

The Role of Mitigation Investigators in Death Penalty Cases

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Abstract: This paper explores the evolving role of mitigation investigators in death penalty cases, tracing the concept of mitigating circumstances from the landmark *Bachan Singh* judgment to contemporary judicial practices in India. It argues that despite legal mandates to consider such circumstances, inconsistent application and the absence of a formal mechanism for appointing mitigation investigators undermine due process. Drawing on case law, judicial trends, and comparative insights from the U. S., the study highlights the necessity of multidisciplinary approaches to assess an accused's psycho-social context, emphasising the mitigation investigator's indispensable role in ensuring just sentencing. It concludes with a call for systemic reform to integrate these professionals into the judicial process.

Keywords: mitigation investigator, death penalty, mitigating circumstances, rarest of rare doctrine, judicial reform.

1. Introduction

"Many who live deserve death, And some that die deserve life. Can you give it to them? Then do not be too eager to deal out death in judgment."

- J. R. R. Tolkien

The process for imposing the death penalty was established decades ago in the case of *Bachan Singh*¹, in which the Supreme Court clearly stated that mitigating circumstances are to be considered before imposing the death penalty. Still, neither the state nor the judiciary has made a single effort to create a mechanism for appointing the mitigating investigators in such cases of the death penalty. Under the virtue of Article 141² the laws established by the Supreme Court hold the same authority as legislative enactments until overturned by the legislature. Thus, both procedural and substantive lapses persist. With the radical interpretation of procedure established by law in *Maneka Gandhi*³ v. *U. O. I.*, the doctrine of "Due Process", which ensures that the law must be just, fair, and reasonable, was introduced. Unfortunately, this doctrine appears futile in death penalty trial proceedings.

This study examines and aims to examine how the concept of mitigating circumstances has evolved over time and whether it has been effectively implemented. Further, this paper explores the importance of mitigating officers in death penalty cases and their role in addition to that of a lawyer. Its significance lies in exposing procedural gaps that compromise fair sentencing and advocating for a reformatory approach to capital punishment. This study employs a doctrinal approach, analyzing key judicial precedents and empirical sentencing data,

Evolution of the Concept of Mitigating Circumstances

In 1973, when a new CrPC was enacted, the requirement of

taking into consideration the "special reasons"⁴ for choosing the death penalty over life imprisonment was introduced. Since then, the ambit of special reasons has become more dynamic and inclusive of the rights of the accused. One such harbinger of this change is the landmark judgment of *Bachan Singh v. State of Punjab*⁵ where the court overruled *Rajendra*⁶ and held that both mitigating and aggravated circumstances collectively need to be considered in death penalty cases. In this case, the Rarest of Rare case doctrine was introduced in the realm of Death sentence cases where it is proven that the accused is beyond the scope of reform or rehabilitation, thereby unquestionably foreclosing the option of life imprisonment and then only the death penalty to be imposed, the responsibility of proving the same falls squarely on the State if the accused cannot provide sufficient mitigating circumstances.

Later, the *Macchi Singh*⁷ ruling, despite being widely cited, did not provide a structured framework for identifying the 'rarest of rare' cases. Instead, it emphasized that such cases are those where "the collective conscience is so shocked that it will expect the holders of the judicial power center to inflict the death penalty irrespective of their personal opinion as regards the desirability or otherwise of retaining the death penalty." In *Gurvail Singh*⁸, the Court attempted to establish a framework to mitigate crime-centric reasoning in capital cases but adopted 'collective conscience' as a relevant indicator.

Now, "conscience of the community"⁹ is an ethical subject which is different for everyone and varies from judge to judge, leading to inconsistencies. The report found that a society-centric penological goals were invoked in 76 (53.1%) of all 143 sentencing judgments. Of these, only 5 (7.04%) commutation judgments disapproved of the invocation of the society-centric goals as a signpost guiding sentencing discretion in capital cases.

¹ *Bachan Singh v. State of Punjab*, (1980) 2 S.C.C. 684.

² *INDIA CONST.* art. 141.

³ *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597.

⁴ Code Crim. Proc. § 354(3) (India).

⁵ *Bachan Singh*, (1980) 2 S.C.C. at 684.

⁶ *Rajendra Prasad v. State of Uttar Pradesh*, A.I.R. 1979 S.C.C.

646.

