ANALYZING THE ENFORCEMENT OF CAPITAL PUNISHMENT UNDER THE PERSPECTIVES OF NATURAL LAW THEORY, LEGAL POSITIVISM AND SOCIOLOGICAL SCHOOL OF LAW

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Introduction

Unlike the subjects of natural science, 'law', as a social science subject does not show one exact idea for its concepts. One single legal concept may have number of interpretations which are delivered by variety of jurists. Gradually, deferent philosophical ideas with regard to legal matters were presented and they developed as school of thoughts, Because of that nature, the area called jurisprudence has been developed over ages. In the reason of that, our statement, i.e. "Law is part of the structure of society, whether modern or primitive. Law both shapes and is shaped by society. Law impacts on every human activity undertaken within society" also can be analyzed as deferent ways.

Natural law school of thought and the school of legal positivism is two of such jurisprudential schools which are considered as the major two schools of thought. However, the Sociological Law School of Thought also bears a similar position as the aforementioned two legal schools of thought by not conking out to them. While the Positivist Theory tries to find out what is the law, the Natural Law Theory attempts to find out what the law should be. Sure enough, the Sociological Law School of Thought believes that the law is only one social control mechanism which regulates human behavior.

The capacity of imposing capital punishment has become the highest talkative topic in present Sri Lanka. By indicating the nature of social sciences, various arguments have been discussed for and against the capital punishment. Thus, I selected to analyze the aforementioned quoted statement by illustrating 'executing of capital punishment'.

Legal Positivism

As a response to other jurisprudential schools, especially to natural law theory, legal positivism emerged in nineteenth century.[1] The contribution of Jeremy Bentham and John Austin colored this jurisprudential school.

Though a definition has been given for legal positivism for the purpose of this discussion, various kinds of legal positivism have made it difficult to give a certain definition.[2] However, according to legal positivism, laws are the commands of sovereignty which can be enforced through pain of punishments. It seems however that this recognition of law has also been varied from one thinker to another.

According to Jeremy Bentham, law must be derived from central powerful monolithic sovereignty having legislative power. For him, all laws and commands, prohibits or permit some conduct. Anyway, he admired rewards rather than sanctions in enforcing

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[1](Dies, 1985). P. 331
[2](Eidlin, 2013). P. 1

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law. His concept of utilitarianism measures the greatest happiness of the greatest number of people. Thus, law should seek to eradicate pain by maximizing pleasure for many. There, ignoring the pleasure of undergoes (minorities, marginalized peoples, subalterns, prisoners etc.) is not a problem.

John Austin is the major character in exclusive (hard) positivism. He is the person who provided the aforementioned positivist idea of law; laws are the commands of sovereignty which are enforced by pain of punishment. There, unlike utilitarianism, people should obey law even though it does not provide pleasure. So, he opposed especially to natural law thinkers who elevate moral principles or a higher law to a level where it can supersede the command of the state.[3] According to him, sovereignty, which always acquires the obedience of majority, must be undivided and absolute. His all idea of positivism can be crystallized as,

> "The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a deferent enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it very from the text, by which we regulate our approbation and disapprobation."[4]

"According to Roger Catterwell, Austin sees law as a technical instrument of government or administrative which should however be efficient and aimed at the common hood as determined by utility. All laws, rights and duties are created by positioning rules, the laying down of rules as an act of government."[5]

Thus, "as a rule, positivism has focused on primarily on issues containing in to the concept of legality and authority. Central to positivism's analysis of legality is the institutional nature of law; central to its analysis of authority is the idea of efficacy."[6]

Natural Law Theory

Natural-Law school of thought which having extremely long history, always tries to find out the human-reason to justify the law. Accordingly, the priority should be given to find-out the purpose of the law. Justice, equality, human-dignity and human-wellbeing have been identified as the main achievement of law by natural-law thinkers regardless of their era. The fundamental right chapter of a Constitution of any state itself proves that the influence of this theory is very important for a democratic state.

