THE BALDEV SINGH CASE: A FLAGRANT VIOLATION OF LAW AND OF CONSTITUTIONAL MORALITY

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ABSTRACT

A speech that must have impressed one and all, the Hon'ble Chief Justice of India emphasized in the strongest words possible that constitutional morality and ethical morality cannot be separated and that ethical morality is equally important for Judges. In the very same year, in an order of the highest court of the land, two Judges upheld a compromise in a gang-rape case after the accused were held guilty. Where then, was the constitutional morality that Hon'ble Chief Justice Kapadia talked of? Clearly, the judgment lost sight of the age old mandate of the Penal Law and the philosophy behind it. The Hon'ble Chief Justice Kapadia also reemphasized that the Judges ought not question a legislation except on the grounds of a violation of fundamental rights, excessive delegation, repugnancy and ultra vires. Thus, in any other situation a Judge is bound to follow the Law in both letter and spirit. Would not then, disregarding a statute be a gross disregard for constitutional morality? Also,

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were the principles of reasonability and objectivity kept in mind while pronouncing the judgment? The objective of this paper is to identify what exactly 'constitutional morality' is, and then whether the judgment of Baldev Singh was right in law. This paper will also discuss whether such a situation would be acceptable in the United Kingdom. Finally, we come to the question of judicial accountability, whether it will be possible to uphold the spirit of the Constitution and help fulfil Ambedkar's dream of 'the diffusion of constitutional morality.' Is it the only way to ensure that the India envisaged in the Preamble does not remain just a dream? The judiciary is independent and rightly so, but whether this should be at the cost of constitutional morality also needs to be answered. The day constitutional morality is compromised, and that becomes a norm, we have nothing to fall back upon.

I. INTRODUCTION

Constitutional Morality, among other aspects, lies in upholding the Rule of Law and in following completely the spirit of the Constitution. The Constitution clearly mandates that the Parliament is the law-making body while the Judiciary is the protector of the law. Any violation of this demarcation would also go against constitutional morality.

This paper discusses how the judgment in Baldev Singh's case[1] was a gross disregard of this demarcation and on what grounds the judgment was passed. In this case, compounding of a non-compoundable offence was allowed, that too in an offence as grave as gang-rape. Rape itself being a very serious offence, and gang-rape falling in the 'aggravated category' under rape, the judgment comes as a shock to the collective conscience. A sentence of merely three-and-a-half years was given, which is terribly lower than the statutory minimum of ten years. The guilty were to pay Rs. 50,000 to the victim by way of compensation. Moreover, since the period of three-and-a-half years was already served by the guilty, the effect was that the judgment released the guilty upon payment of Rs. 50,000 to the victim. Apart from clearly not following the mandate of the law, the factors taken into account were such that it raised doubts as to whether there was any extraneous consideration that played a part in delivering such a judgment.

Constitutional morality is not just about following the provisions of the Constitution or a statute, but it lies in following the spirit of the Constitution, in not losing sight of the vision of its makers.

The principle of constitutional morality being well formed in England since many years, and being similar to that in India, it provides guidance for India as well.

The question of judicial accountability is also pertinent to this whole discussion as it arose after the tainted verdict was given.

II. THE BALDEV SINGH CASE

This is one case that provided easy prey for the media, but not without reason. On 22nd February, 2011, a division bench of the Supreme

[1]Baldev Singh & Ors. v. State of Punjab, Criminal Appeal No. 749 of 20072, (Decided February 22, 2011).

Court pronounced a judgment allowing compromise in a *proven* case of gang rape to reduce the sentence of the culprits to the period already served, i.e., three-and-a-half years. While delivering the judgment, the bench, which included a female Judge, felt that there were 'adequate and special reasons' to reduce the sentence to less than the minimum prescribed.

The offence of gang rape falls under clause (g) of section 376 of the Indian Penal Code, i.e., it has been classified as an aggravated form of the offence, for which the minimum punishment is 10 years rigorous imprisonment, while the maximum is life. This category was added by the 1983 Amendment which was a result of the shocking *Mathura Rape Case*[2] which involved the rape of a sixteen-year old tribal girl by two policemen in the premises of the police station. The Supreme Court in that case had held the accused not guilty on the ground that Mathura had not raised an alarm and that there were no struggle marks.

