On Death, Dignity And Justice: Reflections On The Kantian Paradigm Of Capital Punishment

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Man is mortal. That may be;
But let us die resisting;
And if our lot is complete annihilation,
Let us not behave in such a way that it seems justice!

-Albert Camus[1]

Abstract

As a legal issue, capital punishment at once polarizes public debate. Arguments are advanced, both ways, on grounds as varying as retribution, deterrence and rehabilitation. Grounded in Criminology, this populist frame of reference views capital punishment as just another penal variant in law. Death, however, by its very nature, raises certain philosophical dilemmas. As a fundamental problem of philosophy, it transcends the debate of penal purpose or 'utility'. When so pursued, the endeavour is akin to asking 'the first question' on death penalty- does man deserve an improvised death? The nature of enquiry is so complex that even an affirmative to this query does not resolve the issue. It, consequently, confronts us with the next poser- is such an improvised death a moral entitlement of the society or State? Confronting this philosophical chaos, the paper studies Immanuel Kant on capital punishment. It examines his perspective on the issue and further evaluates its basis in the Kantian ethics. The discussion then shifts to the inherent contradiction- while Kant himself favoured capital punishment for grave crimes; the abolitionists of our times invoke the same Kantian construct of human dignity to seek absolute prohibition of this extreme penalty. The paper attempts to understand the genesis of this contradiction, and, in the process, offer a solution, if any.

Introduction

Forgive us, for we know not what we do in the realm of punishment.

-William E. Connolly[2]

Human endeavour is driven by a quest for perfection, yet perfection eludes our race. This paradoxical loop, however, is not a stigma. Instead of being a bleak clockwork,

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1 Albert Camus, Resistance, Rebellion, And Death 26 (1997).

2 William E. Connolly, *The Will, Capital Punishment, and Cultural War, in* The Killing State- Capital Punishment In Law, Politics, And Culture 192 (Austin Sarat ed., 2001).

it implants creativity in mind and zeal in action. It informs our achievement. This unattainable pursuit is arguably the most valuable attribute of human endeavour. At its zenith, it transforms action into art.[3]

Administration of justice, then, is an art. It has engaged us since our conception. We deliberate upon its meticulous nature and evolution. Towards that end, the comprehensive compendium of Criminology and Penology that we have discerned, including various theories of justice, reflects just how intense is our desire to perfect this art. Justice delivery is certainly a noble pursuit, and perhaps the most 'human' of all- its instrumentalities are 'human' and it manifests itself in our 'human' world.

Punishment, as an element of justice, is inextricably located in this 'human' context. It has its own dilemmas and insecurities. At best, it is an imperfect art. But, as with any other human endeavour, there is nothing disgraceful about this imperfection. It only exemplifies our limits as a mortal race. Why, then, does it polarize our deliberations? If our effort is towards the noble end of justice, and if we continuously strive to perfect this art, then, ideally, we must be united in our judgment. We pursue a noble end and our intentions are equally noble. Mere fallibility in its execution is, therefore, no profound a reason to condemn ourselves.

Our deliberations on administration of justice are, then, only an effort to perfect it as an art. We are divided not on the nobility of our ends or intentions; we are divided only on the method of attaining those ends with such intentions. If this is true, then a discussion in the realm of punishment is only a quest to discern the best possible alternative of administering justice. In the process, we have come a long way. We have improved its procedure and substance, and we continue improving.

A Transcendental Detour

Capital punishment is one of the many ways in which administration of penal justice manifests itself. It is just another 'perspective' or 'proposal' for infusing efficacy in the system. A fleeting survey of the arguments promoting or condemning it, only entrenches this notion. Predominantly, we assure ourselves on the 'utility' of this extreme punishment- deterrence. When moved by higher values, we seek to ascertain a nobler 'purpose'- rehabilitation. One should, then, abolish death penalty for it injures the noble cause of rehabilitation. The utilitarian paradigms of deterrence and rehabilitation, thus, become the populist touchstones to promote or discourage the scaffold practice. This is our frame of reference and we rarely transcend it. Having invested our entire resource in this framework, we practise it with true diligence. Now, we are habituated. We think, propound and formulate for 'deterrence' or 'rehabilitation'; at best, for both.

3 By the word "art" I only intend to draw the distinction between any ordinary "action" and its superlative counterpart. One could call it by any name. I chose the word "art".

