Crime and Punishment in Liberal Democratic Doctrine

SUKUMAR MURALIDHARAN

Capital punishment is by any reckoning, an issue of profound moral significance. It is an issue that was off the radar of public scrutiny and debate in India for long, because of an undeclared moratorium, occasioned it turned out, primarily by the reluctance of successive heads of state to sign off on the death warrants placed before them. Two executions in quick succession – in November 2012 and then February 2013 – the second of which was widely held to have been carried out without following due process, restored the matter front and centre in the public discourse.[1]

There has been no rigorous analysis yet of the tone of the public discourse that followed the two executions, but it is perhaps admissible as a broad generalisation that the majority of expert commentary tended to see the death penalty as indefensible, both morally and legally. Where there were efforts to justify the death penalty, these did not stem from any manner of an assessment of its deterrent effect, but from a misplaced sense of deference to the law as it existed and the institutions that embodied its processes and principles.

The conventional moral calculus holds that it is a far greater iniquity for one innocent man to be punished than for several wrong-doers to go free. It is a serious stigma for any kind of a political order, leave alone one that lays claims to being a democracy, to be accused of executing a person without adequate cause. Elaborate arguments are then advanced that the criteria of 'adequacy' have been fulfilled, both in standards of proof needed to impose this ultimate sanction, and the requirements of fair procedure in evaluating all relevant evidence.

Words of caution are offered to defuse the outrage, but little done to deprecate the unseemly revelry on display in certain quarters over executions carried out by the State. The conscience-stricken opponents of capital punishment are advised that too strong a denunciation of the processes through which the death penalty is awarded and enforced, will undermine popular faith in the institutions of governance. When all procedures prescribed under the law have been followed — and the final recourse, which is the appeal for clemency, has been exhausted – the public must simply learn to put up with the death penalty as a necessary evil, enforced for its own protection. That is part of the argument often heard: all death sentences implemented have been upheld by the Supreme Court which is final not because it is infallible, but invested with the cloak of infallibility because it is final.

This is an argument for political conformity, for accepting the need for discrete silence where the credibility of the institutions of governance is at stake. It also disregards several admissions from the highest court in the land that it has so far been absolutely unable to evolve sound and consistent norms for imposing the death penalty.[2]

Before going any further into questions of ethics and political morality, there is need to attend to something of a curiosity about the mood of public agitation over the death penalty. Considered in purely numerical terms, the level of public engagement with capital punishment might seem a bit of an indulgence. In the eighteen years prior to 2013, India carried out four executions under the law. Most reliable estimations held at the time, that there were fewer than five hundred convicts under the shadow of death, either at various stages in the appeals process or awaiting the outcome of mercy petitions. Though these figures are not insubstantial there is a strong probability that several among the five hundred on death row, in fact, the majority, would be reprieved at some point in the appeals process. The number whose final clemency pleas have been turned down would number fewer than twenty.[3]

Sukumar Muralidharan is a senior freelance journalist. This paper was presented in a Colloquium on "Capital Punishment: State and Society" at the Indian Institute of Advanced Study, 2013, Shimla.

The specific details of each prisoner trapped within the process that is designed to lead, ultimately, to his extinction as a person and an identity, needs to be explored. A modern liberal-democratic order institutes a judicial process governed by certain universally accepted rules of fairness, beyond which, there is an opportunity afforded to the condemned man to invoke the power of mercy held in reserve by the sovereign he is obliged to serve. Once that recourse fails, he is left with no claims to staying alive. His life is as good as extinct.

Purely as a detour into irony: the notion of the "sovereign" as the ultimate protector, which also reserves to itself the right to extinguish human life when provoked to extreme wrath, is obviously a legacy from less enlightened times of despotism. There was a practice in medieval times that an execution once ordered, had to be carried out swiftly. The executioner here was regarded as the "king's champion", chosen to represent his will to do justice. Capital punishment was a gesture of absolute power that the sovereign authority reserved for himself, which necessarily would be imposed on one who had violated the law and caused injury to the "body politic". If the execution was botched or for some reason failed, there would be a popular clamour for the pardon of the convict.[4] A sovereign capable of implacable wrath and infallibility in establishing guilt and innocence, also had to execute his will with a comparable sense of purpose. A botched execution detracted from that image of a sovereign of unbending resolve and all-knowing power. It was an unwitting admission of fallibility which placed an obligation on him to rescind the sentence of death.

