DEATH PENALTY SENTENCING IN TRIAL COURTS

DELHI, MADHYA PRADESH & MAHARASHTRA (2000-2015)

॥न्यायस्त्र प्रमाणं स्यात्॥
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Trial courts have not been a popular site for doctrinal studies in India and this report with its analysis of trial court judgments in death sentence cases from the states of Maharashtra, Madhya Pradesh and Delhi is an attempt to bridge this gap in death penalty jurisprudence in India. We are deeply grateful to Justice G. Rohini (Former Chief Justice, Delhi High Court), Justice Rajendra Menon (Former Acting Chief Justice, Madhya Pradesh High Court) and Justice Manjula Chellur (Former Chief Justice, Bombay High Court), who gave us permission to access necessary records from the High Courts and the district courts. We are also grateful to the Office of the Registrars of all High Court benches across these three states for facilitating access to the physical files of the cases where electronic records were unavailable.

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INTRODUCTION

In response to a constitutional challenge to the death penalty, the Supreme Court of India developed a sentencing framework in 1980 to guide the discretionary power of judges in choosing between life imprisonment and the death penalty. This framework in *Bachan Singh v. State of Punjab* required sentencing courts to weigh the circumstances of the offence and the offender, while also considering probability of reformation, and the suitability of the alternative option of life imprisonment.[1] Subsequently, the framework developed in *Bachan Singh* has been interpreted numerous times by the Supreme Court in the last four decades. The interpretation and use of the *Bachan Singh* doctrine in the Supreme Court has given rise to concerns about significant deviation, error and arbitrary application.

This report, however, is an attempt to understand capital sentencing, as practised at the lowest level of the judiciary, i.e., the district and sessions courts in India. Almost all existing research on capital sentencing in India focuses on judgments of the Supreme Court. However, the trial court gets to appreciate evidence and examine the accused first-hand, not only on points of conviction, but also sentencing. Moreover, lawyers and judges at the trial level, being more local to the context, would presumably be better placed to appreciate the circumstances of the offence and the offender, which are extremely relevant to the process of individualised sentencing. It is imperative, therefore, to understand the manner in which trial courts arrive at the decision of sentencing a person to death.

Our prior research in the Death Penalty India Report[2] reveals that appellate courts ultimately confirmed death sentences in only 4.9% of the cases where trial courts had imposed the punishment. 29.8% of the prisoners went from being sentenced to death to being acquitted of all charges, while 65.3% of the death sentences were commuted to life sentences.[3] Prima-facie, this speaks of trial courts sentencing a large number of people to death, whose cases do not meet the high threshold set by judicial standards determined by the apex court. This project analyses and documents the use of the *Bachan Singh* doctrine in trial courts in Delhi, Madhya Pradesh and Maharashtra. It also examines the inconsistencies within the Supreme Court's jurisprudence on capital sentencing, and argues that the capital sentencing crisis in the trial courts is heavily influenced by the confusion in the apex court.

The sentencing trends and patterns we observed across trial court judgments in the three states are grouped under three broad themes in this report. The first chapter discusses the legislative and judicial evolution of the *Bachan Singh* framework, and the ways in which it has been subsequently interpreted by the Supreme Court. The chapter critically examines the inherent ambiguities in the *Bachan Singh* framework, and grapples with the difficulty of its consistent application. The next chapter discusses the different ways in which courts have interpreted the framework originally developed in *Bachan Singh* and arrived at the imposition of the death sentence. The treatment of aggravating and mitigating factors, and foreclosing unquestionably the alternative option of life imprisonment, are also discussed here, and supplemented with different statistical inferences from the trial court judgments. The third chapter discusses the ways in which trial courts have applied Supreme Court precedents, in arriving at the decision of imposing the death penalty. Emphasising the importance of individualised sentencing within the *Bachan Singh* framework, it questions the proposition that like crimes must always be treated alike. The fourth chapter of the report focuses on penological justifications invoked by the trial courts while sentencing people to death. Focusing on problems arising from the lack of clarity on sentencing goals, the chapter shows how courts apply penological theories without properly understanding their theoretical underpinnings, often going against the formulation laid down in *Bachan Singh*. The last chapter is a numerical and visual representation of capital sentencing data from trial courts in Madhya Pradesh, Maharashtra and Delhi. The report concludes by drawing attention to the broader problems of sentencing within the criminal justice system of India, not limited to capital cases alone.

The report exposes the broken state of capital sentencing in trial courts of Maharashtra, Madhya Pradesh and Delhi and attributes it to the larger problem of sentencing generally within the criminal justice system. The report concludes with the argument that the imposition of death sentences will remain arbitrary and unpredictable without a meaningful judicial discourse on the fair trial requirements during sentencing. ■

METHODOLOGY

ORIGIN

The Death Penalty India Report 2016 found that of over 1700 prisoners who were sentenced to death by trial courts in the period 2000-2015, the appellate courts ultimately confirmed only 4.9% of the sentences. 29.8% of the prisoners went from being sentenced to death to being acquitted of all charges, while 65.3% of the death sentences were commuted to life sentences. While on the one hand, this indicated that appelate courts were working as a safeguard against indiscriminate impostition of the death penalty, on the other hand, it reflected a crisis in judicial decision-making at the level of the trial courts in capital cases. Further, this also meant that a large number of prisoners were being unnecessarily sentenced to death, and spending time on death row, before being acquitted or commuted. It was to understand why trial courts were imposing the death penalty so frequently, when so many decisions were overturned, that we decided to conduct this study. We felt it was necessary to analyse and document the manner in which the sentencing framework developed in *Bachan Singh* has been interpreted and applied at the level of trial courts.

The three states chosen for this study were Delhi, Madhya Pradesh and Maharashtra. These states were important for several reasons, found as part of our prior research, as part of the Death Penalty Research Project. Firstly, the death penalty was frequently imposed in all the three states. Secondly, a large number of the decisions in capital cases were overturned at the appellate level. Our research showed that in Delhi, of the 80 death sentences handed out between 2000-2013, over 60% had been either acquitted or commuted by the Delhi High Court. In Maharashtra, out of the approximately 120 prisoners who were sentenced to death by trial courts between 2000-2013, more than half of the prisoners had been acquitted or commuted by the Bombay High Court. At the time of conceptualising the study, the exact statistics were not available for Madhya Pradesh. However, we noticed a trend, especially in cases involving sexual violence, that there had been short trials and quick confirmation proceedings by the High Court.

In order to accurately understand the frequent imposition of death sentences by trial courts, and recognise patterns and trends of their decision-making process, it was

necessary to study the decisions over a significant period of time. Therefore, we decided to examine judgments between 2000-2015.

ACCESS

In order to identify and obtain a list of death sentences imposed by trial courts of Maharashtra, Madhya Pradesh and Delhi for the 16 year period, we wrote to the Chief Justices' offices of the three states. Once we obtained the list, we searched the trial court websites for judgments. Due to the poor state of digitisation of trial court records in India, we were only able to source some judgments from the later years for Maharashtra and Delhi. A huge proportion of the judgments therefore had to be physically collected from the record rooms of the High Courts and trial courts.

It is important to iterate here that, as s.366 of the Code of Criminal Procedure, 1973 requires that all death sentences imposed by trial courts be mandatorily sent to the High Courts for confirmation, it was much easier to treat the High Courts as the main sources of data collection. It is also important to mention that there were cases missing from the lists provided by the High Courts. These gaps emerged when we went to record rooms of the trial courts for data collection, and the staff shared some files of death penalty cases that were not part of the official lists given to us by the High Courts.

DATA COLLECTION

It took us almost a year to collect the 215 judgments in this study. The data includes 43 judgments from Delhi, 90 judgments from Maharashtra and 82 judgments from Madhya Pradesh. The process of data collection, most of which was from the record rooms, revealed to us the poor state of maintenance and organisation of case records. We often spent hours locating files in dusty record rooms and then carried these bulky files to the nearest private photocopying facility.

In Delhi, we collected the judgments from the seven district courts. In Maharashtra and Madhya Pradesh, we had to travel to the three benches of the respective High Courts to collect hard copies of trial court judgments. For two judgments from as early

as the 2000s, we had to travel to the districts of Mandsaur and Chhindwara in Madhya Pradesh to procure copies of the judgments. Here, the cases had been decided in the Supreme Court and the records had been sent back to the trial courts. Six judgments from Madhya Pradesh were collected from the Madhya Pradesh standing counsel's office in Delhi as these cases were then pending in the Supreme Court.

Surprisingly, data collection in Delhi took us the maximum amount of time, and required the most number of visits to the district courts. Further issues were created because trial courts had been reorganised, such that cases originally from one trial court, say Patiala House, were now found in another trial court, such as Saket. Data collection was the easiest for Maharashtra owing to the swift coordination between the three High Court benches. It was also the most digitised state in terms of record keeping, as we were able to find several judgments online.

All judgments collected from Delhi and Maharashtra were in English. However, as all trial court judgments from Madhya Pradesh, barring five, were in Hindi, they were sent for translation into English.

ANALYSIS AND WRITING

During the data collection process, the research team familiarised themselves with death penalty jurispurdence by reading existing literature on the subject as well as all reported Supreme Court judgments since 1980 [*Bachan Singh* onwards]. This provided the team with much needed perspective and a framework to read and review the 215 trial court judgments. Such preparation also allowed the team to dive deep into analysis almost immediately after the data collection. Some time was taken for translation of judgments from Madhya Pradesh, during which the team read through the judgments from Maharashtra and Delhi. After an initial reading of all the judgments, the team spent a few weeks discussing their findings and observations. Once a template was created in Microsoft Excel for the extraction of data from the judgments, all judgments were read again and the template was simultaneously filled in. This was followed by the writing process. ■

CHAPTER 1

The Bachan Singh Framework

In an attempt to guide judicial discretion in death penalty cases the Supreme Court of India, through a five-judge constitution bench in *Bachan Singh v. State of Punjab,* sought to lay down a sentencing framework.[4] At its core, the framework was meant to guide sentencing judges in discharging their obligations under s.354(3) of the Code of Criminal Procedure, 1973 (hereinafter CrPC), while choosing between the punishments of life imprisonment and death penalty.[5] For all offences where life imprisonment and death sentence were the only options, the amendments to the CrPC in 1973 explicitly indicated the legislative preference for life imprisonment as the default punishment. S.354(3) of the CrPC provided that while all sentencing decisions must have accompanying reasons, the imposition of the death sentence required 'special reasons'. *Bachan Singh* relied on this requirement of 'special reasons' to develop a sentencing framework applicable to s.354(3) of the CrPC.

This chapter has two aims: one, to analyse the development of the *Bachan Singh* framework in the Supreme Court; and two, to discuss the doctrinal gaps and concerns of the *Bachan Singh* framework itself. In discussing the first part, it will become evident through this chapter that there have been major deviations from the framework envisaged in *Bachan Singh*. The doctrinal incoherence in the Supreme Court has contributed in no small measure to the near collapse of the *Bachan Singh* doctrine. The resulting confusion in the Supreme Court's death penalty jurisprudence has clearly had a dramatic impact on the trial courts. The death penalty judgments from trial courts in Madhya Pradesh, Maharashtra and Delhi demonstrate the unrecognisable shape the *Bachan Singh* doctrine has taken in the trial courts. The impact of the doctrinal confusion on the trial courts will be considered in the next chapter.

Part I of the chapter describes the legislative evolution of sentencing in death penalty cases. Part II discusses the judicial evolution of the sentencing framework from *Jagmohan Singh* to *Bachan Singh.* Part III traces the use and development of the *Bachan Singh* framework in subsequent cases starting from *Machhi Singh*. Part IV highlights the inherent doctrinal gaps that plague the *Bachan Singh* framework.

I. LEGISLATIVE EVOLUTION

In the Code of Criminal Procedure, 1898, death was the default punishment for murder, requiring sentencing judges to give reasons in

their judgment if they wanted to give life imprisonment instead.[6] This provision was clearly indicative of the legislative preference for the death penalty, thereby making the death penalty the norm, and life imprisonment an exception. An amendment to the provision in 1955 indicated a shift, as it removed the requirement of written reasons for not imposing the death penalty, reflecting no legislative preference between the two punishments.[7] A more dramatic shift came in 1973, through s.354(3) of the CrPC, which made life imprisonment the default punishment, requiring sentencing judges to give 'special reasons' while imposing the death penalty.[8] This was a significant step, revealing a legislative desire to limit the imposition of the death penalty. The CrPC, 1973 also bifurcated a criminal trial into two stages with separate hearings, one for conviction and another for sentencing.[9]

II. JUDICIAL EVOLUTION

Pre-Bachan Singh

Since the early 1970s, the Supreme Court of India has engaged with constitutional concerns around judicial discretion in death penalty sentencing. In 1972, it upheld the constitutional validity of the death penalty in *Jagmohan Singh v. State of Punjab*.[10] The court observed that the amount of discretion vested in sentencing judges under the 1955 amendments to the CrPC was not excessive, and that, therefore, the arbitrariness of outcomes was not a concern. In that regard, *Jagmohan* is hinged on a strong belief in the need to maintain wide judicial discretion. The court noted that the exercise of judicial discretion on 'well-recognised principles' was the best possible safeguard against arbitrariness, without further elaborating on these principles.[11]

The initial steps towards creating a framework for death penalty sentencing came in *Ediga Anamma v. State of Andhra Pradesh* (1974).[12] Justice Krishna Iyer, speaking for the court, lamented about the lack of statutory sentencing guidelines under the 1955 amendment, which compelled judges to decide outcomes based on a 'judicial hunch'. While commuting the appellant's death sentence to life imprisonment, Iyer J. emphasised on the need for introducing 'facts of a social and personal nature', especially at the sentencing stage, to help judges focus on "not only the crime, but also the criminal".[13] He also hoped that bifurcation of a trial into conviction and sentencing stages under s.235(2) of the CrPC would enable the collection of social and personal data of the offender, thereby, aiding judges in "hearing the accused on the point of sentence" before imposing the appropriate punishment.

The meaning of 'special reasons' under s.354(2) of the CrPC came to be discussed first in *Rajendra Prasad v. State of Uttar Pradesh*.[14] The three-judge bench, headed by Justice Krishna Iyer, discussed the issue of streamlining sentencing discretion, and observed that the legislature had not done enough to channelise capital sentencing.[15] Iyer J. observed that 'special reasons' under the CrPC meant factors relevant "not to the crime, but to the criminal", and in the guidelines, urged sentencing judges to consider 'the personal and social, the motivational and physical circumstances' of the criminal along with duration of incarceration and death row as relevant factors. *Rajendra Prasad* also elaborated upon circumstances that justify the imposition of death, noting that a "callous criminal … jeopardising social existence by his act of murder" is deserving of the death sentence. Iyer J. extended this category to include technologists, manufacturers and white collar criminals who willfully jeopardise the lives of

others to maximise their self-interest, as well as hardened criminals and dacoits who cannot be rehabilitated. Attempting to delineate the contours of justifications for imposing the death sentence, the court ruled that 'special reasons' would exist 'only if the security of State and society, public order and the interests of the general public compel that course as provided in Art. 19(2) to (6)'.

However, in its attempt to give meaning to 'special reasons' under s.354(3) of the CrPC, *Rajendra Prasad* effectively failed to provide clarity for sentencing judges. While the court expressed a preference for individual circumstances of the offender over elements of the crime, it also attempted to identify certain categories of offences and offenders where the death penalty might be more justified. This attempt, in effect, undercuts the idea of individualised sentencing. Also, by reading factors like national security and public order into 'special reasons' under s.354(3), it significantly raised the risk of unguided discretion making its way into sentencing.

Bachan Singh

The question of constitutional validity of the capital punishment under s.302 of the Indian Penal Code, 1860 (hereinafter IPC) was again addressed before a constitution bench of the Supreme Court in *Bachan Singh v. State of Punjab.* The court was called upon to decide the constitutionality of two issues: first, the provision for death penalty under s.302 of the IPC; and second, the sentencing procedure articulated within 'special reasons' under s.354(3) of the CrPC. Answering the first question in the negative, Justice Sarkaria's majority opinion held that s.302 of the IPC met the standard of reasonableness in Article 19 and 21 of the Constitution.[16] For the second question, the petitioners argued that s.354(3) vested unguided discretion with courts, leading to the arbitrary imposition of the death penalty. The court, however, held that the 1973 amendments to the CrPC addressed the concerns raised in its prior ruling in *Jagmohan*, and said that a rigid formulation of 'special reasons' would be impractical as judges would not be able to take account of variations in culpability.[17] Therefore, the court was ready to lay down only very broad guidelines consistent with the legislature's policy indicated in s.354(3) of the CrPC.[18] This led to the formulation of the sentencing framework, which required the weighing of aggravating and mitigating circumstances relating to both the circumstances of the offence and the offender, and deciding if the alternative option of life imprisonment was unquestionably foreclosed. According to *Bachan Singh*, for a case to be eligible for the death sentence, the aggravating circumstances must outweigh the mitigating circumstances.

The majority opinion also seems to suggest that determination of 'special reasons' under s.354(3) of the CrPC requires sentencing judges to establish that the alternative option of life imprisonment under s.302 of the IPC is unquestionably foreclosed. Thus, under the *Bachan Singh* framework, the death penalty can be imposed not only when the aggravating factors outweigh mitigating ones, but also when the alternative of life imprisonment is unquestionably foreclosed. [19]

Weighing aggravating and mitigating circumstances

In order to help sentencing judges identify aggravating and mitigating factors, the court reproduced the list suggested by Dr. Chitale,[20] clarifying that these were only indicative and not exhaustive.[21] The court deliberately refrained from suggesting an exhaustive list as this would feter judicial discretion. Through Dr. Chitale's

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suggestion, the court also cast a special duty on the prosecution to prove that the accused was beyond reformation. It also emphasised upon 'extreme youth' as a compelling mitigating factor, which should be given great weight in the determination of sentence.[22]

In an attempt to clarify the meaning of 'well recognised principles' invoked in *Jagmohan*, the majority held that that these were principles crystallised by judicial decisions illustrative of aggravating and mitigating circumstances in individual cases.[23] The court also added that the relative weight to be attached to each of these factors would depend on the facts and circumstances of the particular case, and that it was not desirable to consider them in watertight compartments, as they were often intertwined and inseparable.[24] The court issued a caveat that these factors must evidence aggravation of an abnormal or special degree, and emphasised that the scope of mitigating circumstances must receive liberal and expansive construction.[25] It is worth noting that the aggravating factors were not identified for similar treatment.

Considering the alternative option of life imprisonment

After weighing aggravating and mitigating circumstances, if a sentencing judge concludes that a case is eligible for the death sentence, the *Bachan Singh* framework requires them to consider the alternative option of life imprisonment. Noting that 'a real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality', the court held that the death penalty could be imposed only when the alternative option of life imprisonment was 'unquestionably foreclosed'.[26] However, the question as to how this determination could be made was left open, without any further clarification.

Post-Bachan Singh

The *Bachan Singh* framework has been in place for over three decades. Subsequent courts have attempted to further re-interpret it, and unsurprisingly, given it new meaning, some of which was, arguably, not originally envisaged by *Bachan Singh*.[27] This section describes the developments in death penalty sentencning since the pronouncement of the judgment in *Bachan Singh*, by thematically discussing trends that have pulled the framework in different directions.

The dominance of 'nature of crime' in death penalty sentencing

The framework for capital sentencing laid down in *Bachan Singh* necessitated the consideration of aggravating and mitigating circumstances

of the offence and the offender while deciding the appropriate punishment. As highlighted above, it also required sentencing judges to interpret mitigating circumstances expansively and liberally. However, the trajectory of death penalty sentencing in the Supreme Court has endorsed a crime-dominant approach.

Three years after the judgment in *Bachan Singh*, *Machhi Singh* attempted to further explain the framework developed in *Bachan Singh* and offered a crime-centric capital sentencing framework.[28] Reflecting on the question of death penalty, the court in *Machhi Singh* delved into reasons of why the community as a whole does not endorse the humanistic approach of 'death sentence-in-no-case'. *Machhi Singh* introduced 'collective conscience' into the capital sentencing framework and laid down five categories, where the community would expect the holders of judicial power to impose death sentence, because collective conscience was sufficiently outraged.[29] These five categories include motive of the crime, manner of its commission, anti-social or socially abhorrent nature of the crime, magnitude of the crime and personality of the victim of the murder.[30] Instances were listed under each of these categories. Notably, the examples cited by the court point towards specific crime categories, an approach that *Bachan Singh* specifically guarded against.

In *Ravji alias Ram Chandra v. State of Rajasthan*, the Supreme Court held that the nature and gravity of the crime, and not the criminal, was central to the question of deciding appropriate punishment.[31] The Court opined that punishment should conform to, and be consistent with, the atrocity and brutality of the crime, as well as the public abhorrence it warrants, and that courts should respond to society's cry for justice against the criminal.[32] *Ravji* was examined subsequently by a division bench of the Supreme Court in *Santoshkumar Satishbhushan Bariyar v. State of Maharashtra,* which rendered it *per incuriam Bachan Singh,* for its exclusive focus on crime.[33] The court in *Bariyar* listed six more cases which had relied on the incorrect precedent in *Ravji*.[34]

In *Shankar Kisanrao Khade v. State of Maharashtra,* the court doubted the imposition of the death penalty in several cases for their failure to appreciate the circumstances of the accused, including that of *Dhananjoy Chatterjee v. State of West Bengal,* which had resulted in execution of the accused.[35] Similarly in *Sangeet and anr. v. State of Haryana,* the Court mentioned three cases, *Shivu v. Registrar General, High Court of Karnataka*,[36] *Rajendra Pralhadrao Wasnik v. State of Maharashtra*[37]and *Mohd. Mannan v. State of Bihar*,[38] where determination of sentence was made only on the basis of the circumstances of the crime, without taking the circumstances of the accused into consideration.

While the legacy of cases like *Machhi* has resulted in the sidelining of mitigating circumstances in favour of the accused, another trend adopted in some Supreme Court judgments has been the summary dismissal of the relevance of mitigating circumstances. In *Sevaka Perumal,* the Court, dismissing mitigating circumstances presented by the defence, held that "these compassionate grounds would always be present in most cases and are not relevant for interference".[39] In *Shimbhu v. State of Haryana*, the Court held that punishment should always be proportionate to the gravity of the offence, and factors like religion, race, and caste, economic or social status of the accused cannot mitigate the punishment to a reduced one of life imprisonment.[40] Similarly in *Krishnappa v. State of Karnataka*, the Court, while deciding the sentence in a case of rape

and murder, deemed the social status of the accused irrelevant, and held that punishment must depend upon the conduct of the accused, the state and age of the victim and the gravity of the crime.[41] These judgments, by deeming irrelevant individual mitigating circumstances of the accused, go against the pronouncement in *Bachan Singh*. While in an individualized exercise of sentencing these factors may not always outweigh aggravating factors (and that depends on facts and circumstances of individual cases), to say that these factors will almost never mitigate the sentence is contrary to the *Bachan Singh* framework.[42] This was acknowledged by the Supreme Court itself in *Sangeet and anr. v. State of Haryana*, where the court observed that the circumstances of the criminal, referred to in *Bachan Singh*, appear to have taken a bit of a back seat in the sentencing process.[43]

Another set of cases have crystallized categories of crime deserving of the death penalty. In *Bhagwan Dass v. State of NCT of Delhi*, for instance, the court held that honour killings, irrespective of the reason, deserve the death penalty.[44] Similarly, in *Mehboob Batcha v. State*, the court held that murder by policemen in police custody was eligible for the death sentence.[45] Such categorisation essentially created judicially-mandated offences deserving the death penalty, resulting in a rigid capital sentencing framework, which had been specifically avoided in *Bachan Singh*.[46]

These developments – reducing the value of mitigating factors favouring the offender, and categorising certain crimes as necessitating the imposition of the death sentence – to retain consistency have evidently led to the creation of a crime-centric capital sentencing framework. This is antithetical to the framework envisaged by *Bachan Singh*, which mandated an expansive interpretation of mitigating factors.

The uncertain relationship between aggravating and mitigating factors

Bachan Singh required sentencing courts to weigh both aggravating and mitigating circumstances of the offence and the offender before deciding the punishment. It clarified that the relative weight to be attached to each of these factors would depend on the facts and circumstances of the particular case. Previously, *Jagmohan* had required sentencing judges to decide the appropriate punishment after 'balancing' circumstances of the crime as well as of the criminal. The seemingly insignificant change of vocabulary from *Jagmohan* to *Bachan Singh*, requiring the 'weighing' and not 'balancing' of aggravating and mitigating circumstances had grave implications when *Machhi Singh* attempted to build on the *Bachan Singh* framework. Taking forward *Jagmohan*'s concept of 'balancing' of aggravating and mitigating circumstances, *Machhi Singh* introduced a balance-sheet approach, and required courts to draw up a balance-sheet, giving full weightage and striking a just balance between aggravating and mitigating factors.[47] A mere 'balancing' gives the option to balance out mitigating and aggravating factors against each other, absolving sentencing courts of the duty to assign reasons for apportionment of weight to every relevant factor. The kind of judicial rigour that comes with the weighing exercise is significantly diluted in drawing up a balance sheet. Unsurprisingly, this judgment paved the way for subsequent sentencing courts to simply list aggravating and mitigating circumstances in a tabular format, in two columns against each other, followed by the conclusion that aggravation outweighs mitigation. This has rendered the exercise meaningless where the focus is more on meeting the technical requirements, rather than an actual meaningful consideration of

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aggravating and mitigating factors in deciding the sentence. What makes this extremely problematic is that courts generally have access to aggravating factors of the crime through the case records, unlike mitigating factors of the accused which need further investigation. Hence, in most cases where the death penalty is imposed, aggravating factors are numerically higher than mitigating factors, making it easier for courts to categorise the case as one deserving the death sentence.

In 2009, the Supreme Court in *Bariyar* reformulated *Bachan Singh*'s idea of individualised sentencing, by calling sentencing courts to give reasons for apportionment of weights to aggravating and mitigating circumstances.[48] In 2013, the Supreme Court, in *Gurvail Singh v. State of Punjab*, introduced a new imagination for the role played by aggravating and mitigating circumstances.[49] Laying down a three-step process, comprising the crime, criminal and then the rarest of rare tests, Radhakrishnan J. held that imposition of the death penalty requires full satisfaction of both the crime test, through an examination of aggravating circumstances, and the criminal test, which requires that there must be absolutely no mitigating circumstance favouring the offender.[50] After the satisfaction of both these tests, the court must finally apply the rarest of rare test, which in turn, would depend on society's perception of the crime as deserving of the death penalty, and not that of the individual judge deciding the case. The court indicated a list of illustrative factors, including society's abhorrence, extreme indignation and antipathy to certain types of crimes like the rape and murder of minor girls, especially intellectually challenged minor girls, minor girls with physical disability, old and infirm women with those disabilities, that the sentencing courts could look into.[51]

In *Shankar Kisanrao Khade v. State of Maharashtra*[52] and in *Ashok Debbarma v. State of Tripura*,[53] the Court reiterated the crime, criminal and the rarest of rare test crafted in *Gurvail Singh*. However, a three-judge bench in *Mahesh Dhanaji Shinde v. State of Maharashtra*, held that the crime and criminal test went beyond what was laid down in *Bachan Singh*.[54]

Role of prosecutors in leading evidence on reformation

Bachan Singh reproduced Dr. Chitale's list of aggravating and mitigating circumstances, one aspect of which placed the burden on the prosecution to lead evidence to show that the accused is beyond reformation. This has become a contested aspect of the *Bachan Singh* sentencing framework, wherein some judgments have read it as a mandatory requirement, and others refused to read it that way.[55] Recently, in 2018, the Supreme Court restated and re-established the duty imposed on the prosecution.[56] In *Rajendra Prahladrao Wasnik*, the Supreme Court clarified that the

standard for the prosecution when proving that the accused cannot be reformed has to be one of 'probability', and not one of 'impossibility' or 'possibility'.[57] These decisions hold conduct in jail, conduct outside jail if on bail, medical evidence about mental make-up, and contact with family, as relevant factors towards adjudicating the probability of reformation. Despite these decisions, confusion still persists about the role of reformation in death penalty sentencing, as the question of the probability of reformation has often been decided by looking back at the manner of commission of the crime.

The introduction of 'public opinion' in various forms

The introduction of 'collective conscience' into the capital sentencing framework by *Machhi Singh* made way for the entry of other similarly amorphous standards into the scheme. In *Dhananjoy Chatterjee v. State of West Bengal*, the Supreme Court, while imposing a death sentence, held that appropriate punishment enables courts to respond to 'society's cry for justice'.[58] This measure of punishment, in turn, must depend upon the atrocity of the crime, the conduct of the criminal and the defenceless and unprotected state of the victim.

In *Bariyar*, the apex court observed that public opinion was incompatible with the *Bachan Singh* framework, since the constitutional role of the judiciary mandates placing individual rights at a higher pedestal than majoritarian aspirations.[59] Another inherent problem it identified with this approach was the difficulty to precisely define what public opinion on a given matter actually is.[60]

In *Rameshbhai Rathod v. State of Gujarat*,[61] the Supreme Court was of the view that expression 'rarest of rare' was used in *Bachan Singh* to read down and confine the imposition of capital punishment to extremely limited cases. Hence, the significance of this expression could not be watered down on a perceived notion of a `cry for justice'.[62] In *Om Prakash v. State of Haryana*,[63] the Court observed that there was significant tension between responding to society's cry for justice and *Bachan Singh*'s sentencing framework, and held that courts are bound by precedent and not by the incoherent and fluid responses of society.[64] Recently, in 2018, the Supreme Court commuted death sentences in *MA Antony @Antappan v. State of Kerala* and *Channulal Verma v. State of Chattisgarh*, noting problems with imposing punishment based on collective conscience.[65]

Despite these concerns, however, the Supreme Court, in some cases, continues to impose death sentences invoking public opinion as a justification. Collective conscience found its most recent endorsement in the Supreme Court judgment in the December 2012 gangrape case of *Mukesh and anr. v. State of NCT of Delhi*, and continues to be used rampantly across trial and appellate courts in India.[66]

Determination of 'life imprisonment' is unquestionably foreclosed

Besides the weighing of aggravating and mitigating circumstances, sentencing courts are also required to give meaningful consideration to the sentence of life imprisonment under the *Bachan Singh* framework. *Bachan Singh*, reflecting the legislative intent behind making the death penalty an exceptional punishment, held that a capital sentence could be imposed only when the option of life imprisonment was unquestionably foreclosed. How this question could be determined, was not something that *Bachan Singh* clarified. *Machhi Singh* made a subtle shift of lowering the standard for consideration of life imprisonment from it being 'unquestionably foreclosed' to one of 'inadequacy'. The Court

observed, '...death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose a sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances'.[67] Such a framing of this standard by *Machhi Singh* makes it seem like one of a much lower threshold, and dependent on the circumstances of the crime. It has pushed the death penalty sentencing jurisprudence towards judges examining whether life imprisonment would be adequate for the crime in question. The extensive use of *Machhi Singh* by sentencing judges has exacerbated this error, with judges often relying on the description of the crime to come to the conclusion that life imprisonment would be 'inadequate', rather than establishing that life imprisonment was 'unquestionably foreclosed'.

