



**CAPITAL PUNISHMENT: A JURISPRUDENTIAL ANALYSIS**

By *Byomakesha Kumar Singh*  
From *National Law University and Judicial Academy, Assam*

**Abstract**

*Capital Punishment is a topic which has always been a controversial one especially in country like India. Bipolar views are there regarding its abolition. Many people support it while many oppose it and support its abolition. Even from a jurisprudential perspective, there are two views and many renowned jurists support these two contrasting views. They support and attack it on various grounds such as morality, right to life, etc. The same has been dealt in the project where both the viewpoints and their respective arguments have been looked at. Finally, the paper concludes on what should be done after looking at both the viewpoints.*

**Introduction**

Capital punishment, popularly known as *death penalty*, is basically a government sanctioned practice, in which the state puts a person to death as a punishment for a crime. The sentence that is given in such a manner is called ‘death sentence’ and the act of carrying out that sentence is called ‘execution’. Crimes for which death sentence is awarded are called ‘capital offences’.

As of now, 56 countries have retained capital punishment, 103 countries have completely abolished it for all crimes, 6

have abolished it for ordinary crimes and 30 are abolitionist by practice.<sup>1</sup>

The debate of capital punishment is a matter of controversy in various countries including India as well. As of now, capital punishment in India is given for seven crimes. They are: murder, dacoity coupled with murder, war against the state, false evidence which results in capital punishment of an innocent person, instigating a minor or an insane person to commit suicide, and leaking out secrets to other countries. However, four types of persons are exempted from capital punishment. They are: (i) children below 15 years of age, (ii) pregnant women, (iii) mentally deranged persons, (iv) persons above 75 years of age. Also, the president is given the power to grant pardon to persons who have been awarded capital punishment.<sup>2</sup> The table below highlights the scenario of capital punishment in India over various years:

Year	Total Murders	Persons Actually Convicted	Persons Awarded Capital Punishment	Persons Actually Hanged
1959	10,712	7,992	843	190
1960	10,910	4,992	791	210
1970	15,708	8,508	576	13
1976	16,673	13,309	312	82
1977	19,314	14,347	329	80

<sup>1</sup> [https://en.wikipedia.org/wiki/Capital\\_punishment](https://en.wikipedia.org/wiki/Capital_punishment)  
<sup>2</sup> Criminology, Ram Ahuja, Rawat Pubns (1 January 2000)



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198 2	23,339	6,335	203	64
199 3	38,240	11,200	316	<50
199 8	38,653	20,936	134	<50

Source: *Crime In India, 1982, 1993, 1998.*

What we can conclude from the table is that in the last two-three decades, the number of persons actually executed has sharply come down. But even then, the debate of capital punishment is unending and is highly controversial. Both retentionists and abolitionists have different point of views which has been dealt in the paper.

**Argument of Retentionists**

- 1. Retribution:** The foremost argument given by retentionists is that of retribution. This theory of retribution is based on the idea of vindictive justice. The basic principle is that of an eye for an eye or a tooth for a tooth or a limb for a limb. They feel that the offender deserve to die, be it a murderer, traitor, rapist or any other for committing such terrible crime. Their death will only satisfy the public and prevent the public to take law into its own hands. The offender deserves to die even if it does not benefit the victim.
- 2.** Kantian ethics also rests on the need for moral consistency, but its focus is less on producing consistent results and more on staying internally true to the moral principles upon which one acts, no matter the consequence. For Kant, for punishment to be just, it must not “use” persons as instruments for serving the general welfare in the way the naked utilitarian calculus

allows.<sup>3</sup> Such motives for punishment are simply destructive of the foundation of justice in treating every human being as worthy of respect as an end in himself. So for Kant, the only just purpose for punishment was retribution, namely punishment responding purely to the individual guilt of the criminal.

**3.**

Kant argued that while executing a murderer, what we do is we treat him as a free and rational human being who is capable of bearing moral responsibility for his voluntary acts. Capital punishment, to this extent is morally permissible and consistent with punishments which respect the dignity of the punished. Kant went on further to say that the society must categorically execute all murderers, since no lesser punishment is responsive to the moral harm to the equal dignity of all human beings the prisoner has done in taking a human life.<sup>4</sup>

Morris Cohen said that it is very easy to dismiss this retributive theory by remarking it is a remnant of barbaric conception of

<sup>3</sup> Judicial punishment can never be merely a means of furthering some extraneous good for the criminal himself or for civil society, but must always be imposed on the criminal simply because he has committed a crime. For a human being can never be manipulated just as a means of realizing someone else’s intentions . . . . He is protected against this by his inherent personality. [W]oe betide anyone who winds his way through the labyrinth of the theory of [utilitarianism] in search of some possible advantage [to society]

