

CRIMINAL WRONGS AND CONSTITUTIONAL RIGHTS

A View from India

This essay offers an overview of how ideas of constitutionalism, rule of law and fundamental rights contributed to the development of criminal law in India. Various courts, and the Supreme Court in particular, have summoned these broad constitutional concepts to understand, interpret and develop criminal law doctrines. But they are also drawing on these concepts to increasingly address “structural” issues of the criminal justice system – the very apparatus responsible for implementing the doctrines.

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I. Introduction

1 The Indian Penal Code 1860¹ (“IPC”), the Code of Criminal Procedure 1973² (“CrPC”) and the Indian Evidence Act 1872³ (“IEA”) together make up the general law of crimes in India.⁴ Until 1950 these three pieces of legislation were also “supreme” in their respective fields.⁵ The inauguration of India’s written Constitution with an entrenched Bill of Rights changed that. No longer the highest law, these colonial pieces of legislation had to meet the tests of constitutionality to remain valid thereafter. This essay explains how constitutional doctrines affected the development of criminal law and procedure in India. It has three main parts. The first part offers an overview of the constitutional provisions that have a direct bearing on the law of crimes, along with

1 Act 45 of 1860.

2 Act 2 of 1973.

3 Act 1 of 1872.

4 While the Indian Penal Code 1860 (Act 45 of 1860) and the Code of Criminal Procedure 1973 (Act 2 of 1973) exclusively deal with criminal law matters, the Indian Evidence Act 1872 (Act 1 of 1872) is more catholic; it applies both to civil and criminal proceedings. Also, note that there are scores of other legislation that create offences and special procedures to deal with such offences. But they are all specific and narrowly defined. It is in this sense that the three statutes mentioned above make up the *general* law of crimes.

5 The Code of Criminal Procedure was introduced in 1861, but was revised and re-enacted in 1973. See Code of Criminal Procedure 1861 (XXV of 1861) (now repealed). It was also revised in 1898. See Code of Criminal Procedure 1898 (V of 1898) (now repealed).

some references to procedural and evidentiary rules. The second part is a discussion of select provisions of the IPC, and the constitutional challenges some of them endured. The third part offers a quick glimpse of some of the structural issues that plague India's criminal justice system, and the Supreme Court's increasing reliance on the idiom of human rights to address these matters.

II. Constitutional basics

2 The Constitution of India ("Constitution") is relatively sparse on criminal law matters. Only three provisions – Arts 20, 21 and 22 – make general references to crime. Articles 20 and 21, at least textually, deal with "punitive detention"; Art 22 deals with "preventive detention".⁶ The analysis in this essay is limited to doctrines of "ordinary" criminal law; the special category of preventive detention will therefore be avoided. Article 20 offers three distinct protections. Article 20(1) guarantees against *ex post facto* criminal laws ("[n]o person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a [greater] penalty"); Art 20(2) protects against double jeopardy ("[n]o person shall be prosecuted and punished for the same offence more than once"); and Art 20(3) incorporates the right against self-incrimination ("[n]o person accused of any offence shall be compelled to be a witness against himself"). Guarantees of such kind are frequently found in constitutional democracies, but their specifics often vary.

3 In India, the prohibition against *ex post facto* laws applies only against substantive criminal law. Persons cannot be convicted for acts that were not crimes on the date of their commission, but Art 20(1) does not create a vested right in any particular procedure.⁷ Nor does the provision apply to the retrospective operation of legislation that creates *civil* liabilities including deprivation of business permits, forfeiture of properties or cancellation of administrative orders.⁸ Also, the provision only bars additional or higher penalty; substituting a penalty for another, however, is not prohibited by Art 20(1).⁹ Similarly, the protection of Art 20(2) applies only after a person has been "prosecuted and punished" for an offence before a court or judicial tribunal.¹⁰ But when the ingredients of the offences in the previous and subsequent trials are

6 Some other provisions making references to specific offences. See Art 17 and Art 23 of the Constitution of India 1950.

7 *Union of India v Sukumar Pyne* AIR 1966 SC 1206; *Shiv Bahadur v State of UP* AIR 1953 SC 394.

8 *Shiv Dutt v Union of India* AIR 1984 SC 1194.

9 *Rattan Lal v State of Punjab* AIR 1965 SC 444.

10 *Maqbool Hussain v State of Bombay* AIR 1953 SC 325.

distinct, Art 20(2) has no application. In fact, a subsequent prosecution may emerge out of the same facts and the same complaint, but must engage with distinct ingredients. For example, an offence and a conspiracy to commit that offence, the Supreme Court has concluded, are sufficiently distinct.¹¹ And as with the “civil liability” exception in Art 20(1), here too administrative actions – non-payment of increments, bar against promotion or dismissal on disciplinary grounds – do not count as “punishments”.¹²

4 In contrast to the relatively narrow reading of Arts 20(1) and 20(2), the Supreme Court has offered more expansive protections under Art 20(3). In *Selvi v State of Karnataka*¹³ (“*Selvi*”), the petitioner challenged the constitutionality of three investigative mechanisms – polygraph, narco analysis and brain mapping – as violative of the right against self-incrimination. After an exhaustive review of the science underlying these methods, leading US and other foreign decisions and references to relevant provisions of the CrPC and IEA, Chief Justice K G Balakrishnan concluded that the involuntary administration of these procedures violates Art 20(3). The guarantee against self-incrimination, he explained, exists first to ensure “reliability of the statements made by an accused”, and second, to “ensure that such statements are made voluntarily”.¹⁴ “Accused” in this context has a non-technical meaning; a formal accusation or chargesheet is not a prerequisite.¹⁵ But to meaningfully protect the right without unduly impairing investigative efforts, the Chief Justice drew two distinctions. First, he distinguished between evidence that is intended for comparison with facts that are already known, and evidence that leads to the discovery of new facts relevant to an ongoing investigation. Second, he distinguished between “physical” evidence – blood, hair, sweat, semen, handwriting samples, *etc* – and “testimonial” evidence – including oral or written statements about the specific events, and psychiatric examinations. In keeping with earlier precedents, physical evidence, he concluded, may be compelled,¹⁶ but not testimonial evidence.¹⁷ In particular, he held that the three investigative techniques amounted to testimonial evidence, even though at least two of them (polygraph and brain mapping) involved only “physiological” responses.¹⁸ This is because such methods could produce “communicative” gestures that

11 *Leo Roy v Superintendent Jail* AIR 1958 SC 119.

12 *Collector v S Rajagopalan* (2000) 9 SCC 145; *Union of India v Sunil Kumar* (2001) 3 SCC 414.

13 (2010) 7 SCC 263.

14 *Selvi v State of Karnataka* (2010) 7 SCC 263 at [91].

15 *Selvi v State of Karnataka* (2010) 7 SCC 263 at [109].

16 *M P Sharma v Satish Chandra* AIR 1954 SC 300.

17 *State of Bombay v Kathi Kalu* AIR 1961 SC 1808.

18 *Selvi v State of Karnataka* (2010) 7 SCC 263 at [165].

could lead to new information, and potential charges.¹⁹ Perhaps the decision's importance lies in the fact that it draws attention to the underappreciated relationship between criminal procedure and fundamental rights, and in particular to the connection between investigative techniques and the right to fair trial.