In *Santosh Bariyar*, Justice S.B.Sinha, speaking for the Supreme Court, interpreted the question of life imprisonment within the context of reformation and clarified that "life imprisonment can be said to be completely futile only when the sentencing aim of reformation can be said to be unachievable".[68] The court also imposed a duty on the court "to provide as to why the convict is not fit for any kind of reformatory and rehabilitation scheme".[69]

A significant development came in 2015, with the widening of the 'unquestionably foreclosed', by a constitution bench of the Supreme Court in *V. Sriharan v. Union of India*.[70] Reaffirming its ruling in *Swamy Shraddhanada @ Murli Manohar Mishra v. State of Karnataka*,[71] 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. The court held that the State government's power of remission under s.432 of the CrPC could be ousted while determining the sentence in an appellate court. Constitutional powers of pardon of the Governor and President under Articles 161 and 72, respectively, remained untouched. 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 normal life sentence (which makes a prisoner eligible for consideration for remission after 14 years). Interestingly, in *Sangeet and anr. v. State of Haryana,* the court had expressly disagreed with the formulation of the Supreme Court in Shraddhananda, which subsequently found affirmation with the constitution bench.[72] Notably, only appellate courts have the power to impose this sentence under *Sriharan.*

An examination of the apex court's judgments, which have decided between life imprisonment and the death penalty, reveals that *Machhi Singh*'s standard of 'inadequacy' has found purchase in death penalty sentencing. This has altered the sentencing courts' duty fundamentally, requiring them to answer the question of life imprisonment in light of the circumstances of the crime. This essentially makes the *Bachan Singh* framework redundant, since all crimes punishable with death are likely to involve significant levels of brutality and heinousness.

III. GAPS, CONFUSIONS AND DEVIATIONS

The judicial evolution of the *Bachan Singh* framework over nearly four decades has revealed many gaps in the original framework,

An examination of the apex court's judgments, which have decided between life imprisonment and the death penalty, reveals that Machhi Singh's standard of 'inadequacy' has found purchase in death penalty sentencing. This has altered the sentencing courts' duty fundamentally, requiring them to answer the question of life imprisonment in light of the circumstances of the crime.

and given rise to many confusions. At the core of the uncertainty surrounding the *Bachan Singh* framework is the lack of normative clarity on sentencing factors. Though the framework requires judges to consider aggravating and mitigating factors, *Bachan Singh* did not provide any conceptual clarity on the reasons for such a requirement. A reading of *Bachan Singh* does not reveal the penological considerations behind judges being required to consider sentencing factors like age, socio-economic background, mental state and reformation. By baldly asserting that these are relevant factors and no more, it left future sentencing judges the discretion to fill this normative gap with their own considerations.

Further, the lack of a theoretical basis for the framework developed in *Bachan Singh* has impacted the procedural fairness of sentencing proceedings. A failure to indicate the integral role of sentencing factors subjects the collection, presentation and consideration of these factors to a very low threshold. With no real judicial discourse on these aspects of sentencing, implications on the fairness of trials with very poor quality sentencing proceedings remain unexplored.

This section delves deeper into these doctrinal gaps within the *Bachan Singh* framework, to understand questions about procedural and substantive aspects that it leaves unanswered.

Onus to produce sentencing material

In March 2019, the Supreme Court in *Khushwinder Singh v. State of Punjab*, confirmed the death sentence imposed on the accused, while acknowledging that the defence had not presented any mitigating material before the court.[73] The death sentence, therefore, was imposed only by taking into consideration aggravating circumstances. This raises significant questions as to the onus of producing and eliciting aggravating and mitigating circumstances, relevant at the time of sentencing.

In a few instances, Supreme Court judges have also played an active role in eliciting relevant mitigating material favouring the accused, from the defence counsels.[74] The Delhi High Court, in *Bharat Singh v. State of NCT of Delhi*, got the probation officer to present a social investigation report showing the conduct of the accused in prison, before commuting the death sentence.[75] In *Mukesh and anr. v. State*, the Supreme Court decided to look at relevant mitigating material that had not been presented before the trial judge, acknowledging its relevance to sentencing.[76] However, none of the judgments saw the courts elaborating upon the role of sentencing judges in cases where the defence fails to produce mitigating circumstances favouring the offender.

For a sentencing hearing to meet acceptable fair trial standards, the threshold cannot be a

perfunctory conversation with the accused, or shallow statements as to their age and socio-economic status. The American Bar Association notes that the process of eliciting sentencing material is complex, and should necessarily involve skills of social workers and mental health professionals.[77] Yet, inadequate legal representation resulting in production of very poor sentencing material in death sentence cases is a reality of the Indian criminal justice system. Death penalty case law (both confirmations and commutations) is rife with superficial references to sentencing factors - a consequence of both the lack of standards on collection of materials and the absence of a normative foundation for considering such materials. Despite this, however, in an adversarial system, a proactive role for the judge to elicit and seek sentencing information raises institutional concerns, as the ability and resources available to judges, in this regard, is far from certain. Hence, instead of requiring the judge to undertake a roving exercise, institutional coherence might nudge us in the direction of addressing this through robust standards of legal representation for capital cases.

What materials are relevant for sentencing? Why are mitigating circumstances relevant?

While *Bachan Singh* provides an indicative, not exhaustive, list of aggravating and mitigating circumstances, it does not clarify why these factors are relevant in a sentencing hearing.

Mitigating circumstances provide insight into an individual's historical, social, biological, and psychological context. Such information pertaining to their life history enables sentencing courts to meaningfully locate the individual in their unique context by providing a cohesive narrative of their life. This contextualisation allows for the courts to understand the implication of these life experiences on the individual and take them into account while deciding the quantum of punishment to be imposed. However, the absence of an underlying normative understanding of mitigation and its role in sentencing, leaves the field open for judges to arbitrarily discard sentencing factors or not accord appropriate weight to those factors.

Ediga Anamma, and later *Santa Singh*, indicate some penological rationale behind considering mitigating circumstances, observing that these factors personalise the punishment so that the reformist component is as much operative as the deterrent element. However, *Bachan Singh* fails to build upon this idea. The sentencing framework does not clarify that the list of aggravating and mitigating factors cannot be exhaustive, since the purpose of the sentencing exercise is individualising punishment, and in that exercise of individualisation, there are numerous possibilities in constructing the social, personal and psychological history of the individual.

Evidentiary Standards

Bachan Singh provides no guidance on the standard of proof that is to be used for considering sentencing materials. An examination of procedural rules in other jurisdictions shows that most commonwealth countries require aggravating circumstances to be proved beyond a reasonable doubt. For instance, this is true in Canada by statutory requirements, and in Australia and England by judicial precedent.[78] The United States sees a wide variety of prescribed evidentiary standards at sentencing across the different states, but the preponderance standard has become the most prominent alternative to the no-prescribed-burden approach. The U.S.

Supreme Court, while deciding the right to jury trial under the Sixth Amendment in *Blakely v. Washington*, held that certain kinds of sentencing facts must be tried before a jury and proven beyond a reasonable doubt.[79] *Blakely* mandates, however, attach to a narrowly defined category of aggravating facts.

The Supreme Court of India, in *Santa Singh*, suggested that affidavits could be used to place a wide variety of material (distinguished from 'evidence') that have a bearing on sentence. It clarified that if the parties disagree on the veracity of the materials, then evidence can be led as per the requirements of the law of evidence.[80] This method of using affidavits to place sentencing material has been affirmed subsequently in cases like *Dagdu*[81], *Mukesh, and Accused X*.[82]

However, evidentiary concerns at the sentencing stage rarely arise in India because sentencing submissions before courts are mostly perfunctory, and limited to the economic background of the accused, number of dependents or the lack of criminal antecedents. Even in the current state of sentencing, questions of reformation hold out the potential for very significant evidentiary concerns.

Remedying Sentencing Errors

Bachan Singh provides hardly any guidance on questions of a constitutional threshold for a sentencing hearing, or the creation of remedies for deficient sentencing hearings. A prominent example of this is the issue of same day sentencing, which has received differential treatment by different judgments of the Supreme Court. While one line of cases[83] recognises that the absence of a separate hearing is a procedural impropriety, another set of cases holds that a pre-sentence hearing is not a mandatory requirement as long as an opportunity is given to the accused to furnish evidence on sentencing.[84] Further, there is significant divergence, on the course of action to be adopted by appellate courts when sentencing hearings are found deficient at trial. While one line of cases has seen the remand of the case to trial, another set of appellate courts has taken it upon themselves to cure sentencing defects.[85]

In *Arif v. Registrar*, the Supreme Court mandated an oral hearing of death sentence reviews, justifying it on grounds of different judicially trained minds coming to different conclusions.[86] Given this context, it becomes difficult to appreciate the constitutional logic behind remedying trial court sentencing errors at the appellate stage. Moreover, this approach also deprives the accused of the right to appeal against the sentencing decision of lower courts.[87] Yet, the failure of *Bachan Singh* to anticipate such problems arising in the course of capital sentencing has given subsequent courts free rein to adopt varied approaches when confronted with procedural sentencing errors at the level of lower courts.

Weighing Aggravating and Mitigating Factors

At the core of the *Bachan Singh* framework is the identification of aggravating and mitigating factors followed by the application of judicial mind to these factors. However, *Bachan Singh* has very little to offer in terms of guiding judicial discretion on this aspect. Perhaps the only real assistance appears in one line of the majority opinion that requires sentencing judges to give mitigating factors a 'liberal and expansive' reading (the absence of such an approach for aggravating factors is instructive).

The lack of any real guidance on weighing aggravating and mitigating factors has led to

a crime-centric focus in sentencing, and has also resulted in some judgments outrightly dismissing any role for mitigating factors, as discussed above. Some judgments have even gone to the extent of dismissing a whole class of mitigating factors, before attempting to weigh them against aggravating factors. For instance, the Supreme Court in *Krishnappa v. State of Karnataka* held that socioeconomic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy.[88] This has been further exacerbated by poor quality of sentencing material presented by the defence and lack of engagement on meaningful fair trial rights during sentencing. The role of the prosecution in leading evidence to show that the accused is beyond reformation has also not received any clarification in *Bachan Singh*, leading to inconsistent and arbitrary compliance by subsequent courts.

Bachan Singh, through its sentencing framework, aspired to create room for individualised capital sentencing, requiring judges to consider the role of each individual accused within their social context. However, it did not throw light on the methods for doing so, or on the normative requirement for the same. Resultantly, the very foundations of the *Bachan Singh* framework have been unsettled by subsequent decisions. ■

> **The lack of any real guidance on weighing aggravating and mitigating factors has led to a crime-centric focus in sentencing, and has also resulted in some judgments outrightly dismissing any role for mitigating factors**

CHAPTER 2

Evidence from Trial Courts

In the last chapter, we discussed the gaps and confusion that emerged from the *Bachan Singh* sentencing framework and indicated the deviations from the original meaning of the framework with its judicial evolution. The present chapter attempts to exhibit the compliance of the trial courts of Madhya Pradesh, Maharashtra and Delhi with the sentencing framework laid down in *Bachan Singh*, along with the impact of the Supreme Court's watering down of the framework on trial courts. A reading of the 215 trial court judgments across the three states suggested an overwhelming reliance on aggravating circumstances of the crime to impose death sentences. Before we started discussing the exact nature of such reliance, it was evident that the *Machhi Singh* sentencing framework was largely driving sentencing in trial courts. The data also revealed a wide gap between the approach to mitigating circumstances in *Bachan Singh* and the dominant approaches in the trial courts.

I. MITIGATING CIRCUMSTANCES

Bachan Singh indicated that a liberal and expansive construction is to be adopted in the identification and apportionment of weight to mitigating factors. However, its failure to provide a normative framework to allow the lawyers and courts to truly appreciate its relevance in sentencing had an obvious impact on the trial courts of Maharashtra, Madhya Pradesh and Delhi. Neither did it seem like the defence lawyers presented comprehensive arguments, nor did the trial courts ask for such. The large number of cases with same day sentencing is indicative of this reality. This section on mitigating circumstances looks at both the arguments made by defence lawyers and the treatment of mitigating circumstances by the trial courts.

Arguments by defence[89]

The trial court judgments across the three states exhibited deficient quality of sentencing arguments by defence lawyers in the cases. It is pertinent to point out that since the scope of this study is restricted to the study of trial court judgments, the evaluation of sentencing arguments made by defence lawyers does not account for any submissions [oral or written] that may have been made by the defence lawyers. A closely connected aspect to deficient sentencing arguments by defence lawyers is the practice of same day sentencing which was found to be rampant with 44% cases having sentencing hearings on the same day as the

pronouncement of guilt. Same day sentencing has an obvious impact on the nature and quality of arguments that are eventually presented before the court. Consequently, the trial court judgments found the defence counsels making a mere mention of facts pertaining to the accused when praying for leniency. Contextualisation of different facts, aspects and information about the life of the accused person in relation to their physical, psychological and social context was sorely missing from these arguments. Lack of such contextualisation made it rather easy for trial courts to not duly consider these factors. The trial court judgments found the defence lawyers frequently mentioning the young or old age of the accused, their lack of criminal antecedents, presence of dependants as mitigating factors to 'plead mercy' before the court.[90] The judgments did not make any mention of the lawyers providing context to these factors, and explaining how they had impacted the life of the accused and their relevance for the purposes of sentencing. Young age is indicative of culpability and is also linked to decision making abilities and the probability of reform. This was, however, completely missing from the judgments and can be related back to the doctrinal deficiency in the *Bachan Singh* framework, which does not provide a normative structure for lawyers and courts to understand the relevance and role of mitigating factors during sentencing.

In most cases where the presence of dependants was recorded in the judgments as a mitigating factor argued by defence lawyers, it was evident that it was done without going into details of the relationship or how the dependants would be affected if the accused was given the death penalty.[91] Further, in several cases, the judgments recorded the defence lawyers only making a mention of all family members of the accused, without attempting to show how they were dependent on the accused for survival. Such arguments do not carry weight as they do not enable the trial court to assess how the accused is placed within their family and how a death sentence would prejudice them through collateral or consequential damage.

Another indicator of the ineffective quality of arguments by defence counsels as recorded in the judgments was the lack of individualised arguments in cases involving multiple accused. Of the 52 cases across the three states where multiple accused persons were involved, individual mitigating circumstances for each accused were argued only in nine cases.[92] In these cases, when arguments were made about individual mitigating circumstances, they were done in a perfunctory manner, without going into the personal circumstances of each of the offenders. For example, in *State of Maharashtra v. Prakash Dhaval Khairnar*,[93] the lawyer representing the accused persons did not make any submission regarding their individual roles in the offence. Additionally, the lawyer did not even argue young age as a mitigating factor for one of the accused who was 19 years old. In *State v. Saquila and ors.*, a case involving kidnapping and murder for human sacrifice, no individualised mitigating arguments were made by the only lawyer representing the six accused.[94] In fact, in this case, the only mitigating circumstance cited for all the accused was that they were first time offenders. In *State v. Jagtar and ors.*, the lawyer representing all the four accused persons submitted only the age of each accused as an individual mitigating factor. No argument regarding their individual roles in the offence was made.[95] In *State of MP v. Manoj and ors.*, all the four accused persons were sentenced on the same day, without their lawyer arguing any individual mitigating circumstances besides age.[96] In *State of MP v. Parvati Bai and ors.*, five accused persons were

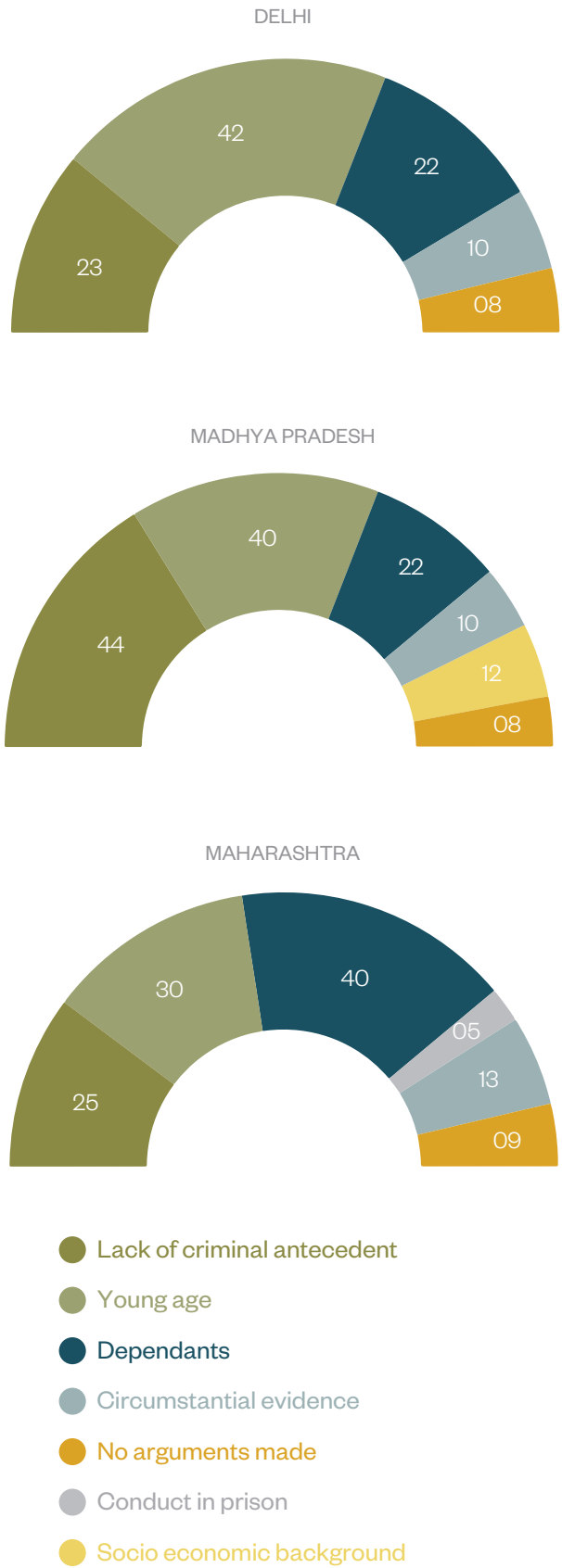
represented by one lawyer while one accused was represented by a different lawyer.[97] Both the defence lawyers did not submit any mitigating arguments for the accused and there was no discussion surrounding their individual roles in the offence. In, *State v. Nihal Ahmed Rais Ahmed Shaikh & Anr*., both accused persons were represented by the same lawyer who did not present individual mitigating circumstances for each accused or discuss individual roles in the offence.[98]

Treatment of mitigating circumstances by trial courts

The inadequate nature of arguments made by defence lawyers had an impact on the trial courts' engagement with mitigating factors during sentencing. The trial courts mainly relied on aggravating circumstances to impose death sentences. The Madhya Pradesh trial courts' reliance only on aggravating factors to impose death sentences was particularly high. In as many as 51 judgments out of a total of 82 in Madhya Pradesh, no mitigating circumstances were considered during sentencing. 41 out of 90 cases from Maharashtra adopted this approach. In Delhi, in 18 out of a total of 43 cases, the decision did not include consideration of mitigating factors.

Mitigating factors argued by defence lawyers were summarily dismissed in a significant number of cases. Brutality of the crime emerged as one of the main reasons for dismissal of mitigating factors. They were found to be irrelevant in sentencing owing to the heinous nature of the crime. Such dismissal of mitigating factors portrayed the understanding of mitigation as an excuse for the crime. Judgments from Maharashtra and Madhya Pradesh[99] strongly evidenced such an understanding. For instance in *Vasanta Sampat Dupare*, the age of the accused and the presence

SENTENCING ARGUMENTS BY DEFENCE (NUMBER OF CASES)



of dependents were dismissed by the trial court because, according to the court, these factors did not 'lessen the gravity or enormity of the crime committed by the accused'. In *Sadashiv Jetappa Kamble*, the court dismissed young age and the possibility of reformation of the accused on the basis of the manner of commission of the crime, which involved extreme brutality. Similarly, in *Charanlal*, which was a case of rape and murder, the court summarily dismissed all mitigating circumstances by posing the following questions: "Can any mitigating circumstance be a reason for such a beastly act? Can such a person gain mercy and sympathy from the society? Can such a person have repentance for his deeds and reform for the good? Should the court allow such a person to live a grand life after serving the punishment?"[100]

The court's response to mitigating factors in *Charanlal* is the starkest example of trial courts' understanding of the scope and concept of mitigating factors. This is attributable to the gap in *Bachan Singh*, which did not provide a normative framework for sentencing courts to appreciate its role in sentencing.

Another mode of dismissing mitigating factors that the trial court judgments revealed was the reliance on precedents. Trial courts in 30 judgments, which included 12 cases from Maharashtra, 14 cases from Madhya Pradesh and 4 cases from Delhi, relied upon two kinds of Supreme Court precedents to dismiss mitigation. The first kind were decisions that were evidently antithetical to the *Bachan Singh* framework, in laying down principles dismissing the relevance of one or few mitigating factors. In five cases from Madhya Pradesh, we found that the socio-economic condition of the accused was dismissed as a mitigating factor by relying upon the case of *State of Karnataka v. Krishnappa*.[101] *Krishnappa* held that 'socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy'. Similarly, we found courts in Delhi relying upon *Narayan Chetanram Chaudhary v. State of Maharashtra*,[102] and courts in Maharashtra relying upon *Sevaka Perumal v. State of Tamil Nadu*[103] to dismiss young age as a relevant mitigating factor.

The second kind of reliance on precedents involved cases with similar facts regarding the crime or the accused. For instance, if aggravating circumstances outweighed the young age of the accused in a case of rape and murder, the trial court would rely on this precedent in a similar case to dismiss young age as a relevant mitigating factor. Young age, along with other mitigating circumstances, might have been outweighed by the aggravating circumstances in an earlier case. However, replicating such an outcome in a future case goes against the grain of individualised sentencing envisaged under s.235(2)[104] given the importance of factual specificity when it comes to both the accused and the crime, and the unique nature of the outcome.

Sometimes trial courts also dismissed mitigating factors on the basis of whimsical observations made without any deliberation. For example, in the case of *State of NCT of Delhi v. Rajesh Kumar*, the court dismissed the argument of the defense that the accused were poor, on the basis of the fact that they had engaged private lawyers for themselves.[105] Similarly, in the case of *State of Maharashtra v. Kamal Ahmed*, that the accused was suffering from tuberculosis was dismissed as an irrelevant mitigating factor since it is a very common disease in India.[106] In the case of *State of Madhya Pradesh v. Dileep @ Dipu*, the court dismissed young age as a mitigating factor by stating that 'sexual crimes are generally not committed by old people'.[107]

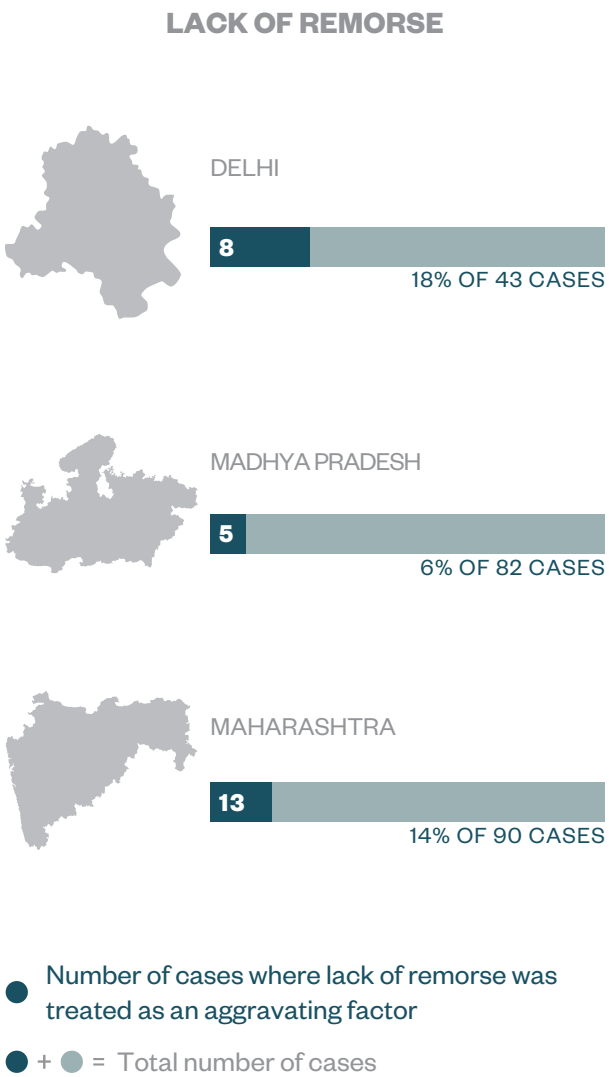
The most commonly listed mitigating factor by trial courts across the three states was the age of the accused - in 18 cases in Delhi, 11 cases in Madhya Pradesh, and 19 cases in Maharashtra. We use the word 'listed' and not 'considered' owing to the quality of discussion around it; such discussion lacked depth or even an attempt to draw any linkages between the young age of the accused and their blameworthiness/culpability and/or the probability of reformation. It was merely listed, along with a couple of other mitigating factors and subsequently dismissed. This was a practice in nearly all cases where young age was listed as a mitigating factor. In cases where old age was argued as a mitigating factor, it was dismissed by the court stating that since the accused was old, there was little or no scope for reformation. For example in *State v. R. P. Tyagi*, the court dismissed the old age of the accused on seeing no scope for reformation because the accused was a retired policeman.[108] Similarly, in *Bharat Singh* the court considered the old age of the accused as an aggravating factor in light of the fact that it was the rape and murder of a minor girl.[109]

The other commonly listed mitigating factor was the presence of dependents. Here too, the depth and quality of consideration was a concern, as the courts routinely failed to go beyond merely mentioning the number of family members of the accused, before stating that such was not sufficient in light of the aggravating factors. In one case, *State v. Surender and Ors*, the court held that the presence of dependants did not hold good for the accused since he committed the murder in front of his children.[110] In a few cases, the court in fact went a step further and noted that since the family members of the accused did not come to meet them in court or while they were in custody, this actually constituted an aggravating factor. For example in the case of *State v. Rajesh Kumar*, the court noted that the wife and children of the accused had given up on him and did not visit him even once during the trial, considering that an aggravating factor.[111] Similarly, in *State v. Raminder Singh @ Happy*, the fact that the wife of the accused had left him after the incident and that his wife, mother and children had not visited him even once during the trial, were considered as aggravating factors by the court.[112]

The probability of reformation has been identified as a mitigating circumstance in *Bachan Singh*. However, most trial court judgments revealed that the courts had not considered the probability of reformation of the accused during sentencing. Chapter V provides the data on this for Maharashtra, Madhya Pradesh and Delhi. In a small number of cases, where the probability of reformation of the accused was considered, it was backward looking, i.e., tied to the brutality of the crime. Chapter V indicates this trend across the three states with it strongest in Madhya Pradesh. The determination of the probability of reformation should necessarily be independent of the circumstances of the crime. A reliance on the crime to make such a determination defeats the very purpose of this consideration, which is to assess the probability of reform.

A peculiar trend that we noticed across the three states was the treatment of the absence of remorse as an aggravating circumstance. In most cases, trial courts did not look at remorse during sentencing but in cases that they did, it concluded on the basis of their demeanour that the accused was not remorseful. In such cases, the courts did not specify what acts of the accused led them to believe that they were not remorseful, and how their demeanour felt so. For instance, in the case of *State of Maharashtra v. Sadashiv Jetappa Kamble*, the court observed

that the accused did not show any repentance as there was no evidence on record to show that he was remorseful.[113] Even for cases where the court did state why it felt that the accused was unremorseful, such was mostly linked to the crime itself and not to any post-offence conduct of the accused. For example, in *State of Maharashtra v. Mayankaur Baldevsingh Sardar*[114], which was a case of honour killing, the court held that the accused were not remorseful, as they felt they had preserved the sanctity of their caste through the act. This approach was observed in several other cases as well. The table below provides the data from the three states on this aspect.

