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MATTERS

OF

JUDGMENT

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Studies on judicial thought processes have been rare in India and this study with former judges of the Supreme Court of India aims to take a small step in that direction in the context of the criminal justice system and the death penalty. We are grateful to all the participating former judges for their time, willingness to speak candidly and the intellectual challenge they posed to our researchers. The conversations encouraged us to think about a wide range of issues and I do hope that many of the participating former judges found the conversations to be thought-provoking as well. This experience demonstrated the value of such conversations in understanding judicial thought and adjudicatory processes.

Responding to the unique dynamics during such a study, from approaching former judges to challenges that emerged during the interviews, was a tremendous learning experience for us. Professor (Dr.) Ranbir Singh (Vice-Chancellor, National Law University Delhi) invested significant time in reaching out to former judges and the efficient administrative support we received from Mr. Anil Menon and Ms. Seema in the Vice-Chancellor's Office in coordinating the large amount of communication went a long way in scheduling interviews within a reasonable period.

As we ventured into the unfamiliar territory of interviewing former Supreme Court judges, it was intellectually rewarding and reassuring to work with individuals who had done similar work in Japan, Malaysia, United Kingdom and Trinidad. Professor Carolyn Hoyle (University of Oxford), Dr. Mai Sato (School of Law, University of Reading) and Saul Lehrfreund (Death Penalty Project, London) were incredibly generous with their time and ideas in helping us design the

study, prepare for the interviews and providing extensive feedback on the drafts. While our interaction with them helped us overcome many methodological and substantive challenges, some concerns remained and the responsibility for those remains with us alone.

When such studies are undertaken and published, the extent of the administrative effort involved is not immediately evident. The enormous administrative effort by Nidhi Thakur, Vijay Badola and Dharmender Yadav was as integral to this effort as anything else. Their efforts brought a certain freedom and efficiency to the study that would have otherwise been unimaginable.

Dr. Anup Surendranath

Director, Centre on the Death Penalty

30th October 2017

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MESSAGE FROM THE VICE CHANCELLOR

This study has been possible largely due to the incredible generosity of 60 former Supreme Court judges with their time. The manner in which they responded to us and facilitated these interviews is testament to their humility and commitment to taking forward some extremely difficult conversations about the criminal justice system.

The death penalty is not an easy subject to research in India due to a variety of reasons. It is an issue on which everyone invariably has strong views and that in some ways might explain the dearth of empirical research in this field. This study involving 60 former judges of the Supreme Court takes yet another step, after the Death Penalty India Report 2016, towards developing a deeper understanding of the administration of the death penalty in India. As stakeholders who have participated in and observed the administration of criminal justice, the thought processes of former judges are immensely valuable. The insights derived from the interviews demonstrate the concerns that drive judicial thought processes and opens up different ways of understanding adjudication in criminal cases.

As a legal academic it was encouraging to see former judges participate in such a study. Conversations with judges is an aspect of legal research that has not received sufficient attention in India and I strongly believe

that legal thought and understanding will be enriched significantly if we deepen academic conversations with judges. Such conversations are of course a two-way street where judges bring their extensive experience to bear on our understanding of the legal system while at the same time exposing themselves to the latest methods of thinking about the law.

I must also take this opportunity to thank Professor Carolyn Hoyle (University of Oxford), Dr. Mai Sato (University of Reading) and Mr. Saul Lehrfreund (Death Penalty Project, London) for closely working with us on this study and helping us find our feet in this completely new endeavour. In addition to this study, all of us at NLU Delhi keenly await the outcomes of the Mental Health Research Project and the Trial Court Sentencing Project being carried out by the Centre on the Death Penalty.

As a law school, we are just as keen to build and invest in our research efforts as we are in strengthening our teaching. However, that is easier said than done in the context of public universities in India. It requires significant cooperation and support from various quarters and we have been fortunate in that regard. Access (to documents, institutions and people) is often an impediment while conducting research in India but our work so far has been facilitated by many supportive individuals in the judiciary, government and civil society. However, having said that, it is obvious that there is an urgent need for structural reforms on multiple fronts to enable public universities such as ours to undertake and sustain high quality research. Unless all of us together initiate and achieve these reforms, universities will struggle to fulfil their role in contemporary India.

Professor (Dr.) Ranbir Singh

Vice-Chancellor

National Law University, Delhi

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EXECUTIVE SUMMARY

The aim of this study was to explore the opinions of former judges of the Supreme Court of India on the death penalty and more generally on the state of India's criminal justice system as far as it was relevant to the death penalty. The study did not focus on the position that former judges took on the death penalty but was instead interested in understanding the reasons they saw for both abolition and retention. In addition to exploring those reasons, the study also wanted to map the understanding of the 'rarest of rare' doctrine among former judges and get insights into the manner in which judicial discretion is exercised in death penalty cases. Finally, we wanted to locate all these discussions on the death penalty in the context of an evaluation of the criminal justice system by the former judges.

Of the 60 former judges interviewed, 47 had adjudicated death penalty cases and confirmed 92 death sentences in 63 cases.

Considering that the death penalty represents the most severe punishment permitted in law, we sought the views of former judges on critical aspects of the criminal justice system like torture, integrity of the evidence collection process, access to legal representation and wrongful convictions. The interviews also examined the meaning of 'rarest of rare', the appropriate role for aggravating and mitigating factors and the nature of judicial discretion during death penalty sentencing. The last chapter of the report looks at the attitudes of former judges to abolition and the retention of death penalty while exploring their thoughts on recent developments that seek to move away from the death penalty.

KEY FINDINGS

- 1** There was explicit acknowledgment and widespread concern about the crisis in the criminal justice system due to the use of torture to generate evidence, fabrication through recovery evidence, a broken legal aid system and wrongful convictions. Though some former judges did offer justifications/ explanations for this state of affairs, there was an overwhelming sense of concern about the integrity of the criminal justice system from multiple viewpoints.
- 2** However, the grave concerns about the criminal justice system did not sit quite well with the support for the death penalty. In conversations on the death penalty, the abovementioned realities of administering criminal justice in India hardly found mention. This disconnect was best demonstrated when 43 former judges acknowledged wrongful convictions as a worrying reality in India's criminal justice system generally but when it came to the death penalty only five judges acknowledged the 'possibility of error' as a possible reason for abolition in India.
- 3** All former judges, irrespective of their position on the death penalty, were asked reasons they saw for abolition and retention of the death penalty in India. In response, 29 former judges identified abolitionist justifications and 39 identified retentionist justifications. 14 retentionist judges took the position that there was no reason whatsoever to consider abolition in India and three abolitionist judges felt there was no reason to keep the death penalty.

4 Deterrence emerged as the strongest penological justification for retaining the death penalty with 23 former judges seeing merit in that argument. However, most of them believed that the deterrent value of the death penalty flows from a general fear of punishment rather than any particular deterrent value specific to the death penalty.

5 The notion of a bifurcated trial, being a division between the guilt-determination phase and the sentencing phase, did not seem to hold much attraction for the former judges. Despite the sentencing process in death penalty cases having very specific requirements as per the judgment in Bachan Singh, the understanding of 'rarest of rare' among former judges was determined / dominated by considerations of brutality of the crime.

6 For a significant number of judges, the 'rarest of the rare' was based on categories or description of offences alone and had little to do with judicial test requiring that the alternative of life imprisonment be 'unquestionably foreclosed'. This meant that for certain crimes, this widely-hailed formulation falls apart rendering the sentencing exercise nugatory.

7 Despite the law setting out an indicative list of both aggravating and mitigating circumstances be taken into account before determining sentence, there was considerable confusion about the weight and scope of mitigating circumstances. Opinions varied considerably on whether factors such as poverty, young age and post-conviction mental illness and jail conduct could be considered mitigating circumstances at all, despite them being judicially recognised. A minority in fact did not believe

in considering any mitigating circumstances at all while others believed that some categories of offences were simply beyond mitigation.

8 A striking feature, in stark contrast to the lack of confidence in the investigative process, was the confidence that judges had in discretionary powers in sentencing. This was despite the fact that more than half the judges believed that the background of a judge, including their religion and personal beliefs, were factors that influenced the choice between the death penalty and life imprisonment. There appeared to be no “bright line” which distinguished judicial sentencing discretion swiftly slipping into individual judge-centric decisions.

9 The law since *Bachan Singh* has evolved considerably on the issue of the scope of a sentence of life imprisonment. In December 2015, a Constitution Bench of the Supreme Court affirmed that it had the power to impose a sentence for a fixed duration or for the natural life of the prisoner which were beyond the scope of remission. While 25 judges believed that this sentencing formulation was a legally valid punishment, 7 found it to be violative of constitutional mandate and separation of powers.

INTRO DUCTION

George Gadbois, in an exceptional study on the Indian Supreme Court in 1970, wrote that “The justices of the Supreme Court of India occupy a unique place among the public policy decision-making elite of the nation. They are highly esteemed by the public. More than any other segment of the elite, they are viewed as exemplars of honesty and integrity in public office. Indeed, one is exaggerating only slightly, if at all, in observing that these judges are perhaps the only group remaining in the political system in whom trust can be placed, and whose motives and actions are publicly perceived as beyond reproach.”

The present study has sought to navigate uncharted territories by attempting to analyse views of former Supreme Court judges, on a set of specific issues concerning the death penalty and the criminal justice system in India. The death penalty in India is tenacious, and has survived various constitutional challenges. The Supreme Court has tried to restrict its application by introducing several formulations, to effectively calibrate the punishment to circumstances which are ‘rarest of rare’ when the alternatives are unquestionably foreclosed. However, the realities of the death penalty affect an estimated 397 prisoners whose cases move through the legal motions at a glacial pace, sometimes taking decades. The Death Penalty India Report 2016 found that 4.9% percent of the 1810 death sentences imposed over a 15 year period were eventually confirmed by the Supreme Court. Since 2004, four executions have taken place during which heated debates about the legitimacy of the penalty were witnessed.

The death penalty is undoubtedly a polarized issue, but this report attempts to engage different avenues of conversation by drawing out the views of those who are extremely familiar with administering certain parts of the criminal justice system. In a society like India's, discussions on the death penalty require greater information if we are to move beyond the rhetoric of abolition versus retention. Former judges appear best placed to assist in developing this conversation, as they are significant stakeholders within this domain, and their invaluable experience will provide insights into the workings of the criminal justice system, whilst also allowing for a much richer understanding of the dynamics of judicial thinking.

86 former Supreme Court judges could have participated in this study, but 26 either declined, or were unable to. Among the 60 who participated, eight were former Chief Justices of India, 24 had over 20 years of experience as appellate judges, and 33 judges had over 15 years of experience. The period in which they served as appellate judges spanned from 1975-2017, and between 47 of them, 208 death penalty cases were decided, and 92 death sentences confirmed.

The study at its core, is about an in-depth examination of the factors influencing judicial thinking on the death penalty. Former judges have judicially trained minds, with a wealth of experience, knowledge, and perspective. Thus, it is important to listen to not just 'what' they think, but also 'how' they think. As such, this

study was just as much an opportunity to learn from them, as it was about an academic responsibility to critically engage. Different parts of this report reflect these approaches, whilst engaging with penological justifications for the death penalty, different aspects of the criminal justice system such as torture, fabricated evidence, wrongful convictions, etc. and examining the exercise of judicial discretion in death penalty cases.

All former judges, irrespective of their position on the death penalty, were asked if they saw legitimate abolitionist and retentionist justifications with regards to the death penalty in India. Only a small proportion, on both sides, said that they refused to accept arguments from the opposite side. However, the report begins by examining the views of former judges on torture, fabricated evidence, legal aid, and wrongful convictions in India's criminal justice. An interesting contrast appears between the nature of responses to the death penalty specifically, and the bleak evaluation of the criminal justice system, which raises interesting questions about the true nature of support for the death penalty.

The perspectives of former judges on their understanding of the 'rarest of rare' doctrine which arose from Bachan Singh, and their judicial discretion in working that doctrine were most revealing, as what emerged was a doctrine that no longer resembles the original terms that were developed in 1980. Not only has the doctrine lost its original meaning, but it seems trying to identify its precise requirements, is like attempting to pin a wave on the sand.

METHODOLOGY

To have an accurate and complete list of all the former Supreme Court judges, we created a database of all the former Supreme Court judges with their addresses and contact details from the directory published by the Supreme Court. We sent letters to all 86 former judges and followed up with multiple rounds of telephonic conversations. 60 consented and those who refused did so because of their busy schedules, and some of them also cited lack of criminal law experience as a reason.

We carried out in-depth, semi structured interviews with former judges with a questionnaire that guided the interviewers. The questionnaire was broadly divided into three themes which included, investigation and trial processes, sentencing in death penalty cases, and judicial attitudes towards the death penalty. Besides the questionnaire, three hypothetical cases were also used as a tool during interviews. Each hypothetical case consisted of relevant evidence on record for a capital offence committed, and a few sentencing factors. The former judges were asked to decide these cases by determining guilt, and sentencing the accused.

Most interviews lasted between 90 to 120 minutes, and were conducted by two interviewers, at either residential, or office spaces of the judges. All participating former judges except one, consented to the use of a voice recorder. The medium of communication during the interviews was English. However, there were judges who switched between English and Hindi which allowed the interviewers to use both languages. It is pertinent to mention here that, given the nature of interviews, and the varying time availability across judges, we were unable to obtain responses to every question from all the interviews, which is evident in the varying number of responses on different issues.

1. INVESTIGATIVE AND TRIAL

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2) Did not disclose cancer

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जालान

5. स्थान का कारण जहाँ संपत्ति प्राप्त हुई

6. व्यक्ती का नाम जिस से संपत्ति प्राप्त हुई

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INTRODUCTION

Before engaging in specific discussions on the death penalty, it is crucial that the broader context of the criminal justice system in India be examined. Conversations on the death penalty are often carried out without focusing on the realities within which the punishment operates. The evaluation of the criminal justice system by the former judges participating in this study is important, because it will aid our understanding of their approach to the death penalty. Understanding their perspective on the functioning of the criminal justice system, will provide us with a far clearer picture of the way in which former judges balance various (and often competing) interests, whilst arriving at their approach to the death penalty.

The attempt in this chapter is to bring forth views on factors that normatively have an impact on the administration of the death penalty. In a criminal justice system factors such as torture, fabrication of evidence, access to legal representation, wrongful convictions etc. must have a profound impact on the death penalty in a retentionist legal system. In that context, it was important to map the responses of former judges on these factors that go to the very heart of the integrity of the criminal justice system. Comparing factors discussed by former judges in this chapter, to factors discussed in Chapter III which considers attitudes towards the death penalty, allowed us to identify an array of factors that enter the mix when thinking

about the death penalty, and perhaps more importantly, the factors that remain, at best, on the periphery.

This chapter explores judges' views on the use of torture in criminal investigations, the fabrication of evidence through recoveries under the Indian Evidence Act, the difficulty of accessing legal representation, and the often ignored issue of wrongful convictions within India's criminal justice system. The views from former judges paint a rather dismal picture of India's criminal justice system, which raises very serious questions about the system in which the death penalty is administered.

1. REALITIES OF THE CRIMINAL JUSTICE SYSTEM IN INDIA

The criminal law is set into motion with the reporting of a criminal wrong followed by its investigation by agencies like the police, a judicial trial for determination of guilt ‘beyond reasonable doubt’, and fixing the quantum of appropriate punishment. Just as much the objective of the criminal justice process is to ensure that guilty persons are punished, it is also to ensure that the procedures used when proving guilt are strictly followed. The Constitution of India, the Criminal Procedure Code, the Indian Evidence Act, and various judgments of the Supreme Court of India, provide protections to individuals from arbitrary and excessive power of the State.³ However, despite these constitutional and legal protections, it is seen that rights violations too often go unchecked and escape judicial scrutiny. The few studies which have been conducted in India on this aspect of the criminal justice system, point to the fact that torture is rampant, and judicial measures are ineffective in curbing its use.⁴

A. TORTURE

Of the 39 former judges who discussed the prevalence of torture in the Indian criminal justice system, 38 believed it to be rampant and one former Chief Justice was of the opinion that torture does not happen. However, views of 38 judges are divided into two schools of thought: first, that torture was a necessary evil, and second, that torture

is inherently wrong and therefore had no place within the law.

