POST-MODERN INFLUENCE AND THE CONTOURS OF THE PRESENT DEATH SENTENCING POLICY IN INDIA: A JUDICIAL CRISIS?

Utkarsh K. Mishra[1] & Apoorva Mishra[2]

ABSTRACT

In the context of a modern welfare state, Sentencing and Punishment are seen as the instrumentalities for taking care of the socially deviant behaviours and maintaining public security and safety. Amongst various forms of punishment, death sentencing being the worst has been able to attract largest criticism in the light of increasing human right violation concerns. With the post-modern studies coming to the fore, the court room dynamics have been also subjected to a sociological examination diluting the very basis of such harsh forms of punishments. In this light, India seems to have been the most 'conservative' nation in its stance of death penalties being awarded. With respect to the standardization of cases where death penalty should be awarded, the Indian judicial trends show a remarkable shift from the liberal and conservative policies to post-modern and feminist policies. The paper seeks to do a sociological analysis of the above-mentioned judicial trends of India with respect to the reported death penalty punishments in various murder and rape cases through the lens of post-modern underpinnings. The cases and judgements discusses herein also reflect on the realities of the court room drama that are conventionally staged before the public.

Introduction: Sentencing policy and India

In order to protract a legal system, one of the primary challenges confronting that society is to warrant that people tag along the legal rules that protect public safety and security. This is although to some degree achieved through the influence of the families, friends, the media and religion, i.e socialisation. But many a times, the same socialisation gives effect to deviant behaviours which causes threat to our public safety and security. In this connection, it is important to note that the purpose of law is to facilitate existence and in order to achieve this goal, it is important to stop those deviant forces and behaviours and persuade such deviant people to follow those rules by the threat of criminal punishment. In other words, there are

[1] The Author is a 4th year law student at National Law University, Odisha. The Author can be contacted at utkarshkmishra.lmp@gmail.com

[2] The Co-Author is a 3rd year law student at Faculty of Law, Lucknow University, Lucknow, Uttar Pradesh.

certain deviant behaviours and actions which are in almost all types of societies considered crime and in order to deal with such crimes; the concept of punishment and sentencing comes into picture.

India follows the '***adversarial***' or '***accusatorial***' system of law where the main role is played by the parties. The judge is supposed to remain flaccid and silent umpire listening to the evidence produced by two parties.[3] But still, it is the judge who at the end of the proceedings, gives the judgement and prescribes the punishment. In other words, In India, judges have the responsibility to give the accused that has been proven guilty, the punishment prescribed by the law. This is the most knotty and the core part of the criminal justice system of India.[4]

The dominant approach of sentencing (which includes imprisonment, fines, death penalty etc.) which has been employed in India is the **approach of Determinate sentencing[5] in general and mandatory minimum sentencing[6]** in certain cases.[7] In any case, the punishment that has is to be given has to be balanced and proportionate to the wrong done because punishment itself is a response to the wrong done. If this is not the case, it will lose its rational basis. Hence, it would be correct to say that it is the duty cast on the judges to strike a balance between the crime committed and its punishment while exercising their discretionary powers in a case.

It must be noted that administration of Death Penalty has to be carried out in the light of the requirements of Article 14 and Article 21. The Bariyar case aptly captures the sentiment in this regard:

"We are also governed by the Constitution of India. Article 14 and 21 are constitutional safeguards and define the framework for state in its functions, including penal functions. They introduce values of institutional propriety, in terms of fairness, reasonableness and equal treatment challenge with respect to procedure to be invoked by the state in its dealings

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[3] Srikrishna, B. N., "The Indian Legal System," *International Journal of Legal Information*: Vol. 36: Iss. 2, Article 8, 2008. Also Available at: http://scholarship.law.cornell.edu/ijli/vol36/iss2/8

[4] The 2nd Dinabandhu Memorial Lecture by Honourable Justice Aftab Alam, Judge Supreme Court of India, also Available at http://www.nluo.ac.in/news/news_1352300376.pdf

[5] As far as determinate sentencing is concerned, the legislature provides judges with certain discretion in sentencing and specifies that the offender is to receive a specific sentence. A shorter or longer sentence may be given but that has to be justified by the judges.

