

# PARADIGM SHIFT

2018-2019 #4

## Abolish the Death Penalty !

- "This country by and large believes in the principle of non-violence. It has been its ancient tradition, and although people may not be following it in actual practice, they certainly adhere to the principle of non-violence as a moral mandate...the proper thing for this country to do is to abolish the death sentence altogether". -- **Dr. B.R. Ambedkar** in "*Writings and Speeches*," Vol. 13, Moon, ed., Government of Maharashtra, 1994.
- "While Black Americans make up 12 per cent of the US population, they make up 48 percent of those on death row! The American justice system is classist. This is made evident by the fact that there are no billionaires on death row, no millionaires on death row, and the number of those from the middle class on death row is marginal. So, who are these people on death row? They are the poorest of the poor..." -- **Mark Ostaplak**, *Death Penalty is Racist and Targets the Poor*.
- "I cannot in all conscience agree to anyone being sent to the gallows, much less a brave man like Bhagat Singh". – **Mahatma Gandhi**, in *Collected Works of Mahatma Gandhi*, Vol.XLV, p.273.
- "The spiritual argument opposing death penalty is simple and easy to understand. "It is god who gives life, only god should be eligible to take it away. Who is the government to take a life since it cannot give a life"?" -- **Dr.B.K. Navayan**, July 28, 2018, PUCL, Bangalore.
- "Any economic-penological survey will reveal that, by and large, death penalty laws...deals the fatal blow on the poor, not the rich, the pariah, not the Brahmin, the Black not the White...the women, not the men, the dissenter not the conformist. Capital sentence perhaps has a class bias and colour bar even as criminal law barks at both but bites the proletariat to defend the proprietary". – **Justice V.R. Krishna Iyer** in his address at the "*Stockholm Conference*", 1972.

### Comment:

Capital punishment, death penalty, or execution is the infliction of death upon a person by judicial process as a punishment for an offence. In the past, methods of execution have been crucifixion, stoning, impaling and beheading. Punishment was but revenge. It enabled tyranny. (1)King Hammurabi of Babylon (1800 BC) codified the death penalty for 25 different criminal acts, omitting murder. By the 7th c. BC, the draconian Code of Athens extended death for every crime committed, while the Roman law of the 12 Tablets codified it, crucifying Jesus by 29 AD. Britain, influencing its colonies, encouraged hanging from the gallows, while beheading was acceptable for the upper classes. Under Henry VIII's reign, 72,000 people were put to death -- either boiled, or burnt on a stake. By the 18th c. several crimes – felling a tree included – were punishable by death.

In 1857, the British captured Kanpur and they took their sepoy prisoners to the Bibighar ("House of Ladies") near Kanpur and "blew them from the cannon". The trials of the 1945 accused cases, held at Red Fort, sought death for waging war against the king. Today executions are largely by lethal gas, injections, electrocution, hanging or shooting, and beheading (in Saudi Arabia).

In India, recognized universally for its values of 'Ahimsa' and Gandhian world view, the concept of death penalty is therefore an anachronism. What is disturbing is the substandard nature of the administration of the death penalty! There is also "very little research on various other aspects of this extreme punishment...The state of record-keeping inspires very little confidence... about a broader historical analysis..." (\*2)

The opposition to the death penalty stems from the fact that killing someone is inhuman. It is legal murder. Its first opposition was the hanging of Indian revolutionaries – Bhagat Singh, Sukhdev - on March 23, 1931 by the British colonial government. Their execution led to widespread demonstrations demanding the abolishment of the death penalty! In its 3-Day Karachi session, March 29-31, 1931, the Congress passed a number of resolutions. One was Clause XIII that declared: "There shall be no capital punishment". Between December 9, 1946 and November 26, 1949, the Constituent Assembly incorporated most of the items of the Karachi Resolution in the Indian Constitution.

However, by the time it raised the issue of capital punishment the mood had changed. The culture of compassion that had created a national consensus against capital punishment in 1931 got sabotaged by a section of the Congress and proponents of the Hindutva brigade, reviving the death penalty. However,, the chairperson of the Constitution Drafting Committee, Dr. B.M. Ambedkar declared that he did not "accept the amendment". The whole atmosphere, left

vitiated by Gandhi's assassination was no longer conducive to carry forward the pledge the nation had taken following the execution of Bhagat Singh and his comrades. It is ironical that the assassination of the man who had famously voiced that eye for an eye makes the whole world blind proved to be the turning point when Indians opted for capital punishment!