JUSTIFICATIONS FOR THE USE OF TORTURE

Five out of 12 former judges justifying torture said that the police resorted to torture because investigating agencies work under strenuous conditions, without adequate time and independence to investigate cases. A judge who decided six death penalty cases, and confirmed four death sentences in the Supreme Court, shared an anecdote about his relative who was in the Indian Police Service. The relative objected to the use of torture by deeming it to be legally impermissible and inhumane, and was subsequently told that he “better leave the job” as he was “not fit to be a policeman”. The judge also mentioned that the police’s mindset is affected by how poorly they are treated by VIPs during law and order duties. This in turn affects them, as “when it comes to crime, they will pick up small men and adopt third degree methods, to make them accused and elicit their confessions, whether they have committed crime or not.” The existence of torture was also rationalised by stating that investigating agencies are “either lazy, or don’t have enough manpower, or do not know methods of scientific investigation.”

A judge, who adjudicated 115 murder cases in the Supreme Court, was in dismay over a particular experience at the National Judicial Academy, Bhopal, where he found the

majority of participating judges held the view that the truth would not come out unless the police had the power to torture.

TORTURE IS UNACCEPTABLE AND DOES NOT WORK

17 judges believed that torture undermines the system, and said they were inherently opposed to torture irrespective of its utility.⁷ Believing torture to be a barbaric investigative technique, a judge said that by adopting scientific methods such as fingerprinting and forensic examination, the reliance upon statements of accused persons and the use of torture would subsequently decrease. Judges felt that the use of torture was an unreliable way of discovering the truth, and it has brought about undesirable results. A former Chief Justice of India said that, because torture was prevalent within the criminal justice system, he would tend to take recovery statements “with a pinch of salt.” Additionally, a judge who served in appellate courts for 16 years, highlighted the consequences of using torture, as he was of the view that torture is widely used to get an innocent person to confess to offences that they have not committed, in order to ensure conviction.

B. FABRICATION OF EVIDENCE

Confessions to police officers are not admissible as evidence in India.⁹ This provision rests upon the principle that confessions to police may be extracted under coercion

or inducement.¹⁰ Section 27 of the Evidence Act, however creates a limited exception to this rule, and permits the statement of a person in police custody to be admitted in evidence to the extent that it distinctly relates to the facts discovered.¹¹ In practice, this provision is used for recording statements of accused persons which lead to the discovery of facts, and recovery of material objects such as, the dead body, weapons, or other articles involved in the offence. Therefore, despite confessions generally being inadmissible, investigating agencies have manipulated this provision as a means of bringing torture in through the backdoor, to ensure that individuals sign blank sheets, or make statements they can then use as recovery of evidence. It is very common modus operandi of investigation agencies, to plant evidence and then demonstrate that such evidence was recovered through ‘voluntary’ statements made by suspects in police custody.¹²

C. SECTION 27 OF THE EVIDENCE ACT—RECOVERY

38 out of 58 judges were of the view that investigating agencies abused this provision. When asked about the reliability of recovery evidence under Section 27, a judge who had decided nearly 100 murder cases over his 23 year judicial career in appellate courts pondered the question, saying “but now I don’t know.... if there are any genuine cases any longer under that exception.” Another judge, who had previously served as a government counsel,

was also sceptical of the reliability of recovery evidence, stating that Section 27 was a “technical matter”, and investigating officers had “no idea and no concept of what Section 27 leads to.”

Judges believed that the provision for recovery evidence under Section 27 was abused in the following ways:

TORTURE

Though prohibited, Section 27 seems to subliminally increase the use of torture as an investigative technique.¹⁴ 12 judges were aware of this practice and therefore were cautious of such recoveries, as torture was often the starting point of an investigation. Judges also spoke about this provision encouraging investigators to adopt “short-cut method” of torturing suspects to affect a recovery, instead of corroborating the materials through scientific investigation.

FABRICATION OF EVIDENCE

The following investigative malpractices emerged from the interviews with the former judges:

1. Planting of Evidence

15 judges spoke about their experiences at the bar and the bench, about the planting of evidence in several cases. This included cases where the murder weapon was proven to be planted as it did not match the injury, and where clothing was recovered at the behest of the accused who

did not understand the language in which the seizure memo was prepared. Planting of evidence is common, and often the investigators already know the ‘secret place’ that the accused is supposed to lead them to. A judge who decided nearly 100 murder cases in appellate courts said, “padding up or brewing or creating more evidence at the insistence of somebody” resulted in the conviction of innocent persons. According to judge who has been a member of the National Human Rights Commission the police plant evidence when they are convinced that a particular person has committed the crime and should be convicted. In such scenarios, the police consider planting of evidence as a minor thing which is justifiable.

Describing the power-dynamics between the police and the accused, a judge who was the former chairperson of a State Human Rights Commission, and who acknowledged the frequent misuse of Section 27 said, “...the position of the police in our society, and the very lower position of the accused in most of the cases, in most of the criminal cases, they are from the lower strata of the society, they are almost all the time in awe of police. They can’t do anything, say any word of protest against the police. It is impossible for them. Though they must know rights, knowledge of rights is so poor, they do not know what is Article 21, what is Constitution, they have no knowledge.” In his view “Section 27 is a colonial legislation. Considering the benefit of Article 21, the explanation of Article 21 which has been

given now, 27 must be revisited, because of its rampant abuse by the police”.

2. Stock witnesses and unreliable testimony

One of the most common problems with the use of Section 27 as identified by 14 judges, was the use of false recovery witnesses by the police. In the ordinary legal course, the investigating authorities must comply with Sections 165 and 100 of the CrPC whilst collecting recovery evidence. This requires the investigating officer to record the statement of the accused, to then go to the said spot and recover the evidence, prepare a recovery memo having obtained details of objects recovered in the presence of recovery witnesses, and finally get them to sign the memo.¹⁵ These witnesses are supposed to be respectable inhabitants of the locality.¹⁶ Such procedural safeguards seek to ensure veracity of the recovery. However, referring to recovery witnesses as ‘stock witnesses’, judges said that they often were “formal” and repeatedly acted as witness for recovery, seizure, and arrest memos. One reason offered by a former Chief Justice of India was that, “...(P)eople are scared of going to the court...people are scared of going to the police. Nobody volunteers. Only the professional witnesses are hired and given money.” This results in the same witnesses appearing in multiple cases and witnesses becoming dependent on the largesse of the police for their sustenance. A former district judge, who later went on to become a judge in the Supreme Court for nearly ten years, narrated an anecdote in which he found that a panch

witness had appeared in his court on numerous occasions. On enquiry, he found that the witness operated a laundry near the police station from where he got much of his business. Testifying against the police would therefore mean losing his business. Another judge narrated that a district judge who the police did not recognise, was detained to act as a recovery witness. He first wanted to read the recovery memo, and then went on to refuse to sign it as the recovery had not been made in his presence. The police constable verbally abused him and threatened to arrest him. He was saved when a senior police officer recognised him. This judge stated that the district judge thereafter, never relied on recovery evidence again.

3. The preparation of the recovery documents

The exercise of police powers during the recovery of incriminating articles based on the accused's statement, requires them to be properly documented if they are to be proven in court. When an accused makes a statement volunteering to get an article recovered, and revealing its location, a disclosure memo is required.¹⁷ The process of recovering this article is recorded in a recovery memo. 3 judges spoke about the preparation of recovery documents. One judge, who decided nearly 110 murder cases over a period of 19 years in appellate courts, doubted the reliability of recovery evidence when stating that in most cases, the disclosure statement is recorded after the recovery is effected but shown as being recorded before it. Another judge, who has confirmed death sentences in all

4 cases he decided in the Supreme Court, said recoveries are made in the police thana (station). Moreover, another judge who was previously a government counsel, said that during the time he was a government lawyer, the Investigating Officer had written the entire case diary in front of him the evening before a hearing.

2. LEGAL REPRESENTATION

A right to fair trial inheres a right to legal representation under Article 21 of the Indian Constitution.²¹ The Supreme Court has held that, within the adversarial system, the right to defence means an ‘effective and meaningful’ defence,²² which assumes the greatest significance in the context of the death penalty, or the total loss of liberty.²³ However, reports on the quality of legal representation have exposed several shortcomings in defence lawyering.²⁴ Whilst the Supreme Court has sometimes evaluated the quality of legal representation in specific cases,²⁵ there has not been any institutional assessment of the overall quality of defence lawyering in criminal cases.

Former judges were asked their views on the standard of legal representation in criminal cases, particularly within the legal aid system. Questions concerning the access to, and quality of legal representation, assume paramount importance in the context of investigations outlined above. Operating within a violent and broken criminal justice system often leaves access to quality legal rep-

resentation as the only real check. The vast majority of India's incarcerated population are poor, and belong to the marginalised sections of society, which in turn raises very serious questions about access to legal representation, and the safeguarding of fair trial rights.²⁶

A. LEGAL AID

It is the obligation of the State to permit any person who is detained to consult and be represented by a lawyer of his choice.²⁹ Indigent persons being tried before a Court of Sessions, are required to be provided with a defence lawyer at the expense of the State.³⁰ The obligation is to ensure that legal aid is effective and meaningful. In cases related to indigent persons, the Supreme Court has invoked the fundamental rights in Articles 14, 19, and 21, along with the Directive Principle of State Policy to provide free legal aid under Article 39A, stating that an experienced defence counsel is a facet of fair procedure, and is integral in protecting the accused's right to life and liberty.³¹

The Legal Services Act, 1987 set up a nationwide legal aid mechanism at national, state and district levels to provide "...free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities..." As the apex body, the National Legal Services Authority (NALSA) had an estimated budget of Rs. 140 crores the year 2016–17.³²

JUDGES VIEWS ON LEGAL AID

Despite the existence of the legal aid mechanism, and the large corpus, not a single judge found the present day legal aid system to be satisfactory. While judges commented upon specific aspects of legal representation, there was a general consensus about the quality of legal representation being unsatisfactory, both on issues of conviction and sentencing. Even judges who once held important positions within the Supreme Court Legal Service Authority, as well as the National Legal Services Authority, did not hesitate to express such views. A judge who was an Executive Chairman of National Legal Services Authority was of the view that legal aid counsels are not very good; they are youngsters who don't have experience and don't work earnestly to study the facts and bring them to the court.

Amongst its strongest critics, was a former judge who was the chairperson of the State Legal Services Authority for over two years who called the legal aid system a 'farce'. Judges pointed out several systemic deficiencies with the legal aid system. One judge, who was once an Advocate General of a State, was of the view that in practice the "aid" was for the lawyer and not for the accused, as it ensured an income for briefless lawyers. This judge also felt that these lawyers failed to even appear in the cases they undertook. Another judge, who was once a Public Prosecutor, said that it was to be taken for granted that a case where a lawyer was legal aid "appointed", only his juniors would attend proceedings. The fact that the legal

aid lawyers appointed in many cases were inexperienced, was also supported by two other judges.

The misgivings with the legal aid system were also attributed to the lack of monetary incentive by three judges.³³ One judge, who served as an appellate court judge for 18 years said that, “...(M)ost of them are not competent; had they been competent, they would not have got themselves empanelled in legal aid, because they get fixed sum of 2000, 5000, 3000 rupees looking to the nature of the case.” However, one judge who has been a Public Prosecutor, and has decided nearly 150 murder cases in the appellate courts was of the opinion, that the lack of economic incentive should not affect the quality of legal aid counsel. That judge said, “after you accept a brief, it is a matter between the lawyer and the judge—the money part doesn’t come into picture.” A competent lawyer should provide good representation “irrespective of how much money he gets.”

Whilst two judges who served on the Supreme Court Legal Services Committee attempted to defend the legal aid system, even they did not believe that the system was anywhere close to being ideal. One judge said that, whilst the system was “quite satisfactory”, its quality was certainly declining. Another judge argued, “What else can be done?”. In his view, it seems whilst there were serious problems within the system, there were some good parts, and having the legal aid system was therefore still beneficial to society.

THE IMPACT OF POOR LEGAL REPRESENTATION ON SOCIO ECONOMICALLY MARGINALISED PERSONS

A legal system where the capacity to afford quality legal representation determines the guilt or innocence of an individual irrespective of their moral culpability, is a system that is fundamentally compromised. The right to a fair trial becomes almost illusory when quality legal representation is primarily a function of a litigant's economic means.

The absence of good legal representation hampers poor defendants, and makes the outcomes in their cases less dependent on its merits which in turn leaves it almost entirely up to chance. Since important evidence regarding coercion and violation of fundamental rights by the police would never be brought to a judge's attention, in the worst cases it can lead to conviction of innocent accused.³⁴ The linkages between socio-economic vulnerability, and legal representation, formed a part of the questions we asked the judges.

While we did not directly ask the former judges about the influence of poverty in affording quality legal representation, 14 judges acknowledged that poor legal representation disproportionately impacts the poor. On certain occasions, judges also explained more specifically, how poverty and ineffective representation, affected fair trial rights and pointed out that, a poor accused would never

be able to get defence witnesses for recovery evidence, despite the law expecting him to do so. A judge who confirmed 6 death sentences in the Supreme Court said that although the accused has fundamental right to counsel of choice, they cannot afford the same. This is because a good lawyer would charge exorbitantly high fees. This would lead to the court assigning a lawyer who does not have much practice. Judges also explained that illiteracy affects an accused's ability to communicate with his counsel, and therefore cannot put his best defence forward.

It was evident from the responses, that the former judges acknowledged the strong connection between poverty, and the access to quality representation. They saw it as a relationship that deepened the crisis within the criminal justice system, and in effect, accentuated many other grave concerns discussed above. Their unequivocal acknowledgement of failing legal aid systems, demonstrates that the constitutional promise of equal justice, is a long way from being translated into practice.

3. WRONGFUL CONVICTIONS

43 out of 49 judges acknowledged the existence of wrongful convictions within our criminal justice system, whilst the remaining six judges denied the possibility of wrongful convictions within India's criminal justice system, on the basis that they had not encountered any such instances during their tenure as judges. Amongst the 43 who

acknowledged the existence of wrongful convictions, only seven of them did not find it to be particularly worrisome, as they felt they are of statistical insignificance, and there is always the possibility of correcting errors within the appellate system. A judge who had decided 15 death penalty cases in the Supreme Court, while relying on the ‘statistical insignificance’ argument, said that the possibility of wrongful conviction was “1 in 10,000.”

A liberal criminal justice system is premised on the formulation that “it is better that ten guilty persons escape than that one innocent suffer”.³⁵ A judge endorsed this view saying, “the principle of benefit of the doubt supports the fact that you can acquit hundred guilty people for want of evidence, but convicting an innocent is a great sin”.

CAUSES FOR WRONGFUL CONVICTIONS

Wrongful convictions were attributed by 14 judges to improper investigation, and prevailing inequalities in legal representation, with 13 of them also arguing that the criminal justice system was easily susceptible to money, power, and political influence. A judge with 35 years judicial experience (including the trial court), spoke of evidence being maliciously “fit” by the police in order to build a strong case to implicate an innocent person, so they could further their personal career goals, and achieve over-night fame.

Public pressure on the police was also cited as a reason for wrongful conviction. Poor defence lawyering according to one judge, was the reason that innocent persons got convicted on trumped up charges. In cases involving multiple accused persons, where the role attributed to each of the accused was not properly identified, also lead to some wrongful convictions.³⁶ Moreover, cases where there was a personal enmity between the victim and the accused, was also cited as a reason for wrongful conviction.

WRONGFUL CONVICTION VERSUS WRONGFUL ACQUITTAL

Discussions on wrongful convictions saw eight former judges repeatedly bring up the issue of wrongful acquittals, sometimes as a greater concern than wrongful convictions. When referring to 'wrongful acquittals', they were mostly cases in which the accused, who had committed the crime, had to be acquitted due to a lack of evidence.