Loosely applying these principles today, consider what it would mean for a government invested with the power to inflict death, that it should secure all necessary legal warrants for the purpose, but falter at the final stage. It is unable to determine if a convicted person deserves the invocation of the power of mercy. There is a failure of will and the edifice of absolute certainty and infallibility crumbles. A government that will brook no challenge to its will, fails to live up to its own self-image of being relentless in its determination to protect society from the reprobates who threaten its cohesion and peace. For the highest judicial body in the country to admit on various occasions that it has erred in the imposition of death is to shed the cloak of infallibility. Further, a delay in carrying out an execution because the ultimate embodiment of sovereignty, who alone is armed with the power of granting clemency, cannot make up its mind, represents a failure of will of the State.

These arguments lead to a singular inference: with the transition from the medieval notion of the sovereign as the absolute power, to a modern principle of popular sovereignty, the death penalty itself needs to be abolished. To carry this argument any further, we need to make a further point: that popular sovereignty does not for its own purposes of self-affirmation, require the negation of life in any form, under any circumstances. From there we could conceivably move on to making the further and stronger affirmation that the extinction of human life, whatever be the circumstances, is a negation of popular sovereignty.

A plain assessment of relevant facts would show that we are a long way from arriving at either of these affirmations in the real world. The circumstances in which killing enjoys the sanction of society are today wide-ranging and we could quite credibly argue, that the tolerance for inflicting death as a matter of social and political necessity, is on the increase.

A reference to the executions that happen not just under the law, but in what could be called the penumbra of the law, would put this in some perspective. These are actions that have acquired a special status within the popular vocabulary, as 'encounters' carried out by officials of the state without the formal sanction of the law, but with an assurance that *post facto* legitimacy will be granted. Coincidentally, within a few months of the last execution carried out on Indian soil, the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions put out a report on India. It was a public reminder that certain grim figures had for long been in the public domain, without eliciting the kind of critical social response they called for. India has the dubious distinction as a country, of adding the term 'encounters' and 'fake encounters' into the international discourse on human rights. And in a period of fifteen years since 1993, the country has had 2,560 deaths arising from encounters with the police. Of this number, almost half, i.e., 1,224 cases were established by the National Human Rights Commission (NHRC),[5] a conformist body which does not step out of line of the official narrative unless the evidence is really compelling, as 'fake'.

There is a problem of consistency between various definitions. The National Crime Records Bureau (NCRB) has its own system of classification, which gives a rather different estimation of crimes involving uniformed officers of the State. The definitions employed by the NCRB do not match those used by the NHRC, though the lessons that the statistics compiled in the former agency impart are very clear: of all the complaints lodged against the coercive arm of the State, i.e., the police in any given year, well over half are dismissed on sight as unsustainable or spurious. Of the rest, well over 90 percent go before internal mechanisms of accountability. Fewer than 5 percent of cases are referred to magisterial

or judicial procedures. And the susceptibility of magistrates and judicial officers at the lower rung to the sheer coercive power deployed by executive agencies such as the police is another 'real world' factor that has to be brought into this calculation.

Clearly, there is a violation of the fundamental principle of fair legal process here: that no person can be judge in his own case. The consequence is a situation of absolute impunity in the matter of extra-judicial killings. It is only the very rare case, such as the killings in Gujarat of Sohrabuddin Sheikh and Ishrat Jahan, where the armour of impunity is breached. There are occasional expressions, somewhat more generalised, of dissent, as with the Supreme Court recently deprecating the State killing its own people, in the context of the encounters in Manipur state that have become the subject of a judicially mandated inquiry.[6] The substantive impact of this manner of intervention is however, far from being clear. It may be premature to say that there is broad popular consent for the impunity that the apparatus of the law enjoys. But it certainly is true, that there is yet no organised or clearly articulated dissent. Where indeed, there is, it gains little voice or traction since the forces enforcing silence are far more powerful.

