



Saving Jadhav

Pakistan's adherence to international law will be under test in proceedings before the ICJ

India's decision to approach the International Court of Justice (ICJ) to stall the possible execution of Kulbhushan Sudhir Jadhav in Pakistan is an unusual move impelled by the peculiar circumstances of the former naval officer's case. Sentenced to death by a military court after what was a summary and arguably bogus trial, he is in imminent danger of execution. His case now hinges on an appeal against his conviction on charges of espionage and on petitions for mercy before Pakistan's Chief of Army Staff and President. India's main contention is that Pakistan had committed "egregious violations" of the Vienna Convention on Consular Relations by repeatedly denying consular access to Jadhav for over a year. His family members have not been issued visas to travel to Pakistan and help him pursue appellate remedies. Pakistan had also linked the consular access issue to India's "assistance" in its investigation into Jadhav's alleged activities. With India instituting the case, the ICJ President has written to Pakistan to act in such a way that any order passed by the court would have its appropriate effect. While this virtually operates as a stay on Jadhav's execution, a substantive interim order is expected only when the court hears India's application for "provisional measures" at its hearing on May 15, pending adjudication of its plea for declaring Pakistan's actions as violative of international law. New Delhi's position is that Jadhav is innocent and that he was "kidnapped" by Pakistani agents from Iran.

On the face of it, India's decision to move the ICJ may appear somewhat incongruous in the light of its position against internationalising its disputes with Pakistan. However, this is not the first time that it has approached the world court against Pakistan. In 1971, it wanted the ICJ to decide the limited question whether the Council of the International Civil Aviation Organisation had the jurisdiction to question India's suspension of overflight rights to Pakistani aircraft. India has every claim to approach the ICJ to protect the life and rights of its nationals. One round of focussed legal proceedings does not amount to giving up its stated position on resolving other issues on a bilateral basis. However, it is likely to face a stiff challenge from Pakistan both on merits and by way of preliminary objections. Pakistan is likely to argue that consular access to Indian prisoners on its territory is governed by a bilateral agreement signed in May 2008. It is likely to quote a clause on reciprocal consular facilities that says, "in case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merit". While Pakistan is free to cite legal and technical points in its favour, it hardly requires iteration that it should avoid any precipitate move that would frustrate the ongoing proceedings before the ICJ. Pakistan's adherence to international law will be under test.

Simply the best

Jhulan Goswami's haul of wickets is a story of her greatness and the system's lack of interest

Jhulan Goswami's successful appeal for leg before wicket against South Africa's Raisibe Ntozakhe in the Quadrangular Series match at Potchefstroom in South Africa is as historic as the late cut that Sunil Gavaskar essayed off Pakistan spinner Ijaz Faqih in the Ahmedabad Test in 1987. Both were path-breaking moments. Goswami's strike helped her get 181 wickets and emerge as the highest wicket-taker in women's One-Day Internationals, breaking Australian Cathryn Fitzpatrick's haul of 180. Gavaskar's stroke helped him reach a then-unheard-of batting milestone: 10,000 Test runs. The obstacles Goswami has had to surmount, though, are perhaps more formidable than what Gavaskar had to counter, in the sense that hers is also a contest against a patriarchal system steeped in gender prejudices. In the context of women's cricket and the limited opportunities it offers or the sexist disdain for a woman fast bowler's claim to greatness, the achievement is mind-boggling. The 34-year-old from Bengal astutely led the seam attack, her tall frame and the power in her sinews used to good effect at the bowling crease. The rewards for her speed and consistency have been emphatic, and currently with 271 international wickets spread across ODIs, Tests (40 wickets) and Twenty20 Internationals (50), she is the highest wicket-taker among women.

