

Ignoring the proportionality principle

The High Court’s verdict in the *Shakti Mills* rape case disregards several judicial standards & precedents



The Bombay High Court last month handed down a judgment upholding the validity of Section 376E of the Indian Penal Code, which authorises the award of either a life sentence or the death penalty to perpetrators upon a second rape conviction.

The Section had been challenged by three of the accused in the *Shakti Mills* rape case, who had been sentenced to death by a trial court in 2014. Section 376E is among a slew of recent laws that have expanded the scope of death penalty to beyond cases of homicide, and primarily to incidents of rape. Its constitutionality has been challenged on multiple grounds, primarily due to disproportionality of the punishment.

The High Court’s reasoning in upholding the law, however, is open to criticism. The constitutional standard that courts must apply when testing laws on the touchstone of Articles 14 (right to equality) and 21 (right to life) of the Constitution is that of “proportionality”. In the context of criminal law and sentencing, proportionality asks whether a particular punishment strikes an adequate balance between the gravity of the crime, the interests of the victim and of society, and the purposes of criminal law. Further, the principle of proportionality calls for a striking down of laws that are excessively harsh or disproportionate.

Violation of rights

In 2015, the Supreme Court in the *Vikram Singh* case limited the application of the proportionality standard to situations where the punishment was “outrageously barbaric”. Subsequent judgments of larger benches – such as in the *Modern Dental College* case and the *Aadhaar* case – have made it clear that where the question of rights violations is concerned, the proportionality test has to be more detailed, and has four prongs: first, there must be a legitimate state aim being pursued by the provision; second, there needs to be a rational nexus between the im-



pugned provision and the aim; third, the impugned measure must be the least restrictive method of achieving the aim; and fourth, there must be a balance between the extent to which rights are infringed, and public benefit to be attained from the legislation. In particular, the third prong asks whether there exists an alternative method of achieving the same goal that does not infringe rights to the same degree.

In the *Shakti Mills* case, given the permanent and irrevocable nature of the death penalty, there arose a fundamental question. This pertained to whether the legislative objective, of increasing the punishment for a certain category of offences to demonstrate social abhorrence towards such offenders, and to create deterrence, could be adequately fulfilled by a sentence of life imprisonment. However, instead of addressing this issue, the Court relied entirely on the fact that the law had been passed with the intention of deterring rapes.

While it is true, in general, that in questions of criminal sentencing, there is a broad presumption in favour of the state, simply stopping at that is not adequate for a court. Proportionality by its very nature precludes a complete deference to the state when it comes to adjudicating on the violations of fundamental rights. However, the Court did not at any point scrutinise the reasons that would have potentially justified the state’s decision to go for death penalty in the case of a non-homicidal crime. Had it applied the proportionality standard in this way, the outcome may have been different.

Another striking aspect of the

judgment is the Court’s discussion of the severe effect of rape on women and society. The court declared that rape is far worse than murder, and used that notion to hold that the death penalty was proportionate.

A regressive paradigm

Such reasoning is steeped in regressive stereotypes of shame and stigma. This represents vestiges of the notion that a woman is a man’s property, as argued by American jurist Ruth Bader Ginsburg in her *amicus* brief before the U.S. Supreme Court in *Coker v. Georgia* case (1977).

The Justice Verma Committee, which was set up to suggest amendments to criminal law after the Delhi gang-rape incident, specifically argued that the state and civil society need to deconstruct and change the ‘shame-honour paradigm’ with relation to rapes, and treat them as an offence against the body. It is troubling that the Bombay High Court conceded to this regressive paradigm.

While non-homicidal crimes might be devastating in the harm that they cause, they cannot, as stated by the U.S. Supreme Court in the *Kennedy v. Louisiana* case (2008), compare to murder in their “severity and irrevocability”. The petitioner in the *Shakti Mills* case had also relied on judgments of the United States Supreme Court such as *Coker v. Georgia* and *Kennedy v. Louisiana*, in which provisions that stipulated death penalty for non-homicidal offences were struck down. However, the Bombay High Court refused to even engage with the arguments on the basis that “the U.S. Courts treat crimes of rape as crimes against indi-

viduals, unlike Indian law, which treats an offence of rape not only as a crime against the victim but, as a crime against the entire society.”

The Court, however, provided no source for this odd claim. It is in the very nature of ‘criminalising’ an offence, instead of treating it as a civil wrong, that the act is deemed to be an offence against society, whether in India, or in the U.S.

Ignoring the American parallels

The American judgments specifically dealt with intricate issues, such as proportionality and harm principle, and the manner in which a court must probe the aims and objectives achieved by such a provision. It would have been a beneficial exercise for the Bombay High Court to deal with those arguments.

