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Essay

Trapped between Law and Politics: The Law Commission of India's Report on Death Penalty

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*The Report of the Law Commission of India on the Abolition of Death Penalty may appear to have shaped popular thinking in favour of doing away with capital punishment in India, except for 'terrorism related offences'. However, as **Rajgopal Saikumar** analyses, the Report fails to convincingly argue the case for the continuation of death as a form of punishment.*

Introduction

It is increasingly becoming difficult to explain the stubborn persistence of death penalty in democracies, globally. We have strong moral-philosophical arguments against it, a jurisprudence to ground its abolition, and evidence-based empirical research that shows the ineffectiveness of death penalty, and yet, it persists. Let us take the recently published Law Commission of India (LCI) Report ¹ as a microcosm of the debate. Almost all standard arguments against death penalty were accepted as valid by the LCI, and yet, the Report ultimately ends up justifying the death sentence in cases of terrorism. Creating such a “state of exception” ² has become a definitive marker of our times. How does the LCI “justify” the exception of terrorism, while simultaneously agreeing with all the grounds for abolition of the penalty — grounds which are more or less universal in scope? ³

In the first part of the essay, I discuss LCI’s reasons for abolishing death penalty. In the second part, I explore their reasons for excluding ‘terrorism’ from this abolition. And in the third part, I read the arguments given by members of the LCI who disagree and reject the recommendations in the Report.

In conclusion, I merely *hint* at two ways of looking at the persistence of death penalty in democracies:

(a) that the LCI report is yet another instance of how the modern state creates ‘states of exception’ to rationalise and justify its transgressions of the ‘rule of law’, and that creating states of exception is inherent to “sovereignty” — this is the philosopher G. Agamben’s argument in *State of Exception*; and

(b) it is not due to lack of “reasons” (moral and legal) that death penalty persists, but the “will of the people” (political) holding on to this form of punishment. And the ‘will of the people’ is engulfed in a discourse of ‘fear’, ‘insecurity’, believing in the myth of ‘deterrent effects of death penalty’, the fear of terrorism, minorities, outsiders, xenophobia etc. Our problem, therefore, is not one of “reasons” (legal, empirical, moral), rather, it is at the realm of the “political” (fear, insecurity, passion, nationalism), and “reasons” cannot be abstracted from the political and emotive contexts.

Part I: The LCI agrees with the following arguments for the abolition of death penalty:

First, it acknowledges that all humans have an inalienable right to life and liberty, and reiterates core principles of human dignity and respect as universal. It is important to note that this is a universal claim theoretically applicable to all humans (typical of the human rights discourse; and yet, the LCI strategically excludes terrorists from this universal claim).

Second, the LCI acknowledges that the death penalty does not serve the goal of deterrence. It also rejects the retributive claim, stating that the notion of “an eye for an eye” has no place in our constitutionally mediated criminal justice system, and so “capital punishment fails to achieve any constitutionally valid penological goals”. ⁴

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Third, the LCI acknowledges that police investigation is often poor, victims are not well-represented by lawyers, and the criminal justice system is ailing with problems such as undue delay. And so, the probability of error in a judgment is rather high. Given the irrevocable nature of the death sentence, such punishments would be unfair.

Fourth, although *Bachan Singh* ⁵ laid down the “rarest of rare” as a “demanding and compelling” standard, the evolution of this guideline has been tragic. In the 1996 Supreme Court decision in *Ravji v. State of Rajasthan* ⁶, this ‘rarest of rare’ standard was completely ignored, departing from any notion of stare decisis, condemning two accused to death. Following *Ravji*, 13 persons were given the capital punishment ignoring the standards set by *Bachan Singh*. In *Bariyar* ⁷, the Court held that “there is no uniformity of precedents, to say the least. In most cases, the death penalty has been affirmed or refused to be affirmed by us, without laying down any legal principle”. That the application of *Bachan Singh* has been inconsistent, arbitrary, judge-centric rather than principled, has been repeatedly iterated in several Supreme Court judgments. ⁸

Fifth, the execution of clemency powers ⁹ by State and Union governments has been appalling, insensitive, delayed, procedurally inefficient, highly politicised by governments in power, and the decisions lack proper application of mind. ¹⁰

Sixth, racial, cultural, and class-based biases are deeply entrenched in our criminal justice system, given that the overwhelming majority of the convicts are from backward castes, Dalits and minorities; almost all of them are poor, from the poorer States, and at some point in the investigation, they were tortured into confessions ¹¹.

