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GUILT BEYOND CONVICTION: THE THEORY OF RESIDUAL DOUBT IN INDIAN CAPITAL SENTENCING

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Abstract The Indian law on capital sentencing is rife with conflicting standards, which has made the process of adjudication increasingly discretionary over the years. In an attempt to reduce such arbitrariness, the Indian Supreme Court recently borrowed 'the doctrine of residual doubt' from the American legal system. The theory is premised on the idea that the notion of 'doubt' is not absolute, but rather of varying degrees. Viewed in the context of the irrevocable nature of capital punishment, the Venn diagrams of doubt and state-sanctioned execution must never intersect. This doctrine attempts to create a higher burden of proof at the stage of sentencing by precluding the possibility of death when any 'lingering doubt' is found to exist – that is, beyond 'beyond reasonable doubt'. In this paper, the authors examine the impact of the doctrine on the Indian law on capital punishment. The authors first study the efficacy (or arbitrariness) of the prevailing tests employed by the Indian courts in their death penalty jurisdiction. Second, the authors introduce the doctrine of residual doubt by looking into its origins in American jurisprudence. Third, the authors attempt to answer the question as to whether – and how – the theory can provide a fairer mechanism for adjudicating capital punishment in India. Given the variance between the American jury system and the Indian judicial process, the authors recommend that the theory ought to be modified through structural and definitional changes to effectively counter the widening margin of discretion exercised by the Indian Supreme Court. The theory of residual doubt would thus find legitimacy based on the moral and legal justification of protecting from death any individual whose case has not been proved with 'absolute certainty - that is the existence of 'no doubt'.

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I. INTRODUCTION

Nobel Peace Prize laureate Andrei Sakharov sent a letter for the Stockholm Conference on the Abolition of Death Penalty, wherein he stated:

> A state, in the person of its functionaries, who like all people are inclined to making superficial conclusions, who like all people are subject to influence, connections, prejudices and egocentric motivations for their behaviour, takes upon itself the right to the most terrible and irreversible act - the deprivation of life.[1]

In India, where capital punishment has not been abolished, one could hope that the law surrounding it would have crystallised so as to minimise the scope for any such human error as cautioned in the preceding quote. Unfortunately, a study of the courts' decisions would reveal the contrary – the jurisprudence on death penalty that has evolved over the decades has been both inconsistent and incoherent, leading to excessive dissymmetry in the pronouncement of such sentences.[2]

The courts have given unto themselves a wide berth for interpreting the 'rarest of rare' doctrine,[3] which was propounded exactly four decades ago. One such permutation has been borrowed from American jurisprudence - the theory of 'residual doubt'. This theory creates dual standards of doubt applicable at the stage of guilt and sentencing in cases that are punishable by death.

The theory posits that although the evidence adduced in a trial might be sufficient to arrive at a guilty determination using the beyond reasonable doubt metric, there could still be room for certain 'lingering doubt' that makes it incompatible with a sentence of death. The apparent paradox and literal double-standard has naturally subjected this theory to intense academic debate, with both the abolitionists and proponents of the death penalty attempting to navigate the true effect of this doctrine.

It is only in the past few years that this theory has been applied by the Indian courts. However, the authors will argue that even its sparing employment has paved way for a new chapter in the capital sentencing jurisprudence.

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1 'Letter from Andrei Sakharov to the Amnesty International Conference on the Abolition of the Death Penalty' (*Sakharov*, 9 September 1977) <https://www.sakharov-archive.ru/English/Death.htm> accessed 6 July 2020.

2 Project 39A, 'Death Penalty Sentencing in Trial Courts: Delhi, Madhya Pradesh & Maharashtra (2000-2015)' (*National Law University: Delhi*, May 2020) <https://static1.squarespace.com/static/5a843a9a9f07f5ccd61685f3/t/5ebc3dc0879c75754ab23f78/1589394902371/Death+Penalty+Sentencing+in+Trial+Courts.pdf> accessed 20 June 2020.

3 *Bachan Singh* v. *State of Punjab* (1980) 2 SCC 684 ('*Bachan Singh*').

This paper shall explore the nuances of the theory of residual doubt and its impact on the legal landscape relating to capital punishment.

Part II of this paper shall trace certain developments in the death penalty jurisprudence in India to contextualise the introduction of the residual doubt theory. In this section, the authors shall look at three principles: the community standard, the balancing test, and the principle of prudence. The primary objective of this exercise is to expose the conflict between judgments and the unfettered discretion exercised by the courts in death penalty cases, which highlights the need for a more uniform standard.

In Part III, the authors shall invite the reader's attention to the birth of the residual doubt doctrine in American law and the evolution of its theoretical parameters. In this segment, the authors will trace the origins of the theory, assess the developments in interpreting its scope, address the criticisms raised against the application of the theory, and finally, discuss its operation within the peculiar paradigm of a jury-system.

Part IV of the paper then scrutinises this doctrine in the Indian context by taking a close look at various judgments relying on it. After studying the circumstances of its introduction to Indian jurisprudence, this section shall comment on the impact of subsequent judgments that have applied the doctrine. The next sub-section will look at the effect that this theory has had on the existing tests employed in capital sentencing. Next, the authors will address the concerns pertaining to the differences in its application in America and in India. Lastly, the authors will propose structural and definitional modifications that could permit a more purposeful and effective application of the doctrine in India.

Part V of the paper concludes that the theory of residual doubt, when held to its highest standard of proof, could play a central role in restricting the margin of discretion exercised by courts in their death penalty jurisdiction. The present form of jurisprudence on the subject is riddled with contradictions, which has only served to increase arbitrariness in an area of law that demands the greatest specificity. The theory of doubt has the potential to supress such arbitrary elements and introduce a fairer process of adjudicating death sentences.

II. DEATH PENALTY IN INDIA: GUIDING PRINCIPLES

The literature and critique on capital sentencing jurisprudence in India is extensive – however, for the purpose of this analysis, the authors shall discuss those areas which provide crucial context to the theory of residual doubt. In this part, the authors will discuss (i) the community standard, (ii) the balancing test, and (iii) the principle of prudence.

A. Community Standard

One of the arguments cited by proponents of the death penalty is premised on retribution – an individual deserves the extreme punishment of death for committing a crime so heinous that it threatens the collective security of the entire community.[4] The Indian Supreme Court has taken opposing views on the justification of capital sentence based on retribution and a community-centric approach.

The starting point for any discussion on death penalty in India is the 1980 decision of the Supreme Court in *Bachan Singh* v. *State of Punjab*.[5] While upholding the constitutionality of the death penalty, the majority propounded the 'rarest of rare' doctrine - the Atlas carrying all capital sentencing jurisprudence on its shoulders. The essence of this doctrine is that life imprisonment must be the rule and death penalty the exception, when all remaining alternatives are foreclosed.[6]

However, the court warned against over reliance on the community's perception of the severity of the crime. They observed that judges too are riddled with their own set of biases which could influence their construction of the community's metric of ethics and extreme depravity.[7] Instead, the Court held that the decision in death penalty cases must be based on 'well-reasoned' principles, that is, the principles evolving from earlier precedents.

Three years later, in *Machhi Singh* v. *State of Punjab*,[8] the Supreme Court adopted a diametrically opposing view on the 'community standard', which was premised on a palpably retributive intent. The Court justified the punishment of death against those who offend the "society's conscience."[9] In an analysis void of the operative portions from *Bachan Singh* regarding the dangers of adopting such a standard, the *Machhi Singh* Court instead assumed its role as a guardian of a hypothetical social contract between members of a community.

