DEVELOPING A UNIFORM SENTENCING POLICY FOR RAPE WITH SPECIAL REFERENCE TO THE ISSUE OF COMPROMISE

Tweisha Mishra* and Shantanu Pachauri+

Abstract

With the advent of a postmodern society that questions the established fabric of 'culture' and attempts to deconstruct conventional gender roles, various pertinent issues have emerged. One of these issues is forcible sexual assault on a woman without her consent, recognized as the offence of rape. It is considered to be one of the most heinous offences which can be committed against the person of an individual and demands urgent attention due to the spike in the rate of its occurrences. In this article, an attempt has been made to formulate a uniform sentencing policy for rape convicts and to analyse the ramifications of allowing out-of-court compromises, between the convict and the victim, upon such a policy. It begins by tracing the extent of sexual violence in India, defining and discussing the offence of rape as provided in the Indian Penal Code. Thereafter it examines how courts have dealt with the question of allowing rape convicts to make compromises with the victims by, for instance, agreeing to marry them and the effects such compromises have on the overall sentence of the offender. It further explores the need for maintain uniformity with regard to the sentencing policy for rape cases in light of the fundamental principles of sentencing laid down by Indian as well as international courts. The article concludes with certain recommendations about the creation and implementation of such a uniform sentencing policy in rape cases.

*Tweisha Mishra is a third year student of B.A. LL.B. (Hons.) at the National Law Institute University, Bhopal and can be contacted at tweisha.mishra@gmail.com.

+Shantanu Pachauri is a third year student of B.A. LL.B. (Hons.) at the National Law Institute University, Bhopal and can be contacted at shantanupachauri@gmail.com.

I. INTRODUCTION

Human beings live in conformity with the norms of the society. An understanding of the manner in which these norms develop is crucial for comprehending the evolution of the construct of gender and gender role assignment.[1] Men declared themselves to be the bread-winners of the household and women were relegated to the domain of the domestic. Gradually, these roles became entrenched in the societal dynamic such that alternate societal circumstances became not just unimaginable, but also extremely undesirable. This provided ample justification for the perpetuation of violence against women as a means to establish male dominance.

As per the 2015 report by the National Crime Records Bureau (NCRB), there were 3,14,575 incidents of violence against women, including rape, molestation, abduction and cruelty by husbands in the year 2015. Out of this figure 34,659 were rape cases.[2] These statistics also revealed that 94.3 per cent of the reported rapes had been committed by people who shared a close relationship with the victim, such as family members, friends and colleagues.[3] An important point to be noted in this regard is that India is a country where the crime of rape is generally perceived to be associated with notions of shame, honour, grace and purity. This implies that once a woman is sexually violated, as per societal standards she ceases to be an appropriate candidate for marriage and this reflects poorly upon the family's honour. Moreover, a rape victim who was sexually active prior to the assault is considered to be at fault as she 'invites' the offence. Frequently, a girl's character, dressing and sexual history are cited as factors to show the victim's contribution to the crime against herself, and are raised before courts. This plays a role in deterring women from reporting incidents of sexual abuse.

Rapes are among the most barbaric, heinous and abhorrent violations of Article 21 of the Constitution of India, which provides all persons with the right to life and liberty. In the case of

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[1] Alberto Alesina, Paola Giuliano, Nathan Nunn, *On the origins of gender roles: Women and the plough* 128(2) The Quarterly Journal of Economics, 469 (2013).

[2] Ministry of Home Affairs, Government of India, *Crime in India 2013 Compendium*, available at http://ncrb.gov.in/StatPublications/CII/CII2015/FILES/Compendium-15.11.16.pdf, last seen on 12/5/2017.

[3] Ibid.

