Capital Punishment: The Never Ending Debte

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Introduction:

The history of Capital Punishment is as old as that of mankind. In the Western world the first instance seems to be "The Law of Moses", inflicting death for blasphemy. By 1179 B.C. murder was a capital crime among Egyptians and Greeks. In India, the Indian Epics namely, the Mahabharata and the Ramayana also contain references about the offender being punished with vadha-danda which means amputation bit by bit. Fourteen such modes of amputating the criminals to death are known to have existed. This illustrates that in every country in the world Capital Punishment existed since times immemorial.

In the beginning, offences against religion and morality attracted Capital Punishment. However, the primitive societies soon grew up into kingdoms and consequently criminal law also changed quickly. Whether it was West or East, offences against the King were considered as more serious. Thus, the political offences were also added to the religious and moral offences and Capital Punishment was prescribed for such offences also. With the advent of industrialization and advancement of civilization, Capital Punishment was prescribed for offences against the property and human body. Now, in the modern world, capital offences further covered drug-trafficking, hijacking the airplanes, bribery etc., Some Muslim countries like Saudi Arabia even want to add "artificial insemination" also to the list of capital offences.

Retentionists of Capital Punishment argue that Capital Punishment is necessary to maintain peace in the world since it acts as a deterrent to potential offenders. In the beginning, public opinion was also in favor of Capital Punishment in preference to life imprisonment. On the other hand abolitionists argue that Capital Punishment failed as a
deterrent and no major work of any researcher ever proved its efficacy. Further they maintain that it is an inhuman punishment arbitrarily imposed on the poor, the minority, the uneducated and the downtrodden. The conflict of opinion between the abolitionists and retentionists over Capital Punishment generated a debate throughout the world about the utility of Capital Punishment in the modern world, where great importance is attached to basic human freedoms. At the International level, every instrument dealing with human rights such as Universal Declaration of Human Rights, International Covenants on Civil and Political Rights etc., were very critical about the Capital Punishment and suggest an alternative punishment to death penalty. The divergent opinions on Capital Punishment are elaborately discussed in this article.

**Arguments for retention and abolition of capital punishment:**

Some people advocate abolition of Capital Punishment, while some strongly oppose the abolition of Capital Punishment. Those who object the abolition and propagate in favor of retention are called retentionists, and who advocate the abolition of Capital Punishment is known as abolitionists. The specialists of social sciences, criminologists, sociologists, penologists, psychiatrists, doctors and writers on social sciences and criminology are, in their great number abolitionists. The supporters of Capital Punishment, apart from a number of political figures and persons holding high public office, are generally jurists with a traditional training and judges¹. Law enforcement and prosecutorial groups tend to be strongly supportive of Capital Punishment². There are three aspects to the question of Capital Punishment: first the moral-humanitarian, religious; secondly, the popular the views, the prejudices and superstitions of a common man in the street; and lastly, the scientific viz., penological, psychiatric, sociological, in short, the accumulated knowledge and experience of various brands.

However, the controversy between the two groups is as old as the issue of death penalty itself. The debate dates back to Bible in the Western world and Mahabharata in the East.

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1 Capital Punishment: UN Publication: 62 (1962)
2 James Carey T: Introduction to Criminology: 272 (1978)
In this article an attempt is made to present the views of both retentionists and abolitionists.

**Arguments for retention:**

In primitive societies and even in the more developed societies which succeeded them, from the Greece-Roman civilization to the Middle Ages and the Renaissance up to the 17th century, one notices the persistence of the idea of talion under the form of individual or tribal vengeance. When the respect for life began to be widely admitted one tried to show that the death of the criminal was complement in such a way that it could be said to be both just and necessary\(^3\).

(a) **Capital Punishment Has Religious Sanction:**

From the religious point of view, the death penalty is in large measure controversial. It is asserted by Catholic authors like Ermecke and Protestant writers like Gloege that the murderer has forfeited his life under the divine order as it is revealed in the scriptures; in consequence, the State, in carrying the death penalty, is only doing something which in any event has been preordained. The death penalty, moreover serves the balance out the disturbance to the moral order\(^4\).

An incident on par with this argument is found in Mahabharata. Justifying the retention of death penalty King Dyumatsena observed that if the offenders were leniently let off, crimes were bound to multiply and that they therefore plead that the true ahimsa lay in the execution of unworthy persons. He further argued that the distinction between virtue and vice must not disappear and the evil element must be removed from the society\(^5\).

