LIFE IMPRISONMENT IN INDIA: A SHORT HISTORY OF A LONG SENTENCE

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Despite more than half of India's convict population serving the sentence of life imprisonment, there exists little critical writing or scholarly debate about this punishment. Following the decision by a constitution bench of the Supreme Court in 2015 in Union of India v. V. Sriharan, and the Criminal Law Amendment Acts of 2013 and 2018, life imprisonment has acquired a new-found texture of harshness which leaves little room for shortening of sentences otherwise provided for in law. This article begins problematising life imprisonment since it is expected that its use will be more rather than less frequent in view of these legal developments. Apart from discussing recent developments in life imprisonment, this article examines life imprisonment in a historical context, surveys the development of prisons in India and maps the mutation of the punishment of transportation into life imprisonment. The article claims that while life imprisonment existed alongside transportation, Indian prisons were not designed to house large numbers of life convicts. The transition from transportation to life imprisonment was unsupported by a robust legislative framework which necessitated a complex but unsatisfactory patchwork of judicial pronouncements and executive orders to overcome legislative lacunae. Such arrangements have made the punishment highly susceptible to arbitrariness. It is apprehended that increased reliance on life imprisonment may only serve to exacerbate existing problems of the criminal justice system, rather than finding sustainable solutions.

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I. INTRODUCTION

Life imprisonment occupies an important place in India's criminal justice system.[1] An estimated 55.8 percent of India's convict population is undergoing a sentence of life imprisonment.[2]

Despite its seeming popularity, "imprisonment for life" is the newest entrant amongst punishments prescribed under the Indian Penal Code, 1860 ('the IPC').[3] Its introduction, through an amendment in 1955 replaced the punishment of transportation.[4] Life imprisonment is reserved for grave offences, for some of which the only prescribed penal alternative is the death penalty.[5] Unlike the death penalty, however, questions related to life imprisonment have failed to capture public attention, polarised opinion or found space in legal scholarship.[6]

Life imprisonment is often viewed as being more humane and less severe than the legislative alternative to the death sentence.[7] The humaneness of the punishment, and its lesser rigor however, is a far cry from the truth. Life imprisonment has been the cause for much suffering and anxiety, not only amongst those who undergo it and their loved ones, but also for those who are tasked with imposing or executing it.

Two developments in the relatively recent past have occasioned this article.

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1 This punishment is used as a sentence for more than fifty offences in the Indian Penal Code, 1860. Madhurima Dhanuka, *A New Form of Life Imprisonment for India* In Life Imprisonment And Human Rights 119, 120 (Dirk Van Zyl Smit & Catherine Appleton, 2016).

2 Ministry of Home Affairs, National Crime Records Bureau, *Prison Statistics India 2015*, 2016, 117, available at http://ncrb.gov.in/statpublications/psi/Prison2015/Full/PSI-2015-%2018-11-2016.pdf (Last visited on February 2, 2019). Prison statistics after 2015 have not been published till the time of writing.

3 The terms "imprisonment for life" and life imprisonment are used interchangeably in this article.

4 This amendment came into force in 1956. Law Commission of India, *Report on the Punishment of Imprisonment for Life Under the Indian Penal Code*, Report No. 39, 1 (July 1968).

5 Offences punishable under §§121, 302, 364A of the Indian Penal Code, 1860 have prescribed life imprisonment or the death sentence as the only possible sentences.

6 Some notable exceptions to this statement are as follows: Sh. B.S. Malik, Senior Advocate argued several cases of life convicts and wrote extensively about issues related to life imprisonment. Some of his articles are referred to in this article. Dhanuka, *supra* note 1, deals with some recent developments in the law related to life imprisonment.

7 *See*, *e.g.*, The Hindu, *Spared the Noose, Convict to Remain in Prison for the Rest of His Life*, October 25, 2016, available at https://www.thehindu.com/todays-paper/tp-national/tp-tamilnadu/Spared-of-the-noose-convict-to-remain-in-prison-for-rest-of-life/article15740354.ece (Last visited on October 11, 2018); The New Indian Express, *Rape, Murder Convict Spared the Noose, Gets 20 Year Term*, January 8, 2017, available at http://www.newindianexpress.com/cities/chennai/2017/jan/08/rape-murder-convict-spared-the-noose-gets-20-year-term-1557320.html (Last visited on October 11, 2018).

First, the Supreme Court ('the SC') in a 2015 constitution bench decision made far-reaching observations about life imprisonment.[8] The Court was split 3:2 on whether, while commuting a sentence of death to life imprisonment, courts could place the sentence beyond the scope of remission for a fixed period. The majority ruled that the High Court ('HC') or the SC could place the sentence beyond remission for a pre-determined period. This punishment was only in cases where death sentence seemed too harsh a punishment and life imprisonment seemed too mild. The minority disagreed, holding that judicial restriction of remissions to life convicts amounted to the creation of a new punishment. It also cautioned that such sentences blurred the line between the judicial function of sentence imposition and the executive functioning of sentence implementation.

Secondly, through Criminal Law Amendment Acts in 2013 and again in 2018, several offences in the IPC were made punishable by "imprisonment for life, which shall mean the remainder of that person's natural life".[9] While this formulation of life imprisonment is consistent with judicial interpretation of life imprisonment, the change in terminology creates inconsistency by not changing the languages of all punishments of "imprisonment for life". It also leads to considerable confusion regarding the legal exercise of the power to shorten sentences.

These developments suggest that this punishment is likely to be used more rather than less frequently. They raise many questions which remain unanswered and much still remains to be known about the punishment of life imprisonment. Considering its popularity in the criminal justice system, it is imperative that we closely examine it. This article is far from the last word on life imprisonment. Rather, it is only an attempt to begin the conversation about the persistently problematic nature of this punishment.

This article tells the story of life imprisonment in four parts.

Following this first introductory part, Part II sets the scene by tracing the evolution of prisons in India.[10] Prisons are the sites where life sentences are served and it is necessary to know the forces of history which shaped them. Part III discusses the punishment of transportation, which is supposed to have been neatly replaced by life imprisonment from 1955. Transportation was introduced by the British East India Company ('the Company') and used frequently under British

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[8] Union of India v. V. Sriharan, (2016) 7 SCC 1 ('Sriharan').

[9] The 2013 Amendment dealt with sexual offences and acid attacks. The 2018 Amendment deals with sexual offences against minors. Both were introduced in response to cases which garnered a considerable public attention.

[10] While some countries make a distinction between prisons and jails, in India, these terms are often used interchangeably. *See* Ministry of Home Affairs, Resolutions adopted by the 5th National Conference of the Heads of Prisons of States/UTs on Prison Reforms, No. 16011/02/2016-PR (May 4, 2017) which decided that all states should consider changing the nomenclature of Prison Departments of all states to "Prisons and Correctional Administration" integrating prison, correctional and probation services. This remains to be implemented.

rule, until its mutation into life imprisonment. Part IV examines the place that life imprisonment occupied in India after 1955 and examines some legal controversies arising from the punishment. Part V discusses recent judicial and legislative innovations regarding life imprisonment and the penological trends which emerge from it.

II. THE LEGAL AND ARCHITECTURAL ORIGINS OF THE COLONIAL PRISON

The Company having obtained a charter to trade in 1600, took nearly a century to begin establishing its dominance in India.[11] By 1765, through military conquest and treaties, the Company came to control vast territories ousting other European trading powers and obtained *diwani* (the right to collect taxes) from the Mughals in Bihar and Bengal. It was several years after this that the Company was granted the right to administer criminal justice under the Mughal court system.[12] Though seen as "archaic and barbaric", the Company appeared to have little wherewithal to reform the Mughal criminal justice system.[13]

The transfer of power from Mughal rulers to the Company was to be more than just *de jure*. It was as much architectural as it was legal. The landscape began seeing the emergence of colonial buildings such as revenue offices, police stations, forts, military barracks and prisons.[14] By 1857 when the Company lost its authority over India, over fifty-five prisons dotted Bengal's landscape.[15]

These prisons seldom bore any resemblance to modern prisons, sometimes not even having *pucca* buildings or boundary walls. Often existing structures such as revenue offices, army barracks, military forts and colonial residences were repurposed for use as prisons.[16] Sites for these new prisons were rarely selected with regard to their surroundings, resulting sometimes in easy escape or the rapid outbreaks of diseases such as malaria, cholera and tuberculosis.[17]

While prisons architecturally lacked uniformity, prison inmates were just as diverse. Caste, religion and geography played important roles in the ordering of prisons. Arrangements for cooking, messing, grooming and dress

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[11] Atul Chandra Patra, *Landmarks in the Constitutional History of India*, 5(1) Journal of the Indian Law Institute 81, 85 (1963).