[6] In case of mandatory minimum sentencing, the legislature requires the judges to sentence an offender to a minimum sentence, regardless of mitigating factors.

[7] As it would be discussed in the next chapter, determinate sentencing in the theory of criminological theory is considered to be a part of liberal and conservative sentencing policy.

with people in various capacities, including as a convict. The position is, if the state is precariously placed to administer a policy within the confines of Article 21 and 14, it should be applied most sparingly..."[8]

It is well known that judicial discretion is a subjective element and this subjectivity of has been considered to be violative of Article 14 and 21 as per the present dominant sentencing policy. The following chapters examine how the Indian judiciary has been very consistent in its inconsistency regarding the award of death penalty in murder cases and in this way India has also moved in the direction of the transition from the present sentencing policy to the post-modern sentencing policy.

Theoretical underpinnings of the Present and the Post-modern Sentencing Policy

The present dominant sentencing policy of determinate sentencing is based on the blend of two contradictory views-that of liberals and conservatives.[9] For liberals, determinate sentencing, as an enterprise to restrict judicial discretion was a part of civil rights movement and to reduce sentencing disparity and discrimination.[10] For conservatives on the other hand, it was a part of ensuring more harsh and certain punishment for the perpetrators of the crime. [11]Secondly, the post-modern sentencing policy is completely based on the social construction of reality and takes into account even the extra legal factors in determining a sentencing policy for a legal system. The theoretical underpinnings of both the approaches are discussed under following heads[12]-

- Objectivity-

  The present sentencing policy focuses more on an objective approach towards determining the sentence and in this way it tries to curb judicial discretion as it inheres in it a belief that such discretion is a basis of sentencing disparity. The post-modern approach criticizes objectivity and believes in the concept of "different truths". Truth from this point of view is never unconditional, unchallenged, trans-

[8] Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra , 2009 6 S.C.C. 498

[9] Nancy A. Wonders, *Determinate sentencing: A feminist and postmodern story*, Justice Quarterly, 13:4, 611-648, 1996.

[10] Greenberg, David F. and Drew Humphries, "*The Cooptation of the fixed sentencing reforms*." Pp. 367-86 in Crime and Capitalism, edited by David F. Greenberg. Palo Alto, Mayfield, 1981.

[11] Walker, Samuel. *Popular Justice: A History of American Criminal justice*. New York. Oxford University Press, 1980.

[12] Nancy A. Wonders, *Determinate sentencing: A feminist and postmodern story*, Justice Quarterly, 13:4, 611-648, 1996.

historical or trans-cultural.[13] Instead reality is considered a complex of different stories being lived and told by different people. [14]

- Process-

  As Mies says, "While dominant science views things as static, dualistically, ahistorical, mechanical and addictive, feminist science, which has not lost sight of its political goal, strives for a new view of the whole societal constellation in which things appear as historical, contradictory, linked to each other and capable of being changed."[15] So the Post-modern sentencing policy views the sentencing process as a part of a larger 'process' where things are inherently political and connected. But the present sentencing policies views it as an independent judicial action.

- Identity-

  Under the present sentencing policy, the individuals are presented as discrete variables. Only the individual identity or the self-identity is taken into consideration.

  While in the post-modern approach, the identity is subject to symbolic interaction, i.e it is constantly created and recreated through interaction and becomes a social mix of social action and contestation.[16] In simple words, it also takes into account the social factors behind an individual be it race, sex, caste, etc.

- Power-

  The dominant sentencing policy conceptualizes power as the control exercised by those sitting in the positions of power. On the other hand the feminist and post-modernists believe in the "omnipresence of power".[17] For these theorists, powers is exercised not only by those sitting in power, instead power is used, abused and reproduced in everyday life by means social interaction.

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[13] Disch, Lisa Jane. *Hannah Arendt and the limits of philosophy*. Ithaca. Cornell University Press, 1994.