Natural law provides the principles which determine the ends of action, as well as these practical ends are universal, i.e. natural law more concerns about the result of an action. The precepts revealing the mode of action / types of behavior which are came from the aforementioned principles tell us what type of action to bake. These precepts can be applied under the rule of law according to the nature of each and every circumstance. Ultimately, a decision can be taken in accordance with the rule of law for a particular case.

Immanuel Kant too was a famous Natural Law thinker who combined the natural law

[3](Weeramantry, 2009). P. 102
[4](Austin, 1832). P. 157
[55](Lionel Database. LB.III)
[6](Patterson, 1996). P. 259

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with morality. According to him, people have morality only if they have freedom. He assumes former laws always as moral. So, obeying the law is very important, because violating law means violating morality. He further states that there is a plan of nature to create perfect political constitutions which means a set of norms to enable people to develop themselves fully only if they approve the constitution. Thus, people do not have an obligation to obey immoral laws. His decisive thought was that the law should be in accordance with nature and the nature of human beings.

Ronald Dworkin can be identified as a present Natural Law thinker who still gives his natural law ideas by writing books. His 'Theory of Adjudication' gives judicial decision too a prominent place as legislations. According to him, a judge should be a Natural Law orient. When the legislations are not clear and suit, judge can apply precedents according to the facts and circumstance of the case. However, policies and principles should be used to hear hard cases that neither legislations nor precedents can be applied. While the policies represent the desire of the state, principles represent the rights and entitlements. Not restricting to legal rights, principle also emphasize natural rights also. Thus, according to Dworkin, principles are always trump over policies. He further says that the society interest should be concerned the same as individual interests.

Sociological School of Law

Sociological school of law can be taken as the largest jurisprudential theory. The areas of sociology of law and social engineering are major disciplines of it. According to them, las is only one social control mechanism among values, custom, religion etc. because of the concept of universality, they reject Natural Law Theory, because for them, laws are specific for individuals and various societies. They care on belief of the Sociological relativist, as well as they recognize people's beliefs, but not recognize las as unique thing. However, they look at law as a part of in regulating human behavior.

Most attention of the Sociological Law School is paid on the preservation of the bond of relationships. they identify element of social regulation through practice rather than Acts and Case laws. Under their introduced process of reconciliation, there is a role to play by law, as well as it should be match with the society. For instance, a state ruling with a good constitution may be really bad if the state is on bad person's hands. And also, a ruling of a state may be really good even with a bad Constitution if the state is on good people's hands.

Eugene Erlick who colored legal jurisprudence in nineteenth and twentieth centuries can be identified as a major philosopher of Sociological School of Law. He divides law as formal law and living law which both laws are found in each and every society, because law operates in society, mainly because of social pressure and not because of state authority. His concept of living law is somewhat equal to practice and habits. Under his introduced concept of Social Control Method, state is only one institution and living law successfully regulate human behavior. That is why people accept those living law in their day-to-day life. there are several living laws in diverse societies for several communities. Law should be discovered not with analytical jurisprudence, but with empirical study. According to him, in

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deciding cases, judges should harmonize both formal laws and living laws. Therefore, primary sources of laws are not so important according to his view.

Roscoe Pound (1870-1964) is an American philosopher who is concerned as the founder of sociology of law and social engineering. He criticized legal professionals and elites by saying that they are not concerning for people's wants. He examined what really ought to be in the role of law in society. However, his main focus was not that how society contributes to the law, but what the contribution of law to make the society. According to him, the end of law to assist people with claims, but meeting satisfaction of human wants[7]. Not merely meeting claims, lawyers and government should take legal and administrative actions to balance demand of the want.

