OF CAPITAL & OTHER PUNISHMENTS

K. BALAGOPAL

A Human Rights Forum Publication

Of Capital And Other Punishments

K. Balagopal

‘Capital Punishment does moral wrong by imputing to the offender the full individual responsibility for the offence, ignoring the contribution of circumstances, more particularly of a social character…It places the totality of the moral guilt on the offender, which is never fair, even in extreme cases such as Dhananjoy Chatterjee's. Every one of us is a little guilty of the cruelty of the Dhananjoys of the world, and hanging them is one way of evading that fact.’

Of Capital And Other Punishments

K. Balagopal

Publication No: 27

October 2012

Rs. 30/-

Cover : Akbar

Printing : Navya Printers
Hyderabad.

For Copies :
S. Jeevan Kumar
3-12-117/A-2/B, P.S. Colony,
Ganesh Nagar, Ramanthapur,
Hyderabad - 500 013
Ph : 040-27039519

Foreword

This is a compilation of articles, petitions and campaign statements on the Death Penalty in India by K. Balagopal. These writings contain compelling arguments for the abolition of Capital Punishment. They do so through persuasive reasoning about the inherently inhuman nature of the Death Penalty and through an interrogation of specific cases: those of two Dalit youth sentenced to death in the Chilakaluripeta bus burning case in Andhra Pradesh and the Rajiv Gandhi assassination case. They not only forcefully set out the philosophical and civilisational basis for the abolition of Death Penalty but take every argument advanced in favour of Death Penalty and show the theoretical and factual fallacies in its reasoning.

Balagopal does not ask us to think about the concept of Death Penalty and those on death row in the abstract or on purely compassionate terms. He gives us clear and cogent reasons, both legal and sociological, why the imposition of Death Penalty simply does not make sense. For instance, he explains that in the context of a flawed investigative system and a not-always-unprejudiced judicial system, giving individuals the ultimate and irreversible punishment of death can have brutal consequences. He also asks us to question our inner urge for collective revenge, which is what Death Penalty amounts to.

In Balagopal's words: 'There is ample evidence to show that Death Penalty does not act as a deterrent to capital crime, because evidence shows no difference in the frequency of such offences before and after abolition. The real reason why people argue for retaining Death Penalty is a desire for retribution, which may be understandable in individuals, but not defensible when pleaded by a civilised society.'

Human Rights Forum feels this collection would provide a valuable guide to thinking and action and help further the abolitionist cause in the country. This compilation is particularly relevant in these times when there is a growing clamour for the execution of Afzal Guru and Ajmal Kasab. We believe they would go some way in helping ongoing campaigns against the Death Penalty given to Santhan, Murugan and Perarivalan in the Rajiv Gandhi case, and those others whose mercy petitions are still pending. It will also immensely interest those engaged with penology and the sociology of crime.

1.10.2012

CONTENTS

Of Capital And Other Punishments

The debate about Death Penalty is one of the endless debates of modern times. That it is endless is understandable, for there is death at both ends of the argument: the one who is to be killed at the hands of justice has himself killed, usually from his own sense of justice, or (more commonly), injustice. And so every argument about the preciousness, the sacredness or the merely secular right to life can be answered with equal force from the other end. Small wonder then that the argument goes in circles. There are those like V.R. Krishna Iyer who takes the consistent stand that all life is precious and nobody -- nobody at all -- has the right to take life, bases his stand as an abolitionist on this argument (among others). The anti-abolitionist may argue that notwithstanding the consistency of this position, while the State may well heed its reason and desist from hanging murderers, citizens are unlikely to give up killing, and Krishna Iyer's pleas are not going to stop them. So may not the State hang a few of them to deter a few others from killing, and thereby save some lives -- precious lives -- in the aggregate?

Economic and Political Weekly, 19-9-1998

Not that Krishna Iyer has no other arguments left, but he would have to leave the terrain of preciousness of life to continue the debate. Preciousness (spiritual or secular) of life is a meaningful moral value, but it is an inadequate ground for distinguishing the two ends of the argument about Capital Punishment. The efficacy of execution as a form of punishment then enters the debate. And so we have arguments about the purpose, effect or impact of Capital Punishment as an act of the State. Here the two poles of the argument are less symmetrical and hence the debate is more fruitful. That it is still inconclusive is a reflection of the fact that we would rather not punish anybody at all in the name of justice, for the cruelty that is inherent in punishment, any punishment and not just execution, is at odds with the lofty sense conveyed by the expression Justice, and yet we do realise that we cannot as yet (perhaps forever) do away with socially inflicted punishment, even if we feel confident enough about our civilisational strength to rule out private revenge as a legitimate response to crime, for then the weak (whether by virtue of social structure or contingent factors) would be at the mercy of the strong. Then, where exactly do we draw the line between just and unjust punishments? How do we ensure a criterion of punishment that will simultaneously be just to the one who has committed the crime (for a signal difference between private revenge and public justice as a response to crime is that the latter must do justice to both sides) and yet leave us with the confidence that by its operation it will ensure that the weak are safe from the depredations of the strong (which is the only rationale -and a real one - for the existence of a public justice system)? This is not a very easy question to answer.

One way out of the dilemma is to reject the claim of contemporary justice that its punishments are intended to protect the weak from the strong. One may argue that on the

contrary the law in contemporary society (in its essence) actually protects the strong from the weak, and that is what its norms and the punishment it inflicts upon transgressors of the norms are aimed at (again, in essence). The primary or essential function of law and justice, in such a critique, is to protect property and unequal order from the property-less and the oppressed, and not the protection of the weak from the strong, and hence the rationale claimed for the punishments the law inflicts is spurious. This pulls the rug from under the feet of the criminal justice system and leaves no basis for the defence of Death Penalty, or any penalty for that matter.

There is undoubtedly a certain force to this argument, whether or not it can be established that the primary or essential role of law and justice is the protection of the privileged classes from their victims. That depends on where one locates the primacy or the essence, and how one understands those terms. If primacy is understood in the sense of determination and is deduced from the a priori theoretical position that the determinate role of the law (as a moment or element of the social superstructure) is the protection of property relations, then evidently so long as property relations are unequal, the law's essential function would be the protection of property from the property-less. And any rationale it claims on the ground of the occasional protection it offers to the weak from the strong only serves to legitimate its essentially iniquitous role. If, on the other hand, primacy or essence is not understood in the sense of determination but the significance that law and parameters of justice have (a significance they share with ethical norms codified in religion and custom) in the historical search for norms of human relations in a humanist paradigm of history, which search runs through and is stamped by, but not negated or rendered meaningless by, the gamut of unequal

social systems and hierarchical orders that the history has traversed, then it is doubtful that the protection of privilege from those that lack privilege can be described as the primary or essential, let alone determinant, role of law and justice (as well as ethics) in history as we know it, though it is evidently one significant role they play. In speaking of such a search, it must be added as a matter of caution, for the history of this century dictates caution in inventing or discovering supra-human 'agency', it may still be pointed out that they do not always target those who are responsible for their iniquitous situation but rather take it out on society in a random manner, often injuring equally helpless people. The killers of Rajiv Gandhi, whatever their reason for taking revenge upon the former prime minister of India, also killed a lot of other bystanders. Chalapathi Rao and Vijayavardhana Rao killed bus passengers who were in no way responsible for their poverty and unemployment, much less their status as dalits in Hindu society. Muslim youth who feel they are justifiably driven to violence by the fast increasing intolerance of Hindu society take revenge with their bombs on train or bus passengers at random. Thus the argument against Death Penalty based on social considerations is less attractive than it appears at first sight, for there are (usually) helpless victims at both ends. But it is nevertheless not rendered invalid, for the two are not symmetrical. There is either compulsive or thoughtless violence on one side and structured iniquity and systematic prejudice on the other. What this consideration tells us is not that we should be heedless about the social consequences of the retention of the Death Penalty, but rather that marginalised groups should be politically cautioned against wayward acts of revenge, and that we should under no conditions indulge in unthinking glorification of all 'subaltern' rebellion, seen in isolation from surrounding social and moral conditions, within a binary (elite vs. subaltern) universe.

But ignoring for the moment these social considerations and reverting to the question whether the retention of a rarely imposed Death Penalty serves any purpose at all, it may be argued that even if it is imposed rarely, the very presence of the penalty will act as a deterrent. The fear should be there in the heart of every would-be murderer that he may - just may - be hanged. That, it will probably be said, will act as sufficient deterrent. To tell the truth, it will also afford us the moral satisfaction that retribution is available in law for the victim. Punishment is perforce discussed these days in terms of deterrence, both inside the courts and outside, for we have reached a stage in civilisation where one does not in polite talk speak of revenge as a legitimate response to crime. But a stronger motivating factor that beats in all hearts - judicial as well as lay - is a desire for retribution, which is a somewhat inoffensive sounding substitute for plain old revenge. The special judge of the TADA court at Poonamallee, Chennai, who sentenced the whole lot of the accused he tried in the Rajiv Gandhi case to death, explained his decision in the language of deterrence: that hereafter, no foreign conspirators or terrorists may use Indian soil for their nefarious conspiracies. Karthikeyan, the CBI chief who prepared the charge-sheet, is said to have exclaimed to press persons outside the court that retribution had been done. Were not the judge and the policemen really saying the same thing, though the former put it in the reasonable sounding language of deterrence, for deterrence of crime may be accepted as one of the rational aims of judicial punishment, and the other in the more popular language of retribution, which is revenge with the subject transferred from the victim to impersonal morality? Legal theories of punishment describe deterrence and retribution as two distinct aims or modes of understanding of punishment, but in fact the argument of deterrence often hides behind it a desire for revenge, vicarious revenge, which is given a moral tone by

being described as retribution. We all feel that the one who has caused suffering must suffer in equal measure and only then justice is done. This feeling is one of the universals of the human moral sense and lies behind much thinking about formal or informal punishment. To the extent that the individual who has caused the suffering is fully, solely and consciously responsible (which means, never at all) for that act, there is nothing very perverse about this common feeling. But the question is whether public justice - justice done in the name of society -- must stop with this personalised notion of justice, or incorporate within its understanding the notion of reform through compassion and mercy taught by the greatest teachers (religious or secular) of social ethics, and the considerations advanced by the more recent analysis of the social and psychological causation of crime. The desire for retribution, often hidden behind the reasonable sounding language of punitive deterrence, is ignorant of both the compassion of the ancient moral teachers and the modern sociology of crime.

But since deterrence is the strongest argument for the retention of stringent punishments, including Capital Punishment, it will not do to 'deconstruct' it to discover a desire for retribution hidden behind it and then proceed to refute the reasonableness of retributive justice. The argument about retribution can come later, but let us deal with deterrence as such, taking it at face value, notwithstanding that its cold calculus often hides an irrational passion for revenge.

Deterrence – A Valid End Of Justice?

Is deterrence of crime a valid end of justice, and therefore a valid measure of punishment? The moment we pose this question we are confronted with a certain unease, which brings back the radical critique of law into our argument. In

speaking of the legitimacy of deterrence of crime as an end of the criminal justice system, we seem to be accepting the legitimacy of the law's notion of crime in toto. But there is crime and crime, and not all of it is criminal to every viewpoint. There is the crime of the landless poor who trespass on to the land of the rich who have acquired it (whether lawfully or not) other than by the honest sweat of the brow. There is the crime of the systematically oppressed person who breaks out of the bonds of oppression one day to do away with the oppressor. There is, on the other hand, the crime of untouchability, rape or dowry killing. And further there is (on the third hand, shall we say) the crime of a drunken brawl on a pay day's evening. Which is the crime whose deterrence one is talking about? To say that punitive justice may validly seek to deter rape is at least a sensible proposition. To say that it may seek to deter neighbours from coming to blows over the disposition of a boundary wall makes less sense but still some sense. But to say that it may seek to deter the poor from encroaching upon a rich man's estate even to put up a hut, or a battered wife from breaking a brick on her husband's head when he is safely asleep, does not even seem to make sense as an end of justice.

One may then make out two lists of crimes: one which one will accept as truly a list of crimes, and with reference to which one will discuss the question of deterrence, and a second which one will not accept as crimes at all, let alone discuss the merits of deterrent action for preventing them. The difficulty with this strategy lies not only in the obvious fact that different people, or at least different social groups, are bound to have different lists, thus rendering the notion of 'deterrence of crime' impossible to discuss in concrete terms. More than this is the difficulty that even within a given classification, there are bound to be many uncertain cases, too many to make it a usable classification at all. For instance, let

us grant that it is not a crime for a landless person to encroach upon a big estate to put up a hut or to carve out a plot to cultivate. Is it also not a crime to encroach upon the land of a two-acre peasant? Or a half-acre peasant? It is not a crime, let us grant, for a wife subjected to regular beating to poison her husband's coffee. But what if it is a lesser matter of marital discord? And so on. Anyone who tries to break up penal law into those crimes that one will (from whichever point of view) definitely accept as crimes, and those that one definitely will not, will discover that there are too many undecidable cases to make it a worthwhile classification.