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\(^3\) Marc Ancel: The Problem of Death Penalty: (Ed: Sellin T: Capital Punishment) 5 (1967)


\(^5\) Mahabharata: Shanti Parva: Chapter: CCLXVII: Verses-4-13
A killer must be killed, though not in the same cruel way as he had dealt with the victim. It is law of nature, and the Gods too. The Bhagavad-Gita reckons it as a sacred duty for which the God himself comes down to earth. A judge hanging the offender and the State executing him are exactly in the same position as the surgeon who straightaway removes the offensive limb of his body to save his life. It is a duty which both owe to the society as Brahmagnani Vishwamitra had emphasized when Rama was face to face with Tataka\textsuperscript{6}.

(b) Capital Punishment Marks The Reprobation Of Society:

Capital punishment marks the society’s detestation and abhorrence. Capital Punishment marks the detestation and abhorrence of the taking of life and its revulsion against the crime of crimes. It is supported not because of a desire for vengeance, but rather as the society's reprobation to the grave crime of murder\textsuperscript{7}.

(c) Retribution Satisfies The Public Conscience:

All retributionists would agree that if anybody deserves death sentence for his crime it is the killer for hire\textsuperscript{8}. The criminal should die because he has committed a terrible crime, and that only his death will satisfy the public and keep it from taking the law into its own hands\textsuperscript{9}.

(d) Capital Punishment Is Deterrent:

No other punishment deters men so effectually from committing crimes as the punishment of death\textsuperscript{10}. True, it cannot be proved by evidence. It is a conclusion that must be drawn from the general impression one gains from experience, from looking around the world, from seeing how things are done and how people feel\textsuperscript{11}.

Lord Simon expressed he had no doubt that Capital Punishment prevented more murders to an extent that no other punishment could. It was not a matter of statistics but of the

\textsuperscript{6}Rajgopal: Death Penalty and Law: 79; Cri.L.J. 1982
\textsuperscript{7}Law Commission of India: Thirty Fifth Report: Para 55: (1967)
\textsuperscript{8}Sellin T: The Penalty of Death: 73 (1980)
\textsuperscript{9}Robert, G. Caldwell: Criminology: 415 (1956)
\textsuperscript{10}Gower Earnest: A Life for Life: 56 (1956)
\textsuperscript{11}Ibid at 62
judgment and commonsense of every individual. In a speech in the House of Lords in 1948, Lord Jowitt said that "to his mind there was only one possible justification of Capital Punishment - that its potency as a deterrent reduced the number of murders. He believed it did; he could not prove it; it must be matter of impression and one’s own personal opinion." Lord Brideman based his belief in the deterrent force of the penalty "more on what I think is my knowledge of human nature than anything else, and Bishop of Truro thought that on the value of the death penalty as a deterrent.... his own feelings were a surer guide than any statistics from other countries..... and he was sure that the death penalty would be a great deterrent to him if he were contemplating murder.

The death penalty is a deterrent to premeditated murders. The experience of law enforcement officers shows that many offenders do not carry weapons because of their fear of death penalty. Statistical studies on the effectiveness of the death penalty have been inconclusive, and are in any case, unimportant. The public views Capital Punishment as both deterrent and denunciation of those who have committed the most terrible crime.

Retentionists further argue that Capital Punishment is a deterrent. Taking a realistic view, so long as the society does not become more refined, death sentence has to be retained. The security of the society and the security of the individual liberty has to be borne in mind. Capital Punishment is a deterrent because the deterrent force of Capital Punishment affects the conscious thoughts of an individual. Most people will not commit a crime if they know they may be executed as a result: this is an outgrowth of man's instinct for self-preservation.

(e) Life Sentence Is Not An Alternative:

12 Ibid at 54
13 Supra note 10 at p.54
14 Ibid at 51-52
Abolitionists suggest life imprisonment as an alternative to Capital Punishment. But, Capital Punishment is less human than the proposed alternative of life imprisonment. If life sentence is substituted for death penalty, a man who has committed a crime for which he may be sentenced to life imprisonment would be as likely to commit other crimes because he would know that he was already subjected to the maximum penalty. The lifers may feel that they have nothing to lose\textsuperscript{16}. Some retentionists argue that lifers would often be released on parole and commit crimes. Thus, the protection of the society is at stake. Keeping the murderers, in the prison greatly complicates the work of prison administration. Life sentence is not an alternative. It is inadequate, because of the practice of early release\textsuperscript{17}.

(f) Capital Punishment Is More Humane:

Capital Punishment is more humane and painless than life imprisonment. Making a person to spend in jail throughout the remaining part of his life is more barbarous. Capital Punishment does not prolong the agony of the prisoner as imprisonment of life does. However, if Capital Punishment is to be abolished the life imprisonment should be implemented strictly. Staying behind the bars all alone- away from the family members till the life ends is more miserable than the death penalty.