Pappu v. State of Rajasthan[4], the Court held that "*rape is a crime against basic human rights and is also violative of the victim's most cherished Fundamental Right, namely the 'Right to Life and Personal Liberty' contained in Article 21*".[5] The Preamble of the Constitution enshrines the principles of social justice and equality of status for all the citizens of India. Explaining the social context of rape, Nithya Nagarathinam[6] writes:

> *"The vocabulary of rape in Indian languages bears testimony to the misogynistic vein in our socio-cultural norms. For example, in Tamil, rape is called karpazhippu, meaning "destruction of chastity". So, essentially, FIRs written in Tamil read that the victim has been "contaminated" by the accused, making it clear that even in the legal system the culturally produced notion of sexual violence holds sway. This victim-centric vocabulary of rape simultaneously objectifies a woman's body as something that can be contaminated by an act of sex, unlike a man's body, and accords her the status of "damaged goods"."*[7]

Black's Law Dictionary defines a crime as "*an act that the law makes punishable; the breach of a legal duty treated as the subject-matter of a criminal proceeding*".[8] It requires two elements, *actus reus* or the guilty act and *mens rea* or the guilty mind. Criminal law has evolved with certain objectives, including apprehension and punishment of offenders, compensation and rehabilitation for the victims and overall protection of the society. This requires defining an offence in clear and unambiguous terms, specifying the appropriate punishment, quick and effective prosecution and a uniform sentencing policy. The Indian Penal Code defines the offence of Rape in Section 375. Briefly, according to this Section, a man is said to commit "*rape"* if he penetrates the vagina, mouth, urethra or anus of a woman to any extent, by his penis or any part of his body or any object, against her will or without her consent.[9] Section 376(1) provides that a person who commits rape shall be punished with rigorous imprisonment for a term which shall not be less than seven years but may extend to

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[4]Pappu v. State of Rajasthan, RLW2008(3)Raj2647.
[5] K.D. Gaur, *Commentary on Indian Penal Code*, 1191 (2006).
[6] *Public Policy Scholar*, Hindu Centre for Politics and Public Policy, available at http://www.thehinducentre.com/scholars/article7053183.ece, last seen on 12/5/2017.
[7]*Rape, Compromise, and the Problematic Idea of Consent*, The Hindu Centre for Politics and Policy Review, available at http://www.thehinducentre.com/the-arena/current-issues/article7443765.ece, last seen on 12/5/2017.
[8]*Black's Law Dictionary,* 455 (9thed. 2004).
[9] The Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013.

imprisonment for life, and shall also be liable to fine.[10] Thus, the offence of rape has been effectively defined in the IPC and the punishment is clearly outlined.

The next section discusses the dimensions of allowing the offender and the victim to enter into out-of-court compromises and the effect such settlements can have upon the overall sentence of the offender. It introduces the meaning of compoundable offences and discusses it in reference to the offence of rape. The judicial trends relating to compromises between the victims and offenders in rape cases are explored and the question whether compounding should be permissible in a uniform sentencing policy for the offence of rape is considered.

II. COMPROMISE IN RAPE CASES

2.1. Legal Provisions regarding Compromise

The Code of Criminal Procedure, 1973 (hereinafter, "Cr.P.C.") provides for two types of offences, compoundable and non-compoundable.[11] An offence for which a compromise can be executed, thereby avoiding a trial, is called a compoundable offence, whereas an offence for which a compromise cannot be executed is called a non-compoundable offence.[12] Compounding a crime means receiving some property or other consideration in return for an agreement not to prosecute a person who has committed a crime. Those offences which are not mentioned in Section 320 of the CrPC cannot be compounded. An agreement to compound a non-compoundable offence is wholly void and unenforceable in a court of law as it impedes the course of public justice.[13] While dealing

[10] Section 376(2) of the Indian Penal Code provides aggravating factors which lead to higher degrees of punishment, ranging from imprisonment up to ten years or for the rest of the natural life of the offender. In certain cases, such as where the offender causes the death of the woman or causes her to be in a persistent vegetative state, the punishment is death of the offender.

[11] Section 320, The Code of Criminal Procedure, 1973.

[12] 237th Law Commission of India Report, *Compounding of (IPC) Offences,* (2011), available at http://lawcommissionofindia.nic.in/reports/report237.pdf, last seen on 12/5/2017.