5 The other provision on punitive detention – Art 21 – is more general. It states that “no person shall be deprived of his life or personal liberty except according to procedure established by law”. By a series of incremental interpretations in the 1970s, the Supreme Court lent new meaning to the provision. Two innovations were key to this. First, the meaning given to “life” expanded. It became the repository of wide ranging rights, many of which were directly linked to the administration of criminal justice.²⁰ The right to life, Judge Bhagwati explained in *Francis Mullin v Union Territory of Delhi*,²¹ includes “the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms”.²² Lawful incarceration abridges some of them, but prisoners, he clarified, continue to enjoy other rights, including in the context of the immediate facts, the right “to have interviews with the members of his family and friends” subject to reasonable restrictions.²³ Second, the State could no longer deprive persons of their life or personal liberty merely by prescribing “any” procedure. Procedures must have certain ethical – or moral – properties. And to meet the demands of Art 21, they must be “just, fair and reasonable”, not arbitrary or fanciful.²⁴ These two innovations, taken together, created a “new” Art 21 which in due course had profound effects on the development of legal doctrines in India.

6 In fact, much of the early “newness” of Art 21 was explained in the context of criminal justice issues. In *M H Hoskot v State of Maharashtra*,²⁵ the petitioner was convicted of forgery and served out his sentence. He later claimed that he was denied legal aid and therefore was unable to appeal his conviction. Relying on the *Maneka Gandhi v Union of India*²⁶ reasoning, Judge V R Krishna Iyer concluded that the right to legal aid was a necessary aspect of the right to life and personal liberty.²⁷ Lawyers’ services are an “ingredient of fair procedure”, he said,

19 *Selvi v State of Karnataka* (2010) 7 SCC 263 at [158].

20 See S P Sathe, *Judicial Activism in India* (New Delhi, Oxford University Press, 2006) at pp 100–160.

21 AIR 1981 SC 746.

22 *Francis Mullin v Union Territory of Delhi* AIR 1981 SC 746 at [8].

23 *Francis Mullin v Union Territory of Delhi* AIR 1981 SC 746 at [8].

24 *Maneka Gandhi v Union of India* AIR 1978 SC 597 at [56].

25 AIR 1978 SC 1548.

26 AIR 1978 SC 597.

27 *M H Hoskot v State of Maharashtra* AIR 1978 SC 1548 at [25].

and making such services available is “the State’s duty”.²⁸ This was repeated in *Hussainara Khatoon v Home Secretary*.²⁹ Judge Bhagwati clarified that “free legal service is an unalienable element of ‘reasonable, fair and just’ procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice”.³⁰ The immediate facts of the case had to do with under-trial prisoners, some of whom had been detained for periods longer than their possible sentences. In that context, the court also clarified that the right to speedy trial was part of Art 21, and undue delay in clearing the docks amounted to a grave violation.³¹

7 A more general principle was laid down soon after in *Sunil Batra v Delhi Administration*.³² The petitioner was on death row, and had been kept in solitary confinement pursuant to s 30 of the Prison Act 1894.³³ Rejecting the claim that such “men ... are so desperate that they will commit more murders if facility offers itself”, Judge Krishna Iyer concluded that while “the operation of Articles 14, 19 and 21 may be pared down for a prisoner”, they cannot be “puffed out altogether”.³⁴ He read down the scope of that provision, adding that “if wars are too important to be left to the generals, surely prisoners’ rights are too precious to be left to the jailors”.³⁵ “Freedom behind bars”, he noted, is part of India’s “constitutional tryst” and rights matter even while prisoners serve their sentences.³⁶ The “new” Art 21 offered almost limitless possibilities to dialogically remake the colonial foundations of India’s criminal justice system, and its effects were only just beginning to emerge.

8 Over time, the humanising effects showed up on an array of criminal justice issues. The expansions fall into three broad categories, and a few important ones will be noted here. First, at the pre-trial stage, persons have, among others, a right to “access legal counsel immediately on arrest”,³⁷ a right against “delayed framing of charges”,³⁸ a right against torture or other forms of custodial violence³⁹ and a right to bail under reasonable conditions.⁴⁰ In fact, the *Selvi*⁴¹ reasoning in rejecting certain

28 *M H Hoskot v State of Maharashtra* AIR 1978 SC 1548 at [26].

29 AIR 1979 SC 1369.

30 *Hussainara Khatoon v Home Secretary* AIR 1979 SC 1369 at [7].

31 *Hussainara Khatoon v Home Secretary* AIR 1979 SC 1369 at [9].

32 AIR 1978 SC 1675.

33 Act IX of 1894.

34 *Sunil Batra v Delhi Administration* AIR 1978 SC 1675 at [57].

35 *Sunil Batra v Delhi Administration* AIR 1978 SC 1675 at [22].

36 *Sunil Batra v Delhi Administration* AIR 1978 SC 1675 at [225].

37 *D K Basu v State of W B* (1997) 1 SCC 416.

38 *Bal Krishna Pandey v State of UP* (2003) 12 SCC 186.

39 *State of MP v Shyam Sunder Trivedi* (1995) 4 SCC 262.

40 *Narinderjit Sahni v Union of India* AIR 2001 SC 3810; *Hussainara Khatoon v Home Secretary, State of Bihar* AIR 1979 SC 1369.

investigative techniques relied in large measure on this expanded meaning of Art 21, and in particular on the right to fair trial. Second, during trial, accused persons have, among others, a right to “fair and open trial”;⁴² a right to “speedy trial”;⁴³ a right “against delay in pronouncing verdicts”⁴⁴ and a right against handcuffing.⁴⁵ And third, at the post-trial stage, convicted persons have a right of appeal,⁴⁶ a right to defend oneself against enhanced sentences⁴⁷ and a right “against inhumane and degrading punishment”⁴⁸ and a right “against delay in executing sentences”.⁴⁹

9 Some of these matters already enjoyed legislative support, but in invoking the language of fundamental rights, the courts elevated their status. These elevations, however, it should be added, did not always alter institutional practices; the core reliefs were often limited to the immediate litigants. But they opened the way for constitutional adjudication of broader criminal justice issues. The next section explains how this language of fundamental rights – especially the new Art 21 – led to a series of challenges to provisions in the IPC.

III. Crime and punishment: The Indian Penal Code

10 Since 1950, several provisions of the IPC have been called to account. Constitutional rights, it was argued, rendered these provisions invalid, and the courts occasionally accepted that view. This section will focus on two areas; first on death-related challenges, and second, on the more recent challenge to the anti-sodomy provision of the IPC.

A. Death: The basic version

11 In *Bachan Singh v State of Punjab*⁵⁰ (“*Bachan Singh*”), the Supreme Court was confronted with constitutional questions about s 302 of the IPC: “Whoever commits murder shall be punished with death, or imprisonment for life, and also be liable to fine.” Contradictory views on at least two occasions created misgivings about

41 *Selvi v State of Karnataka* (2010) 7 SCC 263.

42 *Kehar Singh v Delhi Administration* AIR 1988 SC 1883.

43 *Kadra Pahadiya v State of Bihar* AIR 1982 SC 1167.

44 *Anil Rai v State of Bihar* (2001) 7 SCC 318.

45 *Prem Shankar Shukla v Delhi Administration* AIR 1980 SC 1535.

46 *Hussainara Khatoon v Home Secretary* AIR 1979 SC 1369.

47 *Thippeswamy v State of Karnataka* AIR 1983 SC 747.

48 *Javed Ahmed v State of Maharashtra* AIR 1985 SC 231.

