CAPITAL PUNISHMENT- A DECADENT DETERRENT OR DENIAL OF LIFE?

Akshath Indusekhar, BA LLB, Jindal Global Law School, OP Jindal Global University

ABSTRACT

The death penalty has perpetually existed in a state of conflicted fray throughout sociological and political discourse. The debate surrounding the subject must be deconstructed and with emphasis on the interlink with morality, the foundations and future of the subject. This paper will delve into the moral, legal and political foundations of the death penalty, the arguments in support and against the subject and the potentially problematic aspects in modern society. Literature and reports pertaining to the subject shall be analysed and brought into context. In doing so, this paper shall also weave a link with the debates surrounding the law and morality, inequality in justice and the question of law- as an instrument of social change or inequalities?

Keywords: Law, Theories of Punishment, Death penalty, Domestic and international law, Right to life, Social Justice, Law and Morality, Moral foundations Theory, Constitutional Law, Minority Rights.

"I support the death penalty because I believe, if administered swiftly and justly, capital punishment is a deterrent against future violence and will save other innocent lives."

-George Bush

"I regard the death penalty as a savage and immoral institution that undermines the moral and legal foundations of society"

-Andrei Sakharov

Unmistakably, these quotes illustrate immensely conflicting theories on capital punishment, with both arguments carrying valuable merit in the bone of contention of modern sociological and political discourse. Capital punishment has constituted a moral dilemma for the largest part of human history. To put it simply, popularly referred to as the death penalty, it is the institutionalized practice of executing wrongdoers or criminals, the highest degree of punishment towards any individual. While most nations reserve the penalty for only the most severe of crimes, the method is often after institutionalized determination of guilt in cases warranting their life to be taken. Penal reform, an increased focus on human rights and principled evaluation of the morality of law has spurred the death penalty debate, with constitutional controversies and the emergence of a new international human rights regime, making it a critical component of the socio-political climate today.

The practice has existed for millennia in a slew of different cases- from blasphemy to murder, from dissent to theft- the list is endless. Banner theorized that capital punishment was a base form of punishment from which many others emerged; "*capital punishment was not just a single penalty*," but "*a spectrum of penalties with gradations of severity above and below an ordinary execution*". He claims that the 18th century brought a "*dramatic transformation of penal thought and practice*"[1]. One may identify the earliest origins of capital punishment in ancient law codes, initially in 18th Century BC laws by Hammurabi of Babylon, who codified it for 25 acts. Plato's famous rendition of Socrates' trial and execution holds historical significance till date and there are a plethora of gory, violent accounts of state sanctioned execution[2]. The similar codification was present in the Hittite code, the Draconian Code of

[1] Stuart Banner, *The Death Penalty: An American History* 86 (Harvard University Press, 2003).
[2] Robert Hoag, *Capital Punishment* (*Internet Encyclopedia of Philosophy*) *Available at https://iep.utm.edu/death-penalty-capital-punishment/*

Athens, Roman Law and Mosaic Law among others. The first recorded execution was recorded in 16th century Egypt, bizarrely enough, upon accusations of performing magic. This example's absurdity indicates the fundamental issue with the death penalty throughout history- the immense ambiguity of interpretation of degree of crime. Today, one nation's death penalty for mass murder is another's for homosexuality, and this pluralistic understanding granted by the existence of a plethora of legal systems throughout the world is often a topic extensively mooted upon.

Cesare Beccaria's 1767 treatise, "On Crimes and Punishment", can be identified as instrumental in the movement against the death penalty. The Italian Jurist theorized that there could be no justification for the state taking the life of an individual, claiming it to be "*a war of a whole nation against a citizen, whose destruction they consider as necessary, or useful to the general good.*" Delving extensively into specific cases where it could possibly be applied, he conceded that this penalty could only be considered in cases to protect the security, sovereignty and sanctity of a nation, a rare and far-fetched ideal. This critique of the death penalty raised important questions of efficacy and practical challenges, with Beccaria discussing the historical contexts and international interpretations at the time. His arguments were profoundly impactful, evident from one such translated line- *"Is the punishment of death, really useful, or necessary for the safety or good order of society? Are tortures and torments consistent with justice, or do they answer the end proposed by the laws? What influence have they on manners? These problems should besolved with that geometrical precision which the mist of sophistry, the seduction of eloquence, and the timidity of doubt are unable to resist."*[3]

Before delving into the moral aspect of the death penalty, it is critical to theorize it in the context of punishment by state authority. Punitive executions have been carried out throughout history by insurgency groups and non-state activists, however, we shall be specifically dealing with punishment by the state. Today, the rehabilitative approach of punishment occupies a dominant position internationally, involving the treatment of the offender by isolation or training to reintegrate or separate the member for the benefit of society. However, we can categorize two major approaches to capital punishment- retributivism and consequentialism. Retributivism, as its name suggests, is a theory postulating that the goal of the punishment is retribution, with the past conduct warranting or making an individual deserving of the penalty.

