

NEGOTIATING CONSTITUTIONALISM AND DEMOCRACY: THE 262ND REPORT OF THE LAW COMMISSION OF INDIA ON DEATH PENALTY

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*The 262nd Law Commission of India (“commission”) report on death penalty has recommended the abolition of death penalty for all offences except those related to terrorism. Three members of the commission dissent from this majority view, taking a retentionist stand. The argument this essay makes is not whether or not terrorism ought to be the exception, but that within the commission’s framework of the argument for abolition, ‘terrorism’ appears as an arbitrary exception. The report carves this exception by the sleight of a hand, in shifting the register of its argument. That is, from making ‘Constitutionalism Arguments’ for abolition to suddenly slipping into a ‘Democracy Argument’ for the exception. It comfortably slips through the cracks of what Habermas calls the “paradoxical union of contradictory principles,” namely, constitutionalism and democracy. In closely reading the report, this essay explores two crucial strands of the arguments that the abolitionists and the retentionists deploy: (a) the implications of indeterminacy in judicial decision-making on death penalty cases; and (b) a legislative supremacy argument which suggests that it is ultimately the legislature representing the ‘will of the people’ that has to decide on the issue of abolition. Finally, in aiding the commission’s argument for abolition, I read the landmark *Santosh Kumar Bariyar v. State of Maharashtra* (2009), via Jacques Derrida’s *Force of Law*, to unearth the indeterminacies in legal decision-making that strengthen the justifications for abolition of the capital punishment.*

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INTRODUCTION

But what then is capital punishment but the most premeditated of murders, to which no criminal's deed, however calculated it may be, can be compared? For there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life.

Albert Camus¹

“Legal interpretation takes place in a field of pain and death...The judges deal pain and death.”

Robert M. Cover²

The 262nd report of the Law Commission of India (“commission”) has recommended the abolition of death penalty for all offences except those related to terrorism. Dubbed “historic,” “seminal,” “decisive,”³ and in a more hyperbolic vein a “paradigm shift,”⁴ the report has been widely acknowledged as

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- 1 Albert Camus, *Reflections on the Guillotine*, in Justine O'Brien (trans.), RESISTANCE, REBELLION AND DEATH 151-152 (The Modern Library, 1963).
 - 2 Robert M. Cover, *Violence and the Word*, 95 YALE LAW JOURNAL 1601 (1985-86).
 - 3 “When the history of the abolition of the death penalty in India will be written, the contribution of the 262nd report of the Law Commission will possibly be seen as the moment the tide decisively began to turn,” Anup Surendranath, *Except Terror*, INDIAN EXPRESS (4th September, 2015), <http://indianexpress.com/article/opinion/columns/except-terror/#comments> (last accessed 21st December, 2015); “The Law Commission of India has taken a historic step by declaring that the abolition of the death penalty must become a goal for India” in *The Case Against Death Penalty*, Editorial, THE HINDU (3rd September, 2015), <http://www.thehindu.com/opinion/editorial/the-case-against-death-penalty/article7608365.ece>; For the response of the UNHR Office of the High Commissioner to the LCI Report, see, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16412&LangID=E>.
 - 4 “[Law Commission’s] 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” in Arghya Sengupta and Ritwika Sharma, *Death Penalty in India: Reflections on Law Commission Report*, L(40) ECONOMIC AND POLITICAL WEEKLY 12-15 (2015).

a progressive move in Indian death penalty jurisprudence.⁵ But by recommending changes in the language of exception, what is the progress that it has made? The report replaces the “rarest of rare” standard as the exception to death penalty abolition with “terrorism” cases. The term “replace” is however an uneasy fit in describing what the report does because of a curious conflation at play: “rarest of rare” is a standard of judicial scrutiny, while ‘terrorism’ is a category of criminal offence.⁶ The effect, regardless of this conflation, is that those accused of crimes of terrorism become what Chantal Mouffe calls the new “constitutive outside” of the death penalty discourse in India:

There will always be a “constitutive outside,” as exterior to the community that is the very condition of its existence. It is crucial to recognize that, since to construct a “we” it is necessary to distinguish it from a “them,” and since all forms of consensus are based on acts of exclusion, the condition of possibility of the political community is at the same time the condition of impossibility of its full realisation.⁷

This essay is interested in the emerging vocabulary and debates in the Indian death penalty discourse, especially the new language of exceptionalism that the report inaugurates. Although this author in principle believes that death penalty abolition ought to be absolute, this paper does not enter upon the various policy and national security debates that may also have some valuable comments to make on the subject. Instead, I examine the analytics of *how* this exception is carved out within the juridical discourse. How does the commission, which makes a morally strong and constitutionally entrenched argument for abolition of death penalty, in the very next moment create an exception to it? I read the commission’s report with an attentive eye towards

5 *See, supra* note 3.

6 Meaning that (1) ‘terrorism’ as a category of offence is assumed to fall under the ‘rarest of rare’ standard of crimes, thus being an offence that does not deserve case by case analysis as to whether a particular terrorism crime falls within the standard or not, and (2) that it is the only exceptional category of offence that deserves to be punished with the penalty of death.

7 Chantal Mouffe, *Citizenship and Political Identity*, 61 OCTOBER: THE IDENTITY IN QUESTION 30 (1992).

law's operation in its own suspension, and its creation of liminal spaces where its own derogations are allowed for.⁸ This two hundred and forty page commission report is exhaustive, structured and well-reasoned. Three members of the commission have provided their statements of dissent. Although trite, amounting to hardly twenty pages, the dissent is still suggestive in laying forth broad modular arguments that abolition-activists have to ultimately reckon with.

Part I begins with a brief comment on the aesthetic and literary qualities that colour some recent Supreme Court judgments on death penalty. I use the deployment of the 'balance sheet test' to instantiate these aesthetic and literary qualities. After briefly contextualising the report, Part II of the essay summarises the arguments for abolition, that the commission offers. It then goes on to discuss the retentionist arguments put forward by the dissenting members of the commission. Part III of the article shows how the commission carves out terrorism as an exception to death penalty abolition. As I shall later elucidate, two broad themes emerge from reading the abolitionists and the retentionists: (a) a problem of indeterminacy in judicial decision-making; and (b) conflict between judicial and legislative supremacy. I propose a joint reading of Jacques Derrida's *Force of Law* with *Santosh Kumar Bariyar v. State of Maharashtra*⁹ (hereafter '*Bariyar*'), to suggest that legal decision-making is riddled with indeterminacy and uncertainty, and although this is not necessarily a problem for law in general, it does pose a problem to death penalty in particular. Given that in the secular worldview, death marks an absolute end to life and hence is irrevocable, its incompatibility with indeterminacy and uncertainty of law makes the punishment exceptionally cruel and unreasonable, as opposed to the indeterminacies that may mire other forms of punishments but are yet, arguably, acceptable. Because the Law Commission of India's abolitionist position heavily relies on indeterminacy as its justification, my reading of *Bariyar*, via Derrida, further backs up the commission's stand.

The commission concurs with several of the standard abolitionist arguments that are more or less based on universalist claims (such as right to life, dignity and human rights that all possess, regardless of race, gender, sexuality, etc.), and yet, ensures an exit route so to speak. How do they reason this out? I

8 On different models for accommodating extra-legal emergency measures within legal systems, see, Tom Hickman, *Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism*, 68 MODERN LAW REVIEW 655 (2005).