A judge who decided nearly 180 murder cases as an appellate court judge responded saying, "If you're asking me whether I am concerned about unmerited acquittals? I'm not worried about them. I'm worried about unmerited convictions because the criminal jurisprudence is designed only to prevent an innocent being convicted.

A criminal jurisprudence can afford to have a guilty person escape but not to have an innocent person proven guilty.”

The assumption that wrongful acquittal is as much, or a bigger, evil than wrongful conviction is misguided.³⁷ Wrongful acquittals cannot be invoked as a response to wrongful convictions, because they encompass two different sets of problems, which demonstrate some very different crisis points in the criminal justice system, and equally some similar ones.

It is pertinent to note that, the easy manipulation of the criminal justice system at the stages of investigation such as, obtaining credible testimony, and ensuring fair and reliable evidence collection, are exactly the challenges that both wrongful conviction and wrongful acquittals present the criminal justice system.

4. CONCLUSION

The overwhelming concern among former judges that key elements of the Indian criminal justice are in deep crisis, needs to be compared with their approach to the death penalty discussed in Chapter III. The use of torture, and fabricated evidence, along with very poor standards of legal representation make wrongful convictions a grave concern. Of course, torture and fabricated evidence are concerns independent of wrongful convictions, but all three factors put together, present an even more serious challenge to the reliability and credibility of the criminal justice system. We must avoid thinking of wrongful convictions only in terms of ‘innocence’ and instead adopt the wider understanding where the term refers to those convictions achieved by illegal means.

PROHIBITION OF TORTURE

international law

■ Torture is a crime under international law. According to all relevant instruments, it is absolutely prohibited and cannot be justified under any circumstances. This prohibition forms part of customary international law, which means that it is binding on every member of the international community, regardless of whether a State has ratified international treaties in which torture is expressly prohibited.

■ In 1948, the international community condemned torture and other cruel, inhuman or degrading treatment in the Universal Declaration of Human Rights adopted by the United Nations General Assembly. In 1975, the General Assembly adopted the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

■ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the General Assembly on 10 December 1984 and entered into force on 26 June 1987. It requires States parties, inter alia, to incorporate the crime of torture in their domestic legislation and to punish acts of torture by appropriate penalties; to undertake a prompt and impartial investigation of any alleged act of torture; to ensure that statements made as a result of torture are not invoked as evidence in proceedings (except against a person accused of torture as evidence that the statement was made); and to establish an enforceable right to fair and adequate compensation and rehabilitation for victims of torture or their dependants. India is a signatory to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment since 1994 but has not ratified it.

The technology of torture all over the world is growing ever more sophisticated. New devices can destroy a prisoner's will in a matter of hours but leave no visible marks or signs of brutality.
—*Nandini Satpathy v. PL Dani (1978) SC 1025*

domestic law

■ Section 167 of the Criminal Procedure Code and Article 22 (2) of the Constitution mandate that an arrested person be produced before a magistrate within 24 hours of their arrest to check the use of torture at this stage. The fundamental right under Article 22 has also been recognised in Section 57 of the Criminal Procedure Code, which provides that a police officer shall not detain in custody a person arrested without a warrant for a period exceeding 24 hours, unless produced before a Magistrate. In *Khattri & Ors. v. State of Bihar & Ors*, the Supreme Court opined that the intent behind the provision was to “enable the Magistrate to keep check over the police investigation and the Magistrates should try to enforce this requirement and where it is found to be disobeyed, come down heavily upon the police”.

■ Voluntarily causing hurt, grievous hurt or wrongful confinement to extort confessions are criminalised under section 330, 331 and 348 respectively of the Indian Penal Code.

judicial scepticism on safeguards against torture

■ A judge who has been part of the bench that upheld the constitutionality of the death penalty said that while the accused had opportunity to complain before a court, “Hardly anybody has ever complained to me as a judge. There is no doubt about it (that torture takes place). Without it, they (police) won’t get evidence at all.”

■ A former Chief Justice of India said, “they will be further tortured” or the accused’s family will be taken into custody to build psychological pressure if they complain to the magistrate.

■ A former chairperson of Law Commission of India said that while making a confession, the magistrate asks the accused if there is any compulsion but the accused has been told beforehand that “he will face the music” if he responds affirmatively.

/ not allowed to sit for long periods / stripped and tied to a table with a snake let loose in the room / solitary confinement / forced nudity for long periods / put on a slab of ice and leg broken / rollers pressed on body / immersed in boiling water / immersed in ice-cold water / extreme stretching of arms and legs / forcibly made light-headed and then beaten / fingers broken with pliers / forcible anal penetration with rods / glass bottles / aeroplane—arms and legs tied behind the back, with stomach parallel to the floor, and then pulled up / chilli powder smeared on wounds / unexplainable things / hung by wires / forced to drink urine / handcuffed / hands and feet tied up / tied to furniture / chained / made to urinate on heater / soap water run through nasal canal / head crashed against walls, glass / beaten until unconscious and then made to hop on the spot after drinking water or tea / electric current passed through wet body, lips, nipples, genitals / no food or water for long periods / head immersed in the toilet / teeth broken / put inside a tyre and beaten up / hands and legs tied to a machine with a motor / waterboarding / tied in a sack of chillies hung from a tree and beaten with the butt of police guns / not allowed to use toilets / skin burnt with cigarettes, fire / beaten up with belt, iron rod, pipes on face, head, genitals, soles of feet / petrol inserted into body / dragged by the hair / needles inserted into fingernails / fingernails pulled out / hung upside down and beaten

A R T I C L E 1



**CONVENTION AGAINST TORTURE AND
OTHER CRUEL, INHUMAN OR DEGRADING
TREATMENT OR PUNISHMENT 1984**

The term torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

INDIAN EVIDENCE ACT, 1872



RECOVERY UNDER SECTION • 27



Confessions to police officers are not admissible in evidence in India. This provision rests upon **THE PRINCIPLE** that a confession made to the police might be extracted by means of coercion or inducement. **SECTION 27** of the Evidence Act, however creates an exception to this rule. Any information provided by the accused person which leads to the discovery of facts may be proved against the accused, even if such information is a part of a **CONFESSION** in the police custody. The two essential requirements for the application of section 27 are that (i) the person giving information must be an **ACCUSED** of any offence (ii) the person must also be in police custody.

Practice

The accused is tortured until he agrees to sign, or affix a nearly indecipherable thumb impression, on a blank sheet of paper. The blank sheet of paper is essentially used by the police to fabricate the statement from the accused to the police. This 'supposed' statement involves the accused revealing the location of the dead body, weapons, clothes of the accused or deceased, which the police is already aware of or had planted these facts in the manner revealed in the statement.

To make a recovery of and seize the dead body, weapons, clothes, etc, investigating authorities must comply with the procedure laid down under Code of Criminal Procedure, 1973 (CrPC). The statement of the accused leading to the discovery of a fact requires to be recorded in the presence of two witnesses.. The accused must then lead the police and witnesses to the spot and actually recover and seize the dead body or article. Contemporaneous disclosure and recovery memos signed by the witnesses are required to be prepared with all the material particulars.

Therefore, even though a confession is not admissible, the fact that it was the accused's statement to the police that led the police to the recovery of these 'facts' is presented as a strong piece of evidence by the prosecution in establishing the guilt of the accused during the trial.

2. SENTENCING IN DEATH PENALTY CASES

INTRODUCTION

The Code of Criminal Procedure 1973, bifurcates a trial into the conviction and sentencing stages and requires sentencing judges to give special reasons if they choose the death sentence over life imprisonment as the appropriate punishment.³⁸ While upholding the constitutional validity of the death penalty in *Bachan Singh*³⁹, the Supreme Court developed a detailed framework to guide sentencing judges in deciding between life imprisonment and the death sentence. The previous chapter showed that former judges across the board believed that the sanctity of the investigation and the trial processes were significantly compromised for various reasons. Considering that several deficiencies were acknowledged by judges to exist within the guilt-determination process, it becomes even more important that robust and fool proof sentencing practices exist.

Since 47 of the 60 judges interviewed in this study decided death penalty cases at the Supreme Court, it was a unique opportunity to gain insights into the sentencing process, practices, and jurisprudence. The judicial pronouncements and literature available in India thus far, only looks at the formal reasoning adopted in judgments. This was the first time that judges who once wielded the power to impose the death sentence in the highest judicial forum, were asked about the dynamics involved within this exercise of judicial power.

This chapter brings into sharp focus the confusion which exists in death penalty sentencing on multiple fronts. The meaning of the 'rarest of rare', the identification of aggravating and mitigating factors, balancing those factors, and establishing that the alternative option of life imprisonment is unquestionably foreclosed, all emerge as aspects



afflicted with confusion, a lack of clarity, and inconsistent treatment. We sought to better understand the terms of this confusion by asking judges about their views on the ‘rarest of rare’ formulation, the role of aggravating and mitigating circumstances, and the operation of judicial discretion in sentencing.

1. THE MEANING OF ‘RAREST OF RARE’

The Supreme Court while upholding the constitutionality of the death penalty in *Bachan Singh* developed the sentencing framework for judges to follow when deciding between life imprisonment and the death sentence. Ever since, this framework has been referred to as the ‘rarest of rare’ test, and has been misunderstood both judicially⁴⁰ and in public discourse. Unlike the meaning it has come to assume in the nearly four decades that have followed the decision in *Bachan Singh*, the doctrine was not meant to be read in a way that suggests that the ‘rarity of the crime’ is the qualifying factor for the death penalty. Instead, judges tasked with sentencing are supposed to be presented with a far more comprehensive and nuanced task which goes far beyond merely determining whether the crime before them is ‘rare’.

The sentencing framework requires judges to first identify and balance aggravating factors (related to the crime) and mitigating factors (related to the circumstances of the accused). The framework in *Bachan Singh*, provides an indicative list of factors in both categories, and it is evident that no one factor (including brutality of the crime) trumps the others. In approaching this exercise, the judgment explicitly requires future judges to give a ‘liberal and expansive construction’ to mitigating factors (and not aggravating factors).⁴¹ Included in the



mitigating factors is the obligation on the State to show that the accused is beyond the possibility of reformation. The sentencing framework then requires judges to give the death sentence in the 'rarest of rare' cases, (clearly meaning numerical rarity) where the alternative option of life imprisonment is unquestionably foreclosed.⁴² Therefore, it is clear that judges must firstly, identify and balance aggravating and mitigating factors, and then proceed to determine that the alternative option is unquestionably foreclosed. As is evident, this exercise requires sentencing judges to do a lot more than establish that the crime is 'rare' merely by virtue of its brutality.

There has been significant judicial confusion surrounding this framework, with cases ranging from a *per incuriam* decision⁴³ that left in its wake a string of death sentence confirmations⁴⁴ that looked only at the crime, to a mechanical 'balance sheet' approach which was clearly never envisaged by Bachan Singh. Thus, it is explicit that courts at all levels have struggled to implement any level of consistency with the 'rarest of rare' doctrine. As a result of this confusion, very serious questions have been raised about death penalty sentencing in India being a judge-centric phenomenon.

RAREST OF RARE AS UNDERSTOOD BY FORMER JUDGES

During the interviews, only 13 former judges explicitly articulated their understanding of the 'rarest of rare' doctrine. In these conversations, that involved both retentionist and abolitionist judges, the varied meanings of the doctrine that emerged, were often at variance with the framework laid down in Bachan Singh. Some former judges



Being from a farming family, I think if somebody kills to save his land, **you might have a different approach.**

“But at the end of the day, every judge has his own concept of what is rarest of rare. Of course, up to five to seven things will be common for everybody. Being from a farming family, I think if somebody kills to save his land, you might have a different approach. In the sense that there’s some justification, self-defense or whatever. But I’ve noticed, judges who’re not from farming families, their approach is totally different.”

—A judge who decided nearly 140 murder cases in 21 years as an appellate judge.

RAREST OF

Crime Categories that former judges assumed to be 'rarest of rare'

Rape and murder of minor

Killing family for property

Brutal multiple murders where women, children etc. are victims

Terrorism

THE RARE

Individual articulations

of 'rarest of rare' by
former judges

Those crimes that affect _____ Some crimes are beyond any _____
human values _____ mitigation _____

Rarest of rare is to be determined _____ When the crime is committed _____
by the five categories of Machhi _____ without reason/motive _____
Singh _____

When the crime that is _____ Manner of commission of _____
committed is not seen _____ offence, motive, loss to society, _____
ordinarily _____ number of victims, and method _____
_____ of disposing dead body _____

Rarest of rare to be determined _____
by similarly placed cases and _____
social impact of the offence _____

in this group adopted an approach that understood ‘rarest of rare’ as an issue of crime categories. For example, some judges felt that ‘rape and murder of a minor’ would fall within the “category” of rarest of rare. Other judges in this category, felt the requirements of the rarest of rare doctrine would be satisfied on the existence of certain aggravating circumstances such as, the number or nature of the victims, or the weapons used, etc. which leaves hardly any room for mitigating circumstances. These 13 judges decided 80 death penalty cases between them, and confirmed 41 death sentences.

VIEWS OF FORMER JUDGES ON THE **RAREST OF RARE** DOCTRINE

Different strands emerged on the wisdom of the ‘rarest of rare’ doctrine as such. One view that emerged quite strongly, was that the ‘rarest of rare’ doctrine was quite hollow, which meant it was left open to judges to subjectively fill it with content, without guiding discretion. A smaller set of former judges, felt the doctrine was the best that any court could have evolved for choosing between life imprisonment and the death sentence, whereas others felt it failed to acknowledge, or award sufficient weight to certain important considerations.

RAREST OF RARE SERVES THE PURPOSE

Six judges (among the 22 who responded in detail to this question) were of the view that the ‘rarest of rare’ doctrine was the best possible formulation to guide sentencing judges when deciding between life imprisonment and the death sentence. Among the advantages identified, was the view that the doctrine invoked the ‘correct’ principles to make the decision between life and death, whilst helping to



2

15000

“It is practically almost practical abolition of the death penalty. *You see, in eight or 10 years, two executions.* Out of near about 200,000 murder trials, you have say 15,000 on death sentence. So, I think already the care is being taken that death penalty may be awarded as less as possible, putting it in the parameters which are new.”

—A judge while talking about how Bachan Singh has significantly curtailed executions.

reduce indiscriminate use of the death penalty. Further, the ‘rarest of rare’ doctrine was also seen to provide sufficient room to judges when deciding on the imposition of the death sentence by allowing them to consider particular facts and circumstances in each case.

On the issue of subjectivity inherent in this sentencing process, one response saw it as positive as it provides “sufficient freedom and flexibility to the judge to proceed according to his conscience and his perception”. However, this very subjectivity was also viewed as being deeply problematic, with judges saying that they changed their decisions based on what the other judge(s) on the bench thought.

While judges who supported this approach did speak about the reduction in the number of executions, they did not account for the fact that a much higher number of persons are sentenced to death each year by the trial courts, and they did not account for the long periods of time death row prisoners spend in jail awaiting their decision by the higher courts. A large majority of these cases have resulted in acquittals and commutations.⁴⁵

RAREST OF RARE EXCLUDES IMPORTANT CONSIDERATIONS

Three retentionist judges who decided a total of 15 death penalty cases and confirmed seven death sentences argued that the ‘rarest of rare’ doctrine excluded important considerations. Among them, two felt it was disproportionately offender-centric, and did not focus sufficiently on the victim or the impact on the victim’s family, whilst the third felt it was unreasonable to attempt drawing a distinction between spontaneous and premeditated murders. Considering this to be a specious dif-



ference, the former judges felt that homicides cannot be distinguished inter se, and that the doctrine was deficient for not incorporating the retributive perspective of the victim's family.

