

Revisiting Death Penalty

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Our Senior Partner Shiju Veetil examines adequacy of death penalty in modern societies in his column on LiveLaw

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On the wee hours of 20th March 2020, four men, convicted of brutal gang rape and murder of a twenty-three years old, were hanged to death at Tihar jail in Delhi. The entire country went ecstatic when the morning news broke out, bringing a short relief to the people faced with a grim reality of an impending lockdown due to the Corona epidemic and the only complaint was the delay in delivering justice as it took more than eight years for the culprits to be executed. Incidents like the Delhi crime makes even a committed abolitionist to reconsider his views on death penalty. After all, why should we let such savages to continue to live in our society?

The adequacy of death penalty is a historical debate. There are very strong arguments on both sides to argue for and against death penalty. Abolitionist generally argue that if killing a person is an offence, the State is doing the same offence through death penalty. However, this argument can be easily refuted on the ground that killing itself is not an offence, it will become an offence only if it satisfies the legal conditions to make it an offence. For instance, killing in self-defense is not an offence. Some may even argue that a number of innocents are killed during war also, but sometimes war is inevitable. Another argument is that what if the person executed is turned out to be innocent? The State will be committing an irreversible mistake in such cases. This argument, even though grave for death penalty, can be refuted on the ground that the same problem exists for other kinds of punishments as well.

Those who argue for death penalty often justify it on the ground of its effectiveness to deter others from committing crime. However, justification for punishing an individual for the purpose of deterring potential criminals from committing such crimes in future is highly questionable. If such reasoning is acceptable, then even punishment inflicted upon an innocent can be justified on the ground that it has a deterrence effect and will deter future criminals. Similarly, preventive theorist argues that death punishment can permanently prevent the offender from committing future crimes. Again, the question remains whether it is justified to punish an individual for some future crime, which he has not yet committed especially when there is no certainty that he will repeat the offence. Theories of deterrence and prevention basically fails on these grounds; at the maximum, deterrence or prevention can only be an effect of punishment and not the purpose itself.

Whenever I tried to defend abolition, I was confronted with the question as to how I would have reacted, if such crime is committed upon my family members? I am not in any manner related to the Delhi woman; still my immediate sense of justice desires that the offenders should be met with nothing less than death. In fact, I would have preferred to see them suffering a similar kind of pain, which that helpless woman had undergone on that fateful night of the incident. Punishment don't serve any purpose, unless it addresses the feeling of revenge of the victim (or his near ones). Hence, I have no qualm in admitting that retribution is the primary purposes of punishment. The State is stepping into the shoes of the victim (or his near ones) and carrying out retribution on behalf of them.

Once we accept retribution is the primary purpose of punishment, then the next question is to what extent punishment can be inflicted to satisfy the instinct of retribution. Punishment often varies depend upon the nature of society we live. Eminent French Sociologist, Emile Durkheim in his famous *Two Laws of Penal Evolution*^[1] observed that primitive and authoritarian society prescribed barbaric form punishment. An authoritarian State doesn't have to justify its nature of punishments because the State has an unhindered right to punish an individual. However, the emergence of modern constitutional regimes made it imperative for the State to justify its punishment in terms of its adequacy, purpose etc. Modern societies often confront with the question of a deserving punishment (just punishment) and an adequate punishment and they often conflict with each other. This article examines the adequacy of death penalty in modern societies and tries to establish that even though death penalty may be a deserving punishment for various offences, it may not be an adequate punishment for modern societies.

Death penalty was the prevalent form of punishment in the ancient world. The earliest codified laws such as Code of Hammurabi of the (Eighteenth Century BCE), the Hittite Code (Fourteenth Century BCE) and the Draconian Code of Athens (Seventh Century B.CEs) prescribed death penalty even for minor offences like stealing of grapes, cutting down tree, killing chickens, robbing a rabbit warren etc. In ancient India also death penalty was inflicted even for trivial offences. A chapter of Arthashastra titled as "*death with or without torture*" elaborates circumstances under which a person should be tortured to death. It goes on to elaborate various kinds of death penalties such as burning alive, drowning, shooting down by arrows, etc. The chapter concludes that a king is justified for putting an offender to simple death, if the offender had not been cruel while committing the offence! Arthashastra prescribes death penalty for offences such as murder, adultery, performing witchcraft, breaking of water tanks, setting fire to pasture lands, stealing weapons, etc. Manu Smriti prescribes that a guilty of infidelity shall be fed to animals. It also prescribes that the male offender shall be burned to death. Even in the modern world, many authoritarian regimes invariably authorises extreme form of violence in the form of punishment.

