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Capital Punishment and the 'Acnestis' of its Modern Reformation

*by Sudarsanan Sivakumar**

I. Introduction

The term "Capital Punishment" encompasses any penalizing punishment that results in the death of people accused of committing a crime.[1] This damnation dates back to the Eighteenth Century B.C. in the "Code of Hammurabi," a misemployed code that ensured the death penalty for twenty-five distinct crimes. People convicted of crimes were made to suffer for their actions in horrific ways, including being burnt alive and drowning.[2] Since then, death by hanging has been the conventional method for capital punishment in most of the world .

On the other hand, the reformative theory of punishment asserts that the object of the prison reform system ought to be the transformation of the persons convicted of a crime.[3] The reformative theory depends on the humanistic rule that regardless of whether convicted persons perpetrate wrongdoing, they do not stop being people.[4] The punishment is curative and leads to reformation. The application of capital punishment that is retributive in nature is the contraposition of the meaning and spirit of the reformative theory.

Countries like India, the United Kingdom. and the United States have unique legal approaches to dealing with capital punishment litigation. Although the fundamental law is the same, the "red tape" around each country's bureaucratic procedure is specific to that country. A common approach may not always be the right approach for each country to follow. However, a reformed approach is always preferred. Based on each state's existing legal superstructure, a hybrid reformed approach should be implemented. However, the death penalty should be treated differently from other forms of punishment. In *Gregg v. Georgia*, the U.S. Supreme Court set a constitutional floor for the imposition of the death penalty, which cannot be "random or arbitrary."[5] The U.S. Congress enacted the Federal Death Penalty Act in response, setting out procedural requirements aiming to prevent arbitrary imposition of the death penalty.[6] States are permitted to set a higher floor than the Supreme Court established through their own criminal codes, and many states have abolished it outright.[7]

By examining how the death penalty impacts people convicted of crimes and society, this Article suggests a more progressive reformative system that can replace the barbaric notion of capital punishment, protect society, and integrate people accused of crimes back into society.

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1 *Capital Punishment*, Merriam-Webster, https://www.merriam-webster.com/dictionary/capital%20punishment (last visited Nov. 7, 2022).
2 L.W. King, *The Code of Hammurabi*, Yale L. Sch., https://avalon.law.yale.edu/ancient/hamframe.asp (last visited Nov. 17, 2022) (this code is a compilation of three hundred laws that were recognized during the Mesopotamian era).
3 *Why Promote Prison Reform?*, U.N. Off. on Drugs and Crime, https://www.unodc.org/unodc/en/justice-and-prison-reform/prison-reform-and-alternatives-to-imprisonment.html (last visited Nov. 7, 2022).
4 *Id.*; *See also* Arnold S. Kaufman, *The Reform Theory of Punishment*, 71 Univ. Chi. Press 49 (1960).
5 *Gregg v. Georgia*, 428 U.S. 153, 206 (1976).
6 18 U.S.C. 3593 (2002).
7 *State by State Map*, Death Penalty Info. Ctr. (2021), https://deathpenaltyinfo.org/state-and-federal-info/state-by-state.

II. The Paradigm Shift of Capital Punishment

The death penalty in the United States has followed a series of ebbs and flows of abolishment and reinstatement.[8] States like New York, Vermont, and Washington have suspended the death penalty through legislation and procedure or have revoked and abolished it altogether.[9] Yet, the death penalty remains active in twenty-three states in the United States.[10] The federal government, acting as the bulwark against crime in society, is motivated to keep aggravated crimes under check. New policies and laws enacted by executive orders and administrative orders reflect an upward trend toward bringing crime under control. However, capital punishment still applies to some instances of aggravated murder, and rarely to protect the community. A total of eighteen executions occurred in 2022 and a handful of other people have pending death warrants in the United States.[11]

A reformative move to abolish the death penalty might cause concern of an increase in crime. However, the supposed deterrent effect of capital punishment has been widely studied in the United States using a range of sophisticated statistical methods. A report published by the National Research Council of the National Academies reasoned that studies professing a deterrent effect on murder rates from the death penalty are fundamentally flawed.[12] The report stated that:

> [t]he committee concludes that research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide. Consequently, claims that research demonstrates that capital punishment decreases or increases the homicide rate by a specified amount or has no effect on the homicide rate should not influence policy judgments about capital punishment.[13]

