

ARTICLE

DHANANJOY AND THE DEATH PENALTY: CAN SOCIETY ESCAPE THE NOOSE...?

As one of the lawyers who formulated the recent Supreme Court writ petition to pray for the commutation of the Sentence of Death to one of Life for the notorious rapist and murderer, international human rights barrister and Senior Legal Advisor at the Human Rights Law Network, Shri Vinay Naidoo, sets out his views on why it is so important to save the lives of those condemned to death by our Courts. And why it has been so difficult to do so.

Dhananjay Chatterjee was convicted in West Bengal of the barbaric rape and murder of a defenseless school-going girl named Hetal Parekh. He was a security guard in her apartment block who exacted hideous retribution apparently in retaliation for his transfer away from the building which followed the victim's complaint against him. He allegedly ravished the girl's body again after he had murdered her. The Supreme Court upheld the sentence of death which had been placed on him, and the vast majority of the people in our country agreed with it.

Let us not examine here the merits of the case, the weight accorded to the circumstantial evidence, the motive, let us not consider them. Let us assume that he was as guilty as sin, and he had been rightly convicted. Let us assume that he is indeed a barbaric (or mentally ill?) individual. Let us assume what the majority of our country do, that such a man has no chance of being rehabilitated, of becoming a good person, and let us not question it. Let us ask only: Should even a guilty man such as Dhananjay, receive the Death Penalty?

We must consider the justice to be served for the victim and the victim's loved ones. For the loved ones who remain, it is so often 'justice' disguised as revenge, and why not? Understandably the most emotive factor when justifying the death penalty. Hetal and all who miss her, should know that they have our deepest sympathies, as they always will. Yet how will hanging this man help them? Their daughter will not be returned to them. Yet maybe it can give them a sense of 'closure'. If that is the case, and we as a society applaud our Courts for allowing them that closure by killing him, why has he been languishing in prison for almost 14 years? Why has 'justice for the victim' been so overlooked? Why has the victim's family been made to suffer all the more, *if* (and no statement has been issued by them) closure through killing him is what they wish for and what was ordered?

The truth is, the system forgot about him. For over 8 years. Otherwise known as State negligence. He was forgotten about by everyone, he was no longer news. In these past 14 years – *14 years* – have the family of the victim not suffered each and every day that they knew that he was alive, unable to get his continued existence out of their minds, have they really? Of course they have a dark space where their lost child once resided, of course, but do they imagine that they will no longer have it, no longer pine for their Hetal once Dhananjay is killed? Or have they learned in 14 long years to somehow cope day-to-day with the fact that he is still alive but locked away in the horror story that is prison for rapists, pedophiles and murderers, and have they tried to move on as best they can? Is this one of the reasons why so many studies from around the world have shown victim's family's to have felt no satisfaction at the execution or thereafter, but often somewhat the opposite, with the killing of another person at their behest on their conscience forever, their religion violated, their loved one(s) still so sadly missed? Is it not probable that the most emotive reasons for executing barbaric criminals, by the grace of God simply disappear for most, over time, after a very long time with the offender locked-up in prison, for example? If the most emotive reasons could be satiated without involving any of the major problems raised by the State sanctioned

executions, why not believe that prison can serve the purpose of administering justice' for the victim's loved ones?

Maybe because our society, too, has a say in this matter. Aside from those immediate to the victim, society also demands the killing. Society wants to feel that it is safer without him, that it is a warning to others that might murder, but most of all, society hears of the crime, feel it as the repulsive deed that it is, and wants his victim to be avenged, to see him punished, a life for a life: it is revenge for the poor girl that he brutalised, that the public most want – an emotive/'gut' reaction in us all.

Would society be protected by the killing of this man, be safer without him? Clearly. Would society be protected from this man if he were locked away under rigorous, (or indeed any secure) imprisonment, for decades or maybe for the rest of his natural life? Clearly. So, either way, society is protected. Clearly.

