NEW DIMENSIONS IN SENTENCING VIS-À-VIS RIGHTS OF PRISONERS

Shubham Patel* and Shivam Yadav**

ABSTRACT

Every person has a right to be treated with respect and dignity, be that a person in a suit or a person behind the bars. The prisoners usually face stigma – the government's effort is to avoid their contact with the society and takes away the freedom of mobility. This in turn denies a chance of a prisoner to get reformed. In the recent times, there is upsurge in the sentences in which the court orders that the convicted person should spend the whole life or at least a minimum number of years behind the bars and puts those term beyond the scope of remission by the government. The Supreme Court in the recent case of Union of India v. V. Sriharan declared that these sentences are valid, but only the Supreme Court and High Courts would have power to order such terms. This paper analyses the scope of the life imprisonment with the right to claim remission on which such sentences put bars and their coexistence with the rights of the prisoners, and to find whether this scheme of sentencing hampers rights of prisoners or not from human right's perspective, i.e. right of a person to get reformed and rehabilitated.

Keywords: *prisoners, remission, Supreme Court, term of imprisonment, right to rehabilitate*

* *Student of 4th year, B.A. LL.B. (Hons.), Dr. Ram Manohar Lohiya National Law University, Lucknow. The author can be reached at shubh.rmlnlu@gmail.com*

** *Student of 4th year, B.A. LL.B. (Hons.), Dr. Ram Manohar Lohiya National Law University, Lucknow. The author can be reached at shivamyadav82@gmail.com*

INTRODUCTION

> *"What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts...that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the...courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."* [1]
>
> *- Justice Oliver Wendell Holmes*

The above extract from the *Bad Man's* theory as propounded by Oliver W. Holmes. It portrays the fact that the man who is accused of a certain offence cares less on what the legislations and principles of deduction say about the offence and is concerned more about what the courts would do in his case i.e. would they acquit or otherwise convict him, if convicted what would be the quantum of the punishment he shall have to serve, this doctrine in certain ways points out that the fate of the accused depends upon the ideological opinions of the person who is sitting at the bench and deciding the case.

The main objectives of punishments in any penal system are threefold, to serve as deterrent, punitive or retributive and finally to act as reformative. In the present day scenario most of the punishments are directed towards the reformation of the prisoners or to act as deterrent, with retribution becoming the least likely of the punishments. The scheme of punishments under the Indian Penal Code (I.P.C.) as contained in Chapter III provides for life imprisonment amongst other forms of punishments. The Code of Criminal Procedure (Cr.P.C.) provides for remissions[2] and other executive powers[3]

[1] Oliver W. Holmes, *The Path of Law*, 110 Harv. L. Rev. 991, (1996).
[2] The Code of Criminal Procedure, § 432 (1973).

which the government are authorized to use, if in their opinion the prisoner merits certain diminutions from the sentence he was to actually serve.

The question as to meaning and scope of the term 'life imprisonment' and the rights of the prisoners have always been put in front of the Supreme Court and it has been conclusively answered in a catena of cases. Though, in recent times a new pattern of sentencing has been introduced in which imprisonment for a certain number of years is put beyond the scope of remission and other powers contained under the Cr.P.C.

Of recent, the issue related to giving such punishments was highlighted in the case of *Union of India v Sriharan*[4]*,* where among the seven issues presented before the court, the very first issue was that whether the punishment of imprisonment of life means imprisonment of the rest of the convict's life[5] or whether he is entitled to claim remission as a right and whether in a very few cases this the punishment of death penalty can be replaced by punishment of imprisonment of life or imprisonment in excess of fourteen years and whether such a sentence can be put beyond remission.[6]

This paper deals with the special kind of punishment enunciated by the Supreme Court in *Swamy Shraddanand v. State of Karnataka*[7]*,* the questions raised about its validity and the answers thereof. The paper also tries to answer the question that whether a prisoner has right to life and personal liberty guaranteed under Article 21 of the Constitution of India or not, if yes then whether this kind of special punishment infringes such rights or not? This paper also analyses the concept of separation of power in light of the decision of the Supreme Court barring the right of executive to grant remission to the prisoners who fall under this special category.