49 *Javed Ahmed v State of Maharashtra* AIR 1985 SC 231.

50 AIR 1980 SC 898.

the legality of the death penalty.⁵¹ And *Bachan Singh* provided an opportunity to clarify the matter. The appellant argued that the provision was unconstitutional: It violated the fundamental guarantees of life (Art 21), equality (Art 14) and basic freedoms (Art 19) in India's Constitution.⁵² In addition, the death penalty served no useful social function, and there was no evidence, the appellant claimed, to suggest that its retributive goals were achievable.⁵³ Judge R Sarkaria, writing for the majority, rejected the arguments. He extensively surveyed the international literature on the death penalty and the laws and practices of a large number of jurisdictions only to conclude that "persons of reason, learning and light [were] rationally and deeply divided in their opinion on the issue".⁵⁴ That in itself, he said, was a sufficient basis on which to reject the petitioner's general argument. But he also repelled the argument that the provision violated the right to equality because it offered little guidance on how judicial discretion regarding the death penalty may be exercised.⁵⁵ Refusing to lay down a set of narrowly defined circumstances, Judge Sarkaria pointed to *some* aggravating factors – murder involving "extreme brutality", "exceptional depravity", "a high simultaneous risk of death or injury to more than one person" – and *some* mitigating factors – "influence of extreme mental or emotional disturbance", the age of the accused, possibility of reform or rehabilitation – that judges and magistrates had to take into account in deciding whether to award that punishment.⁵⁶ On the whole, "judges should never be bloodthirsty", he added, and "a real and abiding concern for the dignity of human life" requires that recourse to this punishment be made only "in the rarest of rare cases when alternative options [are] unquestionably foreclosed".⁵⁷

12 What "rarest of rare" means – and how to fairly apply the criterion – has since been the subject of voluminous doubt. The key challenge has been to keep sentencing criteria flexible but fair, and judges have all too often struggled to uphold these competing demands. This challenge is not novel, but *Bachan Singh* exacerbated it. To understand this in context, we must turn back a few decades. The 1898 CrPC in s 367(5) required judges to give reasons for awarding any

51 See *Rajendra Prasad v State of UP* AIR 1979 SC 916; *Jagmohan Singh v State of UP* AIR 1973 SC 947.

52 *Bachan Singh v State of Punjab* AIR 1980 SC 898 at [23].

53 *Bachan Singh v State of Punjab* AIR 1980 SC 898 at [75].

54 *Bachan Singh v State of Punjab* AIR 1980 SC 898 at [131].

55 In his terse minority opinion, Bhagwati J declared the death penalty unconstitutional. See *Bachan Singh v State of Punjab* AIR 1980 SC 898 at [210]–[211]. His longer dissent was published separately in *Bachan Singh v State of Punjab* AIR 1982 SC 1325.

56 *Bachan Singh v State of Punjab* AIR 1980 SC 898 at [200]–[204].

57 *Bachan Singh v State of Punjab* AIR 1980 SC 898 at [207]. See also *Devender Pal Singh v State, NCT of Delhi* (2002) 5 SCC 234.

punishment other than death in capital cases.⁵⁸ The death penalty was the norm, and judges had to offer “special reasons” for bringing it *down* to something else. The provision was deleted in 1955, thereby giving judges complete discretion; they could choose between death or life imprisonment.⁵⁹ The death penalty lost its preeminent standing as a sentence, and its application entirely depended on the presiding judge. This position further changed when the 1973 CrPC came into effect: s 354(3) required judges to record “special reasons” for imposing such a punishment.⁶⁰ In other words, the death penalty was now the exception, and judges had to offer special reasons for bringing it *up*. The “rarest of rare” formulation in *Bachan Singh* in 1980, it may be argued, was a continuation of this evolving legislative policy – one that added another layer to the already “exceptional” interpretation. Now judges may impose the death penalty only in “truly” exceptional cases.

13 The stakes are high. But judges have struggled to attend to this high calling with any credible degree of consistency. In *Machhi Singh v State of Punjab*⁶¹ (“*Machhi Singh*”), three judges gave content to the “rarest of rare” doctrine, and arguably expanded its scope in the process. They held that the manner (killing that is “extremely brutal, grotesque, diabolical”), motive (shows “total depravity and meanness”), nature (involving, *eg*, lower castes and intended to terrorise them), magnitude (involving several deaths) and the personality of the victim (“minor”, “helpless woman”, “beloved public figure”) are relevant factors in deciding whether to impose the death penalty.⁶² They further crystallised their formulation, suggesting that “a balance sheet of aggravating and mitigating circumstances be drawn up”, and “a just balance be struck between the aggravating and the mitigating circumstances before the option is exercised”.⁶³ *Bachan Singh* said nothing about balance sheets, and it is far from obvious if the accounting metaphor offers anything other than a false sense of consistency. And as if to underscore this point, barely two years later the court upheld a death sentence in *Lok Pal v State of MP*⁶⁴ claiming that once a “cruel and heinous murder” is proved, “there can be no other sentence except death”.⁶⁵ Conversely, in *Ashok Kumar v State of Delhi*,⁶⁶ the court commuted the sentence to life imprisonment though the appellant was convicted of murdering his wife and one-year-old child. The facts, the judges felt, did not amount to rarest of the rare. Similarly in *Ravindra Couthmal v State of*

58 See *Pritam Singh v The State* AIR 1950 SC 169.

59 Code of Criminal Procedure (Amendment) Act 1955 (Act XXVI of 1955).

60 Code of Criminal Procedure 1973 (Act 2 of 1973) s 354(3).

61 (1983) 3 SCC 470.

62 *Machhi Singh v State of Punjab* (1983) 3 SCC 470 at [33]–[37].

63 *Machhi Singh v State of Punjab* (1983) 3 SCC 470 at [37].

64 AIR 1985 SC 891.

65 *Lok Pal v State of MP* AIR 1985 SC 891 at [2].

66 AIR 2002 SC 1428.

Maharashtra,⁶⁷ the appellant was convicted of murdering his eight-month pregnant wife for dowry. The Supreme Court found it to be a murder “most foul”, and yet commuted the sentence to life imprisonment. The increasing commonness of dowry deaths meant that they were no longer rarest of the rare, the judges inexplicably claimed.⁶⁸ But in *Mohan v State of Tamil Nadu*,⁶⁹ the death penalty was upheld for two persons convicted of kidnapping and murdering a ten-year-old boy; the murder, the judges said, was “gruesome” and “brutal”.⁷⁰

14 Lurking at the edges of these inconsistencies are the long shadows of Art 14, and its promise of equality. Violation of that right to equality can hardly be doubted when persons convicted of similar crimes involving relatively similar facts are awarded radically different sentences. In his separately published dissent in *Bachan Singh*, Judge Bhagwati vicariously gave voice to a fictional accused with this concern: “Am I to live or die depending upon the way in which the Benches are constituted from time to time? Is that not clearly violative of the fundamental guarantees enshrined in Articles 14 and 21?”⁷¹ The problem of inconsistency was an acute one, and had been so even before the “rarest of rare” doctrine made its appearance. In an important empirical study, Anthony Blackshield demonstrated that decisions to uphold or commute the death penalty typically depended on judges, and their particular beliefs about the utility of such a punishment.⁷² He studied 70 judgments of the Supreme Court between 1972 and 1976, arguing that the judge, rather than the law, was dispositive. Of the sample cases studied between November 1972 and January 1973, Blackshield found that the large number of death penalties could be partly attributed to the misfortune of those appeals being heard by Judges Vaidialingam, Dua and Alagiriswami.⁷³

15 Executions have ebbed and flowed since that study, but the concern never went away. Indeed, almost 25 years after Judge Bhagwati’s rhetorical question, that concern turned into frustration. In *Aloke Nath v State of West Bengal*,⁷⁴ Judges S B Sinha and Dalveer Bhandari admitted that different benches had adopted different criteria over the

67 (1996) 4 SCC 148.