[12] Mira Rai Waits, *The Spatial Economy of British Colonial Penology in India, 1858-1911*, 4 (June, 2014) (Ph.D. dissertation, University of California, Santa Barbara).

[13] Mira Rai Waits, *Carceral Capital* in Across Space and Time: Architecture and the Politics of Modernity 19, 25 (Patrick Haughey, 2017).

[14] Waits, *supra* note 12.

[15] Prisons were generally smaller than the ones that we see today and even the largest were capable of only holding upto 500 inmates. *Id*.

[16] *Id*.

[17] *Id*. *See also* Radhika Singha, A Despotism of Law: Crime and Justice in Early Colonial India 255 (2000).

often depended on caste or religious lines.[18] To European jail administrators, this diversity represented a lack of discipline. However, attempts to alter these arrangements were resented and often violently resisted by inmates.[19]

Prompted by this violence as well as instances of violence in other prisons, Sir Thomas Macaulay requested the appointment of a committee to examine issues related to prison discipline.[20] This committee, of which Macaulay was a member, was appointed in 1836 and submitted its report in 1838.[21]

The Prison Discipline Committee ('the Committee') had a broad mandate to inquire into "the present state of Indian Gaols", "the physical and moral condition" of convicts and under-trials and the impact of imprisonment on prisoners and society.[22] Its 1838 report, would leave a lasting impression in creating the physical prison spaces and also in the legal justification for peopling these spaces.

The Committee's philosophy owed "an obvious debt" to Jeremy Bentham's utilitarian ideas, though the report's wording was "sterner than that of Bentham".[23] Deterrence was viewed as the "great end of punishment". Reformation, as the primary penological goal was rejected, though deemed acceptable, if incidentally achieved.[24] A proposal to educate prisoners was rejected citing its "heavy

[18] David Arnold, *The Colonial Prison: Power, Knowledge and Penology in Nineteenth-Century India* in Subaltern Studies : Essays in Honour of Ranajit Guha, Vol. 8 148, 150 (David Arnold & David Hardiman, 1994). The role that race played in ordering prisons is also worth noting. It is noted in 1877 while Indian prisoners were provided a diet of ragi and dal, the European prisoners were held at Ooty, which had a cooler climate, and were provided a generous diet of mutton, beef, potatoes and bread. These prisoners were never under Indian jailors or subject to punishments considered demeaning. Arnold concludes that even in confinement, the European body maintained its privileged status. *Id*., 170. In the penal settlements, Europeans convicts were provided roles of prison overseers and were provided with better and more clothing, boots. This was in comparison to their Indian counterparts who were provided two pairs of jail clothing and a blanket. This possibly resulted in lower mortality rates amongst European convicts. Clare Anderson, *Fashioning Identities: Convict Dress in Colonial South and Southeast Asia*, 52 History Workshop Journal 152, 165 (2001).

[19] An incident in 1834 in Alipore jail, the largest British jail in India at the time, brought the issue of prison discipline into sharp focus. Inmates struck and killed the British magistrate-cum-superintendent of the jail, in relation to a dispute over prison labour conditions. *Id*., 152.

[20] *Id*., 161. It is worth noting that this was a tumultuous time as rebellions and revolts were breaking out across the country against a number of legal measures adopted by the Company. The criminal justice system was therefore frequently in use.

[21] It is worth noting that at the time, Macaulay played a major role in preparing the first draft of the Indian Penal Code, published in 1837. The Indian Penal Code was part of a larger law reform project of the Indian Law Commission to ensure that laws, both civil and criminal, were uniform across Company-controlled India. Macaulay had previously spoken about imprisonment (which then was more than just indoor confinement) as being the punishment to be used in "99 of 100" cases and also that "the best criminal code can be of very little use to a community, unless there be a good machinery for the infliction of punishment". Sir Thomas Macaulay in *id*., 160-162.

[22] Committee on Prison-Discipline, *Report of the Committee on Prison-Discipline to the Governor General of India*, 1 (1838).

[23] Eric Stokes, as cited in Arnold, *supra* note 18, 162.

[24] The Committee states that while reformation of bad men may be an object of national importance, it relates to aspects which the penal law does not concern itself with. *Supra* note 22, 104.

expense" and the fact that it would amount to placing "a direct premium on vice."[25] Instead, it recommended that prisoners be put to work that was "[…] monotonous, uninteresting labour within doors". Prisoners would also be "deprived of every indulgence not absolutely necessary to health[…]".[26]

Architecturally, the Committee recommended the construction of central jails where prisoners sentenced to more than one year's imprisonment would be confined.[27] Deviating from the practise then in vogue of confining prisoners in a common yard, it recommended that prisoners be segregated to prevent under-trials, convicts and habitual prisoners from mingling.[28] For prisoners with long sentences, it recommended transportation for their whole lives instead of life imprisonment.[29]

The Committee's recommendations, however, did not find favour with the Governor-General who cited "extraordinary expense" and the unsuitability of these recommendations to Indian conditions.[30] The Committee's recommendations, were thus largely unimplemented. Peasant and tribal revolts, and the rude shock of the 1857 rebellion, forced the Company to act.[31]

No sooner had the rebellion of 1857 been suppressed, that a commission was appointed to identify a suitable site for establishing a penal settlement in the Andamans. This settlement was meant to receive, "in the first instance, of Mutineers, Deserters, and Rebels, sentenced to imprisonment in banishment, and eventually for the reception of all convicts under sentence of transportation […]".[32]

The Cellular Jail at Port Blair, appears to be one of the few prisons globally which bears close resemblance to Bentham's "panopticon". The panopticon contained single cells arranged in a "[...] circular or radial plan with an inspection tower at the centre of the circle from which guards could observe cells of inmates. The unity of the arrangement of tower and cells led prisoners to regulate

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[25] The Committee noted that it would be an unjust outcome that a poor man's children would be without education for his inability to afford it, while a prisoner whose only quality is his dishonesty gets the benefit of education. *Id*., 117.

[26] Deviating from much prison practise until then where work was largely performed outside prison, the Committee recommended working intramurally to ensure more supervision, rigor and discipline. *Id*., 99. This may also have been in light of the high mortality rates of prisoners working extramurally. *C.f. id*. 47-49, 59-61.

[27] *Supra* note 22, 121.

[28] *Id*., 63.

[29] *Id*., 120. The draft of the Indian Penal Code also prescribed life imprisonment for only a few offences. *Infra* note 84.

[30] Arnold, *supra* note 18, 163.

[31] An exception was the North West Frontier Province which adopted some of the reforms including the building of a central prison. *Id*., 162-163.

[32] Letter sent by Home Department (Judicial), Instruction No. 3 *& addressed to* The Court of Directors, East India Company (January 19, 1858), 1-2 in *Selection of the Records of the Government of India*, Home Department, No. XXV: The Andaman Islands with notes on Barren Islands (1859).

their behaviour because they believed they were being observed at all times, even though it was impossible for the guards to observe all cells at once".[33] In other prisons across India however, the single-cell construction proved to be far too costly.[34]

After 1857, the model followed for many prisons across India was the more cost-effective radial design, following the then newly opened Pentonville prison in London.[35] Radial prisons were characterised by a central watch tower, radiating cell blocks and high perimeter walls. The barracks were built with identical dimensions and were divided by walls for different classes of prisoners like habitual and non-habitual, juveniles, women, and separate solitary confinement.[36] Unlike the panopticon, where the appearance of constantly being observed was hoped to bring about reform, the radial prison served no reformatory function. It merely separated and classified bodies into different areas of the jail.[37]

Over time, colonial attitudes towards prisons changed. By 1921, when the Indian Jails Committee headed by Andrew Cardew submitted its report, reformation came to be considered a significant goal of imprisonment. This Committee placed great emphasis on the reformative quality of prison labour and proposed modifications to the radial design. Instead of the belief that constant observation would bring about reform, these modifications gave primacy to the perceived reformative quality of work. Establishing prison factories thus helped in achieving the dual objectives of reform and profit.[38]

This modified radial design was capable of holding a significantly larger number of prisoners.[39] The increased capacity was considered necessary as this Committee recommended a reduction in transportation of convicts which would considerably increase the burden on Indian prisons.[40] Prisons therefore

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[33] Waits, *supra* note 12, 28. While construction on the Cellular Jail only began in the 1890s, prisoners were transported to convict lines or smaller jails across different islands in the Andamans. *See also* the Indian Government's submission to UNESCO to have the Cellular Jail recognised as a World Heritage Site. Permanent Delegation Of India To UNESCO, *Tentative List, Ref: 5888 Cellular Jail*, April 15, 2014 available at https://whc.unesco.org/en/tentativelists/5888/ (Last visited on October 11, 2018).

