



**AN ASSESSMENT OF THE
'PROBABILITY OF REFORMATION'
AS A MITIGATING CIRCUMSTANCE
USED IN THE DEATH PENALTY
SENTENCING MATRIX IN INDIA**

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Abstract

In *Bachan Singh v. Union of India* (1980), the Supreme Court questioned the constitutionality of the death penalty in India and laid down sentencing guidelines for cases of such nature. The court prescribed the identification and weighing of aggravating and mitigating circumstances to determine the 'special reasons' required for the imposition of the death penalty on the convict. One of the mitigating circumstances that Bachan Singh recognized was 'the probability that the accused can be reformed and rehabilitated'; with the court declaring that the State 'shall by evidence prove that the accused does not satisfy the condition'. Since this pronouncement, confusion has reigned over the nature of this requirement, the nature of evidence required to make such an assessment and the standard of proof for such assessments. The objective of this article is to revisit the discourse surrounding the assessment of probability of reformation, and tries to briefly analyze the contradictions in the Supreme Court's approach to assess the same, and also its role in the death penalty sentencing array in decisions subsequent to that of Bachan Singh and tries to trace the contrasts in what constitutes evidence of the probability of reform and of the incapability

to reform. The article employs descriptive and analytical methods to trace the contradictory approaches and the confusions surrounding the factor of reformation and the sentencing framework of death penalties in India.

Keywords: Death Penalty, Probability of Reformation, Sentencing framework, Mitigating circumstances, Nature of evidence.

INTRODUCTION

Reformation has been identified as a crucial mitigating factor in the case of Bachan Singh where the court went a step forward to impose a burden on the state to show that the accused is beyond the 'probability of reformation'. More than often, this mitigating factor has been incorrectly tied to the brutality of the crime. In almost 71% of the cases, the trial courts have sentenced persons to death without contemplating the capacity of the convict to reform.¹

The probability of reformation of the accused was articulated by the apex court in other cases²; however the case of Bachan Singh distinctly made reformation, a fragment of the death penalty jurisprudence in India. Here the Supreme Court declared that rehabilitation was an express sentencing goal, and should never be ignored particularly in the matters of death sentencing. The court again went on to reinstate the requirement for the production of evidence of 'beyond reform' in death penalty cases. While contemplating on the "rarest of rare" test evolved in Bachan Singh, the court divided it into-(a) whether the case belonged to the "rarest of rare" category and,

¹ Death Penalty Sentencing in Trial Courts, (2000-2015), Project 39A, NLUD.

² Bishnu Deo Shaw v. State of West Bengal, (1979) 3 S.C.C 714; Maru Ram v. Union of India, (1981) 1 SCC 107.



(b) if the option of life imprisonment is insufficient in accordance to the facts of the case, the court here believed that life imprisonment stood futile, when the sentencing aim of reformation is unachievable.

Hence for the satisfaction of the second exception to the doctrine, the court needs crystal clear evidence as to why the convict stands unfit for any reformatory and rehabilitation schemes.³ In the adjudication of a case under this test, an equal importance was adhered to the assessment of the probability of reformation of the wrong doer. The mandate regarding the evaluation of the offenders capacity to reform, and that life imprisonment stands ‘unquestionably foreclosed’, has often been ignored; The evidence regarding the offender who’s afar reform is seldom cited and put forth.⁴

Critics, including Justice Bhagwati, have opined that when reformation is a principle of sentencing and the evidence regarding the incapability to reform is accorded, it is never possible to draw conclusions that the accused will not be reformed or is incapable of it. In Justice Bhagwati’s words- “There is no way of accurately predicting or knowing with any degree of moral certainty that the murderer will not be reformed or is incapable of reformation. All we know is there have been many successes even with the most vicious of cases. Many examples clearly show that it is not possible to know beforehand with any

degree of certainty that a murderer is ‘beyond reform’.⁵

THE ALTERING COURSES OF THE SUPREME COURT

There has been no uniformity or the adherence to precedents by the apex court when it constituted the evidence to prove the capacity or incapacity of the offender to reform. Discourses on some of the relevant and contrasting cases that are mentioned subsequently in this note are a proof to the same.