The justification for the death penalty is that it cleanses society of evil persons albeit under the assumption that it serves as a deterrent to the crime committed. Over the years however there has been the demand to dismantle this false assumption (explained below) and to go beyond such concepts that are just abstract or purely compassionate. Because the context of a flawed investigative system and a not-always - unprejudiced judicial system, imposing the Death Penalty on individuals as the ultimate and irreversible penalty of death has shown to have a very brutal consequences.

It is also important to question the inner cravings for collective vengeance which is what Death Penalty translates into. Besides, for every crime committed, society as well as the individual carries some responsibility for the crime committed. Society has created the condition that impels the person to commit the crime. Society is therefore partly responsible for it, along with the individual who committed the offence. Punishment, therefore, must 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 (\*3)

The other disturbing aspect of this issue is the knee jerk responses to the death penalty – the public screaming for justice, bordering on vigilantism – with campaigns, strikes, hash tags on social media etc. Demanding "death to the rapists", etc. Such hyper activism is now very often a handle for more violence. The idea of justice here is to inflict even more violence. Consider the case of Swati Maliwal,

## Death Penalty: Reserved for the Poor only!

Further, capital punishment also has socio-economic biases.

In the US, 56 per cent of death row inmates are African-Americans and Hispanics. Although racial minorities comprise half of all murder victims nationwide, 77 per cent of the victims in capital convictions were white Americans.

In India the situation is similar. The Death Penalty India Report (DPIR-India) (2) displayed the following information:

- ❖ 74.1 per cent of the convicts on death row being to the socially and economically marginalized communities;
- ❖ Among the States with 10 or more prisoners sentenced to death, Kerala had the highest number of economically vulnerable prisoners sentenced to death with 14 out of 15 prisoners (93.3%); Bihar (75%); Chhattisgarh (75%), Delhi (80%); Gujarat (78.9%); Jharkhand (76.9%); Karnataka (75%); and Maharashtra (88.9%).

23% of prisoners sentenced to death had never attended school; and 9.6% had barely attended but had not completed even their primary school education.

- ❖ Among the state with a big number of prisoners on death row are Bihar (35.3%) and Karnataka (34.1%) had the highest number of prisoners who had never attended school. Kerala is the only State (amongst those States with 10 or more prisoners sentenced to death) where all prisoners had at least attended school;
- ❖ While the national ratio for prisoners sentenced to death who did not complete their secondary education is 62%, States like Gujarat (89.5%), Kerala (71.4%), Jharkhand (69.2%), Maharashtra (65.5%), Delhi (63.3%), and UP (61%) had a large number of prisoners under this category.

### Caste and Religion

- ❖ 76% (279 prisoners) of prisoners sentenced to death in India are backward classes and religious minorities. While the number of SC/STs among all prisoners sentenced to death is 24.5% that number is very high in Maharashtra (50%), Karnataka (36.4%), Jharkhand (30.8%), and Delhi (26.7%) amongst states with 10 or more prisoners sentenced to death;

Religious minorities comprised a disproportionate number of prisoners sentenced to death viz., in Gujarat out of the 19 prisoners sentenced to death 15 were Muslims (79%), while 60% of prisoners sentenced to death in Kerala were religious minorities (5 Muslims and 4 Christians among 15 prisoners sentenced to death); of the 45 prisoners sentenced to death in Karnataka, 31.8% were religious minorities (10 Muslims and 4 Christians)

- ❖ 108 prisoners (30.2%) were economically vulnerable, had not completed their secondary education and belonged to the religious minorities or STs/SCs

In India, 91 percent of death row convicts are Dalits or from the minorities. A Report by the National Law University, Delhi revealed that 76% of prisoners on death row belong to non-dominant castes and religions, with all 12 women prisoners also from the lower castes, and religions 74.1% of the prisoners came from economically vulnerable families. Wherein, 63.2% of them were primary and/or sole earners in their families. The poor consistently get the short end of the legal stick. The death penalty is a consequence of poor legal representation and institutional bias. The gallows remain a poor man's trap. (2.)