According to the Court, the 'community' respects the basic principle of reverence of life, for only those members who do not breach it themselves.[10] The Court further stated that when the 'collective conscience' of the community is so shocked by the acts of such a deviant member, the community expects the judiciary to impose the penalty of death.[11]

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4 Chad Flanders, 'The Case Against the Case Against the Death Penalty' (2013) 16(4) New Criminal Law Review 595, 606 <https://heinonline.org/HOL/LandingPage?handle=hein.journals/bufcr16&div=25&id=&page=> accessed 16 December 2020.

5 *Bachan Singh* (n 3).

6 ibid [209].

7 *Bachan Singh* (n 3) [175].

8 (1983) 3 SCC 470 (Supreme Court of India) ('*Machhi Singh*').

9 ibid [32].

10 *Machhi Singh* (n 8).

11 *Machhi Singh* (n 8).

The conflict in these two approaches has created a bifurcated body of jurisprudence which regards and disregards the community's perception based on the proclivities of each court. The shift in this direction is indicative of the increasing retributive tendency to lay emphasis on the heinous nature of the crime rather than upholding the sanctity of binding precedents.

B. Balancing the Aggravating and Mitigating Circumstances

The majority in *Bachan Singh* also provided a basic framework for courts to apply in their determination of sentence: the 'balancing test'. This suggested that the aggravating and mitigating circumstances relating to both the crime and the criminal must be weighed against each other to assess whether the option of death is foreclosed or not.[12]

The 'crime' test largely focuses on the nature of the crime – for example, the modus operandi, the vulnerability of the victim, the extent of planning, or the abhorrent character of the crime, to give a few examples.[13] The 'criminal' test is employed to contextualise the crime with the history of the accused, turning to factors relating to the accused, such as their socio-economic status, age and gender, repentance, possible motivation, state of mind, fairness in the trial procedure, etc.[14] The crime test thus usually constitutes the aggravating circumstances, whereas the criminal test constitutes the mitigating circumstances.[15] However, it is relevant to note that the Court did not indicate any guidelines with respect to the possible weight age any circumstance would carry – this, according to the Court, would have to be assessed on a case-to-case basis.

In 2009, the Apex Court pronounced the judgment in *Santosh Kumar Satishbhushan Bariyar & Others* v. *State of Maharashtra*,[16] wherein the accused person's conviction was based on the statement of an approver and other circumstantial evidence. Justice S. B. Sinha observed that the *Bachan Singh* standard of proceeding in death penalty matters on the basis of 'well-recognised principles' could be said to have failed in light of the wide inconsistencies witnessed in courts in balancing the aggravating and mitigating circumstances,[17] which exposed the arbitrariness of the process.

Thus, there are two possible consequences that could have followed from this decision: either the courts would necessarily undertake a comprehensive

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12 *Bachan Singh* (n 3) [201].

13 *State of Madhya Pradesh* v. *Udham* (2019) 10 SCC 300 [12] ('*Udham*').

14 ibid.

15 *Udham* (n 13).

16 (2009) 6 SCC 498 ('*Bariyar*').

17 ibid [109]. The judgment highlights the conflict in various judgements of the Supreme Court, where different sentences have been given in cases with similar facts. The judgment further demonstrates the variance in the application of the community standard.

and exhaustive examination of all death penalty precedents and would only determine the sentence after having considered each and every aggravating and mitigating circumstance (that is, applying the balancing test). In the alternative, the balancing test would have to be discarded and substituted with a new standard altogether.

In the 2013 decision of *Gurvail Singh* v. *State of Punjab*,[18] Justice Radhakrishnan suggested a new test: if even one mitigating circumstance was found to favour the accused, the death penalty could not be awarded:

> To award death sentence, the aggravating circumstances (crime test) have to be fully satisfied and there should be no mitigating circumstance (criminal test) favouring the accused. Even if both the tests are satisfied as against the accused, even then the Court has to finally apply the Rarest of Rare Cases test (R-R Test)…

The above case rejected the balancing test and marks a clear shift in favour of a criminal test over a crime test. However, in a subsequent case,[19] the Court found that the above dictum was incompatible with the position taken in *Bachan Singh,* as the majority there had warned against any rigid standardisation in determining the question of death penalty.[20] We would argue that the standardisation mentioned in *Bachan Singh* only warned against illustrating an exhaustive list of aggravating and mitigating circumstances.

What would be more relevant to this discussion is instead the explicit rejection of a purely criminal-centric approach in *Bachan Singh,* that might render Justice Radhakrishnan's test *per incuriam*. However, Justice Radhakrishnan took the *Bachan Singh* limitations into account and did not pass his judgment in ignorance, but as a means of evolving the law in line with more recent developments. We would thus argue that the Court, in *Bachan Singh*, was cognisant of the fluidity that pervades capital punishment and noted that the principles must evolve in tandem with new research and contemporaneous developments.

C. Principle of Prudence

We must now draw attention to the crystallisation of the 'principle of prudence'. In the 2008 decision in *Swami Shradhanand* v. *State of Karnataka*,[21] the Court created a third sentencing option. For all practical purposes, life

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[18] (2013) 2 SCC 713 [19] ('*Gurvail Singh*').
[19] *Mahesh Dhanaji Shinde* v. *State of Maharashtra* (2014) 4 SCC 292.
[20] ibid [19].
[21] (2008) 13 SCC 767 [92] ('*Swami Shradhanand*').

imprisonment was usually remitted to a period of incarceration of 14 years, which courts often believed was disproportionate to the crime.

However, the absolute irrevocability of the death sentence was considered too harsh, given that the aspect of subjectivity in the exercise of discretion "renders it completely incompatible to the slightest hesitation on the part of the court." To resolve this conflict, the Court thus paved the way for a third sentencing option, that is life imprisonment without any commutation or a period fixed by the court, as opposed to the death sentence.

However, it is in the *Bariyar* case that Justice Sinha employed the expression "principle of prudence", defining it as follows:

> Principle of prudence, enunciated by Bachan Singh (supra) is sound counsel on this count which shall stand us in good stead - whenever in the given circumstances, there is difference of opinion with respect to any sentencing prop/rationale, or subjectivity involved in the determining factors, or lack of thoroughness in complying with the sentencing procedure, it would be advisable to fall in favour of the "rule" of life imprisonment rather than invoking the "exception" of death punishment. [emphasis supplied][22]

This rule of prudence has bifurcated into two prongs of reservations in awarding the death sentence – first, in cases that primarily rest on circumstantial evidence, and second, when there is inconsistency across the different tiers of the judiciary, (i.e., both horizontal and vertical).

This created a new paradigm in the rarest of rare case model, where the Court could go beyond the balancing test, and qualitatively examine the *degree* of certainty in its conviction by supplying reasons for the aggravating and mitigating circumstances. However, in August 2015, the Law Commission published its 262nd report on Death Penalty,[23] which cited various judgments to evince that this principle of prudence has unfortunately been flagrantly disregarded by Courts.

