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REVISITING DEATH PENALTY JURISPRUDENCE

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

On April 22, a Bench of the Supreme Court of India, led by Justice U.U. Lalit, decided to critically examine the routine and abrupt way in which trial judges often impose the death penalty on convicts. The challenge before the Court in the instant case of *Irfan vs State of Madhya Pradesh* was to identify the mitigating circumstances and to ensure a convict-centric approach so that the imposition of capital punishment becomes rarer, fairer, and principled.

The Court seemed to think that an individualistic approach that examines the social, economic, emotional, and genetic components that constituted the offender rather than the offence, would go a long way in evolving a just and judicious sentencing policy. According to the Court, “a ‘one size fit for all’ approach while considering mitigating factors during sentencing should end”. The Bench indicated the need for mitigation experts to assist trial courts in reaching a correct conclusion on whether one should be sent to the gallows or not.

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This is a significant development that can radically alter India’s death penalty jurisprudence, by a comprehensive examination of the multi-disciplinary wisdom relating to the crime, the criminal, and the punishment.

An analysis of the possible reasons to avert the death penalty is reflected in a series of recent verdicts such as *Lochan Shrivas vs State of Chhattisgarh* (2021) and *Bhagchandra vs State of Madhya Pradesh* (2021). These reasons might include socio-economic backwardness, mental health, heredity, parenting, socialisation, education, etc.

According to Section 354(3) in the Code of Criminal Procedure, while imposing the capital punishment, the judge should specify “the special reasons” for doing so. It was in *Bachan Singh vs State of Punjab* (1980) that the Constitution Bench suggested a humane and reformist framework in the matter. It said that the gallows could be resorted to only in the rarest of rare cases, that too when “the alternate option is unquestionably foreclosed”. Thus, *Bachan Singh* requires the trial courts not only to examine the gravity of the offence but also the condition and the ‘reformability’ of the accused. The Court, in *Bachan Singh*, refused to declare the death penalty as unconstitutional. It, nevertheless, tried to reduce the rigour of capital punishment by trying to do away with the indiscriminate use of the penal provisions. It abundantly implied that no person is indubitably ‘irreformable’. It had the effect of practically undoing the death penalty provision, if taken in its letter and spirit. The need to have ‘unquestionable foreclosure’ of ‘alternate option’ (in the matter of punishment , such as life imprisonment) sets the benchmark for the sentencing court very high and even unattainable. This person-centric approach, for its materialisation, needs a different judicial acumen that recognises the convict in her multitudes.

But the *Bachan Singh* principle was followed more in its breach than in compliance even by the Supreme Court. In *Ravji vs State of Rajasthan* (1995), the Supreme Court said that it is the nature of the crime and not the criminal which is germane for deciding the punishment. This is diametrically opposite to what was laid down in *Bachan Singh*. In *Machhi Singh vs State of Punjab* (1983), the Court indicated that inadequacy of other punishments could justify the death penalty. This too negated the humanistic liberalism in *Bachan Singh*. Several other cases also were decided by ignoring the *Bachan Singh* doctrine, as noted by the Supreme Court itself in *Santhosh Kumar Satishbhushan Bariyar vs State of Maharashtra (2009)* and *Rajesh Kumar vs*

State (2011). *The Hindu*'s *Frontline* magazine ("A case against the death penalty", issue dated September 7, 2012) had a list of 13 convicts who were directed to be hanged in different reported cases decided by the Supreme Court itself, illegally and erroneously, by discarding the *Bachan Singh* philosophy.

This egregious judicial error will have to be kept in mind while the Court revisits the issues related to mitigating factors and individual-centered sentencing policy in the Irfan case. In the process, it may need to consider concrete guidelines for such policy.

But the Indian experience shows that whenever the Court tries to dilute the harshness of penal provisions by a balancing approach, instead of striking down the provision, the instrumentalities of the state (including the police, the prosecution and the court) continue to overuse or misuse the provisions. The judgment of the top court in *Kedar Nath Singh vs State of Bihar* (1962) is a case in point. The Supreme Court endorsed the validity of the sedition law (Section 124A of the Indian Penal Code) with a rider that it could be invoked only when there is an incitement to violence. But the state seldom acts based on interpretation of the law. Many were booked for the charge of sedition since then for mere words, innocent tweets or harmless jokes. The top court is now seriously considering the need to revisit *Kedar Nath Singh* itself.

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It is true that Bachan Singh did not, in concrete terms, elaborate on the mitigating factors and the methods to gather them to avert the death penalty. Nor did it explain the issues such as burden of proof and standard of proof in detail. As argued by Anup Surendranath, Neetika Vishwanath, and Preeti Pratishruti Dash in a recent paper, there could be "gaps within *Bachan Singh* itself". The point, however, is that going by the Indian experience, it may not be enough to provide clarity with respect to the mitigative elements in the matter of sentencing or the method of invoking them. Taking empirical lessons from the fate of *Bachan Singh*, the Supreme Court may have to now ask the more fundamental question posed and negatived in *Bachan Singh* — the question of the constitutional validity of death penalty. The judiciary needs to learn a lot from history.

In India, as elsewhere, the poor, rather than the rich, are sent to the gallows. The numbers of the uneducated and the illiterate sentenced to death outweigh those who are educated and literate. In *Williams vs Taylor* (2000), the U.S. Supreme Court said that failure of the defence lawyer in highlighting the mitigating factors that could lead to avoidance of capital punishment makes the legal assistance ineffective. Therefore, it infringes constitutionally guaranteed rights. In the Indian scenario, the legal assistance received by the poor facing serious charges is far from satisfactory. Lack of proper defence results in conviction. And in the matter of sentencing too, the mitigating factors are either not placed before the trial court or not persuaded adequately to convince the trial judge to avoid the death penalty. There is a marked contradiction between the Indian legal plutocracy and the marginalised.

The Court, in the instant case, will have to evolve a legal device for procurement of a comprehensive report dealing with the socio-economic and hereditary backgrounds of the accused from experts in the fields of social work, psychiatry, psychology, anthropology, etc. Yet, there could be inherent inequality and arbitrariness in applying the principles because of multiple factors such as failure of the judges, incapacity or backwardness of the parties, inadequacy of defence, deficits in the reports of experts, disparity in practical application of the doctrine, etc. As such, there is a possibility for the new juridical device also meeting the unfortunate fate which the *Bachan Singh* verdict faced. Therefore, the true way ahead is not merely to fill up the blanks in *Bachan Singh* by laying down concrete propositions for assessment of mitigating factors,

determination of standard of proof, burden of proof etc. The Court may have to revisit *Bachan Singh* itself in so far as it refused to declare the death penalty as violative of the right to life envisaged under Article 21 of the Constitution. Across the world, 108 nations have abolished death penalty in law and 144 countries have done so in law or practice, according to the Amnesty Report of 2021.

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In the Indian context, where judgmental error is quite frequent and the quality of adjudication is not ensured, what is required is a judicial abolition of death penalty. For this, the present matter will have to be referred to a larger Bench, with a view to rectify the foundational omission in *Bachan Singh* — of not explicitly declaring capital punishment as unconstitutional.

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