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RATIONALITY OF DEATH PENALTY

The term punishment has no where been defined in the Indian Penal Code. However, according to the Concise Oxford Dictionary it means “to make an offender suffer for his offence”. The punishment is inflicted on the alleged offender in order to teach him a lesson so that he may not commit the crime again. Besides this, the second aim of the punishment is to open the eyes of the would be criminals who plan to indulge themselves in criminal activities. The infliction of the punishment also serves as an ointment on the wounded feelings of the society because whenever a crime is committed, it is not only the victim who suffers on that score, but the conscience of the entire society and the nation at large is shaken to its very foundation and often there is a hue and cry that the offender should be brought to book. It is at the Stage that the state applies a soothing balm on the wounds of the society by punishing the offender.\(^1\)

Death as a mode of sentence is different from the killing which rested on the instinct of primitive man. Death Penalty is the infliction of highest and extreme penalty. The punishment is supreme because if affects the very existence of human life. In the form of a legalized and justifiable homicide, the capital punishment seems to have originated with the concept of an orderly society only to deal with such extreme cases of disorderly depredation of anti-social elements with the social needs and exigencies.

Capital punishment has been justified from the earliest times, with reference to retributive and deterrent concepts - “An eye for an eye, and a tooth for a tooth”, a sort of vengeance which has been attributed to man from the early days when society had not developed into a body of responsible citizens.

Capital punishment for murder and other serious offences may be said to have come into existence with the emergence of modern State and its growing

\(^1\) Mohd. Shamim, Capital Punishment, 1989 (May), 95 Cr.L.J., pp. 52-53.
recognition of the obligation to maintain peace and order at any cost. Capital punishment is thus, the only instrument in the armoury of civilized world. The only purpose and object, therefore, for which this sentence has been prescribed, is to protect humanity from such elements who are incompatible with the normal course of human life, and who act against the rudimentary principle of “LIVE AND LET LIVE”. 2

(A) DEATH PENALTY AND ITS JUSTIFICATION

It is said that life is sacred and priceless and no decision is more momentous than the decision to take a person's life, no matter what the provocations or the circumstances are while allege that there are occasions when homicide is justifiable. Some say that no war is ever justified and that the taking of human life in war is always morally wrong. Others maintain that in a struggle for national survival or even for national honour, it is permissible, and perhaps even noble, to take the lives of enemies.

Some say that police have a right, and perhaps even a duty to take the life of a felon who is fleeing or resisting arrest, and that any citizen has the right to take the life of another who is threatening him with a deadly weapon; others deny that anyone ever has a right to take the life of another human being, even under such extreme circumstances.

Some say that there are some offences for which the death penalty is appropriate. Others argue that for the State, to take the life of any of its citizens, even of those who have been convicted of the worst offences against their fellow citizens and against society (such as rape, kidnapping, treason and murder), is uncivilized and unjustifiable.

Death sentence is sought to be justified mainly on two theoretical assumptions, namely ‘retribution’ and ‘deterrence’. The former conceives punishment as an end in itself while the latter emphasizes the utilitarian purpose. It

2 D.C. Pande, “Capital Punishment".
is intended here to examine the 'retributive and deterrent aspects of capital punishment.

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(B) DEATH PENALTY JUSTIFIED ON THE GROUND OF RETRIBUTION

Retribution in punishment is an expression of society's displeasure against the offender's criminal act. According to Lord Denning, punishment is "emphatic denunciation" of a crime by the society. Retribution is essentially based on the idea of vengeance. According to Edvin Ropper, "Vengeance is part of the nature of a man and the instinct of revenge which every man possesses".  

Whenever a crime is committed against any person, the first instinct of the victim is to take revenge and sometimes the crime is so heinous and ghastly that this feeling no more remains confined to the victim alone, but its tentacles spread to every nook and corner of the society, as a corollary, there is an upsurge for revenge. Public demonstration and large hue & cry against alleged culprits in Anjana Mishra rape case in Orissa or rape and brutal molestation of nuns in Gujrat, are the glaring examples of manifestation of public revolt and demand for capital punishment for them. Can any organ of the Government entrusted with the task of administrating justice afford to ignore it? The answer is an emphatic no. If it does so, I feel it fails in its primary duty which is to cater to those instincts; as the feelings of vengeance have primitive unconscious roots.

