

Understanding Death Penalty through the Ideas of Retributive Justice and Moral Luck*

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Abstract

This paper concerns philosophical arguments for and against death penalty. I analyze arguments for the death penalty from retributive justice and Kantian standpoint, and arguments against the death penalty from Aristotelian standpoint, which expresses itself through the idea of moral luck. I conclude that, upon careful reflection, we must decide against death penalty, because concerns about moral luck outweigh the claims of retributive justice.

Keywords: capital punishment, death penalty, retributive justice, moral luck, Immanuel Kant, Louis Pojman, pure reason, autonomy.

เข้าใจโทษประหารผ่านความคิดเรื่องความยุติธรรมเชิงชดใช้และโชคทางจริยธรรม เหมือนมรดก มุกข์ประดิษฐ์¹

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บทคัดย่อ

บทความนี้ศึกษาประเด็นเรื่องโทษประหารโดยดูจากข้อโต้แย้งทางปรัชญาที่สนับสนุนและคัดค้านโทษประหาร ผู้เขียนสำรวจข้อโต้แย้งต่างๆ และเสนอว่าข้อโต้แย้งฝ่ายสนับสนุนที่มีน้ำหนักมากที่สุดมาจากฝ่ายที่พูดถึงความยุติธรรมเชิงชดใช้ ข้อโต้แย้งฝ่ายคัดค้านที่มีน้ำหนักมากที่สุดมาจากฝ่ายที่พูดถึงโชคทางจริยธรรม ผู้เขียนสรุปว่าเมื่อพิจารณาข้อโต้แย้งทั้งสองฝ่ายแล้ว ฝ่ายที่คัดค้านโทษประหารมีน้ำหนักมากกว่าฝ่ายสนับสนุน ดังนั้นตามการใช้เหตุผลทางปรัชญาจริยศาสตร์แล้ว เราจึงไม่ควรมีโทษประหาร

คำสำคัญ: โทษประหาร ความยุติธรรมเชิงชดใช้ โชคทางจริยธรรม อิมมานูเอล ค้านท์ หลุยส์ พอจแมน การปกครองตนเองทางจริยธรรม เหตุผลบริสุทธิ์

* The original version of this paper was originally presented at Chulalongkorn University in Thailand in December 2018, as a response to the current death penalty debate. Some of the concerns in this paper reflect current issues and debates in contemporary Thai society.

1. Setting the stage.

The issue of legitimation of capital punishment has been widely debated currently. Because this issue is widely discussed in general society, the scope of debate and points of contention are often unclear. This paper is an attempt to clarify a small part of a bigger picture, so as to make the whole issue of capital punishment clearer and easier to deliberate. I attempt to show how we can understand death penalty through the ideas of retributive justice and moral luck. The decision to single out these two positions lies in the belief that these are two strongest positions in favor of and in opposition to death penalty, respectively. I will show that, upon careful consideration of the issue, we have to decide against death penalty because concerns about moral luck outweigh the claims of retributive justice.

Retributive justice is sometimes expressed by the phrase "an eye for an eye". The idea is one should get what one deserves. What one deserves is based on one's own action. What harm one inflicts upon others, and what good one bestows upon others, should bring about comparable outcome towards oneself. Thus a murderer must be killed.

Retributive justice is not the only ground for the support of capital punishment, there are various other grounds. For example, one could argue for capital punishment from Utilitarian standpoint. In which case, one would reason that capital punishment brings about more desirable outcome for all concerned. It maximizes happiness over all. Capital punishment either reduces the possibility of existing criminals committing crime or it deters crime by discouraging the would-be criminals. I don't think this is a strong position for a philosopher to take, because it has to do with empirical evidence to point out whether death penalty actually reduces crime rate. As it happens, several empirical data does not point uniformly to the direction favorable to capital punishment. Therefore, in this short paper, I will leave the Utilitarian position outside of our discussion. Another ground for arguing in support of capital punishment comes from ideas of Theravada Buddhist tradition. This is perhaps the most popular in Thai society, and perhaps the most convincing in the minds of many people. It has to do with the idea of Karmic justice. One reaps what one sows. The simplistic version of the idea of Karma is whatever you do to others, it is a part of cosmic justice that you receive the same treatment in return. I will not consider this position viable because of these reasons. 1) Not everyone is a Theravada Buddhist, and even if

everyone is, Thailand still has a secular legal and judicial system. 2) Theravada Buddhist doesn't endorse the idea of people assisting Karmic process by killing wrongdoers. 3) If we were to take the concept of Karmic cycles seriously, we must admit we don't know who started the karmic link first, in other words, we have no way of knowing who killed whom in what life-time for the first time. For these reasons, the most popular argument in favor of capital punishment in Thailand isn't a good argument, and I will leave it aside.