[13] Shripad v. Sanikatta Co-operative Salt Sale Society, (1944) 46 BomLR 745.

with the issue of compoundable offences in the case of *B.S. Joshi v. State of Haryana,*[14] the High Court relied upon the judgement of *Surendra Nath Mohanty v. State of Orissa*[15] and declared that a non-compoundable offence cannot be compounded in any case, even with the permission of the Court. The rule of law forbids a judge from evoking extraordinary powers in order to compound a rape case. It has been held that such a compromise cannot be considered to be a factor for the reduction of quantum of punishment imposed upon the offender. Compounding of rape cases cannot be allowed even where the prosecutrix and the accused have settled the matter mutually.

However, in the case of *Hari Mohapatra v. State of Orissa,*[16] the court held that non-compoundable offences can be compounded at the discretion of the Court in order to meet the ends of justice. In cases where the victim pardons the accused, the punishment may either be decreased or the accused may be acquitted if the court reduces the sentence to the period already undergone during judicial incarceration. In *Keir v. Leeman,*[17] it was laid down that "*the law will permit a compromise of all offences though made the subject of criminal prosecution, for which offences the injured party might recover damages in an action.*" But this proposition is limited to the cases where the private rights of the injured party are made the subject of an agreement, and where, by the previous conviction of the defendant, the rights of the public are also preserved inviolate. The offence of rape is not specified in Section 320of the Cr.P.C. and therefore it is a non-compoundable offence. It is considered to be a crime which is committed not just against an individual but against the entire society. In a case of rape, the opposing parties cannot bargain and make out-of-court settlements instead of going through the proper procedure of trial and conviction or acquittal as under the criminal justice system. Until the 2015 Supreme Court judgment of *State of Madhya Pradesh v. Madanlal,*[18] no settled principle with regard to the permissibility of compounding in rape cases existed.

[14] B.S. Joshi v. State of Haryana,(2003) 4 SCC 675.
[15]SurendraNathMohanty v. State of Orissa, 1999 (2) SCR 1005.
[16]Hari Mohapatra v. State of Orissa, 1996 CriLJ 2952.
[17]Keir v. Leeman, (1846) 9 QB 371.
[18]State of Madhya Pradesh v. Madanlal, (2015) 7 SCC 681.

The Law Commission in its 237th report has also clarified the issue of compounding of the offence of rape. According to the report,

> *"Compounding, in the context of criminal law, means forbearance from prosecution as a result of an amicable settlement between the parties. As observed by Calcutta High Court in a vintage decision in Murray[19], compounding of an offence 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". 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.[20] 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. A holistic, and not an isolated, approach is called for in identifying the compoundable and non-compoundable offences. The interest of victims of crimes and the societal interest in the conviction of the offender often clash and this makes the job of law-makers more complex. No offence other than that specified in Section 320 can be compounded."[21]*

The Law Commission in paragraph 24.66 of its 41st report in connection with Section 345 of old 1898 Code of Criminal Procedure (which corresponds with the present Section 320 Cr.P.C.) has stated that "*the broad principle that forms the basis of the present scheme is that where the offence is essentially of a private nature and relatively not serious, it is compoundable*." [22] There can be no doubt that in dealing with this aspect, the impact of the crime on the society and the degree of social harm that might result from it should be duly considered. Any emphasis on one aspect alone, as has been found in the working of harsh and cruel punishment regimes, may become a pigeonhole model. Mrinal Satish argues that the Legislature never intended for compromise to be an alternative avenue for the accused when he says, "*legislature expressly exempted crimes against women from being subject to a plea bargain, because of the often unequal bargaining power of the parties involved, as well as the expressive importance of*

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[19] Murray Case, (1894)21 ILR 103, 112.
[20] Supra 14, at 6.
[21] Supra 14, at 8.
[22] Rajeev Vermav. State of U.P., 2004 CriLJ 2956 (SC).

prosecuting such crimes.[23] *This indicates that the Legislature did not want to permit compromises where victims of crime are women*."[24] There can be many reasons why a compromise might appear more appealing to the victim. Apart from the social stigma attached to the offence of rape, financial constraints in pursuing a trial as well as lack of trust in the criminal justice system often serve as factors tilting the scales in favour of compromise. The case of *Balwinder Singh v. State of Punjab*[25] illustrates how the pressure of entering into a compromise adversely affects the victims. In that case, the police officers tried to force a compromise between the rapists and the victim who later committed suicide. In her suicide note, she mentioned about the harassment by police and the pressure to enter into a compromise with the rapists. The large amount of discretion accorded to judges in rape cases has also led to the practice of allowing compromises based on no apparent grounds. The judicial trends in this regard are examined in the next section.

