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Bilkis Bano: A Human Rights Perspective on Rape in the Realm of Socio-Legal Jurisprudence

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ABSTRACT

Human behavior is closely entwined with definite basic needs including the biological need for sexual gratification. The transition from the idea of procreation based on willing consent to dominance of factors like control, patriarchy, and inferiority has altered the nature of this fundamental instinct into a coercive act. Such factors get pronounced during times of socially disruptive events, further impressing the vulnerability of women. Disregarding bodily autonomy, women's bodies are viewed as an end in themselves. Persuasive international law and ambiguous national provisions on remission exacerbate the legal conundrum in the case of heinous offences. The non-literal implementation of the principle of separation of powers in India makes a judicial pronouncement on sentencing entangled in the domain of the Executive. Constantly striving to achieve a balance between deterrence and reformation, courts are forced to delve deeper into liberty. Certainly, the law is an agent of social change but the fine balance between liberty and remission is intrinsic to achieving justice.

Keywords: gang-rape, remission, human rights, justice, violence, human behavior.

I. INTRODUCTION

Rape is the only crime in which the victim becomes the accused.

- **Freda Adler²**

Human behavior is a complex web of thoughts, perceptions, and opinions whose intricacies are manifested through overt actions. The external manifestation may usher in pleasure or pain, bring forth singular or collective outcomes, and therefore produce short-term or long-term effects. The rationale behind any human behavior will naturally lead to individual and societal repercussions leading to a limited impact for the former, creating ripple effects for the latter.

From a *Freudian* perspective, human behavior is motivated by two driving instincts, life instincts and death instincts. Eros (life instincts) relates to the troika of basic needs including

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survival, reproduction, and pleasure. The pyramid-based explanation advanced by Sigmund Freud defines sexual desire and reproduction as the most primal need of humans. The basic biological instinct of human beings of fulfillment of *sexual desire* is underlined by the idea of procreation.³

A corollary to the needs-based justification was offered by *John M Keynes*, who stated that there is a difference between absolute and relative needs and the degree of *satiability* derived from each such need. Secondly, the absoluteness of needs stands diluted in the background of social construction, which differs according to country and culture.

The Basic Needs, as well as the Capability Approach, place needs within a social construct and accordingly interpret their relevance. These approaches assume salience because they acknowledge that *subjective experiences* matter significantly and that they may be at variance with people's physical circumstances, therefore leading to a difference in behaviors.

Switching from a physical cum psychological imperative paradigm, basic needs are also constructed from *social and political statements*, cutting across cultures and nations. The International Bill of Human Rights, comprising of the UDHR, the ICCPR, and the ICESCR, encompasses the various basic needs required to lead a fulfilling life.

Culture is also presented as a major driving force for human behavior. Picking up cues from the environment, human behaviors are *learnt*. As such, social scientists advance the theory that the rationale behind committing rape is learned, and therefore this piece of flawed learning can be substituted by learning a new lesson.

On the other hand, socio-biologists present an *adaptive theory*. Any human behavior or learning is based on definite psychological adaptations based on long-term evolution. Eventually, such adaptations develop into traits combining both genetic and environmental components. Accordingly, if physical characteristics are a result of Darwinian selection, so also is *rape a learned behavior evolving over a period of time*.⁴

Rape being a materialization of human behavior, it is imperative to understand the import of the intersection of various factors resulting in a such non-consensual sexual acts-

1. Research Findings: Through her research in 1975, *Susan Brownmiller* asserted that contrary to the general perception, rape was motivated not by lust but by an urge to *control and*

³ Cengage, *Needs, Basic*, APPLIED AND SOCIAL SCIENCES MAGAZINES (Sept. 13, 2022, 10:00 AM) <https://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/needs-basic>.

⁴ Randy Thornhill and Craig T. Palmer, *Why Men Rape*, THE NEW YORK ACADEMY OF SCIENCES (Sept. 14, 2022, 10:30 AM) <https://www.csus.edu/indiv/m/merlinos/thornhill.html>.

dominate the female-victim. Eventually, this view gained mainstream recognition. Similarly, *Sherry Hamby* through her research concluded that sexual assault was not merely about sexual gratification or sexual interest but was more strongly co-related with a dominating attitude.⁵ As per a *UN Women* report, behaviors that are intended to control women's bodies, autonomy, and contact with others have a strong correlation with an increased incidence of violence against women.⁶ *Antonia Abbey* talks about a culture of toxic masculinity, factoring in a better social status of sexually active members in a peer group.⁷

2. **Act of Power:** The commission of rape is symbolic of a reckless exercise of power by a man upon a woman. Non-consensual and forceful sexual intimacy is underlined by undue influence and intimidation. This forceful act of the perpetrator is fundamentally against the bodily autonomy of the woman.

3. **Patriarchal Mindset:** The notion of superiority and primacy of a man in a family accords utmost significance to his decisions and thought process. This centrality undercuts social relations, cultural traditions, religious beliefs, and heterosexual relationships. *Karta*, as the senior-most male member of a family is addressed under Hindu Law, which denotes a top-down approach in a family, perpetuating centralization of power and inequality of inter-se status between family members.

4. **Oppression and Subjugation:** The historical social matrix placed women in a secondary position and referred to them as the other sex, euphemistically even referred to as the fairer sex, perhaps denoting physical inferiority. Such male-dominated perspectives create a popular notion of undermining the larger interests of the other half of the human race.