<sup>4</sup> [http://moritzlaw.osu.edu/osjcl/Articles/Volume2\\_1/Symposium/Abramson.pdf](http://moritzlaw.osu.edu/osjcl/Articles/Volume2_1/Symposium/Abramson.pdf) accessed on 5 October 2017.



vengeance.<sup>5</sup> But an important fact here is that many of the early Greek and ancient spiritual books decried that a person has an obligation to avenge the killing of a kinsman. The traditional code of honour which is still prevalent in many of the societies is that a person must, at the risk of his own life, resent an insult to the extent of seeking to remove it with the blood of the offender. Even the popular sentiment in modern times is that if a wife of a person is violated or insulted, he does not need to wait for a policeman; it is his duty and obligation to knock the offender down. Such a view is still prevalent in many of the enlightened nations.

1. **Deterrence:** Just as a wild animal cannot be allowed to roam freely, similarly a dangerous criminal cannot be allowed to roam freely and his liberty is restrained and the penalty of law is imposed until and unless the danger of his giving indulgence to his criminal propensities be past. The mere threat of death penalty many times deters many people to commit capital offences. People like Ranga and Billa who killed two children in Delhi, murderer Auto Shankar who killed seventy persons with a stone, Nagaraja who killed over a dozen of people in Andhra Pradesh and Karnataka, a psychopath like Maya Dolas of Mumbai, the psychopath who was famously known as ‘VIP Serial Killer’ of Lucknow, the four persons of Punjab who killed a large number of men and women by dragging them out of the bus, and many more such killers deserved death penalty. It is therefore essential to protect the society and at the same time preventing people from

committing such acts. Hence there are two purposes of deterrence: (i) to restrain the wrong-doer from constantly and repeatedly engaging in a crime, and (ii) to set an example in the society for other so they too don’t commit the same crime. This theory of deterrence is based on the principle of ‘free will’, according to which a person is free to do what he pleases until and unless he does not harm the society; and if he does he must be given a deterrent punishment for violating laws. Not only must he be taught a lesson but others must also be frightened via his punishment to obey the law. The believers in the doctrine of the freedom of the will are known as ‘libertarians’.

Moral consistency is an important principle in both utilitarian and Kantian schools of ethics. Utilitarianism is a pragmatic doctrine that judges action by the consequences it produces rather than by the intent of the actor. Public policy ought to favor those actions that produce or maximize the general welfare.<sup>6</sup> When it comes to capital punishment, assessing its utility turns largely on whether its use has a general deterrent effect on future crime.<sup>7</sup>

**3. Protection:** It protects the society from ravaging and dangerous criminals who if let free would prey upon the people.

<sup>6</sup> For the general principles of utilitarianism, see HENRY SIDGWICK, *METHODS OF ETHICS* I (1907).

<sup>7</sup> Of course, the death penalty also serves the purpose of incapacitating the particular defendant (sometimes referred to as specific rather than general deterrence). But few argue that the marginal utility gained by using execution rather than life imprisonment to achieve the prisoner’s incapacitation outweighs the social and economic costs of maintaining capital punishment for this purpose alone.

<sup>5</sup> *Crime and Justice*, Vol. II, op. Cit., 1971: 27.



**4. Social Solidarity:** Execution of criminal in a way unifies the society and brings the society closer and together. It also avoids the feeling of private vengeance. Hence, the justification for punishment for capital punishment under maintenance of social solidarity is that (i) it prevents private revenge, and (ii) it upholds the moves of the society and brings it together. Emile Durkhiem has stated that “*the true function of punishment is to maintain social cohesion intact.*”<sup>8</sup>

**5. Cost:** From an economic perspective, capital punishment is less expensive when compared to keeping a criminal in a prison for life.