2.2. Judicial Trends

For the first time in the history of criminal justice in India, in 2011the Supreme Court in *Baldev Singh v. State of Punjab,* considered compromise as one of the factors contributing to the reduction of a sentence.[26] The court adopted the view that the accused may be acquitted in a case where both the parties enter into a compromise in order to put an end to the dispute. However, the Court subsequently rejected this view while dealing with compoundable offences in *Gian Singh v. State of Punjab.*[27] It held that compounding of offences which are non-compoundable in nature cannot be permitted because something which cannot be done directly cannot be done indirectly. Therefore, heinous and serious offences like rape cannot be compounded notwithstanding the fact that the dispute may have been settled between the offender and the victim or the victim's family.

[23]Assistant Professor, *National Judicial Academy India*, available at http://nja.nic.in/mrinal-satish.html, last seen on 12/5/2017.
[24]Mrinal Satish, *Compromise Formula in Rape Sentencing*, Law and Other Things, available at http://lawandotherthings.blogspot.in/2011/03/compromise-formula-in-rape-sentencing.html, last seen on 12/5/2017.
[25]Balwinder Singh v. State of Punjab, 2014 (2) RCR (Criminal) 568.
[26]BaldevSinghv. State of Punjab, (2011) 13 SCC 705.
[27]Gian Singh v. State of Punjab, (2012) 10 SCC 303.

In *Shimbhuv. State of Haryana*[28], the Supreme Court emphasized that a compromise entered into between the parties cannot be construed as a leading factor based on which lesser punishment can be awarded. Rape is a non-compoundable offence and not an issue to be left for the parties to compromise and settle. In cases like these, there is a high degree of probability that the victim may have been pressurised by the offenders to opt for a compromise. The Court does not have the means to ensure that the victim's consent to such compromise is genuine and not vitiated by force or fraud. Therefore, in the interest of justice and to avoid unnecessary pressure and harassment to the victims, considering the compromise arrived at between the parties in rape cases to be a ground for the Court to reduce the punishment is an inappropriate practice.

However, in the case of *Ravindra v. State of Madhya Pradesh,*[29] the Supreme Courtreiterated the principle laid down in *Baldev Singh* case. It awarded lesser punishment to the accused as the victim did not want to proceed with the case. The Madras High Court adopted a similar approach in *V. Mohan v. State of Tamil Nadu*[30] where it allowed the accused to settle the matter through mediation. Similarly, in *State of M.P. v. Madanlal,*[31] the Madhya Pradesh High Court set aside the conviction of the accused based on the fact that the parties had entered into a compromise. However, upon appeal before the Supreme Court, it was clearly stated that in a case of rape or attempt to rape, compromise cannot be accepted under any circumstances. The Court relied on the judgment in the *Shimbhu* case and stated that the judgments in *Baldev Singh* and *Ravindra* have to be confined to the facts of the said cases and are not to be regarded as binding precedents. The Supreme Court emphasized that "*the Courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case, for any kind of liberal approach has to be put in the compartment of spectacular error.*"[32] Therefore, the position that compromises are not to be permitted in rape cases is now settled.

The discussion so far has explained the social and statutory basis of rape as an offence in India and explored whether a case involving rape is compoundable. The judicial trends show that compromises are not permissible in rape cases. The next section discusses how the absence of a

[28]Shimbhuv. State of Haryana, (2014) 13 SCC 318.
[29]Ravindra v. State of Madhya Pradesh, (2015) 4 SCC 491.
[30] V. Mohan v. State of Tamil Nadu, Writ Petition No.10582 of 2015.
[31]Supra 17.
[32]Supra 10.

uniform sentencing policy adversely affects the rights of the accused as well as the victim in a rape case.