*Arthers Koestler* once remarked: "The desire for vengeance had deep unconscious roots and is raised when we feel deep indignation or revulsion ... whether the reasoning mind approves it or not..."  

The above view was again endorsed by *Lord Denning* before the Royal Commission: "The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. There are some

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3 Cr.L.J., April 2000, p. 56.
murders which in the present state of public opinion demand the most emphatic
denunciation of all, namely the death penalty”.

**Retributive Aspects in Capital Punishment**

Basically capital punishment probably survives because many believe strongly that it possesses a certain moral fitness, that it is the only just penalty for murder especially when murder is particularly brutal. In such cases it is maintained that simple justice demands a life for life. It is claimed that murderer has forfeited the right to live. The law of retaliation is pressed into action to support a publicly regulated substitute for private vengeance.

In his opinion for the majority on *Gregg v. Georgia*\(^5\) upholding the death penalty as constitutionally permissible, Justice Stewart observed that capital punishment “*an expression of society's moral outrage at particularly offensive conduct ... It is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs*”. Without orderly means of imposing penalties upon offenders, proportionate to what the aggrieved parties feel is deserved, society runs the risk of anarchy and lynch law.\(^6\) Lord Justice Denning told the British Royal Commission on capital punishment, “some crimes are so outrageous that society insists on adequate punishment, because the wrong doers deserve it, irrespective of whether it is deterrent or not.”

The theory of retribution emphasis retention of death penalty for heinous crimes on three counts viz. (I) vengeance (ii) punitive and (iii) reprobation.\(^7\)

It’s value as a motive of death penalty is well explained by a New York Psychologist in the following words:

“The motives for the death penalty may indeed include vengeance. Legal vengeance solidifies social solidarity against law - breakers and probably is

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\(^6\) Burton M. Leiser, Liberty, Justice and Morals, II\(^{nd}\) ed., p. 245.
\(^7\) S.K. Kumbhaj, Death Penalty: Indian Penological Retrospect, p. 311.
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the only alternative to the disruptive private revenge of those who feel harmed."^8

Thus, Retribution was, is and will continue to be the most important aspect of the criminal administration of Justice. In fact there can't be any administration of justice, if we become oblivious of this aspect of the theory of punishment. To ignore it is tantamount of ignoring the basic nature of man.

(C) DEATH PENALTY JUSTIFIED ON THE GROUND OF DETERRENCE

Deterrence is the foremost principal policy which every penal system advocates. It is applied on the offenders in order to deter people from committing crimes. It underlines the principle that inducement to promote one's selfish interests is at the bottom of every criminal act and by providing adequate penalty and exemplary punishment, it seeks to create a sort of fear in the minds of others and thus, serves to deter them from committing criminal acts. The harshness of penal discipline is a terror and warning to the offender himself and others as well.

According to Bentham, “we consider that an unpunished crime leaves the path open not only to the same delinquent, but also to those who may have the same motives and opportunities for entering upon it. We thus perceive that the punishment inflicted on the individual becomes a source of security to all.”

Punishment, as deterrent, in general seeks to control future events in “three ways”. It seeks -

(a) to stop the offender from offending again (particular deterrence).
(b) to deter other potential offenders (general deterrence), and
(c) to protect the society from the persistent offenders (protection).