[34] While not fully implemented, military architecture and Benthamite ideas of prison management seemed popular amongst prison administrators in India. In 1855, one Mr. J. Rohde, Inspector of Prisons for Madras submitted a plan to build a "panopticon" along the lines proposed by General [*sic*] Bentham. J. Rohde as cited in Arnold, *supra* note 18, 164.

[35] *Id*.

[36] Waits, *supra* note 12, 70.

[37] Waits, *supra* note 13, 25.

[38] The Committee tried to guard itself against criticism by stating that profit was not the true objective of prison labour. In fact, it was to reform the prisoner by giving him work which is "distasteful and irksome" to prevent him from returning to prison, but also work that would help the prisoner form a habit of industry. East India (Jails Committee), *Report of the Indian Jails Committee (1919-1920)*, 286 (1921). *But see, id*. which speaks of the role that prison industry had cemented for itself by this time.

[39] Waits, *supra* note 13, 25.

[40] *Supra* note 38, 286 (1921).

had cemented their place as being more than "a mere interlude between trial and sentencing to permanent places of punishment".[41]

The modified radial design is followed by many prisons in India today.[42] No matter what penological justification is employed to send people to prison, physical spaces rigidly define reality. As reliance on prisons increases by sentencing more people to longer terms of imprisonment, their colonial vintage and underlying philosophies should not be lost sight of. To unquestioningly rely on them is to be complicit in negating their utilisation as institutions of correction. Continued and uncritical reliance on prisons scarcely differentiates prions today from colonial prisons — as spaces for suffering, toil and the confinement of human bodies.

III. TRANSPORTATION: PENOLOGY, POLITICS AND ITS END IN INDIA

Why the prisons built according to the modified radial plan after the 1920s needed to be bigger than existing prisons, is also to enquire into why transportation ended in India. The answer requires understanding how transportation worked.

The very fact that transportation to the Andamans started soon after the rebellion of 1857 was put down, is curious. It is curious, not because transportation was a novel punishment in India. Transportation was practised since 1773 in India.[43] Prisoners transported from the Indian territories of the Company and later British India, accounted for over twenty-eight percent of prisoners transported from British colonies.[44] Nor is it curious for the choice of location — the Andaman islands. A penal settlement was established in 1793 but had to be abandoned in 1796 due to insalubrious conditions.[45]

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41 Waits, *supra* note 13, 19.

42 *Id*., 35. A note appended at the beginning of this report states that while the report makes reference to building plans which are not attached, "being unlikely to be of general interest, but are obtainable free of charge on application to the Records Department (Parliamentary Branch), India Office.". *Supra* note 38.

43 The first prisoners were transported from India in 1773. Judges of the district courts in the province of Bengal and the Nizamat Adalat in Calcutta were instructed to direct transportation of those prisoners who were sentenced to hard labour or imprisonment for life. Clare Anderson, Convicts in the Indian Ocean: Transportation from South Asia to Mauritius, 1815-1853 12 (2000).

44 Of the 378,783 prisoners transported in the British Empire between 1615-1939, a total of 106,450 were estimated to be from India. Figure is an approximation derived by the author from Clare Anderson, *Transnational Histories of Penal Transportation: Punishment, Labour and Governance in the British Imperial World, 1788–1939*, 47(3), Australian Historical Studies 381, Table 1 at 382 (2016).

45 Nearly 300 convicts were transported there for crimes ranging from dacoity, murder or repeated petty theft. On the settlement being abandoned, the convicts were transported to Bencoolen and the settlers sent back to Bengal. Anderson, *supra* note 43, 13.

Why it is curious is because in 1858 when the site for a penal settlement was being identified, transportation had almost ended in the United Kingdom.[46]

The Committee in its 1838 report had tried to make out a case of transportation's uniqueness in India. Transportation, it stated, was a "weapon of tremendous power", as "crossing the black water" invoked a sense of "indescribable horror".[47] The punishment's impact on the convict was "little short of the effect of a sentence of death, whilst the effect of such a sentence on the bystanders is greater than the effect of a sentence of death."[48] A year previously, the Indian Law Commissioner in its draft of the Indian Penal Code, 1837 had preferred transportation for most offences instead of life imprisonment. It observed:

> "Prolonged imprisonment may be more painful in the actual endurance: but it is not so much dreaded beforehand; nor does a sentence of imprisonment strike either the offender or the bystanders with so much horror as a sentence of exile beyond what they *(Indians)* call the Black Water. This feeling, we believe, arises chiefly from the mystery which overhangs the fate of the transported convict. The separation resembles that which takes place at the moment of death. The convict is taken for ever from the society of all who are acquainted with him, and conveyed by means of which the natives have but an indistinct notion over an element which they regard with extreme awe, to a distant country of which they know nothing, and from which he is never to return."[49]

The Committee embraced this observation and recommended further that transportation in all cases, should be for life. A sentence which thrived on the fear of the unknown would serve little purpose if people who were sentenced to it, were to return within a few years.[50]

Although in existence from 1776 in India, several concerns had been raised about transportation before the recommendation of the Committee. These

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[46] The Privy Council in Kishori Lal v. King Emperor, 1944 SCC OnLine PC 46 : ILR (1945) 26 Lah 325 cites 1856 as the year of its end. While European convict flows were declining by the 1840s, Australia's Western Territories accepted the last convicts from the United Kingdom in 1868. Anderson, *supra* note 44, 38. Arnold states that transportation being introduced in India was a deliberate measure despite its declining popularity in Europe. Arnold, *supra* note 18, 175.

[47] *Supra* note 22, 87.

[48] *Id*., 86. A lone member Mr. D. Mcfarlan submitted a minute of dissent against the implementation of the punishment of transportation. In his view, it was a punishment of choice for many prisoners in India as well as Europe and was more expensive and milder than life sentences. His view was that transportation should be classed below the sentence of life imprisonment in terms of severity and would cause greater deterrence. *Supra* note 22, Minute C, 8-11.

[49] Indian Law Commissioners, *A Penal Code*, Note A, 2 (1837).

[50] *Id*.

concerns arose from both the ports of origin as well as the destinations to which prisoners were to be transported, and their nature was both penological and also budgetary.[51]

Firstly, penal settlements wanted only healthy young men who were skilled labourers and were not convicted of a grave crime.[52] Transported prisoners were often used for extra-mural labour such as building infrastructure and clearing forests. The destination for transportation was often determined by the demand for labour in that settlement. As the demand for labour increased, more offences were made punishable by transportation between 1797 and 1808.[53] This close nexus between the demand for prison labour in colonies and transportation raises several uncomfortable questions about the function of transportation. With former penal colonies refusing to accept prisoners, the United Kingdom appeared to constantly be on the lookout for newer sites for transportation.[54]

Secondly, the process of transportation itself, was more expensive than keeping inmates confined in Indian prisons. Convicts were transported by ships to islands in South-East Asia. There needed to be enough prisoners for a ship to be chartered, and as it was impossible to predict beforehand when a sufficient number would be sentenced, prisoners were made to work extramurally until arrangements for transportation were made. While awaiting transportation, many prisoners escaped from the extramural work detail. This rendered the punishment ineffective.[55]

Thirdly, once transported too, prisoners were believed to have a less severe penal regimen than prisoners confined in India. Although separated from family and home, the punishment of transportation was for a limited duration after which prisoners could return home or settle in the penal colony as self-supporting individuals.[56] Despite the perceived "horrors" of transportation, prisoners in Indian jails were petitioning to be transported.[57]

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[51] The reasons listed hereafter draw generally on Anderson, *supra* note 43.