Would society's killing of this man be a warning to others, be a deterrent for would-be future murderers? The truth has to be that most perpetrators of serious crimes do not think that they will be caught. So how will it deter them? Maybe they will say "well: what if I was caught...?" as they plan their murders, or get seized by that inflamed, impassioned moment when murders and rapes most occur, when they are committed to it and out of control. Maybe the terrorist or suicide bomber will think about their punishment before their cause? Maybe the serial killer or multiple rapist will self-impose a moratorium on his heinous activities if the death penalty is imposed for crimes such as theirs? It doesn't sound likely. A person of a disposition to commit rape or murder is going to do it anyway, and is unlikely to be primarily interested in keeping up-to-date on the latest current affairs relating to the possible consequences of his perversion, passion, or hatred.

That putting a murderer to death is not a deterrent to future criminals is an impossibility to assess in India, since the appropriate studies and research have not been done, and what has been is under lock and key at the Home Office. For India we can't say that the State sponsored killing is a deterrent, because the truth is that no-one really knows. Time to find out, maybe?

We can get clues by looking at other countries, who *have* done the appropriate research, though. Take, for example, what has happened to homicide rates in Canada since the abolition of the death penalty there, in 1976. Prior to the abolition, the homicide rate stood at 3.09/100,000 people, in 1975. By 1980, it had fallen to 2.41/100,000. In 1999, the rate had declined to 1.76/100,000. In the 24 years since the death penalty was abolished, the homicide rate fell by 43%, and continues to decline. Something's deterring the murderers, but it doesn't appear to be the death penalty.

Meanwhile, the United States persists with the death penalty, and is the world's greatest democratic State sponsored killer (although per capita, Singapore is at the top of the list, and then there is always the undisclosed and inaccurate data that we get from an undemocratic China and a fundamentalist Iran). Many people are executed there, and it is very much big news, in a country and culture of big media, seen by all – a pre-requisite for any hope that a deterrent effect might work. Yet their homicide rate stands at 5.7/100,000. It is no surprise that a survey of presidents and former presidents of the country's leading criminology institutes found that 84% of them had rejected the notion that any deterrent effect had been demonstrated by the death penalty. The UN undertook the most recent survey conducted in the USA, in 2002, and concluded:

"it is not prudent to accept the hypothesis that capital sentence deters murder to a marginally greater extent than does the threat and application of the supposedly lesser punishment of life imprisonment."

Across the Atlantic, all the 25 countries that now comprise the European Union can only be members of the EU if they have abolished the death penalty. It is seen as an important principle of humanity for a State not to kill individuals in a premeditated fashion – rather like it is in a number of international treaties that India has ratified. Yet the homicide rate, for example, of France is not untypical of most EU countries, standing at 1.6/100,000. It wouldn't appear that the death penalty is a deterrent elsewhere.

But maybe India's different from the rest. With no evidence to prove it, though, just everyone else's that suggests the lack of deterrent effect of the death penalty. So, while we wonder what the situation really is here in India, why shouldn't we just keep on letting the State kill people, and say it's a deterrent? After all: you never know?

Society's final and loudest demand is for revenge. Primal, emotive, prevalent. After all, it's no punishment at all that a barbaric convict suffers year after year of RI, solitary confinement, rape, beatings, and a total lack of any freedom at all. No, for the most serious and revolting crimes, like rape and murder, society demands what it sees as 'more' punishment (though it really prohibits any further suffering and guilt in the convict): ie. he has killed, so he must be killed. Society's revenge – though none of Society's religions or received wisdom – demands it: a life for a life. So what should we do about rapists? Shall we have State employees whose job it is to rape them as punishment, like the State employed hangmen are there to kill the murderer?

Barbaric and cruel do these words sound, but the reason is not the context in which they are being written, but rather that these words are expressing practices that are intrinsically tasteless and barbaric.