As courts around the world, including the Indian Supreme Court, have recognised, death penalty is a form of punishment qualitatively different from any other. It is permanent and irrevocable, rules out any possibility of correcting an error if found later, and denies the possibility of reform and rehabilitation. It is for this reason that the Supreme Court has repeated many times that the death penalty must only be imposed in the “rarest of rare” cases, and this is also why the recent proliferation of statutes expanding the scope of the death penalty, often as knee-jerk responses to public outrage, is a cause for concern.

In this situation, it is of utmost importance for courts to scrutinise such laws carefully, and on the touchstone of constitutional standards. In this regard, the Bombay High Court’s judgment falls short. It engages in excessive deference to the ‘will’ of the state and does not enter into any judicial analysis of whether the death penalty in these circumstances was at all justified under the doctrine of proportionality, and whether any other lesser form of punishment would have sufficed. The judgment also repeats gendered stereotypes about the nature of rape to substantiate the Court’s conclusions, and dismisses, without engagement, insights from other courts grappling with similar issues.

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FROM THE READERS’ EDITOR

Pride and melancholy

To save the hard-won press freedoms, there is a need to form a vibrant covenant between journalism and citizens



A.S. PANNEERSELVAM

Commemorative columns can be an occasion to celebrate a body of work. They have a tone of pride and professional satisfaction. But, I reside in a borderless terrain between personal satisfaction and a profound sense of melancholy as I write this 350th column.

As the Readers’ Editor of *The Hindu*, the seven-year long journey has been gratifying and the constant engagement with the readers, which included periodic ‘open houses’, was not only rewarding but also stimulating. But, the fortune of the news media industry is a cause for concern for any one who cherishes democracy.

The threat comes from multiple nodes: governmental manipulation; digital disruption; the greed of the Silicon Valley platforms; falling advertising revenues; paywalls not generating adequate resources to fund quality journalism; the dual menace of disinformation and misinformation; and finally, the growing news avoidance among the citizens.

With the threat for independent journalism coming from not just authoritarian countries but also from democratic regimes, early this month, Canada and the U.K. jointly hosted a global conference on media freedom in London. Amal Clooney, the human rights lawyer who defended the two Reuters journalists detained in Myanmar for their reportage on the Rohingya crisis and who is defending the Philippines journalist Maria Ressa in her legal battle with President Rodrigo Duterte, made a forceful presentation.

Ms. Clooney said that only one in 10 people in the world live in a country with a free press and that share will shrink further unless democracies protect the freedom of their own media with deeds as well as words and stand up to abuses elsewhere. In her reflections about the conference, Roula Khalaf, Deputy Editor at the *Financial Times*, said we either need to fight for press freedom or watch it wither away.

A trailblazing magazine

There are many articles to mark the 50th anniversaries of man’s landing on the moon and the redefining act of bank nationalisation in India. However, very few are aware of the fact that, if it had been permitted to survive for another five months, *Herald*, a ma-

gazine published from Karachi and one of the finest magazines of South Asia, would have observed its 50th anniversary this year. This trailblazing magazine was shut down this month. In my three-and-a-half decades of experience in journalism, I have been a magazine journalist for two decades and it is disturbing to see the crisis that is engulfing magazine journalism.

My predecessor at Panos South Asia and one of the editors of the *Dawn* group of publications, Saneeya Hussain, introduced *Herald* and its journalism to me. It was she who pointed out how, in a sense, *Herald* exemplified Tom Wolfe’s 1972 canon of “new journalism”. Wolfe had written: “The kind of reporting we were doing struck us as far more ambitious, too. It was more intense, more detailed, and certainly more time-consuming than anything that newspaper or magazine reporters, including investigative reporters, were accustomed to... We had to gather all the material the conventional journalist was after – and then keep going. It seemed all-important to be there when dramatic scenes took place, to get the dialogue, the gestures, the facial expressions, the details of the environment. The idea was to give the full objective description, plus something that readers had always had to go to novels and short stories for: namely, the subjective or emotional life of the characters.”

A voice of dissent

Azhar Abbas, a distinguished print and television journalist from Karachi, wrote a moving piece about the closure of *Herald* in *The News*. His obituary for *Herald* read: “*Herald* has been a voice of dissent for decades. Despite the pressure of daily newspaper coverage, the magazine kept itself relevant by doing investigative stories and detailed political analyses. As a young reporter in the 90s, working with accomplished journalists like Zaffar Abbas, Idrees Bakhtiar and Talat Aslam, it was at *Herald* that I learned why writing in public interest is more important than any other interest.”