[52] *Id*., 23-24.

[53] *Id*., 13.

[54] Initially, convicts were transported to Bencoolen (now in Singapore). From 1789, convicts were transported to Penang (now in Malaysia). With the exception of a few European prisoners, prisoners sentenced in India were not transported to Australia as the climate would be "unsuitable" for the "Indian race". Anderson attributes this to racialised views about Indians and a misplaced understanding of the caste system by colonial officials. *Id*., 16.

[55] Ships were required to be privately chartered to serve as convict transports. The government had to provide for rations and clothing for the inmates. Conditions aboard ships varied widely across individual vessels. *Id*., 14-15.

[56] One obstacle, however, to getting permanent settlers was that transportation in South Asia was heavily gendered. Indian convicts sentenced to transportation were usually males who were sentenced to perform hard labour. *Id*., 33.

[57] This raises doubts about the Committee's 1838 report about transportation being a particularly harsh punishment in India. Anderson writing about this phenomenon in Alipore in 1820s, believes that this could mean simply that conditions there were much worse than those which were supposed to exist in the penal colonies. *Id*., 18.

Given these concerns with transportation, it was decided in 1811 that no more prisoners would be transported from Bengal. Prisoners convicted of serious crimes would be sentenced to life imprisonment and would be held in the then newly constructed Alipore jail. This policy was however abandoned by 1813 as the jail was over-crowded. Transportation re-started and got a further impetus with the British acquisition of Mauritius.[58] From 1815 Indian prisoners were transported there.[59] In 1817 more offences in India were made punishable by transportation.[60] By 1826, Bombay Presidency too began transporting prisoners to Mauritius.[61] The 1837 draft of the Indian Penal Code as well as the Committee's 1838 report, though not immediately implemented, expressed a strong preference for transportation over life imprisonment.

It was the years after the 1857 rebellion that saw a large number of Indian prisoners being transported to the Andamans.[62] This helped reduce overcrowding in Indian prisons, and send persons involved in rebellions and revolts away from the Indian mainland.[63] The construction of the cellular jail which commenced in the 1890s was finally completed by 1906. However, many problems about the conditions and excesses in the cellular jail emerged. In 1921 the Indian Jails recommended that:

> "[…] deportation to the Andamans should cease except in regard to such prisoners as the Governor General in Council may, by special or general order, direct. Eventually the population will be reduced to this small body of specially dangerous criminals who will then be confined only in the healthier localities where the Cellular and Associated Jails are placed."[64]

The furore over maltreatment of prisoners continued and the British government announced that year that the penal settlement in the Andamans would be gradually abolished.[65] While the number of prisoners in the Andamans reduced by nearly half, over the next decade, resistance to prisoner repatriation came from an unexpected quarter.[66]

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58 *Id*., 14.

59 Anderson, *supra* note 43.

60 *Id*., 14.

61 *Id*., 15.

62 The Andamans accounted for the largest number of prisoners received by any penal settlement in the British Empire. Anderson, *supra* note 44, 385.

63 The convict flows from Asia were closely connected with political upheavals and rebellions. *Id*., 387, 391.

64 *Supra* note 38, 286.

65 The Guardian, *Survivors of our Hell*, June 23, 2001, available at https://www.theguardian.com/lifeandstyle/2001/jun/23/weekend.adrianlevy (Last visited October 11, 2018).

66 There was also a considerable furore over treatment of prisoners in the Andamans following an article titled "Hell in the Andamans" by Col. Wedgwood, a member of British Parliament and also the recommendations of the Indian Jails Committee, 1919-1920. *See also* Taylor Sherman, *Hell to Paradise? Voluntary Transfer of Convicts to the Andaman Islands, 1921-1940*, 43(2) Modern Asian Studies 367 (2009).

Provincial governments opposed the move citing the financial burden of transporting prisoners back from the Andamans, overcrowding in existing jails and the enormous cost of constructing new prisons to accommodate the returned prisoners.[67] Since the passage of the Government of India Act in 1919, prisons had become a subject for the provinces. Resultantly, while the British Government in India resolved to largely end transportation, it was legally powerless to compel provincial governments to take the convicts back.[68]

Even a decade after the announcement to close the penal settlement, in 1932 the Secretary of State for India noted that the Andaman Cellular Jail would remain open, but only "as a special measure, of about 100 prisoners, convicted in connection with the terrorist movement […]".[69]

It scarcely helped that by the time *Kishori Lal* v. *King Emperor* (' Kishori Lal') was heard by the Privy Council in 1944, the Andaman Islands were under Japanese occupation.[70] The case was of a prisoner involved in the nationalist movement who sought release since he had served over fourteen years (with remissions) of imprisonment. Although he was sentenced to transportation, he remained un-transported and was confined at the Lahore Jail and subject to discipline as if he were a prisoner sentenced to rigorous imprisonment. The Privy Council ruled that "A sentence of transportation no longer necessarily involves prisoners being sent overseas or even beyond the provinces in which they were convicted."[71] It acknowledged that "[…] at the present day transportation is in truth but a name given in India to a sentence for life[…]".[72] A prisoner sentenced to transportation was to be held in a prison in India and would be subject to such penal discipline as if the prisoners were sentenced to rigorous imprisonment.[73] With this, the Privy Council

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[67] The efforts to reduce the number of prisoners in the Andamans were affected due to the lack of gaol facilities in India. Debate In The House Of Commons, *Andaman Islands*, V.281 cc. 537-8, November 13, 1933, *comments by Samuel Hoare, Secretary of State for India*, available at https://api.parliament.uk/historic-hansard/commons/1933/nov/13/andaman-islands (Last visited on October 11, 2018).

[68] Under the Government of India Act, 1919, prisons were a state subject. Provinces were concerned that the federal government's decisions were affecting their budgets. Only two provinces, C.P. & Berar and Behar & Orissa agreed to build additional prisons at the request of the federal government. Others like the United Provinces, refused to oblige and build new prisons citing that the Government of India had only asked that the policy of deportation be stopped "as far as practicable" and could not legally be mandated. Sherman, *supra* note 66.

[69] *Supra* note 67, V.269 cc. 578-9, October 24, 1932. For a narrative account of British penal policy in the Andamans from prisoners, *see also* The Guardian, *supra* note 65.

[70] Kishori Lal v. King Emperor, 1944 SCC OnLine PC 46 : ILR (1945) 26 Lah 325, at 330. For a critique of this judgment, *see* B.S. Malik, *Punishment of Transportation for Life*, 36(1) Journal of the Indian Law Institute 111-120 (1994).

[71] Kishori Lal v. King Emperor, 1944 SCC OnLine PC 46 : ILR (1945) 26 Lah 325, at 329. On the very next page, 330, in what seems cruelly ironic, the Privy Council in a single paragraph notes how transportation was retained in India for its deterrent effect, but says in the same breath that only prisoners who volunteer could be sent overseas.

[72] *Id*., at 330.

[73] *Id*., at 329. Although this drew strength from §58 of the Indian Penal Code, this appears to be an erroneous interpretation. §58 seems to only deal with the situation of prisoners awaiting

accorded its seal of approval to the practise of treating un-transported prisoners as those sentenced to life imprisonment and subject to rigorous labour.

Although transportation would remain on the statute books till 1955, this judgment practically marked the formal close of a long and painful saga of Indian legal history.[74] This unfortunate decision of the Privy Council continues to shape our current understanding of life imprisonment.