Yet if society's call is still for blood, for punishment, for revenge against the despicable murderer, why are the Court's trying to find a more 'humane method' with which to kill their captive prey? The killing/execution should be as 'quick and simple as possible, free from anything that sharpens the poignancy of the prisoners apprehension, produce immediate unconsciousness passing quickly into death, be decent, and not involve mutilation.' (Deena v UoI (1983)) Lethal injections are now being considered to replace hangings.

Yet it is clear that the public's vengeance and the primal instincts that surround that concept are not born out of sense of consideration for the suffering of the condemned man. So why not let the executions be in public, and horrific in the suffering inflicted on the prisoner under pain of death? Could it be because somewhere, deep down, we all realise that to make the executions so, would be just *too* barbaric and uncivilised for us to contemplate or see? So we look for a 'nice', sanitised way to kill the murderer, that won't make us feel too upset or question our motivations for wanting the murderer dead. We can just leave it to the Judges to hand down the sentence, and the hangmen to do the killing and cleaning-up.

While the Judges and hangmen forever hope that they haven't made a mistake. Not even one. There is not a country in this world that had the death penalty that never made a mistake in awarding it. It is not as though the judiciary and legal systems in those country's are inferior to ours – far from it, and further still from the endemic corruption that exists within our legal system, the backlog and archaic practices in place here, and the low standard of state defense counsels for a society where, it seems, only the poor and low/no caste get the death sentence. Yet each and every country with the death penalty in place has made 'mistakes' in awarding it. When lie detectors were shown to be fallible, 'mistakes' were discovered. When DNA testing arrived, many more 'mistakes' were uncovered. The next forensic breakthrough will no doubt reveal yet more 'errors'. How many innocents have or will be killed as society continues to pursue its

vengeance? What value does society place on the life of an innocent? On the life of *even just one*.

And what is the name given to the crime where an innocent is killed in a pre-meditated fashion, with malice aforethought...? When a proven innocent has been killed by the State, 'society' will become collectively responsible for murder.

It will also be at that moment that society at large will wake up and say: "maybe the death penalty really is wrong?" and the battle will be joined. But we must wait patiently for an unequivocally innocent person to be murdered by us before that occurs. Who will it be? Any one of us, perhaps? Because all it requires is a random innocent, and a miscarriage/perversion of justice – both of which exist already in abundance in India, and that no-one doubts.

As this piece began, one must consider justice for the victim, and for the victim's loved ones. Will any of us really be as bothered as we were when Dhananjay murdered an innocent, after we, society, have murdered an innocent man by mistake? For years before his execution, the innocent we murder 'in error' will have suffered prison and its brutality, his last years will be as a pariah of society, his family will have suffered stigmatisation and a nightmare that will never end. Because when it does, with the confirmation of their son, father or husband's innocence, he will no longer be around for society to at least try and apologise to him. Where will *his loved ones* find *their 'closure'*?

It is a fact that if the State didn't sponsor the death penalty, we would not, like every other country has found, murder any innocents as a result of it. And once we found them to be innocent, we could make some attempt at restitution, an attempt to live up to our billing as a civilised society and country, the Republic with (crumbling) Gandhian foundations revered and respected (if not followed) the world over. We could at least say sorry: if they were still alive and in prison. The death penalty sentences us all to an inevitable guilt that we will simply have to bear when we know that we supported it and it has resulted in the murder of an innocent. Prison, paradoxically, offers us all a way out.

Yet prison costs money, and there is the 'official taxpayer' to consider. So why should the taxpayer foot the bill for someone like Dhananjay's imprisonment? Why should the taxpayer foot the much more sizeable bills demanded by corruption – every day we see it and are affected by it, are we not? Maybe some taxpayers would say that they don't want to be footing the bill for the space programme while almost 300 million fellow citizen's live in poverty. Maybe other taxpayers would say that they don't want to pay billions for a new aircraft carrier. The point is: one doesn't get to choose what one pays tax for. You pay tax, like everyone else, for some things that you may not believe in.

