AN UNCLEAR EMPIRICISM: A REVIEW OF THE DEATH PENALTY INDIA REPORT

—Kunal Ambasta*

I. INTRODUCTION

Empirical studies on death row populations, often exploring effects of socio-economic or racial marginalization, are not uncommon across several legal systems that used to, or continue to retain the death penalty on their statute books.[1] Studies indicating over-representation of certain communities in prisons in India have also appeared with more or less regularity over the years, mostly depending on the data released periodically by the National Crime Records Bureau, through its annual "Prison Statistics India" report.[2] A comprehensive survey of the men and women on death row in India, however, had not been carried out till the publication of the Death Penalty India Report by NLU Delhi in 2016.[3] This, being the first of its kind study carried out in the Indian context is a welcome development in the country's legal scholarship.[4]

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1 These studies have been carried out across several states in the U.S.A. Not only have they produced significant amounts of legal scholarship, but have also diversified into allied issues of death row conditions, such as solitary confinement, legal representation, and method of executions.

2 Irfan Ahmad, and Md. Zakaria Siddiqui, *Democracy in Jail: Over-representation of Minorities in Indian Prisons*, 52(44) ECON. & POL. WKLY 98 (2017).

3 Centre on the Death Penalty, The Death Penalty India Report (National Law University, Delhi Press 2016), http://deathpenaltyindia.com/The-Death-Penalty-India-Report-2016.jsp.

4 The Amnesty International Report on the Death Penalty in India was published in 2008 and focused on the judgments of the Supreme Court in capital sentencing cases between 1950 and 2006. The Law Commission of India has also submitted three reports on the death penalty, the latest being the 262nd, which recommended the abolition of the death penalty except in cases of terror and those affecting national security. That Report marked a quantum shift of stance from the recommendation of the retention of the penalty in the 35th Report of 1967. The 187th Report of the Law Commission of India was submitted in 2003 and studied the mode of execution.

Noteworthy in the Report and its design is the fore fronting of the experiences and 'voices' of the individuals who have been sentenced to death. It is this feature of the report that lends it the strength of personalization and effect, and ensures that it is not merely an inert legal analysis of the area. Strategically speaking, one may even concede that this may be the most meaningful way to engage with the systemic and structural problems of the Indian legal system, by highlighting instances of specific failures in capital cases.[5] The Report also explores the lives of the families of surveyed convicts, and attempts to present a comprehensive view of the devastation that the death penalty brings in its wake. I would count these features as being the successes of the Report, and crucial improvements in, and additions to, the discourse around the death penalty in India.

My claim in reviewing the Report, however, is that the implication of several methodological decisions taken during the collection and analysis of data for the Report is to render some findings susceptible to easy challenge and refutation by 'retentionist' voices. Here, I claim that certain data that has been presented in the Report would require a secondary level of analysis rather than the primary number crunching that has taken place, to make a suitable argument with an implication on the justness of the death penalty. I also claim, as a secondary point, that the reliance placed by the Report, on certain positions of law is misplaced.

II. WHEN DOES 'DEATH ROW' BEGIN?

The task of counting the number of people on death row in India presented its own challenges to the researchers of the Report, and the same has been highlighted by them as well.[6] What is to be noted is that the Report has considered all persons who have been sentenced to death by trial courts as persons on death row. In law, a sentence of death passed by a Session Court must be confirmed in order for the sentence to become executable.[7] One must also note that this is legally distinct from an appeal or a mercy petition, which must be made by or on behalf of the convict, and is, in some sense, discretionary.

One would therefore assume that for a sentence of death to really have the potential for being carried into action, a confirmation must have necessarily occurred. A significant number of respondents in the Report consist of those who have been sentenced to death by trial courts, and whose confirmation cases are

[5] The primary focus of the Report must be noticed to be on the experiences and backgrounds of the men and women on 'death row' in India. Careful consideration is given to the working of the legal process in the cases of these people which led them to be sentenced to death. Report, *supra* note 3, at 8.

[6] Report, *supra* note 3, Vol. I, at 16.

[7] Code of Criminal Procedure, Act No. 2 of 1974, § 366. This is also noted in the Report, *supra* note 3, Vol. I, at 37, 40. This, as the Report notes, is true for all cases which are tried under the Code of Criminal Procedure, 1973, and therefore, for all offences under the Indian Penal Code, 1860.

currently pending before various High Courts.[8] At the outset, one can foresee two effects of this decision on the study itself. First, that the number of persons on 'death row' increases significantly since it is well known that only a small percentage of trial court death sentences are confirmed by High Courts.[9] The inclusion of all prisoners who have been sentenced to death after trial, irrespective of the status of the confirmation proceedings, inflates the number of people on death row and therefore shifts the focus from the persons whose death sentences may have been confirmed or those who may have reached an advanced stage in the proceedings leading toward execution.

