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A NEGATION OF THE INDIVIDUAL AND A COLLECTIVE MORAL DECAY

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

Last week, a little over 13 years after the blasts in 2008 (in July) in Ahmedabad, Gujarat, the designated court to conduct a speedy trial decided the fate of 78 of the accused people. The Sessions Court building turned into a fortress on the day of the verdict. Unlike other days, people were frisked before they were allowed on the court premises. But in this seeming silence and secrecy, on a video-conference link, 49 people were convicted. When those adjudged guilty were asked if they had anything to say, most spoke with fondness about their family members; many recounted their clean jail records and educational qualifications; some pleaded innocence. Many broke down and begged for mercy.

Within a week, the court sentenced 38 of 49 people to death. In a judgment that was 7,015 pages long, written entirely in Gujarati, the court perfunctorily read out the names of convicts, almost like a school roll call — to "...tie a noose around the neck and hang the convict until he is dead...." — making it one of the most jarring cases in the history of independent India of the use of discretion to sentence citizens to death.

According to a report by Project 39A at the National Law University, Delhi, a total of 488 prisoners in India (as of 2021) were on death row, which is an increase of nearly 21% from 2020. In one fell swoop, the unprecedented verdict of the court in Ahmedabad has now added a near 10% increase to this number; it is also a reflection of the growing trend of trial courts to cursorily hand down the death sentence.

Debates on the death sentence often focus on its efficacy or constitutionality. But even the liberal critique sidesteps the central issue: the death sentence grants the state the monopoly of violence. This monopoly is justified by claiming that such a step prevents crime or that it is a measure of long-due justice. But at its core, death as a punishment for the 'rarest of rare' crimes is the highest measure of retributive justice in criminal law, based entirely on discretion.

Fundamentally, 'rarest of rare' is a standard that allows a court of law to use public sentiment as a judicially reliable standard in handing out the death sentence. India's carceral criminal jurisprudence requires a court to calculate proportionality between crime and punishment. But here is a sentence that goes beyond the confines of these calculations to deprive a person of their life — committing an act whose central value itself is immeasurable.

Justice P.N. Bhagwati pointed to this in his dissent from the majority Supreme Court view, in *Bachan Singh vs State of Punjab* (1980). In a remark that discretion is a poor substitute for principle, he held that any standard setting to explain when an institution can kill someone defeats the moral imperative to do no harm. Thus, instead of lifting the moral atmosphere of society, the 'rarest of rare' standard gives an institution the power to bracket people as those who deserve to live imprisoned and those who deserve to be institutionally killed. The impossibility of reform, the heinous nature of the crime, the shock to the public conscience, none of these things sufficiently justify the right of a fallible institution to take someone's life.

The harm of this loose standard is on full display in this verdict under discussion. After the verdict is delivered in any criminal trial, lawyers make what are called 'mitigating arguments' — essentially to contextualise the convict as an individual and not as the accused.

In this case, first, the court orally convicted ‘en masse’ several of the accused instead of declaring the charges proved against them separately. That is, out of the 78 accused, 49 were convicted, but the point of calling it ‘en masse’ is because it was done in groups based on charges, and not for each accused; consequently, not indicating the individual roles of the accused. It then directed the defence to commence sentencing arguments without access to the lengthy written judgment that contained specific findings of the court. By depriving the defence of the verdict, the court crippled even the possibility of making a proper mitigation argument. In a bizarre turn of events, the prosecution argued that the defendants should argue for mitigation before it would even disclose which convicts it intended to seek the death sentence. The role attributed to each of the accused was different. By equating them for mitigation purposes (individual circumstances were unaccounted for and context and circumstances were considered to be the same) and handing down a mass death sentence, the court has only opened the door for greater misuse of a questionable power to end a life without any oversight.

Mitigation turns usual court proceedings on their head. Unlike other trial stages where a court adjudicates between competing legal identities of an accused, the complainant, etc., in mitigation, the court hears evidence of a person’s humanity. Do they play cricket? Do their neighbours like them? Do they feel remorse or empathy for the people they affected? What if they are innocent? How should they feel contrition then? Do they demonstrate the possibility of readjusting to life outside prison if they are ever released? It allows discretionary sentencing to don a veneer of compassion when both outcomes — incarceration or death — are fundamentally inhuman. Hearing mitigating circumstances requires — however temporarily — for the trappings of distance and formality to be stripped away so that a court may see a person instead of a convict. As the keeper of public conscience, the court’s decision to ignore all reasons to let someone live says more about our collective bloodlust than the 38 people we keep pretending are not one of us. It relies on a remarkably craven view of human potential.

Maybe calling it the death ‘penalty’ itself is problematic. It is not a levy on delayed tax filings or a moment in a football match. Such a permanent sentence requires us to assume that our institutions are infallible and user-proof. To cast this as a simple ‘penalty’ ignores what it truly does — and did in this case; it negates the individual for the final time.

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