(g) Studies Of Abolitionists Are Biased:

When Prof. Sellin conducted research in two adjacent states and concluded that both the states have similar rates of crime, Prof. Haag retorted observing that, "the fact that two states, one with Capital Punishment and the other without, have similar rates of crimes does not prove that there is no deterrent effect. Both the studies are based on assumptions. However, this lack of evidence for deterrence is not evidence for the lack of deterrence. It means deterrence has not been demonstrated satisfactorily - not that non-deterrence has\textsuperscript{18}.

\begin{footnotesize}
\textsuperscript{17} Law Commission of India: Thirty Fifth Report: (1967)
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All human beings fear the loss of their lives, even those, who may be suffering from major mental disturbances. The instinct of self-preservation is fundamental and threat of death, apprehended as such must have a powerful deterring influence on the voluntary direction of human activity. The claim that the death penalty itself decreed for the commission of a major crime, will not exercise a deterring influence on the great majority of potential criminals, contradicts one of the fundamental facts of human psychology.\textsuperscript{19}

Threat of the death penalty, plays an important role in forming and maintaining law-abiding self-image. The fear of death is the ultimate deterrent. Although the fear of long term incarceration is also a deterrent, there is a margin of increased deterrence present by the threat of death penalty.\textsuperscript{20}

(h) Miscarriage Of Justice Is Ruled Out:

The danger of miscarriage of justice is negligible under a well-oriented administration of criminal law. Mistakes are unlikely, the presence of judge at the trial and impartial review upon appeal provide adequate protection. Abolitionists show one or two instances. In the light of the existing safeguards of appellate review and the possibility of commutation, executing the innocent is unlikely. However, the modern judicial system has become so foolproof that the chances of an innocent person being hanged are extremely rare.\textsuperscript{21} Supreme Court and Government are there to look after such instances. However, one or two cases do not make history.\textsuperscript{22}

(i) Primacy Of Social Defense:

It is the surest method of eliminating the hopeless elements from the society. It is more dangerous to the society if it supports a criminal whose release means a perpetual peril and subsequent contamination and depredation. Garofalo says the Capital

\footnotesize{\begin{itemize}
\item \textsuperscript{21} Moin Qazi: Death Penalty : No Deterrence Against the Crime: Lex Et Juris: 16-17 (Aug, 1989)
\item \textsuperscript{22} Law Commission of India: 35\textsuperscript{th} Report
\end{itemize}}
Punishment satisfies the sense of justice and protection and relieves the society of the pernicious effect of those who resolutely and ceaselessly was upon it. Garofalo goes up to the extent of saying that it is the only means by which absolute elimination of irreparable or typical criminals can be eliminated. Capital Punishment is not only a threat to the offenders, but to those persons who are yet to have committed murder. If the offenders are not punished severely, criminals will think that they can get away with murder. According to Stephen hundreds and thousands abstain from murder, because they disregard Capital Punishment with horror.

The 35th Law Commission of India also expressed the same fear. A particular potent weapon is needed for dealing with the dangerous criminals and individuals not only for protecting the human life and cultural values but even to safeguard certain social property which is placed under the protection of law. Society must be protected from the risk of a second offence.

(j) Abolition Of Capital Punishment Is A Risk To The Officers:

Murderers after they came out of prison, pursue the man who got them convicted. Likewise there are numerous cases of prison inmates who have killed guards and other inmates, knowing that the worst punishment they could get would be continued tenancy in the same institution. Opponents of the death penalty usually resist even life sentence without parole, and the deterrent function of that would be even less effective than Capital Punishment.

(k) Capital Punishment Is More Economical:

Capital Punishment is least expensive. Public funds shall be saved. The death penalty is often defended on the ground that it is less expensive than life imprisonment. The per capital cost of imprisonment is about ten thousand dollars per year, and the life term

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may amount to an average of twenty years, making a total of two hundred thousand dollars.\textsuperscript{25}

\textbf{(l) Capital Punishment Prevents Murders:}

There is no other surest way to prevent crimes of violence and to reduce the number of professional criminals than implementation of Capital Punishment.

\textbf{(m) Many States Reintroduced Capital Punishment:}

In many countries capital Punishment is re-introduced. For example Brazil had abolished Capital Punishment in the year 1882 but reintroduced it in 1969. Argentina also had abolished Capital Punishment in 1921 and again in 1972 but reintroduced it in 1976.