[14] Davis, Kathy and Sue Fisher. "*Power and female subject.*" Pp. 3-20 in Negotiating at the Margins: the gendered discourse of power, edited by Sue Fisher and Kathy Davis. New Brunswick. NJ: Rutgers University Press, 1993.

[15] Mies, Maria. "*Women's Research or Feminist Research? The Debate Surrounding Feminist Science and Methodology*." Pp. 60-84 in *Beyond Methodology: Feminist Scholarship as Lived Research,* edited by Mary Margaret Fonow and Judith A. Cook Bloomington: Indiana University Press, 1991.

[16] Winter, Steven L. "*For What It's Worth*." *Law and Society Review* 26:789- 818, 1992.

[17] Foucault, Michel. *The History of Sexuality*, translated from the French by Robert Hurley. New York: Pantheon, 1978.

All in all, the major bulk of the sentencing policy believes that sentencing is a part only of the criminal justice system and also that the determinate sentencing reduces disparity by not taking into consideration the social factors. On the top of this, the post modernists are of the opinion that sentencing is a part of a larger 'process' and decisions made within the criminal justice system are inherently political. In this way, determinate sentencing is going to exacerbate the problem and not reduce it.[18]

Jurisprudence of Death Sentencing in India

The 'death penalty' saga in India, for the purpose of a criminological analysis, has to be studied under two heads-Constitutionality and Debate over standardization. Both the strands bring out India's position differently when studied through the powerful lenses of the dominant and post-modern approaches.

- *Debate over constitutional appreciation*

  As far as the issue of the constitutionality of death penalty in India is concerned, it has been consistently upheld by the Supreme Court of India from Jagmohan's case[19] to the decision in the Smt. Shashi Nayar's case.[20] Hence in this regard, the Indian courts adopted the **conservative approach** which believed in "harsh" and "certain" punishment for the concerned crimes. Such conservative influence came as a result of increasing support for a model of "just deserts".[21] Most importantly, India still maintains this position even after the pro-abolished factions of judges like Justice Krishna Iyer and P. N. Bhagwati opposed it. As opposed to the above-mentioned situation, the international community in the light of increasing movements for human rights has been very clear in its stance of abolition of death penalty by adopting the International Covenant on Civil and Political Rights (ICCPR). And so in this context, Indian courts still remain conservative with respect to punishing the deviant individuals.

- *Debate over standardization and categorization*

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[18] Supra note 10
[19] Jagmohan Singh v. State of Uttar Pradesh, AIR 1973 SC 947
[20] Smt. Shashi Nayar v. Union of India and Ors. AIR 1992 SC 395
[21] Von Hirsch, Andrew. *Doing Justice: The Choice of Punishments: Report of the Committee for the Study of Incarceration.* New York: Hill and Wang, 1976.

After the idea of death penalty gained a constitutional status, a new debate started over categorization of cases where the court would award death penalty. This categorization was nothing but the standardization of cases of death penalty, the implication of which would be that if those standards are not fulfilled, then the court would not award death penalty.

- The debate started with the triumph of the ***Jagmohan Singh***.[22] This case relates to a period when the requirement for the court to state reasons for not giving death sentence but giving alternate sentence of life imprisonment in a capital offence was done away with the deletion of Section 367 (5) in the code of criminal procedure, 1898 and the requirement to state reasons for giving death sentence and not the alternative life imprisonment was yet to be introduced.[23] In this case, it was very strongly argued that in order to save the sentence of death from the vice of arbitrariness, it was imperative for the court to lay down guidelines, to mark and identify the types of murder that would attract the punishment of death. But the court rejected the arguments.[24]
- The issue again appeared in the ***Bachan Singh's case***[25]. This case relates to the period after the code of criminal procedure, 1973 came to force that gives the accused the right of presentence hearing under section 235 (2) and under section 354 (3) casts an obligation on the court to state the "special reasons" for awarding the death penalty and not its alternative i.e life imprisonment.[26] In this case also, same arguments as that of the Jagmohan Singh were advanced but again the court rejected the arguments by giving a number of reasons.[27] Arguing against standardisation of cases for the purpose

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[22] Supra note 17.

