NATURALISTIC AND POSITIVISTIC DEBATES ON IMPLEMENTING THE CAPITAL PUNISHMENT

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Abstract

Implementation of the death penalty is a contemporary issue in most parts of the universe. It lies at the heart of retributory justice and is still practiced by a significant part of the globe. While many countries have abolished the death penalty either de jure or de facto, there are still several arguments both for and against the implementation of the death penalty. Regarding these arguments it then becomes important to see whether there is any merit in the jurisprudential arguments specially from the natural law and positivistic schools of legal thought. The proponents of natural law who base their arguments on the connection of law and morality both argue for and against the death penalty and, proponents of the positivistic school are strongly adamant about the validity of the implementation of the death penalty. In the above back drop this paper examines the ideas put forward by Lon Fuller and John Finnis regarding the natural law thinking and, the ideas of H.L.A. Hart and Hans Kelson from the positivistic perspective.

Keywords: HLA Hart, Lon Fuller, John Finnis, Kelsen, Capital Punishment, Theories of Punishment

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Introduction

One of the most serious ethical and legal issues that has confronted the world over the past few years in the face of the proliferation of crimes against humanity, which have been perpetrated, is whether the legislatures of the world should give serious thought to reviving the death penalty regarding certain offences.

A discussion of capital punishment or the death penalty would inevitably involve a discussion and an understanding of the notion of criminal justice. Out of many aims in punishing a perpetrator, retribution is one of the most commonly followed mechanisms. Retribution entails that, punishment is inflicted on someone as vengeance for a wrong or criminal act. The discussion on implementing the death penalty is a historical one and most of the countries in the world to a greater extent. In the modern many countries have abolished the death penalty on the notion that, to inflict death upon another on whatever ground is not a good deed and that retribution in the form of death is a most evil act that a reasoned man could do.

In the broad realm of Jurisprudence, the discourse on the death penalty as with any other matter has not found a single coherent expression where it is either opposed or accepted. Instead, there are difference of opinions in the same school of thought whether the implementation of the death penalty is jurisprudentially acceptable or not. Punishment is seen in two ways, first there are the ones who see it as something of value and second, there are the ones who see it as means to some other end[1]. Retribution in itself is recognized in the bible, where it says that, "Wherever hurt is done, you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, bruise for bruise and wound for wound".[2] This may have more to do with rationalizing the proportionality between the crime and the punishment, retribution is nonetheless accepted in the bible.

As of July 6th 2018, 53 Countries in the world still uses the death penalty as a mode of punishment[3]. Out of these 53 Countries, even such developed ones such as United States, Singapore and Japan still uses the death penalty. All of the above-mentioned countries have executed people this year as well. The other thing one has to take note of is the different modes used to execute the convicts. In the modern era, such methods as, hanging, shooting, electrocution, lethal

[1] Brian H Bix, *Jurisprudence* (4th edn, Sweet & Maxwell 2006). 119

[2] *Exodus* 31:23-25, from *The New English Bible* (OUP, New York, 1971) 84.

[3] Oliver Smith, 'Mapped: The 53 Places That Still Have The Death Penalty – Including Japan' (*The Telegraph*, 2018) <https:// www. telegraph. co. uk/travel/ maps-and-graphics/countries-that-still-have-the-death-penalty/> accessed 9 September 2018.

injections, beheading and gas inhalations are used all over the world in different extents.

It should be remembered that, whether the death penalty is available and whether one should make it available, and when it is actually available whether it should be implemented or not are two different questions, which require two different discussions and attention. In this paper only the latter is answered from a jurisprudential perspective by using two different schools of thought and it is done by dwelling in to jurisprudential analysis provided by leading jurist in that particular school of legal thought.

A jurisprudential analysis of the death penalty is linked with all of the above prepositions that were mentioned above. Jurisprudence is not about the study of a particular law but the law itself. With regard to the concept of capital punishment when seen from a jurisprudential analysis should not answer in an all or nothing manner, instead it should select a broader perspective in considering all of the ethical, moral, social, economic and legal notions that surrounds the debate on whether capital punishment be implemented or not. This paper aims to analyze from the perspectives of both the naturalistic a positivistic ideologies which can be propounded in cumulating an advanced argument as to whether, capital punishment be implemented or not.