Conversely, arguments against death penalty come from many directions as well. There is argument that is based on empirical evidences that death penalty can be wrongly imposed upon innocent people. Organizations such as "The Innocent Project" in the U.S. testify to this point. Several cases where the innocents are wrongfully convicted remind us to beware of human errors involved in judicial system. In countries where state commands unchecked power, as well as in countries with much discrepancies between the rich and the poor, where access to legal representation is unequaled, it is easy to see how death penalty can be a tool for still further discrimination and oppression. Because there is empirical evidence about how death penalty can be wrongly executed, the argument against death penalty that is based on empirical evidence is evidently sound without further analysis. Thus it falls outside the scope of this paper. Another argument against death penalty, however, requires further analysis. The argument against death penalty from the notion of human rights/human dignity seems more complicated than the argument from empirical evidence. This is because the notion of human rights/human dignity is an assumption upon which further arguments rest. The notion itself is not self-evident to every society and every ethical theory. And even if one accepts the idea of human rights/human dignity, it is still debatable whether the idea of human rights/human dignity supports or undermines death penalty. Philosopher Louis Pojman¹, with the help from Kant² refers to human dignity as a ground for implementing death penalty. According to Pojman and Kant, death penalty shows respect for the right to life of victims. It also shows respect for autonomy and free will of wrongdoers. The underlying assumptions for this argument are the same basic liberal assumptions that are used to argue against the death penalty. As such, the argument against

¹ In Louis Pojman and Jeffrey Reiman. The Death Penalty: For and Against.

² Immanuel Kant. Metaphysics of Morals.

death penalty based on the notion of human rights/human dignity, in my view, is not a strong argument. It rests upon an assumption, and the assumption can support different conclusions, both for and against death penalty. I suggest that one of the best arguments against death penalty come from the idea of moral luck, which I will elaborate subsequently.

2. Pojman and retributive justice

In the book that he co-authored, "The Death Penalty: For and Against", Pojman presents his argument systematically and carefully. His argument is worth our careful consideration, and I take his work to represent arguments from Kantian position and retributive justice position. Proponents of retributive justice, including Pojman, remind us that the fundamental ideas of an eye for an eye, or 'one reaps what one sows', is "primordial idea"³ which humans share with other primates higher up in evolutionary scale. According to Pojman, because retributive justice is morally right, and because it requires that state kills people who kill others wrongfully, therefore death penalty is morally right. Our task then is to consider whether retributive justice is morally right, and whether retributive justice requires state to kill people who kill others wrongfully.

Pojman's arguments in "The Death Penalty: For and Against" can be divided into arguments to support retributive justice, and its logical derivative, which is the death penalty; and arguments to defend death penalty against attacks. To support retributive justice and death penalty Pojman gives two reasons. First, we should support retributive justice and death penalty because the basic idea is primordial. Secondly, retributive justice agrees with Kant's Deontological system. Kantian idea is a part of liberal ideal and individualism ideal that are taken to be acceptable in our current global system. I question both of these premises. First of all, we have no reason to take some ideas or sentiments or habits of thought, because they appeared early in our evolution as a species. Furthermore, I don't think the so called 'primordial' idea is the only idea humans have throughout our evolution. We can all agree that humans want to harm people who harm them or harm their loved ones, but humans also forgive, sympathize, pity, other sentient beings. It is

³ Location 331, 333, 547 in Death Penalty: For and Against. (Kindle book version).

plausible to think that for a warm-blooded species, that has a command of language and thus has a capacity to understand and to empathize with others, compassion appeared early on in our evolution. In fact, without these counter-sentiments to the urge to harm, human children would never be able to grow into adulthood and thus the species would perish. The primordial argument therefore doesn't lead to conclusion that the idea of retributive justice carries more weight than any other human sentiments such as sympathy, pity, and the wish to forgive. Secondly, just because an idea or a sentiment is 'primordial' doesn't mean it's morally justified. Moral philosophers such as Peter Singer take pains to distinguish between our habit of thoughts and feelings and our moral judgments. Singer would point out, plausibly, that the urge to be partial towards ourselves and our loved ones are not suitable ground to base ethical judgments upon. These urges are natural in the sense that they are rooted in evolutionary process, it doesn't make them more relevant to our ethical judgment, according to Utilitarians.

Pojman's reference to Kant and Deontology doesn't help in justifying retributive justice either. On this ground of reasoning, retributive justice itself cannot be more sound than Kantian theory on which it is based. This paper doesn't aim at criticizing Kantian theory, I merely point out the fact that one needs separate arguments before concluding that Kantian theory is right. Many moral theorists, such as Utilitarians, Virtue theorists, Post Modern theorists, for example, do not take Kantian theory as given. The idea of Kantian autonomy and categorical imperatives are basic assumptions that many do not share. In order to base death penalty on these concepts, one must first prove the soundness of these concepts, and not merely taking them as given.

