

# THE INJUSTICE OF EXCEPTIONALISM

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

'There is significant research demonstrating the challenges that rape survivors face in filing criminal complaints and navigating the justice system' | Photo Credit: Getty Images/iStockphoto

Eleven men who were sentenced to life imprisonment in 2008 for the gang rape of Bilkis Bano (she was pregnant then) and the murder of her family members in 2002 were [released this week from a jail in Gujarat](#). A Special Central Bureau of Investigation Court had sentenced the men to life imprisonment in 2008. Their release seems unjust and the subsequent celebration of their release by some is revolting. While the applicable law in this case, on the face of it, seems to give the [power to the Gujarat government to release these men](#), serious questions about the legality of the decision have emerged. However, the injustice, in this case, goes beyond questions of legality or illegality. It runs deeper. Therefore, it is crucial to locate the source of this injustice.

As in most States, Gujarat's current remission policy (it adopted a new and revised remission policy for prisoners in 2014), makes those convicted of rape ineligible for premature release. However, the Supreme Court of India had earlier ruled that the remission question in this case would be governed by the remission policy of 1992 that was in force at the time of conviction which did not exclude those convicted of rape from executive remission. Is the injustice in this case to be located in the fact that the 1992 policy allowed remission to this category of offenders? Does justice demand that certain categories of offenders be ineligible for remission? Before we get to these questions, a brief explanation on remission and premature release is called for.

Editorial | [Remission without reform: On the release of 11 convicts in Bilkis Bano case](#)

State governments have laid down behaviour/activities that can earn prisoners a certain amount of days as remission, that is then deducted from their sentence. For example, if a prisoner earns two years in remission and a court has sentenced them to 10 years, they can leave prison effectively after eight years. This system is enshrined in the Prisons Act, 1894, and also rules developed by different States (prison is a state subject). However, the Code of Criminal Procedure (CrPC) is clear that life convicts have to undergo a minimum of 14 years of actual imprisonment before they can be considered for remission/premature release. Each State has its own procedure to consider each application for release. There is very little transparency on how these decisions are made.

Besides this, State governments have also developed premature release rules that include the power to give effect to the Governor's powers of remission under Article 161 of the Constitution. Those powers are not governed by the CrPC and are often used to bypass the minimum 14 years of actual imprisonment requirement in the CrPC. But in this case, the term of imprisonment of all 11 men was more than 15 years and therefore, the calculation of 14 years is irrelevant.

While, undoubtedly, questions of punishment and reformation need to be individualised, a meaningful criminal justice policy should never adopt offence-based exclusions when considering remission or premature release with respect to individual persons. Remission is borne out of the central objective of prisons to operate as reformatory and rehabilitative spaces. The Supreme Court has recognised remission as an inherent part of a prisoner's right to life.

Contrary to popular conception, remission is a right and not a privilege extended to the convict by the state.

However, that broader position on remission cannot settle the questions of justice in this case. It is the extraordinary treatment bestowed on these 11 men when it is now denied to an entire class of offenders across the country that carries the stink of injustice. While the policy of 1992 provided no disqualification for their release, it is unclear why the Gujarat government found these men fit for release when it has excluded the very same category of prisoners from any consideration whatsoever under the policy of 2014. A cardinal rule of justice stands broken — one set of considerations for everyone else convicted for the same offence but, somehow, a different set of governance considerations for these 11 individuals.

While there is much to worry about the legislature, the executive and the judiciary moving towards harsher sentences for those convicted for sexual offences, the impunity for sexual violence remains a grave concern. There is significant research demonstrating the challenges that rape survivors face in filing criminal complaints and navigating the justice system.

These difficulties are particularly pronounced and qualitatively different for survivors from caste and religious minorities against whom rape is used as a weapon of social oppression. One such aspect is the intimidation and pressure from perpetrators, the majority community, and often the police to drop criminal charges. The lack of witness protection measures results in many complainants turning hostile to protect themselves from more harm.

For the Bilkis Bano case too, not only was it an uphill struggle to initiate criminal proceedings but it was also accompanied by several death threats throughout the course of her case. She relocated constantly for her safety. In pursuing justice, survivors from caste and religious minorities have to bear the brunt of a casteist and Islamophobic society, apart from facing greater challenges in negotiating the criminal justice system than other survivors do.

Given this lived reality of survivors, the exceptionalism in granting the release of these 11 individuals in the Bilkis Bano case becomes even starker. When the executive has otherwise made the choice to exclude this category of offenders from the benefit of remission/premature release, releasing these men from the majority community who gang raped Bilkis Bano and murdered her family members during a communal riot is an act of exceptionalism. It is this exceptionalism that lies at the core of injustice in this case.

However, our rage at the grave injustice, in this case, must not be accompanied by a corresponding legitimisation of overly-punitive approaches to sexual violence. The insurmountable difficulties endured by Bilkis Bano to pursue justice and our collective fear for her safety now may make 15 years of imprisonment seem insufficient. But our dissatisfaction with a broken and discriminatory system cannot be fixed by harsher sentences and practices which is, unfortunately, the only form of justice that a punitive system can offer.

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