Main Claims of Naturalistic and Positivistic Perspectives

In this regard it would be important to carry out the inquiry of a Jurisprudential analysis of the two schools of legal thought involving the positivist and the naturalist legal schools on the different perspectives they offer in either implementing or abolishing the death capital punishment. The naturalistic and the positivistic approaches are divided by the "is" and "ought" proposition. While the naturalistic views are influenced by the interconnectedness of law and morality, positivistic ideologies are based on the separation of the two. However, with respect to the implementation of the capital punishment, one cannot take at face value the basic premises of the two different ideologies. From a naturalistic perspective, if one was to argue that, taking a life of another is immoral so that for whatever reason capital punishment should not be implemented would be wrong to have such an idea as one should also look at the reasons behind the implementation of capital punishment in determining whether one is subjected to such punishment on what basis. It must be remembered that, not all but only a handful of offences of the gravest type will carry with it the capital punishment, the prime example being the murder of another. The killing of another human being does not itself calls for capital punishment as evident from the Penal Code of Sri Lanka, where according to

Section 293[4], there could be occasions where, even though there is a killing, it would amount to a culpable homicide not amounting to murder and the punishment for such is not the capital punishment but a prison sentence of up to 20 years. Therefore, a naturalistic approach should advance whether (mis)conduct deemed worthy by the society of being punished with the capital punishment is nevertheless immoral with regards to the conventions of a moral ideology.

On the other hand, when one considers the positivistic ideology which is more or less based on the idea of law being a coercive order where people are made to obey the law irrespective of their moral contents in most of the occasions would allow for the implementation of capital punishment. As with the above, the question is whether the capital punishment is "ought" to be implemented. Even though, the positivistic premise is based on the "what the law is", the question put forward is in the "ought to be" form and there for it requires an answer in the suitable "ought" from. The question then to be answered would be, does the implementation of the capital punishment is in accord with the positivistic ideologies.

The issue of whether or not the application of the death penalty as a penal sanction is desirable in a given society should not be solely determined by the empirical observation of criminologists and legal researchers. A more mature approach is needed, which is capable of blending harmoniously the applicable religious and ethical foundations of a society with the legal justification for such a measure to be adopted. Modern exigencies of developing economies and their scientific enhancement call for societies to be prepared for the proliferation of crime accordingly. Once the religious and ethical considerations of such a society are determined appropriately and clearly by the legislature, compelling legal considerations can inevitably be addressed. Therefore, it will be important to focus the attention towards some of the profound thinkers in the respective schools of thought representing the natural and positive legal thought in addressing and assessing the viability of introducing the capital punishment in to the legal system.

Positivistic ideologies of Hart and Kelsen on the Capital Punishment

Legal positivism, which is the leading doctrine professing the nature of the law, maintains that a realistic understanding of law must respect a distinction between law as it in fact is (de lege lata) and law as it would like to be or should be enacted in its ideal form (de lege ferenda). This philosophy incontrovertibly brings to bear a certain Dr.

[4] Penal Code Ordinance No. 2 of 1883 2018.

Jekyll and Mr. Hyde personality in legal positivism, thus making it virtuous and wicked in different situations. The virtuous side of legal positivism, it is claimed, can help inculcate morally desirable attitudes towards the law in both judges and citizens. The wicked nature of legal positivism, however, inherently makes it authoritarian, making judges obliged to apply the law as it is on the principle "law is law".

Both H.L.A Hart and Hans Kelsen belongs to the positivistic school of legal thought. Kelsen is known for his legal theory based on norms and Hart is known for his analysis of the legal system using both primary and secondary rules. In advancing and argument for and against the implementation of the capital punishment these theories could be used to shred in the light needed to lighten the gloomy picture surrounding the discussion on capital punishment.

According to Kelsen, the law is composite of norms, which guides the behaviors of the human kinds. The validity of a particular norm is defendant on a norm above it and when such validations becomes impossible, the end point is considered as the Grundnorm, which is capable of validating all the norms below it and itself is not capable of being validated by a higher norm. In a Constitutional democracy, the Constitution will be in most of the times be the Grundnorm. If the Constitution itself does allow for the capital punishment, whether it is carried out or not are not to be mingled. Under the Sri Lankan Constitution, the capital punishment is legally allowed. This is evident from Article 13(4), where it allows a competent authority to implement the death penalty if it deems, on the circumstances and according to the provisions of law that it is a justifiable end. In the case of ***Gregg v. Georgia***[5], the American Supreme Court while deciding on the Constitutionality of the death sentence made a ruling, which limits the death sentence being pronounced on the perpetrators by declaring that, there are two guidelines in general which needs to be adhered when making a decision with regard to capital punishment. First, the scheme must provide objective criteria to direct and limit the death sentencing discretion. The objectiveness of these criteria must in turn be ensured by appellate review of all death sentences. Second, the scheme must allow the sentencer (whether judge or jury) to take into account the character and record of an individual defendant. It is evident from the above that, where Kelsen stipulates for a norm validation process where a lower norm could seek for its validation from a higher norm, in the above mentioned case the decision of the Court a lower norm than the

[5] 428 U.S. 153 (more) 96 S. Ct. 2909; 49 L. Ed. 2d 859; 1976 U.S. LEXIS 82

constitution, validated itself from the higher norm, the Constitution, where it allows for the capital punishment to be implemented without being too precise of the circumstances and ting the leverage provided for by the Constitution, the Court, through its powers of Interpretation was able to shape the lower norm in accordance with the higher norm of the Constitution, a device which could be used in addressing and assessing the implementation of the capital punishment.

