted of offences, some of which relate to matters to which the executive power of the Union extends, and who has been sentenced to separate terms of imprisonment which are to run concurrently, shall have effect unless an order for the suspension, remission or commutation, as the case may be, of such sentences has also been made by the Central Government in relation to the offences committed by such person with regard to matters to which the executive power of the Union extends."

Section 434 confers additional powers on the central government in respect of death sentence. Section 435 provides that if the offence is investigated by central force or under their supervision or property of central government is destroyed or the offence is committed by a person in the service of the Central Government, or the matter is such to which the executive power of the Union extends, the appropriate government shall be central government.

There can possibly be two appropriate Governments in a situation contemplated under Section 435 (2) of Cr.PC Additionally, in respect of cases of death sentence, even when the offence is one to which the executive power of the State extends, Central Government can also be appropriate Government as stated in Section 434 of CrPC Except these two cases as dealt with in Section 434 and 435 (2) of CrPC there cannot be two appropriate Governments.[193]

Section 435(1) of CrPC sets out three categories under clauses (a), (b) and (c) and declares that the powers conferred by Sections 432 and 433 of CrPC upon the State Government shall not be exercised except after consultation with the Central Government. The language used in this provision and the expressions "shall not be exercised" and "except after consultation", signify the mandatory nature of the provision. Consultation with the Central Government must, therefore, be mandatorily undertaken before the State Government in its capacity as appropriate Government intends to exercise powers under Sections 432 and 433. This is an instance of express provision in a law made by Parliament as referred to in proviso to Article 73(1) of the Constitution. "Consultation", therefore, ought to be read as concurrence and primacy must be accorded to the opinion of the Central Government in matters covered under clauses (a), (b) and (c) of Section 435(1) of the CrPC.

6.11 Short Sentencing

Remissions are of two kinds. Remissions under Prisons Acts and jail manuals and secondly Remissions under Section 432 of CrPC. The first category is of remissions are under the Jail Manual the grant of which depends upon the good conduct or behavior of a convict while undergoing sentence. These are generally referred to as 'earned remissions' and are not referable to Section 432 of CrPC but have their genesis in the Jail Manual or any such Guidelines holding the field. From

[193] *Union of India and others v. V. Sriharan @ Murugan & Ors* 2015 (13) SCALE 165, p 208

the Prisons Acts and the Rules it is evident that for good conduct and for doing certain duties, etc. inside the jail the prisoners are given some days' remission on a monthly, quarterly or annual basis. The days of remission so earned by a prisoner are added to the period of his actual imprisonment (including the period undergone as an undertrial) to make up the term of sentence awarded by the Court.

The difference between earned remissions "for good behaviour" and the remission of sentence under Section 432 is clear. The first depends upon the Jail Manual or the Policy in question and normally accumulates to the credit of the prisoner without there being any specific order by the Government in an individual case while the remission u/s 432 requires specific assessment in an individual matter and is case specific. *Secondly,* remission under jail manuals can be forfeited for prison offence whereas such restrictions are not applicable u/s 432. *Thirdly*, remission under the former is sanctioned by superintendent of jails whereas in later they are sanctioned by the governor and governments. *Fourthly*, remission under the former may be conditional whereas under the later, no such conditions are generally imposed.

Jail Manual contains merely executive instructions having no statutory force. Thus, it was always open to the State Government to alter, amend or withdraw the executive instructions or supersede the same by issuing fresh instructions.[194]

Remission be it under the jail manuals or under the CrPC or under the constitution serve as shortening tools of judicial sentences. Rehabilitation and reintegration are the main premises on which remission exercises are undertaken. Short sentencing has considerable effect on the lives of convicts. There is a great disparity in respect of jail manuals since the subject matter falls in the state list. As a model example, the jail manual of Maharashtra state may be noted.

Types of Remission

Remission may be granted as hereinafter provided as a matter of concession only and not as of right

Sr. No.	Types of Remission	Category of Prisoner	Scale of Remission
1	Ordinary	1) Convict Overseers 2) Night Watchman 3) Prisoner Working on Conservancy Job	9 Days (Rule 8) 8 Days (Rule 8) 7 Days (Rule 8) 10 Days (Rule 8)
2	Annual Good Conduct Remission	All Prisoners (Subject to Rule No. 6)	30 days in year (Rule 12)

[194] *Sadhu Singh v. State of Punjab* AIR 1984 SC 739, *Laxman Naskar v. Union of India & Ors*. (2000) 2 SCC 595

<table>
<tr><td rowspan="5">3</td><td rowspan="5">Special Remission</td><td rowspan="5">All prisoners (Subject to Rule No. 14)</td><td colspan="3">As per G. R. Dt. 25/3/1981 powers Delegated to (Rule 13-16)</td></tr>
<tr><td>Sr.No</td><td>Authority</td><td>Days</td></tr>
<tr><td></td><td>Government</td><td>120</td></tr>
<tr><td></td><td>I. G. P.</td><td>90</td></tr>
<tr><td></td><td>D. I. G.</td><td>60</td></tr>
<tr><td></td><td>Superintendent</td><td>30</td></tr>
<tr><td>4</td><td>State Remission</td><td>All Prisoners (Subject to Rule No. 14)</td><td colspan="3">As per Government Orders (Rule 18)</td></tr>
<tr><td>5</td><td>Open Jail</td><td>1) Prisoners sentenced to life imprisonment & prisoners sentenced to more than 14 years on aggregate.
2) Prisoners sentenced to more than 5 years & up to 14 years
3) Other Prisoners</td><td colspan="3">Chapter II, Maharashtra Open Prisons Rules,
1971, Rule No. 7, 30 days for a calendar month.
30 Days for a calendar month.
20 Days for a calendar month.
15 Days for a calendar month.</td></tr>
<tr><td>6</td><td>Open Colony</td><td>1) Prisoners sentenced to life imprisonment & prisoners sentenced to more than 14 years in aggregate.
2) Prisoners sentenced to more than 5 years & up to 14 years
3) Other prisoners</td><td colspan="3">Chapter III, Maharashtra Open Colony for
temporarily Released Prisoners Rules 1971, Rule No. 9
60 Days for a calendar month.
40 Days for a calendar month.
30 days for a calendar month.</td></tr>
</table>

GUIDELINES FOR PREMATURE RELEASE OF PRISONERS SENTENCED TO LIFE IMPRISONMENT OR TO DEATH PENALTY COMMUTTED TO LIFE IMPRISONMENT AFTER 18TH DECEMBER, 1978.

	CATEGORISATION OF CRIME	Period of Imprisonment to be undergone including remissions subject to minimum of 14 years of Actual Imprisonment including Set-off period.
1	MURDERS RELATING TO SEXUAL MATTERS OR ARISING OUT OF RELATIONS WITH WOMEN DOWARY DEATHS AND OTHER FORM OF BRIDE KILLING ETC.	
	a) Where the convict is the aggrieved person and has no previous criminal history and committed the murder in an individual capacity in mement of anger and without premeditation.	22 years.
	b) Where the crime as above is committed by the aggrieved person with premeditation.	24 years.
	c) Where the Crime is committed against the aggrieved person without premeditation.	24 years
	d) Where the crime is committed against the aggrieved person with premeditation.	26years.
	e) Where the crime is committed with exceptional violence	28 years

	or with pervarsity.	
2	MURDERS ARISING OUT OF LAND DISPUTE FAMILY FUEDS, FAMILY PRESTIGE & SUPERSTITION.	
	a) If the offence is committed in an individual capacity and without premeditation and the prisoner has no previous criminal history.	22 years
	b) Crime committed as above with premeditation or by a gang.	24 years.
3	MURDERS FOR OTHER REASONS	
	a) Where a murder is committed in thecourse of quarrel without premeditation in an individual capacity and where the person has no previous criminal history.	22 years
	b) As at (a) above but with premeditation or by aging .	24 years
	c) Murders resulting from trade union activities and business rivalry.	26years
	d) Murder committed with premeditation and with exceptional violence or perversity.	26 years.
4	MURDER FORPOLITICAL REASONS	
	a) Murders arising out of political rivalry and political interest without premeditation.	24 years
	b) Murder arising out of political rivalry and political interest with premeditation.	26 years
	c) Murders committed in pursuance of a political philosophy and as a means to acquire political powers as by terrorist of extremist groups	30 years
5	MURDERS BY PROFESSIONAL CRIMINALS	
	a) Murders committed by dacoits and robbers in the act of committing dacoities and robberies.	26 years
	b) Murders committed by gangsters, contract killers, smugglers; drug traffickers, racketeers, bootlegers, gamblers, flesh traders and those indulging in other terms of organised crime in furtherance of their criminal activities.	28 years
6	ESCAPERS	
	Prisoners who have escaped from lawful custody while undergoing imprisonment or who absconded while on parole or furlough.	28 years
7	DEATH SENTENCE COMMITTED TO LIFE IMPRISONMENT.	
	Prisoners in whose cases death sentence has been committed to life imprisonment.	30 years
8	PERSONS GUILTY OF OFFENCES NOT INVOLVING MURDER, WHO ARE SENTENCED TO LIFE IMPRISONMENT.	
	Persons sentenced to life imprisonment for offences like (a) offences against the State (Chapter-VI) IPC, (b) Abetment of Mutiny (Sec.131,132 IPC), (c) Offences against public justice (Sec.222 & 225 of IPC), (d) Offences in respect of Coinage, Stamps (Sec.252, 238, 225 of IPC) etc.	30 years.

6.12 Practices of Different States in Allowing Remission Rules- Consistency and Inconsistencies

The jails fall in the state list and therefore it goes without saying that the practice in respect of remission differ from state to state. Some attempts were made to bring uniformity in jail manuals by commissions[195] and judicial guidelines.[196] However, the practices as on date do not seem to be uniform in all respects. Further, apart from Sections 432 and 433 of the Criminal Procedure Code, 1973, remissions are also conferred by his Excellency Governor under his extra ordinary powers under Article 161 of the Constitution of India.[197] Therefore, it would be practically impossible to assume uniformity in awarding remission, though such a thing is highly appreciable given the equal protection clause of the constitution.[198] In some of the states,[199] powers under section 432 and 433 of the criminal procedure code, 1973 have been extensively used whereas in other states powers under article 161 have been invoked.[200] Life convicts in some of the states even do not serve 14 years of imprisonment[201] whereas states like Maharashtra virtually did not allow the benefit of

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[195] See Justice Mulla Committee Report on Prison Reforms (1982-83) Justice Krishna Iyer Committee on Women Prisoners (1986-87) Draft National Policy on Prison Reforms and Correctional Administration, 2007.

[196] See *Sunil Batra (II) v. Delhi Administration* (1980) 3 SCC 488, *Rama Murthy v. State of Karnataka* (1997) 2 SCC 642, *T. K. Gopal v. State of Karnataka* (2000) 6 SCC 168, *In Re - Inhuman Conditions In 1382 Prisons* http://supremecourtofindia.nic.in/FileServer/2016-02-05_1454655606.pdf

[197] The premature release of lifers in Andhra Pradesh had been ordered only under the provisions of Art.161 of the Constitution

[198] Art 21 of the constitution of India, 1950

[199] It is interesting to note that in Kerla, Premature releases of prisoners are being ordered on the recommendations of two separate Bodies. Kerala Prison Rules 1958 provided for the constitution of a Prison Advisory Board to recommend cases of premature release u/s 432 CrPC the cases of all lifers who had completed actual imprisonment of 14 years excluding remission were referred to the Board. Premature release was also ordered on the recommendations of the State Prison Review Committee under article 161 of the Constitution. The cases of lifers who had completed 8 years of actual sentence and 10 years with remission were considered by the State Review Committee under Article 161 of the Constitution

[200] Premature release in Karnataka was not being ordered u/s 432 of CrPC which provided for actual imprisonment of 14 years without remission in respect of convicts undergoing life imprisonment for an offence for which death was the alternative punishment. The premature release of lifers in the prison was being ordered only under the provision of 161 of the Constitution. The eligibility for premature release under this section was 10 years actual incarceration for male lifers and 5 years for female lifers. The recourse to constitutional provision of Art 161 as a matter of routine had nullified the effect of Section 433A introduced in 1978 following a ruling of the Apex Court. As a result the Central Prison, Bangalore was not holding any lifer who had completed 14 years or even 12 years imprisonment.

[201] In Kerala, the life Convict No. 9610 Babu, S/o. Baby, including parole he had undergone only less than five years of imprisonment. Even according to the Government Orders, Prison Committee can consider only persons with eight years of imprisonment. Here, this prisoner was released prematurely even though he was convicted for imprisonment for life under Section 302, 324, 506(ii) read with Section 34 of the Indian Penal Code and inclusive of parole, he has undergone less than five years of imprisonment and he was granted 515 days of parole. After taking into account the parole days and sentence and earning of various holidays remissions, virtually, he has not suffered any imprisonment at all. We direct the Home Secretary to conduct an enquiry in the matter under what circumstances he was released and who were responsible for his release and whether there was political influence for his parole.

any remission to certain life convicts.[202] In states like Tamil Nadu the life convicts have been classified as male and female resulting in early premature release of women only after completion of 7 years of imprisonment.[203] Male life convicts have to however, wait for 10 years in order to be considered for their release. Elder convicts on the other hand have some concessionary policy in favour of them wherein their case for early release would be considered much early.[204] Persons suffering from disease have also been considered for early release in some of the states.[205] The benefits of remission are denied or prolonged to certain offences and offenders.[206] The habitual offenders are not generally eligible for premature release on the basis of remission.[207]

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[202] The State Government of Maharashtra declared that the offenders sentenced to life imprisonment in connection with the 1993 terrorist attack on Mumbai will have to serve a minimum of 60 years in prison before their plea for release is even considered. See Julian V. Roberts et al, "Structured Sentencing In England And Wales: Recent Developments And Lessons For India" *National Law School of India Review,* Vol. 23(L), 2011, p 44

[203] In Tamil Nadu the cases of women offenders sentenced to life imprisonment may be considered after completion of 7 years of imprisonment, including remission except those covered under Section 433-A of CrPC1973 whose cases shall only be considered after completion of 14 years of actual imprisonment; cases of life convicts (men and adolescent) on completion of 10 years of imprisonment including remission except those covered under Section 433-A of CrPC, 1973 whose cases shall only be considered after completion of 14 years of actual imprisonment. Female convicts would be entitled to be considered for premature release after serving at least 10 years of imprisonment inclusive of remission and after completion of 7 years of actual imprisonment i.e. without remission

In Andhra Pradesh, The criterion followed for considering premature release of all the lifers was that they should have completed actual sentence of 7 years and total sentence of 10 years with remission and the prisoners above 65 years were required to undergo actual sentence of 5 years and total sentence of 7 years. Almost all lifers who had completed 7 years of actual and 10 years of total imprisonment had been released on August 15, 2004

[204] In Tamil Nadu, 65 years old convicts shall be considered for premature release after serving at least 7 years of imprisonment including the remission.

[205] In Tamil Nadu Cases of prisoners above 65 years of age and infirm offenders other than those serving life imprisonment shall be considered on completion of one third of their substantive sentence including remission, subject to the condition that they shall not be released unless they have undergone at least one year of imprisonment including remission.

[206] In Tamil Nadu, benefits of section 433A of Cr,P.C is not available to certain prisoners. Certain categories of convicts sentenced to life imprisonment for heinous cases such as murder, murder with rape, dacoity and murder, murder attracting the Protection of Civil Rights Act, 1955, murder for dowry, murder of a child below 14 years of age, murders committed by contract killers, multiple murders, murder committed after conviction while inside the jail, murder during parole and release, murder in terrorist incident, murder in smuggling operation, murder of a public servant on duty, gangsters, smugglers, drug traffickers, racketeers would be entitled to be considered for premature release only after undergoing imprisonment for 20 years including remission.

[207] In Tamil Nadu, The cases of habitual offenders (other than those sentenced to life imprisonment) sentenced to 5 or more than 5 years imprisonment shall be considered on completion of two-third of their sentence including remission, subject to the condition that they shall not be released unless they have undergone imprisonment of five years including remission;

Cases of non-habitual prisoners including men, women and adolescent (other than those sentenced to life imprisonment) sentenced to more than one year of imprisonment shall be considered after undergoing half of their substantive sentence, including remission subject to the condition that they shall not be released unless they have actually undergone at least one year of sentence including remission;

It would be seen that the rates of remission also greatly differ. In Andhra Pradesh, Manipur and Nagaland it is only at the rate of two days for a month of completed sentence. On the other hand, we have the states of Goa, Gujarat and Maharashtra where it is seven days for a month. However, in most states and UTs it is four days a month- two days for good conduct and another two days for work performance.

It is observed that in the states of Himachal Pradesh and Karnataka no remission is allowed for a part of the month of completed sentence. In Rajasthan, Tamil Nadu and Andaman & Nicobar Islands remission corresponds to the fraction. However, in 19 states and UTs fraction of a month is rounded off to a month for the purposes of calculation of remission.

The method of calculation of special remission also differs from state to state. Usually it is calculated annually. What do jail authorities do if an inmate has spent only a part of the year in jail? It is seen in Himachal Pradesh that no special remission is allowed. In Mizoram, Rajasthan, Tamil Nadu, West Bengal and Chandigarh special remission is granted corresponding to the fraction. However, in 15 states and UTs fraction of a year spent in jail, is rounded off to a full year for the purposes of calculation of special remission.[208]

As to the limit on remission an inmate can earn, there is wide disparity among the prisons. In Maharashtra and Orissa, an inmate can earn as much as 50 per cent of the sentence period as remission. In Assam, Uttar Pradesh and Andaman & Nicobar Islands it is a third of the term of sentence. However, in most states, a limit on earned remission is 25 per cent of the sentence period.

Threre is no uniformity in respect of sentences under 'court martial' also. In Jammu & Kashmir, Uttar Pradesh and Delhi, there is no remission. But in 21 states and UTs they have the benefit of remission in sentence.

In the case of short-term prisoners, the periodicity of sanction of remission widely differs. It is once in 15 days in Sikkim, one month in Mizoram and Tamil Nadu, two months in Orissa and Tripura, three months in Chattisgarh, Haryana, Himachal Pradesh, Punjab, Rajasthan, Uttar Pradesh, West Bengal, Chandigarh and Delhi, and six months in Goa, Gujarat, Maharashtra and Nagaland.

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[208] Bureau of Police Research & Development Ministry of Home Affairs "Implementation of The Recommendations of All-India Committee on Jail Reform (1980-83)"Vol.1,2003, available at http://mha1.nic.in/PrisonReforms/pdf/Mulla%20Committee%20-implementation%20of%20recommendations%20 - Vol %20I.pdf

In respect of long-term prisoners (term of imprisonment, more than five years) variations are there but fewer. Remission is sanctioned to inmates every month in Mizoram, Sikkim and Tamil Nadu. In ten states it is quarterly or once in three months; but in four states it is half-yearly. Needless to say, this correctional procedure certainly needs streamlining and standardization.

In Kerala, under Kerala Jail Manual, Rule 528 allows a convict to purchase remission for 30 days from the Superintendent of the jail and for 60 days from the Inspector General of Prisons by parting with his wages. Even he may earn by parting with his blood in camp. However, not all jails provide for such facility.

In respect of temporary release, home leave or furlough too there is wide differences in practices of the jails. In Himachal Pradesh it is not fixed. In Mizoram, Nagaland and Sikkim it is up to seven days. In another 18 states and UTs, it is between 15 and 30 days.

There is, therefore, urgent need for the implementation of Model Jail Manual 2016 so that a sort of uniformity is brought the short sentencing.

6.13 National Human Rights Commission

The National Human Rights Commission received a number of representations pointing out that the State Governments are applying differing standards in the matter of premature release of prisoners undergoing life imprisonment. After examining the vexed question of disparities and differing standards applied by the various States in considering the cases of prisoners serving life imprisonment for premature release under the provisions of section 432, 433 and 433 A of CrPC ., the Commission issued broad guidelines vide it's letter of even number dated 8.11.1999 as revised on 4 April 2003. Apart from the guidelines as to constitution of review board and its working the commission laid down as under:

3. Eligibility for premature release

3.1 Every convicted prisoner whether male/female undergoing life imprisonment and covered by the provisions of Section 433A Cr.PC shall be eligible to be considered for premature release from the prison immediately after serving out the sentence of 14 years of actual imprisonment i.e. without the remissions. It is, however, clarified that completion of 14 years in prison by itself would not entitle a convict to automatic release from the prison and the Sentence Review Board shall have the discretion to release a convict, at an appropriate time in all cases considering the circumstances in which the crime was committed and other relevant factors like;

a) whether the convict has lost his potential for committing crime considering his overall conduct in jail during the 14 year's incarceration;
b) the possibility of reclaiming the convict as a useful member of the society; and
c) Socio-economic condition of the convict's family.

With a view to bring about uniformity, the State/UT Governments are, therefore, advised to prescribe the total period of imprisonment to be undergone including remissions, subject to a minimum of 14 years of actual imprisonment before the convict prisoner is released. The Commission is of the view that total period of incarceration including *remissions in such cases should ordinarily not exceed 20 years*.

Section 433A was enacted to deny premature release before completion of 14 years of actual incarceration to such convicts as stand convicted of a capital offence. The Commission is of the view that within this category a reasonable classification can be made on the basis of the magnitude, brutality and gravity of the offence for which the convict was sentenced to life imprisonment. Certain categories of convicted prisoners undergoing life sentence would be entitled to be considered for premature release only after undergoing imprisonment for 20 years including remissions. *The period of incarceration inclusive of remissions even in such cases should not exceed 25 years.* Following categories are mentioned in this connection by way of illustration and are not to be taken as an exhaustive list of such categories:

a) Convicts who have been imprisoned for life for murder in heinous cases such as murder with rape, murder with dacoity, murder involving an offence under the Protection of Civil Rights Act 1955, murder for dowry, murder of a child below 14 years of age, multiple murder, murder committed after conviction while inside the jail, murder during parole, murder in a terrorist incident, murder in smuggling operation, murder of a public servant on duty.

b) Gangsters, contract killers, smugglers, drug traffickers, racketeers awarded life imprisonment for committing murders as also the perpetrators of murder committed with pre-meditation and with exceptional violence or perversity.

c) Convicts whose death sentence has been commuted to life imprisonment.

3.2 All other convicted male prisoners not covered by section 433A Cr.PC undergoing the sentence of life imprisonment would be entitled to be considered for premature release after they have served at least 14 years of imprisonment inclusive of remission but only after completion of 10 years actual imprisonment i.e. without remissions.

3.3 The female prisoners not covered by section 433A Cr.PC undergoing the sentence of life imprisonment would be entitled to be considered for premature release after they have served at least 10 years of imprisonment inclusive of remissions but only after completion of 7 years actual imprisonment i.e. without remissions.

3.4 Cases of premature release of persons undergoing life imprisonment before completion of 14 years of actual imprisonment on grounds of terminal illness or old age etc. can be dealt with under the provisions of Art.161 of the Constitution.

6.14 The Model Jail Manual 2016 – Requirements and Implications

On the directives of the Supreme Court in the matter of *Suo Moto Writ petition titled Re Inhuman Conditions*[209] the new model jail manual 2016 was prepared which tries to prescribe uniformity in the practices of remissions and premature release among a host of other things. The model jail manuals 2016 classifies premature release of prisoners into following four types[210]

(1) By way of commutation of sentence of life convict and other convict under Section 433 of the Code of Criminal Procedure, 1973 by the State Government.
(2) By way of remitting term sentence of a prisoner under Section 432 of the Code of Criminal Procedure, 1973 by the State Government.
(3) By order of the Head of the state passed exercising power under Article 72 or Article 161 of the Constitution of India, as the case may be.
(4) pre mature release under any special law enacted by the State providing for release on probation of good conduct prisoners after they have served a part of the sentence.

The jail manual 2016 also prescribes that "the following categories of life convict prisoners shall be eligible to be considered for premature release by the SLC" so that uniformity is brought in the practices of all states and jail manuals.

" (1) Women offenders sentenced to life imprisonment: on completion of eight years of imprisonment, including remission, except those covered under Section 433-A of the Code of Criminal Procedure, 1973, whose cases will be considered after completing 14 years of actual imprisonment.
(2) Life convicts (men and young offenders) on completion of 10 years of imprisonment, including remission, except those covered under Section 433-A of the Code of Criminal Procedure, 1973, whose cases will be considered after completing 14 years of actual imprisonment.
(3) prisoners convicted of offenders such as rape, dacoity, terrorist crimes, kidnapping, kidnapping for ransom, crime against women & children smuggling (including those convicted under NDPS Act), Prevention of Corruption Act, Immoral Traffic Prevention Act, offences against state, and undergoing life imprisonment, after completion of 14 years of sentence inclusive of remission.
(4) Old and infirm offenders of 65 years of age on the day of the commission of offence, sentenced to life imprisonment on completion of 10 years of sentence or 75 years of age including remission, whichever is earlier subject to the condition that they shall not be actually released unless they have undergone at least five years of imprisonment including remission."

It is also prescribed that the superintendent shall prepare a comprehensive note for each prisoner, giving his family background, the offence committed, and the circumstance of crime, the conduct of the prisoner in jail, behaviour pattern, and prisons offence, physical and mental health, which shall be presented before the State

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[209] In the matter of *Suo Moto* Writ petition (Civil) No.406/2013 titled Re Inhuman Conditions Prevailing in 1382 prisons in India.
[210] See Chapter XX, Premature Release, Model Jail Manual, 2016

Level Committee SLC. It is specifically motioned that the rejection of a case of a prisoner for premature release on one or more occasions by the SLC shall not be a bar for reconsideration. Rejected case may be presented within one year from the date of rejection with fresh report by the superintendent. The rejection of application by SLC shall be on sound reasons conforming to the guidelines by the state government.

In order to minimize the disparity in granting remission, the Model Jail Manual 2016 also prescribes the scale of remission as under [211]

"18.09 scale of remission for convicted prisoners: Ordinary remission may be granted to prisoners who are eligible for it at the scale shown below:

1) Three days per calendar month for good behavior, discipline and participation in institutional activities,
2) Three days per calendar month for performance of work according to the prescribed standards,
3) Two days per calendar month for prisoners employed on prison maintenance services requiring them to work even on Sundays and holidays e.g. sweeping, cooling etc.,
4) Eight days per calendar month for those working as night watchmen. Night watchmen will not be eligible for remission mentioned in (a), (b) and (c) above.
5) 10 days per calendar month to convicts overseers and convict warders (until there two categories are abolished). Convict overseers and convict warders will not be eligible for remission mentioned in (a), (b) and (c) above,
6) One day for each month's stay in open institution to prisoners sentenced to imprisonment of one year or more and transferred to such institutions,
7) Any prisoner eligible for ordinary remission, who for a period of one year from the date of his sentence, or the date on which he was last punished (except by way of warning) for a prison offence, has not committed any prison offence, should be awarded 30 days annual good conduct remission in addition to any other remission."

6.15 Conclusion

The ordinary and extraordinary powers of remission and clemency are retained to infuse mercy into sentencing policy of a nation. Indian legal system is protein of such schemes. The exercise or non exercise of such powers, however, has been controversial. Presidential powers of mercy have not been consistently exercised on consistent principles. Instances of mercy on unknown and fanciful grounds have marked their presence in the Indian legal system thereby giving scope for judicial review of such exercises. The court had to reprimand, though in the soft language, the offices of President and Governors to exercise the powers timely and on the principles of time honoured principles. Even the exercise of remission and commutation by the appropriate government is not inspiring. Whereas in few states the powers have been often exercised, other states have been reluctant to exercise same powers liberally as

[211] See Chapter XVI of the Model Jail Manual, 2016

remaining states do. The jail manuals also provide methods of short sentencing where a judicial sentence can undergo substantial modifications in terms of incarceration. Almost one fourth of sentence can be remitted apart from periodical release for reintegration of the convicts. However, short sentencing being state jurisdiction, there is no uniformity in these benefits. Examples above unfolded that there exists a great divergence and disparity in the benefits conferred depending upon the jail the convict is serving in. Though the judicial sentencing and executive interference is expected to be supplementing each other creating an ambience of consistency in sentencing policy, there appears to be tug of war in between rather than being the sides of same coin. There is, therefore, urgent need to re-haul this clemency and concessionary sentencing policy in India.

CHAPTER -VII

ALTERNATE SENTENCING, ALTERNATIVES TO IMPRISONMENT AND REHABILITATIVE SENTENCING: TOWARDS RESTORATIVE JUSTICE

> *"There is a wide range of choice and flexible treatment which must be available with the Judge if he is to fulfil his tryst with curing the criminal in a hospital setting. Maybe in an appropriate case actual hospital treatment may have to be prescribed as part of the sentence. In another case, liberal parole may have to be suggested and, yet in a third category, engaging in certain types of occupation or even going through meditational drills or other courses may be part of the sentencing prescription. The perspective having changed, the legal strategies and judicial resources, in their variety, also have to change. Rule of thumb sentences of rigorous imprisonment or other are too insensitive to the highly delicate and subtle operation expected of a sentencing Judge."*[1]
>
> Justice V.R. Krishna Iyer

7.1 Introduction

The purpose of all laws is to maximize the net happiness of society.[2] Therefore, punishment should only be administered if it results in an overall benefit to society.[3] Only when punishment leads to more aggregate pleasure than aggregate pain is punishment justified.[4] Punishment for a past offense is [only] justified by the future benefits it provides.[5] Punishment should "modify the behavior of the individual who is being punished, hopefully in such a way as to make him a more socially desirable person."[6]

Nobody is born a criminal; it is the circumstances, societal constraints, inherited environment and at times accidents, which makes him a criminal. The ultimate aim of every sentencing policy shall thus be restorative justice. Not only the retributive requirements of the state which prosecutes, but also the needs of the victims and offenders be balanced to attain complete justice. This process is taken care of by a mechanism known as restorative justice. Indian jurisprudence is full of restorative justice system, though the enforcement of it was feeble at times. This chapter shall discuss the methods of restorative justice adopted in India and problems

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[1] Per Justice V.R. Krishna Iyer in *Mohammad Giasuddin v. State of Andhra Pradesh* 1977 AIR 1926
[2] Joshua Dressler, *Understanding Criminal Law*, 4th ed., (Matthew Bender: LexisNexis, 2006), Pp14-19
[3] See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation,* (London: The Athlone Press 1970)
[4] *Ibid*
[5] Paul H. Robinson & John M. Darley, "The Utility of Desert", 91 *Nw. U. L. REV*. 453 (1997), p 454
[6] James B. Appel, Neil J. Peterson, "Whats Wrong with Punishment", 56 *J. Crim. L. Criminology & Police Sci.* 450 (1965), p 450: *See also* Matthew Haist, "Deterrence in a Sea of Just Deserts: Are Utilitarian Goals Achievable in a World of Limiting Retributivism", 99 *J. Crim. L. & Criminology* 789 (2008-2009)

surrounding them.

7.2 Conceptualizing 'Restorative Justice' And 'Alternate Sentencing', Alternatives to Imprisonment and Rehabilitative Sentencing

Restorative justice[7] is a way of responding to criminal behaviours by striking a balance between the needs of the community, the victims and the offenders. Restorative justice is an approach to problem solving which involves the victim, the offender, their social networks, justice agencies and the community. Restorative justice programmes are rested on the primary belief that criminal behaviour not only violates the law, but also injures victims and the community. Any efforts to address the consequences of criminal behaviour, therefore, should involve the offender as well as injured parties, while also providing help and support that the victim and offender require.[8]

Restorative justice programmes which are based on several underlying assumptions[9] can be successfully initiated: (*a)* at the police level (pre-charge); *(b)* prosecution level (post-charge but usually before a trial), *(c)* at the court level (either at the pretrial or sentencing stages); and, *(d)* corrections (as an alternative to incarceration, as part of or in addition to, a non-custodial sentence, during incarceration, or upon release from prison.)[10]

The conventional criminal justice system focuses upon three questions: (1) what laws have been broken? (2) Who has done it? (3) What does he deserve? From a restorative justice perspective, however, an entirely different set of questions are asked: (1) Who has been hurt?; (2) What are their needs?; and (3) Whose obligation are these?[11]

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[7] The alternative terms for restorative justice include "communitarian justice", "making amends", "positive justice", "relational justice", "reparative justice", "community justice" and "restorative justice", among others. Miers, D. and J. Willemsens, *Mapping Restorative Justice. Developments in Twenty-Five European Countries*, (Leuven: Leuven University Press, 2004)

[8] United Nations Office On Drugs And Crime, *Handbook On Restorative Justice Programmes,*(New York: United Nations, 2006), p 6 also available at https://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf

[9] Restorative justice programmes are based on several underlying assumptions that *(a)* the response to crime should repair as much as possible the harm suffered by the victim; *(b)* offenders should be brought to understand that their behaviour is not acceptable and that it had some real consequences for the victim and community; *(c)* offenders can and should accept responsibility for their action; *(d)* victims should have an opportunity to express their needs and to participate in determining the best way for the offender to make reparation, and *(e)* the community has a responsibility to contribute to this process. See United Nations Office On Drugs And Crime, *Handbook on Restorative Justice Programmes,*(New York: United Nations, 2006) p 8

[10] United Nations Office On Drugs And Crime, *Handbook on Restorative Justice Programmes*, (New York: United Nations, 2006), p13

[11] Howard Zehr, *The Little Book of Restorative Justice*, (PA: Good Books, 2002) available at https://www.unicef.org/tdad/littlebookrjpakaf.pdf

The principle of restorative justice is in practice in most of the states in different form and content.[12] One of the first to articulate restorative justice theory was Howard Zehr[13] who distinguishes the response to crime between retributive approach and restorative approach.[14] The United Nations also adopted the basic principle on restorative justice[15] which defined the term "restorative justice" as

> "a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implication for the future."[16]

There are three core models of restorative justice namely (1) Victim-Offender Mediation,[17] (2) Family Group Conferencing[18] and (3) Sentencing circles.[19] Though India does not follow the three models in *stricto senso*, a combination of the three

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[12] Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, "Restorative Justice in the Twenty First Century: A Social Movement Full of Opportunities and Pitfall" *Marquette Law Review*, 89:251

[13] Howard Zehr was considered as grandfather of restorative justice. See Daniel W. Van Ness & Karen Heetderks Strong, *Restoring Justice,* (Ellen S. Boyne: Anderson Publg. Co.,1997), p 26

[14] See Howard Zehr, *Changing Lenses, A New focus for Crime and Justice,* (Scottsdale PA: Herald Press, 1990)

[15] United Nation ECOSOC experts committee adopts restorative justice basic principle in 2002

[16] This definition of UN ECOSOC expert committee is based on Tony Marshall of Restorative Justice Consortium proposed in the year 1996. See Dennis Sullivan & Larry Tifft, *Handbook of Restorative Justice,*(USA: Routledge International Handbooks, 2006), p 23

[17] Sunanda Dey and B.N. Chattoraj summarise Victim-Offender Mediation as

> "Victim-Offender Mediation, also called Victim-Offender Dialogue, is a face-to- face meeting, in the presence of a trained mediator, between the victim of a crime and the person who committed that crime. The practice is also called Victim-Offender Conferencing, Victim-Offender Reconciliation, or Restorative Justice Dialogue. In some practices, the victim and the offender are joined by family and community members or others. During the mediation, they may choose to create a mutually agreeable plan to repair any damages that occurred as a result of the crime. The idea of bringing them together is based on age-old values of justice, accountability, and restoration. This model is most often employed in cases involving property crimes or minor assaults, Victim Offender Mediation programs are frequently found in juvenile courts, law enforcement agencies, probation and corrections departments, and victims' assistance programs. The first "Victim Offender Reconciliation Program" was started in Kitchener, Ontario, Canada in 1976 conducted by members of the Mennonite church, as well as a local judge and a probation officer; the first VORP in the United States was started in Elkhart, Indiana in 1978. In 1990, there were approximately 150 such programs; in 2000, there are more than 1200 programs world-wide."