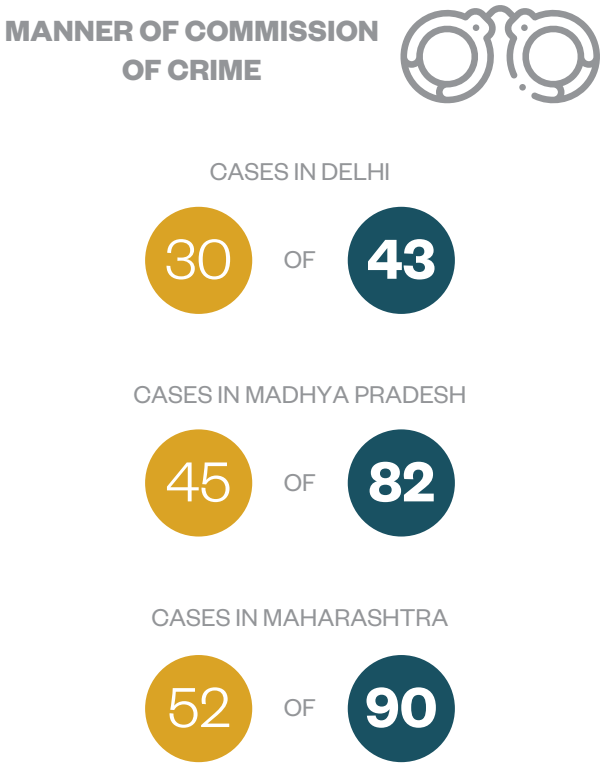


Lack of remorse was also used to dismiss the probability of reformation in 6 cases[115] from Maharashtra and in 3 cases[116] from Delhi. In the United States, many state courts have found remorse to be an appropriate mitigating factor to consider when assigning criminal punishment. However, many states have also found the absence of remorse to be an appropriate aggravating factor when calculating an appropriate criminal punishment.[117] There also exists literature that argues against the use of remorse in sentencing.[118] Application of remorse is not seen to fit within the just deserts model because it does not assist in determining the severity of the sentence. It is argued that while the retributivist theory is 'forward looking' and primarily concerned with assigning punishments that are 'in proportion to the severity of the offense,' feelings of remorse neither assist in determining the blameworthiness of an accused person, nor do they repair the harm caused.[119] In death penalty sentencing in India, remorse finds a place because it is considered as an indicator of the probability of reform of the accused. However, given the ambiguity around determining remorse, using the absence of it as an aggravating factor raises serious concerns about the rights of the accused.

II. AGGRAVATING CIRCUMSTANCES

In a context where mitigating circumstances were hardly presented and argued, aggravating circumstances found overwhelming reliance from trial courts to impose the death sentence. It is pertinent to point out here that the most commonly considered aggravating circumstances in trial courts corresponded to the five categories that have been laid down in *Machhi Singh*. As discussed in the last chapter, the Supreme Court in *Machhi Singh*

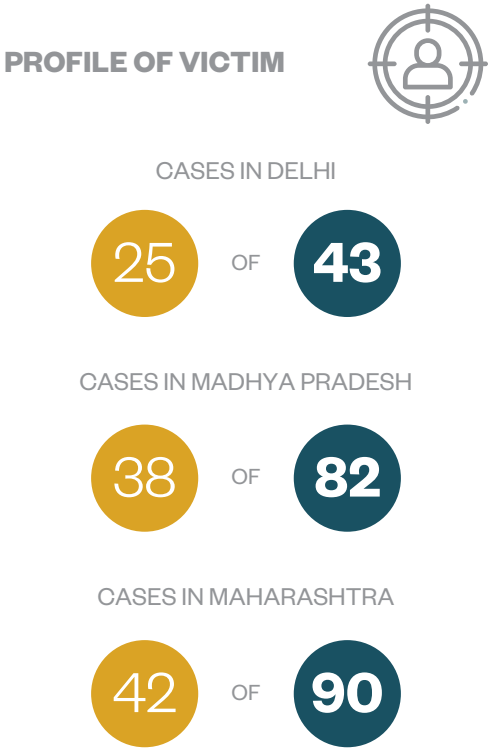
observed that if these categories were met in a case then the 'collective conscience' of the society would necessitate the imposition of the death sentence. Other than these five crime categories laid down in *Machhi Singh*, the trial courts relied on 'collective conscience' itself as an aggravating factor, which was also conceptualised by the Court in *Machhi Singh*, and later took shape in the form of other amorphous categories like 'society's cry for justice'. Besides this, the presence of criminal antecedents was a commonly argued and considered aggravating factor in the trial courts of Maharashtra, Madhya Pradesh and Delhi.



The most commonly argued and considered aggravating factors across the three states was the manner of commission of the crime, raised in 113 cases.[120] In a few cases, the prosecution highlighted the details of injuries inflicted, to show that the crime was extremely brutal, arguing that this was an aggravating factor. For example, in the case of *State v. Ranjeet*, the public prosecutor drew the court's attention to the testimony of a doctor witness, who conducted the postmortem of the dead body and found numerous nail marks on the face of the deceased, multiple nail marks on the neck and numerous other abrasions and scratches on the person of the deceased.[121] He argued that the injuries were a result of the force used by the convict while he was trying to rape the child, due to the child's resistance. In the case of *State of Maharashtra v. Dilip Premnarayan Tiwari*, one of the arguments of the prosecutor was about the number of blows inflicted by accused on the victim.[122] The court also relied on this argument while sentencing the accused to death. Barring a few such cases, however, most saw prosecutors merely stating that the manner in which the crime was committed was brutal or was such as to constitute an aggravating factor requiring the imposition of the death sentence. Brutality of the crime involved was in fact one of the most commonly cited aggravating circumstances by the prosecution. In such cases, the prosecution merely mentioned that the crime was extremely brutal, thereby warranting the death penalty. This is especially relevant in light of the findings that the trial courts overwhelmingly imposed death sentences on the basis of the crimes themselves.

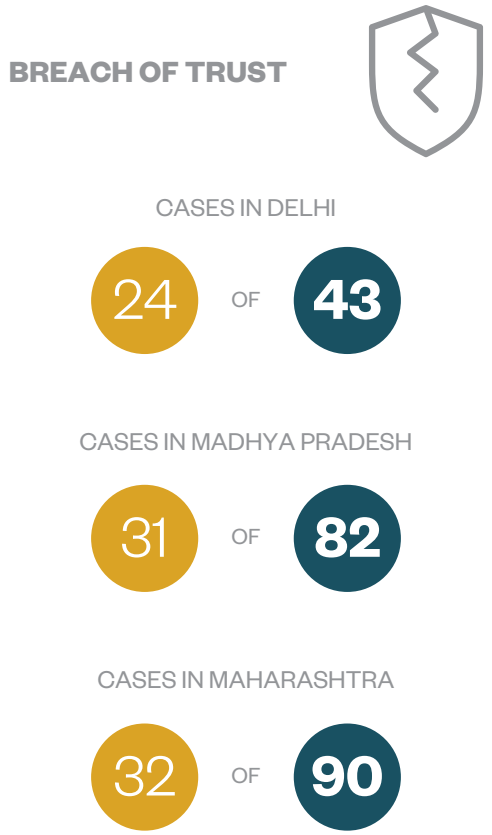
The description of injuries from the post mortem report as an aggravating factor was a practice common to the trial courts of Maharashtra. For instance, in the case of *State v. Tulshiram*, the court went into the details and gave a specific description of the injuries as described in the post-mortem report, observed that there were twelve blows which the accused inflicted on the deceased, and noted that the surviving victim's face had been disfigured.[123] Similarly, in the case of *State v. Tika Ram*,[124] the court noted that the crime

was one of extreme brutality and highlighted the medical details of each wound on each of the deceased persons - these were counted as separate aggravating factors.



The profile of the victim was another common aggravating factor across the three states. Within this broader category of the profile of the victims, there was discussion on the age of the victims, their helpless and innocent nature, lack of provocation on the part of the victims, and their social location.[125] The age of the victims, especially if they were children, featured as a compelling aggravating factor across the three states. In cases of sexual violence and murder against children, the fact that the victim was a child was often the main aggravating circumstance that was considered by courts.

Another commonly considered aggravating factor in cases where the accused was known to the victim was the relationship between the accused and the victim. In these cases, breach of the trust placed in the accused by the victim



was considered as an important aggravating factor. For instance, in *State of Madhya Pradesh v. Mohammad Shafique*,[126] the fact that the accused killed his pregnant wife and children, who he was required to protect and provide security to, was the main aggravating factor considered by the court.

Collective conscience, which was introduced to death penalty sentencing by *Macchi Singh v. State of Punjab*, was frequently considered by trial courts as an aggravating factor across the three states. From a reading of the judgments that invoked collective conscience, it appeared to play a more determinative role in deciding the sentence. For instance, in such cases, the trial courts opined that the crime was heinous enough to shake the collective conscience of the society and therefore, the harshest punishment available under the law had to be meted out to the offenders. In *State of NCT of Delhi v. Vinod Dantla*,[127] a case involving rape and murder of

COLLECTIVE CONSCIENCE

CASES IN DELHI

31 OF 43

CASES IN MADHYA PRADESH

35 OF 82

CASES IN MAHARASHTRA

46 OF 90

a minor, the court considered the outraging of collective conscience as an aggravating factor and noted that the circumstances of the crime arouse social wrath - even though none of this was argued by the prosecution. Similarly, in the case of *State of Maharashtra v. Chandrabhan Sudam Sanap*,[128] the prosecution did not argue anything at sentencing except for a lack of mitigating circumstances - but the court considered shock to the collective conscience as an aggravating factor. Of the 112 cases in which collective conscience was a factor impacting the courts' decisions, in 63 cases the courts considered absolutely no mitigating factors.[129]

In cases involving sexual offences and terror offences, the nature of the offence received significant discussion as an aggravating factor. Criminal antecedents of the accused was commonly argued and considered as an aggravating circumstance. In 2 cases in Delhi, 12 in Maharashtra and 9 in Madhya Pradesh, the prosecution cited the criminal antecedents of the accused as an aggravating factor. However, it must be clarified here that what constituted criminal antecedent varied across cases and states. For instance, in the case of *State v. Surender @ Sonu Punjabi*,[130] the prosecution placed on record details as to the involvement of the accused in past crimes. The prosecutor in this case argued that the convicts Sunil, Sudhir, Surender @ Sonu Punjabi and Suresh @ Phullu had track-records of violence, and had been previously involved in many serious violations; as far as the convict Sunil was concerned, he was involved in eight other cases. This, however, was an exception as, in most other cases, the prosecutor merely mentioned that the accused did not have a clean past and should not be treated leniently. In fact, in a few cases, the prosecution did not even argue this on the basis of prior convictions, but simply mentioned that the accused had been previously 'involved in anti-social/criminal activities'.[131]

Even the trial courts' treatment of criminal antecedents varied across the states and across cases. There was no clarity on what constituted criminal antecedents, raising the larger concern of standard of proof for aggravating and mitigating factors at the sentencing stage, discussed in the last chapter. In Delhi, courts' acceptance of the existence of criminal antecedents was based on evidence of previous conviction. However, in Madhya Pradesh and Maharashtra, the standard immensely varied. For instance in *State of Madhya Pradesh v. Birju*,[132] the court concluded that the accused was a history-sheeter on the basis of testimony of prosecution witnesses that the accused had 24 cases pending against him. In *State of MP v. Rajendra Adivasi*[133] the fact that the prosecution argued that there were pending cases against the accused, and that this was not refuted by the defence lawyer, was used to conclude that the accused was a habitual

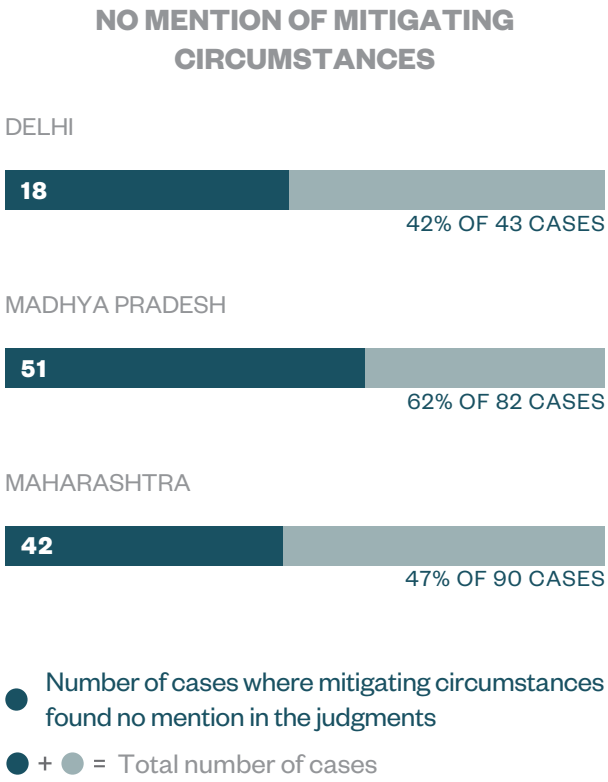
offender. However, in *State of MP v. Dilip Bankar,* the court concluded that the accused was a habitual offender on the basis of the certified copy of a judgment of previous conviction presented by the prosecution.[134]

III. WEIGHING OF AGGRAVATING AND MITIGATING FACTORS

An overwhelming reliance on aggravating factors, coupled with minimal and inadequate consideration of mitigating factors by trial courts, resulted in the outweighing of mitigating factors leading to the imposition of the death sentence. The table below shows that in a significantly high number of cases across the three states, mitigating circumstances did not find a 'mention'. We use the word 'mention' because the figures correspond to cases where courts did not acknowledge the existence of mitigating factor(s). These figures do not include the cases where mitigating circumstances were mentioned but not necessarily considered by trial courts in line with *Bachan Singh.*

As mentioned above, even in cases where courts engaged with mitigating factors, they did not qualify as 'consideration' because they were dismissed before the weighing exercise. In the few cases where the court attempted to weigh aggravating and mitigating factors, it either followed the problematic balance sheet approach or just mentioned that it had weighed the factors. There was no discussion to indicate how the courts went about the weighing exercise, and what weight was accorded to each factor that eventually resulted in the imposition of the death sentence.

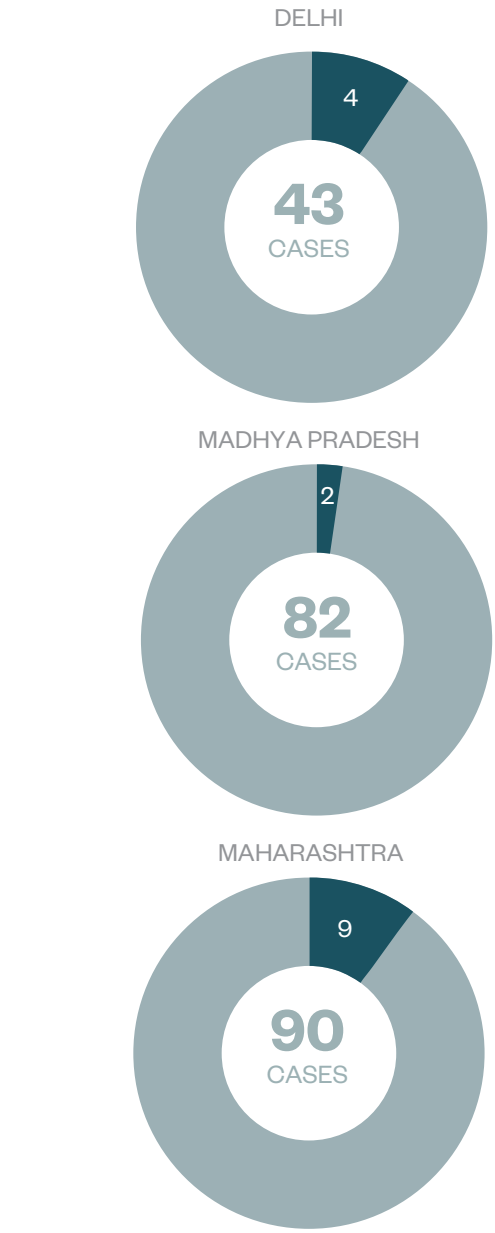
The cases that adopted a balance sheet approach simply listed aggravating and mitigating circumstances in a tabular format against



each other in two columns. The balance sheet approach is not part of the original framework developed in *Bachan Singh.* It was introduced to death penalty sentencing by *Machhi Singh*[135] and seems to have a found a purchase in trial courts. In *Sangeet and anr. v. State of Haryana*,[136] the Supreme court critiqued the balance sheet approach. It was of the view that the circumstances of the crime and the criminal are completely distinct and different elements and cannot be compared with one another. It further noted that *Bachan Singh* had discarded this proposition in *Jagmohan Singh* but *Macchi Singh* revived it. In two cases in Delhi,[137] trial courts took the balance sheet approach a step further. Mitigating and aggravating circumstances were listed in a tabular format against each other and then, by virtue of aggravating circumstances being a longer list than mitigating ones, they were said to be 'numerically' outweighed by aggravating circumstances.

In cases where the courts mentioned that they had weighed aggravating and mitigating

THE BALANCE SHEET APPROACH



circumstances, there was nothing beyond this acknowledgment to evidence the same. The mention of the weighing was followed by the outcome that the aggravating circumstances had outweighed mitigating ones. No reasoning or deliberation of the courts was provided with respect to the weight attached to the identified aggravating and mitigating factors, which led the courts to the outcomes.[138]

IV. UNQUESTIONABLY FORE-CLOSING LIFE IMPRISONMENT

In imposing the death sentence, trial courts rarely meaningfully considered the alternative of life imprisonment. Sentencing courts can impose death sentence only when the alternative of life imprisonment is unquestionably foreclosed. This is an explicit requirement laid down in *Bachan Singh* and has its basis in s.354(3) of the CrPC, wherein life imprisonment is the default option and the death sentence requires special reasons. Instead, the judgments evidenced trial courts only stating the reasons for imposing the death sentence without first establishing (as required by the statute and precedent) that life imprisonment is unquestionably foreclosed.

Consideration of Life Imprisonment by trial courts

Crime based determination on the question of Life Imprisonment

As discussed by the Supreme Court in *Santosh Bariyar*, a determination that life imprisonment is unquestionably foreclosed would necessarily require sentencing judges to show that the accused was beyond reformation. However, even in the small number of cases where the trial courts rejected life imprisonment explicitly, they mostly did so on the basis of brutality of the crime and not on considerations of reformation. In all the cases in which life imprisonment was considered, the courts chose not to impose life imprisonment on the basis of brutality of the crime.

Unquestionably foreclosed v. Inadequacy

The threshold for rejection of life imprisonment as a sentence, as per *Bachan Singh*, is that it should be unquestionably foreclosed. However, as discussed in the last chapter, *Machhi Singh* lowered this threshold by holding that death sentence must be imposed when life imprisonment would seem to be an 'inadequate' punishment. A reading of the trial court judgments suggested that no uniform standard was followed by trial courts for dismissing life imprisonment as a punishment; some courts dismissed it when it seemed to be unquestionably foreclosed, while some dismissed it when it seemed to be an inadequate punishment. Of the 8 cases in Delhi that considered life imprisonment, all of them dismissed it as being inadequate instead of being unquestionably foreclosed. 22 cases in Madhya Pradesh considered the question of life imprisonment and also dismissed it on the basis of inadequacy. 18 cases in Maharashtra used the threshold of inadequacy to dismiss life imprisonment and seven determined that it was unquestionably foreclosed. One case in Maharashtra used neither of the two thresholds, while another went on to hold that imposing life imprisonment would be a mockery of justice.

Role of Reformation

In the few trial court cases from the three States where probability of reformation was considered during sentencing, the determination of the same was often backward looking, focusing on the crime. Courts made a determination about the probability of reformation by considering the aggravating circumstances of the crime. In 14 cases (out of 82) from Madhya Pradesh, probability of reformation was considered during sentencing and dismissed on the basis of crime in 9 cases. Similarly, in Delhi, in 4 of the 10 cases where it was considered, the circumstances of the crime resulted in its dismissal. Among 38 of the 90 cases from Maharashtra that considered probability of reformation during sentencing, 27 dismissed it on the basis of brutality. What is noteworthy is that in none of these cases did the prosecution lead evidence to show that that the accused was beyond reform.

The determination of the probability of reformation should necessarily be independent of the circumstances of the crime. Determining it by looking at the crime defeats the purpose of this consideration as the very core of the idea is to see if there is a probability of reforming the guilty. Reliance on psychiatry through clinical risk assessments is one manner in which other jurisdictions evolved to decide on the question of reformation. However, it has its own limitations and is fraught with ethical dilemmas for clinicians. Any risk assessment is a commentary upon a likely outcome, or a number of outcomes. It is the 'probability', not the 'possibility', of a given event occurring that is described.[139] The Supreme Court in *Birju*[140] *and Anil @ Arikswamy Joseph*[141] suggested calling for a probation officer's report to determine whether the accused could be reformed or rehabilitated. Relying on the same, the Delhi High Court in *Bharat Singh*[142] called for a social inquiry report, on the basis of which it made a determination regarding the probability of reformation. ■

CHAPTER 3

Role of Precedents in Death Penalty Sentencing in Trial Courts

I. INTRODUCTION

The trial court judgments in death sentence cases across the states of Maharashtra, Madhya Pradesh and Delhi relied significantly on precedents in sentencing decisions that imposed the death penalty. The use of precedents was not limited to understanding the requirements of the sentencing framework and had a significant role to play in individualised sentencing as well. While the former is a legally justifiable way of relying on precedents, using precedents as a substitute/alternative to the individualised nature of sentencing goes against the idea of individualised justice envisaged under s.235(2) of the CrPC. The chapter examines the principle of 'similar cases, similar treatment' on which such use of precedents is based. It is further argued that the aforementioned principle often misunderstands the problem of arbitrariness in death penalty sentencing. This confusion is present in existing academic literature and also in the Supreme Court cases. Locating this confusion in an insufficient focus on processes and an overemphasis on outcomes mapped against the nature of the crime, the chapter makes an argument for a far more rigorous sentencing process.

II. USE OF PRECEDENTS BY TRIAL COURTS

Operating within a model of vast judicial discretion, courts have relied on sentencing 'principles' laid down by appellate courts in various decisions. The need for reliance on these principles comes from the lack of sufficient guidance to courts on the sentencing framework laid down in *Bachan Singh* – while identifying aggravating and mitigating factors, the apportionment of weight to individual factors, the eventual weighing of them, and then 'unquestionably' foreclosing the alternative of life imprisonment. In such a scenario, principles from the appellate court decisions seem to drive trial courts' understanding of the requirements and application of the *Bachan Singh* framework.

However, the data from trial court judgments of Maharashtra, Madhya Pradesh and Delhi suggest that the use of precedents by trial courts was not limited to a reliance on 'principles' to

understand the *Bachan Singh* framework. Trial courts also used precedents significantly in the individualised assessment of punishment in a manner that raised important concerns.

Reliance on precedents by trial courts of Maharashtra, Delhi and Madhya Pradesh can broadly be categorised into two categories: (i) reliance on principles evolved from precedents to guide sentencing requirements; (ii) reliance on precedents as part of the individualised sentencing exercise to determine whether the accused is eligible for the death sentence or not, both of which are discussed below.

Using precedents to discern sentencing principles

Trial courts of the three states relied on principles evolved from the Supreme Court and the High Court cases. However, reliance on the High Court cases was not as frequent. Mainly, these principles included the meaning of the *Bachan Singh* framework, the general role of mitigation and/or mitigating factor(s) in sentencing, and penological justifications to impose the death sentence.

Before we get into the reasons for which trial courts relied on principles culled out from precedents, we want to draw attention to the fact that these 215 judgments evidenced frequent use of principles from *per incuriam* judgments. In common law, a judgment that is *per incuriam* has no legal force or validity, and does not count as precedent. The concept of *per incuriam* is very narrow and applicable only in two circumstances - first, to a judgment that is passed in ignorance of a relevant statutory provision, and second, one that is passed without considering binding precedent of a coordinate or larger bench.[143] In case there are two or more mutually irreconcilable decisions of the Supreme Court, the earliest view is considered valid as the succeeding ones would fall in the category of per incuriam.[144] As part of the Supreme Court jurisprudence on the death penalty, cases imposing the death sentence have been held in the recent years to be *per incuriam*. In *Santosh Bariyar*, the court examined the decision in *Ravji v. State of Rajasthan*[145] and held that the sole focus of the case on the crime, by excluding the circumstances of the criminal, is in contravention of prior decisions of the Supreme Court, and thus, *per incuriam*. In three cases, *Santosh Bariyar*, *Sangeet*,[146] and *Shankar Kisanrao Khade v. State of Maharashtra*,[147] the Supreme Court acknowledged errors in 16 cases, involving death sentences to 20 persons.

Three judgments[148] from Madhya Pradesh relied on the very principle in *Ravji* - it is the crime and not the criminal that is relevant during sentencing - that was subsequently declared *per incuriam*. A very common phenomenon involved trial court judgments citing a number of *per incuriam* decisions,[149] along with other cases, thereby making it difficult to identify the extent of the reliance on these *per incuriam* judgments. The citing and use of *per incuriam* decisions (even if it is in conjunction with other judgments) compromises the validity of the reasoning and raises the possibility of vitiating the sentencing decision entirely.

Reliance on principles from precedents was made for three broad reasons across the three states: first, to borrow from a precedent its understanding of the *Bachan Singh* sentencing framework; second, to discern principles pertaining to the role of mitigation and/or mitigating factor(s) in sentencing, but invariably to dismiss mitigation in the case; and, lastly, to demonstrate authority for penological justifications that trial court judges used while imposing the death sentence.

A very common phenomenon involved trial court judgments citing a number of *per incuriam* decisions, along with other cases, thereby making it difficult to identify the extent of the reliance on these *per incuriam* judgments. The citing and use of *per incuriam* decisions (even if it is in conjunction with other judgments) compromises the validity of the reasoning and raises the possibility of vitiating the sentencing decision entirely

Trials courts across the three states frequently cited and extensively quoted from *Bachan Singh*, *Macchi Singh* and other cases to draw from them the meaning and application of the *Bachan Singh* framework. Across the three states, we found that *Macchi Singh* was cited more frequently than *Bachan Singh*. *Macchi Singh* and subsequent courts since *Bachan Singh* have attempted to further interpret and build on the framework originally developed in *Bachan Singh*. These interpretations as discussed in Chapter I have often diluted and given conflicting interpretations to the framework originally propounded in *Bachan Singh*. Trial courts relied on precedents with varying understandings of the *Bachan Singh* framework.

Trial courts also used legally incorrect precedents to form an understanding of mitigation and/or of individual mitigating factors. The reliance here was of two kinds and it was always to dismiss the relevance of all or individual mitigating factors in the case before the trial court. The first kind of reliance on precedents was on those cases that have dismissed the relevance of mitigation or individual mitigating factors, per se, in death penalty sentencing, and hence can be characterised as 'incorrect in law'. The second kind of reliance was the result of incorrect (legal) interpretations of Supreme Court judgments whereby sentencing judges dismissed individual factors as a matter of principle. In such cases, the Supreme Court's imposition of the death sentence, after considering different sentencing factors, was interpreted by trial courts as precedent for non-consideration of certain mitigating factors per se. To illustrate this point, consider Case A where the Supreme Court had considered age as one of mitigating factors but imposed death nonetheless on the basis that aggravating factors outweighed the mitigating factors. Subsequently, trial courts have interpreted Case A as authority for the position that age is not a relevant mitigating factor to be considered during sentencing.

A popular example of the first category across states was the Supreme Court judgment in *Krishnappa v. State of Karnataka*,[150] which held that social, economic, religious, educational and caste status are not relevant during sentencing. In *State of NCT of Delhi v. Tika Ram*,[151] the trial judge relied on the principle in theSupreme Court judgment *Om Prakash @ Raju v. State of Uttaranchal*[152] - that young age cannot be a mitigating factor if collective conscience is shaken, to dismiss young age in that case. In *State of MP v. Veerendra*,[153] the trial court relied on the principle in *State of Rajasthan v. Jamil Khan*[154] - that in a case of rape and murder of a minor, age, socio-economic background and other psychic compulsions of the accused are not relevant during sentencing. In *State of Maharashtra v. Chandrabhan Sudam Sanap*,[155] the trial court relied on the principle in

Shabnam v. State of U.P.,[156] that when an offence is calculated and diabolical, the age of the accused is not a relevant mitigating factor. All of these principles are incorrect in law because they go against *Bachan Singh*, a Constitution bench judgment that lays down mitigation as an inherent part of death penalty sentencing.

An example of the second category was a trial judge's reliance in *State of Maharashtra v. Ravi S/O Ashok Ghumare*[157] on *State v. Raju Jagdish Paswan*.[158] In *Raju*, the young age of the accused was outweighed by aggravating circumstances including the nature and manner of commission of the offence. In *Ravi*, the trial court interpreted and picked up *Raju*'s outweighing of young age as a mitigating factor, as a 'principle' to dismiss young age as a relevant mitigating factor. Therefore, rather than young age being considered and then outweighed as a result of individualised sentencing, it was dismissed as irrelevant to sentencing by using the principle incorrectly culled out from *Raju*. In *Nihal Ahmed Rais Ahmed Shaikh*,[159] the trial judge relied on a Bombay High Court judgment in *Amit @ Ammu v. State of Maharashtra*[160] to dismiss young age as a mitigating factor. In *Amit*, the court outweighed young age in view of the brutality in that case. However, in *Nihal* the court understood the outweighing of young age in *Amit* to mean that, when crime is brutal, young age is not a relevant mitigating factor.

We also found trial courts across the three states using precedents to extensively quote their reflections on penological justifications. These penological justifications were not limited to observations of the courts, but quite often were substitutes to the *Bachan Singh* framework itself. The manner and the content of their usage will be dealt with specifically and in detail in the next chapter.

Outcome based reliance on precedents

Besides relying on precedents for sentencing principles, trial courts also employed precedents in the exercise of individualised sentencing, which is being problematised here. Such reliance was qualitatively different from the one mentioned in the previous section. Here, trial courts replicated either the outcome of a 'similar' precedent or its treatment of mitigating factors. Sentencing judges used precedents to establish similarity purely on the basis of the crime in question, and then used the precedent to impose the death penalty without really undertaking any individualised sentencing. Similar cases were also used as the basis to dismiss mitigation or individual mitigating factors in a case. Therefore, the 'similar cases' precedential framework emerged almost as an alternative to the individualised exercise of sentencing. Rather than weighing aggravating and mitigating circumstances in a case towards deciding the outcome in that context, similarity was invoked to replicate the sentence or dismiss mitigating factors from the precedent.

It is important to iterate at this point that the use of the 'similar cases' framework is not unique to trial courts, but is something often invoked in Supreme Court judgments in death sentence cases when confirming or commuting death sentences.