The problem with the Kelsonian theory is that, it lacks in details regarding the actual Court practice and the art of interpretation something, which Ronal Dworkin has championed. Dworkin advances a legal theory based on interpretation.[6] Hence it could be argued that, from a Kelsonian perspective, as long as there is a higher norm put in general terms which recognizes and not implements the capital punishment and a norm lying below it which is able to validate itself from the higher norm regarding the implementation of the death penalty describing the circumstances would be a valid one as Kelsonian theory is unconcerned with the substance of a particular norm[7].

Hart, who was never interested in defining law instead focused on a macro analysis of the legal system and how it function while containing both primary and secondary rules. According to Hart, a legal system is a combination of both primary and secondary rules[8]. Hart puts a greater emphasis on the importance of secondary rules on a rather complex society and out of all the secondary rules, the rule of recognition is considered by Hart as the primary rule which is at the heart of his analysis. Where a country allows for the capital punishment under its primary rules, which are rules providing for the human conduct, then it becomes possible under the rule of recognition for that capital punishment to be implemented. For an example in the above mentioned case of ***Gregg v. Georgia***[9] Justice White countered that capital punishment cannot be unconstitutional because the Constitution expressly mentions it and because two centuries of Court decisions assumed that it was constitutional. This entails a rule of recognition, where the Court as a result of its practice for nearly two hundred years, recognizes that, the implementation of the death penalty is a valid exercise of its powers. However, at the same time in its decision, the Court is also changing the pith and substance of the rule by shaping and moulding the prerequisites, which needs to be fulfilled

[6] Ronald Dworkin, *A Matter of Principle* (1st edn, Clarendon 1996).
[7] J. E Penner, *Mccouberey and White's Textbook on Jurisprudence* (5th edn, Oxford University Press 2012). 186
[8] H. L. A Hart and Leslie Green, *The Concept of Law* (3rd edn, Oxford University Press 2012).
[9] 428 U.S. 153 (more)96 S. Ct. 2909; 49 L. Ed. 2d 859; 1976 U.S. LEXIS 82

when implementing the capital punishment on an individual.

Therefore, it can be seen that, where there is a higher norm or a primary rule which recognizes the capital punishment as being a valid course of action, both the theories of Hart and Kelsen allows for the implementation of the death penalty on the respective premises that, where the implementation is capable of validation through a higher norm is possible or where it is made possible by a rule of recognition, both the theories allows for the implementation of the death penalty.

Naturalistic ideologies of Fuller and Finnis on the Capital Punishment

Natural Law ideas are based on the intricate connection, which exist between the law and morality. The central theme of the thinkers of this school envisage that, where a particular law fails in attaining certain moral objectives based on a larger concept of moral philosophy, such rules would inherently lack the ability of being labeled as valid law. However, when one considers about the implementation of the death penalty and the stance taken by those who adhere to the naturalistic ways of thinking, it is rather surprising that, there is no uniformity of thought and some of the thinkers do emphasize on the importance of the capital punishment. For an example, Thomas Aquinas, who also advocated the death penalty, brings in the medical analogy of the necessity for a surgeon to amputate a gangrenous limb because it could infect and destroy the whole body if unchecked. Aquinas concludes that similarly, political authority may have to kill someone whose continued existence could threaten the health and well-being of the society concerned.

Lon Fuller in his thesis on natural law advances a morality of law[10] consisting of two parts, internal morality or the morality of duty he asserts that, in any legal system for a particular law to be recognized as valid it has to comply with the internal morality of law and this internal morality is achieved according to Fuller by adhering to a set of principles consisting of eight limbs. The eight limbs are inclusive of, generality, promulgation, prospective, expo facto, clarity, non-contradictory, compliance, consistency. On the other hand, fuller speaks of a metaphysical utopia in the form of morality of aspiration or external morality. A society that has achieved internal morality can then pursue to achieve morality of aspiration as its ultimate goal.

