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## UNIT 9 CAPITAL PUNISHMENT\*

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### Structure

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### 9.0 OBJECTIVES

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- The unit on capital punishment is going to acquaint the students with the concept of death penalty or capital punishment.
- The unit will look at the definition of the term apart from its origins and arguments presented in support and against it.

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### 9.1 INTRODUCTION

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Punishment involves deliberately inflicting one or another form of suffering on person or persons who have committed a crime. In other words, punishment involves application of some stringent measures against those who have violated the legal code of the state, country, etc. where they reside. Punishment involves use of methods that would be ordinarily questioned as violating the dignity of the individual. Thus, punishment basically involves explaining why such a behaviour against the violator is permissible.

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Punishment can take many different forms and the methods involved in punishing the perpetrator may vary from country to country or region to region. The different ways in which a perpetrator can be punished may involve imprisonment, torture, fining, banning, seizing property, home imprisonment and even death penalty or capital punishment. All these are ways of denying freedom or restraining the freedom of the perpetrator or the criminal. All these methods of punishment can be justified only if they are backed by sound reasons that are justifiable in a court of law or any other arrangement that is binding on the parties.

Often times, punishment has been supported by two reasons:

- 1- The person who committed the crime is made to suffer for the wrong act or misbehaviour. This is justified on the grounds that those guilty of crime should be made to suffer. The punishment will not undo the damage but it does provide solace or comfort to the suffering party that the criminal did not get away with the crime. In other words, the criminal or perpetrator was punished for the wrong doing.
- 2- The second reason that is given to justify punishment is based on the consequences that it leads to. Punishment not only punishes the perpetrator but also sends a message to the society that any one indulging in a similar activity will also be punished in a similar manner.

Both these approaches are categorised as backward looking or forward looking- Retributivism and consequentialism. The two main theories or rival schools of thought which have presented arguments for and against punishment. Consequentialists believe that punishment is justified because it leads to consequences that are good for the society. Consequentialism is forward looking in its approach as against Retributivism. Retributivism argues that punishment is justified because it pays back the offender for breaking the law and is therefore, intrinsically good.

One should however assess punishment not simply from the point of view of the effects of the punishment but also from the perspective of the nature of the crime committed. Sometimes punishment is given to censure or stop the recurrence of the crime or the wrongful act. For example, a parent scolding or punishing a child for a wrongful act is done to prevent the child from committing the same act in future. Both purposes of punishment, namely retribution and deterrence are not opposite to each other but are linked together. In other words, the two approaches are not water tight compartments. In order to justify punishment,

we must look at it as a method by means of which individual actions can be evaluated and certain responses to those actions be given.

In the light of this brief introduction of what is punishment and the two theories that are dominant in ethics and philosophy of law, we will now look at capital punishment.

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## **9.2 CAPITAL PUNISHMENT**

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Capital punishment or the death penalty is an institutionalised form of punishment that involves deliberately executing a person or persons for their alleged misconduct. Capital punishment looks to justify that the person or persons have indulged in an act that warrants death by execution.

If we look at the origins of the term Capital Punishment, we find that the term is old and one can find roots of it in classical Latin and French literature, where the term capital indicated punishment by beheading or loss of life. One of the first reference to capital punishment is found in the Babylonian Code of Hammurabi that had 25 crimes listed as capital crimes. Even the Mosaic code of the Hebrews identified numerous crimes punishable by death. Draco's code of 621BCE of Athens referred to a host of crimes punishable by death. A similar case was also there in the 12 tables of Roman law that included capital punishment. All in all, the ancient world did not shy away from using capital punishment against a host of crimes.

Medieval and Early Modern Europe also practiced capital punishment and often times the methods involved included death by beheading, stoning, drowning, beating to death etc. With the passage of time in the 18<sup>th</sup> and 19<sup>th</sup> centuries the process of inflicting capital punishment became less painful and mostly such punishments were carried out by hanging or beheading.