5. **Fundamentals of a Society:** Religion, community, and caste create a unique set of differentiating factors in India. Additionally, in a diverse society like India, the interplay of community and caste assume both historical and contemporary relevance.

6. **Trust Deficit:** Socially disruptive events lead to multiple challenges for marginalized and vulnerable populations, including physical and mental security. Such social disruption invariably leads to a trust deficit within communities. In the long run, such fissures can pose a grave danger to societal well-being.

As far as the legal realm is concerned, the shortcomings can be assessed as follows -

1. *Defining rape* has been a perplexing task as it involves a two-fold determination –

⁵Farah Aqel, *The Psychology of a Rapist*, SCIENCE (Sept. 14, 2022, 11:00AM) <https://www.dw.com/en/the-psychology-of-a-rapist/a-54814540>.

⁶UN Women, *Facts and Figures: Ending Violence against Women*, (Sept. 13, 2022, 09:30 AM) <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>.

⁷Farah Aqel, *The Psychology of a Rapist*, SCIENCE (Sept. 14, 2022, 11:00 AM) <https://www.dw.com/en/the-psychology-of-a-rapist/a-54814540>.

- Extent of Penetration – In a non-consensual sexual act, the degree and extent of penetration is a key deciding factor for the gravity of offence. As per the FBI's Uniform Crime Reporting (2012) program, rape is defined as penetration, *no matter how slight*, of the vagina or anus with any body part or object or oral penetration by a sex organ of another person *without the consent* of the victim.⁸ On the other hand, the definition under Section 375 revolves around the concept of consent,⁹ leaving ambiguity on the question of penetration.¹⁰
 - Consent - *Absence of consent or forced consent* forms the essence of rape and is the determining factor for fixing liability. The lack of third-party witnesses becomes a major hurdle to establishing this aspect.
2. Additionally, proving the commission of rape is challenging as it involves heavy reliance on *circumstantial evidence* combined with the *victim's testimony*.
 3. Deciding upon the *accused's culpability* has also not seen a consistent viewpoint from the courts. A broad spectrum of opinions ranging from the death penalty to life imprisonment to rigorous imprisonment has been witnessed.

II. VULNERABILITY OF WOMEN TO VIOLENCE

In the 1993 session of the UNGA, rape came to be defined as an act of *gender-based violence* occurring in public or private life, which resulted in physical, sexual, or psychological harm or suffering to women, including arbitrary deprivation of liberty.

From a feminist perspective, *Nira Yuval-Davis* states that violence against women is embedded in the relationship between *patriarchal notions of female sexual purity* and the associated aspect of *honor*.¹¹ The corollary to this inter-relationship becomes evident when such values are attached to female sexuality, and the resulting rationale is used to further legitimize sexual regulation of 'one's' women, concomitantly commissioning sanctions for sexual violence against transgressors as well as women belonging to the 'other'.¹² Therefore, at the heart of this debate on sexual violence against women lies the justification built on the *differentiation between one's and other's women, where the honor and esteem of the former are vociferously upheld and disregarded in the case of the latter*.

⁸ US Department of Justice.

⁹ The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

¹⁰ Explanation to Section 375 provides that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

¹¹ NIRA YUVAL-DAVIS, *GENDER AND NATION* (Sage Publications, 2000).

¹² Yakin Ertürk, *Considering the Role of Men in Gender Agenda Setting: Conceptual and Policy Issues*, 78 JSTOR, 3-21 (2004).

This justification of violating another's woman takes the form of ghastly gender crimes during distressing situations like terrorist attacks, riots, and natural calamities, which potentially disrupt entire communities and societal institutions. The tension and stress associated with such socially disruptive events undoubtedly, have long-term repercussions for the victims and even the larger populace. In such times of societal breakdown, governance malfunction, and institutional disruption, certain members of a society become vulnerable targets for perpetuating violence, like women, children, the elderly, the transgender population, the poor, illiterate, and differently-abled people.

In the present context, as violence against women is of prime concern, during times of colossal crisis, the following types of violence are generally afflicted women –

1. Gross and barbaric gender crimes, including rape, physical violence, and cruelty.
2. Human trafficking and prostitution.
3. Kidnapping, abduction, slavery, and forced labor.
4. Religious conversions.
5. Forced marriage alliances result in unwanted pregnancies.
6. Targeted crimes against ethnic or religious minorities.

Despite the wide prevalence of crimes against women, international criminal, and humanitarian law has been deficient in playing a proactive role in the prevention of the commission of such violence against women. Secondly, such acts have not been viewed from the paradigm of a crime and have rather been explained in terms of *aberrant behavior by men under harsh conditions*.