In the past, this very court has refused to recognize agreements which involved withdrawal of a case involving a non-compoundable offence in return for consideration.[3] It was rightly observed in *V. Narasimha Raju*[4],

Once the machinery of the Criminal Law is set into motion on the allegation that a non-compoundable offence has been committed, it is for the criminal courts and criminal courts alone to deal with that allegation and to decide whether the offence alleged has in fact been committed or not. The decision of this question cannot either directly or indirectly be taken out of the hands of criminal courts and dealt with by private individuals. When as a consideration for not proceeding with a criminal complaint, an agreement is made, in substance it really means that the complainant has taken upon himself

[2]Tuka Ram and Anr. v. State of Maharashtra, AIR 1979 SC 185.
[3]V. Narasimha Raju v. V. Gurumurthy Raju and Ors, AIR 1963 SC 107.
[4]*Id.*

to deal with his complaint and on the bargaining counter he has used his non-prosecution of the complaint as a consideration for the agreement which his opponent has been induced or coerced to enter into.

In the same case, the judgment of Hon'ble Mukherjea, J in *Sudhindra Kumar* v. *Ganesh Chandra*[5] was also quoted, *"No Court of law can countenance or give effect an agreement which attempts to take the administration of law out of the hands of the Judges and put in the hands of private individuals."* The court also emphasized on Lord Atkin's observation[6] that to insist on reparation as a consideration for promise to abandon criminal proceedings is a serious abuse of the right of private prosecution.

In a recent case,[7] while denying compounding based on section 320 of the Criminal Procedure Code, the *same* bench observed that in the decisions of *B.S. Joshi* v. *State of Haryana;*[8] *Nikhil Merchant* v. *Central Bureau of Investigation and Another;*[9] and *Manoj Sharma* v. *State and Others*[10] the Supreme Court indirectly permitted compounding of non-compoundable offences. It this connection, it observed,

One of us, Hon'ble Mr. Justice Markandey Katju, was a member to the last two decisions. We are of the opinion that the above three decisions require to be re-considered as, in our opinion, something which cannot be done directly cannot be done indirectly. In our, prima facie, opinion, non-compoundable offences cannot be permitted to be compounded by the Court, whether directly or indirectly. Hence, the above three decisions do not appear to us to be correctly decided.

[5]Sudhindra Kumar v. Ganesh Chandra, [1939] I Cal. 241, 250.
[6]Bhowanipur Banking Corporation Ltd. v. Sreemati Durgesh Nandini Dasi, AIR 1941 P.C. 95. 694.
[7]Gian Singh v. State Of Punjab & Anr, SLP No(s).8989/2010, (Decided Nov. 23, 2010).
[8]B.S. Joshi v. State of Haryana, (2003) 4 SCC 675.
[9]Nikhil Merchant v. Central Bureau of Investigation and Anr., (2008) 9 SCC 677.
[10]Manoj Sharma v. State and Others, (2008) 16 SCC 1.

It is true that in the last two decisions, one of us, Hon'ble Mr. Justice Markandey Katju, was a member but a Judge should always be open to correct his mistakes. We feel that these decisions require re-consideration and hence we direct that this matter be placed before a larger Bench to reconsider the correctness of the aforesaid three decisions.

The Court held that it cannot amend the statute and also that it must maintain judicial restraint in this connection. It also observed that the Courts should not try to take over the function of the Parliament or executive and that it is the legislature alone which can amend section 320 of the Code of Criminal Procedure.

Despite having accepted, on the record, that a mistake had been made by the Honourable Justice Katju, it is quite surprising that the very same bench allows compounding, that too in a gang rape case. This is a gross contradiction that in merely 3 months' time, the same bench has taken an entirely opposite view.

The order rests on the proviso to section 376(2)(g) of the Indian Penal Code, which allows reduction of sentence below the minimum based on 'adequate and special' reasons. But the reasons given by the Supreme Court are that:

1. The parties have entered into a compromise, application an affidavit for the same have been submitted;
2. It is a fourteen year old case; and
3. The prosecutrix is married (not to one of the rapists) and has two children.

