ABSTRACT (ENGLISH)

[...]judicial accountability measures such as public and academic criticism of erroneous decisions and a robust review mechanism for all confirmed death sentences can greatly mitigate the possibility of erroneous decisions in the long term. [...]assessing proportionality is a core judicial function (Bradley 2004). [...]the Court in Mahesh Dhanaji Shinde observes that the initial shock of the circumstances in which the crime was committed should be balanced with the possibility of reform. [...]the report itself provides the strongest arguments on how the Ravji ruling was mistaken in law.

FULL TEXT

The Law Commission of India’s 262nd report is the first official document to recommend abolition of death penalty. Its seminal recommendation notwithstanding, the commission’s conclusion that divergence in judicial reasoning in the death penalties handed out is cause enough for the abolition of such penalty is too hasty. Further, not applying this recommendation to terror-related offences is fuzzy and unreasoned. If death penalty is no more of a deterrent for terrorism than it is for other crimes, as the commission itself finds, to persist with such a recommendation by using the bogey of “national security” is extremely odd. The report is, however, valuable in creating an intelligent discourse around death penalty in India.

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In its 262nd report, “The Death Penalty,” the Law Commission of India has recommended the abolition of death penalty in India for all offences except those related to terrorism. It has done so having delved into numerous sensitive questions associated with the subject. With its well-researched and nuanced analysis, the report makes a well-timed contribution to a simmering debate. It is a valuable addition to the literature on death penalty in India, which, barring a few exceptions, is largely polemical.

The Law Commission's (henceforth the commission) recommendation to abolish the death penalty is seminal—it marks a paradigm shift in the intellectual discourse surrounding death penalty in India, and is the first time that an official institution has openly advocated its abolition. At the same time, the reasoning underlying the recommendation is curious.

The direction to the commission to study on death penalty came not from the Government of India, but the Supreme Court. To recommend abolition of death penalty when no opinion in the matter has been sought from the government might strike some as gratuitous advice. At the same time, the commission's premise for recommending abolition is not that death penalty contravenes the right to life granted in the Constitution. That would have brought the matter within the jurisdiction of the Supreme Court. The recommendation is, in fact, based on a range of penological and philosophical arguments which are beyond the Court’s remit.

But the report comes up short when one considers the merits of these arguments. The major issue outlined by the commission, as well as most critics of death sentence, concerns the unguided discretion of sentencing courts. The report does an excellent job of charting the inconsistencies in judicial opinions over time. Unfortunately, its conclusion that divergences in judicial reasoning in the death penalties handed out is cause enough for its...
abolition is too hasty. Further, not applying this recommendation to terror-related offences is fuzzy and unreasoned. In making a seminal recommendation and then carving out a wide and inadequately-reasoned exception, the report raises more questions than it answers. Perhaps that might have been its intention.

Sentencing Discretion

While recording its conclusions, the commission rues the absence of a principled method to remove arbitrariness from capital sentencing (Law Commission of India 2015a). It rightly criticises erroneous verdicts delivering death sentences in contravention of the Bachan Singh (1980) guidelines. It finds sentencing in India to be judge-centric and based on the personal predilection of judges. Factors such as protracted trial procedures, oppressive conditions in prisons, and non-availability of legal aid lead the commission to conclude that the time is ripe for the abolition of death penalty.

However, in reaching this conclusion, it seems to have conflated two disparate issues: the discretion that is inherent to sentencing and the possibility of error. The exercise of judicial discretion in the matter of sentencing cannot be streamlined by eliminating a particular kind of sentence from the statute books. Sentencing is inherently subject to the personal prejudices of individual judges; in fact the role of a judge in determining a criminal sentence is, at best, characterised by the principle of discretion (Sporer and Goodman-Delahunty 2009). Disparities may be unintended consequences of sentencing discretion when, actually, discretion is meant to provide the sentencing court with the flexibility to consider the peculiarities of a case. This is not unique to capital punishment; sentencing per se is prone to the imperfection of fallibility and misapplication. The Supreme Court has itself embraced the view that the subjective opinion of individual judges as to the morality, efficacy or otherwise, of a sentence, particularly death sentence, cannot be ruled out.1

William W Schwarzer, a federal judge on the United States District Court of the Northern District of Columbia, has observed that judicial discretion in sentencing is obscured by other issues and merits which are discussed only when there is a controversy over a judge's actions (Schwarzer 1991). In other words, judicial discretion becomes a subject of public attention only when the exercise of such discretion leads to blatantly erroneous decisions. Unsurprisingly, in India, capital sentencing generated widespread public debate after the Supreme Court’s decision in the Ravji (1996) case; it was an instance of clear non-application of the Bachan Singh guidelines. Bachan Singh held that the law's instrumentality ought not to be used to take away life, except in the rarest of rare cases when the alternative option is unquestionably foreclosed. It also laid down another key proposition: the court must give regard to every relevant circumstance relating to the crime as well as the accused before sentencing a person for murder.