An important finding based on studies of rape during armed conflicts demonstrates that the theory of cause and effect relationship cannot be established between sexual slavery and armed conflict. *On the other hand, the conclusion emphasizes that women's bodies are seen as an end in themselves, thereby effectively becoming the site of war itself.* Sexual violence is thus instituted as an integral part of the larger chaos and tyranny. Even the traditional paradigm of honor reinforces the stereotypical concepts of chastity, purity, and virginity and hence the female, even though the victim is not recognized as such under humanitarian law. Thus the interlinkage between law and the victim is restricted to the victim's morality.¹³

In the light of the violence against women, it is essential to highlight the following features of

¹³Audrey Thompson, *The United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences*, (Sept. 13, 2022, 12:00 PM), <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/15YearReviewofVAWMandate.pdf>.

the existing regulatory framework –

1. Recognizing violence against women as any act of gender-based violence, the Declaration on Elimination of Violence against Women states that such violence may result in multiple forms of harm, including physical, sexual, or psychological harm leading to deprivation of liberty, in public or private life.¹⁴ Such violence may happen within a *community* or can even be perpetrated by the State.¹⁵
2. Gender-based violence is viewed as a form of discrimination that constitutes a serious obstacle to women's enjoyment of human rights and fundamental freedoms. It is violence that is directed against a woman merely *because she is a woman or an act that disproportionately affects a woman*.¹⁶
3. The Preamble of the Declaration reiterates what Nairobi Forward-looking Strategies for the Advancement of Women has mentioned that violence against women acts as an impediment to the accomplishment of equality, development and peace.
4. Violence against women is a clear manifestation of the historical inequality of power relations between men and women, which perpetuates domination, discrimination, subordination, and *lack of holistic advancement of women*.
5. Among women, the *susceptibility of certain groups of women* to violence, including minority groups, indigenous population, refugee and migrant women, women residing in rural areas, destitute women, women in institutions or under detention, female children, disabled women, elderly women and women in situations of armed conflict is higher than normal.

With reference to Bilkis's gang-rape, rape, and murder of other females in her family and the murder of her infant daughter, it becomes essential to comprehend the degree of physical violence that has been perpetrated on her and the psychological consequences that she has borne. Not only her, but the violence also unleashed against members of a particular community sent shockwaves across the country, directly invoking the relevance of the principle of the collective conscience of a people. With life imprisonment handed down to the convicts, closure seemed within reach for Bilkis, but it is now an open question with the grant of remission, what is the aim of a restorative policy of justice for a rape victim? How can restoration be quantified for Bilkis?

¹⁴ Article 1, *Declaration on the Elimination of Violence against Women*.

¹⁵ Article 2, *Declaration on the Elimination of Violence against Women*.

¹⁶ General Recommendation 19, *Convention on Elimination of Discrimination against Women*.

III. GANGRAPE: AN IMPACT CRIME

Crimes in general but violence against women in specific including rape not only produce a tangible sense of trauma and suffering but have wider and deeper ramifications. Shifting from an individual's loss and suffering, an impact crime encompasses the broader perspective of a society, a community and a country.

As the term denotes, impact crimes have both quantifiable and qualitative aspects. Quantitatively, the impact of the crime is felt beyond the individual victim, extending to larger populations. Qualitatively, impact crimes induce societal changes, often leading to a sense of 'we' and 'they' within communities, thereby leading to the disintegration of societies. While losing a sense of collectiveness, societies witness the weakening of relationships and an erosion of trust, thereby strengthening the existing stereotypes of this binary relationship. The intersection of quantitative and qualitative aspects produces unfavorable effects on the collective conscience of a society.

As per the factual matrix, the attack on Karsevaks was followed by the Godhra riots, tipped by large-scale violence. Bilkis was one of the many rape victims who had to bear the double whammy of being a *woman from a minority religious community*. Bilkis's gang rape brought to light the minority community-oriented crimes perpetrated by a majority community during the riots. The physical, emotional, and psychological suffering caused to a rape victim creates not only an impact on the victim alone, but it is the totality of all such mutually inclusive and inter-linked incidents that produce social, legal, political, demographic, religious, and economic repercussions which therefore make gang-rape an impact crime.

IV. GANG-RAPE OF BILKIS BANO: A HUMAN RIGHTS' PERSPECTIVE

The Universal Declaration of Human Rights (UDHR) is the mother document outlining the fundamental characteristics and principles of human rights, emphasizing upon a regulatory framework for their protection as also in creating a wide acceptance and acknowledgment of the sacred nature of human rights.

The Preamble to the UDHR encapsulates the essence of human rights -

1. Possession of an *inherent right to human dignity* within the singular collective unit of humankind is recognized as equal and inalienable as well as fundamental to freedom and justice in the world, whereas a disregard of human rights results in acts that impact the conscience of humankind.

2. The existence of *rule of law* affords protection to human rights. In order to promote social progress and better standards of life ensuring larger freedom, it becomes imperative to uphold faith in fundamental human rights, in the dignity and worth of the human person as also in the equal rights of men and women.

As has been echoed under Article 3 of Declaration on the Elimination of Violence against Women, in the immediate context, the following aspects of Bilkis's life are testimony to the violation of human rights and fundamental freedoms -

1. In the aftermath of the Godhra riots, Bilkis and her family members, including other community members, lost their right to *live with dignity*, which is intrinsic to human existence.
2. To be able to live fearlessly is the highest aspiration of a common person as all other actions or decisions of an individual's life depend upon it. The fact that Bilkis was forced to change her home multiple times in a span of few years shows how her right to *freedom to movement and residence* along with the right to *life, liberty and security of person* stood grossly violated.
3. Bilkis's *right to justice and recognition as a person before law* was impacted when the police personnel rather than affording assistance and protection to her remained uncooperative. Subsequently charged with dereliction of duty and tampering with evidence under IPC, it resulted in the denial of equality and equal protection of laws to her.¹⁷ Moreover, as the State is expected to act reasonably in its relationship with the citizens, that reasonableness was equally found wanting.
4. The forced relocation coupled with a constant sense of fear involved an arbitrary *interference with family, privacy, home and correspondence* of Bilkis as also the death threats that affected her *honor and reputation*. The UDHR recognizes family as the natural and fundamental group unit of a society and is therefore considered entitled to protection by society and the State but in Bilkis's case, her right to lead a peaceful family life was obliterated.