Effectively, this is a situation of officers of the State enforcing violence not through the processes of the law, but with the assurance of *post facto* sanction, underwritten by the consent – manufactured or otherwise is a matter separately to be addressed — of civil society. There is yet a third category of sanctioned violence that has been common in India. And this is a virulence that originates within civil society and runs its course with the tacit connivance of the State. The State is in modern political doctrine, the agency with a monopoly of legitimate violence, but there are situations in which it is prepared to yield this mantle of legitimacy to certain actors within civil society, on the strength of a largely unstated compact. Thus there have been episodes of mass violence virtually from the very beginning of India's career as a sovereign republic, which have gone unpunished. These have been classified under scholarly and bureaucratic rubrics in various ways: communal violence and caste atrocities being the two main categories. But certain key characteristics are shared: a generalised failure of the State apparatus to contain the violence, impunity for the perpetrators and little redress for the victims.

Still another category of violence would be that which occurs securely within the domain of the family and the clan. The formal system of the law is explicitly in disapproval of this pattern of violence but has little ability or will to intervene or provide redress. In recognition of this incapacity, there are several who argue that the formal apparatus of the State should stay out of this domain and allow customary institutions and practices to prevail. This often has malign effects on even the formal guarantee of equality that the State holds out. A particularly egregious instance was of lawyers who joined in the defence of widow immolation in Rajasthan becoming legal luminaries and in one case, a judge of the state High Court.[7] A Member of Parliament from the party that then held power in both the union government and the state of Haryana, similarly, argued at a time when public sensitivities were especially bruised over the summary justice meted out by institutions of caste such as the *khap panchayat*, that these bodies should be given their due recognition as instrumentalities of justice delivery where the law fails to reach.[8]

Going beyond these categories now and moving to a different plane, these different modes in which violence occurs could be placed within a broader conceptualisation of crime and punishment in a liberal democratic order. In dealing with the death penalty which is the surviving relic of an older order, doctrinal elements that aid the persistence of a despotic instrument within what is imagined as an enlightened liberal dispensation, would need to be identified. The story is obviously a complicated one but could be simplified. In the transition from despotism to liberalism, certain exceptions were always considered warranted and necessary, so that the charter of rights would not be applied universally. There were certain requirements that every aspirant had to fulfil before he gained entry into the liberal order. And those who failed to meet these requirements would suffer abridgments of their rights, in varying degrees of severity. These could cover the entire spectrum: from a denial of sovereignty or any opportunity to dispose of bodily skills and mental faculties in a manner of his or her choice, to an explicit denial of liberty and finally the denial of the right to life itself.

Liberal philosophers from the formative years of modern Western democracy could be considered here, since doctrinal conflicts and dilemmas are most sharply reflected during conjunctures of change. Once the forces of transformation have run their course and society has settled into a calm and consensual mode of functioning, philosophical thinking tends to lapse into conformism.

Hobbes and Locke are two figures of special relevance. Writing during the English civil war, Hobbes posited a model that saw man as inherently acquisitive, driven into continual conflict with fellow man and requiring the strong hand of a sovereign to render him fit for an existence within society.[9] All rights in other words, principal among these being the right to property, or the ability to determine what is "mine, thine and his", rested

with the sovereign and could be allocated among subjects in a manner of his choice. This would seem to put Hobbes outside the liberal spectrum, casting him almost as an apologist for royal despotism. Yet, as the political theorist and philosopher C.B. MacPherson has shown, Hobbes is among the first to clearly enunciate the foundational principles of liberal-democratic philosophy. He drew on contemporary conceptual breakthroughs by Galileo in the physical domain, which posited continual motion rather than rest, as the basic state of nature. In course of this perpetual movement, man entered into collision with others of his species, his instinct for acquisition creating the grounds for conflict with his fellows, leading to a "war of all against all" in which life for all would be "nasty, brutish and short". There was in other words, no alternative but to have a strong sovereign power – an "artificial man" as Hobbes put it – which would stand above this state of unending war by imposing a law and ensuring that the norms of property (or "propriety" in Hobbes' language) were duly respected.