The data from the three states revealed that the basis of similarity was overwhelmingly founded on the circumstances of the crime. It was based on an individual or a group of circumstances of the crime, including similarity based on something as ambiguous as collective conscience and brutality of the crime. The specific circumstances of the crime across the three states that the similarity was based on can be broadly categorised into: (i)

The data from the three states revealed that the basis of similarity was overwhelmingly founded on the circumstances of the crime. It was based on an individual or a group of circumstances of the crime, including similarity based on something as ambiguous as collective conscience and brutality of the crime.

the nature of the crime, (ii) the relationship between the accused and the victim(s), (iii) the number of victims, (iv) the nature of evidence, (v) the nature of the victim, (vi) the manner of commission of the crime, including the nature of weapons, (vii) motive, (viii) provocation and (ix) role of the accused in cases involving multiple accused persons. The only circumstance of the convict on the basis of which similarity was established to use precedents was the age of the accused.

Most cases across states saw trial courts using more than one basis of similarity while using precedents. However, it is difficult to ascertain the exact role qualitatively played by a similar case in determining the sentence. While in some cases it appears to be the only aspect determinative of the outcome, in some others it is difficult to make such a claim.

Similar cases, similar outcomes

This section discusses in detail the trial courts' reliance on 'similar' precedents to replicate the sentence. Similarity was invoked mainly on the basis of circumstances of the crime. For instance, a trial court hearing a rape and murder case would rely on a precedent involving a 'similar' crime to impose the same sentence.

Machhi Singh laid down five instances when the collective conscience is so shocked that the community will expect persons in judicial power to impose the death sentence. These include: (i) the manner of commission of the crime; (ii) the motive for commission of the crime; and (iii) the anti-social or socially abhorrent nature of the crime; (iv) the magnitude of the crime; (v) the personality of the victim of the murder. Each category also lists various instances as examples. These five categories focus merely on aggravation. We found trial courts regularly relying on these categories to impose the death sentence, which sometimes took the form of literal adherence.[161] While this was a very rare phenomenon in Delhi and Maharashtra, it was frequent in Madhya Pradesh. By literal adherence, we mean that similarity was drawn between the case before the court and *Machhi Singh*'s five categories. Using the circumstances of the crime, compliance with either all or one of the categories was shown to impose the death sentence.

In Madhya Pradesh and Delhi, the nature of brutality was a basis for identifying a similar case for comparison. The ambiguity of the basis/ground of comparison allowed space for the court to use any case to further its argument, since every case eligible for death sentence could in some way be described as 'brutal'. However, we saw that trial courts were relying only on a few cases while discussing brutality and in such a scenario, it becomes difficult to understand how trial courts chose to rely on these particular cases. In Delhi, *Devender Pal Singh*[162] was cited in at least 6 cases[163] as a similar case on the grounds of brutality. 3 out of these 6 cases involved murder simpliciter.

The remaining 3 cases involved the rape and murder of a minor, the offence of kidnapping, murder and a terror offence. It is evident that the offences in these cases were very different from each other, making us wonder about the basis for reliance on *Devender*, a case involving a terror offence.

In cases of rape and murder of a minor, the fact that it was a case of rape and murder of a minor was itself a popular basis of establishing similarity. This was most frequent in Madhya Pradesh because it had the most number of cases concerning the rape and murder of minor girls. Across the three states, *Rajendra Prahladrao Wasnik*,[164] *Kamta Tiwari*,[165] *Laxman Naik*,[166] and *Molai*[167] were the most popular similar cases in this category. In all these cases, the Supreme Court affirmed the death sentence based on aggravating circumstances because, according to the court, mitigating circumstances did not exist. It is problematic if sentencing courts in a case of rape and murder of a minor rely on these 'similar' cases to impose the death sentence because this takes away the possibility of considering mitigating circumstances, which might very well be present in the case, along with the aggravating ones when deciding the sentence.

In Maharashtra, the trial courts in 6 cases[168] used the word 'identical' for similar cases when relying on them to decide the outcome. In *State v. Vitthal Tukaram Atugade*,[169] the trial judge relied on *Rajendra Prahladrao Wasnik*[170] and *Md. Mannan @Abdul Mannan*.[171] *Wasnik* was cited as a similar case by the prosecution where death sentence was imposed. Similarity was found on the fact that the case at hand and the cited cases involved a victim girl, seven years of age, who the accused had raped and murdered in a brutal manner. These two cases were used to conclude that *Vitthal* deserved the death sentence. The trial judge in view of the observations of the Hon'ble Apex Court in *Rajendra Pralhadrao Wasnik v. State of Maharashtra* and in *Md. Mannan @ Abdul Mannan v. State of Bihar*, held that "facts of the present case and facts of the above referred authorities are identical and in view of observations of Hon'ble Apex Court in above referred authorities, I have no hesitation to hold that present case falls within the category of rarest of rare case."[172] In *Anil alias Raju Namdeo Patil*,[173] the prosecution cited *Henry West Muller Roberts v. State of Assam*[174] and in *Anil Jagannath Pawar*, the prosecution cited *Saibanna v. State of Karnataka*,[175] while asking for the death sentence during sentencing arguments. The trial judges in both these cases observed that the cited cases were identical to the case at hand. However, the trial court judgments in both these cases did not say anything beyond this for us to certainly know how much of a role it played in sentence determination.

Similar cases, similar treatment of mitigation

Similar cases were also used by trial courts to dismiss mitigation as a whole or to dismiss individual mitigating factors.[176] While a dismissal of mitigation or mitigating circumstances in similar cases that were cited by trial courts could have been a result of an individualised sentencing exercise, to rely on these cases to dismiss mitigation in the case at hand necessarily pulls away from individualised sentencing. In *Prakash Vinayak Rao Shingnapure v. State of Maharashtra*,[177] the trial judge relied on *Ajitsingh Harnamsingh Gujral v. State of Maharashtra*[178] as a similar case to dismiss the possibility of reformation and rehabilitation of the accused. The similarity was drawn on the basis of the relationship between the accused and victims. In both cases, the accused had killed his own family. *Uma Shankar Pandey v.*

State of Madhya Pradesh[179] was relied on as a similar case by the trial court in *Mohd. Shafique v. State of Madhya Pradesh*[180] to dismiss mitigation as a whole. The basis of similarity was that in both cases the accused had killed family members while they were asleep.

The age of the accused was the only circumstance of the accused [and not of crime] that was used to invoke similarity across the three states, but was limited to the dismissal of mitigating factors raised or present in the case. In *Ram Singh v. State of NCT of Delhi*,[181] the trial court relied on *Kasab*,[182] *Atbir*,[183] *Vikram Singh*,[184] *Shivu*,[185] *Jai Kumar*,[186] *and Dhananjoy*[187] as similar cases on the basis that the accused were young in all these cases, as in the present case. The fact that young accused persons were sentenced to death in these cases was then used to dismiss young age as a mitigating factor for all the accused persons in *Ram Singh*. Similarly, in *Padmnath v. State of MP*,[188] the fact that the accused was around 18 years was used as a basis for comparison with *Lokpal Singh v. State of Madhya Pradesh*.[189] In *Lokpal Singh,* the accused, of 18 years, was sentenced to death. The trial judge relying on this case dismissed young age. It is pertinent to mention here that three accused persons in this case were sentenced to death. While two accused persons were of a young age, of around 18 years, the third accused person was 52 years old. However, there was no discussion on other mitigating factors or a discussion specific to each accused person. It was limited to the dismissal of young age by citing *Lokpal Singh.*

III. THE PROBLEM OF ARBITRARINESS IN DEATH PENALTY SENTENCING

In the previous section, we have discussed the problematic use of the 'similar cases' framework by trial courts and the Supreme Court in death sentence cases. Besides being a questionable approach to individualised sentencing in death sentence cases, the 'similar cases' framework points to a larger problem that plagues the death penalty sentencing discourse in India. The use of the framework is rooted in the underlying principle that similar cases must receive similar treatment. It seems to apply with as much force at the post conviction/sentencing stage as at the substantive law stage.[190] The framework is also supported by most academic writing on death penalty sentencing[191] and the Supreme Court's own discussion on arbitrariness in death penalty sentencing.[192] Dominant literature on the subject captures the problem of arbitrariness by focusing on unequal outcomes in similar cases, and attributes it to the inconsistent application of the *Bachan Singh* sentencing framework. Ascribing infirmities to the *Bachan Singh* framework itself is very rare,[193] and there has not been sufficient discussion on the source of arbitrariness being within *Bachan Singh* itself. Trial courts, too, have invoked cases with similar crimes where the death sentence was imposed, and used those to justify the imposition of death in the cases before them. While this can be seen as one way of responding to the dominant discourse on arbitrainess in death penalty sentencing, by focusing on divergent outcomes in similar cases, we argue that such reliance leads to a new set of concerns vis-a-vis precedent in capital sentencing.

The argument concerning inconsistent 'application' of the *Bachan Singh* framework has been the focus of most literature highlighting arbitrariness in death penalty sentencing in India. However, even within the inconsistent 'application' line of argument, the nature and source of the inconsistencies have been articulated differently. The 262nd Law Commission Report on the Death Penalty

(2015) draws from existing literature to discuss different strands of the inconsistent 'application' argument.

Similar crime, different punishment

In 1998, Dr. S. Muralidhar[194] highlighted arbitrariness in sentencing by examining various Supreme Court cases, to argue that there were several instances where a similar crime had not invited the same punishment. He used *Harbans Singh v. State of Uttar Pradesh* to highlight an instance where the appeals of three accused arising from the same crime resulted in different outcomes before three different benches of the Supreme Court. One accused was convicted, sentenced to death and subsequently executed. The death sentence of another accused was commuted by the Supreme Court, while the criminal appeal of the third accused was dismissed, the mercy plea was rejected by the President, and the death sentence was subsequently commuted by the Supreme Court under Article 32. Further, Dr. Muralidhar compared different cases with similar crimes and the same number of victims to demonstrate the different outcomes in those cases. For example, he compared the decisions in four separate cases - *Om Prakash*,[195] *Shivram*,[196] *Bhoora*[197] and *Nirmal Singh*[198] to illustrate his point. Dr. Muralidhar highlighted the nature of the crime and the number of victims in each of these cases, inviting our attention to the different outcomes in these cases. His concern (in that section of his article) seemed to be that the court reached different outcomes in what he considered to be similar cases, where the similarity was drawn from the nature of the crime and the number of victims.

In *Om Prakash*, seven persons were murdered, but mitigating factors like young age, the lack of criminal antecedents and the possibility of reform were considered to commute the death sentence. However, in *Shivram* five persons were murdered, but the death sentence was confirmed despite young age and lack of criminal antecedents, among others, being argued as mitigating factors. However, the court was of the view that the aggravating factors in the case outweighed the mitigating ones. Therefore, one of the ways arbitrariness was shown was through similar cases (with similarity based on the facts of the crime) ending up with different outcomes.

Dominant literature on the subject captures the problem of arbitrariness by focusing on unequal outcomes in similar cases, and attributes it to the inconsistent application of the *Bachan Singh* sentencing framework. Ascribing infirmities to the *Bachan Singh* framework itself is very rare, and there has not been sufficient discussion on the source of arbitrariness being within *Bachan Singh* itself

Inconsistent treatment of sentencing factors

Besides highlighting 'similar cases' resulting in different outcomes, Dr. S. Muralidhar also highlighted the arbitrariness in the weight attached to mitigating factors and used the decisions in *Major RS Budhwar*[199] and *Shankar*[200] to illustrate his argument. In *Major RS Budhwar v. Union of India*, two murders by subordinate army personnel on the orders of superior officers were not seen as warranting the death

sentence. The court pointed out that the accused had acted under dictation, surrendered within two days of the commission of the offence and spoken the truth in the form of confessions that helped bring superiors to book. However in *Shankar v. State of Tamil Nadu*, the confessions by the accused that led to the solving of the crime, did not help mitigate the death sentence awarded to them. It is important to note here that confessions was not argued as a mitigating factor by the defence lawyers in any of these cases.

In 2008, *Lethal Lottery*[201] drew attention to the inconsistencies in attitudes towards a number of factors that have affected death penalty sentencing. Age was one such factor that the report examined. Supreme Court cases were cited to bring out the inconsistency in the treatment of young age. One strand of cases concerns the imposition of the death sentence, despite the accused being young, with the observation that 'well-established law' is clear that age would not come into consideration,[202] and the other strand was where death sentences were commuted with the observation that young offenders should not be sentenced to death[203].

The decisions of the Supreme Court in *Aloke Nath Dutta*,[204] *Santosh Bariyar*,[205] and *Shankar Khade*[206] also highlighted similar concerns with sentencing factors receiving inconsistent treatment. *Bariyar*[207] and *Khade*[208] closely examine sentencing trends in cases involving the rape and murder of minors to highlight the inconsistency in their treatment of neither aggravating or mitigating factors. For instance, Justice Madan Lokur's judgment in *Khade* discusses the treatment of young age of the accused in cases of rape and murder of minors.[209] The judgment takes the view that young age was not considered to be a sufficient mitigating factor[210] in *Dhananjoy Chatterjee*[211] (27 years), *Jai Kumar*[212] (22 years) and *Shivu & anr.*[213] (20 and 22 years respectively). The judgment in *Khade* then goes on to cite another set of cases,[214] also involving the rape and murder of minors, where young age was used as a mitigating factor to commute the death sentences, such as in *Amit v. State of Maharashtra*,[215] and *Amit v. State of Uttar Pradesh*.[216] The judgment in *Khade* also examined the treatment of 'probability of reformation or rehabilitation' as a mitigating factor. It cites one line of cases[217] where, without any expert evidence that includes *Jai Kumar*,[218] *B.A. Umesh*,[219] *and Mohd. Mannan*,[220] the 'probability of reformation' is ruled out despite no expert evidence being adduced to establish that. However, the lack of such expert evidence is used to commute the death sentences in *Nirmal Singh*,[221] *Mohd. Chaman*,[222] *Raju*,[223] *Bantu*,[224] *Surendra Pal Shivbalakpal*,[225] *Rahul*[226] and *Amit v. State of Uttar Pradesh*.[227]

Therefore, it is the inconsistent use of individual factors across cases, and the inconsistent attitudes towards the same factors in different cases by different benches, which has been articulated as the inconsistent application of *Bachan Singh* framework by the literature in this section.

Varied interpretation of the Bachan Singh framework

The Supreme Court in *Bariyar* further attributed the inconsistency of factors used for commutation and confirmation of death sentences (discussed in the previous section) to the varied interpretations of the *Bachan Singh* framework.[228] Supreme Court judgments in the last decade have expressed the concern that the *Bachan Singh* framework has been subject to multiple meanings by different benches and that there has been no discernable and principled basis on which people have been sentenced to death.[229]

Unequal outcome as the manifestation of arbitrariness in sentencing

Most literature on the issues in this chapter identifies the inconsistent application of the *Bachan Singh* framework as the source of arbitrariness in death penalty sentencing. Invariably much of the literature focuses on demonstrating arbitrariness by focusing eventually on the outcome. The Supreme Court's understanding of the arbitrariness problem is epitomised by the judgment in *Shraddananda* that "on the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the criminal justice system". Similarly, the Supreme Court in *Bariyar* demonstrated arbitrariness by listing cases where the death penalty had been affirmed, and where it had been commuted, to show the inconsistency of factors attributing it to the varied interpretation of the *Bachan Singh* framework.

IV. OUTCOME BASED APPROACH TOWARDS SENTENCING EQUALITY

Outcome as the manifestation of arbitrariness is the most tangible way of showing it, given the special nature of death penalty as a punishment. Building on a similar understanding, the Supreme Court in *Bariyar* offered a solution to *repel objections of arbitrariness*[230] in sentencing. Deriving from the mandate of precedent based sentencing envisaged in *Bachan Singh*,[231] it suggested a comparative analysis of the case before it with other purportedly similar cases to make the sentencing process equal. This was also reiterated by the Law Commission of India in its 262nd Report on the Death Penalty.[232] By comparative analysis, the court meant an identification of a pool of equivalently circumstanced capital defendants. The purpose of such comparison was not to take away from the discretion available to courts, but to bring in consistency in identification of various relevant circumstances. This compelled careful scrutiny of mitigating and aggravating circumstances, and then factored in a process by which aggravating and mitigating circumstances, appearing from the pool of comparable cases, could be compared. The court acknowledged that the weight which is accorded by the court to particular aggravating and mitigating circumstances may vary from case to case in the name of individualised sentencing, but, at the same time, reasons for apportionment of weights shall be forthcoming. Such an exercise according to the court would meet fairness and the equal protection clause ingrained in Article 14, as it would address the questions relating to fair distribution of punishment amongst similarly situated convicts. The court also shared *Sharaddananda*'s[233] sense of disquiet and agreed with it that a capital sentencing system, which results in differential treatment of similarly situated convicts, effectively classifies similar convicts differently with respect to their life under Article 21.

The understanding of fairness as fair distribution amongst like offenders is derived from the principle that like cases should be treated alike. However, this understanding often obscures the key question of what factors make cases relevantly alike. For instance, *Bariyar* uses the phrase 'similarly situated convicts' and 'equally circumstanced capital defendants' for a pool of comparable cases. The phrases by itself do nothing to offer clarity. *Shraddananda*, from which *Bariyar* extensively quotes, refers to

similarity in the context of "murder of a similar or far more revolting kind". Therefore, while *Bariyar* suggests a similarity based on offender, *Shraddananda*'s similarity is foregrounded in brutality of the offence. This leads to the functional problem of identifying a pool of comparable cases. It is not clear whether such similarity is to be based on the circumstances of the accused or on the circumstances of the crime.[234] Even if it were to be *Bariyar*'s pool of similarly situated convicts, there is no indication in the judgment how such identification is to be made. If attempted, such identification would be extremely difficult given the scant nature of information about the accused that is available to the sentencing courts, as evident from our findings. Such identification is also problematic theoretically, since the number of factors that could conceivably be compared is practically endless.[235] Therefore, a comparison with the 'pool of comparable cases', based on any metric to identify aggravating and mitigating factors, would necessarily take away from the individualised nature of sentencing. An individualised exercise would require the identification of aggravating and mitigating factors with liberal and expansive construction[236] to mitigating circumstances in the context of an individual case. Borrowing from and comparison with circumstances from 'similar' cases precludes the possibility of identifying and considering mitigating factors that might be exclusive to that particular case. Such predetermined categories would lead to standardisation of the sentencing process, which *Bachan Singh* categorically warned against while emphasising on the importance of individualised nature of sentencing.[237]

Comparison with a pool of comparable cases while sentencing, as suggested by *Bariyar*, promotes distributive justice by bringing equality in sentencing. According to the court in *Bariyar*, one can never determine whether one has received one's fair share except by comparison with that which has been allocated to others. Thus, it is an equality of outcome for similar cases that, in the court's understanding, qualifies as sentencing equality. Though the court clarified that the mandate of equality is applicable to the sentencing process rather than the outcome, an outcome-based equality ignores process-based considerations. A focus on equality outcomes can limit the consideration of intent, motive and the offender's characteristics. If all punishments were perfectly individualised for all offenders, then no offender would be punished unequally. Equality does not mean sameness; the term more commonly refers to the consistent application of a comprehensible principle, or a mix of principles, to different cases.[238] Therefore, the focus on equality in sentencing should be more on inputs and processes rather than on outcomes.

V. EQUALITY OF PROCESS

The aim in this chapter has been to highlight the nature of reliance on precedents made by trial courts in death penalty sentencing. The focus is specifically on the problematic use of precedents to decide the quantum of punishment by giving a go by to the exercise of individualised sentencing. It is, however, important to reiterate that this practice is not unique to trial courts but is something that has been picked up from the Supreme Court. Such approach to death penalty sentencing is further connected to the outcome-based understanding of equality at sentencing.

While equality of outcome is appealing as a metric of fairness, this approach privileges a few values over all others. It turns the criminal

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justice system largely into a deterrence and incapacitation driven equation, leaving little room for reformation and just-deserts. Such an approach sits uncomfortably with the capital sentencing framework as originally developed by *Bachan Singh*, in which offender characteristics (the circumstances of the criminal) are equally important component to the circumstances of crime. Drawing similarity based on the circumstances of the crime and replicating outcomes of similar cases take away the possibility of considering offender characteristics unique to each individual convict. *Bachan Singh* held that the death penalty can only be where the alternative of life imprisonment is unquestionably foreclosed. To foreclose such a possibility, reformation necessarily has to be considered, which again means taking offender characteristics into account. An outcome-based approach to address the problem of inequality and arbitrariness in sentencing does not take into consideration the circumstances of the convict and focuses only on establishing similarity and replicating outcome of a similar case. Thus, it leads to the standardisation of sentences that *Bachan Singh* categorically warned against and saw as contrary to individualised justice.[239]

The focus of sentencing equality has to be on processes and not on outcomes. Within the current sentencing framework in death penalty cases, this would mean equality in terms of compliance with all steps of the sentencing framework developed in *Bachan Singh*. Further, within each step, there has to be equality in the extent of such compliance, to ensure that it matches the standards envisaged in *Bachan Singh*. We acknowledge that ensuring quality compliance with each step is a challenge because of the existing conflicting interpretations of the sentencing framework, discussed extensively in Chapter I. The gaps and limitations identified in the framework developed by *Bachan Singh* in Chapter I need to be bridged as a first step in moving towards fostering equality of processes at sentencing. ■

CHAPTER 4

Penological Justifications

The 215 trial court judgments invoked a variety of penological justifications while imposing the death penalty. In the absence of sentencing guidelines in India, judges deciding appropriate punishment rely on prior judicial pronouncements and legislative enactments, to determine penological goals during sentencing. This is especially true of capital sentencing in India, where a constitution bench of the Supreme Court, through *Bachan Singh*, laid down a sentencing framework for subsequent courts deciding between life imprisonment and the death penalty, premised on certain penological goals. The court in *Bachan Singh*, for its own part, sought guidance on legislative intent through the amendments to the CrPC, which made life imprisonment the norm, and death penalty the exception. This, for the court, was indicative of the legislative will to do away with retribution, understood as vengeance, as a legitimate sentencing goal. However, judgments on death penalty sentencing in India demonstrate a vast variation in sentencing motivations of judges and the impact it has on quantum of punishment. An analysis of penological justifications invoked in trial court judgments raises a range of concerns, including their use without any justification whatsoever, inaccurate understandings of penological theories and a complete lack of clarity on sentencing goals being pursued. This chapter focuses on these issues, while highlighting the problems with the Supreme Court's jurisprudence on sentencing goals in capital sentencing.

This chapter begins with a brief overview of the theoretical foundations of different penological justifications that are often relied upon while deciding between life imprisonment and the death penalty. Following this, the chapter traces the manner in which the Supreme Court of India has invoked these justifications while confirming death sentences, beginning with the majority opinion in Bachan Singh. The next section of the chapter focuses on the major implications of the Supreme Court's use of penological justifications in capital cases. The first of these, as the chapter notes, is that sentencing judges often fail to adhere to theoretical underpinnings of different penological justifications, while invoking them in individual sentencing decisions. Secondly, there is very little clarity on what material sentencing judges are examining to guide them on pursuing certain penological goals over others, especially since many of them go against the very grain of Bachan Singh. This in turn, leads to a situation where each individual judge invokes and applies penological goals, according to their personal predilection. These implications are then linked to the broader problem of a lack of

clarity on sentencing goals generally, which is particularly exacerbated in capital cases. This chapter also raises concerns regarding the roles of different stakeholders in deciding and prioritising sentencing goals, and challenges the normative assumption that judges should have wide discretion in choosing penological goals during (death penalty) sentencing.

I. PHILOSOPHICAL FOUNDATIONS OF PENOLOGICAL THEORIES AND CHALLENGES IN IMPLEMENTATION

In its jurisprudence around capital sentencing, Indian courts have invoked a variety of penological goals, to justify the imposition of the death penalty. While the details about the manner in which courts have dealt with sentencing goals are discussed subsequently, this section touches upon the theoretical foundations of the different kinds of penological justifications. It also discusses challenges confronting judges in applying these sentencing goals, both individually and collectively, while deciding outcomes. The aim in this section is to underscore the significant features of these justifications, and to subsequently contrast their application by courts, thus highlighting how courts completely disregard the theoretical underpinnings of punishment theories, even while applying them in individual cases.

The two categories of penological justifications, discussed here, can be broadly grouped into retributive and utilitarian theories. A brief discussion on these theories below is followed by a detailed description of how they have been used by courts.

Retributive Justifications

Retributive justifications seek to punish offenders for the harm caused by the crime they committed. They are deontological, judge actions based on notions of moral duty, and justify punishment as a means of righting moral wrongs of criminal behaviour. There are two approaches to retributive justifications for punishment - *lex talionis* and just deserts.

- Retribution understood as vengeance, or *lex talionis,* emphasises on inflicting punishment equal to the pain and suffering caused by the crime. This theory, mandates causing exactly the same amount of harm, in degree and kind, to the offender, as was caused to the victim, and is captured by the phrase, 'an eye for an eye'.[240] Modern criminal justice systems often consider *lex talionis* an outdated concept, mostly for reasons of its inapplicability to all situations, especially in cases where the exact amount of harm caused by the offence cannot be assessed. Moreover, the theory also stumbles upon questions of why offenders deserve punishment in the first place.[241]

- Retribution understood as *just deserts* is based on the principle of proportionality and seeks to inflict only that amount of punishment that the offender deserves. This deservedness of the offender is measured through factors of the crime such as heinousness and harm caused to the victim, as well as the circumstances of the offender, such as age, prior criminal record, relationship with the victim, etc.[242] A huge challenge in applying retributive theory to sentencing practice is the difficulty in determining the precise amount of punishment that is deserved by the offender, which is to be specifically tailored by accounting for the offender's individual circumstances. Despite limitations, the theory of just deserts, or proportionality, has great appeal in criminal justice systems, and serves as a commonly cited justification for punishment generally.

> **Modern criminal justice systems often consider *lex talionis* an outdated concept, mostly for reasons of its inapplicability to all situations, especially in cases where the exact amount of harm caused by the offence cannot be assessed.**

Utilitarian Justifications

Utilitarian justifications of punishment are non-retributive, and don't seek to punish the offender for the sake of extracting vengeance for harm caused to the victim and the society. Rather, the underlying philosophy of all such justifications is to derive some greater good from the punishment itself. The most commonly used utilitarian justifications are as follows:

Deterrence

The deterrent theory of punishment seeks to prevent further crime by deterring potential offenders, including the offenders themselves, from reoffending.[243] While one line of disagreement on the deterrent theory is the inability to determine if criminal law and punishment have any deterrent impact, the other and more intense disagreement is whether an additional quantum of punishment can lead to a measurable decrease in the crime concerned.[244] In the context of the death penalty, therefore, the question to ask concerning deterrence is not whether the death penalty has a deterrent effect, but if it has a greater deterrent impact than life imprisonment. Studies on deterrence, however, have provided no conclusive evidence of the deterrent impact of harsh criminal punishment in general, and the death penalty in particular.[245]

Criminologists often provide two responses to highlight the weakness of the deterrent theory of punishment - the rationality fallacy and the knowledge fallacy. While the knowledge fallacy questions the assumption that offenders are aware of the quantum of punishment while committing crimes, the rationality fallacy notes that offenders are not always rational decision makers at the time of committing the crime, and act under a range of emotions such as guilt, anger, shame, fear, or helplessness, or their behaviour was influenced by a spectrum of mental health concerns (even if not touching upon the insanity defence).[246]

Despite these limitations, sentencing courts and criminal justice systems continue to rely on deterrence while imposing punishments. One way to balance this reliance, in a way that does not override concerns about the limitations theory, is by adopting Immanuel Kant's approach to punishment.[247] According to Kant, "[Punishment by government for crime] can never be administered merely as a means for promoting another good, either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed the crime."[248] This means that invoking deterrence would be appropriate when combined with other non-utilitarian sentencing goals, especially proportionality. This would mitigate the doubts about the utilitarian effects of deterrence, by ensuring that offenders are punished not only for utilitarian purposes, but also in a manner and quantum proportionate to their own culpability.

Incapacitation

The theory of incapacitation, which seeks to prevent crime, by removing them from the society either by way of imprisonment or execution, is often argued to be one of the

most certain and tangible goals of punishment within the criminal justice system.[249] Yet, the doubts as to the effectiveness of this sentencing theory arise in the context of determining the exact quantum of punishment that would be necessary for protecting the society, while simultaneously not over-punishing or under-punishing the offender. These concerns are relevant, taking into consideration the realities of the criminal justice system, such as limited capacities of prisons and cost of imprisonment. Thus, while imprisoning every criminal for long periods of time, or executing every person convicted of a death-eligible offence, might appear to be a logical extension of the theory of incapacitation, it comes into conflict with other realities of criminal justice system, especially the cost of prison-expansion and imprisonment. Empirical legal work on this issue has suggested that while prison-expansion might have an initial incapacitative effect, the extra prison capacity might cost more than the social cost of crimes prevented, because substantial diminishing returns are likely to set in after the prison-expansion actually begins.[250]

Reformation and Rehabilitation

The theory of reformation is based on the assumption that all offenders are capable of reformation, and they can lead regular lives once detached from the situations that led them to offend in the first place.[251] As theories of punishment, reformation and rehabilitation seem almost oxymoronic. Yet, their relevance cannot be undermined, because unless every offender is to be executed or locked away for life, justice delivery systems will want them to be returned to the society as contributing members. In the context of the death penalty, executing a person who might be capable of reformation would appear disproportionate, and almost unecessary. The challenge with practically implementing reformation and rehabilitation in sentencing offenders is often centered around the fact that it is almost impossible to determine in the present. Even risk-assessment tests, which try to determine the probability of reformation, are commentaries upon a likely outcome, or a number of outcomes, making them not decisive of the question of reformation of an individual.