9 Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, 2009 (6) SCC 498.

suggest that the report makes this exception by the sleight of a hand, in shifting the register of its argument, i.e., from making ‘Constitutionalism Arguments’ for abolition to suddenly making a ‘Democracy Argument’ for the exception. Constitutionaism is used as an umbrella term covering a “family resemblance”¹⁰ between overlapping concepts such as constitutional morality, rule of law, primacy of fundamental rights, etc., that together articulate limits and constraints upon the scope and powers of electorally formed democratic institutions. Democracy is used as an umbrella term covering “family resemblances” between overlapping concepts such as representative governance, majoritarian electoral systems, *Demos*, populism, deliberative democracy, parliamentary sovereignty, etc., as forms of political institutions that derive legitimacy from the will of people. The inherently difficult relation between constitutionalism and democracy¹¹ is further complicated in India where judicial review grants supremacy to unelected judges as the final arbiters

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- 10 Wittgenstein gives the following illustration to explain what he means by family resemblance: “Consider for example the proceedings that we call “games.” I mean board-games, card-games, ball-games, Olympic games, and so on. What is common to them all? [...] For if you look at them you will not see something that is common to all, but similarities, relationships, and a whole series of them at that.” Ludwig Wittgenstein, *PHILOSOPHICAL INVESTIGATIONS* Section 66 (Wiley-Blackwell, 2009), as cited in, *see generally*, Craig Fox, *Wittgenstein on Family Resemblance*, in Kelly Dean Jolley (ed.), *WITTGENSTEIN KEY CONCEPTS* (Acumen, 2010). Following Wittgenstein, a search for an essence common to all these concepts that fall under the umbrella term ‘constitutionalism’ would lead us to insurmountable difficulties. What is common to concepts such as ‘primacy of fundamental rights,’ rule of law, constitutional morality, etc. is not essential but one of family resemblances. They all have certain group of characteristics in common that is enough to provide a sufficient and necessary condition for the application of the general term ‘constitutionalism’ to these concepts. In the present context, the group-characteristic present in ‘constitutionalism’ is that these are all mechanisms that limit the powers and scope of ‘Democracy.’
- 11 The literature in political theory on this debate is rich and fascinating. *See generally*, Jon Elster and Rune Slagstad (eds), *CONSTITUTIONALISM AND DEMOCRACY* (Cambridge University Press, 1988); Richard Bellamy (ed.), *CONSTITUTIONALISM AND DEMOCRACY* (Ashgate, 2006); Jurgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles*, 29(6) *POLITICAL THEORY*, 766-781 (2001); Jeremy Waldron, *Constitutionalism: A Sceptical View*, in Thomas Christian and John Christman (eds.), *CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY* 267 (Wiley-Blackwell, 2009). In the Indian context, *see*, Sanjay Palshikar, *Democracy and Constitutionalism*, in, Rajeev Bhargava (ed.) *POLITICS AND ETHICS OF THE INDIAN CONSTITUTION* (Oxford University Press, 2008); Sudhir Krishnaswamy, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE* (Oxford University Press, 2009).

of the Constitution. Given this conflicting relation, my argument is that the commission is able to carve out its exception by comfortably slipping through the cracks of this relation - a relation that Jurgen Habermas characterises as “a paradoxical union of contradictory principles.”¹²

Constitutional morality¹³ is precisely about protecting what will otherwise be excluded by popular morality and the ‘constitutive outsides’ of democratic politics. Yet, the irony is in this flip wherein the commission leaves out these ‘constituent outsides’ to democratic whims and protects the rest by asserting constitutional limits on legislative powers.

PART I

Human rights are ethical norms with legal content that accrue to a person for simply being a person. In this sense, isn’t an ethic such as human rights precisely about doing certain things even if it is not advantageous to the society as a whole? Certain wrongs such as torture or slavery are wrong in an intrinsic sense. And yet a cold calculability often seeps in when a little dose of torture is justified in return for a quantum of information. But isn’t there something incalculable about human rights?¹⁴ They are guaranteed to protect not only the good people, but all people all the time: human rights are not negotiable

12 Jurgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles*, 29(6) POLITICAL THEORY, 766-781 (2001).

13 The contemporary use of constitutional morality is slightly different from its usage in the Constituent Assembly Debates. In *Naz Foundation v. Govt. of NCT Delhi and Others*, WP(C) No. 7455/2001 decided on 2nd July, 2009, for instance, it refers to the substantive moral content that the Indian Constitution carries, such as non-discrimination and liberty. Rohit Sharma, *The Public and Constitutional Morality Conundrum: A Case-Note on the Naz Foundation Judgment*, 2(3) NUJS LAW REVIEW 445-449 (2009), Naz distinguishes “Popular Morality” from “Constitutional Morality” by relying on Ambedkar’s usage of the term in his ‘The Draft Constitution Speech’ (4th November, 1948). See, Pratap Bhanu Mehta, *What is Constitutional Morality*, SEMINAR (Vol. 56, 2010); for a discussion on “Constitutional Morality” as used in *Naz*, see, Kalpana Kannabiran, TOOLS OF JUSTICE: NON-DISCRIMINATION AND THE INDIAN CONSTITUTION 433-443 (Routledge, 2012); See also, Andre Beteille, *Constitutional Morality*, 43(40) ECONOMIC AND POLITICAL WEEKLY 35-42 (2008).

14 Costas Douzinas, *THE END OF HUMAN RIGHTS* (Hart Publishing, 2000); David Dyzenhaus, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* (Cambridge University Press, 2006).

instruments of cost-benefit analysis.¹⁵ The ‘balance sheet test’¹⁶ is such a negotiable instrument that draws up a table to compare the aggravating and mitigating circumstances around the case and the criminal in order to judge whether it falls under the ‘rarest of rare’ standard. The test was deployed in *Machhi Singh*¹⁷ in spite of the scepticism expressed by the constitutional bench in *Bachan Singh*.¹⁸ As Justice Madan Lokur in *Sangeet v. State of Haryana* states:¹⁹

...this Court in *Machhi Singh* revived the “balancing” of aggravating and mitigating circumstances through a balance sheet theory. In doing so, it sought to compare aggravating circumstances pertaining to a crime with the mitigating circumstances pertaining to a criminal. It hardly need be stated, with respect, that these are completely distinct and different elements and cannot be compared with one another. A balance sheet cannot be drawn up of two distinct and different constituents of an incident. (emphasis added)

Yet, a three judge bench in *Vasant Sampat Dupare v. State of Maharashtra*²⁰ religiously and precisely does the math, accounting in columned balance sheets of aggravations and mitigations, turning a blind eye to *Sangeet’s* warnings. *Gurvail*

15 Desmond Manderson, *Another Modest Proposal*, 10(2) DEAKIN LAW REVIEW 651 (2005).

16 Referring to United States Supreme Court, Vasant Sampat Dupare notes that the balance sheet test draws up a balance sheet comparing aggravating and mitigating circumstances around the case and the criminal. ‘Aggravating circumstances’ point to facts such as (a) whether the murder has been committed after careful planning and involves extreme brutality; (b) if the murder involves exceptional circumstances; (c) if the murder is of a member of armed forces of the Union or police force or public servant, etc. Similarly, ‘Mitigating circumstances would include facts such as : (a) That the offence was committed under the influence of extreme mental or emotional disturbance; (b) age of the accused; (c) the probability that the accused can be reformed or rehabilitated; (d) that the accused acted under the duress or domination of another person etc. Aggravating circumstances refer to facts surrounding the crime itself, and the mitigating circumstances refer to facts about the criminal, going beyond the crime itself.

17 *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470.

18 *Bachan Singh v. State of Punjab*, AIR 1980 SC 898.

19 *Sangeet v. State of Haryana*, (2013) 2 SCC 452. Here, Justice Madan Lokur categorically shows that *Bachan Singh* discards the balance sheet test.

20 *Vasant Sampat Dupare v. State of Maharashtra*, (2015) 1 SCC 253.

*Singh*²¹ and *Shankar Kisanrao Khade*²² introduce calculation practices and formulas such as the 100% and 0% tests to further this. But as Justice Lokur suggests, how does one draw up balance sheets equating two incommensurable categories? Would sanctity of life be a mitigating circumstance par excellence?