[23] Swami Shraddananda v. State of Karnataka, 13 SCC 2008, para 32

[24] It held that *"…The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the judges with a very wide discretion in the matter of sentence is as already pointed out, liable corrected by superior courts…The exercise of judicial discretion on well-recognized principles is, in the final analysis the safest possible safeguards for the accused."(Para 25).* Also see "Lethal Lottery, the Death Penalty in India", Amnesty International India and People's Union for Civil Liberties, Tamil Nadu and Puducherry, 2008.

[25] Bachan Singh v. State of Punjab, AIR 1980 SC 898

[26] Swami Shraddananda v. State of Karnataka, 13 SCC 2008, para 32

[27] Some of the relevant reasons behind the judgement that can be observed are as follows-

1. *"Firstly, there is little agreement among penologists and jurists as to what information about the crime and criminal are relevant and what is not relevant for fixing the dose of punishment for person convicted of a particular offence. According to* ***Cessare Beccaria****, who is supposed to be the intellectual progenitor of today's fixed sentencing movement, 'crimes are only to be measured by the Injury done to society'. But the 20th Century sociologists do not wholly agree with this view…This is very baffling, difficult and intricate problem."(Bachan Singh, para 172)*
2. *"...criminal cases do not fall into set-behaviouristic patterns. Even within a single-category offence there are infinite, unpredictable and unforeseeable variations…There are countless permutations and*

of death sentence the Court observed that there are countless permutations and combinations which are beyond the anticipatory capacity of the human calculus. The Court further observed that standardisation of the sentencing process tends to sacrifice justice at the altar of blind uniformity.[28] In conclusion the court said that the life imprisonment should be the rule and the death penalty an exception and this exception should be availed only in the "***rarest of rare cases"***.

- The doctrine of the rarest of the rare case came to be re-examined in the case of ***Machhi Singh***.[29] In Machhi Singh the Court put itself in the position of the `Community' and observed that the rarest of the rare doctrine should be read in the background of certain guidelines and hence it laid down 5 guidelines for the courts to follow while deciding the sentence in capital cases.[30]

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combinations which are beyond the anticipatory capacity of the human calculus. Each case presents its own distinctive features, its peculiar combinations of events and its unique configuration of facts."(Bachan Singh, para 173)

3. "*...a standardisation of the sentencing process which leaves little room for judicial discretion to take account of variations in culpability within single-offence category ceases to be Judicial. It tends to sacrifice justice at the altar of blind uniformity. Indeed, there is a real danger of such mechanical standardisation degenerating into a bed of Procrustean cruelty."(Bachan Singh, para 174)*
4. *"We must leave unto the legislature, the things that are Legislature's. The highest judicial duty is to recognise the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits."(Bachan Singh, para 176)*

[28] Swami Shraddananda, Supra note 23, at para 36.

[29] Machhi Singh v. State of Punjab, 3 SCC 470 1983

[30] See Machhi Singh, paras 32-37, pp. 487-89. *"It may do so `in rarest of rare cases' when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance,*
I. Manner of commission of murder-When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,(i) When the house of the victim is set aflame with the end in view to roast him alive in the house. (ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death. (iii) When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner. II. Motive for commission of murder-When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-`-vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course for betrayal of the motherland.III. Anti-social or socially abhorrent nature of the crime-(a) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.(b) In cases of `bride burning' and what are known as `dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation. IV. Magnitude of crime-When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed. V. Personality of victim of murder-When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person

The arbitrariness of the consequence

Courts, after the decision in Machhi Singh, were expected to decide on the basis of these guidelines laid down in the Bachan singh case. In that sense, they were to take a *loose view* of *Machhi Singh* as a precedent; since the illustrations went well beyond its factual matrix.[31] But the post-Machhi decisions showed no uniformity in judgements even in similar facts and arbitrary decisions came to limelight. Some of the important ones are pointed below-

