Briefing Paper

Understanding the Death Penalty in India: The Challenges and Potential of Empirical Research

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UNDERSTANDING THE DEATH PENALTY IN INDIA: THE CHALLENGES AND POTENTIAL OF EMPIRICAL RESEARCH

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After obtaining his law degree from NALSAR University of Law, Hyderabad (India), he was a Felix Scholar at the University of Oxford between 2007-12, where he was awarded the BCL (Distinction), M.Phil in Law (Distinction) and the D.Phil in Law. He had the rare honour of being invited by the Supreme Court of India to serve as a Deputy Registrar (Research) in May 2014, an academic appointment last made in the late 1980s. Professor Surendranath resigned from this post in light of the Supreme Court's handling of Yakub Memon's execution in July 2015.

UNDERSTANDING THE DEATH PENALTY IN INDIA: THE CHALLENGES AND POTENTIAL OF EMPIRICAL RESEARCH

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The Death Penalty India Report (2016) was an attempt to address the lack of empirical information on the administration of the death penalty in India. The dismal state of affairs in this regard is demonstrated by the fact that there exist no reliable figures for the number of executions India has carried out since independence in August 1947. Further, when the Death Penalty Research Project was conceptualised in May 2013 there was no certainty about the total number of prisoners on death row in India either. While there is extensive work on the analysis of Supreme Court judgements on the death penalty, there is an acute absence of research on other facets of the administration of the death penalty. The two specific aims of the Death Penalty Research Project were to document the socio-economic profile of death row prisoners in India and secondly, to map the interaction of death row prisoners with different aspects of India's criminal justice system. These aims were achieved by interviewing all prisoners on death row across India along with tracking down and interviewing their families (in some cases, the prisoners had no families or the families had abandoned the prisoner). Of the 385 prisoners under the sentence of death in India during the project, we had access to 373 prisoners.

Many of the findings contained in the Death Penalty India Report (2016) may be true of the Indian criminal justice system per se. However, the report's central position, without commenting on its abolition, is that the death penalty is a unique form of punishment. Its uniqueness, the report argues, does not arise only on the basis of its irreversibility as a punishment. The uncertainty between life and death that a prisoner experiences on a daily basis while being on death row must lie at the core of the uniqueness of the death penalty as a punishment. The constant anticipation of death with no real information about the ongoing legal processes (given their socio-economic conditions discussed below) makes a strong case for treating the death penalty as a unique punishment within India's criminal justice system.

THE PROCESS

The first challenge in designing the Death Penalty Research Project was determining the exact number of death row prisoners in India. As part of India's federal structure, there are 29 states and 7 Union Territories with prisons being under the jurisdiction of the state governments (and not the Government of India). The project received tremendous assistance from the National Legal Services Authority (NALSA is India's

apex legal aid body funded by the state and the legal aid structure operates right up to the district courts). With NALSA's assistance we were able to convince each State government to send us the list of death row prisoners in their jurisdiction. However, we realised very early on that these figures required to be verified at the level of each central prison (depending on their geographical size, each state could have anywhere between one to five central prisons). We undertook this last mile verification for every state before settling upon the total number of death row prisoners in India.

Verifying the number of prisoners, tracking down the families and interviewing them required a tremendous amount of travel across the country and often multiple times in search of the same family. This was largely possible only due to the excellent pool of student researchers who staffed the project over the three year period. The project had 3 faculty-level coordinators, a core team of 12 student researchers and over the three year period we had 90 student volunteers work with us for varying periods of time. It was their incredible energy, enthusiasm and idealism that ensured the successful completion. The project was financially supported entirely out of the research funds of the University (National Law University, Delhi is an autonomous University funded by the Delhi Government).

PREPARATION AND CONDUCTING INTERVIEW

As indicated above, the project was carried out by interviewing death row prisoners and their families. Prior to the interviews, consultations with experts on the death penalty, prosecutors, defence lawyers, trial and appellate judges were held to prepare questionnaires for the researchers to conduct the field interviews. Extensive orientation sessions were conducted to familiarise researchers on different aspects of such interviews in prisons and with families in myriad socio-economic and cultural contexts. Several measures to protect the privacy of the prisoners and their families and to maintain confidentiality were adopted during data analysis and writing of the report. Some of the measures were to change the names of the prisoners and their families, omitting the names of prisons and also not revealing the locations of family interviews.

The position of the researchers on the death penalty was not relevant to their participation in the project. The researchers had also received clear instructions not to provide or promise any assistance, monetary or otherwise, irrespective of the situations they might encounter while interviewing families or prisoners. All prisoners and families were informed that the interviews were being conducted exclusively for research purposes and were not meant to assist them in any way. Despite this repeated caveat, it was very evident that prisoners and families continued to expect some assistance in resolving their desperate situation arising out of their socio-economic marginalisation.