This cold calculability of the balance sheet test reminds one of Jacques Derrida's turns to Nietzsche when he asks "whence comes this bizarre, bizarre idea, this ancient, archaic idea, this so very deeply rooted, perhaps indestructible idea, of a possible equivalence between injury and pain?"²³ Nietzsche is unable to make sense of the principle of proportionality in punishments. He wonders how a mathematical equivalence is drawn between the wrong committed and the suffering imposed. By way of an answer, Derrida points out that the origin of the modern legal subject and of penal law is commercial law: the law of commerce, debt, market, exchange, surplus and interests.²⁴ He furthers the relation by noting that this contract-economy of punishment is inscribed in a Judeo-Christian tradition going back to the prohibition of murder in the Decalogue. Cesare Beccaria's *On Crime and Punishments* (1764) considered to be the source of modern death penalty abolitionism, Foucault suggests, is rooted less in humanitarian sentiments like sympathy and pity, "than in a quiet economic calculus that turns out to underwrite and direct those sentiments: Beccaria considers state execution undesirable not so much because it is immoral, Foucault argues, but because it is part of a 'bad economy of power.'"²⁵ The modern secular nation-state continues a Semitic tradition of prohibition,

21 *Gurvail Singh v. State Of Punjab*, (2013) 2 SCC 713.

22 *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546; *See generally*, Suhrith Parthasarathy, *Law Commission Report on 'Death Penalty': A Chance to overcome Incoherence in Indian Jurisprudence*, XLIX(29) ECONOMIC AND POLITICAL WEEKLY 17-18 (2014).

23 Jacques Derrida, *THE DEATH PENALTY: VOL. I*, Peggy Kamuf (trans.) 151 (University of Chicago Press, 2013).

24 Roberta Kevelson, *Lex Talionis: Equivalence and Evolution in Legal Semiotics*, VII(20) INTERNATIONAL JOURNAL FOR THE SEMIOTICS OF LAW 155-170 (1994) on the question of how monetary equivalence is drawn out as a compensation for moral and criminal injuries. This idea of monetary compensation in civil law (contractual and commercial law) is traced back to the evolution of retaliation and lex talionis. *See also*, B. Jackson, *ESSAYS IN JEWISH AND COMPARATIVE LEGAL HISTORY* (E. J. Brill, 1975) as cited in Roberta Kevelson, *LEX TALIONIS: EQUIVALENCE AND EVOLUTION IN LEGAL SEMIOTICS* (1994).

25 Michel Foucault, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON*, Alian Sheridan (transl.) 79 (Vintage Book, 1978), as cited in, Adam Sitze, *Capital Punishment as a Problem for the Philosophy of Law*, 9(2) THE NEW CENTENNIAL REVIEW 224 (2009).

forgiveness, mercy, repentance and guilt. In the politico-theology of modern death penalty, *Jus Talionis*,²⁶ the principle of equivalence sets up a relation of debt by equating sin to the “consciousness of guilt.” Sins and injuries become a debt and the psychic guilt becomes the punishment, a perpetual one albeit. Suffering is economised and contracts become the model of justice, both divine and secular.²⁷ The calculations of bad conscience flow into *Machhi Singh* when it adds up “collective conscience” as an aggravating factor in the balance sheet test. This theological principle reaches its epitome, or rather is entombed, in the Delhi High Court judgment on the *Nirbhaya* rape case where the judges hold:

There is no denying the fact that this hair raising incident had shocked the collective conscience of the nation, which is held to be one of the significant tests for determining if a case falls in the rarest of rare category.²⁸

Like reading Lord Denning’s judgments evoke nostalgia of the countryside and its “pastoral beauty,”²⁹ similarly, several recent death penalty judgments in India seem to evoke an ecclesiastical tone as their literary style. The bench comprising Honourable Justices Dipak Misra, Rohinton Nariman and U.U. Lalit in *Vasant Sampat Dupare* is an instance of this style:

26 SAGE GLOSSARY OF THE SOCIAL AND BEHAVIORAL SCIENCES, (Larry E. Sullivan (ed.), Sage Publications, 2009); *Jus Talionis*, also known as *Lex Talionis* is the principle of direct and equal retaliation, or punishment in kind. It is most explicitly incorporated in the Code of Hammurabi (a written code of law dating to 1800 BCE). The principle of *Jus Talionis* is also inscribed in the Biblical idea of “an eye for an eye, a tooth for a tooth” (Exodus 21: 23–25; Leviticus 24:17–20). In modern philosophy, Immanuel Kant’s retributive theory of punishment is premised on *Lex Talionis*; Jeremy Waldron argues that even under the principle of *Lex Talionis*, the capital punishment cannot be justifiably imposed. See, Jeremy Waldron, *Lex Talionis*, 34 ARIZONA LAW REVIEW 25-52 (1992).

27 See Judith Butler, *On Cruelty*, LONDON REVIEW OF BOOKS <http://www.lrb.co.uk/v36/n14/judith-butler/on-cruelty> (Review of Jacques Derrida, *THE DEATH PENALTY: VOL. I*, Peggy Kamuf (trans.) (Chicago, 2013)); See also, Mathew H. Kramer, *THE ETHICS OF CAPITAL PUNISHMENT: A PHILOSOPHICAL INVESTIGATION OF EVIL AND ITS CONSEQUENCES* (Oxford University Press, 2011).

28 Pawan Kumar Gupta v. State of Delhi, Death Sentence Reference No. 6/2013, CRL App. No 1398/1399/1414 of 2013, ¶34.

29 Dennis Klinck, ‘*The Other Eden*’: Lord Denning’s Pastoral Vision, 14 OXFORD JOURNAL OF LEGAL STUDIES 25 (1994) as cited in Desmond Manderson, *SONGS WITHOUT MUSIC: AESTHETIC DIMENSIONS OF LAW AND JUSTICE* 99 (University of California Press, 2000).

In these two appeals, we are required to deal with a sordid and despicable act of a married man whom at the time of incident was in wedlock for more than two scores having a criminal background, has yielded not only to inferior endowments of nature but also has exhibited the gratification of pervert lust and brutish carnality.

Notice the strong theological undertones especially in the use of words such “carnality,” “lust,” and the “inferior endowments of nature.” The judges repeatedly refer to the victim as “holy” and the crime having injured the “soul” of the society: “It is a crime against the holy body of a girl child and the soul of the society and such a crime is aggravated by the manner in which it has been committed.” The language repeatedly invokes the nature of the crime as being “diabolical,” a word which Biblically refers to the evil nature of the Devil. As a mitigating factor, the judges look for “repentance” and “remorse,” both terms characteristic of a Judaeo-Christian language. The judges claim that commutation, mercy, and forgiveness is undeserved because: “As is noticeable, there has been no remorse on the part of the appellants.”

Section 354(3) of the Criminal Procedure Code mandates that “special reasons” be stated when a death sentence is awarded. *Bachan Singh* noted that “special reasons” “obviously means ‘exceptional reasons’ founded on the exceptionally grave circumstances of the particular case...” In practice, these “special reasons” have mutated into descriptive word-play exploiting affective responses. The more literary, brutal and striking the description of the crime, the more “special” and “exceptional” the reason for death penalty seems to become. In *C. Munniappan v. State of T.N.*,³⁰ the Supreme Court held “Stressing upon the manner of commission of offence, if extremely brutal, the diabolical, grotesque killing, shocking to the collective conscience of the society, the death sentence should be awarded.”

How else can the judges prove the special nature of the case if not with aesthetic and narrative flourish? Reading *Vasant Sampat Dupare* closely, notice the vivid descriptions of the victim, a minor girl child, riding on a bicycle with the criminal, wearing a black top and blue skirt, purchasing ‘Minto Fresh’ from a

30 *C. Munniappan v. State of T.N.*, (2010) 9 SCC 567.

neighbourhood shop. On picturing this peaceful calm, thick descriptions of the crime itself are evoked: “the face was flattened, eyes closed, mouth partially opened, tongue was clinched and lacerated between teeth, blood oozing through mouth, nostrils and ears.”