«« These dismal facts force the pertinent question of whether the upper castes do not commit any crime?! (Lest we forget: Remember Sadhavi Pragya Thakur, Lt. Col. Prasad Purohit, Swami Dayanand Pandey,). The only place where Muslims and Dalits can claim a share in proportion to their population is in prison! (Muslim convicts in India is 19.1% and the number of under trials is 22.5% which exceed their population ratio). The condition of Dalits is also the same: with more Dalits in jails than in schools!

In addition, there is the related question of mercy petitions. The following are the relevant information: During the period 1950-1952, that saw 6 Presidents, only 1 such plea was rejected;

- ❖ From 1982-97, 3 Presidents rejected 93 mercy petitions and commuted 7 sentences;
- ❖ From 1997-2007, 2 Presidents decided only 2 mercy pleas;
- ❖ From 2012-2017, the President, Pranab Mukherjee, rejected 32 of the 33 mercy pleas he had decided!

The Presidents who have rejected almost all the mercy petitions were President Shankar Dayal Sharma, President K.R. Narayanan, President Pratibha Patil, and President Abdul Kalam. However, President Pranab Mukherjee is one of the most merciless Presidents India ever had.(4) On the other hand his predecessor, Pratibha Patil, rejected only 3 mercy pleas and commuted the death sentence of 23 petitioners to life imprisonment making her the most merciful president in modern Indian history. Having rejected 22 out of 23 i.e. almost 97% of the mercy petitions President Mukherjee surpassed President Shankar Dayal Sharma who rejected all 14 mercy petitions. But he still has to beat the record of R. Venkataraman (33 rejected petitions) and President Zail Singh (20 rejected petitions)!

the chairperson of the Delhi Commission for Women. She flagged off a campaign "Rape Roko" and went on a hunger strike demanding the death penalty for rapists! Through her over-action she undid years of feminist struggle against the death penalty. Her limited protest clearly overlooked the more relevant questions -- institutional murders, hate speech/hate crime, patriarchy and gender sensitivity, Islamophobia, the death sentences to Dalit and Adivasi communities(3).

The Government, on its part, hastily passed an Ordinance – Criminal Law (Amendment) Ordinance 2018 that affects the Protection of Children from Sexual Offences Act (POCSO), IPC, Evidence Act and the Code of Criminal Procedure – making the death penalty applicable to those guilty of rape of children less than 12 years. The Ordinance exacerbated this situation by failing to consider certain crucial points vis., a) the trauma and psychological impact of the violence on the survivor when even the police disbelieves them or when the survivor feels guilty of reporting on their guilty family member;

when the Government failed to consider the high number of rapes when deciding hastily; to pronounce the death penalty and b) the Ordinance did further damage by stating "The rate of conviction was highest in cases which took over two years to complete, because, practically it takes that much time to record the evidence of all the witnesses. In light of the fact that the ordinance reduces the time given to the police to file a charge sheet and to court to decide appeal against sentencing, displays a complete lack of understanding of the issues on the ground and disturbing disregard for whether a law is implementable"(3)

On the other hand, opposition to the death penalty does not indicate a lack of sympathy for murder victims. On the contrary, murder demonstrates a lack of respect for human life. Because life is precious and death irrevocable, murder is abhorrent, and a policy of state-authorized killings is immoral. State cannot kill its public for establishing the law. A government that prioritizes retribution over pro-active prevention and grievance



redressed, cannot be trusted(5)“Appealing to the “collective conscience” and angry sentiment of the section of the public at large is only adding fuel to fire – further fueling the now normalized lynch mob culture(5)

Reasons for abolishing the death penalty is that

- ❖ 'Even the vilest criminal remains a human being possessed of common human dignity. Therefore each and every human being must be respected;
- ❖ Every human being has an inalienable 'Right to Life' and therefore the State has no right to take it away;
- ❖ It promotes the feeling and atmosphere of retribution and vengeance in the community and it is unhealthy;
- ❖ It is barbaric and not at all a deterrent to future crime

Before concluding, it must be pointed out that the State does not have the right to violate someone else's Right to Life. No government must be free to dispose of lives. The death penalty is nothing but a form of revenge. It is not justice. Today it is an established fact that the death penalty does not deter crime! The death penalty is just irresponsible politics; some sort of a fast food choice, a quick fix for the State so as to avoid dealing with social deterrents that are misogynist and communal in nature. “In an already botched legal system, where justice is a rather biased entity favoring the already privileged, the death penalty is a trick to silence questions on the larger bigoted structure at play.