II. SUPREME COURT'S JURISPRUDENCE IN DEATH PENALTY CONFIRMATION CASES

The Supreme Court in *Bachan Singh* invoked penological goals in both upholding the constitutionality of the death penalty and providing guidance to future sentencing courts to choose between life imprisonment and the death penalty. For the majority, one of the strongest reasons for upholding the constitutionality of the death penalty was that it did not believe that the punishment was bereft of any philosophical penal justification, particularly deterrence and just deserts. The judgment cited Supreme Court precedents,[252] research studies/reports[253] and philosophical material,[254] to demonstrate the recognition of deterrence as a valid objective along with the deterrent value of the death penalty. Dismissing the argument that there are no definite statistics as to the death penalty being a sufficient deterrent, the court observed, "statistics as to how many potential murderers were deterred from committing murders, but for the existence of capital punishment, are difficult, if not impossible to collect".[255] Invoking retributive value of the death penalty, the court noted that retribution, as a means for expressing the society's reprobation was not a totally outmoded concept, as it was not driven by 'vindictiveness' or the 'instinct of the man of the jungle', but rather, with the measurement

of deserts.[256] The court made it evident that it was not giving its approval for retribution as vengeance but was going for the broader concept of 'retributive justice'.[257]

In laying down a sentencing framework for subsequent courts to follow, the majority highlighted the role of proportionate punishment, as well as reformation, in deciding appropriate punishment. The majority required sentencing courts, deciding between life imprisonment and the death penalty, to look at aggravating and mitigating circumstances of the offence as well as the offender, to determine culpability. Reformation also played an important role in the majority's framework, as the death penalty could only be imposed in cases where the accused could be proved to be beyond reformation.

According to *Bachan Singh*, therefore, different penological justifications play a role in determining the question of appropriate punishment. However, the most significant factor within this framework is played by the culpability of the accused, which, in turn, is linked to proportionality. Further, this must be answered along with questions regarding the probability of reformation of the accused. Other utilitarian justifications become relevant only in conjunction with, and not in exclusion of, these justifications. The theory of retribution as vengeance, or *lex talionis*, however, takes a backseat in the *Bachan Singh* framework, dismissed as the 'outmoded instinct of the man of the jungle'.

After *Bachan Singh*, *Machhi Singh* expanded the sentencing framework developed in *Bachan Singh* and brought in 'collective conscience' as one of the elements to be considered while deciding the quantum of punishment.[258] According to *Machhi Singh*, when a member of the society violates the idea of mutual protection by killing another member, the society may withdraw its protection and require the holders of judicial power to inflict the death penalty.[259] Such a formulation, based on collective conscience, gives way for public opinion to be brought in during capital sentencing. This, in turn, made way for retribution, understood as vengeance, or *lex talionis*, to take prominence in capital sentencing in India - a factor categorically rejected by *Bachan Singh*.

Post-*Machhi*, the Supreme Court, in several judgments on the death penalty, often invoked different penological justifications, adding to the discourse on sentencing goals, while confirming death sentences. In *Dhananjoy Chatterjee v. State of West Bengal*,[260] the court ruled that appropriate punishment enabled courts to respond to society's cry for justice. Subsequently, several courts have used 'society's cry for justice' as a valid reason to impose the death penalty.[261] This concept of responding to society's cry for justice, does not fit into the just deserts model of punishment based on culpability, but is rather hinged on retribution, understood as *lex talionis*. This is because this penological justification displays complete disregard for individual circumstances of the offender. In *Dhananjoy*, the court observed that there were no mitigating circumstances in the case, though the counsel for defence had raised arguments around young age. Further, the court also did not discuss why the question of life imprisonment was unquestionably foreclosed, thereby raising doubt on whether death was really the most appropriate punishment in this case. In *Ravji v. State of Rajasthan*,[262] the Supreme court not only invoked 'society's cry for justice' while imposing the death sentence, but also went a step ahead and stated that the circumstances of the criminal are not germane considerations while imposing punishment.[263]

Through the introduction of elements like 'collective conscience' and 'society's cry for justice' in deciding individual capital cases, the focus of sentencing shifted from deserts or deservedness of the offender to retaliation for crime committed, preventing future crimes, protection of society, and sending a message to society, which were not envisaged by *Bachan Singh*. Invoking these justifications, therefore, gave way to the imposition of the death penalty without considering or even discussing mitigating factors in favour of the accused.

Another commonly cited justification for confirming death sentences by the Supreme Court is deterrence. Supreme Court judgments have often imposed the death penalty while highlighting the importance of strict punishments in order to create fear of the law and prevent commission of crimes. For instance, citing reasons such as the "need to impose such maximum punishment under the law as a measure of social necessity which may work as a deterrent to the other potential offenders,[264] the language deterrence must speak in that it may be conscious reminder to the society and undue sympathy would be harmful to the cause of justice"[265] and "an inadequate sentence would fail to produce a deterrent effect on the society at large and similar others",[266] the Supreme Court has imposed the death penalty in several cases. The thrust of these judgments is the need to impose severe punishments generally, so that people fear the law and do not commit crimes. In some other cases, the Supreme Court has also mentioned deterrence, stating that it is a valid penological goal and therefore relevant to the sentence.[267]

> **This concept of responding to society's cry for justice, does not fit into the just deserts model of punishment based on culpability, but is rather hinged on retribution, understood as *lex talionis*.**

III. IMPLICATIONS OF THE SUPREME COURT'S USE OF PENOLOGICAL JUSTIFICATIONS

The above discussion draws attention to the large variety of penological justifications that the Supreme Court has invoked while confirming death sentences. The judgments suggest that the Supreme Court has relied on different penological theories, some even in stark contrast to precedent laid down in Bachan Singh, and used them to justify the imposition of the death penalty. Resultantly, the jurisprudence on sentencing goals vis-a-vis capital sentencing is fraught with contradictions and confusion, and does not present a clear path for subsequent sentencing courts to follow. This section discusses different implications of this phenomenon, arising out of the broader problem of a lack of clarity on sentencing goals.

Dilution of Bachan Singh's principle

Bachan Singh's sentencing framework required subsequent sentencing courts to take into account penological justifications relevant to the accused, which determine individual desert on the basis of aggravating and mitigating factors and the probability of reformation. However, subsequent judgments, focusing on deterring future offenders and accounting for broader penological goals while deciding

individual capital cases, have taken away from *Bachan Singh*'s formulation, which intended to focus on the severity of the crime as well as the circumstances of the accused. Further, by imposing death sentences citing criminal justice policy goals, the Supreme Court has effectively substituted the original capital sentencing framework developed in *Bachan Singh* with these justifications, and made it possible to impose a death sentence on the basis of broader penological goals, without adhering to the framework at all.[268] By not going into the question of suitability of life imprisonment in such cases, the court has further strayed away from *Bachan Singh*'s formulation. For subsequent sentencing courts that seek to impose the death penalty under the *Bachan Singh* framework, culpability is one of the most important aspects that needs to be considered in deciding between life imprisonment and the death penalty. With heavy consideration of factors such as satisfying 'society's cry for justice', deterring future potential offenders from committing crimes, and so on, these judgments have undermined culpability and drifted away from individualised sentencing prescribed by *Bachan Singh*. Moreover, superficial engagement with mitigating circumstances of the offender by the courts implies that the only relevant factors are those related to the offence, thereby making the outcome completely crime-centric.

The theory of proportionality or just deserts thus, appears to have taken a backseat in the process of capital sentencing in India. Only utilitarian goals gain relevance, allowing the offender to be used as a means to secure some social benefit such as crime reduction, leaving no room for individual desert. Arriving at the appropriate punishment in an individual sentencing case requires striking the right balance between retributive and utilitarian justifications.[269] This is especially true of

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criminal justice systems, like India's, which do not have one single goal that must be pursued while imposing punishments.[270] However, in several capital confirmation cases, as discussed above, the Supreme Court has relied either solely on utilitarian justifications like deterrence, to send a message to society, or invoked retribution, understood as *lex talionis*, to 'satisfy the society's cry for justice'.[271]

The morality of using an individual as a means to secure larger societal benefit has often been criticised, especially since it might lead to the imposition of a hugely disproportionate punishment to send a message to society.[272] Essentially, individualised sentencing becomes irrelevant when other utilitarian factors take over, because society's interests then begin to take precedence over deservedness of the individual.[273] Kant had warned against imposing any criminal punishment for a merely utilitarian reason, as solely using such justifications might go against other fundamental principles of modern penology.[274] It is important to note here that though, according to Kant, utilitarian

reasons come into play when an individual is to be punished for a crime, there are moral concerns with punishing one individual to deter others. Besides, unlike colonial times where most felonies were punishable by death, modern penological systems are based on gradation of punishment based on the culpability of the individual and severity of the crime.[275] Imposing a punishment solely for sending a message to society, therefore, not only goes against the *Bachan Singh* framework, but also against the foundational questions of modern penological systems.

Incorrect application of penological theories and crime-centric approach

Besides straying away from basic principles of penology, the Supreme Court's invocation of penological justifications, such as proportionality and deterrence, also raises concerns about the correct understanding and applicability of the same.

The essence of the theory of proportionality lies in carving out a suitable individualised punishment.[276] Relying on the theory of proportionality requires considering aggravating and mitigating circumstances of both the crime and the accused to decide the sentence. Most Supreme Court judgments, which frequently invoke and dedicate paragraphs discussing the relevance of proportionality, have arrived at the death sentence by giving a go-by to mitigating circumstances, which is an inalienable part of the theory.

Similarly, the theory of deterrence is premised on avoiding over-punishing or under-punishing offenders, so as to correctly achieve the greater good of preventing crimes.[277] Moreover, since the actual deterrent impact of criminal sanctions is doubtful, the theory should only be invoked in a manner that does justice to other sentencing goals, instead of merely giving individuals disproportionately harsh punishments for a larger consequentialist aim of preventing crimes.[278]

Such an approach reflects an inadequate and shallow understanding of the theoretical underpinnings of penological justifications that courts seek to apply. The problem with this, then, is that while courts may give an impression of imposing the death penalty only after taking into account different circumstances of the offence and the offender, the actual sentence is driven by the nature of the crime, without due regard to the factors of the offender. Therefore, the penological theory of retribution understood as *lex talionis* finds application in such cases.

Broader problem concerning lack of clarity on sentencing goals

Administration of the death penalty in India is fraught with challenges and confusions for sentencing courts deciding between life imprisonment and the death penalty. Supreme Court judgments, which invoke a variety of penological justifications without really prioritising one over the other, make the picture more confusing for lower courts. For its own part, the Supreme Court faces the challenge of a lack of guidance from the legislature on the point of prioritising sentencing goals. This problem in the context of capital sentencing stems from the bigger concern about a lack of clarity regarding underlying penological goals of the Indian criminal justice system. This lack of clarity on sentencing goals has assumed greater proportions in the context of capital sentencing, given the irreversible nature of the punishment.

This is a serious issue confronting most criminal justice systems today, and even jurisdictions

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that follow the model of sentencing guidelines often stumble on the issue of prioritising one sentencing goal over another. The Federal Sentencing Guidelines in the United States were adopted in a bid to avoid unwarranted sentencing disparity.[279] At the time of their adoption, the guidelines were presumptive and departure was allowed under two circumstances - firstly, when prosecutors filed a motion stating that the accused provided substantial assistance during the investigation, and secondly, when the judge felt that the factors relevant to the case at hand had not been captured by the guidelines. The guidelines were made advisory by the Supreme Court in *United States v. Booker*, for violating the constitutional rights of defendants guaranteed under the Sixth Amendment.[280] Despite being advisory, these guidelines have been subject to much criticism, and one major point of this is that they do not permit the consideration of race, sex, religion or individual mitigating circumstances of the accused, thus prioritising treating equal harms equally over individualised sentencing.[281] Similarly, in the United Kingdom, where sentencing decisions are guided by the Criminal Justice Act, 2003, there is no fixed purpose that courts need to adhere to while deciding the appropriate punishment. The five purposes of sentencing, set out under the said Act, include, the punishment of offenders, the reduction of crime (including its reduction by deterrence), the reform and rehabilitation of offenders, the protection of the public and the making of reparation by offenders to persons affected by their offences.[282] The lack of a hierarchical order among these different sentencing goals makes it completely discretionary for the adjudicating judge to decide which purpose is relevant to what degree in a particular case.[283] This has led to significant critique for want of consistent application.[284]

However, in India, judges have no guidance, either from the legislature or from an independent body such as a sentencing commission, on the philosophical foundations of imposing specific punishments for particular crimes. This enlarges the scope for replacing systemic values with that of individual judges who might consider one penological theory more relevant and applicable than the others. Mrinal Satish has argued that the lack of principles and unfettered discretion granted to courts in their sentencing function leads to arbitrariness in sentencing outcomes, thus violating the constitution.[285]

Moreover, the lack of clarity on sentencing goals to be pursued has enabled individual judges to invoke these theories and use them as sentencing factors instead, essentially substituting them for the *Bachan Singh* framework. Instead of arriving at a punishment by weighing aggravating and mitigating factors of the individual case, while pursuing broad sentencing goals, judges end up using factors like 'sending a message to the society', 'protecting the society', and 'satisfying society's cry for justice', which play a determinative role in deciding appropriate punishment, trumping all individual factors of the case.

While the morality of using an individual to pursue larger consequentialist aims of sending a message to society or preventing crimes remains unclear, such use of penological theories speaks volumes about the problem with the sentencing processes in India. When Supreme Court judges invoke sentencing justifications based on their own penological philosophies, lower courts follow suit and tread on similarly murky grounds while deciding between life and death. The subsequent section demonstrates how this confusion has played out in trial courts while imposing death sentences.

IV. DATA FROM TRIAL COURT JUDGMENTS

Retribution as Revenge

Trial courts, while discussing appropriate penological justifications, rarely explicitly admit that capital punishment is being imposed to avenge or take revenge for the crime committed. However, the language in the judgments emphasises on the brutality of the offence, helplessness of the victim, etc. and points towards building a character of the accused that is akin to a monster or a demon. This betrays the sentiment of the court, exposing the underlying justification of *lex talionis* for imposition of the death penalty. Moreover, in such judgments the punishment is imposed only on the basis of the brutality of the crime, without any regard for mitigating factors of the offender. For instance, in *State of Madhya Pradesh v. Jitendra and anr.*,[286] a case of murder, the court observed that death was the least punishment they could get, since 'it is not legal' to put them to death in the manner in which they killed the victim. Similarly, in *State v. Dilip Bankar*,[287] a case involving the rape and murder of a minor, the court said that if there was a punishment greater than the death penalty, even that would be less, considering the monstrosity of the crime. In the *State v. Raosaheb Ramchandra Thombare*,[288] a case of murder where a father killed his children, the court, in a rare instance, expressly endorsed *lex talionis*, noting that tit for tat is permissible in some cases. There were a total of 14 such cases from Madhya Pradesh, three from Delhi and two from Maharashtra. The three cases from Delhi involved terror offences. This was interesting because, as has been discussed in the previous chapters, judgments from Delhi engage more with discussions around mitigation and circumstances of the offender. However, in terror offences, such an approach appears to have been completely abandoned. In *State v. Mohd. Afzal*,[289] referred to as the 'Parliament attack case', the court imposed the death penalty while observing "... the act of conspiring with the foreign terrorists for attacking Indian Parliament is so horrendous, revolting and dastardly that it has aroused intense and extreme indignation in the community. I therefore consider that it is a rarest of rare cases where the three accused persons should be given death penalty instead of life imprisonment". In *State v. Mohd. Julfikar Ali*,[290] involving a bomb blast in a bus, the court observed that the crime of terror is the worst possible crime against humanity and imposed the death penalty holding that "this is a rarest of rare type of case, where the accused must be punished with the death penalty ... as life imprisonment would be grossly inadequate". In *State v. Mohd Arif*, which involved an attack on the Red Fort, the court observed that any sympathy for terrorists who have no respect for human life would be misplaced and, therefore, the only appropriate punishment here would be that of the death penalty. In all these three cases, the sentencing orders talk at great lengths about the perils of terror offences, emphasising the need to respond with the

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harshest punishment available in law, without any discussion whatsoever on mitigating circumstances of the offender.

Another justification, along the retributive, which has been used by trial courts across the three states while imposing the death penalty, was to keep the faith of the society in the justice system intact by imposing the most severe punishment under the law. For instance, in *State of Madhya Pradesh v. Mahesh Kurmi*,[291] the court imposed the death penalty holding that punishment must be just and adequate so that the public does not lose its faith in the criminal justice system. The defence counsel had raised the argument that if the accused is given the death penalty, he will not get a chance to repent his actions, but the court dismissed it saying that it would be inappropriate to give the accused a chance looking at the enormity of the crime. Other mitigating factors of young age and the presence of dependants were also dismissed on the basis of brutality of the crime. In Chapter V, we have discussed how the question of alternative option of life imprisonment and the possibility of reformation have been dismissed on the basis of brutality of the crime. Using such justifications leaves little room for consideration of individual mitigating circumstances of the offender, and makes the punishment crime-centric, contrary to the requirement of *Bachan Singh*.

Deterrence without sufficiently engaging with mitigating circumstances

Among utilitarian justifications, trial courts have most commonly used deterrence, particularly general deterrence, while imposing the death penalty. This justification has been used in 17 judgments in Delhi, in 19 in Maharashtra and in 34 in Madhya Pradesh. While invoking this justification, courts have justified it with the necessity of sending a message to society that such heinous crimes will not be spared and that the offenders will be given the harshest punishment under the law. Interestingly, such a justification was invoked in crimes considered to have a large-scale impact on society, particularly in cases of the rape and murder of minor girls. For instance, in *State of Madhya Pradesh v. Bantu @ Naresh Giri*,[292] the court imposed death stating that "the maximum punishment permissible under the law should be awarded such that this punishment will work as a deterrent for future criminals." Similarly, in *State of NCT of Delhi v. Bharat @ Mannu*[293] where the court, while imposing a death sentence, observed, "In the recent past, the society has seen a steep increase in the incidents of sexual

assaults upon women and more particularly upon minor girls. Time has come when the courts should deal with such heinous crimes sternly in order to send a strong message to the society so that nobody dares to engage in such brutal crimes". In 2 cases in Delhi, 4 cases in Maharashtra and 2 cases in Madhya Pradesh, cases of sexual offences saw the imposition of capital punishment on the sole basis of the need to create a deterrent effect.

Other crimes where death was imposed by invoking deterrence, included a case of honour killing, and murder prompted by a love affair. In these cases, the court took it upon itself the task of carving out a suitable punishment, and through these punishments, sought to regulate the conduct of people in society. In *State of NCT. of Delhi v. Om Prakash*,[294] involving an honour killing, the court, while imposing the death penalty opined that the punishment was necessary so that it is known in society that such cruel and barbaric acts cannot be allowed to take place in developed metropolitan cities. In *State of Maharashtra v. Harish Baburao Sasane*,[295] where a woman was killed by her lover for refusing to marry him, the court noted that a death sentence was appropriate to deter others so that in society, girls would be free to move without fear of such wicked youths.

In most of these cases, deterrence is the sole justification for the sentence, reiterating concerns about a shallow understanding of theoretical underpinnings of penological justifications highlighted in the section above. Even when it is accompanied with other justifications, those are driven by the brutality of the offence, helplessness of the victims, and so on, thus boiling down to vengeance, or *lex talionis*. For instance, in *State of Madhya Pradesh v. Tattu Lodhi*,[296] the court observed that giving the strictest possible punishment to such criminals would not only serve the objective of justice, but also send an appropriate message to society, creating a fear in the minds of people who are thinking of committing such a crime. Similarly, in *State v. Sanjay Kumar Valmiki*,[297] a case of rape and murder of a minor girl, the court imposed capital punishment because "the nation had failed its children by not giving them a society where they could move freely without being hounded upon".[298]

The principle of proportionality never finds a place in such cases, as mitigating circumstances are almost never considered and, often, not even presented by defence counsels. For example, in *State of Maharashtra v. Govind Vaman Patil*,[299] the court did not consider any mitigating factors and, noting that the defence counsel did not ask for any leniency in punishment, lauded the advocate for being so righteous. In the *State of Maharashtra v. Harish Baurao Sasane*,[300] where a man was accused of killing his lover, the defence counsel mentioned that he had tried to commit suicide during the course of the trial, and was repentant of the crime. However, the court dismissed the argument on the ground that there was no documentary evidence, and held that the accused was trying to evade legal punishment by raising such arguments. Such an approach of trial courts, similar to that adopted by the Supreme Court, reveals a focus on creating a general sentiment of deterrence instead of individualising the punishment vis-a-vis the offender. It validates the argument that when punishment is imposed for instrumental purposes like sending a message to society, there is little or no room for consideration of mitigating circumstances of the offender.

Use of incapacitation and lack of discussion around life imprisonment

Another utilitarian justification frequently used by trial courts is that of incapacitation, aimed

at placing the offender in a position where they are unable to re-offend. Like with other justifications, trial courts rarely explicitly use the word 'incapacitation' in their judgments, but phrases such as 'remove from society', 'cut off from society to prevent future commission of crime', etc., suggest the use of this theory of punishment. For instance, in *State of Madhya Pradesh v. Pyare Khan,*[301] the court noted that the accused was a danger to the lives of innocent citizens, and therefore found it necessary to impose the death penalty. Similarly, in *State of Maharashtra v. Sahebrao@ Navath Sopal Kale*,[302] a case of robbery and murder, the court observed that 'the very existence of the accused is a threat to the society', thus necessasitating the imposition of the death penalty. This justification was most frequently used in Maharashtra with 30 cases relying on it to impose the death penalty. 5 cases in Delhi and 24 in Madhya Pradesh relied on this theory.

Interestingly, in cases where this theory was rejected, or was not considered, arguments around mitigation did not attempt to explain how the question of life imprisonment was unquestionably foreclosed, or why the accused was beyond reformation. For instance, in *Sahebrao* mentioned above, though the defence counsel raised the argument that both the accused persons were juveniles at the time of commission of the crime and should therefore be shown leniency, the court rejected the argument on the basis of brutality of the crime. In the case of *State v. Najir Mohiddin*[303], where a man had been convicted for the murder of his children, the court observed that since the family of the accused was dead, he had no responsibilities left and this in turn would enable him to turn into a bigger criminal, thereby making it necessary to remove him from society by way of a death sentence. On the question of adequacy of the alternative of life imprisonment, the court held that the pre-planned nature of the brutal crime makes it impossible to consider a punishment more lenient than the death sentence. In a case of multiple murders in *State v. Pyare Khan*,[304] the court noted that the accused was a danger to the lives of innocent citizens and, therefore, it was necessary to impose the death penalty. The question of life imprisonment was not considered and no mitigating factor was found relevant in this case. Similarly, *State of NCT of Delhi v. Brij Kishore*,[305] where a man had murdered the secretary of a cooperative society which had prevented his father from carrying on his business, the court imposed the death penalty ruling that the accused was a menace to the society and must be removed, given that he had killed a person who was only performing his duty. In *State v. Jagdish @ Sagar Chaudhuri*,[306] a case of robbery and murder of an elderly couple, the court, while observing that the city of Mumbai had become dangerous for the elderly, held that unless the accused were given the death sentence they would commit similar crimes again. It rejected the alternative punishment of life imprisonment on grounds of brutality of the crime.

As discussed in the previous section, the need to incapacitate must necessarily be balanced against carving out a proportionate punishment and other realities of the criminal justice system. In the context of the death penalty, the court imposing the punishment must necessarily be sure of the fact that the accused will re-offend and therefore is a threat to society. However, trial courts across Delhi, Madhya Pradesh and Maharashtra have assumed that the accused would re-offend based merely on the brutality of the crimes, without going into any other assessment of the dangerousness of the offender. Resultantly, they have relied on the theory of incapacitation, without answering

why the alternative option of life imprisonment is inadequate. This is also linked to the question of reformation, which was another aspect the courts did not consider while imposing the death penalty in such cases. In order to determine the most appropriate punishment, it is necessary to look at the question of reformation in a way that is independent of the circumstances of the crime. Therefore, the question of reformation of the offender cannot be dismissed on the basis of brutality of the crime. Some jurisdictions determine this question by relying on psychiatry through clinical risk assessments.[307] However, it has its own limitations and is fraught with ethical dilemmas for practitioners. Further, any risk assessment is a commentary upon a likely outcome, or number of outcomes. The Law Commission of India, in its 262nd Report on the death penalty, also noted that any commentary on recidivism is a futuristic prediction, and thus bound to be arbitrary.[308] The manner in which trial courts impose the death penalty, without attempting to even discuss questions of adequacy of life imprisonment and probablity of reform, makes the use of incapacitation suspect.

Trial courts across Delhi, Madhya Pradesh and Maharashtra have assumed that the accused would re-offend based merely on the brutality of the crimes, without going into any other assessment of the dangerousness of the offender. Resultantly, they have relied on the theory of incapacitation, without answering why the alternative option of life imprisonment is inadequate.

Improper understanding of proportionality/just deserts

A majority of trial courts judgments have invoked the theory of proportionality, and imposed the death penalty on grounds of any other punishment being disproportionate, given the brutality of the crime. This justification was invoked in 22 cases in Delhi, 25 in Madhya Pradesh and 42 in Maharashtra.

Although the trial courts claimed to be using the theory of proportionality, interestingly, the focus was largely on the brutality of the crime, the manner of its commission, the profile of the victim, and so on. Mitigating circumstances were completely ignored in the sentencing process while determining appropriate punishment. For instance, in *State v. Rajkumar Mane*,[309] the court imposed a death sentence on a man accused of killing his brother's wife and son and held that there were no mitigating circumstances, despite noting previously that the motive for the murder was the fact that the accused's brother had sons, and he himself had a mentally-challenged daughter because of which he felt that he would not get a share in the family property. In *State v. Raju Dadabha Borge*,[310] where the accused was convicted for murdering his wife and children, the court observed that "after thinking over the sociological, juridical, humanistic and criminal behaviour with the psychology for a considerable time and ... repeatedly churning my thoughts, on the point of imposing the minimum punishment provided for the offence, my conscious pricked me suggesting that I am probably not doing justice with the society, the living children and to the judicial process by not imposing the adequate and the only punishment, the only punishment which

the accused deserves, which is that of the death penalty".[311] Although the court claimed to be imposing death after considering all factors, it is noteworthy that mitigating circumstances were rejected based on the brutality of the crime and profile of the victim.

This crime-centric approach was extremely common, wherein trial courts imposed death claiming that the punishment was proportionate, but determining proportionality from brutality of the offence itself. In Chapter V, we have discussed that in 8 cases in Delhi, 9 cases in Maharashtra and 8 cases in Madhya Pradesh, neither did the defence counsel present any mitigating circumstances, nor did the courts ask for it. In as many as 18 cases in Delhi, 42 cases in Maharashtra and 51 cases in Madhya Pradesh, though the defence counsels cursorily mentioned mitigating circumstances like age, socio-economic circumstances, presence of dependants, etc., these found no mention in the courts' reasoning. Interestingly, they were outweighed by a numerical exercise through a balance sheet in 4 cases in Delhi, 9 cases in Maharashtra and 2 cases in Madhya Pradesh. These numbers highlight how the theory of proportionality has been misapplied by Indian courts, both at the appellate and trial levels, while imposing a death sentence.

V. IMPLICATIONS OF USE OF PENOLOGICAL JUSTIFICATIONS IN CAPITAL SENTENCING

While upholding the constitutionality of the death penalty, *Bachan Singh* invoked and discussed penological justifications, at the heart of which lies striking a balance between brutality of the crime and culpability of the accused. However, subsequent benches of the Supreme Court have invoked penological justifications in a way that moves away from the *Bachan Singh* framework, and let solely retributive or deterrent elements creep into the capital sentencing framework. Trial courts, as discussed above, have promptly followed suit. However, such use of penological theories in capital sentencing not only dilutes the framework of *Bachan Singh*, but also does not do justice to the theoretical underpinnings of the theories themselves. This raises serious concerns about the manner in which death penalty is administered in India, revealing that despite judicial and legislative safeguards, it is the brutality of the crime, devoid of other considerations around circumstances of the criminal, that drives the imposition of the punishment. ■

CHAPTER 5

Quantitative Data

I. INTRODUCTION

This chapter is data visualisation of death penalty sentencing from trial courts in Madhya Pradesh, Maharashtra and Delhi. The data presented seeks to throw light on the nature of crimes involved along with multiple aspects of the sentencing process. The data on the time given for sentencing hearings, (non)-consideration of mitigating factors, and life imprisonment as an alternative punishment, are all an effort to understand the nature and extent of the compliance with the *Bachan Singh* framework. The data presented helps to begin understand the crisis in death penalty sentencing in trial courts and opens a window into the manner in which the confusion in the Supreme Court on death penalty sentencing has trickled down to the courts below.

II. NATURE OF CRIMES

322 prisoners across Maharashtra, Madhya Pradesh and Delhi were sentenced to death in 215 cases between 2000 - 2015 by trial courts. The data across these three states shows that 49% of the prisoners were sentenced to death for murder simpliciter, while 28% had the death penalty imposed for murder involving sexual offences. However, in Madhya Pradesh the trend was significantly different compared to Maharashtra and Delhi. In Madhya Pradesh, 49% of the death sentences were imposed for murder simpliciter, while 36% were for murder involving sexual violence. In Maharashtra, 46% of death sentences were for murder simpliciter and 25% were for murder involving sexual violence. The figures for Delhi were 59% murder simpliciter cases and 23% murder cases involving sexual violence.

Murder simpliciter: This category includes cases where the prisoners were convicted under s.300 of the IPC (murder), or s.300 of the IPC (murder) along with the Arms Act, 1959, the Explosive Substances Act, 1908, and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

Murder involving sexual offences: Includes cases where the main offence along with the murder charge was rape.

Terror offences: Includes cases where the prisoners were convicted under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA), the Prevention of Terrorism Act, 2002, the Unlawful Activities (Prevention) Act,

196,7 or for the offence of 'waging war' under s.121 of the IPC.

Kidnapping with murder: Includes those cases where the main offence along with the murder charge was kidnapping.

Dacoity/robbery with murder: Includes cases where prisoners were convicted for dacoity or robbery with murder under s.392 or s.396 of the IPC.