- In *Dhananjoy Chatterjee v. State of West Bengal*[32], the Court awarded death penalty to a security guard, who raped and killed a teenage girl as retaliation for his transfer on her complaint, as the savage crime *"shocked the judicial conscience"*. But in *State of Punjab v. Harchet Singh*[33] decided in the same year, death was not awarded ostensibly because the offence was committed out of lust and not enmity. This distinction drawn between enmity and lust-based crimes seems frivolous, devoid of any legal or moral justification.[34]
- In *State of U.P v. Satish*[35], the Court upheld death penalty where the victim was a six year old girl, based on the decisions of Bachan Singh and Machhi Singh. The Court reasoned that rape, an "iniquitous, flagitious act" in itself, becomes abnormal when the victim is a child, and reaches the lowest level of humanity when it is followed by brutal murder. But in *Surendra Pal Shivbalakal v. State of Gujarat*[36], another Bench refused to uphold the death penalty where the accused had kidnapped, raped and murdered a teenage girl, because her mother had refused his sexual advances. Although, the evidence was almost identical to the former case, but, nevertheless the Court held this was not a '*rarest of rare*' case as the accused was aged 36 years at the

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rendered helpless by old age or infirmity (c) when the victim is a person vis-`-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons."

[31] A 'loose' view of precedents is one where all points discussed by the Court, including those that go beyond the material facts required for the adjudication, are considered to be binding precedent. Such an approach blurs distinctions between *ratio decidendi* and *obiter dicta.* The contrary would be a 'narrow' view, where only the specific decision on the adjudicative facts before the Court is considered to have value as precedent. For a detailed discussion, See KARL LLEWELLYN, THE LEEWAYS OF PRECEDENT 352 (1960).

[32] Dhananjoy Chatterjee v. State of West Bengal, 1994 2 S.C.C. 220, pg. 14

[33] State of Punjab v. Harchet Singh, 1994 3 Crim.L.J. S.C. 1529

[34] Ahmad Siddique, Criminology: *Problems & Perspectives* 342 (4th ed. 1997).

[35] State of Uttar Pradesh. v. Satish , 2005 3 S.C.C. 114

[36] Surendra Pal Shivbalakal v. State of Gujarat, 2005 3 S.C.C. 127.

time of the crime, without any criminal record, and was *"a migrant labourer from U.P. living in impecunious circumstances".*

- In *Ravindra Trimback Chouthmal v. State of Maharashtra*[37], the husband killed his eighth-month pregnant wife, to get more dowries by remarrying thereafter. The Court accepted that the *"blood-boiling"* act was committed to satisfy raw greed, but refused to consider it as a *rarest of rare* case since "dowry death has ceased to belong to that species of killing", ostensibly a reference to their growing incidence. The court overlooked the categorization of the Machhi singh case. The decision was severely criticized as it suggested that the '*rarest of rare*' doctrine was not to be interpreted considering the extreme brutality or depravity of the crime, but instead by an almost literal understanding, dependent on the frequency of incidents.

- After about 25 years, the question of the acceptance or rejection of the idea of standardization came up again in the case of ***Swami Shraddananda v. State of Karnataka***[38].The court in the present case took a departure from the Machhi Singh by delving deep into the fact of tremendous societal changes that have occurred in Indian society which in fact gives prominence to idea that the subjective element is inherent in our criminal justice system itself.[39] This unprecedented judgement also highlighted that the fact that personal predilection of judges at different jurisdictions, bench etc is a very important factor which brings diversity in judgements.[40] Hence there can be no uniformity achieved in terms of awarding capital punishment in murder cases.