III. NEED FOR A UNIFORM SENTENCING POLICY

The statutes have identified the offence of rape and provided clear punishments for it. The problem begins with the question of sentencing an accused whose guilt has been proven beyond reasonable doubt. This stage is extremely important as it determines the quantum of punishment to be imposed upon the convict which further dictates the deterrent effect it will have on potential sex offenders. In India, a uniform sentencing policy does not exist, as neither the legislature has passed legislations to such effect nor has the judiciary promulgated any formal guidelines in this regard. However, the need for the same has been repeatedly recognised by both. The Committee on Reforms of Criminal Justice System (Malimath Committee) published its report in March 2003, stating the need for uniform sentencing guidelines also mentioned,

> *"The Committee recommends that a statutory Committee 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 under the Chairmanship of a former Judge of the Supreme Court or a retired Chief Justice of a High Court who has experience in the Criminal Law, and with members representing the Police department, the legal profession, the Prosecution, women and a social activist."*[33]

Subsequently, the Committee on Draft National Policy on Criminal Justice (Madhava Menon Committee) emphasized the need for the same.[34] Under the present criminal justice system, wide discretionary powers are awarded to the judges. This sometimes results in lopsided, unfair judgments. Even though some basic principles such as proportionality, fairness and deterrence are

[33]Ministry of Home Affairs, Government of India, *Committee on Reforms of Criminal Justice System Report2003,* available at http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_ system.pdf, last seen on 12/5/2017.

[34] Ministry of Home Affairs, Government of India, *Report of the Committee on Draft National Policy on Criminal Justice*, available at http://mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/DraftPolicyPaperAug.pdf, last seen on 12/5/2017.

recognised as forming the basis of the discretionary powers, it is not difficult to observe that they are not consistently followed. The Supreme Court in *State of M.P. v. Bablu Natt* (2009) observed that "*the principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with*."[35] An important principle stated by the Court in *Alister Anthony Pareira v. State of Maharashtra* (2012) is that:

> *"One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: the twin objective of the sentencing policy is deterrence and correction."*[36]

In the recent judgment of *Soman v. State of Kerala* (2013), the Supreme Court observed that:

> *"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."*[37]

In *Gopal Singh v. State of Uttarakhand* (2013) it was held that "*just punishment is the collective cry of the society. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence.*"[38] Thus the criminal justice system has its foundation in two essential objectives, providing justice and protecting citizens. In order to achieve these objectives in rape cases, a uniform sentencing policy that focuses on imposition of adequate sentences of imprisonment and fine in line with the theory of deterrence, alongside reduction in the rates of recidivism, provision of rehabilitation for victims as well as for treatment of sex offenders in line with the restorative theory is urgently required. Moreover it is important to analyse whether compounding in relation to rape cases should find a place in such a

[35]State of M.P. v. BabluNatt, (2009) 2 SCC 272.
[36]Alister Anthony Pareira v. State of Maharashtra, (2012) 2 SCC 648.
[37]Soman v. State of Kerala, (2013) 11 SCC 382.
[38]Gopal Singh v. State of Uttarakhand, (2013) 7 SCC 545.

sentencing policy or if the present position of courts on this issue is correct. The need for a uniform sentencing policy has been correctly explained by Professor Mirko Bagaric[39]in the following words:

> *"The problem with an unfettered sentencing discretion is that it invariably leads to inconsistent sentencing and this offends the principle of equality before the law and the rule of la maxims that the law must be certain and that legal standards must be declared in advance."*[40]

The principles that should underlie any sentencing decision have been discussed in the next section. Some recommendations specifically with regard to developing a uniform sentencing policy for punishing rape offenders have also been provided

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IV. PRINCIPLES FOR A UNIFORM SENTENCING POLICY

In order to deal with a crime that has plagued the society on such a large scale, it is necessary to develop some broad guidelines that would aid the courts in punishing rapists strictly so as to ensure the safety of the entire society. This can help in curbing the discretion of judges so that fairness and justice in can be ensured in maximum cases and the whims and fancies of judges in the determinative process could be restricted. In this section, a few principles which, in the opinion of the authors, must be embraced while framing a general sentencing policy are discussed. A sentencing policy, including one for rape cases, must ideally imbibe the following general principles:

1. A sentencing policy must necessarily espouse proportionality, justice, fairness and deterrence. It must take into account individual characteristics of the criminal and the circumstances of the crime. Its objective must be to provide suitable punishment through incapacitation. It must focus on reducing the rate of recidivism and enhancing rehabilitative measures for the offenders as well as the victims. It should also take the present circumstances prevailing in the society into account.