Drug offences: Includes cases where prisoners were sentenced to death under s.31A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) for a repeat conviction under the Act.

NATURE OF CRIME	NUMBER OF CASES			NUMBER OF PRISONERS SENTENCED TO DEATH		
	DELHI	MADHYA PRADESH	MAHARASHTRA	DELHI	MADHYA PRADESH	MAHARASHTRA
Murder Simpliciter	24	40	39	40	53	64
Murder involving sexual offences[312]	11	30	27	16	39	34
Kidnapping and Murder	1	5	11	6	6	16
Dacoity/ Robbery and Murder	4	7	6	4	14	11
Terror Offences	3	0	5	3	0	13
Drug offences	0	0	2	0	0	2
Total	43	82	90	69	112	138

III. NATURE OF EVIDENCE ACROSS THE 215 CASES

NATURE OF CRIME	DELHI	MADHYA PRADESH	MAHA-RASHTRA
Total Number of Cases	43	82	90
Eyewitness Testimony	13	35	30
s.27 Recovery Evidence[313]	34	56	62
Approver's Evidence	0	2	5
Last Seen Evidence[314]	9	26	50
Forensic Evidence	30	71	63
Confession to Police under Anti-Terror Laws	2* * (out of 5 where applicable)	NA	4* * (out of 5 where applicable)

● DELHI ● MADHYA PRADESH ● MAHARASHTRA

NATURE OF EVIDENCE IN MURDER CASES INVOLVING SEXUAL OFFENCES

NATURE OF CRIME	DELHI	MADHYA PRADESH	MAHA-RASHTRA
Total Number of Murder Cases Involving Sexual Offences	11	32	27
Eyewitness Testimony	3	2	3
s.27 Recovery Evidence	11	25	21
Last Seen Evidence	5	23	21
Forensic Evidence	9	29	20

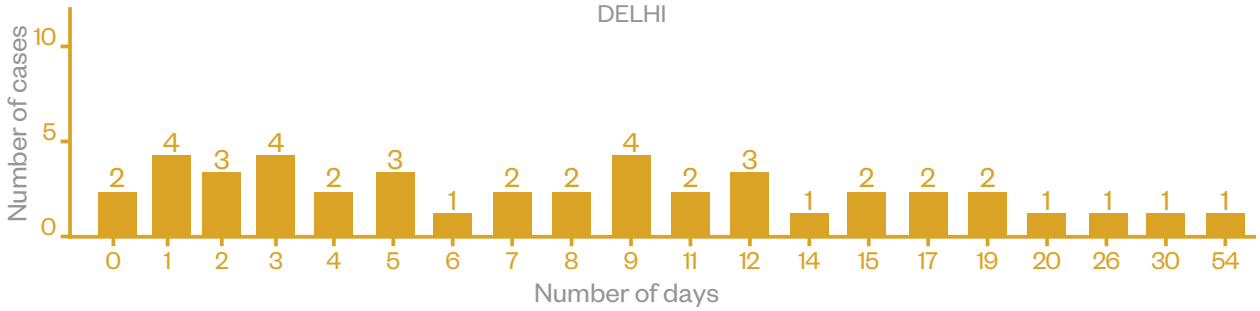
IV. DURATION BETWEEN CONVICTION & SENTENCING HEARING

s.235(2) of the CrPC bifurcates a trial into the conviction and sentencing stages, and s.354(3) requires sentencing judges to give special reasons if they choose death sentence over life imprisonment as the appropriate punishment. The object behind the legislation is to ensure that a just and suitable punishment is imposed after the accused has had enough opportunity to gather evidence on the question of sentence. Information such as age, socio-economic condition, criminal antecedents, etc., will have a bearing on the question of sentence. It is for this reason that a sentence pronounced on the same day is rather weak in the eyes of the law.[315] The duration between pronouncement of guilt and the sentencing hearing reveals that trial judges and lawyers do not take sentencing seriously. Date of conviction and sentencing hearings were available in a total of 211 out of the 215 cases across the three states, and 44% of the cases had sentencing done on the same day as the conviction.[316] This concern is rather acute in Madhya Pradesh where same-day sentencing was observed in 76.9% of the cases. Maharashtra had sentencing on the same day in 34.4% of the cases, but 57% of the cases had sentencing on the same day or with just a 24-hour gap. Delhi fared better relatively with 53.4% of sentencing hearings taking place at least one week after the conviction.

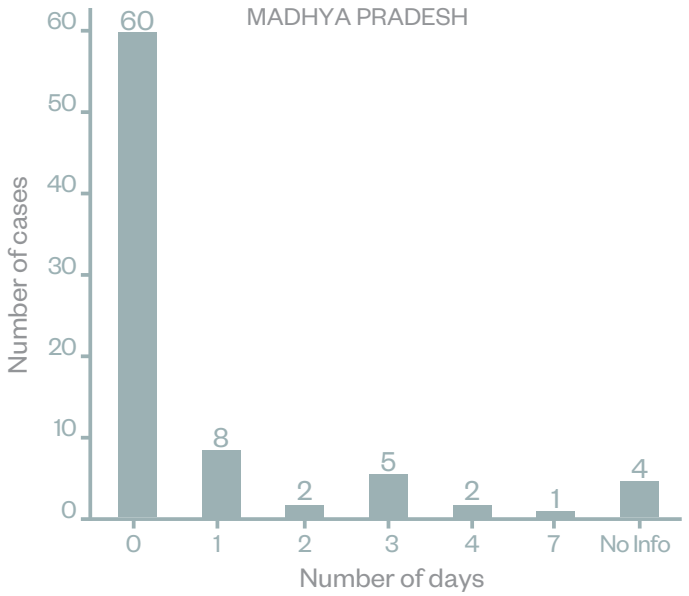
It becomes important to note the impact of same-day sentencing on the consideration of mitigating factors. No mitigating circumstances

DURATION BETWEEN CONVICTION & SENTENCING HEARING

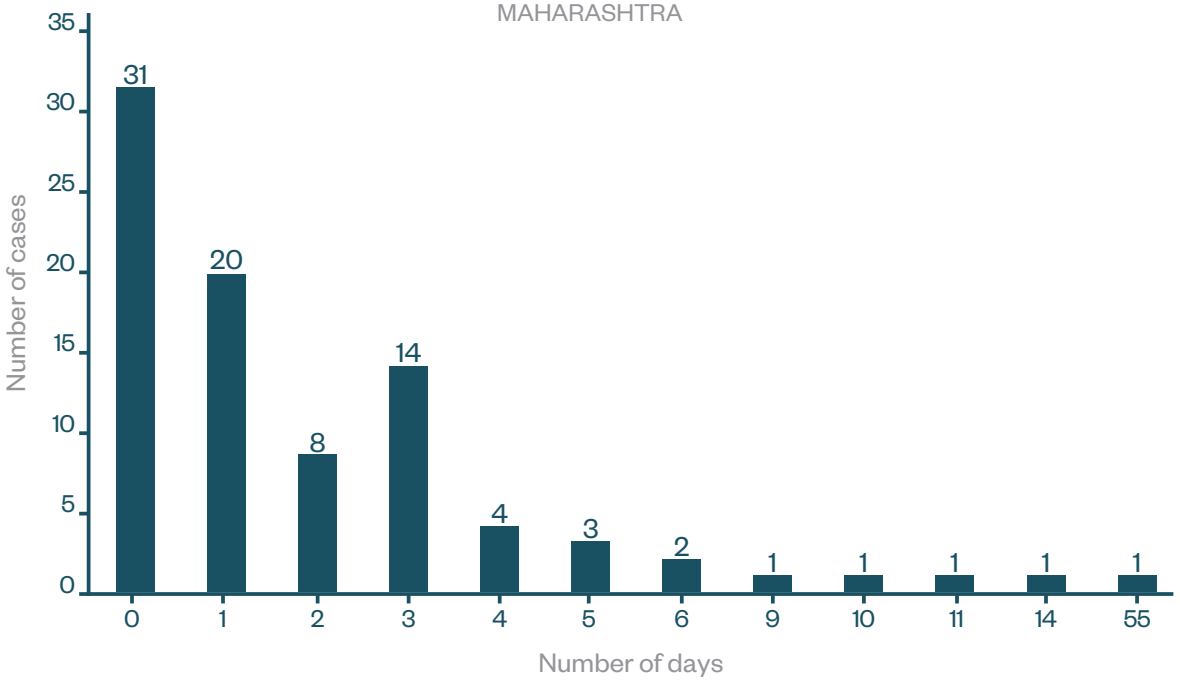
DELHI



MADHYA PRADESH



MAHARASHTRA



were considered in 41 of the 60 same-day sentencing cases in Madhya Pradesh and in 16 of the 31 same-day sentencing cases in Maharashtra. The two same-day sentencing cases from Delhi did not consider any mitigating circumstances either.

Even in cases where same day sentencing did not take place, the time duration between conviction and sentencing hearing was not sufficient for an in depth mitigation exercise. The median of duration between conviction and sentencing hearing across the three states was one day. It was 0, 2 and 7 days respectively for the state of Madhya Pradesh, Maharashtra and Delhi.

Same day sentencing[317] or sentencing with no substantial time between guilt pronouncement and sentencing hearing is antithetical to the *Bachan Singh* framework because it inevitably leads to no substantial information about the accused being presented before the courts, making courts rely only on the circumstances of the crime while deciding the punishment. While deciding between life imprisonment and death sentence, trial court judges are expected to have detailed information about the accused before they weigh aggravating and mitigating factors. The information is also needed to guide courts in making the extremely difficult determination about the probability of reformation, which cannot be redundant by being based on the nature of the crime. Lack of adequate information about the accused renders it impossible for a trial judge to determine the sentence as per fair trial norms.

V. WHETHER MITIGATING CIRCUMSTANCES CONSIDERED ?

As discussed in the preceding chapters, the sentencing framework developed in *Bachan Singh* necessarily requires sentencing courts to identify and weigh aggravating and mitigating circumstances relating to both the circumstances of the crime and those of the accused. *Bachan Singh* further guides this balancing exercise by mandating that mitigating circumstances (and not aggravating ones) must receive liberal and expansive construction.[318] It is evident that the identification of mitigating circumstances is integral to the sentencing process when choosing the death sentence over the default option of life imprisonment provided in the Code of Criminal Procedure, 1973. In that context, it becomes crucial to determine sentencing practices adopted by judges when dealing with mitigating factors. Our research reveals that the practice of not identifying mitigating factors is rampant and should be a matter of grave concern. The non-identification of mitigating factors certainly comes prior to the concerns about the manner in which mitigating factors are treated. Such a widespread practice of not considering any mitigating factors raises very serious questions about the fairness of the trial and takes death penalty sentencing very close to being a purely crime-centric exercise.

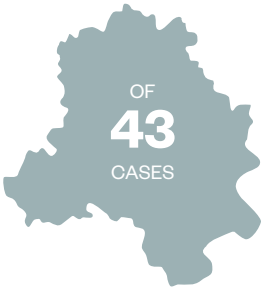
There is a close connection between the cases in which mitigating factors were not considered and same-day sentencing.

The non-consideration of mitigating factors points to problems with the approach to sentencing from both the bar and the bench. It is evident that sentencing judges do not set any meaningful standards (or any standards at all) for the mitigation evidence that is to be presented on behalf of the accused. And it is evident that defence lawyers do not demand sufficient time to collect and present mitigating evidence. This issue brings to the fore an unresolved question concerning the

NO MITIGATING CIRCUMSTANCES MENTIONED[319] (NUMBER OF CASES)

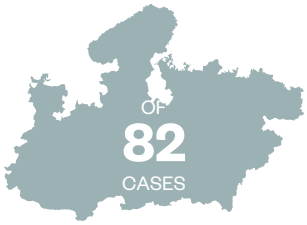
DELHI

18 (42%)



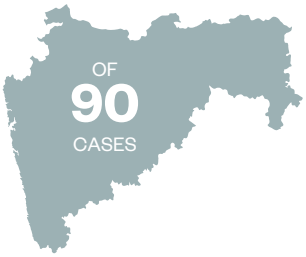
MADHYA PRADESH

51 (62%)

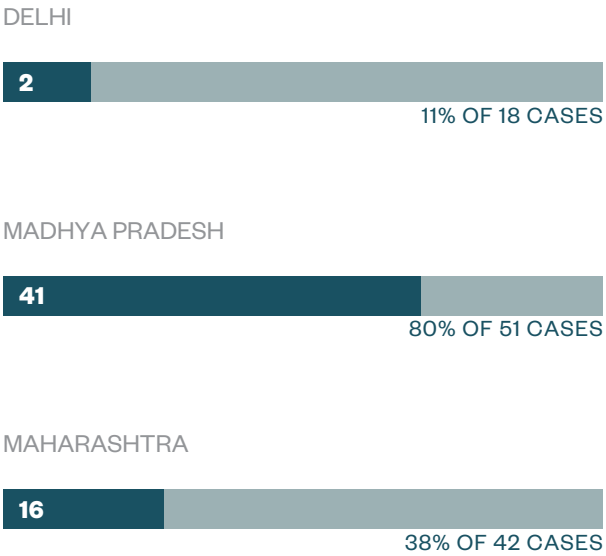


MAHARASHTRA

42 (47%)



SAME DAY SENTENCING CASES & NO MITIGATING CIRCUMSTANCES MENTIONED



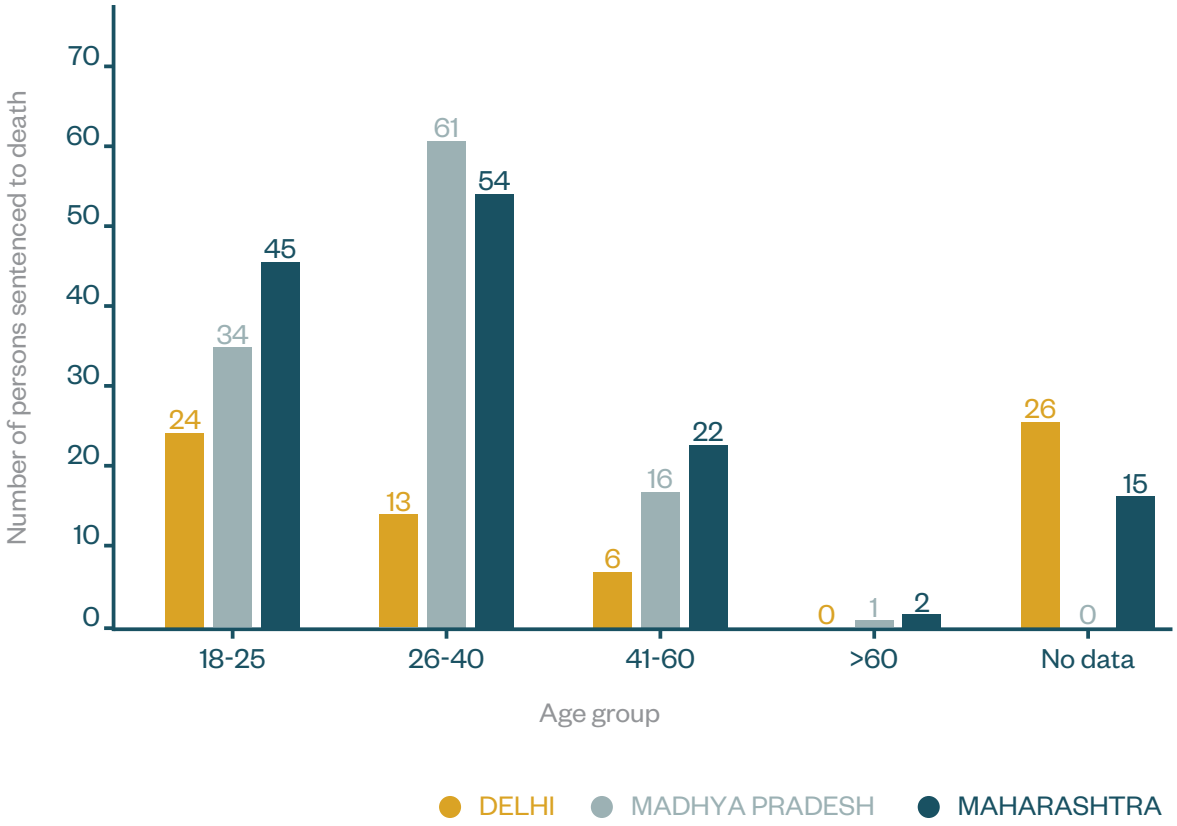
framework in *Bachan Singh* - whether the defence lawyer is solely responsible to bring such mitigation evidence on behalf of his/her client or should the sentencing judge also play a proactive role in demanding mitigation evidence of sufficient quality that meets the requirements of a fair trial?

In 49 out of 90 cases from Maharashtra, 25 out of 43 cases from Delhi and 31 out of 82 cases from Madhya Pradesh, mitigating circumstances did find a 'mention'. However, these 'mentions' were far from amounting to a meaningful 'consideration' of mitigating circumstances. The arguments around mitigation made by defence lawyers as recorded in the trial court judgments did not go beyond routine narration of facts around sympathy, young age, and dependants. The courts often reiterated the mitigating factors mentioned by defence by listing them down with no real engagement with these factors. Mere listing of mitigating factors does not meet the requirements of *Bachan Singh* and makes the purpose of requiring sentencing judges to consider mitigating circumstances redundant.

VI. AGE OF ACCUSED

Bachan Singh recognizes young and old age of the accused as relevant mitigating circumstances

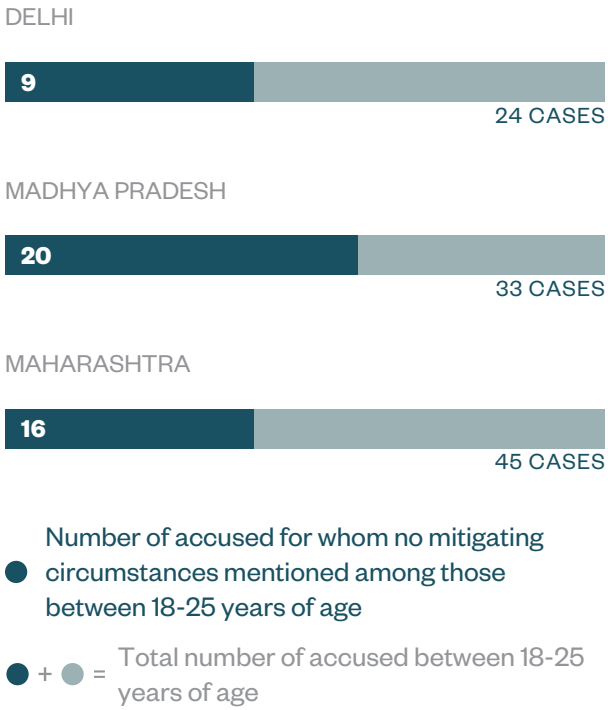
NUMBER OF PERSONS SENTENCED TO DEATH BY AGE GROUP



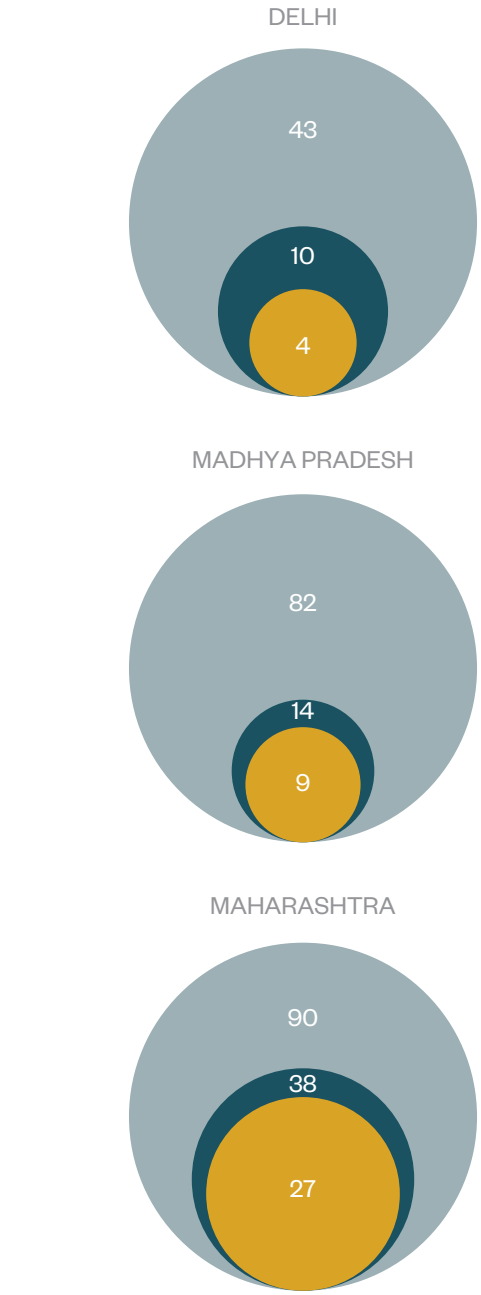
to be be given great weight in the determination of sentence.[320] When available, age of the accused has to be identified and considered as a mitigating circumstance and weighed against other mitigating and aggravating circumstances. 37% of the prisoners (for whom details about age were available in the judgment) were in between 18-25 years of age.

The Court in *Bachan Singh* placed special emphasis on young age as a mitigating factor. It was of the view that "extreme youth can instead be of compelling importance" and that it must be given great weight in the determination of sentence.[321] Given the importance of young age explicitly laid out in *Bachan Singh*, the proportion of cases involving very young accused where no mitigating circumstances are mentioned is rather large and inexplicable.

NO MENTION OF YOUNG AGE AS A MITIGATING CIRCUMSTANCE



DISCUSSION ON THE POSSIBILITY OF REFORMATION



** No cases for all three states, where prosecution led evidence to show that accused is beyond the probability of reform*

VII. 'PROBABILITY OF REFORMATION' AND DEATH PENALTY SENTENCING

As discussed in Chapter I, the capital sentencing framework under *Bachan Singh* comprises two distinct steps. The first step is identification and weighing of aggravating and mitigating factors related to both circumstances of the crime and those of the accused to determine if the case might qualify for the death penalty. The second step involves the sentencing judge determining that the alternative punishment of life imprisonment is unquestionably foreclosed.[322] The probability of reformation is a crucial strand and has a role within both steps of the framework. Firstly, it has been explicitly recognised by *Bachan Singh* as a mitigating circumstance that courts can consider.[323] Secondly, the question of reformation becomes integral to consideration of whether the option of life imprisonment is unquestionably foreclosed. Towards this consideration *Bachan Singh* places the burden of proof on the State of leading evidence to show that the accused cannot be reformed.[324] However, it is contested if this duty is a mandatory one.[325] Our findings from trial court judgments across the three states documents the fact that the probability of reformation is hardly ever considered and, even when it is, it is incorrectly tied to the brutality of the crime. Though paragraph 206 of *Bachan Singh* states that the burden is on the state to show that the accused cannot be reformed, we observed that the prosecution did not discharge this burden in any of the 215 cases. Even the trial courts hardly ever discussed the question of reformation while deciding between life imprisonment and death penalty. In Maharashtra, out of a total of 90 cases, in 52 cases the trial courts sentenced the accused persons to death without considering the probability of reformation. Among 82 trial

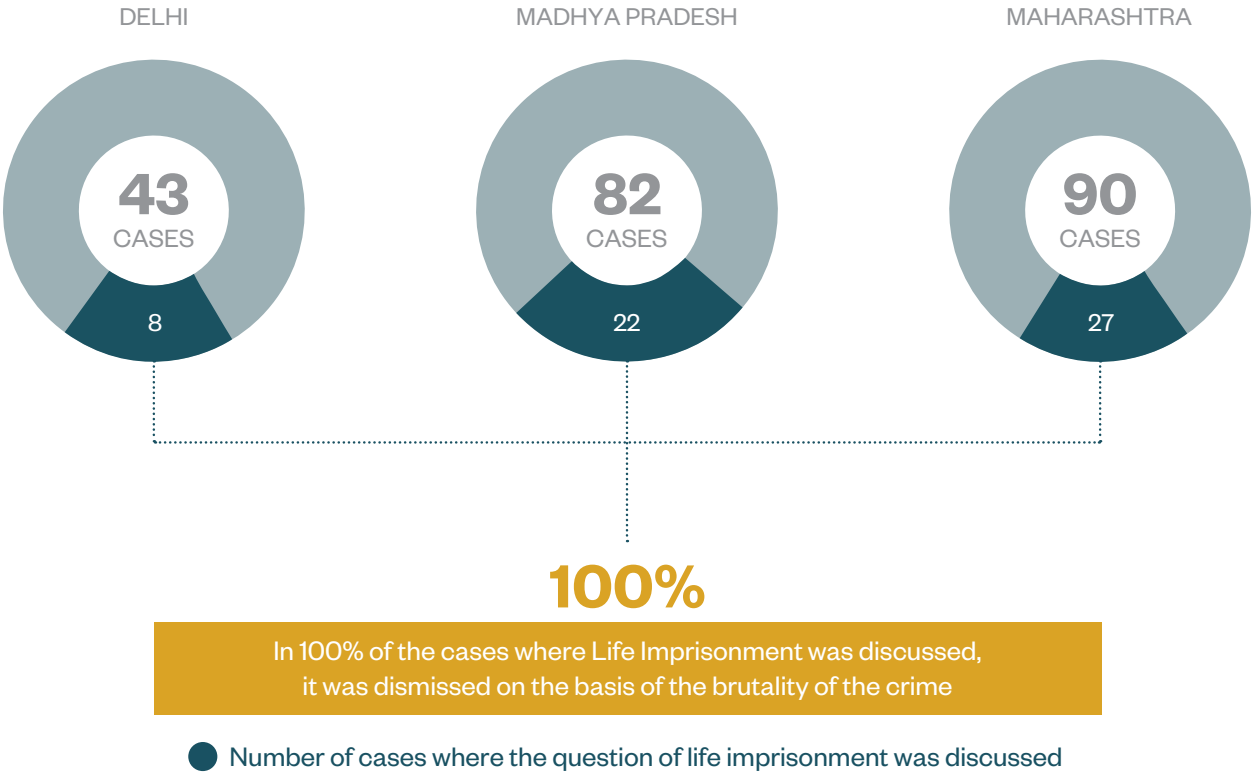
court judgments in Madhya Pradesh, only 14 discussed reformation, and 10 out of 43 did so among the judgments from Delhi.

The determination of the probability of reformation should be independent of circumstances of the crime. Determining probability of reformation by looking at the crime defeats the purpose of this consideration, as the core of the idea is to see if there is a probability of reforming the guilty. In the few cases where it was considered, the determination of the same was often backward looking, focusing on the crime. Courts made a determination about the probability of reformation by considering the aggravating circumstances of the crime. In 14 cases (out of 82) from Madhya Pradesh where probability of reformation was considered during sentencing, it was dismissed on the basis of crime in 9 cases. Similarly, in Delhi, in 4 of the 10 cases where it was considered, the circumstances of the crime resulted in its dismissal. 38 of the 90 cases from Maharashtra that considered the probability of reformation while sentencing, and 27 dismissed it on the basis of brutality.

VIII. WHETHER QUESTION OF LIFE IMPRISONMENT CONSIDERED?

In imposing the death sentence, trial courts rarely ever discussed the reasons for life imprisonment being unquestionably foreclosed. This explicit requirement laid down in *Bachan Singh* has its basis in s.354(3) of the CrPC, wherein life imprisonment is the default option and the death sentence requires special reasons. Instead, trial courts seemed to only state the reasons for imposing the death sentence without first establishing (as required by the

CONSIDERATION OF LIFE IMPRISONMENT



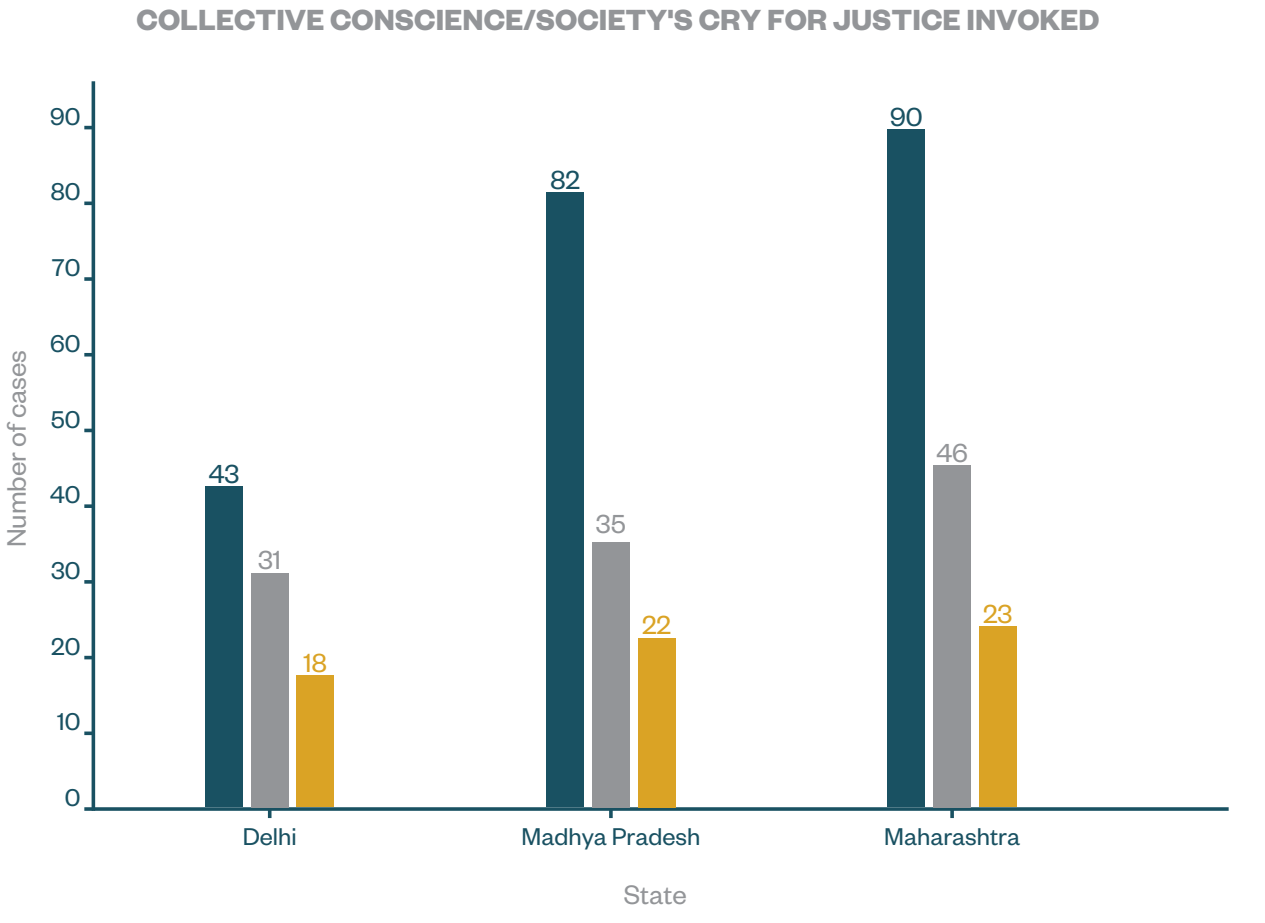
** No cases for all three states, where life imprisonment was unquestionably foreclosed*

statute and precedent) that life imprisonment is unquestionably foreclosed. In the small number of cases where trial courts rejected life imprisonment explicitly, they mostly did so on the basis of brutality of the crime and not on considerations of reformation.