Thus, it is absolutely essential today to ban the death penalty! However, the fact remains that the death penalty is on the statute books, and till such time it continues to be there, the courts are duty bound to administer it, within the parameters of the law and judicial precedent. The first step in this direction is to get civil society to persuade MPs and Parliamentarians that the death penalty must be deleted from the statute books. That being said it is then possible to get the ban on the death penalty

simultaneously, it is also necessary to re-examine the doctrine of 'rarest of rare'.

## I

### Addressing the Death Penalty

The issue of capital punishment has been a subject of debate within the Government and various departments for a long while. The Parliament, Law Commissions and the Supreme Court were actively engaged the debates. For instance:

- ❖ In 1931, the Central Legislative Assembly attempted to abolish the Death Penalty through a Bill. The motion was defeated and on March 23, 1931, B. Singh, Rajguru and Sukhdev were hanged. Later that year, at its session in Karachi, the Congress demanded the abolition of the death penalty;
- ❖ Between 1947 and 194, various aspects on the death penalty were debated in the Constituent Assembly including its discriminatory impact on the poor and the possibility of error. Dr. B.R. Ambedkar demanded its abolition;
- ❖ The issue was raised In the Lok Sabha debates in 1952 and 1954.
- ❖ In 1956, a Congress member of the first Look Sabha moved a Bill seeking its abolition. The Government opposed it and it was rejected;
- ❖ Between 1958 and 1962, three resolutions favoring its abolition were moved. Nominated member Prithvi Raj Kapoor moved the first resolution in April 1958 – 9 MPs opposed it and 5 including .Home Minister Govind Ballabh Pant supported the death penalty. In the second resolution, moved in the Rajya Sabha was debated in August 1961. Of the 19 MPs, 6 demanded its abolition. Only 5 out of 14 MPs who spoke, supported the resolution that the Congress member from Varanasi, moved in Lok Sabha in April 1962;
- ❖ In 1967, the Law Commission of India in its 35th Report recommended the death penalty stating, “...at the [present juncture,

India cannot risk the experiment of abolition of capital punishment”.

- ❖ In 2003, the Commission in its 187th Report it recommended that Section 354(5) of the CrPC “...be amended to allow for lethal injection...and that there should be statutory right of appeal to the Supreme Court...”
- ❖ In its 2015 Report on the Death Penalty, the Commission recommended the abolition of the death penalty and stated, among other things, “...Reliance on the death penalty diverts attention from other problems....(like) poor investigation, crime prevention and rights of victims of crime”.
- ❖ In his minority judgment in Bachan Singh vs. State of Punjab (May 9,1980) delivered on August 16,1982, Justice P.N. Bhagwati struck down IPC Section 302 as “unconstitutional and void as being violative of Articles 14 and 21”. (The 4-1majority judgment rejected the challenge to the constitutionality of Section 302 but stated that death penalty must be awarded only in the “rarest of rare cases when the alternative option is unquestionably foreclosed”).

The minority view criticized the 35th Report of the Law Commission: “that the circumstances that every human being dreads death cannot lead to the inference that death penalty act as a deterrent”.

In *Deena Dayal etc., vs. Union of India*, and others (September 23, 1983) the Supreme Court adjudicated on the method of execution. It held that the method prescribed under the CrPC as valid. The convict “cannot be subjected to barbarity, humiliation, torture or degradation before the execution of (the) sentence...(but) the process of hanging does not involve any of these directly, indirectly, or incidentally”, the court stated. It did not re-open the question of constitutionality of the death sentence;

- ❖ In *Pt. P. Katara vs. Union of India* (August 28,1989) the Supreme Court stated that allowed the body to be hanging even after death – the jail manual prescribed it should be kept hanging for half an hour after death –violated the dignity of the person, and was unconstitutional;
- ❖ In the *S.K.S Bariyar vs. State of Maharashtra* (May 31, 2009), the court while commuting a sentence, noted “...Capital punishment imposes a limitation on the essential content of the fundamental right to life, eliminating it irretrievably”.

Between 2000 and 2012, Indian courts passed 1,677 death sentences! (6) During 2004-12, convictions were recorded in 1, 80,439 cases involving murder. In the same period, death sentences were passed in 1,178 murder cases, that is, in 0.65% cases involving murder convictions.

According to the Law Commission, a convict's fate depends on i) the “ideology and views of the government” and ii) “on the personal views and belief systems of the President.