Part II: State of Exception- Terrorism

The LCI, therefore, agrees with the moral-philosophical reasons (right to life, liberty, dignity, universal in scope), judicial lapses (inconsistency in precedents, judge-centric, arbitrariness), irrevocable nature of the punishment (probability of error in judgment is high); instrumental reasons (that death sentence does not deter crime & vengeance is of little value); political reasons (misuse of clemency powers); and ideological concerns (systemic biases based on caste, religion, class, gender etc.). Still, in the very end, it places a “but”, by constructing an exception in cases of terrorism. Let us briefly explore what are the LCI’s reasons for recommending this exception.

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The Report, in effect, replaces “rarest of rare” with “terrorism” as the exception. So in creating an exception, the LCI has to argue why terrorism (whatever this vague term means) does not fall in any of the abovementioned reasons for abolition. For instance, they have to argue why so-called terrorists don’t fall under universal rights such as life, liberty and dignity (are they not humans?), or why ideological biases (for instance, invoking religious or identity politics in case of terrorism), will not interfere with the judicial system, or why deterrence would work for terrorists (contrary to all evidence) etc. But surprisingly, the LCI does not give a single such reason. ¹²

Chapter 4 (C), part (iii) deals with terrorism. The section begins by stating the lack of evident connection between terrorism and death penalty. It considers various arguments, such as (a) that death penalty is unlikely to deter terrorists who may often be in suicide missions anyway; (b) that death penalty is too adversarial and may in fact increase terror attacks, (c) they even quote Jeremy Bentham to suggest that executing terrorists, anti-nationals and rebels only makes martyrs out of them, inspiring them to rebel further, rather than to deter them. After exploring these possibilities, the report abruptly ends this section without countering any of these arguments. So, the only justification that the LCI offers to exclude terrorism is as follows:

“Although there is no valid penological justification for treating terrorism differently from other crimes, concern is often raised that abolition of death penalty for terrorism-related offences will affect national security. There is a sharp division among law-makers due to this concern. Given these concerns raised by the law makers, the Commission does not see any reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism related offences” (emphasis added by author).

So, in effect, the justification for excluding ‘terrorism’ is that the “law-makers” intend so.

I merely want to stress on a perplexing shift in the *nature of the argument*. Abolition of death penalty was grounded in a “constitutionalism” argument ¹³ (fundamental rights, rule of law). But in creating an exception, they suddenly take a “representative governance” argument — that citizens vote for their representatives, and it is ultimately they who have to decide. This sudden leap in registers, from a language of constitutional rights, to a language of majoritarian democracy — from an argument of constitutionalism to an argument of representative governance — is what is perplexing. That constitutionalism is often in conflict with representative governance is well known ¹⁴. In a representative government, ideally, the laws reflect the “unrestricted” will of the citizens, regardless of how it represents the ethos of the shared political life ¹⁵. Constitutionalism, on the other hand, sets limits on the people’s will, on their determination of the laws of the state. For instance, Rule of Law requires that the representative government not violate human rights of people. So, representative governance is contradictory to constitutionalism, or as Habermas calls it, “a paradoxical union of contradictory principles”.

As shown in Part 1 of this essay, the LCI’s reasons for abolition of death penalty have predominantly been on grounds of ‘constitutionalism’ and ‘rule of law’. But in creating an exception for ‘terrorism’, they conveniently shift gears to an argument of ‘representative governance’, a political claim. This is not to say that a constitutionalism argument is better than a political one, or vice versa, but the shift is arbitrary and on convenience.

Part III: Arguments in favour of the death penalty

Justice (Retd.) Usha Mehra, and Ex-officio members Dr. Sanjay Singh and P.K. Malhotra reject the recommendations of the LCI and, instead, reasserted their support for death penalty. The Appendix to the Report, twenty short pages, consists of their counter to this 200-page report. An initial glimpse will leave the reader curious about how they countered a deep, well researched and reasoned report in just twenty pages, with hardly any footnotes and references to support their claims. Not surprisingly, the counter is rather trite, banal, and lacking in research. I summarise their broad set of arguments as follows:

Human Fallibility Argument: As Justice Usha Mehra states in all wisdom, *“to err is human. Almighty alone is the dispenser of absolute justice. Judges of the highest court do their best, subject of course to the limitation of human fallibility”*. ¹⁶ As per this argument, error in judgment is obvious, yet this is not reason enough to abolish death penalty. In effect, she is suggesting that it is reasonable to kill a few innocent persons on account of errors in judgment and that these ‘accidental’ deaths are inevitable by-products of a system, and this by itself is no reason to abolish the punishment itself.