The numbers point to a complete breakdown of the sentencing framework developed in *Bachan Singh*. As can be seen from the table above, trial courts in the vast majority of cases do not give any reasons for the inadequacy of life imprisonment. And even when they do engage with life imprisonment, its rejection is based on the brutality of the crime and no other consideration. The lack of compliance with the requirements laid down in *Bachan Singh* shows that death penalty sentencing is no longer carried out on any principled basis.

IX. IN CASES INVOLVING MULTIPLE ACCUSED, WHETHER INDIVIDUAL ROLES IN CRIME CONSIDERED?

A combined reading of ss.235(2) and 354(3) of the CrPC, along with the judgment in Bachan Singh, establishes the requirement on individualised sentencing. In essence, this means that sentencing judges have to consider each accused separately and this has given rise to concerns in cases involving death



sentences to more than one accused. Given the requirement of individualised sentence, a sentencing judge has to consider the role of each accused in the crime along with weighing aggravating-mitigating factors separately for each of them. However, in the three states in this study, there has been very little compliance with this requirement.

In 17 cases (out of 82) in Madhya Pradesh which involved more than one person sentenced to death, individual role in crime was considered during sentencing only in five cases. Individual mitigating circumstances were considered only in one case case in the state. In Maharashtra, 23 cases (out of 90) that involved more than one person sentenced to death, individual roles in crimes and individual mitigating circumstances were considered during sentencing in 16 and four cases respectively. 12 cases (out of 43) in Delhi involved more than one person sentenced to death. However, individual role in crime and individual mitigating circumstances were considered during sentencing only in two and four cases respectively. As is evident from the data, only a very small proportion of cases saw sentencing judges consider individual mitigating circumstances while sentencing multiple accused to death in a single case. It is just as much a cause for concern that sentencing judges have not considered individual roles in the commission of the crime when multiple accused are involved.

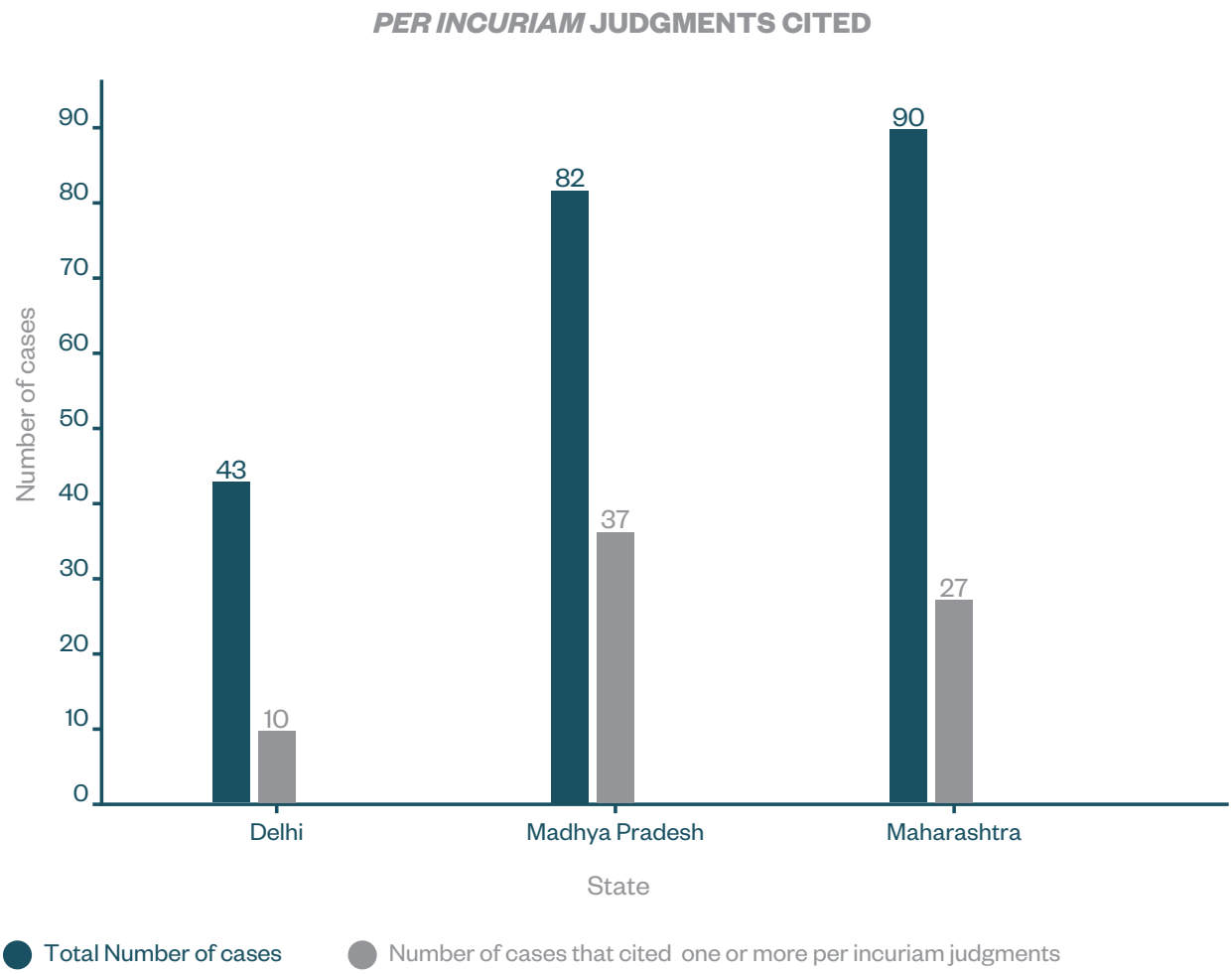
X. USE OF 'COLLECTIVE CONSCIENCE' / 'SOCIETY'S CRY FOR JUSTICE' IN SENTENCING

As discussed in Chapter I, while mapping the evolution of the sentencing framework developed in *Bachan Singh*, subsequent interpretations of the framework have often conflicted with the original framework. In particular the ever-increasing invocation of collective conscience/ society's cry for justice as a justification for the death penalty[326] has been a serious cause for concern, as it does not fit into the framework in *Bachan Singh* that required judges to only consider the circumstances of the crime and the criminal. Perception of the crime in society at large has no place in the framework developed in *Bachan Singh* and, as acknowledged in *Bariyar*, judges have no way of reliably determining factors such as 'collective conscience'. When this trend is compared alongside the observation that trial courts do not seriously consider mitigating factors, it demonstrates significant movements away from the *Bachan Singh* framework.

Trial courts in Delhi demonstrated the most frequent use of collective conscience/ society's cry for justice by invoking it in 72% of the cases. While sentencing judges in Maharashtra invoked it in 51% of the total cases, it was observed that, once it was invoked, the judges did not consider any mitigating circumstances in 50% of the cases. While a qualitative assessment of these judgments in chapter II reveals the nature of reliance on indeterminate standards like collective conscience/ society's cry for justice, we found that a significant number of these cases had not considered any mitigating circumstance once they invoked these considerations.

XI. WHETHER *PER INCURIAM* JUDGMENTS MENTIONED

In common law, a judgment that is *per incuriam* has no legal force or validity, and does not count as precedent. The concept of *per incuriam* is very narrow and applicable only in two circumstances - first, to a judgment that is passed in ignorance of a relevant statutory provision, and second, to one passed without considering binding precedent of a coordinate



or larger bench. In case there are two or more mutually irreconcilable decisions of the Supreme Court the earliest view is considered valid as the succeeding ones would fall in the category of per incuriam. As part of the Supreme Court jurisprudence on the death penalty, a number of cases imposing death sentence have been held in the recent years to be *per incuriam*. In *Bariyar*, the court examined the decision in *Ravji v. State of Rajasthan* and held that the sole focus of the case on the crime by excluding the circumstances of the criminal is in contravention of prior decisions of the Supreme Court on the issue, and thus, per incuriam. In three cases of the Supreme Court, *Bariyar*, *Sangeet*, and *Shankar Kisanrao Khade v. State of Maharashtra*, the Court acknowledged error in 16 cases involving the death sentence to 20 persons.

We found trial courts across the three states citing *per incuriam* judgments during sentencing. Out of the 82 cases in Madhya Pradesh, 37 cases cited *per incuriam* judgments, while 10 out of 43 cases in Delhi and 27 out of 90 cases in Madhya Pradesh did so. In as many as three cases in Madhya Pradesh, trial judges relied on the principle in *Ravji* that it is the crime and not the criminal that is the relevant during sentencing, which resulted in it being declared *per incuriam*. The widely prevalent practice was to mention a number of *per incuriam* decisions along with many other cases, thereby making it difficult to determine whether these *per incuriam* judgments have been only cited or actually relied upon. Therefore, while it would be incorrect to say that the entire reasoning

in judgments citing *per incuriam* decisions is flawed, it certainly raises questions about the manner in which courts sentence and impose the harshest punishment under law. We do, however, admit that some trial court judgments cited Supreme Court decisions that were only subsequently declared *per incuriam*. But even in these cases, concerns arise about what should be done when Supreme Court judgments are declared per incuriam.

Inferences

The data in this chapter on nature of crimes and nature of sentencing hearings that have resulted in the imposition of death sentence on 322 prisoners across 215 cases in these three states, placed with the qualitative findings from the previous chapters, truly depicts the nature of crisis that pervades death penalty sentencing amongst the lowest criminal courts of the country. It raises questions about the procedure that has been followed to impose the harshest punishment in law on these 322 prisoners. The Supreme Court in *Bachan Singh* in line with the legislative policy discernible from ss. 354(3) and 235(2) of the CrPC laid down a sentencing framework for courts to guide judicial discretion and curb arbitrariness in deciding between life imprisonment and death penalty. However, the data in this chapter, reveals the absolute indifference of trial courts towards a sentencing hearing. A separate sentencing hearing, with substantial time between guilt pronouncement and sentencing hearing, and implementation of the *Bachan Singh* framework to arrive at a sentence, are at the core of individualised justice. The deplorable state of compliance with these mandatory requirements is a flagrant violation of an accused person's constitutional right to a fair trial. ■

CONCLUSION

The findings from this study need to be understood within the framework of the right to a fair trial, of which sentencing forms an important part. The shallow engagement on issues of sentencing by trial courts ranged from improper interpretation and application of *Bachan Singh* sentencing framework, problematic engagement with precedent and lack of clarity on sentencing goals. While the problems with capital sentencing are not unique to trial courts and plague the appellate courts as well, the relevance of the study lies in understanding the state of death penalty sentencing in trial courts. Significant number of persons are sentenced to death by trial courts and spend substantial period of incarceration on death row only to be acquitted or commuted by the High Courts or Supreme Court. The broken state of sentencing hearing in these trial courts must therefore be viewed within this context of uncertainty of life and death.

A very important finding, underlying all preceding sections, is the inherent gaps within the Bachan Singh framework itself, which arguably led to its inconsistent application and interpretation. These gaps also enabled subsequent benches of the Supreme Court to stray away from the principles which Bachan Singh had invoked to limit the imposition of the death penalty. As a result, as the Supreme Court itself came to acknowledge, decisions between life and death ended up being determined by bench-composition, instead of principled reasons.

Trial court decision making in capital cases, similarly, was driven by the brutality of the crime, without attempting to understand the context of the individual offender. Reading the decisions of trial courts shows that once guilt was determined on established principles of criminal law, trial courts gave scant attention to determining appropriate punishment. Unlike the decisions in the conviction stage, which often ran to hundreds of pages, sentencing decisions were rarely detailed. In fact, most sentencing decisions in Madhya Pradesh and Maharashtra were less than 5 pages long. In Delhi, where sentencing orders ran longer, most of the space was dedicated to reproducing paragraphs of Supreme Court judgments. The process of individualised sentencing was almost never taken seriously in spirit, though the judgments did baldly state that the decision was based on circumstances of the offence and the offender.

This issue needs to be understood in light of the larger context of the criminal justice system of India, which places little emphasis on the sentencing process generally, not limited to capital cases alone. Sentencing in India, both at trial and appellate levels, is almost completely unguided, and it is extremely difficult to infer how judges decide the quantum of punishment from the range prescribed in statutes. Given this context, provisions for legislative safeguards, such as bifurcated trials and requirement of written reasons for orders choosing death over life, fail to achieve their intended purpose. Fixing the problem of capital sentencing, therefore, requires fixing the larger problem of sentencing generally within the criminal justice system. In the absence of any meaningful judicial discourse on the fair trial requirements during sentencing, the death penalty will continue to be imposed arbitrarily, and unpredictably. ■

END NOTES

1. *Bachan Singh v State of Punjab* (1980) 2 SC 684. [Hereinafter *Bachan Singh*]
2. National Law University, Delhi, Death Penalty India Report (NLU Delhi Press 2016).
3. National Law University, Delhi, Death Penalty India Report (NLU Delhi Press 2016) Volume II, Page 190.
4. *Bachan Singh,* Note 1
5. The Indian Penal Code 1860, s. 302. There are other provisions in the IPC and other legislations that provide for the death penalty and *Bachan Singh* applies to death penalty sentencing across offences by virtue of the obligations on sentencing judges under s.354(3) of the Code of Criminal Procedure, 1973.
6. The Criminal Procedure Code, 1898.
7. The Criminal Procedure (Amendment) Act, 1955.
8. The Code of Criminal Procedure 1973, s 354(3).
9. The Code of Criminal Procedure 1973, s. 235(2)
10. *Jagmohan Singh v State of Punjab* (1973) 1 SCC 20.
11. *Id.* at 26.
12. *Ediga Anamma v. State of Andhra Pradesh* (1974) 4 SCC 443.
13. *Id.* at Para. 14
14. *Rajendra Prasad v. State of Uttar Pradesh* (1979) 3 SCC 646.
15. *Id.* at 23.
16. *Bachan Singh*, Note 1 at Para.140
17. *Bachan Singh*, Note 1 at Para. 173
18. *Bachan Singh*, Note 1 at Para. 177
19. *Bachan Singh*, Note 1 at Para. 209
20. Dr. Y.S. Chitale, Senior Advocate, Supreme Court of India appeared as counsel for the petitioners.
21. *Bachan Singh*, Note 1 at Para. 202, 206
22. *Bachan Singh*, Note 1 at Para. 207
23. *Bachan Singh*, Note 1 at Para. 197
24. *Bachan Singh*, Note 1 at Para. 201
25. *Bachan Singh*, Note 1 at Para. 205, 209
26. *Bachan Singh*, Note 1 at Para. 209.
27. *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009) 6 SCC 498. [Hereinafter *Bariyar*]
28. *Machhi Singh v State of Punjab* (1983) 3 SCC 470. [Hereinafter *Machhi Singh*].
29. *Machhi Singh,* Note 28 at Para. 32
30. *Machhi Singh,* Note 28 at Para. 33- 37. Machhi Singh requires two questions to be considered before imposing the death sentence - first, whether the sentence of life is inadequate and second, whether there is no alternative but the death sentence despite according maximum weightage to the mitigating factors. In his dissenting opinion in *Manoharan v. State* (Cr. Appeal 1174-1175/2019, Para 7), Justice Sanjiv Khanna stated that the five categories elucidated in Machhi Singh, if carefully analysed, relate to the first question to be posed and answered. But this is not the only question that the court must answer, for the second question has to be also answered in order to direct or uphold the death penalty. Second question can be answered with reference to the grounds quoted from *Bachan Singh*. These grounds relating to mitigating factors are however not exhaustive.

31. *Ravji alias Ram Chandra v State of Rajasthan* (1996) 2 SCC 175. [Hereinafter *Ravji*]
32. *Id.* at Para. 124
33. *Bariyar*, Note 27 at Para. 63
34. *Shivaji v State of Maharashtra* (2008) 15 SCC 269; *Mohan Anna Chavan v State of Maharashtra* (2008) 7 SCC 561; *Bantu v State of UP* (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 UP v Sattan* (2009) 4 SCC 736.
35. *Shankar Kisanrao Khade v State of Maharashtra* (2013) 5 SCC 546 [Hereinafter *Khade*] ; *Dhananjoy Chatterjee v State of West bengal* (1994) 2 SCC 220 [Hereinafter *Dhananjoy*].
36. *Shivu v Registrar General High Court of Karnataka* (2007) 4 SCC 713. [Hereinafter 'Shivu']
37. *Rajendra Pralhadrao Wasnik v State of Maharashtra* (2012) 4 SCC 37. [Hereinafter *Wasnik 2012*]
38. *Mohammad Mannan v State of Bihar* (2011) 5 SCC 317. [Hereinafter *Mannan*]
39. *Sevaka Perumal v State of Tamil Nadu* (1991) 3 SCC 471. [Hereinafter *Perumal*]
40. *Shimbhu v State of Haryana* (2014) 13 SCC 318. [Hereinafter *Shimbhu*]
41. *Krishnappa v State of Karnataka* (2000) 4 SCC 75. [Hereinafter *Krishnappa*]
42. *Shimbhu,* Note 40 at Para 19.
43. *Sangeet v State of Haryana* (2013) 2 SCC 452. [Hereinafter *Sangeet*]
44. *Bhagwan Dass v State of NCT of Delhi* (2011) 6 SCC 396.
45. *Mehboob Batcha v State* (2011) 7 SCC 45.
46. Justice S.B. Sinha, 'To Kill or Not to Kill: The Unending Conundrum' 24(1) Nat. L. Sch. India Rev. 1 (2012). [Hereinafter *Sinha*]
47. *Machhi Singh,* Note 28 at Para 38.
48. *Bariyar,* Note 27.
49. *Gurvail Singh v. State of Punjab* (2013) 2 SCC 713.
50. *Id.* at Para 19.
51. *Id*. at Para 19.
52. *Khade*, Note 35 at Para. 52
53. *Ashok Debbarma v State of Tripura* (2014) 4 SCC 747 [Hereinafter Ashok Debbarma].
54. *Mahesh Dhanaji Shinde v State of Maharashtra* (2014) 4 SCC 292.
55. Benches of equal strength of the Supreme Court have conflicting pronouncements on this. *Rajesh Kumar v State through Government of NCT of Delhi* (2011) 13 SCC 706 held that the failure of the State to adduce evidence regarding lack of probability of reformation would be read in favour of the accused. *Vasanta Sampat Dupare v State of Maharashtra* (2017) 6 SCC 631 held that the mere failure of the State to lead such evidence would not give any benefit to the accused.
56. *Channulal Verma v State of Chattisgarh* AIR 2019 SC 243 [Hereinafter *Channulal*] ; *MA Antony v State of Kerala* RP (Crl) No. 245 of 2010, judgment dated 12.12.2018 [Hereinafter *Antony*] ; *Rajendra Prahladrao Wasnik v State of Maharashtra* AIR 2019 SC 1 [Hereinafter *Wasnik*].
57. *Id. Wasni*k at Para 4.
58. *Dhananjoy,* Note 35 at Para. 15.
59. *Bariyar,* Note 25 at Para 86-87.
60. *Bariyar* Note 25 at Para. 84.
61. *Rameshbhai Rathod v State of Gujarat* (2009) 5 SCC 740.

62. *Id*. at Para 110.
63. *Om Prakash v State of Haryana* (1999) 3 SCC 19.
64. *Id*. at Para. 7,
65. *Antony,* Note 56; *Channulal*, Note 56 at Para. 24.
66. *Mukesh and anr v State* (2017) 3 SCC 717. [Hereinafter *Mukesh*]
67. *Machhi Singh*, Note 28 at Para. 38.
68. *Bariyar*, Note 27 at Para. 66.
69. *Id.*
70. *Union of India v V Sriharan @Murugun* (2016) 7 SCC 1.
71. *Swamy Shraddhanada @ Murli Manohar Mishra v State of Karnataka* (2008) 13 SCC 767.
72. *Sangeet, Note 43.*
73. *Khushwinder Singh v State of Punjab* (2019) 4 SCC 415.
74. *Ajay Pandit v State of Maharashtra* (2012) 8 SCC 43; *Muniappan v State of Tamil Nadu* (1981) 3 SCC 11; *Santosh Kumar Satishbhushan Bariyar v State of Maharashtra* (2009) 6 SCC 498; *Mukesh,* Note 66; *Md. Mannan @ Abdul Mannan vs. State of Bihar Review Petition* (Crl.) No. 308 of 2011, order dated 14.02.2019
75. *Bharat Singh v State of NCT of Delhi* Death Sentence Ref No 1 of 2013 and Criminal Appeal No 509 of 2013 (Delhi HC).
76. *Mukesh,* Note 66.
77. American Bar Association, '2003 Guideline 4.1' (*American Bar Association*, 10 October 2018). <https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/2003-guidelines/2003-guideline-4-1/> accessed 19 December 2019; See also: *Inhuman Conditions in 1382 Prisons In Re* (2019) 2 SCC 435, where the Supreme Court held that meetings should be permitted between prisoners sentenced to death and mental health professionals for a reasonable period of time with reasonable frequency to ensure adequate protection of their rights at all stages.
78. Revised Statutes of Canada 1985, c C-46, s 724(e), s 724(d) ; *Isaacs v the Queen* [1997] 90 A Crim R 587 (NSW); *R v Davies* [2009] 1 Cr App R (S) 79 (Eng); *Guppy and Marsh* [1995] 16 Cr App R (S) 25 (Eng); *R v Olbrich* [1999] 166 ALR 330 (Austl).
79. *Blakely v Washington* 542 US 296 (2004).
80. *Santa Singh v State of Punjab* (1976) 4 SCC 190.
81. *Dagdu and Ors v State of Maharashtra* (1977) 3 SCC 68.
82. Order dated 6.3.2017 in *Mukesh*, Note 66; See also - *Accused X v State of Maharashtra* (2019) 7 SCC 1
83. *Malkiat Singh v State of Punjab* (1991) 4 SC 341; *Channulal,* Note 56.
84. *Accused X v State of Maharashtra* 2019 SCC Online SC 543; *Wasnik 2012,* Note 37.
85. For the first set of cases, see: *Malkiat Singh v State of Punjab* (1991) 4 SCC 341; *Nirpal Singh v State of Haryana* (1977) 2 SCC 131; *Ajay Pandit v State of Maharashtra* (2017) 3 SCC 717; *Santa Singh v State of Punjab* (1976) 4 SCC 190; For the second set of cases, see: *Mukesh and Anr v State* (2017) 3 SCC 724; *Tarlok Singh v State of Punjab* (1977) 3 SCC 218; *Channulal, Note 56*; *Accused X v State of Maharashtra* (2019) 7 SCC 1 ; *Md. Mannan @ Abdul Mannan vs. State of Bihar Review Petition* (Crl.) No. 308 of 2011, order dated 14.02.2019
86. *Mohd. Arif alias Ashfaq v. Registrar, Supreme Court of India and others* (2014) 9 SCC 737.
87. Nishant Gokhale and Rahul Raman, 'Death Penalty Sentencing: The Supreme Court as the First

and Final Arbiter of Facts', (Law and Other Things, 10 May 2007) <https://lawandotherthings.com/2017/05/death-penalty-sentencing-the-supreme-court-as-the-first-and-final-arbiter-of-facts/ > accessed 19 December 2019.

88. *Krishnappa,* Note 41.
89. The discussion on arguments raised by defence lawyers is based on and limited to their reflection in the judgments. We have no way of knowing the oral arguments that may have been or were made in court.
90. *State of Madhya Pradesh v. Shyam Lal* Sessions Case No 73/2000, Court of Additional Session Judge Mandsaur; *State of Madhya Pradesh v. Kanwarlal* Sessions Case No 25/1997, Mandsaur; *State of NCT of Delhi v. Rajkumar @ Mane* Sessions Case No 162/1994, Tis Hazari; *State of NCT of Delhi v. Sunil Kumar Mandal* Sessions Case No 111/1999; *State of Maharashtra v. Raju Dadabha Borge* Sessions Case No 1327/1996, Court of II Additional Sessions Judge, Kalyan District at Thane;*State of Maharashtra v. Mohan Anna Chavan* Sessions Case No 142/2000,Court of District and Sessions Judge, Satara.
91. *State of Maharashtra v. Ravi Ashok Ghumare* Sessions Case No 127/2012,Jalna; *Central Bureau of Investigation v. Gopal Sakhru Bijnewar* Special Case No 1/2007, Special Court, Bhandara;*State of NCT of Delhi v. Ramesh Chand and Ors* Sessions Case No 74/2000; *State of NCT of Delhi v. Brij Kishore* Sessions Case No 107/2000; *State of Madhya Pradesh v. Dharm Singh s/o Purshottam Jat* Sessions Case No 57/2002,Upper Session Court, Sheopur (MP); *State of Madhya Pradesh v. Shivrati* Sessions Case No 353/2000, Bhind.
92. For state-wise break-up of this data, see chapter V.
93. *State of Maharashtra v. Prakash Dhaval Khairnar,* Sessions Case No. 24/1997, Additional Sessions Judge Malegaon, District Nasik [Hereinafter Khairnar].
94. *State v. Saqila and Ors*, Sessions Case No 276/1988.
95. *State v. Jagtar and Ors*, Sessions Case No 123/2008, Rohini District Court.
96. *State of MP v. Manoj and Ors*, Sessions Case No 563/2011, Indore.
97. *State of MP v. Parvati Bai & Ors*, Sessions Case No 146/2014, Second Additional Sessions Judge, Mandla Link Court Niwas.
98. *State v. Nihal Ahmed Rais Ahmed Shaikh & Anr*, Sessions Case No 78/2005, Ad-Hoc District Judge & Additional Sessions Judge at Thane.
99. *Poonaji Dhurve v. State of MP*, Session Court No 86/2001, Court of Third Additional Sessions Court, Chinndwara; *State of MP v. Birju*, Sessions Case No 19/2010, Court of Sessions Judge Indore; *State of NCT v. Om Prakash*, Sessions Case No 56/2010, Rohini District Court; *State of Maharashtra v. Gopal Sakhru Binjewar*, Special Case 1/2007, Special Court, Bhandara, *State of Maharashtra v. Vasanta Sampat Dupare*, Sessions Case No 252/2008, Court of Session Nagpur; *State of Maharashtra v. Sadashiv Jetappa Kamble* Sessions Case No. 29/2011, Court of Additional Sessions Judge, Islampur; *State of MP v. Charanlal*, Sessions Case No 52/2001, Chhindwara District Court.
100. *State of MP v. Charanlal,* Sessions Case 52/2001, 3rd ASJ Chhindwara, Madhya Pradesh at Para. 82.
101. *Krishnappa,* Note 41.
102. *Narayan Chetanram Chaudhary v State of Maharashtra* (2000) 8 SCC 457.
103. *Perumal,* Note 39.
104. This has been discussed in greater detail in the Chapter III on Arbitrariness and the Role of Precedents in Death Penalty sentencing.
105. *State of NCT v Rajesh Kumar*, Sessions Case No. 178/2006, Rohini District court. [Hereinafter *Rajesh Kumar*]