## II

### Religion and the Death Penalty

Religion and capital punishment have always been interlinked. Christianity's primordial even was the execution of its founder, Jesus, and the same fate was suffered by many of its early teachers. At the same time putting wrong doers to death has generally been presented as a sacred need. Christianity has changed its outlook on the death penalty over the years. Different Christian denominations have different teachings on it. Early Christians were strongly opposed to the death penalty and judges who enforced it could be excommunicated. Attitudes gradually began to relax in the 5th c. in the 13th c. Thomas Aquinas argued that capital punishment was a form of “lawful slaying” which was the standard Catholic teaching for centuries. During the Protestant Reformation, Martin Luther and John Calvin defended the death

penalty. The Quakers, Brethren and Mennonites have opposed it right from the beginning. As recently as 2018, the Catholic Church explicitly condemns it as an inadmissible attack on the inviolability and dignity of the human being.

In English history, Thomas Cranmer (burned in 1556) is seen as a Protestant martyr and Thomas More (beheaded in 1535 as a Catholic martyr. The holy texts of both Judaism (also revered by Christians) and Islam mandate the death penalty but in certain circumstances. Buddhism has a strong belief in compassion for the lives of others, as state in the 'Panch Shila' (Five Principles). There is an understanding of healing people who have committed crimes rather than retaliation against them. For these reasons Buddhism has generally opposed the death penalty. However, there is no specific Buddhist view on capital punishment as some Buddhist countries do not follow religious principles at all as they do not carry much weight even in the case of a Buddhist ruler as there is no direct effort of its followers to encourage pacifism in their country.

Hinduism and Jainism, with belief in 'karma', encourages non-violence towards humans, animals and even insects. They do not have an official line as such on the death penalty. Historically, Emperor Asoka was one of the first rulers to totally ban capital punishment, the only leader in India's history to openly ban it. This is because of his emphasis on the doctrine of 'ahimsa' or non-violence. (The Mughal invasion in the 16 c. ended Asoka's reign and they imposed the death penalty). Gandhi also opposed the death penalty and stated, "I cannot in all conscience agree to anyone being sent to the gallows"

In Islam, capital punishment was traditionally regulated by Sharia, the religious law in Islam. It states, "Do not kill a soul which Allah has made sacred except through the process of due law" – that is, capital punishment is permitted in certain circumstances where the law says it is necessary. The Holy Quran

explicitly states that the taking a life results in the taking of one's own. But even though the death penalty is allowed, forgiveness is preferable. Forgiveness together with peace is a predominant Qur'anic theme. In comparative terms Islamic Law is thus in many ways more lenient than a number of Western codes: it allows the family of a murder victim to forgive, and hence spare from death, a killer!

### III Doctrine of the Rarest of Rare Principle

The doctrine of the 'Rarest of rare' originated in a Supreme Court decision of 1983, *Machhi Singh v. State of Punjab*. This judgment followed the Court's earlier decision in *Bachhan Singh vs. State of Punjab* (1982), where it was upheld the Constitutional validity of Capital Punishment but with a caveat -- death sentences would be accorded only in the "rarest of rare cases".

The death sentence is no way to be justified! Yet, the Indian legal system justifies it on the basis of the so-called 'rarest of rare' cases. The following cases fall under this anomalous category:

- ❖ 1991 Tsundur Dalit massacre. 8 Dalits were murdered on August 6, 1991. The crime was planned by the upper caste Reddy and Telaga castes in nexus with the police and politicians. If at all the justice system had to consider this crime as 'rarest of the rare' for death sentence, this Dalit atrocity had to be considered. It took 16 years to convict the criminals -- in 2007. The Special Court convicted 21 for life, 35 for 1-year sentence, and rest of the 163 criminals set free by a Muslim judge. In the end, all the convicted were also acquitted in 2014 by the High Court Judge, Lingala Narasimha Reddy (once an ABVP activists with close ties to the RSS and ruling BJP. After the judgement he became Chief Justice of the Bihar High Court. He is currently the Chancellor of Hyderabad

Central University)

Judges who render regressive and anti-Dalit judgment are promoted immediately. (\*Navayan). Supreme Court Judge A.K. Goel has been appointed as chairperson of the National Green Tribunal immediately after retirement. He diluted the Scheduled Casts and Scheduled Tribes (Prevention of Atrocities) Act