See Sunanda Dey and B.N. Chattoraj, "Restorative Justice In India: Prospects And Constraints" *The Indian Journal of Criminology & Criminalistics,*Vol. XXIX Issue no 1, 2008, p 23

[18] Sunanda Dey and B.N. Chattoraj *Ibid*, p 23, summarise Family Group Conferencing as

> "Family Group Conferencing (FGC) has a much wider circle of participants than VOM. In addition to the primary victim and offender, participants may include people connected to the victim, the offender's family members, and others connected to the offender. FGC is often the most appropriate system for juvenile cases, due to the important role of the family in a juvenile offender's life."

[19] Sunanda Dey and B.N. Chattoraj *Ibid*, p 23 summarise

> "Sentencing Circle or Circle Sentencing aims to recognize the needs of victims, secure the participation of the community, and identify the rehabilitative needs of the offender. Unlike many other restorative initiatives, it is part of and replaces sentencing in the formal justice system. It engages the community and the formal justice system as partners and to a lesser extent victims and offenders in the resolution of criminal justicebased disputes. The process is as well suited for adults as for young offenders and is sufficiently flexible to be adapted to other situations, including child welfare disputes. Circle sentencing has many of the attributes of family group conferencing, as developed in Australia and New Zealand. Though, it is not a panacea and its use should be restricted to motivated offenders who have the support of their community."

models can be found in 'indigenized models' such as compounding of offences, mutual disposition, power to withdraw complaints, satisfaction with fine etc.

Alternative Sentencing, on the other hand, is a policy which is based on the premise that the offenders can be reformed, reclaimed, re-assimilated and rehabilitated in the social milieu. Every criminal sanction need not push the person behind the bar. The ill effects of imprisonment are well know and tersely documented.[20] The sentencing policy, therefore, should provide for alternatives to imprisonment and alternate policy which focuses on reclaiming rather than branding and banishing. The introduction of alternative sanctions in Indian sentencing policy, therefore, has been one of the most important developments in sentencing policy in the last few decades. In order to de-congest prisons, the alternatives to imprisonment such as 'Probation' and 'Parole' 'Community Service', 'forfeiture of property', 'payment of compensation to victims', 'public censure' etc have been introduced in India.

Alternative sentencing has received international recognition[21] and has been widely in practice though forms and formats differ from one jurisdiction to another. In India, alternatives to imprisonment are available at all the three stages: pre-trial stage;[22] sentencing stage;[23] and post sentencing stage[24] which are discussed below.

7.3 Alternatives To Sentencing I – Pre-Trial Process

Alternatives to sentencing at pre trial stage can, as of now, is available as two options. Offences of trivial nature can be compounded without the concurrence of the

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[20] In *A Convict Prisoner In The Central Prison v. State of Kerala* 1993 Cri.L.J 3242, Kerala High Court observes,

> "[w]ith imprisonment, a radical transformation comes over a prisoner, which can be described as prisonisation. He loses his identity. He is known by a number. He loses personal possessions. He has no personal relationships. Psychological problems result from loss of freedom, status, possessions, dignity and autonomy of personal life."

[21] In this context , the United Nations Standard Minimum Rules For Non Custodial Measures (Referred as The Tokyo Rules) 1990; United Nations Minimum Rules For The Administration Of Juvenile Justice(Referred here as Beijing Rules), 1985, and Declaration Of Basic Principles Of Justice For Victims Of Crime And Abuse Of Power 1985, are the basic international legal Instruments constituting the legal regime for alternative sentencing at international plane as a model for variety of jurisdiction to follow.

[22] Pre trial alternatives include, interalia, bails, time-limit for detention, plea bargaining, free legal aid, compounding of offences, decriminalization of offences, diversion, administrative fines/ non penal fines, juvenile justice administration etc.

[23] Sentencing stage alternatives include, fines, admonitions, conditional discharges, compensation, probation, community based services etc.

[24] Post sentencing stage include, parole, pardon, remission of sentences, temporary release mechanisms, open prisons, rehabilitative measures etc.

court,[25] whereas offences of bit serious nature can be compounded with the concurrence of the court.[26] Offences of heinous nature or against public interest are kept outside the process of compounding. Even prior to compounding, the facility of withdrawal of complaint[27] or FIR [28] is provided by the Cr.PC. However, once the charge Sheet is filed or trial has commenced or cognizance has been taken of, or high court has refused to quash FIR,[29] compounding seems to be more appropriate. If sentences carry fixed term of imprisonment and are non compoundable, plea bargaining[30] can be invoked as alternative to sentencing in pre-trial process. The next part of the discussion deals with compounding and statutory plea bargaining.

7.4 Alternatives To Sentencing II– During -Trial Process

In the given sentencing policy in India, three alternatives are available at the sentencing stage namely admonition, probation and customized community sentences. There is a 'either or' interplay between admonition under Criminal Procedure Code, 1973 and Probation of Offenders Act, 1958. Where the later Act is applicable, the former is ruled out.

7.4.1. Release on admonition

Section 360 of Cr.PC classifies offenders into two categories *namely*; person who has committed offences punishable with less than seven years and such person is first time offender. *Secondly* offences committed are punishable with less than two years who may or may not be first offenders. For the former, the court may instead of passing any sentence at once, release the offenders on probation. For the second category, court may release such accused on admonition, unless of course in both the categories the court is firmly convinced[31] that the exercise of such powers is not warranted for.[32]

Section 360 is inapplicable where Probation of Offenders Act, 1958 is applicable.[33] Section 360 is almost overruled in view of all states adopting Probation of Offenders

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[25] See Code of Criminal Procedure, 1973, Section 320 (1)
[26] *Ibid* section 320 (2)
[27] *Ibid* section 257
[28] *Ibid* section 321
[29] *Ibid* section 482
[30] *Ibid* Chapter XXIA
[31] *Ibid* Section 361
[32] *Ibid* Section 360
[33] See *Gurbachan Singh v. State of Punjab* 1980 Cri LJ 417 (D.B. Punjab & Haryana High Court), *Pushkar Raj v. The State of Punjab* 1981 Cri LJ 1910 (S.J. Punjab & Haryana High Court), *State of Punjab v. Harbans Lal* 1983 Cri LJ 13, *Mustafa Sheikh v. Lalchand Sheikh* 1985 Cri LJ 1183 (D.B. Calcutta High Court), *M. Somashekhar v. S.A. Subbaraju* 1989 Cri LJ 1686 (S.J. Karnataka High Court), *State of Himachal Pradesh v. Lal Singh* 1990 Cri LJ 723 (F.B. Himachal Pradesh High Court), *Sunil Kahar v. State* of Bihar 1992 (2) BLJ 75 : 1992 Cri LJ 3647, *State through S.P., New Delhi v. Ratan Lal Arora* 2004 AIR SCW 2480

Act, 1958. In fact Probation of Offenders Act, 1958 confers wider benefits than section 360 of CrPC.[34] A detailed discussion on admonition and release would follow in subsequent discussion.

7.4.2 Release on probation

Probation is a community-based sanction imposed by a court in lieu of imprisonment. In many jurisdictions, probation is treated as an alternative to a formal (i.e., custodial) sentence; in others, it is treated as a sentence in its own right. It always includes a defined period of conditional release in the community, sometimes preceded by a short jail stay.[35] The probation of offenders Act, 1958 is "a milestone in the progress of the modem liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of criminal law is more to reform the individual offender than to punish him."[36] The object of the Act is to "prevent the turning of youthful offenders into criminals by their association with hardened criminals of mature age within the walls of a prison. The method adopted is to attempt their possible reformation instead of inflicting on them the normal punishment for their crime."[37] The Act classifies the offenders into two categories (i) offenders under 21 years of age and (ii) others aged 21 and above. Section 6 deals with offenders aged below 21 years. The court is prohibited from sentencing young offenders at once to imprisonment unless it is satisfied that it is not desirable to release him after admonition under Section 3 or on probation of good conduct under Section 4 of the Act. It is pertinent to note that Section 4 applies to offenders of all ages. It is a general provision.

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[34] In *Upendra Nath Chaudhary v. High Court of Judicature At Patna* 2007 Cri.L.J 2913 Justice Aftab Alam brings the difference as under

> "Section 360 of the Code relates only to persons not under 21 years of age convicted for an offence punishable with fine only or with imprisonment for a term of seven years or less, to any person under 21 years of age or any woman convicted of an offence not punishable with sentence of death or imprisonment for life. The scope of Section 4 of the Probation Act is much wider. It applies to any person found guilty of having committed an offence not punishable with death or imprisonment for life. Section 360 of the Code does not provide for any role for Probation Officers in assisting the Courts in relation to supervision and other matters while the Probation Act does make such a provision. While Section 12 of the Probation Act states that the person found guilty of an offence and dealt with under Section 3 or 4 of the Probation Act shall not suffer disqualification, if any, attached to conviction of an offence under any law, the Code does not contain parallel provision"

See also Channi v. State of U.P. (2006) 2 SCC (Cri) 466

[35] Cecelia Klingele, "Rethinking the Use of Community Supervision", 103 J. *Crim. L. & Criminology* 1015 (2013) P 1022

[36] Per *Subba Rao, J. in Rattan Lal v. State of Punjab* [1964] 7 S.C.R. 676

[37] *Ramji Missar v. State of Bihar* 1963 AIR 1088, *See also Isher Das v. State of Punjab* 1972 AIR 1295

7.4.3 Customized community sentences

Community service is not legislatively incorporated alternatives to punishment, though juvenile justice Act 2015 speaks of it in limited way for limited cases. The benefits of community service are limited, thus to juveniles. The benefit may be extendable to first time offenders under probation of offenders Act, 1958. The probation Act does not specially mentions about community service. It provides for conditions subject to which offenders may be released. Courts have, however, made use of this "condition clause" to read community service into it. There is no comprehensive sentencing policy in this respect. The usage of this method is either limited institutionally, as far example, High Courts have frequently made use of this, or territorially, as far example, lowers courts in Delhi have been reported to have made use of it often. A critically discussion would fallow in next titles.

7.5 Alternatives to Imprisonment (Sentencing) Iii– Post- Trial Process

Post trial, many alternatives are available to imprisonment. These alternatives are in fact not alternatives to sentencing, but are alternatives to imprisonment which has a direct bearing on the sentencing. Parole, pardon, remission short sentencing schemes, etc have a huge impact on judicial sentencing. The execution of original sentence passed by the judiciary undergoes drastic and dramatic changes if any of the alternatives are exercised. Life imprisonment which is taken to be life in jail till death may turn out to be imprisonment of 8 or 9 years by the application of remission and short sentencing rules.[38] The rationale behind such 'executive tempering' is to infuse mercy where the need be.[39] Treatment of criminal in a just manner is read as fundamental right[40] and therefore sentencing policy post judicial sentencing has to

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[38] For detailed discussion see Chapter VI: Clemency, Concessionary and Short Sentencing: Executive Interference in Judicial Process; Two Sides of the Same Coin or Tug of War Between?

[39] The observation of Supreme Court in *Mohd Giasuddin v. State of Andhra Pradesh* (AIR 1977 SC 1926) is pertinent is here, which runs as

> "Progressive criminologists across the world will agree that the Gandhian diagnosis of offenders as patients and his conception of prisons as hospitals……is the key to the pathology of delinquency and the therapeutic role of punishment."

[40] In *Charles Sobraj v. Superintendent Central Jail, Tihar, New Delhi* (AIR 1978 SC 1514), the Supreme Court observed

> "Imprisonment does not spell farewell to fundamental rights laid down under part III of the constitution. Prisoners' retain all rights enjoyed by free citizens except those lost necessarily as an incident of confinement. Therefore, it is a court's "continuing duty and authority to ensure that the judicial warrant which deprives a person of his life or liberty is not exceeded, subverted or stultified."

answer the constitutional test too.[41] However, the sentencing policy in respect of post trial alternatives is to a greater extent uncertain and different from state to state. Prison reforms fall under State list of the seventh schedule[42] and therefore states are left to frame their own rules in the absence of uniform jail manuals by the Centre.[43] The policies of the state in respect of post sentencing are increasingly in question, given the disparity and inconsistency inherent in the exercise of such powers. The chapter on clemency and short sentencing would in detail unfold these predicaments with possible solutions.[44]

Temporary Release Mechanisms like parole[45] and furlough[46] and Open

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[41] In *Charles Sobraj v. Superintendent Central Jail, Tihar, New Delhi* (AIR 1978 SC 1514), the Supreme Court observed

> "Judicial policing of prison practices is implied in the sentencing power, thus the 'hands off' theory is rebuffed and the Court must intervene when the constitutional rights and statutory prescriptions are transgressed to the injury of the prisoner."

Further the court observed

> "Whenever fundamental rights are flouted or legislative protection ignored, to any prisoner's prejudice, this Court's writ will run, breaking through stone walls and iron bars, to right the wrong and restore the rule of law." "The criminal judiciary has thus a duty to guardian their sentences and visit prisons when necessary."

In *Sunil Batra v. Delhi Administration & Ors* AIR 1978 SC 1675, the Supreme Court held

> "court has a distinctive duty to reform prison practices and to inject constitutional consciousness into the system."

In *Sunil Batra (Ii) v. Delhi Administration* (AIR 1980 SC 1579) the Supreme Court observed

> "No iron curtain can be drawn between the prisoner and the constitution," and that "The court has a continuing responsibility to ensure that the constitutional purpose of the deprivation is not defeated by prison administration."

[42] 'Prisons' is a State subject under Entry-4 (Prison Reformatories, Borstal Institutions and other institutions of like nature) in the State List (List-II) of the Seventh Schedule to the Constitution of India. Therefore, the management and administration of Prisons falls in the domain of the State Governments. The Prisons are governed by, interalia, The Prisons Act, 1894 and the Prison Manuals/ Rules/ Regulations framed by the respective State Governments from time to time.

[43] The central government has recently adopted a Model Jail Manual 2016 which prescribes uniformity among states in all most all respects of jail policy including remission, premature release, and jail discipline. States are now to modify their jail manuals on the lines of this 2016 manual. For the disparity in remission and premature release and tentative solutions see chapter no

[44] See Chapter VI: Clemency, Concessionary And Short Sentencing: Executive Interference in Judicial Process; Two Sides of the Same Coin or Tug of War Between?, for detailed discussion.

[45] Parole is granted for certain emergency and the release on parole is a discretionary right. However, release on furlough is a substantial right and accrues to a prisoner on compliance with certain requirements. The idea of granting furlough to a prisoner is that the prisoner should have an opportunity to come out and mix with the society and the prisoner should not be continuously kept in jail for a considerable long period.

[46] Furlough/Leave differ from state to state. To take the example of Maharashtra, *MAHARASHTRA PRISON MANUAL*, 1979 provides for Furlough/Leave as under.

The period of furlough shall not exceed two weeks at a time. However, the period of two weeks may be initially extended up to three weeks in case prisoners desire to spend the furlough outside the State of Bombay. (Ch. XXXVII, Rule 2, 3(I) &(2)). Habitual prisoners and prisoners convicted of offences under Sections 392- 402 of the IPC are not allowed to seek furlough. (Ch. XXXVII, Rule 4). Every prisoner desirous of release on furlough shall be required to give a personal bond of the required amount. (Ch. XXXVII, Rule 7) A prisoner may be released for such period on parole as the competent authority in its discretion may order, in case of serious illness or death of any member of the prisoner's family or of the closest relations or for any other sufficient cause. (Ch. XXXVII, Rule 19) The period spent on parole shall not count as remission of the sentence. (Ch. XXXVII, Rule 20) A prisoner may be granted parole either on his own application made by his relatives, friends or legal advisers. (Ch. XXXVII, Rule 21) before claiming Furlough/Leave, at least 1 year of actual imprisonment should have been suffered of the punishment is between 1 – 5 years, 2 years of actual imprisonment in case of 5 years and above and in case of More than 5 years but not life Imprisonment a convict may be released on furlough every year instead of every 2 years during the last 5 years of the unexpired period of sentence. In case of Life imprisonment, convict may be released on furlough every year instead of every 2 years after completing 7 years of actual imprisonment.

Prisons[47] open colonies[48] have been institutionalised to infuse limited and controlled independence and sense of rehabilitation in the convicts. These methods are intended to ease the imprisoned life of the convicts.[49] These mechanisms have limited impact on the judicial sentences and are thus outside the scope of this study and therefore been safely omitted from further references.

7.6 Compounding of Offences

Though all compromises shall not be encouraged in the criminal legal system, law treats certain offences with less impunity and allows the victim and offenders to come together and mutually solve their grievances which can alternatively be done by legal system at any time. The ultimate purpose of law cannot be always to push all criminals behind the bar, provide the remedy of incarceration of offenders to victims, and send unnecessary message of zero tolerance policy of state towards all crimes. The purpose of criminal law, rather, is to strike a balance between the loss of victims, liberty of offenders and safety and security of the society. This purpose of criminal justice leads towards restorative justice. One of the pre sentencing methods of restorative justice is to encourage compounding of offences.

Compounding, in the context of criminal law, means forbearance from the prosecution as a result of an amicable settlement between the parties. The

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[47] In order to save the lifer and long-term prisoners from the ill effects of confining continuously in closed
prisons Open Prisons have been established. The prisoners who respond to programme, based on trust, responsibility are selected for being sent to these open institutions. Once at the open prison camp, these prisoners construct their own dwellings, where they live with their families, who are encouraged to join them. Their children attend local schools. Prisoners cultivate the camp's land, do public works, conduct independent businesses, or work for outside employers. They self-govern their camp community through an elected council of village elders, with the handful of camp officials focusing on facilitating employment
and other matters, rather than on security. The prisoners receive remission credited against their sentences, and having completed them, are then released. This model is being replicated by other states in India as well as attracting regional interest. See Khushal I. Vibhute, *Open Peno-correctional Institutions in India: A Review of Fifty five Years*, (Max Planck Institute for Foreign and International Criminal Law, 2006) "Jailhouse Rocks" in The Telegraph, September 5, 2004, Calcutta; "A Village in a Village" in the Deccan Herald, March 28, 2004, Bangalore.

[48] In Maharashtra for example, Open colonies have been established towards their final rehabilitation. The prisoners are allowed to stay with their families in these colonies. They earn their own living. There is on open colony at present located at Atpadi District Sangli.

[49] In *Sunil Batra v. Delhi Administration & Ors* (AIR 1978 SC 1675), the Supreme Court observed

> "Rehabilitation is a necessary component of incarceration and this philosophy is often forgotten when justifying harsh treatment of prisoners. Consequently, the disciplinary need of keeping apart a prisoner must not involve inclusion of harsh elements of punishment. The Court opined that "liberal paroles, open jails, frequency of familial meetings, location of convicts in jails nearest to their homes tend to release stress, relieve
> distress and insure security better than flagellation and fetters."

compounding scheme relieves the courts of the burden of accumulated cases. For the compounding of the offences punishable under the Indian Penal Code, a complete scheme is provided under Section 320 of the Code of Criminal Procedure, 1973.[50]

Crimes essentially are of two types in terms of their impact and cognizance. Crimes of less impact and personal in nature are considered to be compoundable offences. Crimes which have indefinite impact on the society which challenge the very orderly existence of societal discipline, on the other hand are classified as cognizable offences. Offences like hurt, theft, wrongful confinements cheating, adultery, breach of trust etc are offences of personal nature which can be personally handled without invoking the entire machinery of legal system. Compromise of win win situation are encouraged where both parties sit together and bargain for loss and liberty respectively. Compounding of an offence thus signifies

> "that the person against whom the offence has been committed has received some gratification, not necessarily of a pecuniary character, to act as an inducement of his desiring to abstain from a prosecution".[51]

The victim may have received compensation from the offender or the attitude of the parties towards each other may have changed for good. The victim is prepared to condone the offensive conduct of the accused who became chastened and repentant. Criminal law needs to be attuned to take note of such situations and provide a remedy to terminate the criminal proceedings in respect of certain types of offences. That is the rationale behind compounding of offences. Incidentally, the compounding scheme relieves the courts of the burden of accumulated cases. The listing of offences compoundable is something unique to the Indian Criminal Law. The State's prosecuting agency is not involved in the process of compounding.[52] Which offences should or should not be made compoundable is always an enigma for the law-makers.[53]

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[50]See Praveen Patil, "Elders as Active and Passive Victims of Section 498A Cases: A Critical Analysis of Judicial Efforts in Restoring Human Rights of Elders under this New (Era of) Legal Terrorism" *Research Front*, special issue 2015, Pp 53-58. *See also* Praveen B Patil, "Handling Section 498A Cases: Policing Predicaments in Wake of Judicial Assertions and Compelling Real Time Imperatives- Need for An All-Inclusive Deliberation" *Dehradun Law Review*, Vol. 6, Issue 1, 2014, Pp 41-50. Praveen B Patil, "Compounding Section 498A Offences: A Feasible 'Alternative' In Quasi Criminal 'Dispute Resolutions'?", *Research Dimensions*, special issue (ADR), 2014

[51] (1894)21 ILR 103 at 112 by Calcutta High Court quoted in the Law Commission of India, 237th Report on "*Compounding of (IPC) Offences*" 2011.

[52] *Ibid*, at p 6

[53] Broadly speaking, the offences which affect the security of the State or having a serious impact on the society at large ought not to be permitted to be compounded. So also, crimes of grave nature shall not be the subject-matter of compounding. The policy of law on compoundability of offences is complex and no straightjacket formula is available to reach the decision. A holistic and not an isolated approach is called for in identifying the compoundable and non-compoundable offences.

Section 320 of Cr.P.C deals exclusively with the compoundability of offences under IPC. No offence other than that specified in this section can be compounded.[54] Section 320 consists of three things namely, what offences can be compounded, by whom and weather with or without the permission of the court. The offence can only be compounded by the persons specified in Col.3 of the Table concerned and such person is the person directly aggrieved in the sense that she/he is the victim of the crime. As a result of composition of the offence under Section 320, the accused will stand acquitted of the offence of which he/she is charged and the Court loses its jurisdiction to proceed with the case. Unlike in some of the provisions of special laws, no one on behalf of the State is empowered to compound the offences. However, the public prosecutor may withdraw from prosecution with the consent of the Court, as provided for in Section 321 of CrPC.[55]

Sub-section (3) of Section 320 lays down the rule that in respect of compoundable offences specified in the Section, the abetment or an attempt to commit the offence is also compoundable. So also the composition can be applied to the accused who is liable for the offence constructively by virtue of Section 34 or Section 149 of IPC. Then the composition of offence can be permitted by the High Court or a Sessions Court exercising revisional powers. Sub-section (5) provides that the composition can be allowed only with the leave of the Committal Court or Appellate Court during the pendency of committal or appellate proceedings.[56]

7.6.1 Relationship between compounding of offences and quashing of FIR under inherent jurisdictions

Where the offences could not be compounded but the sentimental requirements of the case warranted the compromise, the courts have started quashing

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[54] In *Ramgopal v. State of M.P* 2010 (7) SCALE 711 the court observed that

> "There are several offences under the IPC that are currently non-compoundable. These include offences punishable under Section 498-A, Section 326, etc. of the IPC. Some of such offences can be made compoundable by introducing a suitable amendment in the statute. We are of the opinion that the Law Commission of India could examine whether a suitable proposal can be sent to the Union Government in this regard. Any such step would not only relieve the courts of the burden of deciding cases in which the aggrieved parties have themselves arrived at a settlement, but may also encourage the process of re-conciliation between them. We, accordingly, request the Law Commission and the Government of India to examine all these aspects and take such steps as may be considered feasible".

S*ee also Diwaker Singh v. State of Bihar* Crl. appeal No. 433 of 2004 Dated 18th August 2010

[55] *Supra* note 51 at p 9

[56] *Ibid*

the FIR under their inherent jurisdictions.[57] The Supreme Court in *Shiji @ Pappu v. Radhika* [58] held that simply because an offence is not compoundable under Section 320 CrPC is by itself no reason for the High Court to refuse exercise of its power under Section 482 to quash the prosecution. In *Gian Singh v. State of Punjab and another*,[59] the court observed:

> "[T]he power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. … However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put [the] accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal

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[57] For the scope of inherent jurisdiction of High Court under section 482 see *Khushi Ram v. Hashim and others* AIR 1959 SC 542, *Lala Jairam Das & Ors. v. Emperor* AIR 1945 PC 94, *State of Uttar Pradesh. v. Mohammad Naim* AIR 1964 SC 703, *Pampathy v. State of Mysore* 1966 (Suppl) SCR 477, *State of Karnataka v. L. Muniswamy and others* (1977) 2 SCC 699, *Madhu Limaye v. The State of Maharashtra* (1977) 4 SCC 551, *Raj Kapoor and others v. State and others* (1980) 1 SCC 43, *Simrikhia v. Dolley Mukherjee and Chhabi Mukherjee and another* (1990) 2 SCC 437, *Dharampal & Ors. v. Ramshri (Smt.) and others* 1993 Crl. L.J. 1049, *Arun Shankar Shukla v. State of Uttar Pradesh and ors* AIR 1999 SC 2554, *G. Sagar Suri and another v. State of U.P. and others* (2000) 2 SCC 636, *State of Karnataka v. M. Devendrappa and another* (2002) 3 SCC 89, *Central Bureau of Investigation v. A. Ravishankar Prasad and others* (2009) 6 SCC 351, *Devendra and others v. State of Uttar Pradesh and another* (2009) 7 SCC 495, *Sushil Suri v. Central Bureau of Investigation and another* (2011) 5 SCC 708, *Madan Mohan Abbot v. State of Punjab* (2008) 4 SCC 582, *Ishwar Singh v. State of Madhya Pradesh* (2008) 15 SCC 667, *Jetha Ram v. State of Rajasthan* (2006) 9 SCC 255, *Murugesan v. Ganapathy Velar* (2001) 10 SCC 504, *Ishwarlal v. State of M.P.* (2008) 15 SCC 671, *Mahesh Chand & another v. State of Rajasthan* 1990 (supp) SCC 681

[58] 2010 (12) SCALE 588

[59] (2012) 10 SCC 303

> proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

If the offences against women and children and the IPC offences falling under the categories, like, murder, attempt to murder, offence against unsound mind, rape, bribe, fabrication of documents, false evidence, robbery, dacoity, abduction, kidnapping, minor girl rape, idol theft, preventing a public servant from discharging of his/her duty, outrage of woman modesty, counterfeiting currency notes or bank notes, etc., are allowed to be compounded, it will surely have serious repercussion on the society. Similarly, any compromise between the victim and the offender in relation to the offences clubbed with Special Enactment, like Arms Act 1950, the Prevention of Corruption Act 1988 or the offences committed by Public Servants while working in that capacity, etc., cannot provide for any basis for quashing criminal proceedings involving such offences. As held by the Apex Court, insofar the offences arising out of matrimonial dispute, relating to dowry or the family disputes where the wrong is basically private or personal in nature, are concerned, the possibility of conviction is remote and bleak, in case the parties resolve their entire disputes amicably among themselves. There cannot be any compromise in respect of the heinous and serious offences of mental depravity and in that case, the Court should be very slow in accepting the compromise. If the compromise is entertained mechanically by the Court, the accused will have the upper hand. The jurisdiction of this Court may not be allowed to be exploited by the accused, who can well afford to wait for a logical conclusion. The antecedents of the accused have also to be taken into consideration before accepting the memo of compromise and the accused, by means of compromise, cannot try to escape from the clutches of law.

7.6.2 Where compounding is impressible- reduction of sentence as alternative

Where the law does not permit the compounding of offences yet the courts feel that maximum leniency needs to be given, the courts as via media have started reducing the sentence already undergone by the accused in selected cases of course![60]

In *Jalaluddin v. State of U.P.*,[61] the accused was convicted for the offence

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[60] *Surendra Nath Mohanty v. State of Orissa* AIR 1999 SC 2181. See also *Gulab Das v. State of M. P.*, 2011 (12) SCALE 625

[61] (2002) 9 SCC 561

under section 326 of the IPC and sentenced to undergo rigorous imprisonment for 18 months. Dealing with an application for compounding of offence under section 320 of the Code, 1973 the Supreme Court said

> " It has been stated that the complainant and the appellant are close relations and have compromised the dispute outside the Court. It is prayed that the offence may be permitted to be compounded. The offence under section 326 IPC is not compoundable and it cannot be compounded. The application for compounding is, therefore, rejected."

However the sentence was reduced to the period already undergone.

In *Y. Suresh Babu v. State of Andhra Pradesh*[62] compounding of a non compoundable offence under Section 326 of the IPC was allowed as a special case. The Supreme Court, however, took care to term the case as a special one and directed that the case should not be treated as a precedent.

The Supreme Court in *Mahesh Chand v. State of Rajasthan,*[63] a case under Section 307 of the Penal Code which is not compoundable, again allowed composition by directing the trial court to accord permission to compound. This was done in the facts and circumstances of that case.

However, both above judgments were held to be judgement *per incuriam* as the two cases did not consider section 320(9) of Code, 1973 and as such are not be treated as Precedent.[64]

7.7 Mutual Disposition – Sui Generis Plea Bargaining

No criminal jurisprudence would ever expect that every breach of law shall compulsorily result in incarceration leaving the life of convict and sufferers devastated. Remedy for wrong lies in the amends, that is to say, in the restoration and rehabilitation. A happy win-win situation is possible in criminal wrongs also. Thus, compounding of offences and Plea bargaining are the methods through which this happy balance is struck. Plea bargaining essentially is a compromise - a compromise between three parties, namely, accused, victim, and prosecutor and other people. Plea bargaining is a form of alternative sentencing or alternatives in the sentencing. According to the gradation of crimes some crimes are compoundable with or without

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[62] (1987) 2 JT (SC) 361
[63] A.I.R 1988 S.C 2111
[64] S.M. Deka "Compounding of Offences under the Indian Penal Code And Those Under Other Laws." Available at http://jaassam.gov.in/pdf/article/Article-23.pdf last seen on 14 December 2016

permission of the court, whereas many other are not. There are few offences where minimum sentencing is provided. All that legislature wants to communicate from such classification is that certain offences are socially so shunned that any kind of leniency would not be tolerated. This however, does not mean that the offender who has recognized his fault and candidly ready to accept his guilt be shown the highest point of law! Accused who are ready to amend and suffer for his crime by cooperating with the prosecution should be dealt with differently in the sentencing policy. Taking care of this particular situation, judicial systems have recognized Plea bargaining of different degrees and nature.[65] Plea bargaining is based on the premise of "Nolo Contendere" *contendere* = (I do not wish to contend).[66] Precisely, object of plea bargaining is to conclude a criminal case without a trial as a result of negotiation between prosecution and defence usually in exchange for a more lenient punishment.[67]

Broadly in the system of pre-trial negotiations where the accused pleads guilty in return, he can fructify concessional treatment from the prosecution.[68]

7.7.1 Process of plea bargaining and sentencing

Plea bargaining was initially frowned upon by the court[69] though subsequently it was legalized in legislative form. 'Plea of guilty' is in vogue in India but not 'plea

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[65] Hon'ble Mr. Justice B. N. Mahapatra, Judge, Orissa High Court in his address at judicial academy quoted the example as under

> "The Mogul Emperor Jahangir had put a bell at the top of his palace tied with a rope. The person aggrieved would pull that rope and the Emperor Jahangir would appear for hearing complaint then and there and decide the case according to law prevailing at that time. Once a complaint was made before the Emperor Jahangir that Prince had misbehaved with the wife of the complainant and as per law in existence at the relevant time was "tit for tat". Therefore, the punishment to be awarded was that the complainant had to misbehave with the wife of the Prince. At that stage, Begam Noorjahan intervened and pleaded for plea bargaining and the complainant was compensated in shape of money."

See Justice B. N. Mahapatra, "Sentencing And Plea Bargaining - An Appraisal, *Vidhya Newsletter*, 11th issue, 2013, Odisha Judicial Academy, Cuttack, available at http://orissajudicialacademy .nic.in /pdf/vidya.pdf

[66] K.V.K. Santhy, "Plea Bargaining in US And Indian Criminal Law confessions For Concessions" *Nalsar Law Review*, Vol.7, 2013, p 87

[67] *Rahul Kumpawat v. Union of India* (2016) Https://Indiankanoon.Org/Doc/48688195/

[68] *Ibid*

[69] See *Kachhia Patel Shantilal Koderlal v. State of Gujarat and Anr* 1980 Cri.L.J553, *Kasambhai v. State of Gujarat* AIR 1980 SC 854, *State of Uttar Pradesh v. Chandrika* 2000 Cr.L.J 384 (386)

bargaining' until it was officially incorporated.[70] 'Plea bargaining' as such has not been subscribed by the Indian legal system though it was recommended so.[71]

A consideration of Chapter XXI-A dealing with plea bargaining will show that certain procedure prescribed for plea bargaining under Sections 265-A to 265-L of Cr.P.C are to be complied with to make it a valid plea bargaining. As per Section 265-A, the plea bargaining shall be available to the accused charged of any offence other than offences punishable with death or imprisonment or for life or of an imprisonment for a term exceeding seven years. Section 265-B contemplates an application for plea bargaining to be filed by the accused which shall contain a brief description of the case relating to which such application is filed, including the offence to which the case relates and shall be accompanied by an affidavit sworn by the accused stating therein that he has voluntarily preferred, after understanding the nature and extent of the punishment provided under the law for the offence, the plea bargaining in his case and that he has not previously been convicted by a court in a case in which he had been charged with the same offence. Sub-clause 4(a) is to the effect that if the court is satisfied with the voluntary nature of the application, then it shall provide time for working out a mutually satisfactory disposition of the case which may include giving to the victim by the accused compensation and other expenses. Section 265-C prescribes the procedure to be followed by the court in working out a mutually satisfactory disposition. Section 265-D deals with the preparation of the report by the court as to the arrival of a mutually satisfactory disposition or failure of the same.