But there is an even greater problem. Law's universality is a necessary precondition for rule of law to be operationalised. You cannot have a fractured universality for law and still have a society and State where rule of law prevails. If each of us is allowed to pick and choose that part of law which we will accept as legitimate, will abide by, and expect the State to force everybody else to abide by, and if this list (apart from its inevitable indefiniteness) changes from person to person (or at least social group to group) then no kind of law-bound society or State is possible. Why should that worry us, it will be asked. That should worry us because a lawless society and State are most injurious to the weak and the vulnerable. However iniquitous a given law or legal system may be, there can be nothing more iniquitous and injurious for the poor and the weak than a society in which there is no rule of law at all. (One is not speaking here of small or ethnically uniform custom-bound communities that need no law at all). Hence what we require in the interests of the poor and the weak, is not an attitude that rejects the legitimacy of the law as such, but one that accepts it, but without giving up a critical attitude towards the social content and significance of the statutes and legal practices that make up the law. (Of course if the law is itself fractured

by denying equality of all before itself, and minimum respect for the person of all, then that is no rule of law at all, and these considerations do not apply to such legal systems). It may be objected that this caveat that one does not give up a critical attitude towards the law is intended only to salvage one's troubled conscience and serves no purpose when the legitimacy of the law as such is conceded. That is not the case. Indeed this critical attitude is precisely where a meaningful radical engagement is taken up with the criminal justice system (whose legitimacy as such must be conceded a priori in the interests of a law-bound society outside which the poor and the weak would be helpless). The critical attitude would help the struggle for sensitising the law to its social context and content, that is, give it a sense of social equality over and above the legal equality and respect for persons that it must possess to be called law at all, thereby paving the way for a progressive democratisation of the law that would simultaneously make the law less oppressive and leave open more freedom for positive acts of social transformation. There could well be situations where such transformation would require breaking with the law (not individual laws, whose infringement is common in any effort at transformation, but law as such) but that would only be a temporary interregnum and even then an extreme choice whose ineluctability must be stark enough to compensate the injury that the total fracture of rule of law does to the people, especially the weak and the vulnerable. More germane to the present discussion is that accepting the legitimacy of the criminal justice system as such, but maintaining an attitude of criticism towards its social content, in particular which act is called a crime and how much of a crime, helps one evolve a useful critique of the punitive aspect of the law, including the meaning and content of often used expressions such as deterrence and deterrent punishment.

Let us now get back to the question: is deterrence of crime (any crime) a valid end of justice, and therefore a valid norm of punishment? It is indeed a valid end of justice, provided it is understood that it is only one of its ends and not the whole of it, and also provided it is understood that only a part and not the whole of the burden of deterrence is upon the criminal justice system. Justice being more than the prevention of crime, deterrence can only be one of its tasks. And public justice being justice done in the name of and on behalf of society, it is society as a whole that carries the burden of deterring crime, the criminal justice system carrying only the appropriate part of the burden. And the role of deterrence as a norm of judicial punishment must be located within this understanding.

As an aim of punishment, the concept of deterrence is used in three different senses (even in judicial pronouncements): (i) the possibility of punishment acts as a deterrent to crime; (ii) the punishment deters the criminal from repeating the crime; and (iii) punishment given to one criminal will deter others from committing the crime. Since all three meanings are jumbled up and produced as a single argument in defence of harsh punishment for heinous crimes, it is necessary to separate them out. Of the three, only (i) is valid, and that too within limits, but not (ii) or (iii). To measure punishment by the requirement that the criminal should not repeat the offence is to assume that circumstances impelling the crime are of no importance and the criminal's will is all. It is indeed close to assuming that crime springs from a permanent part of the person's character, which will repeat itself over and again unless deterred by violent punishment. Even if there is something kinky about the person's character, punishment may not be the best way to ensure that the crime is not repeated. Towards one who has committed an offence, the proper attitude would be to seek

methods of helping him grow out of whatever it was that impelled him to commit the offence. In other words, an attitude of reform, not only of the person but also of his circumstances. Reform of person is likely to work better with crimes born of perversity of outlook than crimes of passion or want. With crimes of want what needs to be reformed is less the convict than the conditions of his life. But perhaps a little of both will be required in all cases, for these causes of crime are difficult to sort out in pure form. However, reform of person does not mean merely lecturing or counselling the person. It would (except in unusual circumstances) include some punishment which would entail the convict forgoing something -freedom, comfort, etc - that is part of normal life. It may also involve some positive activity on his part, whether the kind of labour that convicts in Indian prisons undertake or work that has more of the character of service to other people. Punishment of some sort is therefore integral to the process of reform of the person, to the extent that it is reform of the person and not of his circumstances that justice calls for. And it is this role of punishment - the role of rendering the convict repentant or at least in a mood to contemplate himself and his circumstances, and therefore amenable to the process of correction that should determine its severity, insofar as we are thinking of punishment vis-a-vis one who has already committed a proven crime. Deterrence in the sense of (ii) is an illegitimate notion. Can Capital Punishment be a possible punishment from this point of view? Evidently not, for you don't put anybody in a repentant or reflecting frame of mind by chopping his head off. Exceptionally pathological cases are best shifted to what are popularly called 'mental hospitals'.

The meaning (iii) given to deterrence should not be confused with (i). The latter simply says that the statutory indication of punishment is necessary as a deterrent to crime.

The former goes well beyond this, to an impermissible extent. It says X should be given such a punishment that Y will be deterred from committing that offence in future, whoever that Y may be and whatever his circumstances. That makes X responsible for not only the crime he has committed, which is permissible provided he is not automatically saddled with the full responsibility minus necessary consideration of the circumstances in which he authored the crime, but also for the crimes unknown others may commit in the unknowable future. The only example the law can legitimately make of one for others is to show that the punishment that is written in the statute book will actually be imposed, if and where the culpability is established, and is not merely decorative. But the punishment actually awarded should be strictly guided by correctional considerations relevant to that person, and not that of setting an 'example' to others. When the TADA special judge at Chennai says that he is sentencing to death all the 26 persons he has tried so that other such conspirators may not spill blood on Indian soil in the furtherance of their anti-national designs, he is using the notion of deterrence in the impermissible sense of (iii) and not the permissible sense of (i).

If this is clear, then can Capital Punishment be justified by the role of deterrence in the sense of (i)? Is Death Penalty (even if rarely imposed) a necessary deterrent for the crime of murder (the only common crime for which it is imposed in India)? We have said earlier that punishment has a role to play in correction too. The possibility of punishment also acts as a deterrent. Nobody is deterred by the threat that 'if you commit a crime, you will be reformed in jail'. The punishment part of the reformative effort can act as a deterrent. The actual punishment given must never be 'deterrent' but only as much as is necessary as an accompaniment of correctional efforts. But the maximum

possible punishment may be fixed from the point of view of deterring crime. Is the maximum of death sentence a necessary deterrent for homicide? Let us forget the empirical evidence for a while: studies conducted in countries which have abolished the Death Penalty (56 countries have statutorily abolished it, and close to 100 have got rid of it for all practical purposes) show that Death Penalty has little additional deterrent effect, that is the rate of commission of crimes punishable with death has not increased significantly after the abolition. Such a study can be done in India too. The princely state of Travancore-Cochin had abolished the Death Penalty for a while before it became part of India. When it became part of the union in 1947, it got the Indian Penal Code along with the other blessings of accession. It would be worthwhile making a comparison of the number of crimes of murder per capita registered in that part of Kerala during and after abolition. It is unlikely that such a study will reveal a trend contrary to what has been the experience elsewhere. The reason is not that punishment has no relation to crime (in which case it would be no deterrent at all) but rather that the two are not so simply or linearly related - like the two sides of a balance - that when the one goes up the other goes down to the same extent. Between crime and punishment there lies the whole sphere of human existence, social, economic, political, cultural and the purely individual.

But such studies apart, let us look at the logic of this argument that the provision of Death Penalty can alone be an adequate deterrent for murderers. The logic appears to be that the threat: 'if you take a life, then you will have to lose yours' will alone work effectively, and it should be present in the law, if only as a rare option. That is to say, like suffering for suffering caused (if only in the rarest of rare cases) is necessary as a deterrent. But why does this logic apply only to homicide? Why not to all crimes? If a hand is chopped off,

the court does not order the chopping off of the convict's hands, but only a few years in jail. There will never be like suffering because even after a few years in jail, the convict will be able bodied whereas the victim will be without a hand all his life. Yet nobody would argue that hand-chopping for hand-chopping (at least in the rarest of rare cases) would alone be an adequate deterrent. Or arson for arson, destruction of property for destruction of property, etc. (And what would be an effective deterrent for rape in this logic? Chopping off the penis?) On the contrary, any such suggestion would undoubtedly produce protests about the medieval logic of 'eye for eye and tooth for tooth' and would bring forth outraged comparisons with Saudi Arabia, the Taliban's Afghanistan and all those countries ruled by mullahs than which we all believe we are infinitely more civilised. But why is this logic of like suffering for suffering caused preferred in the case of the death sentence alone?

The Death Penalty excepted, the modern Indian penal law has a uniform punishment for all crimes (excepting very petty ones, for which a monetary fine may suffice), which is supposed to simultaneously act as both deterrent and corrective. The convict is deprived of freedom and comfort by being jailed for a certain period. The prospect of such deprivation is supposed to act as a deterrent, as well as keeping society out of his arms' reach for a while, and the fact of deprivation is expected to engender in the convict a state of remorse that may act as a corrective, though very little is done positively for correctional purposes by our penal system. There is no need to break with this logic and invoke the deterrence of eye for an eye as an exceptional punishment for murder. What is needed, on the contrary, is to further humanise this logic of incarceration as deterrent as well as corrective. That is to think of less in human deterrence and more positive correction. People who have never seen the

insides of an Indian jail may feel that 'inhuman' is too harsh a word, considering that Indian prisoners these days (at least in the less benighted States) get three meals a day, with meat once a week and opportunity to play outdoor games and watch TV (usually once or twice a week). Our prisons are nevertheless less than human, firstly because the quality of the food given is usually very poor, and overcrowding (all Indian jails are overcrowded to the tune of 50 to 100 per cent of their capacity) makes the jails extremely unhygienic. But that apart, the prisoners are deliberately made to feel less than human, as part of the tactics of prison discipline. All wielders of authority know that the simplest way to control their subjects is to structure their relation with authority in such a way that they are systematically made to feel less than human. Beating at the slightest excuse is one way to achieve this. But even the refusal to have a dialogue with the prisoners on even the most inoffensive matters, and instead converting all situations of possible dialogue into fearful supplication on one side and unreasoning refusal or inattention on the other, compounded by humiliating abuse and physical violence at the slightest provocation, creates an ambience of a circus ring rather than a place where human beings are incarcerated for correctional purposes.

This is not accidental. I am not speaking here of any functional need of the ruling classes to create subhuman prison conditions as a strategy of stable governance. That degree of rationality is difficult to demonstrate though easy to declaim. But sub-humanity of prison conditions is systematic and not accidental in a different sense. Most policemen and prison officials (and, I dare say, many judges too) believe that the prison sentences provided by the penal law are by themselves not sufficiently efficacious as a deterrent of crime, and must be supplemented by an inhuman treatment that is no where written in the law. This

feeling is linked to the lowly perception that minions of the State have for crime and criminals who mostly come from the lowest strata of the caste system. That is to say, the humanism of correctional incarceration may be all right for civilised people like you and me but not for the likes of the castes and communities that are found committing crimes most often. (This remark is not imagined. It is frequently expressed by police and prison officials, and quite frequently lies behind the attitudes of officers of the courts).

The point of saying all this is that there should be better and less inhuman ways of ensuring a deterrent punishment than locking up convicts in prisons controlled by jail officers who are all convinced in the heart of hearts that mere incarceration in a prison is no deterrence to the criminal, especially the criminal who comes from the wretched dregs of Hindu society. Nor do these prison officers have any motivation for correctional work. A correctional institution needs some degree of idealism, which is singularly absent from the mental make-up of the jail officers. But they are not alone to blame. The Indian prison as an institution has no correctional system as such, though it teaches the convicts some manual trade and provides them with what passes for a library to read from. More often than not, a prisoner comes out of jail at the end of his term a more hardened and less useful human being than he was when he went in. And that serves neither the purpose of deterrence nor reform. What the Indian prisons need today is a less harsh regime of imprisonment and a more positive correctional approach. Calls for imposition or retention of harsh punishment, including Capital Punishment, have no place in this.

Let us move on now to a different plane of argument. I will try to argue that imperfect societies have no right to impose harsh punishments and that (as indicated earlier)

punishment alone cannot be society's response to crime. The latter is very important today because not only in India but all over the world, the rise of political terrorism and other forms of organised law-breaking is sought to be made a justification for harsh punitive regimes. Imperfection has long been one of the abolitionist arguments, but that is imperfection of judicial appreciation of evidence, both because of human error and the social prejudices or world view held by the judge. Capital Punishment has finality to it that would be justified, other things apart, only by a perfect investigation and perfection in the judicial act of weighing the evidence. Neither is humanly possible. We remember Kehar Singh, the alleged conspirator in Indira Gandhi's murder, about whom all that was proved was that he conferred in secrecy with her assassins, but who was nevertheless found fit to hang. It may well be that judges from the Court of Sessions to the Supreme Court who believed then that it was just to hang him will have second thoughts some time later, for the judgement has been criticised by even otherwise not particularly radical people, but nobody can give back Kehar Singh his life. (There is a more recent case from England. Derek Bentley, hanged 45 years ago for abetment of a policemen's killing, has been now pronounced wrongly executed. The profusion of apologies rendered to his family will not resurrect the dead man).