IV. THE CRUEL CALCULUS OF LIFE IMPRISONMENT IN INDIA

From 1956 transportation no longer remained a punishment even on the statute books. In what was perhaps the first formal acknowledgement of the punishment of "imprisonment for life", the IPC was amended to substitute it for all references to transportation.[75] Life imprisonment however, appears to have a much longer history. While its origins are hazy, it appears to pre-date the punishment of transportation in Indian law.[76]

When the Committee submitted its report, it was split on the issue of life imprisonment.[77] The majority, despite its scepticism about the punishment, opted to retain life imprisonment. Their concerns related to life imprisonment were threefold — security, severity and recovery of costs.[78] The question of appropriate severity of life imprisonment seems to have rankled its members' Benthamite values. With deterrence already declared to be the "great end of punishment", reformation was considered an objective not worth pursuing with life convicts.[79] The difficulty arose because if the punishment was excessively harsh, the pain caused to the individual would be incommensurate to the amount of deterrent

transportation and not those who would never be transported.

74 Although not enough is said about transportation and the lives that it affected, important scholarship exists about this in the South Asian context. *See* Anderson, *supra* note 43. Anderson notes that transportation from South Asia played an important role in the colonial prison labour network. She also notes that amongst the demographic groups transported, a very large proportion were lower caste Hindus, Muslims and tribal persons. It was also heavily gendered unlike in Australia where female convicts from the United Kingdom would perform domestic work. Transportation from South Asia was usually for hard labour. *See also* Sherman, *supra* note 66, who challenges the narrative that in the 19th century, the Andamans was more than just a "terrible torture camp". *See also* work by Satadru Sen, *Contexts, Representation and the Colonized Convict: Maulana Thanesari in the Andaman Islands*, 8(2) Crime, History & Societies 117-139 (2004). Sen's work is a fascinating intersection, which focuses on identity and colonialism in the history of the various phases of the penal settlement in the Andamans.

75 Code of Criminal Procedure (Amendment) Act, 1955, which came into force in 1956.

76 In 1773, instructions were issued to judges in Bengal to order the transportation of convicts sentenced to hard labour or life imprisonment. Anderson, *supra* note 43, 12.

77 The Committee observed that 1052 prisoners lodged in the Great Gaol in Alipore, in February, 1837, were sentenced to imprisonment for life. This gaol held prisoners from the entire region. *Supra* note 22, 61.

78 *Id*., 63.

79 *Id*.

value. However, if perceived as being too mild, the punishment would have no deterrent effect.[80] The minority in its dissenting minute called life imprisonment "cruel" and "unjustifiable", especially when other punishments caused "less misery to the sufferer" and "more or equal dread, generally, to those tempted to commit crimes".[81] The majority prevailed and recommended that if transportation as punishment for life were adopted as a punishment, then life imprisonment in India would become a rarity.[82]

For prisoners already undergoing the sentence, the Committee was unanimous and recommended: **"**We believe that a few years of the same discipline as that of temporary prisoners, and for the rest of life the enforcement of hard work at any profitable occupation, without other circumstances of aggravation, will make imprisonment for life adequately dreaded."[83]

The 1837 draft of the Indian Penal Code too had preferred transportation to life imprisonment.[84] However, since neither report was immediately implemented, life imprisonment continued to survive. With transportation becoming more commonplace after 1858, life imprisonment appears to have largely receded into shadows.

In an 1856 account, the Indian life convict cuts a pitiable and hopeless figure:

> "It is difficult to imagine any fate more dreadful than that of the Indian life prisoner at present. His existence is one continued state of hopeless slavery, in which no attempt is made to reform him, and in which the only mitigation that good conduct and repentance can produce, is the removal of his irons. From this aimless existence, his only chance of release is death – and that he is too often anxious to court by acts of lawless violence towards those in whose custody he is placed."[85]

However, life imprisonment did not disappear completely and often re-emerged to compensate for the vagaries of transportation. As transportation

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[80] The Committee notes that life imprisonment's deterrent value was limited since those serving this sentence could not return to tell those "classes amongst whom crime is most common" about their suffering. *Id*., 120.

[81] *Supra* note 22, Minute D, 12-13.

[82] *Id*., 120.

[83] *Id*., 120.

[84] The Law Commissioners in their 1837 draft of the Indian Penal Code preferred transportation to life imprisonment. Life imprisonment was prescribed for the offences of "thugee" (§311) and "unnatural offences" (§362) which was punishable by a sentence upto a life term.

[85] F.J. Mouat, *Report on Jails Visited and Inspected in Bengal, Behar, and Arracan*, 183 (1856). Mouat was Inspector General of Prisons for Lower Bengal and wrote extensively about prisons, prison factories and prison statistics.

ebbed, it was replaced *de facto* by life imprisonment. The Privy Council's 1944 decision in Kishori Lal appears only to have given judicial sanction to a common practise, for which there was no express legal recognition.

In 1956 life imprisonment finally and statutorily replaced transportation. By this time however, the underlying framework of Indian law had changed with the enactment of the Constitution. Rights became reality for prisoners as well as many others in India. However, while important legal protections have been identified for prisoners, life convicts have rarely succeeded on issues which go beyond their individual cases.[86]

For the most part, life imprisonment in independent India has been characterised by the lack of conceptual clarity, incongruence, *ad hocism* and inaction. Fault for this rests equally with all branches of government — the judiciary, executive and legislature. The piecemeal nature of the few measures adopted for life convicts, instead of helping, have often made it harder to navigate the already confusing legal terrain. Many unresolved issues remain for life convicts. What follows is a discussion about some unresolved issues for life convicts. While they may seem quaint and abstract to general readers, these haunt many life convicts on a daily basis.

A. THE NATURE OF LIFE IMPRISONMENT

There remains confusion about what a life sentence entails. Under the IPC, "imprisonment for life" is mentioned as a category of punishment distinct from "Imprisonment, which is of two descriptions, namely (1) Rigorous, that is, with hard labour; (2) Simple".[87]

The SC however, appears to have collapsed this distinction between life imprisonment and imprisonment which is either rigorous or simple. In *Naib Singh* v. *State of Punjab*[88] the petitioner, a life convict, contended that since he had served a period over fourteen years under the conditions of rigorous imprisonment, his sentence should be deemed to have been commuted and that he should be set at liberty. Rejecting his plea, the Court held that the 1955 amendment to the IPC substituted "transportation" with "imprisonment for life". In doing so, it did not change the nature of the punishment. The Court drew strength from the judgment in Kishori Lal, which held that a prisoner sentenced to transportation would be treated as if he were sentenced to life imprisonment with rigorous labour. Therefore, a prisoner sentenced to life imprisonment too would be treated as if his punishment were one of rigorous imprisonment for life. What the Court did not

[86] One notable exception to this statement would be the Supreme Court's judgment in Muthuramalingam v. State, (2016) 8 SCC 313. Here a constitution bench of the Supreme Court held that life sentences cannot be imposed consecutively.

[87] The Indian Penal Code, 1860, §53.

[88] (1983) 2 SCC 454.

address was that the Privy Council in Kishori Lal had relied on §58 of the IPC — which stated that while awaiting transportation, a prisoner would be treated as if he were serving a sentence of rigorous imprisonment. The Privy Council read this provision to mean that when a prisoner remained untransported, the temporary measure would operate in perpetuity. However, §58 had been repealed in 1955. Thus, the legal basis for considering life imprisonment as being rigorous may be questionable. The SC's decision also contradicts two Law Commission of India reports which state that the nature of life imprisonment requires legislative clarification.[89] Even the Committee in 1838 had noted that life convicts should be sentenced to hard labour for a certain period followed by hard work which was profitable without any other aggravations.[90]

The SC itself considered this question in 2016 and directed in a petition that "Let notice be issued in the matter limited to the question whether life imprisonment could be coupled with the condition that such imprisonment has to be rigorous imprisonment".[91] However, the petition was dismissed on a later date without a reasoned order.[92] While this cryptic dismissal suggests that a sentence of life imprisonment is necessarily accompanied by rigorous labour, this appears to be a missed opportunity to definitively settle this question.

B. DURATION OF LIFE IMPRISONMENT AND SENTENCE SHORTENING

The IPC does not prescribe the duration of a sentence of life imprisonment.[93] Since at least *Gopal Vinayak Godse* v. *State of Maharashtra*,[94] courts have reiterated that life imprisonment means imprisonment for the entirety of the prisoner's life. However, false doubts still remain about this question.