The text of the judgment, as a literary artefact, through rhetorically thick descriptions of crime in all its gory details, is the play of reason in death penalty jurisprudence.³¹ In this affective act of trying to shock and ooh the reader, perhaps the Supreme Court is engaging in a “demosprudence,”³² albeit one which is inverted and negative, and without all the optimism that Upendra Baxi sees in it.³³ Death penalty sentencing is meant to be based on “special reasons” embedded in a so-called legal rationality, devoid of anything aesthetic. This pure rational exclusivism lies at the core of legal authority and legitimacy. My argument however is that a reading of death penalty judgments will make it evident that in fact such reasoning is tightly bound with the use of figurative language, and aesthetic considerations.³⁴

Context of the Report: It is in this newly emerging language of death penalty discourse that I proceed to contextualise the Law Commission report. “The march of our jurisprudence...shows the direction in which we have to head.”³⁵ The commission articulates death penalty jurisprudence in India as a progressive march towards absolute abolition: the law until 1955 was to give

31 On law’s relation to narratives and rhetoric, and law as literature, see generally, Guyora Binder and Robert Weisberg, *LITERARY CRITICISM OF LAW* (Princeton University Press, 2000).

32 Such demosprudence is meant to grant legitimacy to these judicial murders, given that judges are otherwise unelected representatives without any claim to democratic legitimacy. “Demosprudence” is introduced in American legal studies by Lani Guinier and Gerald Torres; See, Lani Guinier, *The Supreme Court Term, 2007 Term- Foreword: Demosprudence Through Dissent*, 122(4) *HARVARD LAW REVIEW* 40-41 (2008); Lani Guinier, *Beyond Legislatures: Social Movements, Social change, and the Possibilities of Demosprudence*, 89 *BOSTON UNIVERSITY LAW REVIEW* 539-561 (2009).

33 Prof. Upendra Baxi suggests that the Indian judiciary has been practicing demosprudence, especially since the late 1970’s, without explicitly acknowledging it as doing so. He sees such demosprudence as giving legitimacy to the institution, even if it is an unelected body. See, Upendra Baxi, *Demosprudence versus Jurisprudence: The Indian Judicial Experience in the Context of Comparative Constitutional Studies*, 14 *MACQUARIE LAW JOURNAL* (2014).

34 Desmond Manderson, *SONGS WITHOUT MUSIC: AESTHETIC DIMENSIONS OF LAW AND JUSTICE* 93-129 (University of California Press, 2000).

35 262nd Report of the Law Commission of India, *The Death Penalty*, 217 (August, 2015).

special reasons for imposing life imprisonment instead of the prescribed death sentence; an amendment in 1973 to Section 354(3) of the Code of Criminal Procedure, 1973 mandated “special reasons” to be given when death sentence is imposed;³⁶ subsequently in 1980 the Supreme Court in *Bachan Singh* upheld the constitutionality of the punishment but restricting it to the ‘rarest of rare’ cases. The commission projects its recommendations as the next step towards abolition.

However, the evolution of precedents since *Bachan Singh* begs the question of whether the death penalty jurisprudence in India has been a forward march or a clouded fuddle. The three-judge bench in *Machhi Singh* began the misreading of the ‘rarest of rare’ exception by trying to concretely define something that was not intended to be an “absolute rule for invariable application” or a “ready [reckoner]”.³⁷ In doing so, the Court only bred uncertainty and arbitrariness in decision-making, ultimately culminating in *Ravji alias Ram Chandra v. State of Rajasthan*³⁸ that led to the erroneous execution of Ravji Rao and Surja Ram on May 4, 1996 and April 7, 1997 respectively.³⁹ *Swami Shraddananda*,⁴⁰ *Santosh Kumar Bariyar*, *Sangeet* and other recent cases declared *Ravji* *incuriam* and showed *Machhi Singh* to be inconsistent with and deviating from *Bachan Singh*. On this admission of error, fourteen former Judges appealed to President Pranab

36 Section 354(3), Code of Criminal Procedure, 1973: When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, *in the case of sentence of death, the special reasons for such sentence.*” (emphasis added).

37 Both phrases as used in *Vashram Narsibhai Rajpara v. State of Gujarat*, (2002) Cri.L.J. 2930 in discussing *Machhi Singh* and *Bachan Singh*.

38 *Ravji alias Ram Chandra v. State of Rajasthan*, (1996) 2 SCC 175.

39 These judgments are erroneous for the following reason: The Division Bench in *Ravji* says that “it is the nature and gravity of the crime but not the criminal which are germane for consideration of appropriate punishment in criminal trial.” This conclusion runs directly counter to *Bachan Singh*, which remains the correct law governing death penalty in India. *Bachan Singh* clearly stated that “in fixing the degree of punishment...the court should not confine its consideration ‘principally’ or merely to the circumstances connected with the particular crime but also give due consideration to the circumstances of the criminal.” Therefore, Justice S. B. Sinha in *Santosh Kumar Bariyar* notes that *Ravji* is clearly per *incuriam* for this reason, along with “at least 6 decisions of this Court in which death penalty has been awarded in the last 9 years.” *Bariyar* also pointed out that the “rarest of rare” standard as laid down in *Bachan Singh* has to take into consideration whether all “alternative option is unquestionably foreclosed,” and this too is a factor that had not been considered in *Ravji*.

40 *Swami Shraddananda v. State of Karnataka*, (2008) 13 SCC 767.

Mukherjee to commute the sentence of nine death-row prisoners whom the Supreme Court had erroneously sentenced to death.⁴¹

In spite of these corrective actions, the Court continues to dilute the ‘rarest of rare’ doctrine such as by misapplication of the problematic balance-sheet test,⁴² courting public opinion, not suitably accounting for socio-economic contexts of the criminal and not ensuring that all alternative remedies are foreclosed.⁴³ More recently, the Supreme Court in *Shatrughan Chauhan v. Union of India*⁴⁴ intervened to commute to life imprisonment the sentence of fifteen death row convicts on grounds of the cruelty and torture inflicted by the executive’s unreasonable delay in disposing mercy petitions. It is these set of recent events that necessitated a Supreme Court referral to the Law Commission for a re-examination of the “coherence, purpose and basis of the sentence and granting of clemency” in such cases.⁴⁵

41 V.Venkatesan, *Getting Judge-Centric*, THE FRONTLINE (25th January, 2013) at <http://www.frontline.in/social-issues/general-issues/getting-judgecentric/article4275933.ece> (last accessed 17th December, 2015).

42 Justice Madan Lokur in *Sangeet v. State of Haryana*, (2013) 2 SCC 452 holds that *Bachan Singh* had discarded the balance sheet test and yet a smaller bench in *Machhi Singh* mistakenly revived it. He goes on to suggest why the balance sheet test is problematic: “a balance sheet cannot be drawn up of two distinct and different constituents of an incident. Nevertheless, the balance sheet theory held the field post [since] *Machhi Singh*.” Even in 2014, *Vasant Sampat Dupare v. State of Maharashtra* continues to apply the Balance Sheet test.

43 *Mulla & Another v. State of U.P* (Criminal Appeal No. 396 of 2008, Decided on the 8th February, 2010) and *Santosh Bariyar v. State of Maharashtra*, echoing the spirit of *Bachan Singh*, unequivocally hold that the ‘rarest of rare’ case will be one where “the alternative option [of life imprisonment] is unquestioningly foreclosed.” This alternative remedies’ precondition (in one instance articulated by Justice Brennan in *Furman v. Georgia*) is in accordance to the principle that a punishment will be justified only if there is no “significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted.” A utility-driven inflection is at the heart of this articulation of the principle. *Arjitsingh Harnamsingh Gujral v. State of Maharashtra*, (2011) 14 SCC 401 and *Vasant Sampat Dupare v. State of Maharashtra* (2014) are two recent instances of this persisting arbitrariness. In the context of inconsistency and uncertainty in sentencing in honour killing cases, see, Abhinav Chandrachud, *Inconsistent Death Sentencing in India*, XLVI(30) ECONOMIC AND POLITICAL WEEKLY 20-23 (2011).