For those who failed to honour the law he laid down, the sovereign would reserve various kinds of punishments. A crime committed against an individual subject would attract one variety of punitive sanction, one committed against an official enforcing the sovereign will, quite another. In the former case, the harm was confined to one person, while in the latter, "the damage extends it selfe (sic) to all". Anything that involved material damage to the sovereign's interests, such as the "betraying of the strengths, or revealing of the secrets" of the king to an enemy would be deemed a crime. So too would anything that tended to "diminish the Authority of the same, either in the present time, or in succession".

Stripped of its seventeenth-century idiom, Hobbes is clearly speaking here of the modern penal provisions of obstructing or in some way harming an officer of the law in the performance of his duties, and of treason and sedition. All of these are actions which involve a challenge to the majesty of the sovereign and would be categorised in modern legal parlance, as "crimes against the State". Punitive sanctions in turn could take several forms: pecuniary, corporal and capital. Each had its specific place within the architecture of power. And capital punishment here referred to "the Infliction of Death; and that either simply, or with torment". Though the ultimate purpose was to rid society of one who refused to live by its rules, the manner in which death was inflicted had its own didactic purpose. The preceding period of torment, when the convicted man was expected to make a public confession of his crimes, served the purpose of deterring any who might seek to follow in his path. It may be added here, that though "torment" has today been eliminated from the modes of inflicting death – at least in terms of the formal law — society still retains a sharp interest in the words and demeanour of a convict at the moment of his execution, as final validation of its power to extinguish life.

A half-century or so after Hobbes, Locke observed a rather more placid state of affairs, with England in the rosy flush of the Stuart Restoration. He had in consequence, a much happier view. Man, said Locke, is inherently in harmony with society. Those who seemingly fail to get a fair deal out of bourgeois-liberal rules, must necessarily have invited that fate upon themselves by some act so much at variance with accepted norms of conduct, that death was the deserved punishment. Once reprieved by society's magnanimity, the delinquent elements were obliged to repay the debt incurred by putting themselves, in body and soul, at the disposal of the wronged persons.[10]

Locke was simply put, a firm and faithful adherent to the dogma of the "original sin", which saw all social inequities as the consequence of some primeval act of transgress. The world was created in all perfection by divine ordainment. But there were among the denizens of this perfect world, many who were unable to live by the indispensable rules that would ensure peace and tranquillity. Those guilty of contravening the rules handed down by a benevolent creator, would be spared a deserved retribution, only if they were to resign themselves to a lesser charter of rights.

Every person was otherwise sovereign over his body, his labour and his faculties: "every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men... Thus the grass my horse has bit; the turfs my servant has cut; and the ore I have digged in any place, where I have a right to them in common with others, become my property, without the assignation or consent of any body."

From being a circumstance requiring a special justification, inequality and a forfeiture of rights over bodily capacities and faculties – "the turfs my servant has cut" – become an integral element within the liberal-democratic framework as conceived by Locke.

Three varieties of power are in play in sustaining this

state of liberal-democratic harmony: the parental, the political and the despotic. Parental power is something that all of tender years put themselves under with the sanction of society. It is what is today called the primary socialisation process, which equips them to deal with the world outside as they grow to mature years. And once of sufficient maturity to take part in public affairs, each individual – who is sovereign in himself and enjoys full power to dispose of his person and faculties in any manner – nevertheless sees a pragmatic purpose in delegating the authority to enforce this state of perfect concord, to a politically constituted entity or civil government.