⁷ *Machhi Singh v. State of Punjab*, A.I.R. 1983 S.C.C. 470.

⁸ *Gurvail Singh v. State of Punjab*, A.I.R. 2013 S.C.C. 713.

⁹ *Death Penalty and Indian Supreme Court Report (2007–2021)*, Project 39A, NLU Delhi, <https://www.project39a.com/death-penalty-and-the-indian-supreme-court> (last visited Feb. 8, 2025).

Adding to the list of Mitigating circumstances, the Supreme Court held that ‘economic depravity’¹⁰ may lead a person to crime, and thus, socio - economic factors could amount to mitigating circumstances. It linked crimes committed due to socio - economic backwardness to the likelihood of reformation, presumably based on the understanding that persons who are driven to crime due to poverty rather than innate criminality shall be amenable to being reformed and rehabilitated.

The existence of dependents/family members of the offender, undeserved adversities of childhood,¹¹ and Other Equity Factors like Old Age¹² and mental and physical Illness¹³ could amount to mitigating circumstances. However, the report found that the existence of dependents/family members of the offender was treated as a mitigating circumstance in 6 commutation judgments, while it was rejected as a mitigating circumstance in 3 judgments (1 commutation and 2 confirmation judgments).¹⁴

Regarding the question of Reformation and Rehabilitation, the Supreme Court has inexplicably stated that assessing an individual’s capacity for reformation is necessarily a ‘forward - looking’ enterprise. The circumstantial evidence of ‘unimpeachable’ and mitigating circumstances. It linked crimes committed due to socio - economic backwardness to the probability of reformation, presumably based on the understanding that persons who are driven to crime due to poverty rather than innate criminality shall be amenable to being reformed and rehabilitated. Also, ‘exceptional’ character can convince the court whether the penological goals of life sentence are foreclosed or not”¹⁵

Contemporary Developments to Bachan Singh

*“Howsoever careful may be the safeguards erected by the law before the death penalty can be imposed, it is impossible to eliminate the chance of judicial murder... the possibility of error in judgment cannot, therefore, be ruled out on any theoretical considerations.”*¹⁶

- Justice P. N. Bhagwati

The inconsistent application of the Rarest of Rare doctrine has led to concerns about arbitrary sentencing. As per the research of NLU Delhi¹⁷; out of 106 judgments in 12 judgments no clear reasons for the death sentence were considered while in the other 94 judgments, the majority of the judgments were offender - related mitigating circumstances only in a few cases of a multi - disciplinary approach was taken towards the

mitigating factors. The Trial Courts report found that trial courts failed to even mention mitigating factors in 40.2% of cases, let alone to qualitatively consider them. In 16.7% of cases, life imprisonment was not discussed. However, where it was discussed, 70% of the reasons for dismissal were crime - and criminal - related aggravating factors.

In the case of *Damu*, the court considered ignorance motivated by Superstition as a mitigating ground, but in the case of *Sushil Murmu*, the accused was sentenced to death, and the superstition was termed as vague.¹⁸

Another instance of the apex court passing the order of death sentence in per incuriam involving 5 people where one of the accused was a juvenile, who when examined by the Psychiatrist¹⁹ tells how he lived in inhumane conditions at jail only to know after years that all of them were falsely implicated.²⁰

What could be more disheartening is that the Judges themselves admit that 12 men across the country are erroneously sentenced to death.²¹ This clearly shows that still, it is the crime, not the criminal, which is germane for consideration. This letter was too late for the two innocents already executed.²²

While *Manoj v. State of M. P.*²³, turn out to be progressive in its approach as after conviction court asked for reports from the probation officer, jail authorities, a trained psychiatrist, and a psychologist to assist the accused in presenting mitigating circumstances before hearing the matter for submissions on sentence the judgment of *Manoj Pratap Singh v. State of Rajasthan*²⁴, seemed to return to zero where the sentence was awarded 3 days after the conviction, after considering both the aggravating and mitigating circumstances.

All these aforementioned inconsistencies show that even after explicit guidelines, the courts specially Trial Courts are arbitrarily imposing death penalties. The contradictory judgments even after 42 years of the Bachchan Singh case, the courts do not seem to progress much or have tried to refine the ambits of mitigating circumstances.

