
NO RETURN TO THE GALLOWS

CRM Opposes Death Penalty

“**T**he return of executions will diminish and degrade us all,” says the Civil Rights Movement (CRM), in an urgent plea against the resumption of judicial hangings. The state has an obligation to calmly weigh the pros and cons of such an important issue. *The responsibility of political leaders is to lead, to guide.*

Citing a unanimous eleven-judge decision of the highest court of South Africa, CRM says that punishment should be commensurate with the offence but *it does not have to be equivalent or identical.* “*The state does not have to engage in the cold and calculated killing of murderers in order to express its moral outrage at their conduct.*”

The greatest deterrent to crime, this South African case held, is not the death penalty, but “*the likelihood that offenders will be apprehended, convicted and punished. It is that which is lacking in our criminal justice system.*”

CRM stresses the irreversible nature of the death penalty, and the danger of executing the innocent. The integrity and reliability of police investigation is crucial, for it is here that the evidence emerges on which a man may be convicted. This is why no system of last-stage review by distinguished judges is an adequate safeguard. “Can we say?” asks CRM, “that our investigative, law enforcement and legal system is such that there is no real possibility of innocent people being convicted and scapegoats being hanged?” There is special danger in “high profile” cases where there is public outrage, and consequent pressure on the police for quick arrests. The poor and the disadvantaged are the most likely victims of miscarriages of justice.

The cruel nature of many murders, and appalling suffering of the victim’s relatives, is recognized. But to end a particular individual’s life at a particular place, date and time, as a deliberate and predetermined act of the state, is in turn extreme cruelty. Murders should be categorized, with varying minimum sentences. A parole system should review remissions, and where appropriate the victim’s relatives should have the right to be heard.

A procedure set up in the UK in 1997 to investigate alleged miscarriages of justice had, by end July 2009, resulted in 280 convictions being quashed. In some instances the accused had been hanged; others would have been if not for the abolition of the death penalty. In a separate document CRM summarizes ten such sample cases.

The proposal to resume, after a lapse of over thirty years, the practice of judicial hangings, is a matter of the gravest concern to the Civil Rights Movement.

Recent horrific murders; the growth of organized crime

The Civil Rights Movement (CRM) is certainly mindful of the horrific crimes that have shocked us all in recent times—the Rita John rape and murder case, the Hokandara murders, the murder of Inoka Sewwandi, the murder of Judge Sarath Ambepitiya, the Lasantha Wickramatunga murder, the Angulana murders, and, preceding these, the rape of Krishanthi Kumaraswamy and the killing of her and her family. These and other gruesome events have hit the media headlines; yet other equally grave crimes of violence against individuals take place with less or no publicity. CRM is also mindful of the problems of underworld and organized crime including large-scale drug trafficking and contract killings. Our organization by no means underestimates the serious law and order problems facing the authorities. But remedies must be sought elsewhere.

Resumption of hangings no solution

Most people who support the death penalty do so on the assumption, sincerely believed, that it will reduce grave crime. This is an assumption that needs to be carefully examined before embarking on such a serious step as the imposition of an irreversible punishment. In CRM’s view it is no answer to the problem of law and order; it will only serve to divert attention from truly effective measures, and make the national scene more brutal than it already is.

Extreme cruelty

The retributive element of punishment has to be included in our penal policy in a responsible way and should not preclude all possibility of rehabilitation of offenders. Admittedly, there is sometimes a demand from some elements of the public for the ultimate penalty. This may be understandable, but that does not mean it should be allowed to prevail over other considerations. Over the centuries, there has been a steady progression away from this type of punishment-away from public executions, mutilations and other torture, inflicted sometimes for comparatively trivial crimes. Society today looks back with abhorrence at such practices. It is the responsibility of an enlightened government to give the lead to this movement towards the adoption of more rational and humane approaches to the ills of society, and to resist a reversion to earlier attitudes. The resumption of hangings in Sri Lanka today would be a retrograde step in the progress of our country.