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[70] In *State of Gujarat v Natwar Harchandji Thakor* 2005 Cri.L.J 2957, the Ahmadabad High Court, brought out the distinction between the two as under

> "…But the 'plea bargaining' and the raising of "plea of guilty", both things should not have been treated, as the same and common. There it appears to be mixed up. Nobody can dispute that "plea bargaining" is not permissible, but at the same time, it cannot be overlooked that raising of "plea of guilty", at the appropriate stage, provided in the statutory procedure for the accused and to show the special and adequate reasons for the discretionary exercise of powers by the trial Court in awarding sentences cannot be admixed or should not be treated the same and similar. Whether, "plea of guilty" really on facts is "plea bargaining" or not is a matter of proof. Every "plea of guilty", which is a part of statutory process in criminal trial, cannot be said to be a "plea bargaining" ipso facto. It is a matter requiring evaluation of factual profile of each accused in criminal trial
> before reaching a specific conclusion of it being only a "plea bargaining" and not a plea of guilty simpliciter. It must be based upon facts and proof not on fanciful or surmises without necessary factual supporting profile for that."

[71] See The Law Commission of India, 142nd Report on *"Concessional treatment for offenders who on their own initiative choose to plead guilty without any Bargaining*" 1991: The Law Commission of India, 154th Report on *"The Code of Criminal Procedure, 1973 (Act No 2 of 1974) Vol. I and II"* 1996: The Law Commission of India, 177th Report on "*Law Relating To Arrest*", 2001

Section 265-E prescribes the procedure to be followed in disposing of the cases when a satisfactory disposition of the case is worked out. Section 265-F deals with the pronouncement of judgment in terms of such mutually satisfactory disposition. Section 265-G says that no appeal shall lie against such judgment. Section 265-H deals with the powers of the court in plea bargaining. Section 265-I makes Section 428 applicable to the sentence awarded on plea bargaining. Section 265-J contains a non obstante clause that the provisions of the chapter shall have effect notwithstanding anything inconsistent therewith contained in any other provisions of the Code and nothing in such other provisions shall be construed to contain the meaning of any provision of chapter XXI-A. Section 265-K says that the statements or facts stated by the accused in an application for plea bargaining shall not be used for any other purpose except for the purpose of the chapter. Section 265-L makes the chapter not applicable in case of any juvenile or child as defined in section 2(k) of Juvenile Justice (Care and Protection of Children) Act, 2000.

7.7.2 When can plea bargain be invoked?

Plea bargaining or mutual disposition can be invoked subject to following conditions

1. Offences must be punishable with less than seven years imprisonment[72]
2. Offences affecting socio-economic condition of the country cannot be mutually disposed of [73]
3. Offences committed against woman or child below 14 years of age cannot be mutually disposed of [74]
4. Provisions as to plea-bargaining shall not apply to any juvenile or child as defined in Sub-clause (k) of Section 2 of the Juvenile Justice (Care and Protection of Children) Act, 2000.[75]

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[72] See section 265A. (1) of code of criminal Procedure, 1973

[73] Offences under the following enactments are declared to be outside the scope of mutual disposition. Dowry Prohibition Act, 1961, the Commission of Sati Prevention Act, 1987, the Indecent Representation of Women (Prohibition) Act, 1986, the Immoral Traffic (Prevention) Act, 1956, Protection of Women from Domestic Violence Act, 2005, Provisions of Fruit Products Order, 1955 (issued under the Essential Commodities Act, 1955), the Infant Milk Substitutes, feeding Bottles and Infants Foods (Regulation of Production, supply and distribution) Act, 1992, Provisions of Meat Food Products Order, 1973 (Issued under the Essential Commodities Act, 1955), the SC and ST (Prevention of Atrocities) Act, 1989., Offences mentioned in the Protection of Civil Rights Act, 1955, Offences listed in Sections 23 to 28 of the Juvenile Justice (Care and Protection of Children) Act, 2000, the Army Act, 1950, the Air Force Act, 1950, the Navy Act, 1957, the Explosives Act, 1884 and Cinematograph Act, 1952.

[74] *Ibid*

[75] 265L. Non-application of the Chapter- Nothing in this Chapter shall apply to any Juvenile or Child as defined in sub-clause (k) of section 2 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000)

5. The accused should not have been convicted earlier for the same offence.[76]

7.7.3 Process of working out mutually satisfactory disposition

The process of working out mutually satisfactory disposition would start once the (a) the report has been forwarded by the officer in charge of the police station under section 173 alleging that an offence appears to have been committed by him[77] or (b) a Magistrate has taken cognizance of an offence on complaint[78] and trial is pending before a court. The accused has to make voluntary application with affidavit.[79] After receiving such application the court shall issue notice to the Public Prosecutor or the complaint of the case, as the case may be, and to the accused to appear on the date fixed for the case.[80] The court shall examine the accused in camera, where the other party in the case shall not be present, to satisfy that the accused has filed the application voluntarily.[81] The court has two options before it in respect of such application.

(a) If the Court is satisfied that the application has been filed by the accused voluntarily, it shall provide time to the Public Prosecutor or the complainant of the case, as the case may be, and the accused to work out a mutually satisfactory disposition of the case which may include giving to the victim by the accused the compensation and other expenses during the case and thereafter fix the date for further hearing of the case.

(b) The Court finds that the application has been filed involuntarily by the accused or he has previously been convicted by a Court in a case in which he had been charged with the same offence, it shall proceed further in accordance with the provisions of the Code.

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[76] section 265-B (4) (b) of Code of Criminal Procedure, 1973
[77] *Ibid* Section 265 A (a)
[78] *Ibid* Section 265 A (b)
[79] *Ibid* Section 265 B provides as under

> 265B. Application for plea-bargaining-
>
> (2) The application under sub-section (1) shall contain a brief description of the case relating to which the application is filed including the offence to which the case relates and shall be accompanied by an affidavit sworn by the accused stating therein that he has voluntarily preferred, after understanding the nature and extent of punishment provided under the law for the offence, the plea bargaining in his case and that he has not previously been convicted by a Court in a case in which he had been charged with the same offence.

[80] *Ibid* Section 265B (3)
[81] *Ibid* Section 265B (4)

7.7.4 Guidelines for mutually satisfactory disposition

Section 265C provides that in working out a mutually satisfactory disposition the court shall follow the following procedure, namely:-

(a) in a case instituted on a police report, the Court shall issue notice to the Public Prosecutor, the police officer who has investigated the case, the accused and the victim of the case to participate in the meeting to work out a satisfactory disposition of the case:

(b) in a case instituted otherwise than on police report, the Court shall issue notice to the accused and the victim to participate in a meeting to work out a satisfactory disposition if the case:

It shall be the duty of the Court to ensure, throughout such process of working out a satisfactory disposition, that it is completed voluntarily by the parties participating in the meeting. It shall also be the duty of the court to ensure that if the victim of the case or the accused, as the case may be, so desires; he may participate in such meeting with his pleader engaged in the case. Weather the mutually satisfactory disposition is successful or otherwise, such report shall be submitted before the Court.[82] Where a satisfactory disposition of the case has been successfully worked out the Court shall dispose of the case in the following manner, namely:-

> (a) the Court shall award the compensation to the victim in accordance with the disposition under section 265D and hear the parties on the quantum of the punishment, releasing of the accused on probation of good conduct or after admonition under section 360 or for dealing with the accused under the provisions of the Probation of Offenders Act, 1958 or other law for the time being in force and follow the procedure specified in the succeeding clauses for imposing the punishment on the accused:
>
> (b) after hearing the parties under clause (a), if the Court is of the view that section 360 or the provisions of the Probation of Offenders Act,

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[82] *Ibid* Section 265D provides as

> "265D. Report of the mutually satisfactory disposition to be submitted before the Court-Where in a meeting under section 265C, a satisfactory disposition of the case has been worked out, the Court shall prepare a report to such disposition which shall be signed by the presiding officer of the Court and all other persons who participated in the meeting and if no such disposition has been worked out, the Court shall record such observation and proceed further in accordance with the provisions of this Code from the stage the application under sub-section (1) of section 265B has been filed in such case."

1958 or any other law for the time being in force are attracted in the case of the accused, it may release the accused on probation or provide the benefit of any such law, as the case may be:

(c) after hearing the parties under clause (b), if the Court finds that minimum punishment has been provided under the law for the offence committed by the accused, it may sentence the accused to half of such minimum punishment;

(d) in case after hearing the parties under clause (b), the Court finds that the offence, committed by the accused is not covered under clause (b) or clause (c), then at may sentenced the accused to one-fourth of the punishment provided or extendable, as the case may be, for such offence.

The Court shall deliver its judgment in terms of section 265E in the open Court and the same shall be signed by the presiding officer of the Court.[83] The judgment delivered thus by the court shall be final and no appeal (except the special leave petition under article 136 and writ petition under article 226 and 227 of the Constitution) shall lie in any Court against such judgment. The accused enjoys two specific benefits under this mutual disposition. Firstly the period of detention undergone by the accused against the sentence of imprisonment imposed under this Chapter shall be set off.[84] Secondly the statements or facts stated by an accused in an application for plea bargaining filed under section 265B shall not be used for any other purpose except for the purpose of this Chapter.[85]

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[83] *Ibid* Section 265F

[84] *Ibid* Section 265I provides:

> "265I. Period of detention undergone by the accused to be set off against the sentence of imprisonment- The provisions of section 428 shall apply, for setting off the period of detention undergone by the accused against the sentence of imprisonment imposed under this Chapter, in the same manner as they apply in respect of the imprisonment under other provisions of this Code."

Ibid Section 428 also provides:

> "Period of detention undergone by the accused to be set off against the sentence of imprisonment.
>
> Where an accused person has, on conviction, been sentenced to imprisonment for a term , not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him.
>
> Provided that in cases referred to in section 433A, such period of detention shall be set off against the period of fourteen years referred to in that section."

[85] *Ibid* Section 265K

7.7.5 Minimum sentencing and plea bargaining

The success rate of plea bargaining are high when a definite minimum sentence is provided for a particular offence and no compounding is allowed. When the offence is petty or punishable with fine, compounding of offence is the best possible solution. When the offence is compounded nothing goes on record and the accused does not incur any disqualifications or disabilities even though the same mutual disposition is worked out as is done under sui genres Indian plea bargaining. Further, no punishment is incurred in compounding whereas plea bargaining subjects the accused to minimum one fourth of punishment. If the accused is first time offender and below 21 years, plea bargaining would not be of much help since section 6 of the probation of offenders Act, 1958 is automatically invoked. Similarly section 4 of the same Act also confers certain similar benefits. However, if the offence carries mandatory minimum sentence below 7 years and the accused has undergone custody, the mutual disposition works wonder for he would get double benefits. Assume for example that the offence is punishable with 5 years and the accused has been under-trial prisoners for 6 months. If mutual disposition is worked out, he may incur two and half years imprisonment out of which six months under-trial duration would be subtracted. Thus two years imprisonment which may be much lesser actually when remissions are added would provide great opportunity to the accused to resettle whereas the victim would have compensation for his rehabilitation and have the convict punished too. It's like eat the cake and have it too. Where no minimum punishment is provided the Indian plea bargaining may inversely work. To illustrate, if the offence is punishable with three years punishment, the language employed Section.265-E (d) CrPC provides that *"… may sentence the accused to one–fourth of the punishment provided or extendable … for such offence"*. Consequentially the court has to invariably sentence the offender to nine months of imprisonment and cannot impose lesser sentence. The prosecutor cannot seek and the court cannot impose less than one-fourth of the sentence on the offender in such circumstances. If the same offender is processed through contest mechanism the court is empowered to sentence him even for as low as one day imprisonment. It is therefore invariably suggested that mutual disposition as said above is better suited where minimum mandatory sentence are provided.

7.7.6 Difference between plea barraging and mutual disposition

There is sharp contrast between mutual disposition in India and proper plea bargaining in USA. *Firstly* in USA all crimes are subject matter of plea bargaining whereas in India only crimes punishable with less than seven years are subject matter of mutual disposition. *Secondly* in USA parties can bargain for any sentence whereas in India parties are not free to mutually dispose the matter for any sentence. Two limitations are imposed namely, only judges have the authority to seal the disposition and where minimum mandatory punishment is provided, judges cannot accept disposition below half of the minimum punishment.

7.8 Community Service

Community service[86] is also referred as community correction which is defined as a non-incarcerative sanction in which offenders serve all or a portion of their sentence in the community.[87] Community service is premised upon the belief that offenders and also victims of crime have rights deserving of protection. Apart from that, human beings are capable of change and that is one of the reasons why a commitment to the reintegration of the offender into the community is very essential.[88] Community service orders benefit the offender greatly, as well as society and the correctional system itself.[89] Community service orders are increasingly popular with judges who find that they can be more flexible and humane in punishing offenders unlikely to commit another crime.[90] Whether the work itself is useful or not, this kind of sentencing is certainly helpful to the criminal justice system in a time of budget deficits and overcrowded prisons. Community service is practical as well as

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[86] According to Martin Wasik

> "Community sentence is one of the available sentencing options, appropriate in cases where the offender has committed an offence of an intermediate degree of seriousness. The judges impose the order in a view that the nature of the offence is not such as to require custody, but it does require something more than the mild penalty of a bind over or a discharge."

See Martin Wasik, *Emmins on Sentencing* 4th ed., (UK : Blackstone Press, 2001)

[87] Leanne Fiftal Alarid, *Community – Based Corrections,* 9th ed., (USA : Wadsworth Cengage Learning, 2013)

[88] Anita Abdul Rahim et al, "The Extent of the Application of Community Service Order as an Alternative Punishment in Malaysia" *Mediterranean Journal of Social Sciences,* Vol.4 No 10, 2013, p 155

[89] Maher, R. J. (1994). "Community Service: A Good Idea That Works." *Federal Probation*, *58*, 20-23. *See also* Maher, R. J., & Dufour, H. E. (1987) "Experimenting with Community Service: A Punitive Alternative to Imprisonment" *Federal Probation, 51*(3), 22-27. Retrieved from https://www.ncjrs.gov/pdffiles1/Digitization/108634NCJRS.pdf

[90] Blog sentencing law and policy "Is community service really a punishment? Should it be ordered more?" available at http://sentencing.typepad.com/sentencing_law_and_policy/2010/09/is-community-service-really-a-punishment-should-it-be-ordered-more.html

humane. It saves court time because few of these cases go to trial.[91] In juvenile justice circles, the term has been associated with "restorative justice" that focuses on righting a wrong and changing a negative behavior into a positive one. In this context, community service is seen as having both compensatory and rehabilitative aspects in which the service is seen as not only righting a wrong but also strengthening the connection between the juvenile and his community, and potentially reducing recidivism.[92]

Community service in India is not codified unlike western jurisdictions. Western jurisdictions like USA, England Australia have community service in their statute book mandating judges to exercise the same as alternative to imprisonment. In India, however, no law provides for community service except juvenile justice and probation jurisprudence. Though judges in India have experimented Community services of different types- some usual some out of the box- the trend is not uniform and not even approved unquestionably.

7.8.1 Community service and Indian courts: some even and uneven practices

In recent times, there are few noteworthy cases on alternative sentencing decided by Hon'ble courts of India.[93] In *R.K. Anand v. Registrar,*[94] the Hon'ble Supreme court has held a Senior Advocate guilty of contempt of court. The court in this case awarded a unique and novel punishment. While considering the age of the accused, physical health of his wife etc. the court sentenced him to one year pro-bono professional services to be rendered to poor accused who on account of lack of resources could not engage lawyer along with a grant of a sum of Rs 21,00,000/- to be paid to the Bar council of India, to be used for developing the infrastructure of the college situated at a mufassil place attended by under privileged and deprived section of the society.

In *Nitin Sharma v. State and others*,[95] the court has restored to alternative sentencing in the form of community service to an accused against whom allegations

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[91] *Ibid*

[92] Richmond, VA, "*Creating Community Service Opportunities for Suspended and Expelled Youth: A Final Report on Virginia's Experience*", (Virginia Department of Education, 2005), p 9 also available at http://www.doe.virginia.gov/federal_programs/safe_drug-free/publications/community_service_ suspended _ expelled.pdf

[93] Prof. (Dr.) M.K. Vyas "Alternative Sentencing: A Felt necessity of the 21st century Criminal Justice System" available at

[94] (2013) 1 SCC 218

[95] Cri.MC.2906/2010

under section 154 IPC (assault or criminal force to woman with intent to outrage her modesty) were leveled. In *Ashgar Ali Khan and others v. state,*[96] the Hon'ble court directed the accused who siphoned of funds of his father, in addition to render social services in the old age home run by NGO 'Help Age India' for one year considering the overall circumstances.

Metropolitan Magistrate Tarun Kumar Sehrawat ordered a legislator named in a case of trespassing to organise a cleanliness drive and also spread awareness about family planning and AIDS.[97] The Metropolitan Magistrate Gautam Mannan ordered a boy, accused of causing a road accident by jumping traffic light and driving without a licence, to attend a traffic school for 10 days.[98] The Delhi High Court asked the two businessmen to perform community service with a voluntary organisation for a year as punishment for firing three shots at their friend for fun. Justice Sanjay Kishan Kaul, while quashing a first information report (FIR) against the two businessmen, asked Delhi Police not to return their gun for a year.[99]

In a recent case, a Delhi Court directed the Delhi Traffic Police to provide road safety training to a 26-year-old engineer who had been booked for drunken driving. Pronouncing the verdict, the court stated that as an alternative to the custodial sentence, the man should undergo four hours of training each day for at least 15 days and help the traffic police sensitise other offenders against traffic violations.[100]

Similarly, the driver of a BMW car and his friends were taken to court for beating up a rickshaw puller. The district court released them on probation but imposed a condition that they would help the rickshaw puller's children in their education, apart from a compensation of Rs 10,000 to the victim. Some legal experts lauded the good intention of the judge, while others considered the fine "too little" and the punishment "too lenient".[101]

For sexually harassing a woman in a bus the magistrate ordered the accused to write a 25-page essay on eve-teasing and harassment. He was further asked to make

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[96] WP(cri) No.911/2010
[97] Available at http://twocircles.net/2008mar11/court_orders_two_businessmen_do_community_service.html#.WDewD9V97IU
[98] *Ibid*
[99] *Ibid*
[100] *Ibid*
[101] Smitha Verma, "Reform, New Age Style" *The Telegraph,* Wednesday , July 16 , 2008 available at http://www.telegraphindia.com/1080716/jsp/opinion/story_9555498.jsp

500 copies of the essay and distribute them outside schools and colleges.[102] Similarly A magistrate sentenced a group of lawless bikers to do community service at a *gurudwara* in Delhi.[103] In yet another incidence a youngster involved in a case of road rage was asked by the lower court to manage traffic at a busy intersection.[104]

In another instance the Delhi High Court directed a perfume manufacturer to supply room freshener to a school for blind children in order to get an FIR filed against him quashed. He was charged with molesting his former woman employee. The court passed the order after the businessman tendered a written apology. It also imposed a fine of Rs 2 lakh on him and directed him to deposit the amount in favour of the Delhi High Court Lawyers Library and the Delhi Police Welfare Society.[105]

In July 2013, two men sentenced to five and 10 days imprisonment for drunken driving were given a chance by Delhi court to reform themselves by doing community service at the government hospitals St. Stephens's hospital and Hegdewar hospital.[106]

In April 2012, six people, accused of causing injury to their neighbor over financial matters were asked by the Delhi HC to carry out community service at a temple for two weeks.[107]

A magistrate, in an order passed in October, had convicted Kishan Solanki for causing hurt to his neighbour in a 13-year-old case. Solanki, who ran a fair price shop in Rajouri Garden area, was released for one year on probation for good conduct after he furnished the requisite bonds. The magistrate also directed him to serve at DDU Hospital for two days every week for two hours during the period of probation. The hospital's medical superintendent could utilise the probationers services to look after admitted patients and to keep the general wards clean.[108] However the court recently set aside a judgment ordering a convict to perform community services at DDU Hospital, holding that there was no legal provision sanctioning such punishments.

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[102] *Ibid*
[103] *Ibid*
[104] *Ibid*
[105] Ayesha Arvind, "Delhi's petty criminals work off their debt to society as courts catch on to community service", *Mail Online,* 7 October 2013, available at http://www.dailymail.co.uk /indiahome/indianews/ article-2447171/Delhis-petty-criminals-work-debt-society-courts-catch-community-service.html
[106] *Ibid*
[107] *Ibid*
[108] Utkarsh Anand , "Cannot force probationer into community service, rules city court" *Indian Express*, New Delhi, January 4, 2010, available at http://indianexpress.com/article/cities/delhi/cannot-force-probationer-into-community-service-rules-city-court/

In *Sanjeev Nanda*,[109] the court ordered that the accused to pay an amount of Rs 50 lakhs to the Union of India within six months, which will be utilised for providing compensation to the victims of motor accidents and further ordered the accused to do community service for two years On default, he had to undergo simple imprisonment for two years.

In *Nidhi Kaim v. State of Madhya Pradesh & Ors Etc*.[110] the Supreme Court going out of the box in mass copying case. In this case students were involved in malpractices in their entrance exams on the basis of which they joined study of medicine. Some even completed their studies whereas some were prosecuting their studies and were nearly finishing it. When prosecuted for the mass copying , Justice Chelameswar held

> "I would prefer to permit the appellants to complete their study of medicine and become trained doctors to serve the nation. But at the same time there is a compelling national interest that dishonest people cannot be made to believe that "time heals everything' and the society would condone every misdeed if only they can manage to get away with their wrong doing for a considerably long period… Society must receive some compensation from the wrongdoers. Compensation need not be monetary and in the instant case it should not be. In my view, it would serve the larger public interests, by making the appellants serve the nation for a period of five years as and when they become qualified doctors… without any regular salary and attendant benefits of service under the State, nor any claim for absorption into the service of the State subject of course to the payment of some allowance (either in cash or kind) for their survival. I would prefer them serving the Indian Armed Forces subject to such conditions and disciplines to which the armed forces normally subject their regular medical corps. I would prefer that the appellants be handed over the certificates of their medical degrees only after they complete the abovementioned five years. The abovementioned exercise would require the ascertainment of the views of Ministry of Defence, Government of India, and passing of further appropriate orders by this Court thereafter. In view of the disagreement of views in this regard, I am not proposing such an exercise."

In the case of sexual harassment by and of teenagers, the Bombay High Court in *Bhavesh Keshav Mhatre and ors v. State of Maharashtra and ors*[111] ordered that

> "The petitioners are in the age group of 19 to 22 years. The respondent[s] have stated that considering the young ages of the petitioners, they should not be dragged to the criminal Court. … The petitioners have shown remorse by depositing a sum of Rs.50,000/each. The petitioners have offered to do social service by undertaking to do the cleaning work in Ward No.1, Kulgaon, Badlapur on every Sunday in the month of November 2016. … Considering the peculiar facts it cannot be said the offence alleged is against the society at large. Considering the respective ages of the petitioners and the remorse

[109] *State v. Sanjeev Nanda* (2012) 8 SCC 450
[110] (2016), https://indiankanoon.org/doc/152246364/
[111] In The High Court of Judicature at Bombay Criminal Appellate Jurisdiction Writ Petition No.3534 of 2016 Decided On October 25, 2016, https://indiankanoon.org/doc/24753548/

> shown by them… we accept the undertakings of the petitioners. The Badlapur Municipal Council shall assign appropriate work of cleaning to the petitioners for a period of two hours on every Sunday in the month of November 2016"

7.8.2 Towards codified Community Service

Although community service is now being ordered by some of the courts as a condition for release on probation of good conduct, there are instances of such orders being set aside by the appellate courts on the ground that there was no legislative sanction for it.[112]

Of late attempts are, however, being made in India to codify community service as a part of penal sanctions. Andhra Pradesh has become the first state in India to introduce community service as a punishment for those serving up to six months in jails for minor offences.[113] Gujarat amended the Bombay Prohibition Act, 1949 in 2009 to include community service as a punishment.[114]

The proposed Motor Vehicles Amendment Bill 2016 intends to incorporate the Community Service as punishment for causing motor accidents. the "Community Service" is defined as unpaid work as a punishment for an offence committed under this Act.[115]

The Draft Model Rules, 2016 under The Juvenile Justice (Care And Protection Of Children) Act, 2015 has tried to define the scope of community service in the context of child in conflict with law as under

> (v) 'community service" means service rendered to the society by children in conflict with law in lieu of or in addition to other judicial remedies and penalties, which is not dangerous, degrading and dehumanizing and with due protection of the identity of the child, Guidelines for community service may be notified by the State Government from time to time, Community service may include:
>
> a) cleaning a park;
>
> b) serving the elderly;
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> c) helping out at a local hospital or nursing home; and

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[112] Gyananat Singh, "Make social work a form of punishment" available at http://indiatoday .intoday. in/story/make-social-work-a-form-of-punishment/1/213234.html

[113] Mohammed Siddique, "Minor convicts in AP jails will do community service as punishment", June 24,2010http://www.rediff.com/news/report/community-service-bpo-work-for-ap-convicts/20100623 .htm

[114] *Supra* note 112

[115] Manu Sebastian "Salient Features of Motor Vehicles Amendment Bill 2016" August 18, 2016, available at: http://www.livelaw.in/salient-features-motor-vehicles-amendment-bill-2016/

d) serving disabled children.

e) serving as traffic wardens or volunteers

Law commissions and Malimath Committee have also recommended for introduction of community service as alternative sanction for certain offences.[116] IPC was also proposed to be changed to introduce community service under IPC.[117] However, law commission of India once rejected this idea as impracticable to work.[118] There is sea change in present times and the perceptions of law commission of India at that point of time. Therefore, community service needs to be generalized for all conceivable offences in the line it is provided to the child in conflict with law.

7.9 Accidental Offenders And Sentencing Policy: Benefits Of Probation Act

7.9.1 Sentencing Policy for Accused below 21 Years

Offenders who are not covered under the JJ Act, 2015 and who are below 21 years are covered by the Probation of Offenders Act, 1958. The law does not assume absolute criminality when the offences are commuted by the person below 21 years. If the purpose of the punishment is reformation and desistence from criminality, incarceration at the young age of 21 years is detrimental to reformative purposes. Therefore section 6 of the Act, lays down an injunction not to impose a sentence of

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[116] See Committee on Reforms of Criminal Justice System, 2003, p178 where the Committee "suggests that community service may be prescribed as an alternative to default sentence."

[117] Clause 27 of the Bill provides for insertion of a new section 74A exclusively to deal with punishment of community service and is in the following terms:

> "74A. (1) where any person not under eighteen years of age is convicted of an offence punishable with imprisonment of either description for a term not exceeding three years or with fine, or with both, the court may, instead of punishing him as aforesaid or dealing with him in any other manner make an order (hereinafter in this section referred to as the Community Service Order) requiring him to perform, without any remuneration, whether in cash or in kind, such work and for such number of hours and subject to such terms and conditions, as may be specified in the said Order:
> Provided that the number of hours for which any such person shall be required to perform work under a Community Service Order shall be not less than forty hours and not more than one thousand hours:
> Provided further that the court shall not make a Community Service Order in respect of any such person, unless-
> (a) such person consents in writing to perform the work required of him under such Order:
> (b) the court is satisfied that such person is a suitable person to perform the work required of him and that for the purpose of enabling him to do such and such work under proper supervision, arrangements have been made by the State Government or any local authority in the area in which such person is required to perform such work.
> (2) Every Community Service Order made under sub-section (1) shall specify the nature of the work to be performed by such person which shall be of general benefit to the community…."

[118] See Law Commission of India, 42nd Report on "*Indian Penal Code*" 1971

imprisonment on a person who is under twenty-one years of age and is found guilty of having committed an offence punishable with imprisonment other than that for life, unless for reasons to be recorded by it, it is satisfied that it would not be desirable to deal with him under Section 3 or Section 4 of the said Act.[119] Section 6 reads

> "6. Restrictions on imprisonment of offenders under twenty-one years of age.—
> (1) When any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under section 3 or section 4, and if the court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so.
> (2) For the purpose of satisfying itself whether it would not be desirable to deal under section 3 or section 4 with an offender referred to in sub-section (1) the court shall call for a report from the probation officer and consider the report, if any, and any other information available to it relating to the character and physical and mental condition of the offender."

The object of section 6 is to ensure that juvenile offenders are not sent to jail for offences which are not so serious as to warrant imprisonment for life, with a view to prevent them from contamination due to contact with hardened criminals of the jail.[120] The provision of Section 6 of the Act is mandatory. If the case is one in which the provisions of the Probation of Offenders Act can be invoked and it is shown that the age of the accused is below 21 years, the Court has no other option but to apply the provisions of Section 6 of the Probation of Offenders Act. The Court, can refuse to invoke the provisions of Section 4 only if it is satisfied that having regard to the circumstances of the case including the nature of the offence and character of the offender it would not be' desirable to deal with under Section 3 or 4 of the Probation of Offenders Act.

Section 6 contemplates that an offence punishable with imprisonment, not being imprisonment for life, must invariably be allowed to be released on admonition or probation unless there are reasons to be recorded having regard to the nature of offence and the character of offender.[121] In case of an offender under the age of 21 years on the date of commission of the offence, the Court is expected ordinarily to give benefit of Section 6 of the Act. While deciding whether the offender should be granted the benefit, it is necessary for the Court to keep in view three relevant aspects

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[119] See *Mohamad Azlz Mohamed Nasir v. State of Maharashtra* 1976 AIR 730, 1976 SCR (3) 663
[120] *Daulat Ram v. State of Haryana,* AIR 1972 SC 2434
[121] *Mafaldina Fernandese v. State* AIR 1968 Goa 103

viz., nature of the offence, character of the offender and the attendant and surrounding circumstances as revealed in the report of the Probation Officer.

7.9.2 Sentencing policy for first time petty offences

The object underlying the infliction of punishment is to make the offender suffer either in person or in purse or in both so that he may not follow errant way in future and at the same time to make other understand that they will be dealt with similarly if they commit any offence against the society. This being recognized not to meet the case of a person having the first lapse in his life from the path of rectitude- Section 3 is introduced.[122] u/s 3 a person who has first lapse in life need not be sentenced to punishment. Section 3 reads

> " 3. Power of court to release certain offenders after admonition.—When any person is found guilty of having committed an offence punishable under section 379 or section 380 or section 381 or section 404 or section 420 of the Indian Penal Code, (45 of 1860) or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code, or any other law, and no previous conviction is proved against him and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence, and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4 release him after due admonition.
> Explanation.—For the purposes of this section, previous conviction against a person shall include any previous order made against him under this section or section"

This section is intended to be used to prevent young persons from committing to jail where they may turn hardened with association with hardened criminals. Term imprisonment often has opposite effect to that which was expected. Given a chance persons may make good citizens. The offenses contemplated by this section are certain petty offences, with offenders having no previous conviction.[123] The provisions relating to admonition cover all offences under IPC as well as other laws punishable with not more than two years imprisonment or with fine.[124]

The exercise of this discretion does need a considerable sense of responsibility in the magistrate. Should he make a bad use of this discretion, far from reforming an offender, he will be a cause of corruption of many.[125]

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[122] R B Sethi, *Probation of Offenders Act*, 4th ed., (Allahabad: Law Publishers Pvt. Ltd, 1998), p 56
[123] *Ibid* p 57
[124] *Ibid* p 58
[125] *Ibid* p 57

7.9.3 Sentencing policy and benefits of probation in deserving cases

Section 4 of the Act empowers the Court to release an offender found guilty of having committed an offence not punishable with death or imprisonment for life, on probation of good conduct instead of sentencing him to any punishment. It reads

> "4. Power of court to release certain offenders on probation of good conduct.—
> (1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour: Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.
> (2) Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.
> (3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order, impose such conditions as it deems necessary for the due supervision of the offender.
> (4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.
> (5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned."

In order to apply the provisions of Section 4 (1), the following requisite conditions must be satisfied: (1) the offence found to have been committed by the offender must not be one punishable with death or imprisonment for life. In other words, only in cases where a person is found guilty of an offence punishable with any sentence other than death or imprisonment for life, the Court-can apply these

provisions.[126] (2) The Court must opine that it is expedient to release him on probation of good conduct instead of sentencing him to any punishment. (3) The offender or his surety must have a fixed place of abode or regular occupation in a place situate within the jurisdiction of the Court. The factors which are material and relevant for the Court to form its opinion about the expediency of releasing the offender on probation of good conduct are

(i) the circumstances of the case,

(ii) the nature of the offence[127] and

(iii) the character of the offender.

The Court shall consider the report of the concerned Probation Officer before passing an order.[128] If the aforesaid requisite conditions are satisfied the Court may

(i) direct the release of the offender on his executing a personal bond, with or without sureties

(ii) take undertaking from the offender to appear and receive sentence when called upon during such period not exceeding three years and in the meantime to keep the peace and be of good behaviour.[129]

It is Manifest from plain reading of sub-section (1) of section 4 of the Act that it makes no distinction between persons of the age of more than 21 years and those of the age of less than 21 years. On the contrary, the said sub- section is applicable to persons of all ages subject to certain conditions which have been specified therein. Once those conditions are fulfilled and the, other formalities which are mentioned in section 4 are complied with, power is given to the court to release the accused on probation of good conduct.[130] The crux of probation order however lies in compensation. The court may order reasonable compensation for loss or injury caused to any person by the commission of the offence, or for the costs of the proceedings.[131]

The release of probationer on bond with or without sureties on probation of good conduct is, in nature, a preventive measure which seeks to save the offender

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[126] *State of Gujarat v. A. Chauhan* AIR 1983 SC 359

[127] For exposition of law on this point see *Dalbir Singh* v. *State of Haryana* AIR 2000 SC 1677

[128] Section 7 Report of probation officer to be confidential.