\textbf{(n) Public Opinion Is In Favour Of Retention:}

In United Kingdom public opinion was in favour of abolition of Capital Punishment. In India majority of the citizens are for Capital Punishment.\textsuperscript{26}

\textbf{(o) Victims' Feelings Should Be Given Preference:}

Knowing that the law would not come to their rescue, or does not respect their feelings, victims may take law into their own hands. Execution avoids popular reactions. Thus, we can avoid lynching.

\textbf{(p) Capital Punishment Serves Atonement:}

Capital Punishment is the only just punishment, the only one capable of effacing an unpardonable crime.

\textbf{(q) Risk To The Innocents:}

Abolition means risking innocent lives. We must weigh the execution of the convicted murderer against the loss of his victims and of the possible victims of other potential murderers.

\textsuperscript{26} Supra Note 22
Arguments for Abolition

a) Religious, Moral And Ethical Grounds:

The abolitionists point to the fifth commandment in support of their argument. "Thou shall not kill" and to Christ’s appeal in the Sermon on the Mount. "Do good to those who hate you." Further, there is the case in the Bible of the murderer Cain, whose life was spared: and Church itself does not provide for the death penalty on its own canonical law.27

In Mahabharata also, Satyaketu, Dyumatsena's son was against Capital Punishment. He protested against the mass scale executions ordered by his father and argued that destruction of human life can never be justified on any ground28.

The sentiment and reasoning against Capital Punishment is found in Sukra, according to whom, this bad practice violates the Vedic injunction against taking any life, and should be replaced by imprisonment for life, if necessary and natural criminal should be transported to an island or fettered and made to repair public roads29.

Life is a precious gift of God. God, who gives the life, alone, has the right to take it back. This right should not be executed by any agency including judiciary. Taking life of the accused by way of death sentence deprives him from salvation (Nirvana or Moksha). The soul of the person who died unnatural death roams above unsatisfied.30

27 Supra Note 24
28 Mahabharata: Shanti Parva: Chapter CCLXVII, Verses- 4-13
29 Subhash C. Gupta: Capital Punishment In India: p. 21 (1986)
The Father of the Indian Nation Mahatma Gandhi also reiterated the same long back. "God alone can take life. Because, He alone gives it. Destruction of human life can never be an virtuous act."  

(b) Right To Life And The State:

Every individual is entitled to have his rights and each individual has a responsibility to protect those rights for all others. Life is a universal human right. To put off such a right by the State diminishes the basic concept of the dignity of the individual, and this dignity is an inalienable right.

While using the death penalty a State was not only exercising a right it was not entitled to possess, but also was engaging in a war against a citizen, whose destruction it believed to be necessary and useful. A similar view was expressed by the French Representative in United Nations Conference on Human Rights. "The Right to Life was the right of individuals. The State conferred no right; it had a duty to protect the life of citizens against anything which endanger it."

Professor Conrod reminds the duty of the State in his famous debate with Professor Haag. "Killing demean the State. Inevitably the State is a teacher, and when it kills it teaches vengeance and hatred. Murderers are not to be loved nor their acts be disregarded. But, in allowing them to live, the State reminds all citizens that no man is always and only a murderer.

However, the abolitionists strongly opine that it is morally wrong for the State to take human life. Conrod in his famous debate observes that "I must oppose Capital Punishment because I cannot accept killing as permissible action for any one, even a civil"
servant acting as an agent of the State. Killing demeans the State and a society that insists killing its murderers violates the precepts that it make it possible for us to live together\textsuperscript{36}.

\textbf{(c) Capital Punishment Is Barbarous:}

Capital Punishment is a cruelly callous investment by unsure and unkempt society in punitive dehumanization and cowardly strategy based on the horrendous superstition that cold-blooded human sacrifice by professional hangman engaged by the state will propitiate the Goddess of Justice to bless Mother Earth with crimeless society\textsuperscript{37}. Execution brutalizes those involved in the process. It brutalizes the human intellect.

Capital Punishment is injurious to human values: the act of execution is degrading for the crowd, the executioner, and the criminal, and its appeal is to basic instincts\textsuperscript{38}. The gallows is not only a machine of death but a symbol. It is the symbol of terror, cruelty and irreverence for life\textsuperscript{39}.