Death, however, is an inherent detour, not so much in criminology, as in ethics and political philosophy; and law is as much based in latter, as it is in former. Death, being the first philosophical problem of man, cannot be studied from the mere positivist prism devoid of the concerns of morality. However, it is an irony that the popular voices resonating in our ears have rarely produced this tone.[4]A rare few have endorsed this detour, and have deserved to earn our respect.[5] Their perspective revolves around the connotation of moral desert- death being the 'deserved' punishment in certain cases. It transcends 'utility'- deterrence and rehabilitation. Here, death is isolated from such 'extraneous' considerations. It is no more viewed as a means to some ends. The desert argument evaluates its intrinsic worth. It is prepared to advance or reject capital punishment, but solely on this ground- *for death itself*.

Death, by its very nature, raises philosophical dilemmas. It is quite often romanticized as 'judicial murder'. Its distinctiveness is reflected in the fact that one never comes across similar 'sacrilege' against other forms of punishment. When was imprisonment called 'judicial abduction'? Has restitution or compensation ever been equated as 'judicial theft'? However crude this may seem, yet it equally stirs the ethical and the rational; and sometimes, mere stirring suffices.[6]

Standing by the side of these lone voices[7], one is confronted by 'the first question'- does man deserve an improvised death?[8] Even an affirmative to this would not satisfy the rational mind. It further poses another question- is such an improvised death a moral entitlement of society or State? It is true that these questions do not form the basis of the prevailing contours of justice. But then, not always does the 'prevailing' appear as the mirror image of the 'right'. We have realised this truth from our evolution as social beings. Our reformist nature comes from this realization. It is for this reason that we challenge and reform the existing norms of our life- because quite often the 'prevailing' is not 'right'.

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4 The populist notion of punishment is dominated by the theories of deterrence (utility) and rehabilitation.

5 Immanuel Kant and Marquis Beccaria are the leading 18th century philosophers in this genre. Intere stingly, both drew divergent conclusions on capital punishment. Yet the author of this paper is deeply moved by Albert Camus- a profound philosopher in ethics and politics. Like the other two, Camus also questions the prevailing premises of Utilitarianism and Rehabilitation. But he, being an abolitionist of our times- 20th century- deserves mention for his articulation in the essay *Reflections On The Guillotine*. Justice P.N. Bhagwati drew almost solely from Camus to render his landmark dissenting opinion in *Bachan Singh v. State of Punjab*, (1982) 3 SCC 24.

6 The author assumes that the readers would be fairly acquainted with the basic Kantian ethics. Because it is beyond the scope of this small article to capsule the entire Kantian philosophy. Kant refutes utilitarianism to say that some things are good in themselves irrespective of what end they achieve. I similarly say sometimes mere stirring of an intellectual mind "suffices". It is good in itself.

7 Kant, Beccaria and Camus, *supra* note 5.

8 Penal death is "improvised" because such death does not come "natural" to the convict.

Immanuel Kant is the 'evangelist' of the 'desert' theme. A detailed study in this 'not so popular' sphere could seek to derive gainful insight from his perspective on punishment and death. Championing the desert argument, with a retributive undertone, he acknowledges the distinctiveness of death as a mode of punishment. This alone designates him as the fulcrum of our discussion. The conclusion he derives from this standpoint is equally profound.

I. The Kantian Paradigm

Kantian ethics is the philosophical genre for which we revere Immanuel Kant. His constructs on morality, freedom and human dignity have shaped the contours of modern philosophy. As a bridge between Empiricism and Rationalism, Kant has earned the repute of an immensely original theorist. Ironically, it is the flip side of this grand biography that forms the theme of this discussion. His propositions on Law, Punishment and Justice have somehow been eclipsed by his otherwise brilliant account of "pure reason".[9] The endeavour, therefore, is to study this 'less discussed' Kantian forte. The effort is to designate it as our analytical paradigm.