#### **J.S. Mill on Capital Punishment**

John Stuart Mill(1806-1873) was born in London, England and was a member of Britain’s parliament and also the most influential philosophers of the 19<sup>th</sup> Century. He delivered a speech before the parliament in 1868 on capital punishment.<sup>9</sup> This speech is not listed in the *Bibliography of the Published Writings of John Stuart Mill* since Mill wanted to exclude speeches delivered after 1865 unless they were published as pamphlets.<sup>10</sup> The speech, however, is given in Stuart’s *Autobiography* as an example of speeches delivered in the parliament that, “... were opposed to what then was, and

probably still is, regarded as the advanced liberal opinion.”<sup>11</sup>

He supported death penalty and contended that it is more humane than imprisonment and that it improves the society due to its deterrence value. In response to the arguments against capital punishment he said that:

*“The influence of a punishment is not to be estimated by its effect on hardened criminals. Those whose habitual way of life keeps them, so to speak, at all times within sight of the gallows, do grow to care less about it, as, to compare good things with bad, an old soldier is not much affected by the chance of dying in battle. I can afford to admit all that is often said about the indifference of professional criminals to the gallows. Though of that indifference one-third is probably bravado and another third confidence that they shall have the luck to escape, it is quite probable that the remaining third is real. But the efficacy of a punishment which acts principally through the imagination, is chiefly to be measured by the impression it makes on those who are still innocent; by the horror with which it surrounds the first promptings of guilt; the restraining influence it exercises over the beginning of the thought which, if indulged, would become a temptation; the check which it exerts over the graded declension towards the state--never suddenly attained--in which crime no longer revolts, and punishment no longer terrifies. As for what is called the*

<sup>8</sup> *The Division of Labour in Society*, Emile Durkhiem, 1964: 108

<sup>9</sup> Great Britain, Parliament, John Stuart Mill’s Speech on Capital Punishment against Amendment to Capital Punishment Within Prisons Bill, Parliamentary Debate(Hansard), 3<sup>rd</sup> Series(1830-1888), pp. 1047-1055.

<sup>10</sup> Ney MacMinn, J.R. Hains, James Mc Nab McCrimmon, Eds., *Bibliography of the Published Writings of John Stuart Mill*(Evanston, Illinois; Northwestern U. Press 1945), p. 96.

<sup>11</sup> *Autobiograph*, John Stuart Mill, New Edition(London: Longman, Green, and Co., 1908), p. 163.



*failure of death punishment, who is able to judge of that?"<sup>12</sup>*

Certainly, people partly know those who are not deterred by the capital punishment, but do they know the people who have been deterred by it? It is a remarkable and worth pondering question asked by him.

Capital Punishment, according to him is more humane than keeping the criminals for a life long imprisonment. Also, in cases where innocents are accidentally executed, Mill responds by saying that such cases are so tragic that it should encourage judicial systems to take the appropriate measures to ensure that it never actually occurs.

### **Immanuel Kant on Capital Punishment**

According to Immanuel Kant, *"society and individuals must act in such a way that you can will that your actions become a universal law for all to follow."*<sup>13</sup>

Kant's idea of crime and punishment is written in his work "Metaphysics of Morals"(Part One). According to him, crime is a violation of social laws, i.e., it is committed against the society and hence punishable. People who obey the society's laws are the members of the society and people who commit crimes lose the right to be the members of the society and deserve to be punished.

Violation of law can be divided into two: personal or social crime. A personal crime is a crime committed against a person and are reviewed by the civil court. A crime that is

committed against the society and reviewed and punished by the criminal code. Kant differentiates between private and public crimes: *"Any transgression of the public law which makes him who commits it incapable of being a citizen, constitutes a crime, either simply as a private crime, or also as a public crime"* (Kant, 1996).<sup>14</sup> Example of private and public crimes are abuse of somebody's trust and coinage offence respectively. However, a private crime is not less serious in comparison to public crime, and hence not subject to a lighter punishment. A victim is not allowed to punish the violator but administrator is since it is believed if the victim punishes the violator, it is no longer seen to be punishment but revenge.

The law always provides for punishing violators. If the crime is unpunished, that means the laws are weak. Weakness of the justice system means that the society itself is weak. If there is no crime, there should be no punishment. Punishment of the innocent means the legislation is worthless; which means that the legal system is not able to differentiate between the criminals and the innocent people.

A criminal does not realize that the damage inflicted by him on the society is equivalently harmful to him as well. A human being cannot exist outside the society, hence if a person is killing or stealing, he is setting up a precedent that the same can happen to him and it might him who suffers from the same crime.

<sup>12</sup> John Stuart Mill, speech before Parliament, April 21, 1868.

<sup>13</sup> *Capital Punishment*, Retrieved on March 24th From: [http://www.digitaltermpapers.com/termpapers/Legal\\_Issues/Capital\\_punishment\\_misc10.shtml](http://www.digitaltermpapers.com/termpapers/Legal_Issues/Capital_punishment_misc10.shtml)

<sup>14</sup> [http://philosophos.org/philosophy\\_article\\_78.html](http://philosophos.org/philosophy_article_78.html) accessed on 6 October 2017.