It is astounding that people can seriously argue that the fear of death is never sufficient to deter would be murderers or kidnappers. Everyone has experienced the temptation to commit some offence or other, and everyone has to some time overcome that temptation. Although many factors enter into that

^8 Dr. E.V.D. Heag, The Voice (USA), June 4, 1979.
decision, one of the crucial ones is frequently the fear of some penalty. The harsher the penalty is, the greater is the fear and the more effective its deterrent effect would be. The fear of death has been powerful enough to dissuade thousands of persons from flying. It has helped to deter thousands more (though not everyone) from smoking, despite the pleasure they derive from tobacco. The fear of cancer or heart attacks has deterred millions of persons from eating sweets and fear of getting HIV-positive, which till date is uncurable, deters many to go for sex. So if people act on the long term fear of death, when death is only a remote possibility. Why is it unreasonable to suppose that some of them might be impelled to take appropriate precautions against the possibility of being executed - one of which might be refraining from committing capital crimes? Thus if even one out of a hundred murderers could be deterred by the execution of those who are guilty of murder, not only the potential victims would be saved, but also the potential murderers. If 1% of the homicides committed in the U.S. in 1975 could have deterred, 205 people would have been spared, such figures can’t be ignored.

Moreover, there are certain major crimes which cannot possibly be deterred by any other penalty. The revolutionary who contemplates blowing up a school bus as a means of terrorizing the population is not likely to be deterred by the threat of life imprisonment, for he believes that even if he is caught, he will be released and be given a hero’s welcome by his fellow revolutionaries when the revolution succeeds.

The same must be true of criminals who are already serving life sentences in prison. The threat of yet another lengthy sentence is meaningless and can therefore, have no effect at all upon them. Thus, if anything at all will deter such men from the crimes they are contemplating it is nothing less than the death penalty.

According to Islamic law, too, the punishment should be deterrent. An accused, once found guilty should be punished at a public place in order to open

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the eyes of a potential criminal. Islam has prescribed death penalty for a premeditated murder. This point is illustrated through verse 179 Sura II from the Holy Quran. “On wise person there is safety for your lives in death penalty and we hope that you would never violate it and would always abide by this law of tranquillity.”

The Deterrent Effect of Capital Punishment: An Analysis

The question whether the death penalty has really and truly a deterrent effect is an important issue which has received careful attention over the last fifty years in several countries.10

Here are some opinions of various legal experts regarding the deterrent effect of capital punishment:

(i) *Sri James Stephen*, the great jurist who was associated with the drafting of Indian Penal Code also was strong exponent of the view that capital punishment has great value as deterrent for murder and other serious offences.

(ii) In *Furman v. Georgia*, *J. Stewart* took the view that death penalty serves a deterrent as well as retributive purpose.

(iii) The eminent social scientist *Prof. Ehrlich* is also of the opinion that death sentence has made intensive deterrent effect on progressive society. The American Economic Review in June 1975 includes a specific test for presence of deterrent effect of capital punishment.

(iv) *J.J. Maclean*, a parliamentarian of Canadian House of Commons in the March-April debates 1966 emphasized the deterrent effect of capital punishment.

(v) The British Royal Commission after making an exhaustive study of issue of capital punishment & its deterrent value in its report (1949-53) has concluded that 'Prima facie the penalty of death is likely to have a stringent

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10 R.P. Upadhaya, Death Penalty in India, CIL Q(J), 1992, p. 48.
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effect as deterrent to normal human beings than any other form of punishment.

(vi) Why a man is so much afraid of capital punishment & why it should act as deterrent can be best described in the words of 'Dostoyevsky' a famous Russian Novelist. He has put the following words in the mouth of one of his characters in his illustrious novel 'IDIOT' while describing the horrors of death penalty. "Yes perhaps the main and the most racking pain comes not from your wounds but from the certain knowledge that in an hour, then in 10 minutes, then in half a minute and then right away at this very instant, your soul will leave your body and you will no longer be man and this is for certain and the main thing is that it is for certain... Lead a soldier to the battlefield, place him opposite the very cannon and fire at him and he will still feel hope, but read out the inescapable sentence of death to that very soldier and he will go out of his mind and bursts into tears...."

The most reasonable conclusion is that we can hardly find a man who is not afraid of death. A person will go to any extent to save his life and that of his family members. It is because life is the most precious thing. It is, thus, natural that death penalty acts as a great deterrent for potential criminals. If we keep all the objects aside, even then the deterrent object, would, by itself, furnish a rational basis for its retention.