Goswami's rise from Nadia in Bengal to her current iconic status is an inspiring tale. It isn't easy to sustain as a woman cricketer over an international calendar that has more gaps than games. Sample this. Since her debut in 2002, Goswami has played 153 ODIs while M.S. Dhoni, following his maiden limited overs game in 2004, has represented the country in 286 matches. This, while Test matches are becoming a rarity in the women's international calendar, and the Board of Control for Cricket in India adheres to the priorities of the men's team while sending, or not sending, teams to tournaments such as the Asian Games, thus depriving Indian women cricketers of the precious opportunity to prove themselves on a big stage. Certainly, the Board has helped in the rise and recognition of Indian women's cricket, but it is still too gradual. The BCCI offered central contracts to the women's team since 2015, and this year, thanks to the Committee of Administrators' (CoA) recommendation, gave the Lifetime Achievement award to former India captain Shantha Rangaswamy. This in itself is a remarkable turnaround for a sport that even at the beginning of the new millennium banked on the players to sustain themselves more than any other sports federation. If Indian women's cricket has gained a foothold over the recent years, Goswami and teammates like her skipper, Mithali Raj, have played a decisive part in it. Jhulan Goswami is a pioneer.

The jurisprudence of outrage

Severity in the award of a death sentence invariably flows in the name of society



K. VENKATARAMANAN

There was nothing unexpected about the final verdict of the Supreme Court in the 'Nirbhaya' case. Given the public outcry for justice and the inherent brutality of the rape and murder of the physiotherapy student in Delhi in December 2012, the award of the death penalty to those found guilty is unsurprising. The fact that a juvenile offender involved in the heinous offence was let off after the statutory maximum period of confinement in a juvenile home had already given vast sections of the public an impression that at least one of the infamous six had walked free. This factor may have increased the burden of expectation on the court, rendering it even more difficult than it was to award a lesser sentence to any of the four available for trial and sentencing after the suicide of Ram Singh, the apparent ringleader, while in prison. The court's reasoning for sentencing all the four to death is steeped in the language and jurisprudence of outrage.

A moral dichotomy

Prosecutions are always in the name of society and the forensic claim that all criminal justice is about the twin objectives of protecting society and deterring crime has a hoary history. While leniency in sentencing is seen as an individual benefit flowing from a judge-centric approach to justice, severity is invariably in the name of society. Thus, in the maze of Supreme Court decisions that set out



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judicial reasons for awarding or avoiding the death penalty, there is a clear moral dichotomy in approach. Verdicts that spare the lives of the guilty take recourse to norms that have limited social appeal: for instance, that the accused are relatively young, not habitual offenders, that there is scope for reform or that the crime was not premeditated or was a result of a rare lapse. Those that allow capital punishment, on the other hand, not only contain normative reasoning that seeks to slake social thirst for retribution but also use strong descriptive elements to win over a wider audience. They often argue, for instance, that the crime has shocked society and the collective conscience, that it was brutal, depraved or caused extreme and intense indignation.

In the Nirbhaya case, too, the citations inevitably lead to the main point drawn from *Machhi Singh* (1983) that capital punishment is to be given in the rarest of rare cases "when its collective conscience is so shocked that it will expect the holders of the judicial

power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty." There are repeated references to "collective conscience" and "society's cry for justice". There is little doubt that the national outcry that the gruesome incident evoked is at the heart of the ultimate outcome, as the defence lawyers and *amicus curiae* appointed by the court argued in vain for separate assessment of the mitigating factors in respect of each individual convict rather than a common set of reasons.

Any critique of the judgment, however, will suffer from the same infirmities inherent in pitting social conscience against individual destiny, a classic contest between the jurisprudence of outrage and the dispassionate dispensation of criminal justice. Unless it is conceded that it is difficult to blame the court for its approach in the face of a social outcry, it is not possible to confront the consequences of two factors that stand out whenever the death penalty is

awarded: the apparent inconsistency in applying the 'rarest of rare cases' rule and the lack of restraint that the 'collective conscience' theory can engender.