- ❖ Chilakaluripeta Bus Burning. On March 8, 1993 two Dalit youth in an attempt to rob a passenger bus burnt the 23 passengers and the bus. The Dalit youth were given the death sentence on September 7, 1995 by Additional District and Session Judge of Guntur within 4 years, confirmed by the High Court. Their clemency petition was rejected by the then President of India, Shankar Dayal Sharma on March 28, 1997. The Division Bench granted a stay. In the meantime the Movement Against Death Penalty by Dalit groups forced the then Prime Minister H.Deve Gowda and the Union Cabinet to grant an indefinite stay on the execution of the Dalit youth. Later President, K.R. Narayanan, a Dalit himself, granted clemency and commuted the death penalty to life imprisonment in May 1998.
- ❖ In 2012, at Laxmipet village in Srikakulam in Andhra Pradesh the land owning upper caste, the Thurpu Kapu caste murdered Dalits.  
The chilling fact is that the higher judiciary in cases of Dalits massacres upheld no convictions and no death sentence is given. In other words the death sentence is reserved for only Dalits and the poor communities. For instance,
- ❖ On 25 December 1968 in Kilvemani, Nagapattinam district of Tamil Nadu 44 Dalit women and children were massacred by the land owning upper caste who was convicted for the crime. 10 of them were sentenced to 10 years of life imprisonment. However, an appeal court over turned the conviction;
- ❖ On July 17, 1985, In Karamchedu, 6 Dalits were murdered and 20 injured by the Kamma caste landowners. The troa; cpirt sentenced 159 to life imprisonment. This was later struck down by the AP High Court
- ❖ On July 11, 1996 in the Bathani Tola, Bihar, 21 Dalits (women and children included) were massacred by the Ranvir Sena. On April 17, 2012, the Patna High Court acquitted 23 men convicted othe mass murder. A Division Bench of Judge Navneeti Prasad Singh and Ashwai Kumar Singh acquitted all of them!
- ❖ In June 1996 in the Madurai district of Melavalavu , 6 Dalits were massacred by the Kallar caste. On appeal, the High Court by its judgment of April 19, 2006, confirmed the trial court's oder.Appeals were filed against this judgment.;
- ❖ On December 1, 1997, the Ranvir Sena gunned down 58 Dalits in the Lamanpur Bathe district. On April 7, 2010, Vijay Prakash Mioshra, additional district and session judge, Patna, gave the death sentence to 16 criminals and life imprisonment to 10 others and 19 were acquitted. The Patna Court acquitted all the 26 accused. A Division Bench of Justice V.N. Sinha and A.K. Lal r ruled that the prosecution witnesses were unreliable and so the appellants deserved to given the benefit of the doubt!
- ❖ On March 11, 2000, in Kambalapally, Kolar district of Karnataka state, 7 Dalits were locked in a house and then burnt alive by the upper caste Reddy community. The bench headed by Justice Mohan Shantanagoudar held that a conviction would be “prejudicial” to the interest of the accused given that 14 years had passed since the incident and all the 22 eye witnesseses had since turned hostile. Many of these witnesses had themselves narrowly escaped with their lives , told that they backtracked because of the threats from the upper castes;



❖ On 29, September 2006, in Khairlanji, in Bhandara district of Maharashtra, 4 members of the Bhotmange family of the Mahar community were killed by a mob of 40 people belonging to the Maratha Kunbi caste. They were stripped and paraded naked in the village square. The sons were ordered to rape their mother and sisters. When refused they were tortured, their genitals were wrenched out, and then killed. A local court convicted 8 people sentencing 6 of them to death and the other 2 to life. However, the death sentences were later commuted to life by the Nagpur bench of the Bombay High Court which declared that the murder was motivated by revenge, not caste.

In all these rarest of rare cases of Dalit massacres the death sentence was given to the criminals only in 2 cases – Laxmanpur Batheand Khairlanji. However, it was commuted to life immediately by the higher courts. No execution of death sentence (to criminals) when Dalits are massacred!