The Supreme Court displayed a curious indifference for this proposition in the Ravji case. The appellant Ravji was convicted for the murder of five persons, including his wife and three minor sons. Having been sentenced to death by the trial court as well as the Rajasthan High Court, he appealed to the Supreme Court for commutation of his sentence to life imprisonment. The non-application of Bachan Singh became apparent when the Court said

It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial.

The Court did not find any justification to commute Ravji’s sentence to imprisonment for life, and he was executed in 1996.

There was public outcry after the Supreme Court admitted its error in the Ravji case while delivering the verdict on the Bariyar case in 2009, yet the Ravji precedent was followed in subsequent judgments (Venkatesan 2012). However, in both Bariyar and Sangeet (2013) the Court held that correction of errors of judgment do not require analysis of the constitutionality of death penalty as such. Mistakes might have been made and need to be corrected. However, that by itself provides no judicial ground to consider death penalty itself as unconstitutional and abolish it.

At its core, any argument for abolition that is based on inconsistencies in sentencing, or the erroneous application of law, is founded on the premise that there is a certain sanctity attached to life itself-as opposed to years spent in prison. But both these, contrary to first impressions, are equally irreversible; neither life nor the time spent in prison
can be brought back. The reasons for treating human life differently requires moral philosophical arguments of a kind that are conspicuous by their absence in the commission’s report. Also, the report ought to have considered, if only to reject, more pragmatic solutions such as setting up a dedicated bench in the Supreme Court to hear all matters where the high court has confirmed death penalty. Alternately, a compulsory reviewing bench in the Court could be set up to which all reviews of death penalties, confirmed by the Supreme Court, could be referred. Such recommendations would have mitigated inconsistencies considerably. While they would, admittedly, not eliminate all inconsistencies, the measures would be truer to the reality of sentencing discretion and not make artificial distinctions between death penalty and other types of sentences where inconsistencies abound as well.

Errors of Judgment

Errors of judgment have been accepted to be an unfortunate but inevitable part of the judicial process. The majority in Bachan Singh held that such errors of judgment cannot be absolutely eliminated from any system of justice, devised and worked by human beings, but their incidence can be infinitesimally reduced by providing adequate safeguards and checks. If introducing consistency in sentencing was an easy matter, the Court would not have rejected categorising, in the Bachan Singh case, the manners of exercising judicial standards into iron case criteria.

A sentence ought to be an outcome of fair play to stand the test of time. The problem of disparities in sentencing is different from the public perception of disparity, which generally stems from the failure of judges to give reasoned judgments (Schwarzer 1991). Section 354(3) of the Code of Criminal Procedure, 1973 addresses this issue. It mandates that a judgment awarding a death sentence should state the “special reasons” for the verdict. Robust reasoning by a sentencing court serves crucial purposes: it serves as a basis for review, increases understanding and acceptance of decisions and also creates a corpus of precedent for the aid of other judges (Crump 1980). The Supreme Court in Bariyar held that the requirement to assign special reasons should not be construed as an empty formality.

The requirement to give reasons is also an exercise in holding judges accountable for their decisions, particularly in light of the grudging admission of error made by the Supreme Court in its Ravji verdict. But Ravji, declared in Bariyar to be per incuriam, set the precedent for five subsequent decisions of the Supreme Court. Justice Arijit Pasayat, who retired from the Supreme Court in 2009, confirmed death sentences in all these five cases. In each of these, the Supreme Court relied upon Ravji, and not Bachan Singh, as an authority, by refusing to consider any mitigating circumstance pertaining to the criminal. The essence of Section 354(3) is that a judge should not deviate from established guidelines on death sentencing without giving cogent reasons for the same. Ravji, and the five subsequent decisions, did exactly that.

Erroneous decisions such as Ravji, as the commission has noted, provide the most compelling ground for abolising death penalty. But by themselves, erroneous decisions cannot justify abolition. There are two reasons for this. First, the possibility of erroneous judgments by wrongful application of principle or ignorance of precedent is not unique to death penalty. Every instance of erroneous application quite obviously cannot lead to questions being raised on the nature of the penalty. Second, judicial accountability measures such as public and academic criticism of erroneous decisions and a robust review mechanism for all confirmed death sentences can greatly mitigate the possibility of erroneous decisions in the long term. The decisions which follow Ravji clearly demonstrate that Justice Pasayat incorrectly applied the law in numerous instances, thereby bringing the Supreme Court itself into considerable disrepute. Widespread public and academic criticism of such actions cannot, of course, restore the life of those executed in pursuance of such decisions but can most certainly reduce the possibility of such judicial recidivism. Bariyar and Sangeet and other well-reasoned decisions on the death penalty after Ravji are testimony to such correction.