'Atmosphere' and sentencing

It is not in every case involving the rape and murder of a minor that the court has sanctioned the death sentence. Similarly, courts have included or excluded bomb blasts, assassinations and incidents of communal carnage without regard to consistency. It was somewhat ironical that the 'Nirbhaya' judgment came a day after the Bombay High Court upheld life sentences in the Bilkis Bano case, but declined to enhance them to capital punishment, even though it involved the rape of three women and the massacre of 14 Muslims, including a child. It may be improper to compare an emblematic case of gender violence with one of many incidents that took place as part of a communal pogrom in Gujarat. However, there are similarities in the underlying pathology behind the Nirbhaya and Bilkis Bano cases. Both involved rape and murder, both were opportunistic acts, and there was absence of premeditation and provocation. However, an obvious difference is the atmosphere in which they took place, one on a peaceful night in the national capital, and another in the charged backdrop of the Godhra violence and its aftermath. The question may now be academic, but is 'atmosphere' an aggravating or a mitigating circumstance when it comes to sentencing policy?

When the Supreme Court evolved the 'rarest of rare cases' doctrine, the idea was to leave only a small window open for a sentence of death, life term being the norm. There is a real danger that

yielding to collective clamour may widen this window and throw it open for more frequent resort to the extreme penalty. One of the likely consequences is that it may become easier to cite shock and indignation in society to justify the death penalty in a given case. Articulating the view that the case has shocked the conscience of the court and society does not require elaborate reasoning, but only an impressive choice of words, of which there are plenty, that express outrage. The question of how the judiciary will rise above the collective clamour for retributive justice will loom large in the future.

For consistency and clarity

One of the foremost requirements in death penalty jurisprudence today is the need for consistency in applying the 'rarest of rare' rule, and for clarity on what satisfies the collective conscience. Is a perceived sense of outrage in society the test, or is it the sheer enormity of the offence? On merits and evidence, it is difficult for anyone to argue that the gang rape on a moving bus on a wintry night in Delhi was not marked by unusual brutality and depravity, warranting severe punishment. It is equally difficult to disagree with the court that the aggravating circumstances far outweigh the mitigating factors. The locus of the problem of applying the death penalty whenever there is a sense of intense indignation in society, therefore, does not lie in the facts of the case or in the text of the judgment, but in the wider domain of criminal jurisprudence. As long as imposing death is available as a form of punishment, the moral dilemma that every judge faces is inescapable.

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A different kind of opponent

As the BJP eyes States such as Odisha, it has to shape its politics relative to dominant regional parties



SANJAY KUMAR & PRANAV GUPTA

The recent cabinet reshuffle in Odisha by Chief Minister Naveen Patnaik seems to be clearly aimed at preparing his Biju Janata Dal (BJD) for the impending clash with the Bharatiya Janata Party (BJP) in the 2019 Assembly and Lok Sabha elections in the State. In advance preparation for the 2019 Lok Sabha election, the BJP is already looking towards expansion in new States, with Odisha being one on them. But the task may not be as easy as the BJP may think.

True, when the elections will be held in 2019, the ruling BJD would be facing an anti-incumbency of two decades but this may not be enough for the BJP to stage a victory in Odisha. The BJP may get a larger share of the anti-BJD votes, but some of these votes would get transferred to the Congress as well. The Congress may no longer be a strong political force in the State but only a Delhi-like decline of the

party can clear the way for BJP to emerge victorious.

Road ahead

There is hardly any doubt that the BJP is on an expansion mode in Odisha and is gaining popularity. Trends from the local body election clearly indicate that the BJP cannot be dismissed as a marginal player in State politics. For the first time in many years, the BJD faced stiff competition in the local body polls. While the BJD led in the civic polls, the BJP stood second by winning 297 Zila Parishad seats out of 853. The Congress was a distant third, winning only 60 seats. These results seem to indicate that the BJP has already replaced the Congress as the principal alternative to the BJD in the State. In 2019, the BJD would have been in power for close to two decades. It is expected to face greater anti-incumbency, in the face of allegations of corruption against Mr. Patnaik's government and infighting in the party.