---

[3] The Code of Criminal Procedure, § 433 (1973).
[4] *Union of India v. V. Shriharan,* 2015 S.C.C. OnLine S.C. 1267.
[5] The Indian Penal Code, § 53 r/w. § 45 (1860).
[6] Shriharan, *supra note* 4.
[7] *Swamy Shraddananda v. State of Karnataka,* (2008) 13 S.C.C. 767.

LIFE IMPRISONMENT: MEANING AND SCOPE

Austin considered sanction as a necessary ingredient of law and was of the consideration that it was only through the sanctions that the obedience to the law can be achieved. Sanction in terms of Criminal Law is punishment and is nothing but infliction of pain or injury upon the wrong-doer. Hence the consequence of any criminal act is punishment which is inflicted by the authorities.

The I.P.C. in Chapter III deals with the various types of punishments, Section 53 of the I.P.C. provides the exhaustive lists of the possible punishments, whereas Section 53 I.P.C. read with Section 45 of the I.P.C. provides for the punishment of life imprisonment. In the present scheme of things there are more than 50 offences that are capable of attracting life imprisonment as a form of punishment. However, the meaning and length of life imprisonment term is ambiguous and not clear, the Hon'ble Supreme Court, in a catena of cases has dealt with the questions raised about the same. The primary reasons for this question to rise from time to time are the provisions contained in the I.P.C.[8] and the Cr.P.C.[9] empowering the government to pardon or remit sentences.

The Supreme Court in *Gopal Vinayak Godse v. State of Maharashtra* [10] answered the question where it observed that *"A sentence of transportation for life or imprisonment for life must be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life."*

The constitution bench of the Supreme Court in *Maru Ram v. Union of India*[11] has held that remission is not a liberty which one can claim even if person has served 20 years in jail and the meaning life sentence is nothing less than life-long imprisonment. On the very similar lines, in *Mohd. Munna*

[8] The Indian Penal Code, §§ 54, 55, 57, (1860).
[9] The Code of Criminal Procedure, § 432, 433 (1973).
[10] *Gopal Vinayak Godse v. State of Maharashtra,* A.I.R. 1961 S.C. 600.
[11] *Maru Ram v. Union of India,* (1981) 1 S.C.C. 107.

vs. Union of India[12] it was held by the Supreme Court that in a case of life imprisonment there is no provision either in the Cr.P.C. or in the I.P.C. which guarantees the automatic release of the prisoner after 14 or 20 years of serving the sentence without the remission given by the government.

Section 57 of the I.P.C. provides that *"In calculating fractions of terms of punishment, [imprisonment] for life shall be reckoned as equivalent to [imprisonment] for twenty years."*[13] It is submitted that though it can be argued by some as the means that the life imprisonment cannot exceed more than 20 years, however, this is not the case. This provision was inserted for some other purpose and one has to read Section 57 with Section 511 of the I.P.C. which talks about attempt it says that whoever attempt to commit an offence punishable with life imprisonment and for which there is no express provision is made in the IPC shall be punished with one-half of the imprisonment of life. So if life imprisonment would be uncertain then it will be difficult for court to punish for attempt in cases punishable for life imprisonment hence in such cases 20 years should be taken as life imprisonment to calculate the fraction so that a person cannot be punished for more than 10 years in cases of attempt to commit offences punishable with life imprisonment. However, the Supreme Court, almost 36 years ago, in *Dalbir Singh and Others v. State of Punjab*[14], held that -

> *"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."*

[12] *Mohd. Munna v. Union of India,* (2005) 7 S.C.C. 417.
[13] The Indian Penal Code, § 57, (1860).
[14] *Dalbir Singh and Others v. State of Punjab,* (1979) 3 S.C.C. 745 ¶ 14.

Thus, it can be argued that the ideas of the punishments which are doled out today were in fact brought into existence much earlier.

REMITTANCE AS CONTAINED UNDER Cr.P.C.

Once a person is convicted of the offence he is alleged of, a sentence is imposed by a competent court, and such a person is sent to the jails as a prisoner, the execution of the sentence is upon the government then, which executes so in accordance to the rules framed in that regard.