Penological Justifications

The commission also examines the penological justifications for the abolition of death penalty in considerable detail and concludes that adequate justifications do not exist for its retention. Significantly, its analysis reveals the absence of evidence to suggest that the death penalty has a deterrent effect over and above life imprisonment.
Given that a significant proportion of crimes meriting the death penalty are heat-of-the-moment crimes, which the deterrent rationale potentially cannot address, the commission’s view is eminently sensible.

But how then can deterrence work for terror-related offences where the commission recommends the continuation of the death penalty? It admits that there is no valid justification for treating terrorism differently from other crimes; the only ground it provides is that abolition of death penalty for terror-related offences will affect “national security.” However, if death penalty is no more of a deterrent for terrorism than it is for other crimes, as the commission itself finds, to persist with such penalty by using the bogey of “national security” is extremely odd.

The report points out that the retributive theory of punishment suffers from lack of guidance on the approximate punishment for an offender, possibly leading to the imposition of punishments harsher than what the impugned act merits. In other words, retribution does not have an answer, either exact or approximate, to the question of “how much to punish.” However, that is precisely where the function of retribution ends. Important choices on sentences for particular offences are made by Parliament; following from this, determinations of proportionality of sentences to be awarded in particular cases have, necessarily, to be made by judicial authorities. In fact, assessing proportionality is a core judicial function (Bradley 2004). The retribution rationale does not, and is not, expected to quantify sentences; that is the ultimate function of the authorities concerned.

The commission also makes a crucial observation that “in addition to adjudging a case ‘rarest of rare’, an equally important part of imposing the death penalty is whether the offender is amenable to reform” (Law Commission of India 2015b). The death penalty forecloses the possibility of reform and hence ought to be revisited. To its credit, the Supreme Court has accorded due consideration to the probability of reform of an accused. One of the scales in the “balance sheet theory” devised in Machhi Singh (1983) pertains to the criminal’s antecedents. The possibility of reform has been kept sight of in all kinds of judicially-devised sentencing tests whether it is the aggravating-mitigating circumstances test or the crime-criminal-rarest of rare cases test. Mahesh Dhanaji Shinde (2014), Gurvail Singh (2013), Surendra Mahto (2011), to name a few, are instances where the Supreme Court commuted death sentences after giving due consideration to the young age of the convicts-and thus the possibility of reforming and rehabilitating them.

Notably, in these cases, commutation was the consequence of what the Supreme Court opined was the possibility, and not certainty, of reform. This suggests that the commission’s assertion that the mandate of the Supreme Court in Bachan Singh requiring the assessment of the convict’s possibility of reform “has often been ignored in death penalty adjudication” may not be entirely accurate (Law Commission of India 2015b). In fact, the Court in Mahesh Dhanaji Shinde observes that the initial shock of the circumstances in which the crime was committed should be balanced with the possibility of reform. It is true that execution forecloses the possibility of reform but when the confirmation of the death sentence itself accounts for the possibility (or impossibility) of reform, the reformatory rationale cannot become a trump card.

Valid Abolitionist Argument

In the final analysis, the report is valuable in creating an intelligent discourse around death penalty in India. Too often the debate is marred by blood-thirsty calls for execution on the one hand and bleeding-heart resistance to such calls on the other. With its detailed research, analysis of case law and criminal theory, it provides a basis better than most current arguments demanding abolition of death penalty.

However, the commission fails to bridge the conceptual divide between the nature of problems it finds and the recommendations it makes. The judge-centric nature of the award of death penalty and errors in decision-making are both true. But there is no evidence to suggest that inconsistencies cannot be reduced or errors mitigated. In fact, the report itself provides the strongest arguments on how the Ravji ruling was mistaken in law.

The commission’s recommendations required a stronger foundation to be persuasive. The commission had to argue why the death penalty ought to be treated differently from other sentences, which are equally characterised by inconsistencies and errors. Such an argument would inevitably have focused on whether there is an intrinsic value to human life that the state cannot take. It required engaging with both philosophical as well as political elements. By choosing to remain silent on these fundamental questions, the report ends up where it started-
preaching to the converted, while failing to convince the unconvinced.

Notes
3 Machhi Singh vs State of Punjab, (1983) 3 SCC 470. The balance sheet theory was devised in Machhi Singh whereby “a balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised” (Para 38).
4 Gurvail Singh vs State of Punjab (2013) 2 SCC 713. Gurvail Singh formulated the crime-criminal-rarest of rare test which meant that “.To award death sentence, the aggravating circumstances (crime test) have to be fully satisfied and there should be no mitigating circumstance (criminal test) favouring the accused. Even if both the tests are satisfied as against the accused, even then the court has to finally apply the rarest of rare cases test (R-R Test), which depends on the perception of the society and not ‘Judge-centric,’ that is, whether the society will approve the awarding of death sentence to certain types of crime or not…” (Para 19).

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