The main flaw in the judgment is in this reasoning cited by the Hon'ble Court. This is because it is well beyond the powers of the any court to allow such a compromise. Rape is a non-compoundable offence, and such a case cannot be settled by compromise. Consequently, the court cannot cite compromise as the reason for reducing the sentence below the statutory minimum. 'Adequate and

special reasons' cannot possibly mean to take into account something that is prohibited by the law and is thus beyond the power of the court to grant. The court has also not gone into the factors which prompted the complainant-victim to enter into a compromise with her violators.

The fact that it is an old case also does not amount to adequate and special reasons as the Indian judiciary is prone to delays and this case is no exception. Thus, with all due respect, the decision in unreasonable and the judgment is a dangerous precedent to set for hard core criminals to use to their advantage. It will only encourage a flagrant violation of the law. And setting a precedent which is binding on all of the other courts of the country with respect to such a grave offence is all the more dangerous. It will become very easy for defence advocates to cite this judgment for less grave offences and get a compromise arranged. The courts will have no choice but to grant the same because where a Supreme Court precedent on an offence like gang rape is in place, how can the same treatment be denied to a lesser offence?

Many a times, the Supreme Court has reversed High Court decisions on the ground that the sentence was reduced without giving suitable reasons. In *State of Karnataka* v. *Raju*[11] the Supreme Court struck down a decision of the Karnataka High Court reducing the sentence of a convicted rapist to three-and-a-half-years. The reason cited by the High Court to reduce the sentence was the background of the accused- *"a young boy of 18 years belonging to Vaddara Community and Illiterate".* The Supreme Court stated that exceptional circumstances were necessary, and it reversed the decision saying that there was an absence of "special and adequate reason".

The basis of the entire penal procedure is that a crime is an offence against the whole society, the offender being a potential threat to society, and it is the duty of the State to bring the accused to book. In such a scenario, it is natural to not have space for any agreement

[11]State of Karnataka v. Raju, AIR 2007 SC 3225.

between the victim and the perpetrator of the crime, especially when grave crimes are involved. Hence, the need for a provision to differentiate between compoundable and non-compoundable offences arose. By not respecting this provision, the Supreme Court has attacked the very basis of the whole criminal prosecution system.

In *State of Andhra Pradesh* v. *Bodem Sundara Rao*,[12] a case involving the rape of a 13-14 year old girl, the Supreme Court reversed the judgment of the High Court and held that a sentence lower than the prescribed minimum under section 376(1) of the Indian Penal Code could not be imposed in any event. It also held that the term "adequate and special reasons" ought to be strictly interpreted. Recently, the Supreme Court opined, on the topic of rape, in *State of U.P.* v. *Chhotey Lal*,[13] *"The important thing that the court has to bear in mind is that what is lost by a rape victim is face. The victim loses value as a person."*

It is quite appalling that two eminent Judges of the same court have gone on to deliver a judgment disregarding the above stated aspect of crime as grave as rape.

It is submitted that, it is unacceptable for Judges to cross the line, travel beyond the realm of the legislation and also question the wisdom of the legislature in such a situation.

This is not the sort of precedent that the apex court of the country should be setting. Rather than moving forward, we have moved a big step backward by not giving the heinous offence of rape the seriousness that is due to it. And since most victims are not very well off, this method of compromise might as well be followed all over the country. It will be like giving affording people a license to rape. Have money, commit a crime. Such a judgment completely takes away the deterrent effect of the law, which is very important in preventing future crimes of the same genre. But it works only when

[12]State of Andhra Pradesh v. Bodem Sundara Rao, AIR 1996 SC 530.
[13]State of U.P. v. Chhotey Lal, (2011) 2 SCC 550.

the courts have come down with a heavy hand upon those found guilty. For crime to be controlled effectively, there should be fear of the consequences of committing it. Such a judgment allays these fears.

Moreover, at a time when even marital rape should be made a punishable offence, such a judgment comes as a real dampener for any such movement.

Hon'ble Chief Justice Kapadia once said, while quoting from the book of a British Judge, that, *"Judicial activism beyond a point is against the rule of law…"* and *"that is why I always tell my brother Judges, 'please see to it we also should continue to learn' ".*[14]

By disobeying the law for reasons which are clearly not 'special and adequate', they are flouting the rule of law and the fundamental principle that no one is above the law.

It is submitted that such a judgment is not just against societal morality, but also against constitutional morality. A compromise in a rape judgment is a horrendous concept.