Section 432 of the Cr.P.C enables the Government to remit wholly or in part the sentence with or without any conditions attached and it applies to any punishment for an offence, and the remission or suspension done under this section does not in any way interfere with the order of conviction passed by the court, but it only affects the execution of the sentence. The effect of the order of remission is that it wipes out the parts of the sentence of imprisonment which has not been served, reducing the sentence to the period which is already undergone by the prisoner, and subsequently leaving the order of conviction and the sentence passed by it untouched.[15]

The powers given to the government in this section are purely discretionary in nature and there is no obligation put upon them to tell the reasons why a person is given remittance, the only need for the government is to apply this power fairly and not arbitrarily. The safeguards to prevent such arbitrary remission are contained in the provisions of Cr.P.C. itself.

PROCEDURAL CHECKS ON ARBITRARY REMISSIONS

The checks are imposed by sub section 2 which says that an application is must to be made by the convict himself or by someone on his behalf and the government cannot take matter *suo moto*, the government can only grant remittance according to the rules in Jail Manuals or statutory rules. It is settled that once such application is made by the prisoner, the 'appropriate

[15] *Sarat Chandra Rabha vs. Khagendranath*, A.I.R. 1961 S.C. 334.

government' then is required to approach the presiding judge of the Court which either made conviction or confirmed the same to give his opinion that whether the application which is made shall be granted remission or shall be refused.[16] The same has been held and followed in several cases.[17]

It is clear that the s*uo moto* remissions cannot be granted as the provision is only an enabling provision and the government can only over-ride the judicial pronouncement if certain conditions are fulfilled.[18] This also eliminates the "discretionary" or collective release of convicts on "festive" occasions since each release requires case to case analysis.[19]

SUBSTANTIVE CHECKS ON ARBITRARY REMISSIONS

A convict of life imprisonment cannot enjoy remission under Sec 432 until he qualifies Sec 433-A, for the power of remission of sentence of life imprisonment of a convict the substantive check is placed by Sec 433-A of the Cr.P.C which provides that for remission in sentence of a capital punishment the convict must serve at least 14 years of imprisonment.

In *Maru Ram*[20] it was said that remissions may benefit the release of the convict when the term is of limited number of years, when the punishment is of life imprisonment then the net number of days of imprisonment is uncertain duration and anything subtracted in uncertain still remains uncertain, the nature of life imprisonment is incarceration until death.

In *Ashok Kumar*[21] case the position was made clearer when it was said that when a person is given life imprisonment the remissions earned by him under remission rules are of limited importance, and do not acquire importance unless the sentence is remitted under Sec 432 of the Cr.P.C,

[16] 1, Ram Jethmalani & D.S. Chopra, *The Indian Penal Code* 1271, (1st ed. 2015)
[17] *Sangeet v. State of Haryana*, A.I.R. 2013 S.C. 447
[18] 2, Ram Jethmalani & D.S. Chopra, *The Code of Criminal Procedure, 1973,* 2389, (1st ed. 2015).
[19] Sangeet, *supra note* 17.
[20] Maru Ram, *supra note* 11.
[21] *Ashok Kumar alias Golu v. Union of India,* (1991) 3 S.C.C. 498.

which is also subjected under Sec 433-A of the code, or constitutional powers has been exercised under Article 72/161 of the Constitution.

It is a well settled principle in law that in the cases where a convict is sentenced to undergo life imprisonment, he would be in custody for unstipulated period i.e. the time which cannot be determined conclusively. Due to the same reason, the remissions, whatever are earned by or awarded to such a person end up only being notional in nature. In these types of cases, to reduce the period of incarceration, a specific order under Sec 432 of Cr.P.C is needed to be passed by the 'appropriate government', in *State of M.P. v. Ratan Singh*[22] case it was said that in cases where punishment given is life imprisonment, the death of convict cannot be fixed and the remission given under Rules could not be considered as substitute to the sentence of transportation for life/life imprisonment.

THE NEW KIND OF SENTENCING

The very inception of these kind of sentences can be found in the observations and belief of the courts that there are certain cases where the facts of the case are such that the case does not qualifies to fit in the test of the '*rarest of the rare'* doctrine, but also at the same time is, in terms of the seriousness, above the status of life imprisonment and if the convict is awarded with the punishment of life imprisonment only which can be remitted after the passing of 14 year or any other number of years then the ends of justice would not meet.