Fear and Insecurity Argument: P. K. Malhotra is of the opinion that *“in spite of economic development, improvement in the education levels, there is increase in the crime rates and overall cultural deterioration”*. ¹⁷ In a more apocalyptic tone, Malhotra even suggests that abolition of the death penalty may eventually lead to a time *“when the law will cease to exist”*. ¹⁸ He even refers to former U.S. President George W. Bush to note that *“the reason to support the death penalty is that it saves other people life”*. ¹⁹ Mr Malhotra alludes, without evidence, to the growing

threat of terrorism, increased cases of kidnapping and abduction for ransom, organised crime etc. as the reason for retaining the punishment. He, of course, presumes that deterrence works in order to make such an argument in the first place. And second, by whipping up fear and insecurity, he prevents us from reflecting on all the evidence that been repeatedly suggesting that death penalty does not result in deterrence of crime.

Due Process of Law Argument: These three members agree that there is an unbridled, arbitrary and judge-centric application of death penalty in most cases. But they assert their faith in 'due process of law', 'rule of law', procedural safeguards, checks and balances, to remedy this arbitrariness. As per this argument, the problem with death penalty in India is in its implementation, the problem is not essential, it is incidental. That is, the legal framework, in essence, can handle death sentence cases in a principled manner and so, as this argument goes, we just have to start doing it right.

Deterrence Argument: This is the all-famous "deterrence argument", a stubborn misconception that has rendered us blind to all evidence busting this myth. Yet, Dr Singh parrots this claim yet again:

"The capital punishment acts as a deterrent. If death sentence is abolished, the fear that comes in the way of people committing heinous crimes will be removed, which would result in more brutal crimes. All sentences are awarded for the security and protection of society and peaceful living of the people. Whoever committing a pre-meditated heinous crime...should not be allowed to go with life imprisonment...as they do not deserve for the same." ²⁰

Majoritarian Argument: This is the strongest argument against the abolition of death penalty stating that it is the law-makers (and majority of the citizens) who want to retain it. As Mr Malhotra states, "*The Parliament which reflects the will of the people passed law with death penalty for certain offences against women as late as in 2013.*" The Hijacking Bill that proposes death penalty also reflects the will of the people. With a paternalistic subtext, he laments that the will of the Parliament shows that looking into the prevalent situation in the country, the Indian society has not matured for total abolition of death penalty" ²¹ , and that the "time is not ripe" ²² yet.

No doubt that the majoritarian argument is the most difficult one to counter precisely because of the paradox built internally in a "constitutional democracy". That arguments of constitutional morality do conflict with "will of the people", and resolving it may be not be the easiest.

Conclusion

“How can the State first iterate a right to life, and without any logical inconsistency, legislate the taking away of this life?”

The philosopher Jacques Derrida points out a contradiction in modern law in Biblical terms. He asks: "So, how can God tell Moses [in the Ten Commandments]...*thou shalt not kill* and, in the next moment, in an immediately consecutive and apparently inconsistent fashion, "*you will deliver up to death whoever does not obey these commandments?*" ²³ Derrida is intrigued by how God can decree a law that is itself a "flagrant offence" of the Ten Commandments. How can the State first iterate a right to life and, without any logical inconsistency, legislate the taking away of this life? This inconsistency holds valid even for nations that are so-called "abolitionists" of death penalty, for they may uphold the right to life by abolishing death penalty but the very next moment snatch it away in the guise of a war on terrorism. I shall conclude with two broad set of remarks:

First, the manoeuvre, from a constitutionalism argument to a majoritarian argument (from legal to the political) in order to exclude “terrorism” ²⁴ is typical of what philosopher Giorgio Agamben called the “State of Exception”. The state of exception operates at the intersection of law and politics, wherein politics makes its entry via the suspension of the rule of law. The extra-judicial is both inside and outside the law. In the modern state, especially evident after 9/11, the exception has become the rule; a modus operandi that has become so common that separation of law and politics is collapsing. For Agamben, the state routinely suspends the ‘rule of law’ in order to preserve the ‘rule of law’, and the sovereign is the one “who decides on the state of exception” ²⁵. Just as Guantanamo Bay is an exception in American law ²⁶, or terrorists are an exception to the Rule of Law, or Jews were an exception to Nazi law ²⁷, refugees and sweatshop and, in the same vain, terrorism is the exception to LCI’s law. It is this ‘state of exception’ that defines and explains, even rationalises and justifies, our transgressions and injustices.