68 *Ravindra Couthmal v State of Maharashtra* (1996) 4 SCC 148 at [10].

69 (1998) 5 SCC 336.

70 *Mohan v State of Tamil Nadu* (1998) 5 SCC 336 at [4].

71 *Bachan Singh v State of Punjab* AIR 1982 SC 1325 at [67].

72 A R Blackshield, “Capital Punishment in India” (1979) 21(2) *Journal of the Indian Law Institute* 137.

73 A R Blackshield, “Capital Punishment in India” (1979) 21(2) *Journal of the Indian Law Institute* 137. See also S Muralidhar, “Hang Them Now, Hang Them Not: Travails with the Death Penalty” (1998) 40 *Journal of the Indian Law Institute* 143.

74 (2007) 12 SCC 230.

years, although the offences were similar in nature.⁷⁵ Noting that “no sentencing policy in clear cut terms [had] been evolved”, they asked, as if in resignation: “What should we do?”⁷⁶ Five years later, in November 2012, that frustration of applying the law unequally gave way to a surprising judicial admission. In *Sangeet v State of Haryana*⁷⁷ (“*Sangeet*”), Judges K S Radhakrishnan and Madan Lokur observed that courts had significantly deviated from *Bachan Singh* over the years. *Machhi Singh*, they declared, was incorrectly decided and its “balance sheet” approach of accounting for aggravating and mitigating factors was mistaken. “Aggravating circumstances”, they clarified, “relate to the crime while mitigating circumstances relate to the criminal”. As such, “a balance sheet cannot be drawn up for comparing the two”.⁷⁸ Also, *Bachan Singh* had spelt out that the nature of the crime *and* the circumstances of the criminal were germane to the question of the death penalty. But later decisions gradually left out this latter half of the equation. They cited with approval a 2009 decision that exposed some of the errors that had crept into sentencing policy overtime, along with names of those wrongly executed.⁷⁹ And acknowledging the glaring discrepancies with which sentencing had proceeded, they suggested that the court “relook at some conclusions that had been taken for granted” and “continue the development on the basis of the experience gained over the years”.⁸⁰

16 Shortly before this verdict was rendered, 14 retired judges of the Supreme Court did just that. In an unprecedented step, they petitioned the President, Pranab Mukherjee, seeking commutation for 13 death row convicts. These convicts had been wrongly sentenced pursuant to erroneous precedents, the judges told the President.⁸¹ Clarifying that their petition had nothing to do with their personal beliefs about the ethicality of the death penalty, the retired judges added that their concerns “pertain to the administration of the death penalty in a conscientious, fair and just manner”. Wrongful executions, they anguished, will “undermine the credibility of the criminal justice system and the authority of the state to carry out such punishments in

75 *Aloke Nath v State of West Bengal* (2007) 12 SCC 230 at [90].

76 *Aloke Nath v State of West Bengal* (2007) 12 SCC 230 at [90].

77 (2013) 2 SCC 452.

78 *Sangeet v State of Haryana* (2013) 2 SCC 452 at [80].

79 *Santosh Kumar Bariyar v State of Maharashtra* (2009) 6 SCC 498. Ravji Rao and Surja Ram were identified as having been wrongly executed in 1996 and 1997 respectively, pursuant to the flawed judgments. Their fate was decided in *Ram Chandra v State of Rajasthan* (1996) 2 SCC 175.

80 *Sangeet v State of Haryana* (2013) 2 SCC 452 at [80].

81 V Venkatesan, “A Case against the Death Penalty” 29(17) *Frontline* (25 August–7 September 2012) <<http://www.frontline.in/navigation/?type=static&page=fllonnet&rdurl=fl2917/stories/20120907291700400.htm>> (accessed 1 October 2013).

future”.⁸² That retired judges felt compelled to take a public stand against the errors of an institution they had honourably served is a telling reminder of what is at stake here.

17 Apart from fairness, “delayed” death is another aspect the Supreme Court had intensely agonised over. Here too, inconsistency is the hallmark of its many decisions. Recall that the right to “fair and speedy” trial is now part of Art 21. Trial in this context includes more than just the judicial assessment of guilt. It includes the disposal of appeals and petitions, and the prompt execution of sentences if any are also part of it. Does a prolonged delay in executing a death sentence justify commutation? It does, the Supreme Court said in 1953 – long before the language of the right to speedy trial became part of India’s constitutional jurisprudence.⁸³ There was a three-year delay in confirming the death sentence, and another two years had passed since then. Finding that the appellant was in no way responsible for this “long delay”, the court commuted his sentence.⁸⁴ A decade later, in characteristic fashion, the Supreme Court changed its mind. “Each case must be decided on its own facts”, Judge Hidayatullah (as he was then) said, “and a sentence of imprisonment for life can only be substituted if the facts justify that the extreme penalty of the law should not be imposed”.⁸⁵ Delay by itself did not warrant commutation, and therefore the sentence was upheld. This arbitrariness became routine in the 1970s as judges made *ad hoc* calls. A six-year delay was commuted in 1971,⁸⁶ in 1976 a similar delay was denied relief.⁸⁷

18 Judges Reddy and Mishra tried to bring some order to this unhappy state of affairs in *T V Vatheeswaran v State of Tamil Nadu*.⁸⁸ There was an eight-year delay and that directly implicated Art 21. “Prolonged detention to await the execution of a sentence of death is an unjust, unfair and unreasonable procedure and the only way to undo the wrong is to quash the sentence of death”, the judges wrote.⁸⁹ More generally, they offered a two-year rule: delay of more than two years between the initial sentence and its execution after exhausting all

82 V Venkatesan, “A Case against the Death Penalty” 29(17) *Frontline* (25 August–7 September 2012) <<http://www.frontline.in/navigation/?type=static&page=f lonnet&rdurl=f12917/stories/20120907291700400.htm>> (accessed 1 October 2013).

83 *Abdul Khader v State of Mysore* AIR 1953 SC 355. See also *Kalawati v State of Himachal Pradesh* AIR 1953 SC 131.

84 *Abdul Khader v State of Mysore* AIR 1953 SC 355 at [14].

85 *Babu v State of UP* AIR 1965 SC 1467 at [19].

86 *Vivian Rodrick v State of WB* (1971) 1 SCC 468. See also *Bhagwan Singh v State of UP* (1978) 1 SCC 214.

87 *Mohinder Singh v State of Punjab* AIR 1976 SC 653. See also *Joseph Peter v State of Goa, Daman and Diu* (1977) 3 SCC 280.