Therefore, in the light of UDHR and the principles of equality, justice and liberty given under the Indian Constitution, the question that arises is, haven't the gang-rape of Bilkis Bano and the remission of sentence together obscured the significance and sanctity of the Golden Triangle comprising of Articles 14, 19 and 21 in an Indian citizen and a human being's life?

¹⁷Special Correspondent, *Bilkis Bano case: IPS Officer dismissed*, (Sept. 13, 2022, 01:00 PM) <https://www.thehindu.com/news/national/other-states/bilkis-bano-case-ips-officer-dismissed/article27690093.ece>.

V. REMISSION: LEGAL FRAMEWORK

The legal connotation of remission implies that the time period of a sentence is reduced without changing its character. By law, the state is vested with the power to grant remission but a legitimate rationale is a condition precedent to grant of any such relief.

In India, the law on remission can be classified as follows –

1. Constitution of India – On the executive side, the constitutional heads, the President and the Governor, have been bestowed with remission powers. Articles 72 and 161 of the Constitution elaborate that the President and the Governor respectively enjoy 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. Certainly, under the Constitution, the President has been bestowed with wider powers in this regard.
2. Code of Criminal Procedure, 1973 – Section 432(1) provides a framework whereby the appropriate Government enjoys the power to either suspend the execution of a sentence or remit, wholly or partly, the time period of such sentence.¹⁸

In the present case, the remission of life imprisonment has been squarely criticized on the following grounds –

1. In violation of Section 432(2) of the CrPC, while deciding upon the question of remission, the opinion of the presiding Judge of the trial court, Justice U D Salvi was not sought.¹⁹ Such non-compliance is violative of *procedural due process* as enshrined under Article 21 of the Constitution.
2. The remission of sentence for crimes like gang-rape and murder, committed in the most inhumane manner, strikes at the rationality of such a measure. Such rationality is manifested by the *application of mind*, which is a quintessential feature of the law on remission, but has been found wanting in the present case. Questioning this premise, petitions have been filed in the Supreme Court to undo the injustice caused to Bilkis Bano.²⁰
3. In accordance with the rule against bias, the exercise of discretionary power by the members of the committee constituted to decide the question of remission stands on a

¹⁸The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1973 (India).

¹⁹ Sharmeen Hakim and Amisha Shrivastava, "Have Those Criminals Truly Repented?" : Judge Who Passed Sentence In Bilkis Bano Case Criticises Premature Release Of Convicts (Sept. 16, 2022, 07:00 AM) <https://www.livelaw.in/top-stories/judge-who-passed-sentence-in-bilkis-bano-case-criticises-premature-release-of-convicts-207308>.

²⁰PTI, 'Felicitating convicts was distasteful': Judge who presided over Bilkis Bano gang-rape trial, THE NEW INDIAN EXPRESS (Sept. 12, 2022, 02:30 PM) <https://www.newindianexpress.com/nation/2022/aug/24/felicitating-convicts-was-distasteful-judge-who-presided-over-bilkis-bano-gang-rape-trial-2490853.html>

shaky ground.²¹ Not following *adequate determining principles* in arriving at a decision or non-application of mind annuls the core spirit of fairness in action covered by Article 14 of the Constitution of India²²; a principle reiterated in *E P Royappa v State of Tamil Nadu*.²³

Having regard to the individual impact on the victim coupled with the societal conscience, remission of sentence specifically in *offences affecting the human body* must therefore be underlined by the broader principles of natural justice including reasonableness, equity, equality and fairness. Upholding liberty of a convict by granting remission is certainly within the realm of State's power but it is equally true that the principles of natural justice are omnipresent in the Indian Constitution and their fulfillment only helps further the goal of justice.

Herein, the grant of remission to convicts accused of heinous offences like murder and gang-rape violates the essence of reasonableness, equity and fairness.²⁴

VI. REMISSION GUIDELINES: A GRAY AREA

Section 432 of the CrPC states that the Appropriate Government, which implies that the Central or the State Government, as the case may be, has the power to grant remission. In accordance with this provision, various State Governments have their respective remission policies in operation which are invoked to grant remission to convicts within their respective jurisdictions. Additionally, under Section 59(5), the State Government has the power to frame guidelines for shortening of sentences.²⁵

Acknowledging 75 years of Independence, the Central Government released remission guidelines under which certain categories of prisoners are eligible for remission. Under these Guidelines, it has been expressly stated that persons convicted of offences whose prescribed punishment is death or life imprisonment or where a prisoner is convicted of rape, remission shall not be granted to such categories of convicts.²⁶

Although in the present case, the remission guidelines of the State Government of Gujarat are

²¹Mahesh Langa, *Two BJP legislators on panel that backed remission in Bilkis Bano case, 2022 POST GODHRA RIOTS* (Sept. 09, 2022, 11:30 AM) <https://www.thehindu.com/news/national/two-bjp-legislators-on-panel-that-backed-remission-in-bilkis-bano-case/article65780663.ece>.