A different dimension of imperfection arises from social and political passions and prejudices that judges are as much prone to as anybody else. Not that they never make any effort to achieve objectivity. One may grant that much to judicial discipline, but there is no guarantee that they will always succeed, which guarantee is mandated by the finality of Capital Punishment, especially in times of social crisis and turbulence when even the need to make the effort may not be urgently felt. But it is precisely in such times that both

judicial and extra-judicial executions are likely to be more frequent, thereby leaving the socially and politically abnormal groups and individuals all the more vulnerable to execution by prejudice. An instance is the rhetoric of the Chennai special judge's reasoning in the Rajiv Gandhi murder case, in which all the 26 conspirators and abettors (only the conspirators and abettors fell to the judge's lot, for the actual perpetrators of the offence had all died before the law could catch them) were sentenced to death. Half of them are Sri Lankan Tamils and the other half their local collaborators, and so the judge could indulge in patriotic anger about foreign terrorists executing their nefarious design on Indian soil. The LTTE connection being a fatal political sin in the current political mood - so much so that it could even bring down a government at the Centre - it is not surprising that the rhetoric should end with a wholesale death sentence. The judgment has been described by what the Press calls 'eminent jurists' as extraordinary, but suitable for an extraordinary case. Their memory is unfortunately not able to recall that even assuming that the murder of an eminent political personality is deemed different from that of a person in the street (Article 14 of the Constitution says otherwise), there was another Gandhi, certainly a more eminent one, who was murdered 50 years ago, in whose case only the perpetrator was hanged and not the abettor. It is in the case of the two later Gandhis, mother and son, that abettors were found fit to be hanged. Judicial perception of culpability is evidently quite sensitive to changing political conditions. Such being the case, can the judiciary be trusted with the power to order execution of people? Quite some time back, the US Supreme Court had ruled that Death Penalty is discriminatory because it puts in human hands the arbitrary power of deciding which crime is worthy of Capital Punishment. That the US law-makers found a way of getting around this judgment, and that country continues to be one

of the staunchest defenders of Capital Punishment, does not rob this observation of its reason. Especially in a country like India where extreme social stratification and increasing turmoil are likely to sharply affect the ideas and opinions of people, including judicial officers, putting in human hands the discretion to take life can be quite dangerous. It is extraordinary that, on the contrary, people find it possible to argue that precisely because of the social turmoil that defines contemporary India, Capital Punishment is needed as a deterrent, as if the turmoil does not affect judicial minds to the detriment of their impartiality, and as if the harm that can do to those on the margin of society is a matter of no consideration. Conflict and. turmoil apart, the very deep stratification of Indian society makes even-handed dispensation of justice a problematic thing in the best of times. All those familiar with the criminal justice system are aware of the extreme hostility exhibited by the system - policemen, judges and lawyers too - towards thieves, robbers and dacoits, not merely because of the respect for property that one may expect to find in the judicial systems of all countries, but also (perhaps more) because the perpetrators of such crime (in particular, dacoit gangs) come from castes and communities that are held in loathing and contempt, often even more than the untouchable communities, by caste Hindu society.

But these are arguments concerning the imperfection of judicial decision-making. Over and above that is the imperfection of society's, any society's, moral order. Let us turn to that now and argue the point that imperfect societies (in a specified sense) have no right to claim the privilege of harsh punishments. This may appear obvious, but it is necessary to argue carefully from first principles, for otherwise it may end up as mere rhetoric. Let us begin with the question: Can a public justice system take a person's life

in the name of punishment, and still be said to have done justice? The question is not: is it at all just to take life? Notwithstanding the valuable caution of the fundamentalists of non-violence, that we who have no capacity to create life have no right to take it, we can all nevertheless imagine situations of extreme oppression wherein the taking of the life of the oppressor cannot but be called a just act, which is of course no argument for a cavalier attitude towards all violence claimed to be perpetrated in the name of equity. Our question is more closely circumscribed: is it permissible for the institution of public justice to kill as a measure of punishment for crime, any crime?

Let us try to answer this question. What exactly does a court of justice do when it awards punishment to an offender? In a civil offence, justice recompenses the wronged person. That is clear. It hands back the misappropriated property, it restores the breached contract, or it computes and awards monetary compensation when such restoration is not possible. But that is not what it does in a criminal offence. Whether it is punishing as a deterrent measure, or as retribution, or as a measure of reform, it is doing something other than recompense the victim, except to the extent that punishment aimed at retribution gives some mental satisfaction to the victim or the victim's survivors. This satisfaction is frequently quoted by judges, though in impersonal terms, such as the 'moral anger or outrage of society' that needs to be answered or assuaged by the punishment awarded. This is often the argument used by judges to justify the award of harsh punishment when they sense that the usual argument of deterrence is not enough to justify the severity of the punishment they have chosen to impose.

Strictly speaking, this language should have no place in judicial thinking, though quite erudite judges continue to

employ it, for if the desire for revenge that the victim of a criminal offence feels and with which society identifies or empathises — so that judges find it possible to say 'we have to answer society's moral outrage' instead of 'we have to satisfy the victim's vengeance' -- can be a rational criterion of judicial punishment, then the judiciary is nothing but a seemingly public institution for serving private revenge, a seemingly dispassionate forum for satisfying private passion. But private revenge is explicitly ruled out by modern law as an answer to crime. Even the most morally justified revenge is disallowed. Can it then be smuggled in through the back door, dressed up in black robes, speaking the language of society's moral conscience, and set up as a legitimate norm of punishment? Is it that the law's aversion to private revenge is only that it is private and not that it is revenge?

That is not the case. Human thinking about crime has always tended to see it, at least in one aspect, not as an injury to the person affected by the crime, but as an act upsetting society's moral order, that is the norms that define the contours of legitimate behaviour. Modern law has explicitly accepted this as the central characteristic of crime. A crime, whether it is theft, rape or murder, is primarily an offence against society, and only secondarily against its victim. Whatever the defects of this notion (one defect frequently pointed out is that it transfers the victim's 'agency' as seeker of justice to the State acting on behalf of society, but that is not always avoidable nor necessarily bad), and whatever objection one has to society's moral order and its norms that are thereby shown as universal and legitimised (this objection too is well taken, but only up to a point, unless one can show that there is no element of universality at all in the given society's normative order), this is a useful perspective, for it allows us to think in terms that go beyond injury and revenge, prevention and punitive violence. If crime is that

which upsets society's moral order, then punishment should be guided by the consideration of setting right the normative order disrupted. And the giving of the punishment is society's act, even if it is a particular institution of society that tries and punishes offences on behalf of society.

That we are speaking of the moral order and not just the legal order needs emphasis. Merely saying that a crime upsets society's legal order offers neither a justification nor a norm of punishment. If a law is violated, then so what? What justification or criterion of punishment do you derive from that? None, evidently. But behind the legal order lies a normative order, a universe of values, and that can offer a justification as well as norms of punishment, right or wrong, acceptable or unacceptable. The 'ought' of the law is merely the policeman's dictate, but behind it lies an 'ought' of values which can be weighed as a moral code to decide what may and what may not society do when that normative order is violated. For if the normative order seeks legitimacy to impose itself by sovereign force on the ground that it is morally desirable, then restoring it back to shape is the only legitimate response to its disruption, that is, to any act of crime. And the principles that guide the means by which the restoration is effected must be - and must be declared to be - a part of that normative order, and not something external to and certainly not antithetical to the values of that order. Justification of judicial punishment and the norms thereof must flow from this. Just as judicial response to civil offences is to set right the wrong done to the individual, judicial response to crime then is to merely set right the wrong done to society and its moral order.

It is perhaps necessary to clarify one point here. The moral order that we have set up as the object that the criminal justice system protects is not identical with the dominant

system of moral values prevalent in that society. It shares something with it but is not necessarily identical with it. It is the system of norms revealed by the law, which lays down the contours of legitimate behaviour as understood by the law. The actual social reality, that is to say the socio-economic order, as well as the moral world view of that society, which again consists of at least two elements, one, the system of values widely held to be valid or desirable by (different social groups within) society, and two, the system of values that supposedly represent the higher truth by virtue of the dominant religious or political world view of that society, may well differ from the legal norms of legitimate behaviour. Take caste, for instance. Caste is a living part of actual Indian social reality. In terms of its moral standing, Hindu society views it from a partially secularised but still essentially brahminical position. In terms of higher morality, it abhors the more extreme practices of caste, but the attitude towards caste as a whole has been vacillating between a secular world view and one that sees some hidden principle of a righteous social order in it. The legal view of caste is, however, uncompromisingly secular. Untouchability and related caste-based discriminating practices are very serious offences in the eyes of the law, the only discrimination legally allowed being the protective discrimination of reservations. Much the same can be said about gender. The normative order of the law is much more secular (though not entirely so, as in the case of caste) than social morality, and certainly very much more so than actual social reality. Or take the case of violence. Violence is very much part of our lives. Morally, it is not always regarded as wrong, especially when it is retributive in character. Though, at the level of higher morality, all of us are supposed to believe in non-violence as a superior virtue. The law, for its part, abhors all violence except only that which is a direct act of defence of person or property, which is much narrower than the retributive violence sanctioned by popular

morality. The situation is somewhat reversed when it comes to property.

Our economic class structure is highly unequal, and popular morality is a mixture of envious acceptance (even abject reverence), and resentment (even hatred) of the fact. Higher morality affects an ascetic contempt for property. The law, however, is a ruthless protector of all property rights. One can go on. But the point is that there is a clear normative order underlying the law, whose protection is what the law aims at. The normative order is not just the set of rules of behaviour one deduces from the law as present in the statute book. It is a moral order, a civilisational perspective of human social and material relations that the law encodes. Legitimacy of the law derives from this normative order. It is of course contested and not universal in the sense of being beyond argument, though there may well be elements of it that have achieved universal acceptance. But it is not spurious merely because the egalitarian or rights-giving parts of it are (possibly) at variance with the actual social order, or the dominant aspects thereof, (Of course, if the whole of the law were only a justification of inequality and injustice, then there would be no legitimacy at all but that is not the kind of law we are talking about). This view is at variance with one common radical view of law and legal justice, that where they appear to deservingly claim legitimacy for their suppressive force, they are only acting as a legitimating ideology for (or enacting a hegemonic practice of) the unequal social order. Such a view, as said earlier, leaves no space for any meaningful discussion of norms of punishment, and more importantly, it does not constitute an adequate understanding of the history of normative standards (whether of the law or morality) which reflects a ceaseless human search for norms of social behaviour, a search that runs through the ups and downs of exploitative

and oppressive social systems and revolutions and rebellions, constantly accumulating new values, discarding or revising old ones, generating a corpus that can at any point of time be evaluated from the viewpoint of equality and freedom, and which has significance for actual social struggle for equality and freedom, and also for the possible shape of the institutional mechanisms that may help structure an egalitarian society.

If, then, it is accepted that what a public justice system does when it punishes criminal offences is to act on behalf of society to correct the harm done by the offence to society's moral order (the normative order of its law, to be precise), then it is possible to think of how much punitive violence justice may legitimately allow. Obviously, it cannot be allowed any greater self-righteousness in responding to crime than the righteousness of its normative order. In other words, how harsh the law may be on offenders must be limited by how just its normative order is. No society known to us is so perfect that it can demand the right of harsh punishments, such as the Capital Punishment, nor will there ever be. It may be said that the criterion of 'justness' of the moral order is vague and subjective. But since inequality -- of status, opportunity, endowment, respect, freedom, consideration for individual peculiarities, etc. - is what alienates people from the social order in which they live, and makes them prone to violating its norms, the apt criterion for justness here is the absence (relatively speaking, of course) of such inequality.