A. Penal Justice: A Non-Utilitarian Model

As with his *Metaphysics of Morals*, Kant's notion of legal justice, too, is non-utilitarian. Just as he initiates his discourse on morality, freedom and dignity with a fierce criticism of Utilitarianism, so also, in his *Science of Right*[10], he anchors the legal construct of punishment and justice on his abhorrence for utility:

> *Juridical punishment can never be administered merely as a means for promoting another good, either with regard to the criminal himself or to civil society, but must in all cases be imposed* (sic) *only because the individual on whom it is inflicted has committed a crime… The penal law is a categorical imperative; and woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage…*[11]

The rationale for such vehemence can be discerned in the Kantian notion of human dignity or "man as an end in himself". As a necessary corollary, a man should never be dealt with merely as a means subservient to the purpose of another. This proposition is so absolute that even a criminal has this entitlement- of being punished *for the sole reason of committing a crime and none other*. Kant articulates on behalf of the condemned man:

> *Against such treatment, his inborn personality has a right to protect him (sic), even though he may be condemned to lose his civil personality. He must first be found guilty and*

9 Kant is acclaimed for his highly original works as *Critique Of Pure Reason* and *Fundamental Principles Of Metaphysics Of Morals*. This paper is predominantly concerned with his politico-legal work *Science of Right*.

10 Immanuel Kant, Science Of Right (W. Hastie Trans.).

11 *Id.*, Part E.

punishable, before there can be any thought of drawing from his punishment any benefit for himself or his fellow-citizens.[12]

Kant furnishes an illustration beyond the classical penal utility of deterrence and rehabilitation. The idea of pardoning a criminal for the reason that he agreed to volunteer his body for medical experiments is one such concrete instance of justice being contingent upon extraneous considerations. Kant snubs this notion of justice, "for justice would cease to be justice, if it were bartered away for any consideration whatever."

B. The Criterion for Punishment

For Kant, a crime deserves punishment because it is autonomously willed against the law that we have given to ourselves as rational beings. Punishment is something the will brings upon itself by contradicting its own essence.[13] Consequently, the level of punishment must be proportional to the degree the will's disobedience contradicts its own essence.

The Kantian purpose of such discourse is to ascertain a principle of legal justice that effortlessly determines the degree of punishment for an unjust act. He proposes the equality principle for such an endeavour. In such a legal system, "the pointer of the scale of justice is made to incline no more to the one side than the other." This informs the spirit of retribution in Kantian justice:

… the undeserved evil which anyone commits on another is to be regarded as perpetrated on himself… If you slander another, you slander yourself; if you steal from another, you steal from yourself; if you strike another, you strike yourself; if you kill another, you kill yourself.[14]

This deduction is drawn from the following two premises: First, that crime is an act against the society and not just against a private individual. Second, that a criminal himself is a member of the society on which he inflicts the evil. It, therefore, follows that his action is against each member of the society, including himself. It is on such basis that the criminal must lose the membership of his society. This is the sole aim of penal justice. The delinquent is punished not for deterring the potential delinquents; nor is he spared for rehabilitation. He is punished for *he deserves it*. His criminal act is the sole basis for the consequent punitive measures.

As are his notions of morality and freedom derived from "pure practical reason", so is his idea of justice located in this theme of retribution:

… the right of retaliation (jus talionis)… is the only principle which in regulating a public court… can definitely assign both the quality and the quantity of a just penalty. All other standards are wavering and uncertain; and on account of other considerations

12 *Id.*
13 *Supra* note 2.
14 *Supra* note 10.

> *involved in them, they contain no principle conformable to the sentence of pure and strict justice.*[15]

Mere compensation cannot be a just penal measure for general and economic offences. The existing inequality in the society would then bestow an unfair advantage upon the upper class rich individuals. They could easily sustain such economic loss on their indulging in such crimes. Conversely, such a legal system would cause a relatively higher degree of suffering to a poor delinquent. The Kantian paradigm, therefore, promotes *imprisonment* as the ideal form of punishment, under standard circumstances.

He provides an illustration in the offence of theft. The right of retaliation robs a thief of all security in property- by indulging in theft, he made the property of all others' insecure. Such a criminal, then, has nothing, and can acquire nothing. Yet he has a will to live and, being bereft of all property, his existence shall now depend on the support of others- the society. This support, however, is no benevolence or gratuity. The criminal must, in return, yield his powers to the State to be used in penal labour:

> *… and thus he falls for a time, or it may be for life, into a condition of slavery.*[16]

C. Dialectic of Fatality

Retributive justice admits flexibility on account of the prevailing inequality in our society. Imprisonment, therefore, serves as model punishment for most offences. Murder, however, is one such offence where Kantian justice reinstates its 'purity' of retribution. This one offence deserves no accommodation or adjustment, whatever be the social condition. Such absoluteness on death can be directly located in the sanctity that Kant accords to human life. For him, life is not a property of the living. It is of absolute value, even under deplorable conditions. Its necessary corollary, then, would prohibit murder and suicide in the similar tone. Killing is, therefore, the gravest of all crimes. It deserves the highest and the most proportionate punishment:

> *… whoever has committed murder, must die. There is… no juridical substitute or surrogate that can be given or taken for the satisfaction of justice. There is no likeness or proportion between life, however painful, and death; and therefore there is no equality between the crime of murder and the retaliation of it but what is judicially accomplished by the execution of the criminal. His death, however, must be kept free from all maltreatment that would make the humanity suffering in his person loathsome or abominable…This ought to be done in order that every one may realize the desert of his deeds, and that blood-guiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice.*[17]

15 *Supra* note 10.
16 *Id.*
17 *Supra* note 10.