²²Eklavya Dwivedi, *The Doctrine of Manifest Arbitrariness – A Critique*, INDIAN LAW JOURNAL (Sept. 02, 2022, 12:00 PM) <https://www.indialawjournal.org/the-doctrine-of-manifest-arbitrariness.php>.

²³ 1974 4 SCC 3

²⁴NIOS, *Principles of Natural Justice, FUNCTIONS AND TECHNIQUES OF LAW* (Sept 09, 2022, 10:30 AM) https://nios.ac.in/media/documents/SrSec338New/338_Introduction_To_Law_Eng/338_Introduction_To_Law_Eng_L6.pdf.

²⁵ The Prisons Act, 1894, No. 9, Acts of Parliament, 1894 (India).

²⁶MHA, *Guidelines for grating Special Remission to Prisoners*, (Sept. 10, 2022, 09:30 AM) https://www.mha.gov.in/sites/default/files/SpecialRemissionModulePrisons_13062022.pdf.

applicable but the Central Government guidelines assume significance due to the following reasons –

1. Even though such guidelines have been issued in the backdrop of a historically commemorative occasion, yet the express exclusion of prisoners convicted of heinous offences provides an insight that remission is a *deliberative measure* and must be exercised cautiously.
2. The gravity of such offences is also a limiting factor in granting remission. Rape and murder are *offences committed against human body*, directly impacting human dignity. Therefore, exclusion of such offences is justified from a human rights' perspective as well.
3. Thirdly, as such guidelines are issued by the Government, they carry merit, and therefore inclusion or exclusion of offences assumes socio-legal significance.

Hence, it can be seen that the subject-matter of remission is dealt with by both tiers of Government. Such a scenario has the potential to lead to procedural ambiguities, indirectly or directly impacting the position of the victim, as can be understood from the present case.

According to the facts of the case, the following observations can be drawn –

1. The remission policy of the State Government of Gujarat issued in 1992 was invoked to provide remission to the convicts. As per the Supreme Court guidelines, the remission policy of the State where the crime had been committed was applicable.²⁷ Therefore as the crime was committed in 2004, the policy in operation was of 1992 and hence the convicts were covered under that policy.
2. For a person to be eligible for remission, it is statutorily mandated to serve fourteen years imprisonment. In the instant case, *Radheshyam Bhagwandas Shah (Lala Vakil) v State of Gujarat*,²⁸ the petitioner (convict) had completed fifteen years and four months of his sentence and therefore had applied for remission under Section 432 of CrPC.
3. As of date, the 2014 policy of remission issued by the State Government is applicable under which persons accused or murder or rape are not eligible for remission as also under the Azadi ka Amrit Mahotsav (Special Remission Guidelines). Therefore, the invocation of the 1992 guidelines provided a ray of hope to the convicts, as it was considered more liberal in nature and hence apt for the release of the convicts. Despite

²⁷Live Law News Network, *Remission To Be Considered By Govt Of The State Where Crime Was Committed, Even If Trial Was Transferred To Another State : Supreme Court*, (Sept. 10, 2022, 04:30 PM) <https://www.livelaw.in/top-stories/remission-by-govt-state-where-crime-committed-even-if-trial-transferred-another-state-radheshyam-bhagwandas-shah-lala-vakil-gujarat-2022-livelaw-sc-484-199164>.

²⁸ WP(C) 135 of 2022.

a liberal outlook, a major shortcoming of the 1992 policy was also that it was ambiguous unlike the 2014 policy which is far more detailed.²⁹

In the present case, the grant of remission is questionable on the following grounds –

1. Impact on collective conscience and the fiduciary relationship between citizens and the State.
2. The grant of remission to convicts of gang-rape defies the unwritten norm and the broader legal prudence.³⁰
3. Aspect of fairness in decision making.

VII. OVERLAP OF REMISSION POWERS

As far as remission powers are concerned, the ambiguity is partly due to a liberal architecture of separation of powers.

Accredited to Montesquieu, the theory finds an implied resonance in *Article 50 of the Indian Constitution*. It provides for separation of judiciary and executive in the sphere of public services of the State.

Montesquieu established a positive and direct relationship between *separation of powers and liberty of an individual*. A deliberate and conscious exercise of power by the various organs of the government promotes citizen-State relationship, enhances governance and social cohesion.

As far as the subject-matter of remission is concerned, the separation of powers in the context of remission assumes significance.

In India the remission powers of the Executive and the statutory powers for the Appropriate Government co-exist.

The Constitution of India, under Articles 72 and 161 provides substantive powers to the President and Governor, Executive Heads of the Union and State respectively, with powers of remission, reprieve, respite and commutation, whereas the CrPC provides discretionary power to the Central or State Government, as the case may be, to grant such relief in sentences. Naturally, the powers under the Constitution are untouched by the legislature.

²⁹Outlook Web Desk, *Explained: Gujarat's 1992 Remission Policy And Why Bilkis Bano Case Convicts Wouldn't Be Freed Under 2014 Policy*, (Sept. 11, 2022, 12:30 PM) <https://www.outlookindia.com/national/explained-gujarat-1992-remission-policy-and-why-bilkis-bano-case-convicts-would-not-be-freed-under-2014-policy-news-217267>.