The SC has encountered several cases where life sentences have been reduced *en masse* or for arbitrary reasons like festivals, visits by important

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89 Law Commission of India, *Report on the Punishment of Imprisonment for Life Under the Indian Penal Code*, Report No. 39, 12 (July 1968). This finding was reiterated by the Law Commission of India, *Indian Penal Code*, Report No. 42, 66 (June 1971). B.S. Malik, *Decision of the Supreme Court in Naib Singh v. State of Punjab: A Critique*, 38(1) Journal of the Indian Law Institute 116-120 (1996) states that Uttar Pradesh in 1962, specifically passed an amendment to clarify that life imprisonment would be punishable as if it were punishable with hard labour.

90 *Supra* note 83.

91 Ram Kumar Sivare v. State of Chhattisgarh, SLP (Crl) No. 10111 of 2016, decided on 28-7-2017 (SC) ('Sivare').

92 Dismissed vide order in Sivare, SLP (Crl) No. 10111 of 2016, decided on 28-7-2017 (SC). While the Supreme Court is not required to pass reasoned orders in petitions under Art. 136 of the Constitution of India, having framed a specific question of law while issuing notice, the Court should have provided reasons as to why it was being dismissed.

93 The chapter on General Explanations in §45 defines the term "life" as being "The word "life" denotes the life of a human being, unless the contrary appears from the context."

94 Gopal Vinayak Godse v. State of Maharashtra, AIR 1961 SC 600 ('Godse').

personalities or political affiliations of prisoners.[95] Resultantly, the SC has often repeated an observation that life imprisonment, "[…] in practice amounts to incarceration for a period between 10 and 14 years […]".[96]

This confusion seems to arise due to the multiplicity of sources for sentence shortening.[97] The tangle of constitutional provisions, laws, regulations, policies and orders is sometimes innocuous but often allows for play in the joints. Without entering too deep into the thicket of sentence shortening provisions, three distinct paths are visible — constitutional, legislative and regulatory. Constitutional authority is the broadest and vests with the Governor and the President. This authority operates on a plane higher than statutory or regulatory powers and it cannot be curbed except by constitutional amendment.[98] Legislative powers are narrower and are conferred on State or Central Governments under the Code of Criminal Procedure, 1973 ('CrPC') and IPC.[99] Regulatory powers of sentence shortening are the narrowest. These powers are conferred on prison authorities under prison manuals or regulations. This is usually limited to remissions based on factors such as time spent in prison, general conduct and work done in prison. These are subordinate to legislative and constitutional powers and can be changed through administrative action.[100]

Parliament in 1978 sought to prevent arbitrary sentence shortening by inserting §433-A in the CrPC. Through this, life convicts on death row whose sentences were commuted and those for whom the death penalty was a legislatively prescribed alternative sentence, would require to serve a minimum term of fourteen years before sentence-shortening measures could be applied.[101]

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[95] In Maru Ram v. Union of India, (1981) 1 SCC 107, it was brought to the Court's attention that prisoners were released to honour the visit of a minister. In Epuru Sudhakar v. Govt. of A.P., (2006) 8 SCC 161, the order of commutation noted that the prisoner was a "good Congress worker".

[96] Dalbir Singh v. State of Punjab, (1979) 3 SCC 745. This has often been cited in various other judgments of the Supreme Court, including most recently in *Sriharan*. No statistical basis seems to have been provided by the Supreme Court for this assertion. Unfortunately, the National Crime Records Bureau's prison statistics also do not provide this information.

[97] This term is used for the purposes of convenience as it takes multiple forms such as remission, pardons, suspension and respites. It also includes measures which alter the nature of the sentence such as commutation.

[98] The Constitution of India, 1950, Arts. 161, 72. The powers are broad and extend to grant of pardons, reprieves, respites or remissions of punishment, or to suspend, remit or commute the sentence. Limited powers of judicial review exist. *See* Epuru Sudhakar v. Govt. of A.P., (2006) 8 SCC 161.

[99] The Code of Criminal Procedure, §§432, 433; The Indian Penal Code, 1860, §§54, 55, 57. These are powers to permit commutation, suspension and remission of sentences by the State or Central Government.

[100] These prison regulations vary from state to state. Godse holds that although a life convict may accumulate remission under jail regulations, it cannot take effect unless the appropriate government actually remits the remainder of the sentence or commutes it to a lesser punishment than life imprisonment.

[101] This did not include sentence-shortening measures under the Constitution. *See also* B.S. Malik, *Parliament Impairs Federalism: A Critique of Maru Ram v. Union of India*, Journal of the Indian Law Institute 512, 517 (1994).

A batch of petitions by life convicts unsuccessfully challenged the constitutionality of this provision in what came to be known as *Maru Ram* v. *Union of India* ('Maru Ram').[102] Without §433-A, the Court held that there appeared little which would prevent prisoners from walking out of prison the day after they were sentenced to life imprisonment. The Court while acknowledging that the period of fourteen years had no specific basis, deferred to the legislature's determination. It also clarified that §433-A could not fetter the "untouchable and unapproachable" constitutional powers vested in the Governor and President.[103] Though limited to two classes of life convicts, it was clear following this judgment that life convicts could not benefit from sentence shortening provisions, except from constitutional authorities, until they had served at least fourteen years of their sentence. Even this qualified clarity in life sentencing appeared too good to last. Recent legislative and judicial action has reintroduced uncertainty in life sentences and the law on sentence shortening.

V. RECENT DEVELOPMENTS IN THE LAW ON LIFE SENTENCING

These developments through the 2013 and 2018 Criminal Law Amendment Acts and the SC's decision in *Union of India* v. *V. Sriharan* ('Sriharan')[104] have particularly affected two categories of life convicts.

One category is those sentenced to life imprisonment under the Criminal Law Amendment Acts of 2013 and 2018.[105] Through these amendments, Parliament has used the sentencing formulation "imprisonment for life which shall mean imprisonment for the remainder of that person's natural life". The legal implications of the words "[…] which shall mean imprisonment for the remainder of that person's natural life" are unclear.

If this formulation merely is seen as following the SC's interpretation that life imprisonment is imprisonment for the remainder of the prisoner's natural life, what then is the problem? If this is considered only clarificatory, then the law lacks uniformity. In fact, both the 2013 and 2018 amendments use both "imprisonment for life" and "imprisonment for life which shall mean imprisonment for the remainder of that person's natural life" for different offences.[106] If it latter is meant

[102] Maru Ram v. Union of India, (1981) 1 SCC 107.

[103] *Id*.

[104] Union of India v. V. Sriharan, (2016) 7 SCC 1.

[105] While the 2013 amendment included aggravated sexual offences and acid attacks, the 2018 amendment relates to sexual offences against minor children.

[106] In the Criminal Law (Amendment) Act, 2013, §326A uses the term "imprisonment for life" whereas §§376-A, 376-D, 376-E use "imprisonment for life which shall mean imprisonment for the remainder of that person's natural life". In The Criminal Law (Amendment) Act, 2018, the term "imprisonment for life" is used in §376(1) whereas the term "imprisonment for life which shall mean imprisonment for the remainder of that person's natural life" is used for §§376(3), 376-AB, 376-DA, 376-DB.

to create a qualitatively different sentence from "imprisonment for life", it does not have legislative backing as it does not amend §53 of the IPC.[107] It also leaves the application of sentence shortening provisions in a tenuous situation since it does not speak about their repeal or exclusion. While legal bar to apply sentence shortening measures exists, it is doubtful that governments or prison authorities will take this view given the wording "[…] which shall mean imprisonment for the remainder of that person's natural life".[108] A clarification that life convicts sentenced under these amendments would also be eligible for sentence-shortening measures, would go a long way in avoiding a flood of needless litigation.

The second category is prisoners whose death sentences are judicially commuted to life imprisonment. In some cases, courts were faced with situations where they felt that the death sentence was too harsh a punishment but life imprisonment would be too mild. In those cases, courts have held that it would be within their power to bar statutory and regulatory sentence shortening for a particular period.[109] In 2015 a constitution bench of the SC through a 3:2 majority upheld the HC and SC's power to limit statutory and regulatory sentence shortening. The minority amongst the judges dissented and stated that this bar on remission would amount to the invention of a new punishment and would be beyond the law.[110]

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[107] §53 of the Indian Penal Code sets out the punishments which can be imposed under the Code. While "imprisonment for life" is prescribed, there is no separate punishment which speaks about life without remission. In fact, the powers of remission still continue to be recognized under §432 of the Code of Criminal Procedure Code, 1973, and do not appear to be barred.