The above shows that the rarest of rare doctrine makes a mockery of the legal system! In a technical sense, “at best”, it leaves it to the dissertation of the judge's conscience and political mindset. Apart from the above mentioned cases, consider the case of Harbans Singh vs. the State of UP (1982) in which 3 persons were given the death penalty. Their appeals went before 3 different benches of the Supreme Court. Each of these benches pronounced a radically different sentence. This rationale of rating the proportionality of the crime cannot be objectively decided. A state of contradiction and confusion surrounds the jurisprudence of the death penalty. Accuracy in judgment cannot be guaranteed. A study of 5,760 cases in the US (between 1973-1995) exposes an error rate of 70 per cent in capital punishment verdicts. In India, a wrong “condition precedent” has been established (Ravji alias R.Chandra vs. State of Rajasthan) leading to further sentences being capital punishments that, in

spirit, ran contrary to the principle of 'rarest of rare', the cornerstone of capital punishment in India (as established under the Bacchan Singh vs. State of Punjab case).

There is also the arbitrary and subjective nature of the judgments. A judgment ultimately depends on the judges' feelings of moral outrage and lie in the realm of the total subjectivity. The subjective factors such as judicial authorities' lack of empathy with the lives of such accused makes the awarding of the extreme penalty likely. The death penalty to Nalini in the Rajiv Gandhi case. (Justice Quadri, on observing that 'the taking of life, when it cannot be given is a divine function" went ahead and pronounced the death penalty to Nalini. While resolving his dilemma in favour of death for Nalini,, the Judge observed that Rajiv Gandhi “was a young popular leader so much loved and respect by his fellow citizens This and other subjective factors illustrates the role of subjectivity in the imposition of capital punishment. But what if a judge did not have such a high opinion of Rajiv Gandhi?

Indeed, a sentence of death or life can vary from judge to judge or bench to bench was clearly highlighted in a study of 48 Supreme Court judgments on the death penalty by the Asian Centre for Human Rights. It pointed out that one judge's conscience differs from another's. The problem is internal:

2009 – The Supreme Court admitted an error of judgment in sentencing 15 people to death

2012 – 14 eminent retired judges wrote to the President, pointing out that the Supreme Court had erroneously given the death penalty to 15 people since 1966;

2015 - 2 academics of the Indian Statistical Institute, Kolkata, published study that found glaring anomalies in the police investigation of the D. Chatterjee case;

❖ A study conducted by the Centre on the Death Penalty at the National Law University, Delhi, and the National Legal

Services Authority, stated that 1,790 death sentences had been pronounced by the trial court in the last 15 years;

- ❖ Death in the name of conscience, a study by the Asian Center for Human rights, states that “conscience” varies from judge to judge, depending upon his “attitudes and approaches, predilections and prejudice

Such humongous mistakes have since been acknowledged. Some former judges of the SC and HC had addressed the President to commute the death sentence of 13 convicts as the punishment was accorded on a highly flawed application of the law. With the ethical principle of 'in dubio pro reo' (when in doubt, favour the accused) compromised, mistakes could become the norm rather than the unacceptable exception. In India, custodial abuse is widespread, and wrongful convictions are not impossible. The irrevocability of the capital punishment allows for no correction of wrong convictions!.

MYTH: The Death Penalty is a deterrent against brutal crime

FACT: Empirical evidence failed to support this claim!

First and foremost the claim puts the blame for violence exclusively on the individual. There is a search for a cause, the character of the abuser, his upbringing, drugs, alcohol, etc. Little or no attention is paid to the social conditions that produce the problem. This outlook however has another plus point; “...it allows us to distantiate ourselves from our own capacities, both for inappropriate desire and murderous rage”. (7.)

In Canada when the death penalty was abolished in 1976, the homicide rate declined. In the US a survey for the last 20 years carried out in September 2000 showed that homicide rate with the death penalty had been 48 to 101 per cent higher than in those without. Between 1945 and 1950, in the then State of Travancore, there were 962 murders when the death penalty was not in force. Five years later, when

it was re-imposed there were 967 murders. Evidently, the deterrence theory is not borne out by facts. There is no proof of the deterrent effect. Moreover, several studies have failed to establish any link between the death penalty and crimes rates. Way back in the 50s the UK Royal Commission on Capital Punishment had concluded “there is no clear evidence, in any of the figures...examined that the abolition of capital punishment has led to an increase in the homicide rate, or that its reintroduction has led to a fall”.

One study showed that criminals who plan serious crime may decide to proceed despite the risks, in the belief they will not be caught. In such cases, the key to deterrence is to increase the likelihood of detection, arrest and conviction. On the other hand, the death penalty may even be counter-productive in that it diverts official and public attention from efforts needed to bring genuine improvements in fighting crime.