According to Kalpana Kannabiran,[15] three judgments by the Supreme Court in the month of July mark a sharp departure from pedantic legalism and point to the possibilities of a transformative constitutionalism that sustains and elaborates the idea of constitutional morality developed in the *Naz Foundation* judgment of the Delhi High Court in 2009,

Moral indignation, howsoever strong, is not a valid basis for overriding individual's fundamental rights of dignity and privacy. In

[14]Special Correspondent, *Kapadia Cautions Judges Against Judicial Activism*, THE HINDU, May 3, 2010.
[15]Kalpana Kannabiran, *Development, Justice and the Constitution*, THE HINDU (Jul. 27, 2011), http://www.thehindu.com/opinion/op-ed/article2296451.ece.

our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view.[16]

The three cases are also very different pieces that speak to different realities in similar fashion: *Ram Jethmalani* v. *Union of India;*[17] *Nandini Sundar and Others* v. *State of Chhattisgarh;*[18] and *Delhi Jal Board* v. *National Campaign for Dignity and Rights of Sewerage and Allied Workers.*[19]

According to her, these Supreme Court decisions demonstrate the significance of social action. They draw important connections between courts, social sciences and social movements; connections that are often forgotten or negated in courts. The framework of justice by this token stretches illimitably beyond the narrow confines of constitutional law and decided cases to the letter and spirit of the constitution. Thus, they address constitutional morality which involves not straying from the spirit or core of the Constitution rather than just sticking to bare words for the sake of formality.

This is precisely what the case in question does not do. It is quite an irresponsible judgment, as far as constitutional morality is concerned. That brings us to the question of what exactly constitutional morality is.

III. CONSTITUTIONAL MORALITY

To Dr. Ambedkar, constitutional morality would mean an effective coordination between conflicting interests of different people and the

[16]Naz Foundation v. Government of NCT of Delhi and Ors, WP (C) No. 7455/ 2001 (Decided July 2, 2009).
[17]Ram Jethmalani v. Union of India, WP (C) No. 176 of 2009 (Decided July 4, 2011).
[18]Nandini Sundar and Others v. State of Chhattisgarh, WP (C) No. 250 of 2007 (Decided July 5, 2011).
[19]Delhi Jal Board v. National Campaign for Dignity and Rights of Sewerage and Allied Workers, Civil Appeal No.5322 of 2011 (Decided July 12, 2011).

administrative cooperation to resolve them amicably without any confrontation amongst the various groups working for the realization of their ends at any cost.[20]

While moving the Draft Constitution in the Assembly on November 4, 1948, Dr. Ambedkar quoted the Greek historian Grote, who had said,

The constitutional morality, not merely among the majority of any community but throughout the whole, is an indispensable condition of government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable without being strong enough to conquer the ascendancy for themselves.

After quoting Grote, Dr. Ambedkar added,

While everybody recognised the necessity of diffusion of constitutional morality for the peaceful working of the democratic constitution, there are two things interconnected with it which are not, unfortunately, generally recognised. One is that the form of administration must be appropriate to the end in the same sense as the form of the Constitution. The other, that it is perfectly possible to pervert the Constitution, without changing its form by merely changing its form of administration and to make it inconsistent and opposed to the spirit of the Constitution.

Dr. Ambedkar paused to ponder over the possible cultivation of constitutional morality in India. He observed,

The question is, can we presume such a diffusion of constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it.

[20]Minu Elizabeth Scaria, *Constitutional Morality and Judicial Values*, (Mar. 5, 2008), http://www.legalserviceindia.com/article/l186-Constitutional-Morality-And-Judicial-Values.html.

Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic.

Thus, the Father of the Indian Constitution had a premonition that in the absence of constitutional morality, democracy would flounder in India.

In *D.C. Wadhwa* v. *State of Bihar*,[21] it was observed by the Constitution Bench headed by the then Chief Justice P.N. Bhagwati,

The power to promulgate an Ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be 'perverted to serve political ends'. It is contrary to all democratic norms that the Executive should have the power to make a law.

The court also strongly said while concluding,

It is a settled law that a constitutional authority cannot do indirectly what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. This would clearly be a fraud on the constitutional provision.