44 *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1.

45 The reference to the commission comes in *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546.

PART II

Arguments for Abolition

The following are the arguments that the commission gives for recommending the abolition of death penalty:

First, the commission suggests that “the passage of thirty five years since” *Bachan Singh*, along with “considerably altered global and constitutional landscape in that time” necessitates a re-evaluation of *Bachan Singh* itself.⁴⁶ It reiterates a thick conception of rule of law,⁴⁷ substantive due process and reaffirms *Maneka Gandhi’s* reading of Article 21, that life and personal liberty can be deprived only “according to procedure established by law,” where the procedure, through a harmonious construction of Articles 14, 19 and 21 has been interpreted as a substantive due-process clause.⁴⁸ This introduces a stricter test on grounds of cruelty, reasonableness, dignity and proportionality in the sentencing process especially because these are cases concerning infringement of fundamental rights. Although the commission doesn’t extend this rationale to its end, one can assume that the specific argument for abolition being made here is premised on the moral belief in the sanctity of human life. Respecting for the sanctity of life, a principle that the commission unearths as existing in the Constitution, becomes a ground for its abolitionist argument.

Second, the commission strongly agrees that death penalty does not serve the goal of deterrence.⁴⁹ It also rejects the retributive claim, stating that “the

46 262nd LCI Report, *supra* note 35, at 169-170.

47 For an overview of the different conceptions of Rule of Law, see, Brian Tamanaha, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (Cambridge University Press, 2004). A thick conception (maximalist) of rule of law incorporates in it, notions of the “good,” “just” and “right” as opposed to a thin conception (minimalist) which entails basic procedural restraints on sovereign power. On the Indian Supreme Court’s rule of law jurisprudence, see, Upendra Baxi, *The Rule of Law in India*, 4(6) SUR-INTERNATIONAL JOURNAL OF HUMAN RIGHTS 7-25 (2007) where he suggests that a thick, enriched, non-mimetic and non-western conception of RoL has evolved in the Indian subcontinent that not just restraints State domination but also empowers progressive state intervention in civil society.

48 *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

49 It has to be noted that the commission does not offer any substantive India-specific empirical evidence for this claim. It infers this from American and European data for the ineffectiveness of death penalty to deter future crimes.

notion of ‘an eye for an eye, tooth for a tooth’ has no place in our constitutionally mediated criminal justice system. Capital punishment fails to achieve any constitutionally valid penological goals.”⁵⁰

Third, the commission acknowledges that police investigation is often poor, victims are not well represented by lawyers, and the criminal justice system is ailing with immense problems such as undue delay, overwhelming case load, etc., thus leading to a rather high probability of error in judgment.

Fourth, although *Bachan Singh* laid down the ‘rarest of rare’ exception as a “demanding and compelling” standard, the evolution of this guideline has been dismal. The commission recounts *Ravji*’s violation of *stare decisis*, and argues that the application of *Bachan Singh* has been inconsistent, arbitrary and judge-centric rather than principled.

Fifth, the exercise of clemency powers⁵¹ by State and Union governments has been insensitive, delayed, procedurally inefficient and politicised, and the decisions lack proper application of mind.⁵²

Sixth, that religious, caste and class biases are deeply entrenched in our criminal justice system. An overwhelming majority of the convicts are Dalits, religious minorities and from backward castes; almost all of them are poor, from the poorer geographical regions, and a majority of them, at some point in the investigation, were tortured into confessions.⁵³

50 262nd LCI Report, *supra* note 35, at 213.

51 Article 72 and Article 161 of the Constitution of India provide powers to the President and the Governor, respectively, to grant pardons, reprieves, respites or remissions of punishment, or to suspend, remit or commute the sentence of any person convicted of any offence where the sentence is of death. 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.

52 262nd LCI Report, *supra* note 35, at 174.

53 *See generally*, the research conducted by Death Penalty Research Project at <http://www.deathpenaltyindia.com/death-row-prisoner-information/> (last accessed 17th December, 2015); See also, Sourjya Bhowmick, *Was President Kalam right? Does the death penalty only stalk the poor?*, CATCH NEWS (10th July, 2015) at <http://www.catchnews.com/india-news/is-president-kalam-right-does-the-death-penalty-only-stalk-the-poor-1436544975.html>; or see, Himanshi Dhawan, *Death Sentence Rate Highest in Delhi, J&K*, THE TIMES OF INDIA (9th September, 2015) at <http://timesofindia.indiatimes.com/india/Death-sentence-rate-highest-in-Delhi-JK/articleshow/48876922.cms>; Interview with Anup Surendranath on the Death Penalty Research Project: *Most Death Row Convicts are Poor*,

As is evident, the *first* argument is a universalist, human rights-like argument (based on the presumption of an inviolable sanctity of human life). The second is a functionalist argument (that the punishment does not serve the purpose/objective was intended for); while the *third*, *fifth* and *sixth* indicate problems of institutional prejudices. The *fourth* indicates the problem of indeterminateness in legal decision-making. The commission seems to argue that because these aforementioned reasons ultimately jeopardise due process and render the application of rule of law on shaky ground, capital punishment deserves to be abolished. Both due process and rule of law are crucial devices that, enabled by the Constitution, set limits on the scope and powers of the democratic institutions. For this reason, let us title the commission's arguments for abolition, *Constitutionalism Arguments*. I use 'constitutionalism' as an umbrella term covering a family of overlapping concepts such as constitutional morality, rule of law, primacy of fundamental rights, etc., that together articulate limits and constraints upon the scope and powers of electorally formed democratic institutions.

Retentionist Arguments by Dissenting Members of the Commission

Three members of the commission, namely, Justice (Retd.) Usha Mehra, and *ex-officio* members Dr. Sanjay Singh and Mr. P.K. Malhotra, rejected the recommendations of the commission in its entirety. The Appendix to the Report, comprising about twenty pages, consists of their counter. An initial glimpse will leave the reader curious about how the recommendations of this reasonably well-drafted report were rejected in such brevity. But this Occam's razor optimism of the reader will be immediately smudged on realising the dissent's rehearsal of familiar claims. Their broad set of arguments are summarised as follows:

First, Human Fallibility Argument: As Justice Usha Mehra states in all platitude, "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."⁵⁴ As per this line of argument, indeterminacy and error in judgment is inherent and all too human, and so this is not reason enough to abolish death penalty. Since errors in judgment are unavoidable, these

OUTLOOK (15th December, 2015) at <http://www.outlookindia.com/article/most-death-row-convicts-are-poor/292798> (last accessed 21st December, 2015).

54 262nd LCI Report, *supra* note 35, at 222.

‘accidental’ deaths are inevitable by-products of a system. *Second, Order and Security:* Mr. 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.”⁵⁵ In a more apocalyptic tone, Mr. Malhotra suggests that abolition of the death penalty may eventually lead to a time “when the law will cease to exist.”⁵⁶ He alludes, without evidence, to the growing threat of terrorism, increased cases of kidnapping and abduction for ransom and organised crime as the reason for retaining the punishment.⁵⁷ He has to presume the effectiveness of deterrence to make such an argument, but does not explicitly comment on it. *Third, Due Process of Law Argument:* The three members agree that there is an unbridled, arbitrary and judge-centric application of death penalty in several cases. But they assert their faith in the due process of law, rule of law, procedural safeguards and institutional checks and balances to remedy this arbitrariness. As per this line of reasoning, the problem with death penalty in India is the poor *application* of law: 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. *Fourth, Deterrence Argument:* With no reference to any evidence, the members consider the deterrent value as self-evident. For instance, Dr. Singh in an anecdotal fashion claims: “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. Whoever committing a pre-meditated heinous crime... should not be allowed to go with life imprisonment... as they do not deserve for the same.”⁵⁸ *Fifth, Legislative Supremacy Argument:* Per this view, it is the will of the majority, expressed through the law-makers, which justifies retention of the sentence. 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.” With a paternalistic subtext, Mr. Malhotra laments “that the will of the Parliament shows that looking into the prevalent situation in the country, the

55 262nd LCI Report, *supra* note 35, at 240.