\textbf{(d) Capital Punishment Is Not Ethical:}

"... taking a human life, even with subtle rites and sanctions of law, is retributive barbarity and violent futility, travesty of dignity and violation of divinity, bankruptcy of deterrent dividends, revocation of correctional possibilities, myopically unscientific in that its focus is on the effect not the cause and its basis is macabrely devoid even of moral alibi".\textsuperscript{40}

\textsuperscript{36} Ibid at p. 8
\textsuperscript{37} Supra Note 31
\textsuperscript{38} Ibid at p.32
\textsuperscript{39} Arthur: Koestler: Reflections on Hanging (1956)
\textsuperscript{40} Supra Note 31
(e) Capital Punishment Is Inhuman:

Capital Punishment is inhuman and barbaric. Man is a wonderful creation of God. One cannot destroy it in the name of punishment. The physical pain caused by the action of killing a human being cannot be qualified. Nor can the psychological suffering caused by foreknowledge of death at the hands of the State. Whether a death sentence is carried out six minutes after a summary trial, six weeks after a mass trial or sixteen years after a lengthy legal proceedings, the person executed is subjected to uniquely cruel, inhuman and degrading treatment and punishment. It denies the value of human life.

A great reverence to human life is worth more than a thousand executions in prevention of murder: and is, in fact, the great security of human life. The law of Capital Punishment while pretending to support the reverence does in fact tends to destroy it. It is against the spirit of humanity. It brutalizes the human intellect.

There is a phrase in the early book of the Bible that runs something like this. "Ye shall make no slaves: for ye were slaves in Egypt." So, we might say "Ye shall be cruel to no man: for ye are men, and know what cruelty done unto you would mean."

"We are not discussing ideas of justice, retributive, retaliatory, or otherwise: we are merely claiming that Capital Punishment is abominably cruel, having taken for granted, I hope with objector's agreement, that abominable cruelty, deliberately inflicted on anyone, is in all circumstances inadmissible."

"Thou shall not kill" must penologically overpower "an eye for an eye". The authentic voice of the divinity and dignity of humanity, echoed in many national constitutions and now underscored in the Universal Declaration, has been that of Buddha and Gandhi.

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42 Gollanz: Capital Punishment: The Heart of the Matter: p.6 (1955)

43 Supra nOte 31 at p. 14
and not of Manu and Hammurabi. Beccaria and Bentham, not Bradely and Bosanquet are the torch bearers in this area\textsuperscript{44}. The extreme penalty's falsity and ferocity, its humanity and irreversibility, life's sanctity and society's safety and above all, finer criminology transformed by high consciousness, argue for Jesus and against Moses.” A deep reverence to human life is worth more than a thousand executions in the prevention of murder."

\textbf{(f) Retribution Is No Answer:}

Strict “Lex Talionis" was not practical even for the early Romans\textsuperscript{45}. Execution is no more than vengeance, and vengeance is not the aim of the justice. Justice no longer lies in retribution. It demands the criminal’s induction into a new social environment devoid of those circumstances that incited the criminal in him\textsuperscript{46}. However, the most conspicuous failure of retribution by death is seen in Capital murders committed by hired killers and their employers, who are rarely brought to the bar of justice. Retribution can hardly protect the society. The Legislative vengeance has adversely failed to cope with the present day biological and social problem\textsuperscript{47}. However, we may inflict harm as a means of denouncing violation of the law, but in doing so we have to set careful limitations on the harm we may inflict.

\textbf{(g) Capital Punishment Is Not Deterrent:}

British and Canadian White papers as well as the works undertaken by the European Council, the committee for the Prevention of Crime created by the United Nations and the European Parliament studies came to the conclusion," violent crime follows a curve that is a function of social and economic conditions and the evolution of the moral values of society at a given moment. It is unaffected by the existence or

\begin{itemize}
\item \textsuperscript{44} Ibid at p. 27
\item \textsuperscript{45} George Wilhelm Friedrich Hegel: The Philosophy of Right: (Translated by T.M. Knox) 72 (1942)
\item \textsuperscript{46} Moin Qazi: Death Penalty: No Deterrent Against the Crime: Lex Et Juris: pp. 16-17 (August, 1989)
\item \textsuperscript{47} Lehr Singh Mehta: Is Capital Punishment Justified? Pp. 103-105 AIR 1949; See also Nishant Jaiswal: Role of the Supreme Court with Regard to Right to Life and Personal Liberty: p. 166 (1979)
\end{itemize}
absence of Capital Punishment. In other words the death penalty does not reduce crime, nor does its abolition increase it."

A criminal does not expect to be caught, if caught to be convicted, if convicted to be the recipient of the maximum sentence, it is also true that criminals will not be deterred by the most severe sentence that may be imposed on them. Studies do not prove any deterrent effect\textsuperscript{48}.