The most radical verbalization is yet to appear. Kantian rationale for the extreme penalty is derived from the human will- "pure and practical reason". Kant suggests that even if the legal system offered the condemned man with a choice between life imprisonment and death, he would choose the latter. In an illustration of criminal conspiracy, where a few are driven by the sense of duty, for instance revolting against a tyrant, and remaining others lured by their own personal motives:

> *… the man of honour would choose death, and the knave would choose servitude. This would be the effect of their human nature as it is; for the honourable man values his honour more highly than even life itself, whereas a knave regards a life, although covered with shame, as better in his eyes than not to be.*[18]

If, then, law prescribes life imprisonment for all, it, in effect, punishes the 'honourable' more than the 'knave'. For this reason:

> *In the judgment to be pronounced over a number of criminals united in such a conspiracy, the best equalizer of punishment and crime in the form of public justice is death.*[19]

D. Whither Social Contract?[20]

Kant met a fierce counter in his contemporary, Beccaria who opposed capital punishment on its intrinsic unjustness. For Beccaria, such a punishment could not have found place in the original social contract. It cannot be presumed that people consented to their being subject to such a law because none can so dispose of his life by consenting to be killed if he murdered another.

Kant criticizes Beccaria on this account. For him, individual will is not attached to punishment but to the criminal act. Punishment falls not because the individual wills so, for then it would be no punishment at all. Instead, it is suffered because one willed the criminal act. Just as Kant makes a distinction between the individual in a *sensible world* and the individual in an *intelligible world*, so does he distinguishes the individual as one of the legislator of penal laws and the individual as the criminal himself:

> *The individual who, as a co-legislator, enacts penal law cannot possibly be the same person who, as a subject, is punished according to the law; for, qua criminal, he cannot possibly be regarded as having a voice in the legislation, the legislator being rationally viewed as just*

18 *Id.*

19 *Id.*

20 Kant's famous reconciliation of Empiricism (sensory perception) and Rationalism (intellect or reason) comes through the dualism that acknowledges the possibility of two co-existing worlds- Sensible (physical or natural) and the Intelligible (normative world of human beings governed by the norms of law, economics, politics etc.). This dualism is entrenched in his theory. In the same vein, he considers man in a dualism as both- the *recipient* as well as the *maker* of moral laws. Thus, he counters Beccaria by asserting that these two "men" are not governed by identical considerations. So it is possible for man as the "maker"to incorporate death as a punishment, even though the same man as a "receiver" may disagree.

> *and holy. If anyone, then, enacts a penal law against himself as a criminal, it must be the pure juridical law-giving reason (homo noumenon), which subjects him as one capable of crime, and consequently as another person (homo phenomenon), along with all the others in the civil union, to this penal law.*[21]

II. The Kantian Abolitionist

A discussion on death suffers from the problem of aplenty. Yet here one is confronted with a challenge qualitatively distinct. One has to be fair in evaluating Kant. Instead of invoking a different paradigm or theory, like those of utility- deterrence, rehabilitation and the likes- the endeavour must be to continue within the Kantian paradigm while questioning his propositions. Now, the Kantian paradigm hinges around *moral desert*. For him, man *deserves* death in certain circumstances. In such a framework, death transcends its legal attribute and, at once, becomes a philosophical problem. The Kantian paradigm, therefore, raises two posers: First, does man deserve an improvised death as punishment? and second,is such an improvised death a moral entitlement of the society or State?