56 262nd LCI Report, *supra* note 35, at 236.

57 Crime in India, 2014 Report published by the National Crime Records Bureau (<http://ncrb.nic.in/>) suffices to show that these claims are an exaggeration.

58 262nd LCI Report, *supra* note 35, at 232.

59 262nd LCI Report, *supra* note 35, at 237.

Indian society has not matured for total abolition of death penalty” and that the “time is not ripe”⁶⁰ yet.

The following can be inferred from the above:

- (a) The *second* and *fourth* argument are functionalist justifications presuming that capital punishment leads to deterrence in crime. Since neither the abolitionists nor the retentionists in the report adduce any substantive India-centric evidence to support their respective claims, it is hard to wrestle with whether deterrence works or not (although global evidence clearly shows that it does not).
- (b) The first and *third* argument refer to indeterminacy in legal decision-making. As evident from the abolitionist argument as well, two kinds of indeterminacies emerge: (i) inherent indeterminacy and (ii) resolvable indeterminacy. The *Human Fallibility Argument* of the retentionist is of the former kind of indeterminacy, one which is inherent and inevitable in the judicial process. They suggest that if all forms of legal decision-making are indeterminate and uncertain, then this is not reason enough to abolish the penalty for it would lead to the absurd proposition that all legally imposed punishments, including fines and imprisonment, are unjustified. Resolvable indeterminacy is the kind which can be corrected, such as remedying *Ravji's* misreading of *Bachan Singh*, or ensuring better police investigation, correcting institutional biases, etc. Since we can potentially correct these factors, the retentionists argue that this too is not a sufficient justification for abolition.
- (c) The final strand of argument by the dissenters (*fifth argument*) suggests that abolition of death penalty is not a constitutional/judicial matter but a legislative one. Abolition must ultimately be a legislative decision representing democratic sentiments.

As is obvious by now, the abolitionist and retentionist debate in the commission's report hinges on these three inter-related themes: constitutionalism, legislative supremacy and indeterminacy in judicial decision-making.

60 262nd LCI Report, *supra* note 35, at 242.

PART III

Terrorism as the State of Exception

The Law Commission of India agrees with the global ethic of human rights and constitutional morality, and still, in the very end, places a “but,” carving an exception in cases of terrorism. The report lacks consistency and the will to take its own argument to its rational end. It caves in and compromises.

What are the commission’s reasons for recommending this exception? To create an exception, the commission will have to show why “terrorism” (the report does not define or explain it) does not fall in any of the above-mentioned reasons for abolition. For instance, they have to argue why terrorists are not covered within the category of universalizable guarantees such as sanctity of life, and dignity; or why ideological biases (such as religious, caste bias, etc.) will not interfere in deciding terrorism cases; or why deterrence and retribution will work against terrorists but no other kind of crimes; or why the probability of error is not a concern for trying those accused under terrorism laws. But surprisingly, the commission does not give a single such reason. *The argument this essay makes is not whether or not terrorism ought to be the exception, but merely that within the commission’s framework of the argument for abolition, ‘terrorism’ appears as an arbitrary exception.*

Chapter 4 (C), Part (iii) of the report deals with terrorism. The section begins by stating the lack of connection between terrorism and death penalty. It recognises that death penalty is unlikely to deter terrorists, and in fact death penalty maybe too adversarial, and only increases chances of retaliation. But after recognising this, the report abruptly ends this section without countering any of its own arguments. The only justification that the LCI offers for the exception 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).

“Paradoxical Unity” of Constitutional Democracy

In effect, the commission’s justification for excluding terrorism is that the “law-makers” intend so. This essay wishes to stress on this perplexing shift in the *nature of the argument*. As described in Part I, the report proposes the abolition of death penalty on what I called the Constitutionalism Argument.⁶¹ They are the sort of arguments that are meant to place limits on the scope of legislative powers. Yet the commission allows for a derogation from these limits. And it justifies this by grounding it in representative governance (“Democracy Argument”): that people vote for their representatives, and these representatives do not intend such an abolition. This leap in register, from a language of constitutionalism, to a language of democracy is what is perplexing. The question then is: how do exceptions arise from the conflict between these two different but equally legitimate rationales?

In this context however, the Law Commission becomes a body that allows itself to swerve between these two incommensurable choices in a manner that is arbitrary, and ultimately political. The report instrumentalizes the “paradoxical unity of contradictory principles,” to the end that it is predisposed towards.

That constitutionalism is often in conflict with democracy is well known.⁶² In classical political theory, a representative government ideally reflects the “unrestricted” will of the citizens regardless of how it represents the ethos of the shared political life.⁶³ Constitutionalism, on the other hand, sets limits on people’s will and their determination of the laws of the State. As Leslie Green starkly puts it “Democracy is rule by the people. Constitutionalism is [rule] under a constitution. There is no guarantee that what the people will want is what their constitution will permit.”⁶⁴

61 On such “constitutionalism arguments” for abolition, see generally, Benjamin S. Yost, *Rule of Law Abolitionism* in Austin Sarat (ed.), *STUDIES IN LAW, POLITICS AND SOCIETY: SPECIAL ISSUE- IS DEATH PENALTY DYING* 53-89 (Vol. 42, 2008).

62 Jurgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles*, 29(6) *POLITICAL THEORY* 766-781 (2001); On the conflict between the judiciary (constitutionalism) and legislature (representative institution), see, Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18(2) *JOURNAL OF DEMOCRACY* (2007).

63 *Id.*, at 766.

64 Lecture: Leslie Green, *A Democratic Constitution: The Basics*, UCL POLITICAL THEORY SEMINAR at <http://abcdemocracy.net/2011/11/17/some-recent-papers/>.

In modern politics the relation between constitutionalism and democracy is hyphenated rather than paradoxical. The former becomes the precondition for the latter to arise, and in the process reinforce each other. But in making the Constitution the precondition for democratic politics, the judiciary consisting of unelected judges as the final arbiter of the Constitution (through powers such as of Judicial Review) takes up an institutional supremacy over and above democratic institutions.⁶⁵ So, although they are theoretically meant to reinforce each other, in practice the relationship remains one of struggle between two competing institutions over the final say on the Constitution. In the Indian context, Pratap Bhanu Mehta frames the conflict between parliamentary sovereignty and constitutionalism as a competitive struggle for supremacy between the judiciary and the legislature.⁶⁶ The Supreme Court's striking down of the National Judicial Appointments Commission (99th Constitutional Amendment) on grounds of it being violative of judicial independence,⁶⁷ while the Union Government in turn accusing the Court of becoming the "tyranny of the unelected,"⁶⁸ is a recent instance of this conflict.

A key insight then, is that the entire report is an embodiment of this conflict between the two contradictory principles. Add to this the fact that the report, which is meant to give recommendations to the legislative wing of governance, has been referred to not by the legislature but the Court itself. It is in embodying this conflict that it walks a slippery slope mediating the constitutional and the democratic, the political and the judicial. The argument is that it is the possibility of this *slippage* that ultimately allows for such

65 See, Jeremy Waldron, *The Core Case against Judicial Review*, 115 YALE LAW JOURNAL 1348-1386 (2006) criticises the legitimacy, authority and expertise of unelected judges when exercising powers of judicial review to nullify legislative actions.

66 Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18(2) JOURNAL OF DEMOCRACY (2007). On the rise in judicial influence over political institutions post-Emergency and through the coalition politics of the 1990's in India, see, Sanjay Ruparelia, *A Progressive Juristocracy? The Unexpected Social Activism of India's Supreme Court*, KELLOGG INSTITUTE (Working Paper Series 391; 2013).