106. *The State of Maharashtra v. Kamal Ahmed Ansari & Ors*, Case No 21(MCOC Special case)/2006, The Special Court No. 1 of the Special judge under the Maharashtra Control of Organised Crime Act, 1999 and The National Investigation Agency Act, 2008 at Mumbai.
107. *State of Madhya Pradesh v. Dileep @ Dipu,* Sessions Case No. 74/2011, Additional Sessions Judge Mandla at Para. 65.
108. *State v. R. P. Tyagi and ors*, Sessions Court No. 1/2006, Karkardooma.
109. *State v. Bharat Singh and Ors*, Sessions Court No. 14/2013, Dwarka District Court.
110. *State v. Surender and ors*, Sessions Court No. 81/2009, Saket.
111. *Rajesh Kumar,* Note 104.
112. *State v. Raminder Singh @ Happy*, Sessions Court No. 78/2006.
113. *State of Maharashtra v Sadashiv Jettappa kamble*, Sessions Court No. 29/2011, Court of Additional Sessions Judge, Islampur. [Hereinafter 'Sadashiv']
114. *State of Maharashtra v. Mayankaur Baldevsingh Sardar,* Sessions Case 178/1999, Additional Session Judge Raigad, Alibag
115. *State of Maharashtra v. Najir Mohiddin*, Sessions Case 10/2002, Additional Sessions Judge, Kalyan; Sadashiv, Note 112; *Dattatray @ Datta Ambo Rokde,* Special Case no 1/2013, Court Of Special Judge (PCFSOA) Thane; *State of Maharashtra v Babasaheb Maruti Kamble*, Session Court No.87/2012, Dindoshi District Court; *State of Maharashtra v Vitthal Tukaram Atugade* , Session Court No.4/2013, Islampur District Court. [Hereinafter *Vitthal 2013*]
116. *State v. Mukesh Kumar,* Session Court No. 42/2010, Patiala; *State v. Bharat Kumar @ Manoj @ Mannu*, Session Court No.46/2013, Dwarka; *State v. Ravi Kumar and ors*, Session Court No. 91/2013, Dwarka District Court.
117. Bryan H Ward, 'A Plea Best Not Taken: Why Criminal Defendants Should Avoid the Alford Plea' (2003) 68 Missouri Law Review 913, 921.
118. Rocksheng Zhong, 'Judging Remorse' (2014) 39 NYU Review of Law and Social Change 163,168.
119. Bryan H Ward, 'Sentencing without Remorse' (2006) 38 Loyola Univ Chicago LJ 31.
120. There were 27 such cases in Delhi, 50 in Maharashtra, and 36 in Madhya Pradesh.
121. *State v. Ranjeet*, Session case No. 6/2008, Tis Hazari District Court.
122. S*tate of Maharashtra v Dilip Premnarayan Tiwari and others*, Session Case No. 205/2004, Court Of Session, At Palghar, Dist.Thane.
123. *State of Maharashtra v Tulshiram*, Session Case No.49/2008, Ad-hoc Additional Sessions Judge, Court Of Sessions, Gadchiroli.
124. *State v. Tika Ram*, Session Case No. 330/1996, Additional Sessions Judge, New Delhi.
125. Social location included mostly arguments around occupation, indicative of the defendant's position in the society.
126. *State of MP v. Mohammad Shafique @ Munna @ Shafi*, Session Case No.329/2009, Bhopal.
127. *State v. Vinod @ Dantla*, Session Case No. 49/2008, Rohini District Court.
128. *State of Maharashtra v. Chandrabhan Sudam Sanap*, Session Case No.388/2014, V.V. Joshi, Greater Bombay.
129. For state-wise break-up, see chapter V.
130. *State v. Surender @ Sonu Punjabi and Ors*, Session Case No. 28/2013, Rohini District court.
131. *State of MP v. Ashok Atmaj*, Session Case No. 200/2010, Upper Sessions Judge Pipariya, Dist: Hoshangabad; *State of MP v. Rajendra Adivasi*, Session Case No. 507/2013, Court of Addl Sessions

Judge, Rahli, Dist Sagar MP; *State of Madhya Pradesh v. Padamnath*, Sessions Case 318/2004, Sessions Court, Ujjain; *State of Maharashtra v Anil Jagannath Pawar, Anil @ Piraji Sukhdeo Pawar*, Session Case No.43/2011, Additional Sessions Judge, Kopargaon. [Hereinafter *Anil Jagannath*]

132. *State of MP v. Birju*, Session Case No. 19/2010, Court of Sessions Judge Indore.
133. *State of MP v. Rajendra Adivasi*, Session Case No. 507/2013, Court of Addl Sessions Judge, Rahli, Dist Sagar MP.
134. *State of MP v. Dilip Bankar*, Session Case No.28/2006, Bhopal
135. *Machhi Singh*, Note 28 at Para. 38
136. *Id.* at Para. 29
137. *State v. Surender @ Kalwa and Ors*, Session Court No.27/2013, Rohini District Court; *State v. Surender @ Sonu Punjabi and Ors*, Session Case No.28/2013, Rohini District Court.
138. Case Examples: *State of MP v. Ganesh,* Session Case No. 324/2002, Indore; *State of MP v. Narendra alias Bode Singh*, Session Case No.229/2004, Satna; *State of MP v. Vivek Bithle @ Bittu*, Session Case No.44/2005, Balaghat Sessions Court; *State of MP v. Ashok Atmaj,* Session Case No.200/2010, Upper Sessions Judge Pipariya, Dist: Hoshangabad; *State of Maharashtra v. Rajendra Pralhadrao Wasnik*, Session Case No.183/2007, Amravati Sessions Court;*The State of Maharashtra v. Sunil s/o Damodar Gaikwad*, Session Case No.118/2008, Sessions Court, Beed; *Vitthal 2013,* Note 113; *State v. Mohd. Afzal*, Session Case No.53/2002, Patiala House [Hereinafter *Afzal*]; *State v Sushil Sharma and others;* Additional Sessions Judge, New Delhi; *State v. Atbir and Ors*, Session case No. 5/2004, Tis Hazari District Court; *State v Shree Gopal@ Mani Gopal*, Session case No.14/2003,Tiz Hazari District court.
139. Bernadette McSherry, '*Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment*' (1st edn, Routledge 2013); Eric Silver and Lisa L Miller, 'A Cautionary Note on the Use of Actuarial Risk Assessment Tools for Social Control' (2002) 48.1 Crime & Delinquency 138.
140. *Birju v State Of Madhya Pradesh* (2014) 3 SCC 421.
141. *Anil @ Arikswamy Joseph v State of Maharashtra* (2014) 6 SCC 69.
142. *Bharat Singh v State of NCT of Delhi* Death Sentence Ref No 1 of 2013 and Criminal Appeal No 509 of 2013 (Delhi High Court).
143. Bryan A Garner, *Black's Law Dictionary* (4th edn, OUP 2011); *Municipal Corporation of Delhi v Gurnam Kaur* AIR 1989 SC 38.
144. *Sundeep Bafna v. State of Maharashtra* AIR 2014 SC 1745.
145. *Ravji,* Note 31.
146. *Sangeet,* Note 43.
147. *Khade,* Note 35.
148. *State of MP v. Sachchu @ Sachin Kushwaha*, Session case No.56/2012, Sagar District court; *Poonaji Dhurve v. State of MP*, Session Court No 86/2001,Court of Third Additional Sessions Court, Chhindwara; *State of MP v. Basanta alias Basant Singh*, Session Court No.31/2002, Damoh District Court.
149. Some of the frequently cited per incuriam judgments were *Dhananjoy Chatterjee,* Note 35; *Kamta Tiwari v. State of Madhya Pradesh* (1996) 6 SCC 250; *Ravji,* Note 31 *Sushil Murmu v. State of Jharkhand* (2004) 2 SCC 338; *Mannan,* Note 38.
150. *Krishnappa v. State of Karnataka* (2012) 11 SCC 237.
151. *State of NCT of Delhi v Tika Ram* Sessions Case No 330 of 1996 ASJ New Delhi.
152. *Om Prakash @ Raju v State of Uttaranchal* (2003) 1 SCC 648.

153. *State of MP v. Veerendra,* Sessions Case No.642/2014, Court of Second Additional Sessions Judge at Dabra District, Gwalior.
154. *State of Rajasthan v Jamil Khan* (2013) 10 SCC 721.
155. *State of Maharashtra v Chandrabhan Sudam Sanap* Sessions Case No 3 of 2015 SJ Greater Bombay.
156. *Shabnam v State of UP* (2015) 6 SCC 632.
157. Session Case No.127/2012, Additional Sessions Judge, Jalna.
158. *State of Maharashtra v. Raju Jagdish Paswan*, Session case No.193/2010, Sangli Sessions Court.
159. Sessions Case 78/2005, Additional Sessions Judge, Thane.
160. *Amit @ Ammu v State of Maharashtra* (2003) 8 SCC 93.
161. *State of MP v. Manoj and ors*, Sessions Case No. 563/2011, Indore District Court; *Halke Bhaiyya v. State of Madhya Pradesh*, Sessions Case No. 62/2014, Additional Sessions Judge, Bijawar, District Chhatarpur.
162. *Devender Pal Singh vs State National Capital Territory* (2002) 5 SCC 234.
163. *State v. Sanjay Kumar Valmiki*, Sessions Case No.62/2014, Additional Sessions Judge, Bijawar, Dist Chhatarpur; *State v. Surender @ Kalwa and Ors*, Session Case No 27/2013, Rohini District Court; *State v. Surender @ Sonu Punjabi and Ors*, Session Case No.28/2013, Rohini District Court; *State v. Chandrakant Jha*, Session Case No.90/2011, Rohini District Court; *State v. Hussain @ Julfikar Ali*, Session case No.122/2008, Delhi.
164. *Wasnik 2012,* Note 37.
165. *Kamta Tiwari v State of Madhya Pradesh* (1996) 6 SCC 250.
166. *Laxman Naik v State of Orissa* (1994) 3 SCC 381.
167. *Molai and anr v State of Madhya Pradesh* (1999) 9 SCC 581.
168. *Anil Jagannath,* Note 129; *State v Vitthal Tukaram Atugade* Sessions Case No 1/2015 SJ Islampur; Viran Gyanlal Rajput Sessions Case No 8/2013 SJ Raigad; *Anil @ Raju Namdev Patil v Administration Of Daman & Diu* Sessions Case No 4/2002 SJ Raigad; *State v. Prakash Daval Khaimar* Sessions Case No 24/1997, Court of Additional Sessions Judge, Nashik; *Purushottam Dasrath Borate v State of Maharashtra* Sessions Case No 284/2008 SJ Pune.
169. *State v Vitthal Tukaram Atugade* Sessions Case No 1 of 2015 SJ Islampur.
170. *Wasnik 2012,* Note 37.
171. *Mannan,* Note 38.
172. Para 80, *State v Vitthal Tukaram Atugade* Sessions Case No 1 of 2015 SJ Islampur.
173. *Anil @ Raju Namdev Patil vs Administration Of Daman & Diu* Sessions Case No 4 of 2002 SJ Raigad.
174. *Henry West Muller Roberts v State of Assam* AIR 1985 SC 823.
175. *Saibanna v. State of Karnataka* 2005 (4) SCC 165.
176. See Aparna Chandra, 'A Capricious Noose: A Comment on the Trial Court Sentencing Order in the December 16 Gang Rape Case' (2014) 2 Journal of National Law University Delhi 124.
177. *Prakash Vinayak Rao Shingnapure v State of Maharashtra* Sessions Case No 461 of 2011 SJ Nagpur.
178. *Ajitsingh Harnamsingh Gujral v State of Maharashtra* (2011) 14 SCC 401.
179. *Uma Shankar Panda v State of Madhya Pradesh* AIR 1996 SC 3011.
180. *Mohd Shafique v State of Madhya Pradesh* Sessions Case No 32 of 2009 SJ Bhopal.
181. *Ram Singh v State of NCT of Delhi* Sessions Case No 114 of 2013 SJ Saket.
182. *Md Ajmal Md Amir Kasab @Abu Mujahid v State Of Maharashtra* (2012) 9 SCC 1.

183. *Atbir v Govt of NCT of Delhi* (2010) 9 SCC .
184. *Vikram Singh & Ors v State Of Punjab* (2010) 3 SCC 56.
185. *Shivu,* Note 36.
186. *Jai Kumar vs State Of MP* (1999) 5 SCC 1.
187. *Dhananjoy Chaterjee v State Of WB* (1994) 2 SCC 220.
188. *Padmnath v State of MP* Sessions Case No 318 of 2004 SJ Ujjain.
189. *Lokpal Singh v State of Madhya Pradesh* State 1985 JLJ, Page 744.
190. Nicola Lacey, *Discretion and due process at the post-conviction stage* (Sweet & Maxwell 1987) 221.
191. Law Commission of India, *The Death Penalty* (Law Commission No 262, 2015) [Hereinafter *LCI 262*]; Muralidhar S, 'Hang Them Now, Hang Them Not, India's Travails with The Death Penalty' (1998) 40 Journal of the Indian Law Institute 143 [Hereinafter *Muralidhar*]; Amnesty International India and PUCL Tamil Nadu, 'Lethal Lottery: The Death Penalty in India—A study of Supreme Court judgments in death penalty cases 1950-2006' (May 2008) 61 [Hereinafter *Amnesty Int*]; *Sinha*, Note 46.
192. *Aloke Nath Dutta v. State of West Bengal* 2007 (12) SCC 230; *Bariyar,* Note 27; *Khade,* Note 35; *Mohd. Farooq Abdul Gafur v. State of Maharashtra* (2010) 14 SCC 641; *Sangeet,* Note 43; S*wamy Shraddananda @ Murali Manohar Mishra v State of Karnataka* (2009) 5 SCC 740.
193. Deva S, 'Death penalty in the 'rarest of rare' cases: A critique of judicial choice-making' in Roger Hood and Surya Deva, *Confronting Capital Punishment in Asia: Human Rights, Politics and Public* Opinion (Oxford 2013) 238.
194. *Muralidhar,* Note 188.
195. *Om Prakash v State of Haryana* (1999) 4 SCC 19.
196. *Shivram v State of Uttar Pradesh* (1998) 1 SCC 149.
197. *State of UP v Bhoora Singh* (1998) 1 SCC 128.
198. *Nirmal Singh v State of Haryana* (1999) 3 SCC 670.
199. *Major RS Budhwar v Union of India* (1996) 9 SCC 502.
200. *Shankar v State of Tamil Nadu* (1994) 4 SCC 478.
201. *Amnesty Int,* Note 188.
202. *Amnesty Int,* Note 188 at 68; *Mohd Aslam v State of Uttar Pradesh* AIR 1974 SC 678; *Om Prakash v State of Uttaranchal* (2003) 1 SCC 648; *Sunil Baban Pingale v State of Maharashtra* (1999) 5 SCC 702.
203. *Amnesty Int,* Note 188 at 68 ; *Ediga Anamma v State of Andhra Pradesh* AIR 1974 SC 799; *Dalip Singh and Ors v State of Punjab* (1979) 4 SCC 332; *Ujjagar Singh and Anr v Union of India and Ors* AIR 1981 SC 2009.
204. *Aloke Nath Dutta v State of West Bengal* 2007 (12) SCC 230.
205. *Bariyar*, Note 25 at Para. 94- 103.
206. *Khade*, Note 35 at Para 87-123.
207. *Bariyar*, Note 25, Para 96-98, 100, 101.
208. *Khade*, Note 35 at Para. 30-48.
209. *Khade*, Note 35 at Para. 107-121.
210. *Khade*, Note 35 at Para 123.
211. *Dhananjoy*, Note 35.
212. *Jai Kumar v State of MP* (1999) 5 SCC 1. [Hereinafter *Jai Kumar*]
213. *Shivu,* Note 36.

214. *Khade*, Note 35 at Para. 123.
215. *Amit v State of Maharashtra* (2003) 8 SCC 93.
216. *Amit v State of UP* (2012) 4 SCC 107.
217. *Khade*, Note 35 at Para. 123.
218. *Jai Kumar*, Note 188.
219. *BA Umesh v State of Karnataka* (2011) 3 SCC 85.
220. *Mannan,* Note 38.
221. *Nirmal Singh v State of Haryana* (1999) 3 SCC 670.
222. *Mohd Chaman v State (NCT of Delhi)* (2001) 2 SCC 28.
223. *Raju v State of Haryana* (2001) 9 SCC 50.
224. *Bantu v State of MP* (2001) 9 SCC 615.
225. *Surendra Pal Shivbalakpal v State of Gujarat* (2005) 3 SCC 127.
226. *Rahul v State of Maharashtra* (2005) 10 SCC 322.
227. *Amit v State of UP* (2012) 4 SCC 107.
228. *Bariyar*, Note 27 at Para. 125.
229. *Mohd Farooq Abdul Gafur v State of Maharashtra* (2010) 14 SCC 641, *Sangeet,* Note 43; *Sinha*, Note 46.
230. *Bariyar*, Note 27 at Para. 133.
231. *Bachan Singh*, Note 1 , at Para 19 reiterating Jagmohan's understanding that sentencing discretion is to be exercised judicially on well recognised principles, after balancing all the aggravating and mitigating circumstances of the crime. According to the court in Bachan Singh , by well recognised principles the court in Jagmohan meant the principles crystallised by judicial decisions illustrating as to what were regarded as aggravating and mitigating circumstances in those cases.
232. *LCI 262,* Note 188 at 94.
233. *Swamy Shraddananda @ Murli Manohar Mishra v. State of Karnataka*, (2009) 5 SCC 740.
234. Mrinal Satish, *Discretion, Discrimination and The Rule of Law: Reforming rape sentencing in India* (Cambridge University Press 2016) 171. [Hereinafter *Mrinal Satish*]
235. ML Frost 'Sentencing disparity: An overview of research and issues' in ML Frost *Sentencing reform: Experiments in reducing disparity* (1982).
236. *Bachan Singh*, Note 1 at Para. 209.
237. *Bachan Singh*, Note 1 at Para. 173.
238. Marc L Miller, 'Sentencing Equality Pathology' (2005) 54 Emory LJ 271.
239. *Bachan Singh*, Note 1 at Para. 173.
240. Dan Merkerl, 'What Might Retributive Justice be? An Argument for the Confrontational Conception of Retributivism' in *Retributivism : Essays on Theory and Policy* (Oxford 2011).
241. Jean Hampton, 'Correcting Harms v Righting Wrongs: the Goal of Retribution' (1992) 39 UCLA Law Review 1659.
242. Andrew von Hirsch and Andrew Ashowrth, *Proportionate Sentencing: Exploring the Principles* (Oxford Scholarship Online 2005) [Hereinafter *Hirsch & Ashworth*]; Andrew Von Hirsch, 'The "Desert" Model for Sentencing: Its Influence, Prospects, and Alternatives' (2007) 74(2) Social Research 413-34. [Hereinafter *Hirsch*]
243. Deterrence, as a theory of punishment, is understood in two ways- general deterrence and specific deterrence. General deterrence aims to prevent potential future criminals from committing crimes

by instilling in them a fear of punishment. Specific deterrence aims at punishing offenders to deter those particular individuals from re-offending.

244. Demleitner, Berman, Miller and Wright, *Sentencing Law and Policy; Cases, Statutes, and Guidelines* (4th edn, Wolters Kluwer 2018)13,14. [Hereinafter *Demleitner et.al.*]
245. Daniel S. Nagin and John V. Pepper, *Deterrence and the Death Penalty*, National Research Council, National Academies Press (2012).
246. Robert Apel, 'Sanctions, perceptions, and crime: Implications for criminal deterrence' (2013) 29 Journal of quantitative criminology 67,101; Michael L Benson and Tara Livelsberger, *Emotions, Choice, and Crime* (Oxford 2013).
247. Immanuel Kant, *The Science of Right* (W Hasie B.D, 1790) 195. [Hereinafter *Kant*]
248. *Ibid*; It is however, relevant, that Kant was in favour of capital punishment. For a detailed discussion see: Nelson T. Potter Jr., 'Kant and Capital Punishment Today' (2002) 36 The Journal of Value Inquiry 267–282.
249. Michael Tonry, 'Purposes and Functions of Sentencing' (2006) 34 Crime and Justice 28,29.
250. Anthony Bottoms and Andrew von Hirsch, *The Crime Preventive Impact of Penal Sanctions* (Oxford Handbook of Empirical Legal Research 2010) 116,119.
251. *Hirsch & Ashworth*, Note 239.
252. *Bachan Singh*, Note 1 at Para 80-84 citing *Paras Ram v. State of Punjab* (1981) 2 SCC 508; *Jagmohan v. State of Uttar Pradesh* (1973) 1 SCC 20; *Ediga Anamma v. State of Andhra Pradesh* (1974) 4 SCC 443; *Shiv Mohan Singh v. State of Delhi Administration* (1977) 2 SCC 238; *Charles Sobhraj v. Superintendent of Police Delhi* (1978) 4 SCC 104.
253. See *Bachan Singh*, Note 1 at Para 93 citing Isaac Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death (1975) 69 The National Bureau of Economic Research. Subsequently, the methodology of this study was found to be faulty by the National Academy of Sciences in 1978. See also, para 100-101 citing the British Royal Commission Report (1949-53). However, it is relevant to note that the British Parliament abolished the death penalty in 1965.
254. *Bachan Singh*, Note 1 at Para. 89-96.
255. *Bachan Singh*, Note 1 at Para. 101
256. *Bachan Singh*, Note 1 at Para 105.
257. While the majority opinion differentiated retributive justice from lex talionis by referring to it as 'measured deserts' and the other as 'instinct of the man of the jungle', the lone dissenting opinion in *Bachan Singh* of Bhagawati J., refused to see the distinction between the two. According to him, it is euphemistic to refer to retribution as retributive justice and revenge as reprobation. He refuted the argument of the majority that the death penalty is said to be necessary for preservation of society, by saying that it is actually enables the society to avenge itself for the wrong done to it.
258. *Machhi Singh*, Note 28 at Pg. 487.
259. *Machhi Singh,* Note 28 at Pg. 487.
260. *Dhananjoy*, Note 35.
261. *Jameel v State of UP* (2010) 12 SCC 532; *Bantu v State of UP (@008)* 7 SCC 561; *Mohan Anna Chavan v State of Maharashtra* (2008) 7 SCC 561; *State of Madhya Pradesh v Sheikh Shahid* (2009) 12 SCC 715; *State of UP v Sattan @ Satyendra* (2009) 4 SCC 736; *Jai Kumar v State of Madhya Pradesh* (1999) 5 SCC 1; *State of Madhya Pradesh v Santosh Kumar* (2006) 6 SCC 1; *Shailesh Jasvantbhai v State of Gujarat*

(2006) 2 SCC 359; *Bheru Singh v State of Rajasthan* (1994) 2 SCC 467.

262. *Ravji,* Note 31.
263. It is relevant to note that *Ravji* was subsequently held to be *per incuriam* by the Supreme Court in *Bariyar*. For a detailed discussion, see Chapter 3, Notes 143-149.
264. *Mahesh v State of Madhya Pradesh* (1987) 3 SCC 80.
265. *Paniben v State of Gujarat* (1992) 2 SCC 474.
266. *Jashubha Bharatsingh Gohil v State of Gujarat* (1994) 4 SCC 353.
267. *Paras Ram v State of Punjab* (1981) 2 SCC 508; *Allauddin Mian v State of Bihar* AIR 1989 SC 1456.
268. *Dhananjoy Chatterjee*, Note 35, *Mukesh*, Note 66; *State of NCT of Delhi v. Navjot Sandhu (2005)* 11 SCC 600.
269. *Kant*, Note 244 at 195.
270. *Mrinal Satish,* Note 231
271. *Dhananjoy,* Note 35 ; *Bariyar,* Note 27; *Ravji,* Note 31.
272. *Kant*, Note 244.
273. *Hirsch*, Note 239.
274. *Kant*, Note 244 at 195.
275. Douglas G. Smith, 'The Historical and Constitutional Contexts of Jury Reform' (1996) 25 Hofstra Law Review 377, 432.
276. *Bariyar*, Note 27; *Bachan Singh*, Note 1; *LCI 262,* Note 229; *Demleitner et.al.* Note 244
277. *Demleitner et.al.* Note 244
278. HLA Hart, 'Prolegomenon to the Principles of Punishment', in *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd edn, Oxford 2008) 1, 8–13; Zachary Hosking, 'Deterrent Punishment and Respect for Persons' (2011) 8 Ohio State Journal of Criminal Law 369.
279. Andrew von Hirsch, 'The Sentencing Commission's Functions' in Michael Tonry et al (eds) *The Sentencing Commission and its Guidelines* (NUP 1987).
280. *United States v Booker* 543 US 220 (2005).
281. Nancy Gertner, 'A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right' [2010] J CRIM L & CRIMINOLOGY 691.
282. The Criminal Justice Act, 2003, s. 142.
283. Justice Committee- Sixth Report, 'Sentencing Guidelines and the Parliament- Building a bridge' <https://publications.parliament.uk/pa/cm200809/cmselect/cmjust/715/71507.htm#note67> accessed on 8 January 2020
284. D Faulkner, 'The Reform of Sentencing and the Future of the Criminal Courts', in Peter Sedgwick (eds) *Rethinking Sentencing* (Church House Publishing 2004) 9.
285. *Mrinal Satish*, Note 231 at 171-72.
286. *State of MP v. Jitendra @ Jitu and Anr* Session Case No.82/2011, Burhanpur District Court.
287. *State of MP v. Dilip Bankar*, Session Case No.28/2006, Bhopal.
288. *State of Maharashtra v. Raosaheb Ramchandra Thombare*, Sessions Case No.44/2000,Shrirampur Sessions Court.
289. *Afzal,* Note 136.
290. *State v. Hussain @ Julfikar Ali*, Session case No.122/2008, Delhi.
291. *State of MP v. Mahesh Kurmi*, Sessions Case No.62/2005, Court of Additional Sessions Judge, Sagar, MP.

292. *State of MP v. Bantu alias Naresh Giri,* Sessions Case No.117/1999,Additional Sessions Judge, Umariya.
293. *State v. Bharat Kumar @ Manoj @ Mannu*, Session Case No.46/2013, Dwarka District Court.
294. *State v. Om Prakash*, Session Case No.56/2010, Rohini District Court.
295. *State of Maharashtra v. Harish Baburao Sasane*, Session Case No.154/2001, Kolhapur.
296. *State of MP v. Tattu Lodhi*, Session Case No.324/2011,Twelfth Upper Sessions Judge, Jabalpur.
297. *State v. Sanjay Kumar Valmiki*, Session Case No.166/2011, Rohini District Court.
298. *Id.* at Para. 24
299. *State of Maharashtra v Govind Vaman Patil and others*, Session case no.14/2011, Court of The Sessions Judge, Raigad-Alibag.
300. *State of Maharashtra v. Harish Baburao Sasane*, Session Case No.154/2001, Kohlapur.
301. *State of MP v. Pyare Khan*, Session case No. 163/1997, Raisen. [Hereinafter 'Pyare Khan']
302. *State of Maharashtra v Bhagwat Bajirao Kale (Sahebrao alias Navath Sopal Kale) and others*, Session case No. 368/1997, Sessions Court, Pune.
303. *State v. Najir Ahmad Mohid Khan @ Mohammad*, Sessions Case No. 10/2002, Court of Additional Sessions Judge at Kalyan
304. *Pyare Khan*, Note 297.
305. *State of NCT of Delhi v. Brij Kishore*, Sessions Case No 107/2000, Delhi.
306. *The State (Malabar Police Station) v Jagadish @ Sagar Choudhary and others*, Session Case No.91/2008, Court of Sessions for Greater Bombay.
307. *DPP v. Cannonier* SKBHCR2005/0016; *Trimmingham v. R* (St. Vincent and the Grenadines) [2009] UKPC 25.
308. *LCI 262,* Note 188 at 87.
309. *State v. Rajkumar @ Mane*, Session Case No.162/1994, Tiz Hazari District Court.
310. *State of Maharashtra v Raju Dadaba*, Session Case No. 1327/1996, Court of II Additional Sessions Judge, Kalyan District at Thane.
311. *Ibid* at Para. 40.
312. *State of Maharashtra v. Vijay Jadhav and ors,* SC No. 846/2012, Greater Bombay was case involving a repeat conviction for rape punishable with death under Section 376E of the Indian Penal Code, 1860.
313. Confessions to a police officer and confession while in police custody (except to a Magistrate) are inadmissible under the Indian Evidence Act, 1872 (IEA). However, a recovery based on confession to a police officer is admissible as evidence under Section 27 of the IEA.
314. 'Last seen' evidence is an example of circumstantial evidence. 'Last seen' evidence literally means that the victim was last seen with the accused and the prosecution seeks to then establish the guilt of the accused on that basis. The Supreme Court in *M.G Agrawal v. State of Maharashtra* (1963) 2 SCR 405 has held that the courts must adopt a very cautious approach while convicting purely on the basis of circumstantial evidence. Reliance may be placed on circumstantial evidence only if it is "wholly consistent" with the guilt of the accused, and that if two interpretations of the evidence are possible, then the benefit of doubt must be given to the accused. It is also now a settled position of law that the chain of circumstances presented should be able to show within all human probability that the act was committed by the accused.
315. *Allaudin Mian v. State of Bihar* (1989) 3 SCC 5.

316. This information was unavailable in four cases from Madhya Pradesh.
317. *Allaudin Mian v. State of Bihar* (1989) 3 SCC 5.
318. *Bachan Singh,* Note 1 at 209.
319. This number corresponds to cases where mitigating circumstances did not find even a mention by the trial courts while deciding between a sentence of life imprisonment and death. These numbers do not reveal the cases where mitigating circumstances were mentioned but not necessarily considered in line with *Bachan Singh.*
320. *Bachan Singh,* Note 1 at 206.
321. *Bachan Singh,* Note 1 at 207.
322. In *Bachan Singh,* Note 1 at 206., reformation is mentioned as one of the mitigating circumstances that can be considered while deciding the sentence. Para 207 of *Bachan Singh* requires the alternative of life imprisonment to be unquestionably foreclosed. This determination according to the court in Para 66 of *Santosh Kumar Satishbhushan Bariyar* necessarily requires considering the probability of reformation of the accused. According to the court in *Bariyar*, the alternative of life imprisonment is unquestionably foreclosed only when the sentencing aim of reformation can be said to unachievable.
323. *Bachan Singh,* Note 1 at 206.. It is often misunderstood that paragraph 206 requires the mandatory consideration of possibility of reformation. However, a reading of the paragraph should make it evident that it is a list of factors that sentencing judges 'could' consider. The determination of life imprisonment being unquestionably foreclosed under paragraph 209 is where the consideration of reformation assumes a mandatory nature.
324. *Bachan Singh,* Note 1 at 206.
325. The Supreme Court has dealt with this requirement inconsistently. For instance in *Rajesh v. State of NCT of Delhi*, (2011) 13 SCC 706, the court held that the accused was capable of reform because the state had failed to lead evidence on reformation to show that the accused was beyond reformation. However, in *Vasant Sampat Dupare v. State of Maharashtra*, (2017) 6 SCC 631, the court rejected *Rajesh* which was cited by the defence counsel to argue that since the prosecution had led no evidence to show that the accused is beyond reformation. The Court in *Duprare* was of the view that non fulfillment of this burden by state does not vitiate the process and in the absence of it matter cannot always be answered in favour of the accused person. It must be noted that this observation in *Dupare* concerns paragraph 206 and does not discuss the role of reformation for the requirement in paragraph 209 on the question of life imprisonment being unquestionably foreclosed.
326. For a discussion on its introduction through the judgment in *Macchi Singh* and its subsequent evolution, see Chapter II.

॥न्यायस्त्र प्रमाणं स्यात्॥

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