It is however, the third form of power in Locke's framework that is key here. Despotic power for him, is "an absolute, arbitrary power one man has over another, to take away his life, whenever he pleases. This is a power, which neither nature gives, for it has made no such distinction between one man and another; nor compact can convey: for man not having such an arbitrary power over his own life, cannot give another man such a power over it". Despotic power rather, is "the effect only of forfeiture, which the aggressor makes of his own life, when he puts himself into the state of war with another... for having quitted reason, which God hath given to be the rule betwixt man and man, and the common bond whereby human kind is united into one fellowship and society; and having renounced the way of peace which that teaches, ... he renders himself liable to be destroyed by the injured person, and the rest of mankind, that will join with him in the execution of justice, as any other wild beast, or noxious brute, with whom mankind can have neither society nor security".[11]

Despotic power in other words, is invoked in a state of war, when society is forced to take up arms against elements within which threaten its internal harmony. And once despotic power is called into play, the common human decencies cease, since the target of social wrath is one who has forfeited all rights. It could be added here, that the Supreme Court of India has frequently in its rulings on the death penalty, echoed this sentiment of the 'brutish' or 'beastly' man being a menace to society. In the case of *Kuljeet Singh* (better known as the Billa and Ranga case), the court held that the "survival of an orderly society demands the extinction of the life of persons like Ranga and Billa who are a menace to social order and security". And in the case of *Ram Deo Chauhan*, the court took the argument on the protection of society to what has been described as a 'new low', by ruling that "when a man becomes a beast and menace to the society, he can be deprived of his life".[12]

Moving on in the evolution of the liberal-democratic doctrine to Immanuel Kant, we see man in conflict with society being elevated to little less than the principal motive force, the mainspring, of human progress. For Kant, the "antagonism of men in society" was nothing less than the means that "nature" had itself decreed "to accomplish the development of all (human) faculties". Ends that individual human beings would "care little for if they knew about it" are promoted by "each pursuing his own ends according to his inclination and often one against another (and even one entire people against another)". Given these inherent qualities of the individual and the human species, Kant saw the "supreme test (that) nature has set for mankind" as the evolution of a "perfectly just civil constitution". Such a regime of law alone could ensure the "development of all faculties of man by his own effort". The greatest degree of freedom should be assured under the law, so that there is a "very general antagonism of (a society's) members". But there should also be concurrently, a "precise determination and enforcement of the limit of this freedom".[13]

How does harmony emerge by some miracle, from the collisions of infinitesimal individuals who share nothing except the instinct for acquisition and a tendency to allow their egos to take over their existence? In his *Critique of Practical Reason*, Kant was to return to this issue, proposing among his most crucial axioms, that the human will should "freely" submit itself to the law. In this sense of "free" submission lay the preservation of individual liberty. Every individual, under the reign of reason, would be enjoined to act as though the exercise of his will could "always at the same time hold good as a principle of universal legislation".[14]

Kant was not of course a theorist of civil society in the manner that Hegel was. But his notion of a settled and agreed pattern of social practice that would conform with civilised norms, independent of the State and the coercive power it holds in reserve, is as clear a construct of "civil society" as can be found in the thicket of conceptual confusion that has sprouted around the term.

Three principles are essential to the constitution of the "civic state" in Kant's judgment: "1. The freedom of each member of society as a *man*; 2. The *equality* of each member with every other as a *subject*; 3. The autonomy of each member of a commonwealth as a *citizen*".[15] There was though, one condition that every person had to satisfy to qualify for all the rights available to a citizen. And these lines from Kant encapsulate the central dilemma of the liberal doctrine so well, that they need quotation at some length: "The requisite quality for (citizenship), apart from the natural one that the person not be a child or a woman (sic), is only this: that such a

person be *his own master* and hence that he have some property (under which we may include any art, craft, or science) that would provide him with sustenance. To put this another way, he must be a man who, when he must earn a livelihood from others, acquires property only by selling what is his own and not by conceding to others the right to make use of his strength".[16]

Clearly then, the man who has no sovereignty over his person, over the manner in which his bodily strengths and mental faculties are deployed, does not merit the rights of citizenship. It is a dilemma of liberal-democratic theory that persists to this day, one that detracts seriously from its claim to being a doctrine of equality.