The searing editorial, ‘Sword against pen’ (July 18) in this newspaper brought out the challenges in India. It said: “In India, the Centre and several State governments have not merely shown extreme intolerance towards objective and critical reporting but also taken unprecedented measures to restrict journalism.” There is a need to form a vibrant covenant between journalism and citizens to strengthen our democratic credentials and to save the hard-won freedoms.

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An invasive and inefficient tool

Use of facial recognition technology in law enforcement can have disastrous consequences

VIDUSHI MARDA

The Automated Facial Recognition System (AFRS) recently proposed by the Ministry of Home Affairs is geared towards modernising the police force, identifying criminals, and enhancing information sharing between police units across the country. The AFRS will use images from sources like CCTV cameras, newspapers, and raids to identify criminals against existing records in the Crime and Criminal Tracking Networks and System (CCTNS) database.

The Home Ministry has clarified that this will not violate privacy, as it will only track criminals and be accessed only by law enforcement. However, a closer look at facial recognition systems and India’s legal framework reveals that a system like the AFRS will not only create a biometric map of our faces, but also track, classify, and possibly anticipate our every move.

Technically speaking, it is impossible for the AFRS to be truly used only to identify, track and verify criminals, despite the best of intentions. Recording, classifying and querying every individual is a prerequisite for the system to work.

Assumed guilty

The system will treat each person captured in images from CCTV cameras and other sources as a potential criminal, creating a map of her face, with measurements and biometrics, and match the features against the CCTNS database. This means that we are all treated as potential criminals when we walk past a CCTV camera – turning the assumption of “innocent until proven guilty” on its head.

It is assumed that facial recognition will introduce efficiency and speed in enforcing law and order. However, the evidence suggests otherwise. In August 2018, a facial recognition system used by the Delhi police was reported to have an accuracy rate of only 2%. This is a trend worldwide, with similar levels of accuracy reported in the U.K. and the U.S.

Accuracy rates of facial recognition algorithms are particularly low

in the case of minorities, women and children, as demonstrated in multiple studies across the world. Use of such technology in a criminal justice system where vulnerable groups are over-represented makes them susceptible to being subjected to false positives (being wrongly identified as a criminal). Image recognition is an extremely difficult task, and makes significant errors even in laboratory settings. Deploying these systems in consequential sectors like law enforcement is ineffective at best, and disastrous at worst.

Fears of mass surveillance

Facial recognition makes data protection close to impossible as it is predicated on collecting publicly available information and analysing it to the

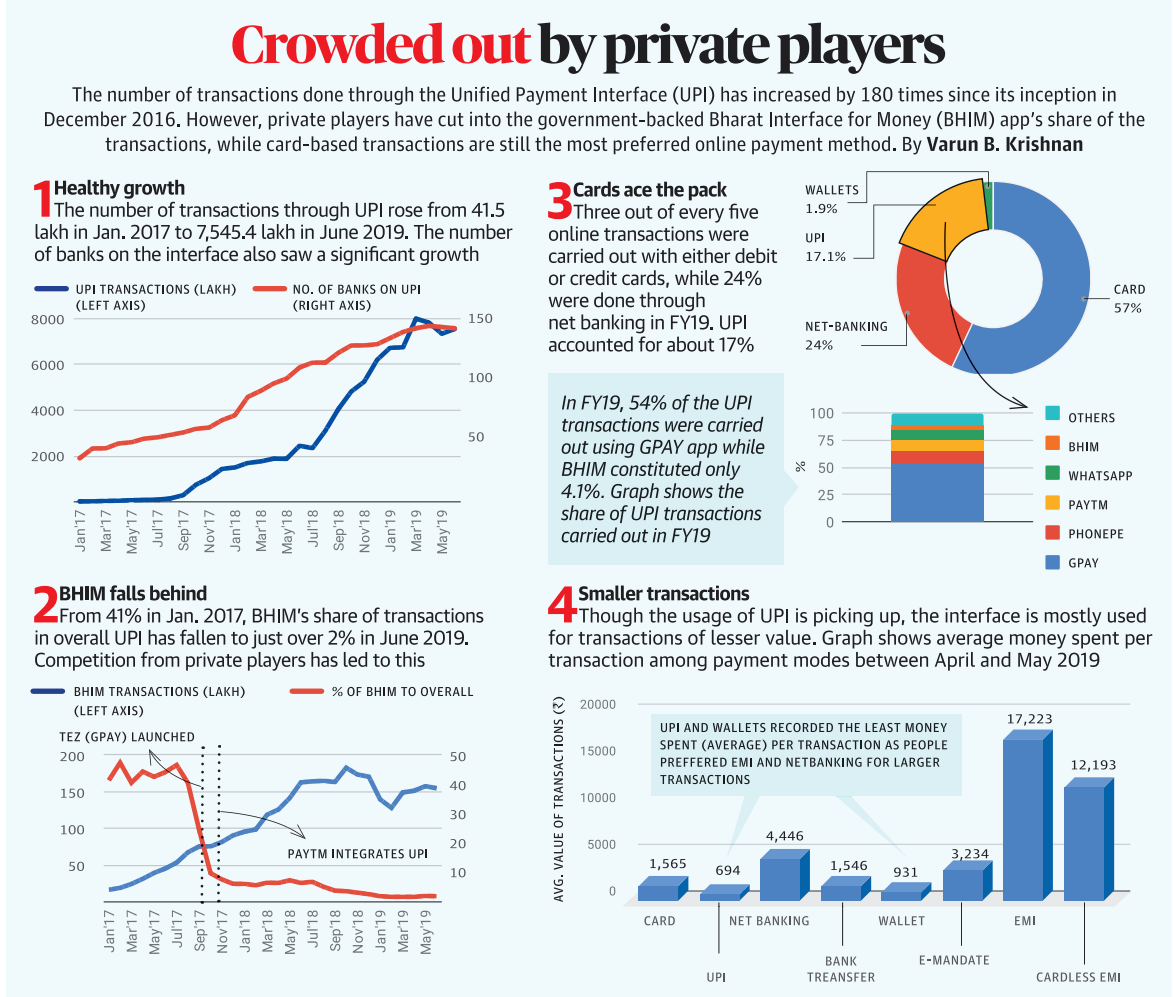
point of intimacy. It can also potentially trigger a seamless system of mass surveillance, depending on how images are combined with other data points. The AFRS is being contemplated at a time when India does not have a data protection law. In the absence of safeguards, law enforcement agencies will have a high degree of discretion. This can lead to a mission creep. The Personal Data Protection Bill 2018 is yet to come into force, and even if it does, the exceptions contemplated for state agencies are extremely wide.