88 AIR 1983 SC 361.

89 *T V Vatheeswaran v State of Tamil Nadu* AIR 1983 SC 361 at [22].

appeals and petitions would entitle convicts to a commutation.⁹⁰ This definite, if arbitrary, order lasted all of three weeks. In *Mohammad v State of Kerala*,⁹¹ Chief Justice Chandrachud and Judge A N Sen disputed the “two-year” formulation. “We do not hold or share the view that a sentence of death becomes inexecutable after the lapse of any particular number of years”, they clarified.⁹² With that the Indian jurisprudence on death returned to its original state of chaos.

19 Soon after, in *Sher Singh v State of Punjab*,⁹³ Chief Justice Chandrachud along with two of his colleagues formally buried the two-year rule. Prolonged delay was a fact of Indian life, and made even more problematic by convicts resorting to “frivolous proceedings”.⁹⁴ Without disputing the relevance of the right to speedy trial in Art 21 to death penalty proceedings, the Chief Justice explained why a larger view had to be taken. The justice system was overburdened; matters move slowly, and hearings, interim applications and appeals drag on. At the stage where the condemned offender petitions for mercy, Presidents and Governors are known to take years to process them. And while convicts are entitled to exhaust all legal remedies available under the law, they often pursue “untenable proceedings which have the effect of defeating the ends of justice”.⁹⁵ For those reasons, no hard and fast rule was possible. The Supreme Court later clarified that judicial delays would not count; only delays at the clemency stage may merit commutation, but like before, no specific period was offered.⁹⁶ “The facts” would determine that.⁹⁷ Today the law of “delayed death” inhabits this twilight zone, and as with the earlier issue of fairness, judges rather than the law decide the fate of convicts.

20 Declared constitutional in *Bachan Singh* though only for the “rarest of rare”, the death penalty raised two substantive questions: Who deserved it? And when? The Supreme Court, we have seen, has struggled to credibly answer these questions. But the constitutionality of this form of punishment also raised two procedural questions: How? And where? These issues have human rights implications, and the court’s views on them will be briefly mentioned.

21 Section 354(5) of the CrPC provides that “[w]hen any person is sentenced to death, the sentence shall direct that he be hanged by the

90 *T V Vatheeswaran v State of Tamil Nadu* AIR 1983 SC 361 at [23].

91 1984 Supp SCC 684.

92 *Mohammad v State of Kerala* 1984 Supp SCC 684 at [2].

93 AIR 1983 SC 465.

94 *Sher Singh v State of Punjab* AIR 1983 SC 465 at [23].

95 *Sher Singh v State of Punjab* AIR 1983 SC 465 at [23].

96 *Triveniben v State of Gujarat* (1988) 4 SCC 574.

97 See *Madhu Mehta v Union of India* AIR 1989 SC 2299; *Ram Pal v State of UP* (2003) 7 SCC 141.

neck till he is dead". This was challenged in *Deena v Union of India*.⁹⁸ Hanging, the petitioners claimed, was an "inhuman, barbarous and degrading" method, and therefore inconsistent with the expanded mandate of Art 21.⁹⁹ The State bore the burden of showing that the method was "humane and dignified",¹⁰⁰ and "a responsible body of scientific and legal opinion" led the court to conclude that the burden was discharged.¹⁰¹ Two reports in particular swayed Chief Justice Chandrachud – the Report of the Royal Commission on Capital Punishment (1949–1953)¹⁰² and the Thirty-fifth Report of the Law Commission of India on Capital Punishment 1967. These reports extensively surveyed alternative methods – guillotine, electrocution, lethal gas, lethal injection, firing – and rejected them. The Chief Justice agreed with those findings. He found it "impossible" to record a finding that any of these alternative methods "had any distinct or demonstrable advantage over the system of hanging".¹⁰³ Hanging was "quick and certain", and designed to "eliminate the possibility of a lingering death".¹⁰⁴ As such, the method, he concluded, was "consistent with the obligation of the State to ensure that the process of execution is conducted with decency and decorum without involving degradation or brutality of any kind".¹⁰⁵ These, then, it may be said are the requirements of "fair" punishment in India: it should be quick and certain, without involving degradation or brutality of any kind. Whether death by hanging is "quick and certain", or involves prohibited features of some other kind is partly an empirical question, an answer to which may depend on the state of technology in vogue. And dramatic improvements in medical sciences along with the ability to better understand human physiology may indeed require the court to revisit its conclusion in future.

22 Finally, in *Attorney-General v Lachma Devi*,¹⁰⁶ the place of death was debated. A High Court ordered that a particular death sentence be carried out in a public stadium "after giving widespread publicity – through the media – of the date, time and place of such execution".¹⁰⁷ It was later rescinded; the relevant Jail Manual did not provide for such a "spectacle". But the Supreme Court in *Lachma Devi* made it abundantly

98 AIR 1983 SC 1155.

99 *Deena v Union of India* AIR 1983 SC 1155 at [10].

100 *Deena v Union of India* AIR 1983 SC 1155 at [29].

101 *Deena v Union of India* AIR 1983 SC 1155 at [80].

102 For an overview, see Melvin Wingersky, "Report of the Royal Commission on Capital Punishment (1949–1953): A Review" (1954) 44(6) *The Journal of Criminal Law, Criminology, and Police Science* 695.

103 *Deena v Union of India* AIR 1983 SC 1155 at [78].

104 *Deena v Union of India* AIR 1983 SC 1155 at [81].

105 *Deena v Union of India* AIR 1983 SC 1155 at [81].

106 AIR 1986 SC 467.

107 *Attorney-General v Lachma Devi* AIR 1986 SC 467 at [1].

clear that the “barbaric practice” of public hanging was “clearly violative of Article 21”.¹⁰⁸ And as if to preempt amendments to manuals so as to provide for such possibilities, the court added: “The direction for execution of the death sentence by public hanging is, to our mind, unconstitutional and we may make it clear that if any Jail Manual were to provide for public hanging, we would declare it to be violative of Article 21.”¹⁰⁹ Consequently, the State may “kill”, but only in private.

23 In summary then, the death penalty endures in India, but under tragic rules. And the irony is hard to miss. Inconsistencies plague the two most important questions – who should be sentenced to death and why. In contrast, how and where to execute such sentences enjoy the benefit of remarkable clarity; by hanging, in private. There is, however, an emerging judicial recognition that the substantive rules about death may be beyond redemption. Indeed, the near impossibility of narrowly tailored – and fairly applied – sentencing rules coupled with the exceptional nature of the punishment is a compelling reason why the Supreme Court should take up its own *Sangeet*¹¹⁰ invitation, and invalidate this “lethal lottery” entirely.¹¹¹

B. Death, with add-ons

24 Two other death-related provisions of the IPC and challenges to their constitutionality should be mentioned. Here too, the Supreme Court has vacillated occasionally. First is the mandatory death penalty. Section 303 of the IPC provided for such a punishment: “Whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death.” In *Mithu v State of Punjab*¹¹² (“*Mithu*”), the appellant argued that the provision violated Art 14; singling out convicts under life sentences for additional mandatory punishment was constitutionally suspect. The court agreed. Murders may be committed by life-convicts within the prison premises, or outside when they are out on parole or bail. But murders may also be committed within prison premises by those that are *not* serving life sentences, or outside while on parole or bail. And the court found no “rational justification for making a distinction, in the matter of punishment, between these two classes of offenders”.¹¹³ In fact when a murder is committed while serving a life sentence, circumstances may demand and the convict may deserve,

108 *Attorney-General v Lachma Devi* AIR 1986 SC 467 at [1].

109 *Attorney-General v Lachma Devi* AIR 1986 SC 467 at [1].