The incongruity of law highlighted here in above naturally trickles down to the trial courts who bear the responsibility of sentencing accused persons to death at the first instance. A detailed study of the behaviour of the lower courts across 215 cases relating to the death penalty has revealed that they demonstrate a strong tendency to rely on the case law of the Supreme Court that is *per incuriam,* causing prejudice to the rights of the accused.[24] Without any

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22 *Bariyar* (n 16) [149].
23 Law Commission of India, *The Death Penalty* (Law Com No 262, 2015).
24 Project 39A (n 2) 38.

clear guidelines framed by either the legislature or the judiciary, the best-case scenario for those sentenced to death by a trial court is to wait in the gallows, with the hope that the appellate courts can take cognisance of such incongruities of the law.

Thus, the Indian sentencing law on capital punishments poses several functional problems due to the non-uniform application of various tests – including the community standard, the balancing test, and even the rule of prudence. However, the common link between these standards appears to be the increasing discretion that each test brings with it. The introduction of the theory of "residual doubt" in India, thus finds itself caught between the tussle of these varying standards, with a sombre task of restoring fairness to the process.

III. THE AMERICAN ROOTS OF RESIDUAL DOUBT

The theory of residual doubt in the context of capital punishment sentencing first originated in the United States.[25] In the American legal system,

> Residual, or "lingering," doubt has been defined as (1) actual, reasonable doubt about guilt of any crime; (2) actual, reasonable doubt that defendant was guilty of a capital offence, as opposed to other offences; (3) a small degree of doubt about (1) or (2), sufficient to cause the juror not to want to foreclose (by execution) the possibility that new evidence might appear in the future.[26]

This may be contrasted with the metric of 'beyond reasonable doubt', which is employed to determine the guilt of an accused.

The standard 'beyond reasonable doubt' enshrines that the prosecution in a criminal trial must establish, based on the evidence, that no other reasonable explanation is probable other than the guilt of the accused.[27] It is noteworthy that the standard does not indicate that 'no doubt' exists, but rather that 'no reasonable doubt' can be adduced from the evidence on the guilt of the accused. Critics of this standard of proof are quick to argue that such a high standard of proof often results in the acquittal of criminals, especially in sexual offences, which are often characterised by the absence of witnesses.[28]

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[25] *Lockhart* v. *McCree* 476 US162, 181 (1986) (Supreme Court of the United States) ('*Lockhart*').

[26] Christina S Pignatelli, 'Residual Doubt: It's a Life Saver' (2001) 13 Capital Defense Journal 307-08. <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1445&context=wlucdj> accessed 23 July 2020; *See also*, William S Geimerand Jonathan Amsterdam, 'Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases' (1987-88) 15 American Journal of Criminal Law 1, 27.

[27] ibid.

[28] Marilyn Mchanon, 'Pell Decision: Why Sexual Offence Trials Often Result in Acquittal, Even With Credible Witnesses' (*The Conversation*, 8 April 2020) <https://theconversation.

However, it is also a commonly held belief that no innocent man ought to be deprived of his liberty, therefore reaffirming the significance and necessity of meeting a heightened standard in criminal prosecutions.[29] The theory of residual doubt, therefore, acts as a higher burden of proof than the doctrine of "beyond reasonable doubt", as it pleads that the death sentence may only be imposed when there is unimpeachable and indisputable certainty regarding the commission of the crime by the accused.

Criminal trials in America consist of (a) the 'guilt phase' – where the culpability of the accused is determined 'beyond reasonable doubt' based on the evidence presented; and (b) the 'sentence phase' – where the punishment is determined by looking into the aggravating and mitigating circumstances of the case.[30] Fisher[31] refers to this as the "threshold standard", which precludes the reassessment of the same (or in some cases, new) evidence at the sentence phase.

Instead, she argues in favour of a "probabilistic standard", where the punishment awarded to the defendant is proportionate to the nature and quality of the evidence. The doctrine of residual doubt thus disrupts the commonly accepted "threshold standard", which measures the certainty of guilt through a 'probabilistic' lens in the sentence phase, and prescribes a burden of 'no doubt' to pronounce a death sentence. Especially in view of data that reveals that nearly 4.1% of the cases are false convictions,[32] this increased burden of proof gains moral justification.

This section of the paper will trace the birth and development of this theory in America: *firstly*, by looking into its origins, *secondly,* by looking at how the definition of the theory developed, *thirdly,* by addressing the criticism raised against the implementation of the theory, and *fourthly,* by highlighting its significance, if any, to an American jury trial as distinguished from the Indian legal system.

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com/pell-decision-why-sexual-offence-trials-often-result-in-acquittal-even-with-credible-witnesses-135932> accessed 18 August 2020.

29 Jon O Newman, 'Taking Beyond a Reasonable Doubt Seriously' (2019) 103(2) Judicature <https://judicature.duke.edu/articles/taking-beyond-a-reasonable-doubt-seriously/> accessed 22 July 2020.

30 Elizabeth R Jungman, 'Beyond All Doubt' (2003) 91 Georgetown Law Journal 1065 <https://heinonline.org/HOL/LandingPage?handle=hein.journals/glj91&div=37&id=&page=> accessed 18 August 2020.

31 ibid 836.

32 Samuel R Gross et al. 'Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death' (2014) 111(20) Proceedings of the National Academy of Sciences 7230-7235.

A. Roots of the Doctrine – From Lockett to Franklin

The doctrine of residual doubt can be traced back to the decision of the US Supreme Court ('USSC') in 1986 in *Lockhart* v. *McCree*.[33] The Court acknowledged that a plea of residual doubt could be beneficial to a defendant and may caution jurors who are uncertain about the defendant's guilt to decide against the death sentence.[34]

Subsequently, in *Lockett* v. *Ohio*,[35] the USSC observed that it is the constitutional right of the defendant on death row to urge before the jury any and all evidence relating to the defendant as well as the crime that might persuade the jury to grant him a sentence lesser than death. However, Justice Blackmun's concurring judgment sought to restrict such evidence only to enable an assessment of the 'degree' of participation by the defendant and not to judge whether the defendant was guilty or not.

Even so, scholars have argued that this decision marked a turning point in enabling a more fair and equitable process to the determination of the death penalty in the United States.[36] The Court, in the aforementioned case, observed that any limitations imposed by states as to what mitigating circumstances may be urged before a jury would be violative of the constitutionally guaranteed principles regarding the rights of the accused[37] - thus, seemingly expanding the scope of mitigating circumstances *ad infinitum*.[38]

However, a decade later, *Franklin* v. *Lynaugh*[39] heavily diluted the impact of the *Lockett* decision and the weightage of residual doubt as an argument at the stage of sentencing. First, it held that a defendant does not have any constitutional right under the Eighth Amendment to instruct members of the jury on residual doubt, and that it would fall under the domain of individual states to determine whether residual doubt is an appropriate argument during the

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33 *Lockhart* (n 25).

34 ibid.

35 *Lockett* v. *Ohio* 438 US 586 (1978) (Supreme Court of the United States).

36 Jeffrey L Kirchmeier, 'Is the Supreme Court's Command on Mitigating Circumstances a Spoonful of Sugar With a Poison Pill for the Death Penalty?' (2018) 10 ConLawNOW 65<https://ideaexchange.uakron.edu/cgi/viewcontent.cgi?article=1077&context=conlawnow> accessed 22 July 2020; *See also*, Russell Stetler, 'Lockett v. Ohio and the Rise of Mitigation Specialists' (2018-2019) 10 ConLawNOW 51 <https://ideaexchange.uakron.edu/cgi/viewcontent.cgi?article=1076&context=conlawnow> accessed 22 July 2020; *See also*, Karen A Steele, 'Lockett as It Was, Is Now, and Ever Should Be' (2018-2019) 10 ConLawNOW 77 <https://ideaexchange.uakron.edu/cgi/viewcontent.cgi?article=1079&context=conlawnow> accessed 22 July 2020; *See also*, Margery Malkin Koosed, 'Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt' (2001) 21 Northern Illinois University Law Review 41 <https://commons.lib.niu.edu/bitstream/handle/10843/21832/21141KoosedpdfA.pdf?sequence=1&isAllowed=> accessed 23 July 2020.