[3] Marquis Beccaria of Milan, 1762. M De Voltaire, *An Essay on Crimes and Punishments- A New Edition Corrected* 25 (Albany: W.C. Little & Co., 1872)

Consequentialism or utilitarianism, on the other hand, prioritizes the greatest benefit to society; in this case, the deterrence or incapacitative aspect in lieu of consequences to society is the goal of punishment (Hoag). The arguments for and against the institutions broadly arise from these theory. Proponents for the death penalty argue on the grounds of deterrence, to prevent repetition of the act. Limiting prison overpopulation, proportionality to crimes and enforcing consequences are just some of the points in support of the death penalty. However, there are just as many against- the possibility of use as a political tool, the blatant denial of human rights, the potentially discriminatory nature and perhaps most of all, the irrevocable, permanent power of the penalty in eliminating a member of society is the most debated of all.

The argument of ambiguity is extremely convincing, in a sense that an immensely variable moral compass in pluralistic nations makes for skewed results. This manifests itself it variations in internal moral principles of jurors too, in jury trials on the death penalty. These moral principles are shaped by personal experiences, feelings towards subjects, the external discourse regarding the death penalty, character traits of the accused/victims and can be tampered with by the use of certain powerful triggers and it is this dilemma that is explored in "Applying Moral Foundations Theory to the explanation of capital juror's sentencing decisions". This paper introduces the Moral Foundations Theory, with emphasis on conscious reasoning of morality and intuitions associated with interactions and moral transgressions; further, the MFT's premises of specific psychological modules eliciting distinct moral intuitions is discussed. Introducing these theories to the death penalty, they highlight the core questions that jurors grapple with, the US Supreme Court declared that "*jurors ought to exercise reasoned moral judgment when considering evidence in the sentencing phase of a capital trial*".[4]

The paper involves plenty of valuable inferences, one of which is that jury individuals' own concerns regarding vulnerability, proportionality and the threat of wrongful prosecution tighten the cuffs on the imposition of capital punishment. Aggravating or mitigating factors emerge from individuals' own experiences and challenges, such as the background of the crime, the offender, victim characteristics and situational factors. Individualizing foundations, such as the presence of a vulnerable victim such as a child or based on gender, or a police victim, are particularly impactful on sentencing decisions. Demographic characteristics, ontological insecurities and political orientation can define outlook towards a crime or victim. The

[4] Tyler Vaughan, Lisa Holleran & Jason Silver. *Applying Moral Foundations Theory to the Explanation of Capital Jurors' Sentencing Decisions* 3. (Justice Quarterly, 2019)

researchers also conducted a study to assess the impact of such stimuli; using characteristics such as Gender, Race, Spirituality and Political Views, they managed to design a fascinating probability model to predict results and incorporated the heterogeneity of prospective jurors. The study was successful in confirming all of the above characteristics as impactful in sentencing decisions- individualizing foundations had a leniency effect, vulnerable victims drastically coloured the opinion and motives and background played a critical role[5]. Ultimately, they held that moral foundations have a drastic impact on sentencing decisions and this reinforces the ambiguity argument. The goal of the law is to be a benign, equal and uniform institution; if the jurors opinions can be so coloured and variable based on one's moral compass in a situation as pressurized as the death penalty, how can uniform sentencing be ensured for a punishment so volatile?

Whilst the argument may be made that since the KM Nanavati case[6], jury trials have gradually subsided in India, there are a plethora of other challenges that may exist. The centre has persistently maintained the retention of the death penalty in legal statutes as a deterrent; the 'rarest of rare' doctrine has been applied by the Supreme Court in cases such as Jagmohan Singh v. UP[7] and Bachan Singh v. Punjab[8]. *It said that if capital punishment is provided in the law and the procedure is a fair, just and reasonable one, the death sentence can be awarded to a convict* [9].

The death penalty India Report by NLU Delhi explores some of the sentencing trends that have persisted with the death penalty in India. It provides answers to the arguments made for frequency of the death penalty in extreme, draconian cases of rape, murder and treason, also delving into the socio-economic profile of convicts. An inquiry into this subject also sheds light upon the overwhelming pendency rates and how shockingly long incarceration trials impact justice delivery. The individuals executed/on a death row have been found to have committed the crimes of murder *simpliciter*, sexual offences, terrorism, kidnapping and dacoity with murder, in the order of prevalence. However, the sheer complexity and devastating nature of terrorism can be linked to the length of trial, which is found to be the longest at an median of 8 years and 4 months. The report identifies age as an important determinant in sentencing, as