In Re-promulgation of Ordinances, Prof. Wadhwa gives a quotation from the Roman legalist Julius Paulus (B.C. 204), *"One who does what a statute forbids transgresses the Statute; one who contravenes the intention of a Statute without disobeying its actual words, commits a fraud on it."*

The Vajpayee Government, in issuing the proclamation of the Prevention of Terrorism Ordinance, relied on the words of Article 123 without following the spirit and morality of the Constitution. In this context, it has been opined that unless the moral values of a

[21]D.C. Wadhwa v. State of Bihar, AIR 1987 SC 579.

Constitution are upheld at every stage, mere written words in it will not protect the freedom and democratic values of the people.[22]

Dr Ambedkar thought constitutional morality to be of utmost importance in the working of the Constitution. He again endorsed the view of Grote, that constitutional morality required *"a paramount reverence for the forms of the Constitution, enforcing obedience to authority acting under and within these forms"*. He stressed that diffusion of constitutional morality should be *"not merely among the majority of any community but throughout the whole — since even any powerful and obstinate minority may render the working of a free institution impracticable without being strong enough to conquer ascendancy"*. Dr Ambedkar then posed the question: "*Can we presume such a diffusion of constitutional morality?''* His frank answer was, "*Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it."*[23]

In the words of William D. Guthrie,

It is the duty of lawyers worthy of the profession, not merely to defend constitutional guaranties before the courts for individual clients, but to teach the people in season and out of season to value and respect the constitutional rights of others, to value and respect the moral principles embodied in our constitutions, to value and respect the rights of person and property, to respect and cherish the institutions we have inherited. What higher duty could engage us than to teach its sacredness and its permanence, in the lofty phase of the Roman advocate, its eternity, and to preach to all classes the virtue of

[22]Era Sezhiyan, *Perverting the Constitution*, Vol. 18 - Issue 25, Dec. 08 -21 (2001).
[23]Soli J Sorabjee, *Dr Ambedkar and the Constitution*, INDIAN EXPRESS (Jan 30, 2005), http://www.indianexpress.com/oldStory/63681/.

self-restraint and respect for rights of others without which there can be no true constitutional morality![24]

Andre Beteille[25] is of the opinion that

The strength or weakness of constitutional morality in contemporary India has to be understood in the light of a cycle of escalating demands from the people and the callous response of successive governments to those demands. In a parliamentary democracy, the obligations of constitutional morality are expected to be equally binding on the government and the opposition. In India, the same political party treats these obligations very differently when it is in office and when it is out of it. This has contributed greatly to the popular perception of our political system as being amoral.

Constitutional democracy acts through a prescribed division of functions between legislature, executive and judiciary. Populist democracy regards such division of functions as cumbersome and arbitrary impediments that act overtly or covertly against the will of the people. Populism sets great store by achieving political objectives swiftly and directly through mass mobilisation in the form of rallies, demonstrations and other spectacular displays of mass support. Constitutionalism, on the other hand, seeks to achieve its objectives methodically through the established institutions of governance.

According to Beteille, populist movements drew on 'the Gandhian tradition of civil disobedience used with great effect during the nationalist movement'. However, 'one has to make a distinction between Gandhi and those who have acted in his name after his passing... No one has shown - or can be expected to show - the restraint and moral discipline of which he was the great exemplar.'[26]

[24]William D. Guthrie, *Constitutional Morality*, THE NORTH AMERICAN REVIEW , Vol. 196, No. 681, 154-173 (August, 1912).
[25]Andre Beteille, *Constitutional Morality*, ECONOMIC AND POLITICAL WEEKLY, Vol. 43 No. 40 (October 04 - October 10, 2008).
[26]*Supra* note 20.

At the same time, Beteille had some sharp things to say about the deficiencies in the practice, as opposed to the theory, of constitutional democracy in India today. 'In a parliamentary democracy', he remarked, 'the obligations of constitutional morality are expected to be equally binding on the government and the opposition. In India, the same political party treats these obligations very differently when it is in office and when it is out of it. This has contributed greatly to the popular perception of our political system as being amoral.'