However, the execution of Earnest Lee Johnson, a cognitively disabled man, by lethal injection leaves a bad aftertaste.[14] It is immoral to kill someone, yet it is also immoral to order a person's execution. The law is *Fictio legis neminem leadit* (fiction in law does not injure anyone) and should only work to mend and reform people who committed crimes.[15] However, when an individual takes the life of another, some states retain the right to take the life of the person who committed the killing; this is where an ambiguity exists. *Nec veniam laeso numine casus habet* (Where blood is spilled, the case is unpardonable). [16]

8 *See generally*, *Death Penalty Fast Facts*, CNN (Aug. 16, 2022, 1:23 PM), https://www.cnn.com/2013/07/19/us/death-penalty-fast-facts/index.html#:~:text=According%20to%20the%20Death%20Penalty,as%20of%20January%201%2C%202022 (outlining the evolution of the death penalty in the United States).
9 *Death Penalty States 2022*, World Population Rev., https://worldpopulationreview.com/state-rankings/death-penalty-states (last visited Nov. 21, 2022).
10 *Id.*
11 *Execution List 2022*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/executions/upcoming-executions. (last updated Dec. 14, 2022).
12 Deterrence and the Death Penalty, 15-26 (Daniel S. Nagin & John V. Peppers eds., 2012).
13 *Id.* at 2.
14 *See generally Johnson v. Blair*, 142 S. Ct. 2856 (2021) (cert. denied); Kim Bellware, *Missouri Executes Man Whose Advocates Say had Intellectual Disabilities*, Wash. Post (Oct. 5, 2021), https://www.washingtonpost.com/nation/2021/10/05/ernest-lee-johnson-execution/ (stating that Johnson requested to be executed by firing squad rather than lethal injection because he had a condition that caused painful seizures).
15 *Fictio Legis Neminem Laedit Law and Legal Definition*, U.S. Legal, https://definitions.uslegal.com/f/fictio-legis-neminem-laedit/ (last visited Nov. 7, 2022).
16 *Nec veniam effuse sanguine, casus habet*, Acad. dictionaries & encyclopedias, https://ballentine.en-academic.com/25478/Nec_veniam_effuso_sanguine%2C_casus_habet (last visited Nov. 7, 2022).

The crux of the reformative theory is that all crime is a manifestation of sickness, and the person who committed the crime must be subjected to a therapeutic approach.[17] The animus of revenge cannot be the correct motive behind the penal code of a country. Subjecting a person who committed murder to the death penalty cannot lessen the grief and anguish felt by the family and friends of the victim. The disease of crime should be cured with the apparatus of imprisonment or rehabilitation, as there is no positive outcome from death. Any act to cause death by a person or state will never be within the framework of natural justice. Capital punishment lowers society's standard, and "[w]hen society exacts this penalty, it acts on the same level as the murderer himself."[18] Nevertheless, punishment is also essential to safeguard society, so "the court shall impose a sentence sufficient, but not greater than necessary" as mandated by U.S law.[19]

Some argue that retributivism and *lex talionis* (an eye for an eye) justify and require the death penalty.[20] However, *la ley favour la vie d'un home* (the law will always favor a man's life and not his death).[21] There is a certain sanctity to human life and as "an eye for an eye leaves the whole world blind," sentencing convicted peoples to alternative punishments, rather than the death penalty reduces harm to both defendants and their families.[22] It is within the realm of possibility to mend a person who committed a crime into a legal religieux with a sophisticated set of reformation techniques.

17 Amit Bindal, *Rethinking Theoretical Foundations of Retributive Theory of Punishment*, 51 J. Indian L. Inst. 307, 336 (2009).
18 HC Deb (16 Dec. 1969) (793) cols. 1148-297 (Gr. Brit.).
19 Imposition of a Sentence, 18 U.S.C. § 3553 (2018).
20 *Lex talionis*, dictionary.com, https://www.dictionary.com/browse/lex-talionis (last visited Nov. 7, 2022).
21 *La ley favour la vie d'un home*, Acad. dictionaries & encyclopedias, https://blacks_law.en-academic.com/33388/la_ley_favour_la_vie_d%27un_home (last visited Nov. 7, 2022).
22 *The Case Against the Death Penalty*, ACLU, https://www.aclu.org/other/case-against-death-penalty (last visited Nov. 7, 2022); *Effects of Sentencing Alternatives*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/policy-issues/sentencing-alternatives/effects-of-sentencing-alternatives (last visited Nov. 18, 2022).