As discussed earlier, *Dalbir Singh and Others v. State of Punjab*[23] provided the mandate for imposing the sentences which would run for whole life without remission, the first case which followed this way of sentencing was the peculiar case *Subash Chander v. Krishan Lal and Others*[24] where the court held that the appellant who was to serve sentence of life imprisonment should remain in prison for the rest of his life and he would not be entitled to

[22] *State of M.P. vs. Ratan Singh*, (1976) 3 S.C.C. 470.
[23] Dalbir Singh, *supra note* 14.
[24] *Subash Chander v. Krishna Lal and Others,* (2001) 4 S.C.C. 458.

any commutation or premature release. However the judgment is peculiar because in the present case the appellant himself submitted before the court that if he were to be sentenced life imprisonment he should not be released.

The Supreme Court in the case of *Swamy Shraddanand v. State of Karnataka*[25] where while awarding life-long imprisonment to the accused without any remission court reserved its opinion on standardisation of life imprisonment as 14 years imprisonment court said that *"The sentence of imprisonment for a term of 14 years, that goes under the euphemism of life imprisonment is equally, if not more, unacceptable."*

On this issue the court further made it clear that the sentence of life imprisonment, when it is awarded as a substitute for death penalty should be carried out strictly as directed by the Court. It also further laid down the legal basis for putting the punishment of imprisonment for life, awarded as substitute for death penalty, beyond any remission.[26] The Supreme Court pointed out that death penalty would be harsh and the life imprisonment which can be remitted in 14 years would be inadequate and not proportional in the present case and sentenced was awarded with an order that the convict must not be released for rest of his life.

This trend has been followed in several cases where the convicts had to spend minimum required years from their sentences before being considered entitled to receive remission. For instance *Shri Bhagwan v. State of Rajasthan*[27], *Prakash Dhawal Khairnar (Patil) v. State of Maharashtra*[28], *Haru Ghosh v. State of West Bengal*[29].

In *Haru Ghosh vs. State of West Bengal*[30] the Supreme Court was of the opinion that the life imprisonment would not be punishment as he was already under the shadow of one in another case, and that death penalty

[25] Swamy Shraddananda, *supra note* 7.
[26] *Id.*
[27] *Shri Bhagwan v. State of Rajasthan,* (2001) 6 S.C.C. 296.
[28] *Praksh Dhawal Khairnar (Patil) v. State of Maharashtra,* (2002) 2 S.C.C. 35.
[29] *Haru Ghosh v. State of West Bengal,* (2009) 15 S.C.C. 551.
[30] *Id.*

would be harsh, the court in determining that death penalty would be harsh also took the fact that he had two children as a mitigating factor. The court in this case gave a punishment of a minimum thirty five years to the accused.

The Supreme Court again in the case of *Dilip Premnarayan Tiwari vs. State of Maharashtra*[31] while commuting the sentence of death penalty to life imprisonment gave a direction that the two accused should not be released before 25 years and the third one before 20 years.

It is submitted that the latter two cases provide for the punishment in some years which can be said are arbitrarily decided as nowhere in the judgments judges give the reason why the specific time period they have provided is necessary and how in fact the time of 35 years in *Haru Ghosh*[32] case or 25 years in *Dilip P Tiwari*[33]case is going to serve as the time specifically needed to reform such criminals, question arises that how the bench sitting and deciding the case came to the conclusion that 35 years is needed, why not 30 or 40 years instead. There is an element of subjectivity in the manner these cases and number of years is decided. The cases where sentences are for whole life without remission present a different case altogether, as the court decided not to take their life, but the 'life' they so provided also lacked life.

However, a two judge bench in *Sangeet and Anr. v. State of Haryana*[34] opined that the decision of the Supreme Court in *Swamy Shraddanand*[35] case cannot be permitted as the appropriate government cannot be told that it is prohibited from granting remission of a sentence. Though this decision was given while keeping the principle of separation of powers in mind but was done away by constitution bench of Supreme Court in *Union of India v V. Sriharan*[36].

[31] *Dilip Premnarayan Tiwari v. State of Maharashtra,* A.I.R. 2010 S.C. 361.
[32] Haru Ghosh, *supra note* 29.
[33] Dilip P Tiwari, *supra note* 31.
[34] Sangeet, *supra note* 17.
[35] Swamy Shraddanand, *supra note* 7.
[36] Sriharan, *supra note* 4.