The absolutely cruel nature of many murders, and the appalling suffering of the relatives, cannot be gainsaid. This does not detract from the truth that the ending of a particular individual's life at a particular place, date and time, as a deliberate and predetermined act of the state, is in turn an act of extreme cruelty. Those who have had personal contact with condemned prisoners and their family members, in the days when hangings *did* take place, have experienced at close quarters the particular horror of this punishment, and feel it is one the state has no right to inflict on any human being. As the Constitutional Court of South Africa pointed out, punishment should be commensurate with the offence but *it does not have to be equivalent or identical*. "The state does not have to engage in the cold and calculated killing of murderers in order to express its moral outrage at their conduct."¹

Much of the problem is not only that many crimes go undetected or unpunished, but also that, when a death sentence is commuted, a uniform sentencing system applies. Rather than hanging some offenders, the alternative is to categorize murders into various degrees, which carry different minimum prison sentences, coupled with appropriate review mechanisms which take into account the circumstances of the crime. There should be parole boards to consider remissions of sentence; in appropriate cases these might give a hearing to relatives of victims. Such measures would go a long way to satisfy the legitimate public complaint when persons convicted of particularly grave crimes are released after what appears to be an unduly short period.

The 'deterrent' argument

Nowhere has the death penalty (as opposed to other punishments such as long-term imprisonment) been shown to have any *special* power to deter the commission of crime. An international survey of research findings on the relation between the death penalty and homicide rates, conducted for the United Nations and revised in 1996, concluded that this research "has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment, and such proof is unlikely to be forthcoming. The evidence as a whole still gives no positive support to the deterrent hypothesis."

Diversion from real need

Reliance on the death penalty diverts attention from the real solution, which is prompt and efficient investigation of crime followed by effective prosecution and conviction. "*The greatest deterrence to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is lacking in our criminal justice system.*"

The above is from the judgment of the Constitutional Court of South Africa cited earlier which held the death penalty unconstitutional. The eleven judges were not only unanimous, each wrote a separate and carefully considered judgment. These judgments in their sum set out a comprehensive and compelling case against the death penalty; they merit study and consideration by any person concerned with, and in particular any person involved in decision-making on, this issue.

Irreversibility and the danger of executing the innocent

We said earlier that the death penalty has no proven special deterrent effect above other forms of punishment. At the very highest, its effect is uncertain. *Two things about the death penalty are, however, certain beyond dispute*. One is that it is irreversible. The other is that sometimes innocent people have been convicted and executed. These certainties are another compelling reason why this particular punishment should have no place in our criminal justice system. The most prominent miscarriages of justice in the UK have been for crimes that produce the greatest outrage and the loudest calls for vengeance.

Reliability of police investigation; discrimination against the disadvantaged

Can we say that our investigative, law enforcement and legal system is such that there is no real possibility of innocent people being convicted and scapegoats being hanged? It is vital to remember that the process which may end at the gallows begins, not at the trial stage, but at the initial stage of investigation of the crime.

The integrity and reliability of the police investigation is absolutely crucial, for it is here that evidence emerges on which a man may be eventually executed. This is why no system of last-stage review by distinguished judges is an adequate safeguard. Numerous events in Sri Lanka, several in recent times, show it would be unwise to act on the basis that the police will always act fairly, impartially and within the law. Added to this is the pressure the police are under to “solve” and make quick arrests in the case of particularly horrific or other “high profile” crimes. In such cases, when the evidence seems to lead in one direction, there will be a temptation to cut corners, and a reluctance to explore all avenues for possible alternative perpetrators.

CRM is also disturbed by indications that underworld elements appear to have support of politicians who in turn influence police investigation. The poor and the disadvantaged, who do not have the capacity to search for evidence that would indicate their innocence, and who have less access to competent and experienced lawyers, are the most likely victims of miscarriages of justice.

Of course, the danger of wrongful conviction applies equally to crimes punished by imprisonment. But the unique nature and awesome finality of the death sentence places it in a category apart.

Experience elsewhere

There are a disturbing number of recorded instances in other countries where persons have been found guilty and the conviction has later been found unsafe. In some cases they have been executed, in others they would have been had the death penalty not been abolished. Notably, there have been cases where the police or the prosecution has suppressed evidence favourable to the defence. Persons advocating the death penalty would be well advised to study developments following the setting up of the Criminal Cases Review commission in the UK in 1997 to investigate

suspected miscarriages of justice. This is an independent public body of eleven Commissioners with about 100 staff, and has wide-ranging investigative powers. Where it feels there is a “real possibility” that a conviction will not be upheld it refers it to the Court of Appeal. A quick skim through the results only of murder cases reveals over fifty persons whose convictions have thus been set aside as unsafe, including those of Mahmood Mattan (hanged 1952) and George Kelly (hanged 1950). Many others were fortunate that their convictions were after the UK abolished the death penalty and they could therefore be freed from prison.