Roscoe Pound defines Social Engineering as a role of law in society is to satisfy human needs in the least of sacrifice friction/waste. Accordingly, there are three aims of human interests into which these wants fall into. They are:

1. Interest of Personality - Physical & spiritual existence of a person
2. Personal Interest – Privacy
3. Interest of substance – Food, Water, Health & infrastructure facilities

Capital punishment

Capital punishment can be defined as "punishment by execution".[8] There, one's life is taken by the state as a result of a decision of a fair trial as a punishment for particular severe crimes she/he has done. In Sri Lanka, it was exercised since the country was a monarchy.

The legal system of Sri Lanka has imposed capital punishment for murder[9], rape not resulting in death[10], robbery not resulting in death[11], kidnapping not resulting in death[12], drug trafficking not resulting in death[13], drug possession more than 500 grams of a number of substances[14], treason[15]military offences not resulting in death[16] and particular offences by the use of gun[17].

[7](Pound, 1922). P. 49

[8](Oxford Dictionary of Law)

[9](Penal Code 1885 (Chapter 19)) arts. 294-296, amended by (Penal Code (Amendment) Act No 16 of 2006)

[10](Penal Code 1885 (Chapter 19)) arts. 294-296, amended by (Penal Code (Amendment) Act No 16 of 2006)

[11](Penal Code 1885 (Chapter 19))art. 44(A) & Schedule C, amended by (Penal Code (Amendment) Act No 22 of 1996). arts. 379-385, amended by (Penal Code (Amendment) Act No 16 of 2006)

[12](Penal Code 1885 (Chapter 19))art. 44(A) & Schedule C, amended by (Penal Code (Amendment) Act No 22 of 1996). arts. 350-360(A), amended by (Penal Code (Amendment) Act No 16 of 2006)

[13](Poisons, Opium and Dangerous Drugs Ordinance, 1936) ss 5. 14

[14](Poisons, Opium and Dangerous Drugs (Amendment) Act) ss 5. 14

[15](Penal Code 1885 (Chapter 19))arts. 294-296,amended by (Penal Code (Amendment) Act No 16 of 2006)

[16](Penal Code 1885 (Chapter 19))arts. 128-137, amended by (Penal Code (Amendment) Act No 16 of 2006). (Air Force Act, 1949), arts. 95, 97, 98, 131(1-2), amended by (Air Force (Amendment) Act No 9 of 1993); (Army Act, 1949), arts. 95, 97, 98, 131(1-2), amended by (Army (Amendment) Act No 10 of 1993).(Navy Act, 1950), arts. 54, 55, 57, 58, 60, 63, 64, 65, 71, 83, 92, 118(1-2), amended by (Navy (Amendment) Act No 53 of 1993)

[17](Firearms Ordinance, 1917) amended by (Firearms (Amendment) Act No 22 of 1996)

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After imposing the capital punishment by a judgment, the signature of the president is needed to exercise it. Anyhow, since 1975, Sri Lankan Presidents did not give their consent to impose the penalty[18]. Though the former Sri Lankan President Mithripala Sirisena had signed the death warrants for four drug convicts, due to order of the Supreme Court to take any attempt by the President from ordering the execution[19] and due to the huge objections made by number of international human right organizations[20] the execution could not be enforced. Thus, at present, no execution is practicing in Sri Lanka.

Analysis

Bentham thought human beings are keen to maximize their individual pleasure even by doing a greater harm to the whole community. Thus, according to him, it is the responsibility of the state to establish the greatest happiness to the greatest number of people of the state by restraining the aforementioned personal desire. Hence, punishment wouldbe justified where it had the capacity to reduce "mischief"[21].Bentham summarized his views as follows:

"But all punishment is mischief: all punishment is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil."[22]

It shows that Bentham did not justify punishment where it is groundless, inefficacious, unprofitable or needless. As Bentham was also a Positivist, he subscribed to the theory that the punishment should fit the criminal[23]. For Bentham,

"The value of the punishment must not be less inany case than what is sufficient to outweigh that of the profit of the offence."[24]

