Source : www.thehindu.com Date : 2019-03-15

AN ABHORRENT AND UNJUST DEVICE: ON DEATH PENALTY

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On March 5, a three-judge bench of the Supreme Court delivered verdicts in three different death penalty cases. In two of those the court entirely exonerated the suspects, while in the third it not only found the accused guilty of murder, but also deserving of capital punishment. Individually read, the judgments typify the deep penological confusion that pervades India's criminal justice system. Collectively, the cases demonstrate how arbitrary the death penalty is, how its application is mired by a belief in conflicting values, and how the fundamental requirement of precision in criminal law has been replaced by a rhetorical cry for avenging crime by invoking the "collective conscience" of society.

In the first of the cases, *Digamber Vaishnav v. State of Chhattisgarh*, two persons were convicted of murdering five women and were sentenced to death in 2014. A year later, the Chhattisgarh High Court affirmed these sentences. But the chief testimony, which formed the backbone of the prosecution's case, was that of a nine-year-old child, who was, shockingly, not even an eye-witness to the crime. This, the court therefore ruled, was effectively a conviction premised on surmise and conjecture.

Ankush Maruti Shinde v. State of Maharashtra, the second of the cases, saw a gut-wrenching series of events being reduced to macabre farce. In 2006, a trial court found six persons guilty of rape and murder and sentenced each of them to death. A year later, the Bombay High Court confirmed the finding of guilt, but commuted the sentences imposed on three of the individuals to life imprisonment. However, in 2009, the Supreme Court not only dismissed the appeals filed by those sentenced to death, but also, astonishingly, enhanced the penalties of the three persons whose sentences had been commuted by ordering that they too be punished with death. In doing so, the court relied on a 1996 verdict, in *Ravji v. State of Rajasthan*, where it had ruled that in determining whether to award the death penalty "it is the nature and gravity of the crime" alone that demand consideration. Although in May 2009, the Supreme Court had declared its earlier ruling in *Ravji* incorrect, by holding that even in those cases where the crime is brutal and heinous the criminal's antecedents, including his economic and social background, must have a bearing on the award of the sentence, it took until October last year for the court to recall its order sentencing the six persons to death.

During this time, as the court records, "The accused remained under constant stress and in the perpetual fear of death." What is more, one of them, who was later found to be a juvenile at the time when the alleged crime was committed, was kept in solitary confinement. He was not allowed to meet any of the other prisoners and was only allowed an occasional meeting with his mother. For their troubles — for having spent more than a decade on death row despite having committed no crime — the bench ordered that the state pay each of them a sum of 5 lakh. But while the court was quick to apportion blame on the prosecution, it didn't so much as mention its own errors and its own proclivity to mirror the mentality of a mob.

Yet, we might have been forgiven for thinking that the court's experience in hearing *Digamber Vaishnav* and, especially, *Ankush Maruti Shinde* may have made it more circumspect in upholding death sentences. After all, if these decisions had shown us anything, it was that the judicial process is far from inerrant. But the collective conscience of society, represented through the court's capital punishment jurisprudence, it appears, is still alive and kicking. For in the third

of the cases, in *Khushwinder Singh v. State of Punjab*, it not only affirmed the conviction of the accused, on charges of murdering six members of a family, but also gave its imprimatur to the award of the death penalty. The murders, the judgment holds, were “diabolical and dastardly” and the case fell into the “rarest of rare” categories where “there is no alternative punishment suitable, except the death sentence”.

The rarest of rare doctrine has its origins in *Bachan Singh v. State of Punjab* (1980). There, the court declared Section 302 of the Indian Penal Code, which prescribes the death penalty for murder, as constitutionally valid, but bounded its limits by holding that the punishment can only be prescribed in the rarest of rare cases. Since then, the court has repeatedly cautioned that capital punishment ought to only be decreed when the state can clearly establish that a convict is incapable of being reformed and rehabilitated. But, in *Khushwinder Singh*, the court does not place on record any such piece of evidence that the state was called on to produce. Indeed, the court does not so much as attempt to answer whether the accused was, in fact, capable of reformation or not. Instead, it merely endorses the death sentence by holding that there simply were no mitigating circumstances warranting an alternative penalty.

That capital punishment serves no legitimate penological purpose is by now abundantly clear. There’s almost no empirical evidence available showing that the death penalty actually deters crime. If anything, independent studies have repeatedly shown the converse to be true. In the U.S., for instance, States that employ capital punishment have had drastically higher rates of homicide in comparison with those States where the death penalty is no longer engaged. In India, evidence also points to a disproportionate application of the sentence, with the most economically and socially marginalised amongst us suffering the most. The Death Penalty India Report (DPIR), released on May 6, 2016, by Project 39A of the National Law University, Delhi, for example, shows that 74% of prisoners on death row, at the time of the study, were economically vulnerable, and 63% were either the primary or sole earners in their families. More than 60% of those sentenced to death had not completed their secondary school education, and 23% had never attended school, a factor which, as the report states, “points to the alienation that they would experience from the legal process, in terms of the extent to which they are able to understand the case against them and engage with the criminal justice system.” Just as distressingly, 76% of those sentenced to death belonged to backward classes and religious minorities, including all 12 female prisoners.

In the face of this invidiously prejudiced application, the retention of capital punishment utterly undermines the country’s moral foundations. Over the course of the last decade, the Supreme Court may well have expanded the rights of death row prisoners: delays by the President in disposing of mercy petitions now constitute a valid ground for commutation; review petitions filed by death row convicts now have to be mandatorily heard in open court. But as the judgments delivered on March 5 reveal, the very preservation of the death penalty creates iniquitous results. Cases such as *Ankush Maruti Shinde*, where the accused, as the judgment records, were very poor labourers, “nomadic tribes coming from the lower strata of the society,” ought to make it evident that the death penalty is an abhorrent and unjust device.

Not only are wholly irrational criteria applied to arrive at dangerously irreversible decisions, the law’s application is made all the more sinister by invariably imposing these standards on the most vulnerable members of society. The Constitution promises to every person equality before the law. But capital punishment renders this pledge hollow. It legalises a form of violence, and it closes down, as Judith Butler wrote, expounding Jacques Derrida, “the distinction between justice and vengeance,” where “justice becomes the moralised form that vengeance assumes.”

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