The notion that sophisticated technology means greater efficiency needs to be critically analysed. A deliberative approach will benefit Indian law enforcement, as police departments around the world are currently learning that the technology is not as useful in practice as it seems in theory. Police departments in London are under pressure to put a complete end to use of facial recognition systems following evidence of discrimination and inefficiency. San Francisco recently implemented a complete ban on police use of facial recognition. India would do well to learn from their mistakes.

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DATA POINT



The Hindu.

FROM THE ARCHIVES

FIFTY YEARS AGO JULY 22, 1969

2 men leave footprints on moon

Two men walked on the moon to-day [July 21]. They were U.S. astronauts, Neil Armstrong (38) and Edwin Aldrin (39), the first men to leave their footprints on the dusty, rocky surface of the moon where they landed in the Lunar Module Eagle at 1-47 a.m. (I.S.T.) to-day [July 21]. After completing the tasks set for them, the astronauts again took off successfully to rejoin the command ship. Armstrong set foot on the moon first at 8-27 I.S.T. and Aldrin joined him 19 minutes later. Millions of people all over the world, quarter of a million miles away watched them on television as they walked slowly and warily at first and as they gained confidence, jumping, bouncing and Kangaroo-hopping gaily in front of their landing craft taking advantage of reduced gravity. They stayed in the open for two and half hours carrying out meticulously all the tasks assigned to them and then returned to the Eagle. Armstrong stepped out of the lunar module, Eagle and put his left foot down on the moon with the words “this is one small step tor man, but one giant leap for mankind.” The sun was then just rising over the lunar horizon where the days and nights are 14 days long and temperatures range from a scorching 250 degrees centigrade above to a frigid 280 degrees below zero.

A HUNDRED YEARS AGO JULY 22, 1919.

Death of Dr. T.M. Nair.

(From an editorial)

The news of the death of Dr. T.M. Nair wired by Reuter will be received with profound regret in this Presidency and elsewhere. Dr. Nair was a fluent and eloquent speaker, an acute debater, a bold and courageous politician, a vigorous writer, and an eminent medical man and his loss deprives Madras of a striking personality who for nearly quarter of a century took a prominent part in the civic and public life in the city. A cable to our morning contemporary says that Dr. Nair breathed his last on Thursday morning last, as a result of complications brought on by diabetes, Bright’s disease, gangrene of the leg and heart failure. Dr. Nair was nearly 50 years of age at the time of his death. He proceeded to Edinburgh from the Madras Presidency College, where he passed the Medical Examination in 1894 and at Brighton and Paris he obtained valuable experience in ear and throat diseases. While at Edinburgh he took an active part in various college activities and acquired that mastery of English which gained for him distinction as a faultless speaker of that language in after life.