The Biblical principle of *lex talionis* which calls for "an eye for an eye, a tooth for a tooth and life for life" was one of the earliest attempts to set a limit on punishment. *Lex talionis* suggests that a person, who injures another, shall be punished with the same degree of injury, which he has inflicted on the victim. Death penalty is the most deserving punishment for murder according to *lex talionis*.

But *lex talionis* requires an equation of punishment with the crime. Accordingly, a torturer shall be tortured, a rapist shall be raped, and a murderer shall be murdered. It also means that if the murderer tortured the victim before killing, punishment should also be torture followed by the execution of the offender.

Can a modern society allow strict application of *lex talionis*, even if the offender deserves such punishment? I think most of us will answer this question in the negative. Most of the modern States will not allow acts such as rape, mutilation, torture etc. as a form of punishment because these acts are, by their very nature, barbaric and uncivilized. Modern States refuse to do those acts, even if the crime is most heinous and the criminal deserve such punishment. Otherwise, it amounts to the State allowing some barbaric offender to dictate the behaviour of the State. Instead, modern States apply the principle of 'proportionate retribution', which means that retribution need not require an equality of injury between crime and punishment, but a fit and proportional punishment would be sufficient to carry out retribution. This theory prescribes a range of punishment to deal with a crime and worst offence in a society shall be punished with severest form of punishment allowed in that society even though the injury resulting from the punishment may not be the duplication of the crime itself and could be even less severe.

Accordingly, modern States, while inflicting punishment, try to strike a balance between the values of that society and victim's right of revenge. In the event of conflict between both, a civilised State should always give preference to its values. These values refrain modern States from committing certain acts such as torture, mutilation etc. even if the offender deserves such punishment. Jeffrey H Reiman in his article *Justice, Civilization, and the Death Penalty*^[2] explained the reasons for refusal of modern States to carry out severe corporal punishments as follows:

- i) corporal punishments violate basic human dignity and amounts to extreme subjugation of an individual over the authority of the State. It is not adequate for modern States to subject its individuals to such an extent of subjugation even if the offender deserves such punishment; and
- ii) One reason for the severity of punishment in ancient times can be attributed to a high degree of tolerance towards pain during that time. Pain suffered due to natural causes such as deceases, calamity, wild animals etc, was so common that people tend to consider pain inflicted by the sovereign was also one among them. However, we are able to reduce pain caused by natural causes

sovereign was also one among them. However, we are able to reduce pain caused by natural causes to a great extent in modern times. In other words, growth of civilization is characterised by its ability to reduce pain to its individuals. We have considerably reduced physical pain suffered by individuals in everyday life, which can be attributed to reasons such as development in medical science, invention of anaesthetic etc.

As a consequence of advance of human civilisation, the tendency of States to impose punishment as a direct physical intervention over the body of the offender has been significantly reduced. As a result, one of the essential characteristic of the modern State is that it is less severe in its form of punishment. We no longer beat an assaulter, rape a rapist or torture a torturer even though they deserve such punishment due to the reason that infliction of such pain even towards its worst criminals is not adequate for a civilised society. By doing so, the State is declaring that the State will not tolerate certain acts upon its people to such an extent that it will not perform such acts by itself. As a result, perhaps more people may be discouraged from committing such crimes in those societies.

Death penalty is the highest form of corporal punishment as it involves all elements of other corporal punishment such as torture, assault, etc. on a much higher level. It amounts to total subjugation of an individual over the authority of the State and it also involves highest amount of torture, both physical and psychological. Human civilisation, as it progresses, had done away with other milder form of corporal punishment (comparing to death penalty). Is it not the time to abolish the extreme form of corporal punishment? Instead, there is an increasing demand to extend death penalty to various other offences such as rape, corruption etc. Should we allow the actions of a few uncivilised criminals to halt the advancement we have made over the centuries?

The modern civilisation is characterised by its ability to prolong the life of its people. Due to the development of modern medical science, we are able to increase the life expectancy. Human death due to other reasons like natural calamity, wild animals etc. are also reduced to a considerable extent. As a result of all this, human life looks more precious today than it was in any other time. This progress in civilization should be reflected in our penal system also. The respect towards human life and dignity, the hallmark of modern civilisation, should be extended to our penal system.

Partially, we have achieved it by doing away with punishment like mutilations, torture etc. There is no reason for not extending this to death penalty also. After all, when it comes to question of life and physical infirmity, we always chose life over physical infirmity. Medically we conduct mutilations to save life of patients.

I have argued for the abolition of death penalty on the ground that respect for human life and dignity are the fundamental value of modern civilised society and death penalty violates these values. Once we rule out death penalty as a form of punishment, then only alternative is imprisonment; however, is it adequate to serve the purpose of retribution, the primary objective of punishment?