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

111 Amnesty International India & People’s Union for Civil Liberties, *Lethal Lottery: The Death Penalty in India* (May 2008) <<http://www.amnesty.org/en/library/info/ASA20/007/2008>> (accessed 1 October 2013).

112 AIR 1983 SC 473.

113 *Mithu v State of Punjab* AIR 1983 SC 473 at [15].

Chief Justice Chandrachud said, “greater consideration, understanding and sympathy”.¹¹⁴ But a provision for a mandatory death penalty makes such “relevant circumstances irrelevant”, thereby denying courts of their “legitimate jurisdiction” to exercise discretion against the death sentence.¹¹⁵ Depriving persons of their “life and personal liberty” through such a procedure, the Chief Justice added, would not satisfy the fair, just and reasonable demands of Art 21.¹¹⁶ Section 303, therefore, was invalidated for offending both Arts 14 and 21.

25 That was in 1983. Thirty years have passed, but doubts have persisted about the larger implications of *Mithu*, if any. What exactly did the court decide? Did it invalidate a *particular* instance of mandatory death penalty found in s 303 of the IPC? Or did it invalidate all such instances in Indian legislation? Parliament clearly rejected the second view; several pieces of legislation enacted after 1983 provided for the mandatory death penalty.¹¹⁷ What then are we to make of such provisions? In *Indian Harm Reduction Network v Union of India*,¹¹⁸ the constitutionality of s 31A of the Narcotic Drugs and Psychotropic Substances (Prevention) Act 1985 (“NDPS Act”) was challenged. The death penalty was made mandatory for certain repeat offenders, and the petitioners argued that the provision violated Arts 14 and 21.¹¹⁹ The Bombay High Court agreed. Grounded in the requirements of Art 21, the *Mithu* reasoning, Judge Khanwilkar said, had general applicability; it was not limited to s 303 of the IPC. He found that s 31A of the NDPS Act suffered from the same vice as s 303 of the IPC: it deprived “the Court of the use of its wise and beneficent discretion in a matter of life and death”.¹²⁰ Judicial discretion matters, and more so when the punishment is death. As such, a provision that mandates it without regard to the circumstances in which the offence was committed, and, therefore, without regard to the gravity of the offence is irredeemably “harsh, unjust and unfair”.¹²¹ The Supreme Court has reaffirmed this reasoning in *State of Punjab v Dalbir Singh*¹²² recently. A provision of the Arms Act 1959 was challenged on the ground that it provided for a mandatory death penalty. After a lengthy – and perhaps unnecessary –

114 *Mithu v State of Punjab* AIR 1983 SC 473 at [16].

115 *Mithu v State of Punjab* AIR 1983 SC 473 at [17].

116 *Mithu v State of Punjab* AIR 1983 SC 473 at [18].

117 See, eg, s 4(1) of the Commission of Sati (Prevention) Act 1987; s 31A of the Narcotic Drugs and Psychotropic Substances (Prevention) Act 1985; s 3(2)(i) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989; s 3(b) of the Explosive Substances Act 1908; s 27(3) of the Arms Act, 1959; and s 16(1) of the Unlawful Activities (Prevention) Act 1967.

118 2012 Bom CR (Cri) 121.

119 The Narcotic Drugs and Psychotropic Substances (Prevention) (Amendment) Act 2001 (Act 9 of 2001).

120 2012 Bom CR (Cri) 121 at [52].

121 *Indian Harm Reduction Network v Union of India* 2012 Bom CR (Cri) 121 at [63].

122 AIR 2012 SC 1040.

judicial tour of select foreign jurisdictions, Judge Asok Ganguly concluded that the provision was “against the fundamental tenets of [Indian] Constitutional law” and therefore invalid.¹²³

26 The mandatory death penalty, it is safe to say, is now generally unconstitutional in India, though a judicial declaration to that effect has not yet been made. Only specific instances of mandatory death penalty have been invalidated thus far. But the cumulative reasoning of these decisions – grounded in Art 21 and the significance of judicial discretion – apply broadly. Nonetheless, it is worth mentioning that the text of s 303 still endures in the IPC. Parliament has not deleted the provision. This is also true of other legislative provisions invalidated more recently. What this means is that the provisions are now under an “eclipse”,¹²⁴ but may be revived if the Supreme Court changes its current view. As such, the only way to avoid a judicial revival of the mandatory death penalty is for Parliament to amend the relevant legislation, and delete the invalidated provisions.¹²⁵

27 Apart from the mandatory death penalty, the prohibition against suicide in s 309 of the IPC has also been challenged on several occasions. The provision states that “whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished”. In *Maruti Shripati Dubal v State of Maharashtra*,¹²⁶ a police constable with a history of mental illness tried to set himself on fire. He was arrested and charged under s 309 of the IPC. He challenged the constitutionality of the provision, and the Bombay High Court sympathised with his line of reasoning. Rights, Judge Sawant said, include their negatives. Freedom of speech and expression “includes the freedom not to speak and to remain silent”.¹²⁷ Freedom of association and movement “likewise includes the freedom not to join any association or to move anywhere”.¹²⁸ Freedom of business and occupation “includes freedom not to do business and to close down the existing business”.¹²⁹ The right to life, he concluded, must, therefore, include “a right not to live or not to be forced to live”.¹³⁰ Nonetheless, he was careful to uphold

123 *State of Punjab v Dalbir Singh* AIR 2012 SC 1040 at [103].

124 For the doctrine of eclipse, see *Bhikaji Narain v State of Madhya Pradesh* AIR 1955 SC 781.

125 A Bill to amend the Arms Act along these lines is pending in Parliament. See V Venkatesan, “Impulsive Clamor” 30(1) *Frontline* <[http://hindu.com/thehindu/thscrip/print.pl?file=20130125300102900.htm&date=fl3001/&prd=fline&](http://hindu.com/thehindu/thscrip/print.pl?file=20130125300102900.htm&date=fl3001/&prd=fline&http://hindu.com/thehindu/thscrip/print.pl?file=20130125300102900.htm&date=fl3001/&prd=fline&)> (accessed 1 October 2013).

126 1987 Cri LJ 743. A contrary view was taken by the Andhra Pradesh High Court in *Chenna Jagadeeswar v State of AP* 1988 Cri LJ 549.

127 *Maruti Shripati Dubal v State of Maharashtra* 1987 Cri LJ 743 at [10].

128 *Maruti Shripati Dubal v State of Maharashtra* 1987 Cri LJ 743 at [10].

129 *Maruti Shripati Dubal v State of Maharashtra* 1987 Cri LJ 743 at [10].