[5] *Supra* note 4, pp 5.
[6] K. M. Nanavati v. State Of Maharashtra [1962] AIR 605.
[7] Jagmohan Singh v. The State of UP [1973] AIR 947.
[8] Bachan Singh v. State Of Punjab [1982] AIR 1325.
[9] Lok Sabha Secretariat, Capital Punishment in India 6 (No.27/RN/Ref./October/2015. *Members Reference Service*, 2015).

evident in the *Bachan Singh* case where the Supreme Court held that "*if an accused is young or old, he shall not be sentenced to death.*"[10]

The discussion on death penalty in India cannot ignore the concept of extrajudicial killings and torture, a denial of basic human dignity. *The narratives of custodial torture reveal the unreliable and illegal ways through which evidence may be collected during criminal investigations*. Economic vulnerability is found to be frequent among accused groups but perhaps the most shocking of the statistics is that 76% of sentenced prisoner belong to backward classes or religious minorities. As the report puts it, "*While the purpose is certainly not to suggest any causal connection or direct discrimination, disparate impact of the death penalty on marginalised and vulnerable groups must find a prominent place in the conversation on the death penalty.*"[11]

Having mentioned the prosecution of minorities, critics of capital punishment have argued that there is disproportionate exercise of the death penalty against minorities[12]. It is an extremely debated but known fact the rigid stratification in lieu of caste and religious discrimination is prevalent even today. If society is plagued by this discrimination, can even the death penalty be considered as discriminatory is circumstances? It is this question that "The Political Sociology of the Death Penalty: A Pooled Time-Series Analysis" answers in the American context. Racial strife is no stranger to American Society and this report claims that "*whites from all classes successfully demand enhanced criminal punishments in areas with the largest minority populations.*" The findings are illustrated with empirical evidence; there has been a long-existing notion of crime as synonymous with Hispanics and Blacks in American society[13]. Yet, this immensely problematic narrative bares it's ugly head in areas as 'equal' as the law.

The authors also recognize that Weberian and Neo-Marxists claim that the economic disparities create an unstable social order, indicated by another author's work- "The more economically stratified a society becomes, the more it becomes necessary for dominant groups to enforce through coercion the norms of conduct that guarantee their supremacy" (Jacobs, Carmichael 112). The link between socio-economic backwardness and capital punishment is no

[10] National Law University Delhi, Project 39A. *Death Penalty India Report- Summary* 18. (Project 39A, 2016).
[11] Supra note 7, pp. 20.
[12] Radelet, Michael L., and Marian J. Borg. "The Changing Nature of Death Penalty Debates." *Annual Review of Sociology*, vol. 26, 2000, pp. 43–61.
[13] Jacobs, David, and Jason T. Carmichael. *The Political Sociology of the Death Penalty: A Pooled Time-Series Analysis* 109-131. (*American Sociological Review*, vol. 67, no. 1, 2002).

coincidence- the NLUD report delves extensively into how these factors impact the availability of legal representation and consequentially, possibility of bail/ pleas. Moreover, the debilitating impact on their families must be made note of, as already existing backwardness is amplified exponentially, especially in financial loss as death row inmates have no income to send home. The unparalleled trauma and countless cases of wrongful implications only contribute to this further, and the law can be used as a political tool in authoritarian regimes to eliminate dissent/ opponents of the state.

Having explored various specific examples, let us return to a core question to be answered in this paper- is law an instrument of social change or inequalities? The truth is, there is no simple, binary answer, as it intersects both realms. The law is a powerful instrument with fluidity shaped by societal progress while dictating the same drastic change. It has the power to dictate elimination of inequality, create a more egalitarian world and deliver justice for prince and pauper alike. At the same time, this theoretical understanding can be branded as utopian and naïve; in practice, structural inequalities creep in to this institution meant to eliminate it and our baser human emotions and stratification colour political opinion. Powerful individuals can misuse this state machinery at the cost of the oppressed and the death penalty is a lewd testament to the fact. The weapon of the death penalty at the hands of state machinery must be wielded with heed, as the consequences of wrongful implementation are devastating and irreversible. This paper has explored how this concept has swept between polar opposites- from a tool for deterrence to a strategic means of oppression. There are a plethora of problematic elements as it relies on individual judgement, a profoundly subjective exercise, to take the life of another, even if it is in the most extreme of crimes. Capital Punishment, as a potent, destructive show of state authority, has been shown to disproportionately affect certain groups and we have explored it's epistemological basis under Moral Foundations Theory. It comes as no surprise that the discourse against it is gaining popularity international, all the way from a potential UN moratorium to individuals' political opinion, leaving the future of the subject rather bleak. Ultimately, as a force for empowerment or a weapon for oppression, the multifaceted nature of law leaves it for the taking. The question is, how will we, as a modern society, utilize it?