37 ibid.

38 ibid [68].

39 *Franklin* v. *Lynaugh* 487 US 164 (1988) (Supreme Court of the United States).

sentencing hearing.[40] Second, that the defendant was not precluded from presenting evidence relating to his character or the circumstances of the crime, but they did not have any vested right to re-agitate the question of guilt. Third, the majority acknowledged that although juries might be instructed to consider any and all evidence as per *Lockett,* residual doubt may not be a sole ground to reject the death sentence.

Further, in her concurring judgment, Justice O'Connor has argued against categorising 'residual doubt' as a mitigating circumstance. Instead, almost counterintuitively, she has advocated for a probabilistic sentencing structure wherein "punishment should be directly related to the personal culpability of the criminal defendant."

Despite the fact that *Franklin* denied 'residual doubt' the status of a constitutional right, it has since been employed by various sates as detailed hereinafter.

B. Post-Franklin Developments

The post-*Franklin* era witnessed dissonance between the varying positions adopted by states on residual doubt. States were left to decide whether residual doubt may be argued by a defendant, and even when it was permitted as a plea, the Courts could decide to not give the jury a specific instruction on residual doubt as the same is not protected under the Eighth and Fourteenth Amendments.[41] This has led to a variance in the application of residual doubt as a mitigating factor in states where it has been recognised as a valid argument.

A few states such as New Jersey mandated written and oral arguments on residual doubt.[42] Others such as Tennessee[43] and Ohio[44] held that residual doubt is a valid non-statutory mitigating factor in the penalty phase for the jury to weigh. Virginia has also failed to recognise any argument relating to a plea of residual doubt,[45] and the Supreme Court of Florida has taken the consistent view stating that residual or lingering doubt is not an appropriate non-statutory mitigating circumstance.[46]

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40 ibid.

41 *Franklin* (n 39).

42 Talia Fisher, 'Conviction Without Conviction' (2012) 96 Minnesota Law Review 833 <https://scholarship.law.umn.edu/mlr/399/> accessed 23 July 2020. The state of New Jersey in the *State* v. *Biegenwald* 594 A2d 172, 197 (NJ 1991) (Supreme Court of New Jersey) mandated the presentation of oral and written residual doubt arguments during the sentencing phase.

43 *State* v. *Mckinney* 74 SW3d 291 2001 (Supreme Court of Tennessee).

44 *State* v. *Garner* 656 NE2d623 1995 (Supreme Court of Ohio).

45 Talia Fisher, 'Comparative Sentencing' (2009) Social Science Research Network <http://dx.doi.org/10.2139/ssrn.1488345> accessed 8 January 2021 ('Fisher: Comparative Sentencing').

46 *King* v. *State* 514 So 2d 354 (1987) (Supreme Court of Florida).

The Supreme Court of Virginia, in *Frye* v. *Commonwealth*,[47] held that a defendant cannot contest the correctness of a guilty verdict at the sentencing stage. In *Stockton* v. *Commonwealth*,[48] it was held that a defendant is not permitted to present evidence of residual doubt from the guilt-phase during the sentencing phase. In *Atkins* v. *Commonwealth*,[49] the Court reiterated that defendants cannot present evidence of residual doubt during sentencing.

In 2006, the USSC once again had the opportunity of defining the parameters of a residual doubt plea in *Oregon* v. *Guzek*.[50] The plurality presented three circumstances that are relevant to define what evidence may be presented at the stage of sentencing: first, that the sentencing theory is concerned with *how* the crime in question was committed and not *whether* it was committed at all, which is only of relevance in the guilt-determination stage. Second, that the issue in question had already been litigated and determined before, that is, whether the defendant committed the crime in question. Third, that Oregon law permits the defendant to present any and all evidence pointing to the innocence of the defendant from the original trial phase.[51]

In his separate but concurring opinion, Justice Scalia observed that the third circumstance mentioned in the majority's opinion runs counter to the first two, and as such, arguments relating to the evidence of the crime in question ought not to be raised at all - essentially erasing any right to present evidence on residual doubt at the stage of sentencing.[52]

Justice Scalia is correct to the extent that the third circumstance - which speaks of an unqualified 'all' evidence - is incompatible with the first and third circumstances that seek to restrict its application. The plurality appears to have enabled an intersection between the 'threshold' and 'probabilistic' standard, but with a clear bias towards the former, as it prevented any post-conviction arguments on evidence that might help determine the potential innocence of an accused.

The weightage accorded to a residual doubt argument also varies from state to state. In *USA* v. *Gabrion*,[53] the Court of Appeals for the Sixth Circuit (Ohio) interpreted the exercise of sentencing and appreciation of mitigation evidence to be a moral duty, that is defined by both the crime and the criminal. In this case, the accused argued that there was lingering doubt regarding the location of the alleged murder. The Court dismissed this argument on the logic that the

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47 *Frye* v. *Commonwealth* 345 SE2d 267 (Va 1986) (Supreme Court of Virginia).
48 *Stockton* v. *Commonwealth* 241 Va 192 (Va 1991) (Supreme Court of Virginia).
49 *Atkins* v. *Commonwealth* 534 SE2d 312, 314 (Va 2000) (Supreme Court of Virginia).
50 *Oregon* v. *Guzek* 546 US517 (2006) (Supreme Court of the United States).
51 ibid.
52 ibid.
53 *USA* v. *Gabrion* 719 F3d 511 (6th Cir 2013) (Court of Appeals for the Sixth Circuit).

location of the crime did not form a critical element of the crime itself, and therefore any sense of dubiety in its regard would be redundant.

Thus, it rejected the conceptualisation of residual doubt to be limited to "any doubt whatsoever", but instead to be a "doubt of certain significance". However, interpretations such as this run counter to the purpose of residual doubt, which is intended to decrease the parameters of discretion. Instead, by attaching a qualification of 'certain significance', the jury is burdened with distinguishing between 'reasonable doubt', 'no doubt', and 'doubt of certain significance'.

This doctrine has gained legitimacy in some American states, with both the *Franklin* and *Oregon* decisions acknowledging that nothing precludes such evidence from being presented to the jury. However, some states do not give any consideration to the doctrine of residual doubt, as they believe that a verdict of guilty cannot be challenged at the sentencing phase.

C. Criticisms against Residual Doubt

There are some fair reservations that have been raised against the application and definitions of the theory. Some critics of residual doubt argue that an application of two different standards of proof to ascertain the culpability of a defendant with regard to the same criminal act is legally unsound and arbitrary. On the other hand, supporters of the residual doubt metric urge that the nature of death penalty is unlike other punishments in that it cannot be reversed.

