

BOOK REVIEW

DISCRETION, DISCRIMINATION AND
THE RULE OF LAW: REFORMING
RAPE SENTENCING IN INDIA

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Book: *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* Author: Dr. Mrinal Satish Year: 2016
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The site of rape law has been the subject of vociferous debate and extensive amendment over the past five years in India. The frenzied atmosphere of recent years, unfortunately, tends to put blinkers on how this site had been the subject of intense discussion over previous decades as well. In *Discretion, Discrimination, and the Rule of Law*, Dr. Satish offers this panoramic perspective that has been sorely lacking. The author has examined all decisions passed by the High Courts and Supreme Court of India reported in the Criminal Law Journal (a publication specialising in reporting criminal law decisions) over a twenty-five-year period i.e. 1984-2009. This data is then subjected to statistical tools for determining whether there is unwarranted disparity in sentencing. Unwarranted disparity is identified as a deviation from established set of norms or values, and typified by considering legally irrelevant factors for making decisions. Despite this being a short book, Dr. Satish lays down his arguments clearly and efficiently to offer an unequivocal conclusion: rape sentencing in India is suffering from a crisis of legality that must urgently be addressed. By extension, the author makes a second-level argument at a more general level from this particular aspect of rape law: that the entire system of sentencing suffers from the effects of unbridled discretion, causing unfair discrimination and arbitrariness. These descriptive arguments are complemented by prescriptive claims about possible solutions to better manage the discretion, which forms the heart of sentencing criminal offenders.

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I. CONTEXTUALISING RAPE LAW AND SENTENCING

The author leads us through the history of rape law and adjudication in India. This historical sketch offers two narratives. Through one, we get a basic insight into how statutory provisions have evolved in India, placing the focus on exercise of judicial discretion in sentencing. The second, interlocking narrative exposes how this evolution of the law continues to struggle against the several myths and stereotypes that have dogged adjudication of rape cases. For instance, a single woman was considered more likely to be truthful by judges in levelling allegations of rape, owing to her depleted chances of marriage. Similarly, allegations of rape on a virgin were viewed with greater seriousness by judges owing to the idea that taking the woman's chastity was a primary harm that she suffered. These prejudices are identified not only with judges while determining guilt, but also in the procedures on collection of evidence in rape cases, as well as treatises on medical law which are routinely accessed during trials (*Modi's Textbook on Medical Jurisprudence* being a prominent example). A useful summary of the literature on the subject is also offered in the book.

These narratives are then shifted to the arena of rape sentencing. The author argues that while statutory amendments attempted to tackle the stereotyping affecting rape *adjudication*, this has only invited judges to shift this practice to the domain of sentencing where no such legislative changes have been introduced. For instance, the legislature took away the right of an accused to ask questions about the complainant's past sexual history in rape adjudication by way of an amendment. But, no such amendments were brought in to prevent judges from relying upon such rationales while sentencing offenders. The pre-2013 mechanism of rape sentencing supported the utilisation of such reasoning, as judges required 'special reasons' to deviate from the mandatory minimum of seven years' imprisonment that § 376 of the Indian Penal Code ('§ 376') imposed back then. Perhaps, some more words could have spent examining the similarities in rape law amendments through time; particularly, focusing on the role played by victims' rights movements. But that would take away from the focus of the book, which is *sentencing* in rape trials.

II. THE EMPIRICAL CLAIMS

This brings us to the heart of the argument, where the author seeks to support his claims of sentencing decisions being affected by stereotypes and irrelevant factors by offering statistical analysis of all decisions between 1984 and 2009. Restricting the scope in such a manner is justifiable, with the limitations duly explained as well. The study effectively sought to inquire whether the Supreme Court and various High Courts take into consideration similar factors in deciding questions of sentencing in rape cases. This hypothesis is

tested by running the data through statistical models to determine the impact on sentencing by the following broad group of factors: (i) location of the crime, (ii) chastity-related information, (iii) nature of evidence made available, and (iv) theories of punishment used in sentencing. The focus of these efforts, again, was to determine whether or not there exists an *unwarranted disparity* arising from sentencing decisions in rape trials because of (i) considering stereotypes and myths, (ii) inconsistent use of factors, and (iii) use of irrelevant factors.

The study shows how the percentage of cases overturned in appeal is fairly high; possibly indicating that reliance is being placed upon different factors by the different forums. These implications are not fully pursued by the author while he offers structural reasons to explain the data. Rather, we move on to developing the claims made above, that the site of rape myths and stereotyping has shifted to sentencing from the guilt-determination stage where such factors have been banished. Thus, the chastity and marital status of the victim are seen as being given an over-emphasis for *sentencing*, reflected by how lighter sentences tend to be awarded where the victim is married. Similarly, the analysis shows how the presence of injuries on the victim resulted in a marked increase in the sentence awarded, despite these factors having been rendered unnecessary to prove guilt. The relationship between the victim and defendant also had a role to play in determining the quantum of sentence. Starkly, but unsurprisingly, the data revealed how in a majority of cases no theory of punishment to justify the decision was cited. But citing (or not citing) a theory was found to have little impact on the length of sentences. The inconsistencies in considering different aggravating and mitigating factors by the courts while arriving at sentencing decisions is made glaringly obvious. The author also attacks the use of *irrelevant* factors, i.e. those without any connection to the crime or any penal purpose – for instance, the role played by the location of the crime. In no possible theory of sentencing would it become relevant to determine the quantum of punishment that must be meted out to an offender, and is thus purely, irrelevant.