In the United States, capital punishment has been in practice since the original colonies were formed. In fact, it was used for a large number of crimes including burglary, murder, treason, counterfeiting. As time progressed the law makers began to review such practices and in 1791 the constitution was amended for the 8<sup>th</sup> time to prohibit any form of punishment considered as cruel and unusual. In the 1800's the electric chair was introduced and in 1970's the lethal injection to make death less painful for the guilty. However, over a period of time death penalty or capital punishment has become more controversial and throughout the world

and several states within the United States have abolished it completely. As of now, Out of the 194 UN member countries, 54 have abolished it completely.

As discussed earlier the two major theories of punishment are **Retributivism and Consequentialism**.

### **9.2.1 Retributive Approach**

There are many versions of this approach but almost all agree on one point that the offence has been committed and it cannot go unpunished. For the retributivists, future results do not matter. Punishment according to them, is morally permissible because criminals deserve to be punished. The amount of punishment that is to be meted out must be in proportion to the seriousness of the crime committed. Thus, retributivism seems to operate on the principle, that giving people what they deserve is morally justified.

So, far as, capital punishment goes retributivism looks at the principle of *lex talionis or an eye for an eye*, an idea based on the biblical tradition. Within retributivism there are many versions that have interpreted this biblical notion differently. One chief philosopher who needs to be mentioned is, Immanuel Kant, who in the late 18<sup>th</sup> century argued in his *The Metaphysics of Morals* that the principle of *lex talionis* has to be employed when a murder has been committed. Kant based his retributive theory of punishment on the principle of equality and basic human dignity or his concept of every rational being as an end in itself.

Contemporary retributivists have interpreted this idea as expressing proportionality rather than an equitable measure of crime and punishment. Philosophers like, John Rawls have talked of an idea of fairness. Any misconduct or violation of rules allows the perpetrator to take an unfair advantage of the system. To ensure that such practices do not put people in disadvantageous conditions, punishment has to be given. Thus, retributive punishment would act like a check.

### **9.2.2 Consequentialist Approach**

Consequentialist approach makes the connection between crime and punishment a contingent one. This approach analyses capital punishment in view of the consequences or results it leads too. If the death penalty results in an increase of general happiness and promotes peace in society then it is justifiable. The consequentialist approach is often classified as forward looking as against the retributive approach which is considered to be backward looking.

The consequentialist approach is rooted in the Utilitarian theory. The main proponents of this theory were Jeremy Bentham and John Stuart Mill. For, Bentham punishment basically serves to prevent crime, reform the offender and also deters future offenders from committing crimes. John Stuart Mill also supported death penalty, as he felt it would deter criminals from committing grievous crimes. The deterrent theory of punishment basically seeks to create fear in the minds of others by providing adequate penalty to the offenders. The punishment also acts as a warning to others. The theory operates on the belief that if the criminal is not punished the crimes may increase manifold.

**Check Your Progress I**

**Note: a) Use the space provided for your answer.**

**b) Check your answers with those provided at the end of the unit.**

1. Define Capital Punishment.

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3. Explain briefly the Retributive and Consequentialist theories of punishment.

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4. Elucidate the concept of *lex talionis*.

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## 9.3 ARGUMENTS FOR AND AGAINST

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Before we evaluate capital punishment, we must assess the concept of punishment. Often times it has been argued that criminal activities arise due to several factors which may include external circumstances as well as the mental framework of the offender. These reasons are suggestive of a strain of thought that crimes can be or may have a causal explanation. But such an approach may not help in providing a sound justification for punishment, all that it does is to point out that in certain cases persons may not be able to control their actions because of a genetic problem. Whether it is social circumstances or genetic framework, both do not provide a comprehensive framework to cover all aspects of punishment. Thus, punishment needs to be evaluated and justified.

Death penalty or capital punishment, is one of the most controversial forms of punishment and has been at the centre a debate regarding its efficacy in preventing crime. In recent years the debate around it has resulted in those who are in favour of abolishing it and those who want to retain it. These two approaches are broadly divided into the retentionists and abolitionists.

The retentionists rely on consequentialist and retributive approach to support their arguments for capital punishment. The consequentialist claim is that death is a superior deterrent as compared to other available forms of punishment. The retributive argument is that death penalty is the only penalty severe enough to be appropriate compensation for the most heinous crimes.