A. The First Question

If our justice system is 'human'[22] and death has an intrinsic absoluteness, then we are doomed- the first question is unanswerable. We cannot be certain if man really deserves death as punishment in our world. This is no abstract rationalization. Since death is an inevitable phenomenon, it is truly beyond human jurisdiction. This is the precise irony of our existence. The very 'challenge' that we have not conquered, the 'challenge' which, by this very reason, becomes transcendental, we deliver the same as justice, so assured and so justified as if it were our own creation just like imprisonment or restitution.[23] Can we ever truly designate death as a punishment in the 'human' realm? The enigmatic realm of capital punishment and moral desert is discernable in the brilliant eloquence of Albert Camus:

> *The instinct of preservation of societies, and hence of individuals, requires that individual responsibility be postulated… But the same reasoning must lead us to conclude that there never exists any total responsibility or, consequently, any absolute punishment or reward. If no one can be rewarded completely… no one should be punished absolutely. The death penalty… simply usurps an exorbitant privilege by claiming to punish an always relative culpability by a definitive and irreparable punishment.*[24]

Kant faced this profound problem of transcendence, although in a more generic context of individual accountability for juridical punishment. While Camus acknowledges

21 *Supra* note 10.

22 *See* Introduction, *supra* note 2, at 3.

23 Death is transcendental because it is beyond human perfection. This is so because, in a way, each one of us is under death penalty, for we all have to die. No human endeavour dictates death.

24 Albert Camus, *Reflections on the Guillotine, in* Resistance, Rebellion, And Death 209-10 (1997).

the transcendental nature of death and so removes it out of the 'fallible' human legal jurisdiction; Kant, though, acknowledges that delinquency and the consequent culpability of a pure rational will (read "man") is beyond human to grasp, he moves beyond the human "reason and will" by invoking the religious paradigm. Thus, for him, the murderer deserves death but he is to be treated decently until the execution- "His death… must be kept free from all maltreatment…" because he is a free agent of the rational will. The offender brought the punishment upon himself by wilfully disobeying the moral law. But how does a 'pure' will develop a propensity to will evil maxims? Kant finds the source for perversion of will to be a profound and *an unanswerable question*:

> *Now if a propensity to this does lie in human nature, there is in man a natural propensity to evil; and since this very propensity must in the end be sought in a will which is free, and can therefore be imputed, it is morally evil. This evil is radical because it corrupts the ground of all maxims; it is, as natural propensity, inextirpable by human powers…*[25]

It is here that Kant is forced to invoke the Divine Intervention. Since the evil is not extinguishable or, as he puts it, "inextirpable" by human powers alone, he raises "hope" of a divine grace to enter the human will and drive away its evil maxims.[26] This recourse to grace corrupts the autonomy of will. The Kantian paradigm, thereby, comes to a dead end. Kant began with absolute faith in human reason and will. Consequently, his was a 'pure' paradigm independent of the extraneous considerations like religion, God, politics, etc. But he failed to explain the problem of evil in human actions, and here he invoked the same religious paradigm of Grace which he so wished to exclude from his philosophy. It shows how a problem that goes beyond human grasp becomes transcendental. In the similar context, death is transcendental, for there is no plausible 'human' explanation to it. This, precisely, is the absolute limitation on any criminal justice system. Camus values this ignorance or 'unknowability' and exhorts:

> *… having made up our minds never to submit and never to oppress, we should admit, at one and the same time, our hope and our ignorance, we should refuse absolute law and the irreparable judgment. We know enough to say that this or that major criminal deserves hard labour for life. But we don't know enough to decree that he be shorn of his future- of the chance we all have of making amends.*[27]

B. The Second Question

The next level of enquiry would not arise unless we have answered the first query; and we have realized just how inexplicable the first query is! Yet for the sake of completion and coherence, the second question deserves to be addressed. Let us, then, presume that

25 Immanuel Kant, Religion Within The Limits Of Reason Alone 32 (Theodore Greene and Hoyt Hudson trans.) (1960).

26 Maxim means any well-defined principle or motive on which human actions are performed.

27 *Supra* note 24 at 230.

we have determined the first poser; and not just that, let us presume that we have determined it in the affirmative- "Yes, man deserves death in punishment."

The sole objective, then, is to determine the *locus standi* of the society and State in such punishment. Can the society claim a moral standing in the penal death of a man? Can State demand death as its moral entitlement? Is death a due towards the society and State? Similar to the first enquiry, the Kantian abolitionist begs to differ from his idol- Kant- for he answers these queries in negative. Unlike Kant, he is not prepared to designate the society or State with any such moral standing. Albert Camus can be considered as the model Kantian abolitionist. As witnessed in the previous question, he operates within the Kantian paradigm of moral desert, but reaches a diametrically opposite conclusion. The basis for denying the society its moral standing is again derived from the very nature of death- an absolute and irreparable punishment. No human reward or punishment can be absolute, or else it loses the essence of 'humanity'. None of our values is absolute- not even society or State. We are a fallible and a mortal race. This is our common condition. Then, to sit on judgment to administer death is to assume a power that has not been granted to us in the first place. Our sincere abhorrence for murder is based on a moral standard- it is not for man to kill another man. Let us not invoke this abhorred act in the name of penal justice.