³⁰Amisha Shrivastava, *Bilkis Bano Case: Stigma Attached To Even Petty Offences, How Can We Stand Convicts Of Such A Barbaric Offence? – Justice Abhay Thipsay*, (Sept 10, 2022, 05:00 PM) <https://www.livelaw.in/news-updates/bilkis-bano-case-retired-justice-abhay-thipsay-remission-207300>.

In *Maru Ram v UOI*³¹, this contestation between executive and judiciary became apparent, as the court held that once a sentence is imposed, the termination of the same before the stipulated term can be effectuated either through Sections 432 or 433 of the CrPC or Articles 72 or 161 of the Constitution. As per the *corpus juris* in operation in India, there is no other mode of granting remission to a convict. Secondly, the sentencing power of the judiciary precedes State action whereas remission is solely a government or executive measure exercised as per Section 432 of the CrPC.

In *Bachan Singh v State of Punjab*³², the court held that in order to achieve the goals set out by the Constitution it becomes necessary that executive and judicial action have their independent sphere of functioning. There is no subordination of one organ to another but a mutual exclusivity.

Secondly, the judicial decision regarding imprisonment should be implemented bearing in mind larger public interest and a liberal policy of the State must not nullify judicial decisions.

Thirdly, the constitutional power and statutory power exist exclusively of each other. The court added that the power exercised under Section 432 and 433 of the CrPC are exercised independently of any petition Article 32.

Fourthly, the court stated that Section 432 was an *enabling provision* and the power exercised by appropriate Government was subject to conditions enumerated under Section 432(2) to (5). Ancillary conditions are further mentioned in the Jail Manual and statutory rules. *To ensure that the decision on remission is well-informed, the statutory procedure laid down in Section 432 must be diligently followed.*

In *Sangeet v State of Haryana*³³, the court held that life imprisonment implies custody till the end of a convict's life, subject to any remission granted by the appropriate Government under Section 432 which is *further subject to procedural checks.*

Furthermore, it must be borne in mind that it is the judiciary which performs the function of sentencing but the implementation of the sentence is an executive function. In the immediate context, the remission powers have been exercised by the State Government of Gujarat, but the most pertinent question that arises in this regard is that will a mere lapse of fourteen years of sentence automatically invoke a State's executive powers, thereby overriding the judicial sentence of life imprisonment for a heinous crime?

³¹ (1980) AIR 2147 (India).

³² AIR 1980 SC 898 (India).

³³ Criminal Appeal Nos. 490-491 of 2011 (India).

VIII. JUDICIAL PERSPECTIVE ON REMISSION

In order to facilitate more clarity with regard to exercise of remission powers, the Supreme Court has contributed to the development of law on remission touching upon various aspects including the extent of the discretionary power, the procedural compliances and the circumstances under which remission can be granted.

In *State of Madhya Pradesh v Rattan Singh*³⁴, the court held that remission is not a right but an *act of discretion* exercised by the appropriate government, an opinion reiterated in *Gopal V Godse v State of Maharashtra*³⁵ and *Surjit Singh v State of Punjab and Ors*³⁶. The decision to remit or refuse to remit lies wholly with the executive and no writ can be issued to direct the State Government to act otherwise.

Laying stress on the fact that granting remission entails tangible societal consequences, in *Maru Ram v UOI*³⁷, the court stated that sentencing of an individual in heinous offences acts as a deterrent. To this end, the rationale of the court lay in *upholding the social sentiments of a civilized society*.

In line with this thought, the court in *Bachan Singh v State of Punjab*³⁸ held that in case of heinous offences, imposition of harsh punishments like the death sentence or life imprisonment become an *imperative necessity*. Following the deterrent theory of punishment, the court held that such sentencing policy was aimed at preventing criminals from committing heinous offences. Furthermore, the court highlighted the societal repercussions of releasing individuals convicted of heinous offences by stating that in such cases if a deterrent punishment is not implemented then an atmosphere of chaos can shape up in the country, which can therefore endanger the life and liberty of all citizens. The court emphasized that liberty under Article 21 of the Constitution was a broad concept and every individual had a complete right to avail of liberty. Conversely, where a person has completely deprived another person of his right to liberty and has therefore endangered the liberty of his family, enjoyed no right to ask the court to uphold his liberty.

On the basis of these observations, the compelling question that arises in Bilkis's case is if equilibrium between the liberty of the convicts and of the victim has been wisely struck?

³⁴ (1976) AIR 1552 (India).

³⁵ (1961) AIR 600 (India).

³⁶ (1996) AIR 1388 (India).

³⁷ (1980) AIR 2147 (India).

³⁸ AIR 1980 SC 898 (India).