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[37] Ravindra Trimback Chouthmal v. State of Maharashtra, 1996 4 S.C.C. 148.
[38] Supra note 23.
[39] See Swami Shraddananda, (Para 43). *"...But the judgment in Machhi Singh was rendered on 20 July, 1983, nearly twenty five years ago, that is to say a full generation earlier. A careful reading of the Machhi Singh categories will make it clear that the classification was made looking at murder mainly as an act of maladjusted individual criminal(s). In 1983 the country was relatively free from organised and professional crime. Abduction for Ransom and Gang Rape and murders committed in course of those offences were yet to become a menace for the society compelling the Legislature to create special slots for those offences in the Penal Code. At the time of Machhi Singh, Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were no mafia cornering huge government contracts purely by muscle power. There were no reports of killings of social activists and `whistle blowers'. There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made today. Relying upon the observations in Bachan Singh, therefore, we respectfully wish to say that even though the categories framed in Machhi Singh provide very useful guidelines, nonetheless those cannot be taken as inflexible, absolute or immutable. Further, even in those categories, there would be scope for flexibility as observed in Bachan Singh itself."*
[40] Supra note 23, para 51.

Confusion and non-uniformity still persists

At this stage, it would be imperative to cite some recent cases where despite a lot of effort made in the past, the court's predicament did not improve. In the very famous *Santosh Singh v. State*[41], also known as the *Priyadarshini Matoo* case, the Court spared Santosh Singh the noose solely due to the circumstances he faced subsequent to the murder.[42] In *Md. Mannan @ Abdul Mannan v. State of Bihar*[43], where a small child was raped and murdered by a mason working in the house, the Court imposed death penalty, by stating that the collective conscience had been shocked by the cruelty to an innocent, defenceless child who did not provide even an excuse, much less a provocation for murder.[44] But in *Haresh Mohandas Rajput v. State of Maharashtra*[45], involving similar facts and evidence, the Court refused to award death penalty, despite finding conclusive evidence against the accused, based on the "considered opinion" that the case does not fall within the *rarest of rare* cases.[46]

Like the above-mentioned examples, there were numerous reported cases where despite the similar facts, judges opined differently. It must also be noted that in actuality, the judicial response remained almost similar in both the situations-whether before Swami Shraddananda or after it. This itself speaks of the fact that even court room is not unaffected by the social constructions of reality.

Post-modern Analysis of the Death Penalty Jurisprudence in India

As observed in the last chapter, India has adopted a ***conservative approach*** as far as the issue of having death penalty as a punishment in the first place is concerned. It has been called conservative in the relative sense of the international community getting more against death penalty. The criminological analysis of the issue becomes more intense when the inconsistency of Indian courts on the issue of standardization is focussed upon.

The decisions in Jagmohan Singh and Bachan Singh although rejected the arguments in favour of standardization but still the judgements do not reflect post-modern and feminist influence in strict sense and instead showcase a ***convenience-based approach***. Albeit, the

[41] Santosh Singh v. State through CBI, 2010 9 S.C.C. 747
[42] Ibid, para 99.
[43] Md. Mannan @ Abdul Mannan v. State of Bihar, 2011 5 S.C.C. 317
[44] Ibid ,para 26.
[45] Haresh Mohandas Rajput v. State of Maharashtra, 2011 12 S.C.C. 56.
[46] Ibid, para 30.

decisions reflected upon the fact that even though the guidelines are laid down, those will not be able to subsume in themselves all the permutations and combinations of crimes, it did not explicitly took into consideration the relevant social factors. It focussed much on the idea of separation of domain of legislature and judiciary and rejected the task of having categorization by stating that doing so would make the whole process very mechanical. The decisions seemed to be based more on convenience of Indian courts rather than some post-modern principles.

The Machhi Singh went on to frame the guidelines for the purpose of the rarest of the rare doctrine, resulting in which many decisions were given arbitrarily.[47] The case took very ***objective approach*** and showed the influence of ***Liberal Sentencing policy.*** The claims of the Post-modernists and feminists seem to appropriate at this juncture by the very fact that even though certain guidelines were laid down in Machhi Singh, but still decisions that followed it were not able to deliver justice in proper sense. The post-modernists and feminists have given very fine explanation for the failure of such determinate sentencing approach, which shatters the conservative belief that judicial discretion is the source of sentencing disparity. It has been argued by them that most of the determinate sentencing schemes severely try to limit judicial discretion while almost ignoring other factors that systematically shape sentencing schemes. According to this strand of criminology, sentencing should not be treated as a part of single judicial decision. Like all social reality, it is also not fixed, but is a part of a larger process. Sentencing according to them, takes place in a social and institutional milieu that shapes how criminal justice workers respond to particular individuals.[48] Moreover, under the present sentencing policy, judges do not hold all the power but rather depend greatly on the cumulative perception of 'others'. Nardulli argued that the "courtroom elite"-the judge, the prosecutor, and the defence attorney-have common interests, such as efficiency which shape courtroom decisions.[49] In fact, some researches show that determinate and objective approach in sentencing has given more power to prosecutors and diminished the role of a