Contemporary Development to Bachan Singh

Like in geometry, two triangles can be similar but not the same facts of the two cases can be similar but not same. Therefore, to present a straight - jacket formula for all the

¹⁰ *Mulla & Anr v. State of Uttar Pradesh*, (2010) 3 SCC 508.

¹¹ *Sunil Damodar Gaikwad v. State of Maharashtra*, (2014) 1 S.C.C. 129.

¹² *Mulla*, (2010) 3 S.C.C. 508.

¹³ *Yakub Abdul Razak Memon v. State of Maharashtra*, (2013) 3 S.C.C. 215.

¹⁴ Project 39A, supra note [9].

¹⁵ *Swapan Kumar Jha @ Sapan Kumar v. State of Jharkhand*, (2019) 13 S.C.C. 579.

¹⁶ *Bachan Singh v. State of Punjab*, (1980) 2 S.C.C. 684.

¹⁷ *Death Penalty Sentencing in Trial Courts* [Delhi, Madhya Pradesh, and Maharashtra] (2000–2015), Project 39A, NLU Delhi, <https://www.project39a.com/dpsite/> (last visited Feb. 10, 2025).

¹⁸ *State of Maharashtra v. Damu*, (2000) 6 S.C.C. 269.

¹⁹ Prachi Bhardwaj, *SC Acquits 6 Falsely Implicated Death Row Convicts in a 16-Year-Old Crime; Orders Reinvestigation*, The

SCC Online Blog (Mar. 6, 2019),

<https://www.sconline.com/blog/post/2019/03/06/sc-acquits-6-falsely-implicated-death-row-convicts-in-a-16-year-old-crime-orders-reinvestigation/> (last visited Feb 10, 2025).

²⁰ *Ankush Maruti Shinde v. State of Maharashtra*, 2019 S.C.C. OnLine S.C. 317.

²¹ *Former Judges Call for Commutation of the Death Penalty*, The Hindu (Aug. 22, 2012, 12:34 AM), <https://www.thehindu.com/news/national/former-judges-call-for-commutation-of-death-penalty/article3804480.ece>.

²² *Ravji @ Ramachandra v. State of Rajasthan*, (1990) 2 S.C.C. 231.

²³ *Manoj v. State of M.P.*, 2021 S.C.C. OnLine S.C. 3219.

²⁴ *Manoj Pratap Singh v. State of Rajasthan*, 2022 S.C.C. OnLine S.C. 768.

cases of the Death Penalty is an impossible task. But an attempt can be made to decrease the inconsistencies and one such attempt has been recently made in the celebrated judgment of *Manoj Kumar v. State of M. P.*²⁵ has framed guidelines for the evaluation of the mitigating circumstances and categorized few as the age, and early family background, present family background, type and level of education, socio-economic background (including conditions of poverty or deprivation, if any), criminal antecedents (details of the offense and whether convicted, sentence served if any), Income and the kind of employment; other factors include the history of unstable social behavior, mental or psychological ailments, alienation of the individual.

Recently, in case²⁶ to ensure that a psychiatric and psychological evaluation of the accused is carried out, Ms. Nuriya Ansari²⁷ along with a mitigation investigator, is granted permission by the Supreme Court to take an in-person interview of the accused. The interviews are to be kept confidential, and Ms. Ansari has access to documents about the applicant and directs the Respondents to set up video conferencing facilities so that the applicant can speak to the legal representative. In another case²⁸, the court permitted the Mitigation Associate at Project 39A, Shruthi, to conduct an interview with the accused, which was made possible only after the progressive judgment of Manoj.²⁹

Why A Mitigating Investigator is Indispensable?

The center of gravity of all legal developments lies in society itself.³⁰ The living law is the governing fact that governs the conduct of human beings and to understand the same social conditions of a person needs to study thoroughly. Mitigation is one such way to do so by using the tool of behavioral science and it can be defined as:

*“An exercise of collection, documentation, and analysis of a wide range of information like historical, cultural, social, familial and individual factors, and any other relevant factors that influence an individual’s perception, response and understanding of the world and the people around them. Its purpose is to better appreciate the social and individual context and circumstances of the accused while determining the extent of their culpability and blameworthiness about the death penalty.”*³¹

While a lawyer focuses on the facts of the case and law points, a Mitigation officer presents a comprehensive psycho-social

history of the client. Death Penalties and other harsh punishments are often perceived by their recipients as dehumanizing resulting in feelings of resentment and psychological reactance. Recipients of coercion do not function as effectively as those permitted self-determination.³² The concept of mitigation officer is much more evolved in the USA, which can be understood from the fact that as per the ABA Guidelines³³, the Mitigation officer is an indispensable member of the defense team as he possesses the clinical and psychological skills of information gathering that a lawyer does not have as there can be some personal information and hush-hush topic which a person usually refrains from telling even his lawyer.