In his book, Pojman refers to one particular concept of Kant that he believes justifies death penalty. It is the "principle of equality" about which Kant explains, "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. This is the law of retribution"⁴ Kant explains that by harming society, we harm ourselves because we are in the society. Furthermore, Kant says those who commit murder must die "...Here there is no substitute that will satisfy justice. There is no similarity between life, however wretched it

⁴ Pojman, location 204.

may be, and death, hence no likeness between the crime and the retribution unless death is judicially carried out upon the wrongdoer." To neglect to execute death penalty would result in the fact that "blood-guiltiness remains upon the people."⁵ Here Pojman extracts the concept of moral desert from Kant's writing. Because those who killed others had transgressed the inviolable rule; the rule that one cannot take other rational beings as means to our own ends. In transgressing the rule, the principle of equality is violated. It is the burden of the state, to put the situation right again by killing the killers in return. The argument here seems complex. On one level, it is easy to see, together with Kant, that to harm society in which one lives amounts to harming oneself because one is bound to be impacted by the state of society. On another level, to see that state is obligated to kill the killers is more problematic and less intuitive than meet the eyes. First, to elevate death penalty to moral imperative ("so as not to have bloodguiltiness remains upon the people") in Kantian style means it is universally applied⁶. In each instance that principle of equality is destroyed, state must kill perpetrator. But in our judicial system, we expect judges to exercise their personal discretion in each case. Even when death sentence is an available option, judges often don't give death sentence. We feel this is morally right because each particular case has nuances particular to that case. Even if one agrees with the death penalty, one would still wish for the death penalty to be sentenced discriminately based on facts of the cases. Secondly, Pojman asks us to take 'principle of equality' itself for granted. To think that the perpetrator wrongs someone is not the same as framing the situation in terms of disturbed equilibrium, where the balance needs to be restored again. This idea of atomistic self with inalienable rights, is neither natural nor neutral. It comes from liberal ideal based on 18th century enlightenment notion of rationality and human dignity. From a non-western perspective, for example, one could read the situation of wrongful killing as being a situation of excessive violence, a situation of a total lack of compassion, whereby the remedy would be to become even less violent and more compassionate, so as to restore compassion in the world. One could also argue that compassion is a primordial ideal and thus state and its people should uphold it, seeing that each individual is in a web of

⁵ Ibid, location 214-222.

⁶ Kant, *Metaphysics of Moral* in *Practical Philosophy (Cambridge edition of the Works of Immanuel Kant)*, Kindle edition, p. 475.

relationships. My point here is not that we should read the situation in the second way and not the first way, my point is rather that these two ways of reading the situation are both based on assumptions. We have no moral or logical obligation to accept one or the other. The Kantian way of seeing wrongful killing also assumes autonomy on the part of wrongdoer, and the practical reasoning of our rational self that transcends particular contexts and circumstances. While I cannot disprove these assumptions, when it comes to sentencing defendants, as when arguing for a philosophical point, the burden of proof lies on the part of those who put forward a judgment or a position. Where there is doubt, it is reasonable to take not killing as a default position. Thirdly, it is difficult to see, even if we want to restore 'the principle of equality', how it could be restored. Given the fact that our current method of executing death penalty has become "humane", it can hardly be compared to the manner in which the perpetrator harms their victims. If, together with Kant, we aim for the "likeness between crime and retribution", we should aim at torturing the perpetrator in exactly the same manner as he or she did to his or her victims. To do this is not to reduce the dignity of perpetrator, because we has no intention to disrespect him or her, the same way that killing him or her doesn't count as disrespecting his or her dignity. We merely want to restore the lost equilibrium that happened when the victim was tortured or was put in painful situation in the process of being killed. To say that killing the killer is restoring equality but torturing the torturer is not, is to be logically inconsistent. Still there are cases where the killers kill more than one person. If we kill him or her only once, equality would still not be restored. Should we think about torturing him or her in addition to the actual killing so as to account for the other deaths he or she also causes? It seems that if we want an eye for an eye, we should not only want an eye removed, but want it to be removed in the manner in which its owner had wrongfully removed an eye of another human being. Because if we execute it less painfully or more hygienically, we get into slippery slope, in which we should also accept other kinds of punishment. For example, we might be compelled to accept a life-sentence for the crime of murder. There is no non-arbitrary line that allows us to say it still counts as restoring equality if we kill the killer less painfully than he or she kills his or her victims, we also don't torture the torturer, but to give a life-sentence to a killer is fundamentally different from the previously mentioned cases, to the extent that it no longer counts as restoring justice to society.