130 *Maruti Shripati Dubal v State of Maharashtra* 1987 Cri LJ 743 at [10].

the constitutionality of s 306 of the IPC which criminalised abetment to suicide. Distinguishing “euthanasia” and “mercy killing” from suicide, Judge Sawant concluded that s 309 did not include the former within its scope. Consequently, killing one self was legal, but intervening to end another’s life remained illegal.¹³¹ The Supreme Court approved this line of reasoning in 1994; a person, Judge Hansaria wrote, “cannot be forced to enjoy the right to life to his detriment, disadvantage or disliking”.¹³²

28 But a change of mind came soon after.¹³³ This time the direct challenge was to s 306 of the IPC – a provision courts had earlier upheld. Writing for a Constitution Bench of five judges, Judge J S Verma declared both provisions – ss 306 and 309 – *constitutional*. All rights do not necessarily include their negatives, he said. “Life” in Art 21 has been “construed as life with human dignity [and] any aspect of life which makes it dignified may be read into it but not that which extinguishes it”.¹³⁴ Therefore, the “right to die”, if any, is “inherently inconsistent with the ‘right to life’ as is ‘death’ with ‘life’”.¹³⁵ As a result, any sort of “sacrificial” death, personally induced or through the agency of others, became illegal in India. But this across the board ban was “amended” in 2011.¹³⁶ A “public spirited” individual approached the Supreme Court on behalf of a person who had been in a permanent vegetative state for over 37 years, claiming that she should be euthanised. Armed with an elaborate discussion of the differences between active and passive euthanasia, regulations that govern these matters in foreign jurisdictions and perfunctory remarks about Art 21, but without consulting s 309 of the IPC, Judge Markandey Katju concluded that “voluntary and involuntary passive euthanasia” should be legal in India.¹³⁷ Persons who are “brain dead” may now approach various High Courts – or their relatives may approach on their behalf – for permission to withhold medical treatment or other procedures, thereby hastening death.

29 Accordingly, the law today is the opposite of what it was in 1994. After *P Rathinam v Union of India*,¹³⁸ suicide was legal, but not euthanasia. *Aruna Shanbuag v Union of India*¹³⁹ legalised passive euthanasia, though surprisingly, not suicide.¹⁴⁰

131 *Maruti Shripati Dubal v State of Maharashtra* 1987 Cri LJ 743 at [10].

132 *P Rathinam v Union of India* AIR 1994 SC 1844 at [33].

133 *Gian Kaur v State of Punjab* 1996 2 SCC 648.

134 *Gian Kaur v State of Punjab* 1996 2 SCC 648 at [23].

135 *Gian Kaur v State of Punjab* 1996 2 SCC 648 at [23].

136 *Aruna Shanbuag v Union of India* AIR 2011 SC 1290.

137 *Aruna Shanbuag v Union of India* AIR 2011 SC 1290 at [52].

138 AIR 1994 SC 1844.

139 AIR 2011 SC 1290.

140 The court has called for the decriminalisation of suicide on several occasions. See also Report No 210 of the Law Commission of India, *Humanization and Decriminalization of Attempt to Suicide* (October 2010) <<http://lawcommissionofindia.nic.in/reports/report210.pdf>> (accessed 1 October 2013).

C. Gay love: An “Indian” Penal Code?

30 Death-related provisions apart, the constitutionality of s 377 of the IPC with its ban on “carnal intercourse against the order of nature” has also been challenged. In *Naz Foundation v Government of NCT*,¹⁴¹ the Delhi High Court “read down” the provision, declaring it unconstitutional to the extent that it criminalised “consensual sexual acts of adults in private”.¹⁴²

31 Chief Justice A P Shah drew on four strands of argument to establish the provision’s unconstitutionality. First, privacy and dignity. The rights to privacy and dignity are now part of the new Art 21,¹⁴³ and s 377, he said, violated them. For privacy does not merely imply “a private space free from government intrusion, but [includes] a right to get on with [one’s] life ... and make fundamental decisions about [one’s] intimate relations without penalisation”.¹⁴⁴ This includes among other things the right “to build relationships of [one’s] choice and fulfil all legitimate goals that [one] may set”. This is particularly true, he added, when the conduct in question “causes no harm to anyone else”.¹⁴⁵ Second, public health implications. Even unenforced penal provisions, Chief Justice Shah concluded, reduces gay men and women to the status of “unapprehended felons”, thus “entrenching stigma and encouraging discrimination in different spheres of life”.¹⁴⁶ It makes them susceptible to “harassment, blackmail [and] extortion”¹⁴⁷ by law officers, while making it difficult for public health officials to reach such persons with information about prevention and treatment.¹⁴⁸ Third, he then found that the provision infringed Art 14. Though “facially neutral”, the provision in effect targeted gay men, and did so in a way that did not further any legitimate state objective.¹⁴⁹ Most importantly, “popular morality or public disapproval”, he made it clear, is not a valid justification for restricting fundamental rights.¹⁵⁰ After all, rights exist precisely as a bulwark against the ebb and flow of mass opinions. And fourth, he found that the Indian expressions of “life”, “dignity” and “equality” were essentially in sync with global developments on this issue. Chief Justice Shah surveyed a wide range of decisions from foreign jurisdictions that invalidated anti-sodomy laws, perhaps impliedly

141 2010 Cri LJ 94.

142 *Naz Foundation v Government of NCT* 2010 Cri LJ 94 at [132].

143 *Gobind v State of Madhya Pradesh* AIR 1975 SC 1378.

144 *Naz Foundation v Government of NCT* 2010 Cri LJ 94 at [40].

145 *Naz Foundation v Government of NCT* 2010 Cri LJ 94 at [92].

146 *Naz Foundation v Government of NCT* 2010 Cri LJ 94 at [50].

147 *Naz Foundation v Government of NCT* 2010 Cri LJ 94 at [50].

148 *Naz Foundation v Government of NCT* 2010 Cri LJ 94 at [72].

149 *Naz Foundation v Government of NCT* 2010 Cri LJ 94 at [92].

150 *Naz Foundation v Government of NCT* 2010 Cri LJ 94 at [79].

suggesting that this large body of literature attested to the correctness of his conclusions.

32 The High Court's findings about "life" and "equality" in India's Constitution and the provision's incompatibility with these concepts are unexceptionable. But it is far from clear if the copious references to foreign materials serve any useful purpose; they are, it is argued, unhelpful at best.¹⁵¹ If anything, such references play into the hands of those who see "liberal" attitudes towards same-sex behaviour and relationships as a "Western" innovation. The Ministry of Home Affairs' submission is instructive: "Indian society (as opposed to the 'West')", the Ministry argued, has "yet to demonstrate readiness or willingness to show greater tolerance to practices of homosexuality".¹⁵² The implication is clear: the "West" has evolved on the matter; India has not. Section 377, therefore, should remain. The legal logic is flawed, but so is the historicity of the claim.

33 Ruth Vanita and Saleem Kidwai in their pioneering anthology bring together mythological, historical and literary readings that lucidly attest to the long history and everyday reality of gay life in India.¹⁵³ In fact, some of the earliest – and approving literature – on same-sex conduct are found in the *Kama Sutra*, a core text of Hinduism that is estimated to have been compiled in its current form around 2AD.¹⁵⁴ When Thomas Macaulay drafted his Indian Penal Code, and s 377 of the IPC therein, it was part of a larger colonist attempt to evangelise Indian society into certain modes of Christian thinking and practice.¹⁵⁵ The provision appeared relatively soon after the East India Company had secured a new Charter that for the first time authorised evangelical missions in India.¹⁵⁶ And its immediate effect was to displace a remarkable diversity of indigenous opinion about same-sex love – both in Hindu and Islamic thought – that varied from approval, to apathy to occasional condemnation.

34 In partially invalidating s 377, the Delhi High Court reached the right conclusion. But extensive foreign references to the exclusion of

151 For a contrary view see, Madhav Khosla, "Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision" (2011) 59(4) *American Journal of Comparative Law* 909.

152 *Naz Foundation v Government of NCT* 2010 Cri LJ 94 at [13].

153 *Same-Sex Love in India* (Ruth Vanita & Saleem Kidwai eds) (London: Macmillan Press, 2000).