The actual process of conducting interviews threw up several challenges. While managing the expectations of prisoners from such an exercise remained a very serious concern, the ethical consideration that we might be nudging prisoners towards reliving traumatic experience loomed large. Repeated exposure to such narratives of

custodial violence, economic desperation, and social boycott had a deep impact on researchers that we were making prisoners revisit and articulate such thoughts without really providing any help in return. The cooperation of prison administrations across the country was varied. In some states we received incredible support in the prisons with extensive interview time, appropriate settings for a private conversation and no undue restrictions. In other states we had to push really hard for the smallest of things like not having a prison guard within hearing range of the interview, ensuring that the prisoner is not forced to sit on the floor while we were made to sit on a chair, getting the bare minimum time required for such an interview etc. The challenges during family interviews were different and there were numerous instances where families refused to talk to us for various reasons – they might have abandoned the prisoner and moved on; or the crime was such that the community around them in their locality would have demanded that they maintain no relationship with the prisoner if they wanted to continue living there; or the families themselves found the crime so abhorrent that they wanted nothing to do with the prisoner.

ORGANISATION OF THE REPORT

The Death Penalty India Report (2016) is presented in two volumes. Volume-I is predominantly quantitative and contains provides statistics on the durations on death row, the nature of crimes involved and the socio-economic profile of death row prisoners. There are multiple levels of enquiry within each of these heads that have been explored in Chapters 2, 3 and 4 of the report. For example, in the chapter on socio-economic profile, data is presented on the caste and religious profile of prisoners and then further analysed from the perspective of socio-economic composition at each stage of the legal process. It is seen that as we move further up the legal process, the proportion of the poor and the socially marginalised keeps increasing. We have also used multiple indicators to track marginalisation like employment history, educational levels along with providing state-level analysis for each of them. The chapter on legal representation in Volume-I and large parts of Volume-II are dedicated to a qualitative analysis of the experience with the criminal justice system. We felt that in research of this nature it was extremely important to humanise these narratives rather than present them purely as statistics. Much of what we heard would not be captured by numbers alone and we thought it important to put out the voices of the prisoners in the best way possible.

SPECIFIC FINDINGS

Periods of Incarceration: The report in Chapter 2 documents the long periods that death row prisoners spent in incarceration during their trial and under the sentence of death. Taking into consideration the harsh conditions of incarceration and the agonising mental strain from living in the grey area between life and death, this in itself is an extreme form of punishment. The duration of the legal proceedings involved in death cases also takes a heavy toll on the families of the prisoners, firstly since the emotional strain of having a loved one with a death sentence looming large can not

be understated, but also due to the enormous financial burden of ensuring the best possible legal representation so as to best help their loved ones chances of avoiding capital punishment. Of the 373 prisoners, 127 of them had trials that took more than five years and the trials took more than a decade for 54 prisoners.

Social and Economic Vulnerability: It has been a long held belief in India that the death penalty had a disproportionate impact on the marginalised and the vulnerable. The report has taken that belief beyond doubt and highlighted that the death penalty is more commonly imposed on marginalised, poor or otherwise vulnerable sections of society. Our research showed that nearly 75% of India's death row population were economically vulnerable and that 76% of the prisoners belong to socially backward groups and religious minorities. Among the economically vulnerable prisoners, 63.2% were either the primary or the sole earners in their families before being arrested. While this is not to suggest any direct discrimination (for that would require a lot more research and evidence), these figures do indicate the disproportionate burdens that the criminal justice system places on the poor and the marginalised. This disproportionate impact is only further amplified when we look at the educational profile of the death row prisoners in India. It was observed that 32% of India's death row prisoners had barely attended school and nearly 62% had not completed secondary school education. The report while presenting national figures has also ensured that the vastly different state-wise figures are represented.

Age is essential when considering the imposition of the death sentence, as a Constitution Bench of the Supreme Court of India held that both young and old prisoners cannot be sentenced to death¹. Young people are thought to have their whole lives ahead of them, and in their youth reform is a distinct possibility, therefore it is the preferred alternative. Furthermore, young people tend to be vulnerable and can not be held to the same standard as older adults. The elderly cannot be considered to be threats to society and therefore can not be sentenced to death. However, despite this, 54 prisoners in the study were between the ages of 18 and 21, and seven prisoners were over the age of 60 at the time they committed the crimes for which they were convicted.