The court also sought to balance penology and victimology. J Krishna Iyer held that the grant of remission may be driven by myriad reasons and the appropriate government had been bestowed with all the power but no exercise of such power could be a law unto itself. Instead it must be a *decision that should be based on the finer canons of constitutionalism*.³⁹

In *State of Haryana v Mohinder Singh*⁴⁰, the accused was convicted under Section 376 of the IPC. Multiple executive orders issued by the Governor outlined guidelines for remission of sentence whereby an *express exclusion of rape* or dowry deaths showed that such crimes were not considered fit for grant of remission. The court noted that the decision of remission cannot be arbitrary in nature but must be *well informed, reasonable and fair*. The CrPC, apart from the procedural check, outlines a substantive mechanism under Section 433A that minimum fourteen years of imprisonment must have been served by the individual before the remission of a sentence is granted in a capital offence. This decision further highlighted that grant of remission in commemoration of an occasion could not be solely used as a legitimizing factor for remission. Presently, the Central Government issued remission guidelines to commemorate Azadi ka Amrit Mahotsav which excluded remission in case of heinous crimes yet as per the State Government policy, remission was granted.⁴¹

In *State of Haryana v Jagdish*⁴², the grant of remission was held to be a plenary power which was to be *based upon reason, relevance and reformation* and not the fancy, frolic or frown of the Government. The Constitution envisaged that the exercise of *discretionary power* must be underlined by the consideration of some *public purpose*. The court further highlighted that this power exercised by the sovereign is independent of the power exercised by the judiciary. Therefore, remission signified a *liberalized policy* of a State's pardoning powers.

The public welfare connotation of remission was reiterated in *Epuru Sudhakar & Anr v Govt. of A.P. & Ors.*⁴³, whereby the court held that the power of remission was a *prerogative power* of the State and was not to be understood as solely an act of grace.

In *Sangeet v State of Haryana*⁴⁴, the court held that the appropriate government's power of remission was enabled by Section 432 to override a judicially pronounced sentence based on the conditions highlighted in the Jail Manual or in the statutory rules. Accordingly, the

³⁹V Venkatesan, *Prisoners and Precedents* (Sept. 11, 2022, 03:30 PM) <https://frontline.thehindu.com/other/article30177924.ece>.

⁴⁰ 2003 (1) AWC 567 SC (India).

⁴¹MHA, *Guidelines for granting Special Remission to Prisoners* (Sept. 10, 2022, 05:15 PM) https://www.mha.gov.in/sites/default/files/SpecialRemissionModulePrisons_13062022.pdf.

⁴²Criminal Appeal No. 566 of 2010 (India).

⁴³ AIR 2006 SC 3385 (India).

⁴⁴ Criminal Appeal Nos. 490-491 of 2011 (India).

appropriate government is required to consult the presiding judge of the Court who passed the conviction sentence. This statutory procedure provides that there has to be application of mind to the issue of grant of remission.

The court in *UOI v Sriharan*⁴⁵ noted that the framework of remission in India could be understood under the relevant Prison Rules as also statutorily under Section 432 of CrPC.

The paradox, therefore, lies in the fact that despite an express statutory and constitutional framework, the grant of remission has been marred by an unrestrained exercise of State's discretionary authority therefore inviting constant adjudication.

IX. DETERRENCE OR REFORMATION: RELEVANCE OF PUNISHMENT IN A HEINOUS CRIME

If you do not know how to value the human rights of anybody else then you cannot expect the act of mercy to fall upon you. If at the same time you have brought brutality to your act and that too at a level that it shocked the conscience of every sane person and therefore if you have shaken the conscience of the country then you deserve to die.

-Justice R S Sodhi⁴⁶

Violation of collective conscience acts as glue in societies and the acknowledgement of such violation, therefore, builds a consensus around what constitutes a *rarest of the rare* crime.⁴⁷ Devoid of a definition, interpretation of this principle varies on a case to case basis but the common underlying factor remains the impact of a crime on the larger society, beyond the victim-accused paradigm.

The erosion of trust in a society and the resultant imbalance brought about by commission of heinous crimes, throws questions beyond mere incarceration. As the wider public interest and societal conscience is to be restored, it becomes crucial for the judiciary to galvanize collective interests of a society, a community and a country.

The Supreme Court in *State of Haryana v Jagdish*⁴⁸ noted that the State has to achieve a balance between protecting the society from a convict and to ensure rehabilitation of the offender.

⁴⁵ Writ Petition (Crl.) No. 48 of 2014 (India).

⁴⁶ Indo-Asian News Service, *They Deserve It: Ex-High Court Judges On Death Penalty To Nirbhaya Convicts* (Sept. 11, 2022, 08:30 PM) <https://www.ndtv.com/india-news/they-deserve-it-ex-high-court-judges-on-death-penalty-to-nirbhaya-convicts-2197428>.

⁴⁷ Aarushi Punia, *Nirbhaya Verdict: What Does 'Rarest of the Rare' Actually Mean?* (Sept. 10, 2022, 07:45 PM) <https://www.thequint.com/voices/blogs/nirbhaya-verdict-death-sentence-indian-judiciary-legal-system-rarest-of-the-rare-cases#read-more>.

⁴⁸ Criminal Appeal No. 566 of 2010 (India).

Ensuring that the convict's right to liberty, as a human right is upheld, while equally securing the society, is a goal that punishment seeks to achieve.

The theory of deterrence acts as a restraining power on the actual or potential motives of an offender; helps in modifying the behavior of an individual vis-à-vis the society at large. On the other hand, altering the nature of sentences, including abandonment of sentences and the greater employment of methods like probation, parole and suspension of sentences provide space for reformation. *It was further emphasized that although the reformatory theory of punishment has gained attention but at the same time it must not be allowed to assume undue prominence.*⁴⁹

The 2012 Delhi gang-rape reignited this sensitive debate. The exceptionality of rarest of the rare is to be objectively justified depending upon the factual matrix of a case. When the public conscience stands violated due to the manner in which a crime is committed and not the crime per se, law as a social instrument must be judiciously utilized to restore broken communities as well as satiate collective conscience. Relying upon the collective conscience aspect⁵⁰, death penalty, as a deterrent, was emphasized upon by the Supreme Court in the twin cases of *Bachan Singh v State of Punjab*⁵¹ and *Machhi Singh v State of Punjab*⁵².