Available information confirms that removal of Capital Punishment has never been followed by a notable rise in the incidence of the crime. In fact, theft, robbery, forgery, counterfeiting currency, infanticide which were punished with death in 19th Century decreased after partial abolition. In Greece, banditry decreased after it ceased to be punishable with death. The same thing with Canada in cases of rape. In England, there has been since 1957 no increase in the crimes which ceased to be capital murders under the Homicide Act of that year. Yugoslavia shares this experience. Arizona, Colorado, Kansas of United States and in Queensland of Australia where Capital Punishment was reintroduced after a period of abolition crime did not decrease. In Argentina Capital Punishment was abolished in 1922. Yet, despite the constant increase in population, the number of murders of the kind previously punishable with death declined steadily in the decade which followed\textsuperscript{49}.

The authorities on death penalty like Sellin, Isenberg and do not accept the deterrent theory. "There is no evidence that the abolition of death penalty generally causes an increase in criminal homicides or that its re-introduction is followed by a decline\textsuperscript{50}. "...."the presence of death penalty - in law as in practice does not influence homicide death rates....the death penalty as we use it exercises no influence on the extent of fluctuating rate of capital crime. It has failed as a deterrent.\textsuperscript{51}

\textsuperscript{48} Supra Note. 31 at p. 27

\textsuperscript{49} Capital Punishment : UN Publication: p. 54 (1962)
\textsuperscript{50} Sellin T: Experiments with Abolition of Capital Punishment: p. 124 (1967)
\textsuperscript{51} Sellin T: Homicides in Retentionist and Abolitionist States in Capital Punishment: p. 136 (1967)
(h) Capital Punishment Vis-À-Vis The Family Of The Victim:

Killing one offender means killing not only a particular offender, but killing his wife, children and parents also. The loss suffered by the victim's family is a legitimate concern of the State, but it should be dealt with through economic support rather than the perpetrating vengeance. Because, the victim's grief does not command that society should put the offender to death. The march of justice over the centuries has been to overcome private vengeance. How can we do this without first rejecting the law of an eye for an eye?\textsuperscript{52}

(i) CAPITAL PUNISHMENT IS DEGRADING AND FUTILE:

Punishment for death is degrading after all. If the current standards of review over imposition of death penalty are insufficient, the death penalty should be banned. It is futile to attempt to reconcile in one’s mind the abstract justification of death penalty jurisprudence with the pain and suffering of a murder victim. Law cheats morality.

Murder and Capital Punishment are not opposites that cancel one another, but similar that breed their kind, when the State itself kills, the mandate "thou shall not kill" looses the force of the absolute.

A significant percentage of death-row inmates request the death penalty rather than exhaust their appeals, thereby indicating the desirability of death over imprisonment. The inmates who choose death may simply desire to put an end to the waiting involved. In other words, the inmates might prefer the certainty of immediate death rather than continue to experience anguish through the appeals process while waiting on death row. Most murderers perceive life imprisonment as more severe than the death penalty\textsuperscript{53}.

(j) Capital Punishment And The Likelihood Of Uncertainty:

\textsuperscript{52} Supra Note: 47
\textsuperscript{53} Deserts and Death: Limits on Maximum Punishment: B.S. Pollock; Rutges Law Review: vol. 44 (Summer, 1992)
In A Public Opinion Survey, 60% Of Death Penalty Proponents stated that as jurors they would require "much more" or some what more” evidence in order to convict if the penalty would be death. Of those opposed to the death penalty, 40% stated that they would never vote to convict if they knew that the penalty would be death. Consequently, the use of death penalty might result in an increase in the acquittal of murderers and therefore, lead to more lives lost at the hands of those acquitted murderers who kill again.

(k) Life Imprisonment Is A Good Alternative:

It is far from clear that life imprisonment may, in fact, perform the punishment better than the death penalty. Prisoners convicted for murder are no more likely to commit violent acts while imprisoned, than other types of prisoners.

(l) Irreversible Error May Result In Capital Punishment:

Although it is impossible to determine the exact percentage of defendants executed wrongfully, one study indicates that a significant number exists. Certainly our criminal justice system is filled with errors. Jurors can err in their findings of fact. Judges can err in their legal determinations and in the exercise of discretion. Witnesses can err in their recall. Lawyers can err in their strategy. These imperfections can alone, without a system of perfect review, serve as the basis of a strong argument against the use of the death penalty.

Joseph Regan's reprieve arrived two minutes too late; Rush Griffin was hanged, but nonetheless, papers requiring a stay of his execution were delivered to the courts three days later; and an order by the governor requiring the stay of the execution of Burton Abbot reached the warden just after the pellets of the gas chamber were dropped. Fortunately for Charles Stielow and William Wellman, their reprieves arrived in time,

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55 Supra 53 at pp.1006-07
although they were both already strapped into the electric chair. A wrongfully convicted offender sentenced to life imprisonment can hope, each day of his or her natural life, for justice to be done. Like wise, no wrongful sentence in terms of years matches the injustice of a wrongful sentence of death. The risk of judicial error should suffice to ban the death penalty.