67 Supreme Court Advocates-on-Record Association and Another v. Union of India, W.P. (Civil) No. 13 of 2015 http://supremecourtindia.nic.in/FileServer/2015-1016_1444997560.pdf (last accessed 21st December, 2015)

68 Arun Jaitley on NJAC Verdict: Democracy Cannot Be "Tyranny of the Unelected", INDIAN EXPRESS (19th October, 2015) at <http://indianexpress.com/article/india/india-news-india/njac-sc-verdict-democracy-cannot-be-tyranny-of-the-unelected-says-arun-jaitley/> (last accessed on 21st December, 2015).

exceptionalism. As Carl Schmitt famously observed “sovereign is he who decides on the exception”- sovereign power disguises itself as law.⁶⁹ The commission’s report, as discussed in this essay, functions exactly in this zone of *indistinction* between sovereign power and law, folding into a helix.

*Shatrughan Chauhan v. Union of India*⁷⁰ is significant in the context of terrorism laws for holding *Devender Pal Singh Bhullar v. State of Delhi*⁷¹ *per incuriam* and upholding *Triveniben v. State of Gujarat*⁷² as valid law. In effect, the Supreme Court states that unexplained delay as grounds for commutation of death sentence into life imprisonment is applicable to all cases including those falling under terrorism laws. Distinguishing terrorism cases from other criminal offences, in the context of mercy petitions, was held to be unconstitutional. Although this judgment is not directly applicable to death sentencing itself, it does reopen the question of whether a blanket distinction between terrorism offences and other offences is valid.⁷³

69 On the relation between Sovereignty, Law and Exception, see, Giorgio Agamben, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Stanford University Press, 1998); Giorgio Agamben, *STATE OF EXCEPTION*, Kevin Attell (trans.) (University of Chicago Press, 2005); On the sovereign disguised as law, see also, Harriet Murav, *E Proboscis Unum: Law, Literature, Love and The Limits of Sovereignty*, in Austin Sarat (ed.) *LAW AND LITERATURE RECONSIDERED: SPECIAL ISSUE 2* (Emerald Group Publishing, 2008).

70 *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1.

71 *Devender Pal Singh Bhullar v. State of Delhi*, (2013) 6 SCC 195.

72 *Triveniben v. State of Gujarat*, (1989) 1 SCC 678.

73 The report has to be read in the context of the Indian Supreme Court’s history of negotiating with executive discretion in terrorism laws. See, Ujjwal Kumar Singh, *THE STATE, DEMOCRACY AND ANTI-TERROR LAWS IN INDIA* (Sage Publications, 2007); Shylashri Shankar, *Judicial Restraint in an Era of Terrorism: Prevention of Terrorism Cases and Minorities in India*, 11(1) *NLSIU SOCIO-LEGAL REVIEW* 103-124 (2015)103; Shylashri Shankar, *SCALING JUSTICE: INDIA’S SUPREME COURT, SOCIAL RIGHTS, AND CIVIL LIBERTIES* (Oxford University Press, 2009). Most anti-terrorism legislations normalise extra-constitutional exceptionalism and the Supreme Court has a poor track record in checking these powers. See, Menaka Guruswamy, *Countering Terror or Terrorizing the Law*, 599 *SEMINAR* 2-5 (2009); Shylashri Shankar, *Judicial Restraint in an Era of Terrorism: Prevention of Terrorism Cases and Minorities in India*, 11(1) *NLSIU SOCIO-LEGAL REVIEW* 103-124 (2015). Be it the establishment of Special Courts, admitting extra-judicial confessions, detention without trial, interception of phone calls, etc. provided in numerous legislations such as Unlawful Activities (Prevention) Act, 1967, Armed Forces (Special Powers) Act, 1958, National Investigation Agency Act, 2008, etc.; they have all been upheld by the Court by Be it the establishment of Special Courts, admitting extra-judicial confessions, detention without trial, interception of phone calls, etc. provided in numerous legislations such as

On The Indeterminacy of Decision Making

The indeterminacy in legal decision-making arises from a peculiar negotiation between two conflicting demands made upon the judge. In the context of death penalty, *Santosh Kumar Bariyar* articulates, perhaps not consciously or voluntarily, this conflicting demand that I suggest is the cause for indeterminacy in judgments. *Bariyar* is being considered a landmark judgment for providing a much needed corrective reading of *Bachan Singh*.⁷⁴ But in doing so, the judges themselves get trapped in a conflict that shows how indeterminacies can never be eliminated from the ‘rarest of rare’ test. I wish to draw attention to the following two conflicting arguments articulated in *Bariyar*:

Demand A: “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.” And “principled sentencing” has degenerated into “judge-centric sentencing”.

Demand B: *Bariyar* is crucial for reiterating the centrality of “Individualized Sentencing” while deciding cases. “[...] (A) standardisation of the sentencing process which leaves little room for judicial discretion to take account of variations in culpability within single-offence category ceases to be judicial. It tends to sacrifice justice at the altar of blind uniformity.”

In saying A, the Court laments the lack of principled, calculable, predictable uniformity in decision-making, while in saying B, the Court stresses on the need for individualising every case and to avoid mechanising or standardising the sentencing process. If A demands generality, uniformity and sameness; then B demands uniqueness and difference. And this gap between A

Unlawful Activities (Prevention) Act, 1967, Armed Forces (Special Powers) Act, 1958, National Investigation Agency Act, 2008, etc.; they have all been upheld by the Court by reading down constitutional guarantees. See, Jayanth K. Krishnan and Viplav Sharma, *Exceptional or Not? An Examination of India’s Special Courts in the National Security Context*, in Fionnuala Ni Aolain, Oren Gross (eds.) *GUANTANAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVE* 283-301 (Cambridge University Press, 2013); Anil Kalhan, *Colonial Continuities: Human Rights, Terrorism and Security Laws in India*, 20 *COLUMBIA JOURNAL OF ASIAN LAW* 93 (2006).

74 On why Santosh Bariyar is to be considered a landmark judgment, see, Tarunabh Khaitan, “Landmark Death Penalty Case: *Santosh Bariyar v. State of Maharashtra*” in *Law and Other Things* <http://lawandotherthings.blogspot.in/2009/05/landmark-death-penalty-case-santosh.html> (last accessed on 17th December, 2015).

and B is what gives rise to indeterminacy. For the philosopher Jacques Derrida, it is these two opposing impulses: equal treatment (analogous to “A”) and singular respect (analogous to “B”) that open up an irresolvable *aporia* that plagues judicial decision-making.⁷⁵ The Bench in *Bariyar* is no formalist, they insist that “there is a real danger of such mechanical standardisation degenerating into a bed of procrustean cruelty,” thus noting that one cannot “sacrifice justice at the altar of blind uniformity.” In effect, the judges insist that they cannot just act on Demand A while sacrificing Demand B, and that justice mandates a balance between the two demands. Indian death penalty jurisprudence is arguably at its best in *Bariyar* precisely for reflecting on this conflict that plagues legal decision-making. Like driving a car requires the windscreen and the rear-view mirror, similarly every legal decision is simultaneously backward-and-forward looking. It requires the judge to apply a prior established norm to necessarily *different* and *singular* situations in front of her.⁷⁶ The aspiration on one hand is toward legality, stability, calculability, predictability, prescriptive regularity, while at the same time is the desire for a unique and singular response that justice demands of judges. “The necessary passage of time between the enunciation of a norm and its application, and the necessary uniqueness of the present judgment by comparison to its prior instances, inevitably opens up a space for decision.”⁷⁷

This echoes the conflict discussed in the previous section between constitutionalism and democracy as well. For instance, as Leslie Green says: “Democracy requires an agile responsibility to the will of the people; constitutionalism requires a government under a slow-moving system of fundamental law. They make an uneasy pair...”⁷⁸ The “agile responsibility” is to respond to the individual-singular fact situations of the people (demos), while the “slow-moving system of fundamental law” (nomos) embodies the spirit of the Constitution as envisaged by the drafters. The Basic Structure Doctrine is such a negotiation between (a) the scope of legislative agility to meet the singular demands of populist realities and (b) holding on to the basic features of the

75 Jacques Derrida, *Force of Law: The “Mystical Foundations of Authority*, Mary Quaintance (tras.), 11 CARDOZO LAW REVIEW 921-1045 (1980-90).