Based on this reasoning Bentham did not advocate the death penalty, as

"Whether a given offence shall be prevented in a given degree by a given quantity of punishment, is never anything better than a chance, for the purchasing of which, whatever punishment is employed, is so much expended in advance."[25]

As mentioned previously, the father of Legal Positivism, John Austin says laws as command of sovereignty which should be enforced through pain of punishment. In Sri Lanka, Parliament is the main institution which exercises people's sovereignty power, because it is the law-making authority which is consistent with people's representatives. It has a power to make laws including laws having retrospective effect.[26] The power has been strengthened more by not permitting the judiciary or any other authority to question its laws.[27] Thus, it points out that Penal Code and a few other

[18](Capital Punishment in Sri Lanka, 2018)
[19](Srinivasan, 2019)
[20](Sri Lankan Death Penalty Reinstatement 'Extreamly Disturbing', 2019)
[21](Kamardeen, 2001-2002). P. 77
[22](Bentham, 1823) Chapter 13
[23](Kamardeen, 2001-2002)P. 77
[24](Bentham, 1823)
[25](Bentham, 1823)
[26](Constitution of the Democratic Socialist Republic of Sri Lanka, 1978). Article. 75
[27](Constitution of the Democratic Socialist Republic of Sri Lanka, 1978). Article. 80(3)

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legislations which have enforced capital punishment are commands of sovereignty.

Sure enough, according to Positivism, laws can be passed by the sovereignty, even if it is not accepted by its subjects. Accordingly, in this case, although there are thousands of arguments against imposing capital punishment, if it is the command of sovereignty, it can be enforced as a law.

Therefore, it proves that enforcing capital punishment is a clear reflection of legal positivism, because it can be taken as the commands of sovereignty which has been enforced through punishment. It proves the idea that "Austin's thought still remains worthy of examination not only on account of his widespread influence, especially in common law countries, but also his reason of penetrating power of applying analysis to jurisprudence."[28]

Though it is really difficult to find out an exact natural law idea on imposing the capital punishment, the ideas of various Natural Law thinkers show that the theory is against to that.;

As mentioned in a previous chapter, Ronald Dworkin is another natural law thinker who mainly discussed about the system of adjudication. Recognizing that the provisions of the legislation and judicial precedents may not clear for a particular incident, he suggested referring policies and principles to hear hard cases. In there also, the principle which mainly concern about natural rights (not merely legal rights) should trump over policies which can be identified as the goals of the state.[29] According to him, the superior qualification of elected legislators in making political decision is weak in the case of decision of principles, because it can be a mere political conviction which reasonable men disagree.[30] It proves that whatever has been mentioned in legislations, in deciding a case, the principle should be protected though those are not guaranteed legally. Thus, in a case of imposing capital punishment, the natural rights of the guilty person too should be regarded and as mentioned by Immanuel Kant, people are not obliged to obey immoral rules. Thus, as Fuller argued in the famous Hart-Fuller debate, though the laws have been enacted by sovereign authority, people should not be subjected to any law if it is against these universal truths.

It also proves that imposing capital punishment is a clear violation of the concept of morality which was discussed by Immanuel Kant. Actually, it is an act of moral suicide, as well as "killing a human being in cold blood can only undermine the moral core of the state."[31]

In addition to that, imposing capital punishment seems a real challenge to human reasoning which is a core concept of Natural Law Theory. "If it is wrong for an individual to kill, how can it be right for the State to kill?"[32] Here, the words of Dag Hammarskjold, former Secretary General of the United Nations can be applied: "You cannot play with the animal in you without becoming wholly animal, play with falsehood without forfeiting your right to

[28](Freeman, 2008). P. 255
[29](Dworkin, 1977). PP. 155-160
[30](Dworkin, 1977). P. 123
[31](Samaranayake, 2009) P. 7
[32](Samaranayake, 2009) P. 7

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truth, play with cruelty without losing your sensitivity of mind."

