

DEATH AS PUNISHMENT

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“Let us call [capital punishment] by the name which, for lack of any other nobility, will at least give the nobility of truth, and let us recognize it for what it is essentially: a revenge.”

Albert Camus, *Reflections on the Guillotine*.

Capital punishment or the death penalty is a legal process whereby a person is put to death by the state as a punishment for a crime. In almost all legal systems the concept of capital punishment has its basis in concept of ‘sanction’ which indicates a social reaction to a certain mode of behavior. A person may wish to commit a crime, or think of committing a crime, but the crime does not occur until the action takes place. As such, criminal law relates to actions that are considered so dangerous that they threaten the welfare of society as a whole. To everything covered on the subject crimes and punishment in any law of crimes, the fundamental principles of the Constitution are relevant. If judges are the ones vested with the authority to interpret the constitution, then it is for judges to state what is or is not inhuman treatment.

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Capital Punishment is an important aspect of the system of punishments about the administration of which there have been developments at the national and international levels. While in certain countries capital punishment is administered for serious as well as ordinary crimes. Likewise, in certain countries Capital Punishment has been totally abolished, in certain others it has been abolished for a few crimes only and retained for many other crimes. Capital punishment or the death penalty is a legal process whereby a person is put to death by the state as a punishment for a crime. The judicial decree that someone be punished in this manner is a death sentence, while the actual enforcement is an execution.

The hunger of victims for revenge may well be “the least discussed and most pervasive force in the desire to punish.”¹ But support for revenge varies over time and space. Some societies believe that “revenge is a kind of wild justice, which the more man’s nature runs to it; the more ought to law to weed it out.”² This kind of view prevailed in the US Supreme Court’s *Furman v. Georgia* decision of 1972, which

¹ Connolly, William E. 1995. *The Ethos of Pluralization*. Minneapolis, MN: University of Minnesota Press. p. 42.

² Bacon, Francis. 1625. “Of Revenge.” In Francis Bacon, *Essays, Civil and Moral*. Whitefish, MT: Kessinger Publishing, LLC (reprinted in 2010). p.1-10.

held 5-4 that capital punishment as then practiced was unconstitutional, and which produced separate opinions by each of the nine Justices, most of which “denounced retribution as a bad reason to punish.”³ But other societies proceed from the premise that payback on behalf of victims is a legitimate purpose of capital punishment, even when cultural conventions make it unacceptable to acknowledge the victim’s desire for vengeance as motivation. On this view, “the law has no choice but to satisfy the craving” for revenge if survivors would otherwise gratify their passion for vengeance outside the law.⁴

In almost all legal systems the concept of capital punishment has its basis in concept of ‘sanction’ which indicates a social reaction to a certain mode of behavior. Where the reaction is by an individual in his own way the sanction takes the form of private vengeance but where the reaction is by the entire society through the machinery set up by it the sanction takes the form of public vengeance, which in penology is expressed by the term ‘punishment’. The kind of punishment, the quantum of punishment and the procedure to be followed have all been considered by the penologists and theories have been offered by them with regard to all these matters.

Further, in almost all legal systems the kind of punishment and the method of inflicting punishment are based upon certain theories formulated by the criminologists. Though the concept of capital punishment basically is an aspect of the substantive law of crimes there are certain matters of capital punishment which have a bearing on the procedural law of crimes too. But whether it is the substantive law of crimes or the procedural law of crimes, there are certain theories propounded by the criminologists which furnish the background to the concept of Punishment. Likewise, the theories of punishment are also a significant aspect of the system of Capital Punishment. A person may wish to commit a crime, or think of committing a crime, but the crime does not occur until the action takes place. As such, criminal law relates to actions that are considered so dangerous that they threaten the welfare of society as a whole. Legal liability generally is of two kinds, one civil liability and the other penal liability. A very important aspect of penal liability is Punishment. Criminal law is of a variety of types, such as, statute law, case law, and common law.

Contemporary criminal law rests on the content of constitutional law, administrative law, the federal and state laws and the contemporary criminal codes. In the modern legal systems constitutional law is the law set forth in the Constitution of the country; it is the supreme law of the land; it presents the legal rules and principles that define the nature and limits of governmental power. Duties of individuals in relation to the state and its governing organs, and the legal rules and principles that are interpreted and extended by courts exercising the power of judicial review. In regard to matters of capital punishment also the Courts abide by the Constitution and interpret the rules and principles laid down in the Statutes in the light of the constitution, and they review the action of the State agencies according to their interpretation of the rules and principles found in various segments of Criminal Law.