As the Kantian abolitionist cautions:

> *Without absolute innocence, there is no supreme judge… There are no just people- merely hearts more or less lacking in justice. Living at least allows us to discover this… Such a right to live, which allows a chance to make amends, is the natural right of every man, even the worst man… Without that right, moral life is utterly impossible... On this limit, at least, whoever judges absolutely condemns himself absolutely.*[28]

This caveat sufficiently illustrates the problematical nature of the Kantian paradigm. Yet this is no criticism to the great genius. His model has served for such a profound debate, which was hitherto least tread. Unlike the populist paradigm that conceptualizes death in an instrumentalist tone, the Kantian paradigm poses a more fundamental challenge. It abhors any extraneous purpose in death. It seeks death, *for itself*.

III. The Indian Terrain

It must be recalled here that the problem of capital punishment has a multitude of paradigms to focus upon. Even if one broadly categorizes two schools as the abolitionists and the retentionists, it is still apparent that propounders of either school have invoked such a range of varying arguments- deterrence, rehabilitation, retribution, human dignity, cruelty, irrevocability etc. In the context of law, with a plethora of legal

28 *Supra* note 24 at 221.

provisions, statutes and precedents, it becomes even more difficult to account for the 'core' paradigm that moulded the legal terrain of a specific national jurisdiction.

In this backdrop, the Indian position deserves a study so as to evaluate the degree to which it is determined by the Kant-Camus paradigm both, in theory and its 'execution' (pun intended). The case of *Bachan Singh v. State of Punjab*[29] is the watershed that shaped the Indian jurisprudence on capital punishment. For our limited objective, we can move beyond the intricacies of legal texts and the accompanying jargon. The judgment upheld the retentionist stance by 4:1 majority, with Justice P.N. Bhagwati, dissenting.

The majority, with some minor philosophical detours, remained loyal to the classical positivist paradigm of seeking solace in the legal texts. Justice Bhagwati, however, made the detour as his guiding path as he sought his answers from the most profound of voices both- ancient and modern. His dissent, therefore, maps with absolute congruency to the Kant-Camus paradigm.[30] It is reflected in his "deep and abiding faith in the dignity of man and worth of the human person and passionate conviction about the true spiritual nature and dimension of man."[31]

Justice Sarkaria, in the majority's *obiter dicta* confronts Albert Camus through the arguments advanced by Professor Jean Graven[32]. Any moral principle, according to Prof. Graven, must hold good "in troubled times as well as peaceful times". It cannot shift stance as per its own convenience. Kant's moral philosophy, too, demands a similar kind of universalism. Since Camus abhors death as a punishment in a civil society, Prof. Graven asks if Camus would hold the same for a military system or a society fighting for its survival. But this is too obscure a challenge to Camus. If Prof. Graven is pointing out, as he begins, to the inevitable "double standards" of the civil and military protection inter-se, then Camus is not confronted at all. No doubt, Camus, in his political avatar, was an anti-war campaigner, but he was not bereft of patriotism. It is out of this genuine patriotism that he beseeched his country France not to indulge in expansive wars that only brought travesties upon their own people. Camus never suggested that a country should even yield its right to self-protection. On the other hand, if Prof. Graven is concerned with that category of "monsters", as he calls them, whose extinction is a societal necessity, he comes face to face with Camus then and there alone. But, here as one studied him, Camus is not refuted by any logic. Both the thinkers have a diametrically opposite perspective on these "monsters" and the alleged "societal necessity".[33]

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29 (1982) 3 SCC 24. 5 judges' Constitutional Bench determining the constitutional validity of capital punishment.

30 Bhagwati, J. copiously invoked several excerpts from Camus' *Reflections on the Guillotine*.

31 *Bachan Singh*, *supra* note 23, at 227.