When one looks at the theory propounded by Fuller on more realistic terms, with regard to the implementation of the capital

[10] Lon L Fuller, *The Morality of Law* (2nd edn, Legal Classics Library 2006).

punishment, there seems to be no barriers in doing so. The death penalty can be implemented without harming or without degrading any of the principles elucidated by Fuller. In a way, one could argue that, implementing the death penalty could be supplementary for the achievement of internal morality of law as Fuller's theory is based more upon the procedural aspects of law and in protecting and legitimizing the substantive laws of a country, death penalty could serve as a tool to combat against serious deviances of conduct and outrage.

John Finnis, on the other hand advances his theory of natural law based on natural rights[11]. While in the contemporary society, Fuller's legal philosophy is linked with the procedural law, Finnis is linked with the substantive law of the country. Finnis thesis is based upon the notion of values. He calls them as basic values which must be protected and enshrined in every legal system and that no value is neither superior nor inferior to the other. The seven basic values includes life, knowledge, friendship and sociability, play (for its own sake), aesthetic experience, practical reasonableness and religion.

If one was to look at the basic values envisaged by Finnis, it is clear that, life is one of the basic values that the legal system is supposed to protect and enshrine. On this basis it can be argued that where one commits murder, he or she should not be punished with murder as life is considered as a basic value. However, one has committed a murder does not entail that the offender be punished with death as well, to do so will be a violation of the basic values. Therefore, it can be seen that, from the theory advanced by Finnis, there is opposition rather than support for the implementation of the capital punishment.

Conclusion

The proponents in favour of reintroducing the death penalty would of course argue that it has a uniquely potent deterrent effect on potentially violent offenders for whom the threat of imprisonment is not a sufficient restraint. Other arguments that have been adduced by jurisdictions of the world, which have introduced the death penalty as a sanction against crime are: that death is the only penalty which adequately reflects the gravity of the offence of murder and treason; and that execution is the only way of ensuring that a murderer or traitor does not repeat his crimes. The more practical proponent has also argued that society should not pay money for the sustenance of a criminal for long periods of time in jail, and that, in any event, a swift execution of the criminal is

[11] John Finnis, *Natural Law* (1st edn, New York University Press, Reference Collection 1991).

more merciful than a prolonged incarceration.

Those against the imposition of the death penalty, on the other hand, argue that there is no proof or evidence that the death penalty is a more potent deterrent than life imprisonment and that the death penalty could be used as a discriminatory tool against the poor and the underprivileged. They also bring forward the rather compelling arguments that there is a grave risk that an innocent person may be executed and that society would not be given an opportunity to rehabilitate its offenders. Above all, they argue that hatred and recrimination does not beget hatred and recrimination and that a tolerant and just society should not stoop to the level of the criminal. Criminologists have not so far solved the question convincingly and, therefore, it behooves a society concerned to solve the problem by its own efforts.

Penal sanction in criminal law is one of the most difficult to generalize and, indeed, impossible to justify with empirical argumentation. Therefore, it becomes very difficult to determine the extent to which a particular punishment, such as the death penalty, serves to deter potential offenders from committing a crime. This phenomenon has led some researchers to conclude that in the area of penal sanction, "nothing works". Some researchers, however, believe that lenient penalties and severe ones have an equal degree of effect on society and therefore would be equally effective in preventing crime.

The operative, and indeed most compelling consideration of all is whether a society has the right to expunge the life of a person. On the one hand, one can accept the reasoning of Aristotle who justified the legitimacy of executions by introducing certain metaphysical principles to the effect that an individual person stands in relation to the community as a part to the whole. Accordingly, if one accepts that the good of the whole is more important than the good of a particular part (a part is to the whole as imperfect is to perfect) then if a part is to threaten the well-being of the whole, it is sometimes necessary to eradicate that part in order to safeguard the common good. Thomas Aquinas, who also advocated the death penalty, brings in the medical analogy of the necessity for a surgeon to amputate a gangrenous limb because it could infect and destroy the whole body if unchecked. Aquinas concludes that similarly, political authority may have to kill someone whose continued existence could threaten the health and well-being of the society concerned.

The answer may lie in a certain deep-seated subjectivity that a legislature, which decides to enforce the death penalty, could specify in the law once moral, ethical and religious tradition allows the consideration of the death penalty in legislation. This way, the

death penalty would not automatically apply, even if introduced into the statute books of a society. One of the ways in which a detailed structure leading to the sanction of the death penalty could be developed is by devolving upon a group of legal ethicists and jurists the responsibility of laying down criteria for such a sanction before the issue is debated before a democratic parliament. As to how these criteria could be determined, I dare not suggest.