Owing to the hypocrisy and arrogance of politicians in power, continued Beteille, 'the people of India have gradually learnt that their own elected leaders can be as deaf to their pleas as the ones who came from outside.' He also said that our elected politicians had sometimes 'shown themselves to be even more venal and self-serving than the British who ruled India.' Our politicians may devise ingenious ways of getting round the Constitution and violating its rules from time to time, but they do not like to see the open defiance of it by others. In that sense the Constitution has come to acquire a significant symbolic value among Indians. But the currents of populism run deep in the country's political life, and they too have their own moral compulsions. It would appear therefore that the people of India are destined to oscillate endlessly between the two poles of constitutionalism and populism without ever discarding the one or the other.'[27]

The highest court of our country, with utter disregard to this concept has granted a relief which is against the spirit of the constitution. Such a relief cannot be given even if it satisfies the majority. Here, the law has not been given any regard. It is a different thing to overrule a law and different altogether to disobey an existing valid law without questioning its validity at any stage.

[27]Ramachandra Guha, *Let Us Live In Hope*, HINDUSTAN TIMES (Jan. 09, 2012), http://www.hindustantimes.com/News-Feed/TopStories/Let-us-live-in-hope/Article1-793826.aspx.

IV. CONSTITUTIONAL MORALITY IN ENGLAND

Constitutional Law in the United Kingdom has been discussed extensively in Dicey's lectures.[28] He explains constitutional morality as follows- The one set of rules are in the strictest sense laws, since they are rules which (whether written or unwritten, whether enacted by statute or derived from the mass of custom, tradition, or Judge-made maxims know as the Common Law) are enforced by the Courts; these rules constitute "constitutional law" in the proper sense of that term, and may for the sake of distinction, be called collectively, "the law of the constitution. The other set of rules consist of conventions, understandings, habits, or practices which, though they may regulate the conduct of several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all since they are not enforced by the Courts. This portion of constitutional law may, for the sake of distinction, be termed the "conventions of the constitution," or constitutional morality.[29]

From the fact that the judicial Bench supports under federal institutions the whole stress of the constitution, a special danger arises lest the judiciary should be unequal to the burden laid upon them. But the moment that this bias becomes obvious a Court loses its moral authority, and decisions which might be justified on grounds of policy excite natural indignation and suspicion when they are seen not to be fully justified on grounds of law.[30]

[28]A. V. DICEY, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION (2nd ed. 1886).
[29]*Supra* note 23, at 24-25.
[30]*Supra* note 23, at 163.

The fact that all offenses great and small are dealt with on the same principles and by the same Courts is the most important feature in the legal system to maintain the authority of law.[31]

In such a scenario, there is no place for such a judgment in which the same Judges keep changing their stand over and over again without a valid reason as done by the Supreme Court.

V. JUDICIAL ACCOUNTABILITY

Justice S.H. Kapadia famously said, "For a Judge, ethics, not only constitutional morality but even ethical morality, should be the base."

The legal maxim *"Fiat justitia, ruat caelum"* translates into "let justice be done though the heavens fall." Thus, the first duty of a Judge is to administer justice according to law, the law which is established by the legislative authority or the binding authority of precedent. Where there is no anomaly in the law, the Judge has to apply it and has no choice.

The Judicial Standards and Accountability Bill, 2010 replaces the Judges (Inquiry) Act, 1968. It seeks to create enforceable standards for the conduct of Judges of High Courts and the Supreme Court, change the existing mechanism for investigation into allegations of "misbehaviour" or incapacity of Judges of High Courts and the Supreme Court, change the process of removal of Judges, enable minor disciplinary measures to be taken against Judges, and require the declaration of assets of Judges.

The issues of Judicial Standards must be seen in the context of Article 124(4) of the Constitution which provides for the process of impeachment of a Judge on the grounds of proved "mis-behaviour" or incapacity."

[31] *Supra* note 23, at 227.

A report by Transparency International (TI) called the "Global Corruption Report 2007," based on a 2005 countrywide survey of "public perceptions and experiences of corruption in the lower judiciary," conducted by the Centre for Media Studies, found that a very high 77 percent of respondents believe the Indian judiciary is corrupt. It says that *"bribes seem to be solicited as the price of getting things done".* The estimated amount paid in bribes in a 12-month period it found was around 580 million dollars. Money was paid to the officials in the following proportions: 61 percent to lawyers; 29 percent to court officials; 5 percent to middlemen.[32]

We cannot afford to have the public lose faith in the judiciary. It is the only body we currently lean upon when all other efforts have failed. Such trust that is reposed in it should not be broken.

As per Justice Cardozo[33]

The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at Will in pursuit of his own ideal of beauty or of goodness...; He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence... He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life. Wide enough in all conscience is the field of discretion that remains".