- *If the offender is a threat to the society*

The court in Rameshbhai Rathod v. State of Gujarat⁶ held that it won’t prioritize the outrageous sentiments about the nature of the crime committed over the need to carefully consider whether the person committing the crime is a threat to the society. The court must ponder over the possibility of reform or rehabilitating the offender, which should be at the heart of the sentencing process. It is with this approach that the court can impose death sentence with the ‘rarest of rare’ test⁷.

- *Gruesome acts motivated by ignorance that lack basic humanity*

Contrasting the cases of State of Maharashtra v. Damu⁸ against Sushil Murmu v. State of Jharkhand⁹, we find that- in Damu’s case, the convict was accused of murdering three children for human sacrifice to recover hidden treasure, the court here didn’t award the sentence of death even after it felt that ‘such horrendous acts made it an extremely

³ Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra (2009) 6 SCC 498.

⁴ Chapter 5: Arbitrariness in death penalty adjudication, 262nd Law Commission Report of India on ‘Death Penalty’; Aparna Chandra, A Capricious Noose: A Comment on the Trial Court Sentencing Order in the December 16 Gang Rape Case, 2 J. NLUJ 124 (2014).

⁵ Madhu Mehta v. Union of India (1984) 4 SCC 62.

⁶ Rameshbhai Rathod v. State of Gujarat, (2009) 5 SCC 740 (per Ganguly J).

⁷ Rameshbhai Rathod v. State of Gujarat, (2009) 5 SCC 740, at para 108.

⁸ State of Maharashtra v. Damu, (2000) 6 SCC 269.

⁹ Sushil Murmu v. State of Jharkhand, (2004) 2 SCC 338



rare case¹⁰, but gave life imprisonment reasoned on the ground of mitigating circumstances of ,that the crime was motivated by ignorance and superstition; however in the case of Sushil Murmu where he was convicted to murdering one child for human sacrifice, the court opined that he accused ‘did not possess the basic humanness and lacked the psyche which is amenable to any kind of reformation’¹¹. The court refused to consider the superstitious motivation to be a mitigating factor here and declared it to be an illustrative and exemplary case where death penalty should be the rule with no exception whatsoever.

- *Prior criminal antecedents of the offender*

The court has also quite often accounted the prior criminal record of the accused in determination of its capacity to reform. However in the case of Sangeet v. State of Haryana¹², the Supreme Court has pointed to instances where the court has considered merely pending cases, and upheld that the decision of imposing death penalty on such pending cases would tantamount to the complete negation of the principle of innocence, the apex court clearly admitted that all these decisions of foisting death penalties¹³ were erroneous, in certain cases where the court rejected the probability of reformation of the accused grounded on the reasoning that “ the antecedents of the appellant and his subsequent conduct indicated that he is a menace to the society and is incapable of rehabilitation”¹⁴. The Supreme Court however noted in a case, that

the allegations against the offender for having committed other offences were never brought on record. The court showcased a whimsical attitude wherein in one line it emphasized on the fact that the innocence of the accused was hampered in light of pending cases that were referred to elucidate on his prior criminal record and in another line used it as an aggravating factor and an evidence to prove his incapability to reform in Sushil’s¹⁵ case.

Bachan Singh, apart from formulation of the rarest of rare, the assessment of the offender’s probability to reform was also central, the determination of which would be through a distinct pre- sentence proceeding where evidence has to led in issue. This evidence based account was deemed to be essential for introducing an element of objectivity in to the process of sentencing.¹⁶

- *The ambiguous outlook of the courts*

The requisite that the State should justify, in addition to arguments with evidence, that the penalty of death is the ultimatum of the case, has been reiterated by the Court in subsequent cases but is rarely followed in practice, is itself a testament to the erratic nature of the death penalty jurisprudence in the country. There were cases on the one hand where the possibility of reformation or rehabilitation was ruled out, without any expert evidence and, while on other instances, again without any expert evidence, the benefit of this possibility was given in.