154 See Alain Danielou, *The Complete Kama Sutra* (Rochester: Park Street Press, 1994).

155 There is considerable scholarly dispute about the antiquity of homophobic ideas in Christian thinking, but is not relevant for the purposes here. See Michel Foucault, *The History of Sexuality* vol 1, (Robert Hurley trans) (New York: Random House, 1978).

156 John Keay, *India: A History* (New York: Grove Press, 2010) at pp 428–429.

local materials may have inadvertently historicised ideas about sexuality and tolerance that are not borne out by the relevant Indian records. This is worth mentioning because judges do not just speak to the immediate litigants before the court, especially on matters such as these. Their decisions are often addressed to the broader community of citizens, and if the reasoning therein is to gain greater salience, foreign references may do more harm than good.

35 In the penultimate section, we will briefly turn to the more structural – as opposed to doctrinal – issues of the criminal justice system, and focus on how courts are drawing on the language of human rights to redress some of the chronic complaints.

IV. Shift in focus: From doctrinal to the structural

36 Legal doctrines do not work by themselves; a machinery is essential to make them work. Indeed, the efficacy of the doctrines often depends on the nature of this machinery. In the context of the criminal justice system, police, prosecutors, witnesses and Magistrates are all part of it, and their independence is key to the fair administration of justice. But in India many of these elements have chronically lacked independence, with alarming implications for the system as a whole. For example, governed by an archaic piece of legislation, the police are accountable first – and principally – to the political executive.¹⁵⁷ Their core functions are to maintain law and order and investigate offences, and they perform these functions under the “superintendence” of state governments.¹⁵⁸ This political superintendence can manifest itself in several ways, and inevitably spills onto elements over which the Executive lacks direct control. First, the police may undermine the justice system by refusing to investigate “inconvenient” crimes, that is, inconvenient to the political executive to which they are accountable.¹⁵⁹ Conversely, fuelled by vindictive demands of their political masters, they may aggressively pursue investigations in less meritorious cases. Second, taking cues from the preceding investigations, prosecutors may undermine a case by their incompetent presentation before a court.¹⁶⁰ In fact, pleas for withdrawing charges, or introducing new ones are routine

157 Police Act 1861 (Act 5 of 1861).

158 Police Act 1861 (Act 5 of 1861) s 3.

159 See, eg, “1984 riots: Case Against Jagdish Tytler to be Reopened” *Zeenews* (10 April 2013) <http://zeenews.india.com/news/nation/1984-riots-case-against-jagdish-tytler-to-be-reopened_841013.html> (accessed 1 October 2013).

160 See, eg, “BJP Silent on Compromise of Gujarat Riot Cases” *NDTV* 9 August 2011 <<http://www.ndtv.com/article/india/bjp-silent-on-compromise-of-gujarat-riot-cases-124774>> (accessed 1 October 2013).

in India – and they frequently depend on the *diktats* of the Executive.¹⁶¹ Lastly, by instigating witnesses to turn hostile, or turning a blind eye to such instigations, the police and the Prosecution can damage the possibility of a fair trial.¹⁶²

37 In the last decade or so, the Supreme Court has increasingly turned its attention to these structural aspects of the justice system, often by invoking the language of human rights and the rule of law. In *Prakash Singh v Union of India*,¹⁶³ the court effectively took it upon itself to introduce police reforms in India. A retired police officer had approached the court in 1996, praying that Parliament be directed to enact a new piece of legislation. But the legislative body showed no interest even after ten years. As a result, the Supreme Court, Chief Justice Sabharwal said, could no longer wait; “the gravity of the problem” and the need to “preserve and strengthen the Rule of Law” demanded urgent action.¹⁶⁴ Accordingly, the court laid down a series of mandatory directives designed to promote the independent functioning of the forces.¹⁶⁵ Why such independence is critical to the criminal justice process was amply demonstrated in *Zahira Habibullah Sheikh v State of Gujarat*.¹⁶⁶ Alleged perpetrators of a communal riot in 2002 were acquitted by a trial court. The petitioner approached the Supreme Court arguing that the acquittals resulted from the collusive conduct of the investigators and prosecutors, perhaps at the behest of their political masters. The Supreme Court agreed. An acquittal “based on tainted evidence, tailored investigation, unprincipled prosecutor and perfunctory trial and evidence of threatened/terrorized witnesses” Judge Arijit Payasat said, “is no acquittal in the eye of law”.¹⁶⁷ And finding that fair trial was denied to the victims, the judges in an unprecedented step, ordered a retrial in a neighbouring state; the glaring “subversion of [the] justice delivery system” compelled them to do so.¹⁶⁸ Offering continuing oversight, the court in a related matter set up a Special Investigation Team in 2009 to credibly investigate allegations against ministers, believing that ordinary police officials would not be able to do so.¹⁶⁹

161 See, eg, “HC Stays UP Govt’s Move to Withdraw Cases Against Terror Accused” *Zeenews* (7 June 2011) <http://zeenews.india.com/news/uttar-pradesh/up-govt-to-reply-on-withdrawing-terror-cases-in-hc_853441.html> (accessed 1 October 2013).

162 See, eg, “Riot Trial Witness Turns Hostile” *BBC News* (19 November 2004) <http://news.bbc.co.uk/2/hi/south_asia/4026641.stm> (accessed 1 October 2013).

163 (2006) 8 SCC 1. See also *Vineet Narain v Union of India* AIR 1996 SC 3386.

164 *Prakash Singh v Union of India* (2006) 8 SCC 1 at [11].

165 *Prakash Singh v Union of India* (2006) 8 SCC 1 at [14].

166 AIR 2004 SC 346.

167 *Zahira Habibullah Sheikh v State of Gujarat* AIR 2004 SC 346 at [63].

168 *Zahira Habibullah Sheikh v State of Gujarat* AIR 2004 SC 346 at [75].

169 See “SIT Likely to Begin Recording Statement in the Zakia Case” *Hindustan Times* (18 June 2009) <<http://www.hindustantimes.com/India-news/Ahmedabad/SIT-likely-to-begin-recording-statement-in-Zakia-case/Article1-422652.aspx>> (accessed 1 October 2013).

38 While political supervision, and the consequent lack of independence of the police forces, have ailed India's criminal justice system for long, until recently they were primarily seen as matters of institutional design and discretion. The language of rights and the rule of law, however, offer a different path by which to address these concerns. And by using the latter to speak about the former, the Supreme Court has effectively brought to life the connections between the two. Whether these developments will produce enduring changes partly depends on Parliament's willingness to follow this promising lead.

V. Conclusion

39 India's criminal law jurisprudence is rich in rights; they apply to almost all aspects of substantive, procedural and evidentiary matters. Mostly originating from the new Art 21 the Supreme Court found in 1978, these rights have been the basis for invalidating – or limiting – the scope of several statutory provisions. But they are now increasingly being put to a different use. Courts in general, and the Supreme Court in particular, are paying greater attention to the more structural features of the justice system that are responsible for the everyday realisation of these rights. Over the years, Parliament has by and large internalised many of the doctrines, and followed the court's lead in revising statutory provisions. But the record on the structural aspects is less promising; the legislative branch has shown little appetite for incorporating the proposed changes. As such, the future of India's criminal justice system in large measure will depend on the ability of the legislative and judicial branches to dialogically remedy its structural inadequacies.