This excursus into the history of ideas could be wound up with a consideration of Immanuel Kant's great contemporary Adam Smith. Now remembered as the founder of the modern discipline of economics, Smith was also a moral theorist profoundly concerned with law and justice. Though he shared much with Kant's worldview, in seeing the unfettered exercise of the human will as the best guarantee of progress, he saw a quite distinct process of mitigating the conflict potential inherent in this situation. He considered "sympathy" in this respect: an emotion that every person is susceptible to, though one difficult to intuit since it goes beyond the senses and common faculties. The illustration Smith used was of a witness to torture. A person who sees a near and dear one "upon the rack", he argued, would have no way of knowing through his senses and faculties, of his true suffering. But the sight nevertheless would stir up a deep emotional turmoil. Sympathy, said Smith, once referred to the emotions of pity and remorse, but could more accurately be characterised as one man's sharing in the emotions – whether merited or not – of another.

This was, said Smith, an illogical sentiment if any, which could be ascribed solely to the generalised dread of death that all humanity suffered. The emotion of "sympathy" arose from the sense of mortality that all humanity was condemned to live under, an emotion that indeed was "one of the most important principles in human nature". Indeed, the fear of death made every individual intimately aware of the limits to which he could challenge or push back against the norms imposed by society. This singular trait in human nature was responsible for the sense of discrimination that every individual possessed between justice and its opposite.

The sense of Smith's remarks is clear. All life is finite and worth treasuring. But one who pushes too hard against social norms risks forfeiting his right to live. He will be dealt with either in accordance with society's powers of sanction — if necessary through capital punishment — or else through lesser devices. Though never quite convinced of the moral basis by which a society could deprive an individual of his life, Smith was prepared to put up with it as a necessary evil. The fear of death, he argued, was "the great poison to the happiness, but the great restraint upon the injustice of mankind; which, while it afflicts and mortifies the individual, guards and protects the society".[17] In contrast to Kant, who saw an exalted and rather reified notion of "Reason" as the ultimate arbiter in a society that would otherwise be torn apart by the competitive instincts of its members, Smith saw a kinder, gentler attribute of "sympathy" serving that function.

The key issues here could be summed up in a few lines. The liberal-democratic order is built on a model of competitive man, which in turn is an acknowledgment that conflict is inherent in society. Conflict is contained by enacting a civil constitution that enshrines equality as a value without holding out any form of assurance of substantive equality. Individuals without sovereignty over their persons and their faculties would not be entitled to the full rights of citizenship. But as a pragmatic decision, they could be granted formal rights since a benevolent State could conceivably create the conditions under which they could lift themselves out of deprivation into a state of genuine equality. All who choose to dishonour or defy the compact under which liberal-democratic society is established, forfeit the right to the protection of law. The right to life becomes in extreme cases, an indefensible entitlement for these recalcitrant elements.

Turning to India now, the death penalty has been preserved as an element of the law and implemented over the years in a particular political context. Two of the moral preceptors of Indian independence – Mahatma Gandhi and Babasaheb Ambedkar – both expressed themselves not just once, but at several critical junctures, against the retention of capital punishment.[18] And this was against the background of the Karachi session of the All India Congress Committee in 1931, the first formal attempt at laying down a constitutional framework for Indian independence, making it an explicit commitment to do away with capital punishment.

Yet, at the decisive moment, when the republican constitution was actually enacted, the death penalty remained on the statute. What explains this seeming anomaly? The question prompts a reevaluation of some of the mythologies of Indian nationhood, and a sober assessment of the pathway that brought her to independence and the strategies that have since been deployed in sustaining national unity. Paul Brass for instance, has said that the Indian Constitution was born not in the abundance of hope and unbound ambitions,

as the nationalist mythology would have, but "in fear and trepidation". There were, on Brass's reading, several factors that contributed to the unsettled national mood at independence, notably the partition, the war in Kashmir, the near-insurrectionary conditions in Hyderabad state, and memories of the acute food crisis of the war years. The "fear of disorder" was a looming presence all through the Constituent Assembly debates and it led to a number of qualifications being inscribed into the Constitution on the fundamental rights of free speech and association. The numerous emergency powers conferred on the Central Government under the Constitution were, Brass argues, a direct outcome of this sense of "trepidation".[19] So too, it could be added, was the retention of the death penalty.