Coming back to the case in question, even during the hearing, the case seemed to lean towards what would have been the righteous decision. When the defense Counsel Rajat Sharma said that an agreement had been reached, and also remarked *"We want to live peacefully",* the bench was quick to retaliate: "*after having committed a gang rape now you want to live a peaceful life?"* Justice Gyan Sudha Mishra

[32]Suman Meena, *Judicial Accountability* (Nov. 20, 2011), LEGAL INDIA http://www.legalindia.in/%E2%80%9Cjudicial-accountability%E2%80%9D.
[33]BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921).

said that since the penal provision does not provide for compounding the offence as under the statute, the court, apart from awarding a minimum of 10 years, can also impose a fine or extend the punishment to life imprisonment. She added *"how can we let you all go scot-free for such an offence like rape? There is no provision under the law to compound the offence. Punishment has to be awarded so that it acts as a deterrent."*[34] But letting them go scot-free is what was ultimately done.

This raises serious doubts. Even if the Hon'ble Judges actually disagreed, a split verdict is always an option. Such a judgment where a u-turn is taken from previous judgments and even from the apparent sentiment during the hearing will inevitably lead to deep dissatisfaction. Rs. 50,000 is hardly any sum to pay on the part of the rapists, *after* having committed the crime, *and* in lieu of six-and-a-half years' imprisonment.

VI. CONCLUSION AND RECOMMENDATIONS

The Baldev Singh judgment does not do Justice to long established tradition of Indian Judiciary. Such a decision could also lead to situations where victims are coerced into agreeing to a compromise. It is for the Legislature to amend the law. Does it intend to do so? When plea bargaining was introduced in India a few years ago, the 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 prosecuting such crimes. Thus, the Legislature did not want to permit "compromises" where victims of crime are women. Despite this clear intention, the court in a gang-rape case granted a compromise!

[34]PTI, *Court Frees Rapists, Agrees They Can Pay Victim* (Feb. 23, 2011), http://www.ndtv.com/article/india/court-frees-rapists-agrees-they-can-pay-victim-87242.

Unfortunately, this now constitutes precedent and before it leads to trading in sentences, one hopes that the Court corrects this anomaly at the earliest.

This is one precedent which criminals can surely do with. Due to the doctrine of precedent, this judgment is binding on all the other courts of the *entire* country! This means that any criminal can easily cite this judgment and he merely has to show similar circumstances. After that, it is simply a matter of time till the verdict is passed and the guilty are free to walk. All that they have to do is pay some money to the hapless victim, who, obviously has been wronged.

It also strikes at the very root of the criminal justice system of India, where it is the duty of the State to bring the accused to book and save the society from future threats by that person. Today he has committed the crime against one person, tomorrow it might be someone else. If the judiciary itself takes such a lenient approach, it will wreck the criminal system. The system is already weak, with overburdened courts. Now, if the cases which reach the higher judiciary and are decided are harmful to our system, there is no hope left.

Moreover, when the legislation mandates that a certain *minimum* punishment is necessary, there are reasons behind the same. It is a well thought decision. The Parliament believes that the punishment imposed is necessary to act as a deterrent and reform for the guilty and other potential offenders. It is not up to the judiciary to decide in the contrary.

In all this, the basic constitutional tenet of the rule of law is violated. Also, the Constitution clearly demarcates the Parliament as the law making body and the judiciary as the protector of those laws. It is not upon to judiciary to disobey the law (the validity of which has also not been challenged) while pronouncing a judgment. That is beyond the powers given to it by the Constitution. Thus, such a judgment violates not just the written provisions of the Constitution, but also its

spirit, and consequently, constitutional morality. Such a situation would have been unacceptable, even in England.

It is important that not only should the Rule of Law and principle of Parliamentary Law be followed, it is important that Judges also be made accountable for their actions. All of these lessons are to be learnt from just one judgment of the Apex court: a judgment which has the power to change the face of criminal prosecution in India if it is not remedied soon.

It will surely do well to the country if this judgment is reversed or overruled soon. That will also be a step towards realizing Dr. Ambedkar's dream and towards a safer society where hard-core criminals do not abound and move scot-free.

Such a decision cannot even be justified under the guise of judicial activism. It is rather against the interests of society.