³ Blecker, Robert. 2013. *The Death of Punishment: Searching for Justice among the Worst of the Worst*. New York: Palgrave Macmillan. p.15.

⁴ Holmes, Oliver Wendell. 1909. *The Common Law*. Boston: Little, Brown. p. 45.

The legal sanction, manifested in the form of penalties, remedies, and modes of redress of the law, represents the means of enforcing conformity to norms and restating their validity when they are breached. The national governments which enjoy sovereign power over their people have to adopt the norms embodied in the rules of International Law. In 1979 India acceded to one of the main international human rights treaties, the International Covenant on Civil and Political Rights (ICCPR). As a party to the treaty, India is bound under international law to respect its provisions. Article 6(2) of the ICCPR states: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes." Further precision is provided in Safeguard 1 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the UN Economic and Social Council in 1984, which states that capital punishment may be imposed 'only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences'.

In 1993, India introduced the death penalty for kidnapping for ransom (Section 364A, Indian Penal Code). The UN Human Rights Committee - the body charged with monitoring the compliance of states parties with the provisions of the ICCPR has stated that abduction not resulting in death cannot be characterized as a "most serious crime" under Article 6(2) of the ICCPR and that the imposition of the death penalty for such an offence therefore violates the ICCPR.

In India, capital punishment may be awarded by the criminal courts under the provisions of the general law of crimes and the special law of crimes. The Indian Penal Code, 1860 is the general law of crimes, and a few other Statutes dealing with certain particular persons, subjects and places together constitute the special law of crimes. These two kinds of laws are the primary sources of law with regard to capital punishment in India.

The Indian Penal Code, 1860 describes the various kinds of offences and the punishments that may be awarded by the criminal courts. It describes the defences that may be pleaded when there is any allegation of the offences mentioned in the Penal Code. It also describes the situations in which Capital Punishment may be awarded. The Penal Code in its nature is a substantive law of crimes. The procedural law however is in the form of the Code of Criminal Procedure, 1973. It also contains the safeguards to the persons accused of crimes.

To everything covered on the subject crimes and punishment in any law of crimes, the fundamental principles of the Constitution are relevant. The significance of the Constitution therefore is that it contains the safeguards which may be pleaded by a person against the process of conviction by a court of criminal jurisdiction.

Apart from the principles embodied in the Code of Criminal Procedure and the Constitution there are the principles of Human Rights Law which represent the urging norms of International Law on the subject of safeguards to the individuals against any punishment by the law enforcement agencies.

A principle of far reaching importance as embodied in the Latin maxim is: “*Nullum Poena sine lege. Nullum Crimen Sine Lege*”. This principle has the meaning that “Nothing is a crime which is not a violation of the law, and no punishment can be given without the authority of law”. This fundamental principle has been incorporated in our Constitution in Article 20 (1) which says, “No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.” Proceeding further Article 20 (2) of the Constitution says, “No person shall be prosecuted and punished for the same offence more than once.” Clause 3 of Article 20 says, “No person accused of any offence shall be compelled to be a witness against himself.”

Under the ordinary criminal law, all trials involving a possible death sentence are initially held before a District and Sessions Court at state level. Death sentences imposed in such trials must be reviewed by the High Court of the same state, which has the power to direct further inquiry to be made or additional evidence to be taken upon any point bearing on the guilt or innocence of the defendant. In the High Court, a bench comprising a minimum of two judges must, on appreciation of the facts, come to its own conclusion on guilt and award sentence as deemed fit in the circumstances of the case. Based on its assessment of the evidence on record, the High Court may: i. Confirm the death sentence or impose another sentence in its place; ii. Annul the conviction and convict for any other offence of which the Sessions Court might have convicted the defendant, or order a new trial on the basis of the amended charge; or iii. Acquit the defendant.

The High Court serves as the first court of appeal. Where a death sentence has not been imposed by a trial court, the State can appeal to the High Court to enhance the sentence to one of death.