The above formula of “eye for an eye” justifies punishment, but is not always acceptable either. For example, if a monetary penalty is imposed upon a person who insults somebody would mean that a wealthy person can always insult the poor and pay money. This definitely would not be fair.

Kant adamantly prescribes capital punishment for murderers. According to him, *“whoever has committed murder, must die”* (Kant, 1996), because no matter how difficult life might be, it is still better than death: *“However many they may be who have committed a murder, or have even commanded it, or acted as art and part in it, they ought all to suffer death”* (Kant, 1996). A society that does not sentence a murderer to death turns itself into an accomplice in crime. Furthermore, a person sentenced to death can’t ask for appeal for pardon or lighter punishment. If it happens, then that would mean justice is in a ridiculous position.

According to Kant there are circumstances whilst a murderer merits lighter penalty. E.G. Every now and then a mother kills her child to keep away from shame; people die combating a duel to guard their honor and many others. In those instances regulation provides for milder punishment however as the time passes, the society will become increasingly more liberated from those indulgences and the precept requiring capital punishment for murderers is still legitimate. A punishment must always correspond to the crime. It is a mistake to impose different punishment for the same crime, even in those cases when the criminal has no honor. E.g. when one prisoner prefers death and the

other shameful life imprisonment. A death sentence would be an equal punishment for the both, but a life imprisonment will not, because it would be a more severe punishment for the first prisoner, who prefers death. Therefore, when a sentence is passed on rebels a death sentence would be highest measure.

Kant stresses that besides murderers, people who commit lese-majesty also deserve death. Lese-majesty is a crime equal to death, because it might bring very significant misfortune upon each member of society. As an example Kant describes Karl Edward Stuart's unsuccessful attempt to usurp the throne (1745-1746). A lot of people died due to this rebellion, including Lord Balmerino. Of course the rebels did not have the same goals. Some fulfilled their duties towards Stuarts' dynasty, others had some private interests.<sup>15</sup>

According to him, the ruler cannot be punished for his crime, however he can retire due to his committing crime. “The head of the state cannot therefore be punished; but his supremacy may be withdrawn from him” (Kant, 1996)

In conclusion, it can be said that Kant's doctrine on crime and punishment contains many valuable ideas on issues that are widely discussed in the modern world. It is still very useful for contemporary legislators and moralists.

### Abolitionists on Capital Punishment

<sup>15</sup> Ibid 14.



The retributive theory of eye for an eye and tooth for a tooth is not always accepted in a civilised and advanced society.

Furthermore, the argument to deter people to commit a crime via the fear of capital punishment is also not based on hard evidence. Three methods can be used to determine the deterrent effect of death penalty. First, by comparing the homicide rates in countries which have abolished capital punishment with the countries who have retain it; second by comparing homicide rates in the countries which have abolished the capital punishment and after its abolition; third by comparing homicide rates in a state/country before abolition, during abolition and after the reintroduction of capital punishment( which happened for instance in Travancore State in India or in Italy which abolished capital punishment in 1890, reintroduced the same in 1930 and abolished it again in 1947). We will definitely find variations in homicide rates. For instance, in the United States, homicide rates in states which have abolished the capital punishment is 30 to 50 percent higher than those which have capital punishment(Sutherland, 1956:292). In Travancore, the number of murders reduced during the abolition period(between 1944 and 1950) but however increased when it was reintroduced, with the numbers going from 159 in 1950 to 170 in 1952. Italy showed a similar pattern between 1930 and 1947. Sweden and Norway which abolished capital punishment have homicide rates about one-half as high as England which had retained it till 1969. In Australia too, the homicide rate was higher after abolition than before abolition.<sup>16</sup> Hence, the difference in

these rates of homicides is due to other factors and not just death penalty. The composition of population of a state/country and the culture which the people follow is of much more significance than the abolition or presence of capital punishment. The above data justifies the fact that death penalty does not always prove to have a deterrent effect. There is no denying the fact that human behaviour is influenced via fear but it is equally true that all individuals don't think of death penalty before committing a murder. In India, it has been estimated that about three-fourths of the murders are emotional and only one-fourth are premeditated and pre-planned. Selling(1932:12) stated, "*Death penalty can never be made deterrent. Its very life seems to depend on its rarity and therefore on its ineffectiveness as a deterrent.*"

It has also been argued that crime is not a result of personality deficiencies but is caused by unfavourable environment and interaction of various factors. Hence, a long imprisonment is a considered a better alternative for abolitionists.