Between Bilkis Bano and Nirbhaya, there are many a parallels that can be drawn but of direct concern here is the commonality based on nature of punishment and the relationship with collective conscience. In the present case, life imprisonment was pronounced for the convicts by the Special Court in 2008 whereas the CBI had demanded death penalty for the convicts based on the rarest of the rare principle.⁵³ Refuting the plea for death penalty, the court upheld life imprisonment.

Conspicuously, the rationale of collective conscience was acknowledged in Nirbhaya whereas in the case of Bilkis Bano, the lack of application of the same manifests arbitrariness.⁵⁴ The question that therefore arises is how can the criminal jurisprudence as regards the crimes committed against women be reformed so as to make its application more rational, uniform and

⁴⁹ P.J. FITZGERALD, SALMOND ON JURISPRUDENCE (12th Ed., Universal Law Publishing Co.)

⁵⁰ Satya Prakash, *Death penalty: 'Rarest of rare' cases are not so rare in India now* (Sept. 11, 2022, 09:00 PM) <https://www.hindustantimes.com/india/rarest-of-rare-cases-are-not-so-rare-in-india-now/story-JxnTLyJ4tPIDBnHhatCcIL.html>.

⁵¹ AIR 1980 SC 898 (India).

⁵² (1983) 3 SCC 470 (India).

⁵³ Outlook Web Bureau, *No Death Penalty For Gujarat Riots Victim Bilkis Bano Rapists: Bombay High Court*, NATIONAL (Sept. 09, 2022, 07:15 PM) <https://www.outlookindia.com/website/story/no-death-penalty-for-bilkis-bano-rapists-bombay-high-court/298740>.

⁵⁴ Vakasha Sachdev, *Bilkis Bano vs Nirbhaya: All That's Wrong With Capital Punishment*, OPINION (Sept 11, 2022, 10:30 PM) <https://www.thequint.com/voices/opinion/nirbhaya-bilkis-bano-case-and-death-sentence#read-more>.

legally sound?

To reduce arbitrariness and introduce consistency in decision making, WHO's strategy, called RESPECT is noteworthy –

1. Strengthening of *relationship* skills.
2. Women *empowerment*.
3. Ensured *services*.
4. Reduction of *poverty*.
5. Creation of an *enabling* environment.
6. Prevention of *child* and adolescent *abuse*.
7. Behavioral, attitudinal, and belief *transformation*.⁵⁵

Law as an instrument of social change should be utilized to initiate transformative action by addressing the structural and root causes of violence against women. Further analysis of the convergence of hyper-masculinity in today's modern yet materially unequal society with a neo-liberal economic model will help provide an insight into the culture supporting violence against women.

X. WHAT IS THE NOTION OF JUSTICE?

Today, I can only say this — how can justice for any woman end like this? I trusted the highest courts in our land. I trusted the system and I was slowly learning to live with my trauma. The release of these convicts has taken from me my peace and shaken my faith in justice.

-Bilkis Bano⁵⁶

These words throw light on the mental state of Bilkis Bano and how justice that took years to come by, in an instant stood reversed for her. A sense of closure, which is the starting point for a rape-victim to rehabilitate and recover from her wounds, has been transgressed, thereby making her wounds come alive once again.

In a country, whose existential foundation rests upon the fragility of immense socio-cultural diversity, occurrence of riots overtly based on religious overtones destabilized not just a

⁵⁵WHO, *Violence against Women*, FACTSHEET (Sept. 08, 2022, 06:30 PM) <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>.

⁵⁶Bilkis's Statement through Advocate Shobha Gupta, THE INDIAN EXPRESS (Sept. 14, 2022, 11:00 PM) <https://indianexpress.com/article/cities/ahmedabad/bilkis-bano-speaks-trusted-highest-courts-faith-shaken-give-back-right-to-live-without-fear-8096376/>.

particular territorial jurisdiction but the entire country. The aftermath of the riots fractured societies and induced brittleness.

The system of remission in India strives to achieve temperance between law's rigors and State's authority to act graciously. As remission entails liberty, which is constitutionally protected in our country, the benefit of same ought to be bestowed upon the deserving yet with a cautious exercise of wisdom. Furthermore, grant of remission must be underlined by a genuine element of reform, as remission without reform will certainly not further the cause of justice.⁵⁷

Therefore, it is vital to bear in mind the principle of Justice as enshrined in the Preamble to the Indian Constitution, and therefore the State must strive to strike a fine balance between the power of remission and the societal interest at large.

Justice should not only be done but should be manifestly seen to be done.

-Gordon Hewart⁵⁸

⁵⁷ Editorial, *Remission without Reform: On the release of 11 convicts in Bilkis Bano case*, OPINION (Sept. 08, 2022, 08:30 PM) <https://www.thehindu.com/opinion/editorial/remission-without-reform-on-the-release-of-11-convicts-in-bilkis-bano-case/article65775922.ece>.

⁵⁸ 1st Viscount Hewart, Lord Chief Justice of England.