[108] In interactions with prison officials and lawyers from different states, the author has come across opinions which state that the new sentencing formulations under the 2013 Amendment would mean that these inmates would be ineligible for remission or other sentence-shortening measures, while those sentenced to "imprisonment for life" would be eligible for these benefits.

[109] While in several cases, the Court imposed a bar on term of years (e.g. 20, 25 or 30 years) on prisoners availing of legislative or regulatory sentence-shortening provisions, in Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767 and Subash Chander v. Krishan Lal, (2001) 4 SCC 458, the Court ruled that sentence-shortening provisions would be barred for the remainder of the prisoners' natural life. In *Swamy Shraddananda (2)*, the Court accepted the contention that the prisoner was likely to be released on the completion of a term of fourteen years if sentenced to life imprisonment. In *Subash Chander*, the Court commuted the death sentence on the condition that "for him the imprisonment for life shall be the imprisonment in prison for the rest of his life. He shall not be entitled to any commutation or premature release under Section 401 of the Code of Criminal Procedure, Prisoners Act, Jail Manual or any other statute and the Rules made for the purposes of grant of commutation and remissions."

[110] The minority noted that the Malimath Committee had recommended punishment and §32-A of the Narcotic Drugs and Psychotropic Substances Act provided a legislative model to bar sentence-shortening provisions. However, since neither the central nor state legislature had adopted these suggestions to pass law, the Court could not appropriate this power to itself and create punishments for individual cases. Union of India v. V. Sriharan, (2016) 7 SCC 1, ¶¶269-271 (per Lalit J., minority).

The dissenting judges identify important gaps in the majority judgment. This critique builds on the minority view and elaborates on three significant fallouts of the majority decision.[111]

Firstly, the majority view rejects the reformative theory of punishment. Instead, it adopts a sternly worded deterrence theory. In doing so, it undermines the belief that prisoners are capable of reformation and also the belief that that the institutions in which they are housed for decades, if not their whole life, are spaces capable of bringing about reform. This is a departure from a previous constitution bench's decision in Maru Ram. In it, the Court held:

> "In our view, penal humanitarianism and rehabilitative desideratum warrant liberal paroles, subject to security safeguards, and other humanizing strategies for inmates so that the dignity and worth of the human person are not desecrated by making mass jails anthropoid zoos. Human rights awareness must infuse institutional reform and search for alternatives."[112]

The majority in *Sriharan*, however, draws on the concurring but separate opinion of Justice Fazl Ali in Maru Ram to hold that until there are "necessary facilities, the requisite education and the appropriate climate created to foster a sense of repentance and penitence in a criminal […] in our country, this ideal is yet to be achieved and in fact, with all our efforts it will take up a long time to reach this sacred goal."[113]

Justice Fazl Ali wrote the concurrence in Maru Ram in 1981. With respect to the majority decision, it is disquieting that in 2018 the same argument from three decades ago is applied to state that sufficient facilities do not exist to actualise the "sacred goal" of reformation. The majority does not seem to have considered that significant efforts have been taken by prison officials, judges and civil society groups to convert the colonial prisons into sites of reform.[114] The 2016

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[111] Some of these have been written about by the author previously, while the judgment in Sriharan was reserved for judgment. However, given that the judgment has since been pronounced and is being used across different courts, it requires a more detailed critique. *See generally* The Hindu, *Granted Life But Never Free*, September 30, 2015, available at https://www.thehindu.com/opinion/op-ed/granted-life-but-never-free/article7703091.ece (Last visited October 11, 2018).

[112] Maru Ram v. Union of India, (1981) 1 SCC 107. While Justice Krishna Iyer wrote for the majority opinion held by three judges, two judges disagreed with him on some aspects of his reformative theory of punishment and wrote separate opinions, either concurring (Justice Fazl Ali) or partly dissenting (Justice Koshal). Justice Krishna Iyer's opinion however still represents the judgment of the Court.

[113] Maru Ram v. Union of India, (1981) 1 SCC 107, ¶77 (per Fazl Ali J., concurring), as cited in Union of India v. V. Sriharan, (2016) 7 SCC 1, ¶72.

[114] In fact, instead of supporting their endeavours, the Court in Union of India v. V. Sriharan, (2016) 7 SCC 1, ¶74 (per Kallifullah J., majority) seems to attack these actors by stating: "Even those who propagate for lessening the gravity of imposition of severe punishment are unmindful of such consequences and are only keen to indulge in propagation of rescuing the convicts from being meted out with appropriate punishments. We are at a loss to understand as to for what reason or

Model Prison Manual itself framed under directions of a different bench of the SC declares at the outset that "Reformation is the Ultimate Goal".[115]

The majority in Sriharan goes on further to state that "it is the hard reality that the State machinery is not able to protect or guarantee the life and liberty of common man" and that leniency or sympathy shown to death row or life convicts would result in chaos and anarchy.[116]

While undoubtedly, these arguments espoused by the Court make out a case for urgent examination of the State machinery's failure, it is worth contemplating whether they justify longer punishments for individual prisoners.

This schism in the directions to prison authorities from the SC leaves doubt on how life convicts are to be treated. It is only a matter of time before arbitrariness takes the place of doubt in prison administration.

Secondly, Sriharan straddles a narrow space in criminal sentencing. It relates to prisoners who were sentenced to death but where death seems too harsh a punishment and life imprisonment too narrow a punishment. A death sentence in India must consider factors laid down in decisions of the SC and should not be imposed "save in the rarest of rare cases when the alternative option is unquestionably foreclosed."[117] The inconsistency in the application of the death sentence has invited comments from various quarters, including the SC itself.[118] The situations which Sriharan covers are those where a sentence lesser than death is found appropriate as there is a probability of reformation of the convict. While it is difficult enough to judicially determine who should die, it may be significantly more difficult to determine who should live but never leave the prison. It is made harder still by the absence of any principles to guide the sentencing under

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purpose such propagation is carried on and what benefit the society at large is going to derive."; *See* Dhanuka, *supra* note 1, 120 who notes the progressive rise in amounts spent on vocational/ educational training and welfare activities for prisoners from figures provided by the National Crime Records Bureau. *See also supra* note 2, 127-132 (vocational training), and 167-170 (education and best practises. Here, at 169 it is noted that "Education is sine qua non for reformation").

115 Model Prison Manual, 2016. It is pertinent to note that the manual was drafted under the directions of the Supreme Court in Inhuman Conditions of 1382 Prisons, In re, WP (Civil) No. 406 of 2013 which is currently pending before the Supreme Court. Vide its order dated February 5, 2016, the Court had directed that the Model Prison Manual, 2016 be implemented "with due seriousness and dispatch". *See also supra* note 10, which decided that all states should consider changing the nomenclature of Prison Departments of all states to "Prisons and Correctional Administration" integrating prison, correctional and probation services.

116 Union of India v. V. Sriharan, (2016) 7 SCC 1, ¶73 (per Kalifulla J., majority).

117 Bachan Singh v. State of Punjab, (1980) 2 SCC 684 ('Bachan Singh').

118 This standard has been called into question by the Supreme Court in Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498, and Shankar Kisanrao Khade v. State of Maharashtra, (2013) 5 SCC 546. A majority of the members of the Law Commission of India in its 262nd Report on the Death Penalty recommended its abolition, except in cases of terrorism. Law Commission of India, *The Death Penalty*, Report No. 262, (August 2015).

Sriharan. The only possible guidance that the majority in the Sriharan provides is that the HC or the SC may:

> "[…] alter the said punishment *(death sentence)* with one either for the entirety of the convict's life or for any specific period of more than 14 years, say 20, 30 or so on depending upon the gravity of the crime committed and the exercise of judicial conscience befitting such offence found proved to have been committed."[119]

If this is considered to be the sentencing test, its two prongs account only for the gravity of the crime and judicial conscience. These are highly subjective factors and provide little guidance for sentencing in individual cases. The test also fails to take into account any circumstances related to "the criminal", the omission of which has occasioned critique of the application of the death penalty in India.[120] The determination of the period for which there can be a bar on sentence shortening appears to lack any gradation or calibration, and has possibly already begun showing vastly disparities in sentencing outcomes.[121]

Thirdly, the majority incorrectly assumes that life convicts are automatically released after completing a sentence of fourteen years. A harmonious reading of judicial pronouncements, the CrPC, IPC and prison regulations merely states that prisoners are 'eligible for consideration' after fourteen years for sentence-shortening.[122] It is up to the prison authorities and sentencing review bodies who will determine the appropriateness of sentence-shortening measures on a case-by-case basis. While this process itself is not defect-free and requires

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[119] Union of India v. V. Sriharan, (2016) 7 SCC 1, ¶104 (per Kalifulla J., majority).