The function of the law is to balance the competing interests in society.³⁴ Lawyers are social engineers who with the help of law, maintain the balance between individual, public, and social interests. Since mitigating circumstances are multi-faceted in nature, the same person can't be appointed for every death penalty case. For this very purpose, lawyers need to be well-equipped with multidisciplinary approaches to an instant matter at hand. As per the need of the case, different psychological, clinical, psychiatric, and medical qualifications are required. Here, the lawyer needs to act as a guiding light and guide the court and mitigation officer while determining the mitigating circumstances.

Generally, it is understood that the mitigating investigator's role comes into action at the penalty stage. But what we have to understand is the humility of the accused is attached to every step of the trial. In the words of Professor Craig Haney³⁵, it becomes quite difficult to change the perception of the judges about the criminal once they already formed an opinion about his personality and convicted him. Premature decision-making is pervasive, in most cases, judges already know what punishment needs to be given even before the sentencing phase, even during the guilt-innocence phase. That is why it is of utmost importance that counsel with the aid of a mitigation investigator presents the mitigating circumstances since the beginning of the trial.

2. Conclusion

Remarking on the words of Justice Krishna Iyer, “*Society must strongly condemn crime through punishment, but brutal deterrence is fiendish folly and is a kind of crime by punishment. It frightens, never refines; it wounds never heals.*”³⁶ Mitigation provides for the humane model to approach

²⁵ Id.

²⁶ *Ramkirat Munilal Goud v. State of Maharashtra*, 2021 S.C.C. OnLine Bom 4562.

²⁷ CrIMP No. 91490/2022 (A criminal miscellaneous petition filed by Project 39A, a legal aid initiative under National Law University Delhi, providing pro bono representation to death row convicts. Ms. Nuriya Ansari, an Applied Psychology postgraduate from Amity University, serves as a mitigating investigator at Project 39A).

²⁸ *Irfan @ Bhayu Mevati v. State of Madhya Pradesh*, 2022, <https://indiankanoon.org/doc/92874343/>.

²⁹ Gursimran Kaur Bakshi, *Individualised and Informed Sentencing Inquiry is Necessary, Says Team from NLU's Project-39(A)*, NewsClick (July 9, 2022).

³⁰ Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Vol. 5, Transaction Publishers 1975).

³¹ P. Verma, *The Inevitable Inconsistency of the Death Penalty in India*, 6 *CAMBRIDGE L. REV.* 24 (2021).

³² Bruce J. Winick, *Therapeutic Jurisprudence: Enhancing the Relationship Between Law and Psychology*, 9 *Law & Psychol.: Current Legal Issues* 30, 30-48 (2006).

³³ Nicholas D. Capiello, *A Problem with Deadly Consequences*, 31 *Geo. J. Legal Ethics* 561 (2018).

³⁴ S. A. Gochhayat, *Social Engineering by Roscoe Pound*, 3 *Issues Legal & Pol. Pol'y* (2010)

³⁵ Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 *Stan. L. Rev.* 1447 (1996).

³⁶ V. K. Iyer, *Justice in Prisons: Remedial Jurisprudence and Versatile Criminology*, in *Punishment and the Prison: India and International Perspectives* (Rani Dhawan Shankardass ed., 2000).

criminal law and keeps the spirit of Reformatory Theory high. With due consideration to the research aforementioned, it is crystal clear that with a multi - disciplinary approach being applied to almost every field, the law cannot remain untouched by this trend to do justice to the reformatory jurisprudence and the principles of the Constitution of India. We cannot just rely on the pro bono initiative of the mitigating investigators to resolve the death penalty matters. The state needs to come up with a mechanism for appointing mitigating officers in every case related to the death penalty. Given the persistent judicial inconsistencies and procedural gaps highlighted, integrating mitigation investigators is not just a reformatory ideal but a constitutional imperative.