The death penalty offers no scope for future correction, and therefore, the need for certainty with regard to the guilt of the accused assumes paramount importance. The adoption of different standards at the conviction and sentence stage sits ill at ease at the very first blush, as it seems to enforce contrary views on the guilt of the accused. However, academics[54] urge that the adoption of the theory of residual doubt standard *only* at the stage of sentencing is necessitated due to the irreversibility of capital punishment, and that in view of any lingering doubt, innocent people should not be sentenced to death.

It has also been argued that the application of the theory of residual doubt could open the floodgates for other grievances regarding the culpability of the defendant.[55] For example, it permits defendants to urge before appellate courts that the residual doubt used to award a sentence lesser than death ought to be employed at the stage of conviction to acquit the defendant. However, this

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[54] Jungman (n 30) 1089.

[55] Jennifer R Treadway, '"Residual Doubt" in Capital Sentencing: No Doubt It Is an Appropriate Mitigating Factor' (1992) 43(1) Case Western Law Review 215 <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=2277&context=caselrev> accessed 15 January 2020.

argument lacks compassion and places greater importance on the possible misuse to delay litigation vis-à-vis the right to life of an individual.

Further, as highlighted earlier,the question regarding the definition and scope and ambit of the theory remains unanswered. From *Lockett* to *Franklin* and *Guzek,* the USSC has consistently whittled down the strength of a residual doubt plea. The conflict between states has led to varying rules, limitations, and weightage to the application of the theory. Due to the final discretion to permit such a plea resting with the courts, the defendants are left at the mercy of what a court may find to be appropriate or necessary instruction in a given case.

Some academics[56] urge that 'any lingering doubt whatsoever' should be the standard adopted to award sentences lesser than death to all such defendants who are able to evoke 'lingering doubt' of their guilt before the jury. However, the *Gabrion* decision exposed that evidence which might be considered as residual doubt by some juries to grant a sentence lesser than death, could conversely be considered by other juries as not compelling.[57] The lack of a uniform understanding of what constitutes 'residual doubt' continues to contribute to arbitrariness in the application of such a metric in sentencing hearings.

Lastly, although residual doubt might reduce the incidence of death penalties, especially in case of false convictions, it might increase the number of convictions of life imprisonment in cases where a jury might otherwise have acquitted an accused.[58] This argument is largely presumptive and fails to find basis in any data or evidence. Moreover, states such as Florida, where there is no mandate to consider residual doubt, have evinced that specific instructions to this effect does not necessarily mean that it does not weigh with the jurors. Therefore, the assumption that it could lead to increased convictions might be misplaced.

Despite the reservations highlighted above, the theory challenges the threshold model and compliance of the same in absolution. It breaks the binary phenomenon of guilt as envisioned by the threshold model and challenges the 'all-or-nothing' sentencing structure that prevails in the criminal systems in American and Indian Courts. The theory of residual doubt thus creates a direct link between the certainty of guilt and severity of punishment, and such a metric is a perfect example of a probabilistic approach to sentencing.[59]

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[56] Pignatelli (n 26).

[57] *See,' Rompilla* v. *Beard* 545 US 374 (2005) (Supreme Court of the United States), where despite the presentation of a residual doubt argument, the USSC rejected the same in view of the previous criminal record of the defendant.

[58] Fisher (n 42).

[59] ibid [838].

Further, although several states preclude jury instructions on residual doubt, it is found to be the strongest mitigating factor used by juries in America to ascertain the appropriate penalty for defendants facing capital punishment.[60] After surveying thousands of capital jurors, the Capital Jury Project[61] found that residual doubt was the most compelling factor for jurors to choose life sentence over capital punishment.[62] A study also found that raising doubts about the guilt of the defendant at the sentencing hearing urged 60.4% of the jurors to award a sentence lesser than death.[63]

Intuitively, the adoption of different standards at the guilt and sentencing phase might appear antithetical as it makes one pass a judgment while harbouring opposing views on the guilt of the accused.[64] But if such a standard is necessitated in view of the harshness and irreversibility of the death penalty, then what is the impediment in the adoption of the standard of residual doubt taken to its full extent?

D. Conditions Peculiar to the American Jury Trial

Unlike the Indian legal system, the American legal system follows a jury system, where jurors decide in favour of the plaintiff or the defendant in a civil case, or between guilty or not guilty in a criminal case. Jurors in a criminal case also decide whether the accused ought to be given a sentence of death.

The jurors hearing a case are given what are called 'jury instructions', wherein they are guided on what verdict to arrive at, based on what facts they ascertain to be true.[65] The jury is informed about the relevant laws and their application in order to arrive at a verdict.[66] The members constituting the jury are persons with non-legal backgrounds, and therefore, the jury instructions assume a significant role in such a legal system.[67]

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60 Patrick Mulvaney & Katherine Chamblee, 'Innocence and Override' (2016) 126 Yale Law Journal Forum <https://www.yalelawjournal.org/forum/innocence-and-override> accessed 23 June 2020.

61 The Capital Jury Project is an association of university-based research studies on the process of decision-making of jurors in death penalty cases in the United States.

62 Mulvaney and Chamblee (n 60).

63 Stephen P Garvey, 'Aggravation and Mitigation in Capital Cases: What Do Jurors Think?' (1998) Cornell Law Faculty Publications 287 <http://scholarship.law.cornell.edu/facpub/287> accessed 23 June 2020.

64 Erik Lillquist, 'Absolute Certainty and the Death Penalty' (2005) 42(1) American Criminal Law Review 45; *See also*, Leonard B Sand and Danielle L Rose, 'Proof Beyond All Possible Doubt: Is there a Need for Higher Burden of Proof When the Sentence May Be Death?' (2003) 78(3) Chicago Kent Law Review 1359 <https://scholarship.kentlaw.iit.edu/cklawreview/vol78/iss3/16> accessed 22 July 2020.

65 Bryan A Garner, *Black's Law Dictionary* (10th edn, Thompson West 2014).

66 ibid.

67 Anona Su, 'A Proposal to Properly Address Implicit Bias in the Jury' (2020) 31(1) Hastings Women's Law Journal 79 <https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1436&context=hwlj> accessed 22 July 2020.

Secondly, some would argue that a jury would be at greater risk of getting swayed by their emotions as opposed to judges, who are supposed to be dispassionate to external factors and their personal beliefs. Jurors bring with them their beliefs and biases to the jury room, and therefore, the weight assigned by jurors to mitigating circumstances varies.[68]

However, this argument does not consider two factors that could potentially negate it. One, that the members of a jury for a case punishable by death, or 'death-qualified juries', are specifically picked to weed out any such persons who hold strong views either for or against the death penalty. Two, that the assumption that judges are free from personal biases is naïve and not founded in fact. In India, where judges alone decide the capital punishment, a recent report[69] revealed that an overwhelming number of trial courts cite "collective conscience" or "society's cry for justice" in their decisions on death penalty.[70]

Thirdly, another feature that contrasts the Indian legal system from its American counterpart is the complete absence of judicially mandated collection and presentation of mitigation evidence.[71] In the United States, capital punishment cases mandatorily entail the involvement of a mitigation specialist.[72] Sentencing hearings without the presentation and collection of mitigation evidence are inadequate to say the least, and do not provide an equitable hearing to the accused.

Fourthly, the constitution of a jury might change between the phases of a trial. Thus, it is possible that the jury that convicts someone of a crime is not the same as the one that determines their sentence. However, in *Buchanan* v. *Kentucky*,[73] the USSC recognised the importance of a single jury in cases where a plea of residual doubt may be raised in capital sentencing. The Court observed that the need for a single jury was accentuated as it would enable the jury to consider any lingering doubts they may have harboured during the trial.