Second, when an inquiry necessarily looks into factors such as disparate impact on marginalized groups, systemic bias, and vulnerability, the true effect of such factors may be made visible, or even more patently visible, once the sustained effects of the said system are perceived on the test subject. A solid demonstration of disparate impact of the death penalty along axes of marginalization would have to do two things, one, engage in a comparative analysis of cases which may be similar in terms of allegations and nature of crime, but with materially different results.[10] This would establish the foundational fact that similar cases are being decided differently. This, the Report does not engage in.[11] Two, it would have to demonstrate the disparate impact as a function and result of the system.[12] A focus on a restricted death row population, such as those whose death sentences had been confirmed, or those whose mercy petitions had been rejected, would have been more helpful to an analysis of the fairness or justness of the system as a whole as the systemic or structural problems which may exist, may not be all apparent or perceptible at the trial stage alone.

Furthermore, from a purely legal perspective, duration on death row is calculated at the very least from the date of confirmation by the High Court or, after the dismissal of the appeal to the Supreme Court.[13] Considering the trial court

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[8] This number comes to 270 prisoners out of the 385 that the Report considers part of its study. Report, *supra* note 3, Vol. I, at 41.

[9] The Report itself notes this fact. Report, supra note 3, Vol. II, at 158, 162.

[10] In the present context, this would imply that the probability of the award of death sentences varies if the socio-economic backgrounds of either the victim or the perpetrators are varied, the nature of crime being kept constant.

[11] The Report stresses on socio-economic indicators to show that the burden of being on death row falls along certain socio-economic axes. However, it denies all causative links into the two features. Further, the Report sets a comparative analysis as out of its scope. Report, *supra* note 3, Vol. I, at 101.

[12] This is only done very fleetingly in the Report when a stage-wise analysis of the composition of capital cases is carried out. The data here shows that the proportion of SCs/STs under a sentence of death increases with the advancement of the stage of proceedings. Report, *supra* note 3, Vol. I, at 111.

[13] *Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678. The discussion in the present case revolves around the duration of time spent by a prisoner on death row and the delay in the disposal of mercy petitions by the Executive as a supervening circumstance. The terms indicate the judicial pronouncement attaining finality, which could, one may argue, begin even after the confirmation by the High Court. It is not, however, consistent with the period beginning from the date

verdict as determinative may not be the most accurate method, since at that stage, a wide ranging and automatic scrutiny into the penalty is underway at the High Court and there exists a significant chance that the penalty will be commuted.

The reason the Report provides for considering such prisoners to be on death row is that the conditions of incarceration change as soon as the sentence of death is handed down by the trial court. This practice is certainly true in several states, and the shifting of convicts to special barracks or cells does occur once a sentence of death is passed. However, the conditions of this new confinement are not uniform.[14] It should also, in my opinion, not be conflated with illegal and dehumanizing incarceration such as solitary confinement. Not all death row confinement is solitary, and all solitary confinement which is not in accordance with Sections 73 and 74 of the IPC is illegal.[15] Another use that duration on death row may be put to is to raise the legal ground of delay as has been done in Triveniben and other cases. However, there exists ample guidance on how it is to be calculated, and it does not begin from the date of the trial court verdict.[16]

The method followed in the Report further gives the perception that the time taken for the confirmation proceedings constitutes delay, which would be incorrect. Even the reasoning of the Report for considering the trial court verdict as determinative of the beginning of death row appears to be on weak foundations. It would be correct to state that the conditions of imprisonment would change, but this, as the Report itself notes, does not always imply imposition of solitude, nor does it automatically lead to the onset of the psychological trauma that renders death row cumbersome or egregious.[17]

It may be said that a focus on the narrow time period of "death row" as it is traditionally acceptable to employ the term in law, would have lent itself to a

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of the trial court verdict. The same position has been followed in *Shatrughan Chauhan* v. *Union of India*, (2014) 3 SCC 1. This method of looking at death row is important because it is this duration which is considered to be egregious and especially causative of mental agony and distress associated with death row. The duration of time spent in prison awaiting judicial outcomes does not accrue into a legal benefit for the prisoner. Further, if one were to see the interpretation given to the term "prisoner under the sentence of death" for the purpose of considering conditions of incarceration according to prison rules, the Supreme Court has included within this category only those prisoners who have exhausted their judicial remedies in such a manner that the sentence of death may be carried out without any further intervention. *See Sunil Batra* v. *Delhi Admn.*, (1978) 4 SCC 494, at para 223.