As at end July 2009, out of 397 convictions examined to conclusion by this procedure, 280 had been quashed. In one case it was revealed that a culture of corruption and perversion of the course of justice had prevailed at the relevant time in the police station concerned, in respect of which the investigating officer was later jailed for bribery. Other instances included non-disclosure to the defence of relevant material, deficiencies in conduct of the defence including insufficient pre-trial preparation by lawyers, and serious challenge to medical expert witnesses in a series of other cases. Fresh evidence has established psychiatric illness which impaired the ability of the accused to instruct defence lawyers; linguistic expert evidence has shown that an alleged confession was unlikely to have been recorded in the manner claimed by the police. In the case of 19-year-old, illiterate and mentally backward Derek Bentley, the judgment quashing the conviction stressed the particular importance of a calm approach in cases which evoke public outrage. The judge’s summing up in that case was palpably unfair and would have made the jury feel there was no option but to convict. To their eternal credit the jury nevertheless added a recommendation to mercy, but to no avail, and Bentley was hanged.

Moves towards abolition abroad and at home

There is a clear international trend towards abolition of the death penalty, more than two thirds of countries having abolished it in law or in practice. In 1965 there were only 25 abolitionist countries. By the end of 2008, 92 countries had by law abolished the death penalty for all crimes, and some 46 more were abolitionist in practice. Notable among third world countries that abolished the death penalty during the past 20 years are South Africa (despite its serious problems of violent crime), Senegal, Rwanda, Angola, Mozambique, Nepal, Philippines and Bhutan (where Buddhism was

specifically mentioned as the reason). It is a significant mark of the abhorrence with which the death penalty is now viewed, that life imprisonment is the most severe penalty that can be imposed by either the International Criminal Court, or any of the ad hoc international tribunals that deal with crimes against humanity and genocide.

In Sri Lanka, attempts to abolish the death penalty commenced before independence. In 1928 the Legislative Council adopted a resolution moved by D.S. Senanayake that capital punishment should be abolished. Similar resolutions were thereafter at various times proposed by Susanta de Fonseka of Panadura, Dr A.P. de Zoysa of Colombo South, and MP for Kandy Fred E. de Silva. By decision of the very first Cabinet meeting of the government of S.W.R.D. Bandaranaike in 1956, the Suspension of Capital Punishment Act suspended the death penalty for a three-year period, and the famous Norval Morris Commission was set up to examine the issue. However, in the aftermath of the assassination of Prime Minister Bandaranaike the Act was repealed by the caretaker government headed by W. Dahanayake. Executions resumed, but fell into disuse again after 1976. In our country over a long period of time repugnance at the death penalty has been felt and expressed by individuals of varying political colourations, and is a matter that should and can be taken out of party politics.

The Responsibility of political leadership

The state has an obligation to calmly weigh the pros and cons of a question of such importance, without being influenced by uneven moods and sudden passions generated by gruesome murders. This is an issue on which public opinion can easily shift. People may look to the death penalty impulsively when they hear of a shocking crime, but change their minds when its special deterrent effect is shown to be unproved, when alternative punishments

of long prison sentences are suggested, when the danger of conviction of the innocent is remembered, when the widespread opprobrium in which executions are held in other societies is realised, and when the stark horror of an actual hanging comes home to them.

If, in the yearning we all share for a safe life, some people mistakenly press for the death penalty, we do not blame them. But the responsibility of a leader is to lead, to guide. Our society is complex and contains different strands, some inspiring, some frightening, at times even within the same individual. We have to nurture the good and discourage the bad. The return of executions will diminish and degrade us all.

Unacceptable in any circumstances

The return of the hangman as part of our public life is, in CRM's view, unacceptable in any circumstances. Defence of life and defence of the state may sometimes justify the taking of life by law enforcement officials, but even in such cases the use of lethal force is constrained by legal safeguards to prevent abuse. Judicial execution, on the other hand, is not an act of defence against an immediate threat to life. It is the premeditated killing of an identified prisoner for the purpose of punishment, a punishment which could take another form.

There is an urgent need for careful and serious study of crime in Sri Lanka, and of the problems of investigation and law enforcement. CRM urges that executions not be resumed under any circumstances, and that real solutions to violent crime, both short and long term, be identified and meticulously pursued. ■

End Note

1 State v Makwanyane 1995 (3) S.A. 391.

Hangman - Spare that Noose

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