It will be immediately perceived that there is a trap in this otherwise reasonable argument: it seems to imply that the more just the normative order of a society, the more right it has to impose harsh punishments, and therefore that a perfect society may execute every criminal. This is, of course,

the logic with which communist-ruled countries (irrespective of whether they have actually been perfectly just societies) have always justified their illiberal justice systems. One answer to this perverse interpretation is that the argument is not meant to be used in the converse direction. It is like the dictum that only those who have never sinned should hasten to throw stones at sinners, which does not mean that the less one has sinned, the more stones one may throw. More positively, the norms of punishment are not something external to the normative order which the punishment seeks to protect. They are part of it. Therefore a society which is otherwise perfect but imposes harsh punishment on transgressors of its norms would not meet the criterion of a just society, for a correctional attitude as against a retributive or merely deterrent attitude of judicial punishment is part of the justness -- in the sense of equal consideration for the normal and the aberrant -- of the normative order. But that is not all. We have said that punishment as given by a public justice system -- as distinguished from private revenge -- is aimed at restoration of the moral order of society violated or disrupted by the offence. But can judicial punishment do all of it? Or is it properly to be seen as only one of the mechanisms of societal response to the disruption of its moral order? Most of the arguments in defence of harsh punishments, in particular the Capital Punishment, assume that judicial punishment is the total answer to crime. But if judicial punishment is what we have identified it to be, it can never be the total answer to crime, and therefore it need never be and can never be as harsh as the crime, as cruel as the criminal. The usual argument (a very popular argument in defence of Capital Punishment) that there is nothing wrong if the judicial response to crime is cruel when the criminal is cruel, places the offender and justice on par. This is wrong for two reasons. One is that the individual is seeking some private gain or retribution whereas justice is acting on

behalf of society to restore, to shape the normative order disrupted in that process by the offender. It certainly does not seek retribution, and deterrence, within limits, is only one of the goals aimed by it in its job; and secondly, the criminal justice system is not the whole of the answer to crime. Society must act through its various wings to effect the restoration of the order disrupted, of which the institution of punitive justice is only one (though a necessary and legitimate one). Confronted with an act of crime, society should consider that it could have been occasioned by three possibilities: a lack in the normative order, a mismatch between the normative order and the actual social conditions or possible human associability, or a fault of the offender himself. Indeed, usually the three are not easy to separate. Societal response, a part of which is structured through the criminal justice system, must address all the three possible facets of crime. It can never put all the blame upon the individual's wilful and perverse disobedience of the law and reduce the whole of crime to the domain of criminal justice, and answer cruelty with cruelty, violence with violence. It is this logic that results in the fervent arguments heard whenever the criminal justice system fails to deter crime, that its institutions and norms should be made more stringent, given more 'teeth' (a rather telling piece of canine imagery), etc. On the contrary, societal response, while including within its ambit a corrective and (within limits) deterrent penal system, should concentrate at least as much on a self-critical look at itself, its actual condition, its normative order, and the position of human individuals and groups within either of them. Capital Punishment, or any kind of harsh punishment, not to speak of tolerance of extra-judicial punishments inflicted by the police or armed forces, are ruled out because they put excessive blame on the individual's -- or the dissident group's -- perverse rejection of the law, and moreover reduce criminal justice to an answer in kind.

We live in times of severe social turmoil, crisis and the ascendance of the extremely illiberal politics of the Hindu fanatics. The crisis and the turmoil provide them with enough scope to legislate their illiberal attitudes with unreflecting popular sanction. Most people feel understandably disturbed by the mindless bombings of trains and buses in Coimbatore or Thrissur and the equally mindless killing of Hindus in Doda and Poonch; by the stories of rape in Rajasthan and gangsterism in Bihar or Uttar Pradesh. This mood has already got the Hindutva forces going: they have blackmailed Karunanidhi (not that he is an angel but he had no need to be a devil) into enacting an anti-terrorist law for the State least affected by violence, and Advani promises agitated protestors about rapes in Rajasthan that this country will soon hang rapists. He advises the naxalite-affected States of south-central India to look upon the People's War as purely a problem of crime, and draft repressive laws to the dictation of the police. He will no doubt be saying the same thing to Farooq Abdullah, who is in any case ready to crawl when he is only asked to curtsy. As this mood catches on -- the communal fanaticism and the general illiberality and inhumanity of the Hindu fanatics is a mood that goes well beyond the votes they get -- we are going to find courts silently handing out more and more harsh punishments, bending backward to look at evidence from the policeman's point of view (one comment frequently made about the Rajiv Gandhi case judgment is that it is the charge-sheet suitably rewritten to look like a judgment), and sending more and more people to the hangman. At the end what we are going to have is not a solution to any of the social or political problems underlying this degeneration but only a more harsh and inhuman criminal justice system. Today's debate about the Capital Punishment must be seen in this context.

Death Penalty: For An Abolitionist Campaign

For a long time now, it has been customary to say that the trend in the world in the matter of Death Penalty is towards abolition rather than retention. Statistics of progressive augmentation in the ranks of the abolitionists among the member states of the United Nations do justify the optimism. Are we, however, in for a reversal in the matter?

India, at any rate, is perceptibly moving in the direction of a greater rather than lesser use of the Death Penalty. It was never in any case in sympathy with the abolitionists' cause in the U.N and its human rights bodies. In the matter of the Death Penalty, the Indian attitude at the U.N can be accurately described as shame-faced retentionism[1]. It was not an aggressive retentionist like for instance, the U.S., but was nevertheless always on the side of the retentionist States. India's explanation for its stand has been that a poor country with serious socio-economic problems cannot imitate the welfare States of Europe in the matter of penal law. Many people in our country regard this as a legitimate answer, not knowing that the earliest and most dedicated abolitionist

Foreword to a volume on Capital Punishment published in Tamil. Date of publication not known.

States were not the European States which have a rather high standard of living and are much less troubled by crime than countries such as India, but the South and Central American countries, whose societies are beset with all the problems that are familiar to us.

But in truth India appears to have avoided any active participation in the debate about Death Penalty in the U.N bodies, going by what one can glean from secondary records. With our claim to a very ancient and wise civilisation, our rulers have behaved as though they were telling the UN that we are in no need of lectures in civilisational values from Uruguay and Columbia. But at every stage in the voting, our representatives joined voices with the retentionists, defending the argument that the Death Penalty is a matter to be taken care of by the penal laws of the respective countries, and efforts by the U.N to pressurise countries into abolishing it are unwarranted. One does not know whether India ever went to the extent of declaring, as did the United States, that Death Penalty is not a human rights issue, but a matter concerning the criminal justice system of the respective countries. But there is little doubt that India's sympathies lay with such arguments.

This was in the past. Today, official India should be happier. The atmosphere in the country -- both inside the Courts and outside -- is more conducive to arguments in favour of retaining rather than abolishing Death Penalty. Perhaps soon India can cease to be shame-faced and become a brazen defender of Death Penalty. As in all occasions when popular prejudice takes the place of facts and reason, the State is in a happy position where it can take an anti-human rights stand and also be popular. The prejudice in question is that the country is witnessing an upsurge of crime because of its lax criminal justice system. Nobody has bothered to

support this prejudice with the careful analysis it deserves, but the belief is nevertheless widely held. V.S. Malimath[2] (retired Chief Justice of two High Courts and retired member of the National Human Rights Commission) has adorned this belief with the sanction of judicial (retired, to be sure) approval, and what more can prejudice want?

The way the Supreme Court converted life imprisonment into Death Penalty in the 'Veerappan case'[3] is symptomatic of the trend. There is of course nothing in the law or common sense which says that a higher court cannot take a more harsh view of a crime than the trial court. But the general experience has been that trial courts some times get carried away by the emotional overtones of a case or popular perceptions of right and wrong and impose severe punishment. It is usually left to the higher courts to take a dispassionate view of the matter suitable to the notion of even-handed dispensation of justice.

But in the 'Veerappan case' it has been the turn of the Supreme Court to play the role that trial courts normally do. From the time of the kidnap episode of the Kannada film star Raj Kumar, what has dominated the mind of the Supreme Court is the anguish that small groups of outlaws are dictating terms to the legitimate State, the fount of law and lawful authority. The inability of the administration in Karnataka and Tamil Nadu to put an end to this situation has rankled with the Supreme Court. It even went out of its way, ignoring the normal perimeter of Constitutional propriety, to ask the two governments to quit if they could not arrest Veerappan. It was the turn of the normally impetuous politicians to maintain a dignified silence.

The anguish is understandable, up to a point. Society no doubt needs a recognisable source of law and lawful authority, for a situation where any one can pick up a gun and dictate terms is not conducive to public welfare. Only the

romantic radicalism popular with a certain type of intellectual can think otherwise. But this is at a very general level. Any concrete situation would require a more balanced analysis. First and foremost, it needs to be understood that legitimacy of the law does not spring from mere assertion of the sovereign power of its maker. It has got to be won in the minds of the people. To the extent that the State fails to do so, it will have to contend with every Veerappan who comes along. For the common masses, the legitimacy of lawful authority is not a truth conceived theoretically. It has to mean something practical to them to become true. They must not feel it as an imposition, but as a beneficent instrument, not theoretically but in their day to day life.

I am aware that such an argument will be resented by many people who will see it as a defense of brigands and purported Robin Hoods. But it is not a question of defending or opposing them. It is a question of the terms within which society may persuade the people not to collude, sympathise or even just put up with them. That will be possible not on the plane of an abstract distinction of legitimate vs. illegitimate, but something more practical. Otherwise the system will only do more and more violence to the people in the name of defending the legitimate against the illegitimate, at a level of abstraction where it ceases to be a real distinction and becomes a fetish. It is unfortunate that in the face of a rising trend in gun-wielding groups dictating terms in various localities, in the name of revolution or liberation or mere illegal trade in forest produce, influential sections of public opinion, and the courts in particular, are exhibiting a tendency to rally around an abstractly conceived legitimacy of the law and lawful authority. They are unmindful that in the process they are causing greater injury to the common citizens of the country, and to basic principles of humane

governance, than to the hard-core terrorists and gangsters that their ire is apparently directed against.

The arguments for a harsher criminal justice system, in particular for more severe punishments, stem from this tendency. All that one can say in its favour is that it is unfortunately not without some popular sanction. The common human sense of insecurity is at any time a force that would drive a lot of ordinary people to this view. But the establishment of authority over large areas of society by gun-wielding groups of all kinds in recent times has increased this ever-present sense of insecurity. Some of the groups (Ranvir Sena[4] of Bihar, for instance) are manifestly in the service of the elite, and some are plain predators, even if they are of plebian origin. One can expect from them no sensitivity to the larger consequences of their practice. But even those groups that have a proclaimed larger purpose as the goal of their armed activity are so cocooned in their ideologies and strategies that they exhibit little concern for what is happening to humane principles of governance in the course of the clash between them and the agencies of the State.

But perhaps the armed groups and the insecurity they generate are merely providing an excuse for the elite the world over to permit the surfacing of illiberal feelings that lay hidden under the skin. Hidden all these days for fear of being branded inhuman, for till recently it was thought necessary to heed such criticism.

For the times have definitely changed, and we are living in a new era. There is a tendency to characterise this era of history in terms of 11 Sept 2001, or simply '9/11' as the Americans say. It is already customary to say that the world will never be the same after that date. A radical thinker like Noam Chomsky too agrees, though for a reason that the Americans will not like. But while that date is no doubt an

important one, to make it a bench-mark of the new times is to shift the onus for the changes on to the wrong party. That date is merely a significant event in the period that started with the ascendancy of crass neo-liberalism in world politics and economics. The current era started when capitalist civilisation, which learnt a lot of lessons in the last couple of centuries, decided that the collapse of the Soviet experiment entitled it to forget all of them, and get back to the fundamentals of its brutal logic. This has had an impact on not only the preferred economic policies, but also the seemingly consensual understanding of civil rights within the liberal tradition, and the element of decency introduced into international relations by the creation of the United Nations and allied structures. All of them are in a shambles now, ridiculed, devalued, derided. So is international human rights law, which the US always regarded with a certain amount of contempt. But now, thanks to the US being de facto the world government, it is no more 'international law' but a mere aspiration of the toothless and the boneless. International relations has been reduced to an arrangement for hunting down rogue States and organisations so proclaimed by the US, and international law turns around the doctrines of pre-emptive assault and preventive war. Human rights, in this changed scenario, is sometimes a joke, and sometimes a serviceable slogan in the pursuit of war.

It is in this background that we are looking at the future of Death Penalty – in the world, and in our country. In terms of logic and reason there is no answer to the abolitionist arguments, or in general to the argument for a reworking of penal law away from notions of retribution. There is ample evidence to show that Death Penalty does not act as a deterrent to capital crime, because evidence shows no difference in the frequency of such offences before and after abolition. The real reason why people argue for retaining

Death Penalty is a desire for retribution, which may be understandable in individuals, but not defensible when pleaded by a civilised society. The impossibility of correcting mistaken judgement of guilt in case of imposition of the ultimate punishment is another consideration to which the retentionists have no answer. Capital Punishment does moral wrong by imputing to the offender the full individual responsibility for the offence, ignoring the contribution of circumstances, more particularly of a social character. To these and related arguments, there is no reasonable answer.

But we do not live in the realm of logic and reason, but in that of power and resistance. And power desires the opportunity to impose extreme retribution on its subjects. The resistance built over the decades into the institutions of society, including the law and legal institutions, ought to have been a great asset to day-to-day resistance to the arbitrary demands of power. But that has been the first casualty of the current times. Human rights principles built into the law and legal culture are ceding way to inhuman assumptions about human affairs under the neo-liberal assault on governance. That sets the context for the ideological devaluation of any humanist understanding of crime and punishment.