¹⁰ State of Maharashtra v. Damu, (2000) 6 SCC 269, at para 47

¹¹ Sushil Murmu v. State of Jharkhand, (2004) 2 SCC 338, at para 22.

¹² Sangeet v. State of Haryana, (2013) 2 SCC 452.

¹³ Sushil Murmu v. State of Jharkhand, (2004).

¹⁴ B.A. Umesh v. Registrar General, High Court of Karnataka, (2011) 3 SCC 85, at para 84, Md. Mannan v. State of Bihar, (2011) 8 S.C.C 65.

¹⁵ Sushil Murmu v. State of Jharkhand, (2004).

¹⁶ Santosh Bariyar v. State of Maharashtra, (2009) 6 SCC 498, at para 66.



- *Other factors that could aid the evidence for the 'probability of reformation'*

In some cases, the Supreme Court did not seriously examine the issue of mitigating circumstances or scope for reform and rehabilitation. In *Ravji alias Ram Chandra v. State of Rajasthan*¹⁷ for example, there was no discussion of mitigating factors at all and the Court ignored doubts about the mental health of the accused. In *Om Prakash v. State of Haryana*¹⁸, Justices Thomas and Shah commuted the sentence of the offender stating that the murder was a result of "the human mind going astray because of constant harassment." The Court observed that the appellant would be no menace to society and that there was no good reason to believe that he could not be reformed or rehabilitated; such observations were made by the apex court in other subsequent cases as well.¹⁹ In a number of cases, there were socio-economic factors or mental health facets that could have been used by the courts to determine the probability of rehabilitation of the offender and the scope of his reformation could have been based out of such considerations, which would have further affected the imposition of the death sentence.

CONCLUSION

The plethora of cases decided by the Courts in India regarding the imposition of death sentence showcase the inconsistency even after a sentencing framework was formulated by the Supreme Court in *Bachan Singh's* case. The inconsistency is also reflected in how the probability of reformation is used as a tool for mitigating the imposition of a capital sentence. What the courts truly understand by the probability of an offender

to reform or, beyond reform is hard to comprehend by the decisions that follow *Bachan Singh*. The prospect of reformation and the adduced evidence presented by the State to prove otherwise, has remained a grey area hardly excavated. Whether the courts have used a liberal and expansive discourse in this regard is also a question that remains unanswered, due to the varying approaches used by the judges and the courts to comprehend the virtue of rehabilitating the accused. There is a complete absence emphatically to determine what evidence should be used to determine the convict's capacity and what to adhere to for his incapacity.

However in a handful of cases the court has regarded matters of mental health, and the disturbed state of mind of the accused and his prevalent circumstances and has reinstated that there's hardly any reason to believe that he cannot be reformed.

The probability of reformation is something that can never be put into a straight jacket formula and applied to each case to evaluate the possibility of rehabilitation, nor there any such ideal evidence to testify the capacity. The courts therefore need to delve into the mitigation strategies more and not centralize the brutality of the crime. The 'probability to reform' as a mitigating circumstance involves a large number of facts and aspects that needs to be heralded by the courts for a better analysis and engagement with the case. Also to emphasize on a compelling fact that there can never be enough evidence to show that a person has surpassed all the bases of humanity and morality and shall not be reformed because no man is born bad, it is

¹⁷ AIR 1996 SC 787

¹⁸ (1999) 3 SCC 19

¹⁹ *Nemai Mandal and anr. v State of West Bengal* [(2001) 9 SCC 239]



just his fate or his circumstances. Death also does deprive a person of his likelihood to reform since law takes away his chances; he is never expected to be a better man.

Thus, convicting a person and declaring that he is beyond reform puts a burden on the courts and state to be prudent enough to put forth this argument, because he was never given a chance.