Legal Representation: The availability and standard of legal representation is of great importance while evaluating the fairness of the administration of the death penalty. While there was a widely held view that prisoners on death row were represented by legal aid lawyers at all stages, our research found that to be not true. In the first two stages of the legal process we found that nearly 65% of the prisoners had private lawyers despite extreme economic vulnerability. When we probed this seeming inconsistency, the narrative emerged that prisoners and their families had absolutely no faith in the legal aid system and because of this lack of faith, bordering on fear, families sold all their belongings or borrowed money to be able to afford private legal counsel at the trial courts and High Courts. However, as families were often able to pay very

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

little to their lawyers, it often resulted in completely inadequate representation due to disinterest from the lawyers. Several prisoners reported a complete lack of interaction with their lawyers outside court and also being constantly kept in the dark about the progress in their cases. Such lack of information regarding their fate only exacerbated their suffering on death row as they struggled to cope with the uncertainty.

Article 22 of the Constitution of India guarantees every individual the right to be represented by a legal practitioner of her choice. However, the right to state provided lawyers has been declared to start only at the stage of the production before a magistrate after 24 hours of police custody. There is no right to a free legal aid lawyer during police custody though there is a right to access a lawyer if you can afford one. Of the 191 prisoners who spoke of their access to a lawyer during their time in custody, 185 (97%) stated they did not have a lawyer. Despite the Supreme Court having held that the State is obliged to provide a lawyer to the accused from the time they are presented before a magistrate after 24 hours of police custody, of the 189 prisoners that spoke of it, 168 (89.4%) did not have a lawyer and of the 20 that did, only 3 were represented by legal aid lawyers.

Investigation and Production Before a Magistrate: Both the Constitution of India and the Code of Criminal Procedure 1973, attempt to protect the rights of prisoners and ensure law enforcement does not overstep their bounds while investigating cases. However, a study of the experiences of India's death row prisoners demonstrates the rampant use of custodial torture by the police during investigations. 80% of prisoners who spoke of their time in police custody spoke of being tortured by the police.

Article 22 of the Constitution grants the accused the right to be produced before a magistrate within 24 hours of their arrest as a fundamental right, and is intended to allow the magistrate to check the power of the police during their investigation. However, of the 258 prisoners who spoke about being produced before a magistrate, 166 said they were not produced before a magistrate within 24 hours of their arrest. They were often kept in custody for weeks and months, and when they were finally produced before a magistrate, the magistrate neglected to ask if they were tortured, and when they complained of torture themselves, the magistrate neglected to act.

Death Row in Indian Prisons: The lives of death row inmates while incarcerated take a drastic change once their death sentence is pronounced, despite the law requiring the High Court to confirm the trial court's verdict. Chief among the atrocities against death row inmates in prison is solitary confinement. The Supreme Court stated that death row inmates can only be kept separate from other prisoners once the sentence becomes executable, and it has completely prohibited solitary confinement for death row inmates². Despite this, prisoners sentenced to death reported that they were kept in solitary confinement for considerable periods of time, and the combination of solitary

2 Sunil Batra v. Delhi administration & ors. (1978) 4 SCC 494

confinement with the death sentence is especially cruel and inhumane. Additionally, the research showed living conditions in prisons in violation of prison manuals including low standards of hygiene and almost non-existent mental health facilities.

The state of living in prison while under the death sentence also adds to the suffering of prisoners on death row. The constant presence of gallows in prison is a constant reminder of their fate, and prisons are designed in such a crude manner that the prisoners always have a view of the gallows. Often, officials take prisoners on death row to see the gallows before leading them to their cells. Their existence in such a state amounts to walking the fine line between life and death, not knowing which side they will end up on, which is enough mental strain to drive anyone insane. This uncertainty, along with the terrible living conditions in prison are almost unbearable, and several prisoners stated that they would rather die than continue living on death row.

Prisoners sentenced to death are also allowed to seek pardon from the President or Governor, who are not bound by the verdict of the judiciary. However, the practices developed to file mercy petitions have become standardised and therefore rarely involve the prisoners themselves. Prison authorities tend to use templates without any application of their minds, and the prisoner simply puts a thumb print at the bottom, reducing the last chance to save a human life to a mere formality.

Death warrants are issued by the court that initially sentenced the prisoner to death and specify the date and time of the execution of the prisoner. The current framework however, allows Governments to obtain death warrants prior to the prisoner exhausting all her constitutional remedies. Thus prisoners are often led to believe they are going to die before a stay is granted a few hours before the execution. The emotional trauma caused by swinging between life and death in such a short period of time, coupled with months of living on death row, is in itself a terrifying and incredibly severe punishment.

DEATH PENALTY AND THE IMPORTANCE OF EMPIRICAL RESEARCH

The project was always clear that this was NOT an exercise meant to make a case for the abolition of the death penalty. It was an exercise to bring to the fore certain realities of the administration of the death penalty. Such realities are essential for the social conversation on the death penalty so that the discussion is an informed one and grounded in reality. Undoubtedly philosophical and political debates on the death penalty are important but in India such debates have been carried out in a vacuum without any information from the ground. The Death Penalty India Report (2016) is a step towards removing that vacuum so that a national conversation on the death penalty takes into account the systemic realities that confront us.

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