The abolitionists on the other hand challenge both these arguments of the retentionists, by stating that there is insufficient evidence to demonstrate that death penalty or capital punishment acts as deterrent in preventing future acts of homicide. In fact, they assert that life imprisonment is more effective than death penalty. Another reason for questioning capital punishment is that it is racially biased and, targeted towards the socio-economically vulnerable group and also error prone.

Capital punishment has also been assessed by those in favour of it by stating that –

1. Punishing a criminal who has committed a heinous crime is justified because that criminal is beyond the stage of being rehabilitated into the society.
2. Punishing such a criminal provides a closure for the victim's family'

3. The criminal can be used as a negotiating tool by police and investigators where a reduced sentence may help them in catching criminals.

However, those who oppose capital punishment argue-

1. It is cruel and immoral. It is a violation of the individual's right to his life and thereby a violation of human rights.

2. Further, inflicting capital punishment has not demonstrated that there is a reduction in crime or related activities.

3. If a wrong verdict is given and an innocent person gets executed then there is no way of undoing that gross injustice.

4. Further, it has been observed that capital punishment is biased in its approach as people are punished due to racial bias/ religious bias/ poor strata of society and many such factors.

In the light of both these approaches, one can assess that neither is completely holistic in its presentation. The retributive- retentionist approach is fraught with difficulties as it allows certain behaviour or treatments of human beings (criminals) to be morally permissible. They do argue that there are multiple layers of due process and it is unlikely that an innocent person will be executed, yet they have not been able to demonstrate that death penalty is superior.

The abolitionists- consequentialist have to demonstrate that other forms of punishment are more efficacious as compared to death penalty. These arguments have to be rationally constituted and also need to be backed by evidential support.

At the end all we can conclude is neither argument can fully support its position and we may have to assess the cases on ethical grounds.

### **Check Your Progress II**

**Note: a) Use the space provided for your answer.**

**b) Check your answers with those provided at the end of the unit.**

1. Should death penalty be abolished? State your views.



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## 9.6 FURTHER READINGS AND REFERENCES

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- Kant, Immanuel (ed.). *The Metaphysics of Morals*. Cambridge: Cambridge University Press, 1996.
- Tebbit, Mark. *The Philosophy of Law*. New York: Routledge, 2017.

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## 9.7 ANSWERS TO CHECK YOUR PROGRESS

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### Check Your Progress I

1. Capital punishment or the death penalty is an institutionalised form of punishment that involves deliberately executing a person or persons for their alleged misconduct. Capital punishment looks to justify that the person or persons have indulged in an act that warrants death by execution.

2. **Retributive Approach-** There are many versions of this approach but almost all agree on one point that the offence has been committed and it cannot go unpunished. For the retributivists, future results do not matter. Punishment according to them, is morally permissible because criminals deserve to be punished. The amount of punishment that is to be meted out must be in proportion to the seriousness of the crime committed. Thus, retributivism seems to operate on the principle, that giving people what they deserve is morally justified.

Consequentialist Approach makes the connection between crime and punishment a contingent one. This approach analyses capital punishment in view of the consequences or results it leads too. If the death penalty results in an increase of general happiness and promotes peace in society then it is justifiable. The consequentialist approach is often classified as forward looking as against the retributive approach which is considered to be backward looking

3. So, far as, capital punishment goes retributivism looks at the principle of *lex talionis or an eye for an eye*, an idea based on the biblical tradition. Within retributivism there are many versions that have interpreted this biblical notion differently. One chief philosopher who needs to be mentioned is, Immanuel Kant, who in the late 18<sup>th</sup> century argued in his *The Metaphysics of Morals* that the principle of *lex talionis* has to be employed when a murder has been committed.

## Check Your Progress II

**1 The student should answer this question as per his or her understanding of the matter.**

**2** Death penalty or capital punishment is one of the most controversial forms of punishment. In recent years the debate around it has resulted in those who are in favour of abolishing it and those who want to retain it. These two approaches are broadly divided into the retentionists and abolitionists.

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