76 Desmond Manderson, *Judgment in Law and the Humanities*, in Austin Sarat, Mathew Anderson, Cathrine O. Frank (eds.) LAW AND THE HUMANITIES 499 (Cambridge University Press, 2009).

77 *Id.*, at 499

78 Lecture: Leslie Green, *A Democratic Constitution: The Basics*, UCL POLITICAL THEORY SEMINAR at <http://abcdemocracy.net/2011/11/17/some-recent-papers/>.

Indian constitution as envisaged by the framers of the constitution. The former demands adapting to change while the latter demands stability and endurance.⁷⁹ Decision-making is a pull towards consistent application of a rule on the singular demand of the fact-situation before the judge.⁸⁰ This gap throws up the *Aporiatic* indeterminacies inherent to judicial decision-making. I have also shown that *Bariyar* most clearly articulates this indeterminacy although misleadingly believes it can overcome it.

79 See generally, Sudhir Krishnaswamy, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE* (Oxford University Press, 2010).

80 This conflict between ‘principled uniformity’ and ‘singularity,’ between *Santosh Bariyar*’s hope for “principled judgment” as well “individualized judgment,” is reflected in the struggle between “enduring constitutionalism” and “evolving constitutionalism”- a struggle that underlies the death penalty debate in the United States Supreme Court. If the “enduring constitutionalist” focuses on the original intent of the framers of the constitution, then the “evolving constitutionalist” sees the text as a living organism adapting to the changing demands of the society. The former insists on interpreting the Constitution as it is and as was intended, while the latter is keenly aware of the changing factual circumstances around her, reading the texts in its dynamic contexts. This is most clearly evident in the 2015 judgment of the US Supreme Court, *Glossip v. Gross* (decided on 29th June, 2015), in the differing opinions of Justice Scalia and Justice Breyer. Justice Scalia suggests that the constitutionality of death penalty is a straightforward question because it was clearly permitted when the Eighth Amendment was adopted, and so it is clearly permitted today. If the “standards of decency” have changed since then, it is the legislature that has to account for it, and not the judges. For him the constitution is not a living and evolving organism, but a dead and enduring one. Justice Breyer on the other hand, articulates his dissent in *Glossip* by discussing the abolitionist trends in various international jurisdictions, quotes several recent studies, analyses facts and statistics in order re-contextualize the meaning of “cruel and unusual punishment,” not as envisaged by the framers of the constitution, but by the current national and international standards. In the Indian context, the majority in *Bachan Singh* take a partly originalist position while the LCI report takes the evolutionary approach. As per the former, the framers of our Constitution were aware but unsure of how to deal with the punishment, leaving it to the legislature to decide the matter (Report 15-17). Articles 72 and 161 of the Constitution empower the President and the Governor respectively to commute death sentences, thus showing that the framers were cognizant of the matter when drafting it. An originalist would therefore argue that the framers did not prohibit the punishment and hence left the matter to the legislature. On the other hand, the LCI performs an evolutionist reading of the provisions. Where *Bachan Singh* holds that death penalty does not violate principles of cruelty and unreasonableness, the commission suggests that “the passage of thirty five years since that decision, and the considerably altered global and constitutional landscape in that time, are factors to be considered in any re-evaluation of the constitutionality of the death penalty” (262nd LCI Report, *supra* note 35, at 169-170).

To conclude the argument being made in this section: we saw that *Santosh Kumar Bariyar*, in its reading of *Bachan Singh*, articulates a conflicting demand between principled-consistency on one hand, and singularity (“individualisation”) of facts on the other. This conflicting demand, as Derrida shows, opens up the *need* for a decision, but also simultaneously opening up an *aporia* that leads to the indeterminateness of that very decision. As we saw in Part II, the dissenting members of the commission argue that indeterminacy of law is unavoidable and this by itself does not vitiate or render death penalty unconstitutional. Sengupta and Sharma similarly argue that if we were to render death penalty unconstitutional on grounds of the inherent indeterminacy of law, then no punishment in law is justifiable, even simple imprisonment and fines.⁸¹

This is a mistaken argument for an obvious reason: Death is a different category of punishment from all other punishments. Sengupta and Sharma suggest that “neither life nor the time spent in prison can be brought back”.⁸² In case of imprisonment, time spent in jail cannot be brought back, but death sentence is a ceasing of time itself. Murder (of which capital punishment is a mode) is a kind of offence different from all other offences because of “its irreversibly complete termination of any opportunities for the victim to undergo future positive experiences.”⁸³ Death being a different category of punishment from all other categories, makes the argument of inherent indeterminacy a legitimate justification for abolition. Extending the jurisprudence in *Bariyar* and *Bachan Singh* through such Derridean reading explains why the ‘rarest of rare’ standard inevitably leads to inconsistency and arbitrariness, in turn strengthening the commission’s case for abolitions.

CONCLUSION

The philosopher Jacques Derrida points out the 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*

81 Arghya Sengupta and Ritwika Sharma, *Death Penalty in India: Reflections on the Law Commission Report*, L(40) ECONOMIC AND POLITICAL WEEKLY 12-15 (2015).

82 *Id.*

83 Mathew H. Kramer, *THE ETHICS OF CAPITAL PUNISHMENT: A PHILOSOPHICAL INVESTIGATION OF EVIL AND ITS CONSEQUENCES* 42 (Oxford University Press, 2011).

84 Jacques Derrida, *THE DEATH PENALTY: VOL. I*, Peggy Kamuf (trans.) 11 (University of Chicago Press, 2013).

does not obey these commandments?”⁸⁴ Derrida is intrigued by how God can decree a penal code that itself looks like a “flagrant offence” against the ethic 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?⁸⁵

In this essay, I have argued that: Even though the commission provides Constitutionalism Arguments for abolition based on universalizable guarantees, it is able to derogate from its own act of universalisation. How do they justify this selective derogation? I suggested that they do this by exploiting the paradox between constitutionalism and democracy. It is because constitutionalism conflicts with democracy that arbitrary exception such as that of terrorism, is possible in juridical discourse.

These discussions flag a crucial insight that needs to be pursued by the abolitionists in India. The abolitionists expound abstract principles of justice based on a conception of humanity’s intrinsic value and moral worthiness. The retentionists, as evident in the report, talk a language of passion, fear, insecurity, and exclusionism. Here, the difference is also one of style and rhetoric. The significant point is that in doing so, the retentionist dissent speaks to the *demos* and engages in agonistic politics, while the former speaks a detached language of constitutional morality devoid of politics. This gap in the dialogue between abolitionists and retentionists, between *nomos* and the *demos*, is what has to be overcome by death penalty activism in India. The abstract principles of justice that the abolitionists talk of has to embrace sociality and take roots in culture. As Martha Nussbaum suggests in *Political Emotions* (2013), “the human mind is quirky and particularistic, more easily able to conceive a strong attachment if these high principles are connected to a particular set of perceptions, memories and symbols that have deep roots in the personality and in people’s sense of their own history.”⁸⁶ By appeal to emotions, using symbols, poetry, narratives, films, literature and music, the abstract principles of justice get embedded in the ethos of the community. It is only by speaking to the *demos* that the gap between constitutionalism and democratic sentiments can be potentially bridged.

85 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*, if not as death penalty but then as militaristic drone strikes.

86 Martha C. Nussbaum, *POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE* 10 (Harvard University Press, 2013).