RAREST OF RARE IS EFFECTIVELY A HOLLOW DOCTRINE

13 former judges out of 22 who provided detailed responses, felt that the 'rarest of rare' doctrine was subjective to such an extent that it has no real standard at all. Attempting to capture different concerns on this front, a former Chief Justice of India admitted that the formulation was unclear, and that he did not understand what it really meant. In his view there were two tests, one which considered the brutality of the murder, and the other which considered the shock to social and collective conscience. He said that no society approves of murder and is 'always' shocked by it. Explaining further, he said that all murders are brutal and therefore, this formulation does not provide any guidance on how to differentiate between murders. One of the judges in this group, who upheld a death sentence which ultimately resulted in an execution, commented on the difficulty of reducing the subjectivity involved within the doctrine stating that, throughout his judicial career, he had tried 'to think of ways in which his discretion could be guided (in the context of the death penalty), but was unable to'. He went on to say, "The problem is so rampant, so obvious, that it is difficult to find any consistency in the approach, and it is difficult to see rationale in awarding death sentence in one case and not awarding in another, more severe case."



“It can be safely said that the Bachan Singh threshold of rarest of rare cases has been most variedly and inconsistently applied by the various High Courts as also this court. At this point, we also wish to point out that the uncertainty in the law of capital sentencing has special consequence as the matter relates to death penalty: the gravest penalty arriving out of the exercise of extraordinarily wide sentencing discretion, which is irrevocable in nature. This extremely uneven application of Bachan Singh has given rise to a state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principle.”

—A judge who decided nearly 140 murder cases in 21 years as an appellate judge.

**THE RAREST OF
RARE PRINCIPLE
HAS NOT BEEN
FOLLOWED
UNIFORMLY OR
CONSISTENTLY. 47**

If in my mind I think that a case is rarest of rare, I can write many things to show that. If I think it is not, then I will write things to show it is not. That is the flaw of the formulation. You award death in cases where you think it should be given.

2. IDENTIFYING AGGRAVATING AND MITIGATING FACTORS

As discussed in the initial parts of this chapter, the first step within the sentencing framework laid down in *Bachan Singh*, is the identification of aggravating and mitigating factors. For this part of the study, we had conversations with judges about the factors they considered to be aggravating and mitigating. While the decision in *Bachan Singh* provides an indicative list of factors, it was interesting to note that judges tended to over-include certain factors in the aggravating list, and exclude certain others on the mitigation side. The over-inclusion of aggravating factors in the interviews involved giving undue weight to certain factors, and considering factors whose legal validity is doubtful. The exclusion of mitigating factors saw two strands emerge; first, the whole scale rejection of mitigation as a requirement in death penalty sentencing, and secondly, the wholesale rejection of certain mitigating factors.

BRUTALITY AND OTHER AGGRAVATING FACTORS

Brutality of the crime emerged as a dominant theme in discussions on aggravation. For 21 judges, the nature of the crime, or the manner of its commission, were not just aggravating factors, but bordered on being determinative of the question whether the accused deserved to be sentenced to death. Additionally, for an almost equal number, the brutality of the crime weighed very heavily in the balancing between aggravating and mitigating factors. One judge who decided nearly 130 murder cases as an appellate court judge said, “The heinous nature of the crime certainly colours our judgment.” Another judge who decided

four death penalty cases while in the Supreme Court said, “...(B)roadly what I feel is that the manner of commission of the crime... how brutally, how much collective conscience of the society, how much fear does it spread... I mean, those are very relevant factors.” A judge who confirmed four death sentences in Supreme Court said that, “Now, in each case there will be different factors. And I also go with this that the, you know, gruesome nature in which the crime has been committed, is also a factor which must be considered.”

The contrast with the framework laid down in *Bachan Singh* will be immediately evident here on two counts. Under the framework sentencing judges are expected to follow a much more comprehensive process, beyond examining the mere brutality of the crime. Yet, it is evident that when balancing aggravating and mitigating factors, the greatest weight is being awarded to the brutality of the crime. However, the framework in *Bachan Singh* requires sentencing judges to give an ‘expansive and liberal construction’ to the mitigating factors, and not aggravating factors.

Among the other aggravating factors that emerged, 10 judges felt that the nature of victims was an important consideration. Women, individuals with intellectual disability, minors, or national leaders, were cited as examples of the nature of victims being an aggravating factor. Pre-meditated killing was also seen as an aggravating factor (in line with *Bachan Singh*), and this comprised categories of offences like terrorism, acid attacks, contract killing, and assassination of political leaders.

DISAGREEMENT OVER **COLLECTIVE CONSCIENCE** IN DEATH PENALTY SENTENCING

The demands of 'collective conscience' was seen to be a relevant aggravating factor by 11 judges. It is important to mention here that 41 death sentences were confirmed by these 11 judges in cases where collective conscience was invoked whilst confirming death sentences. A judge who had confirmed three death sentences in 13 death penalty cases justified the use of collective conscience by saying, "It is a relevant consideration so far as punishment is concerned, because punishment has to be proportionate-in proportion to the nature of the offence committed and how do you judge it? It can only be judged with respect to the effect on the public, how public is affected by it, how the public feels about it, and what the public thinks about it."

It must be noted here that, there is an explicit prohibition in Bachan Singh on sentencing judges attempting to determine the demands of public opinion—

"Judges should not take upon themselves the responsibility of becoming oracles or spokesmen of public opinion. When judges...take upon themselves the responsibility of setting down social norms of conduct, there is every danger, despite their effort to make a rational guess of the notions of right and wrong prevailing in the community at large ... that they might write their own peculiar view or personal predilection into the law, sincerely mistaking that changeling for what they perceive to be the community ethic. The perception of 'community' standards or ethics may vary from judge to judge...judges have no divining rod to divine accurately the will of the people."⁴⁸



Reflecting the above sentiment in *Bachan Singh*, 15 judges rejected any legitimacy for 'collective conscience' within death penalty sentencing, by arguing that it reflected 'mob justice'. Former judges in this category felt that, using this factor in sentencing would amount to 'populism' that was irrational and injurious to the administration of criminal justice.

MITIGATING FACTORS

33 former judges identified 22 mitigating factors during the interviews in this study:

1. Poor socio-economic condition
2. Sudden provocation
3. Crime not very cruel:
 - Single person's murder
 - Only one family is affected and not entire society
4. Old age
5. First time offender
6. Pregnant woman
7. Young age
8. Inadequate legal representation
9. Low level of education/illiteracy
10. Poor socio-economic condition leading to pressure from the master
11. Remorse
12. Background/childhood of the accused
13. Has dependent family
14. No control over oneself
15. Circumstantial evidence
16. Opinion of society about the accused
17. Acts done for good of society
18. Acts done whilst in prison and prison reports
19. Mental illness
20. Schizophrenia
21. Hallucinations
22. Long period of incarceration



“AND THE STANDARD YOU GIVE IS SOCIAL CONSCIENCE. YOU SAY THAT YOU SEE, IF IT'S DISTRICT SESSIONS COURT, WHOSE CONSCIENCE? IS SOCIETY'S CONSCIENCE OF THE DISTRICT? IF IT'S HIGH COURT, IS SOCIETY'S CONSCIENCE OF THE STATE? IF IT'S SUPREME COURT, IS SOCIETY'S CONSCIENCE THE ENTIRE COUNTRY? WHOSE CONSCIENCE? HOW DO YOU JUDGE IT? IT IS VERY DIFFICULT.”
—FORMER CHIEF JUSTICE OF INDIA.

“Whether
an accused is
a dropout is
irrelevant. **All**
criminals are
like that.”

all

all

— Former Chairperson of
National Human Rights
Commission.

ALL

DOUBTING MITIGATION

Six former judges took the position that mitigation as a concept itself, was irrelevant. Reasons for this ranged between, mitigation being an ‘excuse’ for the crime, to mitigation being wholly irrelevant for certain crimes such as, the Delhi gang rape case, and the Nithari murders. It was argued that, circumstances of the criminal can never be an ‘excuse’ for the crime committed, and that there was no real reason to explore such circumstances. Viewing mitigation as an ‘excuse’, highlighted a widespread misconception that circumstances of the accused, presented during mitigation, are meant to be ‘excuses’. Mitigation is not meant to have any effect on the determination of guilt, but is instead meant to act as a tool to individualise punishment.

PROBABILITY OF REFORMATION AS A MITIGATING FACTOR

The judgment in Bachan Singh lists the ‘probability of reformation’ as one of the mitigating factors to be considered, and makes it clear that the obligation is on the State to establish that there is no such probability while asking for the death sentence. It is evident from the judgments of the Supreme Court since Bachan Singh, that there has been no consistency in considering this factor. Even when considering this factor judges have often sought to determine this issue by studying the brutality of the crime. Determining the probability of reformation by looking at the brutality of the crime defeats the purpose of this consideration, as at the very core of this idea is to decide if there is a probability of reforming the person who has committed the crime. However, 10 former judges, including two former Chief Justices of India, were of



the view that the probability of reformation was to be deduced from the brutality, and heinousness of the crime.

38 judges who supported reformation saw that it was an inherent part of penological theory. Only three of the 38 judges saw the ‘probability of reform’ as an abolitionist justification. The others believed that reformation should be a factor to be considered in death penalty cases, given the number of years it takes to finally decide them. Judges who supported this theory were also unconvinced about its content, and sceptical about its vagueness, whilst another judge said it was a “gut conclusion.” 14 judges also acknowledged that the duty on the prosecution to establish a lack of probability of reformation created in *Bachan Singh*, was never fulfilled.

However, 14 other former judges believed either that reformation generally had no role to play in penological theory, or it had no application to death penalty cases. One judge who decided nine death penalty cases in six years at the Supreme Court dismissed the entire notion, calling it “astrology”. Another judge who presided over 13 death penalty cases in five years at the Supreme Court, did not see the point of reformation in serious crimes stating, “...(P)eople out of habit go and do some small offences—he can be reformed... a man who is determined to kill innocent persons...how do you expect to reform him?... and reform him for what purpose and how...and what will happen after he’s reformed in the jail? Are we going to release him?...Life imprisonment... I mean life...is life, then what happens?” The reformatory exercise was dismissed by a judge who decided six death penalty cases over six years



“INDIA IS NOT A DEVELOPED SOCIETY WHERE YOU HAVE RECORD OF **PEOPLE, THEIR EDUCATION, BACKGROUND AND MENTAL HISTORY**; IT IS VERY WELL OF THE SUPREME COURT TO SAY THESE THINGS (ABOUT MITIGATING FACTORS) BUT AS FAR AS PRACTICAL REALITY IS CONCERNED, IT IS NOT POSSIBLE.”

—A judge who decided nearly 140 murder cases in 21 years as an appellate judge.

in the Supreme Court saying “*yeh sab toh kitaab mein likhne ki baat hai*” (these are all things to be written in books).


3. FACTORS INFLUENCING JUDICIAL DISCRETION IN DEATH PENALTY CASES

Whilst former judges held differing opinions on whether they had sufficient sentencing discretion in death penalty cases, they also spoke about the factors which influence the way in which discretion is exercised. The background of judges, and the unguided nature of discretion under the ‘rarest of rare’ doctrine emerged as major factors.

31 judges were of the view that the discretion available was significantly guided by the judge’s background. Different factors such as class, socio-cultural background, and religious beliefs were flagged as factors influencing the exercise of judicial discretion.

However, eight judges felt the unguided nature of the discretion under the ‘rarest of rare’, was the biggest factor that influenced the way in which judges decided death penalty cases. A judge who decided nearly 110 murder cases in the appellate court felt that, the insufficiency of ‘rarest of rare’ doctrine resulted in discretion being exercised in an unstructured, unfettered, and vague manner. He went on to describe it in following manner – “And this discretion, which is so vague and without being structured, it’s totally unfettered discretion. Where to choose...what should the yardstick be...the disparity is so huge! The Supreme Court is saying that there is no sound sentencing policy and





**“I THINK BRINGING ANY
AMOUNT OF PUBLIC
SENTIMENT INTO THE
ADMINISTRATION OF
JUSTICE, WHETHER IT IS
CRIMINAL JURISPRUDENCE
OR OTHERWISE, IS WHOLLY
UNJUSTIFIED... FINALLY,
IT SHOULD BE YOUR
JUDGMENT ON THE BASIS
OF THE LAW. IT’S THE
PAPERS BEFORE YOU...”**

—A FORMER JUDGE WHO
ALSO SERVED AS THE
ADVOCATE GENERAL OF
A STATE.

the position remains the same even today! Despite several Supreme Court judgments saying this.”

The reason for this unguided discretion, was identified by former judges as being the lack of a proper sentencing policy, and the fact that judges were not trained in a way that enabled them to undertake principled sentencing. A judge who spoke about the lack of a sentencing policy was against the death penalty for this very reason. This judge was of the view that, there was every possibility of committing a serious error without structured guidelines. As such, judges recommended that the legislature lay down sentencing guidelines as a possible solution to this problem. However, the limitations of sentencing guidelines also emerged during these interviews. Language, and its limitation according to a judge, would always make the guidelines subjective and therefore, would fail to serve the purpose. Some judges who agreed that the issue of unguided sentencing presented a crisis, however did not offer any potential solutions.

PUBLIC AND MEDIA PRESSURE

17 former judges believed that public and media pressure affected judges when they were deciding cases, whilst 17 others argued otherwise. The latter category said that whilst deciding on a case, the evidence presented was the only consideration that decided the outcome, and that it was Parliament who was affected by public and media pressure, not judges. It was also the opinion of three former judges, that it only affected trial and High Court judges, not Supreme Court judges. A judge who served as an appellate judge for 18 years spoke about how High Court judges are influenced by the opinion of the bar, and referred to it as “popularity syndrome”. A former Chief Justice of India



said that, trial court judges were more likely to succumb to public and media pressure because they were very young, and within the local vicinity of the crime. One judge who served as an appellate judge for 18 years referred to judges who are affected by public and media pressure as having “weaker minds”.

Those who felt that public and media pressure affected judges said that they were humans after all, and they had to also think about their families. According to these 17 judges, it took a very strong judge to ignore, and not succumb to the immense media and public pressure in certain cases. Judges expressed that in certain cases which were high profile, it was extremely difficult not to be affected by media and public pressure. The example of the Delhi December 16th gang rape case came up in 10 interviews when discussing this aspect. Another view was that the role of the media made judges extremely cautious while deciding the case.

4. DOES DEATH PENALTY SENTENCING IN INDIA SUFFER FROM ARBITRARINESS?

The exercise of judicial discretion in applying the ‘rarest of rare’ doctrine has received intense criticism from both within,⁴⁹ and outside of the judiciary. The concern has been that, the use of the doctrine for nearly four decades now, has demonstrated judicial arbitrariness. One concern of ours was, when and how does the exercise of judicial discretion become arbitrary? In our conversations with former judges, their response to this concern often used the argument that the facts and circumstances of each individual case differ, and therefore any differences amongst the outcomes of these cases should not really be a concern.



“SOME PEOPLE LIKE TO GIVE THE DEATH SENTENCE, OR SOME PEOPLE SAY NO, I HAVE NO RIGHT TO TAKE SOMEBODY’S LIFE. THAT AGAIN DEPENDS ON YOUR BACKGROUND, A JUDGE’S BACKGROUND.

WHEN WE BECOME JUDGES, WE COME WITH CERTAIN PREJUDICES IN OUR MIND, CERTAIN SENSE OF RIGHT AND WRONG. FOR EXAMPLE, THERE MIGHT BE A JAIN JUDGE WHO PRACTICES JAINISM AND FOR HIM PLAYING A ROLE IN KILLING ANYBODY WILL BE A NO-NO. IT’S HIS FEELING THAT I’LL BE COMMITTING A CRIME. THEY ARE SO SENSITIVE...

YOU KNOW, IT DEPENDS ON YOUR BACKGROUND ALSO, THERE ARE CERTAIN PEOPLE WHO TAKE A VERY DIFFERENT VIEW, THEY HAVE A VERY ROBUST COMMON SENSE, THEY HAVE A VERY DIFFERENT PERCEPTION OF SOCIETY...” —A JUDGE WHO SERVED IN THE APPELLATE COURTS FOR 18 YEARS.