Gandhi famously said that "[I]n matters of conscience, the law of the majority has no place."[23] Today's society has built a great sense of compassion and morality in favor of reforming the criminal justice system to impose capital punishment only in the *"rarest of rare cases"* set by constitutional standards. The opportunity of identifying people who committed crimes who can be reformed would truly usher the legal sphere into a more reformed, liberal, and empathetic system.

III. The Position of Law and Its Role in Reforming Capital Punishment

In India, the Supreme Court restricted the death sentence to its doctrine called the "rarest of rare cases" in the landmark case of *Bachan Singh v. The State of Punjab.*[24] The Court held that the death penalty must be imposed only in the "gravest cases of extreme culpability."[25] The penal provisions of other former colonial countries like India, which finds its origin in the legal system left by the British, still uphold the death penalty as constitutional.[26] Conversely, the United Kingdom abolished the death penalty with the Murder (Abolition of Death Penalty) Act 1965 enacted by the U.K. Parliament.[27] In its stead, the United Kingdom replaced the death with imprisonment for life: "[n]o person shall suffer death for murder, and a person convicted of murder shall . . . be sentenced to imprisonment for life."[28]

India follows the legal footprint left by the British and should also lend an ear to enlightened penal reformers like Sydney Silverman MP. The Labour Party acted in a conducive manner by embedding

23 Mahatma Gandhi, *The Congress and Non Co-Operation*, Young India (Aug. 8, 1920), http://www.gandhiashramsevagram.org/gandhi-literature/mahatma-gandhi-collected-works-volume-21.pdf (available on page 114).
24 *Bachan Singh v. The State of Punjab*, (1982) 3 SCC 24 (India).
25 *Id.*
26 *Id.*
27 Murder (Abolition of Death Penalty) Act 1965, c.71 (Eng.).
28 *Id.*

abolitionism in its political agenda.[29] In 1927, the Labour Party took an abolitionist stance in its *Manifesto on Capital Punishment*.[30] The Indian legislature must notice that there is no room for retributive capital punishment if humanity has to move into an era of peace and harmony. Immanuel Kant famously de-constructed the retributive theory stating that it is solely concerned with redeeming negative morality.[31] For countries like India that still need to apply capital punishment to their legal playbook to ensure the protection of society, this application cannot fall on the bedrock of revenge. Judge Trivedi stated in *Mohd. Firoz v. State of Madhya Pradesh* that

> [*T*]*he maximum punishment prescribed may not always be the determinative factor for repairing the crippled psyche of the offender. Hence, while balancing the scales of retributive justice and restorative justice, we deem it appropriate to impose upon the accused, the sentence of imprisonment for a period of twenty years instead of imprisonment for the remainder of his natural life for the offence under Section 376 IPC.*[32]

The court further added that any appropriation of compassion towards the accused would amount to a gross miscarriage of justice, however it was bought to the attention of the Indian Supreme Court that this particular incident did not amount to the *"rarest of the rare"* clause.[33]

The Supreme Court of the United States held in *Gregg v. Georgia* that the death penalty does not violate the Eighth and Fourteenth Amendments per se but should be applied under sentencing procedures to prevent capricious or indiscriminate application.[34] Justice Stewart opined that there would only be chaos and anarchy in a society that believed that the criminal justice system is soft on crime.[35] However, the decisions following *Gregg* ensured that the "administration of the death penalty would be, at least, extremely cumbersome."[36] It is, therefore, necessary to identify individuals who can be reformed using reformative techniques.

IV. Implementation of a 'Reformed' Legal System

Even though abolishing the death penalty may lead to a more "permissive" society, life imprisonment by itself is as harsh as a death sentence. The element of suffering is more than a quick death. Individuals who repeatedly commit crimes might never be reformed, but they can be imprisoned for life. The notion here is to identify whether the person convicted of a crime has committed other crimes and to impose the punishment based on the severity of the crimes committed.[37] People wrongly accused and people convicted of their first-time offense can still have another shot at life by applying the reformation theory. A wrongly accused person need not be crucified for the sins of another. It is better for the judicial system of a country not to err while handing down the sentence. Employing the latest legal tools and technology, people who committed a crime could be more appropriately reformed after identifying the number, frequency, and culpability of