The aforementioned guidance provides an idea on making an effective law, because natural law theory always considers about the purpose and content of the law. In a democratic society, the sovereignty makes rules and imposes punishment to establish peace and human wellbeing. Thus, it the laws are not peaceful, a peaceful society cannot be established by only enforcing punishments. It also proves that "as in the past, so in the future, the problem of human freedom will continue its strong links with theories of natural law."[33]

Laws are created for society, as well as those are imposed on society. Thus, if the law does not suitable for the society, it cannot be properly implemented, because it would be rejected automatically by the society.

According to sociological school, law is an only one method of controlling society. There are various non-legal mechanisms to regulate it. For example, people have used to live without doing harm to others since their childhood even without knowing that there are laws and punishments against harming others, because their religion and the society have taught them not to do harm others. They scared to being rejected from the society. Likewise, the strong influence of the religion, customs and values has taken people away from doing murders rather than the influence of enforcing the capital punishment.

According to them, just the same like punishment, social recognition also influences for one's behavior. Eugene Erlick's idea of living law too accepts it. According to him, social pressure can play a major role than state authority. In such a situation, primary sources of law, i.e. legislations and judgments would not be that important. In Sri Lanka, though and though the Penal Code has clearly legalized the capital punishment as a punishment and hundreds of judges has imposed the capital punishment via their judgments, since 1973, the capital punishment was not practically enforced. People's reluctant to apply for the position of executioner also prove that the social pressure is more powerful than the state authority.

For Roscoe Pound, "law is social engineering which means a balance between the competing interests in society… Like an engineer's formulae, laws represent experience, scientific formulations of experience and logical developments of the formulations, also inventive skill in conceiving new devices and formulating their requirements by means of a developed technique."[34] Thus, unlike command of the sovereignty that is enforced through pain of punishment, continues experiment and experience is necessary to create a law which is necessary for the society and fulfill all their needs.

Interest of personality is his first aim of his hierarchical 'wants' list. It shows physical and spiritual existence of human being. Accordingly, right to life, freedom from torture, cruel, inhuman and degrading punishment is come under that want. It shows that due to the cruel nature of the death penalty, imposing it is against with his theory.

[33](Weeramantry, 2009)

[34](Baruah). PP. 2-3

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Moreover, imposing the capital punishment appears as a true challenge to human reasoning that is a pure idea of Sociological School of Law that was also believe by Natural Law thinkers. If it is wrong for a person to kill, how would it's right for the State to kill?[35] Here, the words of Dag Hammarskjold, former Secretary General of the United Nations can be applied. He states that you cannot play with the animal in you while not changing into entirely animal, play with falsehood while not forfeiting your right to truth, play with cruelty while not losing your sensitivity of mind.

Conclusion

This discussion clearly points out that the positive idea of legal positivism towards imposing capital punishment and the negative idea of Natural Law Theory and Sociological School of Law for the same. However, many instances were found that the idea of the jurist cannot exactly be categorized into the aforementioned two pillars, i.e. the given idea of a jurist sometimes shows that the jurist is in favor of imposing capital punishment while another statement of the same jurist shows that he/she is against with capital punishment. And also, there were some instances where we cannot exactly say the particular jurist is an associate of a particular school of thought. Accordingly, there are some thoughts of jurists which sometimes reflects natural law ideas while another time his/her thought reflects the idea of Legal Positivism, and also the ideas of Sociological School of Law. It again proves the uncertain nature of social science subjects.

Today, after few decades, discussion for in-enforcing the capital punishment has been come forward. In such a situation, this is high time to analyze scholars' ideas on that area. However, because of the severe nature of taking one's life, the public confidence towards the administration of justice system should be made strengthen[36]. Otherwise, due to the weakness of the practical implementation of the law, the real purpose of the law of establishing the peace and human wellbeing in the state cannot be properly fulfilled.

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