(m) Capital Punishment And Biased Jury:

Inability of jurors to deliver unbiased results is a problem detected by a leading empirical study completed over two decades ago. More recent evidence suggests that at times juries still convict or sentence offenders based on race or social status rather than on the proof of harm and culpability. Biased verdicts do result. In the infamous Chessman's case among twelve jury members eleven were women, whose verdict naturally went against him, because he was charged with the offence of attempted rape. The conviction depends upon the choice of the judges, the respective abilities of the lawyers and prosecutors. Isn’t it true that for identical crimes, some criminals may be punished by death and others escape Scot free? When the life of a man is at stake, this judicial lottery is morally intolerable.

Law gives to the judge the sovereign power to decide the fate of another human. Not only must they decide the guilt or innocence with all the risks of the error inherent in such a decision, but they can also decide whether this human is to live or to die. Such absolute power is not acceptable in a democracy.

(n) Power Of Commutation In Capital Punishment Cases:

The same is true of the power to commute. Such a power implies that one person may, according to his whim, halt the execution or allow it to proceed, without answering to

56 Ibid at 1007
57 Ibid at 1008
58 Moin Qazi: Death Penalty: No Deterrent Against the Crime: Lex Et Juris; pp. 16-17 ( August, 1989)
59 Ibid
60 Ibid
anyone. This right of life or death granted to one man is the survival of another age of another political system, a throwback to the period when the right to pardon had its basis in the sacred aura of the monarch. In a democracy, no man, no power, can hold the right of life or death over another person.61

(o) Revocability Is Impossible:

"... miscarriage of justice through judicial error, minimal may be, cannot be ruled out62." 
"...if Capital Punishment eliminates the guilty it also eliminates the chance of correcting judicial errors imposed on the innocent.63" Former Home Secretary, Mr. Chuter Ede, who in 1950 had refused to reprieve Timothy John Evans frankly admitted that "Evan's Case shows ... that a mistake was possible, and that, in the form in which the verdict was actually given on a particular case, a mistake was made. I hope no future Home Secretary will ever have to feel that although he did his best he sent a man to the gallows who was not guilty as charged". As long as the death penalty remains, such irremediable errors of justice can never be altogether excluded.

(p) Death Penalty Is A Lazy Answer:

To fancy comfortably that Capital sentence is a sovereign remedy for the criminal syndrome afflicting the current complex society is a somber confusion about social defense, a guilty ignorance about executioner's impotence and jural farewell to advancing human rights and civilized meanings64.

This extreme penalty, an amalgamation of collective vengeance, and deterrence, has scientifically lost its penological purpose particularly in the context of traditional crimes and is functionally non-utilitarian. At global level it has claimed numerous

61 Ibid
62 Krishna Iyer.J. “Death Sentencw on Death Sentence” The Indian Advocate: Journal of the Bar Associate of India: VXVIII 34 (Jan-June, 1978)
63 Ibid at 32
64 Ibid
outstanding and socially significant lives and it still continues particularly in the third world countries where the governments are dictatorially hysterical and lethargic.

To be precise, if murder by an individual or a group of individuals is undesirable, how could it be justified if committed by the state or body politic.

In any case the test by which rightfulness of Capital Punishment must be judged is not only its immediate success or failure in deterring potential murders, but its long-term influence on the conscience of the community.65

(q) Capital Punishment Does Not Serve The Purpose Of Social Defense:

Death Penalty, as violation of fundamental human rights, would be wrong even if could be shown that it uniquely met a social need. Anyway, it has never been shown to have any special power to meet any genuine social need66. However, there is no indication that people who have committed capital crimes are more likely to commit other crimes. Many who commit repeated capital crimes are adjudged legally insane and are not executed even in Capital Punishment jurisdiction. Surveys reveal that murderers are the best behaved persons.

(r) Capital Punishment Is Discriminatory:

Most of the condemned persons are poor men, perfunctorily defended in court by appointed counsel. Many were Blacks, Chicanos or Indians. Death Penalty is imposed more frequently on the poor, the ignorant and the minorities. Even though women commit about one of every seven murders (in the United States) of the 3,298 people executed for murder from 1930 through 1962, only 30 were women. In the same period 446 were executed for rape. Of these 45 were Whites, 399 Negroes and 2 American Indians. If Capital Punishment is not uniformly applied it should be abolished. It is unlikely that any

65 Walter Moberley: The Ethics of Punishment: (1968)
66 Supra Note 41 at p.5
future application of death penalty would be non-discriminatory. It is clear that it has been highly discriminatory in the past.67

"Do remember that the blow of Capital punishment often falls on the socially, mentally and economically backward, on the brave revolutionaries, and patriotic dissenters, on the derelicts, and desperates, on the lowliest and lost and on those who have turned delinquent because society, by its continued maltreatment, cultural perversion and environmental pollution has made them so. The villain of the peace, in the large view, is psychopathic society itself, the victims are so called criminals and the other sufferers of crime68. It is disproportionately imposed upon the poor, the Negro and the unpopular. The same view was expressed by Justice Douglas in the case of Furman." It is the poor, the sick, the ignorant, the powerless and the hated that are executed."