THE JUDGMENT: UNION OF INDIA V. V SHRIHARAN

In 2015 the Supreme Court constituted a constitution bench in *Union of India v V. Sriharan*[37] to answer various questions among which first question was related to the special category of sentence made by the Supreme Court in *Swamy Shraddanand*[38]case the judgment hold much value as two different opinion appeared on the answer of the above mentioned question.

The Supreme Court held that the life imprisonment means imprisonment for whole of the life, and further also said that the special category of punishment which put the bar on the remission can be given. It came up with reasons for giving such kind of special punishment. In this case court made a distinction between the constitutional power of remission and statuary power of remission, it said that "*……the constitutional power of remission provided under Art. 72 and 161 of the Constitution will always remain untouched, inasmuch as, though the statuary power of remission etc., as compared to constitutional power under Art. 72 and 161 looks similar, they are not the same.*"[39]

On giving special kind of punishment court said that *"…in order to ensure that such punishment to operate without any interruption, the inherent power of the court concerned should empower the court in public interest to make it certain that such punishment imposed will operate as imposed by stating that no remission can nullify such imposition."*[40]

It is also important to note that the Supreme Court also held that this power of giving special kind of punishment should only be exercised by Supreme Court and High Court and not by Sessions Court. For Sessions Court the only option which is open is to give life imprisonment with no specified term and death sentence. The only plausible reason for doing so is that it is not permissible under the statuary law and therefore can only be done by

[37] *Id.*
[38] Swamy Shraddanand, *supra note* 7.
[39] Sriharan, *supra note* 4.
[40] *Id.*

exercising the inherent powers of the Court to do justice. But resorting to the inherent power raises serious doubts as inherent power to do justice can only be used where a statute does not permit a course to be treaded but the Supreme Court itself said that punishment for different specified term is implicit in the punishment of life imprisonment so why take away power from the Session Court but this question was left unanswered by the Supreme Court.

However the judgment was not of the unanimous nature and Uday Umesh Lalit J. wrote the dissenting judgment on the first issue and Abhay Manohar Sapre J. concurred with Lalit J. On the first part of the question that whether imprisonment of life in I.P.C. meant imprisonment of the rest of the life of the convict, minority had concurred with the majority and said that imprisonment of life means imprisonment for the rest of the person's natural life but it dissented on the second part of the question of giving special category of punishment. Minority said that a convict can always apply to claim remission either under Article 72 and Article 161 of the Constitution or under Section 432 Cr.P.C. According to them it was not open for the courts to give any special category of punishment by making it beyond the application of remission. Lalit J. referred to the report of the Committee of Reform on Criminal Justice under the chairmanship of Justice Malimath, which in its report had recommended for the addition of an additional kind of punishment in cases where imprisonment of life is one of the punishments namely, imprisonment of life without commutation or remission.[41] He held that despite the recommendation of the committee the Parliament chosen not to act on it. Further the minority also referred to the judgment of Supreme Court in the case of *Vikram Singh v. Union of India*[42] where the Supreme Court said that prescribing punishment is the function of legislature and not the Courts. Further minority raised an important problem that as per section 433A Cr.P.C. even a person whose death sentence was confirmed by the Supreme Court may avail the benefit of

[41] Sriharan, *supra note* 4 ¶ 315.
[42] *Vikram Singh v. Union of India,* (2015) 9 S.C.C. 502.

remission after serving the statutory minimum 14 years in prison, if his death sentence gets commuted to life by the executive. Therefore, there can actually be a scenario, wherein, a person whose case fell short of rarest of rare will have no option of seeking remission, whereas, the one who was actually given death penalty may be released as per section 432/433A of Cr.P.C. [43]

The minority judgment raises very serious doubts over the Supreme Court's power to create special category of sentences and making it beyond the power of remission.