MYTH: Mahatma Gandhi failed to prevent the death sentence of the anti-colonial revolutionaries -- Bhagat Singh, Sukhdev and Rajguru.

FACT: According to Advocate, A.G. Noorani could have intervened effectively to save Bhagat Singh's life. He did not!

However, Gandhi had made several attempts to save the lives of the three revolutionaries! He was engaged with their situation right from Day 1 intensified weeks before Bhagat Singh was executed. After all, Gandhi had more to gain by saving the lives of Bhagat Singh and comrades, if it was possible, than the contrary.

As way back on May 4, 1930, a day before he was arrested, Gandhi had written to the Viceroy and strongly criticized him for creating the Special Tribunal to try the revolutionaries in the Lahore Conspiracy Case. On January 31, 1931, he spoke at Allahabad on Bhagat Singh's execution. “Those done a death sentence should not be

hanged...they should not even be kept in prison”.

There was intense pressure on Gandhi from Congressmen and the general public with the Colonial power to negotiate for Bhagat Singh's life during his discussions with Viceroy Irwin. The Congress Working Committee had agreed with Gandhi in not making commutation a condition precedent to truce and he entered the talks without making Bhagat Singh's issue a precondition. On February 18, 1931 Gandhi raised the issue of Bhagat Singh with the Viceroy. "...if you want to make the present atmosphere more favorable, you should suspend Bhagat Singh's execution". The Viceroy appreciated Gandhi's point that suspension (over commutation of sentence) was worth consideration.

Accounts by both Gandhi and Irwin made it very clear that Gandhi had asked for postponement or suspension of the execution and not the commutation. On this stand, Gandhi was bitterly criticized.

Gandhi was well aware that his failure to stop their execution will make the people in general and members of the Congress in particular, angry. Secondly, the executions would inevitably glorify the revolutionaries and popularize the ideals underlying revolutionary violence and thus it will be a tactical error in his fight with forces favouring use of violence in the battle for swaraj. "If Gandhi had succeeded in saving the lives of Bhagat Singh, Sukhdev and Raj Guru, it would have been seen as a victory of non-violence over violence and a moral victory of Gandhi over the revolutionaries".

There is need to understand Gandhi's approach towards the use of violence (revolutionary) for patriotic purpose. He was totally convinced in the futility of violence and the efficacy of non-violence in achieving social transformation. He had always held that means (non-violence) are of paramount importance than the end, Swarajya. On the other hand, he never doubted the patriotic

impulses behind political violence though he considered it "misguided". He called the murder of the colonial Saunders by the revolutionaries as barbaric but he accused the colonial government in provoking the violence. "The fault is of the system of Government. What require mending is not men but the system..."

Gandhi opposed all forms of violence including the violence justified by law – prison sentence and capital punishment. He had stressed this point at a public rally in Delhi on March 7, 1931. "I cannot in all conscience agree to anyone being sent to gallows, much less a brave men like Bhagat Singh". (8)

Three days following the execution of the 3 revolutionaries, Gandhi elaborated: "You must know that it is against my creed to punish even a murderer, thief or a dacoit. There can be no excuse for suspicion that I did not want to save Bhagat Singh. But I want you to realize Bhagat Singh's error. The way they pursued was wrong and futile. I wish to tell these young men...that the way of violence can only lead to prediction". (8)

**MYTH:** The death penalty is a legally sanctioned law and the only available option

**FACT:** On the contrary! It is premeditated killing of a prisoner who could be dealt with equally well by much less barbaric methods! And there are alternatives to it – in abolitionist countries as well as in those which retain the death penalty have abolished it for certain offences.

Measures to deal with crime effectively include: addressing the relevant socio-economic factors such as poverty, inequality, and unemployment; strengthening social standards on and attitudes towards crime; education through media on what the public can do to protect itself and reduce the chances for crime; improve crime detection and arrest of offenders; programmes for the rehabilitation of offenders enabling them to lead productive and even creative lives; programmes to address the needs of victims

of crime, including the compensation for damages or injuries sustained; and continued study and research into patterns of crime and appropriate ways of preventing and detecting it.

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**Paradigm Shift** is a quarterly factsheet to highlight the shifts in various socio-cultural and political fields that affect especially the marginalized communities including transgender people. **Paradigm Shift** also aims to unpack the unsustainable development practices, outsourced to India -- adversely affecting the environment -- and responsible for where humanity finds itself today.

## Next Issue: Drought in India



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