Retentionists argue that for improving the conditions and living standards of jail and giving long imprisonment might need a huge amount of money. The counter to this by abolitionists is that it can be improved by spending a significant amount of money and not too much. Furthermore, is it logical and sane to link economy with hanging human beings? Is it civilised and proper to argue that it would be cheaper to kill mentally and physically ill persons than to treat them, and hence we should hang such persons. Also, the introduction of wage system in the

<sup>16</sup> Ibid 2.



prisons can help prisoners to earn money and support their families.

Many a times due to the defects of the judicial system, many a times an innocent person is hanged. It is hence unfair. Capital punishment has a negative effect in the criminal justice system. Abolition of death penalty might improve the situation of criminal justice system since judges take a lot of time in deciding cases and determining whether a person must be given capital punishment or not.

#### **Cesare Beccaria on Capital Punishment**

Cesare Beccaria, who was born in Milan, Italy, is remembered for his famous work on "*Crime and Punishment*" (1764), which basically critiqued the oppressive and brutal criminal justice system of his time. He is often said to be the one who presented the sustained critiques of death penalty. His core argument was that capital punishment does not deter criminals, rather a long term imprisonment creates a long lasting impact on the minds of the criminals and spectators. Furthermore, what death penalty does is that it reduces people's sensitivity to human suffering, hence it has a kind of harmful effect on the society. He accepts the fact that death capital punishment is practiced everywhere and it would be hard to break that custom; however, he feels that the collective voices of the critics of the capital punishment scattered around the world will influence the political rulers.

*What right, I ask, do people have to cut the throats of their fellow creatures?*<sup>17</sup> It is

<sup>17</sup> *Crime and Punishment*, Cessare Beccaria(1764), tr. Edward D. Ingraham, Ch. 28.

definitely not the right on which the sovereignty and the laws are founded. The laws are only the sum of the smallest portions of the private liberty of each individual, and represent the general will which is the aggregate of that individual.<sup>18</sup> No one has certainly given others the right to take one's life.

However, there can be one justification for capital punishment and when the life of a person can be taken away. This is when the person is deprived of his liberty and yet has adequate and sufficient power and connections to endanger the security of the nation. However, even this is would be only done if and only if there are high chances of a nation losing its liberty or on the verge of losing it, or in the times of absolute anarchy, when the disorders hold the place of laws themselves. Hence, a citizen cannot be deprived of his life when the state is in a reign of peace, or is properly fortified against its enemies or any other similar circumstances.

Furthermore, it not the intenseness of the pain but its continuance which has the greatest effect on the mind. Our sensibility is strongly affected by weak and repeated impressions, rather than by violent and momentary impulse. It is the power of habit which is universal over every sentient being. It is only by habit that we learn to talk, to walk and to satisfy our needs. In the same way, the ideas of morality are stamped on our minds by repeated impressions. The death of a criminal is terrible but only a momentary spectacle, and hence less effective in deterring others, than the

<sup>18</sup> Ibid 17.



continued example of a person deprived of his liberty and condemned. "If I commit such a crime, I shall be reduced to that miserable condition for the rest of my life", says the spectator to himself.<sup>19</sup> This is a powerful preventive than the fear of death itself.

times the innocent too are hanged. Also, the theory of retribution does not hold water anymore with the humanisation of society. What one can conclude is that the arguments of abolitionists outweigh the arguments of retentionists.

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### Conclusion

Despite the arguments of retentionists, the paper concludes on the note that capital punishment must be abolished, since everybody has a right to live under Article 21 and the criminals deserve a chance to be reformed so that they can be used as worthy assets for the development of the society. The argument that death penalty serves as a deterrent is also not a true one. In 1988 a survey was conducted for the UN to determine the relation between the death penalty and homicide rates. This was then updated in 1996. It concluded:

*"...research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment. Such proof is unlikely to be forthcoming. The evidence as a whole still gives no positive support to the deterrent hypothesis. The key to real and true deterrence is to increase the likelihood of detection, arrest and conviction.*

*The death penalty is a harsh punishment, but it is not harsh on crime.*<sup>20</sup>  
-Amnesty International

Furthermore, the fear of capital punishment puts the life of victim at risk and many a

<sup>19</sup> <https://www.utm.edu/staff/jfieser/class/300/9-cap-pun.htm> accessed on 6 October 2017.

<sup>20</sup> [http://www.bbc.co.uk/ethics/capitalpunishment/against\\_1.shtml](http://www.bbc.co.uk/ethics/capitalpunishment/against_1.shtml) accessed on 7 October 2017.