"The report of a probation officer referred to in sub-section (2) of section 4 or sub-section (2) of section 6 shall be treated as confidential:

Provided that the court may, if it so thinks fit, communicate the substance thereof to the offender and may give him an opportunity of producing such evidence as may be relevant to the matter stated in the report."

[129] *The Public Prosecutor v. Nalam Suryanarayana Murthy* 1973 Cri.L.J 1238

[130] *Ishar Das v. State of Punjab* 1972 AIR 1295

[131] See section 5 of the Probation of Offenders Act. 1958

from the evil effects of institutional incarceration and affords him an opportunity of reformation within the community itself. It is a discretionary remedy rather than a mandatory one.[132]

In the interest of offender and public, variations in conditions of probation can be made by the courts provided such application is made by the probation officer and due opportunity of being heard is given to the offender and sureties.[133]

Where the offender has failed to observe any of the conditions of the bond, the court may issue a warrant for his arrest or may, if it thinks fit, issue a summons to him and his sureties, to attend before it and sentence him for the original offence or where the failure is for the first time impose upon him a penalty not exceeding fifty rupees.[134]

Section 12 of the Act provides for Removal of disqualification attaching to conviction. It runs as:

> Notwithstanding anything contained in any other law, a person found guilty of an offence and dealt with under the provisions of section 3 or section 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law: Provided that nothing in this section shall apply to a person who, after his release under section 4 is subsequently sentenced for the original offence.

The provision of section 4, however, should not be mistaken as undue leniency not should it be applied leniently in undeserving cases[135] where the offender has committed a reprehensible offence of rape on his neighbour's wife,[136] gold smuggling[137] guilty of abducting a teenage girl and forced her to sexual submission,[138] nefarious trade affecting the morals of society particularly of the young.[139]

7.10 Sentencing Policy and Juvenile Justice: Restoration and Rehabilitation

To what extent is the criminal to be punished? Crime in the abstract cannot be punished. Therefore, the answer must be - to the extent of the criminal's responsibility. It is by this standard that we gauge the responsibility of children or the

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[132] *Dasappa v. State of Mysore* AIR 1965 Mys 224
[133] See section 8 of the Probation of Offenders Act,1958
[134] *Ibid* Section 9
[135] Section 4 would not be extended to the abominable culprit who was found guilty of abducting a teenage girl and forced her to sexual submission with commercial motive. See *Smt. Devki* v. *State of Haryana* AIR 1979 SC 1948
[136] *Phul Singh v. State of Haryana* AIR 1980 SC 249
[137] *State of Maharashtra v. Natverlal* AIR 1980 SC 593
[138] *Smt. Devki v. State of Haryana* AIR 1979 SC 1948
[139] *Uttam Singh v. The State (Delhi Administration)* 1974 AIR 1230

insane.[140] Democracies worldwide have carved out a separate sentencing policy for the children to which India is no exception. Since from the 1986 when the first Juvenile Justice Act came on the statute book, new changes are being read into this jurisprudence till date. The Juvenile Justice jurisprudence was thoroughly revised in 2015 providing for a shift in the sentencing policy as under.

7.10.1 Background of JJ Act 2015

Increased ratio of juvenile crimes particularly heinous crimes have alarmed the nation and government.[141] After the Delhi Gang rape episode, numbers of criminal reforms were initiated by virtue of which, comprehensive sentencing policy has been initiated. Apart from the Criminal Law Amendment Act, 2013, a bill was introduced to amend existing law bring comprehensive law[142] in place of old law to address the perceived threat of juvenile crimes and overcome implementation hurdles that had occurred during implementation of old laws. Thus came the Juvenile Justice (Care and Protection of Children) Act, 2015. The 2015 Act has been labeled as misconceived steps in hurry taken contrary to international commitment.[143] The virus of new law has also been unsuccessfully challenged before the Supreme Court.[144]

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[140] Julian P. Alexander, "Philosophy of Punishment", 13 *J. Am. Inst. Crim. L. & Criminology* 235 (May 1922 to February 1923), p 243

[141] *Cf* Parliament of India Department related parliamentary standing committee on human resource development two hundred sixty fourth report The Juvenile Justice (Care and Protection of Children) Bill, 2014, p 16 where it observes that

> "[a] lot of misinformation about the juvenile crimes was being spread through media which required relooking. Research has shown that adolescence was a specific stage of development where the brain is not fully developed and matured, therefore, the adolescents were more prone to reckless behaviour. A lot of children who end up offending were also the children in need of care and protection requiring extra attention. The whole philosophy of juvenile jurisprudence centred around the quality of restoration, rehabilitation and reform and not around incarceration into jails and throwing children with adults into a system where they would get further brutalized. About the NCRB data, the representative opined that juvenile crimes account for only 1.2 per cent and that this percentage had remained constant over 2012 and 2013. Even most cases of rape were either love or elopement cases where girl's parents subsequently charged the boy with rape"

[142] See The long title of the Juvenile Justice (Care and Protection of Children) Act, 2015

[143] For the development of juvenile delinquency law and controversies surrounding it in the context of violation of international norms, see Ved Kumar, "The Juvenile Justice Act 2015- Critical Understanding", *Journal of Indian Law Institute*, Vol. 58 No.1,2016, Pp 83 to 103

[144] See "Plea filed in Supreme Court against new juvenile law" *The Indian Express*, January 31, 2016. Even prior to the enactment of this law, the erstwhile Act was unsuccessfully challenged as unconstitutional on the basis of unreasonable classification in *Salil Bali v. Union of India* (2013) 7 SCC 705 and *Subramanian Swami v. Raju Through Juvenile Justice Board* (2013) 10 SCC 465

See also Praveen Patil, "Sentencing Rights of Juveniles: Should They Be Read 'Up' or 'Down'? A Note on Conflicting Arguments and Narratives With Reference to Two Recent Supreme Court Pronouncements" LAW MANTRA, Volume 1, Issue 2, January 2014 available at http://lawmantra.co.in/wp-content/uploads/2014/12/HERE3.pdf

Though a new classification of juveniles between 16 and 18 has been created for heinous crimes, the basic fabric of rehabilitation and reintegration principles based upon which the jurisprudence of juvenile justice has been developed world wide has been kept intact with necessary facelift in this new law.

7.10.2 Juvenility- reclassification

The criminal liability in India is based on maturity to understand the consequences of crimes. Children below 7 years[145] are considered to be *doli incapex* and no question of criminal liability therefore arises. Children above seven years but below 12 years are prima facie believed to be innocent and therefore their criminal liability is subject to strict proof.[146] However, children above 12 years may be imputed with full criminal liability under the criminal laws. However, in recent years for the purpose of care, protection, welfare, training and education, and rehabilitation of neglected and delinquent children,[147] social legislation such as JJ Act, 1986 as recast in 2015 are enacted to provide different mechanism to deal with delinquent children.

Juvenile Justice (Care and Protection of Children) Act, 2015, defines "juvenile"[148] as "a child below the age of eighteen years", child[149] as "a person who has not completed eighteen years of age" and child in conflict with law[150] "means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence"

Thus, eighteen years has been retained as bench mark of juvenile jurisprudence in line with international norms[151] and repealed enactment.[152] The new catch however is the new entrant in the cap of sixteen to eighteen years. In other words, though eighteen years is the benchmark for differential treatment, if the child

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[145] See section 82 of Indian Penal Code, 1860
[146] *Ibid* section 83
[147] B. M. Gandhi, *Indian Penal Code*, 3rd ed., (Lucknow: Eastern Book Company, 2010), p111
[148] (*35*) "juvenile" means a child below the age of eighteen years.
[149] (*12*) "child" means a person who has not completed eighteen years of age.
[150] Section 2 (*13*) Juvenile Justice (Care and Protection of Children) Act, 2015
[151] See Convention on the Rights of the Child, 1989: UN Convention for Prevention of Juvenile Delinquency: The Riyadh Guidelines, 1990: UN Rules for the Protection of Juveniles Deprived Of their Liberty: Havana Convention, 1990: Guidelines for Action on Children in the Criminal Justice System: Vienna Guidelines, 1997: The UN Guidelines on Justice In Matters Involving Child Victim And Witnesses of Crime: Adopted By The Economic And Social Council In Its Resolution 2005: International Covenant on Civil and Political Rights, 1966: International Covenant on Economic Social and Cultural Rights, 1966: Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.
[152] See Juvenile Justice (Care and Protection of Children) Act, 2000. *See also* Juvenile Justice Act, 1986

is below eighteen years but above sixteen years and committed heinous crime, such child may be treated as adult on the recommendations of the child board. All punishments except death and life imprisonment without parole may be imposed on such child.[153] Though simultaneous rehabilitative measures may also be invoked, the substantive sentence needs to be served by such child in cases of heinous offences. Thus for practical purposes juveniles are of two types juvenile below eighteen years who has committed offences other than heinous offences and juveniles below eighteen but above sixteen who has committed heinous offences. Section 5 (1) provides that a person who was juvenile at the time of commission of offence shall continue to be treated as child even if he turns adult during the process of inquiry.[154] Same treatment is to be followed even in respect of person, who has completed eighteen years of age, and is apprehended for committing an offence when he was below the age of eighteen years.[155]

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[153] *Cf* Parliament of India Department related parliamentary standing committee on human resource development two hundred sixty fourth report The Juvenile Justice (Care and Protection of Children) Bill, 2014, p 30 where it observes that

> "3.21 From the above, the Committee can only conclude that the existing juvenile system [JJ Act 2000] is not only reformative and rehabilitative in nature but also recognises the fact that 16-18 years is an extremely sensitive and critical age requiring greater protection. Hence, there is no need to subject them to different or adult judicial system as it will go against Articles 14 and 15(3) of the Constitution.
> 3.23 Clause 21 of the Bill, which allows the Children's Court to transfer a child in conflict with law on attaining 21 years of age from a place of safety to jail is also violative of not only Article 20(1) but also of established principle of juvenile justice which prohibits co-mingling of a child offender with hardened criminals. It was forcefully contended by the stakeholders that why should treatment of a child become harsher on crossing a particular age. When our system does not allow a child below 18 to drive, vote, enter into contracts, engage a lawyer, sue and take legal action, marry or own property why that child be allowed to go to adult criminal justice system. The Committee also notes that introducing children into the criminal justice system amounts to violation of Article 21 (Protection of life and personal liberty) as the procedures contained therein are not commensurate with the requirements of children. The juvenile justice system has child appropriate procedures keeping in mind the best interest of the child.
> 3.24 Furthermore, there were provisions in the Act of 2000 itself i.e Section 16 to deal with children between 16-18 who have committed serious crime which were within the juvenile system and there was no need to push those children into adult criminal system, a move which could be described as retributive only."

[154] Section 5 provides that

> "where an inquiry has been initiated in respect of any child under this Act, and during the course of such inquiry, the child completes the age of eighteen years, then, notwithstanding anything contained in this Act or in any other law for the time being in force, the inquiry may be continued by the Board and orders may be passed in respect of such person as if such person had continued to be a child."

[155] Section 6 (*1*) provides that

> "any person, who has completed eighteen years of age, and is apprehended for committing an offence when he was below the age of eighteen years, then, such person shall, subject to the provisions of this section, be treated as a child during the process of inquiry."

7.10.3 Classification of offences- A new entrant

Under the new law three offences are labeled to base the liability of the juveniles namely- petty offences, serious offences and heinous offences. Section 2 (45) defines "petty offences" to include the offences for which the maximum punishment under the Indian Penal Code or any other law for the time being in force is *imprisonment up to three years.*

Section 2 (54) defines "serious offences" to include the offences for which the punishment under the Indian Penal Code or any other law for the time being in force, is *imprisonment between three to seven years*;

Section 2 (33) defines "heinous offences" as the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is *imprisonment for seven years or more*.

7.10.4 Principles governing sentencing

Section 3 of the new Act mandates that the Central Government, the State Governments, the Board, and other agencies, as the case may be, while implementing the provisions of this Act shall be guided by the following fundamental principles, namely: (i) Principle of presumption of innocence[156] (ii) Principle of dignity and worth[157] (iii) Principle of participation[158] (iv) Principle of best interest[159] (v) Principle of family responsibility[160] (vi) Principle of safety[161] (vii) Positive measures[162] (viii) Principle of non-stigmatising semantics[163] (ix) Principle of non-waiver of rights[164] (x) Principle of equality and non-discrimination[165] (xi) Principle of right to privacy and

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[156] Any child shall be presumed to be an innocent of any *mala fide* or criminal intent up to the age of eighteen years.

[157] All human beings shall be treated with equal dignity and rights.

[158] Every child shall have a right to be heard and to participate in all processes and decisions affecting his interest and the child's views shall be taken into consideration with due regard to the age and maturity of the child.

[159] All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.

[160] The primary responsibility of care, nurture and protection of the child shall be that of the biological family or adoptive or foster parents, as the case may be.

[161] All measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system, and thereafter.

[162] All resources are to be mobilised including those of family and community, for promoting the well-being, facilitating development of identity and providing an inclusive and enabling environment, to reduce vulnerabilities of children and the need for intervention under this Act.

[163] Adversarial or accusatory words are not to be used in the processes pertaining to a child.

[164] No waiver of any of the right of the child is permissible or valid, whether sought by the child or person acting on behalf of the child, or a Board or a Committee and any non-exercise of a fundamental right shall not amount to waiver.

[165] There shall be no discrimination against a child on any grounds including sex, caste, ethnicity, place of birth, disability and equality of access, opportunity and treatment shall be provided to every child.

confidentiality[166] (xii) Principle of institutionalisation as a measure of last resort[167] (xiii) Principle of repatriation and restoration[168] (xiv) Principle of fresh start[169] (xv) Principle of diversion[170] and (xvi) Principles of natural justice[171]

The entire focus of all these stated principles is to create child friendly[172] environment in the trial which shall be in the best interest of the child.[173]

7.10.5 Juvenile Justice Board- a crucial forum

The entire responsibility of juvenile justice falls on the Juvenile Justice Board (JJB). Right from the Body before which apprehended child is to be produced to the role of what sentences to be passed is decided by this Board. Child friendly environment at the time of trial or enquire shall be ensured by this Board. Section 14 clearly spells out the role of JJB as under:

> *Inquiry by Board regarding child in conflict with law*
>
> "14. (*1*) Where a child alleged to be in conflict with law is produced before Board, the Board shall hold an inquiry in accordance with the provisions of this Act and may pass such orders in relation to such child as it deems fit under sections 17 and 18 of this Act.
>
> (*2*) The inquiry under this section shall be completed within a period of four months from the date of first production of the child before the Board, unless the period is extended, for a maximum period of two more months by the Board, having regard to the circumstances of the case and after recording the reasons in writing for such extension.
>
> (*3*) A preliminary assessment in case of heinous offences under section 15 shall be disposed of by the Board within a period of three months from the date of first production of the child before the Board.
>
> (*4*) If inquiry by the Board under sub-section (*2*) for petty offences remains inconclusive even after the extended period, the proceedings shall stand terminated:
>
> Provided that for serious or heinous offences, in case the Board requires further extension of time for completion of inquiry, the same shall be granted by the Chief Judicial Magistrate or, as the case may be, the Chief

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[166] Every child shall have a right to protection of his privacy and confidentiality, by all means and throughout the judicial process.

[167] A child shall be placed in institutional care as a step of last resort after making a reasonable inquiry.

[168] Every child in the juvenile justice system shall have the right to be re-united with his family at the earliest and to be restored to the same socio-economic and cultural status that he was in, before coming under the purview of this Act, unless such restoration and repatriation is not in his best interest.

[169] All past records of any child under the Juvenile Justice system should be erased except in special circumstances.

[170] Measures for dealing with children in conflict with law without resorting to judicial proceedings shall be promoted unless it is in the best interest of the child or the society as a whole.

[171] Basic procedural standards of fairness shall be adhered to, including the right to a fair hearing, rule against bias and the right to review, by all persons or bodies, acting in a judicial capacity under this Act.

[172] Section 2 (15) "child friendly" means any behaviour, conduct, practice, process, attitude, environment or treatment that is humane, considerate and in the best interest of the child.

[173] Section 2 (*9*) "best interest of child" means the basis for any decision taken regarding the child, to ensure fulfillment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development.

Metropolitan Magistrate, for reasons to be recorded in writing.

(*5*) The Board shall take the following steps to ensure fair and speedy inquiry, namely:—

(*a*) at the time of initiating the inquiry, the Board shall satisfy itself that the child in conflict with law has not been subjected to any ill-treatment by the police or by any other person, including a lawyer or probation officer and take corrective steps in case of such ill-treatment;

(*b*) in all cases under the Act, the proceedings shall be conducted in simple manner as possible and care shall be taken to ensure that the child, against whom the proceedings have been instituted, is given child-friendly atmosphere during the proceedings;

(*c*) every child brought before the Board shall be given the opportunity of being heard and participate in the inquiry;

(*d*) cases of petty offences, shall be disposed of by the Board through summary proceedings, as per the procedure prescribed under the Code of Criminal Procedure, 1973;

(*e*) inquiry of serious offences shall be disposed of by the Board, by following the procedure, for trial in summons cases under the Code of Criminal Procedure, 1973;

(*f*) inquiry of heinous offences,—

(*i*) for child below the age of sixteen years as on the date of commission of an offence shall be disposed of by the Board under clause (*e*);

(*ii*) for child above the age of sixteen years as on the date of commission of an offence shall be dealt with in the manner prescribed under section 15."

7.10.6 Trial of petty offences and serious offences

Section 2 (45) defines "petty offences" to include the offences for which the maximum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment up to three years; Section 14 (d) requires that cases of petty offences, shall be disposed of by the Board through *summary proceedings*, as per the procedure prescribed under the Code of Criminal Procedure, 1973;

Section (54) defines "serious offences" to include the offences for which the punishment under the Indian Penal Code or any other law for the time being in force, is imprisonment between three to seven years. Section 14 (*e*) mandates that the inquiry of serious offences shall be disposed of by the Board, by following *the procedure, for trial in summons cases* under the Code of Criminal Procedure, 1973;

Section 14 (2) requires that "the inquiry under this section shall be completed within a period of four months from the date of first production of the child before the Board, unless the period is extended, for a maximum period of two more months by the Board, having regard to the circumstances of the case and after recording the reasons in writing for such extension." Section 14 (4) supplements that "[i]f inquiry

by the Board under sub-section (*2*) for petty offences remains inconclusive even after the extended period, *the proceedings shall stand terminated*"

7.10.7 Sentencing petty and serious offences

Though different trials are contemplated for 'petty' and 'serious' offences no separate sentencing policy is provided. Offenders of petty offence, or a serious offence, or a child below the age of sixteen years who has committed a heinous offence are treated in single stroke by section 18 which essential crafts the need based punishments mostly in the form of admonition, group counseling, probations of different degrees and exceptionally with institutional detentions. Section 18 reads:

> "18**.** (*1*) Where a Board is satisfied on inquiry that a child irrespective of age has committed a petty offence, or a serious offence, or a child below the age of sixteen years has committed a heinous offence, then, notwithstanding anything contrary contained in any other law for the time being in force, and based on the nature of offence, specific need for supervision or intervention, circumstances as brought out in the social investigation report and past conduct of the child, the Board may, if it so thinks fit,—
> (*a*) allow the child to go home after advice or admonition by following appropriate inquiry and counselling to such child and to his parents or the guardian;
> (*b*) direct the child to participate in group counselling and similar activities;
> (*c*) order the child to perform community service under the supervision of an organisation or institution, or a specified person, persons or group of persons identified by the Board;
> (*d*) order the child or parents or the guardian of the child to pay fine:
>
> Provided that, in case the child is working, it may be ensured that the provisions of any labour law for the time being in force are not violated;
> (*e*) direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or fit person, on such parent, guardian or fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and child's well-being for any period not exceeding three years;
> (*f*) direct the child to be released on probation of good conduct and placed under the care and supervision of any fit facility for ensuring the good behaviour and child's well-being for any period not exceeding three years;
> (*g*) direct the child to be sent to a special home,[174] for such period, not exceeding three years, as it thinks fit, for providing reformative services including education, skill development, counselling, behaviour modification therapy, and psychiatric support during the period of stay in the special home:
>
> Provided that if the conduct and behaviour of the child has been such that, it would not be in the child's interest, or in the interest of other children housed in a special home, the Board may send such child to

[174] Section 2 (*56*) "special home" means an institution established by a State Government or by a voluntary or non-governmental organisation, registered under section 48, for housing and providing rehabilitative services to children in conflict with law, who are found, through inquiry, to have committed an offence and are sent to such institution by an order of the Board.

the place of safety.[175]

(*2*) If an order is passed under clauses (*a*) to (*g*) of sub-section (*1*), the Board may, in addition pass orders to—

(*i*) attend school; or

(*ii*) attend a vocational training centre; or

(*iii*) attend a therapeutic centre; or

(*iv*) prohibit the child from visiting, frequenting or appearing at a specified place; or

(*v*) undergo a de-addiction programme.

(*3*) Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences."

Section 24 provides that shall not suffer disqualification, if any, attached to a conviction of an offence under such law except for heinous crimes. It also imposes duty on the board to direct the registry to destroy the relevant records once the purpose is served. Section 24 reads

"24. (*1*) Notwithstanding anything contained in any other law for the time being in force, a child who has committed an offence and has been dealt with under the provisions of this Act shall not suffer disqualification, if any, attached to a conviction of an offence under such law:

Provided that in case of a child who has completed or is above the age of sixteen years and is found to be in conflict with law by the Children's Court under clause (*i*) of sub-section (*1*) of section 19, the provisions of sub-section (*1*) shall not apply.

(*2*) The Board shall make an order directing the Police, or by the Children's court to its own registry that the relevant records of such conviction shall be destroyed after the expiry of the period of appeal or, as the case may be, a reasonable period as may be prescribed:

Provided that in case of a heinous offence where the child is found to be in conflict with law under clause (*i*) of sub-section (*1*) of section 19, the relevant records of conviction of such child shall be retained by the Children's Court."

7.10.8 Sentencing heinous crimes

Section 2 (*33*) defines "heinous offences" as the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years or more. To deal with heinous offence, a new and altogether different procedure is contemplated u/s 15 as under

"15. (*1*) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of

[175] Section 2 (*46*) provides "place of safety" as "any place or institution, not being a police lockup or jail, established separately or attached to an observation home or a special home, as the case may be, the person in-charge of which is willing to receive and take care of the children alleged or found to be in conflict with law, by an order of the Board or the Children's Court, both during inquiry and ongoing rehabilitation after having been found guilty for a period and purpose as specified in the order."

the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of sub section (*3*) of section 18:

Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts.

Explanation.—For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence.

(*2*) Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973:

Provided that the order of the Board to dispose of the matter shall be applealable under sub-section (*2*) of section 101:

Provided further that the assessment under this section shall be completed within the period specified in section 14.

Section 17 (*3*) provides that "[w]here the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences." Section 19 provides for the detailed powers of and the procedure to be followed by the Children's Court. Section 19 runs as:

Powers of Children's Court

"19**.** (*1*) After the receipt of preliminary assessment from the Board under section 15, the Children´s Court may decide that—

(*i*) there is a need for trial of the child as an adult as per the provisions of the Code of Criminal Procedure, 1973 and pass appropriate orders after trial subject to the provisions of this section and section 21, considering the special needs of the child, the tenets of fair trial and maintaining a child friendly atmosphere;

(*ii*) there is no need for trial of the child as an adult and may conduct an inquiry as a Board and pass appropriate orders in accordance with the provisions of section 18.

(*2*) The Children's Court shall ensure that the final order, with regard to a child in conflict with law, shall include an individual care plan for the rehabilitation of child, including follow up by the probation officer or the District Child Protection Unit or a social worker.

(*3*) The Children's Court shall ensure that the child who is found to be in conflict with law is sent to a place of safety till he attains the age of twenty-one years and thereafter, the person shall be transferred to a jail:

Provided that the reformative services including educational services, skill development, alternative therapy such as counselling, behaviour modification therapy, and psychiatric support shall be provided to the child during the period of his stay in the place of safety.

(*4*) The Children's Court shall ensure that there is a periodic follow up report every year by the probation officer or the District Child Protection Unit or a social worker, as required, to evaluate the progress of the child in the place of safety and to ensure that there is no ill-treatment to the child in any form.

(*5*) The reports under sub-section (*4*) shall be forwarded to the Children´s Court for record and follow up, as may be required."

The eventuality of Child attaining twenty-one years of age but yet to complete prescribed term of stay in place of safety is taken care of by section 20 which runs as under:

> **"20.** (*1*) When the child in conflict with the law attains the age of twenty-one years and is yet to complete the term of stay, the Children´s Court shall provide for a follow up by the probation officer or the District Child Protection Unit or a social worker or by itself, as required, to evaluate if such child has undergone reformative changes and if the child can be a contributing member of the society and for this purpose the progress records of the child under sub-section (*4*) of section 19, along with evaluation of relevant experts are to be taken into consideration.
> (*2*) After the completion of the procedure specified under sub-section (*1*), the Children's Court may—
>
> (*i*) decide to release the child on such conditions as it deems fit which includes appointment of a monitoring authority for the remainder of the prescribed term of stay;
> (*ii*) decide that the child shall complete the remainder of his term in a jail:
> Provided that each State Government shall maintain a list of monitoring authorities and monitoring procedures as may be prescribed."

7.10.9 Special protection for child in conflict with law

Following special protections have been provided to child in conflict with law.

1. No child in conflict with law shall be sentenced to death or for life imprisonment without the possibility of release.[176]
2. No proceeding shall be instituted and no order shall be passed against any child under Chapter VIII of the said Code of criminal procedure, 1973[177]
3. There shall be no joint proceedings of a child alleged to be in conflict with law, with a person who is not a child.[178]

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[176] Section 21 reads
" No child in conflict with law shall be sentenced to death or for life imprisonment without the possibility of release, for any such offence, either under the provisions of this Act or under the provisions of the Indian Penal Code or any other law for the time being in force."

[177] Section 22 reads
" Notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1973, or any preventive detention law for the time being in force, no proceeding shall be instituted and no order shall be passed against any child under Chapter VIII of the said Code."

[178] Section 23 reads
"(*1*) Notwithstanding anything contained in section 223 of the Code of Criminal Procedure, 1973 or in any other law for the time being in force, there shall be no joint proceedings of a child alleged to be in conflict with law, with a person who is not a child.
(*2*) If during the inquiry by the Board or by the Children's Court, the person alleged to be in conflict with law is found that he is not a child, such person shall not be tried along with a child."

4. The child shall not suffer disqualification, if any, attached to a conviction of an offence under such law unless the child is above the age of sixteen years and is convicted for heinous crime with jail term. The relevant records of such conviction shall be destroyed after the expiry of the period of appeal or, as the case may be, a reasonable period of time.[179]

7.10.10 Rehabilitation and Social Re-Integration

The long title of Act speaks in no uncertain words the purpose of the law as

> "[a]n Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, herein under and for matters connected therewith or incidental thereto."

Consistent with long title section 39 provides for process of rehabilitation and social integration of children as under

> **" 39.**(*1*) The process of rehabilitation and social integration of children under this Act shall be undertaken, based on the individual care plan of the child, preferably through family based care such as by restoration to family or guardian with or without supervision or sponsorship, or adoption or foster care:
>
> Provided that all efforts shall be made to keep siblings placed in institutional or non institutional care, together, unless it is in their best interest not to be kept together.
>
> (*2*) For children in conflict with law the process of rehabilitation and social integration shall be undertaken in the observation homes, if the child is not released on bail or in special homes[180] or place of safety[181] or fit facility or with a

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[179] Section 24 reads

> "(*1*) Notwithstanding anything contained in any other law for the time being in force, a child who has committed an offence and has been dealt with under the provisions of this Act shall not suffer disqualification, if any, attached to a conviction of an offence under such law:
> Provided that in case of a child who has completed or is above the age of sixteen years and is found to be in conflict with law by the Children's Court under clause (*i*) of sub-section (*1*) of section 19, the provisions of sub-section (*1*) shall not apply.
> (*2*) The Board shall make an order directing the Police, or by the Children's court to its own registry that the relevant records of such conviction shall be destroyed after the expiry of the period of appeal or, as the case may be, a reasonable period as may be prescribed:
> Provided that in case of a heinous offence where the child is found to be in conflict with law under clause (*i*) of sub-section (*1*) of section 19, the relevant records of conviction of such child shall be retained by the Children's Court."

[180] Section 48 reads

> (*1*) The State Government may establish and maintain either by itself or through voluntary or non-governmental organisations, special homes, which shall be registered as such, in the manner as may be prescribed, in every district or a group of districts, as may be required for rehabilitation of those children in conflict with law who are found to have committed an offence and who are placed there by an order of the Juvenile Justice Board made under section 18.

[181] Section 49 reads

> (*1*) The State Government shall set up atleast one place of safety in a State registered under section 41, so as to place a person above the age of eighteen years or child in conflict with law, who is between the age of sixteen to eighteen years and is accused of or convicted for committing a heinous offence.

fit person,[182] if placed there by the order of the Board.

(*3*) The children in need of care and protection who are not placed in families for any reason may be placed in an institution registered for such children under this Act or with a fit person[183] or a fit facility,[184] on a temporary or long-term basis, and the process of rehabilitation and social integration shall be undertaken wherever the child is so placed.

(*4*) The Children in need of care and protection who are leaving institutional care or children in conflict with law leaving special homes or place of safety on attaining eighteen years of age, may be provided financial support as specified in section 46, to help them to re-integrate into the mainstream of the society."

7.10.11 Special role of probation officer

Probation officer[185] plays a significant role in rehabilitation and re-integration of the delinquents. Right from the apprehension of a child to disposal of cases, various roles are contemplated by the Act for probation officer. Where a child alleged to be in conflict with law is apprehended, the probation officer must be informed for preparation and submission within two weeks to the Board, a social investigation report containing information regarding the antecedents and family background of the child and other material circumstances likely to be of assistance to the Board for making the inquiry.[186] Where a child is released on bail, the probation officer or the Child Welfare Officer shall be informed by the Board.[187]

Section 12 requires that the apprehended or detained child alleged to be in conflict with law shall be released on bail or placed under the supervision of a probation officer.[188] Once the child is produced before the Board, probation officer

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[182] Section 52 reads

(*1*) "The Board or the Committee shall, after due verification of credentials, recognize any person fit to temporarily receive a child for care, protection and treatment of such child for a specified period and in the manner as may be prescribed."

[183] Section 2 (*28*) "fit person" means any person, prepared to own the responsibility of a child, for a specific purpose, and such person is identified after inquiry made in this behalf and recognised as fit for the said purpose, by the Committee or, as the case may be, the Board, to receive and take care of the child;

[184] Section 51 reads

(*1*) The Board or the Committee shall recognise a facility being run by a Governmental organisation or a voluntary or non-governmental organisation registered under any law for the time being in force to be fit to temporarily take the responsibility of a child for a specific purpose after due inquiry regarding the suitability of the facility and the organisation to take care of the child in such manner as may be prescribed

[185] Section 2 (*48*) defines "Probation officer" to mean "an officer appointed by the State Government as a probation officer under the Probation of Offenders Act, 1958 or the Legal-cum- Probation Officer appointed by the State Government under District Child Protection Unit."

[186] Section 13(1)

[187] Section 13(2)

[188] Section 12 reads

(*1*) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person

has to undertake a social investigation into the case and submit a social investigation report within a period of fifteen days.[189] Section 8 (*h*) requires that while disposing of the matter and passing a final order such order includes an individual care plan for the child's rehabilitation, including follow up by the Probation Officer or the District Child Protection Unit or a member of a non-governmental organization, as may be required.

The working of the probation officer in India had not been inspiring under erstwhile law.[190] Therefore, Draft Model Rules, 2016 under the Juvenile Justice (Care and Protection of Children) Act, 2015 prescribes the exhaustive and detailed role and responsibility of the probation officers under Rule 54 which reads as under:

> "54. Duties of a Probation Officer
> (1) On receipt of information from the Police or Child Welfare Police Officer under sub-section (1) (ii) of section 13 of the Act, without waiting for any formal order from the Board, the probation officer shall inquire into the circumstances of the child as may have bearing on the inquiry by the Board and submit a social investigation report in Form 6 to the Board.
> (2) The social investigation report should provide for risk assessment, including aggravating and mitigating factors highlighting the circumstances which induced vulnerability such as traffickers or abusers being in the neighbourhood, adult gangs, drug users, accessibility to weapons and drugs, exposure to age inappropriate behaviours, information and material.
> (3) The probation officer shall carry out the directions given by the Board and shall have the following duties, functions and responsibilities:
>
> (i) To conduct social investigation of the child in Form 6;
> (ii) To attend the proceedings of the Board and the Children's Court and to submit reports as and when required;
> (iii) To clarify the problems of the child and deal with their difficulties in institutional life;
> (iv) To participate in the orientation, monitoring, education, vocational and rehabilitation programmes;
> (v) To establish co-operation and understanding between the child and the Person- in-charge;
> (vi) To assist the child to develop contacts with family and also provide assistance to family members;
> (vii) To participate in the pre-release programme and help the child to establish contacts which could provide emotional and social support to the child after release;
> (viii) To establish linkages with probation officers in other districts and States for obtaining social investigation report, supervision and followup.
> (ix) To establish linkages with voluntary workers and organizations to

[189] Section 8 (*e*) directing the Probation Officer, or in case a Probation Officer is not available to the Child Welfare Officer or a social worker, to undertake a social investigation into the case and submit a social investigation report within a period of fifteen days from the date of first production before the Board to ascertain the circumstances in which the alleged offence was committed.