In the near future all that we can reasonably expect in the matter of the Death Penalty is therefore an increase in the frequency with which the Courts impose the extreme punishment, and the indifference with which the executive will reject mercy petitions. Perhaps they will also add a few more offences to the list of the crimes for which Death Penalty can be imposed -- rape is one offence for which the change has been canvassed by none less than the Deputy Prime Minister of India.[5]

The only way to fight this is to fight unitedly. We have seen a popular agitation against Death Penalty awarded to

two dalit would-be bus robbers of Andhra Pradesh. The main participants in the agitation were dalit associations. Against the death penalty awarded to the accused in the Rajiv Gandhi assassination case, it is Tamil nationalist groups that are the main protestors. Now we have death sentence confirmed in a Jharkhand case pertaining to naxalites. Groups sympathetic to the naxalites have started an agitation for commutation of the sentence. And willy-nilly the campaigns have made it seem as if the Death Penalty in each of those cases was condemnable because that group/community/cause is somehow morally privileged. This is no way to organise the agitation against Death Penalty. I am not saying that the specific nature of the case and its social/political background is, or ought to be, irrelevant for the campaign. No, the abstract principle that Death Penalty is a violation of human rights will make sense only through individual instances of its imposition. But that is different from saying that individualisation of the protest can be an efficacious way of fighting for abolition of Death Penalty. It can never be. If we wish the campaign to be efficacious, we must overcome the temptation to stick to the cosy company of the politically like-minded.

There is, as they say, no time like the present. Since more than one campaign on individual cases is already underway, it is time to get together with a single slogan: do away with Death Penalty in Indian law, for it has neither reason nor expediency to commend it. Strategically, the movement can rely on a convenient instrument of international law: the Second Optional protocol to the International Covenant on Civil and Political Rights (ICCPR). The campaign should demand that India sign the Protocol, which would commit it

to immediate stay of all executions, and abolition of the Death Penalty as a matter of principle.

The Second Optional Protocol was adopted by the General Assembly of the United Nations on 29 Dec 1989. It commits the signatories to declare an immediate moratorium on executions and to legally ban the Death Penalty in due course. Being optional, it does not bind all members of the UN, but only those who sign it. But nevertheless India was not happy with the adoption of even this optional measure. While 59 countries voted for its adoption, 26 opposed it and 48 abstained. India, true to its character as a shame-faced retentionist, was among the absentees. Today's task is to insist that this country which was unhappy with even the adoption of the optional protocol shall opt for it forthwith. The task is evidently not going to be easy, especially as we go into the era of burgeoning neo-liberalism, but to abandon it is to succumb to the brutal logic of the times. The campaign must go ahead with vigour, if nothing else to ensure that we do not slip back.

I hope the present volume will provide its readers with enough material to answer the questions and queries that the campaign would no doubt attract, and thereby win over more friends to the abolitionist cause.

---

1. *'retentionist' is the expression used in international law for countries or States that argue for retaining the Death Penalty*
2. *Chairman of the Committee on Reforms of the Criminal Justice System*

3. *The Supreme Court on January 29, 2004 converted life term into Death Penalty to four members of the 'Veerappan gang' for killing 22 policemen and forest officials in a landmine blast in Karnataka in April 1993*

4. *A right-wing upper caste landlord militia mainly based in Bihar*

5. *L.K. Advani. Deputy Prime Minister of India from 2002 to 2004*

Death Penalty: Why Not India Join The Global Mainstream?

The President of India[1] is believed to be a political novice, and his political acts have been understood as such. For instance, a more artful person than he would not have allowed himself to get implicated without protest in the Bihar Assembly dissolution mess. Likewise his recent recommendation on clemency petitions of death-row convicts pending with his office may be construed as proof that he is also a novice in the exercise of executive powers. Otherwise, it would seem, he would not have so guilelessly recommended commutation of the Death Penalty in all the 50 applications.

Novice or not, he has done a good thing by rekindling the debate on Death Penalty, that too by the positive act of recommending clemency. The Press has reported his statement at some gathering that he has found that only the poor are getting hanged. That is indeed one of the many reasons why complete abolition of the Death Penalty is sought by human rights activists, though poor may not be the

---

Date of publication not known

exact word for it. Those who are on the margins of the economy, the society and polity -- the poor, the socially disadvantaged and those politically beyond the pale -- are the ones who get the extreme punishment. It is not that the crimes they are hanged for are never heinous. They may well be. But others who commit equally heinous crimes manage to avoid the hangman, indeed any punishment at all, to an extent disproportionate with their proclivity for crime. It need not be that judges let them off willfully: it is the way justice works. It works not only through the abstractions of law and the solemnity of evidence. It works also through society and its political, economic and social structures.

What will happen to the President's recommendation is to be seen. One of the grey areas of Constitutional interpretation is whether the President, while exercising the sovereign's power of clemency, is bound by the opinion of the Union Cabinet as he is in the exercise of less exalted executive powers. It depends on the relative obduracy of the Union Cabinet and the Presidential conscience whether this issue is going to be settled now.

That Death Penalty is objectionable, among other things, because it reeks of revenge is a well known argument. It is not that the desire for revenge is necessarily inhuman, for we all know of situations where we sympathise with that desire in victims of injustice. Yet it is found objectionable as a guiding principle of penal justice because revenge, even when understandable, is believed to be a reaction born of weakness, whereas justice rendered by society organised as a civilised entity is expected to eschew human weakness.

But in at least two of the cases pending with the President, even the principle of revenge does not require that those on death row be hanged, for the revenge was had at the time of the offence itself. Dhanu who blew up Rajiv Gandhi

blew herself up along with him, and the five militants who attacked Parliament died in the shootout that followed. Even revenge should not require that their associates be hanged.

If criticism of the principle of revenge -- called retribution in polite talk, namely jurisprudence -- did not get us hot under the collar, we would be able to see an anomaly in the usual equation made by popular morality: when he has killed, what is wrong in killing him in turn? Nobody would say: if he has burnt another's house why should not the law burn his house? If he has broken another's leg, why should not the law, in cold blood, aim a rod at the middle of his leg and break it into two? The alternative of keeping the offender out of society's way for a time calculated to render him contrite is deemed sufficient punishment in such offences, at least by those who regard themselves as modern. How are murder and treason so different that they require recourse to the archaic moral equation? But more is wrong with this moral equation than that it is archaic. It places the totality of the moral guilt on the offender, which is never fair, even in extreme cases such as Dhananjoy Chatterjee's[2]. Every one of us is a little guilty of the cruelty of the Dhananjoys of the world, and hanging them is one way of evading that fact.

But the President has a very contemporary argument in his defence. These days we Indians wish to be global, and not live outdated autarchic lives. Well, the majority of the countries of the world are no longer imposing the Death Penalty. Some have banished it from the law, some have suspended it for extended periods, and some have confined it to war-related offences. It is true that the strong anti-democratic currents sweeping the world after 11 September 2001 have put pressure on these countries to reverse the trend, but as of now the pressure has on the whole not succeeded. Would India not like to go global in this area, join

the global mainstream? Or do we wish to transport into this realm too the equation we have tacitly accepted in international politics: global means the US, in which case there is no hope for those on death row, for the US is next only to China in the gruesome frequency of the recourse to the Death Penalty.

1. *A.P.J Abdul Kalam. President of India from 2002 to 2007*
2. *Security guard who was executed by hanging on August 14, 2004 at Alipore Central Jail, Kolkata for the rape and murder of 14 year-old Sheetal Parekh on March 5, 1990*

Campaign Statement

The Death Penalty is one of the most blatant assertions of the State's privilege to take life. The sheer irreversibility denies it justification, more so given the proven fallibility of the criminal justice system. The Law Commission considered the matter in the early sixties and recommended retention of the Death Penalty on the ground that there was nevertheless some social purpose to be served by it. A private member's bill for abolition, also moved in the sixties, failed with the majority in Parliament expressing belief in the same elusive social purpose. Thereafter, the only meaningful debate on Capital Punishment has been in the course of challenges to its Constitutionality before the Supreme Court. While laying down that it should be imposed only in the "rarest of rare" cases and from time to time prescribing other safeguards in the process, the Supreme Court has stopped short of striking down Capital Punishment. The increasing crime and violence in society, the Law Commission's observations made on the sole occasion when it considered the matter, and the view that it is for the Parliament to settle such an issue, have all weighed with the Supreme Court in not declaring the provision unconstitutional.

Written in 2004

Within the polity, a certain complacency has grown on the issue of Capital Punishment. The law that it is to be the exception rather than the rule, the Supreme Court's ruling that even this must be only in the rarest of rare cases, incidental safeguards, and the fact that the numbers of those executed is comparatively small in India, have contributed to this complacency and diffused civil society debate. Executive intransigence faced while pursuing clemency appeals, signifies the extent to which thought has been blunted on such a vital issue. The Supreme Court's whittling down of the scope of the Death Penalty generally and the judicial pronouncement of this punishment in a particular case is taken as having settled everything, rendering any reopening of issues unwarranted. The absurdity of such a position becomes obvious when we see that the occasion for executive clemency arises only after a judicial imposition of punishment.

The assumptions supporting the continuation of Capital Punishment need to be thoroughly debunked. The clamour for severe punishment accompanying every shocking crime creates an illusion of public support for Capital Punishment. The State's active role in engendering alienation and repression, and its failure in crime prevention and effective prosecution is sought to be covered by its ready offer to kill the individual offender. Besides the complicity of the State in it, escalating violence in fact proves the ineffectiveness of the Death Penalty as a deterrent. Violence in society cannot be addressed without addressing the issue of the State's justification to kill i.e. the Death Penalty.

The proposition that crime and violence exist spontaneously and inspite of the State, is a great lie. The specious logic that equates the demand for abolition with support for crime must also be addressed. The argument against the Death Penalty is not an argument against justice. It is an argument against violence.

Capital Punishment is a conscious acknowledgement that the State may kill in public interest. This insidiously generates a less articulate justification for other forms of State violence.

The safeguards prescribed by the Supreme Court have empirically not worked out. For example, at least two Supreme Court judgements have ruled that Capital Punishment should not be imposed in cases where the trial and the appellate courts have given contrary findings on guilt. In spite of this, we find that in several such cases, even the Supreme Court has confirmed the death sentence. Such anomalies have escaped even the notice of the executive while considering mercy pleas.

The eventual imposition of the death sentence is more a function of the inadequate legal assistance that the accused have been able to secure than of the nature of the crime itself. For example, two young boys from Andhra Pradesh were convicted of murder and sentenced to death by every court, while the conviction itself arose on the basis of a clearly vitiated process of identification. The vitiation in the identification process, a technical point, was discovered quite late. It had not been pointed out at the trial. It is frightening to think of how random the whole process can be. Of course it is the poorer sections that are most likely to suffer the consequences of this randomness.

The executive power of clemency conferred on the President and the Governor is exercised in complete opaqueness. There is no knowing what weighs with the executive head in granting or refusing mercy. The Supreme Court has held that the President and the Governor are bound by Cabinet advice while dealing with clemency petitions. Further, the executive head can review the judicial findings as also other factors which are beyond the ken of the

judiciary, while considering crime and punishment. Nevertheless, it is not known how the Cabinet's advice is taken and what nature of scrutiny is adopted in disposing of a clemency petition. And, as said earlier, instances exist of the official channels raising the very fact of the judicial pronouncement as a ground for non interference. No data is readily available on the number of mercy appeals by or on behalf of death row prisoners and their fate.

The abysmal record of the State in rehabilitation of crime victims, and in meaningful attempts at reform, render it completely suspect as a welfare institution. The sheer increase in the volume of crime and violence in spite of the usurpation by the State of more and more powers and alongside the existence of the Death Penalty is a complete refutation of its justification for any social purpose.

Above all else is the repugnance that any people sensitive to human values and dignity must feel on contemplating the existence and maintenance of a system to consciously and with legal sanction eliminate life. This repugnance has moved thinkers and writers of all ages to call for the abolition of the Death Penalty --Tolstoy, Camus, Sartre and Dostoyevsky being some of them.

The argument against the Death Penalty is not to condone the crime. It is not even merely to emphasise the right to life, dignity and opportunity for reform of the persons on death row, though all these things are important. It is an exhortation to society and the State to make a positive statement against violence.

We are cognisant of the fact that the Death Penalty is an extreme issue, but in reality it cannot be seen as divorced from other repressive and dehumanising aspects of the penological policy of the State.

Sporadic attempts have been made by civil society groups to engage with the issue. In recent years these have taken the form of pursuing mercy appeals before executive authorities. Some have resulted in interventions by civil society groups in the process, even after the rejection of appeals by the condemned prisoners themselves. In a recent case, members of a civil rights group even visited the village of a condemned prisoner, interacted with his social surroundings and placed the material before the President in support of the plea of mercy. However a more concerted campaign is called for. Dialogue must begin involving the State and social agencies, the victims of crime, and activists all over the country. There is need to build a strong network, for an informed campaign. Documentation and dissemination of information will be a necessary part of this. It is certain that if the anatomy of Capital Punishment is exposed, there would be very little public support for it.

We hereby resolve to carry out an informed campaign for the abolition of the Death Penalty in India.

Chilakaluripeta Bus Burning Case :

Mercy Plea To President

To
His Excellency
The President of India

Sir,

This is a plea for the exercise of your Constitutional power under Article 72 to grant commutation of death sentence in favour of Sathuluri Chalapathi Rao (20) and Gantela Vijayavardhana Rao (22)[1]. The two young men in their twenties were convicted by the Sessions Court at Guntur. The court sentenced them to death. The death sentence was confirmed by the Andhra Pradesh High Court, and the convicts appeal to the Supreme Court has been dismissed on 28 August 1996 (Criminal Appeal No. 195/1996). Following the dismissal of the appeal, the Sessions Court of Guntur has issued a death warrant for the execution of the two convicts on 18-12-1996.