32 The then Judge of the Court of Appeal of Geneva, *id* note 23, at ¶ ¶ 98-99.

33 Here the argument of "rarest of the rare" is invoked. Death is necessary in exceptional cases where criminals act as "monsters" and their extinction is a "societal necessity". Graven and Camus hold diametrically opposite stance on this argument and it is difficult to trump one by another. Graven endorses the "rarest

A close reading of Justice Bhagwati, however, tackles the issue with an exceptional approach. While the majority opinion is largely legalistic, his dissent acknowledges:

> *...that the question of constitutional validity of death penalty is not just a simple question of application of constitutional standards by adopting a mechanistic approach. It is a difficult problem of constitutional interpretation to which it is not possible to give an objectively correct legal answer. It is not a mere legalistic problem that can be answered definitively by the application of logical reasoning but it is a problem, which raises profound social and moral issues and the answer must therefore necessarily depend on the judicial philosophy of the Judge.*[34]

With this admission, his judgment becomes an intense philosophical study of the problem. For the limited purposes of this paper, once all the other factors- deterrence, rehabilitation, legal fetters etc.- have been filtered out, one can discern the underlying Kant-Camus paradigm in his views. Justice Bhagwati, locates the Kantian position of the individual person in the constitutional scheme:

> *Constitution is a unique document. It is not a mere pedantic legal text but it embodies certain human values, cherished principles and spiritual norms and recognises and upholds the dignity of man. It accepts the individual as the focal point of all development and regards his material, moral and spiritual development as the chief concern of its various provisions. It does not treat the individual as a cog in the mighty all-powerful machine of the State but places him at the center of the constitutional scheme and focuses on the fullest development of his personality.*[35]

The penal infliction of death, and its consequent irrevocability and psychophysical cruelty, directly injures this Kantian conception of human person. Justice Bhagwati, also renders a profound argument in this regard. While highlighting that the graded punishment, with its proportionality principle, is a logical necessity for penal laws, he asserts that graded reform is the logical necessity of a civilized society.

> *In an evolutionary society, the standards of human decency are progressively evolving to higher levels and what was regarded as legitimate and reasonable punishment proportionate to the offence at one time may now according to the evolving standards of human decency, be regarded as barbaric and inhuman punishment wholly disproportionate to the offence.*[36]

Thus the core rationale in his extensive judgment remains inspired by the Kantian paradigm, which found its noble application in the writings of Albert Camus. Since then, even though the Indian courts have rendered several pronouncements of death penalty,

cases" thesis, while Camus, as we saw in his refusal of assigning any such power to society, rejects this altogether. He supports life imprisonment as the highest possible punishment within human jurisdiction.

34 *Supra* note 29, at ¶ 229.

35 *Supra* note 29, at ¶ 235.

36 *Supra* note 29, at ¶ 265.

the actual practice reflects another tale. Statistics reveal that the actual number of executions have fallen to a negligible point; the last being as back as 2004. If that suggests the philosophical dilemma of the 'executioner', it is time to realize the virtue of dissent.

IV. Conclusion

The discussion began with two quotes[37], and they construct the theme of this paper. While one asks us to strive for justice even if our fate is sealed[38], the other wants us to acknowledge, with humility, our ignorance of the transcendental.[39] As Camus exhorts that it is not our certain end as mortals, but our approach, that determines our moral worth, so does Connolly beseech us to be mindful of our limits. Let us not seek the justification for death within our 'human' realm, for death is truly transcendental. Let us discourage a society that:

> *…proceeds sovereignly to eliminate the evil ones from her midst as if she were virtue itself… She assumes the right to select as if she were nature herself and to add great sufferings to the elimination as if she were a redeeming good.*
>
> *To assert, in any case, that a man must be absolutely cut off from society because he is absolutely evil, amounts to saying that society is absolutely good, and no one in his right mind will believe this today… Every society has the criminals it deserves… The State that sows alcohol cannot be surprised to reap crime.*[40]

Forbidding a man's execution would amount to proclaiming publicly that "society and the State are not absolute values, that nothing authorizes them to legislate definitely or to bring about the irreparable."[41] As it all began on the Kantian note- it is not our action but our intent that determines our redemption or culpability, so should it conclude. Let us hang, but with some humility.

Let the noble assassins begin...[42]

37 *Supra* note 1; *Supra* note 2.
38 *Supra* note 1.
39 *Supra* note 2.
40 *Supra* note 24 at 225-27.
41 *Supra* note 24 at 228.
42 Alphonse Karr (1808-1890), a French critic and novelist, *vide* Albert Camus, "Reflections on the Guillotine".