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Why We Can't Have A 'Democratic' Discourse On Death Penalty

Karan Tripathi 30 May 2020 1:32 PM



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***After hearing a death sentence for the first time in my life, with my own ears in a court of law, I had trouble returning to the normal course of life over the next several days. I felt like a blunt weight was inside my chest. The moment the presiding judge announced death penalty, death reared its head in the court...
The death that appeared in the courtroom took away its share.'***

• **-Haruki Murakami**

These words by Murakami were recorded in an interview he gave to a Japanese National Daily after the execution of all the 13 convicts in the AUM Shinkriyo cases. These cases pertained to a sarin gas attack in the subway of Tsukiji station in Tokyo, resulting in the death of multiple people.

Murakami had personally attended the trial in these cases, had interviewed the families of the deceased and captured their bereavement in his book titled 'Underground'. As he spoke of the executions in this interview, while claiming himself to be an abolitionist of death penalty, he displayed a sense of unsettling doubt towards the moratorium on death penalty.

If one wonders where such resentment towards moratorium on death penalty was stemming from, the answer would lie in Murakami's emotional overwhelming by the victim oriented narratives about the perceived notion of justice.

The atonement for the unfathomable wrong done to Nirbhaya established a Murakami-esque resentment in the majority of this country. However, what makes such resentment the strongest argument for the moratorium on death penalty as justice is what I'll be exploring in this article.

In order to begin, the answer is teased by Murakami himself in the said interview: there is supposed to be a fundamental difference in meaning between one human being killing another, and the system, or institution, killing a human being.

Unlike other policy decisions, it is extremely antithetical to the purpose of justice to hold a public discourse or a democratic referendum on death penalty. Out of the many reasons for the same, I'll be primarily focusing on three:

First, there is a significant information asymmetry that exists regarding the actual process of carrying out death penalty, from the date of sentencing to the actual execution.

Second, the government's understanding regarding 'democratic' discourse on death penalty is myopic as it limits itself only to principles of representative democracy, and not liberal and legal democracy.

Third, examples from many countries have shown that moratorium on death penalty can be brought about through executive will even if the public opinion is towards retaining capital punishment.

My coverage of the Nirbhaya rape case exposed me to various practices, both in the executive and the judiciary, that insulates the process of death penalty from transparency. For instance, when the execution order was first announced to the convicts through video conferencing, the media was deliberately asked by the concerned judge to exit the courtroom. After that, media persons were never allowed to witness this process of communicating the execution order to the convicts, which seals their fate in the eyes of law.

This argument becomes significant because the order to evacuate the media from the courtroom was ordered only after one of the convicts raised a point of prejudicial

propaganda against him. Media could never witness as to whether this concern was addressed by the court or not while communicating or deciding the execution order.

On many occasions, state moved applications for fresh death warrants in such a hurry that it didn't even ensure that procedural protections were being complied with or not. At times, the state didn't even ensure that the convicts were adequately represented through a counsel as they pushed for a bizarre demand of an ex-parte issuance of death warrant.

There were applications from the defence that pointed out that procedural protections such as communication of rejection of the mercy plea, and allowing convicts to have a meeting with their counsels, were not implemented by the Tihar authorities. These procedural violations led to nothing more than a moral rapping from the judge; 'Please ensure that this shall not happen again', the judge used to say before continuing with business as usual.

Lack of information and transparency regarding the state of the death convicts as well as the procedure of death penalty was also reflected by the mechanical denial of the prison authorities to let media conduct an interview with the convicts. There was no reasonable or rational justification given for such a denial, and even the courts refused to intervene substantially.

If such lack of transparency and information asymmetry can exist with a case as popular as Nirbhaya's, one can only imagine the degree of secrecy that shrouds cases of other death row convicts.

What aggravates this lack of transparency as a mode of injustice is the political propaganda of the state. The matter of hanging Nirbhaya's convicts no longer revolved around effectuating justice. Public interviews, press conferences, and PILs seeking change in death penalty law to ease the process of execution, all suggested political motives undertaken to get gains in the Delhi legislative assembly elections.