[47] "Lethal Lottery, the Death Penalty in India", Amnesty International India and People's Union for Civil Liberties, Tamil Nadu and Puducherry, 2008.

[48] Supra note 10.

[49] Nardulli, Peter F. 178. *The Courtroom Elite: An Organizational Perspective on Criminal Justice.* Cambridge, MA: Ballinger.

judge. In such a case, determinate sentencing under the misconception of reducing sentencing disparity, in fact encourages it.[50]

The streak of ***Post-modernism and feminism*** came in abundance with the landmark decision in Swami Shraddananda's case. Firstly, it analyses the whole situation by analysing the facts which the changing Indian society witnessed with the changing time (a comparison was made between the circumstances that existed in 1980s and that in the present). In this way it recognizes the post-modernist assumption that reality is never fixed and is always socially constructed. Secondly, it also emphasised on the fact the crisis that plagues our present criminal justice system is the "***crisis of imagination***", the crisis of not having able to accommodate all the permutations and combinations under some strict parameters. Thirdly and most importantly, it high-lightened the fact that judges while entering the courtroom also carry their mental social baggage with them and give decisions which reflect their personal predilections.

Conclusion: The current sentencing policy of India

As discussed in the preceding heads, even after the landmark move in Swami Shraddananda, Indian courts exhibited non-uniformity in awarding death sentence. Such non-uniformity according to the post-modernists is bound to occur because of continuous construction of different realities and also because of the fact that decisions in the Criminal justice system are inherently political.

The recent case of ***State v. Ram singh and others (Nirbhaya's Rape case)*** speaks volumes of the current sentencing policy in India. Firstly it reiterates the fact that India, being conservative, has yet not been able to do away with 'death penalty' as one of the forms of punishment. Relying on a precedent set by the Supreme Court, the additional sessions judge-Justice Yogesh Khanna Said-"***the rarest of rare test largely depends on the perceptions of the society as to if it approves the awarding of death sentence for certain types of crimes. The court has to look into factors like society's abhorrence, extreme indignation and antipathy to certain type of cases...***" This statement actually shows the direction in which Indian death penalty jurisprudence is heading where the whole criminal justice system is not to be seen in a vacuum but to be a part of larger process which is inherently political.

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[50] Donziger, Steven R. *The Real War on Crime: The Report of the National Criminal Justice Commission.* New York: Harper, 1998.

As Prof. Aparna Chandra argues in her recent narrative, the decision in the Nirbhaya's rape case showcased Indian courts more as the '***courts of public opinion***' and less as courts of law.[51]The judgement in the case was highly influenced by '***media trial***' and public sentiment. In this sense, post-modernists' claim that power is cultural and political in nature is affirmed. The Ram Singh's case verdict shows that power does not remain only in the hands of those sitting in power but is used and abused by various institutions that interact with each other in daily life.

All in all, no particular shape can be given to India's current sentencing policy, but yes, it can be well said that a remarkable transition is being observed from it being Liberal to Post-Modern in its approach. Moreover, the increasing concerns for human right violations would also be much more visible if a sociological approach is adopted while studying court room phenomenon.

[51]Aparna Chandra, *A Capricious Noose-An analysis of December 16 Gang Rape Verdict* , Available at http://barandbench.com/content/capricious-noose-analysis-december-16-gang-rape-verdict#.UkwzDYaiuSo