PRISONERS' RIGHT TO LIFE

Individuals who are in custody, despite the societal perception towards them, are humans and are entitled to as such treatment. A person does not loses his human rights merely because of the reason that he has committed some offence, and he has some dignity which is ought to be protected.[44]

Justice Posner while emphasizing on the treatment of prisoners noted that, while there are two ways to look upon the inmates, "one is to look at them as a separate species, as a type of vermin, devoid of any humanity"[45], but he advised the alternate approach that "We must not exaggerate the distance between 'us,' the lawful ones, the respectable ones, and the prison and jail population; for such exaggerations will make it too easy for us to deny that population the rudiments of human consideration."[46]

In *Shatrughan Chauhan v. Union of India*, Hon'ble Supreme Court while holding that every prisoner has right to life and personal liberty observed that *"... Article 21 inheres a right in every prisoner till his last breath and this Court will protect that right even if the noose is being tied on the condemned prisoner's neck."*[47]

---

[43] Sriharan, *supra note* 4 ¶ 328.
[44] R. K. Gupta & Karam Singh, *Human Rights of Prisoners in India,* 2, Imperial Journal of Interdisciplinary Research, (2016).
[45] *Jhonson v. Phelan,* 69 F. 3d. 144, 151 (1995)
[46] *Ibid* at 152
[47] *Shatrughan Chauhan v. Union of India,* (2014) 3 S.C.C. 1 ¶ 26

However, the majority decision of *Union of India v. V. Shriharan*[48] presents a question that whether the special category of sentence, which was held permissible encroaches upon the prisoner's right to life and personal liberty?

In the case of *State of Haryana v. Mahendra Singh*[49] SC said that right to be considered for remission is a legal right keeping in mind the constitutional safeguards of a convict under Article 20 and Article 21 of the Constitution of India. It is submitted that in *Maru Ram*[50] the Supreme Court said that remission is not a liberty which one can claim but here prisoner is not claiming right to get remission instead he is claiming right to be considered for remission. Hence taking this right from a person strikes at the very root of right to life. In *Haru Ghosh*[51] case and in in *Dilip P Tiwari*[52] court provided for 35 years and 25 years of imprisonment without remission. It can be said are arbitrarily decided as nowhere in the judgments judges give the reason why the specific time period they have provided is necessary and how in fact the time of 35 years in or 25 years case is going to serve as the time specifically needed to reform such criminals.

In *Maneka Gandhi v Union of India*[53] the Supreme Court said the law must be just, fair and reasonable in order to restrict the fundamental right. In the present case the principle enunciated by the Supreme Court is full with subjectivity and arbitrariness hence violative of Article 21. The Supreme Court invoked its inherent power to give such kind of sentence but in *V. Sriharan*[54] case Lalit J. while dissenting with this conclusion said that exercise of Article 142 cannot be inconsistent with the fundamental rights further it cannot be even inconsistent with the substantive provisions of the relevant statuary laws.

---

[48] Sriharan, *supra note* 4.
[49] *State of Haryana v. Mahendra Singh,* (2007) 13 S.C.C. 606.
[50] Maru Ram, *supra note* 11.
[51] Haru Ghosh, *supra note* 29.
[52] Dilip P Tiwari, *supra note* 31.
[53] *Maenka Gandhi v. Union of India,* A.I.R. 1978 S.C. 597.
[54] Sriharan, *supra note* 4.

Creation of special category of sentence and to put this category beyond remission gives too much power to the judge further there is no mechanism to check that whether a person is reformed after or before the completion of said punishment or not. The main goal of imprisonment as a punishment is reformative rather than retributive. Right to life is made of various things like for an ordinary person it consist of right to shelter, right to livelihood, right to food etc. but for a prisoner it consist of right against delay in deciding mercy petition and right to be considered for remission hence it is an important prop which is holding the right to life together with others and denying this right would violate the prisoner's right to life.

Moreover, the issue of prison problem is not a new scenario in India and there is a widespread concern about the overpopulation of prisons. The average overpopulation of prisons is 114%[55] and in exceptional cases up to more than 200%[56], and such cases are not only going to affect the prisoners but also the undertrial prisoners who by far make more than 50% of the total prison population.[57]

SEPARATION OF POWERS

S P Sathe observes that –

> *"People's understanding of judicial activism depends on their conception of the proper role of a constitutional court in a democracy. Those who conceive the role of a constitutional court narrowly, as restricted to mere application of the pre-existing legal rules to the given situation, tend to equate even a liberal or dynamic*

[55] Prison Statics India, 2015, National Crime Records Bureau, available at http://ncrb.nic.in/StatPublications/PSI/Prison2015/Full/PSI-2015-%2018-11-2016.pdf (accessed on 26 January 2017).

