Death Penalty: For An Abolitionist Campaign

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

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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 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.

[1] 'retentionist' is the expression used in international law for countries or States that argue for retaining the Death Penalty

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

[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

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

[4] A right-wing upper caste landlord militia mainly based in Bihar

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

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

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.