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[39]Director, *Centre for Evidence-Based Sentencing, Deakin University, Melbourne* available at https://www.deakin.edu.au/apps/research/find-a-researcher/16017/Prof-Mirko-Bagaric, last seen on 12/5/2017.
[40]MirkoBagaric, *Punishment & Sentencing: A Rational Approach*, 17 (7thed., 2001).

2. The Legislature must express its intention and objectives of the policy clearly and unequivocally so that definite guidelines can be laid down for the courts to follow. The policy must be transparent, rational, consistent and easily comprehensible for all the stakeholders in the criminal justice system.

3. A spectrum of sentences must be laid down based on the gravity of the offence committed by the offenders. This implies that serious and recidivist offenders would get the maximum sentence specified for an offence while a first-time offender would be treated using different types of restorative measures.

4. The Legislature must enact a policy which can be practically implemented in terms of resources to be employed and financial obligations that may arise. It must be realistic in its goals and based on an effective cost-benefits analysis.

5. The policy must not be based on incarceration exclusively. It must bring into its fold modern strategies based on the restorative theory of sentencing which emphasizes that the criminal justice system should attempt to treat the offender using new techniques such as community service and treatment programs. The policy should focus on being 'smart' so that the investment in the criminal justice machinery yields positive returns in terms of reduced recidivism and enhanced public safety. Punishments must be risk-based which means that high-risk offenders would receive longer, harsher punishments, usually through imprisonment. Similarly, intermediate sanctions such as community service could be utilised where long-term incarceration is not considered suitable. Applying mandatory minimum sentences for violent offenders, recidivists or habitual offenders, sex offenders and offenders targeting the weak, children or elderly should be considered as appropriate as they increase the level of risk in society if let free.

6. The sentencing policy should follow due process considerations, such as ensuring that offenders with similar situations are sentenced similarly, that reasonable notice is provided to the accused with reference to the crimes with which they have been charged, and that the decision implicating an accused in a lower court can be subjected to appeal before a higher court for review.

7. The sentencing policy must also be victim-oriented. Victims have largely been ignored in the traditional justice system. With changing times and increased emphasis on studies on victimology, taking the needs and considerations of victims of a crime into account has become necessary. The policy must include adequate compensation for the victims for the purpose of their rehabilitation. It must ensure their fair treatment during the entire process of the criminal justice system.

Apart from these general rules, sentencing rape offenders involves a few additional considerations. The need for imposing restrictions on the discretionary powers of a judge while sentencing a sex offender has already been explained. In light of this, the following section attempts to provide certain recommendations for a uniform sentencing policy addressing sex offenders.

V. RECOMMENDATIONS FOR A UNIFORM SENTENCING POLICY

In light of the above discussion, the need for a uniform sentencing policy with regard to rape cases has been established. However the principles essential to the formulation of such a sentencing policy also need to be discussed. The points enumerated below reflect such principles as developed in the international as well as national context.