[190] See generally Erika Rickard "Paying Lip Service To The Silenced: Juvenile Justice In India" *Harvard Human Rights Journal* Vol. 21, 2008, pp 155 to 166

facilitate rehabilitation and social reintegration of children and to ensure the necessary follow-up;

(x) Regular post release follow-up of the child extending help and guidance, enabling and facilitating their return to social mainstreaming;

(xi) To prepare the individual care plan and post release plan for the child;

(xii) To supervise children placed on probation as per the individual care plan;

(xiii) To make regular visits to the residence of the child under his supervision and places of employment or school attended by such child and submit periodic reports as per Form 10;

(xiv) To accompany children where ever possible, from the office of the Board to the observation home, special home, place of safety or fit facility as the case may be;

(xv) To evaluate the progress of the children in place of safety periodically and prepare the report including psycho-social and forward the same to the Children's Court;

(xvi) To discharge the functions of a monitoring authority where so appointed by the Children's Court as per sub-rule 16(xiii) of rule 18 of these rules;

(xvii) To maintain a diary or register to record his day to day activities such as visits made by him, social investigation reports prepared by him, follow up done by him and supervision reports prepared by him;

(xviii) To identify alternatives of community services and to establish linkages with voluntary sector for facilitating rehabilitation and social reintegration of children; and

(xix) Any other task as may be assigned."

7.11 Sentencing Young Offenders – Mandates of New Model Jail Manual 2016

The Jail Manual 2016 prescribes the mode and method of dealing with young offenders from evil of incarceration. It mandates following non-institutional treatment for young offenders.

Non-Institutionalised Treatment

" 27.05 It is necessary to save young offenders from evil of incarceration. Noncustodial treatment for young offenders should be preferred to imprisonment. Under mentioned process should be followed for young offender:

(A) When any young offender found guilty and is likely to be punished with imprisonment not exceeding one year, the court should take recourse to any of the following non-custodial measures:

(1) Release on admission

(2)Release on taking a bond of good conduct, with or without conditions from the young offenders and from parents/guardians/approved voluntary agencies.

(3)Release on probation under the Probation of Offenders Act on any of the following conditions:

(a) Continuation of education/ vocational training/employment;

(b) Obtaining guidance from probation officer /teacher counsellor:

(c) Getting work experience in work camps during week–ends and on holidays;

(d) Doing useful work in work centres (agricultural farms, forestry housing projects, road projects and apprenticeships in work-shops.)
(e) Young offenders released on probation shall be kept under constant supervision.

Note: suitable cases of young offenders likely to be sentenced to periods above one year of imprisonment should also, as far as possible, be processed through the above-mentioned non institutional approach. Young offenders should be sent to prison only as a last resort.

(B) (1) Young offenders involved in minor violations should not be kept in police custody. Instead, they should be kept with their families/guardians/approved/ voluntary agencies on the undertaking that they will be produced before the police ,as and when required for investigation for minimum period required for investigation.
(2) Young offenders involved in serious offences, while in police custody, should be kept separate from adult criminals and the police custody should be only for the minimum period required for investigation.
(3) The investigation of cases of young offenders must be expeditiously completed.
(4) Bail should liberally granted in cases of young offenders .
(5) When it is not possible to release a young offender on a bail, he should be kept in a reception centre /Kishoresadan/Yuvasadan during the pendency of his trial.
(6) In case it become necessary to keep young offenders in a sub-prison during investigation and trial, it should be ensured that they do not come in contact with adult criminal there."

7.12 Rehabilitative Sentencing

Adhering to the rule book and providing possible remedy and justice is a thing of past now. Indian judicial corridors have, of late, been witness to a new kind of rehabilitative sentencing where the courts have gone to the possible extent of espousing the life of victim by providing even jobs and by providing adequate compensation disregarding the financial limits fixed by the governments for rehabilitation. Few such judgements need mention here which have opened a new era in the economics of sentencing in India.

The decision of the Delhi High Court in *Brindavan Sharma* v. *State*[191] is a milestone in Indian criminal jurisprudence inasmuch as for the first time the Delhi High Court thought it obligatory both morally and legally to care for the victims of not only crime but also of punishment.[192] The facts are unique - Father of three children killed the mother making them virtually orphans. Father accused showed willingness to give all the movable and immovable property to the children but the

[191]Available at http://www.delhicourts.nic.in/Aug07/Birndavan%20Sharma%20Vs.%20State.pdf
[192] K.N. Chandrasekharan Pillai, "Victims of Both Crime And Punishment: Delhi High Court's Attempt To Make Law Humane" *JILI*, 2007, Pp 554-555

court was not satisfied with it. It went ahead and suggested to one Vinod Dhawan, a philanthropist to pay a monthly assistance to these children (Rs. 2,100/-). Justice Mukul Mudgal took judicial notice of the absence of a scheme to make provision for such victims and asserted the need for the court's proactive role. After noting that the philanthropist has taken care of the children and that the court is duty bound to do something it also stressed the obligation of the government "to ensure that the victims of crime such as the three children in the present case, are looked after institutionally and provided succour and support."[193]

Tekan Alias Tekram v. State of Madhya Pradesh[194] decided by the Hon'ble Supreme Court of India on February 11, 2016, is a unique and of its kind judgment, heralding a victorious jurisprudence for rape victims in particular, and believers of restorative and compensatory jurisprudence in general. Going out of its usual way, the Supreme Court ordered the state government to pay Rs 8000/- monthly compensation[195] to the unfortunate blind victim of the rape for the rest of her life![196]

Though the court did not directly subscribe to the scheme framed by Goa state where Rs 10,000,00/- compensation is payable in respect of rapes, the fact that the scheme was highlighted in bold letters in the survey of schemes and applaud by the court here and there in the judgment itself indicates that, judiciary was judiciously underlining the scheme of Goa as a model scheme to be adopted by every state. This is precisely what the court expressed in its concluding part.

> "In the typical facts before the court, in fact, the court awarded the compensation of Rs.10,00,000/- to the victims but for the inability of the victim to manage the funds, the court awarded Rs.8,000/- per month till her life time, treating the same to be an interest fetched on a fixed deposit of Rs.10,00,000/-."

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[193] *Ibid*

[194] 2016 SCC OnLine SC 131, Criminal Appeal No. 884 Of 2015, 11/02/2016

[195] In the presence of above facts, and dismal compensation scheme framed by the State of Chhattisgarh, the court was seized with what compensation to be awarded and how. The court observed that

> "The victim, being in a vulnerable position and who is not being taken care of by anyone and having no family to support her either emotionally or economically, we are not ordering the respondent-State to give her any lump sum amount as compensation for rehabilitation as she is not in a position to keep and manage the lump sum amount. From the records, it is evident that no one is taking care of her and she is living alone in her Village. Accordingly, we in the special facts of this case are directing the respondent-State to pay Rs.8,000/- per month till her life time, treating the same to be an interest fetched on a fixed deposit of Rs.10,00,000/-. By this, the State will not be required to pay any lump sum amount to the victim and this will also be in the interest of the victim."

[196] Praveen Patil, "Rehabilitative Sentencing In Rape Cases: An Appraisal Of Tekan Alias Tekram V. State Of Madhya Pradesh" *JSSJLSR-Online Journal*, Vol. IV, Issue-I, 2016, available at http://jsslawcollege.in/wp-content/uploads/2013/12/REHABILITATIVE-SENTENCING-IN-RAPE-CASES-AN-APPRAISAL-OF-TEKAN-ALIAS-TEKRAM-V.-STATE-OF-MADHYA-PRADESH.pdf

In *Re v. Indian Woman Says Gang-Raped*[197] the court directed to pay Rs. 3,00,000/- to the victim who was a minor. The court asked the government to deposit 75% of the amount in a fixed deposit for a period of three years to be paid thereafter with accrued interest.

The Madras High Court in *C. Thekkamalai*[198] enhanced the compensation from Rs.75,000/- to Rs.5,00,000 and directed that the State to consider the application of the victim for allotment of agricultural land under THADCO land purchase scheme or to allot the land of her choice at concessional rate in accordance with the scheme.

In a rare order, the Bombay High Court has asked the government to contemplate if the benefits of the rehabilitation schemes meant for rape/child abuse victims can be given with retrospective effect in certain "deserving cases". "The state government would contemplate as to whether in deserving cases, the benefits under the Manodhairya scheme as well as Maharashtra Victim Compensation Scheme, 2014 could be provided to the victims retrospectively," said a divisional bench in an order passed on March 23.[199]

The predicament of acid victims in terms of sufferings and agony has been well documented.[200] Though much jurisprudence has not been developed in respect of acid crimes since the crime and legislative and judicial responses to such crime are of recent origin and still in the formative years, *Laxmi v. Union of India*[201] decided by the Supreme Court of India is a path breaking judgments and exemplary example of judicial sensitivity towards the acid victims. This is the case initiated a decade back[202] in the Supreme Court the final result of which is awaited. In the same case Supreme Court ruled that

> "victims shall be paid compensation of at least Rs. 3 lakhs by the concerned State Government/Union Territory as the after care and rehabilitation cost. Of this amount, a sum of Rs 1 lakh shall be paid to such victim within 15 days of

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[197] *Re v. Indian Woman Says Gang-Raped* http://indiankanoon.org/doc/153043729/

[198] *C. Thekkamalai v. State of Tamil Nadu* (2005) http://indiankanoon.org/doc/839968/

[199] Naziya Alvi Rahman, "Can benefits of rehab schemes for rape victims be given with retrospective effect: Bombay High Court asks govt" *DNA*, April 22 2016

[200] See The Law Commission of India, 226th Report, *"The Inclusion of Acid Attacks as Specific Offences in the Indian Penal Code and a law for Compensation for Victims of Crime"* 2009

[201] (2014) 4 SCC 427

[202] Laxmi A minor who was a minor in 2005 had been attacked by three men with acid for rejecting love proposal. Her life was shattered in no times. The predicament furthered when she learnt that the existing laws are inadequate in punishment of offenders, compensation and rehabilitation of acid victims. She filed a writ petition in 2006 (WRIT PETITION (CRL.) NO (s) 129 of 2006) before the Supreme Court of India praying for various directions to centre and states. The case is pending since then with interim relief and directions for compliances.

> occurrence of such incident (or being brought to the notice of the State Government/Union Territory) to facilitate immediate medical attention and expenses in this regard. The balance sum of Rs. 2 lakhs shall be paid as expeditiously as may be possible and positively within two months thereafter…"

The real judicial empathy was witnessed in *Parivartan Kendra*,[203] in which the Supreme Court pronounced that three lakhs compensation is minimum and not a bar to award higher compensation than that. The court clarified its own ruling in which it fixed Rs 3 lakhs as compensation, in following words;

> "12. The above mentioned direction given by this Court in Laxmi's case … is a general mandate to the State and Union Territory and is the minimum amount which the State shall make available to each victim of acid attack. The State and Union Territory concerned can give even more amount of compensation than Rs.3,00,000/- as directed by this Court. It is pertinent to mention here that the mandate given by this Court in Laxmi's case nowhere restricts the Court from giving more compensation to the victim of acid attack… In peculiar facts, this court can grant even more compensation to the victim than Rs. 3,00,000/-"
> "19. …We are conscious of the fact that enhancement of the compensation amount will be an additional burden on the State. But prevention of such a crime is the responsibility of the State and the liability to pay the enhanced compensation will be of the State. The enhancement of the Compensation will act in two ways:-
>
> 1. It will help the victim in rehabilitation;
> 2. It will also make the State to implement the guidelines properly as the State will try to comply with it in its true sprit so that the crime of acid attack can be prevented in future." [204]

With the intervention of the Madras High Court, the State government provided a job to a victim of an acid attack, an M.Phil-degree holder, on compassionate grounds.[205] In another case, G. Valentina of Villupuram district was in class IX when Dhansekar trespassed into her house and threw acid on her face. The Madras High Court confirmed a sentence of 10 years rigorous imprisonment against the attacker. It also directed the government to give the victim a suitable job as she possessed a M.Sc. degree and an M.Phil in microbiology. By a G.O. in April last year, the State government directed the director of medical and rural health services to give employment to the victim as a junior assistant in the Tamil Nadu ministerial service as a special case[206]

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[203] *Parivartan Kendra v. Union of India* (2016) 3 SCC 571
[204] *Ibid*
[205] Praveen Patil, Do *We Deal Acid Violence Acidly? A Critical Analysis of Criminal Law (Amendment) Act, 2013, Policy and Approach, in Sentencing Acid Attackers and Rehabilitation of Acid Victims* in Dr. Vishwanath M. et al., (eds.) *The Majesty of Law*, (Dharwad: Saraswati offset, 2016), p158
[206] *The Hindu*, Feb.13, 2013 (Chennai Edition)

Thus, the loss of job, social stigma and the pain, physical injury, marriage prospects, after care and rehabilitation cost etc. were taken into consideration for awarding compensation.

7.13 Conclusion

Reformation and rehabilitation of victims and offender is at the heart of Indian sentencing policy though not in the structured form and format. Courts have shed their traditional role of neutralism and have become pro-active in dispensing customized justice. Alternatives like compounding, plea bargaining, community service etc are being increasingly used by the courts though it has not reached in its intensity. Alternative mechanism of sentencing first time offenders under probation and juvenile justice law is commendable subject to the suggestions offered in the conclusion chapter.

CHAPTER -VIII

COMPENSATION IN CRIMINAL CASES- AN INDISPENSABLE EXERCISE IN SENTENCING POLICY- EMERGING LEGISLATIVE TRENDS AND JUDICIAL EXPOSITIONS

> *"While social responsibility of the criminal to restore the loss or heal the injury is a part of the punitive exercise, the length of the prison term is no reparation to the crippled or bereaved but is futility compounded with cruelty. Victimology must find fulfillment … not through barbarity but by compulsory recoupment by the wrong doer of the damage inflicted not by giving more pain to the offender but by lessening the loss of the forlorn."*[1]
>
> Krishna Iyer

8.1 Introduction

The criminal commits the crime. The State apprehends such accused and brings him to trial. If found guilty, he is convicted and sentenced to undergo punishment. Does this complete the wheel of criminal justice? What about the crime victims? Traditionally, it may have been sufficient that the criminal is caught and punished. But, the modern approach is to also focus on the victims of crime. It is all very well that the accused is given a fair and just trial, that the guilty are punished, that the convicts and prisoners are given a humane treatment, that jail conditions are improved and the erstwhile criminals are rehabilitated, but, what about the crime victim?[2]

The agony and anguish of the victim cannot be kept at bark. It cannot be envisaged that in the criminal trial, the victim is to be forgotten or kept in the oblivion.[3] In petty offenses, it is the monetary help that addresses the cause and not the incarceration of the accused.[4]

In *State of Gujarat v. Hon'ble High Court of Gujarat*,[5] the Supreme Court succinctly noted:

> " A victim of crime cannot be a "forgotten man" in the criminal justice system. It is he who has suffered the most. His family is ruined particularly in case of death and other bodily injury. This is apart from the factors like loss of reputation, humiliation, etc. An honour which is lost or life which is snuffed out cannot be recompensed but then monetary compensation will at least provide some solace."[6]

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[1] Per Krishna Iyer J. in *Maru Ram & Ors. v. Union of India and Ors.* (1981) 1 SCC 107
[2] *M.S. Grewal v. Deep Chand Sood* (2001) 8 SCC 151
[3] *Subhash Yadav v. State of M.P.*, 2007 (2) Jab LJ 207 (Madhya Pradesh High Court)
[4] *K.A. Abbas H.S.A. v. Sabu Joseph* (2010) 6 SCC 230
[5] *State of Gujarat v. Hon'ble High Court of Gujarat* AIR 1998 SC 3164
[6] *Ibid*

The victim is entitled to reparation,[7] restitution and safeguard of his rights. Criminal justice would look hollow if justice is not done to the victim of the crime.[8] Criminal trial is meant for doing justice to all - the accused, the society and the victim.[9] In order to give the victim complete mental satisfaction, it is essential to provide him compensation so that it can work as a support for the victim to start his life afresh.[10]

This revise, it may be noted at the outset, does not undertake to elaborate victims' compensation from the point of constitutional commitments and tortious liabilities. Compensation for violation of fundamental and other constitutional rights can be claimed under aegis of constitutionally developed compensatory jurisprudence[11] under article 32 or 226[12] or both via article 21 of the constitution.[13]

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[7] In *Rattan Singh v. State of Punjab* (1979) 4 SCC 719, Krishna Iyer J., held that:

> "It is a weakness of our jurisprudence that the victims of the crime, and the distress of the dependants of the prisoner, do not attract the attention of the law. Indeed, victim reparation is still the vanishing point of our criminal law! This is a deficiency in the system which must be rectified by the legislature. We can only draw attention to this matter. Hopefully, the welfare State will bestow better thought and action to traffic justice in the light of the observations we have made."

[8] *State of Gujarat v. Hon'ble High Court of Gujarat* AIR 1998 SC 3164

[9] *Dayal Singh v. State of Uttaranchal* (2012) 8 SCC 263

[10] *Satya Prakash v. State*, decided by High Court of Delhi on 11 October, 2013, available at http://indiankanoon.org/doc/135464464/ accessed on 23 October 2014

[11] The 154th Law Commission Report, identified right to compensation as rooting in the constitution. It observed thus:

> "The principle of victimology has foundations in Indian constitutional jurisprudence. The provision on Fundamental Rights (Part III) and Directive Principles of State Policy (Part IV) form the bulwark for a new social order in which social and economic justice would blossom in the national life of the country (Article 38). Article 41 mandates inter alia that the State shall make effective provisions for "securing the right to public assistance in cases of disablement and in other cases of undeserved want." So also Article 51-A makes it a fundamental duty of every Indian citizen, inter alia 'to have compassion for living creatures' and to 'develop humanism'. If emphatically interpreted and imaginatively expanded these provisions can form the constitutional underpinnings for Victimology"

[12] in *Nilbati Behara v. State of Orissa* AIR 1993 SC 1960, the Supreme Court observed that

> "This Court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also *an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim* whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings."

[13] In *D.K. Basu v. State of W. B.* (1997) 1 SCC 416 the Supreme Court observed that

> "Award of compensation for established infringement of the indefeasible rights guaranteed under Article 21 of the Constitution is a remedy available in public law since the purpose of public law is not only to civilise public power but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved. Grant of compensation in proceedings under Article 32 or Article 226 of the Constitution of India for the established violation of the fundamental rights guaranteed under Article 21, is an exercise of the courts under the public law jurisdiction *for penalising the wrongdoer and fixing the liability for the public wrong on the State which failed in the discharge of its public duty to protect the fundamental rights of the citizen*."

The position in this regard seems to be almost settled except for academic renovation. The primary focus of this research is compensation that is to paid under criminal law, i.e., Criminal Procedure Code 1973 which redresses purely private wrongs, unless such private wrongs are attributed to state.

8.2 Compensation in Criminal Cases- A State Obligation

8.2.1 Theorizing state obligation

With modern concepts creating a distinction between civil and criminal law in which civil law provides for remedies to award compensation for private wrongs and the criminal law takes care of punishing the wrong doer, the legal position that emerged till recent times was that criminal law need not concern itself with compensation to the victims since compensation was a civil remedy that fell within the domain of the civil Courts. This conventional position has in recent times undergone a notable sea change, as societies world over have increasingly felt that victims of the crimes were being neglected by the legislatures and the Courts alike.[14] Legislations have, therefore, been introduced in many countries including Canada,[15] Australia,[16] England,[17] New Zealand,[18] Northern Ireland[19] and in certain States of USA as for example California,[20] Massachusetts,[21] New York,[22] South Korea,[23]

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[14] Internationally, the UN General Assembly recognized the right of victims of crimes to receive compensation by passing a resolution titled *'Declaration on Basic Principles of Justice for Victims and Abuse of Power, 1985*. The UN General Assembly passed a resolution titled *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005* which deals with t he rights of victims of international crimes and human rights violations

[15] The Victims of Crime Act, 1997

[16] Each Australian state and territory has developed a scheme for the financial (and other) assistance of victims of crime. The schemes are set out in the following legislation: Australian Capital Territory: Victims of Crime (Financial Assistance) Act 1983; New South Wales: Victims Rights and Support Act 2013; Queensland: Victims of Crime Assistance Act 2009; South Australia: Victims of Crime Act 2001; Tasmania: Victims of Crime Assistance Act 1976; Victoria: Victims of Crime Assistance Act 1996; Western Australia: Criminal Injuries Compensation Act 2003. There is also a recent Commonwealth scheme established by the Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012, which provides financial assistance e to Australians who are harmed in an overseas terrorist act and Australians whose family members have died in an overseas terrorist act.

[17] State compensation for victims of crimes of violence committed in England, Scotland or Wales is currently detailed in the Criminal Injuries Compensation Scheme 2012

[18] See New Zealand Public Act No. 134 of 1963

[19] See (Northern Ireland) Criminal Injuries to persons (Compensation) Act, 1968 (16and17 Eliz. 2 c. 9).

[20] Cal. Pen. Code. Art. 13.000 (1966), Cal. Welf. and Insnt's Code art. 11211(1966)

[21] Massachusetts General Laws, (1968), Ch. 258A

[22] New York Executive Laws, section 620-635, 1967 Suppl.

[23] The legal framework for the National Compensation Scheme is set out in the legislations in South Korea. The highest law in South Korea, the Constitution declares that the state has obligation to compensate victims of crime. In order to implement such obligation of the state, legislative bodies of South Korea promulgated rules, statutes, regulations and enforcement orders. The following three legislations set forth procedures and standards of the crime victim compensation system - (1) Crime Victim Protection Act [No. 12187, revised on January 7, 2014]; (2) Enforcement Decree of the Crime Victim Protection Act [Presidential Decree No. 25050, revised on December 30, 2013]; and (3) Enforcement Rules of the Crime Victim Protection Act [Legal Decree No. 789, revised on May 28, 2013].

Taiwan,[24] providing for restitution/reparation by Courts administering criminal justice.

Basically two types of rights are recognized in many jurisdictions particularly in continental countries in respect of victims of crime, namely,[25] the victim's right to participate in criminal proceedings[26] and *secondly*, the right to seek and receive compensation from the criminal court for injuries suffered as well as appropriate interim reliefs[27] in the course of proceedings.

Apart from criminalizing the act and penalizing such offences, therefore, victim compensation is a State obligation in all serious crimes, whether the offender is apprehended or not, convicted or acquitted.[28]

8.2.2 Three patterns of compensation

What type of compensation scheme shall be adopted depends to a greater extent on the sentencing system a country has inherited or adopted. In some of the jurisdictions, legislatures have imposed the burden of paying compensation on the convicted. In some other jurisdictions this responsibility has been assumed by the state itself. Even separate funds and budgets are earmarked for this. Mixed forms of schemes are also not uncommon and in the modern days, states have gone for this hybrid version of compensation.

The Law Commission of India noted three patterns of compensating the victim of the crime.[29] The State may take upon itself this responsibility of compensation in defined classes of cases. *Secondly*, the offender can be sentenced to pay a fine by way of punishment for the offence and, out of that fine compensation can be awarded to the victim. *Thirdly*, the court trying the offender can, in addition to punishing him in accordance with law, direct him to pay compensation to the victim of the crime, or otherwise make amends by repairing the damage done by the offence. Let us elaborate these three Patterns in some details.

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[24] Taiwan enacted the Crime Victim Protection Act in 1998, which became effective on 1 October the same year. It has been amended four times since, and the latest version was promulgated on 22 May 2013, which became effective on 1 June of the same year.

[25] See Committee on Reforms of Criminal Justice System (Government of India Ministry of Home Affairs, March, 2003), p 76

[26] Such as right to be impleaded, right to be heard, right to know, right to assist the court, right to appeal, right to compromise, if the offence is compoundable, right to medical assistance etc.

[27] See *Bodhisattwa Gautam v. Subhra Chakraborty* (1996) 1 SCC 490

[28] See Committee on Reforms of Criminal Justice System 2003. *See also* Law Commission of India 154th Report, (1996), Government of India, Report: *The Commission to review the working of the Constitution* (Ministry of Home Affairs, 2002) which have advocated victim-orientation to criminal justice administration and victim compensation.

[29] See Law Commission of India, 42nd Report on "*Indian Penal Code*", 1971, p 50

8.2.2.1 Pattern I

The first pattern of compensation is that the State assumes the responsibility to compensate the victim. Traditionally, the role of the state in criminal wrongs is confined to prosecution of criminals before appropriate courts and establishing the guilt which may result in conviction or no conviction by the courts. The State was no longer concerned with economic and emotional harm (even though capable of repatriation) of the victims. The sovereign function was said to have been discharged with apprehension and accusation of the culprits. The progressive penological discourses, however, convinced the states to take upon itself the responsibility of compensation in defined classes of cases. Two classes of cases, it is argued, may qualify for state compensation in *pattern I* namely, for violation of guaranteed constitutional rights and public law imperatives and *secondly* for established failure in maintaining law and order (social order) in the society the result of which is crimes in questions.[30] In both the circumstances, the liability is attributed to the state via-a-vis the failure to discharge sovereign functions.[31]

Compensatory rights under public law have been comfortably established by judicial pronouncements. The Supreme Court in *D.K. Basu,*[32] observed that:

> "The claim of the citizen is based on the principle of strict liability to which the defense of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrongdoer. The public law demand, as distinct from the private law tort remedy, is that crime victims be given compensation even in "no-fault" situations by the State. Compensation cannot be limited to cases of police torture or custodial deaths. It must extend to riot victims and victims of terror; *indeed, it must ultimately cover all victims of crime and all criminal injuries*." [33]

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[30] In view of recent Supreme Court pronouncement, there remains no distinction between these two and the state responsibility is established in payment of compensation.

[31] Though the sovereign function clause and defence as such has been nullified by the courts vide *Consumer Education and Research Centre v. Union of India* (1995) 3 SCC 42. Yet these functions remain to be sovereign in the sense that maintenance of law and order cannot be outsourced. The sovereign function tag can be attached to the way the state functions but this tag cannot be invoked by the state for avoiding its liability in payment of compensation and being accountable to the public.
In *Nilabati Behera v. State of Orissa* AIR 1993 SC 1960, the Supreme Court observed:

> "... it is sufficient to say that the decision of this Court in [*Kasturi Lal Ralia Ram Jain* v. *State of U.P.*, AIR 1965 SC 1039] upholding the State's plea of sovereign immunity for tortious acts of its servants is confined to the sphere of liability in tort, which is distinct from the State's liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the constitutional scheme, and is no defence to the constitutional remedy under Articles 32 and 226 of the Constitution which enables award of compensation for contravention of fundamental rights, when the only practicable mode of enforcement of the fundamental rights can be the award of compensation."

[32] *D.K. Basu v. State of W. B*. (1997) 1 SCC 416

[33] *M.V. Elisabeth v. Harwan Investment and Trading (P) Ltd.* 1993 Supp (2) SCC 433, p 473

In a number of cases,[34] the Supreme Court has redefined the need for a separate Victim Compensation. Thus victim can claim compensation under torts, and public law as well. Further, under public law, jurisdiction of Supreme Court and high courts can be invoked for awarding compensation where a violation fundamental right is established.[35]

Apart from constitutional claims, state responsibility is also fixed by public criminal law. Criminal Procedure Code, 1973 addresses[36] such claims in India.

Thus in class one of the *Pattern I*, compensation is claimed and paid for, for the violation of constitutional rights.

Class two in the pattern I is one is in respect of state assuming the responsibility to amend the wrong by way of establishing a fund[37] and authority[38] to answer the claims.

8.2.2.2 Pattern II

The second pattern of compensation is that the offender can be sentenced to pay a fine by way of punishment for the offence and, out of that fine, compensation can be awarded to the victim. This pattern has been taken care of by Criminal Procedure Code, 1973. Section 357(1) and 357(3) of said Code provide for

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[34] See the following judgments and writings touching upon the aspects of compensation although on a different note and context; *Nilbati Behara v. State of Orissa* AIR 1993 SC 1960, *Saheli, A Women's Resources Centre v. Comm. Police, Delhi* (1990) 1 SCC 422, *Peoples Union for Democratic Right v. State of Bihar* (1987)1 SCC 265, *Bhim Singh v. State of Jammu and Kashmir* AIR 1986 SC 494 see also writings on victim compensation- Shephali Yadav, 'Compensation: A Developing Means of Social Defence', (1999) XXIII *C.U.L.R.*; Gurpal Singh, 'Compensating Victims of Crime',(1982) *Journal of the Bar Council of India*, Vol.9; Girish, 'Compensating the Victims of Human Rights Violations- Need for legislation' *The Academy Law Review*, (1998) Vol.XXII, No.1 & 2 ; Paras Diwan, *Human Rights and the Law- Universal and India*, 1st ed., (New Delhi : Deep and Deep Publications); K.L.Vibute, "Compensating Victims of Crime in India; An Appraisal", Vol. 32, *Journal of Indian Law Institute*, 1990.

[35] In *Nilabati Behera Alias Lalit v. State of Orissa And Ors* (1993 AIR 1960), the Supreme Court observed:

> "This Court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings."

[36] Section 357 sheds compensatory responsibility on the offenders, section 357 A shifts this responsibility on the state, whereas, newly introduced section 357 B guarantees compensatory claims ensured by the State.

[37] Section 357A obligates on every state to prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

[38] District Legal Service Authority and the State Legal Service Authority have been established to enquiry into and award adequate compensation by completing the enquiry within two months.

compensation out of fine and independent of fine respectively. However, this pattern suffers from obvious defects stated infra.

8.2.2.3 Pattern III

The third pattern of compensation is that the court trying the offender can, in addition to punishing him according to law, direct him to pay compensation to the victim of the crime, or otherwise make amends by repairing the damage done by the offence. The third pattern is improvement over the second pattern in the sense that this pattern is 'suffering orientated'. A meager fine or minimal compensation (as in case of acid attacks etc) adds in insults to victims of the crime. Therefore, culprits must be asked to restore the victims to the possible extent. Recent amendments of 2013 in Criminal Procedure Code subscribe to this pattern.

8.3 Victim Compensation As State Responsibility: Distinction Between Constitutional law And Criminal law- Blurred

The compensation between criminal law and constitutional law is apparent yet disputable. Compensation under constitution is provided for violation of fundamental rights either by the state or by its instrumentalities in excess of their powers. The compensation for not maintaining law and order resulting in looting, death, loss or injury is example of direct violation of fundamental rights providing eligibility to claim compensation.[39] Even the defence of sovereign function is of little use in such cases.[40] There is second layer of liability of the state however. If the instrumentalities

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[39] In *Rudul Sah v. State of Bihar & Anr.* (1983) 4 SCC 141, for the illegal detention of a person in jail for 14 years the supreme court has awarded Rs. 30,000 as interim compensation leaving the person to raise the claim for adequate compensation appropriate courts

In *Sebastian M. Hongray v. Union of India & Ors.*[1984] 3 S.C.R. 544, in such a writ petition, exemplary costs were awarded on failure of the detaining authority to produce the missing persons, on the conclusion that they were not alive and had met an unnatural death.

In *Bhim Singh v. State of J&K and Others* [1985] 4 S.C.C. 677, illegal detention in police custody of the petitioner Bhim Singh was held to constitute violation of his rights under Articles 21 and 22(2) and this Court exercising its power to award compensation under Article 32 directed the State to pay monetary compensation to the petitioner for violation of his constitutional right by way of exemplary costs or otherwise

[40] See Justice G. Yethirajulu, "Article 32 and the Remedy of Compensation" (2004) 7 *SCC (J)* 49, where he notes

> "[t]here are several cases in which the Supreme Court and the High Courts made the State liable to pay compensation as a public law remedy ignoring the plea of the State about its immunity from liability. The Supreme Court categorically observed that the defence of sovereign immunity is inapplicable and alien to the concept of guarantee of fundamental rights. There is no question of defence being available for constitutional remedy. It is a practical and inexpensive mode of redress available for the contravention made by the State, its servants, its instrumentalities, a company or a person in the purported exercise of their powers and enforcement of the rights claimed either under the statutes or licence issued under the statute or for the enforcement of any right or duty under the Constitution or the law"

of the state like police use their excess powers or become privy to the crime, the liability of the state is established vicariously for compensation, though the state would be free to get reimbursed from the errant officer.[41] In an orderly society citizens have right to assume complete safety in public life. If such public life safety is infringed the state must compensate the sufferers. This is inescapable liability of the state. Thus where rape takes place, it questions the law and order of the state entitling the sufferer to get compensation from the state. In *Nilabati Behera* [42] Dr. Anand, J. in concurring but separate opinion observed:

> "The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court molds the relief by granting "compensation" in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of exemplary damages awarded against the wrong doer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and persecute the offender under the penal law. This Court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights

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[41] In *Nilabati Behera Alias Lalit v. State of Orissa And Ors* 1993 AIR 1960, the court observed that

> "[t]he State, of course has the right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law through appropriate proceedings."

In *Saheli, A Women's Resources Centre v. Comm. Police, Delhi* (1990) 1 SCC 422, the State was held liable to pay compensation payable to the mother of the deceased who died as a result of beating and assault by the police. However, the principle indicated therein was that the State is responsible for the tortious acts of its employees. In *State of Maharashtra and Others v. Ravikant S. Patil* [1991] 2 S.C.C. 373, the award of compensation by the High Court for violation of the fundamental right under Article 21 of an under trial prisoner, who was handcuffed and taken through the streets in a procession by the police during investigation, was upheld.

[42] *Nilabati Behera Alias Lalit v. State of Orissa And Ors* 1993 AIR 1960

> under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings. The State, of course has the right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law through appropriate proceedings. Of course, relief in exercise of the power under Article 32 or 226 would be granted only once it is established that there has been an infringement of the fundamental rights of the citizen and no other form of appropriate redressal by the court in the facts and circumstances of the case, is possible."

Compensation under the criminal law on the other hand is premised on the notion that private wrongs, even if they acquire public gloss, must be remedied by the wrongdoer himself. Such remedy may be by restitution or compensation or amends or rehabilitation. Criminal procedure code recognizes compensation as mode of satisfying the wrong. Criminal courts may either pay monitory satisfaction out of the fine imposed on the convict or may separately order for compensation.

There may be a convergence of violation of fundamental rights and criminal wrongs where the compensation may become a matter of debate. Take for example a case of murder. Assume that the victim lodges a complaint against a person under apprehension of attack. Due to negligence of the police in handling the case, the victim is killed by the accused. The relatives of the victim may have both the claims under constitution and criminal law as well. However, it may become difficult to adjudge under what law to award compensation. From the point of the victim however, he would be remedied under one of the law for he cannot be sent back without compensation.

The debate however does not end here. Once the compensation is read as fundamental right under Article 21 of the constitution, it cannot be denied on the ground that the accused did not have the capacity to pay or was not apprehended or his guilt could not be established. In such cases, the state plays *Parens Patrie* assuming the responsibility of such victims to itself. State establishes fund from which such persons shall be compensated. In this given case, it is ultimately the state that bears the responsibility of the compensation.