Nonetheless, the BJP faces an uphill task in Odisha. It needs to increase its vote share significantly if it wants to defeat the BJD. In the 2014 Lok Sabha and Assembly elections, the BJP's vote share was lower than the Congress's. The BJD's vote share in the Legislative



Assembly (43%) was almost equal to the combined vote share of the BJP (18%) and the Congress (26%). This indicates that a mere shift of a section of Congress voters may not be enough for the BJP. Support among Adivasis is critical for any party in Odisha as they constitute more than a fifth of the State's population. Data from post-poll surveys conducted by Lokniti-CSDS in the State show that support for the BJP has been relatively lower amongst the Adivasis as compared to upper castes and OBCs. In the 2014 Lok Sabha election, less than a fifth of the Adivasis (18%) had voted for the BJP, slightly lower than the party's overall vote share. Though the BJP did well in some tribal-dominated districts such as Malkangiri and Kalahandi in the civic polls, a lot more needs to be

done by the party. The BJP's performance would depend a lot on whether its leaders from the State, Union Ministers Dharmendra Pradhan and Jual Oram are able to match Mr. Patnaik's popularity. Also, drawing lessons from its own victory in Assam, the BJP would know that on-ground organisational presence across the State is a critical factor. Currently, its organisational network in Odisha is relatively weak and inadequate for taking on the BJD. For instance, in the local body polls, the party was able to appoint booth-level teams in only about 35,000 out of the State's 92,000 polling booths.

A small increase

Though difficult, it may still be possible for the BJP to expand in Odisha, but in the other major States where the BJP hopes to make inroads on its own, namely West Bengal, Kerala and Tamil Nadu, the task may be far more difficult. In West Bengal, the party has performed well in some bypolls held after the 2014 Lok Sabha election but failed to consolidate these gains in the 2016 Assembly elections. At the moment, it seems that the rise of the BJP would only lead to a division of the anti-TMC votes in the short run and end up helping

the Trinamool in holding on.

In Tamil Nadu, the 'third front' built by the party in the 2014 Lok Sabha election collapsed before the 2016 Assembly elections and it received just around 3% of the votes when it contested on its own. The BJP replicated its 2014 Lok Sabha performance in the Kerala Assembly election and managed to open its account in the legislative assembly. But with just around 11% of the votes, it remains far behind both the UDF and LDF. It is evident that despite some positive developments, there may not be any dramatic change in the BJP's performance in these States.

In the recent past the BJP has managed to win elections in many States with the clarion call for a 'Congress-Mukt Bharat'. With the presence of strong regional alternatives in all these States where BJP is eyeing expansion in 2019, an anti-Congress sentiment will not be enough. The BJP needs to convince the voter why it can offer better governance than both the Congress as well as the dominant regional parties.

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LETTERS TO THE EDITOR

Letters emailed to letters@thehindu.co.in must carry the full postal address and the full name or the name with initials.

The Karnan case

The unpleasant situation arising out of Justice Karnan's pronouncements and his behaviour should serve as a 'wake-up' call ("Karnan wants SC to recall order", May 13). It is not enough to think in terms of enforcing rules and regulations as it would be viewed as a strangulation of the freedom of speech. The more fundamental problem that needs to be addressed is a sound procedure in selecting judges. Taking the cue from the system used in the administrative, police, railway and the revenue services, a similar approach is required in judicial administration as well. A body of young and meritorious law graduates passing a gruelling exam to become a member of an 'Indian Law Service (ILS)' must be put in place. These law officers can be promoted over a period of time based on certain criteria to become judges across the country. The selection of judges should be from this pool of meritorious law officers. If we can make the judiciary stronger, we can arrest the growing erosion of faith in the judicial system.