1. Punishing a sex offender involves various aspects i.e. the retributive, punitive, deterrent as well as restorative aspects. In *Walden v. Hensler*,[41] Brennan J stated that the "*chief purpose of the criminal law is to deter those who are tempted to breach its provisions*". The sentencing policy must be able to balance these considerations against each other and impose a punishment suitable for the offence committed.[42]

2. The sentencing policy must be a policy of deterrence. In his work on *Principles of Sentencing*, D.A. Thomas demonstrated that in England, the range of sentences for rape ranges between

[41] [1987] HCA 54
[42] D. A. Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20(2) Alabama Law Review 193 (1968).

two to three years of imprisonment and ten years of imprisonment. Sentences tend to lean towards the higher figure when a substantial amount of violence has been employed in order to overpower the victim or where a gang-rape has been committed, while they lean towards the lower figure when a certain amount of liability through presence of provocation is attributable to the victim.[43] Similarly, Sir John Barry in his work entitled *The Courts and Criminal Punishment* identified another factor which warrants the imposition of a severe sentence in rape cases, namely the case where a relationship of trust or a fiduciary relationship has been violated. [44]

3. In rape cases, the penalty imposed must be proportional to the degree of violence used by the offender.[45]

4. If it is established that the offender is a sexual deviant, higher penalty in the form of incarceration must be imposed so as to keep the offender at a distance from the general public and to incapacitate him so that he does not repeat the offence.[46]

5. The discretionary powers of the judges must conform to certain standards established by the Supreme Court of India and should not be dependent on their respective whims and fancies. In *Shimbu v. State of Haryana*, the Court laid down that "*the Indian legal system confers ample discretion on the judges to levy the appropriate sentence. However, this discretion is not unfettered in nature, rather, various factors like the nature, gravity, the manner and the circumstances of the commission of the offence, the personality of the accused, character, aggravating as well as mitigating circumstances, antecedents etc., cumulatively constitute as the yardsticks for the judges to decide on the sentence to be imposed.*"[47] Similarly, in the case of *State of Karnataka v. Krishnappa*[48], the Court said that "*the measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the age of the sexually assaulted female and the gravity of the criminal act. The socio-economic status, religion, race, caste, or creed of the accused, or of the victim are irrelevant considerations in sentencing policy*." It should be remembered that as part of the

[43] D. A. Thomas, *Principles of Sentencing*, 27 Cambridge Studies in Criminology 294, 295 (1970).
[44] Sir John Barry, *The Courts and Criminal Punishment* (1969).
[45]Supra 35.
[46]Adu Ram v. Mukna, AIR 2004 SC 5064. *See* N.V. Paranjape, *Criminology & Penology with Victimology*, 323 (16th ed. 2014).
[47]Supra 20.
[48]State of Karnataka v. Krishnappa, (2000) 4 SCC 75.

amendments to Indian criminal law made in 2013, a proviso in Section 376 of IPC (punishment for rape) that allowed judges to award lesser prison terms than what are set down, on 'special grounds', has been omitted. Judges are no longer "*allowed to consider offers of marriage, the passage of time, or the state of a woman being "happily married" as factors justifying a soft approach towards perpetrators of rape.*"[49]

6. In order to introduce rationality into sentencing, it is essential that a clear and consistent theory of punishment be identified. Aggravating and mitigating factors should accordingly be determined. Indian courts generally do not use or cite any theory while sentencing. This leads to disparity in sentencing, as well as to irrelevant factors being considered.[50]

7. The sentencing policy should include stringent punishment in the form of imprisonment and in addition, compensation should be provided to the victim. This will ensure that the punishment in terms of incapacitation would serve its deterrent effect while simultaneously guaranteeing rehabilitation to the victims.[51]

8. In order to ensure the creation of a uniform sentencing policy for rape as well as its implementation, a commission constituted solely for this purpose should be constituted. The members of such a commission could be retired judges of the Supreme Court, eminent legal scholars and academicians as well as an economist who could analyse the cost and benefits of such a policy. The activities of the commission could center on collection of data and its analysis and structuring of a sentencing policy consisting of recommended rules, regulations and amendments to be implemented across the country.The guidelines of the commission can serve as the basis of the exercise of discretion by judges in High Courts as well as the Supreme Court. Monitoring the performance of such a policy and suggesting further alterations to it would also be required to ensure its efficient implementation. The recommendations of the commission should be fair and equitable, and its working should be transparent.

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[49] Editorial, *Crime and Compromise*, The Hindu (03/07/2015), available at http://www.thehindu.com/opinion/editorial/editorial-on-call-for-rapistvictim-mediation/article7379600.ece, last seen on 12/5/2017.