The idea that there remains some degree of doubt regarding the guilt of a defendant affects the very fundamentals of sentencing verdicts. Residual doubt appeals to the common sense, and often acts as a *de facto* mitigating circumstance with juries opting to give a lesser sentence if persuaded about

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68 Garvey (n 63).

69 *See*, Project 39A (n 2) 75; 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.

70 ibid.

71 'Litigating Death Penalty Cases: A Consultation' (*Centre on the Death Penalty at National Law University, Delhi*, 2017) <https://criminallawstudiesnluj.files.wordpress.com/2020/08/4b439-issuesinlitigatingdeathpenaltycases.pdf> accessed 22 July 2020.

72 ibid 18.

73 *Buchanan* v. *Kentucky* 483 US 402 (1987) (Supreme Court of the United States).

the existence of residual doubt.[74] Despite attempts to dilute the importance of the theory and questions surrounding its implementation, the theory of residual doubt has proved to play a central role in American death penalty jurisprudence and has saved the lives of countless defendants. The next segment of this paper will study the transposition of the theory from American to Indian jurisprudence, and will assess its efficacy in that context.

IV. EVOLUTION OF THE DOCTRINE IN INDIAN JURISPRUDENCE

Part II of this paper had highlighted some of the guiding principles in Indian capital sentencing, which reflected excessive discretion in the process due to inconsistency in standards and their application. Part III of the paper introduced the residual doubt doctrine as developed in the American legal system. This segment of the paper shall argue that the theory of residual doubt, when redefined to address the issues of the Indian legal system, could be a powerful antidote to the arbitrariness of the sentencing process. The authors will explore (a) the introduction of the doctrine into Indian jurisprudence; (b) its definition and scope in India; (c) its impact vis-à-vis the tests discussed in Part II; and (d) suggestions to improve the application of the doctrine to suit it to the issues that confront Indian capital sentencing.

A. Ashok Debbarma and the Introduction of Residual Doubt

The first example of this doctrine in India is found in the case *Ashok Debbarma* v. *State of Tripura*,[75] wherein the appellant was booked, *inter alia,* for murder under Section 302 of the Indian Penal Code. The broad allegation was that the accused, along with thirty five others, had set fire to several homes which had resulted in the death of fifteen persons. The Supreme Court confirmed the findings of the Trial Court and the High Court, stating that the involvement of the appellant in the said crime was undeniable and had been proved beyond reasonable doubt. However, the prosecution had not been able to prove the case against any of the others.

Turning to the question of sentencing, the Court drew a distinction between two thresholds: proof beyond 'reasonable doubt' while determining the conviction, and 'residual doubt' at the stage of sentencing. The Court found that since the original case of the prosecution - that is, 35 persons had committed the said crime - had not been proved, this generated a 'residual doubt' as to whether the appellant alone could have committed the crime.[76] The Court declared that such residual doubt would have to form a part of the mitigating

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[74] Fisher: Comparative Sentencing (n 45) 9.
[75] (2014) 4 SCC 747 ('*Ashok Debbarma*').
[76] ibid [34].

circumstances, and accordingly, the sentence of the accused was commuted to life imprisonment.[77]

However, the court did not stop there: Justice Radhakrishnan reiterated and emphasised the importance of his test in *Gurvail Singh,* according to which, if even one mitigating circumstance is found to favour the accused, the question of giving the penalty of death is entirely foreclosed.[78] This weightage to mitigating circumstances – including residual doubt - is particularly significant, especially when contrasted with Justice O' Connor's concurring opinion in *Franklin*, where she failed to regard residual doubt as a mitigating circumstance at all.

The *Debbarma* case thus suggested the following process to courts seized with the question of a possible death sentence:

Firstly, they must determine if the 'crime test' has been satisfied upon a perusal of the aggravating circumstances. If the court answers the question in the affirmative, they must see if any other mitigating circumstance favouring the accused exists. Only if there is no mitigating circumstance, can the court apply the "rarest of rare" doctrine to determine whether the case justifies the awarding of a death penalty.

However, while looking into the mitigating circumstances, if the court is of the view that the facts and evidence of the case evoke any lingering doubt, then that can be a sole circumstance to grant life imprisonment over the death penalty. A plain reading of this judgment would thus reveal the introduction of a heightened burden on the courts to meet the standard of 'absolute certainty' in its capital punishment sentencing.

Another aspect of this judgment which has strangely not received any attention, is the manner in which the Court extrapolated the American law - with almost no significant analysis. The Court cited an extract from the *Franklin* decision - acknowledging that it is "generally, not found favour by the various Courts in the United States."[79] It also cited the case of *California* v. *Brown*,[80] which stated that nothing in the cases before them demanded an application of a "heightened burden of proof at capital sentencing."[81] In fact, the two American judgments cited by the *Debbarma* Court do not recommend a mandatory standard of residual doubt. Yet, without expanding on the context of its

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[77] *Ashok Debbarma* (n 75) [45], [46]. The Court further stated that his life imprisonment would be awarded without the option of any remission up to twenty years.

[78] ibid [43]. *See also*, *Sangeet and Another* v. *State of Haryana* (2012) 11 SCALE 140.

[79] *Ashok Debbarma* (n 75) [32].

[80] 479 US 538 (1987) (Supreme Court of the United States) ('*Brown*').

[81] *Ashok Debbarma* (n 75) [33].

application in India, which follows a distinct legal system, the Court mechanically applied this theory to the case.

A closer look at the nature of doubt in this case would reveal that it is in consonance with the reasoning adopted in *Franklin* and *Guzek,* where the USSC had held that 'residual doubts' at this stage must be concerned with *how* and not *whether* the crime has been committed. It is therefore not clear whether the Court adjudicating *Debbarma* intended to restrict the definition in those terms or whether it chose to leave it open to subsequent interpretation.

This line of (non) reasoning begs the question of *how* one can determine which cases and evidentiary lapses would amount to lingering or residual doubt. A literal and intuitive interpretation would suggest that any doubt, however remote, including the most minor of inconsistencies in the investigation and trial, would render the application of the 'residual doubt' principle applicable to a given case. However, as the next sub-section will detail, the developments since the *Debbarma* decision have not consistently followed the above parameters while considering residual doubt.

B. Scope and Definition of Residual Doubt

On October 1, 2019, a three-judge bench of the Supreme Court delivered the judgment in *Sudam* v. *State of Maharashtra*,[82] which marked the first instance since 2014 where the doctrine of residual doubt was explicitly applied to commute a death sentence to life imprisonment for the murder of four children. The Court found that the nature of circumstantial evidence and the possibility of incorrect observations relating to the victim's injuries would be a significant enough mitigating circumstance.[83]

What distinguishes this case from *Debbarma* is the interpretation of residual doubt, which attaches a qualitative condition to the nature of doubt – one of significance – and therefore serves to dilute the theory from the original iteration proposed.[84] In fact, by requiring the residual doubt to have greater relevance, the Court blurs the boundaries between the 'reasonable doubt' and 'residual doubt'.

This yields a greater probability of the unintended consequence of increased convictions: a court that would otherwise acquit someone on 'reasonable doubt'

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82 (2019) 9 SCC 388 ('*Sudam*').

83 ibid.