**WHEN HE
INDICATED AN
INCLINATION TO
COMMUTE THE
DEATH SENTENCE, I
JUST DIDN'T WANT
TO HURT THE
SENTIMENTS OF A
PERSON.”**

“The lawyer who was defending the accused in the High Court came after the judgment and asked me—‘Everybody in the bar knew that you would give a death sentence. So how did you ultimately agree to a commutation?’ ‘Now that the judgment is delivered I can tell you the reason. It was because the chief justice is leaving the High Court in a few days and being elevated to the Supreme Court. I told the lawyer, when he indicated an inclination to commute the death sentence, I just didn’t want to hurt the sentiments of a person.”

*A judge who has confirmed death sentence
for 13 persons in the Supreme Court.*

However, there has been much writing which argues that death penalty sentencing in India is judge-centric, with similar cases resulting in very different outcomes.⁵⁰ If it were indeed so, then the necessary consequence would be that the death sentences were imposed not by an identifiable and consistent interpretation of legal principles, but instead by individual predilections of the judges. We saw two sets of responses emerge on whether death penalty sentencing in India is judge-centric. On the one hand, some responses took the position that the judge-centric nature of adjudication in this context was inevitable, and on the other, it was articulated that what appears to be judge-centric, was not really that, because each case was inevitably different in some way or another.

A judge who was of the view that nothing justified retention of the death penalty in India said - "How can it be anything but judge-centric? Judges have to come to a conclusion and it has to be judge-centric. Can you again have something like a mathematical formula? You can't do it, and that again will depend on his own personality." He was also of the view that what was being deemed as arbitrary, would be better described as a 'variant conclusion'. The fact that different judges have reached different conclusions, is due to their difference in perception, and could not be referred to as arbitrary. Arbitrariness, according to this judge, would constitute an instance where a judge convicted an individual even if there was no evidence to point towards that person's guilt. Another judge, who confirmed a full house of death sentences in the 4 cases he decided in the Supreme Court, was of the view that sentencing could be said to be arbitrary, only when a judge was not consistent with his/her behaviour. Thus, according to this judge, arbitrariness could not be measured with respect to another judge's behaviour.



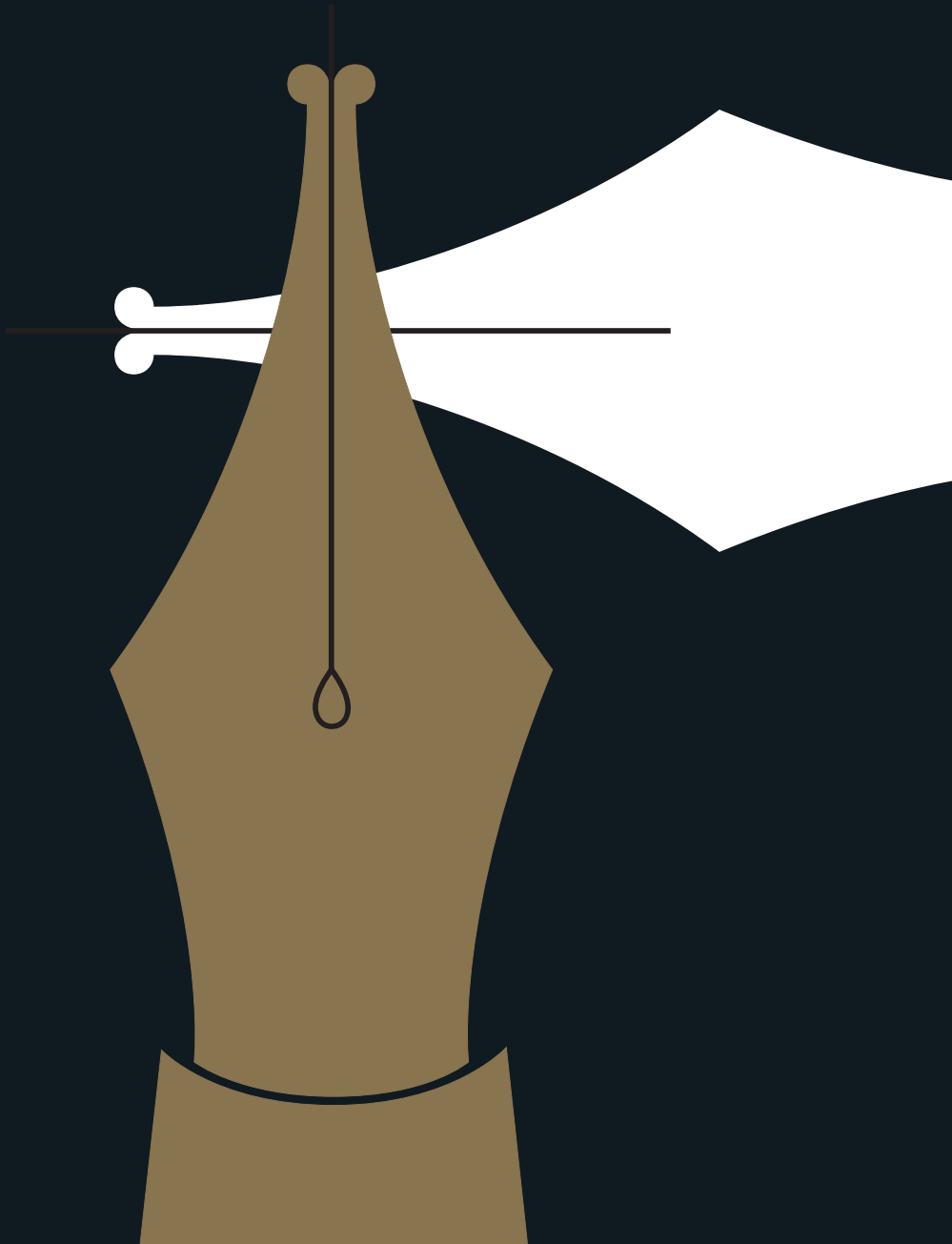
Another position viewed 'too much' judicial discretion in death penalty sentencing as being problematic for a very different reason. Three judges felt that, whilst a lot has been written about the adverse effect judicial discretion has on accused persons, too much judicial discretion for them was instead about taking away the effectiveness of punishment. This small group was of the view that there is a lot of space for judges to be 'too liberal' and to focus unduly on the circumstances of the criminal. According to them, punishment was not just about the accused, but was also about sending a message to the society. They believed that this approach required change if punishment was to ever lead to a crime-free society.



If X is hearing
my case I will
end up hanging
from a rope,
but if Y is hearing
it instead, I'll live.

“On the same considerations different people react differently. And that is the strongest reason why I am against the death penalty. I find it horrible and terrifying, the subjective element in death penalty sentencing. If X is hearing my case I will end up hanging from a rope, but if Y is hearing it instead, I'll live. That's one thing which is absolutely and completely unacceptable to me. What Amnesty International has said in the Lethal Lottery report describes it very well, really.”

—A JUDGE WHO DECIDED
NEARLY 90 MURDER CASES
IN APPELLATE COURTS.



CONCLUSION

The former judges participating in this study heard 208 death sentence cases between them in the Supreme Court, and confirmed 92 death sentences in 63 cases. Each of these cases would have involved a discussion about the sentencing framework developed in *Bachan Singh*, but the themes discussed in this chapter reveal considerable confusion about the “rarest of rare” formulation, as well as the notions of mitigating circumstances and sentencing discretion.

The understanding of ‘rarest of rare’ among the former judges, was often at variance with the original meaning assigned to it in *Bachan Singh*. The formulation as initially understood, collapsed easily into certain categories of crime, or was conflated with aggravating circumstances such as the brutality of the offence. There was a significant lack of clarity about the scope, weight, and content of mitigation, as well as whose duty it was to bring it before the court. Additionally, uncritically accepting the seemingly unfettered sentencing discretion has proven problematic, as there appears to be no way of distinguishing judicial discretion from plainly arbitrary judge-centric sentencing. This is particularly problematic given that over half of the judges interviewed, acknowledged that sentencing choices were influenced by their personal backgrounds. The impact of media coverage on sentencing outcomes too seems to be worrisome, as a majority of judges stated that it affects at least some judges at all levels within the judicial hierarchy. The repeated mention of some specific cases which caught



Circum- stantial Bias

“We use the stock phrase, ‘facts and circumstances’. You can never find absolute answers to these questions. World over it will be impossible to find an answer. Wherever you confer a power upon any individual or a system of deciding the rights and wrongs, there you will have to accept that the discretion will be used, of course objectivity has got to be there, you are not biased against anybody, but circumstantial bias you cannot possibly decipher.”

A JUDGE WHO DECIDED SIX DEATH PENALTY
CASES IN SUPREME COURT IN SIX YEARS.

the public eye due to the media coverage they received, was something that stood out from the interviews.

The sense of confidence in the sentencing process seems to be at odds with the responses on investigative, and trial processes, where they believed those processes to be compromised. Given that material for both conviction and sentencing originates within the same system, there appeared to be no principled basis for distinguishing between the two. Sentencing outcomes in death penalty cases therefore, seemed to be a result of little more than what circumstances most appealed to individual judges.

It is evident that the lack of familiarity with varied, and in-depth mitigation factors, is a function of flawed sentencing practices before judges. Evidently, lawyers do not produce sufficient mitigation information before judges, which fails to familiarise them with the various considerations that are relevant to sentencing. As is evident from



death penalty judgments across all courts, judges are often presented with very limited mitigation factors that lack any real depth. The stark reality that emerges is that, sentencing norms, and the quality of sentencing practices, fall far too short of the fair trial requirements which are established in other retentionist jurisdictions. Sentencing practices therefore need to be scrutinised with as much rigour and intensity, as the fair trial requirements during the guilt-determination phase require. Unfortunately, both the substantive law on sentencing, and sentencing practices, are in desperate need of widespread reform.



SENTENCING EXERCISE ANALYSIS CASE NO. 1

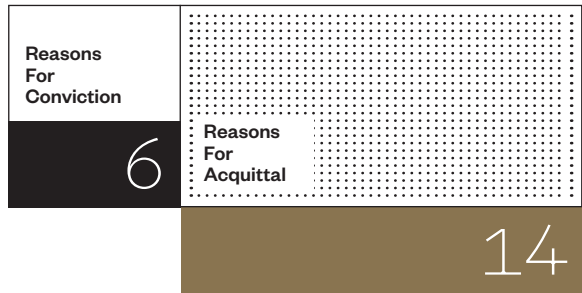
facts

Yusuf, aged 30, was convicted and sentenced to death by the trial court for a terror offence in which at least 30 people were killed and several others injured in a gun attack inside a shrine. He was accused of having been present at the time of the incident, of having conspired with others to commit the offence, arranged for funds, and providing shelter to the assailants. Yusuf was arrested nearly one year after the incident. He claims to have been tortured in custody. He also claims that the investigative authorities threatened to harm his family members if he did not confess. The confession he had made to the police was later retracted by him. Weapons were recovered at the behest of the accused. The only evidence linking him to the crime was the confession of an approver. The High Court has upheld his conviction and confirmed his death sentence

sentencing factors

Yusuf is a Class V school drop-out, and had run away from his home at the age of 11. His father was a daily wage labourer and his mother had died of an incurable disease when he was six years old. He had no one looking after him when he was growing up. He has a wife and three children and is the sole earning member of his family. He earned his living as an auto-rickshaw driver. At the trial stage, Yusuf's lawyer never met him to discuss or seek instructions in the case. His lawyer was not present to cross examine key prosecution witnesses. He also argued sentencing on the same day as conviction was pronounced.

total no. of
responses on
conviction &
acquittal 20



REASONS FOR CONVICTION	NO. OF JUDGES
No reason	1
Judges convict only where there is sufficient evidence	3
Heinous crime	2
REASONS FOR ACQUITTAL	NO. OF JUDGES
Evidence is extremely weak	6
Lawyer was not present	2
Retracted confession	2
The anti-terror offences under which he was convicted do not have any safeguards	1
Accused was denied fair trial	1
Arrested after one year	1
Coerced confession	1
His weapon, i.e., one gun not enough to kill 30 people	1
Approver's Evidence without any other evidence not sufficient	2

total no. of
responses on
sentencing 18



DEATH PENALTY IMPOSED	NO. OF JUDGES
Being poor is not a relevant mitigating circumstance for terror offence	6
30 years is mature age	2
No reason	2
Being indoctrinated by terror outfits is not a relevant factor	1
Sentencing factors are irrelevant	1
DEATH PENALTY NOT IMPOSED	NO. OF JUDGES
Did not receive proper legal assistance	4
There is no direct evidence, only circumstantial evidence	4
Lawyer not present to cross examine key prosecution witnesses	4
Same day sentencing	3
Case to be sent back to trial court	1
He had been indoctrinated by terror organisations	1
Retracted confession	1
Possibility of reform	1
No criminal history	1
No direct role in the offence	1

Pioneering work on causes of crime have identified stressors or strain like poverty to increase the likelihood to commit crime because of lack of opportunities. Thus, poverty in and of itself does not become a mitigating circumstance but is a factor that determines a person's interaction with the external factors. In *Mulla v. State of UP* ((2010) 3 SCC 508), the Supreme Court drew a link between socio economic backwardness and reformation. The Court held that while socio-economic depravity does not justify crime, it cannot be denied that 'in the real world', such factors lead persons to crime. Being raised in a socio-economically backward neighbourhood or family, such persons are more likely to face and normalise violence and a general lack of empathy in their formative years, and further are at a greater risk of physical, mental and sexual abuse before attaining adulthood. The quality of legal representation that an accused can afford also relies heavily on the socio-economic profile making it a significant sentencing factor. It was, therefore, interesting to see that eight judges considered inadequacy in legal representation as a factor to decide against the death sentence. However, six judges dismissed the fact of poverty without contextualising its impact on the convict's life.

Bifurcated trial enables the court to consider evidence and arguments on conviction and sentencing independently. Individualised sentencing process allows the sentencing court to consider circumstances surrounding not only the crime, but also the criminal. The importance of the same was acknowledged by three judges who saw same day sentencing as a relevant factor.

CASE NO. 2

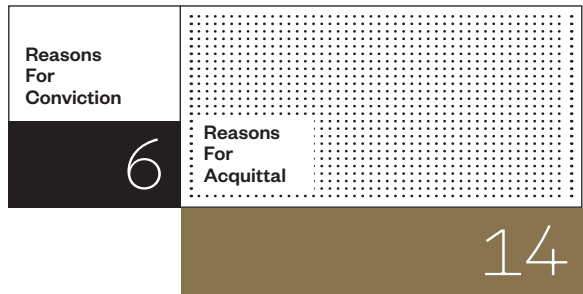
facts

Hari was convicted under section 302 of the IPC for murder of eight members of his family including five children. The motive alleged by the prosecution is dispute over joint family property. Several others in the village were also charged for murder as part of the same incident and tried, as they were seen with weapons such as a sword, axe, scythe etc. However, they were acquitted for lack of evidence. Only one scythe was recorded on which traces of human blood were found. No blood test was done nor were the clothes of the accused recovered or seized. Due to lack of adequate lighting, the witnesses who identified the accused did so only by his voice. The High Court upheld his conviction and confirmed his death sentence.

sentencing factors

There was history of tension between Hari and his brother for many years. Hari has been in prison for 10 years. Hari fondly remembers his childhood days spent with his brother and is tearful while narrating the same. He has also conveyed his desire to teach other inmates, to study and to help prison officials with their administrative work. The Superintendent has recommended that his sentence be commuted. Hari has been kept in single-cell solitary confinement ever since his arrest 10 years ago. He is kept alone in a cell and is allowed outside his cell only twice in a day for two hours each. During these four hours, he is allowed only to walk in a yard outside his cell. His only human interaction is with the prison guards and the lights in his cell are permanently switched on for security reasons.