Unfortunately, our democratic process has created a feeling that one has to create a ruckus in order to be heard. We need a good system put in place before such anarchic behaviour becomes the norm.

S. MOHANAKRISHNAN,
Chennai

Sinking Valley

The situation in the Kashmir Valley is deteriorating by the minute. The near unanimous call by top defence officials dealing with the Kashmir situation for urgent political intervention requires the Centre to rethink its unwavering status quoism on Kashmir. Such a call reflects that the situation is slipping out of the hands of the government. Further procrastination may only lead to a situation of antisocial elements gaining the upper hand both within and outside the State. The Army's unrelenting and tireless efforts need to be complemented and supported by efforts from the top civilian administration. The recent spectacle of a 'gun salute' for a militant displays the

gravity of the situation in the Valley.
ATIN SHARMA,
Jammu

Approaching the ICJ

India's move of approaching the International Court of Justice to get a stay on the death sentence of former Indian Navy officer Kulbhushan Jadhav is a retrograde step in the management of our external affairs. We have always taken a position that issues concerning Kashmir *vis-à-vis* Pakistan are to be settled bilaterally and have even resisted intervention by any third party. We seem to have played into the hands of Pakistan, which will now find justification in taking the Kashmir problem to the international court on grounds of human rights.

A. RAGHUNATH,
Bengaluru

No prosecution

The Uttar Pradesh government's decision to decline sanction to prosecute Chief Minister Yogi Adityanath for his "provocative" speech, which allegedly led to communal riots in Gorakhpur in 2007, shows how far citizens are from

'equality before law' (May 12). It has once again been proved that the truth continues to be 'all are equal, but some are more equal than others'. It is clear that this decision stems from his VIP status. The hollowness of Prime Minister Narendra Modi's claim, hardly a month back, announcing a 'ban on beacon lamps for VIP cars' and that "a strong beginning has been made to erase the VIP culture in the country", followed by Union Minister M. Venkaiah Naidu's statement that "everybody is a VIP" needs no elaboration. The Prime Minister has chosen an inverted priority. Perhaps, beacons could be the last priority and true 'equality before law' the first.

P.R.V. RAJA,
Pandalam, Kerala

The death penalty

Despite vociferous demands to dispense with capital punishment in a civilised society, the fact remains that crimes especially against women have grown exponentially in recent years ('Left, Right, Centre' - "Should we do away with Capital Punishment?", May 12). The Nirbhaya case is

standing testimony of the need to retain the death penalty in the statute books. Doing away with capital punishment without factoring in the ground realities will only embolden potential perpetrators to commit heinous crimes.

P.K. VARADARAJAN,
Chennai

The Bieber flop show

That the much-celebrated Justin Bieber show turned out to be a flop is not surprising ('Life' page - "Bieber's lip-synching leaves fans furious", May 12). There has been more hype than substance around pop music barring the Beatles group who lived up to their

image. In comparison, Indian singers such as SPB and Lata Mangeshkar have been true and popular. They have never resorted to lip-synching or limited their singing to four choices. Recent live concerts by SPB across the world have drawn a full audience. Our singers' concerts are not expensive also unlike the Bieber show. I would like to recall Osibisa, the troupe that took India by storm. Some of their songs were remade in Indian film music. I wish our native singers are given their due.

A.V. NARAYANAN,
Tiruchi

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CORRECTIONS & CLARIFICATIONS:

In the Business page report headlined "Central coal unions may go on 3-day strike" (May 11, 2017) there was an erroneous reference to Singareni Coal Company. It should have been the Singareni Collieries Company.

A sentence in "Navigating between friends" (April 27, 2017, Editorial page) read: "Among the commercial agreements ... between Iran, the five permanent members of the United Nations Security Council and the *European Union*", is ... 80 passenger aircraft. It should have been: "Among the commercial agreements ... between Iran, the five permanent members of the United Nations Security Council and *Germany*) is ... 80 passenger aircraft."

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