[56] Delhi Prisons Annual Review, 2016, available at http://www.delhi.gov.in/wps/wcm/connect/lib_centraljail/Central+Jail/Home/Prisoner+Profile (accessed on 28 January 2017).

[57] Prison Statics India, 2015, National Crime Records Bureau, available at http://ncrb.nic.in/StatPublications/PSI/Prison2015/Full/PSI-2015-%2018-11-2016.pdf (accessed on 26 January 2017).

> *interpretation of a statute with activism. Those who conceive a wider role for a constitutional court, expecting it to both provide meaning to various open textured expressions in a written constitution and apply new meaning as required by the changing times, usually consider judicial activism not as an aberration, but as a normal judicial function."*[58]

Now even if we consider the second part of this statement, where we conceive a wider role for a constitutional court by expecting it to provide meaning to "open textured expressions" and apply new meaning as required by changing times, it falls short in the present scenario as here court is not giving meaning to any "open textured expression", it is ignoring a legislative mandate and making a judicial legislation. Now court did not bar the application of Article 72 and Article 161 but it barred the application of statutory provisions. But again question arises that why made a distinction between both the provisions when both have the influence of government as president and governor exercise this constitutional power under the aid and advice of council of ministers. In a democracy the job of the Courts are to interpret and apply the law it can even provide meaning to various open textured expressions but it should not make a new law ignoring the very intention of legislature. Parliament purposely ignored the recommendation of Malimath committee report on formation of special category of sentence without remission but court allowed it. In a democracy legislature represents the will of the people and it has been authorized by the people to legislate on their behalf but court ignored this part which raises serious questions.

INTERNATIONAL PERSPECTIVES

If an international perspective is brought in, then it can be very well discovered that the long term of sentences are a very rare phenomenon. Though there have been countries which award exceptionally long years of sentences, the same are very limited in number. There has been a trend,

[58] S.P. Sathe, *"Judicial Activism: The Indian Experience"* 6 Washington University Journal of Law and Policy, 29, (2001).

especially in the USA to sentence the convicts exceptionally long sentences (in terms of 100+ years) and multiple life imprisonments, but those are seen as 'exceptionally bad precedents', are generally criticized and seen as giving the punishment an angle of retribution rather than reformation[59], with an attempt to send out the message that the wrongdoer is getting the maximum what can possibly be done to punish him.[60]

The European scenario is much different and divided in their approaches to dole out the punishments in terms of imprisonments. The European nations in general, with exception of England and Netherlands as the only two nations which have life imprisonment without parole, have abolished the punishment of indefinite life imprisonment and what remains is the limited term of imprisonment which varies on local laws of the countries. The ECHR (European Convention on Human Rights) provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment"[61] The European Court of Human Rights held that if the law is such that if the law is such that the offender has no chances of release, whether *de facto* or *de jure* then in such case such a law can be held not in accordance with Article 3.[62]

Since the laws of England provide for indefinite period of imprisonment, the same have been question on the point of validity with respect to Article 3 of the ECHR time and again. England first followed the scheme of provisions where the Home Secretary used to prescribe the minimum terms of imprisonment, but after it was held unlawful[63], Criminal Justice Act, 2013 came into picture whereby all the courts passing mandatory life sentence are

[59] Prof. Faizan Mustafa, *Lifer without Remission, Another Regressive Verdict,* Live Law (Dec. 30, 2015), available at: http://www.livelaw.in/lifer-without-remission-another-regressive-verdict-2/. (accessed on 15 July 2017).

[60] Owen Bowcott, *Why do US judges give such long prison sentences?*, The Guardian (March 7, 2012), available at: https://www.theguardian.com/law/shortcuts/2012/mar/07/us-judges-long-prison-sentences. (accessed on 15 July 2017).

[61] The European Convention on Human Rights, § 3 (1950).

[62] *Kafkaris v. Cypress,* (2009) 49 E.H.R.R. 35. However in this case the laws of Cypress had both *de jure* and *de facto* measures which provided the offenders a chance of release, hence the laws were held to be consistent with Art. 3.