There is no automatic right of appeal to the Supreme Court, except in cases where a High Court has imposed a death sentence while quashing a trial court acquittal. Even where a High Court enhances a trial court's sentence to that of death, there is no automatic right of appeal to the Supreme Court. ‘Special leave’ to file an appeal with the Supreme Court has to be granted by the High Court or by the Supreme Court itself. The judicial process in capital cases comes to an end once the higher courts have confirmed the death sentence. At this stage, the defendant can file a mercy petition with the state or national executive. Under Articles 72 and 161 of the Constitution of India, the State Governor and the President of India have the power to grant pardon or commutation of sentence. These constitutional provisions implicitly allow for a two-tier process of seeking commutation, first from the state governor and then from the President. The executive also has the power under the Indian Penal Code to commute death sentence without the consent of the offender. Mandatory death sentences are currently prescribed in India in three ‘special’ laws: the Arms Act 1959; the Narcotic Drugs and Psychotropic Substances Act, 1985; and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

Article 6(5) of the ICCPR prohibits the use of the death penalty against people who were under 18 years old at the time of the crime, as does Article 37(a) of the Convention on the Rights of the Child, another international human rights treaty to which India acceded in 1992. Indian law came into conformity with this prohibition in 2000 with the passage of the Juvenile Justice (Care and Protection of Children) Act, 2000. Before that, it was lawful for a boy of 16 to be sentenced to death, but prior to 1986 there was no minimum age prohibition, contrary to India's obligations as a party to the ICCPR.

The highest courts in three African jurisdictions have likewise concluded that imposing the death penalty with no discretion to impose a lesser sentence in appropriate cases violates the constitutional prohibition of inhuman or degrading treatment or punishment. This conclusion was reached by the Constitutional Court of Uganda, in *Kigula & 416 Others v. Attorney-General (2005)* later affirmed by the Supreme Court of Uganda and by the Court of Appeal of Malawi in *Two boy Jacob v. the Republic*.⁵

The same conclusion was reached in 2010, in the case of *Bangladesh Legal Aid and Services Trust v. Bangladesh (Shukur Ali)*,⁶ where the High Court of Bangladesh declared unconstitutional Section 6(2) of the Women and Children Repression Prevention (Special) Act which provided for the mandatory death sentence for those convicted of killing a woman or child after rape. The decision was affirmed by the Supreme Court of Bangladesh in 2014, which emphasized that: "Determination of appropriate measures of punishment is judicial and not executive functions."⁷

The constitutional courts described above have, in recent years, therefore adopted an interventionist approach to the application of the death penalty, and in so doing have removed the mandatory death penalty and introduced judicial discretion. By contrast, the courts in Singapore and Ghana have rejected this approach. The Singapore Court of Appeal and the Supreme Court of Ghana have emphasized that the reform of death penalty laws is a matter exclusively for parliament and not the courts and as such have been guided by a spirit of judicial restraint and deference to the legislature. Notwithstanding the fact that the Singapore parliament has modified its mandatory death penalty provisions and the Government of Ghana has maintained a moratorium on executions and indicated that it is committed to abolition, this is simply an outdated view of the role of the judiciary. It has been stigmatized as an abdication of judicial responsibility. If judges are the ones vested with the authority to interpret the constitution, then it is for judges to state what is or is not inhuman treatment.⁸

⁵ Criminal Appeal Case No. 18 of 2006, Judgment of 19 July 2007.

⁶ 30 B.L.D. 194 (2010) (High Ct. Div. of Bangladesh Sup. Ct.).

⁷ *Bangladesh Legal Aid and Services Trust and others v. The State* (Appellate Division, Supreme Court of Bangladesh) (5 May 2015).

⁸ Andrew Novak. "The Abolition of the Mandatory Death Penalty in India and Bangladesh: A Comparative Commonwealth Perspective." *Global Business & Development Law Journal* (28) 2015.

If murder is the willful deprivation of a victim's right to life, then the justice system's willful deprivation of the criminal's right to the same is even if overly severe a punishment which fits the most severe crime that can be committed. Without capital punishment, it could be argued that the justice system makes no provision in response to the crime of murder, and thus provides no justice for the victim.

In relation to the number of murders recorded and the number of convictions for murder, the number of death sentences imposed in India is very small 97 persons were sentenced to death in 2012, a year when over 34,000 murders were recorded and over 7,000 persons convicted of murder. There is a probability of only 0.3% that a murder will lead to a death sentence being imposed. Enforcement of the death penalty is exceptionally rare: only one execution for an *ordinary* (non-terrorist inspired) murder has been carried out since 1995 - an execution in 2004 for the rape and murder of a juvenile. This is a rate of one execution for murder in 20 years among a population in excess of 1 billion people.

Three executions have taken place in India since 2004, all for terrorist-related offences: Ajmal Kasab in 2012; Afzal Guru in 2013 and Yakub Menon in 2015.

Death as punishment for any crime makes horrible murderers of us all. Simply put, there is no "humane" way to extinguish a human life.