[50] Supra 16.

[51] Aisha K., Gill Karen Harrison, *Sentencing Sex Offenders in India: Retributive Justice versus Sex-Offender Treatment Programmes and Restorative Justice Approache*s, 8(2) International Journal of Criminal Justice Sciences 166,181 (2013).

9. The idea of permitting compromises in rape cases should be categorically rejected.[52] It must be acknowledged that compromises harm the victims adversely and dilute the deterrent effect of punishment.[53]

10. Introduction of novel methods of reducing recidivism through Sex Offender Treatment Programs (SOTPs) in accordance with the restorative theory of justice could lead to positive results. SOTPs explore offenders' distorted beliefs in order to help them alter their sexually-deviant behaviour and their attitudes towards children, women and sexual entitlement. SOTPs also look into the correlation between these issues and offenders' self-esteem, ability to empathise with others (especially victims), offending cycles (including thoughts that lead to offending behavior), social functioning, and sexual preferences.[54]

11. The factors that should not be considered in sentencing rape offenders should be specifically recognised and recorded. Such factors could include the victim's dressing sense, sexual history and number of sexual partners, marital status as well as her socio-economic background. The sentence should be purely based on the facts and circumstances of the case.

Thus, the sentencing process may be conveniently divided into three stages. Stage one would involve deliberations into the facts and circumstances of the case and an analysis of the gravity of the offence and guilt of the criminal based on "*his motives, intent, the degree of premeditation, as well as the extent of harm, or threatened harm, resulting from the offence. This would involve an assessment of the offender's mental capacity, degree of insight or appreciation of the possible consequences of the act, as such factors may bear on the culpability of the offender.*"[55] The second stage would involve evaluation of subjective considerations, such as the offender's previous criminal record. A clear record could lead to the mitigation of the sentence. Similarly, if the offender is mentally deranged, the sentence may be mitigated and proper psychiatric treatment may be provided. The third stage would be centered around ensuring that the

[52]Supra 17.
[53] Michael Abramowicz, *A Compromise Approach to Compromise Verdicts*, 89(2) California Law Review 231, 265 (2001).
[54] Supra 24 at 174.
[55] Ivan Potas, *The Principles of Sentencing Violent Offenders: Towards a More Structured Approach*, 4 International Journal of Law and Psychiatry 107, 110 (1981).

sentence imposed on the offender is fair, reasonable and due. This would involve an analysis of precedents based on similar facts and whether the sentence would be welcome by the public at large. Imposition of a sentence beyond the maximum limit prescribed by the Legislature would be unfair and morally questionable.

VI. CONCLUSION

Rape is a social reality demanding immediate attention. Much research has been done, inquiring into the causes behind the occurrence of rapes and measures to curb its outspread. However substantial success in this regard is yet to be achieved. Judges exercise wide discretion while dealing with rape cases, and this sometimes leads to absurd judgments. In some cases, the judges have even allowed the victim and the offender to enter into a compromise leading to the eventual reduction of the sentence of imprisonment on the offender. It is necessary to recognise why permitting compromise is adverse to the interests of the victims. For curbing such practices, a uniform sentencing policy is required which not only restricts the discretion of the judges but also lays down uniform guidelines for the exercise of this discretion. A clear sentencing policy in rape cases would lead to greater certainty of conviction and would also enhance the deterrent effect of the punishment imposed, as potential offenders would be discouraged due to the threat of stringent and certain punishment. This would eventually translate into greater public faith in the criminal justice system. Finally it would prove to be immensely beneficial to the victims as they would be provided with at least some amount of closure through proper compensation and state-sponsored retribution through strict punishment to the offender. Therefore concept of compromise in rape cases must be absolutely rejected. In order to make a tangible change, the attitude of the society needs to be transformed. The idea of paramountcy of virginity or chastity of an Indian woman needs to be changed with the changing times. Awareness must be created so as to make people realise that a woman is not the chattel of her father, husband or son but insteadshe is a human being in her own right, with rights over her own body and mind. Any idea that is contrary to this universal truth must be rejected and rape must be seen as what it is—an offence against the body of an individual.