29 Lizzie Seal, Capital Punishment in Twentieth Century Britain 17 (Routledge ed., 1st ed. 2015).
30 Judith Rowbotham, Histories of Crime: Britain 1600-2000 186 (Anne-Marie Kilday et al. eds., 2010).
31 Amit Bindal, *Rethinking Theoretical Foundations of Retributive Theory of Punishment*, 51 J. Indian L. Inst. 307, 316 (2009).
32 *Mohd Firoz v. State of Madhya Pradesh*, 2022 SC 1967 (India); Central Government Act, 1860, § 376 (IPC) (India).
33 *Bachan Singh v. State of Punjab*, (1982) 3 SCC 24 (India).
34 *Gregg v. Georgia*, 428 U.S. 153, 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 285 (1976); *but see Furman v. Georgia*, (holding three years earlier that capital punishment is deemed 'cruel & unusual punishment' in violation of the the Eighth and Fourteenth Amendments).
35 *Gregg v. Georgia*, 428 U.S. 153, 153 (1976).
36 Jeremy Rabkin, *Justice and Judicial Hand-Wringing: The Death Penalty since Gregg*, 4 Crim. Just. Ethics 18, 25 (1985).
37 *Woodson v. North Carolina*, 428 U.S. 280, 280 (1976) (interpreting the "respect for human dignity underlying the Eighth Amendment" to require individualized considerations of the offense and offender).

crimes committed.[38] People who committed crimes could be sentenced to permanent detention with a clause of re-establishing oneself back into society if the therapeutic education and practice remove the disease of crime.[39] By enabling such a legal system, wrongly accused people will not lose their lives until new evidence comes to light that proves their innocence beyond a reasonable doubt.

The U.S. Supreme Court recently decided in *Montgomery v. Louisiana* that the states shall not impose the death penalty and mandatory life without parole sentences in cases with juvenile offenders.[40] The Court considered the ruling given in *Miller v. Alabama*,which upheld the principle of a new substantive rule of constitutional law, that a juvenile who commits homicide cannot be sentenced to life without parole without first considering the juvenile's special circumstances.[41] This decision created an opportunity to educate and rehabilitate juveniles. The possibility that incarceration can reform a young person is higher than the possibility that an adult can be, as the juvenile brain is still developing and impressionable.[42] As long as the youth does not pose any serious threat, social sciences, scientific techniques, and psychology can be applied to cure the youth that committed a crime.[43] The progress and advancements made in the U.S. legal system can be applied by other countries to their own capital punishment litigation.

Article 21 of the Indian Constitution, states that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law."[44] This provision shields '"human dignity." Nevertheless, even if a life can be deprived by a procedure established by law, taking another's life is against the postulate of natural justice if it is done on the pretext of revenge. The Indian legal system, the egg of Columbus of the British Judicial Sphere, should try to ensure that the same expression of abolition is followed in its most sovereign book of law. It should remove capital punishment from its penal code and entomb the reformative theory of punishment in its stead. However, since many countries still carry out the death sentence, standards must be set before an abolition can occur for good. The "rarest of the rare" doctrine established in *Bachan Singh v. The State of Punjab*[45] by the Supreme Court of India can be adopted by other countries still practicing the death penalty. Standards can be set by the judicial systems of such countries, which include the requirement that capital punishment only be carried out pursuant to a final judgment by an independent and impartial court after legal proceedings complying with international standards. Anyone suspected or charged with a crime for which capital punishment may be imposed should have the right to adequate legal assistance throughout the proceedings. Additionally, a consular representative can be contacted where necessary. Other international standards include the right to a fair trial, the right to appeal, and the right to seek a pardon or commutation.[46] Because there is no proof that capital punishment decreases crime, there is no viable argument against safeguarding the human

38 *See generally* Lila Kazemian, Pathways to Desistance From Crime Among Juveniles and Adults: Applications to Criminal Justice Policy and Practice 1 (Nt'l Inst. Just. ed., 2021); *Prison Reform: Reducing Recidivism by Strengthening the Fedearl Bureau of Prisons*, U.S. Dep't Just., https://www.justice.gov/archives/prison-reform (last visited Nov. 21, 2022).

39 *See generally* Introductory Handbook on The Prevention of Recidivism and the Social Reintegration of Offenders 1 (U.N. Off. On Drugs and Crim. ed. 2018); *but see* Rebecca Tan & Ovetta Wiggins, *They Were Sentenced to Life in Prison. Who Could Decide If They Get a Second Chance?*, Wash. Post (Jan. 28, 2022, 8:00 AM), https://www.washingtonpost.com/dc-md-va/2022/01/28/maryland-parole-life-criminal-justice-politics/.