Written in 1997

Both the young men belong to poor Scheduled Caste families of Guntur town. If they are hanged to death their families will be rendered destitute. Both these young men are victims of poverty and hunger. In order to get out of the dragnet of poverty and hunger they thought of resorting to robbery of a bus and in the process the bus caught fire killing 23 passengers. It is a case of poverty leading to robbery, robbery leading to an accident taking away innocent lives. We appeal to Your Excellency to look at the cause of the crime -- poverty -- and allow them to live to reform themselves as they have a long life ahead. Added to this they have no history of previous robbery, theft, jail life and not even of entering into police lockup. The caste-class nature of our society had driven them to this end. Therefore, they must be allowed to live and reform.

A Constitution Bench of the Supreme Court had held, in Bachan Singh Vs. State of Punjab (1980), that death sentence must not be awarded as a matter of course, but only in the 'rarest of rare cases, when the alternative option is unquestionably fore-closed'. Subsequently, what is it that distinguishes a case as 'rarest of rare' is a matter that has been agitating the Supreme Court. While the court has discussed the question again and again, the debate is not yet closed. However, in the present case all the courts have evidently concluded that since the crime has resulted in the death of 23 passengers the courts, without looking at the cause of deaths, felt that they must be given death sentence. The matter however, should be viewed from the moral and human angle as well.

The plain facts of the case are that Chalapathi Rao and Vijayavardhana Rao are youth with no previous criminal record, let alone previous conviction. This is the first time that they were at all booked in any criminal case. They are not

habitual and hardened criminals whom society can get rid of only by physical extermination. The two were hard working labourers who belong to the Scheduled Caste. Both of them have old parents and other dependents to look after. With their death both the families will get ruined. They were tempted to take to robbery for the first time in their lives in an effort to meet their dire need of money. It was not 'lust for wealth' but dire need that motivated them, contrary to the interpretation the courts put on their act. Their aim was only to commit robbery and not kill any one. Lacking any previous 'experience' in committing robberies, they did not know how to set about the task they had assigned themselves. They read in a newspaper about somebody who had robbed a bus by using petrol to threaten the passengers, and decided to use the same technique. Their idea was to sprinkle petrol in the bus, threaten passengers with the show of setting fire, and rob them without causing injury to any of them. However, when one of them started sprinkling petrol along the floor of the bus as planned, an unforseen thing happened. The driver smelt the petrol, shouted and braked the bus and switched on the lights. The passengers then woke up and started shouting. This scared the novice robbers who were paralysed by the unforseen turn of events. They got scared that the passengers may lynch them. Their only thought was to escape unhurt. But the passengers too were in a hurry to get out of the bus. In the melee the petrol caught fire, and the horrible tragedy occurred in a matter of minutes.

In the Trial Court, the two accused took the usual plea that the whole charge against them was fabricated, and that even the charge of attempted robbery was not a fact. However, after being convicted by the Trial Court, they narrated to us the above facts as the true story of what happened. They are as much in the dark as everybody as how exactly the fire started. They insist that even in their panic

they did not set the bus on fire. However, petrol being highly combustible, it need not occasion any surprise if it caught fire accidentally in the commotion caused by the scramble, perhaps with the ignitions from the engine. One of the accused, Vijayavardhana Rao, himself partly got burnt by the fire.

We do not ask for condonation of their crime. All that we say is that in the circumstances, the extreme penalty of death is not warranted. Life imprisonment, which will help them to repent the one act of crime they have committed in their lives, and become useful citizens and better human beings, is a more appropriate punishment, considering that they are not hardened criminals by any stretch of imagination, but only poverty stricken young men misled by their dire need of money. This is in truth a consideration that could have moved the courts too, in deciding whether the crime was of the 'rarest of rare' category for which the death sentence is warranted, but the courts were evidently carried away by the prosecution presentation of the case, in which the unintended happening is made to appear as an act of diabolical inhumanity. As the accused pleaded not guilty to all the charges, the courts did not have the benefit of a first person account of what actually transpired that night. Now the true narration has been submitted to Your Excellency by the convicts in the pleas for mercy submitted by them, which we briefly summarised above. The narration indicates plainly that they had in mind only robbery and not the killing of a single passenger, let alone 23 of them, and that they did nothing to kill the passengers.

Vijayavardhana Rao was a rod-bender in building construction, and Chalapathi Rao a painter. Vijayavardhana Rao's father had died long ago, and this man was the sole support for his sickly mother. Chalapathi Rao's father is old

and infirm, and that young man too was the bread-winner of his family, his wife and his younger sister. Neither of them earned anything for their family's survival by means of their honest toil. They were constantly tormented by poverty, which is the common lot of labourers in the unorganised sector of the Indian economy.

In a different milieu, perhaps, their thoughts would not have turned to crime, but we live an era where the political and media culture make it almost inevitable that indigent young men soon start thinking of short-cuts to earn money. Mass murders have been engineered in the city of Hyderabad to dislodge one Chief Minister and enthrone another. In a socio-economic milieu where the well to do and even the political leaders engineer criminality to earn more and more why should one then feel surprised if poverty stricken young men do not hesitate to commit crimes for the sake of some money? And the media (especially films, which even very poor people see) has made crime and vengeance heroic. If the politicians have bridged the gulf between public service and crime, our film world has, in its theatrics, dissolved the distinction between crime and just rebellion. It is no surprise that intelligent and impressionable young men like Chalapathi Rao and Vijayavardhana Rao should let the frustrations born of irremediable poverty drive them towards crimes of violence. We no doubt rightly feel shocked at their irresponsible act, but has our society striven to preserve the human moral environment that would inhibit young men from taking recourse to such means? This is not to absolve them totally of their responsibility for the conscious choice they made, but only to point out that society should at last in part bear the burden of the crime they chose to commit, and the much bigger crime that resulted from their attempt. To hang the two young men is to absolve society -- and all of us -- of all responsibility in the matter. To commute their

sentence to a smaller one, and to hope that they will emerge penitent and better human beings from the incarceration, is to at least acknowledge that they are only part authors of the crime.

We, therefore, request you to commute their death sentence and allow them to live and reform.

-- Joint Action Committee for the Commutation of Death Sentence of Chalapathi Rao and Vijayavardhana Rao, Andhra Pradesh.

---

1. Their death sentences have since been commuted to life imprisonment. The two have been in prison for more than 18 years serving out their sentences. The AP government is as yet unwilling to give them the benefit of a premature release.

On Death Row :
NHRC Urged To Intervene

To

The Hon'ble Chairperson

National Human Rights Commission

New Delhi

Respected Sir,

Sub: Intervention in mercy petition under Article 72 pending before the President of India.

This is a plea to the NHRC to intervene in the matter of the death sentence passed against two dalit youth, Sathuluri Chalapathi Rao and Gantela Vijayavardhana Rao by the Sessions Court, Guntur, A.P. (S.C.No.662/1993). The death sentence was confirmed in due course by a Division Bench of the High Court, and the appeal by the convicts was dismissed by the Supreme Court on 28 August, 1996.

Petitions seeking commutation of the death sentence to one of life imprisonment under Articles 161 and 72 of the Constitution of India were filed with the Governor of A. P. and the President of India respectively. The Governor of A.P. declined to act on the petition. As a similar petition was pending with the President, the President of India considered and rejected the mercy petition in March, 1997.

The convicts were to be hanged on 29 March, 1997 but a fresh last minute petition for commutation presented to the President of India by Maheswata Devi, well known Bengali writer and Jnanpith award winner, impelled the Supreme Court to direct a stay on the execution until 5 April, 1997 to enable the President to dispose of the matter. On April 4, the Union Cabinet considered the petition but did not make any recommendation to the President. Instead, it extended the stay on execution until a decision is taken.

Many prominent citizens have written to the President seeking a positive response to the commutation petition. Prof. Rajini Kothari, eminent political scientist, Prof. Manoranjan Mohanty, also an eminent political scientist and renowned expert on Chinese politics, Sri V.M. Tarkunde, former Judge of the Bombay High Court and a pioneer of the human rights movement in India, have personally met the Union Home Minister, Prime Minister and President and explained the rationale for seeking commutation. So have Sri George Fernandes and Sri G. Venkataswamy, both former Union Ministers and Sri Rabi Ray, former Speaker of the Lok Sabha. Sri V.R. Krishna Iyer, former Judge of the Supreme Court of India and Sri K.G. Kannabiran, president of the PUCL are among the many who have written to the President in defence of the plea for commutation. So have many academics, lawyers and journalists including Sri Nikhil Chakravarthy, Editor of Mainstream. Many human rights,

dalit, worker, peasant and youth organisations all over the country are actively campaigning for commutation of the death sentence.

We request the NHRC to also intervene and defend the plea for commutation before the President of India. Our request is based upon two considerations. One is that to the human rights viewpoint, which guides the outlook of the NHRC, death sentence is itself abhorrent and objectionable, irrespective of the specific details of the case in question. The second is that this case in question deserves a more lenient view than has been adopted by the courts.

1. The NHRC's task is to inculcate a human rights culture in the administration. It is required to not merely investigate and pronounce upon individual complaints, but also to strive for reform and reshaping of the law, legal administration and executive practices in general with a view to increasing their commitment to human rights. While the courts are bound by the framework of existing law and its progressive interpretation, the NHRC has the task of not only ensuring that the statutorily guaranteed human rights are enforced, but also of trying to reshape law and the State practices in general in tune with the values and principles of internationally acknowledged human rights. We are aware that the Protection of Human Rights Act, 1993 includes internationally accepted principles in the definition of human rights only to the extent they are enforceable by Indian courts. However, we are not at this point concerned with positive human rights law but with the framework within which the NHRC may comprehend and interpret the provision of sovereign mercy contained in Article 72 the Constitution of India. This framework is constituted by the principles advocated by the most enlightened human rights opinion of the world. These principles are the frontiers of human rights law. If they are not yet positive law in all

countries, they are nevertheless the emerging principles of what can be tomorrow's norm for a human rights law. It is these frontiers that constitute the true frame of reference for the NHRC to the extent that its concern is not just to ensure compliance with legally guaranteed human rights, but to reshape the country's law and practices in accordance with the evolving principles of human rights.

The mercy jurisdiction of the Head of State under Article 72 is an appropriate arena for giving effect to such principles, for that jurisdiction is not limited by existing Indian law which has not yet abolished the Death Penalty. Abolition of Death Penalty, or the principle that nobody shall be deprived of life in the name of administration of justice, is one of the important principles in international human rights discourse. The principle is not yet law in India, but it can be a guide for interpreting the meaning and scope of the power of mercy granted to the President in Article 72. About 55 countries of the world, including some Third World nations, have abolished Death Penalty. Another 40 countries have in practice ceased to award the Death Penalty. The UN has repeatedly made efforts to obtain a consensus in the General Assembly for the universal abolition of Death Penalty. What this indicates is that the abolition of Death Penalty is not an unrealistic dream, but a matter on the agenda of international human rights law. Article 72 of the Constitution of India, which is not limited by existing penal law, is an apt context for furthering the human rights content of penal culture in line with international norms, even if the norms have not yet succeeded in taking the form of a UN Covenant.

Thus we feel that the NHRC can effectively intervene in the matter in the furtherance of its own statutory responsibility of strengthening the human rights content of the country's administration.

2. The facts of the case are that the two convicts are poor dalit labourers, skilled but not regularly employed. They had no previous criminal record whatsoever. Tormented by poverty, they decided to commit a bus robbery. Taking the clue from a news item about a similar robbery, they decided to buy some petrol, board a bus, sprinkle petrol in the bus and rob the passengers at the point of a match stick. At no point did they have any intention of killing anyone.

Accordingly, they boarded an overnight express bus proceeding to Chilakaluripeta from Hyderabad on the intervening night of 7-8 March, 1993 and tried to put their plan into effect. But due to their total lack of experience their plan went awry as the bus crew and passengers got up and started shouting. The would-be robbers were as scared as the passengers and they too tried to jump out of the bus without robbing anyone. But they had already sprinkled petrol in the bus; the bus caught fire in the melee killing 23. Some of them died instantly and others later in hospital. It is not clear how the bus caught fire. Petrol being highly combustible, the slightest spark from any source could have ignited it. The convicts insist that they did not light the fire. One of them was even partially burnt. It makes no sense to assume that they lit the match stick for their aim was only to rob the passengers and not to kill them and they had as yet robbed no one.

In the case made out by the prosecution, the incident is described as a case of diabolical murder rather than an accidental happening. The motive for the killing is nowhere made out in the charge-sheet. There are other discrepancies too which can be read in the Sessions Court's judgement annexed as A-I to this letter. All the initial accounts of the incident, including the dying declarations, mentioned four and not two perpetrators of the offence. The prosecution has

not explained this discrepancy. We are enclosing as annexure A-3 a copy of the plea for mercy submitted to the Governor of A.P. by the convicts which narrates the event as it actually happened. We are also enclosing as annexure A-2, a copy of the plea for mercy submitted by us on their behalf to the Governor of A.P., in which we have explained the event and its background. We must also add here that the accused did not have legal assistance until the time of framing of charges which violates the principle of fair trial as laid down by the Supreme Court of India in Khatri Vs State of Bihar, 1980.