Before answering the question, we need to distinguish punishment in its retributive form from raw revenge. American philosopher Robert Nozick in his renowned book *Philosophical Explanation*^[3] summarises this differentiation as follows:

1. Retribution is done for a wrong, while revenge may be done for an injury or harm or slight and need not be for a wrong.
2. Retribution sets an internal limit to the amount of the punishment, according to the seriousness of the wrong, whereas revenge internally set no such limit as to what is inflicted.
3. Revenge is personal, whereas the agent of retribution need not have special or personal tie to the victim of the wrong for which he exacts retribution.
4. Revenge involves a particular emotional tone, pleasure at the suffering of another, while retribution either need involve no emotional tone or involves another one, namely pleasure at justice being done.

Though the above differentiation between punitive retribution and revenge often overlaps, the fundamental difference between both arises from the fact that the sole motive of an avenger is revenge, whereas a State imparting punishment represents much more than just revenge. Revenge is a raw emotion with no limits (or subject to very narrow limits), it is subjective, it can go to any extent and can even go beyond the offender, such as towards his friends, relative etc. Whereas State administered retribution, in the form of punishment, is subject to various limitations defined by the values of that society. Punishment, howsoever retributive it may be, has to be confined within those limits. Once we accept that human life and dignity are the fundamental values of our society, then State has no option but to do away with such form of punishments, which extremely violates these values. The offender may deserve such punishment, but they are not adequate for modern civilised society.

More than a century back, Durkheim family stated that *"Deprivations of liberty, and of liberty alone, varying in time according to the seriousness of the crime, tend to become more and more the normal means of social control"*. Durkheim made this suggestion analysing evolution of imprisonment as a form of punishment over the centuries. In the earlier societies, prison was used merely for the purpose of detention and not as a tool of punishment. Over the years, with the advancement of human society, the prison changed its character and imprisonment with varying degree became the major tool of criminal punishment. Once the State does away with corporal punishment, then it can only imprison the offender. As far as retributive objective is concerned, in my opinion, the objective is served so long as the duration and rigor of imprisonment is severe enough to commensurate with the severity of crime. This will inevitably lead to a lifelong

imprisonment without any parole, akin to civil death of the offender, in cases which deserve death penalty. Victim (or his near ones) may be more satisfied with death penalty. They would have been much more satisfied if the offender is tortured before death. However, as we discussed above, the society has to confine itself to its values while inflicting punishment.

Another reason for increased demand for capital punishment is its deterrent effect. The deterrence theory of punishment considers punishment as a vehicle to deter people from committing crimes in future. The deterrent effect of punishment is a controversial topic and all we can say that there is no consensus among people regarding deterrence effect of punishment. Common sense says that people do fear pain of punishment and it will have certain deterrence effect on potential criminals. But how much punishment is required to deter people from committing crime? It may be true that people do fear death over any other kind of punishment. However, it may not be equally true to suggest that fear of death will deter more people from committing crime than fear of imprisonment for the entire life span. If death penalty can be justified on the ground that it has more deterrence effect than imprisonment, then torturing the offender before death can also be justified on the ground that it will have more deterrence effect over simple death penalty. J Reiman^[4] argued that if

a person is deterred from committing a crime due to fear of death, then it can be assumed that he may be more or less equally deterred from committing the same crime due to the fear that he has to spend the rest of his life in prison. Hence, even from the perspective of deterrence, death penalty is not the only option; alternate punishment like imprisonment for the rest of the life without any chance of parole can equally deter people from committing crime^[5]. This serves the preventive object of punishment also as there are very less likelihood of the offender committing future crimes, if he has to spend the rest of his life in jail.

Death penalty is the only form corporal punishment still allowed in modern society. We no longer inflict other lesser kind of corporal punishment like torture, mutilations etc. Even though an offender may deserve them, our sense of humanity prevents us from authorising such punishment to any human being. We are declaring zero tolerance as a society towards such brutalities and we don't authorise such acts even as a form of punishment. Then, why we still continue with highest form of corporal punishment? If we are not including death penalty in the same list of abandoned form of punishments, are we not indirectly declaring that as a society we are more tolerant towards taking the life a person than committing acts like torture, mutilation? Death is not an adequate form of

punishment for modern civilisation; it may be a just punishment, but a modern state can no longer justify a punishment only on the ground that the offender deserved such punishment, but it also has to answer whether such punishment is adequate for that society.

[1] The article was first published in 1901 in French in *Année Sociologique* 4: 65-95

[2] *Philosophy & Public Affairs*, Vol. 14, No. 2 (Spring, 1985), pp. 115-148

[3] NOZICK, R. (1981). *Philosophical explanations*. Cambridge, Mass, Harvard University Press.

[4] *Supra* note 2.

[5] There are certain other interesting arguments against the deterrence effect of death; if given a chance many of us drive our car without seatbelt even though chances of death in the event of accident is very high.