What you are paying for is the imprisonment of a terrible individual, and prison is not a holiday camp for any criminals, let alone rapists and murderers, and everyone surely accepts that. What you are paying for is to send a message to would be murderers that 'you too will spend your life in prison'. What you are paying for is to protect society from the menace posed by the convicted murder, which is done effectively.

Yet the taxpayer is paying for far more than just that. The taxpayer is paying for the life of the few innocent people who would otherwise be murdered by us 'in error', and therefore for the conscience of the society to which he belongs. The taxpayer's money spent on keeping them alive makes sure that the State does not find itself having murdered an innocent, incredible numbers of whom have been executed in so many countries with at least as sophisticated legal systems as here in India, like in the US, or in the UK before abolition. What price is the life of an innocent worth to the taxpayer?

The taxpayer is paying for the country to realise that it cannot be civilized to kill people, to lower our hearts, minds and spirits to the level where we sanction a killing. It leaves no

recourse generally to find justification in our religions, leaves no recourse for us to believe that we can find ever a forgiveness in our hearts nor believe in the redemption of the lost, leaves no recourse to pardoning an innocent... yet *guarantees* inflicting huge suffering on the innocent parents and loved ones of the condemned person (otherwise known as our next victim).

Perhaps the last word should thus, fittingly, go to a survivor of loved ones who were the victims of killings, for which the death penalty for the perpetrator was considered. As Marietta Lane, whose 7-year old daughter was raped and murdered, simply stated when addressing the U.S. House Judiciary Committee - and in so doing reflected the sentiments of so many 'survivors':

"Every time we use the death penalty, we become what we deplore – people who kill people"

Abolishing the death penalty is not fundamentally just about saving the life of an innocent that is wrongly condemned, nor about the inequality before the law in the application of the ultimate sanction, nor about any of the other numerous and credible reasons already discussed that will combat the death penalty, and eventually steal its life. Abolishing the death penalty is simply about understanding - maybe *feeling* in the part of each of our consciences that moves us to aspire to be the best that we can be – that killing is not an example to be set, nor one to be followed. Because, quite simply, it is wrong.

"Many that live, deserve death. Many that die, deserve life. Can you give it to them?"

asked Gandolf, in J.R.R. Tolkein's immortal epic, and most popular novel of the 20th Century. Morality, as we know that it should be, truth that we admit to in our hearts, reflected, as so often, only in fables. Literature, holy texts, religious songs, art, theatre and film. Reflecting ourselves. Or the way that we know that we should be.

As standards of decency in the world continue to evolve, the retention of the death penalty will become an anachronism, inevitably. For the majority of the world's countries, it already has. Until it becomes so in India, the challenge is there for us all to end this barbaric punishment, and to further civilise our unique society by so doing.

It is time for 'society' to take a long look at itself, and that means each of us as individuals. An alternative exists to the death penalty. It is clear, and there should be no exceptions. Even in the case of Dhananjay. The arguments in favour of the abolition are strong, and they get stronger the more we dare to recognize that the execution is carried out in our very names, and so it is doubly imperative that we should have a view that is informed. The taxpayer and the State has to declare a moratorium on the use of the death penalty, at least pending the studies and research results that show that the powerful tool used to support it - the 'deterrent effect' - in India, is much the same as elsewhere: a myth. Thus 'society' will have to recognise that its motivation in keeping the Death Penalty is one that as singular as it is primal, and it is best served cold: '*revenge*'. We will have to look long and hard at ourselves, our maturity, our religions and our culture.

And then we will have to abolish the Death Penalty. As 119 other more enlightened countries have already done, for the best of reasons. At present, though, the death penalty is an olden day punishment in a 21st Century world, and it is alive and well in India. Only with its abolition will our society – and each of us - finally escape the noose.

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Dhananjay Chatterjee was hanged behind closed doors in Alipore Jail at dawn on his birthday, 14th August 2004. So began the Independence Day weekend in India.

So ended a 7-year moratorium on the execution of the death sentence.
So renewed determination took hold of those who cared,
To kill the death penalty in India, and ensure that our society finally escapes the noose.