In light of the above, we wish the NHRC to consider whether the criminality of the act is such as to make it an offence that can be put in the 'rarest of rare' category in terms of its heinousness. The only reason for doing so would appear to be the fact that 23 persons were killed in the incident. Can the number of persons killed as a consequence of the act add to the heinousness of the act as evidenced by the intention, motive etc.? If the occupancy of the ill-fated bus had been thinner and if, say, five or six persons had died, would the law have regarded it as so heinous that sentence of death alone is the deserved punishment, and option of any smaller punishment as irrevocably closed?

Moreover, how unpardonable the crime is deemed to be is a matter that cannot be divorced from the conditions and circumstances that led to the crime. The circumstances of poverty and suffering that led the two dalit youth to try to rob the bus are described and discussed in annexures A-2 and A-3. They must be taken into account in deciding whether we treat the offence as so unpardonable that a sentence of death alone can redress the wrong, quite apart from the fact that the accused had no intention of killing anyone but only of robbing them.

Thus, within the framework of Indian law relating to Death Penalty, we feel that this is an apt case for the NHRC to raise before the Supreme Court of India the question of the various dimensions and facts that go to decide whether an offence qualifies for the description 'rarest of rare' used by the Supreme Court in re Bachan Singh (1980). As the Protection of Human Rights Act provides general locus standi to the NHRC to raise legal issues pertaining to human rights before the Supreme Court, we request you to take this up in an appropriate petition before the Supreme Court in addition to intervening with the President of India.

Date: 15-4-1997

Yours truly
K. Balagopal
General Secretary,
APCLC

Do They Deserve To Be Hanged ?

Dear friends,

This is an appeal to residents of the nation's capital to join us in the campaign to persuade the Government of India to commute to life sentence the sentence of death passed on S. Chalapathi Rao and G. Vijayavardhana Rao, two dalit youth of Andhra Pradesh.

The two young men were self-employed labourers of Guntur district in Andhra Pradesh. The former was a painter and the latter a rod-bender in building construction. They had no previous crime record, and indeed had never stepped into a police station in their lives.

Unable to make both ends meet with their honest toil, and unwilling to resign themselves to the life of distress imposed by their birth in a property-less dalit family upon them and their dependents, they decided one day in 1993 to rob a bus. Taking the cue from a news item they read in a paper, they decided to buy a can of petrol, board a bus, sprinkle the petrol on the floor of the bus, threaten the

Written for a Dharna at Jantar Mantar, New Delhi, 6-10-1997 seeking commutation of death sentence in the Chilakaluripeta bus burning case.

passengers that they would set the bus on fire, and rob them. It was not their intention to kill anyone, but only use the threat to rob the passengers.

It was no doubt an irresponsible plan. Petrol being highly combustible, there was always the possibility that it would catch fire and cause unintended damage. That is what in fact happened when the two young men put their plan into effect. The overnight express bus in which they tried their robbery caught fire before they could rob anyone, and twenty three passengers, half asleep, were burnt to death. One of the two would-be-robbers was also partly burnt before the two of them could jump out and escape.

The Sessions Court of the district sentenced them to death, and both the High Court and the Supreme Court have confirmed the death sentence. Now a plea for commutation of the death sentence to a sentence of life imprisonment is pending with the President of India. On behalf of the Joint Action Committee for Commutation of the Death Sentence, consisting of a number of dalit, workers', women's and civil rights organisations of Andhra Pradesh, we request you to join us in asking the President of India to exercise his discretion in favour of the plea.

Why?

The two young men have committed a crime, a horrible crime. They undoubtedly deserve to be punished. But do they deserve to be hanged? To hang them is to hold them alone and exclusively responsible for the offence they have committed and to absolve the rest of us of our responsibility for driving them to crime.

Fifty years after Independence, the life of unemployed, semi-employed or self-employed slum dwellers continues to be an unrelieved tale of misery and suffering. The government, which under the Constitution of India is supposed to build a society based on social, economic and

political justice, has failed miserably in taking the country forward one inch in that direction.

For those among the poor who are dalits by birth, the possibility of moving up in life are further closed by the accident of their birth. No helping hand is offered to them by society. A life of endless misery, toil and eternally belied hope is their lot.

It is no surprise that young men brought up in this milieu seek desperate remedies. What, in any case, is the role model offered to them by our society's elite, whether political or economic? Is it not a model of selfishness, plunder, scams and *hawalas*? What is the message sent out by the indifference that all of us exhibit towards the misery of the poor and the deprived? Is it not a message of each for himself, and the devil take the hindmost? Does society spend even one-hundredth of the time in worrying about the misery of slum-dwellers that it does worrying about the crimes committed by slum-dwellers? If we did, would it be necessary for poor semi-employed dalits such as these two boys to take to crime?

To allow these two young men to be hanged is to allow our country's rulers to get away once more with their crime of indifference towards their Constitutional obligation to build a welfare State in India. It is to allow the rest of society - that includes all of us-get away once more with our crime of indifference to the lot of the poor and the deprived except when they turn to crime. We hope, therefore, that you will join us in putting pressure upon the President of India to commute their death sentence to a sentence of life imprisonment.

— Joint Action Committee for the Commutation of Death Sentence of Chalapathi Rao and Vijayavardhana Rao, Andhra Pradesh.

Rajiv Gandhi Murder Case :
A Plea For Clemency

To
His Excellency
Sri K.R. Narayanan
President
Rashtrapathi Bhavan
New Delhi

Your Excellency,

Sub: Requisition to His Excellency Sri K.R. Narayanan, President of India to grant clemency and commute the death sentence to one of life imprisonment in favour of the four convicted in the Rajiv Gandhi murder case.

This is a plea for the exercise of Your Excellency's power of clemency under Article 72 of our Constitution to commute

Written in 1999

the death sentence to one of life imprisonment in favour of (1) T. Suthenthiraraja @ Santhan, (2) S. Nalini, (3) Sriharan @ Murugan, (4) G. Perarivalan @ Arivu[1] whose death sentence in the Sriperumbudur bomb blast case, popularly known as the Rajiv Gandhi murder case was confirmed by the Supreme Court in Death Reference case no. 1 of 1998 on 11.05. 99. The Review petitions filed by the above four persons were dismissed by the Apex Court on 07.10.99.

We state below in brief the main grounds on which we seek Your Excellency's indulgence:

(1) Your Excellency will agree that in any civilized penal system, punishment must strictly be commensurate with the crime, but not equivalent to it.

The bomb blast at Sriperumbudur which was targeted at and which killed, among others the much loved and respected Sri Rajiv Gandhi, former Prime Minister of India, was unquestionably a dastardly and brutal act. Twelve of the accused who played a pivotal role in the offence are already dead. Except Dhanu and Haribabu who died in the bomb blast, all the others committed suicide, apprehending arrest and torture. Those who were apprehended and tried are minor players in the conspiracy. The evidence shows that all of them merely followed the dictates of Sivarasan, who planned and led the conspiracy and the actual offence. It is not that they are therefore innocent, but their culpability is less than that of the leaders who are no more. It is most likely that if Sivarasan, Subha and the other main perpetrators of the crime had been caught alive and prosecuted, those who are now sentenced to death would not have been sentenced to death along with them. In all probability, the court, either

at the First or Appellate instance, would have found a lesser sentence sufficient for them. There is no reason to come to a different conclusion now merely because the main perpetrators of the crime did not wait to come before the court.

The penal principle of deterrence, we submit with respect, even if one were to subscribe to it, does not require that the minor players should be executed when the main players have evaded the gallows by killing themselves.

(2) Your Excellency will agree that the extreme penalty of death is inappropriate in a case where there is even a slight suspicion that the conviction is obtained by coerced confessions.

The case was charged and tried under the Terrorist and Disruptive Activities (Prevention) Act (TADA). Section 15 of TADA allows a confession made to a police officer admissible in evidence and this was used to extract confessions from the accused. The case has been proved only on the basis of these confessions.

The nature of these confessions may be gauged from the fact that, barring one of them, all others who confessed did so only at the fag end of the 60 day period of police remand. Their mental state during that period may be gleaned from the fact that ten of their co-accused committed suicide, having decided to die, rather than fall into the hands of police.

All those who confessed have told the court that confessions were extracted from them. While that may not be reason enough for the court to disbelieve the confessions, it raises enough doubt to rule out the application of extreme

punishment. Besides, the contents of the confessions extracted by the police contradicted each other and the evidence of the prosecution witnesses were not in many instances corroborative of the contents of the confessional statements -- facts which have been pointed out in the Judicial Review petition.

(3) Your Excellency will agree that when the case is tried under a law that is admittedly draconian, the extreme punishment is inappropriate, for error cannot be ruled out in the prosecution.

Your Excellency is aware that TADA was allowed by Parliament to lapse, because of the widespread criticism of its draconian character. While technically, it is not wrong that cases which were earlier booked under TADA are allowed to be tried under it, such a practice would be most improper, since the Act lapsed, not for any other reason, other than that it was extremely draconian.

But for the use of TADA, which allows confessions made to police officers admissible in evidence, unlike normal law, there would be nothing in this case. To put it frankly, the case has been proved only by using the facility provided by the draconian TADA to lock up the accused for 60 days in police custody, extract a confession from him/her and use it as evidence to prove his/her guilt.

The voluminous records submitted in this case cannot hide the fact that the Prosecution's case has been established and proved only in this manner. Your Excellency will agree that awarding the Death Penalty on the basis of an Act that lapsed because there was a national consensus on its draconian character is not only improper but also extremely unsuited to a democratic polity.

(4) Your Excellency will agree that death sentence should not be awarded when the proof of the case is based on an admittedly debatable view of the law, in this instance, Section 12 of TADA, which has been interpreted by the learned judges in such a way as to make confessions made under Section 15 of TADA admissible in evidence, even after the charges made under TADA had been struck down.

The Supreme Court has held, upon an elaborate consideration of the evidence in this case, that the Sriperumbudur bomb blast was not a terrorist or disruptive act, as defined in TADA, though it is without doubt a heinous act. That is, the offence does not attract the provisions of TADA. The learned judges of the Court have held that none of the four accused are guilty of terrorist or disruptive acts, thus implying that they are not a menace to our country and society.

Yet it is paradoxical that the Court has held that since the case was charged under TADA, the confessions extracted by police officers can be admitted in evidence under Section 15 of TADA. With all due respect to the learned judges, we submit that such a view is debatable.

We do not ask Your Excellency to sit in judgement over this view of the Supreme Court, nor can we reasonably make such a plea.

But we would like to point out that this is a view which is quite likely to be reversed by the Court at some point or other. But, if by that time, the accused are hanged, their lives cannot be resurrected.

(5) In this context, we would like to draw Your Excellency's attention to the nature of these young lives which were drawn into a conspiracy in which they were mere pawns.

We submit, Your Excellency, and it is clear from their social and economic backgrounds that they were persuaded to subscribe to a misguided idealism. This idealism, in turn, derived from an indoctrination they were powerless to criticise or resist, given their extremely humble social origins and also from more mundane, material considerations dictated by their economic situations.

All these four persons have had to endure 8 years of uncertain and painful incarceration, haunted by the ever present shadow of an impending death, which have left every one of them scarred in different ways. At a time of their lives when they should have been enterprising and lively, they were forced to endure prison life for their unwitting role in a heinous crime of which they knew almost nothing. Their imprisonment, trial in the designated court and the awarding of death sentence have already caused a great deal of anguish to them and their families.

(6) Leaving aside the considerations bordering on questions of a legal nature, Your Excellency will agree that the power of clemency takes into account considerations of a human and moral character which the law may consider as existing outside of its ken. Indeed it is precisely because of the relevance and value of these considerations that the power of executive clemency is provided for in our Constitution over and above the multiple tiers of appeal and review.

Here, Your Excellency may not stop where the Supreme Court has stopped in considering the human and moral side of the punishment. For instance, should the child of Nalini and Murugan be orphaned in the interests of justice? Would justice be defeated, if Nalini is allowed to live for the sake of

the child? If so, that would be a very insecure justice indeed. We would like to draw Your Excellency's attention to the fact that one of the learned judges, Justice K.T. Thomas, did approach the issue compassionately but had to agree with the majority decision that indeed justice would be defeated even if one of the two parents is allowed to live for the sake of the child. The explanation offered by the judges was: think of all those children orphaned by the Sriperumbudur blast. That is, to imply, that justice required taking revenge for the death of all those children. Compassion is a fundamental duty (Art. 51 A of our Constitution) and making even a single child motherless is merciless violation of justice in its humanist dimension.

Whatever the legal propriety of the thinking of the judges of the Supreme Court on those lines, Your Excellency is not bound to interpret justice in a like manner. The one who kills seeks revenge for some wrong, real or perceived. But the justice done by society cannot seek revenge. Then society and its civilisation would be as weak as the weakest individual. Would India like to put itself on par with a Sivarasan?

(7) Finally, we would like Your Excellency to consider the merit of Death Penalty as such. The right to life is the most fundamental right enshrined in the Universal Declaration of Human Rights and is guaranteed as such in our Constitution.

