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THE DEATH PENALTY: A FATAL MARGIN OF ERROR

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

On March 5, 2019, a three-judge bench of the Supreme Court headed by Justice A.K. Sikri (now retired) found Khushwinder Singh guilty and befitting of the death sentence (*Khushwinder Singh v. State of Punjab*). In 2013, the Fatehgarh Sahib sessions court had convicted and sentenced him to death for killing six relatives of his wife with the motive of committing theft. The last time the death penalty was upheld by the Supreme Court was in July 2018 in the Delhi gang rape case. Since then, the court has acquitted 10 death row prisoners and reduced the sentence to life imprisonment of 23 others. As Singh's case moves closer to the gallows, the judgment highlights the processes that cause cases to slip through the cracks of the 'rarest of the rare' doctrine, which mandates a consideration of both the crime and the criminal. The judgment exemplifies the varied standards of legal representation that impacts the imposition of the death penalty.

Singh's death sentence stands in contrast to nine cases decided by three-judge benches headed by Justice Sikri since November 2018 which resulted in six commutations to life imprisonment and eight acquittals. In these judgments, the duty of the court to conduct an effective sentencing hearing was emphasised and factors such as good conduct in custody, education, age, social, emotional and mental condition of the offender, and the possibility of reform were highlighted as relevant considerations in the sentencing scheme. However, none of these factors appear to have been considered for Singh. The judgment declares at the outset that Singh's lawyer "is not in a position to point out any mitigating circumstance". Without commenting on the effect of that deficiency on the quality of the sentencing exercise being carried out by the court, it erroneously relies only on the pre-planned nature of the crime, its brutality and the number of victims to impose the death sentence. Grounds relating to the criminal such as his conduct in prison, his socio-economic and educational backgrounds, or the probability of reformation receive no comment from the court.

In late 2018, another three-judge bench of the Supreme Court reversed its own finding in *M.A. Antony v. State of Kerala*, involving the murder of six relatives of the accused. The court chose to commute the death penalty factoring the 'lack of evidence' to show that the convict was a hardened criminal or that he was beyond reform. The similarities in the nature of the crime between the cases of Singh and Antony are unfortunate and uncannily similar. In both cases, six family members lost their lives, including two children. The motive in both, according to the prosecution, was money and the victims were close relatives. Both convicts were middle-aged men with families of their own. While in Antony's case, his socio-economic conditions and lack of criminal antecedents were considered by the court in deciding that there was a probability of his reformation, in Singh's judgment, there is a complete silence on this aspect, providing yet another instance of the arbitrary imposition of the death penalty.

The irreversibility of the death penalty has fundamentally affected the jurisprudence around it. It is commonly accepted that a judge in adversarial proceedings cannot go on a 'truth searching exploration' beyond what is presented. Yet, death penalty jurisprudence is rife with examples where duty has been placed upon the courts to elicit information relating to the question of sentence, even if none is adduced before it. Justice K.S. Radhakrishnan's judgment in *Ajay Pandit v. State of Maharashtra* (2012), held that the court has a 'duty and obligation' to elicit relevant facts even if the accused was totally silent in such situations. In *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009), while discussing the responsibility of courts with respect to the sentencing scheme laid out in *Bachan Singh v. State of Punjab*,

Justice Sinha opined that *Bachan Singh* makes no distinction on the roles and responsibility of appellate courts and therefore it was incumbent upon all courts to ensure the ratio laid down in *Bachan Singh* was 'scrupulously' followed, adding, "if anything, inverse pyramid of responsibility is applicable in death penalty cases".

Unlike Khushwinder Singh's case, in the past few months the Supreme Court has rightly considered evidence about the criminal by calling for medical records, reports of prison conduct, including poetry written by a convict post-incarceration to ascertain the appropriate sentence. This was not attempted in Singh's case. At the core of the arbitrariness in death penalty sentencing is the inconsistent approach to mitigating factors. The Supreme Court has, unfortunately, not developed any requirements that guide the collection, presentation and consideration of mitigating factors. Very often, barely any mitigating factors are presented on behalf of death row prisoners; if they are, they are of poor quality. Judges are often left only with information concerning the crime to determine the punishment. And, undoubtedly, Singh is a victim of this. He ended up being defined only by his crime with no other information about his life coming up before the judges. The quality of legal representation continues to affect the administration of the death penalty, even when cases are decided by pro-active and sensitive judges.

The inconsistent and arbitrary application of the death penalty remains a matter of great concern to the judiciary. Justice Kurian Joseph's parting words in *Chhannu Lal Verma v. State of Chhattisgarh*, calling for the gradual abolition of the death penalty, require serious introspection from the court and the body politic, and for us to recognise that the efforts to make the administration of the death penalty fairer are like chasing the wind. Our institutions may persist with attempts to 'tinker with the machinery of death' until there is a collective realisation that the death penalty is untenable in a fair criminal justice system. Till such time, the setting of established benchmarks for practice, and a system of oversight are necessary to ensure that the quality of legal representation does not become the difference between a sentence of life and death.

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