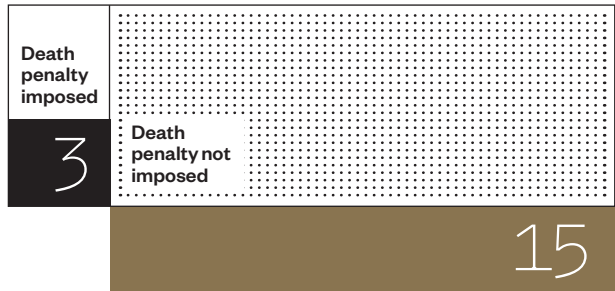
total no. of
responses on
conviction &
acquittal 20



REASONS FOR CONVICTION	NO. OF JUDGES
No reason	5
Gruesome crime for property	1

REASONS FOR ACQUITTAL	NO. OF JUDGES
Evidence is weak	9
Accused identified only by voice	5
Lack of adequate lighting	3
No blood test done	3
No recovery of clothes	2
When there are multiple accused, only one person cannot be convicted	1
No reason	1

total no. of
responses on
sentencing 18



DEATH PENALTY IMPOSED	NO. OF JUDGES
Being tense is not a relevant mitigating circumstance	1
Mental illness may be manipulated	1
Heinous crime	1
DEATH PENALTY NOT IMPOSED	NO. OF JUDGES
Mitigating circumstances are strong	4
His conduct in prison shows that he is reforming	4
Not a hardened criminal	4
Not enough evidence to prove his guilt	3
Motive pertaining to property	2
Already spent 10 years in solitary confinement in prison	2
Probability of reformation	2
Based on facts of the case	1
Has already suffered a lot	1

Probability of reformation is a very significant aspect of sentencing. A special duty is cast on the prosecution to lead evidence to show that the accused is beyond reformation. The probability of reformation has to necessarily be ruled out before the option of life imprisonment is unquestionably foreclosed. However, it is seen that the question of reformation is often linked to and inferred from the brutality of the crime as was also noted in chapter II. Sentencing factors presented in this case relate to the 10 years spent by the convict in prison including his desire to teach other inmates to study and help prison officials with their administrative work.

This information becomes significant while deciding the question of probability of reformation which is evident from the fact that four judges saw the convict's conduct in the prison as a relevant factor in deciding against the death penalty. Even three judges taking into account the convict not being a hardened criminal ties in with the probability of reformation being acknowledged by the judges. One judge has chosen to award the death sentence based on the heinous nature of crime which is an aggravating factor relating to the circumstance of the crime which is only one component of factors to be considered. Mitigating factors relating to the circumstances of the crime have to be considered with a liberal and expansive interpretation.

CASE NO. 3

facts

Babloo was convicted and sentenced to death by the trial court for the rape and murder of two sisters aged four and 10 years respectively. The bodies were recovered from a well at the instance of Babloo where he confessed before the police to having dumped them. Babloo was one of 4 accused in the case. However, the other three accused were given life sentences due to insufficient evidence linking them to the crime. The High Court has upheld Babloo's conviction and confirmed his death sentence.

sentencing factors

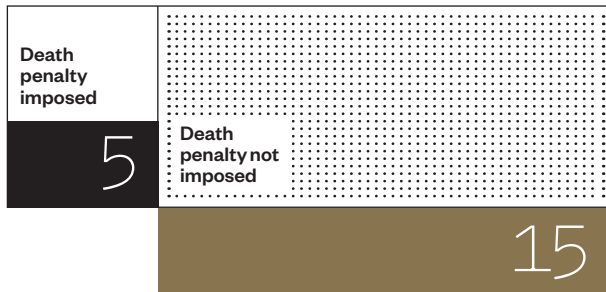
During Babloo's incarceration, which has so far spanned for 10 years, it has been found that he suffers from hallucinations. He is currently on antipsychotic medication consuming about 30 pills each day for various ailments including mental illness. Babloo has been previously charged with petty offences on three previous occasions. When Babloo committed the crime he was 19 years old. He has never been enrolled in a school as his father was an alcoholic and his mother was a labourer in the tea gardens who had to care for Babloo and six other siblings. There is evidence to show that he was sexually abused by members of his family as a child.

total no. of
responses on
conviction &
acquittal 20



REASONS FOR CONVICTION	NO. OF JUDGES
No reason	7
Premeditated crime	1
Heinous crime	3
REASONS FOR ACQUITTAL	NO. OF JUDGES
Confession to police is inadmissible evidence	1
Weak evidence	9
Others were not given similar punishment	2

total no. of
responses on
sentencing 20



DEATH PENALTY IMPOSED	NO. OF JUDGES
No hallucination at the time of commission of crime	2
Sentencing factors irrelevant	2
Heinous crime	2
Nature of victim	1

DEATH PENALTY NOT IMPOSED	NO. OF JUDGES
Psychotic medications and hallucinations	11
Weak evidence	4
Age	3
Because other accused got life imprisonment	3
Socio-economic condition	2
Time lapse	2
Disturbed childhood	2

The Supreme Court in *Shatrughan Chauhan v. Union of India* (January 2014) has acknowledged the growing trend to consider the mental health status of the prisoner before determining the appropriate punishment, making this an important mitigating factor to be considered. However, often questions of mental health are considered relevant only to determine the competence of the accused to stand trial and are rarely considered during the sentencing phase. Therefore, it was very interesting to see that 11 judges considered the accused being on psychotic medication and having hallucinations as a relevant factor in deciding against the death sentence. This also raises pertinent questions about the prisons being equipped with resources and skilled personnel to evaluate mental health of the prisoners and the lawyers being well informed about the subject matter to be able to present it before the court. Two judges have chosen to impose the death sentence because there were no hallucinations at the time of commission of crime. Mental health concerns are not only legally relevant at the competency stage in guilt determination phase of the trial but also is equally relevant (albeit different role) during the sentencing phase in death penalty cases. The fact of the convict not having hallucinations during the commission of crime should not have any bearing upon it being a relevant factor during sentencing.

OVERALL OBSERVATION

It was encouraging to see judges consider personal factors like age, socio-economic profile and childhood while deciding against imposing the death sentence in this case. We rarely see these factors being presented as a part of the life history of the accused as was done in this exercise through the sentencing factors. Judges willingness to appreciate these personal factors emerged as a positive sign and reiterates the onus on defence lawyers to bring these forward.

Majority of the judges were clearly willing to consider sentencing factors that were presented to them in each case. The fact that we rarely see this happening in cases decided by our courts begs the question about such materials being placed before the court by the lawyers. Investigating the personal and social history of the accused to be presented as relevant sentencing factors is an intensive exercise that involves significant investment of time and resources. Discussions surrounding the requirements of legal representation in death penalty cases has completely neglected this requirement in death penalty sentencing. The shallow discussions on sentencing in judgments across different levels of the judiciary is a clear indication of this failure within the criminal justice system.

3. JUDICIAL ATTITUDES TOWARDS



THE DEATH PENALTY



INTRODUCTION

The first chapter discussed the grave concerns that former judges expressed about the criminal justice system, while the second chapter presented the confused state of death penalty sentencing in India. Given the views that emerged from those chapters, it is important to consider judicial attitudes towards the death penalty, and the underlying basis of those attitudes. The effort in this chapter has been to understand the judicial perception of the death penalty in terms of its purpose, administration, and its future in our society. The social conversation on the death penalty is an evolving one, and therefore our interest was in capturing the perspectives of judges on different aspects of the death penalty, rather than only recording their personal positions. The dominant perspectives that emerged from these interviews help us understand the state of the death penalty conversation in courts which goes beyond the text of judicial pronouncements. The background considerations discussed throughout this chapter, will perhaps also begin to explain the confused state of death penalty sentencing in India. It is evident that the approach of the law on death penalty sentencing, and the dominant perspectives amongst the former judges, are significantly at odds with one another. The formal requirements of death penalty sentencing make it very difficult to impose the punishment, yet these requirements have been consistently chipped away at by courts that have not applied them with full rigour. These conversations with former judges reveal a significant dissonance between the attitudes of former judges to the death penalty, and the demands of the law on death penalty sentencing.

This chapter in the first half tracks the abolitionist and retentionist justifications provided by former judges (irrespective of their position on the death penalty). It was important to adopt this approach when exploring abolitionist justifications with retentionist judges, and vice versa, as it enabled us to fully grasp, and make sense of the movement between these two positions. The second half of this chapter documents the views of judges on recent developments that take small steps in moving away from the death penalty. In these parts, the reactions of former judges to the 262nd Report of the Law Commission of India 2015, and the new sentencing powers crafted in *Union of India v. Sriharan* (December 2015) are discussed.

ABOLITIONIST AND RETENTIONIST JUSTIFICATIONS

Irrespective of their personal positions, all former judges were asked justifications for both abolishing, and retaining the death penalty in India. Cumulatively, 29 former judges identified possible abolitionist justifications in the Indian context, and 39 identified retentionist justifications. Whilst 17 former judges highlighted justifications in both categories, 14 explicitly stated that they saw no reasons whatsoever for abolishing the death penalty in India. Three judges explicitly stated the reverse, and said they saw no reason for retaining it.

Whilst we did not explicitly enquire the judges' position on the death penalty, the conversations did reveal their standings, and from that it emerged that we had 44 retentionists, and 11 abolitionists within our sample. The 11 abolitionists heard 61 death penalty cases between them in the Supreme Court, and confirmed 19 death sentences, whilst the 44 retentionist judges confirmed 86 death sentences in 163 death sentence appeals.

**NOBODY IS HAPPY
IN IMPOSING DEATH
SENTENCE OR
CONFIRMING IT,**

**BUT ONE IS
CONSTRAINED.**

— A judge who decided
four death penalty cases
in the Supreme Court

29 former judges, comprising 11 abolitionists, and 18 retentionists, provided possible justifications for abolishing the death penalty in India. These 29 former judges had decided 124 death penalty cases, and confirmed 53 death sentences between them.

1. THE POSSIBILITY OF ERROR

The nature of India's criminal justice system, and the possibility of error therein, was one of the abolitionist justifications identified by the former judges, whose reasoning was founded on the belief that there were serious problems associated with the investigation and trial processes. An abolitionist judge who confirmed three death sentences said "*...there will be too many uncertainties in investigation and trial. You may have imposed death sentence on someone who is not really guilty! How can the court be hundred percent sure that they are convicting real culprits?*". Furthermore, a former Chief Justice of India expressed his discomfort giving the death penalty, acknowledging that torture during investigation increased the possibility of false evidence. A retentionist judge

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ABOLITIONIST JUSTIFICATIONS

Of the 39 judges who gave retentionist justifications, four were abolitionists and the remaining 35 were retentionists. The justifications were as follows:

**1. SERVES VITAL
PENOLOGICAL PURPOSES**

Deterrence emerged as the most popular retentionist justification, but there was considerable variation in the way in which deterrence was understood. Retribution, both as revenge and just deserts, as a retentionist justification also found acceptance amongst the former judges, but to a far less extent than deterrence.

Penological purposes were mentioned as retentionist justifications by a total of 23 judges, including 22 retentionists, and one abolitionist judge. Of these 23, all of them invoked deterrence as a penological justification for retaining the death penalty.

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RETENTIONIST JUSTIFICATIONS

also acknowledged the ‘possibility of error’ as a justification for abolishing the death penalty, but ultimately believed that the deterrent effect of the death penalty justified its retention.

The death penalty in a criminal justice system like India’s, appeared to impose an extremely heavy moral burden on judges. A former chairperson of the Law Commission of India even went as far as to say that, the strain judges were put under due to this punishment was so immense, that the death penalty should be abolished to ease the burden on the judges.

However, attention must be drawn once again to the finding in Chapter I, which identified that 43 judges acknowledged the possibility of error while discussing the general state of India’s criminal justice system, with a particular focus on the investigative and trial processes. Of these 43 judges, however, a very small number identified it as a relevant factor when reflecting on the viability of the death penalty in India.

Four judges also mentioned retribution along with deterrence as a retentionist penological justification.

A. DETERRENCE

Broadly, the deterrence theory states that imposition of the penalty deters offenders and other potential offenders from committing the same act in the future.⁵⁸ When former judges spoke of the deterrent value of death penalty, significant differences emerged in their understanding of it. The first of the two main strands that emerged viewed the fear of death achieving deterrence. Judges in this category took the position that, the qualitative nature of the death penalty distinguished it from any other punishment, and that the fear of death was an effective deterrent. A judge who has confirmed three death sentences in his four year tenure as a Supreme Court

**“HE LEFT BEHIND A
SUICIDE NOTE SAYING THAT—
TODAY WHILE READING THE
RECORDS, I REALIZED THAT I
HAVE MADE A MISTAKE”**

“I remember a sessions judge who gave the death penalty, after which the convict was executed. He then called for the records, read it, had dinner in the night, went to bed, put a gun to his head and shot himself. He left behind a suicide note saying that—today while reading the records, I realized that I have made a mistake”

—A judge who served as the Chief Justice of two High Courts

**“YOU HAVE HARMED
SOMEONE IN SUCH
A BRUTAL, WRONG
WAY THAT PERHAPS
THIS CAN BE YOUR
ONLY PUNISHMENT.”**

“Perhaps I do have this instinct of retribution; that you have done...you have harmed someone in such a brutal, wrong way that perhaps this can be your only punishment. I won't give death sentence very easily, normally. But I admit that the instinct of retribution is not completely extinguished in my own psyche also.”

—A judge who upheld the death sentence in one case during his tenure in the Supreme Court

2. ARBITRARINESS

The argument that death penalty sentencing in India suffers from arbitrariness was strongly articulated amongst abolitionist justifications. Former judges citing this as an abolitionist justification, were concerned about the lack of any principled gradation between life imprisonment and the death sentence. As a result, they viewed death penalty sentencing as having become judge-centric, with no meaningful or real guidance on the exercise of judicial discretion in this context.⁵¹

Acknowledging this, the Supreme Court has said that “the truth of the matter is that the question of death penalty is not free from subjective element, and the confirmation of death sentence or its commutation by this court depends a good deal on the personal predilection of the judges constituting the bench”.⁵² However, some former judges were of the view that arbitrariness in this context was not a concern, because different judicial minds are inevitably going to reach different conclusions when exercising their discretion. Such an understanding of judicial discretion was articulated by a former judge when he said—“Article 14

judge, remarked “*What is the greatest fear of every human being?...Death. Everything else you can swallow, but death you cannot.*”

However, a far larger number of judges believed that the deterrent value of the death penalty flows from a general aversion to punishment, and not any particular deterrent value attached to the death penalty. A judge who adjudicated three death penalty cases during a four year tenure in the Supreme Court, said the death penalty in its form and application seemed like a “scarecrow”. When probed further on the basis for the deterrence argument, it emerged that former judges relied significantly on their ‘belief’ that deterrence in this context worked. Judges dismissed the need for statistics to prove the deterrent effect of the death penalty by stating that it was not a “game of numbers”, and that statistics from

**“THE MAIN REASON IS IT
IS VERY, VERY DIFFICULT
TO JUDGE IN WHICH
CASE DEATH PENALTY
SHOULD BE GIVEN”**

“The main reason is it is very, very difficult to judge...in which case death penalty should be given or in which case death penalty should not be given, right? If you look at the case laws, sentencing in death penalty cases has become confusing”

—A judge who adjudicated 11 death penalty cases in the Supreme Court

**“ACCORDING TO
ME, IT WOULD BE
TOO DANGEROUS
TO ABOLISH THE
DEATH PENALTY.”**

“Death penalty has to be retained because the law is still there. It is up to the Parliament to take it away. But according to me, it would be too dangerous to abolish the death penalty.

As I say, there are many kinds of criminals, some of them are bloodthirsty and cannot be reformed. If death penalty is abolished, they will be a menace to the society.”

—A judge who has been the chairperson of a State Human Rights Commission

(right to equality), all that is there but you cannot just keep it on balance.... Discretion is there, and it has to be there. Otherwise computerisation would have been the best thing. Feed it and get the death sentence". Former judges on both sides of the 'arbitrariness v. discretion' debate agreed that there must be specialist criminal law judges hearing death sentence cases to reduce arbitrariness.