Thus in any eventuality that is either for violation of fundamental rights or for criminal wrongs the economic burden is on the state though the mode of enforcement of such rights differs from each other. In a limited number of cases, where the accused is well of, such accused may be asked to bear the compensation failing which or for

falling short of , state again steps in. In *D.K. Basu v. State of W.B.*,[43] the Supreme Court observed that

> "41. ... Prosecution of the offender is an obligation of the State in case of every crime but the victim of crime needs to be compensated monetarily also. The Court, where the infringement of the fundamental right is established, therefore, cannot stop by giving a mere declaration. It must proceed further and give compensatory relief, not by way of damages as in a civil action but by way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the State of not protecting the fundamental right to life of the citizen. *To repair the wrong done and give judicial redress for legal injury is a compulsion of judicial conscience."*
>
> [Emphasis supplied]

In *D.K. Basu*, (supra) the court also noted that there was no express provision in the Constitution of India for grant of compensation for violation of a fundamental right to life and that the court had judicially evolved a right to compensation in cases of established unconstitutional deprivation of personal liberty or life.

Expanding scope of Article 21 is not limited to providing compensation when the State or its functionaries are guilty of an act of commission but also to rehabilitate the victim or his family where crime is committed by an individual without any role of the State or its functionary. Apart from the concept of compensating the victim by way of public law remedy in writ jurisdiction,[44] need was felt for incorporation of a specific provision for compensation by courts irrespective of the result of criminal prosecution. Accordingly, Section 357A has been introduced in the CrPC. Compensation under the said Section is payable to victim of a crime in all cases irrespective of conviction or acquittal. The amount of compensation may be worked out at an appropriate forum in accordance with the said Scheme, but pending such steps being taken, interim compensation ought to be given at the earliest in any proceedings. In *Sube Singh v. State of Haryana*[45] it was observed that:

> "Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in the enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under Section 357 of the Code of Criminal Procedure."

This stands reiterated in several cases of Supreme Court thereafter.[46] The court thus held that the award of compensation by way of public law remedy would not impede the criminal court from ordering compensation under Section 357of the CrPC.

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[43] (1997) 1 SCC 416
[44] *Rudul Sah v. State of Bihar & Anr.* (1983) 4 SCC 141
[45] (2006) 3 SCC 178
[46] *Vishal Yadav v. State Govt. of UP* (2015) available at http://indiankanoon.org/doc/154440315/, para 352

8.4 Legislative Trends In The Development Of Compensation In Criminal Cases

Commensurate with the judicial innovation and international developments, legislature has also played pro active role, though bit lately in this aspects, in making provisions for compensation in criminal cases. The old section with supplemental amendments can be seen as under:

8.4.1 Section 357 of CrPC - Order to pay compensation – an ice breaker yet short of restorative and reparative aspirations

The erstwhile, Criminal Procedure Code of 1898 contained a provision for restitution.[47] However, for inherent defect,[48] The Law Commission of India[49] in its 41st Report submitted in 1969, invited the attention of government of India for reforms in compensatory jurisprudence. On the basis of the recommendations made by the Law Commission in the above report, the Government of India introduced the Criminal Procedure Code Bill, 1970, which aimed at revising Section 545 and introducing it in the form of Section 357 as it reads today. The Code of Criminal Procedure, 1973 made an improvement over the old Code of 1898 in that sub-section (3) of section 357, recognised the principle of compensating the vicitms even when no sentence of fine is imposed. First improvement (over the old law) in the form of section 357 reads;

> "357. Order to pay compensation
>
> (1) When a court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the court may, when passing judgment order the whole or any part of the fine recovered to be applied-
>
> (a) In defraying the expenses properly incurred in the prosecution,
>
> (b) In the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the court, recoverable by such person in a Civil Court;
>
> (c) When, any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such

[47] Section 545, of the Criminal Procedure Code of 1898, which stated in sub-clause 1(b) that the Court may direct "payment to any person of compensation for any loss or injury caused by the offence when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court"

[48] This section had two limitations - that in order to be compensated, the act which constituted an offence should also be a tort and the word "substantial" excluded in cases where only nominal damages were recoverable. Its application depends, in the first instance, on whether the court considers a substantial fine proper punishment for the offence. In the more serious cases, the court may think that a heavy fine in addition to imprisonment for a long term is not justifiable, especially when the public prosecutor ignores the plight of the victim of the offence and does not press for compensation on his behalf. Another limitation stems from the fact that the magistrate's power to impose a fine is itself limited. At present,(sic. till 1971) a magistrate of the first class cannot impose a fine exceeding two thousand rupees and a Magistrate of the second class cannot impose a fine exceeding five hundred rupees. Further, under section 545(l)(b), the court has to be satisfied that substantial compensation is recoverable in a civil court by the person to whom loss or injury has been caused by the offence.(see The Law Commission of India, 42nd Report on "*Indian Penal Code"* , 1971

[49] See The Law Commission of India, 41st Report on "*Criminal Procedure Code, 1898"*, 1969

> an offence, in paying in, compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855) entitled to recover damages from the person sentenced for the loss resulting to them from such death;
>
> (d) When any person is convicted of any offence which includes theft, criminal, misappropriation, criminal breach of trust or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of stolen property knowing or having reason to believe the same to be stolen in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.
>
> (2) If the fine is imposed in a case, which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or if an, appeal be presented, before the decision of the appeal.
>
> (3) When a court imposes a sentence, of which fine does not form a part, the court may, when passing judgment order the accused person to pay, by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.
>
> (4) An order under this section may also be made by all Appellate Court or by the High Court or Court of Session when exercising its powers of revision.
>
> (5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the court shall take into account any sum paid or recovered as compensation under this section."

Reading the foregoing provision, it becomes clear that compensation may be awarded out of the fine imposed[50] or independently.[51] Such compensation shall be payable by the convicted person, upon the completion of the trial, at the time of sentencing. In other words, this section, essentially , empowers the courts, not just to impose a fine alone or fine along with the sentence of imprisonment, but also when the situation arises, direct the accused to pay compensation to the person who has suffered any loss or injury by reason of the act for which the accused person has been sentenced.

However, from the victim's perspective this provision would be inadequate on several counts.[52] *Firstly,* the interval between the commission of the crime and the conclusion of the trial and ultimate disposal of the appeal is not short and likely to run into several years. Assuming that compensation is ultimately awarded and that it is of a reasonable sum, the delay in making it available to the crime victim would itself

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[50] sub-section (1) of section 357

[51] sub-section (3) of section 357

[52] The foregoing defects have been succinctly depicted by Badar Durrrez Ahmed J. (Delhi High Court) in *Smt. Kamla Devi v. Government of Nct of Delhi And Anr*, III (2004) ACC 335, 2005 ACJ 216, 114 (2004) DLT 57

defeat the purpose.[53] *Secondly,* before an order of compensation can be made under this provision, the criminal needs to be apprehended put to trial and to be convicted. Unsolved crimes would leave the crime victim without recourse to this provision. Similar would be the situation where the offender dies while committing the crime.[54] *Thirdly*, if the convicted person is a person of no means or little means then how is the compensation to be realised by the crime victim? *Fourthly*, in awarding compensation under section 357, the court's power, insofar as the quantum is concerned, is constrained by the convict's ability to pay[55] *Fifthly,* the payment remains suspended till the limitation period for the appeal expires or if an appeal is filed, till the appeal is disposed of.[56] A person who fails to pay the fine/compensation is normally required to undergo imprisonment in default of the said payment. There are many cases of default for a variety of reasons. Many persons who are sentenced to long term imprisonment do not pay the compensation. Rather they choose to continue in jail in default thereof. It is only when fine alone is the sentence that the convicts customarily choose to remit the fine. In such cases the harm inflicted on the victims is far less serious.[57] The hopeless victim, therefore, is indeed a cipher in modern Indian criminal law and its administration. So, although compensation is provided for under section 357, it is riddled with limitations, which often, add to the woes of the victim. Therefore, the restorative and reparative theories are not effectuated into real benefits to the victims[58]

These limitations of section 357 and overall developments in compensatory jurisprudence, nationally and internationally, led to the Criminal Law Amendment Act 2008.

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[53] *Ibid*

[54] Law Commission of India, 154th Report on "*The Code of Criminal Procedure Code, 1973*", 1996, p 61

[55] in *Sarwan Singh v. State of Punjab* (1978) 4 SCC 111, the Court held that in awarding compensation it was necessary for the Court to judge the capacity of the accused to pay, the justness of the claim for compensation and other relevant circumstances in fixing the amount of fine or compensation. See also *Palaniappa Gounder v. State of Tamil Nadu* (1977) 2 SCC 634

[56] Section 357(2) of Code of Criminal Procedure, 1973

[57] Per K.T. Thomas, J. (Bench consisting of M.M. Punchhi, CJI., K.T. Thomas and D.P. Wadhwa, JJ.) in *State of Gujarat and Anr. v. Hon'ble High Court of Gujarat* AIR 1998 SC 3164

[58] *Ibid* para 48

8.4.2 Insertion of Section 357A – assuming 'Parens patriae' [59]

The amendments to the CrPC brought about in 2008[60] focused heavily on the rights of victims in a criminal trial, particularly in trials relating to sexual offences. Though the 2008 amendments left Section 357 unchanged, they introduced Section 357A[61] under which the Court is empowered to direct the State to pay compensation to the victim in such cases where "*the compensation awarded under Section 357 is not adequate for such rehabilitation, or where the case ends in acquittal or discharge and the victim has to be rehabilitated.*" Under this provision, even if the accused is not tried but the victim needs to be rehabilitated, the victim may request the State or District Legal Services Authority to award him/her compensation. Section 357A[62] reads;

"**357A. Victim compensation scheme**

(1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation

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[59] *Charan Lal Sahu Etc. v. Union of India and Ors*. 1990 AIR 1480, the supreme court elaborated the concept of "parens patria" in Indian context and observed that:

> "The connotation of the term "parens patria" differs from country to country, for instance, in England it is the King, in America it is the people, etc. According to Indian concept parens patria doctrine recognised King as the protector of all citizens as parent. The Government is within its duty to protect and to control persons under disability. Conceptually, the parens patriae theory is the obligation of the State to protect and take into custody the rights and privileges of its citizens for discharging its obligations. Our Constitution makes it imperative for the State to secure to all its citizens the rights guaranteed by the Constitution and where the citizens are not in a position to assert and secure their rights, the State must come into picture and protect and fight for the right of the citizens. The Preamble to the Constitution, read with the Directive Principles contained in Articles 38, 39 and 39A enjoins the State to take up these responsibilities. It is the protective measure to which the social welfare state is committed. It is necessary for the State to ensure the fundamental rights in conjunction with the Directive Principles of State Policy to effectively discharge its obligation and for this purpose, if necessary, to deprive some rights and privileges of the individual victims or their heirs to protect their rights better and secure these further."

[60] Came into effect from 31 December, 2009

[61] This provision was introduced due to the recommendations made by the Law Commission of India in its 152nd (1994) and 154th (1996) Reports.

[62] Section 357A seems to be inspired by Paragraphs 12 and 13 of the 1985 General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34 of 29 November 1985) relate to compensation which reads as under:

"12. When compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to:

(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

(b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm."

> to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.
> (2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in subsection (1).
> (3) If the trial court, at the conclusion of the trial, is satisfied, that the compensation awarded under Section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.
> (4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.
> (5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

Radical change brought by this amendment is that the benefits under section 357A can be invoked either by the

a) sentencing court itself
   - when it is of the opinion that the compensation awarded under Section 357 is not adequate for such rehabilitation, or
   - where the cases end in acquittal or discharge and the victim has to be rehabilitated or

b) victim or his dependents where the offender is not traced or identified, but the victim is identified, and where no trial takes place

Rights under section 357 are not foreclosed but continued in section 357A. Courts are empowered to travel beyond section 357 and award compensation where relief u/s 357 is inadequate or where the cases end in acquittal or discharge. This amendment has brought forth rehabilitation of victims on the forefront.

Difference between compensation under Section 357A and Section 357 CrPC

Following differences[63] can be noted between Section 357A and Section 357 CrPC

a) Under Section 357A**,** compensation is payable out of funds created by the State Government whereas under Section 357, it is payable out of fine recovered from the convict.

b) Under Section 357A**,** compensation is payable even if offender is not traced or

[63] See Note by Partners for Law in Development, August 2012 available at http://pldindia.org/wp-content/uploads/2013/03/PLD-notes-on-acid-attack.pdf (assessed on 9 August 2013)

identified but under Section 357, it is payable only upon conviction of the offender.

c) Under Section 357A**,** compensation is payable in addition to compensation awarded under Section 357 whereas under Section 357, there is no such provision.

d) Section 357A is a mandatory provision for compensation whereas Section 357 is discretionary.

e) Under Section 357A, order for compensation is made by District Legal Service Authority or State Legal Service Authority whereas under Section 357 order is made by the Court.

f) Section 357A empowers District Legal Service Authority or State Legal Service Authority to make order for interim relief whereas under Section 357, there is no such provision.

g) Under Section 357A, no criteria is specified for dependents of victim entitled to compensation whereas under Section 357 only dependents or heirs of victim who are entitled under Fatal Accidents Act can claim compensation.[64]

8.4.3 The Criminal Law (Amendment) Act, 2013[65] Insertion of Section 357B- Reaffirmation of Rehabilitative Rights

In the aftermath of Delhi gang rape the government of India urgently pushed for reforms in the criminal law specially law relating to rape and other forms of sexual assaults.[66] Stop gap ordinance was replaced by 2013 Amendment Act.[67]

Though this law essentially focused on sexual assaults, it touched upon the vital issues of victim compensation. This amendment has introduced section 357B to the Code of Criminal Procedure 1973, which further strengthens the rights of acid and

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[64] *Ibid*

[65] The spirit of this amendment can be traced, *interalia*, in The Declaration on the Elimination of Violence against Women 1993 which stipulates that States should condemn violence against women and pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should...develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence.

[66] On December 22, 2012, a judicial committee headed by J. S. Verma, a former Chief Justice of India, was appointed by the Central Government to submit a report, within 30 days, to suggest amendments to criminal law to sternly deal with sexual assault cases. The Committee submitted its report after 29 days on January 23, 2013, after considering 80,000 suggestions (perhaps a role model case that suggests vertical and horizontal participation of common person in shaping laws) An Ordinance was promulgated on February 3, 2013 to incorporate recommendations made by Justice Verma Committee.

[67] The Criminal Law (Amendment) Bill, 2013 was passed in the Lok Sabha on March 19, 2013, and by the Rajya Sabha on March 21, 2013.The, Bill received Presidential assent on April 2, 2013 and came into force from April 3, 2013.

rape victims to seek compensation. Newly inserted section 357B reads

> "The compensation payable by the State Government under section 357A shall be in addition to the payment of fine to the victim under section 326A or section 376D of the Indian Penal Code."

Economical rehabilitation rights have been recognised by this amendment. Under Section 357 compensation can be awarded if the culprit is known. Under section 357A compensation shall be awarded out of the state fund even if the offender is not traced or identified. However, identified culprit who is responsible for the entire legal struggle may escape with a minor fine even for major offences. To plug this loophole, section 326A (Acid attacks)[68] and 376D (gang rape)[69] have advocated for economical retributive sentencing policy.[70] The provisos added to both the sections come with triple riders, i.e.,

(i) The *fine shall be imposed* by sentencing courts

(ii) such fine *shall be just and reasonable* to meet the medical expenses and rehabilitation of the victim

(iii) further that the fine imposed under this section *shall be paid to the victims directly*

The sentencing courts are mandated to impose fine compulsorily since the

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[68] Section 326A of Indian Penal Code reads

> " Whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine:
>
> Provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim:
>
> Provided further that any fine imposed under this section shall be paid to the Victim"

[69] Section 376D of Indian Penal Code reads

> "Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:
>
> Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim: Provided further that any fine imposed under this section shall be paid to the victim."

[70] It is interesting to note that the Criminal Law Amendment Bill 2012 and Criminal Law Amendment Ordinance 2013 provided for imposition of 10 lakh fine as compensation for acid attacks. However, the Criminal Law Amendment Act 2013 dropped those figure and instead chose flexible words "…shall be just and reasonable to meet the medical expenses of the treatment of the victim" The obvious reason for non-confining the fine to a fixed sum of amount lies in the fact that, the cost of each surgery is exorbitant. It goes up to Rs.30 lakh. The compensation of Rs.10 lakh will not cover the cost of treatment and care.

word ‘and’ in both the sections has been used conjunctively.

Stated differently, victims of acid attacks and gang rapes are entitled to restitution form the offender and government as well. Further, it has been cautioned that, the compensation payable by the State Government under section 357A shall be in addition to the payment of fine that may be recovered by the offender(s). The duty cast on the state government by virtue of this section is independent. Even if a heavy fine is imposed on the culprit, yet, the government cannot shed off its responsibility. This new insertion has somewhere instilled the confidence in criminal compensatory justice.

The comparison of section 357, 357A and 357B is relevant here. Section 357 provided for compensation to be paid either out of the fine imposed or independent of such fine. However, the accused must be identified and convicted for the offence before section 357 is invoked. Section 357A dispensed with this condition precedent and provided for compensation even when no conviction takes place or no offender is identified. Section 357A is, thus, supplemental to section 357. The amount of compensation to be awarded under Section 357 CrPC depends upon (a) the nature of crime (b) extent of loss/damage suffered and (c) the capacity of the accused to pay for which the Court has to conduct a summary inquiry. In case the accused does not have the capacity to pay the compensation or the compensation awarded against the accused is not adequate for rehabilitation of the victim, the Court can invoke Section 357A to recommend the case to the State/District Legal Services Authority for award of compensation from the State funded Victim Compensation Fund. Section 357B is limited in scope in the sense that, it is applicable only in respect of 326A or section 376D of the IPC cases where context specific fine may be imposed and such fine shall be paid to the victim in addition to compensation to be paid under section 357A by the government. In other words, section 357B is declaratory in nature. It merely declares that the rights of victims to receive compensation under section 357A is not disturbed by the amount and quantum of the fine that may be imposed under section 326A or section 376D of IPC.

8.5 Judicial Expositions

Apart from the legislative trends noted above, judiciary has played a significant role in shaping compensation in criminal cases.[71] In fact, it is the frequent observations by the apex courts in number of cases that actualised the legislative initiatives. In *D K Basu*[72] it was observed that '…to repair the wrong done and give judicial redress for legal injury is a compulsion of judicial conscience.' The court further held that:

> "The courts have the obligation to satisfy the social aspirations of the citizens … A court of law cannot close its consciousness and aliveness to stark realities. Mere punishment of the offender cannot give such solace to the family of the victim - civil action for damages is a long drawn and a cumbersome judicial process. Monetary compensation for redressal by the court finding the infringement of the indefeasible right to life of the citizen is, therefore, useful and at time perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim, who may have been the breadwinner of the family . It has always been a judicial stance to expand and imbibe compensatory jurisprudence in those black and dead letters of law."[73]

Albeit number of judgments, pronounced by Supreme Court and High Courts directly or indirectly, touching upon compensatory schemes, two judgments appeared to have brought a sea change in the perception of section 357 and the amendments that followed it. These two judgments are *Hari Singh v. Sukhbir Singh and Ors*[74] and *Ankush Shivaji Gaikwad v. State of Maharashtra*[75]. In *Hari Singh,* the Supreme Court pronounced that powers under section 357 are in addition to and not ancillary to other sentences. This initial foundation was exemplified by *Ankush Shivaji Gaikwad*[76] where Supreme Court held that, it the duty of the court to state the reasons for

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[71] in *M.V. Elisabeth v. Harwan Investment and Trading (P) Ltd.* 1993 Supp (2) SCC 433 at p 473, the Supreme Court observed as follow

> "The judicial power of this country, which is an aspect of national sovereignty, is vested in the people and is articulated in the provisions of the Constitution and the laws and is exercised by courts empowered to exercise it. It is absurd to confine that power to the provisions of imperial statutes of a bygone age. Access to court which is an important right vested in every citizen implies the existence of the power of the Court to render justice according to law. Where statute is silent and judicial intervention is required, Courts strive to redress grievances according to what is perceived to be principles of justice, equity and good conscience."

[72] See *D.K. Basu v. State of W. B.* (1997) 1 SCC 416

[73] Somewhat similar approach was adopted by the courts in the cases like *Nilbati Behara v. State of Orissa* AIR 1993 SC 1960, *Saheli, A Women's Resources Centre v. Comm. Police, Delhi* (1990) 1 SCC 422, *Peoples Union for Democratic Right v. State of Bihar* (1987)1 SCC 265, *Bhim Singh v. State of Jammu and Kashmir* AIR 1986 SC 494, *Delhi Domestic Working Women's Forum v. Union of India* (1995) I SCC 14, *Bodhisattwa Gautam v. Shubhra Chakraborty* AIR 1996 SCC 922

[74] (1988) 4 SCC 551

[75] (2013) 6 SCC 770

[76] *Shivaji Gaikwad v. State of Maharashtra* (2013) 6 SCC 770

application on non application of section 357 to eligible criminal cases. For the convenience of reading let us note the above rulings in Phase I and Phase II.

8.5.1 Phase I- Power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto

In *Hari Singh v. Sukhbir Singh and Ors*,[77] Supreme Court lamented the failure of the Courts in awarding compensation to the victims in terms of Section 357 (1) of the CrPC. The Court recommended to all Courts to exercise the power available under Section 357 of the CrPC liberally so as to meet the ends of justice. Thus observed the Court:

> "…. Sub-section (1) of Section 357 … is an important provision but Courts have seldom invoked it. Perhaps due to ignorance of the object of it. … *It may be noted that this power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto.* This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all Courts to exercise this power liberally so as to meet the ends of justice in a better way."

In number of other cases,[78] the Supreme Court assented judicial exposition to the fact that the power of the Courts to award compensation to victims under Section 357 is not ancillary to other sentences but in addition thereto and that imposition of fine and/or grant of compensation to a great extent must depend upon the relevant factors apart from such fine or compensation being just and reasonable.[79]

In *Manish Jalan v. State of Karnataka*,[80] the Supreme Court observed

> "Though a comprehensive provision enabling the court to direct payment of compensation has been in existence all through but the experience has shown that the provision has rarely attracted the attention of the courts. Time and again the courts have been reminded that the provision is aimed at serving the social purpose and should be exercised liberally yet the results are not very heartening."

In *K.A. Abbas H.S.A. v. Sabu Joseph*,[81] the Supreme Court retrated the position held by the above cases.

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[77] (1988) 4 SCC 551

[78] *Sarwan Singh and others v. State of Punjab* (1978) 4 SCC 111, *Balraj v. State of U.P.* (1994) 4 SCC 29, *Baldev Singh and Anr. v. State of Punjab* (1995) 6 SCC 593, *Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd. and Anr.* (2007) 6 SCC 528

[79] See *Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd*., (2007) 6 SCC

[80] (2008) 8 SCC 225

[81] (2010) 6 SCC 230

In *Roy Fernandes v. State of Goa*,[82] the Supreme Court again lamented that "the Criminal Courts do not appear to have taken significant note of Section 357 CrPC or exercised the power vested in them there under"

The bent of the judicial approach was, thus, always on the fuller exercise of the existing provision to rub the compensatory balm on the wounds of the victim so that possible rehabilitation could take place. The real exercise, however, began which may be noted as second phase.

8.5.2 Section 357 CrPC confers *a power coupled with a duty* on the Courts to apply its mind to the question of awarding compensation in every criminal case

Ankush Shivaji Gaikwad v. State of Maharashtra[83] decided by Hon'ble Supreme Court of India has been an eye opener in victim jurisprudence, an essential insertion in progressive interpretation and flagship in economic rehabilitation of sufferers.[84] Hon'ble bench consisting of J Thakur T.S. and J Gyan Sudha Misra laid down the proposition that

> "While the award or refusal of compensation under Section 357 of Code of Criminal Procedure, in a particular case may be within the Court's discretion, *there exists a mandatory duty on the Court to apply its mind to the question in every criminal case*. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation"[85]

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[82] (2012) 3 SCC 221

[83] *Ankush Shivaji Gaikwad v. State of Maharashtra* (2013) 6 SCC 770

The appellant-Ankush Shivaji Gaikwad accompanied by Madhav Shivaji Gaikwad (accused No.2) and Shivaji Bhivaji Gaikwad (accused No.3) were walking past the field when there was a scuffle between the deceased and the accused persons in the course. On account of the injury inflicted upon him, the deceased fell to the ground. All the three accused persons ran away from the spot. The deceased was rushed to the hospital. But, the deceased eventually succumbed to his injuries. According to the doctor, the death was caused by the injury to the common intention. The decision was affirmed by the High Court. The court had asked the learned counsel for the parties to make their submissions as to applicability of S. 357 A of the Code of Criminal Procedure providing for compensation by the State to the victims of the crime.

[84] Praveen Patil "Power of the Court to Award Compensation in Criminal Cases- Revisited? A Critical Appraisal of Ankush Shivaji Gaikwad V. State of Maharashtra", *JSSLC-Online Journal*, Volume-II, Issue-II , 2014, available at http://jsslawcollege.in/wp-content/uploads/2013/12/POWER-OF-THE-COURT-TO-AWARD-COMPENSATION-IN-CRIMINAL-CASES-REVISITED_.pdf

[85] In *Ankush Shivaji Gaikwad v. State of Maharashtra* (2013) 6 SCC 770, two premises weighed the court's reasoning for the said holding. *One* the established practices in England and USA, *second* rules of statutory interpretation where 'may' may be interpreted as 'shall'.

In England, the Criminal Justice Act 1982, requires courts to consider the making of a compensation order in every case of death, injury, loss or damage and, where such an order was not given, imposed a duty on the court to give reasons for not doing so. It also extended the range of injuries eligible for compensation. These new requirements mean that if the court fails to make a compensation order it must furnish reasons. Where reasons are given, the victim may apply for these to be subject to judicial review *(*Oxford Handbook of Criminology (1994 Edn., p.1237-1238), which has been quoted with approval in *Delhi Domestic Working Women's Forum v. Union of India and Ors.* (1995) 1 SCC 14)

In the United States of America, the Victim and Witness Protection Act of 1982 authorizes a federal court to award restitution by means of monetary compensation as a part of a convict's sentence. Section 3553(a) (7) of Title 18 of the Act requires Courts to consider in every case *"the need to provide restitution to any victims of the offense"*. Though it is not mandatory for the Court to award restitution in every case, the Act demands that the Court provide its reasons for denying the same. Section 3553(c) of Title 18 of the Act states as follows: *"If the court does not order restitution or orders only partial restitution, the court shall include in the statement the reason thereof."*

Applying the reasoning adopted in *Smt. Bachahan Devi and Anr. v. Nagar Nigam, Gorakhpur and Anr* [86]and *Dhampur Sugar Mills Ltd. v. State of U. P. and Ors,*[87] the court observed that,

> "[a]pplying the tests which emerge from the above cases to Section 357, it appears to us that the provision confers a power coupled with a duty on the Courts to apply its mind to the question of awarding compensation in every criminal case. We say so because in the background and context in which it was introduced, the power to award compensation was intended to reassure the victim that he or she is not forgotten in the criminal justice system. The victim would remain forgotten in the criminal justice system if despite Legislature having gone so far as to enact specific provisions relating to victim compensation, Courts choose to ignore the provisions altogether and do not even apply their mind to the question of compensation. It follows that unless Section 357 is read to confer an obligation on Courts to apply their mind to the question of compensation, it would defeat the very object behind the introduction of the provision." [88]

Further, after survey of number of cases,[89] the court observed that,

> "Section 357 CrPC confers a duty on the Court to apply its mind to the question of compensation in every criminal case. It necessarily follows that the Court must *disclose* that it has applied its mind to this question in every criminal case"

The ignorant attitude of lower judiciary was intolerable to the Supreme Court when it apparently observed that

> "we regret to say that the trial court and the High Court appear to have remained oblivious to the provisions of Section 357 CrPC. The judgments under appeal betray ignorance of the courts below about the statutory provisions and the duty cast upon the courts. Remand at this distant point of time does not appear to be a good option either. This may not be a happy situation but having regard to the facts and the circumstances of the case and the time lag since the offence was committed, we conclude this chapter in the hope that the courts remain careful in future."

In para 68 of the said judgment, the Supreme Court directed that the copy of the judgment be forwarded to the Registrars of all the High Courts for circulation

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[86] AIR 2008 SC 1282
[87] (2007) 8 SCC 338
[88] *Ankush Shivaji Gaikwad v. State of Maharashtra* (2013) 6 SCC 770 at Para 50
[89] *NEPC Micon Ltd. and Ors. v. Magma Leasing Ltd*. (1999) 4 SCC 253, *Swantraj and Ors. v. State of Maharashtra* (1975) 3 SCC 322, *Hari Singh's State of Andhra Pradesh v. Polamala Raju @ Rajarao* (2000) 7 SCC 75, *State of Punjab v. Prem Sagar and Ors*. (2008) 7 SCC 550, *Sangeet & Anr. v. State of Haryana* (2013) 2 SCC 452, *Maya Devi (Dead) through LRs and Ors. v. Raj Kumari Batra (Dead) through LRs and Ors*. (2010) 9SCC 486, *State of Rajasthan v. Sohan Lal and Ors*. (2004) 5 SCC 573, *Hindustan Times Ltd. v. Union of India* (1998) 2 SCC 242, *Director, Horticulture Punjab and Ors. v. Jagjivan Parshad* (2008) 5 SCC 539, *Hindustan Times Ltd. v. Union of India* (1998) 2 SCC 242, *Arun v. Inspector General of Police* (1986) 3 SCC 696, *Union of India v. Jai Prakash Singh* (2007) 10 SCC 712, *Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity* (2010) 3 SCC 732, *Ram Phal v. State of Haryana* (2009) 3 SCC 258, *Director, Horticulture, Punjab v. Jagjivan Parshad* (2008) 5 SCC 539

among Judges handling criminal trials and hearing appeals.[90]

Thus the combined reading of *Hari Singh*[91] and other judgments[92] that followed *Ankush Shivaji Gaikwad*, [93] the invincibly corollary that follows is[94]

1. The power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto
2. Section 357 CrPC confers a power coupled with a duty on the Courts to apply its mind to the question of awarding compensation in every criminal case.
3. It necessarily follows that the Court must disclose that it has applied its mind to this question in every criminal case.
4. Disclosure of application of mind is best demonstrated by recording reasons in support of the order or conclusion.
5. If application of mind is not considered mandatory, the entire provision would be rendered a dead letter.
6. This power is intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system.
7. This power is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes.

Exercising powers under section 357A, many states have framed their own schemes for the providing victim compensation. However, there exists marked imbalance in the way the schemes are framed and compensation provided. In *Tekan Alias Tekram Versus State of Madhya Pradesh*[95] Supreme Court while addreesing the scheme framed by the State of Chhattisgarh the court surveyed[96] the schemes framed by other states in respect of similar crimes. As many as 25 schemes prepared on similar crimes by states and union territories were surveyed by the court to note that surprisingly as low as 20,000/ to 10,00000/- compensation schemes have been

[90] Pursuant to the said direction, the copy of the judgment was circulated vide letter no. 3551-356/DHC/Gaz/GX/ SCJudgment/2013 dated 8th July, 2013
[91] *Hari Singh v. Sukhbir Singh and Ors* (1988) 4 SCC 551
[92] See *Manish Jalan v. State of Karnataka* (2008) 8 SCC 225, *K.A. Abbas H.S.A. v. Sabu Joseph* (2010) 6 SCC 230, *Roy Fernandes v. State of Goa* (2012) 3 SCC 221
[93] *Ankush Shivaji Gaikwad v. State of Maharashtra* (2013) 6 SCC 770
[94] *Supra* note 84
[95] 2016 SCC OnLine SC 131
[96] In Para 11 the court juxtapositioned the position in 25 states and union territories and appreciated scheme framed by Goa as model scheme to be adopted.

developed for the same crimes! The court observed

> "[p]erusal of the aforesaid victim compensation schemes of different States and the Union Territories, it is clear that no uniform practice is being followed in providing compensation to the rape victim for the offence and for her rehabilitation. This practice of giving different amount ranging from Rs.20, 000/- to Rs.10, 00,000/- as compensation for the offence of rape under section 357A needs to be introspected by all the States and the Union Territories. They should consider and formulate a uniform scheme specially for the rape victims in the light of the scheme framed in the State of Goa which has decided to give compensation up to Rs.10,00,000/-."

In the end, the court ordered as under

> "19. In the result, we dismiss the appeal having no merit and issue the following directions:-
>
> 1) All the States and Union Territories shall make all endeavour to formulate a uniform scheme for providing victim compensation in respect of rape/sexual exploitation with the physically handicapped women as required under the law taking into consideration the scheme framed by the State of Goa for rape victim compensation;"

i. Interim Compensation for Immediate Relief

In *Suresh & Anr.v. State of Haryana*,[97] the Supreme Court interpreted section 357 to include interim compensation also.[98] In a case where state failed to protect the life of two,[99] the court observed:

> "…We are of the view that it is the duty of the Courts, on taking cognizance of a criminal offence, to ascertain whether there is tangible material to show commission of crime, whether the victim is identifiable and whether the victim of crime needs immediate financial relief. On being satisfied on an application or on its own motion, the Court ought to direct grant of interim compensation, subject to final compensation being determined later. Such duty continues at every stage of a criminal case where compensation ought to be given and has not been given, irrespective of the application by the victim.
>
> Gravity of offence and need of victim are some of the guiding factors to be kept in mind, apart from such other factors as may be found relevant in the facts and circumstances of an individual case. We are also of the view that there is need to consider upward revision in the scale for compensation and pending such consideration to adopt the scale notified by the State of Kerala in its scheme, unless the scale awarded by any other State or Union Territory is higher. The States of Andhra Pradesh, Madhya Pradesh, Meghalaya and Telangana are directed to notify their schemes within one month from receipt of a copy of this order. We also direct that a copy of this judgment be forwarded to National Judicial Academy so that all judicial

[97] Supreme Court November 28, 2014 [bench consisting of JJ. V. Gopala Gowda and Adarsh Kumar Goel and lead judgment by J. Adarsh Kumar Goel)

[98] Interim compensation for violation of public law was first promulgated by supreme court in *Bodhisattwa Gautam v. Subhra Chakraborty* (1996) 1 SCC 490

[99] This was case of kidnap and murder for a ransom of Rs fifty lakh. Two persons were murdered for not fulfilling the demand of ransom amount. The appeal was preferred against conviction and sentence of the appellants under Sections 302 read with Sections 34, 364-A, 201 and 120-B of the Indian Penal Code. The conviction was upheld by the high court and confirmed by the Supreme Court.