[14] The conditions in which prisoners under sentences of death are kept vary considerably depending on the state in which they are incarcerated. This is clear when one sees Graphic 2 of the Report, *supra* note 3, Vol. I, at 31. Not all prisoners sentenced to death are shifted to Central Prison facilities in all states, or to prisons which have the gallows machinery or dedicated death yards. Further, full segregation of prisoners may not be effected until the mercy petitions have been rejected by the President, which also, as the Report notes, is followed in certain states. Report, *supra* note 3, Vol. II, at 74-75.

[15] *Sunil Batra* v. *Delhi Admn.*, (1978) 4 SCC 494, at para 219.

[16] *See supra* note 13.

[17] *See supra* notes 13 and 14.

sharp analysis of the factors which lead to a consistent imposition of an executable sentence of death, and which would have been a more reliable analysis of the circumstances under which the sentence is awarded, given the next sections of the Report.

III. WHITHER DISPARATE IMPACT?

Though the Report does not claim any direct causation between marginalization and the imposition of the death penalty in India, the analysis of disparate impact of the death sentence on marginalized communities is clear. This is sought to be provided to the reader through statistics of the over representation of certain classes or communities of people on death row in India. An analysis that proceeds on this premise alone is susceptible to a seemingly perverse objection. For example, to the argument that African Americans are over represented in prisons and on death rows across the United States of America, one of the responses that did get elicited was that the crime rate of these communities was equally high, and therefore, there was no over representation.[18] A similar argument could be made about socio-economically marginalized groups as well. Therefore, in order to make a disparate impact or a disproportional representation argument, what would be necessarily required is a relative or comparative frame, which would analyse similarly placed cases and dissimilarly placed perpetrators/victims to demonstrate the presence of systemic bias. The Report does this only at the place where it analyses the changing composition of death row cases as they travel further into the legal system.[19] To my mind, this point merited far more detail and importance than what it did receive. Instead, the primary focus of the Report is on a much weaker and facile point, which is analysed below.

The primary focus of the Report's claim on the compositions of death row populations across various states is to present data on socioeconomic vulnerability and make a back door argument towards disparate impact of the death penalty. The Report clearly states that its attempt is not to make causative links, but to test the perception, from studies on death row populations in the USA, that it is the marginalized who get sentenced to death.[20] However, a close look at the data presented in the Report does not hold out any evidence to prove disparate impact or overrepresentation of the socio economically vulnerable.

The data is further convoluted by the fact that the Report chooses a sui generis model of testing economic vulnerability, which would render, given the current status of economic development in Indian society, a considerable proportion of the population marginalized or "economically vulnerable". For example, it is curious as to how the Report came to a decision on the actual size of agricultural

[18] *See* John C. McAdams, *Racial Disparity and the Death Penalty*, 61(4) L. & CONTEMPORARY PROBLEMS 153 (1998).

[19] *See supra* note 12.

[20] Report, *supra* note 3, Vol. I, at 90.

landholding to decide one of the factors of economic vulnerability. The size of the landholding, below which an agriculturist would be treated to be economically vulnerable in the Report would, given studies on agricultural land holdings in India, include almost all agriculturists in the country.[21] A model such as this is susceptible to the argument of being over-broad, that is, of making eligibility criteria so wide, that all results fit into the category of vulnerability.

The problem with keeping fluid and flexible models as the basis for segregation of data is that the frame of reference with which such data must be compared to gauge disparate impact must also then become flexible. For example, if the same indicators were used which are employed to measure poverty, one could have had the advantage of comparing the statistics presented in the Report with the proportion of the population below the poverty line, which would have, at least, introduced a standardly accepted criteria for comparison. Such an exercise is not possible for most readers with the model that the Report follows. The different axes of vulnerability which are taken as determinative, may not be amenable to analysis with the general population. In such a situation, any claim of over representation or disparate impact becomes vacuous.