III. CRISIS OF LEGALITY

Through the microcosm of sentencing in rape cases, the author offers empirical proof for the inking suspicion that many have had over the years: there is a crisis of legality when it comes to sentencing crime in India. The near-unfettered discretion that § 376 placed upon judges has only promoted arbitrariness and unwanted disparity between like cases. The author employs an inductive approach to assail the entire sentencing framework as unconstitutional, for being contrary to not only the guarantee of equal protection made by Art. 14, but also of the fundamental right to life safeguarded by Art. 21 of the Indian Constitution.

Any argument assailing the constitutionality of the sentencing structure today necessarily refers back to the dissent by Bhagwati, J. in *Bachan Singh v. State of Punjab*² where he flagged this concern. Bhagwati, J., writing in context of the death penalty, questioned whether exercise of discretion by judges while sentencing offenders did not suffer from arbitrariness. This part of his opinion was given short shrift by India's pre-eminent constitutional scholar H.M. Seervai who ridiculed it by suggesting that, by implication, this meant the *entire* sentencing structure under the Indian Penal Code ('IPC') was bad which could surely not be the case. This ridiculous suggestion is treated as a very real possibility in this book as the author engages with the criticisms raised by Mr. Seervai, after offering a comparative perspective of how sentencing discretion has been structured in the United Kingdom and the United States of America. The literature reviewed is vast and shows how the experience of these jurisdictions gives useful insight into how the legislative, judicial, and administrative models of managing sentencing discretion have operated. India currently employs the legislative model, where the law sets the broad range within which judges operate, while both the U.S.A. and U.K. today employ administrative models in varying degrees, with sentencing commissions and councils in place. One wonders, though, whether the comparative perspective would have been enhanced by considering literature on managing sentencing discretion in jurisdictions that continue to employ the Indian Penal Code, i.e. Singapore and Malaysia.

I find it difficult to accept the author's claim that the *entire* sentencing structure is suffering a crisis of legality, based on the limited study offered on rape law. The inductive leap appears a step too far. This is for two reasons: (i) due to the study's limitations, decisions by courts most involved with sentencing decisions, i.e. trial courts, have not yet been examined, and (ii) the manner of sentencing discretion at play in India is more complex than the author leads us to believe. Since the focus is on rape and § 376, the book does not comparatively examine how judicial discretion is affected by the potential scope offered by particular offences. For instance, can similar conclusions be drawn from how sentencing decisions are made for offences with prison terms of seven years *to* life imprisonment, and those allowing for only imprisonment *up to* three years? Secondly, the book advances the general claims while excluding the burgeoning collection of penal statutes in the regulatory context, which today count for a substantial portion in the Indian criminal ecosystem.

IV. PRESCRIPTIVE CLAIMS

The remainder of the book is occupied with making prescriptive claims of how to remedy the problem. As the legislative and judicial models (through the example of the *rarest of rare* test) of managing discretion have proved

² (1980) 2 SCC 684 : AIR 1980 SC 898.

ineffective in India, it is argued that administrative models be considered as the way forward, and a methodology to manage sentencing discretion in rape cases through this method is offered as well. The author posits establishing a Sentencing Commission by Parliament, which is responsible for developing 'sentencing guidelines' which may be adhered to but *must* be considered when making deviations. The author suggests how the Guidelines can be developed: the Commission ought to identify starting points for each offence, from which deviation would be based on the existence of aggravating or mitigating factors. These factors are identified with reference to a core, underlying theory of sentencing that informs the choices of the Sentencing Commission. This, for the author, is the deterrence theory of punishment. His choice is made considering the emphasis placed upon a deterrent approach by the Indian Supreme Court, and the explicit references to deterrence made by Parliament while amending the IPC most recently in 2012.

Addressed in a final brief chapter, the suggestions are not so brief to be a considered a concluding thought, nor are they fleshed out sufficiently to address the questions they pose. Take the choice behind the sentencing theory guiding the proposed model. While picking deterrence, the author suggests that sentences would be subject to a just deserts cap, with the possible consideration of rehabilitative potential not ruled out so long as the deterrent potential is not undermined. How these decisions are to be made is anyone's guess, especially since the empirical data surrounding deterrent potential continues to remain sketchy. Further, the claims that deterrence is the anointed theory here go against earlier parts of the book where the absence of a theory is lamented. The equanimity is only compounded by the end where the author suggests that the legislature may reject deterrence in favour of just deserts of rehabilitation based approaches to consider some of the mitigating factors that deterrence models will leave out. A thorough discussion of the questions is a project considerable enough to warrant an entire book, which I hope is a challenge that the author addresses in future scholarship.

V. CONCLUDING THOUGHTS

Indian literature that delves into issues of sentencing theory and practice remains extremely sparse despite it being a commonly accepted truth that there is something wrong with the system. Even more non-existent are discussions of the discretion that is a necessary component of any decision-making process and permeates throughout various parts of the criminal justice system. Dr. Satish has made an eminently useful contribution to these fields and convinces this writer of there being a crisis of legality in rape sentencing. He offers convincing support through the statistical models for his claims of there being unwarranted disparity in sentencing decisions for rape cases. His argument, displaying how the site of stereotyping has shifted from adjudication to the stage of sentencing, comes with serious implications that demand further

and research to spur law reform. Where, initially, the author was concerned with the issues of unwarranted disparity in rape sentencing, by the end of the book we find the concern becoming about judges being granted unbridled discretion while making decisions on sentencing across the breadth of criminal law. These brief parts reflect the difficulties faced in addressing system-wide arguments dealing with the Indian criminal justice system. A more consolidated effort will be required to streamline and rationalise the current morass of Indian criminal law, and in particular, sentencing offenders. *Discretion, Discrimination, and the Rule of Law* leaves one thinking that it will be a while before India can restore the rule of law from the vices of discrimination and arbitrariness that plague judicial discretion in the realm of criminal sentencing. Thankfully, this work suggests we are making a start.