This information asymmetry is closely connected, and often precedes, the government claiming retention of death penalty as a 'democratic' sentiment. This claim appropriates a certain meaning associated with the word 'democracy' and then exploits it to serve a political discourse which is anything but democratic.

The word democracy cannot be conflated with the idea of 'majoritarianism'. This also appears in the classification provided by Professor DT Johnson while differentiating between representative, participative, liberal and legal democracy.

The Indian Constitution, while making our polity a representative democracy, also emphasises immensely on the inculcating of a legal democracy, where Rule of Law is paramount. As it becomes apparent from the jurisprudence of the Supreme Court from over the years, Indian legal and political system has also imbibed the values of a liberal democracy - which advances values such as dignity, liberty, equality, and most importantly, the right to life.

The discourse on death penalty, as it exists today and where's it headed, conveniently ignores the principles of legal and liberal democracy. It attempts to silence values that protect right to life and abolition of state killing with the jingoism of societal clamour.

Even if it claims to be representative, one might argue, it doesn't fulfill the criteria of informed participation as operation of death penalty is shrouded with secrecy, and the death row convicts are systematically dehumanised by using this secretive state narrative.

One of the major critiques of a purely participative discourse on capital punishment comes from a psychoanalytic perspective. As it also appears from Murakami's article, that the belief that death is deserved for certain heinous offences is more a matter of emotion and intuition than reason or evidence.

This observation also appears in Dr Tali Sharot's book, 'The Influential Mind: What The Brain Reveals About Our Power To Change Others'.

She says: Providing more information about capital punishment is unlikely to alter habits of the heart, for humans are adept at ignoring contrary evidence and discounting and denying its significance.

Politically motivated governments systematically control the discourse on capital punishment and frustrates the democratic values through information asymmetry that is created from such a discourse. This has been recognised by many states across the world.

More than 140 countries have abolished the death penalty in law or have gone more than 10 years in a row without an execution; yet in none of these countries did the change result from majority public opinion pushing for reform.

Andrew Hammal, in his book 'Ending The Death Penalty: The European Experience', states that the straightest road to abolition often involves bypassing public opinion entirely.

As observed by Prof Sangmin Bae, in South Korea and Taiwan, execution as punishment ceased primarily because political leaders wanted to stop this form of political killing, even though public opinion favours retaining death penalty.

Therefore, in India, the policy on death penalty cannot establish itself on the problematic ground of participative democracy. The process of carrying of death penalty in this country, and how institutions use it as a language to propagate political ideologies and motives, renders an ideal democratic discourse on capital punishment an impossibility.

If the state of affairs continue to remain unchanged, or as the developments suggest, they're going to get worse, the solution has to come from a non-participative source

which, comparatively, has the least polarising political motives.

As much as it might count as an unpopular opinion, this legal discourse should come from the judiciary. A movement towards moratorium on death penalty is a long one, and it must address all the aspects and stakeholders of criminal justice system.

However, addressing the issues can't be subjected to factors that lead to impossibility of justice.

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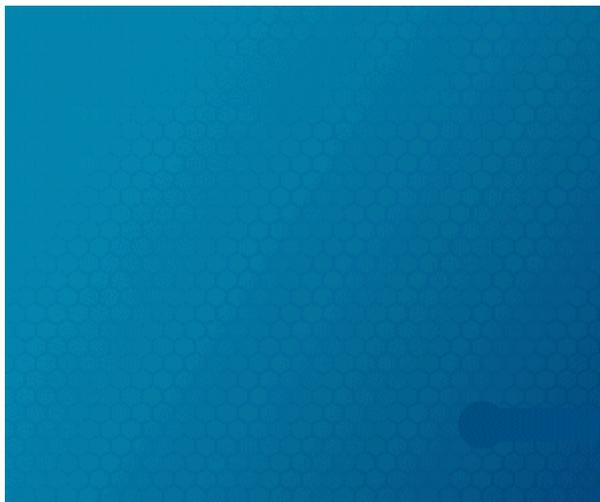


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