Further, the Report's analysis of representation of death row prisoners from Scheduled Castes and Scheduled Tribes does not establish disproportionate impact of the death sentence on such populations. One can observe, in fact, that state death rows, with the notable exception of Maharashtra and Bihar, correspond to the proportions of the actual populations within the state.[22] In fact, some of the data from states may even suggest an under representation of the sample population. To repeat, an exercise such as this cannot, by itself, unless it adopts some model of comparative analysis with the non-subject population, carry forth any value to an argument of disparate impact. The stage-wise analysis of the Report begins this exercise, but is not sufficiently developed. The stage wise analysis should have encompassed a comparison between the cases that went out of the death sentence system at each stage, and compared them with those that did not. Such a framework could have established disparate impact. As it stands presently, the Report unfortunately does not engage in such an analysis, but picks the low hanging fruit readily available from primary data.

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[21] Report, *supra* note 3, Vol. I, at 99-100. The findings of the Agricultural Census, 2010-2011 (Phase-II) may be used to put the same in perspective. The size of agricultural holdings that are considered a marker of "economic vulnerability" in the Report constitute approximately 95% of all agricultural holdings in the country by number. The Census may be accessed here: http://agcensus.nic.in/document/agcensus2010/allindia201011H.pdf. With regard to educational status, I could not observe a discernible difference between the studied sample and the literacy rates prevalent on either national or state levels. With regard to both the presence and nature of employment, it is not possible for them to be compared to actual rates with specificity.

[22] As compared with the data of the 2011 Census available here: http://censusindia.gov.in/Tables_Published/A-Series/A-Series_links/t_00_005.aspx.

IV. A HAGIOGRAPHY OF BACHAN SINGH

In the section where sentencing practices are discussed, we find an assertion that is startling, and arguably deeply problematic in capital sentencing in India. Undoubtedly, it is correct to assert that the sentencing guidelines laid down in Bachan Singh[23] are not strictly followed by trial courts in India. It is a completely different matter to call the framework itself robust and arguably the best in a retentionist context.[24] Such an assertion forgets the genesis of Bachan Singh itself, coming as it did from a line of cases which were far more progressive than it. These cases were decided in light of the enactment of the Code of Criminal Procedure of 1973, which introduced a requirement for special reasons to be given for passing the sentence of death.[25] Though facially innocuous, the import of the legislative change brought in thus could scarcely be overstated. In the context of the requirement of "special reasons", the Supreme Court had delivered the judgment in *Rajendra Prasad* v. *State of U.P.*,[26] with the majority opinion being pronounced by Justice V.R. Krishna Iyer for himself and Justice Desai.[27] The constitutionality of the death sentence having at that time been settled by Jagmohan,[28] the Court was concerned with how to canalize sentencing discretion within a retentionist model. In what is undoubtedly a fascinating judgment, the Supreme Court engages on a wide ranging and comprehensive survey of the legislative movement on the death penalty in India, concluding that the scope of the punishment has been consistently narrowed, and never broadened.

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[23] *Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684.

[24] Report, *supra* note 3, Vol. II, at 55.

[25] Code of Criminal Procedure, Act No. 2 of 1974, § 354(3).

[26] *Rajendra Prasad* v. *State of U.P.*, (1979) 3 SCC 646.

[27] It is instructive to note that Justice Iyer had also delivered the opinion in *Ediga Anamma* v. *State of A.P.*, (1974) 4 SCC 443, where he had taken note of the then pending bill to amend the Criminal Procedure Code and the consequent insertion of § 354(3), requiring special reasons to be given prior to awarding the death sentence. He observes that the legislative development would be beneficial and provide guidance to judges. Especially illustrative is the treatment given by the Court to the decision in *Jagmohan Singh* v. *State of U.P.*, (1973) 1 SCC 20, the scope of which is restricted to the question of constitutionality, therefore leaving it open to restrict the application of death sentences through statutory provisions or guiding principles. In Ediga, the Court holds that the unusual brutality of a crime would be a factor to award the death sentence. However, Justice Iyer himself overruled this point later in Rajendra Prasad, where he held that in light of the Code of Criminal Procedure Code, 1973 being enacted, details of the crime could no longer be examined to determine the sentence. The scope had to be restricted to the criminal to decide whether he could be sentenced to death. This position of law was again overruled in Bachan Singh. Incidentally, Justice Sarkaria, who was on the Bench in Ediga, delivered the majority opinion in Bachan Singh.

[28] *Jagmohan Singh* v. *State of U.P.*, (1973) 1 SCC 20. This case was the first challenge to the constitutionality of the death sentence in India. It was argued that the death sentence was violative of Articles 14, 19 and 21 of the Constitution. A major thrust of argument was that there did not exist clear or necessary guidelines for the award of the death sentence. The Supreme Court upheld the validity of capital punishment and held that judicial discretion on the basis of legal principles as well as rights to appeal were adequate basis for the award of the sentence.