Krishna Iyer adds to this list the harijan, the woman, the worker or the illiterate. Over the periods the Capital Punishment is imposed on the poor, not on the rich, on pariah, not on the Brahmin, on the black not on white, on the underdog, not on the top dog, the woman not the man, the dissenter not on the conformist. It is class biased and colour biased. Criminal barks at both but bites only the poor. That is why white collar criminals, adulterers, smugglers are not imposed capital Punishment.69 In country after country it is used disproportionately against the poor or against the racial or ethnic minorities70. It destroys only the sinner not the sin.

(s) **Capital Punishment Rules Out The Possibility Of Reformation:**

Every saint has a past and every sinner a future. Never write off the man wearing the criminal attire but remove the dangerous degeneracy in him, restore retarded human potential by holistic healing of his fevered, fatigued or frustrated inside and by repairing the repressive, though hidden, injustice of the social order which is

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67 Lee H. Bowker; Corrections: The Science and Art: p.97 (1982)  
68 Supra Note 62 at p.29  
69 Ibid  
70 Sellin T: A Useful Book on Capital Punishment: p. 479 (1967) See also Supra Note 41 at p.1
vicariously guilty of the criminal behavior of many innocent convicts. Law must raise with life and jurisprudence respond to humanism\textsuperscript{71}.[221]

Human nature is complex and acts not by fear alone but by love, loyalty, greed, lust and many other factors. However, individuals do not think death penalty before they act. Social scientists and public policy makers must search for ways that will reduce the inclination of men and women to commit crimes\textsuperscript{72}. However, efficient police officer does more work than an executioner. Criminologists and Penologists now teach that it is less important to strike blindly than to reform thoughtfully.\textsuperscript{73}

**(t) Many States Abolished Capital Punishment:**

In a large number of countries in the world where the murder rate is higher than in India, the death penalty has been abolished. In most Latin American Countries, in Argentina, Brazil, Colombia, Costa Rica, Ecuador, Mexico, Panama, Peru and Uruguay, Venezuela, in European countries, in Australia, Belgium, Denmark, Germany, Italy, Netherlands, Norway, Sweden and Switzerland, in Iceland, in Israel, in many Australian States and in many of the States in the United States of America, death sentence has been abolished.

**Conclusion:**

Sanction is an essential ingredient of law. Punishment is a social custom and institutions are established to award punishment, after following criminal justice process. Governments prohibit taking life, liberty or property of others and specify the punishments, threaten those who break the law. Criminologists hold the view that certainty of punishment is more important than the severity. However, punishment shall prevent crime, it shall sustain the morale of conformists and it shall reform the offender at the same time.

\textsuperscript{71} Supra Note: 62 at p.28
\textsuperscript{72} Earnest Van Den Haag and John P. Conrod: The Death Penalty: A Debate: p. 125 (1983)
\textsuperscript{73} Marc Ancel: The Problem of Death Penalty: ;(Ed. Sellin T: )p.17 (1967)
Of the theories of punishment namely, retributive, deterrent, preventive and reformative, the first two theories, being the philosophies of classical and neo-classical schools advocate the retention of Capital Punishment. While the last viz., reformative theory, the product of positive school is against the death penalty. Retributionists argue that death will satisfy the public and keep them away from taking the law into their hands. Deterrent theory suggests that punishment is designed not to take revenge but to terrorize the future offenders, thus explaining the necessity of carrying out the execution of the offender. Preventive theory which is known as incapacititative theory also, is a two edged weapon used for arguments of retentionists as well as abolitionists. Reformative theory which used mass methods to reform the criminals in the last century resorted to individual treatment, in the present century. This theory advocates that punishing the offender is as good or as bad as punishing a cancer patient. It serves no good.

The retentionists interpret the retributive and deterrent theories in such a way to suit their arguments. They advocate the retention of Capital Punishment on moral, ethical and religious grounds. Abolitionists argue on the other hand in favour of abolition on the same grounds as that of retentionists.