84 *See*, *Manoharan* v. *State* (2019) 7 SCC 716 [58-62]. Here, the Court confirmed the death penalty on the ground that the case was proved beyond any residual doubt. It is relevant to note that the evidence in this case was purely circumstantial, and that the accused had retracted his confessional statement. Further, the High Court had confirmed the death penalty despite a dissenting opinion by one of the judges. Despite this, the Court did not find these facts to be of relevance in determining the death sentence.

now might favour conviction, while granting life imprisonment over the death penalty based on 'residual doubt'. This highlights the need for an absolute and unqualified degree of certainty that renders the slightest flaw in any evidence - relating to the crime, criminal, or even the trial process - subject to the residual doubt theory. Without clarifying the distinction in the standards of doubt, both reasonable and residual doubt standards will be left without any valuable meaning.

Soon after on October 3, 2019, Justice Surya Kant delivered two judgments sitting on a three-judge bench, both of which upheld the conviction of the accused. The first is *Ravishankar* v. *State of Maharashtra*,[85] where the appellant had been accused of the kidnapping, rape, and murder of a 13 year-old girl. Here, the Court noted that there were certain aberrations in the evidence adduced, including a suspect absconding, non-examination of viscera samples, and minor inconsistencies in testimonies. According to the Court, the slight imperfection in the evidence, although not enough to disrupt the chain of circumstances, cast enough doubt to commute the sentence to life imprisonment.[86]

The most recent decision on residual doubt was delivered on November 2, 2020.[87] Although the sentence here was commuted to life imprisonment on other grounds, the Court did not accept the argument of residual doubt. The Court further observed that even in American law, the theory of residual doubt does not carry much weight.[88] It was found that the chain of circumstances had been proved with unimpeachable clarity.[89]

Since there appeared to be no other alternative, the Court found with absolute certainty that the accused was in fact guilty.[90] However, one of the factors cursorily mentioned while commuting the sentence was that the Ordinance making the offence punishable by death had only been issued a few days prior to the incident.[91] Such instances of human hesitation, which could arise from factors outside of merely the quality of evidence, could be covered by adopting a wider definition of the residual doubt theory.

What emerges from the aforementioned analysis is that the Courts have not yet engaged in a detailed discussion on the exact scope and weightage of a residual doubt argument. The two critical questions to be answered are regarding the nature of doubts that the theory would extend to, and in what

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85 (2019) 9 SCC 689 ('*Ravishankar*').

86 ibid [64].

87 *Shatrughna Baban Meshram* v. *The State of Maharashtra* (2020) SCC Online 901 ('*Meshram*').

88 Ibid [124]. The Court recalled the words of Justice O'Conner in *Franklin* v. *Lynaugh*, where he stated that 'Nothing in our cases mandated the imposition of this heightened burden of proof at capital sentencing.'

89 *Meshram* (n 87) [133].

90 *Meshram* (n 87) [133].

91 *Meshram* (n 87) [135].

situations, if at all, the residual doubt argument would take precedence over any other factor.

C. Effect on Existing Tests

In this section, the authors will address whether and how the introduction of residual doubt would have any impact on the other principles in Indian capital sentencing.

In *Sudam,* the Court appears to have conflated the principle of prudence and that of residual doubt. The court found that the latter is merely a reiteration of the rule of prudence, which cautions a court against passing a death penalty in cases that rest purely on circumstantial evidence.[92] While it might be correct that cases resting on circumstantial evidence might fall within the scope of residual doubt, the reverse is not necessarily true.

There could be other deficiencies in a case that justify the application of this theory – for example, the High Court of Calcutta found, *inter alia,* that non-compliance with procedure, failure to conduct appropriate forensic tests, and minor contradictions in statements, raised lingering doubt in the mind of the court, which justified commuting the sentence.[93]

Further, even in cases based purely on circumstantial evidence, the Court has found on several occasions[94] that it cannot be a sole ground to commute the death penalty. The principle of prudence could thus be subsumed by the residual doubt theory, but it would be fallacious and in fact, dangerous to for the courts to equate the two as the same.

Additionally, the *Sudam* Court also ignored the critical reasoning performed in *Ashok Debbarma*, relating to the erasure of the balancing test. The Court found the residual doubt to be "significant enough to tilt the balance of aggravating and mitigating circumstances in the petitioner's favour", viewing it as one of the mitigating factors to be considered, as opposed to a sole mitigating factor that would justify commutation.

The implication of this interpretation in *Sudam* is realised more acutely when contrasted with the 'community standard'. In *Ravi* v. *State of Maharashtra*,[95] the Court completely ignored the theory of residual doubt and the rule of prudence, and instead solely focused on the heinous nature of the crime. Interestingly, the primary difference in facts between *Ravishankar* and *Ravi* was the age of the victim. In *Ravi*, the appellant had been accused of the

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92 *Sudam* (n 82).
93 *State of West Bengal* v. *Ustab Ali* Death Reference No 2 of 2018 (Calcutta High Court).
94 *Meshram* (n 87).
95 (2019) 9 SCC 622 ('*Ravi*').

kidnapping, rape, and murder of a 2-year-old girl. The Court did not engage in any discussion relating to the possible mitigating circumstances and upheld the sentence of death purely from a "crime-centric" approach.[96]

However, more significantly, one of the judges on the bench, Justice Subhash Reddy, rendering a dissenting opinion, highlighted the disregard to the rule of prudence and residual doubt. The analysis by Justice Reddy took due note of the fact that the entire case of the prosecution was premised on circumstantial evidence alone,[97] and emphatically took into account the "criminal" test, by noting the weak socio-economic status of the appellant,[98] thus upholding the principles of residual doubt and prudence. Again, unlike the *Debbarma* Court which suggested that even a single mitigating circumstance is sufficient to preclude a sentence of death, the majority in this case only focused on the "crime test".

Since *Bariyar,* the Supreme Court has made attempts to displace the existing standards with one that can ensure greater fairness and less discretion in the process of death sentencing. The residual doubt holds the potential of being that standard – however, the multiplicity of tests and guidelines has created a situation where Courts choose a standard that best suits their sensibilities qua a case. Later in this section, the authors will make suggestions on how the theory might be modified to reduce the instance of conflicting standards.

D. Differences Between Residual Doubt in India and America

In the *Meshram* case, the Court compared the theory in the context of an American jury trial as opposed to the Indian judicial system[99] – something which had been overlooked till this point. Quite fairly, the Court found that the jury system vastly differs from the trial procedure in India.[100] Some of the Court's reservations, including the tendency of jurors to get swayed by their sentiments, and the effect of the change in the constitution of jury members, have already been addressed in Part II of this paper.

Additionally, the Court noted that in America, the determination of conviction and sentence is usually in the hands of non-legal minds, where as in India, the adjudicatory process is solely governed by judicially trained judges.[101] In this light, the Court in *Meshram*, suggested that the need for jury instructions on residual doubts was greater in the USA than in India, as the possibility of errors would be higher when a jury decides a verdict.

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96 ibid [62].
97 *Ravi* (n 95) [98] per S Reddy J.
98 *Ravi* (n 95) [95] per S Reddy J.
99 *Ravi* (n 95) [118-125].
100 *Ravi* (n 95) [124].
101 *Ravi* (n 95) [124].

However, this analysis discounts the fact that while the processes of the two jurisdictions might have stark differences, the underlying commonality remains that both a jury and a judge are subject to human doubt, and more importantly, the facts and evidence in most cases are not unimpeachable. This fact holds true regardless of whether a judge is to decide the penalty or a juror.