3. NO PENOLOGICAL PURPOSE

Among those holding the position that the death penalty served no penological purpose, was a former judge who had decided nearly 200 murder cases in the appellate courts over his judicial career which spanned over two decades. However, he was also of the opinion that abolition of the death penalty would be unnecessary, as the need of the hour was ensuring that judges strictly comply with the requirements of Bachan Singh. He felt that such strict compliance would make it extremely difficult for any judge following the law to impose the death sentence. Another judge who confirmed one death sentence in the Supreme Court felt that the death penalty

western countries could not be applied to India.⁵⁹

The responses also left several questions unanswered about the knowledge and rationality fallacies which have considerably weakened the deterrence theory. The knowledge fallacy is the assumption that, individuals know the specific legal penalties applicable to them if they are to commit a crime.⁶⁰ The rationality fallacy assumes that at the time of the incident, the offender was making rational choices by undertaking a cost-benefit analysis.⁶¹ However, it has been observed that offenders act under a range of emotions such as guilt, anger, shame, fear, helplessness, or their behaviour was influenced by a spectrum of mental health concerns (even if not touching upon the insanity defence).⁶² Thus, the assumptions necessary to generate clear predictions of rational choice models do not always hold.⁶³

served no purpose. He spoke about the need for the Indian society to become more rational and civilized to understand the same, but also considered whether the instinct of retribution within the Indian psyche made it difficult for us as a society to do so, and to identify that the death penalty was incapable of fulfilling any legitimate purpose. Other judges have cited the claim for abolition of the death penalty in other jurisdictions where it has not lead to an increase in crime rates, as a justification of the position that the death penalty serves no penological purpose.

4. THE PROBABILITY OF REFORMATION

For some former judges, the impossibility of ruling out the probability of reformation, was a reason to consider abolition of the death penalty. They believed that every individual had the potential to be reformed, and therefore, felt it would be unjust to extinguish life. However, none of the retentionist judges identified the possibility of reformation as having the potential to justify abolition of the death penalty. A former chairperson of the National Human Rights Commission (former Chief Justice

B. RETRIBUTION

Formulated broadly, retribution is harm imposed on those who have intentionally harmed others as a means of holding them responsible. Retributive theory takes two distinct forms: *lex talionis* (retribution as revenge)⁶⁴ and just deserts (principle of proportionality in determining punishment)⁶⁵. Whilst very few judges cited retribution as a retentionist justification, both strands of the retributive theory found support within this small group. Both strands of the retributive theory come with their own critiques. Apart from having been rejected by the Supreme Court⁶⁶, *lex talionis* is deemed barbaric and inhumane, because it ends up combining private vengeance and punishment through the criminal justice system⁶⁷. A critique of the just deserts principle is that it has calibration problems. It raises these questions: when we slide a scale of

of India) stressed the relevance of reformation by remarking - "Who is perfect in this world? We all make mistakes. Many major mistakes, minor mistakes..... If that is so, I don't know why people think that individuals cannot be reformed. See, you must in universities educate these people." However, those former judges with the view that the probability of reformation is irrelevant, spoke about the magnitude of certain crimes precluding any real consideration of reformation. This negation of reformation on the basis of the crime arises throughout judicial decisions, and it does so because of the confusion that surrounds the role reformation plays in criminal law. Determining the probability of reformation by looking at the brutality of the crime, defeats the purpose of this consideration, as at the very core of this idea, is the determination of the probability of reforming a person who has committed the crime, and it should therefore be about the individual more than it is the crime. Linking probability of reformation and brutality of the crime has already received detailed consideration in Chapter II.⁵⁴

punishments against a scale of crimes, how do we know where to stop, that is, how do we know how much punishment fits a given degree of accountability⁶⁸?

“Perhaps I do have this instinct of retribution; that you have done...you have harmed someone in such a brutal, wrong way that perhaps this can be your only punishment. I won’t give death sentence very easily, normally. But I admit that the instinct of retribution is not completely extinguished in my own psyche also.” - A judge who upheld the death sentence in one case during his tenure in the Supreme Court.

2. GRAVITY AND NATURE OF OFFENCE

Only retentionist judges mentioned the gravity and the nature of an offence as a retentionist justification. Former judges in this category believed that, when the offence of a serious nature involves excep-

5. NOBODY CAN TAKE LIFE

Along with the ‘possibility of error’ and ‘arbitrariness’, the argument that nobody can take the life of a human being for any reason, was also among the common abolitionist justifications identified. The former judges in this category held that, the sanctity of life must be respected, and that the State cannot take away life through the form of a punishment. This argument believes that the act of taking a life is inherently cruel, and that the loss of life caused by the offender cannot be the reason for the State taking away the life of an offender. The terms of this argument urge us to abandon utilitarian reasoning for taking a life, and instead encourage us to respect the inherent value of every individual’s life.

6. THE MODE OF EXECUTION IS CRUEL

A few judges also identified death by hanging as a cruel mode of execution. While the Supreme Court did uphold the constitutionality of death by hanging in 1983⁵⁵, there have been persistent concerns about the cruelty inflicted through this method of execution. The cruelty largely concerns

tional brutality, not imposing the death sentence would be going against the oath of office, and would subsequently amount to a failure in protecting society. Judges justifying the retention of the death penalty due to the gravity and brutality of certain offences, emerged to be problematic, because each former judge in this category had their own yardstick by which they measured the gravity and brutality of crimes that necessitated the death penalty in their view. This justification did not seem to be driven by any criminal law policy, or penological theory, but largely by subjective, personal predilections instead.

3. INDIAN SOCIETY NEEDS THE DEATH PENALTY

Former judges in this category felt that peculiar conditions of Indian society required the retention of the death penalty.

**“THERE IS A LURKING
CONCLUSION AS
REGARDS THE
CAPITAL SENTENCING
SYSTEM BECOMING
CONSTITUTIONALLY
ARBITRARY.”**

“In the ultimate analysis it serves as an alarm bell because if capital sentences cannot be rationally distinguished from a significant number of cases where the result was a life sentence, it is more than an acknowledgement of an imperfect sentencing system. In a capital sentencing system if this happens with some frequency, there is a lurking conclusion as regards the capital sentencing system becoming constitutionally arbitrary.”⁵³

**“THE DEATH
PENALTY
TERROR IS A
BIG FACTOR IN
CONTAINING
CRIMINAL
TENDENCIES
OF HUMAN
BEINGS.”**

“India lives in rural areas. After a trial, if a person is convicted and given the death penalty, it creates a sensation in the entire village. People talk. That itself creates some kind of terror in the village and is a big factor in containing criminal tendencies of human beings.”

—A judge who has decided two death penalty cases in the Supreme Court

itself with the fact that death by hanging often involves death by asphyxiation which is a long and painful process that occurs when hangings go wrong, rather than snapping of the neck.⁵⁶ The Supreme Court acknowledged this concern in a landmark judgment in January 2014, where they required that post-mortems take place after all executions, and they must all document whether the cause of death was dislocation of the cervical vertebrae, or strangulation.⁵⁷ The challenge really is to comprehend the considerations which drive the death penalty in a system that is plagued with torture, fabricated evidence, and wrongful convictions. As the harshest punishment in our legal system, the discussions and positions on the death penalty must feel the utmost impact of these worrying realities. It is the extreme ends of our criminal justice system, that need to be tempered by the grim reality that the former judges brought out so powerfully in Chapter I. Ultimately, the fact that their concerns about the criminal justice systems, having not migrated on their discussions about their position on the death penalty, is indicative of the terms on which multiple and competing interests get balanced.

An abolitionist judge citing this as a retentionist justification felt that the “Indian psyche” would not be suited for abolition at this moment in time. A former Chief Justice of India said, it will take at least another 50 years before abolition is even contemplated by Indian society. The response to abolition in other countries, was that each country is uniquely placed, and that abolition elsewhere did not mean that India should automatically follow suit.⁶⁹

4. THE DEATH PENALTY HAS LEGAL SANCTION IN INDIA

A small group of former judges comprising both abolitionist and retentionist judges, felt that abolition or retention of the death penalty was ultimately the prerogative of elected representatives, and for as long as it is on the books, judges have to apply it in appropriate cases.

JUDICIAL OPINION ON THE 262ND LAW COMMISSION REPORT AND THE TERROR EXCEPTION

The Law Commission of India in its 262nd Report 2015, recommended that India should move towards complete abolition of the death penalty, but as a first step that it be done away with for all crimes except terrorism. 28 judges responded to our questions on the Law Commission's recommendation. Five former judges agreed with the Law Commission of India, but 23 of them disagreed that the death penalty be abolished for all offences except terror cases.⁷⁰ Among those 23, 17 provided specific (but varied) justifications for their disagreement:

EXCEPTION TOO NARROW

11 judges believed that the exception was too narrow, and they approached this disagreement from different perspectives. One school of thought was that actions which were labeled as 'terrorism' were unclear, vague, and arbitrary, whilst a second school of thought was that it was wrong to exclude other crimes such as gang-rape, serial killings, and contract murders, which supported Justice Usha Mehra's dissent in the Law Commission report. Among the 11 judges, there was a view that the 'rarest of rare' doctrine was sufficient, and subsequently there was no reason to limit the death penalty to a specific category of crimes. In a variation of the same argument, some former judges felt that there was no reason for terror exceptionalism in this context, because it was an offence no different from other offences which involved the death sentence.


MARTYRDOM IS THE OBJECTIVE

Three of the 23 judges who disagreed with the recommendations, were of the view that for terrorists, the death sentence had no deterrent value, as they are willing to give up their lives to seek martyrdom. These former judges felt that executing terrorists would only help fulfil their objectives.

INDIA IS NOT READY FOR ABOLITION

Only one judge offered this justification for rejecting the recommendations, stating that India was uniquely situated and therefore, could not abolish the death penalty even under the auspices of the Law Commission's recommen-

**“HE’S NOT GOING TO
BECOME A MARTYR, HE
WILL SUFFER.”**



“See, a terrorist welcomes it. Therefore, to say that only in the terrorist instances, death sentence should be imposed, that is a meaningless exercise. In fact, if you put him into life imprisonment, that may be a greater suffering for him. He’s not going to become a martyr, he will suffer.” —**A former Chief Justice of India**

dations. This judge disagreed with the terror exception, explaining that, “the anxiety appears to be to catch with the trend and that 140 nations have already done it.”

EXCEPTION WILL CONTINUE TO EXPAND

Two judges criticised the terror exception, viewing it as the thin end of the wedge. Once an exception is carved out, they believed it would lead to a continuous and a never-ending process. The exception for terrorism particularly, was deemed to be a populist move, and somewhat alarming given that there was no definition of sentencing. It was stated that in cases of terrorism, particularly under special laws, one had to be careful of convicting since the safeguards available under general criminal law were diluted.

The five judges agreeing with the Law Commission’s course of action were retentionist judges, who believed in retention of death penalty only for terror offences. These judges regard terrorism as a special category of offence, because they feel it cannot be equated to ‘commonplace murder’ due to the potential of such offences to ‘destabilise’ the whole country.

JUDICIAL OPINION ON THE SRIHARAN SENTENCING FORMULATION

Following the discussions on the death penalty, we enquired from the judges their opinion on the sentencing formulation in *Union of India v. V. Sriharan*⁷¹. A five judge constitutional bench in the Supreme Court held that it is open to the appellate courts to impose a life sentence for the rest of the prisoner’s natural life without any possibility of review, or parole, in cases where death is one of the statutorily prescribed punishments. Through this judgment, the Supreme Court held that the State government’s power of remission under the Criminal Procedure Code, could be ousted while determining the sentence in an appellate court. Two dissenting judges in the case found the formulation to be a violation of the separation of powers. The Sriharan sentencing formulation is supposed to be a middle ground between death and a life sentence (what is often erroneously believed to be automatic release after 14 years) with the rampant use of remission powers by State governments. Pardon powers of the

Governor and President under Article 72 and 161 of the Constitution remain untouched. The responses from judges on this sentencing formulation can be classified into three categories.

THE SRIHARAN SENTENCING FORMULATION IS LEGALLY VALID

28 judges supported this form of punishment while eight others took the position that such a punishment was invalid. The support for the punishment can be categorised into the following:

1 Penological purpose

Support for this form of punishment ranged from its incapacitating effect, to its ability to meet the penological goals of deterrence, protection of society, and retribution. Reflecting on this punishment, a judge with 15 years of experience in the appellate courts, and subsequently a member of the National Human Rights Commission, felt that he did not see any additional penological purpose of the death penalty.

2 Middle ground between life imprisonment and death penalty

Nine of the 28 judges saw practical value in adopting this punishment because it successfully bridged the chasm between a life sentence (as previously practiced) and the death sentence.

3 Sriharan sentencing formulation prevents misuse of power of remission, and does not take away the constitutional power of the President or Governor

Five judges who supported this form of punishment did so because they were of the view that the executive misused its power of remission, and this form of punishment was a good way to check that practice. Another five judges

**“THERE IS NO
AUTOMATIC RELEASE
AT THE END OF 14
YEARS, AND THE PANIC
ON THIS COUNT IS
EXAGGERATED.”**

“Alterations of sentence are possible under the Criminal Procedure Code 1973, and various State prison manuals. Normal remission is provided as a function of the number of months spent in prison without adverse disciplinary remarks, and special remission for good work or behaviour. A prisoner who was sentenced to death, but subsequently commuted to life imprisonment, must spend 14 actual years in prison and adding remission earned, a total of 20 years. Even after that, release is not automatic, but is subject to approval by the government based on the recommendations of various police, district and jail officials. Therefore, there is no automatic release at the end of 14 years, and the panic on this count is exaggerated.”

considered it a legally valid punishment because it did not take away from the constitutional clemency powers of the President or the Governor.

4 Sriharan formulation as an alternative to the death penalty

It becomes pertinent to mention here that nine judges who supported this punishment saw it as an alternative to the death penalty. However, three of these were of the view that the Sriharan formulation would be a good alternative to the death penalty only once the death penalty is removed from the statute books. One judge who decided nearly 200 murder cases as an appellate judge, and eight death penalty cases in the Supreme Court, was of the view that if Bachan Singh along with this possibility of imposing life imprisonment without remission was to be strictly followed, then it would be as good as abolition.

As many as 11 judges did not consider the punishment as a sufficient alternative to the death penalty, as it was not deemed to be a good enough deterrent and retributive substitute. Two judges saw the economic costs involved in keeping persons in prisons for the rest of their life as a concern, whilst others argued that the punishment could also not be considered as an alternative to the death penalty because it completely foreclosed the scope for reformation. Similarly, these concerns were expressed by the dissenting judges in the Sriharan judgments, holding that this sentence would mean that the prisoner would be condemned to live in the prison until their last breath without any sort of hope to be released. One judge found it to be more ‘atrocious’ than the death penalty, henceforth they refused to see it as an adequate alternative.

THE SRIHARAN SENTENCING FORMULATION IS INVALID
EIGHT JUDGES WHO TOOK THE VIEW THAT SUCH A
PUNISHMENT WAS ILLEGAL, PROVIDED TWO LINES
OF REASONING:

1 Violation of fundamental rights in the Constitution and international law

Three former judges took this position, with a former chairperson of a State Human Rights Commission explaining that it would cause a difference in treatment amongst convicted persons whose offences were determined not to fall

14 YEARS



DEATH

“If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years, and the other death, the court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable, and proper course, would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the court, i.e., **the vast hiatus between 14 years' imprisonment and death.**”⁷²

within 'rarest of rare'. Some of them would get life imprisonment without release/parole, whilst others would get life imprisonment simpliciter. The punishment was also considered invalid as it militated against criminal jurisprudence for non-capital sentencing which centered around the notion of reformation. A judge who acquitted all the appellants in the only death penalty case he decided in the Supreme Court, saw the punishment to be a violation of the prisoner's human rights, as has been recognised in foreign jurisdictions,⁷³ and throughout international treaties.⁷⁴

2 The punishment fell foul of the separation of powers doctrine

Five judges viewed the punishment as a violation of the separation of powers between the executive, and the judiciary. They argued it was the judiciary's role to pronounce guilt and hand out a sentence, but it was the executive's prerogative to see if the sentence was being properly served out, and to encourage reformation and/or good behaviour through remission. However, four judges who supported this form of punishment took the position that it did not violate the separation of powers. One such former judge said, "If you can give longer sentence, you can give a shorter sentence also, unless it goes below the minimum provided." Another judge who has adjudicated five death penalty cases was of the view that it was in fact the power of remission given to the executive in the Criminal Procedure Code, that violated the separation of powers, not the Sriharan sentencing formulation.