40 *Montgomery v. Louisiana*, 136 S. Ct. 718, 718 (2016).

41 *Miller v. Alabama*, 567 U.S 460, 460 (2012).

42 *Id.* at 471 (citing *Roper v. Simmons*, 543 U.S. 551 (2005) and *Graham v. Florida*, 560 U.S. 48 (2010)).

43 *See Roper v. Simmons*, 543 U.S. 551 (2005)

44 India Const. art. 21.

45 *See Bachan Singh v. State of Punjab*, (1982) 1 SR 145, 152 (India) (finding that for those convicted of murder, life imprisonment is the rule for which the death penalty is the exception applicable only in "the rarest of rare" cases).

46 *See* Economic and Social Council, Res. 1984/50, annex, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, at 33 (May 25, 1984), http://www.consilium.europa.eu/uedocs/cmsUpload/10015.en08.pdf.

rights of those accused of crimes..[47] Though safety is important, the government should ensure that safety is accorded to society when it rehabilitates a person who committed a crime.

The promotion of human rights and democracy around the world is of great importance. When there is the abolition of the death sentence, a pathway opens for applying the idea of a reformative concept of punishment. Support for reformation found its way in *Narotam Singh v. The State of Punjab,* where the Supreme Court of India took the view that the "[r]eformative approach to punishment should be the object of criminal law, in order to promote rehabilitation without offending community conscience and to secure social justice.[48] So, the Indian apex court has endorsed the use of reformative techniques provided that they are done in a manner that protects society's integrity and safety.

V. The Anathema

Understanding the United Kingdom's position on abolition, judicial systems around the world can follow suit. Very soon, many other countries can abolish capital punishment. In spite of having a federal superstructure with different states having their own legal procedure, the United States of America is taking steps toward abolishing capital punishment, thanks to a series of federal judicial decisions that made the federal government take a softer stance towards capital punishment.[49] Now more than ever, India and the United States lean toward reformative practices. Where reformation is possible, it must be exercised, and rehabilitation must increase the safety of the public. Retributive capital punishment is *quae solum deum habent ultorem* (Crimes, which can only be punished by God).[50] No man has the right to take the life of another man even, in retaliation.

VI. Conclusion

The world is changing, and so should the law. The functions of punishment should deter and ameliorate. Gone are the times when the law acted as a tyrant. The law is now a well-meaning system that places safeguarding human rights as its priority. Criminal procedure and penal codes must adhere to the changing times and work with the reformative theory to rehabilitate people who committed crimes. There are several ways countries can enforce a reformative theory in their penal codes, such as abolishing the death penalty as the United Kingdom did,[51] adopting the "rarest of the rare" case doctrine from India,[52] or enabling preventive criminal procedures like the United States of America.[53]

47 *See* National Research Council, Deterrence and the Death Penalty 1 (Daniel S. Nagin & John V. Pepper eds., 2012) (concluding that research to date is not informative on whether capital punishment has any positive or negative effect on homicide rates).

48 *See Narotam Singh v. The State of Punjab*, AIR 1978 SC 1542 (India).

49 *See, e.g., Gregg v. Georgia*, 428 U.S. 157, 187 (1976) (finding that although capital punishment is suitable to extreme crimes, a penalty for a crime cannot be disproportionate to the crime involved); *Furman v. Georgia*, 408 U.S. 238, 271-79 (1972) (Brennan, J., concurring) (interpreting the Cruel and Unusual Punishment Clause to require the imposition of capital punishment not be arbitrary, unacceptable to contemporary society, or degrading to the dignity of human life); *Miller v. Alabama*, 567 U.S. 460, 477-80 (2012) (holding that mandatory life-without-parole sentencing schemes are unconstitutional when imposed on juvenile offenders given their transient immaturity).

50 *Quae solum deum habent ultorem*, Wharton's Concise Law Dictionary (15th ed. 2009).

51 *See* Murder (Abolition of Death Penalty) Act 1965, c.71, s.1 (Eng.).

52 *See Bachan Singh v. State of Punjab*, (1982) 1 SR 145, 152 (India).

53 *See* Imposition of a Sentence, 18 U.S.C.A. § 3553 (2018) (describing several factors to be considered in imposing a sentence, including the needs of the defendant and society at large, in order to remain within the Sentencing Commission guidelines absent an aggravating circumstance).