This fear of disorder led to a number of practical concessions being made to older power cliques whose sustenance otherwise would be in flat-out contradiction to basic republican values. There were also sections that by virtue of the partition and the circumstances of the national unification that followed, were seen to be in forfeit on the rights that all others were guaranteed. These foundational characteristics of the Indian nation have created their own terrains of violence, a violence that is exercised within civil society, often with the active connivance of the State. They also determine to a great extent how the State exercises its right to violence: both the legitimate kind and in that other, more shadowy form in which legitimacy is conferred after the fact. In recent years and especially since the Indian elite began discovering an identity of interests with the western powers that had earlier been elusive, the battle against terrorism has become another rubric under which rights could be denied and even the due process of law made superfluous. That was the essence of two recent rulings by the Supreme Court, in one of which it upheld a death sentence despite the passage of endless years since it was imposed – which in its more enlightened jurisprudence the court had likened to cruel and inhuman treatment – on the grounds that the convict had been guilty of a crime of terrorism.[20] Another convict who made a case on the same grounds for the commutation of his death sentence, was granted a reprieve because he had been sentenced for a lesser crime than terrorism.

Terrorism in India is believed by some to have a specific religious and communal identity. Infirmities in the judicial system and the numerous incapacities that those of lesser means suffer, means that they may never quite manage to negotiate the processes of the law, when once they are trapped in its coils. These exceptions to the guarantees of fundamental rights and lawful process – some explicit and others implicit – speak of a situation in which the ultimate punitive power of imposing death, could continue being an instrument of ultimate injustice. Significant progress towards eliminating the potential for abuse has been achieved by recent judicial rulings. The decisive move towards abolition now remains to be made.

Notes

1. For details of how the execution of Afzal Guru, sentenced to death for his purported role in the attack on India's parliamentary compound in December 2001, see this writer's 'Express Delivery of Death', *Economic and Political Weekly*, March 2, 1013, pp. 13-5. Important rulings on the death penalty and its legality in a context of inordinate delay in its execution were made by the Supreme Court during the tenure of Chief Justice P. Sathasivam, between July 2013 and April 2014. (See V. Sriharan *alias* Murugan versus Union of India and Others, decided by the Supreme Court on 18 February 2014; and Shatrughan Chauhan and Another Versus Union of India, decided on 21 January 2014). These are not specifically dealt with in this article, but they mark a significant though not quite decisive change in the jurisprudence of capital punishment.
2. In 2006, despite over a quarter century of evolving jurisprudence over the death penalty emanating from the formulation in the *Bachan Singh* case that it should only be enforced in the "rarest of rare cases", a two-judge bench of the Supreme Court effectively threw up its arms at the absence of clear norms. The bench of Justices S.B. Sinha and Dalveer Bhandari expressed its frustration rather directly, while commuting a death sentence: "No sentencing policy in clear terms has been evolved by the Supreme Court. What should we do?" (Cited in *Lethal Lottery, A Study of the Death Penalty in* India, Amnesty International India and the Peoples' Union for Civil Liberties, Tamil Nadu and Pondicherry, May 2008, p. 90). This volume also presents a number of arguments by a small but committed number of judges on the Supreme Court, especially in the 1980s, that made out a strong case for the abolition of the death penalty. Notable figures here would be V.R. Krishna Iyer, D.A. Desai, O. Chinnappa Reddy and P.N. Bhagwati.
3. Statistics on the death penalty are not available at any centralized source. An important project by the National Law University, Delhi, underway since 2012, seeks to survey all prisoners currently under the death sentence and profile them in terms of social background, nature of crime, and numerous other parameters. The results of this research project are expected to be in the public domain by the end of 2014.
4. Foucault, Michel (1979). *Discipline and Punish: The Birth of the Prison*. London: Penguin, p. 52.
5. U.N. Human Rights Council, Twenty-third session, Agenda Item Three, Addendum, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christoph Heyns – Mission to India*, April 26, 2013.
6. This observation of the Supreme Court is mentioned in the report of the U.N. Special Rapporteur, cited in footnote 3.
7. In 2004, a lawyer who had joined an agitation in 1987 within Rajasthan's Rajput community to permit a ritual observance glorifying the practice of widow immolation or *sati*, soon after