Second, the dominant arguments against death penalty is abstracted in a legal, philosophical and empirical language. Yet, the reason death penalty persists, as evident from the three detractors of the LCI Report, is not based on this language of abstract reason. Their support for death penalty is driven by passion, a discourse of fear, insecurity, blame, vengeance, xenophobic exclusionism, identity politics etc.

These two discourse are operating in parallel worlds ²⁸. As evident from the LCI’s own argumentative strategy of conveniently shifting from constitutionalism to representative democracy, and excluding terrorism on “political grounds”, the emotive and political cannot be abstracted, the anti-death penalty movement has to respond at this register of the ‘political’ as well.

References:

- 1.^ [Law Commission of India, Report No. 262 \(August, 2015\)](http://lawcommissionofindia.nic.in/reports/Report262.pdf)
(Original URL: <http://lawcommissionofindia.nic.in/reports/Report262.pdf>) (hereinafter referred to as LCI Report)
- 2.^ G. Agamben, State of Exception (2005)
- 3.^ To draw an analogy, this is like the American Constitution in 19th century which declared that every human has the inalienable right to life and liberty, and yet, did not find it contradictory to exclude slaves and non-Europeans from this.
- 4.^ LCI Report, p. 213
- 5.^ (1980) 2 SCC 684
- 6.^ (1996) 2 SCC 175
- 7.^ (2009)6 SCC 498
- 8.^ Alok Nath Dutta v. State of W.B (2007) 12 SCC 230; Sangeet v. State of Haryana (2013)2 SCC 452; Swami Shraddhananda v. State of Karnataka (2008) 13 SCC 767.
- 9.^ Article 72 and Article 161 of Constitution of India. Clemency is the power of the State and Central government to commute a death sentence after the judicial conviction and sentencing of the offender, in the final stage.
- 10.^ LCI Report, p. 174; Also see Shatrughan Chauhan v. Union of India (2014) 3 SCC 1
- 11.^ See [the research conducted by Death Penalty Research Project](http://www.catchnews.com/india-news/is-president-kalam-right-does-the-death-penalty-only-stalk-the-poor-1436544975.html) Also See <http://www.catchnews.com/india-news/is-president-kalam-right-does-the-death-penalty-only-stalk-the-poor-1436544975.html>; “Death Sentence Rate Highest in Delhi, J&K” (Tol)
- 12.^ Chapter 4(C)(iii) of the LCI Report deals with terrorism.
- 13.^ See Generally; Benjamin S. Yost “Rule of Law Abolitionism” in *Studies in Law, Politics and Society. Special Issue- Is Death Penalty Dying* (Vol. 42, 21-52)2008 p. 53-89

14. ^ Jurgen Habermas "Constitutional Democracy: A Paradoxical Union of Contradictory Principles" *Political Theory* Vol. 29, No. 6 (2001) 766-781; In the Indian context, Pratap Bhanu Mehta "The Rise of Judicial Sovereignty" *Journal of Democracy* (Vol. 18, No.2; 2007)

15. ^ Ibid, 766

16. ^ LCI Report Appendix A

17. ^ None of these claims are referenced, or grounded in proof and evidence. LCI Report, p. 240

18. ^ LCI Report P. 236

19. ^ LCI Report p. 236

20. ^ LCI Report. P. 232

21. ^ LCI Report p. 237

22. ^ LCI Report p. 242

23. ^ Jacques Derrida "The Death Penalty: Vol. I" transl. Peggy Kamuf (Chicago, 2013)

24. ^ Borrowing from Foucault, in the process of excluding and repressing 'terrorism', it effectively constructs, produces and defines 'terrorism' and 'terrorists'.

25. ^ This is Carl Schmitt's well-known definition of the Sovereign. Agamben's "exception" is located in a dialectic between Walter Benjamin's Critique of Violence and Schmitt's Political Theology. Homo Sacer and State of Exception deal with this concept.

26. ^ Lord Steyn, "Guantanamo Bay: The Legal Black Hole" in *International and Comparative Law Quarterly*, 2004 (Vol. 53, Issue 1)1-15

27. ^ D. Dyzenhaus 'Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar" (OUP, 1997) on the Constitution of the Weimar Republic between 1918 and 1933 on creating such laws of exception.

28. ^ For a discussion of this phenomenon in the American context, See, Susan A. Bandes "The Heart Has Its Reasons: Examining the Strange Persistence of the American Death Penalty" in *Studies in Law, Politics and Society: Special Issue- Is Death Penalty Dying* (Vol. 42, 21-52)2008

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