3. Moral Luck

Moral luck as discussed in moral philosophy could mean any of the three types a) situational luck b) circumstantial luck, and c) constitutive luck. Situational luck is often expressed in thought experiments such as the car crash example. The two drivers equally drunk or equally careless, with a stroke of luck one driver drives the car into a tree, while another one runs over a person. Socially and legally we condemn the second driver more than the first. Moral luck thought experiment shows that we are inconsistent in our judgment, for while we think one is morally responsible for that which is in one's control (and luck is outside of one's control), we continue to assign praise and blame according to outcome, and not according to moral desert of a person. If we decide to be consistent in our judgment, we should then feel as bad hitting a tree as we do hitting a person, in which case common sense would render us unreasonable. Circumstantial luck refers to one's station in life; one's socio-economic situation, moral cultivation, and other aspects of one's personal background. Constitutive luck refers to one's character. It focuses on the part of us that some believe we are born with, such as our personality and moral inclinations. In order to contemplate the issue of just desert, which is a crucial step in understanding the argument for and against death penalty, we turn our attention to moral luck. As type a) of moral luck is not about just desert, it's about our inconsistent moral judgment, I will not consider this type. Types b) and c) have to do with just desert, but I don't want to engage in the nature vs. nurture debate, which falls outside the scope of this paper, I will only consider type b) of moral luck, circumstantial moral luck. Moral theories such as virtue ethics stress the importance of upbringing and cultivation. Aristotle, in the *Nicomachean ethics*, expresses the view that moral self is not atomistic self which can be decontextualized or should be decontextualized. Man is born for citizenship, he says. The starting point of moral deliberation is a set of our moral virtues. They come by through habituation and training. If one is so unfortunate as to be in a bad political state, which instills the wrong values, or grew up without moral exemplar, or worse still, without a true friend, one will not be able to actualize one's potential as a moral person. In this sense, one's morality is a joint project. It has to do with one's own critical deliberation as well as one's upbringing. If we think that Aristotle makes sense, we must admit that Aristotle's idea complicates the understanding about moral desert. One's moral desert has to be something that does not depend on luck,

such as one's moral deliberation. If we think that the decision to do wrong, is a moral failing of an agent only, we can then say that an agent deserves the punishment. But if we see, together with Aristotle, that moral cultivation is a communal project, it is hard to say that the decision to do wrong is a personal moral failing of an agent only. On a view that moral self is a relational self, it is impossible to blame one person and neglect the circumstances that give rise to that person. This doesn't mean there cannot be moral responsibility, nor does it mean there can be no autonomy at all. It means that there is no way to decide with precision where the responsibility lies; how many parts of the responsibility of a wrong doing lie upon us, how many parts lie upon our parents, and upon society at large. If we adopt this way of thinking, we would not be worrying that not inflicting death sentence upon a killer would leave blood-guiltiness upon the people. To have a crime happening at all leaves blood-guiltiness upon the people, because it's a communal failing when a person morally fails. The relevance of this discussion to the argument against the death penalty is this; if we cannot say with absolute certainty, how much of a responsibility belongs to the wrongdoer, we cannot assign moral desert justly, we can only estimate. We know a callus person, or a cruel person, or a dishonest person, deserves to be blamed. We think that they should have done better, we believe that it is within the ability of normal decent person to do better. But to blame someone based on estimation that they did not take up their part of responsibility is crucially different from killing them. Because life is a ground for all values, to kill someone rips them of all future values they could have. Therefore it is commonly considered that death penalty is the most severe form of punishment. When society sentences someone to death, it is an extreme measure. It is unreasonable to inflict extreme form of punishment on a person based only on an estimation of a person's moral desert. The heart of an argument for death penalty is therefore, an idea of an absolute autonomy and pure reason. Without believing that a person, no matter their circumstances, can elevate themselves completely through rationality untainted by inclination, one cannot reasonably argue for death penalty. One has to admit however, that the idea of Kantian autonomy and pure reason are assumptions, and ones that many do not share. Even if Kant is right at the end, until we prove beyond doubt that Kant is right about autonomy and pure reason, we have to put death penalty on hold, because the idea of autonomy and pure reason are not self-evident to many people. When there is doubt, we must decide in favor

of defendant. We should also consider the fact that Pojman and Kant do not argue from Utilitarian standpoint at all, in fact, Kant makes it clear that we should not kill for the sake of society. We should kill because the person deserves death. If the issue rests solely on moral desert, it is reasonable to not kill until we can be sure what a person's moral desert is, and with doubt regarding moral luck, it is virtually impossible to judge a person with such level of precision that we should feel comfortable killing them for it.

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