a young woman from the state had reportedly burnt herself on her deceased husband's funeral pyre, was appointed to the High Court. This was despite a sustained agitation by women's rights groups and other civil rights advocacy organisations. See Sanghamitra Chakraborty, 'The Devi's Advocate', *Outlook*, September 27, 2004, extracted May 28 2013 at: http://www.outlookindia.com/article.aspx?225259.

8. Naveen Jindal a Member of Parliament representing the Congress party in Haryana and a former Chief Minister of Haryana, Om Prakash Chautala, recently made common cause arguing that the *khap panchayat* deserved a fair hearing in matters of enforcing marital law. The *khap panchayat*'s alacrity in enforcing "honour killings" on individuals who married outside their caste or within the same *gotra* – a supposedly primeval but most likely socially constructed family lineage – was at the time earning it much public opprobrium. But Jindal praised the institution for its role in administering society before the formal systems of law were instituted and urged that its demands for a legal ban on the forms of marriage deemed taboo, should be considered in all seriousness. See: 'Navin Jindal supports khap panchayat', *The Hindu*, May 10, 2010 (National News), extracted May 28, 2013 at: http://www.hindu.com/2010/05/10/stories/2010051061441000.htm. In the case of Chautala, the support he extended to the *khap panchayat* was read as a way of entrenching his support among the Jat community. See 'Chautala backs khap marriage idea', *The Indian Express*, October 11, 2012 (dateline Chandigarh), extracted May 28, 2013 at: http://www.indianexpress.com/news/chautala-backs-khap-marriage-age-idea/1015113/.
9. See C.B. MacPherson's 'Introduction', Hobbes (1968). *Leviathan*. London: Penguin Books.
10. Locke, John, *An Essay on Government*, available in numerous editions, including in e-books. The key sections here would be between paragraphs 1 and 50.
11. Ibid., section 172.
12. Both quotations from *Lethal Lottery*, as cited in footnote 2, pages 75 and 87.
13. Kant, Immanuel. 'Idea for a Universal History with Cosmopolitan Intent,' ed. Allen W. Wood (2001). Basic Writings of Kant. New York: Modern Library, p. 119.
14. Kant, 'Critique of Practical Reason', in Allen W. Wood (ed.), *op. cit.*, p. 238.
15. Kant, 'Concerning the Common Saying: This May be True in Theory but Does not Apply to Practice', in Allen W. Wood (ed.), *op. cit.*, p. 420.
16. Ibid., p. 424, emphases in original.
17. Smith, Adam (2000). *The Theory of Moral Sentiments*. New York: Cambridge University Press, pp. 3-9.
18. It should be added here that at the time that the Indian Constitution was written and adopted, Ambedkar was certainly not recognised as a moral preceptor. That status came to him later, after roughly four decades of India's existence as a sovereign republic. He was however, acknowledged to be a person of great legal expertise and wisdom.
19. Brass, Paul. 'The Strong State and the Fear of Disorder,' ed. Francine R. Frankel (2000). *Transforming India: Social and Political Dynamics of Democracy*. Oxford: Oxford University Press.
20. The reference is to decision of the Supreme Court on 12 April 2013 in the case of *Devinder Pal Singh Bhullar and Another versus National Capital Territory of Delhi*, in which a two-judge bench held that the fact of the convict's mental illness had not been properly established and did not mitigate the overweening reality of his involvement in a heinous act of terrorism. This was reversed by a four-judge bench headed by Chief Justice P. Sathasivam that took up a curative petition filed by the convict's wife on 31 March 2014. The grounds for commutation of the death penalty to life imprisonment were an "unexplained/inordinate delay of eight years in the disposal of mercy petition" and the convict's "insanity". (Case citation: *Navneet Kaur versus National Capital Territory of Delhi).*