CONCLUSION

It is interesting that a significant number of retentionist judges identified abolitionist reasoning. It demonstrates the inescapable force of certain abolitionist arguments, but stark in its complete absence was any acknowledgment of the disparate impact of the death penalty on the poor and marginalised sections of Indian society. In a criminal justice system that is corrupt and violent at multiple levels, the burden on vulnerable sections of society is immense, and it is only accentuated within the death penalty context. As such, it is peculiar as to why this aspect of the death penalty in India did not find any real favour amongst former judges, especially those that were abolitionist. The disproportionate representation of the poor, illiterate, and socially marginalised within the death penalty context is abundantly clear in India and other retentionist countries across the globe.

The contrast between the discussions on the criminal justice system in Chapter I, and the confidence that seems to exist in administering the death penalty in the very same system is striking. The role of harsh punishments within a crisis-ridden criminal justice system is a complex one, and perhaps the new formulation in Sriharan could ameliorate some of this complexity. Undoubtedly, the crafting of a new sentencing power in Sriharan will impact death penalty sentencing in India, and it will be interesting to observe if sentencing judges in appellate courts discharge an additional burden of establishing the insufficiency of the Sriharan punishment, before imposing the death sentence.

The challenge really is to comprehend the considerations which drive the death penalty in a system that is plagued with torture, fabricated evidence, and wrongful convictions. As the harshest punishment in our legal system, the discussions and positions on the death penalty must feel the utmost impact of

these worrying realities. It is the extreme ends of our criminal justice system, that need to be tempered by the grim reality that the former judges brought out so powerfully in Chapter I. Ultimately, the fact that their concerns about the criminal justice system has not migrated to their discussion on the death penalty is indicative of the terms on which multiple competing interests get balanced.

CONCLUSION



Among the starkest outcomes of this study is the negligible impact of the scepticism concerning the criminal justice system on the support for the death penalty. While the arguments in support of the death penalty in abstraction may seem attractive, the normative coherence of the arguments in favour of the death penalty begins to thin when applied to the realities of the system. This near inexplicable “double-speak”, on the one hand explicitly acknowledging the crisis within India’s criminal justice system, and on the other articulating such strong support for the death penalty, creates a peculiar situation where the death penalty starts to appear as a perfect distraction from the criminal justice system’s chronic malaise. Added to this, the utter confusion surrounding the meaning of ‘rarest of rare’, and the approach towards judicial discretion, makes the administration of the death penalty a cruel game of chance. It is then perhaps time to confront ourselves, and admit that it is a retributive instinct in response to ‘brutality’ that is driving the legal discourse on death penalty, rather than considerations of deterrence.

NOTES

1. George H Gadbois Jr, 'Indian Judicial Behaviour' (1970) 5 Economic and Political Weekly 149, 166.
2. Only Supreme Court criminal appeals have been accounted for while calculating the number of death penalty cases adjudicated by the judges.
3. See Constitution of India 1950, Articles 20(3), 22; Indian Evidence Act 1872, Sections 24-26; Code of Criminal Procedure Code 1973, Sections 41B, 41D, 50A, 55A, 60A, and 162; Nandini Satpathy v. PL Dani (1978) SC 1025; Joginder Kumar v. State of UP and Ors. AIR (1994) SC 1349; DK Basu v. State of West Bengal AIR (1997) SC 610.
4. See National Law University, Delhi, Death Penalty India Report (NLU Delhi Press 2016); Asian Centre for Human Rights, Torture in India 2011 (New Delhi 2011); Asian Centre for Human Rights, Torture in India 2010 (New Delhi 2010); People's Watch (National Project on Preventing Torture in India), Torture and Impunity in India (Madurai 2008); Asian Centre for Human Rights, India Human Rights Report 2009 (New Delhi 2009); National Human Rights Commission, India Submission to UNHRC for Third Periodic Review of India (April 2017); National Human Rights Commission, Annual Report 2012-2013, 12 (New Delhi 2013); Amnesty International, Amnesty International Report 2015/16: The State of the World's Human Rights, (London 2016), 181, 186.
5. Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1.
6. Nandini Satpathy v. PL Dani and Another, AIR (1978) SC 1025, 26.
7. Immanuel Kant, Grounding for the Metaphysics of Morals (1785). According to this, there are two universal rules by which moral questions can be addressed. The first requires pursuance of an act with the goal of making it a universal law. The second requires treatment of humanity always as an end and never as a means only. Both of these rules do not allow for torture, as the first would allow universalisation of torture, and the second would involve using a person as a means and not the end.
8. Nandini Satpathy v. PL Dani and Another, AIR (1978) SC 1025, 31.
9. Indian Evidence Act 1872, Sections 24, 25. Exceptions to this are: Maharashtra Control of Organised Crime Act 1999, Section 18; Karnataka Control of Organised Crime Act 2000, Section 19 which permits confessions to be recorded by senior police officials.

10. Kartar Singh v. State of Punjab, (1994) 3 SCC 569; See also, Dagdu v. State of Maharashtra (1977) 3 SCC 68.

11. State of Bombay v. Kathi Kalu Oghad (1962) 3 SCR.

12. Madhu v. State of Kerala (2012) 2 SCC 399, 57, 71; National Law University, Delhi, Death Penalty India Report, 2 (NLU Delhi Press 2016) 42.

13. Sir James Fitz James Stephens, A History of the Criminal Law of England, 3 (London 1883) 442, cited in State of Bombay v. Kathi Kalu Oghad (1962) 3 SCR.

14. National Law University, Delhi, Death Penalty India Report, 2 (NLU Delhi Press 2016) 42.

15. Code of Criminal Procedure Code 1973, Sections 100, 165.

16. Code of Criminal Procedure Code 1973, Section 100(4).

17. Code of Criminal Procedure 1973, Sections 100, 165.

18. Ibid

19. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 14 (1) (g).

20. State of Bombay v. Kathi Kalu Oghad, (1962) 3 SCR 1.

21. Suk Das v. Union Territory of Arunachal Pradesh (1986) 2 SCC 401; Rajoo @ Ramakant v. The State of Madhya Pradesh AIR (2012) SC 3034.

22. Kishore Chand v. State of Himachal Pradesh AIR (1990) SC 2140.

23. Hussainara Khatoon and Ors. V. Home Secretary, State of Bihar (1980) 1 SCC 98; Khatri v. State of Bihar (1981) 1 SCC 627; Ashok Debbarma v. State of Tripura, (2014) 4 SCC 747.

24. Law Commission of India, The Death Penalty, (Law Commission of India, No 262, 2015)150; National Law University, Delhi, Death Penalty India Report, (NLU Delhi Press 2016).

25. Mohd. Hussain @ Julfikar Ali v. The State (Govt. of NCT) Delhi AIR (2012) SC 750; Ashok Debbarma v. State of Tripura (2014) 4 SCC 747; State (NCT of Delhi) v. Navjot Sandhu (2005) II SCC 600.

26. National Crime Records Bureau, Prison Statistics India- 2015,

(NCRB, Ministry of Home Affairs, Government of India, 2015) 95. Law Commission of India, *The Death Penalty*, (Law Commission of India, No 262, 2015) 214.

27. 121 of 177 prisoners who spoke about their legal representation in HC, National Law University, Delhi, *Death Penalty India Report*, (NLU Delhi Press 2016) .

28. Law Commission of India, *The Death Penalty*, (Law Commission of India, No 262, 2015)152.

29. Constitution of India 1950, Article 22(1).

30. Code of Criminal Procedure 1973, Section 304.

31. *Kishore Chand v. State of Himachal Pradesh* (1991) 11 SCC 286.

32. The revised estimate was of Rs. 83, 95,00,000.

33. The Law Commission of India in its 262nd Report found that (with the exception of Delhi which paid higher) legal aid lawyers were paid in the range of Rs.500-1500 for a trial and Rs.1,000-3,000 for an appeal. These amounts according to the law commission were “absurdly low amounts”. Law Commission of India, *The Death Penalty*, (Law Commission of India, No 262, 2015)150.

34. Stephen B Bright, ‘Race, Poverty, the Death Penalty, and the Responsibility of the Legal Profession’, (2002-03) 1 *Seattle Journal of Social Justice* 73. Also See S. Muralidhar, *Law, Poverty, and Legal Aid: Access to Criminal Justice*, (LexisNexis Butterworth 2004).

35. Sir William Blackstone, *Commentaries on the Laws of England*, 4 (Clarendon Press 1765-1769); Alexander Volokh, ‘N Guilty Men’, *University of Pennsylvania Law Review*,1 (1997)173, 216.

36. According to this strand of opinion in cases with several accused (10-12) judges have no mechanism to find out about role of each accused, and there is a possibility that one or two of them might be innocent.

37. *Kali Ram v. State of Himachal Pradesh* AIR (1973) SC 2773; *Re Winship* 397 US 372(1970) [Harlam J consenting]; See Lawrence B. Solum, ‘You Prove it! Why Should I?’(1994) 17 *Harv. J. L. & Pub. Pol’y* 691, 701.

38. Code of Criminal Procedure 1973, Section 235(2), states that if the accused is convicted, the judge shall hear the accused on the question

of sentence, and then pass sentence on him according to the law.

39. Bachan Singh v. State of Punjab (1980) 2 SCC 684.

40. The 'rarest of rare' dictum entrenches the policy that life imprisonment is the rule, and a death sentence is an exception. It is a settled law of interpretation that exceptions have to be construed narrowly. The case that belongs to the rarest of rare category must conform to the highest standards of judicial rigour as the norm under analysis is an extremely narrow exception. Santoshkumar Shantibhushan Bariyar and ors. v. State of Maharashtra (2009) 6 SCC 498.

41. Bachan Singh v. State of Punjab (1980) 2 SCC 684, 751.

42. Ibid

43. Ravji @ Ram Chandrav v. State of Rajasthan (1996) 2 SCC 175.

44. Shivaji @ Dadya Shankar Alhat v. The State of Maharashtra (2008) 15 SCC 269, Mohan Anna Chavan v. State of Maharashtra (2008) 7 SCC 561, Bantu v. The State of U.P (2008) 11 SCC 113, Surja Ram v. State of Rajasthan (1996) 6 SCC 271, Dayanidhi Bisoi v. State of Orissa, (2003) 9 SCC 310, State of U.P. v. Sattan @ Satyendra and Ors (2009) 4 SCC 736, Ankush Maruti Shinde v. State of Maharashtra (2009) 6 SCC 667, Sunder Singh v. State of Uttaranchal (2010) 10 SCC 611, Ajitsingh Harnamsingh Gujral v. State of Maharashtra (2011) 14 SCC 401.

45. 136 persons were sentenced to death by Session Courts across India in 2016. The Death Penalty India Report (2016) found that 1486 people were sentenced to death between 2000-2015, of which the Supreme Court confirmed 73 cases. For the remaining persons, it was many years, if not decades that they were waiting on death row.

46. Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra (2009) 6 SCC 498.

47. Sangeet v. State of Haryana (2013) 2 SCC 452.

48. Bachan Singh v. State of Punjab (1980) 2 SCC 684, 726.

49. Sangeet v. State of Haryana (2013) 2 SCC 452.

50. Law Commission of India, The Death Penalty, (Law Commission of India, No 262, 2015)10; Amnesty International, India: Lethal Lottery: The Death Penalty in India - A study of Supreme Court judgments in death penalty cases 1950-2006 (2008, Amnesty Inter-

national); Mr. Justice S.B. Sinha, 'To Kill or not to Kill: The Unending Conundrum' (2012) 24(1) NLSIR, 10, 178, 193-198; See also: Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra (2009) 6 S.C.C. 498, Shankar Kisanrao Khade v. State of Maharashtra(2013) 5 SCC 546, and Sangeet v. State of Haryana(2013) 2 SCC 452.

51. See Chapter II, pages 43 to 48.

52. Swamy Shraddananda v. State of Karnataka(2008) 12 SCC 288, 33.

53. Santosh Kumar Santibhushan Bariyar v. State of Maharashtra (2009) 6 SCC 498, 130.

54. See Chapter II, pages 42 and 43.

55. Deena v. Union of India (1983) 4 SCC 645.

56. Harold Hillman, 'The Possible Pain Experienced During Execution by Different Methods'(1993) 22 Perception746. Also see Roberta. M. Harding, 'The Gallows to the Gurney: Analyzing the (Un) Constitutionality of the Methods of Execution'(1996) BU Pub. Int. LJ 6, 163.

57. Shatrughan Chauhan v. Union of India (2014) 3 SCC 1, 242.

58. See Andrew Von Hirsch and Andrew Ashworth, Principled Sentencing Readings on Theory and Policy (2nd edn, Oxford Hart Publishing, 1998).

59. One judge however said that even if the murder-rates have not declined, he believed that that non-homicidal and petty crimes were considerably reduced due to the death penalty.

60. David. A. Anderson,'The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging' American Law and Economics Review 4 (2) (2002) 295, 313.

61. See Robert Apel,'Sanctions, Perceptions, and Crime: Implications for Criminal Deterrence' Journal of Quantitative Criminology 29 (1) (2013) 67, 101; Paul. H. Robinson, 'The Role of Deterrence in the Formulation of Criminal Law Rules: At its Worst When Doing its Best' Geo. LJ 91 (2002) 949.

62. See Michael. L. Bensonand Tara Livelsberger. Emotions, Choice, and Crime: The Oxford Handbook of Criminological Theory, (OUP, 2012).

63. See Ray Paternoster and Ronet Bachman, Perceptual Deterrence

Theory: The Oxford Handbook of Criminological Theory, (OUP, 2012).

64. James Herbert Paton, *Immanuel Kant: Groundwork of the Metaphysic of Morals* (Harper Perennial Modern Classics, 2009).

65. See Andrew Von Hirsch, Charles. E. Goodell, and Willard Gaylin, *Doing Justice: The Choice of Punishments* (Report of the Committee for the Study of Incarceration), (Northeastern University Press, 1976)19, 35.

66. *Deena v. Union of India* (1983) 4 SCC 645, *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1.

67. Susan Jacoby, *Wild justice: The Evolution of Revenge*, (HarperCollins Publishers, 1983).

68. Jesper Ryberg, 'Punishment and Desert-adjusted Utilitarianism' in Michael Tonry, *Retributivism Has a Past: Has It a Future?* (OUP, 2012). Also see, Andrew Oldenquist, 'Retribution and The Death Penalty' *U. Dayton L. Rev.* 29 (2003)335, 338.

69. The Law Commission of India had in 1967 observed "having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population, and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment." The Law Commission of India's 262nd Report in comparison to the previous report did not appear to have been a major factor considered by the judges.

70. We were not able to ask this question to all the judges due to constraints of time and their willingness to answer follow-up questions.

71. *Union of India v. V Sriharan @Murugun*, (2016) 7 SCC 1 (upholding by a 3:2 majority the decision in *Swamy Shraddhanada's* case).

72. *Swamy Shraddhanada @ Murli Manohar Mishra v. State of Karnataka* (2008) 13 SCC 767.

73. *Vinter v. UK* [2013] ECHR 66069/09; *State v. Tcoieb* (1996) (1) SACR 390.

74. *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

(ICCPR); United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), General Assembly Resolution (UN-Doc A/Res/70/175) adopted on 17 December 2015. Also see Harvard Law Review Association, 'A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment' 119 (2006), *Harvard Law Rev.* 1838, 54; Catherine Appleton and Bent Grøver, 'The Pros and Cons of Life Without Parole' 47 (4) (2007) *British Journal of Criminology* 597, 615.