Another reservation raised by the Court pertained to the bar in American trial on presenting new evidence at the stage of sentencing as decided in *Guzek*. The Court argued that this restriction is not found in India, where if new compelling evidence comes to light, it might also be presented at the appellate stage. The Court reasoned that due to this unique feature, the need for a residual doubt plea is stronger in the United States than in India.

However, it may be noted that in 2004, the United States Congress passed the Innocence Protection Act which permits defendants to plead new DNA evidence post-conviction, in view of the concerns regarding wrongful convictions in death penalty cases.[102] Further, the Court in the case of *House* v. *Bell*,[103] specifically permitted a plea of 'actual innocence' based on new evidence that emerges post-conviction.

Therefore, we argue that for the reasons stated above, the need for a residual doubt plea would stand as much ground in India as it would in America.

E. Structural and Definitional Suggestions

In what form then should the theory be tailored so as to suit the conditions of Indian jurisprudence? The authors would suggest that the law requires both structural and definitional changes to act as an effective tool against the increasing margin of discretion.

Firstly, it may be noted that America follows a 'bottom-up' approach, wherein the discretion regarding residual doubt vests with the states, which then legislate and provide guidelines to district courts. However, the absence of specific guidelines by the Indian Supreme Court directing trial courts on how to navigate issues concerning the consideration of mitigating circumstances has led to arbitrariness in meting out the death penalty.

Although the *Debbarma* Court followed the dictum propounded in *Bachan Singh*, it introduced for the first time a mitigating factor, which had not been considered by Indian courts up till that juncture. What was lacking in the *Debbarma* decision was the mention of guidelines, similar to jury instructions,

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[102] 'Post-Conviction in Capital Cases' (*Capital Punishment in Context*) <https://capitalpunishmentincontext.org/issues/postconviction> accessed 16 January 2021.

[103] 547 US 518 (2006) (Supreme Court of the United States).

on how lower courts must weigh and consider residual doubt as a mitigating factor during sentencing.

To take this one step further, the authors would suggest that such a consideration of residual doubt ought to be mandated in each case. This would be crucial in suppressing the tendency of lower courts to place greater emphasis on other factors such as the 'community standard', as discussed in Part II of this paper.

Secondly, with regard to the definitional concerns, while some courts have found the threshold of doubt in capital sentencing to be that of 'absolute certainty',[104] other courts continue to focus on the 'collective conscience'[105] and heinous nature of the crime alone.

To resolve such definitional ambiguities, the authors would propose the following changes:

(i) Weightage: For the doctrine to find a non-discretionary application, it must be formulated without attaching qualifications or weightage to the degree of doubt. As noted in the *Sudam* judgement, the Court attached the qualification of significance to the doubt. The consequence of this interpretation can be seen in the *Ravi* case, where despite certain aberrations in the evidence, the weightage accorded to the 'heinous nature' of the offence prevailed over the conscience of the Court.

(ii) Erasure of the balancing test: At its core, the theory of residual doubt precludes a death sentence notwithstanding the prevalence of any other circumstances of the case. The basic principle of 'reverence of life', when there are any doubts surrounding an accused person's innocence, is thus incompatible when outweighed by any other consideration. It is therefore important to categorise residual doubt as a sole mitigating circumstance that may justify the exclusion of a death sentence.

(iii) Nature of doubts: The discussion on residual doubt relates primarily to the nature and quality of evidence provided during (and in some cases, after) a trial. The authors propose that the assessment of doubt should not merely be restricted to the evidence presented in a given case but should be understood to subsume any and all doubts which relate to the case. This could include doubts relating to the process of trial, efficacy of counsel, dissent by judges, or other circumstances surrounding the crime.

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[104] *Ashok Debbarma* (n 75); *Ravishankar* (n 85); *Ustab Ali* (n 93).

[105] *Ravi* (n 106); *See also*, *State of Uttarakhand* v. *Jai Prakash* (2020) UC 1 (High Court of Uttarakhand) [236]; *State of Uttarakhand* v. *Akhtar Ali* Criminal Appeal No 104 of 2016 (Uttarakhand High Court).

Thus, the correct standard according to the authors would be that any doubt whatsoever ought to be reason enough not to grant the death penalty. A purposive interpretation such as this would permit residual doubt to be applied in order to reduce the discretion exercised by judges, and substitute a *subjective* test based on the nature of the crime with an *objective* exercise of studying the quality of all evidence and surrounding circumstances.

The authors are cognisant that this high standard of proof for the death penalty would make it nearly impossible for a court to pass a sentence, owing to minor lapses found in nearly every case. However, the sheer extremity and irreversibility of the penalty justifies – legally and morally – a burden of proof so high, that no person should be condemned to death unless there is absolute, objective certainty of their guilt.

V. CONCLUSION

The theory of residual doubt is one that does not yet have deep roots in the Indian legal thought. The theory attempts to displace the existing notion of a trial with a bifurcated version, with an independent stage for both guilt and sentencing. The theory is sympathetic to the fact that no human - whether a judge of the court or even a member of a jury - is omniscient, and there are organic layers that may creep into one's mind while determining the culpability of an individual in a given case.

When the question is of charging an individual with a mere fine, the human mind finds it easy to overlook minute inconsistencies. When it is that of divesting one of their liberty by sentencing one to a term in jail, the mind is sharper and more critical to these flaws. But when the question becomes that of deprivation of a life, can there be any moral or legal justification for leaving room for the slightest error?

Aside from a reflection on underlying moral platitudes, this theory is conscious of the most fundamental legal principle of fairness. It attempts to reduce the arbitrariness in the procedure established by law, by increasing the threshold of certainty in cases where an individual may be condemned to death.

Given its fullest meaning - denial of death penalty where there is any doubt, howsoever minute and irrelevant - this theory would in effect lead to the substantive erasure of the capital punishment in a legal system, or at the very least be directed most sparingly. Within the realm of capital punishment, this theory thus holds the potential of being a real lifesaver.

Unfortunately, theory and practice seldom align with each other. In both American and Indian law, residual doubt continues to exist as a mitigating circumstance, but its application reveals a divergent position on what constitutes

doubt. The error in creating new parameters without elucidating their standard only acts in a fashion counterproductive to a death penalty trial, as it widens the subjective discretion in each case.

The Indian law on death penalty is shambolic - even at the most preliminary level of whether a balancing or a criminal test ought to be employed. Further, the complete lack of guidelines and training to trial courts enable improper application of precedents, which often results in an individual waiting on the side-lines of the death row for decades.

Despite the recommendations adduced in the Law Commission's Report in 2015 for abolishing the death penalty, neither the judicial nor the legislative wings of the government have demonstrated any inclination to pay heed to such a recommendation. Thus, the introduction of a more well-defined iteration of this theory along with clearer guidelines could, until such time that the death penalty prevails over the legal conscience, provide a greater burden of responsibility in such cases.

As a concluding thought, it would be apposite to recall the words of Justice Bhagwati in his evocative dissent in the *Bacchan Singh* case, wherein he stated that "There is nothing like complete objectivity in the decision making process and especially so, when this process involves making of decision in the exercise of judicial discretion." While truer words could not be uttered, the theory of residual doubt might act as a reminder to a judge that their lack of complete objectivity and knowledge should humble them in their exercise of discretion.