> officers in the country can be imparted requisite training to make the provision operative and meaningful.
> We determine the interim compensation payable for the two deaths to be rupees ten lacs, without prejudice to any other rights or remedies of the victim family in any other proceedings. … Accordingly, while dismissing the appeal, we direct that …the victim be paid interim compensation of rupees ten lacs. It will be payable by the Haryana State Legal Services Authority within one month from receipt of a copy of this order. If the funds are not available for the purpose with the said authority, the State of Haryana will make such funds available within one month from the date of receipt of a copy of this judgment and the Legal Services Authority will disburse the compensation within one month thereafter"

ii. Judiciary Crossing Ceiling of Maxim Fixed by Various Compensation Schemes

Victim Compensation Scheme under Section 357-A, Cr.PC have been framed by most of the states ranging from as low as Rs. 25,000/ to 10 Lacs. Most of the states range their compensation scheme from 2 lac to 3 lacs. However, this amount may not satisfy certain crimes. Crimes like rapes and acid attacks require through rehabilitation which may not be possible in the meager amount of 2 to 3 lacs. Therefore supreme court refused to be bound by monetary limits fixed by the schemes or limits fixed by judgments of the court. In *Parivartan Kendra*,[100] Supreme Court disregarded its own judgment[101] and awarded 10 lacs compensation for acid victims.[102] In *Tekan Alias Tekram v. State of Madhya Pradesh*[103] the Supreme Court Going out of its usual way, ordered the state government to pay Rs 8000/- monthly compensation to the unfortunate blind victim of the rape for the rest of her life! [104]

In a judgment of far reaching consequence, in *Aarti Thakur v. State of Maharashtra and Ors*,[105] the Bombay High Court held that Manodhairya Yojana framed by government of Maharashtra is arbitrary on both counts, i.e., fixing October

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[100] http://indiankanoon.org/doc/16029001/ assessed on 17 March, 2016

[101] In *Laxmi v. Union of India* (2014) 4 SCC 427, the Supreme Court laid down Rs 3 Lacs as minimum compensation. See *Laxmi v. Union of India W.P* (CRL.) NO.129 OF 2006 by order dated APRIL 10, 2015 available at http://judis.nic.in/supremecourt/imgs1.aspx?filename=42588 assessed on 17 March, 2016

[102] In *Parivartan Kendra v. Union of India and Others* (http://indiankanoon.org/doc/16029001/) the Supreme Court awarded ten lacs compensation to the duo who suffered acid attack. The court itself clarified that Rs. 3,00,000/ compensation fixed in the earlier case is the minimum and there is nothing in that case or in any schemes framed by the states which binds the state or court to award more than that in peculiar cases and circumstances.

[103] 2016 SCC OnLine SC 131, Criminal Appeal No. 884 Of 2015, 11/02/2016

[104] See Praveen Patil "Rehabilitative Sentencing In Rape Cases: An Appraisal of Tekan Alias Tekram V. State Of Madhya Pradesh" *JSSJLSR-Online Journal*, Vol. IV, Issue-I, 2016, available at http://jsslawcollege.in/wp-content/uploads/2013/12/REHABILITATIVE-SENTENCING-IN-RAPE-CASES-AN-APPRAISAL-OF-TEKAN-ALIAS-TEKRAM-V.-STATE-OF-MADHYA-PRADESH.pdf

[105] The petition copy is available at http://www.hrln.org/hrln/images/stories/pdf/arti-thakur-case.pdf

2, 2013 as the date from which benfits shall be claimed and such benfits shall be upto Rs 3 lakh only. Aarti Thakur suffered acid attack in 2012. She claimed for her medical treatment to the tune of 4 lakhs. Upon being turned down, she moved the high court challenging the cap of Rs 3 lakh and the cut-off date of October 2, 2013 set on the Manodhairya Yojana. The court ordered 'the government to pay the hospital after collecting the bills'. Aarti's surgery and other hospital expenses was estimated at Rs 4 lakhs approximately. The court also directed 'the hospital to ensure that the Aarti is operated without waiting for the money. The bills shall be submitted to the state government which shall within four weeks thereafter pay them.'[106]

a. **Recovery And Default In Payment – Sentencing Policy**

i. Fine and compensation - distinction

Courts are empowered to make direction u/s 357 of the CrPC towards paying compensation. Section 357(1)(b) also enables the court to direct payment of compensation, if a sentence of fine has not been imposed. What then is the difference between a 'fine' and 'compensation'? This was cleared the Supreme Court in *Dilip S. Dahanukar v. Kotak Mahindra Co*.[107] the court held

> "…The distinction between sub-sections (1) and (3) of Section 357 is apparent. Sub-section (1) provides for application of an amount of fine while imposing a sentence of which fine forms a part; whereas sub-section (3) calls for a situation where a court imposes a sentence of which fine does not form a part of the sentence…We must, however, observe that there exists a distinction between fine and compensation, although, in a way it seeks to achieve the same purpose. An amount of compensation can be directed to be recovered as a fine but the legal fiction raised in relation to recovery of fine only, it is in that sense fine stands on a higher footing than compensation awarded by the court."

i. Can a compensation order impact the severity of the sentence imposed?

Compensation is a part of the sentence not a sentence in toto. Though compensation can be awarded with substantive term imprisonment the award of compensation shall not reduce the quantum of sentence. Several pronouncements would show that in cases where compensation has been enhanced by the appellate court or the revisional court, notional sentences have been imposed. Can a compensation order be permitted to impact the severity of the sentence imposed? [108] Though this practice was and is in

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[106] See Rosy Sequeira, "Pay for acid attack victim's surgery: HC directs Maharashtra govt" *The Times of India*, Mar 19, 2015 available at http://timesofindia.indiatimes.com/india/Pay-for-acid-attack-victims-surgery-HC-directs-Maharashtra-govt/articleshow/46623846.cms

[107] (2007) 6 SCC 528

[108] *Vishal Yadav v. State Govt. of UP* (2015) available at http://indiankanoon.org/doc/154440315/, para 345

vogue,[109] actually this practice has been deprecated by the Supreme Court. In *Hazara Singh v. Raj Kumar & Ors*.,[110] the court "deprecated the practice of lesser imprisonment, against higher compensation. The court observed that payment of higher compensation will not absolve the accused from sentence of imprisonment. Power of wealth need not extend to overawe court processes." [111]

In the *Guru Basavaraj v. State of Karnataka*,[112] the Supreme Court again ruled that compensation is not a substitute for adequacy sentence. Thus a compensation order is not a part of a sentence. The practice of a heavier compensation order resulting in a small sentence is clearly contrary to the very basis of sentencing.[113] If applied, there is a large possibility of it being misused. It would certainly result in miscarriage of justice.[114]

ii. Quantification and Recovery of compensation and whether imposition of a default sentence for default in payment of compensation is permissible

The modes of determination of compensation remain unclear, uncertain and inconsistent. The suitable method for determining compensation for the purpose of section 357 would be multiplier method for computation of adequate compensation[115]

The method recognised in Section 163A of the Motor Vehicles Act appears to be safest method. This is multiplier method which followed in all other branches of law.[116] The statutory mode of recovery of fine is provided u/s 421 of Cr.PC as under

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[109] See *Prabhu Prasad Sah v. State of Bihar* (1976) 4 SCC 289, *Nand Ballabh Pant v. State (Union Territory of Delhi)* (1976) 4 SCC 512, *Guruswamy v. State of Tamil Nadu* (1979) 3 SCC 797, *Nehru Jain v. State NCT of Delhi* 116 (2005) DLT 634, *R. P. Tyagi v. State* 153 (2008) DLT 693, *Roy Fernandes v. State of Goa* (2012) 3 SCC 221

[110] (2013) 9 SCC 516

[111] See also *Sadha Singh v. State of Punjab* (1985) 3 SCC 225

[112] (2012) 8 SCC 734

[113] *Vishal Yadav v. State Govt. of UP* (2015) available at http://indiankanoon.org/doc/154440315/ para 350

[114] *R. v. Oliver John Huish* [(1985) 7 Cri App R (S) 272, *K.A Abbas H.S.A. v. Sabu Joseph* (2010) 6 SCC 230

[115] See *U.P. State Road Transport Corporation & Ors. v. Trilok Chandra & Ors*. (1996) 4 SCC 362, *C.K. Subramania Iyer v. T. Kunhikuttan Nair* (1969) 3 SCC 64, *Gobald Motor Service Ltd. v. Veluswami* 1962 (1) SCR 929, *Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole* AIR 1969 SC 128, *Lachman Singh v. Gurmit Kaur* (1984) ACC 489, *Lachman Singh v. Gurmit Kaur* AIR 1979 P&H 50, *Bir Singh v. Hashi Rashi Banerjee* AIR 1956 Cal. 555, *Lata Wadhwa v. State of Bihar* (2011) 8 SCC 197, *Jaipur Golden Gas Victims Association v. Union of India* (2009) DLT 346, *Ram Kishore v. MCD* 2007 (97) DRJ 445, *Ashok Sharma v. Union of India* 2009 ACJ 1063, *Jaipur Golden Gas Victims Association v. Union of India & Others* (2009) DLT 346, *Ashok Sharma & Others v. UOI & Others* 2009 ACJ 1063, *Kamla Devi v. Govt. of NCT of Delhi* (2004) DLT 57, *M.S. Grewal & Anr. v. Deep Chand Sood & Ors* (2001) 8 SCC 151, *Ishwar Devi Malik. v. Union of India ILR* (1968) 1 Delhi 59, *Nagrik Sangarsh Samiti v. Union of India* MANU/DE/0965/2010.

[116] *Vishal Yadav v. State Govt. of UP* (2015) available at http://indiankanoon.org/doc/154440315/, para 369

> "421. Warrant for levy of fine.-
> (1) When an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may-
> (a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;
> (b) issue a warrant to the Collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter:
> Provided that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless it has made an order for the payment of expenses or compensation out of the fine under section 357.
> (2) The State Government may make rules regulating the manner in which warrants under clause (a) of sub- section (1) are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.
> (3) Where the Court issues a warrant to the Collector under clause (b) of sub-section (1), the Collector shall realise the amount in accordance with the law relating to recovery of arrears of land revenue, as if such warrant were a certificate issued under such law: Provided that no such warrant shall be executed by the arrest or detention in prison of the offender."

What can be done if a person commits default of payment of fine? The Indian Penal Code statutorily recognises the permissibility of directing imprisonment in default of payment of fine under Section 64 of the Indian Penal Code which specifically provides that the court which sentences an offender, shall be competent to direct that in default of payment of fine, the offender shall suffer imprisonment for a certain term, in which the imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence. So far as the description of such imprisonment for the non-payment of fine is concerned, discretion is given to the court under Section 66 of the IPC which permits the court to impose imprisonment in default of payment of fine to be of any description to which the offender might have been sentenced for the offence. So far as the limits to imprisonment for non-payment of fine are concerned, when imprisonment and fine are awardable, the same are provided in Section 65 and when the offence is punishable with fine only, Section 67 provides the limits. Under Ss 68 and 69, the legislature has provided for payment of the fine or part of the fine and the consequences thereof on the default imprisonment.[117]

Though the Cr.PC does not provide specific provision for recovery of the

[117] *Vishal Yadav v. State Govt. of UP* (2015) available at http://indiankanoon.org/doc/154440315/, para 394

amount of compensation u/s 357 of the Cr.PC, it is essential to refer to Section 431 in this regard which reads thus:

> " 431. Money ordered to be paid recoverable as a fine.- Any money (other than a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine:
>
> Provided that Section 421 shall, in its application to an order under section 359, by virtue of this section, be construed as if in the proviso to sub-section (1) of section 421, after the words and figures under section 357, the words and figures or an order for payment of costs under section 359 had been inserted."

An order for payment of compensation by the defendant upon conviction in a criminal trial is certainly an order under Section 357 of the CrPC and therefore, would be recoverable in accordance with the procedure prescribed under Section 431. Section 431 adverts to Section 421 of the CrPC As such, the recovery of compensation would be effected in a manner prescribed under Section 421 of the CrPC.

The statute has provided for imposition of imprisonment upon default of payment of a sentence of fine.[118] In *Balraj v. State of U.P.*,[119] the Supreme Court directed that if the appellant did not pay the amount of compensation as ordered, the same may be collected as provided under Section 431 of the CrPC and paid to the victim.

The sentence of imprisonment for default in payment of compensation is different from the regular sentence of imprisonment imposed as a punishment. It is in consonance with Section 66 of the IPC.

iii. Impact of undergoing default sentence on liability for payment of fine/compensation

Having said that u/s 357 of the CrPC the court can impose a default imprisonment for failure to pay compensation, what is the impact of undergoing the

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[118] See *K. Bhaskaran v. Sankaran Vaidhyan Balan* (1999) 7 SCC 510, *Suganthi Suresh Kumar v. Jagdeeshan* (2002) 2 SCC 420, *Hari Singh v. State of U.P.* (1988) 4 SCC 551, *Hari Singh v. Sukhbir Singh* (1988) 4 SCC 551, *Ahammedkutty v. Abdullakoya* (2009) 3 SCC (Cri) 302, *Vijayan v. Sadanandan K. & Anr.*, (2009) 6 SCC 652, *K.A Abbas H.S.A. v. Sabu Joseph* (2010) 6 SCC 230, *Radhakrishnan Nair v. Padmanabhan* (2000) 2 KLT 349 *R. Mohan v. A.K. Vijaya Kumar* (2012) 8 SCC 721, *Subrata Roy Sahara v. Union of India* (2014) 8 SCC 470

[119] (1994) 4 SCC 29

default sentence on the compensation liability needs to be answered.[120] By the ruling of *Kuldeep v. Surender Singh*[121] the court has already established that sentencing a person to jail is a "mode of enforcement" and not a "mode of satisfaction".

It is evident, therefore, that too heavy a compensation amount and too trivial the default imprisonment would negate the efficacy of not only the compensation, but also of the length of default imprisonment.[122] The nature of term imprisonment default of payment of fine is best illustrated by the Supreme Court in *Shantilal v. State of M.P.*[123] It observes

> " …The term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment of fine. The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole either in appeal or in revision or in other appropriate judicial proceedings or otherwise. A term of imprisonment ordered in default of payment of fine stands on a different footing. A person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. He, therefore, can always avoid to undergo imprisonment in default of payment of fine by paying such amount."

The default sentence is a method of procuring enforcement of the order and not a method for discharge of liability. Undergoing the default sentence would not discharge the liability to pay the compensation ordered by the court.[124]

8.6 Cost of Litigation and Sentencing Policy

There is huge cost of litigation even in criminal cases also though comparatively criminal cases run for a lesser duration to get disposed of. The contributing factors in the increase is the fact that the accused who is in the state custody is deemed to be innocent and therefore all expenses of such person as long as he is in custody is to be borne by the state itself. At the end of the trial, courts may ask the accused to pay for the expenses which are surprisingly limited to the fine to be paid under section 357. The unscrupulous litigant have taken advantages of such facilities and spend considerable time in government or private hospitals to avoid inconvenience of jails and to be in touch with their well wishers. The entire or substantial expenses of such cozy trip to hospital is sponsored by the state which

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[120] *Vishal Yadav v. State Govt. of UP* (2015) available at http://indiankanoon.org/doc/154440315/, para 409
[121] (1989) 1 SCC 405
[122] *State of Gujarat v. Hon'ble High Court of Gujarat* (1998) 7 SCC 392
[123] (2007) 11 SCC 243
[124] *Vishal Yadav v. State Govt. of UP* (2015) available at http://indiankanoon.org/doc/154440315/, para 414 and 415

encashes on public exchequer. This fact has been predominantly deprecated by Justice Geeta Mittal in *Vishal Yadav* [125] where she went to miniscule minutes of the each penny spent on the accused during the entire trial and ordered for the recovery of the same. Justice Geeta Mittal imposed a fine of rupees fifty lac on the accused and ordered it to be disbursed in the order mentioned. The operative part of the judgment was as under:

For commission of offences under	**Sentences awarded to each of Vikas Yadav & Vishal Yadav**	**Sentence awarded to Sukhdev Yadav**
Section 302/34 IPC	Life imprisonment which shall be 25 years of actual imprisonment without consideration of remission, and fine of Rs. 50 lakh each	Life imprisonment which shall be 20 years of actual imprisonment without consideration of remission, and fine of Rs.10,000/-
	Upon default in payment of fine, they shall be liable to undergo rigorous imprisonment of 3 years.	Upon default in payment of fine, he shall be liable to undergo simple imprisonment for one month.
Section 364/34 IPC	Rigorous imprisonment for 10 years with a fine of Rs.2 lakh each	10 years rigorous imprisonment with fine of Rs.5,000/-
	Upon default in payment of fine, they shall be liable to undergo rigorous imprisonment for 6 months	Upon default in payment of fine, he shall be liable to undergo simple imprisonment for 15 days
Section 201/34 IPC	Rigorous imprisonment for 5 years and a fine Rs.2 lakh each	5 years rigorous imprisonment with fine of Rs.5,000/-
	Upon default in payment of fine, they shall be liable to undergo rigorous imprisonment for 6 months	Upon default in payment of fine, he shall be liable to undergo simple imprisonment for 15 days

(III) The amount of the fines shall be deposited with the trial court within a period of six months from today.

(IV) We further direct that the fine amounts of Rs.50,00,000/- of each of Vikas Yadav and Vishal Yadav when deposited with the trial court, are forthwith disbursed in the following manner:

1	To the Government of Uttar Pradesh towards investigation, prosecution and defence of the cases with regard to FIR No.192/2002 P.S. Ghaziabad.	Rs.5,00,000/- from the deposit of the fine of each of the defendants
2	To the Government of NCT of Delhi towards prosecution, filing and defence of litigation, administration of courts and witness protection with regard to FIR No.192/2002 P.S. Ghaziabad	Rs.25,00,000/- from the deposit of the fine of each of the defendants
3	To Nilam Katara towards the costs incurred by her	Rs.20,00,000/- from the deposit of

[125] *Ibid*

	in pursuing the matter, filing petitions and applications as well as defending all cases after 16th/17th February, 2002 with regard to FIR No.192/2002 in all courts.	the fine of each of the defendants

(V) Amount of fines deposited by Sukhdev Yadav and other fines deposited by Vikas Yadav and Vishal Yadav shall be forwarded to the Delhi Legal Services Authority to be utilised under the Victims Compensation Scheme.

(VII) So far as Vikas Yadav is concerned, we also issue the following directions:

(i) The period for the admission in AIIMS from 10th October, 2011 to 4th November, 2011 (both days included) shall not be counted as a period for which he has undergone imprisonment. His records and nominal rolls shall be accordingly corrected by the jail authorities.

(ii) **Vikas Yadav** shall make payments of the following amounts to the Government of NCT of Delhi:

1	Amounts paid to AIIMS	Rs.50,750/-
2	Towards security deployment during AIIMS	Rs.1,20,012/-
3	OPD visits	Rs.50,000/-
4	Taxi fare	Rs.18,500/-
	Total	**Rs.2,39,262/-**

(ii) **Vishal Yadav** shall make payments of the following amounts to the Government of NCT of Delhi:

1	Provision of security during the above seven hospital admissions post conviction	Rs.14,75,184/-
2	During OPD hospital visits	Rs.50,000/-
3	Post conviction visits on taxi fare	Rs.14,700/-
	Total	**Rs.15,39,884/-**

(IX) The amounts directed to be paid by Vishal Yadav and Vikas Yadav at Sr. Nos.(VI) and (VII) above shall be deposited within four months of the passing of the present order.

(X) In the event of the failure to deposit the amount as directed at Sr. Nos.(VI), (VII) and (VIII), the defaulting defendant (Vikas Yadav and Vishal Yadav) shall be liable to undergo rigorous imprisonment of one year. It is made clear that these directions are in addition to the substantive sentences imposed upon them."

It is interesting to note that out of 50 lacs, 30 lacs was awarded to the government for various expenses it incurred towards hospitalization charges and hospitality. This kind of exercises is hardly seen in courts. The economics of sentencing policy can work in proper perspective if such exercises are undertaken by the judges. Incarceration is not the only answer to the crime. It has to be rebuked with appropriate economic sanctions, which may be in the form of victim compensation and reimbursement of legal expenses incurred both by the state and the party.

8.7 Mandatory Fine And Or Compensation- A New Legislative Trend Of Sentencing Policy

The modern tendency of legislature in fixing fine and or compensation for every crime is being witnessed which fact underlines that there is economics behind sentencing policy. Though state undertakes to provide compensation where there is need of, such responsibility shall be assumed, primarily, by the offender who causes harm. To fix such responsibility modern legislations have come up with mandatory fine - fixed or unremunerated- whereby courts shall impose fine and or compensation on the accused to be paid to the victims. The recent legislations like Protection of Children Form Sexual Offences Act, 2012, Criminal Law (Amendment) Act, 2013; The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 etc have come up with mandatory fine provision in addition to the incarceration. All offences under Protection of Children Form Sexual Offences Act, 2012, come with mandatory fine which is unremunerated. The courts are free to calculate the harm and cost of restitution in imposing fine. This mechanism gives free hand to the courts to bring the accused to the book economically. Similarly, The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, also prescribes mandatory fine apart from increasing victim compensation from the state to the tune of eight lacs.[126] As noted elsewhere, the Criminal Law (Amendment) Act, 2013 went a step further in providing that in case of acid victims and gang rapes the fine imposed shall be adequate to meet the medical expenses of such victim. There is no problem, thus, seen with modern legislations. The Indian Penal Code, 1860, however needs complete overhauling in terms of increase in the fine and economics of sentencing policy. At least 100 times increase in the existing legislations is needed on the urgent basis to answer the economics of sentencing policy in India.

The need of the hour in sentencing policy is to think about the crimes and punishments from the backgrounds of the economics. Offenders must no doubt be meted with incarceration, but the fact of economical effects of such crimes cannot be lost sight of. The existing provisions under IPC relating to fine are not up-to-date. Rather they are so outdated that criminals are encouraged by such provisions. Take

[126] See Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Rules, 2016. The notification now specifies 47 categories of offences in which states will pay compensation ranging from Rs 1 lakh to Rs 8.25 lakh to SC/ST victims. Prior to this notification, only 22 kinds of offences with minimum compensation ranging from Rs 60,000 to Rs 5 lakh were included.

for example of sections 372 and 373 of IPC relating to the food adulteration. The punishment is six months imprisonment and one thousand rupees fine. Even if the criminal is punished under these sections, he would happily accept the punishment in return for the huge gain he may obtain from such business. Such offenders may on the other hand cause huge economic loss to the victims leaving them economically devastated and crippled. Therefore, in this context, the Law Commission of India thus reports:[127]

> " 6.5 As we are aware that adulteration of food causes several health problems in humans. Most of the food adulterants are very harmful and toxic; yet, the greed and profit motive encourages anti-social persons for adulteration. Therefore, the tackling of food adulteration is required to be given due importance for its serious effect on the health of the public. From the above, it may be seen that though the offences covered under sections 357A and 357B of CrPC stand at a different pedestal than the food adulteration; yet, in case where the food adulteration causes grievous injury or where such adulteration results in death seems to be the cases which can be squarely covered under section 357B keeping in view the health hazards due to food adulteration which results in various ailments and premature deaths. Thus, keeping in view the serious nature of the crime, the aforesaid two cases be covered under section 357B of CrPC"

Taking into account the above predicament and to infuse economics in the sentencing policy, the Law Commission[128] has recommended newer version of section 272[129]

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[127] Law Commission of India, 264th Report on "*The Criminal Law (Amendment) Bill, 2017 (Provisions dealing with Food Adulteration)"*January, 2017

[128] *Ibid*

[129] The existing section as on date with state amendment is as follows

> "Section 272. Adulteration of food or drink intended for sale.
> Whoever adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.
> The text of the State Amendment in respect of Orissa is as under:
> Orissa.- In section 272 for the words "shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both", the following shall be substituted, namely:—
> "shall be punished with imprisonment for life and shall also be liable to fine:
> Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment which is less than imprisonment for life." [Vide Orissa Act 3 of 1999, sec. 2 (w.e.f. 27.1.1999)].
> Uttar Pradesh. – In section 272 for the words "shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both", substitute the following words, namely:-
> "shall be punished with imprisonment for life and shall also be liable to fine:
> Provided that the court may, for adequate reasons to be mentioned in the judgement, impose a sentence of imprisonment which is less than imprisonment for life."
> [Vide Uttar Pradesh Act 47 of 1975, sec. 3 (w.e.f. 15.9.1975)].
> West Bengal.-In section 272 for the words "of either description for a term which may extend to six months, or with fine which mays extend to one thousand rupees, or with both", substitute the following words, namely:-
> "for life with or without fine:
> Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment which is less than imprisonment for life." {Vide West Bengal Act 42 of 1973, sec. 3 (w.e.f. 29.4.1973]

which will take care of economic needs of the victim on the basis of gravity of the offence. The Law Commission recommends:

> Substitution of new section for section 272. In the Indian Penal Code, (45 of 1860) (hereinafter referred to as the Penal Code), for section 272, the following section shall be substituted, namely :-
>
> *"*272. *Adulteration of food or drink intended for sale.*- Whoever adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished, -
>
> (i) where such adulteration does not result in injury, with imprisonment for a term which may extend to six months and also with fine which may extend to one lakh rupees;
>
> (ii) where such adulteration results in non-grievous injury, with imprisonment for a term which may extend to one year and also with fine which may extend to three lakh rupees;
>
> (iii) where such adulteration results in a grievous injury, with imprisonment for a term which may extend to six years and also with fine which shall not be less than five lakh rupees;
>
> (iv) where such adulteration results in death, with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and also with fine which shall not be less than ten lakh rupees:
>
> Provided that the court may, for adequate reason to be mentioned in the judgment, impose a sentence of imprisonment which is less than imprisonment for life:
>
> Provided further that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:
> Provided also that any fine imposed under this section shall be paid to the victim."

Similarly section 273 is also proposed to be recast[130] with heavier elements of fine on the basis of proportionality principle. The Law Commission recommends the following words in the existing section

> Substitution of new section for section 273. In the Penal Code, for section 273, the following section shall be substituted, namely:-
>
> *"*273. *Sale of noxious food or drink.*- Whoever sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit for food or drink, knowing or having reason to

[130] The existing section as on date is as under

> "273. Sale of noxious food or drink. - Whoever sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit for food or drink, knowing or having reason to believe that the same is noxious as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."
> In section 273, State Amendments are the same as under section 272

believe that the same is noxious as food or drink, shall be punished, -

(i) where the sale, offer for sale or exhibition for sale of such food or drink, does not result in injury, with imprisonment for a term which may extend to six months and also with fine which may extend to one lakh rupees;

(ii) where the sale of such food or drink, results in non-grievous injury, with imprisonment for a term which may extend to one year and also with fine which may extend to three lakh rupees;

(iii) where the sale of such food or drink, results in a grievous injury, with imprisonment for a term which may extend to six years and also with fine which shall not be less than five lakh rupees;

(iv) where the sale of such food or drink, results in death, with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and also with fine which shall not be less than ten lakh rupees:

Provided that the court may, for adequate reason to be mentioned in the judgment, impose a sentence of imprisonment which is less than imprisonment for life:

Provided further that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:
Provided also that any fine imposed under this section shall be paid to the victim."

8.8 Conclusion

A victim of a crime cannot be a "forgotten man" in the criminal justice system. It is he who has suffered the most. Injustice to victims in terms of reparation would create a constitutional vacuum in legal system. Although, retribution is primary function of law, reparation is the ultimate goal of the law. Hence, there is an all round development of compensatory jurisprudence would over. India has anchored the compensation claims in constitution and Criminal Procedure Code 1973. Sections 357, 357A and 357B of Criminal Procedure Code 1973 hold launching pad of compensation in criminal cases. Though comprehensive provisions enabling the Court to direct payment of compensation have been in existence all through, the experience shows that the provision has rarely attracted the attention of the Courts. Time and again the Courts have been reminded that the provision is aimed at serving the social purpose and should be exercised liberally yet the results are not very inspiring. However, of late, the insertion of section 357A and 357B in Criminal Procedure Code 1973 has triggered the new compensatory regime which is further supplemented by recent pronouncement of Supreme Court in *Ankush Shivaji Gaikwad v. State of Maharashtra.*(supra) No words can better summarize than that the court in *Ward v.*

James [131]

> "[a]lthough you cannot give a man so gravely injured much for his 'lost years', you can, however, compensate him for his loss during his shortened span, that is, during his expected 'years of survival'. You can compensate him for his loss of earnings during that time, and for the cost of treatment, nursing and attendance. But how can you compensate him for being rendered a helpless invalid? He may, owing to brain injury, be rendered unconscious for the rest of his days, or, owing to a back injury, be unable to rise from his bed. He has lost everything that makes life worthwhile. Money is no good to him. Yet judges and juries have to do the best they can and give him what they think is fair. No wonder they find it well nigh insoluble. They are being asked to calculate the incalculable…"

The reply to this paragraph lies in the legislative trends that are emerging and the judicial expositions the courts are supplementing to compensatory law in India.

[131] (1965) 1 All ER 563

CHAPTER-IX

CONCLUSION AND SUGGESTIONS

9.1 Conclusion

Sentencing in India is predominately dominated by discretion and individualization of punishment. The judges in India enjoy considerable discretion in choosing sentences in the given choice.[1] The old yet time tested Indian penal Code, 1860 vests considerable discretion in the hands of the judges.[2] The choice of punishment is also limited though that can be justified on the ground that the penal legislation is old and British. The Indian Penal Code, 1860 prescribes only five types of punishments death being the highest and fine being the lowest. Whereas death penalty and life imprisonment are in controversial conundrum for being imposed freakishly and arbitrarily, term imprisonments have attracted the attention of penologist for hardening the criminals rather than brining a sense of reformation. Fines are criticised for being too low and unrepresentative of harms and losses. [3] The supplementing procedural law for adjudicating guilt and holding a convict guilty is the Code of Criminal procedure, 1973. (hereinafter CrPC). The CrPC provides for hierarchy of courts starting from judicial magistrate second class to Supreme Court of India.[4] Courts up to sessions Courts are governed by CrPC whereas apex courts namely, High Courts and Supreme Court are governed by CrPC and Constitution of India. CrPC spells the sentencing powers of the different courts. Fact finding is left to the lowers courts up to sessions court whereas apex courts are courts of law. Cognizance of all cases is taken by the Magistrates though such Magistrates are barred to try cases punishable with more than seven years. Considerable size of cases are decided by the magistrates, be it first class, second class, chief judicial or metro Politian Magistrate. All Death penalty cases are heard by the session court unless special courts are established under special laws. The CrPC provides for detailed procedure in respect of warrant cases whereas in respect of summons case equally powerful mechanism is adopted. [5]

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[1] See chapter 1, 2 2.1. and 3

[2]

[3] See Chapter 2 , 2.1. see also chapter 8

[4] See Chapter 2, 2.4

[5] See chapter 2, 2.4

The Indian legal system adopts a 'commensurate guilt' approach in sentencing. Children below seven years are presumed to be *doli incapex* and therefore no question of guilt arises. Children above seven years and below eighteen years are termed as Juveniles and therefore a different sentencing policy is adopted for them. Though attainment of majority in terms of eighteen years makes a man guilty of crimes, not all crimes are weighed in the same scale. Offenders below twenty one years derive the benefit of section 6 of the Probation of Offenders Act, 1958. The first time offenders are chalked out form rest and are treated concessionally in the scale of Probation of Offenders Act, 1958. Even the repeat offenders are entitled to the benefits of the said Act, provided the offender is not habitual and menace to the society. [6]

The CrPC provides for detailed hearing on the guilt and sentence.[7] However, the experience of the judiciary so far has been that only guilt finding has been given importance than the hearing on the sentence. Sufficient checks and balances have been provided under CrPC to correct the sentences of lower courts in the form of appeal, revision and reference.[8]

The thrust of the sentencing policy in India is individualisation of the punishment. [9] The power to choose sentences between minimum and maximum has given considerable discretion to the judges which resulted in the unwarranted disparity and discrimination. Warranted disparity served the purpose and therefore every legal system accepts it. However when all variables before the sentencer are same and yet the results are conspicuously different an unwarranted disparity is said to have occurred. Legal systems worldwide have suffered from this syndrome.[10] Studies are being made to conceptualize the sentencing disparity, discrimination and inconsistent sentencing worldwide.[11] Sentencing disparity has hunted Indian legal system badly. Judges have adopted different yardsticks to sentence on similar facts. Basically there are four reasons for disparity and discrimination in Indian sentencing policy, viz., individualised

[6] See chapter 2, 2.8, chapter 7.4., 7.10.,
[7] See chapter 2, 2.4. and 2.6.
[8] See chapter 2., 2.9
[9] See chapter 1, chapter 2., 2.5 and chapter 3
[10] See chapter 3., 3.1
[11] See chapter 3., 3.2

sentencing system, [12] no coherent sentencing aims,[13] judicial variability[14] and lack of guidelines.[15] The Indian legal system is full of judgments which qualify for absurd category where the judges have inconsistently awarded judgments resulting in speaking disparity. The judges have used their powers to reduce the sentence in the name of individualisation of punishment to such an extent that, the Supreme Court had to reprimand the trial judges. Instances of awarding death penalty without referring to *Bacchan Singh* and *Machi Singh* judgments have also entered the legal books. Irrelevant considerations like poverty and caste have also influenced the judges in sentencing process. Judges had been exceptionally liberal in some cases whereas they were unreasonably strict in other. [16] The High Courts which act as moderator of the trial courts have also erred on the lines of trial judges. It goes without saying that even such judges were also on the radar of the Supreme Court. The matter of debate however, surrounded the disparity that exists in the Supreme Court judgments. Two things make the Supreme Court judgments more vulnerable. *First* the Supreme Court being the last court in the hierarchy should have been consistent in their sentencing which factor is noticeably missing. *Secondly* the Supreme Court judgments being precedents for the lowers courts should have been torch bearer which factor is equally missing.