[63] *Anderson v. Secretary of States,* [2003] 1 A.C. 837.

mandated to provide a minimum which a prisoner has to undergo before claiming parole, the term is calculated using the Schedule 21. The Schedule 21 has divided the three categories which separately put the punishments and the minimum terms which the offender can be given based on their age and seriousness of the offence. However, one of the key features under the law is that the judge is duty bound to provide the reasons for choosing the particular minimum term in the open court.[64]

The ECHR held that in cases when the whole life imprisonment is awarded then such a prisoner is entitled to know that what he must do to be considered for release, and when and under what conditions the review of his sentence would be done. If the domestic laws does not provide the same the incompatibility with Art. 3 arise, as and when such decision is made.[65] This would have rendered the 'whole life order' invalid, but in a later case the Court of Appeals took a look into the same and held that the sentencing under Sec. 269 of the Criminal Justice Act, 2003 was not in violation of Art. 3 of ECHR, 1950 and the judges can continue to pass such orders in exceptional circumstances as the local laws provide for hope and possibility of release in exceptional circumstances.[66]

On a comparison with the present Indian scenario it can be concluded that the aspect of sentencing, at least, in terms of life imprisonment due to the rise in cases of a fixed term without remission, is drifting towards the retributive form of sentencing rather than focusing on the reformative parts. The other difference arises when the aspect of the necessity of providing reasons as to awarding the minimum non pardonable term is considered, the courts of England are bound by the provisions of law to tell the reasons whereas there is no such need in the Indian scenario.

[64] The Criminal Justice Act, § 270, (2003).
[65] *Vinter v. The United Kingdom,* [2013] All E.R. (D.) 158 (Jul.) ¶ 122.
[66] *R. v. McLaughlin and R. v. Newell,* [2014] E.W.C.A. Crim. 188.

CONCLUSION

In the case of *Divisional Manager Aravali Golf Club v. Chander Hass*[67], the Hon'ble Supreme Court said -

> *"Judges must know their limits and must not try to run the Government. They must have modesty and humility, and not behave like Emperors. There is broad separation of powers under the Constitution and each organ of the State i.e. the legislature, the executive and the judiciary must have respect for the others and not encroach into each other's domain"*

It is the duty of the Courts to decide and sentence an accused, but, this no-where entitles courts to encroach upon the matter which is given to some other organ of the state by the virtue of legislation. The entire idea of punishment in modern times is the reformation of the convicted person so as from being an anti-social element the person can again go and join he society, but if the case are considered where some fixed number of sentences were given, there is no probable justification that sheds light that why such time is needed and how after spending this much time in the captivity the person would get reformed. Further how it can be possible that Sessions Courts are allowed to give the punishment of death penalty while they are barred from giving punishment falling between life imprisonment and death penalty. Also the concern of the minority judgement in *V. Sriharan*[68] is well founded as there can actually be a scenario, wherein, a person whose case fell short of rarest of rare will have no option of seeking remission, whereas, the one who was actually given death penalty may be released as per section 432/433A of Cr.P.C. The decision of the Supreme Court raises various questions which need to be answered as the right to life and every chance which enables the person to gain back his liberty, in a lawful manner, should be respected and sought to be protected, even if that is of a prisoner and to

[67] *Divisional Manager Aravali Golf Club v. Chander Hass,* (2008) 1 S.C.C. 683 ¶ 20.
[68] Sriharan, *supra note* 7.

lock away the prisoner for rest of his life, overlooking his capacity to redemption and rehabilitate, and taking away the hopes of release is violation of his rights and dignity.

As submitted above, the need for reasons, that why a particular number of years are kept as mandatory imprisonment is of grave importance, the same is followed by nations where the of minimum time of imprisonment before one can claim pardon are provided, and the absence of the same makes the process all the more subjective and thus worrisome. *"The State must ensure that a person is detained under conditions which are compatible with respect for his human dignity and that the manner and method of the execution of the measure do not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention."*[69] The above observation sums up the duty of the state in terms on how even the convicts are to be treated and this is what all the civilized states should aspire to follow on.

[69] *Kudla v. Poland,* (2002) 35 E.H.R.R. 198.