The Supreme Court, in its decision in Rajendra Prasad case, renders almost insurmountable, the task by which the death penalty may be given in a particular case. Not only does it establish the extreme narrowness of cases where the penalty may be awarded, but also lays emphasis on the difficult process which must be negotiated by both the prosecution and the judge before a court may pass a sentence of death.[29] The case also establishes the position, that the sentence of death is per se an infringement of Fundamental Rights, and therefore may be passed only where a compelling state interest may demand it.

Contrary to this, the decision in Bachan Singh was by all means, a step back from the potential of Rajendra Prasad. The majority opinion, by harking back to Jagmohan, rendered the development of law in Rajendra Prasad redundant. Not only were the strict requirements placed in the latter case removed, they were replaced by vague markers in ostensible deference to the legislature and because it was considered that the judiciary could not set inflexible guidelines. The markers to be relied on, as laid down by Bachan Singh, are not only vague, but allow for the exercise of discretion that may not be channelized in all cases. The oft repeated refrain of "rarest of rare" was only a 'footnote'[30] in the decision, after the damage of overruling Rajendra Prasad was done.

Further, any perfunctory study on the impact of Bachan Singh may clearly display the havoc it has played in sentencing guidelines in capital cases. Taking advantage of the vagueness of standards therein, and also the subsequent interpretation given to it in Machhi Singh,[31] it is possible to achieve any outcome and reverse reason it to fit the available judicial guidelines. These effects would continue irrespective of whether sentencing hearings are carried out with detail and precision, and the availability of resources, the lack of which the Report laments. The argument that exists of course is to say that the standards for sentencing someone to death themselves are vague and prone to conflicting outcomes. Needless to say, the Supreme Court itself has noted the lack of consistency in standards of sentencing on multiple occasions.[32]

In the given context, it is therefore difficult to see why the Report considers Bachan Singh model to be highly beneficial or desirable to capital sentencing

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[29] *Rajendra Prasad* v. *State of U.P.*, (1979) 3 SCC 646, at paras 46-59, 64. One may argue that the decision of Rajendra Prasad confined the imposition of the death sentence to the narrowest conspectus possible without abolishing it altogether. The judgement goes far enough to state that the award of the death sentence is in fact, anathema to the constitutional scheme of rights, and is justifiable only as a necessary violation of Fundamental Rights.

[30] *Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684, at para 209. The 'rarest of rare' test was hardly a doctrine which Bachan Singh laid down, but more of a final passing remark in the conclusion of the judgment. It does not find mention in the actually determinative portions of the judgment.

[31] *Machhi Singh* v. *State of Punjab*, (1983) 3 SCC 470.

[32] *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, (2009) 6 SCC 498, at paras 104-110.

in India and premises its analysis of the actually occurring sentencing practice on its fidelity to the same model. What would have been more interesting, and perhaps also of permanent value, would be an attempt to evolve a guideline for sentencing that judges should normatively follow, and not the ones that they necessarily are required to, given the resources and limitations that operate in the Indian context.

V. CONCLUSION

I have not, in writing this review, focused on the parts of the Report which detail police investigative malpractices and concern with the quality of legal assistance to convicts awarded the death sentence. I believe that these problems have been the subject of much discussion and study elsewhere,[33] and though those studies may not strictly apply to death sentence cases, the factors which actuate these problems remain the same. The reason why the Report has analysed these problems in detail appears to be the fact that the death penalty stands on a qualitatively different footing from other punishments, and therefore it must place a "higher burden to be met in such cases".[34] Undoubtedly, it is true that sentencing people to death in a system which is plagued with recurrent and persistent problems at each stage of the legal process presents concerns that cannot and should not be underplayed by a comparison with the general state of affairs. However, in my opinion, that would be, strictly speaking, the disproportionate effect of such problems in death cases, and not factors which are causative of the problems themselves.

Lastly, I do believe that the Report opens up many ways and means by which India may engage in a meaningful conversation about the death penalty, and determine legislative policy on the subject as well. I wish that the Report had, as a benefit of the direct empirical research carried out by them, taken a publicly articulated stance on the desirability of the death penalty itself. Currently, the same feels like an undercurrent through the work, but remains unarticulated. One can hope that the research and result of this Report spurs further work into the many lives of the death penalty in India.

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[33] The Ribeiro Committee, 1998-99 and the Sorabjee Committee, 2005 are illustrative examples.

[34] Report, *supra* note 3, Vol. II, at 202.