(D) SOCIOLOGICAL JUSTIFICATION

Apart from the theories of punishment the Supreme Court has emerged with the principle of 'Social Necessity' in justifying imposition of death sentence. "A sentence or pattern of sentence which fails to take due account of the gravity of the offence can seriously undermine the respect for law". It is rightly said, "It is the duty of the court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment as a measure of social necessity is a means of deterring other potential offenders".

11 Cr.L.J. April 2000, p. 56.
"Failure to impose a death sentence in such grave cases where it is a crime against the society - particularly in cases of murders committed with extreme brutality - will bring to naught the sentence of death provided by sec. 302 IPC."\(^{12}\)

Perhaps it was this line of reasoning which prompted the court to suggest that "the survival of an orderly society demands the extinction of lives of persons like Birla and Ranga who are a menace to social order and security."\(^{13}\)

The credibility of the judicial process and public belief in the efficacy of the judicial system springs into sight as a further justification "... Faced with such evidence and such acts to give the lesser punishment, therefore, would be to render the judicial system of this country, suspect. The common man will lose faith in the courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon."\(^{14}\)

The court should approach the question of sentence "from a broader sociological point of view" in which "not merely the accused but the whole society has a stake."\(^{15}\)

Thus, "Any leniency shown in the matter of sentence", the court threatened "would not only be misplaced but will certainly give rise to foster a feeling of private revenge among the people leading to destabilization of the society."\(^{16}\)

Moreover, it has been observed that in countries where the punishment is severe, deterrent & capital punishment is in operation, crime ratio is lower in comparison to the countries where it is not so. **William Rogers, an American Minister of Foreign Affairs** while visiting Saudi Arabia admitted that he had such a feeling of security over there, which he had not felt anywhere and there was no need of any guard (vide conference of jurists at Riyad on 23.03.1972).\(^{17}\)

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\(^{13}\) *Kuljeet Singh Ranga v. Union of India*, (1981), 3 SCC 324.


\(^{16}\) (1983) 3 SCC 354.

\(^{17}\) Cr.L.J. April 2000, p. 59.
According to the report of Amnesty International (1979) only 18 states have so far done away with capital punishment. It implies thereby that most of the states have retained it on account of its efficacy. So why we cannot? And why we should not? This happens to be the moot issue.

**RETENTIONISTS**

*(Countries and territories which retain and use the death penalty for ordinary crimes)*

| Afghanistan | Ethiopia | Liberia | Sudan |
| Armania     | Gabon    | Libya   | Suriname |
| Austria     | Gambia   | Malawi  | Switzerland |
| Australia   | Ghana    | Malaysia | Syria |
| Angola      | Grenada  | Mali    | Taiwan (Republic of China) |
| Antigoa     | Guatemala | Mauritania | Tanzania |
| Bahamas     | Guinea   | Mauritius | Thailand |
| Bangladesh  | Guinea-Bissau | Mongolia | Tonga |
| Barbados    | Guyana   | Morocco  | Trinidad and Tobago |
| Botswana    | India    | Myanmar  | Tunisia |
| Bulgaria    | Indonesia | Nigeria  | Turkey |
| Burundi     | Iran     | Oman    | Uganda |
| Cameron     | Iraq     | Pakistan | USSR |
| Central African Republic | Jamaica | Poland | UAE |
| Chad        | Japan    | Qatar    | USA |
| China (People's Republic) | Korea, N | Jordan | Rwanda | Vietnam |
| Congo       | Korea, S | Saint Christopher | Yeman & Nevis |
| Cuba        | Kuwait   | Saint Lucia | Yugoslavia |
| Dominica    | Laos     | Saint Vincent | Zaire & Grenadines |
| Egypt       | Lebanon  | Saudi Arabia | Zambia |
| Equatorial Guinea | Lesotho | Singapore | Zimbabwe |

*Courtesy. Amnesty International*

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