[120] The crime centric focus of the death penalty has been criticised by the Supreme Court itself, which has ruled that several cases decided using the crime-centric framework are *per incuriam* as they leave out circumstances related to the criminal, which the 4-judge majority in *Bachan Singh* states must be considered. Law Commission of India, *The Death Penalty*, Report No. 262, 112-115 (August 2015).

[121] Consider three cases from Delhi under §302 of the Indian Penal Code which consider the decision in *Sriharan*. In all three, it appears that the trial court imposed a sentence for life but fettered the power of remission. While in Sanjay Kumar Valmiki v. State, 2018 SCC OnLine Del 9304, the High Court held that the trial court order barring remission for twenty-five years was illegal. Drawing on ¶104 of Sriharan, the High Court itself awarded the same sentence. In another case, the trial court sentenced the prisoner to life imprisonment without the possibility of remission for thirty years. The High Court in Jitender v. State (NCT of Delhi), 2016 SCC OnLine Del 6463 : (2017) 236 DLT 307, held the trial court's sentence to violate the direction in *Sriharan* and directed that the prisoner be released on the period of over sixteen years which had already been undergone. In yet another case the trial court had imposed a life sentence and directed that no remission would be granted for twenty-five years. Holding this sentence to be illegal, the High Court in Govind v. State, 2018 SCC OnLine Del 8014, directed that the petitioner's sentence be reduced to life imprisonment without any bar on consideration for remission. While undoubtedly each case is unique to its own facts, no reasons exist in these decisions as to why that specific sentence was thought appropriate by the High Court. Sriharan has left in its wake considerable scope of inconsistency in sentencing in cases involving life sentences.

[122] Ashok Kumar v. Union of India, (1991) 3 SCC 498.

review, it at least provides the prisoner hope that his case will come up for review after a certain period. For prisoners sentenced under the Sriharan formulation, the HC or the SC itself precludes this executive determination of sentence-shortening measures.

Early on in their sentences, these courts shut out the already slender "ray of hope" which would provide an incentive to prisoners to maintain a good record in prison and to try to reform themselves.

The Criminal Law Amendment Acts as well as the majority decision in Sriharan have resurrected old anxieties about life imprisonment. While the objective seems to be to make life imprisonment sterner and longer than what it is currently perceived to be, it does so at great costs of certainty and coherence in criminal sentencing. Though little sympathy exists for those convicted under the Criminal Law Amendment Acts and those facing the prospect of a sentence under Sriharan, the vagaries of these new sentencing formulations risk becoming a license for the rights of this class of prisoners to be trifled with.

VI. CONCLUSION

An attempt to examine the history of life imprisonment in India appears to be inextricably intertwined with India's colonial past. While the relationship between the State and the citizen has undergone an almost paradigmatic shift after Indian independence, the colonial penal and judicial institutions have remained largely unchanged in relation to life imprisonment.

As the SC's decision in Sriharan and the Criminal Law Amendment Acts of 2013 and 2018 demonstrate, increasing faith is being placed on longer and harsher prison sentences. Not only do these developments demonstrate a lack of conceptual clarity about life imprisonment by either selectively ignoring or barring sentence shortening measures, they also uncritically view prisons as institutions capable of implementing the punishment.

Life imprisonment's resilience has been demonstrated through history. Not only did it pre-date transportation, it was never entirely abolished. Even when transportation was in vogue, life imprisonment continued to exist on the margins and never entirely disappeared. As practical difficulties appeared with transportation, it mutated into life imprisonment and was in 1956 formally acknowledged as a distinctive punishment. The reason for the resilience of life imprisonment seems to be its comparative advantages over other severe punishments. It was cheaper and more convenient than transportation and morally less contentious than the death penalty. These features ensured that even in the absence of a robust legislative framework, life imprisonment continued to survive.

Today the punishment has been held together by a complex and deeply inadequate patchwork of judicial pronouncements and executive orders. While the judicial decisions about the punishment still maintain dogmatic loyalty to colonial legal precedent, executive orders lack any significant accountability structures and vary across different states. The few attempts at legislative intervention have resulted in confusion and have made the terrain of life imprisonment even more difficult to navigate. As it stands, the punishment lacks any principles to guide discretion and its high susceptibility to arbitrary application has begun to emerge.

In studying life imprisonment, it is important to study the architectural and theoretical foundations of prisons — the sites, which carry the punishment into effect. These institutions — physical manifestations of colonial penological ideas — still survive mostly unmoved by constitutional values. Periodically, calls for prison reforms have resulted in some changes but many have been content to limiting these reforms to retrofitting prison infrastructure. While infrastructural improvement is undoubtedly important, doing so unquestioningly only reinforces the purposes for which prisons were originally constructed.[123]

Colonial prisons appear to have been sites more of labour and sequestration than they were of reform. Life imprisonment does not appear to have factored into prison design given that transportation was philosophically more agreeable to the makers of the physical colonial space of the prison and the criminal laws that peopled it. As life imprisonment has come into vogue, little seems to have changed in terms of judicial attitudes or prison design to accommodate it.

Although some recent statements on penological policy speak of a greater role for reform and correction, they are undermined by weightier developments such as the Sriharan decision and the Criminal Law Amendment Acts of 2013 and 2018, which signal a revival of a retributivist streak in sentencing. In resoundingly rejecting reformation as a sentencing objective, these developments undo decades of jurisprudence and work by prison officials and civil society groups, which have tried to make prisons into sites of meaningful rehabilitation of convicts. The retributivist solutions are piecemeal, but only the latest in a series of solutions, which have tried to tackle criminal justice issues. Until a comprehensive, workable and sustainable solution is developed, issues related to life imprisonment will occasionally continue to resurface. Prisons alone cannot be the solution, and even at their very best, they are only a part of the solution. The role of education, social security, better housing and healthcare in preventing peoples' entry into the criminal justice system cannot be underestimated.

[123] At the time of writing, the issue of prison reforms is being considered by a three-member committee headed by retired Supreme Court Judge, Justice Amitava Roy and two other senior government officials. This Committee has been appointed by the Supreme Court in Inhuman Conditions of 1382 Prisons, In re, WP (Civil) No. 406 of 2013, which is currently pending before the Supreme Court vide its order dated September 25, 2018, setting out broad-ranging terms of reference.

By increasing reliance on longer and harsher prison sentences, these retributive sentencing formulations may result in exacerbating rather than resolving existing problems with the prison system. These problems arise, at least in part, due to a gap between the perception and realities about life imprisonment. In seeking to develop solutions to narrow this gap, the voices of those who face the punishment cannot be left out. Prisoners are recognised as rights bearing individuals and not only passive recipients of punishment or largesse. It is important to recognise the realities of their physical spaces — horrific living conditions, overcrowding, disproportionate representation of socio-economically vulnerable groups and limited opportunities for education and skilling work. Prison officials too, tasked with administering the punishment on a day-to-day basis, must be heard in developing sustainable solutions. Prisons continue to be chronically under-funded and under-staffed. Prison administrators are often required to follow prison manuals based on pre-constitutional templates even while good sense and progressive reform measures may dictate otherwise. Without these voices being provided a platform and followed up by concerted and reflective action by the judiciary, executive and legislatures, the solutions will lack the granularity required to address the problems plaguing life imprisonment.

As debates around the working of the criminal justice system intensify in India, it is imperative that questions about life imprisonment are seriously considered. These questions do not admit to easy answers. However, to answer them, we must. This is not merely because answers to these questions define the everyday realities of life convicts but also because it would be pointless to pontificate on the criminal justice system's performance without understanding how it affects those that live with its consequences the longest.