Courts have always defended their discretion on or the other considerations. 'One jacket cannot fit all' has been the convincing arguments by the defenders of the discretion. Even Supreme Court advocated for sentencing discretion time and again.[17] On the other hand, however, the same Supreme Court has raised concerns for the misuse of discretion and advocated for self imposed discipline. On number of occasions the courts have highlighted for sentencing uniformity by establishment of sentencing councils etc., as are exiting in other jurisdictions. [18]

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[12] See chapter 3., 3.4.1.
[13] See chapter 3., 3.4.2.
[14] See chapter 3., 3.4.3.
[15] See chapter 3. 3.4.5.
[16] See chapter 3., 3.5
[17] See See chapter 3. 3.6
[18] See chapter 3. 3.7

To arrest arbitrariness in sentencing, techniques like sentencing guidelines by sentencing councils,[19] guideline judgments[20] and minimum mandatory sentences[21] have been used in other jurisdictions. Even in India also few attempts were and are being made to regulate sentencing discretion and discipline the very approach of sentencing.[22] Guideline judgments by the supreme court have made the sentencing process regulated in crimes like murder, rape, offences against vulnerable etc. [23] However, in the absence of restatement of law, as are issued in western countries, Supreme Court judgments have not been followed in their pristine purity and propagated purpose. Parliament has been trying to introduce 'minimum mandatory sentences' of different layers and forms to arrest unwarranted disparity in sentencing.[24] The recent Criminal Law Amendment Act, 2013 and Protection of Children from Sexual Offences Act, 2012 are the best examples of minimum mandatory sentences. Even sui generis *two strikes* and *three strikes* laws (sections) have been introduced for sexual offences.[25] However not all legislations and not all offense can be so classified for the purpose of minimum mandatory sentences.

United States and England and Wales have tried sentencing Councils. US sentencing councils have been rejected by many including England and Wales for being too restrictive and counterproductive for small offences.[26] Even the US Supreme Court struck down the mandatory sentencing guidelines as unconstitutional. The sentencing guidelines are now optional in US for federal crimes. Sentencers are free to depart from the guidelines though the guidelines are most respected in the first place.[27] England and Wales sentencing council which has witnessed a re- hauling, has been recast in 2009. The working of the guidelines is productive and inspires consistency.[28] India can borrow sentencing council experimentation form England and Wales. [29]Secondary improvements

[19] See chapter 3., 3.8.1
[20] See chapter 3., 3.8.2
[21] See chapter 3., 3.8.3
[22] See chapter 3., 3.9
[23] See chapter 3., 3.9.4.
[24] See chapter 3., 3.9.1. and 3.9.2.
[25] See chapter 3., 3.9.3.
[26] See chapter 3., 3.10
[27] See chapter 3., 3.10.1.
[28] See chapter 3., 3.10.2.
[29] See chapter 3., 3.11.1.

like mandatory pre sentencing reports,[30] prioritizing the aims of punishments etc can be immediately undertaken.[31]

Nothing has hunted the Indian judiciary as death penalty cases have. In spite of the arguments of retention versus abolition, death penalties continue on the statute book and as witnessed are being newly introduced.[32] In *Bachan Singh v. State of Punjab* (1980) the Supreme Court of India sealed the constitutional validity of death penalty and laid down the 'doctrine of rarest of rare'.[33] However as the research revealed the doctrine of rarest of rare has been routinely articulated in loose sense foreclosing the very purpose for which the doctrine was emancipated. [34] Not only the lower courts, even the High Courts and Supreme Court have utterly erred in application of rarest of rare theory. Judgments which were *per incurim* were followed and death penalties were handed out. Few were even executed. Subsequent to execution, the cases were declared *per incurim*![35] The judges who handed down various *per incurim* judgments came together to display the extra –ordinary courage to petition the President of India to exercise mercy for those convicted. A group of 14 judges of eminence has, in an appeal to the President of India, requested His Excellency to correct judicial errors!

Death penalty has become judge centric. Studies have established that personal propensity of a judge greatly influences the outcome. Few judges have converted all death penalties to life imprisonment whereas few have did exactly opposite of it! Judges have sent the cases back to reconsider as why death penalty shall not be imposed![36]

Judges have erred in assessing variables in death penalty cases.[37] Few judges have considered variables like, age, possibility of reformation etc as mitigating factors whereas the same variables have failed to convince other judges.[38] It is also interesting to note that the same facts have been differently appreciated by different courts in the hierarchy.[39]

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[30] See chapter 3., 3.11.2.
[31] See chapter 3.,3.11.4
[32] See chapter 4. 4.1. and 4.2
[33] See chapter 4. 4.2
[34] See chapter 4. 4.3
[35] See chapter 4. 4.3.
[36] See chapter 4. 4.4.
[37] See chapter 4. 4.5.
[38] See chapter 4. 4.5.
[39] See chapter 4. 4.6.

Until death penalty is removed from the statute book, utmost care can be taken to impose it in rarest of rare cases. Safeguards like proper legal representation has to be ensured in all its sincerity. Absence of proper and full pledged legal representation in most of the capital punishments are commonly heard lapses, supported even by the judiciary. Though right to seek a lawyer to represent is a constitutional right read into Article 21, the facility is only proforma than real.[40] Cases have highlighted that even the amicus curie have failed to represent the accused in proper conspectus.[41] Therefore, it needs to be ensured that a proper cell of seasoned lawyers is created from the session courts to Supreme Court to represent the accused guilty of capital offences. The legal representation shall be by a group of lawyers on the quantum of sentence. The power of words shall not be denied even to those who cannot afford it. The right to appeal to Supreme Court in every death penalty is not yet guaranteed.[42] Demand for constitution of five judges bench to decide death penalty cases has also not been accepted though as on date bench of three judges is constituted at Supreme Court.[43] It has been the practice of the courts to avoid death penalty if there is difference of opinion in respect of sentence. However this has not been followed in all cases. Cases are noted where three judges held in three different way- one sentencing with death other with life imprisonment and third acquitted! Countries life USA does not sentence to death unless complete unanimity is reached among the sentencers. The courts need to rigorsly follow the safeguards laid down in *Shatrughan Chauhan v. Union of India* (2014)[44] and *Mohd Arif v. Registrar, Supreme Court of India and others* (2014)[45]

Bifurcated hearing on quantum of sentence[46] and special reasons for death[47] can surely eliminate the disparity in sentencing and answer the "unquestionable foreclosed test"[48]

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[40] See chapter 4. 4.6.1
[41] See chapter 4. 4.7.2.
[42] See chapter 4. 4.7.3.
[43] See chapter 4. 4.7.4
[44] See chapter 4. 4.7.5
[45] See chapter 4. 4.7.6
[46] See chapter 4. 4.8.2
[47] See chapter 4. 4.8.3
[48] See chapter 4. 4.8.1.

Delhi High Court has started the practice of appointing Probation officer to elicit information about the offenders and thoroughly considers the Pre-Sentence Report before choosing between life and death.[49] This practice needs to be generalized by all courts and for all other offences.

There was no much controversy in respect of life imprisonment since life imprisonment was taken to be imprisonment till life in jail. [50] Though life imprisonment was mistaken for few years and rightly so, life imprisonment is at the hands of government for remission.[51] The judiciary, however, always read life imprisonment in its literal sense. [52] There are two types of life imprisonments, *namely* life imprisonment as highest punishment in term imprisonment and life imprisonment as alternative to death penalty. The powers of the remission are fettered by section 433A which does not permit the government to remit the life imprisonment if such life imprisonment is alterative punishment with death penalty. In such cases, remission can take place only after fourteen years actual incarceration.[53]

The judiciary however felt that even the minimum mandatory fourteen years incarceration is not sufficient for certain crimes. Where the courts do not convict with death penalty on many considerations, they impose life imprisonment with a hope that the convict will spend his considerable time of life in jail. However, the remissions are conferred routinely after fourteen years which fail the very purpose for which life imprisonment was imposed. To weed out this situation courts have now started fixing the term of life imprisonment.[54] The possibility of imposing life imprisonment with term rider began from *Jagmohan Singh v. State of UP* (1973) and rested with a constitutional bench of *Union of India v. Sriharan* (2015). By the ruling in this case, courts are now empowered to structure life imprisonment with possible terms like 20/21/25/30/35 years.

In the mid of this controversy, Criminal Law Amendment Act, 2013 introduced a new type of imprisonment which clarifies for the first time that the life imprisonment shall mean imprisonment for the remainder of that person's natural life. However this

[49] See chapter 4. 4.8.4
[50] See chapter 5., 5.2
[51] See chapter 5., 5.3
[52] See chapter 5., 5.4
[53] See chapter 5., 5.5
[54] See chapter 5., 5.6

clarification is in respect of only few offences.[55] The remaining offences under this Amendment Act kept the traditional forms of life imprisonment intact. This amendment further added into the existing confusion.

There are many difficulties created in working out life imprisonment. Life imprisonment being indeterminate sentence, executive shall retain the powers to reconsider the case after a lapse of time. However indiscriminate award of remission are not uncommon. To cut this power the judiciary started fixing the term of life imprisonment. This however has raised many doubts than providing solutions. Life imprisonment with term rider has become another leatal lottery. Few may get life simpliciter, whereas others may get life with term of 25 to 35 years. Even life imprisonment has become judge centric. [56] Life imprisonment with determinate period puts the questions of reformation into front row. Chances of release even if he displays exceptional good conduct is ruled out in terms of fixed life sentences. [57] NHRC has suggested that every life convict's application shall be entertained after 25 years. This direction is overruled by structured life imprisonment.

Clemency and short sentencing have been part of Indian judiciary since ages. [58] President and Governors have been embodied with extra-ordinary constitutional prerogatives to pardon, commute and remit sentences. The need for such powers has been vindicated by judicial errors and humanitarian considerations.[59]

These powers are independent and are not ordinarily subject to judicial review unless patent miscarriage of justice is done. Second layer powers of remission and commutation is vested in the government. A third layer power to remit sentence is also conferred under prison act and jail manuals.[60] These powers, however, do not cut short the sentence passed by the judiciary. These powers only suspend the operation of judicially imposed sentences. To take example, if a person is disqualified from elections for being convicted with 2 years imprisonment, he may be released at early stage but his disqualification continues. Therefore, the act of pardon or remission of the State does not

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[55] 5, para 5.10
[56] 5, para 5.11.2.
[57] 5, para 5.11.
[58] Supra chapter 6
[59] Ibid 6.4.1.
[60] *Supra* para 6.3.

undo what has been done judicially. The punishment awarded through a judgment is not overruled but the convict gets benefit of a liberalised policy of state pardon.[61] The pardoning power in India has however, become a full bag of controversies. In the absence of concrete guidelines the exercise of the power has failed to create a pattern in India in the sense that the said powers have been so arbitrarily exercised that there appears to be 'a complete void' in this field. The Ministry of Home affairs (MHA) has framed certain guidelines only to be disregarded.[62] Even in the mercy jurisdictions personal predilection of the presiding officers has played a decisive role. [63] The MHA has failed to respect its own guidelines in commutation. [64] There is no time limit to dispose of the mercy petition. However, it is in the interest of justice and equity that mercy petitions are disposed of. One of the reasons attributed for mismanagement is ill equipped machinery to handle mercy petitions.[65]

Once upon a time three months delay was considered to be unreasonable. However this sincerity did not last long, but the hangman's noose on the neck of the convict lasted longer. Though judiciary in the initial years held two years delay as unreasonable, the same proposition did not hold true subsequently. [66] In *Shatrughan Chauhan v. Union of India* (2014) the court held that unreasonable delay in disposing of mercy petition directly impinge on Article 21 of the constitution.[67] Respecting the constitutional prerogatives, judiciary has been slow in judicially reviewing clemency powers. However, erroneous use of the power has been always under judicial scanner. [68]

Apart from the constitutional clemency powers, power of remission and commutation are also available under the Cr.PC. Sections 432 to 435 of the same code confer wide powers on the government. [69]

Remission does not wipe out the offence nor conviction. It does not override judicial sentences.[70] All that it does is to have an effect on the execution of the sentence;

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[61] Ibid para 6.2.
[62] Ibid 6.5.1.
[63] Ibid para 6.5.2.
[64] Ibid para 6.5.3.
[65] Ibid para 6.5.4
[66] Ibid para 6.5.5
[67] Ibid para 6.5.5
[68] Ibid para 6. 6
[69] Ibid para 6. 7
[70] Ibid para 6. 7.2

though ordinarily a convicted person would have to serve out the full sentence imposed by a court, he need not do so with respect to that part of the sentence which has been ordered to be remitted.[71] The powers under Articles 72 and 161 on the one hand and powers under section 432 and 433 on the other are different. The constitutional power is "untouchable" and "unapproachable" and cannot suffer the vicissitudes of simple legislative processes.[72] The powers of pardon can be excercised even if remission is granted in the first place.[73] Further, power of remission under ordinary law can be excluded by another law.[74] In order to curb the powers of excessive remission and commutation in certain cases, section 433A of Code of Criminal procedure , 1973 was brought in. This section places restriction on power of remission namely, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.[75] Though this section ensures minimum actual incarceration for fourteen years, there is no bar to exercise powers under Articles 72 and 161. States have routinely invoked Article 161 of the constitution in commuting and remitting the sentences. Instances of abuse of this power are not rare in India.[76] Sections 434 and 435 of the Code of Criminal Procedure, 1973 provide for mutual arrangement between centre and states. If the crime has been investigated by the centre, the centre shall compulsory be consulted before the state exercises the power of remission and commutation.

Remission on the basis of good conduct is also provided under Prisons Act and jail manuals. In fact substantially portion of remission is governed by this short sentencing methods. Jailer and other hierarchies are empowered to cut short the jail term by conferring remissions. It boasts the morale of the accused to stride good path.[77] The practice of remission under short sentencing schemes are not, however, uniform in all

[71] Ibid para 6. 7.2.1
[72] Ibid para 6.7.2.2
[73] Ibid para 6.7.2.3
[74] Ibid para 6.7.2.4
[75] Ibid para 6.8
[76] Ibid para 6.9
[77] Ibid para 6.11

states. There is wide disparity in granting remissions.[78] To minimize the disparity and bring uniformity, the NHRC has suggested for constitution of Review Board.[79] The attempt of the NHRC has been further supplemented by The Model Jail Manual 2016 which prescribes in detail the formula for remission.[80]

Restorative justice is a way of responding to criminal behaviour by balancing the needs of the community, the victims and the offenders. Not all punishments suit all persons. Therefore, the criminal jurisprudence has experimented alternate sentencing and alternatives to imprisonment. [81] Alternative Sentencing is a policy which is based on the premise that the offenders can be reformed, reclaimed, re-assimilated and rehabilitated in the social milieu.[82] Withdrawal of complaint and compounding of offences are *pre trial stage* alternatives. [83] Three alternatives are available[84] at the *sentencing stage* namely admonition,[85] probation[86] and customized community sentences.[87] In Post trial, many alternatives are available to imprisonment. These alternatives are in fact not alternatives to sentencing, but are alternatives to imprisonment which has a direct bearing on the sentencing. Parole, pardon, remission short sentencing schemes, etc have a huge impact on judicial sentencing.[88] As mentioned above one of the pre sentencing methods of restorative justice is to encourage compounding of offences. Section 320 of Cr.P.C deals exclusively with the compoundability of offences under IPC. No offence other than that specified in this section can be compounded.[89] Where the offences could not be compounded but the sentimental requirements of the case warranted the compromise, the courts have quashed the FIR under their inherent jurisdictions.[90] Alternatively where the law does not permit the compounding of offences yet the courts feel that maximum leniency needs to be given, the courts as via media have started reducing the sentence

[78] Ibid para 6.12
[79] Ibid para 6. 13.
[80] Ibid para 6. 14
[81] Chapter 7, para 7.1
[82] Chapter 7, para 7.2
[83] Chapter 7, para 7.3
[84] Chapter 7, para 7.4
[85] Chapter 7, para 7.4.1
[86] Chapter 7, para 7.4.2
[87] Chapter 7, para 7.4.3
[88] Chapter 7, para 7.5
[89] Chapter 7, para 7.6
[90] Chapter 7, para 7.6.1

already undergone by the accused in selected cases. [91] Plea bargaining is a form of alternative sentencing or alternatives in the sentencing. Plea bargaining essentially is a compromise - a compromise between three parties, namely, accused, victim, and prosecutor and other people.[92] Procedure for plea bargaining is prescribed under Sections 265-A to 265-L of Cr.PC [93] these sections detail out as to when can plea bargain be invoked, [94] the process of working out mutually satisfactory disposition [95] and the Guidelines for mutually satisfactory disposition.[96] The working out of plea bargaining in India is below expected as it has been seen successful in only marginal number of cases where the minimum mandatory sentence is provided and the offence is not compoundable.[97] India should have adopted the US Model of plea bargaining for better success.[98]

Community service in India is not codified unlike western jurisdictions. Western jurisdictions like USA, England and Australia etc., have community service in their statute books mandating judges to exercise the same as alternative to imprisonment. In India, however, no law provides for community service except juvenile justice and probation jurisprudence. Though judges in India have experimented Community services of different types- some usual some out of the box- the trend is not uniform and not even approved unquestionably. [99] For sexually harassing a woman in a bus the magistrate asked the accused to write a 25-page essay on eve-teasing and harassment. He was asked to make 500 copies of the essay and distribute them outside schools and colleges.[100] Community service gives a chance to first time errant to reclaim himself with dignity. Of late attempts are being made to codify community service as a part of penal sanctions.[101]

Offenders who are not covered under the JJ Act, 2015 and who are below 21 years are covered by the Probation of Offenders Act, 1958. The law does not assume

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[91] Chapter 7, para 7.6.2
[92] Chapter 7, para 7.8
[93] Chapter 7, para 7.8.1
[94] Chapter 7, para 7.8.2
[95] Chapter 7, para 7.8.3
[96] Chapter 7, para 7.8.4
[97] Chapter 7, para 7.8.5
[98] Chapter 7, para 7.8.6
[99] Chapter 7, para 7.9
[100] Chapter 7, para 7.9.1
[101] Chapter 7, para 7.9.2

absolute criminality when the offences are commuted by the person below 21 years. Therefore section 6 of the Act, lays down an injunction not to impose a sentence of imprisonment on a person who is under twenty-one years of age and is found guilty of having committed an offence punishable with imprisonment other than that for life, unless for reasons to be recorded by it, it is satisfied that it would not be desirable to deal with him under Section 3 or Section 4 of the said Act.[102] First time offenders with offence punishable with less than two years are covered under section 3 the Probation of Offenders Act, 1958.[103] Section 4 of the said Act, confers powers on the court to exercise powers to release on probation with probation officer for certain crimes.[104] Juveniles are the special focus of law.[105] Replacing the old law, Juvenile Justice (Care and Protection of Children) Act, 2015 came into force.[106] The Act defines "juvenile" as "a child below the age of eighteen years", child as "a person who has not completed eighteen years of age" and child in conflict with law "means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence"[107] Under the new law three offences are labeled to base the liability of the juveniles namely- petty offences, serious offences and heinous offences.[108] For the safety of child, certain fundamental principles have been laid down to be followed by the Central Government, the State Governments, the Board, and other agencies while trying a child. [109] Under the 2015 Act, the entire responsibility of juvenile justice falls on the Juvenile Justice Board (JJB).[110] Almost the old mechanism with cosmetic enhancement is retained for trial of petty offences and serious offences.[111] However a new and different mechanism is provided for heinous crimes. A juvenile who is above sixteen but below eighteen may be tried as adult for heinous crimes.[112] The Act

[102] Chapter 7, para 7.10.1
[103] Chapter 7, para 7.10.2
[104] Chapter 7, para 7.10.3
[105] Chapter 7, para 7.11.
[106] Chapter 7, para 7.11.1
[107] Chapter 7, para 7.11.2
[108] Chapter 7, para 7.11.3
[109] Chapter 7, para 7.11.4
[110] Chapter 7, para 7.11.5
[111] Chapter 7, para 7.11.6
[112] Chapter 7, para 7.11.8

however provides Special protection for child in conflict with law.[113] Rehabilitation and social integration of children is the central focus of this Act.[114] The role of the probation officer under this new Act has been recast.[115]

In consonance with restorative justice adopted by the JJ Act, 2015 and the Probation of Offenders Act, 1958, the Jail Manual 2016 prescribes the mode and method of dealing with young offenders from evil of incarceration. It mandates non-institutional treatment for young offenders.[116] Of late courts are inventing techniques to do justice by providing unconventional remedies. The Supreme Court in *Tekan Alias Tekram v. State of Madhya Pradesh* (2016) going out of its usual way, ordered the state government to pay Rs 8000/- monthly compensation for rape victim. With the intervention of the Madras High Court, the State government provided a job to a victim of an acid attack, an M.Phil-degree holder, on compassionate grounds. [117]

Victim compensation has received unprecedented attention of late.[118] Victim compensation has been read as state obligation.[119] There are three patterns of victim compensation. The first pattern of compensation is that the State assumes the responsibility to compensate the victim.[120] The second pattern of compensation is that the offender can be sentenced to pay a fine by way of punishment for the offence and, out of that fine, compensation can be awarded to the victim.[121] The third pattern of compensation is that the court trying the offender can, in addition to punishing him according to law, direct him to pay compensation to the victim of the crime, or otherwise make amends by repairing the damage done by the offence.[122] All three patterns of compensations are existing in India. Even the distinction of compensation under constitutional law and criminal law is blurred.[123] The legislature has introduced sections

[113] Chapter 7, para 7.11.9
[114] Chapter 7, para 7.11.10
[115] Chapter 7, para 7.11.11
[116] Chapter 7, para 7.12
[117] Chapter 7, para 7.12
[118] Chapter 8 para 8.1
[119] Chapter 8 para 8.2
[120] Chapter 8 para 8.2.2.1
[121] Chapter 8 para 8.2.2.2
[122] Chapter 8 para 8.2.2.3
[123]

357,[124] 357A[125] and 357B[126] to the Code of Criminal Procedure, 1973 to provide for victim compensation. Section 357 primarily focuses on the liability of the offender to pay compensation whereas as section 357A focuses on the liability of the state to pay compensation. Section 357B provides that the victims of acid attacks and gang rapes are entitled to restitution form the offender and government as well. Such compensation shall be just and reasonable to meet the medical expenses and rehabilitation of the victim. The courts have been however slow in providing remedy even though provisions exist on the statute book. [127] The Supreme Court had to observe in *Hari Singh v. Sukhbir Singh and Ors* (1988) that "the power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto." In *Ankush Shivaji Gaikwad v. State of Maharashtra* (2013), the Supreme Court again retreated that "section 357 CrPC confers a power coupled with a duty on the Courts to apply its mind to the question of awarding compensation in every criminal case." The courts have been, of late, balancing the economics of the sentencing policy. The huge expenditure on the part of the state towards prosecution is now being recovered from the convicts. Justice Geeta Mittal of Delhi High Court imposed a fine of 50 lakh each (in addition to life imprisonment) in *Vishal Yadav v. State Govt. of UP* (2015) case.[128] The shift in the legislative policy is surely towards economic rehabilitation apart from state sanction in the form of incarceration. The recent legislations like Protection of Children Form Sexual Offences Act, 2012, Criminal Law (Amendment) Act, 2013; The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 etc have come up with mandatory fine provision in addition to the incarceration. All offences under Protection of Children Form Sexual Offences Act, 2012, come with mandatory fine which is un-enumerated. The courts are free to calculate the harm and cost of restitution in imposing fine. This mechanism gives free hand to the courts to bring the accused to the book economically.[129]

The existing provisions under IPC relating to fine are not up-to-date. Rather they are so outdated that criminals are encouraged by such provisions. Take for example of

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[124] Chapter 8 para 8.4.2.
[125] Chapter 8 para 8.2.3
[126] Chapter 8 para 8.2.4
[127] Chapter 8 para 8.5
[128] Chapter 8 para 8.6
[129] Chapter 8 para 8.7

section 372 and 373 of IPC relating to the food adulteration. The punishment is six months imprisonment and one thousand rupees fine. Even if the criminal is punished under these sections, he would happily accept the punishment in return for the huge gain he may obtain from such business. Such offenders may on the other hand cause huge economic loss to the victims leaving them economically devastated and crippled. Therefore the law commission of India in its 264th Report (2017) suggested for minimum one lac to ten lac fine for the said offences. [130]

9.2 Suggestions

Following Indian efforts can be made to arrest the unwarranted disparity, reduce the discrimination , bring consistency in sentencing .

1. Sentencing council should be established in India to study and suggest the range of punishment the courts should award. Sentencing council should specify the objectives of the punishment, the purpose of the punishment and intended outcome of the punishment. It should also specify the range of punishments for set of offences leaving discretion to the courts to depart either upward or downward to individualise certain punishment with reasons.
2. As on date India does not have set goals and stated philosophy of punishment. In other words, we do not exactly know why are we punishing except for the fact that legislature has created offences which carry a band of punishment to be imposed. In the absence of stated philosophy, sentencing judge is lost in the trembling sea to chart his ship to the shore, which exercise often fails him and the ship. It is urgent, therefore, that stated philosophy of sentencing policy is charted out and sentences are prioritized. In England and Wales, minor punishments are the first goals of the sentencing exercises. If incarceration is to be prescribed, a pre-sentencing report has to be generated detailing out as to why such accused deserves incarceration and if so how much. In India however, such exercises are not undertaken resulting that few get the benefit of probation, few fine, few

[130] Chapter 8 para 8.7

admonition, few community services and majority of them get incarceration ranging from few days to few months.

3. Indian sentencing policy still harbours traditional punishments which have more of incapacitate role than reformation. Deterrence as object of punishment has been disproved. Hence the useful and economically feasible punishments like probation, community service etc should be encouraged which benefits the accused in terms of personal liberty and victims in terms of economic rehabilitation. If accused can buy sentences for minor offences, such exercises must be encouraged.
4. Judicial academies have educative role to play. Unless judges are thoroughly trained in using the sentencing choices consistent with the stated philosophy of sentencing policy, uniformity is sentencing is difficult to achieve. The disparity in sentencing is existing in lower courts to a greater extent. Apex courts are not, however, free from this blame. Few glaring disparity in apex courts are also noted. The role of judicial academy, therefore, is questioned across institutions.
5. Laying down with sufficient elucidation with graded punishment also helps structuring sentencing discretion. In the newly enacted legislations, like Criminal Law Amendment Act, 2013, Protection of Children form sexual offences Act, 2012 etc Parliament of India has really come up with sufficient elucidation of offence and punishment to be meted thereof. Such legislative exercises may really help reduce the disparity in sentencing. However, most of the Indian penal legislations are century old carrying the same band of "may extend to…years" for such crimes either restructuring is needed which is time consuming and cumbersome or sentencing legislation has to be introduced.
6. Absence of proper and full pledged legal representation in most of the capital punishments are commonly heard lapses, supported even by the judiciary. Though right to seek a lawyer to represent is a constitutional right read into Article 21, the facility is only proforma than real. Cases have highlighted that even the amicus curie have failed to represent the accused in proper conspectus. Therefore, it needs to be ensured that a proper cell of seasoned lawyers is created from the session courts to Supreme Court to represent the accused guilty of capital

offences. The legal representation shall be by group of lawyers on the quantum of sentence. The power of words shall not be denied even to those who cannot afford it.

7. The test of "*unquestionably foreclosed*" can be fulfilled only when bifurcated hearing is given to the accused on the quantum of sentence. That is the intended purpose of sections 235(2) and 354 (3) of CrPC. However, courts have not taken this ingredient in its spirit and sense. The courts cannot play a role of spectator. Inquisitive role is contemplated by this section. Courts must explore all possibilities including appointment of Probation Officer to elicit relevant information to satisfy the test of 'unquestionably foreclosed'. In this context, therefore, following amendments shall be brought to Criminal procedure code, 1973.

Section 235 may be amended as follows (proposed amendment text in italics)

> **235. Judgment of acquittal or conviction -**
> (1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case.
> (2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360 hear the accused on the question of sentence, and then pass sentence on him according to law.
>
> *Provided that no sentence shall be passed by the Judge, unless a pre-sentencing report generated by the Probation Officer appointed under this Act or under probation of offenders Act, 1958, is considered by the judge.*
>
> *Provided further that the pre-sentencing report may not be binding on the judge.*
>
> *Provided further that the judge shall state with reasons as to how the pre sentence report was evaluated in separate paragraphs of the judgments.*

Section 354 may be amended as follows (proposed amendment text in italics)

> Section 354
> (3) When the conviction is for an offence punishable with dealt 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.

Provided that when the conviction is for an offence punishable with dealt, the court shall ensure that the State by evidence proves that the accused does not satisfy the conditions (a) and (b) below:

(a) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(b) The probability that the accused can be reformed and rehabilitated.

8. One of the best methods appointed to resolve arbitrariness from the sentencing policy is to appoint Probation Officer to elicit relevant information. This method has been followed by the Delhi High Court. This method has only benefits with no negatives. The dispassionate information generated by the Probation Officer of the accused helps beyond the mere formalities in assessing the accused as to whether he is beyond repair and thus needs to be physically liquidated. This practice needs to be generalized and made compulsory by all the courts be it a trial court or a final court. As on date this is practiced only by the Delhi High court and eventually by the trial courts of Delhi.
9. Though courts generally allow special leave petitions against confirmation of death penalty by high courts, no statutory appeal lies to Supreme Court. The CrPC needs an amendment to that effect. The proposed amendment is as follows.

Section 379-A may be introduced as follows (proposed section is in italics)

379. Appeal against conviction by High Court in certain cases.
Where the High Court has, on appeal reversed an order of acquittal of an accused person and convicted him and sentenced him to death or to imprisonment for life or to imprisonment for a term of ten years or more, he may appeal to the Supreme Court.

379-A. Appeal against conviction by High Court in death penalty cases.
Notwithstanding anything contained in this Chapter, where

the High Court has convicted the accused person to death by virtue of section 366 of this code, an appeal shall lie to the Supreme Court as a matter of right.

10. The structured life imprisonment propounded by *Swami Shraddananda (2)* is the best substituted penalty for death. Courts have either imposed life imprisonment with term riders of 20/21/25/30/35, without remission in lieu of death penalty. Courts have also sentenced consecutively rather than concurrently. These types of punishment serve all penological purposes. Its only when the accused is beyond repair and eminent threat to the society that such persons should be physically liquidated.
11. The office of President and Governor has to be rearranged with a separate legal cell equipped with sufficient full time staff to guide the high offices to exercise their clemency powers especially in the death penalty cases. A well thought out and times honored set of principles are to be charted out before hand and must be used while exercising clemency and concessionary powers. There must be upward and downward flexibility to deviate from the principles in the interest of the case and sentencing policy. Though powers under Article 72 and 161 are extra-ordinary powers, least warranting for speaking orders, it is in the interest of sanctity of such powers that the said powers are exercised with speaking orders.
12. Even though the powers under section 432 and 433 cannot be structured, there is nothing wrong, and in fact judicially propriety would require is so, that certain principles for the exercise of such powers are stated before hand. Though the powers are distributed among the appropriate governments which may be either state or central, it is desirable that the central government issues advisories from time to time in respect of exercises of such powers, so that a nearing unanimity is brought though identical handling is unachievable.
13. Where the courts sentence a convict for an offences which carries minimum mandatory sentences, it would be unadvisable to reduce the sentence below the minimum by exercising clemency and concessionary sentencing. For example section 376 of the IPC as introduced by 2013 Criminal Law Amendment, punishes the rape offenders with minimum 20 years of imprisonment with

alternatives of life imprisonment and death penalty. If a convict is punished with life imprisonment or with death whose sentence is remitted to life imprisonment, it would fail the sentencing policy if such convict is released before 20 years of minimum incarceration. However there are no such guidelines as on date to deal with such issues. There is need to issue restatement of law on such issues.

14. There exists an unwarranted disparity in short sentencing policy. Jail manuals have conferred powers on the government and other jail officers to cut short the sentences of convicts on the basis of good conduct and productivity of the criminal. However, there is no uniformity in the jail manuals and the period of relaxation a convict may earn. It is therefore the need of the time that the model Jail Manual 2016 is adopted which speaks for comprehensive short sentencing schemes.
15. Penological innovations, in terms of sentencing policy , like, compounding of offences, plea bargaining, concessional treatment for first time offenders, separate sentencing policy for juveniles, community services in lieu of traditional incarceration, rehabilitative sentencing, victim compensation, etc have to be increasingly used. Thorough training to judicial officers of such exercises must be periodically given.
16. Liberal use of section 357, 357A of the Code of Criminal Procedure, 1973 in terms of *Ankush Shivaji Gaikwad v. State of Maharashtra* (2013), needs to be made by the lower judiciary and they must be trained accordingly. There is urgent need to orient sentencing policy in India in line with economics of sentencing policy.

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He is graduated from Karnataka University Dharwad, Karnataka. He is a rank holder throughout. He won prizes at LL.B. and LLM. He cleared National eligibility test consecutively twice in a row. He has experience of 18 years in teaching. His area of interests are, constitutional law, criminal law, sentencing policy, good governance, human rights, research methodology and upliftment of marginalized in right perspective and moot courts. He has authored five books on law and political science. His books on Constitution of India and Drafting, Pleading and Conveyancing have been overwhelmingly received by the stakeholders which is evident by the fact that the two books have gone for second and subsequent edition. He has to his credit more than 30 articles published in repute of national and inter-national journals and books. He has participated in more than 50 national, international and state level seminars. He stood all India first in the case comment competition organized by the Rajiv Gandhi Law University, Punjab for which he won cash prize and certificate.

He has been invited as subject expert on the 'curriculum development orientation program' held by the Shivaji University at Sangli. He was invited as resource person for the sensitization program orgnised by the UNICEF, Maharashtra in the Shivaji University, Kolhapur. He has widely traveled to the colleges of Karnataka as a resource person for seminars and innovative events. He has acted as moot judge for national and state level moot competitions organized by various colleges. He had the privilege to sit with High Court Justices and District judges as moot court judge in national moot court competitions. The students of Shahaji Law College represented the Shivaji University in 13th Youth Parliament and won six prizes under his leadership and guidance. He has served as Vice President of 14th Youth Parliament Committee of Shivaji University.

Publisher:

Shahaji Law College, Kolhapur
1090 'E' ward shahupuri, kolhapur – 416 001
www.shahajilawcollege.com
prin.shahajilawcollege@gmail.com
call: 8600664343

ISBN: 978-81-972236-9-3