The Death Penalty is a premeditated and cold blooded killing of a human being by the State which can exercise no greater power over a person than that of deliberately depriving him or her of life. Article 51 of our Constitution urges compassion and humanism as fundamental duties. The Supreme Court of India has held that the focus of interest in penology is the individual, and the goal is salvaging him for

society. The infliction of harsh and savage punishment is thus a relic of the past and regressive times (AIR 1977 S.C 1926 at page 1929). Though the Death Penalty has not been eliminated from our penal system, the history of the judicial process in our Apex Court has set it as an exception rather than the rule. It is only in the rarest of rare cases that even courts should use death sentence. And in mercy petitions life sentence is the Gandhian rule.

Your Excellency will agree that more and more countries are responding to the United Nations' call to abolish Capital Punishment from the statute books of the member countries and that India finds herself only amongst the handful of nations which either opposed or abstained from voting when the UN Human Rights Commission recently voted in favour of a general moratorium on Capital Punishment. It is apt to quote a part of the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the Death Penalty. It runs thus:

"The State Parties to the present Protocol, believing that abolition of the Death Penalty contributes to enhancement of human dignity and progressive development of human rights, recalling Article 3 of the Universal Declaration of Human Rights, adopted on 10.12.1948 and Article 6 of the International Covenant on Civil and Political Rights, adopted on 16.12.1966, noting that Article 6 of the International Covenant on Civil and Political Rights refers to abolition of the Death Penalty in terms that strongly suggest that abolition is desirable, convinced that all measures of abolition of the Death Penalty should be considered as progress in the enjoyment of the right to life, desirous to undertake hereby an international commitment to abolish the Death Penalty, have agreed as follows:

Article 1

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.

2. Each State Party shall take all necessary measures to abolish the Death Penalty within its jurisdiction."

(8) The general arguments of deterrence and retribution in favour of awarding Death Penalty are equally applicable to the Rajiv Gandhi case. However, the onus of establishing the deterrent value of Capital Punishment is on those who are seeking to retain it. The hanging of Satwant Singh and Kehar Singh for the assassination of Indira Gandhi did not seem to have deterred the murder of Rajiv Gandhi. Recurrences of such political murders are not likely to disappear from the face of the earth.

The attraction that terrorism holds to bitter minds can only be countered by the offer of generosity. If what we seek is to win over embittered minds, we must first give up the embittered mode of thought which argues that those who did not care how many children are orphaned do not deserve greater consideration. The gift of life to those who killed our former Prime Minister out of political spite is the best signal Your Excellency can send out to the world to signify that India is generous. The courageous Gladys Staines,[2] when told of the death of her husband and two children at the hands of the bigots said: "May God forgive them." Cannot India learn from her and display the same sort of nobility?

We therefore plead with Your Excellency to exercise the greatest possible compassion and return to these young persons the life they are on the verge of losing. All of them then will in the future have the time and opportunity to re-

examine their lives and orient it to useful purposes and enjoy the profound compassion and the spiritual values nurtured by our society.

Yours truly,
K. Balagopal
Human Rights Forum

---

1 *Nalini's sentence has since been commuted to one of life on humanitarian grounds. However, the other three accused continue to be on death row. In the wake of their imminent hanging, there is a sustained campaign against the Death Penalty in Tamil Nadu with campaigners arguing on both legal and compassionate grounds. A case was filed in the Madras High Court seeking commutation of the death sentence on account of the time they had already spent in prison, and the inordinate delay in fixing the day of hanging. As we go to press, the three await their fate.*

2 *Her husband Graham Staines was an Australian missionary who was burnt to death along with their two sons Philip (9) and Timothy (7) while they were asleep in their station wagon at Manoharpur village in Keonjhar district, Orissa on the night of January 22, 1999.*

Law Of Confessions And Rajiv Gandhi Case[1]

The Kalpanath Rai judgment was an attempt by the Supreme Court to soften the rigor of Section 15 of the Terrorist and Disruptive Activities (Prevention) Act -- TADA. Section 15 makes (i) a confession given to a police officer of a rank not less than that of a Superintendent of Police admissible in a TADA case, and (ii) it makes such a confession admissible not only against the accused who has made the confession but also against the co-accused and abettor etc.

In normal law, at least in the English tradition, the best evidence is direct evidence. That is, what is spoken on the witness stand and is subjected to cross examination. Confession is brought to evidence by a third person speaking of it, saying that the accused said this and that to me. For this reason, a confession is not regarded as very good evidence.

1. These are notes given by Balagopal in June 1999 to K. Manoharan, Convenor of the Campaign Against Death Penalty that was seeking commutation of death sentence to the four convicted in the Rajiv Gandhi murder case. They were written before the review petitions of the four were rejected by the Apex Court.

But if it stands up to the test of voluntariness, it is accepted as evidence on the common sense ground that nobody would voluntarily speak ill of himself unless it is true. That is why voluntariness is absolutely essential if a confession is to be believed. If any force or coercion is involved, it would be of no value. That is why any confession made to the police officer or to any one while in the custody of police is not admitted in evidence as a general principle (irrespective of whether in the particular case there was any coercion).

But the question that arises is this: suppose an accused person makes a confession (other than to a police officer). If it is voluntary, then it is admitted in evidence on the principle that (as said above) nobody would voluntarily speak ill of himself if it were not true. But suppose that in the course of implicating himself, the accused implicates his co-accused also. Can the 'confession' he makes about his co-accused also be received as evidence? The reason for admitting confession affecting him does not apply here. Here in the ordinary law, confession of an accused is not evidence against a co-accused. Section 30 of the Indian Evidence Act says that it can be 'taken into consideration' by the court against the co-accused. Judicial interpretation has laid this to mean that it is not evidence and therefore cannot stand on its own, but if there is other evidence against the co-accused, then the confession of the accused which implicates the co-accused can be called upon to support it.

Section 15 of TADA, on the contrary, not only makes a confession given to a police officer of a rank not less than that of a Superintendent of Police admissible in evidence against the accused who has given the confession, but also against the co-accused. It is the latter part that has been 'read down' by the Supreme Court in the Kalpanath Rai case. Instead of striking it down, the Supreme Court said that it means

nothing more than Section 30 of the Indian Evidence Act as far as the co-accused is concerned.

A look at the Rajiv Gandhi case shows that if the above interpretation is applied to that case, not much remains. Much of the evidence consists of confessions in which each of the accused implicates the other. If all that is discounted, except where there is independent evidence in support of it, then nothing remains in this case.

So, the Supreme Court could 'save' the prosecution only by reversing the Kalpanath Rai judgment, and it has done so.

The other very unsatisfactory aspect of the judgment is the assessment of voluntariness. The TADA allows a confession given to a police officer of a rank not less than that of a Superintendent of Police to be admitted in evidence, but the general principle that the confession must be voluntary in order to be believed remains intact. As in the Kartar Singh case, the Supreme Court said that the test of voluntariness is the same for TADA confessions as for normal confessions.

It is here that the Supreme Court has slipped up badly in the Rajiv Gandhi case. There is absolutely no assessment about voluntariness. None of the principles laid down in a long line of earlier cases has been followed. It has been held that if the confession is made after a long time in police custody, the accused should be sent to jail custody for at least a day or two and only then the confession should be recorded. And that after the confession, the accused must not spend any more time in police custody but should be immediately taken to court and from there remanded to judicial custody. And so on. There is no application of any of these principles in the Rajiv Gandhi case.

Capital Punishment Should Go

Q. Why are human rights activists in Andhra Pradesh up in arms against Capital Punishment?

A. It is part of the agenda of human rights organisations all over the world. All human rights organisations advocate the abolition of Death Penalty in principle. When the United Nations drafted the International Covenant on Civil and Political Rights in 1966, one of the points incorporated in the draft was that Death Penalty should be abolished. But that was not agreeable to many countries. So the relevant provision now reads that death sentence should be awarded only in rare cases, and that provision for an application for pardon should be available in all cases.

Q. The Indian Supreme Court ruled in 1980 in Bachan Singh Vs Union of India that Capital Punishment should be awarded only in 'rarest of rare' cases. How do you interpret 'rarest of the rare'?

A. The Supreme Court has till now not laid down any criterion for deciding whether a given case falls in the

Interview in Deccan Chronicle, 17-1-1997

category 'rarest of rare'. The courts are interpreting it case by case. In the case of Billa and Ranga the criterion was that they had murdered helpless and innocent children. In the case of Indira Gandhi's murderers the reason was that they had conspired and killed the Prime Minister of the country. The former may seem reasonable, but the latter is not. But even in the former case, if the children killed by Billa and Ranga had been slum-dwellers rather than upper middle class kids, would the court have reacted in the same way? We feel that if at all hanging is to be there, and is to be resorted to in the 'rarest of rare' cases, the criterion should be free from social and political prejudices.

Q. What punishment do you think should be given to those who perpetuate unpardonable offences?

A. It is a question that is still being debated. What is the purpose of giving punishments? One popular answer is that it deters other people from committing crimes. But research has shown that the deterrent effect of punishments is slight. Moreover it seems unfair that one person is punished so that others may be prevented from committing crimes. How is this person answerable or responsible for the crimes that others may commit in future? The other answer usually given is that if crimes go unpunished, the moral outrage that society feels at the commission of a crime remains un-assuaged. To assuage or answer this moral outrage, crimes must be punished. But this 'moral outrage' appears to be nothing short of a collective desire for revenge. We put ourselves in the shoes of the crime's victim, and collectively seek revenge. But when we consider that private revenge as the sanction of penal law is regarded as uncivilised and unacceptable in modern societies, is this collective revenge acceptable? Does it cease to be uncivilised merely because it is clothed

in the expression 'moral outrage'? This is an ongoing debate. There are no easy answers. But when we seek punishment for what you have called 'unpardonable offences', we should be clearly aware whether we are seeking revenge or justice. That is the cardinal distinction.

Q. Can you explain why you are totally opposed to Death Penalty?

A. Death Penalty is a tit for tat punishment. It says: 'Because you have killed, you must die'. Such logic was characteristic of punishments in a stage of history in which punishment was nothing but revenge. But once we start looking at punishments not from the point of view of revenge but of justice, this tit for tat logic loses its legitimacy. Today a person who is convicted of setting fire to somebody else's house is not punished by having his own house set on fire. He is sent to jail or fined. A person who kidnaps somebody else's child is not deprived of his own child. Why, then, should an exception be made in the case of murder? Why should the last vestiges of the tit for tat logic of punishment be retained in the form of the Death Penalty?

There is a more important reason. For every crime that is committed, society carries some responsibility, as well as the individual who has committed it. Society has created the conditions that impel or motivate the person to commit the crime. It is therefore partly responsible for it, along with the individual who has intentionally taken the decision to commit the offence. Punishment, therefore, should not hold the individual fully responsible for the crime. This is precisely what Death Penalty does. It holds the murderer 100 per cent responsible for the murder.

Q. Your petition for condoning death sentence of Chalapathi

Rao and Vijayavardhana Rao, who have been convicted for burning to death 23 passengers in a bus at Chilakaluripeta has been rejected by Governor Krishan Kant. Is he empowered to condone a person waiting for the gallows?

A. He is empowered under Article 161 of the Constitution of India. The President is empowered under Article 72. Another petition is pending now before the President of India.

We have also filed a writ petition challenging the fairness of the trial of the two convicts. They did not have a lawyer in the pre-trial stage. A judgment of the Supreme Court given by Justice Bhagavathi in a Bihar case says that "legal aid from the moment a person is first produced in court is a fundamental right, and is part and parcel of fair procedure."

Q. There are some civil liberties activists who feel that the court judgements are prejudicial if an accused happens to be a dalit. What is your view?

A. Nobody is beyond mistakes and prejudices. Just as mistakes in judicial pronouncements can stem from logical or interpretative error, judgements can also be affected by social prejudices and the worldview of the judge, which may well be affected by the caste of the person. However, we are opposed to the Death Penalty in principle, irrespective of the caste of the condemned person. We will also fight for the accused in the Tsundur massacre of dalits, who are all from forward castes, in case they are condemned to death, which is however quite unlikely.

Q. What is your action plan to achieve your objective?

A. As far as the Chilakaluripeta case is concerned, I have already said that a mercy petition is pending with the President and a writ petition in the Supreme Court. In the meanwhile, we are undertaking a campaign to educate the people about this case, as well as Death Penalty in general. After all, 55 countries have completely abolished the Death Penalty. That includes some Third World countries also and not merely the developed nations. And there are 37 countries where Death Penalty is not being imposed for several decades, though it is on the statute books.

OF CAPITAL & OTHER PUNISHMENTS

K. BALAGOPAL

The argument against the Death Penalty is not to condone the crime. It is not even merely to emphasise the right to life, dignity and opportunity for reform of the persons on death row, though all these things are important. It is an exhortation to society and the State to make a positive statement against violence.

Others who commit equally heinous crimes manage to avoid the hangman, indeed any punishment at all, to an extent disproportionate with their proclivity for crime. It need not be that judges let them off willfully: it is the way justice works. It works not only through the abstractions of law and the solemnity of evidence. It works also through society and its political, economic and social structures.